

59228-9

59228-9

No. 59228-9-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

JOEL ZELLMER,

Appellant.

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

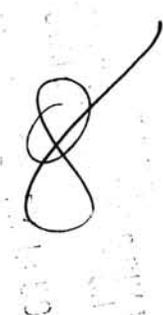
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APPELLANT'S REPLY BRIEF  
AND SUPPLEMENTAL ASSIGNMENTS OF ERROR

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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The court erred by refusing to hold an evidentiary hearing to determine the extent of and prejudice caused by the violations of Joel Zellmer's right to counsel.

2. The court did not comply with the requirements of GR 15 when ordering the unsealing of pleadings that were previously sealed.

B. ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The court rejected Zellmer's claims that the violations of his right to a confidential relationship with counsel undermined his right to have a fair trial. It refused to hold an evidentiary hearing or accept documents that were privileged in support for his motion that the State had violated the attorney-client privilege. Did the court err by refusing to hold an evidentiary hearing or review sealed documents to determine the extent of the violation of the attorney-client privilege?

2. Zellmer asked the court to reconsider its order unsealing previously sealed documents because it had not followed the framework of GR 15 and the State had not met its burden under GR 15. The court refused and summarily ruled that GR 15 was

satisfied. Should the case be remanded for further proceedings when the court never explained the legal basis of its ruling so that this Court can determine if the ruling based on a correct apprehension of the law?

C. ARGUMENT.

**1. The State relied on a flawed and overbroad search warrant to take vast amounts of Zellmer's property**

As set forth in Zellmer's original briefing challenging the search warrant, the prosecution, working in tandem with the Department of Labor and Industries, used overbroad search warrants to seize what amounts to every piece of paper or document contained in Zellmer's home. They took coins, dictionaries, calendars, photographs, and computers. See e.g., Pretrial Ex. 5, at 2, 4, 5. The trial judge ruled, the officers "scooped up everything they could, and in certain cases clearly exceeded the scope of the search warrant." CP 647. The overbroad warrant and its overbroad execution violated Zellmer's constitutional rights under the Fourth Amendment and article I, section 7 and the required remedy is suppression of the illegally seized evidence. Wong Sun v. United States, 371 U.S. 471, 484 (1963); State v. Winterstein, 167 Wn.2d 620, 632, 220 P.3d 1226 (2009).

Excluding the improperly seized evidence from being introduced at trial is something of a moot point in Zellmer's case because at trial, the prosecution did not offer into evidence most of the tangible materials it seized during the unconstitutional search. Nonetheless, suppression also requires excluding the fruits of that improperly gathered evidence. See Wong Sun, 371 U.S. at 485 (evidence "which derives" from an unlawful entry is "the 'fruit' of official illegality"). The improperly seized evidence was used against Zellmer even if not directly introduced into evidence, because it informed and guided the prosecution's case, as discussed below.

**2. The State's numerous separate violations of Zellmer's right to a confidential relationship with counsel gave the prosecution an impermissible advantage**

a. The State's superficial briefing ignores the constitutional violation at issue.

The prosecution takes no issue with the case law discussion in Appellant's Opening Brief describing the scope of Zellmer's right to a private relationship with his attorneys free from any State interference. See Response Brief at 46 ("Zellmer correctly recites well-established case law"). Its response is simply that it did not act in bad faith when violating Zellmer's right to counsel and Zellmer

did not prove the State expressly introduced impermissibly seized information at trial.

The prosecution's response rests on several flaws. First, it minimizes the inescapable fact that it received and reviewed privileged information. Second, it insists that its lack of intent to disregard the law means there is no relief available to Zellmer, even though the pertinent legal standard does not demand purposeful violation of the attorney-client privilege. Third, the trial court denied Zellmer's request for a hearing that would more fully establish the nature of the information learned by the prosecution in violation of Zellmer's right to a relationship with counsel free from state interference. 3/8/10 RP 132-33; 3/9/10RP 41, 43; Supp. CP \_ , sub. no. 449A (Defense Supplemental Offer of Proof Pertaining to Jailhouse Informant's Status as a Government Agent, at 1-2). He also asked to file a pleading more fully explaining the nature of the intrusion into his attorney-client privilege but the court refused to accept it. 3/8/10RP 111-12. The court said it would assume the State obtained privileged materials. 3/8/10RP 112-13.

Although the court denied Zellmer the ability to more fully explain the nature of error, the available record shows multiple

violations of Zellmer's fundamental right to a confidential relationship with counsel.

- b. The available record shows the State intruded upon Zellmer's right to a confidential and private relationship with counsel and the court's refusal to hold evidentiary hearings should not be blamed on Zellmer.

The prosecution erroneously treats the various attorney-client privilege violations in a vacuum when they must be considered cumulatively and mischaracterizes those violations to minimize them.

The State paints informant Kevin Olsen as offering only "benign" information about Zellmer to avoid the repercussions of using Olsen as a "listening device" to get "an ear" into Zellmer's defense. But at trial, the prosecution insisted "Mr. Olsen's testimony is critical to the State's case because . . . it is the first time – as far as the State is currently aware – that the defendant admitted that the victim did not get to the pool on her own." CP 2570. The prosecution described Olsen's "critical" importance to the State in a motion in which it attached three recorded interviews

with Olsen. Id.<sup>1</sup> The trial court ruled that the State was impermissibly obtaining information from Olsen when these interviews occurred. CP 2740-2632 (interviews dated December 19, 2008, January 29, 2009, February 24, 2009); 3/8/10RP 107 (finding State was “getting information it shouldn’t be” getting after December 17, 2008); see also Supp CP \_\_, sub. no. 388, at 2-10 (explaining history of Olsen contacts with state).

The lengths to which the State went to procure Olsen’s testimony show the importance with which it viewed Olsen’s information. Prosecutor Brenneman had routine telephone calls with Olsen about his circumstances and testimony. See Supp CP \_\_, sub. no. 449A (App. E, Brenneman-Olsen conversations). Hundreds of pages of recorded telephone calls Olsen made to detectives and the prosecution show he sought he benefits for himself as he tried to pass information to detectives who thanked him for his help. Id. (Apps. A-G). The volume of calls shows Olsen’s close alignment with law enforcement. The particulars of the calls

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<sup>1</sup> In Zellmer’s Opening Brief, he cited sub. no. 204 as containing interviews between Olsen and the State. This citation was erroneous, and Zellmer intended to refer to sub. no. 240, the State’s Motion for Video Deposition of Material Witness Kevin Olsen. The correct document was supplementally designated at the time of filing the Opening Brief, CP 2567-2632. Counsel for Zellmer apologizes for any confusion.

show Olsen trying to do the state's investigation for it and the State actively listening and encouraging this jailhouse investigation. See e.g., Supp. CP \_\_, sub. no. 449A (App. C, 12/17/08 call to Peters at 9, 11: Olsen says "trying hard" to reach detectives in Zellmer's case; Peters says Zellmer's case "is a thorn in my side," and Olsen responds that he will "take the thorn out of your side" when he meets with detective in person); Id. (App. D, 11/20/09 call to Brenneman, prosecutor states to Olsen, "I think you're really important as a witness in this case . . .").

The reason the prosecution did not call Olsen as a witness at trial was not his unimportance. After going to considerable lengths to procure Olsen as a witness and repeatedly insisting it would call Olsen as a witness throughout the trial, it dropped Olsen because of his flawed credibility. He had 21 prior felony convictions, including nine burglaries and four forgeries. Supp. CP \_\_, sub. no. 237 (at 6, 15). He admitted to one detective that as an informant in another case he was "giving him some bullshit information." Supp. CP \_\_, sub. no. 449A (App. B, 11/27/09 Olsen call to Cienynski at 5). He told this same detective that he had not yet told Zellmer's prosecutors about the lies he offered in this other case. Id. at 6. This detective agreed that if Zellmer's prosecutors

knew that “most of that stuff” Olsen said in the prior case “was not true,” the prosecutors “wouldn't be using you.” Id. at 7.

In short, Olsen was a risky witness with a remarkable number of convictions for crimes of dishonesty who admitted giving “bullshit” information in the past, but he was a helpful ear on Zellmer's trial strategy. He was the only person who affirmed for the prosecution that Zellmer was responsible for the child's death, was trying to beat the case by tricking the State or delaying the trial to outlast witnesses, and he had engaged in many scams. This reinforced the prosecution's strategy and informed the State's efforts to push their case against Zellmer.

The National Merit Insurance file also contained “significant” information protected by the attorney-client privilege, including detailed statements by Zellmer describing his role in the incident – the very crime with which he was being charged. CP 968. The State not only possessed but also read Zellmer's confidential discussions about McLellan's death. CP 1731. It conceded this material and had “significant” evidentiary value. CP 342.

Furthermore, the State knew in advance when executing the search warrant for Zellmer's home that a blanket seizure of writings from Zellmer's home would include materials involving Zellmer's

McLellan's death. Zellmer was involved in protracted litigation about her death, including a wrongful death law suit, divorce proceedings, and multiple child custody cases. The State seized an extraordinary amount of privileged materials. CP 231-44 (special master report).

Copies of materials seized from Zellmer's home were put into the homicide case file and shared with prosecutors. CP 1719, 1723 n.8. The State had emails from Zellmer and his lawyer that were protected by the attorney-client privilege. CP 1729. It had a complete electronic copy of Zellmer's computers and the detective who tried to screen the computers for attorney-client privileged materials missed 17 documents. CP 1727. These documents were put onto a CD and shared with the detectives. Id. A detective closely reviewed Zellmer's dayplanner, which included notes to his attorney there were deemed privileged by the special master. CP 441; CP 1539; CP 1719.

c. The repeated intrusions into Zellmer's right to counsel gave the State an impermissible advantage

Zellmer does not need to prove that this information actually altered the prosecution's trial strategy, which is the standard the prosecution posits. The reason why courts have adopted a structural error approach to serious incursions by prosecutors or

police officers into an accused person's private relationship with counsel is that the effects cannot be measured and quantified.

The prosecution takes no issue with the legal reasoning of State v. Lenarz, 22 A.3d 536 (Conn. 2011) but tries to distinguish it on its facts. In Lenarz, the court held that the burden is not on the defendant to establish prejudice when the prosecutor has obtained information concerning the defendant's trial strategy. Because the disclosure of such information is inherently prejudicial, prejudice should be presumed regardless of the intentional nature of the invasion. The subjective intent of the government and the identity of the party responsible for the disclosure simply have no bearing on that question. Id. at 549.

In Lenarz, the court found that the only way to render harmless an unintentional intrusion into privileged information containing trial strategy requires the prosecution to "establish" that:

it notified the defendant and the court immediately of [an] intrusion, that it ensured no government official with knowledge of the information had any contact with witnesses or investigators and that it ensured that no such person was involved in the prosecution of the case . . . .

Id. at 550 n.14. Lenarz also explains that if the prosecution wants to rebut the presumption of prejudice and seek a remedy other than dismissal, the State must present clear and convincing

evidence that it removed any taint derived from the intrusion into the accused's right to counsel. Id. at 549-50, 554.

Here, the prosecution spent months hearing from Olsen about what Zellmer thought about his lawyers and his case before letting the defense or court know about its "ear" on Zellmer's trial strategy. Supp. CP \_\_, sub. no. 237, at 6 (explaining late notice of Olsen's contacts with Zellmer despite on-going trial preparation and discovery obligations). The State read the National Merit Insurance file's discussions between Zellmer and his lawyers before Zellmer knew they obtained it. It copied and reviewed privileged documents taken from Zellmer's home.

The information improperly or surreptitiously obtained by the State had strategic value to the prosecution. Its value includes affirming its suspicions of Zellmer and assuring the prosecution of Zellmer's trial tactics. It cemented its trial strategy that Zellmer's different versions of events proved his guilt. CP 1745. It learned how Zellmer and his lawyers viewed the strength of the State's allegations and their strategy. Id. It learned what Zellmer's concerns were as he awaited trial and how he planned on tricking the prosecution or court. This information had clear and identifiable

benefit to the prosecution, even if only some if it was novel or otherwise unavailable.

The State emphasizes how the trial court soft-pedaled its ruling about Olsen -- finding his testimony largely inadmissible but going out of its way to tell the people in the courtroom it did not find they acted in bad faith. 3/8/10RP 85-86, 104-05. Yet it does not cure the error to say that the prosecutor did not personally order the violation of Zellmer's right to counsel. The problematic nature of the violation of Zellmer's right to a confidential relationship with his lawyer is that intangible benefits follow.

It is inescapable that the court held that the detectives intruded upon Zellmer's right to counsel by repeatedly talking with Olsen about the specifics of what Zellmer said about his case at a time when Zellmer was represented by counsel. The detectives did not need to act in bad faith to violate Zellmer's right to counsel. Likewise, the prosecution sought and reviewed privileged materials Zellmer supplied his lawyers in the insurance litigation, and parsed a trove of items seized from Zellmer's home. The prosecution has not proved by clear and convincing evidence that none of this information affected the trial.

d. The objection is preserved by extensive briefing.

The State also presents a spurious preservation argument, contending that Zellmer's failure to request dismissal as the remedy for one of the several violations of his right to counsel waives this error on appeal. The defense filed multiple motions, had a multi-day hearing, and extensively complained about the harm that followed from the State's numerous intrusions upon his right to a confidential relationship with counsel. He sought an evidentiary hearing to further explain the privileged information improperly obtained by the prosecution both regarding Olsen's state-actor status and the attorney-client privileged material the State obtained, but the court refused. 3/8/10RP 114-15, 121-30, 133. In fact, he sought dismissal as the remedy. 3/9/10RP 55 (court ruling refusing to dismiss due to attorney-client privilege violation); CP 1708 (Defense Motion to Dismiss for Right to Counsel Violations: Intrusions into Privileged Attorney-Client Communications). The preservation rules exist so that the court has the legal arguments before it when ruling, not as a game of "gotcha" to preclude relief based on cumulative errors. See e.g., Teter v. Deck, 174 Wn.2d 207, 226, 274 P.3d 336 (2012) (holding it

would be unduly “onerous” insist that a party request the same remedy during the trial as requested later).

Moreover, it is the cumulative effects of numerous violations of Zellmer’s right to counsel that should be taken together when determining the necessary remedy. This cumulative assessment appropriately occurs on appeal, where the multiple intrusions into Zellmer’s confidential relationship with his attorneys establish the denial of his right to counsel as guaranteed by the Sixth Amendment and article I, section 22.

**3. Excluding an observer from the courtroom without just cause and absent the required procedural protocol violated the constitutional requirement of open court proceedings.**

A member of the public may not be prohibited from watching a trial absent substantial cause following necessary procedural considerations of the need for the closed proceedings and the extent of the closure. United States v. Presley, 558 U.S. 209, 130 S.Ct. 721, 724, 175 L.Ed.2d 675 (2010); United States v. Sherlock, 962 F.2d 1349, 1356 (9<sup>th</sup> Cir.), cert. denied, 113 S.Ct. 419 (1992). The prosecution incorrectly claims that the trial court merely “temporarily excluded a teenager” from watching the trial. The

unbridled discretion. However, it is well-established that there are limits on the court's discretion to exclude a spectator. "Where a trial court orders a partial closure of the courtroom, the judge must have a substantial reason for making the exclusion, and the closure must be narrowly tailored to satisfy the purpose for which it was ordered." Sherlock, 962 F.2d at 1356. Sherlock explains that the difference between a full closure and a partial closure is that the court needs to supply a compelling reason for the former and a substantial reason for the latter. Id.

Even in the instance of a narrowly tailored order that partially closes the courtroom for a substantial reason, the reviewing court must further determine whether the trial court properly followed the procedural requirements for closing the proceedings. Id. There are three procedural requirements: first, the court must hold a hearing on the closure motion; secondly, the court must make factual findings supporting the closure; and finally, the court must consider reasonable alternatives to the closure. Id.; see also United States v. Rivera, 682 F.3d 1223, 1236 (9<sup>th</sup> Cir. 2012) (recent case applying the framework of Sherlock to court's exclusion of single child observer from hearing).

Washington courts cannot have a more lenient standard than that which governs under the First and Sixth Amendments.

Thus, Lormor does not accord unbridled discretion to a court to exclude an observer. Instead, as Lormor explained, the court must “exercise caution in removing a spectator.” Id. at 94-95. This “caution” limits the court’s discretion in line with the constitutional mandates at stake when the court bars a person from attending a public trial. Even a partial closure that affects a single person, as occurred in Presley or Lormor, triggers the mandatory considerations of the right to a public trial guaranteed to both the accused and the public. This right may not be restricted absent substantial reason, based on a hearing at which the need for the closure is addressed and alternatives considered. See Sherlock, 962 F.2d at 1357; see also, Presley, 130 S.Ct.at 724 (“trial courts are required to consider alternatives to closure even when they are not offered by the parties”). These procedural protections did not occur in the case at bar and the court unreasonably barred a teenager from attending the trial when the teenager had not been disruptive or shown himself unable to follow the court’s instructions.

The remedy for a non-trivial, purposeful and unjustified closure of the courtroom under Washington precedent is reversal.

The court's blanket policy excluding minors and its failure to conduct any individualized inquiry to see if this particular teenager actually poses any risk of being affected by the subject matter of the trial or would talk about the case to his father in an improper way violates the core values the right to open proceedings is designed to protect. The error was not inadvertent or trivial. It was manifestly unreasonable for the court to order a teenager to leave the courtroom without considering and weighing the precise circumstances of the case and the less restrictive alternatives available.

**4. The court denied Zellmer his right to be present at a proceeding that substantially affects his rights**

While the jury was deliberating, the court held a private conference with the attorneys to discuss its response to a question from the jury. Zellmer was not invited to attend and was not apprised that this meeting occurred. See Appellant's Opening Brief at 44. Where Zellmer was not included in the proceeding, his failure to object to its occurrence cannot waive his right to be present or to public court proceedings. It violated Zellmer's right to be present for the court to discuss and rule upon a question from the deliberating jury in private. State v. Irby, 170 Wn.2d 874, 883-

84, 246 P.3d 796 (2011). In addition, Zellmer has a right to a public trial and the public has a right to open court proceedings under the federal and state constitutions. Lormor, 172 Wn.2d at 90-91; State v. Easterling, 157 Wn.2d 167, 180-81, 137 P.3d 825 (2006)..

Conducting substantive discussions about jury questions in private, without Zellmer's presence, violated these rights and it was presumptively prejudicial, as further analyzed in Zellmer's Opening Brief.

**5. The prosecution offers no support for its claim that prior accidents constitute a deliberate scheme to injure another person under ER 404(b)**

In his Opening Brief, Zellmer explained that the State used three unrelated incidents in which a child came in harm's way when Zellmer was present to proclaim Zellmer had a propensity for harming children and trying to benefit from it. The court admitted these prior incidents under the common scheme or plan admissibility rule of ER 404(b). The court erred because a scheme or plan requires a deliberate and intentional set of acts with a markedly similarity, rather than acts that are recognized as accidental or negligent.

The prosecution does not respond to Zellmer's contention that accidents may not constitute a common scheme or deliberate plan under ER 404(b). Instead, it summarily asserts that the court did not abuse its discretion. Response Brief, at 72. This cursory response does not address the questions presented.

"Interpretation of an evidentiary rule is a question of law, which we review de novo." State v. Gresham, 173 Wn.2d 405, 422, 269 P.3d 207 (2012) (quoting State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007)). A court necessarily abuses its discretion to decide factual issues when it bases its decision on a misunderstanding of the law. See Yokoyama v. Midland Nat. Life Ins. Co., 594 F.3d 1087, 1091 (9<sup>th</sup> Cir. 2010) ("If the district court's determination was premised on a legal error, we will find a per se abuse of discretion."). Thus, the question is whether the court reasonably applied the law with an accurate understanding of its parameters.

ER 404(b) requires a deliberate plan causing similar results, not merely accidental conduct or negligent supervision resulting in different types of injuries. Gresham, 173 Wn.2d at 422. As the Supreme Court recently explained, "[m]ere similarity in results is

insufficient” to meet the requirements of a common scheme or plan. Id. The underlying acts must be “markedly similar.”

Yet in Zellmer’s case, the court never found Zellmer acted intentionally in causing harm to children on other occasions to further a predetermined plan. Zellmer had no financial benefit in two of the three incidents, although the State claimed financial benefit was his motive in the “plan.” Zellmer was alone with the children in only two of the three situations and the children were of different ages. At least one of the children was injured accidentally, and the cause of the other injuries was speculative. Injuries caused by accident or unknown circumstance and the differing situations in which they occurred do not establish a common scheme or plan.

On appeal, the prosecution describes the scheme as one of Zellmer’s “education,” rather than enacting a specific plan. But “education” is not a deliberate scheme and is not a permissible purpose for admitting highly prejudicial claims of uncharged misconduct under ER 404(b). Instead, “education” implies bit-or miss-efforts and is such an open-ended category that it permits the inference of propensity rather than providing evidence material to the charged crime.

The highly prejudicial nature of painting Zellmer as a repeated child-injurer based on evidence that never should have been admitted denied Zellmer a fair trial, as discussed in Zellmer's opening brief.

**6. Using tracking experts to interpret the absence of wet footprints in an old photograph is patently unhelpful and confusing to the jury**

The fact that courts have permitted a "tracker" to testify in two other cases does not mean it is reasonable to admit that tracker's testimony to opine how or whether a crime may have occurred. Joel Hardin's purported expertise was in live tracking, not footprints left by shoes on a damp wooden deck. Hardin was not testifying as a live tracker in Zellmer's case. Instead, his testimony was that of a person who looked at old photographs. His conclusion was not that he saw something no inexperienced person could see. Instead, he opined that the photographs showed no footprints from Ashley McLellan. He did not opine that Zellmer's footprints were on the deck -- there was a partial work boot footprint but that print was most likely from an EMT or police officer who responded to the 911 call. The lack of footprints is apparent to anyone looking at the pictures. Exs. 204, 210.

Yet Hardin did not only repeat the obvious about the photographs. He claimed that from his tracking experience, he could tell that the absence of McLellan's footprints meant she had not trod upon the deck and therefore must have been carried to the pool. This claim was critical to the State's case but was not within Hardin's expertise. In State v. Ortiz, 119 Wn.2d 294, 831 P.2d 1060 (1992) Hardin visited the crime scene and his opinion stemmed his observations of actual foot impressions. In State v. Groth, 163 Wn.App. 548, 556, 261 P.3d 183 (2011), rev. denied, 173 Wn.2d 1026 (2012), Hardin testified that his tracking skills enabled him to view photographs to interpret signs left by actual footprints.

In Zellmer's case, Hardin looked at pictures and drew conclusions far afield of his expertise. His lack-of-footprint conclusion was obvious to the lay person and his speculation that the absence of the child's footprint meant the only adult present must have carried her to her death was too far removed from his expertise to have been permissible at trial. His claim that McLellan was not the person who left cake crumbs on the path to the pool – divined from dark photographs of small crumbs – is similarly far-fetched and afield from Hardin's tracking experience.

Following the court's unreasonable decision admitting Hardin's testimony, the court let the State bolster his opinion by offering the testimony of two cohorts who agreed with Hardin. 4/21/10RP 38. This rebuttal testimony affirming Hardin's opinions occurred over defense objection. 4/20/10RP 23. One of these purported expert opinions was offered without the expert testifying in person, in violation of Zellmer's confrontation clause right. The resulting piling-on of testimony to bolster Hardin's opinion exacerbated the prejudice flowing from Hardin's inadmissible, speculative guesswork about how the incident must have been a crime.

**7. The prosecutor's unseemly and repeated appeals to sympathy for the family of the deceased, despite repeated defense objections, denied Zellmer a fair trial.**

Tellingly, rather than quoting a single one of its statements to the jury, the prosecution tries to sanitize its arguments by summarizing them in a clinical fashion. The prosecution purposefully downplays what the jury actually heard and understood when the court repeatedly overruled Zellmer's objections to the prosecution's pleas for sympathy for the family of the deceased.

The prosecutor also omits any discussion of the case law presented in Zellmer's opening brief addressing strikingly similar arguments that courts found to be reversible error and instead presents highly generic case law. The State's failure to address the on-point cases cited by Zellmer should be construed as an implicit acknowledgement that those cases cannot be distinguished from Zellmer's case.

As recently explained by this Court, "a prosecutor commits reversible misconduct by urging the jury to decide a case based on evidence outside the record." State v. Pierce, \_\_ Wn.App. \_\_, 280 P.3d 1158, 1169 (2012); see State v. Clafin, 38 Wn.App. 847, 851, 690 P.2d 1086 (1984) ("statements of facts not proved, and comments thereon, are outside of the case. They stand legally irrelevant to the matter in question, and are therefore not pertinent. If not pertinent, they are not within the privilege of counsel." (internal citations omitted)).

In Pierce, the Court of Appeals reversed a murder conviction because the prosecutor made arguments that were not based on evidence introduced at trial. The prosecutor imagined what the murder victims may have said during the incident. Id. at 1170. The court concluded, "[t]hese emotionally charged embellishments to

the evidence were nothing more than an improper appeal to the jury's sympathy that encouraged the jury to decide the case based on the prosecutor's heart-wrenching, though essentially fabricated, tale of how the murders occurred." Id. The prosecution employed a similar technique here, by concocting scenarios between McLellan and her mother, father, sister, and grandparents that would have occurred if she had not died.

The Pierce Court also reversed the conviction because the prosecutor argued that the victims would not have expected to be murdered "in their wildest dreams . . . or in their wildest nightmare."

The Pierce Court ruled that,

[t]his argument was an improper appeal to passion and prejudice. It served no purpose but to appeal to the jury's sympathy. That the Yarrs [the victims] would never have expected the crime to occur was not relevant to Pierce's guilt, nor were the prosecutor's assertions about the Yarrs' future plans. Moreover, the argument invited the jury to imagine themselves in the Yarrs' shoes, increasing the prejudice."

Id. at 1171.

The essence of the prosecution's argument to Zellmer's jury was to put themselves in the heart-wrenching shoes of McLellan's parents, grandparents, aunts, uncles and younger sister. He asked them to imagine each family member's pain as they were denied

rites of passage, such as seeing Ashley McLellan losing a tooth, buying a cell phone, or playing on a soccer team. These repeated arguments offered speculative yet specific examples of the life-not-lived by McLellan and the pain thereby inflicted on others. It was not based on evidence in the record, not probative of whether Zellmer put McLellan into the swimming pool or she fell into it, and served no purpose other than to pull on the jurors' heartstrings.

This argument was delivered even though Zellmer made numerous objections. By forcing Zellmer to make repeated objections, the jury was left the jury with the impression he was trying to hide something important. Teter, 174 Wn.2d at 223 (“repeated objections, even if sustained, leave the jury with the impression that the objecting party is hiding something important.”).

And the court exacerbated the problem by overruling Zellmer's objections, thereby signaling to the jury that the court endorsed the prosecution's claims about the pain and loss of McLellan's relatives as proper factors in deliberating. The State tries to hide behind the generic instruction given to the jury before closing arguments telling them not to decide the case based on sympathy, but the State undermined this instruction when it made detailed appeals to juror sympathy for the deceased's family and

the court overruled Zellmer's objections. The excessive and egregious nature of injecting the sympathy due to and the entitlement of the deceased's family into deliberations, both alone and together with the other errors in the case, denied Zellmer a fair trial.

**8. Zellmer should be permitted to revisit the court's improper unsealing order and withdraw any documents that should not be unsealed and publicly available**

During the course of lengthy pretrial proceedings, the court granted numerous defense motions to seal documents. These documents involved privileged attorney-client materials. After Zellmer's trial, the court reversed its sealing orders and ordered these same documents unsealed.

In State v. McEnroe, \_\_ Wn.2d \_\_, 279 P.3d 861, 867 (2012), the Supreme Court held that if a court denies a motion to seal, "a party may withdraw documents submitted to the court in connection with a motion to seal." Because the court initially sealed the documents and then reversed its ruling, Zellmer was not afforded the opportunity to withdraw those documents. He should be permitted to withdraw materials that contained privileged materials and would hamper Zellmer's ability to receive a fair trial on remand.

The court's unsealing ruling was issued at a time when the legal standards for such rulings were less than clear. Now that the Supreme Court has clarified the legal standard for denying requests to seal documents and the right to withdraw such documents, Zellmer should be permitted to revisit these rulings and withdraw those materials that should not be unsealed.

Additionally, the prosecution points out that after improperly unsealing the documents by relying on the Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); factors, the court cursorily added that the requirements of GR 15 have been "satisfied." CP 415. But a mere citation to a court rule does not establish a valid legal ruling predicated on proper legal analysis.

GR 15(e)(2) requires that sealed documents "shall be ordered unsealed only upon proof of compelling circumstances." The court's one sentence order relating to GR 15 did not explain how the State met the requirements of GR 15. CP 415. It did not have an in-court hearing on the matter. It did not mention the compelling circumstance. It did not explain whether it based its ruling on the State's claim that Zellmer lacked attorney-client privilege now that his trial was over, which would have been a suspect legal ruling given his on-going appeal. The court's failure to

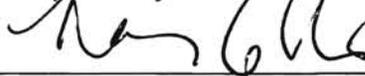
articulate the basis of its ruling cannot insulate it from review. Instead, this Court should remand the case for a hearing on the unsealing of privileged documents that is conducted based on recently decided cases explaining the parameters of sealing and unsealing privileged materials.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Zellmer respectfully requests this Court reverse his conviction and dismiss the charge against him, or alternatively order a new trial.

DATED this 28<sup>th</sup> day of August 2012.

Respectfully submitted,



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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 65701-1-I
v.	)	
	)	
JOEL ZELLMER,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 28<sup>TH</sup> DAY OF AUGUST, 2012, I CAUSED THE ORIGINAL **APPELLANT'S REPLY BRIEF AND SUPPLEMENTAL ASSIGNMENTS OF ERROR** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] SHERYL MCCLLOUD LAW OFFICES 710 CHERRY ST. SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] JOEL ZELLMER 343003 WASHINGTON STATE PENITENTIARY 1313 N 13 <sup>TH</sup> AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

STATE OF WASHINGTON  
COURT OF APPEALS - DIVISION ONE  
2012 AUG 28 PM 1:50

**SIGNED** IN SEATTLE, WASHINGTON THIS 28<sup>TH</sup> DAY OF AUGUST, 2012.

X \_\_\_\_\_ 

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