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BY SUSAN L. CARLSON  
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Supreme Court No. 97443-8

In the  
*Supreme Court of the State of Washington*

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STATE OF WASHINGTON,

Respondent,

v.

GREGG A. LOUGHBOM,

Petitioner.

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**SUPPLEMENTAL BRIEF OF PETITIONER**

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Court of Appeals No. 35668-0-III; Lincoln County District Court No. 17-  
1-00028-8

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## I. INTRODUCTION

Gregg A. Loughbom (“Mr. Loughbom”) was convicted of drug crimes and sentenced to 40 months in prison following a trial in which the prosecution overcame evidentiary deficiencies by framing the case as “yet another battle in the ongoing war on drugs throughout our state and throughout our nation as a whole.” VRP 87:7-9. Despite the fact that prosecutors had been admonished to refrain from inherently inflammatory “war on drugs” argument in no less than four Washington appellate decisions dating back to the 1990s, Division III of the Court of Appeals (COA) held, over a dissent from Justice Fearing, that although “imprudent”, the “war on drugs” argument did not rise to the level of misconduct. Attach. A to Pet. for Discretionary Review. Mr. Loughbom timely petitioned this Court to exercise discretionary review, the State filed a response brief, and discretionary review has been accepted. Oral argument is scheduled for March 19, 2020. Mr. Loughbom now submits this Supplemental Brief pursuant to RAP 13.7(d).

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## II. ARGUMENT

### A. The Prosecutor's "War on Drugs" Rhetoric was Flagrant and Ill-Intentioned.

The State argues that, although “imprudent” and “ill advised”, the prosecutor’s “war on drugs” argument does not warrant reversal because the prosecutor did not “intentionally and improperly stok[e] the jury’s emotions.” Ans. to Pet. for Discretionary Review at 9-10. This argument should be rejected because (1) the prosecutor’s violation of well-established appellate jurisprudence must be deemed intentional, and (2) the clear purpose and effect of the prosecutor’s war on drugs narrative was to stoke the jury’s emotions, regardless of whether the prosecutor expressly implored the jury to convict in order to combat society’s drug scourge.

#### **1. Because the prosecutor is presumed to know the law, his use of the inflammatory “war on drugs” narrative must be deemed flagrant and ill-intentioned.**

Prosecutors, with the power and prestige of the state at their disposal, must be held accountable for violating established restrictions on inflammatory opening and argument. See State v. Ollivier, 178 Wn.2d 813, 860, 312 P.3d 1 (2013) (quoting State v. Warren, 165 Wn.2d 17, 27-28, 195 P.3d 940 (2008)); State v. Monday, 171 Wn.2d 667, 677, 257 P.3d 551 (2011). The prosecutor in Mr. Loughbom’s case had abundant notice that using a “war on drugs” theme from voir dire to closing rebuttal

would constitute misconduct. His decision to nonetheless employ this tactic cannot reasonably be deemed anything other than flagrant and ill-intentioned. The Court must reject outright the State's assertion that, although admittedly "imprudent" and "ill advised" under established law, the prosecutor's "war on drugs" invocations "were made with reasonable intentions". Ans. to Pet. for Review at 9. They were not.

As detailed in Mr. Loughbom's Petition for Discretionary Review, it is well-established in Washington and federal jurisprudence that employing a "war on drugs" narrative in opening and closing argument is impermissible. See State v. Echevarria, 71 Wn. App. 595, 860 P.2d 420 (1993) (a prosecutor committed prejudicial misconduct by invoking the broader "war on drugs" during argument, warranting reversal of the defendant's convictions despite trial counsel's failure to object); United States v. Solivan, 937 F.2d 1146, 1148-55 (6th Cir. 1991) (finding improper prosecutor's statement urging jurors "to tell [defendant] and all of the other drug dealers like her...that we don't want that stuff in Northern Kentucky...").

The Echevarria decision has been cited in at least 40 other decisions and the impermissibility of invoking the war on drugs has been reiterated in at least three other Washington Court of Appeals decisions. See State v. Ramos, 164 Wn. App. 327, 263 P.3d 1268 (2011) (applying

Solivan and finding reversible misconduct on the basis of a prosecutor's arguments that "were designed, both in purpose and effect, to arouse passion and prejudice and to inflame the jurors' emotions regarding the War on Drugs by urging them to send a message and strike a blow to the drug problem"); State v. Neidigh, 78 Wn. App. 71, 79, 895 P.2d 423 (1995) (citing Bennett L. Gershman, ch. 10, *Forensic Misconduct* (1994) (stating that "exhortations to join the war against crime or drugs" are an example of prosecutorial tactics that are "out of bounds."); State v. Perez-Mejia, 134 Wn. App. 907, 916, 143 P.3d 838 (2006) (condemning as "forbidden" a prosecutor's adoption of a war on drugs narrative).

Numerous federal courts of appeal and other state courts have similarly condemned a prosecutor's attempt to place an individual drug case in the broader context of the war on drugs. See Arrieta-Agrosot v. United States, 3 F.3d 525, 527 (1st Cir. 1993); United States v. Beasley, 2 F.3d 1551, 1559-60 (11th Cir. 1993); United States v. Johnson, 968 F.2d 768, 770-71 (8th Cir. 1992); Solivan, 937 F.2d at 1148-55; United States v. Barlin, 686 F.2d 81, 93 (2d Cir. 1982); United States v. Hawkins, 595 F.2d 751 (D.C. Cir. 1978) cert. denied, 441 U.S. 910 (1979); Billings v. State, 251 Ga. App. 432, 433, 558 S.E.2d 10 (2001); Commonwealth v. Lindsey, 48 Mass. App. Ct. 641, 724 N.E.2d 327 (2000); State v. Holmes,

255 N.J. Super. 248, 604 A.2d 987, 989 (App. Div. 1992); State v.

Draughn, 76 Ohio App. 3d 664, 602 N.E.2d 790, 795 (1992).

In addition to the foregoing cases specifically condemning war on drugs rhetoric, countless other cases, along with the American Bar Association's Standard for Criminal Justice, implore prosecutors to refrain from making "arguments calculated to appeal to improper prejudices of the trier of fact" and arguments that seek to "divert the trier from th[e] duty" to decide the case on the evidence only. American Bar Ass'n, Criminal Justice Standards for the Prosecution Function § 3-6.8 (4th ed. 2017); see In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012) (recognizing it is improper for prosecutors to "use arguments calculated to inflame the passions or prejudices of the jury.") (quoting American Bar Ass'n, Standards For Criminal Justice, std. 3-5.8(c) (2d ed.1980)); State v. Bautista-Caldera, 56 Wn. App. 186, 195, 783 P.2d 116 (1989) (argument that "exhorts the jury to send a message to society about the general problem of child sexual abuse" qualifies as improper emotional appeal); State v. Thierry, 190 Wn. App. 680, 690, 360 P.3d 940 (2015).

Such appeals to jurors' passions by invoking pressing social issues are particularly inappropriate during opening statements. See State v. Campbell, 103 Wn.2d 1, 15-16, 691 P.2d 929 (1984), cert. denied, 471

U.S. 1094 (1985) (“[a]rgument and inflammatory remarks have no place in the opening statement.”); American Bar Ass’n, Criminal Justice Standards for the Prosecution Function § 3-6.5 (“The prosecutor’s opening statement should be made without expressions of personal opinion, vouching for witnesses, inappropriate appeals to emotion or personal attacks on opposing counsel”).

Based on these firmly established principles, the prosecutor in this case was thoroughly notified that it is misconduct to begin an opening statement in a drug case by telling the jury “[t]he case before you today represents yet another battle in the ongoing war on drugs throughout our state and throughout our nation as a whole”, and then continue that theme up until the jury is sent away to deliberate. VRP 87:7-9. See Arrieta-Agressot, 3 F.3d at 527-28 (finding it “remarkable, in light of ... a slew of other recent cases in this circuit [condemning war on drugs and similar arguments], that the government defends as proper its closing [war on drugs] argument in this case”).

As recognized in Justice Fearing’s dissent, compared with the prosecutor’s war on drugs rhetoric in Mr. Loughbom’s case, “the prosecutor’s comments [warranting reversal] in United States v. Johnson, United States v. Solivan, State v. Draughn, and State v. Holmes, were either milder, similar in intensity, or fewer in number.” Attach. A

(Dissent) at 46. Based on these decisions and the Washington appellate decisions cited herein, to accept the State's argument that the prosecutor's conduct was not ill-intentioned under these circumstances would be to both presume and reward ignorance of the law.

As another state high court has pointedly recognized, “[t]he law cannot reward ignorance; there must be a point at which lawyers are conclusively presumed to know what is proper and what is not.” Pool v. Superior Court, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (Ariz. 1984), quoted in State v. Lewis, 78 Wn. App. 739, 743, 898 P.2d 874 (1995). The law presumes ordinary citizens to know the law in myriad situations, including criminal cases, dealings with governmental entities, banking supervisors who are presumed to know banking law, executors of estates are presumed to know community property law, and delinquent tax payers are presumed to know a tax sale may result. Hutson v. Savings and Loan, 22 Wn. App. 91, 98-99, 588 P.2d 1192 (1978). The legislature is also presumed to know the existing state of case law. Woodson v. State, 95 Wn.2d 257, 262, 623 P.2d 683 (1980). These presumptions apply with even greater force in the case of attorneys:

If every citizen is presumed to know the law, even though his opportunities to acquire such knowledge are extremely limited, how much greater is the presumption in the case of the attorney, who has been found to have the knowledge and the skill necessary to enable him to detect the presence of a legal problem and to find the

answer.

In re Krogh, 85 Wn.2d 462, 478, 536 P.2d 578 (1975); see also State v. Adams, 91 Wn.2d 86, 93, 586 P.2d 1168 (1978) (judges in bench trials are presumed to know and apply the law).

Thus, the prosecutor's improper invocations of the war on drugs throughout the trial cannot be treated as an innocent mistake, as the State urges. The prosecutor must be charged with having known the abundant Washington and national authority roundly condemning appeals to passions in opening statements and argument generally, and holding specifically that invocations of the war on drugs constitute such improper appeals. To conclude otherwise would be to accept the State's unsupported claim that the prosecutor was simply ignorant of the fact that he was making improper comments, and to reward that ignorance.

Even if the prosecutor were somehow unsure as to whether his planned war on drugs narrative would run afoul of Echevarria and the other authorities cited herein, it was incumbent upon him to raise the issue with the defense and the court in advance, and his failure to do so violated ABA standards. See American Bar Ass'n, Criminal Justice Standards for the Prosecution Function § 3-6.5(d) "[w]hen the prosecutor has reason to believe that a portion of the opening statement may be objectionable, the prosecutor should raise that point with defense counsel and, if necessary,

the court, in advance”). His failure to raise the issue in advance as urged by the ABA provides further evidence of ill-intent.

Given the abundance of case law putting the prosecutor on notice that use of a war on drugs theme, particularly in opening, constitutes misconduct, it follows that the prosecutor’s decision to violate the rules clearly articulated in these decisions was ill-intentioned. Because the prosecutor employed rhetoric nearly identical to that previously held to constitute misconduct, the misconduct was also flagrant. Therefore, as in Echevarria, reversal is required despite defense counsel’s failure to object.

**2. The State’s argument that misconduct occurs only when a prosecutor expressly urges the jury to convict in order to win a battle in the war on drugs is without merit.**

Echoing the Court of Appeals decision in this case, the State argues the prosecution’s use of the war on drugs theme is distinguishable from that held inflammatory in the cases cited in Mr. Loughbom’s briefing because no reference to the war on drugs was “associated with a call for [sic] ‘inflamm[e] the jurors’ emotions’ or ‘urge them to send a message’”, or “made based on a desire to ‘urge jurors to convict... in order to protect community values, preserve civil order, or deter future lawbreaking’”, or “a blatant invitation to the jury to convict the defendant... on the basis of fear and repudiation of drug dealers in general.” Resp’t’s Answer to Pet.

for Review at 9 (citing Solivan, 937 F.2d 1146; United States v. Monaghan, 741 F.2d 1434 (D.C. Cir. 1984), cert. denied, 470 U.S. 1085 (1985); Echevarria, 71 Wn. App. at 598-99).

However, pursuant to Washington and federal jurisprudence, reversible misconduct occurs when the prosecutor uses the war on drugs theme “as a prism through which the jury should view the evidence” or when the prosecutor equates “directly *or by innuendo*, a verdict of guilty to a blow against the drug problem”. Ramos, 164 Wn. App. 327; Hawkins, 595 F.2d 751 (emphasis added). Therefore, contrary to the State’s unsupported argument, a prosecutor’s implicit calls to convict in order to strike a blow against the drug scourge constitute misconduct to the same extent as those that are explicit.

In Echevarria, the prosecutor made no explicit call on the jurors to strike a blow against the war on drugs. Rather, the prosecution told the jury that the trial was a part of the “war on drugs,” that there is a “battlefield” in our neighborhoods, and that low-level drug dealers such as the defendant in that case were “the ‘enlisted men or the recruits’ who become involved in drugs ‘for the power or the money or the greed or peer pressure’”. Echevarria, 71 Wn. App. at 596. Despite the absence of any express call to convict the defendant because he was an enemy combatant in the war on drugs, the Court of Appeals viewed the

prosecutor's "extensive remarks as a blatant invitation to the jury to convict the defendant, not on basis of the evidence, but, rather, on the basis of fear and repudiation of drug dealers in general." Id.

The key point that the State overlooks is that the prosecutor in Echevarria did not say to the jury "I invite you to convict the defendant on the basis of fear and repudiation of drug dealers in general." Rather, by casting the specific case as a battle in the war on drugs, this invitation was implied. Likewise, the prosecutor in Mr. Loughbom's case did not need to expressly call on the jury to convict Mr. Loughbom because he was part of a larger societal problem. By framing the case as "yet another battle in the war on drugs", the jury is told that reaching a "guilty" verdict would be a victory in that war, and a "not guilty" verdict would be a defeat at society's expense.

By framing the case from the outset as "yet another battle in the ongoing war on drugs throughout our state and throughout our nation as a whole", and repeating that theme throughout the trial, the prosecutor invited the jury to convict Mr. Loughbom on the basis of fear and repudiation of drug dealers in general in the same manner and to the same extent as did the prosecutor in Echevarria. VRP 87:7-9. The State's attempt to distinguish Echevarria on the ground that the prosecutor here did not expressly enlist the jury as combatants in the war on drugs fails on

its face. In both cases, the invitation to score a victory in the war on drugs, although implicit, was nonetheless “blatant”. The prosecutor’s argument in Echevarria cannot be materially distinguished from the argument at issue in this case.

Similarly, in Ramos, the Court of Appeals found prejudicial misconduct despite no explicit request that the jury convict to win a drug war battle. Ramos, 164 Wn. App. at 338. In that case, the prosecutor argued in his closing that the prosecutor and jurors were in that courtroom that day “so people can go out there and buy some groceries at the Cost Cutter or go to a movie at the Sunset Square and not have to wade past the coke dealers in the parking lot” and “to stop Mr. Ramos from continuing that line of activities.” Ramos, 164 Wn. App. at 338.

Notably, the prosecutor did not expressly ask the jury to convict “so people can go out there ... and not have to wade past the coke dealers”. Instead, the prosecutor advised the jury that this was the reason the arresting detectives were in the parking lot the day of the arrest, and the reason everyone was gathered in the courtroom that day for the trial. Id. at 337-38. Citing Solivan, the Court of Appeals held that the prosecutor’s statements regarding the broader drug problem in the community constituted flagrant and ill-intentioned misconduct because the

prosecutor used these statements “as a prism through which the jury should view the evidence”. Id. at 340.

The prosecutor’s conduct in Mr. Loughbom’s case was more severe. Whereas the prosecutor in Ramos merely referenced the broader drug problem in one portion of the closing argument, the prosecutor here used the war on drugs “as a prism through which the jury should view the evidence” beginning with voir dire and persisting with that theme right up until the jury was sent out to deliberate.

There is no support in Echevarria or Ramos, or in any other case cited in the State’s submission to this Court, for the State’s argument that misconduct occurs only when the prosecutor explicitly asks the jury to convict in order to score a victory in the drug war. Misconduct occurs when the prosecution inflames the jurors’ passions by implicitly or explicitly placing the case in the context of a broader war on drugs, thereby using the drug war “as a prism through which the jury should view the evidence”. Ramos, 164 Wn. App. at 340. Such misconduct clearly occurred in this case when the prosecutor repeatedly referenced the war on drugs throughout the trial.

**B. Holding that the Prosecutor’s Pervasive War on Drugs Rhetoric Constitutes Misconduct Would Not Set an “Extreme Precedent.”**

The State fails to consider the totality of the trial record in arguing that reversing Mr. Loughbom’s convictions “would effectively declare any

mention of the ‘war on drugs,’ by a prosecutor, as instantaneous grounds for reversal.” Ans. to Pet. for Discretionary Review at 10-11. This argument dramatically understates the severity of the prosecutor’s emphasis of the war on drugs narrative throughout the trial proceedings.

In other cases finding misconduct, the war on drugs reference occurred only in an isolated portion of closing argument. See, e.g., Beasley, 2 F.3d at 1559-60 (two references to the war on drugs in closing argument); Johnson, 968 F.2d at 770-71 (misconduct based on a single war on drugs reference in rebuttal); Solivan, 937 F.2d at 1148-55 (misconduct based on single reference to broader drug problem in closing); Barlin, 686 F.2d at 93 (single drug war reference in closing may have warranted reversal but for overwhelming evidence of guilt); Lindsey, 48 Mass. App. Ct. 641, 724 N.E.2d 327 (reversing convictions due to single war on drugs statement in closing); Holmes, 255 N.J. Super. 248, 604 A.2d at 989 (reversed conviction based on two war on drug references in closing); Draughn, 76 Ohio App. 3d 664, 602 N.E.2d at 795 (reversing convictions due to war on drug references in rebuttal). There does not appear to be a single other case in which the war on drugs theme so pervaded a trial as in this case, appearing in voir dire, opening statement, officer testimony, closing argument, and rebuttal.

In Ramos, the State made a similar assertion that its invocations of the war on drugs at trial were benign and isolated. The Court of Appeals rejected this argument, instead finding the prosecutor's war on drugs narrative particularly prejudicial because "[r]ather than an isolated instance of misconduct, the prosecutor's improper comments were made at the beginning of closing argument as a prism through which the jury should view the evidence." Ramos, 164 Wn. App. at 340.

The prosecutor's improper conduct in Mr. Loughbom's case was far more pervasive than that warranting reversal in Ramos. The prosecutor here did not merely utter the phrase in isolation. Instead, he employed the phrase at every stage of the trial proceedings, thereby ensuring that the jury would apply the war on drugs "as a prism through which the jury should view the evidence". Ramos, 164 Wn. App. at 340.

Finding misconduct under these particularly egregious circumstances would not, as the State contends, "establish a new and extreme precedent" that mere utterance of the words "war on drugs" would require reversal. See Ans. to Pet. for Discretionary Review at 10-11. Rather, reversing Mr. Loughbom's convictions would simply remind prosecutors that they may not cast an individual case as a battle in the war on drugs, and in particular may not repeat this rhetoric throughout the trial. There is nothing "extreme" about this proposition, as similar rulings have

already been made in two Court of Appeals decisions and recognized in dicta in two more, and numerous federal courts of appeal have also so held. Given the pervasiveness of the improper remarks in this case, to deny Mr. Loughbom relief would effectively overturn well-established Court of Appeals jurisprudence and reject established federal persuasive authority.

**C. The State Effectively Concedes that its Case Against Mr. Loughbom Was Weak.**

Mr. Loughbom argued to the Court of Appeals and in his Petition for Discretionary Review that the evidence against him was weak. As presented in prior briefing, the State's case relied entirely upon the testimony of an unreliable CI who had motive to fabricate allegations in order to seek leniency from the prosecutor's office with respect to his pending charges and to implicate Mr. Loughbom, someone he did not know, rather than the friend at whose home he retrieved the drugs at issue. There was no evidence corroborating the CI's testimony, such as recovered marked bills, fingerprints, or audio recordings.

Mr. Loughbom has argued that, given these weaknesses in the State's evidence, there is a likelihood that the prosecutor's war on drugs theme unduly swayed the jurors, indicating that the misconduct in fact contaminated the verdict and that no curative instruction could have ameliorated the substantial prejudice. In its Answer to Mr. Loughbom's

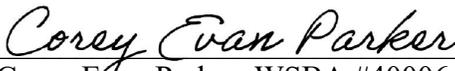
Petition for Discretionary Review, the State does not respond to this argument. Therefore, it should be deemed to have conceded that this argument is well-taken. See State v. Ward, 125 Wn. App. 138, 143-44, 104 P.3d 61 (2005) (holding that the State conceded a defendant's argument on appeal by failing to respond to it).

### III. CONCLUSION

For the foregoing reasons, Mr. Loughbom respectfully requests that this Court reverse Mr. Loughbom's convictions and remand for a new trial.

Respectfully submitted this 2nd day of January, 2020.

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**CERTIFICATE OF SERVICE**

I, Corey Parker, certify under penalty of perjury under the laws of the United States and of the State of Washington that on January 2, 2020, I caused to be served the foregoing Motion to Publish to the parties listed below in the manner shown

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