No. 41795-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Robert Maddaus,

Appellant.

Thurston County Superior Court Cause No. 09-1-01772-1

The Honorable Judge Christine Pomeroy

Appellant's Opening Brief

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1. The trial court erred by denying Mr. Maddaus's motion to suppress.

2. The trial court violated Mr. Maddaus's right to privacy under Wash. Const. Article I, Section 7 by admitting evidence seized under authority of a warrant issued without probable cause.

3. The police violated Mr. Maddaus's right to privacy under Wash. Const. Article I, Section 7 by seizing evidence under authority of a warrant issued without probable cause.

4. The police violated Mr. Maddaus's Fourth Amendment right to be free from unreasonable searches and seizures by seizing evidence discovered pursuant to a warrant issued without probable cause.

5. The search warrant affidavit did not establish probable cause to believe evidence of a crime would be found within Mr. Maddaus's home or elsewhere on his property.

6. The search warrant was overbroad because it authorized police to search for and seize items for which the affidavit did not establish probable cause.

7. The search warrant was overbroad because it failed to describe the things to be seized with sufficient particularity.

8. The search warrant affidavit did not establish probable cause to search for or seize "[a]ny clothing with apparent blood evidence."

9. The search warrant affidavit did not establish probable cause to search for or seize "any clothing that matches the description given by witnesses to include blue jeans, a dark colored hooded sweatshirt, a dark colored baseball style hat."

10. The search warrant affidavit did not establish probable cause to search for or seize any firearms other than the handgun used in the shooting.

11. The search warrant affidavit did not establish probable cause to search for or seize any packaging for handguns.

12. The search warrant affidavit did not establish probable cause to search for or seize new bullets or packaging for bullets.

13. The search warrant unlawfully authorized police to search for and seize items protected by the First Amendment.

14. The search warrant affidavit did not establish probable cause to search for or seize "receipts or documentation for firearms or any firearm related items."

15. The search warrant affidavit did not establish probable cause to search for or seize "notes and records to establish dominion and control."

16. The search warrant affidavit did not establish probable cause to search for or seize "notes and records that relate to the distribution or sales of controlled substances."

17. The search warrant affidavit did not establish probable cause to search for or seize "any computers, media storage devices, cell phones, that could be used to communicate between the victim and suspect or could contain an [sic] recording of subjects speaking about the robbery of Robert Maddaus."

18. The search warrant affidavit did not establish probable cause to search for or seize "any surveillance equipment to include cameras and any device that could contain recordings from the surveillance equipment, any device that could contain surveillance camera recordings from the address of 1819 Capitol Way S #4 that is believed to be missing at this time."

19. The search warrant affidavit did not establish probable cause to search for or seize "packaging for handcuffs and documentation or receipts for handcuffs."

20. The search warrant affidavit did not establish probable cause to search for or seize "any controlled substances including methamphetamine and any of the associated paraphernalia that is associated with the use, distribution and sales of narcotics to include methamphetamine."

21. The trial court erred by adopting Finding No. 4. CP 3.

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25. The trial court erred by failing to hold a hearing prior to requiring that Mr. Maddaus be restrained during his jury trial.

26. The trial court erred by requiring Mr. Maddaus to attend his trial wearing a leg brace and shock device without holding a hearing to determine whether or not these measures were necessary.

27. The trial court erred by imposing restraints on Mr. Maddaus without adequate cause.

28. The trial court erred by imposing restraints on Mr. Maddaus without considering less restrictive alternatives.

29. The trial court erred by failing to determine whether jurors observed Mr. Maddaus's restraints during trial.

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31. The trial court erred by failing to admonish jurors who saw Mr. Maddaus's restraints not to draw an adverse inference from their observations.

32. The trial court violated Mr. Maddaus's confrontation right under the Sixth and Fourteenth Amendments.

33. The trial court violated Mr. Maddaus's confrontation right under Wash. Const. Article I, Section 22.

34. The trial court erred by prohibiting cross-examination into Leville's bias in favor of the government.

35. The trial court abused its discretion by failing to hold a hearing to investigate allegations of governmental misconduct.

36. The trial judge applied the wrong legal standard in refusing to hold a hearing to investigate allegations of governmental misconduct.

37. The trial court erred by admitting illegally recorded conversations that did not fit within an exception to the Privacy Act.

38. The Thurston County Jail unlawfully recorded Mr. Maddaus's telephone calls without obtaining prior consent from all parties to each conversation.

39. The prosecutor committed misconduct requiring reversal.

40. The prosecutor improperly expressed a personal opinion in closing arguments.

41. The prosecutor improperly maligned the role of defense counsel in closing arguments.

42. Mr. Maddaus's two convictions for Tampering with a Witness (in Counts VI and VII) violated his constitutional right not to be twice put in jeopardy for the same offense.

43. Mr. Maddaus's witness tampering convictions in Counts VI and VII (regarding Theodore Farmer) infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of each offense.

44. The prosecution failed to prove beyond a reasonable doubt that Theodore Farmer was a witness at the time of the alleged witness tampering.

45. The prosecution failed to prove beyond a reasonable doubt Mr. Maddaus had reason to believe that Farmer was about to be called as a witness or might have information relevant to a criminal investigation at the time of the alleged witness tampering.

46. Mr. Maddaus's assault conviction was entered in violation of his right to have the jury consider applicable lesser offenses.

47. The trial judge erred by refusing to instruct the jury on the inferior offense of third-degree assault.

48. The trial judge violated Mr. Maddaus's Fourteenth Amendment right to due process by refusing to instruct on the inferior offense of third-degree assault.

49. The trial judge violated Mr. Maddaus's state constitutional right to a jury trial by refusing to allow the jury to consider the inferior offense of third-degree assault.

50. Mr. Maddaus's state constitutional right to a unanimous jury was violated when the state failed to elect a particular weapon for conviction of second-degree assault, and the judge failed to give a unanimity instruction.

51. Mr. Maddaus's state constitutional right to a unanimous jury was violated when the state failed to elect a particular act for conviction of attempted kidnapping, and the judge failed to give a unanimity instruction.

52. Mr. Maddaus's assault conviction infringed his right to due process because the court's instructions relieved the state of its obligation to prove an essential element of the charged crime.

53. The court's instructions relieved the state of its burden to prove that Mr. Maddaus assaulted Abear with a deadly weapon, an essential element of Assault in the Second Degree.

54. The court's instructions on second-degree assault failed to make the relevant legal standard manifestly clear to the average juror.

55. Mr. Maddaus's attempted kidnapping conviction violated his Fourteenth Amendment right to due process.

56. The trial court erred by instructing the jury with an erroneous definition of the phrase "substantial step."

57. The trial court erred by giving Instruction No. 22.

58. The court's instruction defining "substantial step" impermissibly relieved the state of its burden of establishing every element of attempted kidnapping by proof beyond a reasonable doubt.

59. The court's instructions on attempted kidnapping failed to make the relevant legal standard manifestly clear to the average juror.

60. Mr. Maddaus was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

61. Defense counsel was ineffective for failing to object to the imposition of a leg brace and shock device on Mr. Maddaus, in the absence of an impelling necessity.

62. Defense counsel was ineffective for failing to object to inadmissible and prejudicial evidence.

63. Defense counsel unreasonably failed to seek suppression of telephone conversations recorded in violation of the Privacy Act.

64. Defense counsel unreasonably failed to object to inadmissible hearsay that bolstered Abear's allegations.

65. Defense counsel was ineffective for failing to object to Instruction No. 22 and failing to propose a proper instruction defining "substantial step."

66. Defense counsel was ineffective for failing to propose a proper instruction defining "deadly weapon" relating to the second-degree assault charge.

67. Defense counsel was ineffective for failing to object to prosecutorial misconduct in closing argument.

68. The sentencing court erred by imposing firearm enhancements on Counts I, III, and IV.

69. The firearm enhancements were not authorized by the jury's verdicts.

70. The firearm enhancements were improper because of errors in the court's instructions to the jury.

71. The court's instructions failed to make manifestly clear the jury's duty in answering the special verdict on each sentencing enhancement.

72. The firearm enhancements were imposed in violation of Mr. Maddaus's right to notice of the charges against him under the Sixth and Fourteenth Amendments, and under Wash. Const. Article I, Section 22.

73. The firearm enhancements were imposed in violation of Mr. Maddaus's Fourteenth Amendment right to due process.

74. The firearm enhancements were imposed in violation of Mr. Maddaus's right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Sections 21 and 22.

75. The sentence imposed exceeded that authorized by the jury's verdicts.

76. The trial court erred by sentencing Mr. Maddaus to life in prison without possibility of parole.

77. The evidence was insufficient to prove that Mr. Maddaus had two prior "strike" convictions.

78. Mr. Maddaus's life sentence was imposed in violation of his Fourteenth Amendment right to equal protection.

79. Mr. Maddaus's life sentence was imposed in violation of his state constitutional right to equal protection.

80. Mr. Maddaus's life sentence was imposed in violation of his right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Sections 21 and 22.

81. Mr. Maddaus's life sentence was imposed in violation of his Sixth and Fourteenth Amendment right to proof beyond a reasonable doubt.

82. Mr. Maddaus's life sentence was imposed in violation of his state constitutional right to due process.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A search warrant must be based on probable cause. Here, the search warrant affidavit did not establish probable cause to believe that evidence of a crime would be found at Mr. Maddaus's residence or elsewhere on his property. Was the search warrant invalid because it was not based on probable cause?

2. A search warrant is overbroad if it authorizes seizure of items for which probable cause does not exist, or if it fails to describe the things to be seized with sufficient particularity. In this case, the search warrant was overbroad for both reasons. Must the evidence derived from execution of the overbroad search warrant be suppressed?

3. Prior to requiring an accused person to attend trial in restraints, a trial judge must hold a hearing to determine the necessity of shackling the person during trial. Here, the judge did not hold a hearing to determine the need for restraints, and Mr. Maddaus was required to attend trial with a leg brace and a shock device. Was Mr. Maddaus's conviction entered in violation of his Fourteenth Amendment right to due process?

4. An accused person has the constitutional right to confront witnesses. Here, the trial court restricted Mr. Maddaus's opportunity to cross-examine Leville regarding matters affecting credibility and bias. Did the restriction on cross-examination violate Mr. Maddaus's Sixth and Fourteenth Amendment right to confront his accuser?

5. Governmental interception of attorney-client communication may require dismissal of charges. In this case, the trial judge refused to hold a hearing when faced with the possibility that a government agent had unlawfully copied Mr. Maddaus's letter to his attorney and provided it to the prosecution. Did the trial judge abuse her discretion by refusing to hold a hearing to investigate the matter?

6. A recorded telephone conversation is inadmissible unless the recording was made with prior consent of all parties to the conversation. Here, the state introduced recordings made without the prior consent of a party to the conversation. Did the erroneous admission of illegally recorded telephone calls violate Mr. Maddaus's rights under the Privacy Act?

7. A prosecutor may not express a personal opinion or impugn the role of defense counsel. Here, the prosecutor expressed his personal opinion and impugned the role of defense counsel in his closing argument. Did the prosecutor commit reversible misconduct?

8. An accused person may not receive multiple convictions for the same offense. In this case, Mr. Maddaus received two convictions for ongoing conduct that was (allegedly) directed at inducing Theodore Farmer to provide false testimony. Did the entry of two tampering convictions violate Mr. Maddaus's right to be free from double jeopardy under the Fifth and Fourteenth Amendments and Wash. Const. Article I, Section 9?

9. To obtain convictions for witness tampering in Counts VI and VII, the prosecution was required to prove that Theodore Farmer was a witness, or that Mr. Maddaus had reason to believe that Farmer was about to be called as a witness in any official proceedings, or that Mr. Maddaus had reason to believe Farmer might have information relevant to a criminal investigation. Instead, the evidence established that Farmer had no connection to the case and had no relevant information at the time of the alleged tampering. Did the convictions for witness tampering in Counts VI and VII infringe Mr. Maddaus's Fourteenth Amendment right to due process because they were based on insufficient evidence?

10. An accused person is entitled to have the jury instructed on applicable inferior-degree offenses. Here, the trial judge refused to instruct on the inferior-degree offense of Assault in the Third Degree. Did the trial judge's refusal to instruct on Assault in the Third Degree violate Mr. Maddaus's unqualified right to have the jury consider an inferior degree offense, as well as his Fourteenth Amendment right to due process and his state constitutional right to a jury trial?

11. When evidence of multiple criminal acts is introduced to support a single conviction, either the state must elect one act upon which to proceed, or the court must give the jury a unanimity instruction. Here, the state introduced proof of three assaults and two attempted kidnappings, but the court did not provide a unanimity instruction. Did the trial court's failure to give a unanimity instruction violate Mr. Maddaus's constitutional right to a unanimous verdict?

12. A trial court's instructions must inform the jury of the state's burden to prove every essential element of the charged crime. Here, the court's instructions allowed conviction of Assault in the Second Degree absent proof that Mr. Maddaus committed the assault with a deadly weapon. Did the trial court's instructions relieve the state of its burden to prove the essential elements of the second-degree assault, in violation of Mr. Maddaus's Fourteenth Amendment right to due process?

13. A conviction for attempt requires proof that the accused person took a "substantial step," defined as "conduct strongly corroborative of the actor's criminal purpose..." Here, the court's instructions defined the phrase as "conduct that strongly indicates a criminal purpose..." Did the instruction relieve the prosecution of its burden to prove the elements of attempted kidnapping beyond a reasonable doubt?

14. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. Was Mr. Maddaus denied his right to the effective assistance of counsel by his attorney's unreasonable failure to:

a. Object to the needless imposition of physical restraints?
b. Seek suppression of illegally recorded telephone conversations?
c. Object to inadmissible testimony bolstering Abear's allegations?
d. Object to the court's instruction defining "substantial step" and to propose a proper instruction?
e. Propose an instruction defining the phrase "deadly weapon" for purpose of the second-degree assault charge?
f. Object to prosecutorial misconduct?

15. An accused person may not be convicted of or sentenced for an uncharged enhancement. In this case, Mr. Maddaus was alleged to have committed two offenses while armed with a deadly weapon; he was not charged with firearm enhancements. Did the imposition of two consecutive firearm enhancements violate his right to due process and to adequate notice under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Section 22?

16. When the jury is directed to determine whether or not an offender was armed with a deadly weapon during the commission of a crime, the sentencing court may not impose a firearm enhancement. In Counts I, III, and IV, the court's instructions asked the jury to consider whether or not Mr. Maddaus was armed with a deadly weapon. Did the imposition of firearm enhancements violate Mr. Maddaus's right to due process and to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Sections 21 and 22?

17. A firearm enhancement may not be imposed unless the offender was "armed" with a firearm. Here, the court's instructions and special verdict forms permitted the jury to return a "yes" verdict, even if the prosecution failed to prove that Mr. Maddaus was armed during the commission of each charged crime. Did the imposition of firearm enhancements violate Mr. Maddaus's Fourteenth Amendment right to due process in light of the error in the court's instructions and special verdict forms?

18. Equal protection prohibits discrimination between similarly situated people. Prior convictions used to enhance sentences are sometimes treated as "elements" of the offense, and other times as "sentencing factors." Does the arbitrary classification of prior convictions as "elements" in some circumstances and as "sentencing factors" in other circumstances violate equal protection under the Fourteenth Amendment and Wash. Const. Article I, Section 12?

19. An accused person is guaranteed the right to a jury determination beyond a reasonable doubt of any fact necessary to increase punishment above the otherwise-available statutory maximum. The trial judge, using a preponderance standard, found that Mr. Maddaus had two prior "strike" offenses, elevating his sentence to life without possibility of parole. Does the life sentence violate Mr. Maddaus's Sixth and Fourteenth Amendment right to due process and to a jury trial?

20. State deprivation of liberty must be accomplished by procedures that take into account (1) the private interest at stake, (2) the risk of erroneous deprivation under the existing procedure and the probable value of additional or substitute procedures, and (3) the government's interest in maintaining the existing procedure. In Washington, persistent offenders are sentenced to life without possibility of parole based on a judicial finding by a preponderance of the evidence that the offender has two prior "strikes." Does the existing procedure for sentencing persistent offenders violate the right to procedural due process under Wash. Const. Article I, Section 3?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS[1]

Shawn Peterson was shot on Capitol Way in Olympia in the very early morning of November 16, 2009. RP[2] 503-505, 524-525, 533-536, 552-553, 617. Five people had been with Peterson in a Capitol Way apartment just before the shooting. Peterson and these five people—

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[1] Because of the number of issues, the length of the brief, and the complexity of the facts, some of the evidence will be summarized in the Argument section of the brief.

[2] The trial transcript is numbered consecutively, and will be cited as RP followed by the page number. Cites to any other portions of the Verbatim Report of Proceedings will include the

(*Continued*)

Matthew Tremblay, Jesse Rivera, Falyn Grimes, Daniel Leville, and Robert Maddaus—were all convicted felons, drug users, and (except for Rivera) drug dealers.[3] RP 494, 960, 1042, 1055, 1090, 1178, 1180, 1185, 1208, 1275-1276, 1302, 1321, 1390, 1394, 1538.

The state persuaded all of them (but one) to provide statements implicating Robert Maddaus for the shooting. RP 1088-1093, 1116-1117, 1130-1134, 1207-1209, 1224, 1292-1293, 1388. As a result of their statements, Mr. Maddaus was charged with first-degree murder.[4] RP 1040-1152, 1177-1231, 1266-1408.

The only witness who claimed to have seen Mr. Maddaus shoot Peterson was Tremblay (who was also the subject of "other suspect" evidence introduced by the defense at trial.) *See, e.g.*, RP 1555-1557.

Tremblay had done time for nine to twelve felony convictions before the shooting. RP 1362. He was arrested after the shooting, and gave a statement regarding his involvement in an unrelated murder investigation. He admitted he traded methamphetamine for a gun (the murder weapon in that case), sold the gun, and came into possession of it a

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date of the hearing.

[3] Leville and Grimes lived in the apartment where they'd gathered just before the shooting.

[4] The Information captioned the charge as follows: "Murder in the first Degree, While Armed with a Deadly Weapon – Firearm." Mr. Maddaus was also charged with Unlawful Possession of a Firearm in the First Degree.

second time. RP (12/21/10) 58-59; RP 1369; Supp. Motion filed 12/17/10, Supp. CP. As a convicted felon, his possession of the firearm was itself a felony crime; however, no charges stemmed from this activity. RP (12/21/10) 59.

At the time of his arrest, Tremblay was found with two ounces of methamphetamine, stolen property, and $6000 cash, and he admitted that he made his living selling drugs. RP (12/21/10) 59-60; RP 1371. No charges stemmed from this criminal activity. RP (12/21/10) 60; RP 1408; Supp. Motion filed 12/17/10, Supp. CP. The prosecution gave Tremblay use immunity for his testimony regarding Peterson's death. Supp. Motion filed 12/17/10, Supp. CP.

The defense theory at trial was that Tremblay shot Peterson. *See, e.g.,* RP 1555-1557. Tremblay admitted to friends that he'd shot Peterson, and expressed concern that Mr. Maddaus was being charged even though he, Tremblay, had fired the shots.[5] RP 1621, 1652-1658, 1711-1713.

Daniel Leville was another prosecution witness. Like Tremblay, Leville had served time in prison (for eight felony convictions). RP 1089-1090. Like Tremblay, he was arrested multiple times between the shooting and Mr. Maddaus's trial. In July of 2010, Leville had an outstanding arrest

[5] At trial, he denied having done so. RP 1400-1406.

warrant. Police watched his apartment, and observed him make a hand-to-hand drug delivery. As officers approached to arrest Leville, he placed a bindle of heroin into his car. Attachment F to Supp. Motion filed 12/17/10, Supp. CP.

Inside the apartment Leville shared with Grimes, police found five bags of marijuana, drug paraphernalia with methamphetamine and heroin residue, and a ledger detailing transactions with customers, including amounts owed and payments received. The police also found completed checks and other items implicating Leville in forgeries and identity thefts, as well as a large number of electronic items and power tools (even though neither Leville nor Grimes had jobs). One arresting officer wrote "I anticipate a referral for a significant number of additional charges against ...Daniel Leville." Attachment F to Supp. Motion filed 12/17/10, Supp. CP. The state did not file any charges stemming from this incident. Leville was released on his warrant and fled. RP (12/21/10) 60-61.

Grimes was another prosecution witness who had several felony convictions under her belt. RP 1207. Like Leville, she was arrested on outstanding warrants in July of 2010. Like Leville, she was not charged with any crimes relating to the contraband found in their shared apartment. Supp. Motion filed 12/17/10 and Attachment F, Supp. CP.

Grimes talked with her friends about the shooting, and told them

that Tremblay had killed Peterson.[6] RP 1688, 1724.

Leville and Grimes conspired with Rivera to lie to the police about Rivera's presence in the apartment on the night of the shooting. RP 1096, 1225. After Grimes and Rivera had a falling out, she pressured him into contacting police and making a statement. His initial statement did not implicate Mr. Maddaus. RP 1210-1217, 1290-1300. He was granted immunity from prosecution after he changed his statement to implicate Mr. Maddaus in the shooting. RP (12/21/10) 63.

Other witnesses who received benefits from the prosecution included Anthony Samlock (who pled guilty to one misdemeanor charge, even though the state filed probable cause for five felonies) and Amanda Harader, Tremblay's girlfriend (who did not get charged even though she was in possession of controlled substances and stolen property when she was arrested). RP (12/21/10) 56-58; RP 981-982.

The state's theory at trial was that Mr. Maddaus killed Peterson because he believed Peterson had stolen drugs and money from him. RP 1986-2015. The prosecution presented the testimony of Jessica Abear, who was at Mr. Maddaus's home during the robbery. RP 645-650. She testified that Mr. Maddaus returned home and assaulted her with a

[6] At trial, she denied having done so. RP 1218-1221.

paintball gun, a handgun, and bear mace, in an attempt to force her to reveal who had committed the robbery. RP 646, 653-655, 679. She also testified that he'd talked about taking her somewhere and torturing her to get the information. RP 655-657. As a result of her allegations, Mr. Maddaus was charged with attempted first-degree kidnapping and second-degree assault, both with deadly weapon allegations.[7] CP 21-23.

While in custody awaiting trial, Mr. Maddaus's telephone calls were recorded by the Thurston County Jail. RP 1464-1509. The state reviewed these phone calls, and alleged (1) that he had tried to convince Theodore Farmer to provide a false alibi during two telephone calls, and (2) that he tried to persuade Grimes and Leville to tell police they knew nothing about the shooting. RP 1464-1509, 1997-2015. Mr. Maddaus was charged with four counts of Tampering with a Witness. CP 22-23.

The charges proceeded to trial in January of 2011.[8] The jury voted guilty on all charges, and answered "yes" on each special verdict. Verdict Forms, Supp. CP. At sentencing, the court found that the murder conviction was Mr. Maddaus's third "strike", and sentenced him to a

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[7] The Information used the following language to charge each crime: "Attempt to Commit Kidnapping in the First Degree While Armed with a Deadly Weapon – Firearm," and "Assault in the Second Degree While Armed with a Deadly Weapon – Firearm." CP 21-23.

[8] An initial attempt to start the trial was halted and a mistrial declared before the jury was sworn in. RP 263, 270.

sentence of life in prison without the possibility of parole. RP (2/8/11) 132. Mr. Maddaus timely appealed. CP 35.

ARGUMENT

I. THE TRIAL JUDGE SHOULD HAVE SUPPRESSED ITEMS SEIZED FROM MR. MADDAUS'S RESIDENCE BECAUSE THE SEARCH WARRANT VIOLATED THE FOURTH AMENDMENT AND ARTICLE I, SECTION 7.

A. Standard of Review

Whether a search warrant meets the probable cause and particularity requirements is an issue of law reviewed *de novo*. *State v. Neth*, 165 Wash.2d 177, 182, 196 P.3d 658 (2008); *State v. Reep*, 161 Wash.2d 808, 813, 167 P.3d 1156 (2007).

B. Factual Basis

Prior to trial, Mr. Maddaus moved to suppress evidence obtained during execution of a search warrant at his home. RP (8/12/10) 54-60; Memorandum in Support of Motion to Suppress, Supp. CP.

The affidavit in support of the search warrant includes seven factual statements relating to the property:

- That Mr. Maddaus lives at 10220 179th Ave SW in Rochester, which is the address on his driver's license.
- That Mr. Maddaus did not answer when police knocked on the door of his trailer on the afternoon of November 17th.
- That his mother resides in a home on the property, and did not wish to cooperate with police.
- That his 2002 green VW Jetta, registered to him at that address, was not on the property when police visited on November 17th.
- That numerous other cars registered to Mr. Maddaus list that address,

and were located on the property at the time of the police visit.

- That Emerald Akau spent the night with him at his residence on November 16 (the night following the shooting) and left him there the next morning (November 17th).
- That the property is situated "roughly one mile" from Josephine Lundy's residence (10919 Highway 12, Rochester), where (according to Tremblay) Mr. Maddaus allegedly unloaded items from his Jetta following the shooting.

CP 5-8.

The police had already searched Josephine Lundy's property (which is where Tremblay claimed he and Maddaus had gone immediately after the shooting). CP 8. The affiant notes that nothing of evidentiary value had been found at the Lundy residence.[9] CP 8. From this, the affiant concludes: "The evidence that Tremblay had described as being at [Lundy's property] was not located as he described it. Therefore it is believed to have been removed and may be concealed in the home, mobile home or outbuildings located at 10220 179th Ave SW." CP 8.

The warrant allowed seizure of the following items from Mr. Maddaus's address:

> Any clothing with apparent blood evidence, any clothing that matches the description given by witnesses to include blue jeans, a dark colored hooded sweatshirt, a dark colored baseball style hat; any firearms, to include handguns, packaging for handguns, spent casings, new bullets, packaging for bullets, receipts or documentation for firearms or any firearm related items; notes and records to establish dominion and

[9] The affiant also indicates that a search at the Capitol Way apartment failed to turn up a gun, bullets, or other associated items, concluding "that these items were removed from the scene." CP 8-9.

> control; notes and records that relate to the distribution or sales of controlled substances; any controlled substances including methamphetamine and any of the associated paraphernalia that is associated with the use, distribution and sales of narcotics to include methamphetamine; any computers, media storage devices, cell phones, that could be used to communicate between the victim and suspect or could contain an [sic] recording of subjects speaking about the robbery of Robert Maddaus; any paintball guns, paintballs, marbles or items associated with paintball guns; any surveillance equipment to include cameras and any device that could contain recordings from the surveillance equipment, any device that could contain surveillance camera recordings from the address of 1819 Capitol Way S #4 that is believed to be missing at this time; handcuffs, handcuff keys, packaging for handcuffs and documentation or receipts for handcuffs, documentation related to the ownership or possession of a 2002 green VW Jetta... to include photographs and other associated paperwork... CP 4.

The court denied the motion. RP (8/12/10) 60; CP 2-3. The state introduced evidence discovered during the search, including a handgun (which was not the murder weapon) and photos taken during the search. RP 667, 816-823. Included in the pictures were a paintball gun, drug paraphernalia, and ammunition for various types of guns. RP 816-821.

C. A search warrant must be based on probable cause.

The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the... things to be seized." U.S. Const. Amend. IV. The Fourth Amendment is applicable to the states through the action of the Fourteenth Amendment. *Mapp v. Ohio,* 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961). Washington's constitution provides that "No person shall be

disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. Article I, Section 7.

Under both provisions, search warrants must be based on probable cause. *State v. Young*, 123 Wash.2d 173, 195, 867 P.2d 593 (1994) ("*Young* I"). Evidence seized pursuant to a search warrant issued without probable cause must be suppressed. *Neth, at* 183-186. Furthermore, evidence tainted by the initial unlawfulness must also be suppressed as "fruit of the poisonous tree." *State v. Eisfeldt*, 163 Wash.2d 628, 640-641, 185 P.3d 580 (2008) (citing *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)).

An affidavit in support of a search warrant "must state the underlying facts and circumstances on which it is based in order to facilitate a detached and independent evaluation of the evidence by the issuing magistrate." *State v. Thein*, 138 Wash.2d 133, 140, 977 P.2d 582 (1999). The facts outlined in the affidavit must establish a reasonable inference that evidence of a crime will be found at the place to be searched; that is, there must be a nexus between the item to be seized and the place to be searched. *Young* I, *at* 195; *Thein, at* 140. Generalizations cannot provide the individualized suspicion required under the Fourth

Amendment and Article I, Section 7 of the Washington Constitution.[10] *Thein, at* 147-148.

D. The search warrant affidavit did not create a reasonable inference that evidence of a crime would be found on Mr. Maddaus's property.

In this case, the affiant had no basis to believe that evidence of a crime would be found at Mr. Maddaus's residence (or elsewhere on his property). The affidavit's few facts relating to the property are wholly innocuous, and fail to suggest a nexus between the crime and 10220 179th Ave SW. Nothing in the affidavit gives rise to any inference that the property would hold any of the specific items listed. CP 5-8. In fact, the affidavit lacks even the generalizations and blanket inferences condemned by the Supreme Court in *Thein.* Instead, the general theory underlying the warrant application appears to be that police should be allowed to search the home of anyone suspected of a crime, because a suspect might keep evidence of the crime at her or his residence.

This is exactly the approach rejected by *Thein.*

Because the officer lacked probable cause to believe evidence of a crime would be found inside the residence, the search warrant was invalid. Evidence seized under the warrant must be suppressed. *Thein, supra.*

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[10] *See also State v. Nordlund*, 113 Wash.App. 171, 182-184, 53 P.3d 520 (2002) ("Nor is the [warrant] salvageable by the affidavit's generalized statements about the habits of sex offenders… These general statements, alone, are insufficient to establish probable cause.")

Furthermore, any evidence derived from execution of the warrant must also be suppressed as fruits of the poisonous tree. *Eisfeldt, at* 640-641. Mr. Maddaus's convictions in Counts I-V must be reversed, and the case remanded with instructions to suppress the evidence. *Thein.*

E. The search warrant was unconstitutionally overbroad: it authorized seizure of items for which probable cause did not exist and failed to describe the things to be seized with sufficient particularity.

The particularity and probable cause requirements are inextricably interwoven. *State v. Perrone,* 119 Wash.2d 538, 545, 834 P.2d 611 (1992). A warrant may be overbroad either because it authorizes seizure of items for which probable cause does not exist, or because it fails to describe the things to be seized with sufficient particularity.[11] *State v. Maddox,* 116 Wash.App. 796, 805, 67 P.3d 1135 (2003) (citing, *inter alia, Perrone, supra,* and *State v. Riley*, 121 Wash.2d 22, 846 P.2d 1365 (1993)). An overbroad warrant is invalid regardless of whether the executing officers conducted an overbroad search. *Riley, at* 29.

A warrant authorizing seizure of materials protected by the First Amendment requires close scrutiny to ensure compliance with the particularity and probable cause requirements. *Zurcher v. Stanford Daily,*

[11] One aim of the particularity requirement is to prevent the issuance of warrants based on loose, vague or doubtful bases of fact. *Perrone,* at 545. The requirement also prevents law enforcement officials from engaging in a "'general, exploratory rummaging in a person's belongings...'" *Perrone* at 545 (citations omitted). Conformance with the rule "eliminates the danger of unlimited discretion in the executing officer's determination of what to seize." (*Continued*)

436 U.S. 547, 564, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978); *Stanford v. Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965); *Perrone at* 547. In keeping with this principle, the particularity requirement "is to be accorded the most scrupulous exactitude" when the materials to be seized are protected by the First Amendment. *Stanford, at* 485.

In this case, the affidavit lacks probable cause for a number of items listed in the warrant, including items protected by the First Amendment.[12] These items are addressed separately below.

Clothing. Nothing in the affidavit refers to "clothing with apparent blood evidence."[13] Nor does the affidavit provide any basis to conclude that Mr. Maddaus wore "blue jeans, a dark colored hooded sweatshirt, a dark colored baseball style hat…"[14] CP 5-8.

Firearms. Although the affidavit provides probable cause for seizure of the handgun used during the offense, it does not justify seizure

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Perrone, at 546.

[12] In addition, as noted above, the affidavit does not provide any basis to believe evidence would be found at Mr. Maddaus's residence.

[13] The affiant refers to the autopsy, but does not reference any findings regarding the likelihood of blood being ejected toward the shooter. Nor did Tremblay indicate that the shots were fired at such close range that the shooter could have been spattered with blood. Neither Tremblay nor Lundy told detectives that Maddaus had blood on his clothing, and Akau did not notice any bloody clothing when she visited Maddaus on the evening of November 16th. CP 5-8.

[14] The affiant lists these articles of clothing in his description of "Evidence of the crime of Murder" to be sought, and claims that this clothing "matches the description given by witnesses," but does not specify who these witnesses were, what they said, or what their

(*Continued*)

of "any firearms." Because witnesses referred only to a handgun, there was no basis to believe that a rifle, a shotgun, or any other firearm would have evidentiary value.[15] Nor does the affidavit outline probable cause justifying seizure of "packaging for handguns… new bullets, packaging for bullets, receipts or documentation for firearms or any firearm related items." CP 5-8.

Materials protected by the First Amendment. The warrant authorizes police to peruse and potentially seize writings, recordings, and computer files possessed by Mr. Maddaus, no matter how private. This authorization was made without probable cause, and without describing the materials with the "scrupulous exactitude" required by the First Amendment. *Stanford, at* 485.

First, the affidavit does not explain why "notes and records to establish dominion and control"—presumably of Mr. Maddaus's residence—would be helpful to the investigation. No facts are provided to establish that proof of Mr. Maddaus's dominion and control over his own residence would relate to the crime. CP 5-8.

Second, the affidavit does not contain facts suggesting that Mr.

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basis of knowledge was, and does not provide any facts establishing their credibility. CP 5-8.

[15] The blanket directive to seize "any firearms" likely also infringes the right to bear arms. *See* U.S. Const. Amend. II; Wash. Const. Article I, Section 24.

Maddaus kept "notes and records that relate to the distribution or sales of controlled substances."[16] CP 5-8.

Third, although the affidavit references a laptop and desktop (at Leville's apartment), it does not justify the seizure of "any computers…that could be used to communicate between the victim and suspect or could contain an [sic] recording of subjects speaking about the robbery of Robert Maddaus." The directive to seize "any computers" authorizes seizure even if the officers had already located the laptop and desktop at the apartment.[17] It also allows seizure of tablet computers (such as Apple's iPad or Motorola's Xoom), netbooks, handheld PDAs, servers, or even mainframes, even though no mention is made of such technology in the affidavit. CP 4-11.

Fourth, nothing in the affidavit justifies seizure of "media storage devices…that could be used to communicate between the victim and suspect or could contain an [sic] recording of subjects speaking about the robbery of Robert Maddaus." None of the witnesses mentioned disks,

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[16] None of the witnesses interviewed made reference to written notes or records relating to drug dealing; no one told the police that Mr. Maddaus kept a ledger, a list of customers, or anything else relating to the drug business. CP 5-8.

[17] The officers had already searched Leville's apartment. They note in the affidavit their failure to find "a handgun, bullets, and other associated items…;" The officers do not claim that they'd failed to find the laptop and desktop in the apartment. Affidavit, p. 5. This omission suggests that they did find the laptop and desktop when they searched the apartment. CP 8.

thumb drives, CDs, DVDs, external hard drives, or other media storage devices. CP 4-11.

Fifth, although the affidavit does refer to Mr. Maddaus's cell phone,[18] it does not justify seizure of all "cell phones…that could be used to communicate between the victim and suspect or could contain an [sic] recording of subjects speaking about the robbery of Robert Maddaus."[19] There is no indication that Mr. Maddaus used more than one phone to communicate with Peterson, with the unnamed informant mentioned in the affidavit, or with Lundy. CP 5-8.

Sixth, the affidavit does not provide a basis to seize "any surveillance equipment to include cameras and any device that could contain recordings from the surveillance equipment, any device that could contain surveillance camera recordings from the address of 1819 Capitol Way S #4 that is believed to be missing at this time." Although information about missing surveillance recordings was brought out at trial,[20] nothing in the affidavit refers to surveillance equipment, cameras,

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[18] Which was assigned the number (360) 789-2264.

[19] A modern cell phone is much more than a telephone; instead, it holds the same kind of personal data that can be stored on a computer, in addition to phone records and texts. Accordingly, a warrant authorizing seizure of a cell phone requires the close scrutiny demanded by the First Amendment.

[20] *See* RP 814, 1071.

related devices, or surveillance recordings.[21] CP 4-11.

Seventh, although the affidavit refers to handcuffs, there is no indication that Mr. Maddaus possessed "packaging for handcuffs and documentation or receipts for handcuffs."[22] CP 5-8.

Drugs and paraphernalia. Although Mr. Maddaus was understood to be a drug dealer, none of the witnesses made specific reference to any drugs in his possession, or to any "associated paraphernalia that is associated with the use, distribution and sales of narcotics to include methamphetamine." Apparently, the officers presumed that Mr. Maddaus would necessarily be in possession of such items simply because he was involved in the drug trade. However, there was no evidence outlining how he ran his alleged operation. In fact, the concrete references to his drug business suggested that he may have relied on others (such as the decedent) to conduct the hands-on aspects of the venture. CP 4-11.

The search warrant affidavit fails to set forth facts establishing

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[21] Because such equipment could contain sensitive materials protected by the First Amendment—including home photos, home movies, etc.—the authorization to seize these devices must be subjected to heightened scrutiny. *Zurcher, supra; Perrone, supra.* Given the absence of any reference to these items, the requirement of probable cause is not met under this heightened standard.

[22] Because a search for documentation and receipts allows police to peruse written materials, these items are included under this section (relating to materials protected by the First Amendment).

probable cause with respect to all but a few of the items the police were authorized to seize. The warrant was overbroad, and the search violated Mr. Maddaus's rights under the Fourth Amendment and under Wash. Const. Article I, Section 7. It also infringed his First Amendment rights. *Stanford, supra.* Accordingly, Mr. Maddaus's convictions must be reversed, the evidence suppressed, and the case remanded for a new trial. *Reep, supra.*

II. THE TRIAL COURT VIOLATED MR. MADDAUS'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AND ARTICLE I, SECTION 3 BY ALLOWING HIM TO BE RESTRAINED AT TRIAL IN THE ABSENCE OF AN "IMPELLING NECESSITY."

A. Standard of Review

Constitutional violations are reviewed *de novo. State v. Schaler,* 169 Wash.2d 274, 282, 236 P.3d 858 (2010). A manifest error affecting a constitutional right may be raised for the first time on review.[23] RAP 2.5(a)(3); *State v. Kirwin*, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009). A reviewing court "previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed." *State v. Walsh,* 143 Wash.2d 1, 8, 17 P.3d 591 (2001). An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the

[23] In addition, the court has discretion to accept review of any issue argued for the first time on appeal. RAP 2.5(a); *see State v. Russell,* 171 Wash.2d 118, 122, 249 P.3d 604 (2011). This includes constitutional issues that are not manifest, and issues that do not implicate

(*Continued*)

error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wash.2d 428, 433, 197 P.3d 673 (2008).

B. Factual Basis

Mr. Maddaus's case was called for trial on January 3, 2011. Mr. Maddaus had been fitted with a shock device and a leg brace by jail staff. The court did not hold a hearing to address the issue of Mr. Maddaus's restraints. Defense counsel asked that the leg brace be removed; however, the court declined the request.[24] RP 50-52.

The next morning (prior to jury selection), Mr. Maddaus again raised the issue of these restraints and noted that jurors could see them. RP 52. Without analyzing the need for restraints, the court rearranged the courtroom furniture in an attempt to prevent the jury from seeing the shock device or leg brace. RP 52-55.

On the second day of evidence, Mr. Maddaus again noted that jurors could see the shock device on his leg. RP 628. The court had flat pieces of cardboard placed in such a way that jurors' views would be blocked. RP 628-629.

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constitutional rights. *Id.*

[24] Defense counsel did not ask that the shock device be removed at that time. RP 50-55.

C. Mr. Maddaus was entitled to attend trial free of shackles absent some "impelling necessity" for physical restraint.

A defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary circumstances. *State v. Damon,* 144 Wash.2d 686, 691, 25 P.3d 418 (2001); *State v. Finch*, 137 Wash.2d 792, 844, 975 P.2d 967 (1999). Restraints may not be used "'unless some *impelling necessity* demands the restraint of a prisoner to secure the safety of others and his own custody.'" *Finch, at* 842 (quoting *State v. Hartzog,* 96 Wash.2d 383, 398, 635 P.2d 694 (1981) (emphasis in original)). The accused has the right to be brought before the court "with the appearance, dignity, and self-respect of a free and innocent man." *Finch, at* 844.

Restraints are disfavored because they undermine the presumption of innocence, unfairly prejudice the jury, restrict the defendant's ability to assist in the defense of his case, interfere with the right to testify, and offend the dignity of the judicial process. *Finch, at* 845; *Hartzog, at* 399. Close judicial scrutiny is required to ensure that the inherent prejudice of restraint is necessary to further an essential state interest. *Finch, at* 846.

The trial court must base its decision to physically restrain an accused person on evidence that s/he poses an imminent risk of escape, intends to injure someone in the courtroom, or cannot behave in an orderly

manner while in the courtroom. *Finch, at* 850. Concern that a person is "potentially dangerous" is not sufficient. *Finch, at* 852. Restraints may only be imposed based on information specific to a particular person; a general concern or a blanket policy will not pass constitutional muster. *Hartzog, supra.* Finally, restraints should be used only as a last resort, and the court *must* consider less restrictive alternatives before imposing physical restraints. *Finch, at* 850.

A trial court electing to impose restraints must make findings of fact and conclusions of law that are sufficient to justify the use of the restraints. *Damon, at* 691-692. On direct appeal, improper use of restraints is presumed to be prejudicial. *In re Davis*, 152 Wash.2d 647, 698-699, 101 P.3d 1 (2004).

The burden is on the court to remain alert to any factor that may undermine the fairness of trial. *State v. Gonzalez*, 129 Wash.App. 895, 901, 120 P.3d 645 (2005). The judge is responsible for preventing prejudicial occurrences and for determining their effect. *Id.* It is the court's duty to shield the jury from routine security measures; this duty "is a constitutional mandate." *Id.* (citing *State v. Hutchinson,* 135 Wash.2d 863, 887-888, 959 P.2d 1061 (1998).

D. Mr. Maddaus was prejudiced by the unconstitutional use of restraints during trial: the judge failed to hold a hearing, to consider less restrictive alternatives, and to inquire after notified that jurors had seen Mr. Maddaus

in restraints.

In Mr. Maddaus's trial, the jail placed two kinds of restraints on him, apparently without any input from the court. Although Mr. Maddaus raised the issue multiple times, the court did not remove the restraints or explain the reason for their use. RP 50-55, 628. Nor did the court hold a *Finch* hearing to determine whether restraints were needed. *See* RP, *generally*. Nothing in the record suggests that Mr. Maddaus posed an imminent risk of escape, that he intended to injure someone in the courtroom, or that he could not behave in an orderly manner. *Finch, at* 850. Nor is there any indication that the court considered less restrictive alternatives. *Finch, at* 850. Because the issue is raised on direct appeal, the court's improper use of restraints is presumed to be prejudicial. *In re Davis, at* 698-699.

Although the judge took steps to minimize future views (by arranging cardboard around the defense table), she did nothing to ameliorate any prejudice already created in the jurors' minds by their observations on the first day of trial. RP 628.

Mr. Maddaus was forced to sit through trial—and to testify—with his freedom of movement limited by the leg brace, and with the possibility of electric shock looming over him. RP 1814-1898; *see, e.g., Wrinkles v. Indiana*, 749 N.E.2d 1179 (2001) ("*Wrinkles* I") (banning the use of shock

belts in Indiana courts because of their effect on the accused.) This restricted his ability to assist his attorney and interfered with his right to testify. *Finch, at* 845.

All of the concerns outlined by the *Finch* Court are implicated by the shacking that took place here. In addition to the practical impact—prejudice, restriction of ability to assist in the defense, and interference with the right to testify—the restraints here "offend the dignity of the judicial process." *Finch, at* 845. The illegal imposition of restraints violated Mr. Maddaus's due process rights. *Id.* His convictions must be reversed and the case remanded with instructions to permit Mr. Maddaus to appear in court without restraint, absent some impelling necessity. *Id.*

III. THE TRIAL COURT VIOLATED MR. MADDAUS'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONTATION BY RESTRICTING HIS CROSS-EXAMINATION OF LEVILLE.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Schaler, at* 282. Although evidentiary rulings are ordinarily reviewed for an abuse of discretion, this discretion is subject to the requirements of the Sixth Amendment. *United States v. Lankford*, 955 F.2d 1545, 1548 (11th Cir. 1992). Where a limitation on cross-examination directly implicates the values protected by the Sixth Amendment's confrontation clause, review is *de novo*. *United States v. Martin*, 618 F.3d 705, 727 (7th Cir. 2010).

B. Factual Basis

Leville testified that shortly after Mr. Maddaus, Peterson, and Tremblay left the apartment, he heard shots. When he looked out, he saw Mr. Maddaus walking behind Peterson, holding a gun. RP 1070-1076. He claimed that he did not see Tremblay. RP 1076.

Mr. Maddaus attempted to cross-examine Leville regarding the prosecutor's failure to charge him with multiple crimes.[25] The court sustained an objection under ER 608(b). RP (12/21/10) 76; RP 1128. The trial judge explained her reasoning:

> You've already gotten in that there was some controlled substances in a car, perhaps in his house, but I think we are beating a dead bush, and we need to go on. I do not believe under 608 that this is relevant.
> RP 1129.

Offered the opportunity to make a record, defense counsel explained his position:

> It's clear he's committing crimes. He's just not charged, by the same prosecutor that's prosecuting Mr. Maddaus, and how is that fair?
> RP 1129.

The trial judge countered by saying

> I have let you go on. The scope and the purpose, I believe you have done your probative situation. We are moving on. I will not let you go into further specific incidents of conduct at this point.
> RP 1129.

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[25] *See* Supp. Motion filed 12/17/10, Attachment F, Supp. CP.

C. The Sixth and Fourteenth Amendment guarantee an accused person the right to confront adverse witnesses, particularly on matters pertaining to credibility and bias.

An accused person has a constitutional right to confront her or his accuser. U.S. Const. Amend VI; U.S. Const. Amend. XIV; Wash. Const. Article I, Section 22. The primary and most crucial aspect of confrontation is the right to conduct meaningful cross-examination of adverse witnesses. *State v. Foster,* 135 Wash.2d 441, 455-56, 957 P.2d 712 (1998); *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974). The purpose of cross-examination

> ...is to test the perception, memory, and credibility of witnesses. Confrontation therefore helps assure the accuracy of the fact-finding process. Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question. As such, the right to confront must be zealously guarded.

State v. Darden, 145 Wash.2d 612, 620, 41 P.3d 1189 (2002) (citations omitted).

Where credibility is at issue, the defense must have wide latitude. *State v. York*, 28 Wash.App. 33, 621 P.2d 784 (1980). The only limitations on the right to confront adverse witnesses are (1) that the evidence sought must be relevant and (2) that the right to admit the evidence "must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the trial." *Darden, at* 621.

D. Evidence implicating a witness in recent uncharged criminal activity is

relevant to show the witness's bias in favor of the government.

The threshold to admit relevant evidence is low, and even minimally relevant evidence is admissible unless the state can show a compelling interest to exclude prejudicial or inflammatory evidence. *Darden, at* 621; *see also* ER 401, ER 402. Where evidence is highly probative, no state interest can be compelling enough to preclude its introduction. *State v. Jones*, 168 Wash.2d 713, 721, 230 P.3d 576 (2010) ("*Jones* I") (citing *State v. Hudlow*, 99 Wash.2d 1, 16, 659 P.2d 514 (1983). An accused person "has a constitutional right to impeach a prosecution witness with bias evidence." *State v. Spencer*, 111 Wash.App. 401, 408, 45 P.3d 209 (2002). Cross-examination designed to elicit witness bias directly implicates the Sixth Amendment. *Martin, at* 727.

Evidence that shows witness bias is relevant and admissible, even if it would not be admitted as past conduct to show veracity under ER 608.[26] *United States v. Abel*, 469 U.S. 45, 50-51, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984) (interpreting Federal Rules of Evidence). In *Abel,* the Supreme Court upheld the admission of evidence that a defense witness was in the same prison gang as the defendant. *Id.* The Court found the

[26] ER 608(b) provides that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence," but may be the subject of cross-examination if relevant to credibility.

evidence admissible to show bias, even though it might not be admissible to impeach veracity under ER 608(b). *Id, at* 55-56.

An accused person must be allowed to cross-examine a witness regarding any expectation that testimony might affect the resolution of a pending investigation or a pending charge. *Martin, at* 727-730.[27] A witness may provide biased testimony "given under… [an] expectation of immunity," even if no promise has been made. *Alford v. United States*, 282 U.S. 687, 693, 51 S.Ct. 218, 75 L.Ed. 624 (1931).[28] A witness with such expectations may have "a desire to curry favorable treatment" in connection with the uncharged crime. *Martin, at* 727.[29] The absence of an explicit agreement "does not end the matter;" nor does the fact that an accused is "permitted to examine other matters relating to [the witness's] alleged bias, such as the written plea agreement and [any] prior convictions." *Martin, at* 728-730.

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[27] *See also United States v. Sarracino*, 340 F.3d 1148, 1167 (10th Cir. 2003) (Refusal to allow cross-examination violates the confrontation clause when "the impeachment material concern[s] possible, not pending, criminal charges.")

[28] *See also Davis v. Alaska, at* 319-320 (juvenile witness's probationary status relevant to bias); *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) (prosecution's dismissal of charges might have "furnished the witness a motive for favoring the prosecution in his testimony"); *United States v. Anderson*, 881 F.2d 1128, 1138 (D.C. Cir. 1989) (possible reinstatement of dismissed charges relevant to bias).

[29] In *Martin,* for example, a witness was implicated in a murder investigation unrelated to the crime with which the defendant had been charged. The Seventh Circuit held that refusal to allow cross-examination about the murder investigation infringed the defendant's confrontation right. The court concluded that the error was harmless, because the witness did not provide significant information in the prosecution of the case.

E. The trial judge violated Mr. Maddaus's right to confrontation by restricting cross-examination on matters relating to Leville's credibility and bias.

The state's use of Leville's testimony against Mr. Maddaus raised "serious questions of credibility." *On Lee v. United States*, 343 U.S. 747, 757, 72 S.Ct. 967, 96 L.Ed. 1270 (1952). Despite this, the trial judge limited cross-examination regarding Leville's recent involvement in uncharged criminal activity. This was error. *Davis v. Alaska, supra.*

Leville was an important prosecution witness: he claimed that Mr. Maddaus was armed, that Tremblay was not, and that Mr. Maddaus was behind Peterson with a gun just after the shots were heard. RP 1074-1078. This directly contradicted Mr. Maddaus's own version of events, and corroborated Tremblay's testimony. RP 1325-1351, 1356-58, 1850-1861. Accordingly, Leville was a witness whose credibility should have been subject to challenge through broad cross-examination. *On Lee, at* 757.

Instead, the trial court unreasonably limited cross-examination about bias. When counsel tried to explore the prosecutor's failure to charge him for his multiple instances of criminal activity, the court sustained an objection under ER 608(b). RP (12/21/10) 76; RP 1128.

The judge applied the wrong legal standard by excluding the evidence through application of ER 608(b)'s grant of discretion. In essence, the judge confused relevance to show *veracity* with relevance to

show *bias*. The evidence of criminal activity was not offered as conduct relevant to prove Leville's veracity. Instead, it was offered to show that Leville was biased toward the government. As in *Martin,* Leville may have had "a desire to curry favorable treatment" in connection with the uncharged crimes. *Martin, at* 727. Instead of admitting the evidence, the trial judge erroneously excluded it under ER 608(b) because it was not probative of Leville's veracity. Instead, she should have admitted it because it was relevant to show bias. *Martin, supra.*

The restriction on cross-examination violated Mr. Maddaus's confrontation right under the Sixth and Fourteenth Amendments and Article I, Section 22. *Foster, at* 455-56. Accordingly, his conviction must be reversed and the case remanded for a new trial. *Id.*

IV. MR. MADDAUS'S CASE MUST BE REMANDED TO THE SUPERIOR COURT FOR AN EVIDENTIARY HEARING TO DETERMINE WHETHER OR NOT GOVERNMENT MISCONDUCT INFRINGED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO COUNSEL IN A MANNER THAT PERVADED THE ENTIRE PROCEEDING.

A. Standard of Review

Constitutional violations are reviewed *de novo. Schaler, at* 282. A trial judge's refusal to hold an evidentiary hearing is generally reviewed for an abuse of discretion.[30] *See, e.g., Harvey v. Obermeit,* ___ Wash.

[30] A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wash.2d 842, 858, 204 P.3d 217 (2009). This

(*Continued*)

App. ___, ___, ___ P.3d ___ (2011); *State v. Diemel*, 81 Wash.App. 464, 467, 914 P.2d 779 (1996).

B. Factual Basis

On December 21, 2010, court convened for a pretrial hearing. RP (12/21/10) 46. One of several issues raised by the defense related to a fifty-plus page letter Mr. Maddaus had written to his attorney, detailing what he knew about the events leading up to Peterson's death. Supp. Motion filed 12/17/10, Response filed 12/21/10, Supp. CP. On December 14, 2010, the prosecutor's office had received a copy of that letter, sent anonymously through the mail.[31] Attachment to Memorandum on Dismissal filed 12/20/10, Attachments to Motion to Dismiss filed 1/7/11, Supp. CP.

The letter itself was addressed to Mr. Woodrow, Mr. Maddaus's attorney. Mr. Maddaus sent his attorney the original letter in August or September of 2010. At that time, Mr. Maddaus made a copy of the letter for himself, using the jail's procedure for copying confidential legal materials. This involved giving the document to a corrections officer, who

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includes when the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *State v. Hudson*, 150 Wash.App. 646, 652, 208 P.3d 1236 (2009).

[31] The letter was not signed, and no case name or identifying information appeared on the envelope or in the letter.

would copy the document and return both copies without reading them.[32] RP (12/21/10) 54-55; Attachments to Motion to Dismiss filed 1/7/11, Supp. CP.

When the letter was received at the prosecutor's office, a staff person copied it and faxed it. RP (12/21/10) 51; Attachments to Motion to Dismiss filed 1/7/11, Supp. CP. Mr. Woodrow noted that the envelope had been affixed with a label unavailable to jail inmates, and had been addressed using a marker unavailable to inmates in maximum security.[33] RP (12/21/10) 55-56; Motion and Declaration filed 12/20/10, Supp. CP.

Mr. Maddaus sought a factual hearing to determine how the letter was copied, how it was sent to the prosecutor, and who had seen or reviewed it. RP (12/21/10) 51, 64, 74. Prosecutor David Bruneau claimed that he had not reviewed the letter, and that it was in a locked cabinet in his office. RP (12/21/10) 69-71.

Judge Pomeroy characterized the letter as "clearly a letter to Mr. Woodrow" and ordered the copy held by the prosecutor to be sealed in an envelope and taken into evidence by the police. RP (12/21/10) 46, 52, 75. She denied Mr. Maddaus's request for a hearing. RP (12/21/10) 75. Mr.

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[32] Mr. Maddaus also had to use an intercom phone device for calls to his attorney from the jail, which allowed anyone in the vicinity to hear both sides of the conversation. Motion and Declaration filed 12/20/10, Motion to Dismiss filed 1/7/11, Supp. CP.

[33] Which is where Mr. Maddaus was held at the jail.

Maddaus later attempted to raise the issue again, but the court did not address the issue on the record. Motion to Dismiss filed 1/7/11, Supp. CP.

C. The trial judge should have held a hearing after learning that Mr. Maddaus's confidential letter to his attorney was anonymously delivered to the prosecutor's office.

The effective assistance of counsel guaranteed by the Sixth Amendment requires private communication between attorney and client. *State v. Cory*, 62 Wash.2d 371, 374, 382 P.2d 1019 (1963); *see also State v. Garza*, 99 Wash.App. 291, 296, 994 P.2d 868 (2000). An attorney must have the full and complete confidence of the client, which can only occur when attorney-client conversations are strictly confidential. *Cory, at* 374.

When the government intercepts, eavesdrops, or otherwise compromises the confidentiality of attorney-client conversations, the violation often cannot be remedied by granting a new trial. *Id, at* 377-379. Instead, dismissal is required, because government activity of this sort "vitiates the whole proceeding." *Id, at* 378; *see also State v. Granacki,* 90 Wash.App. 598, 959 P.2d 667 (1998) (dismissal appropriate where police detective read legal pads at defense table during a recess in trial). Sixth Amendment violations that "pervade the entire proceeding" fall within the category of constitutional violations that "by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless." *Satterwhite v. Texas*, 486 U.S.

249, 256, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988).

In this case, someone—possibly even a sheriff's deputy employed by the Thurston County Jail—made an extra copy of Mr. Maddaus's lengthy letter to his attorney, and delivered it to the office of the prosecuting attorney. Defense counsel repeatedly asked the court to hold a hearing, so that the presumed governmental misconduct could be explored under oath. RP (12/21/11) 51, 53, 54, 56, 74; Supp. Motion filed 12/17/10, Memorandum filed 12/20/10, Motion and Declaration filed 12/20/10, Responsive Memorandum filed 12/21/10, Motion to Dismiss filed 1/7/11, Supp. CP. Despite this, the court refused to hold a hearing. RP (12/21/11) 75.

Under these circumstances, "the superior court abused its discretion by failing to resolve... critical factual questions." *Garza, at* 301. The case must be remanded with instructions to hold an evidentiary hearing, in order to determine how the letter ended up at the prosecutor's office and who had access to it. *Id.* If the court determines that a state agent (such as a sheriff's deputy) deliberately copied the document and/or provided it to the prosecutor, prejudice will be presumed, and the court will be required to fashion an appropriate remedy, which could include dismissal of the charges. *Id, at* 300-302 (citing *Cory* and *Granacki*).

V. THE TRIAL JUDGE VIOLATED MR. MADDAUS'S RIGHTS UNDER THE PRIVACY ACT BY ADMITTING ILLEGALLY RECORDED CONVERSATIONS.

A. Standard of Review

Questions of statutory interpretation are reviewed *de novo*. *State v. Engel*, 166 Wash.2d 572, 576, 210 P.3d 1007 (2009). The Court of Appeals has discretion to accept review of any issue argued for the first time on appeal, including issues that do not implicate a constitutional right. RAP 2.5(a); *Russell, at* 122.

B. Factual Basis

While Mr. Maddaus was in jail awaiting trial (from December of 2009 to January of 2011), his telephone calls were recorded by the jail. Law enforcement officers reviewed these calls, and Mr. Maddaus was charged with four counts of Tampering with a Witness.[34] CP 22-23; RP 1465-1466.

Each call was made to Chelsea Williams, who heard a recorded warning indicating that the calls would be recorded. RP 1418-1423, 1466-1509. During two of the calls, Williams indicated her acceptance of the conditions, and then connected with Theodore Farmer for a 3-way call. The recorded warning was not played while Farmer was on the phone, but his part in the conversation was recorded nonetheless. RP 1523; Ex. 232,

[34] Counts VI through IX.

234, Supp. CP. The prosecution claimed that in these calls, Mr. Maddaus attempted to persuade Farmer to provide a false alibi for the night of the shooting. RP 1477-1478, 1507-1509.

An additional recording related to a conversation Mr. Maddaus had with Grimes and Leville. As before, Mr. Maddaus called Williams, who heard the recorded warning and accepted the call. Williams then handed the phone to Grimes, who spoke with Mr. Maddaus and then passed the phone to Leville. RP 1490-1496. The recorded warning was not replayed for either Grimes or Leville. Ex. 232, 234, Supp. CP. The prosecution asserted that Mr. Maddaus encouraged Grimes and Leville to falsely claim they had no knowledge of the shooting. RP 1492-1496.

A redacted version of each call was played for the jury. RP 1466-1509; Ex. 237, 237a, Supp. CP.

C. A private telephone conversation may not be recorded without the prior consent of all parties, and any person has standing to object to the admission of any illegally recorded conversation.

Washington's Privacy Act "puts a high value on the privacy of communications." *State v. Christensen,* 153 Wash.2d 186, 201, 102 P.3d 789 (2004). The legislature "intended to establish protections for individuals' privacy and to require suppression of recordings of even conversations relating to unlawful matters if the recordings were obtained in violation of the statutory requirements." *State v. Williams*, 94 Wash.2d

531, 548, 617 P.2d 1012 (1980) ("*Williams* I"). Recordings made in violation of the Privacy Act are inadmissible in court. RCW 9.73.050. An accused person has standing to object to the admission of any illegally recorded conversation, even if his or her privacy rights were not personally violated. *Williams* I, *at* 544-546. The admission of evidence obtained in violation of the Privacy Act requires reversal unless "within reasonable probability, the erroneous admission of the evidence did not materially affect the outcome of the trial." *State v. Porter*, 98 Wash.App. 631, 638, 990 P.2d 460 (1999).

The Act must be strictly construed in favor of the right to privacy. *Williams* I, *at* 548; *see also Christensen, at* 201. The Act prohibits the recording of a private communication "without first obtaining the consent of all the participants in the communication." RCW 9.73.030(1). Explicit consent is not required if certain conditions are met:

> Where consent by all parties is needed pursuant to this chapter, consent shall be considered obtained whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted: PROVIDED, That if the conversation is to be recorded that said announcement shall also be recorded.

RCW 9.73.030(3).

In this case, the prosecution introduced recordings of three

telephone calls that were made in violation of the Privacy Act.[35] In each recording, Mr. Maddaus called his niece (Williams) from the Thurston County Jail.[36] Williams then arranged for Mr. Maddaus to speak with other parties, including Farmer, Grimes, and Leville.[37]

Because Farmer, Grimes, and Leville were parties to the recorded conversations, the jail was required to obtain consent from each of them prior to recording. RCW 9.73.030(1). None of the three provided explicit prior consent. *See* Ex. 234, pp. 6, 25, 28, 46; Ex. 237, 237a; Supp. CP. Nor did the telephone system announce to Farmer, Grimes, or Leville that the call was "about to be recorded" as permitted under RCW 9.73.030((3).[38] Accordingly, each recording violated the Privacy Act and should not have been admitted at trial. RCW 9.73.030.

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[35] Edited versions of the illegally recorded conversations were admitted as Exhibit 237 (with corresponding transcripts admitted for illustrative purposes only, *see* Exhibits 237a). In addition, an unredacted transcript of the recordings was marked as Exhibit 234, but was not admitted into evidence. Supp. CP.

[36] Telephone calls from a jail facility do not qualify as "private" if all parties hear an announcement that the call is subject to monitoring or recording. *State v. Modica*, 164 Wash.2d 83, 88, 186 P.3d 1062 (2008). In the three recordings at issue here, only Williams and Mr. Maddaus heard any recorded announcement.

[37] In the first and third recordings, Williams set up a three-way call so that Mr. Maddaus could speak to Farmer. RP 1470-1478. In the second recording, Williams handed the phone to Grimes, who handed it to Leville. RP 1485-1496.

[38] Instead, the telephone system made the announcement when Williams answered the phone. Ex. 234, Supp CP.

D. The statutory presumption of consent does not apply to any of the recordings introduced into evidence because the announcement of intent to record was not made by a "party" to the conversation.

The Privacy Act creates a presumption of consent "whenever one *party* has announced to all other parties...that such communication or conversation is about to be recorded..." RCW 9.73.030(3) (emphasis added). The parties to the recorded conversations included Mr. Maddaus, Williams, Leville, Grimes, and Farmer. None of these parties announced that the conversation would be recorded. Instead, the announcement was itself a recording, played by the jail's automated telephone system. Ex. 234, Supp. CP. When the Act is strictly construed (*see Williams* I, *at* 548), the jail's automated telephone system cannot be described as a "party." Accordingly, the recorded announcement does not trigger the presumption of consent contained in the Act. Because of this, all of the recorded telephone calls—not just those involving Farmer, Grimes, and Leville—were obtained in violation of the Act. *Williams* I, *supra.* None of them should have been admitted at trial. *Id.*

E. The erroneous admission of recordings made in violation of the Privacy Act requires reversal of all charges, and remand for a new trial.

Although the illegal recordings relate directly to Counts VI-IX (the tampering charges), they also had an impact on Mr. Maddaus's other charges. In particular, the recordings were used as circumstantial evidence to prove that Mr. Maddaus had killed Peterson; this is how the prosecution

used the recordings during closing arguments. RP 2003-2014.

The admission of the recordings materially affected the outcome of trial. The convictions must be reversed, the recordings excluded from evidence, and the case remanded for a new trial. *Porter, at* 638.

VI. THE PROSECUTOR COMMITTED MISCONDUCT THAT VIOLATED MR. MADDAUS'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO COUNSEL AND HIS FOURTEENTH AMENDMENT RIGHT TO A DECISION BASED SOLELY ON THE EVIDENCE.

A. Standard of Review

Alleged constitutional violations are reviewed *de novo. Schaler, at* 282. Prosecutorial misconduct that affects a constitutional right may be argued for the first time on review.[39] *State v. Jones,* 71 Wash.App. 798, 809-810, 863 P.2d 85 (1993) ("*Jones* II"). Where such misconduct infringes a constitutional right, prejudice is presumed.[40] *State v. Toth,* 152 Wash.App. 610, 615, 217 P.3d 377 (2009). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *City of*

[39] In addition, the court has discretion to accept review of any issue argued for the first time on appeal. RAP 2.5(a); s*ee Russell. at* 122.

[40] Prosecutorial misconduct that does not affect a constitutional right requires reversal whenever there is a substantial likelihood that the misconduct affected the verdict. *State v. Henderson,* 100 Wash.App. 794, 800, 998 P.2d 907 (2000). In the absence of an objection, such misconduct requires reversal if it is "so flagrant and ill-intentioned" that no curative instruction would have negated its prejudicial effect. *Id, at* 800.

Bellevue v. Lorang, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). The state must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke,* 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

B. Factual Basis

During closing argument, David Bruneau called certain defense testimony "poppycock," "unreasonable under the law," and "crazy." RP 1984. He also suggested that the defense investigator had been "duped" by Mr. Maddaus:

> I'm not suggesting Mr. Wilson [defense investigator] of wrongdoing; I'm just suggesting that Mr. Wilson, like Chelsea Williams, was duped into being this defendant's agent. "I've got somebody that's got this information." "Oh, we'll go talk to that person."
> RP 2074.

Mr. Bruneau later argued:

> Counsel for the accused's argument was a reminder of the distractions that sometimes people create when they're passengers in a vehicle. You're driving down the highway, and you're focused on paying attention to what's going on in front of you and keeping your eye on the rear-view mirror, and someone says, "Look over there. Look over there." That's what the argument was about. It was all about everything but the proof of Mr. Maddaus's guilt.
> RP 2075.

> What you heard in the defense case, those witnesses from the defense in the defense argument, was the last gasp of this defendant, the last gasp, the last effort to develop lies to try to convince you of what he's not, that he's innocent, and he's not. The last gasp.

RP 2077.

Defense counsel did not object to these arguments. RP 2074-2077.

C. The prosecutor infringed Mr. Maddaus's constitutional right to counsel by disparaging the role of defense counsel and impugning counsel's integrity.

It is improper for a prosecuting attorney to comment disparagingly on defense counsel's role or to impugn the defense lawyer's integrity. *State v. Thorgerson*, ___ Wash.2d. ___, ___, 258 P.3d 43 (2011) (citing *State v. Warren,* 165 Wash.2d 17, 195 P.3d 940 (2008) and *State v. Negrete,*72 Wash.App. 62, 67, 863 P.2d 137 (1993)). For example, a prosecutor who characterizes defense counsel's presentation "as 'bogus' and involving 'sleight of hand'" improperly impugns counsel's integrity. *Thorgerson, at* ___.

In this case, the prosecuting attorney went beyond the misconduct in *Thorgerson,* by claiming that the defense investigator had been "duped into being this defendant's agent," by likening defense counsel's argument to "the distractions that sometimes people create when they're passengers in a vehicle," and by declaring that "[w]hat you [the jury] heard in the defense case, those witnesses from the defense in the defense argument, was the last gasp of this defendant, the last gasp, the last effort to develop lies to try to convince you of what he's not, that he's innocent, and he's not. The last gasp." RP 2074-2075, 2079. These comments maligned the

role of the defense team and impugned the integrity of defense counsel, by suggesting that both counsel and the defense investigator were involved—albeit unwittingly—in an effort to deceive the jury. *Id.*

By arguing that the jury should not trust the defense investigator (because he was "duped into being [Mr. Maddaus's] agent"), by calling defense counsel's argument a "distraction," and by suggesting that "the defense case" and "the defense argument" were "the last effort to develop lies," the prosecutor infringed Mr. Maddaus's Sixth and Fourteenth Amendment right to counsel. Accordingly, his convictions must be reversed and the case remanded for a new trial. *Toth, supra.*

D. The prosecutor improperly expressed a personal opinion about the evidence.

It is misconduct for a prosecutor to express a personal opinion as to the credibility of a witness. *State v. Horton*, 116 Wash.App. 909, 921, 68 P.3d 1145 (2003); *State v. Reed,* 102 Wash.2d 140, 684 P.2d 699 (1984). Prejudicial misconduct occurs when it is clear that counsel is expressing a personal opinion rather than arguing an inference from the evidence. *State v. Copeland*, 130 Wash.2d 244, 291, 922 P.2d 1304 (1996). Misconduct of this sort infringes an accused person's due process right to a decision based on the evidence admitted at trial. *Id.*

Here, the prosecutor expressed his personal opinion about Mr.

Maddaus's credibility, by describing certain testimony as "poppycock," "unreasonable under the law," and "crazy." RP 1984. His choice of adjectives makes clear that he was expressing his personal opinion rather than drawing inferences from the evidence. Accordingly, the misconduct was prejudicial.[41] *Copeland, at* 291.

The trial boiled down to a credibility contest between Mr. Maddaus on the one hand and Tremblay *et al* on the other. By putting his thumb on the scale, Bruneau improperly influenced the jury to decide this critical issue on improper considerations. *Id.* Accordingly, the convictions must be reversed and the case remanded for a new trial. *Horton.*

VII. MR. MADDAUS'S TAMPERING CONVICTIONS IN COUNTS VI AND VII VIOLATE HIS DOUBLE JEOPARDY RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND WASH. CONST. ARTICLE I, SECTION 9.

A. Standard of Review

Constitutional violations are reviewed *de novo. Schaler, at* 282. Double jeopardy violations may be raised for the first time on review. *State v. Bobic*, 140 Wash.2d 250, 257, 996 P.2d 610 (2000).

B. Factual Basis

The prosecution introduced two recordings of telephone conversations between Mr. Maddaus, Chelsea Williams, and Theodore

[41] In addition, this misconduct was so flagrant and ill-intentioned that no curative instruction would have eliminated its effect.

Farmer, a tattoo artist and drug user. RP 1235, 1237, 1474-1475, 1507-1509. Both of the calls were arranged by Williams, who set up three-way calls on December 4 and 18, 2009. RP 1474, 1499.

In the calls, Mr. Maddaus urged the other man to talk to the police about a tattoo appointment they had the night of the shooting. RP 1246, 1475-1478, 1507-1509. The prosecutor asked the jury to view these calls as Mr. Maddaus's attempt to secure a false alibi from Farmer. RP 1998, 2003-2014, 2074, 2076.

Farmer testified that he had agreed to provide a false alibi to Mr. Maddaus, but later had a change of heart. RP1246. This was the basis for two of the witness tampering charges that resulted in convictions (Counts VI and VII). CP 22-23.

C. The state and federal constitutions prohibit entry of multiple convictions for the same offense.

The Fifth Amendment[42] provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. A similar prohibition is set forth in the Washington Constitution. Wash. Const. Article I, Section 9. An accused person may face multiple charges arising from the same conduct, but double jeopardy

[42] The Fifth Amendment's double jeopardy clause applies in state court trials through action of the Fourteenth Amendment's due process clause. *Monge v. California*, 524 U.S. 721, 728, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998).

forbids entering multiple convictions for the same offense. *State v. Hall*, 168 Wash.2d 726, 730, 230 P.3d 1048 (2010).

Whether or not a defendant faces multiple convictions for the same offense turns on the unit of prosecution. *Id.* The Supreme Court addressed the unit of prosecution for Tampering with a Witness in *Hall, supra.* The Court agreed with the appellant in that case that the evil addressed by the legislature

> is the attempt to "induce a witness" not to testify or to testify falsely. The *number* of attempts to "induce a witness" is secondary to that statutory aim, which centers on interference with "a witness" in "any official proceeding" (or investigation). RCW 9A.72.120(1). The offense is complete as soon as a defendant attempts to induce another not to testify or to testify falsely, whether it takes 30 seconds, 30 minutes, or days.

Id, at 731.[43] Accordingly, multiple attempts to induce a single witness to testify falsely constitute only one offense.[44] *Id, at* 738.

D. Mr. Maddaus committed (at most) one unit of witness tampering with respect to Theodore Farmer.

Like the defendant in the *Hall,* Mr. Maddaus committed - at most - a single unit of witness tampering. As in *Hall,* his phone conversations with Farmer were all (allegedly) aimed at inducing Farmer to testify

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[43] The statute has since been amended. Laws of 2011 c 165 § 3, eff. July 22, 2011. Mr. Maddaus's charges predated the effective date of the amendment.

[44] The Court left open the possibility that additional attempts to induce could be a separate crime if they "are interrupted by a substantial period of time, employ new and different methods of communications, involve intermediaries, or... [otherwise] demonstrate a different course of conduct." *Id. at* 738.

falsely. As in *Hall*, he committed only one offense, and should not have been convicted of two counts of tampering with respect to Farmer. *Id.* The conviction in either Count VI or Count VII must be vacated and the charge dismissed with prejudice. *Id.*

VIII. MR. MADDAUS'S TAMPERING CONVICTIONS IN COUNTS VI AND VII VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT FOR CONVICTION ON EACH CHARGE.

A. Standard of Review

Constitutional questions are reviewed *de novo. Schaler, at* 282. The interpretation of a statute is reviewed *de novo,* as is the application of law to a particular set of facts. *Engel, at* 576; *In re Detention of Anderson*, 166 Wash.2d 543, 555, 211 P.3d 994 (2009). Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Engel, at* 576.

B. Factual Basis

As described in the preceding section, the prosecution alleged that Mr. Maddaus attempted to induce Farmer to provide a false alibi. RP 1246, 1475-1478, 1507-1509; 1998, 2003-2014, 2074, 2076. Prior Mr. Maddaus's attempts to contact him, Farmer had no connection to the case. Nothing in the trial record indicates that Farmer had any knowledge or information about the shooting, or that he could be used as a witness in the

case. *See* RP *generally*.

C. The prosecution failed to prove that Farmer was a witness, was about to be called as a witness, or was in possession of information relevant to a criminal investigation at the time of the alleged tampering.

To obtain convictions for witness tampering in Counts VI and VII, the prosecution was required to prove beyond a reasonable doubt that the alleged tampering occurred at a time when Theodore Farmer was a witness, or when Mr. Maddaus had reason to believe that Farmer was about to be called as a witness in any official proceeding, or when Mr. Maddaus had reason to believe that Farmer might have information relevant to a criminal investigation. CP 22-23; Instr. No. 25, Supp. CP; *see also* RCW 9A.72.120(1).

The prosecution did not present any such evidence. Instead, the evidence established that Mr. Maddaus contacted Farmer at a time when Farmer had no connection to the case. Under the state's theory, Mr. Maddaus reached out to Farmer hoping to convince him to help fabricate an alibi. RP 1998, 2003-2014, 2074, 2076. According to the state's evidence, Farmer was not a witness, was not about to be called in an official proceeding, and was not in possession of information relevant to a criminal investigation. RP 1235-1258. Any alleged tampering occurred at a time when Farmer had no connection to the case. Given the evidence (as it was presented at trial), the prosecution should have charged Mr. Maddaus

with an attempt to commit first-degree perjury (as an accomplice). *See* RCW 9A.72.020. The prosecution's failure to charge the correct crime does not permit conviction for the wrong crime.

Because the evidence was insufficient, Mr. Maddaus's convictions for Counts VI and VII violated his right to due process. *Engel, at* 576. The convictions must be reversed and the charges dismissed. *Smalis, supra.*

IX. MR. MADDAUS'S SECOND-DEGREE ASSAULT CONVICTION MUST BE REVERSED BECAUSE THE TRIAL JUDGE ERRONEOUSLY REFUSED TO INSTRUCT THE JURY ON THE INFERIOR DEGREE OFFENSE OF THIRD-DEGREE ASSAULT.

A. Standard of Review

A trial court's refusal to instruct on an inferior-degree offense is reviewed *de novo*, if the refusal is based on an issue of law. *City of Tacoma v. Belasco*, 114 Wash.App. 211, 214, 56 P.3d 618 (2002).[45] The evidence is viewed in a light most favorable to the instruction's proponent. *State v. Fernandez-Medina*, 141 Wash.2d 448, 456, 6 P.3d 1150 (2000).

B. Factual Basis

Two charges, the Assault in the Second Degree and Attempted Kidnapping in the Second Degree, stemmed from the state's allegation that Mr. Maddaus "tortured" Jessica Abear to get her to tell him who had done the robbery. CP 22.

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[45] An abuse of discretion standard applies if the refusal was based on a factual dispute. *Id, at*
(Continued)

Abear testified that she was alone in Mr. Maddaus's trailer when unknown people entered and held her at gunpoint. RP 646-648. They ransacked the trailer, taking drugs, cash, and Abear's cell phone. RP 648-650. She contacted Mr. Maddaus. When he arrived he was "in a rage" and suspected Abear of being complicit in the robbery. RP 651-654. Abear alleged Mr. Maddaus hit her in the head with the butt of a handgun, he sprayed her with bear mace, he ripped off her clothing and shot her with a paintball gun, and he tried to shoot her in the foot with the handgun. RP 654-655. When he pulled the trigger, the gun didn't fire. RP 654.

Abear also claimed that Mr. Maddaus called his dealer and discussed over the phone his need to find a place to "torture" Abear, to find out who had done the robbery. RP 656-657. Abear left the house, went to Mr. Maddaus's mother's home, and later got a ride to a friend's apartment in Lacey. Mr. Maddaus came and talked with her there, leaving when a neighbor called the police. RP 657-663.

Mr. Maddaus denied that he had assaulted Abear with a handgun or a paintball gun. RP 1821-1828, 2051-2053. He stated he had scuffled with Abear over the mace, and they both got sprayed. RP 1818, 1824.

Mr. Maddaus proposed jury instructions on the lesser included

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214.

offense of third-degree assault. Defendant's Proposed Instr., Supp. CP.

The court declined to give the instruction, stating:

> The court believes that based on the fifth amended Information that there is no evidence of criminal negligence or assault in the fourth degree, that it's simply assault in the second degree or not guilty. So again, I decline to give that.
> RP 1952.

During his closing argument, Mr. Bruneau argued that Mr. Maddaus had used both a handgun and a paintball gun to assault Abear.

RP 1993-1994.

C. The refusal to instruct on third-degree assault denied Mr. Maddaus his statutory right to have the jury consider any applicable inferior-degree offense.

An accused person has a statutory right to have the jury instructed on applicable inferior-degree offenses. RCW 10.61.003 provides:

> Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

RCW 10.61.010 provides as follows:

> Upon the trial of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime. Whenever the jury shall find a verdict of guilty against a person so charged, they shall in their verdict specify the degree or attempt of which the accused is guilty.

These statutes guarantee the "unqualified right" to have the jury decide on the inferior degree offense if there is "even the slightest

evidence" that the accused person may have committed only that offense. *State v. Parker,* 102 Wash.2d 161, 163-164, 683 P.2d 189 (1984), *quoting State v. Young*, 22 Wash. 273, 276-277, 60 P. 650 (1900) ("*Young* II"). The instruction should be given even if there is contradictory evidence, or if the accused presents other defenses. *Fernandez-Medina, supra.* The right to an appropriate inferior degree offense instruction is "absolute," and failure to give such an instruction requires reversal. *Parker, at* 164.

Here, there was at least "slight[] evidence" that Mr. Maddaus was only guilty of an inferior degree of assault against Abear. *Id.* Conviction of second-degree assault—under the alternative charged in this case—required proof of an intentional assault by means of a deadly weapon. Instr. No. 18, Supp. CP. A reasonable juror could have believed that Mr. Maddaus did not assault Abear with a gun (given his denial and the lack of corroborating evidence), and that the paintball gun and mace did not qualify as deadly weapons. In the absence of a deadly weapon, the jury could not have convicted Mr. Maddaus of Assault in the Second Degree.

Taking the evidence in a light most favorable to Mr. Maddaus (as the proponent), the trial court should have instructed the jury on third-degree assault. If the jury believed either that Mr. Maddaus inflicted bodily harm "accompanied by substantial pain that extended for a period of time sufficient to cause considerable suffering," or that he inflicted

bodily harm by means of "a weapon or other instrument or thing likely to produce bodily harm," they would have been justified in convicting him of third-degree assault. *See* Defendant's Proposed Instr., p. 3, Supp. CP; *see also* RCW 9A.36.031(1)(d)(f).

The state argued to the jury that Mr. Maddaus assaulted Abear by shooting at her with a paintball gun and by hitting her with a pistol. RP 1993-1994. Whether or not the paintball gun qualified as a deadly weapon should have been a jury question. If even one juror believed that the paintball gun did not qualify under the statutory definition, Mr. Maddaus might have been convicted of third-degree assault instead of second-degree assault. Furthermore, the prosecution never proved that the pistol was an operable firearm, as required under the court's instructions. *See* Instr. Nos. 30, 32, Supp. CP.

The trial judge applied the wrong legal standard in denying Mr. Maddaus's request for an inferior degree instruction. When defense counsel raised the issue, the court noted "there is no evidence of criminal negligence or assault in the fourth degree" and denied the request. This analysis was incorrect. If Mr. Maddaus intentionally assaulted Abear and caused bodily harm "by means of a weapon or other instrument or thing likely to produce bodily harm" (but failing to qualify as a deadly weapon), he was entitled to the instructions. RCW 9A.36.031(1)(d). This is so

because proof of an intentional act satisfies the requirement that a person act with criminal negligence. *See* RCW 9A.08.010(2).[46] The same analysis applies if he intentionally assaulted Abear and caused "bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering." RCW 9A.36.031(1)(f).

The failure to instruct on third-degree assault violated Mr. Maddaus's unqualified right to have the jury consider the inferior degree offense. RCW 10.61.003; RCW 10.61.010; *Parker, at* 163-164; *Fernandez-Medina, at* 456. Accordingly, the conviction must be reversed and the case remanded for a new trial. *Id.*

D. The refusal to instruct on third-degree assault denied Mr. Maddaus his constitutional right to due process under the Fourteenth Amendment.[47]

Refusal to instruct on an inferior-degree offense can violate the right to due process under the Fourteenth Amendment. U.S. Const. Amend. XIV; *Vujosevic v. Rafferty,* 844 F.2d 1023, 1027 (1988). The constitutional right to such an instruction stems from "the risk that a defendant might otherwise be convicted of a crime more serious than that which the jury believes he committed simply because the jury wishes to

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[46] RCW 9A.08.010(2) allows, *inter alia*, proof of an intentional act to substitute for an act done with criminal negligence.

[47] This argument is parallel to the statutory argument. It is included because constitutional error is reviewed under a standard that is more favorable to the defendant, and because omission of the constitutional argument would preclude Mr. Maddaus from pursuing the

(*Continued*)

avoid setting him free." *Vujosevic, at* 1027. *See also Beck v. Alabama*, 447 U.S. 625, 634, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) (In capital cases, "providing the jury with the 'third option' of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable doubt standard…").[48]

In the absence of instructions on a lesser offense on the assault charge, the jury was forced to either acquit or convict Mr. Maddaus; they did not have "the 'third option' of convicting on a lesser included offense…" *Beck, at* 634. Because the trial judge refused to instruct the jury on the inferior-degree offense, Mr. Maddaus was denied his constitutional right to a fair trial under the due process clause. U.S. Const. Amend. XIV; *Vujosevic.* The conviction must be reversed and the case remanded to the superior court. *Id.*

E. The refusal to instruct on third-degree assault violated Mr. Maddaus's state constitutional right (under Wash. Const. Article I, Sections 21 and 22) to have the jury consider applicable lesser included offenses.[49]

Under the Washington constitution, "The right of trial by jury shall

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issue in federal court, should his appeal be denied.

[48] The court in *Beck* explicitly reserved the question of whether or not the rule applies in noncapital cases. *Beck. at* 638, n.14. Some federal courts only review a state court's failure to give a lesser-included instruction in noncapital cases when the failure "threatens a fundamental miscarriage of justice…" *Tata v. Carver*, 917 F.2d 670, 672 (1st Cir. 1990).

[49] This argument parallels the statutory and federal constitutional arguments raised above. It is included (in part) because any independent state constitutional right to a lesser-included or inferior-degree instruction may be stronger than the corresponding federal right.

remain inviolate..." Wash. Const. Article I, Section 21. Furthermore, "[i]n criminal prosecutions the accused shall have the right to ... a speedy public trial by an impartial jury..." Wash. Const. Article I, Section 22. As with many other constitutional provisions, the right to a jury trial under the Washington state constitution is broader than the federal right. *State v. Hobble*, 126 Wash.2d 283, 298-99, 892 P.2d 85 (1995); *City of Pasco v. Mace*, 98 Wash.2d 87, 97, 653 P.2d 618 (1982).

Washington state constitutional provisions are analyzed with reference to the six nonexclusive factors set forth in *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986). In this case, analysis under *Gunwall* supports an independent application of the state constitution. Article I, Sections 21 and 22 establish an accused person's state constitutional right to have the jury instructed on applicable inferior-degree offenses.

The language of the constitutional provision. Article I, Section 21 provides that "[t]he right of trial by jury *shall remain inviolate*..." (emphasis added). "The term 'inviolate' connotes deserving of the highest protection... For [the right to a jury trial] to remain inviolate, it must not diminish over time." *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989). Wash. Const. Article I, Section 22 (amend. 10) provides that "[i]n criminal prosecutions the accused shall have the right to ... a speedy public trial by an impartial jury..." The direct

and mandatory language ("shall have the right") implies a high level of protection. Thus an accused person's right to have the jury consider a inferior-degree offense remains the same as it existed in 1889, and "must not diminish over time," *Sofie, at* 656. *Gunwall* factor one favors an independent application of these provisions.

Comparison with federal provision. Article I, Section 21 has no federal counterpart. The Supreme Court has determined that the state constitution provides broader protection. *Mace, supra.* This difference in language favors an independent application of the state constitution.

State constitutional and common law history. Article I, Section 21 "preserves the right as it existed at common law in the territory at the time of its adoption." *Mace, at* 96. *See also State v. Schaaf*, 109 Wash.2d 1, 743 P.2d 240 (1987); *Hobble, supra; State v. Smith*, 150 Wash.2d 135, 151, 75 P.3d 934 (2003) ("*Smith* I"). In 1889, when our state constitution was adopted, the lesser-included offense doctrine was well-established under the common law. *Beck v. Alabama, at* 635 n. 9 (citing 2 M. Hale, Pleas of the Crown 301-302 (1736); 2 W. Hawkins, Pleas of the Crown 623 (6th ed. 1787); 1 J. Chitty, Criminal Law 250 (5th Am. ed. 1847); T. Starkie, Treatise on Criminal Pleading 351-352 (2d ed. 1822)).

Thirty years prior to the adoption of the state constitution in 1889, the Court for Washington Territory addressed inferior degree offenses, and

declared that "There is no better settled principle of criminal jurisprudence than that under an indictment for a crime of a high degree, a crime of the same character, of an inferior degree, necessarily involved in the commission of the higher offense charged, may be found." *Clarke v. Washington Territory,* 1 Wash. Terr. 68, 69 (1859).

It was against this backdrop that the framers decided that "[i]n criminal prosecutions the accused shall have the right" to a jury trial, and that the jury trial right "shall remain inviolate." Wash. Const. Article I, Sections 21 and 22. Accordingly, *Gunwall* factor 3 supports an independent application of Article I, Sections 21 and 22 in this case, and establishes a state constitutional right to instructions on applicable inferior-degree offenses.

Preexisting state law. The fourth *Gunwall* factor "directs examination of preexisting state law, which 'may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims.'" *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake,* 150 Wash.2d 791, 809, 83 P.3d 419 (2004) (quoting *Gunwall, at* 62). Just one year before adoption of the state constitution, the court noted that a jury had the power to convict an accused person "'of any offense, the commission of which is necessarily included within that with which he is charged in the indictment.'" *Tinnerman v. Territory,* 3

Wash. Terr. 445, 449 (1888) (quoting Territorial Code of 1881, Section 1098). This language endures in the current provision. *See* RCW 10.61.006. Thus *Gunwall* factor four supports a state constitutional right to applicable instructions on an inferior-degree offense.

Structural differences between federal and state constitutions. The fifth *Gunwall* factor always points toward pursuing an independent state constitutional analysis. *Young* II, *at* 180.

Particular state interest. The right to a jury trial is a matter of state concern; there is no need for national uniformity on the issue. *Smith* I, *at* 152. *Gunwall* factor number six points to an independent application of the state constitution, and supports the existence of a state constitutional right to applicable jury instructions on inferior-degree offenses.

All six *Gunwall* factors favor an independent application of Article I, Sections 21 and 22 of the Washington Constitution. Our state constitution protects an accused person's right to have the jury consider inferior-degree offenses. The trial judge's failure to instruct on the inferior-degree offense violated Wash. Const. Article I, Sections 21 and 22. Therefore, Mr. Maddaus's conviction for Assault in the Second Degree must be reversed and the case remanded for a new trial.

X. THE CONVICTIONS FOR ASSAULT AND ATTEMPTED KIDNAPPING VIOLATED ARTICLE I, SECTION 21 BECAUSE THE COURT FAILED TO GIVE A UNANIMITY INSTRUCTION.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Schaler, at* 282. Failure to give a unanimity instruction may be reviewed for the first time on appeal if it had practical and identifiable consequences at trial.[50] *Nguyen, at* 433; RAP 2.5(a)(3).

B. Factual Basis

As described in the preceding section, Mr. Maddaus was charged with Assault in the Second Degree, stemming from an incident in which the prosecution alleged that he used bear mace, a paintball gun, and a handgun to assault Abear. CP 22.

Mr. Maddaus was also charged with the attempted kidnapping of Abear. CP 22. At trial, Abear testified that Mr. Maddaus talked about taking her somewhere to torture her. RP 656-657. The state also presented evidence that Mr. Maddaus abducted Peterson at gunpoint.[51] CP 21; RP 1056-1076. The court's instructions regarding the attempted kidnapping charge did not list the victim. Instr. Nos. 19-23, Supp. CP; CP 22.

The prosecuting attorney referred to all three weapons in his

[50] The court also has discretion to review any issue argued for the first time on review. *Russell. at* 122.

closing argument. RP 1393-1394. He also argued that Mr. Maddaus abducted both Abear and Peterson.[52] RP 1979, 1985, 1987-1989, 1992. The court did not give the jury a unanimity instruction. Court's Instr., Supp. CP.

C. The state constitution guarantees an accused person the right to a unanimous verdict.

An accused person has a state constitutional right to a unanimous jury verdict.[53] Wash. Const. Article I, Section 21; *State v. Elmore*, 155 Wash.2d 758, 771 n. 4, 123 P.3d 72 (2005). Before a defendant can be convicted, jurors must unanimously agree that he or she committed the charged criminal act. *State v. Coleman,* 159 Wash.2d 509, 511, 150 P.3d 1126 (2007). If the prosecution presents evidence of multiple acts, then either the state must elect a single act or the court must instruct the jury to agree on a specific criminal act. *Coleman, at* 511.

In the absence of an election, failure to provide a unanimity instruction is presumed to be prejudicial.[54] *Coleman, at* 512; *see also State*

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[51] This later offense was the underlying crime in the felony murder charge.

[52] At one point, he referred to the kidnapping of Abear as Count III, but only in passing. RP 1979.

[53] The federal constitutional guarantee of a unanimous verdict does not apply in state court. *Apodaca v. Oregon*, 406 U.S. 404, 406, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972).

[54] Accordingly, the omission of a unanimity instruction is a manifest error affecting a constitutional right, and can be raised for the first time on appeal. RAP 2.5(a); *State v. Greathouse*, 113 Wash.App. 889, 916, 56 P.3d 569 (2002).

v. Vander Houwen, 163 Wash.2d 25, 38, 177 P.3d 93 (2008). Without the election or instruction, each juror's guilty vote might be based on facts that her or his fellow jurors believe were not established. *Coleman, at* 512.

Failure to provide a unanimity instruction requires reversal unless the error is harmless beyond a reasonable doubt. *Coleman, at* 512. The presumption of prejudice is overcome only if no rational juror could have a reasonable doubt about any of the alleged criminal acts. *Id, at* 512.

D. The absence of a unanimity instruction requires reversal of the assault charge, because the prosecution relied on evidence that Mr. Maddaus used three different weapons to assault Abear.

The state presented evidence that Mr. Maddaus assaulted Abear with three different weapons: bear mace, a handgun, and a paintball gun. RP 654. She testified that he hit her on the head with the handgun, then aimed it at her foot and pulled the trigger. She also claimed that he sprayed her with bear mace three times, and that he shot her numerous times with the paintball gun. RP 654-655, 691. The prosecutor argued all three weapons in his closing argument. RP 1393-1394.

The mace, handgun, and paintball gun might all have qualified as deadly weapons. *See* RCW 9A.04.110(6). Despite this, the state failed to elect one weapon as the basis for Count IV, and the court failed to give a unanimity instruction. Court's Instr., Supp. CP. This violated Mr. Maddaus's constitutional right to a unanimous jury, and gives rise to a

presumption of prejudice.[55] *Coleman, at* 511-512.

This case does not turn on the exception allowing courts to dispense with a unanimity instruction where multiple acts are part of a single continuing course of conduct, even though Abear described several assaults occurring in sequence,. *See, e.g., State v. Boyd,* 137 Wash.App. 910, 923, 155 P.3d 188 (2007). This is because the state produced evidence of three weapons: the mace, the handgun, and the paintball gun. Testimony that Maddaus used three different weapons presented jurors with three different acts to consider, regardless of the timing of the acts. Because of this, a unanimity instruction was required. *See, e.g., United States v. Rocha*, 598 F.3d 1144, 1157 (9th Cir. 2010) (applying federal law) ("The jury was instructed in a special verdict to check whether it unanimously found beyond a reasonable doubt that Rocha used 'his hands' or 'a concrete floor' or both as a dangerous weapon"). In the absence of an election or a unanimity instruction, a divided jury might vote to convict if some jurors thought the mace qualified as a deadly weapon, while others focused on the paintball gun, and still others concentrated on the

[55] As a matter of law, it creates a manifest error affecting a constitutional right, and thus can be reviewed for the first time on appeal. RAP 2.5(a)(3); *State v. O'Hara*, 167 Wash.2d 91, 103, 217 P.3d 756 (2009) (failure to give a unanimity instruction is "deemed automatically [to be] of a constitutional magnitude.")

handgun.[56] Conviction by a jury divided in this manner violates Mr. Maddaus's right to juror unanimity. Thus, under *Coleman,* an instruction was required, even though the acts occurred in sequence.

Accordingly, Mr. Maddaus's conviction must be reversed, and the case remanded for a new trial. *Coleman, supra.* At retrial, if the same evidence is presented, either the state must elect a single weapon as the basis for its charge, or the court must give a unanimity instruction. *Id.*

E. The absence of a unanimity instruction requires reversal of the attempted kidnapping charge, because jurors could have voted to convict based on either the attempted kidnapping of Abear or the attempted kidnapping of Peterson.

The prosecution presented evidence of two kidnapping attempts: one involving Abear and one involving Peterson. RP 656, 657, 1056-1070. Although the Information clearly referenced Abear, nothing in the instructions made clear that Count III pertained to her and not to Peterson. CP 22; Instr. Nos. 19-23, Supp. CP. Because of this, jurors were free to convict on Count III for the incident involving Abear or for the incident involving Peterson.

The issue was further confused because the instructions on felony murder *did* relate a kidnapping to Peterson (as the felony underlying the

[56]The prosecution failed to prove that the handgun used in this assault was an operable firearm. Abear testified that she didn't know much about guns, that she couldn't describe the difference between a revolver and a pistol, and that the handgun "looked a little" like one

(*Continued*)

murder charge). *See* Instr. Nos. 8, 9A, 10, Supp. CP. Furthermore, the prosecutor referred to both kidnapping incidents in closing, and made only one passing reference tying Count III to the incident involving Abear. RP 1979, 1985, 1987-1989, 1992.

In light of this, the court should have provided a unanimity instruction or required the prosecutor to make an election. *Coleman, at* 511-512. The court's failure to provide a unanimity instruction violated Mr. Maddaus's right to a unanimous jury: some jurors might have voted to convict based on the Abear incident while others voted to convict based on the Peterson incident.[57] *Id.* The conviction for Count III, Attempted Kidnapping in the First Degree, must be reversed and the charge remanded for a new trial. *Id.*

XI. MR. MADDAUS'S ASSAULT AND ATTEMPTED KIDNAPPING CONVICTIONS VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT'S INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE THE ESSENTIAL ELEMENTS OF EACH CRIME.

A. Standard of Review

Constitutional violations are reviewed *de novo,* as are jury instructions. *Schaler, at* 282; *State v. Bashaw*, 169 Wash.2d 133, 140, 234 P.3d 195 (2010). Instructions must be manifestly clear to the average

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depicted in Exhibit 159. RP 670.

[57] This creates a manifest error affecting a constitutional right. RAP 2.5(a)(3); *Coleman, supra; O'Hara, supra.* In the alternative, the court should exercise discretion to accept

(*Continued*)

juror, because juries lack tools of statutory construction. *See, e.g., State v. Kyllo*, 166 Wash.2d 856, 864, 215 P.3d 177 (2009); *State v. Harris*, 122 Wash.App. 547, 554, 90 P.3d 1133 (2004).

B. Factual Basis

Mr. Maddaus was charged with Assault in the Second Degree; the state alleged that he assaulted Abear with a deadly weapon. CP 22. The court did not define the phrase "deadly weapon;" instead, it instructed the jury that "A firearm, whether loaded or unloaded, is a deadly weapon." Instr. No. 30, Supp. CP.

Mr. Maddaus was also charged with attempted kidnapping; the state alleged that he took a substantial step toward kidnapping Abear. CP 22. The court defined "substantial step" as follows:

> A substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation.

Instr. No. 22, Supp. CP.

Defense counsel did not object to either definition, and did not propose alternative definitions. Defendant's Proposed Instr., Supp. CP; RP 1946-1951.

C. Due process requires the prosecution to prove every element of an offense beyond a reasonable doubt.

Due process requires the prosecution to prove every element of the

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review. *Russell, at* 122.

charged crime. U.S. Const. Amend. XIV; *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A trial court's failure to instruct the jury as to every element violates due process. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wash.2d 422, 429, 894 P.2d 1325 (1995). An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of an offense violates due process. *State v. Thomas*, 150 Wash.2d 821, 844, 83 P.3d 970 (2004). Such an error is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wash.2d 330, 341, 58 P.3d 889 (2002) ("*Brown* I").

D. The court's instructions did not require the prosecution to prove that Mr. Maddaus assaulted Abear with a deadly weapon, an essential element of second-degree assault.

As charged, a conviction for Assault in the Second Degree required the prosecution to prove that Mr. Maddaus assaulted Abear with a deadly weapon. CP 22; RCW 9A.36.020. In this context, the phrase deadly weapon "means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance… which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm." RCW 9A.04.110(6); *see also* WPIC 2.06, 2.06.1.

The court did not provide this definition to the jury. Instr., Supp.

CP. Instead, the court instructed the jury that "[a] firearm, whether loaded or unloaded, is a deadly weapon." Instr. No. 30, Supp. CP. Based on WPIC 2.06, this instruction applies where "the only weapon alleged is a firearm," because it does not contain the full definition explaining what constitutes a deadly weapon. *See* Note on Use, WPIC 2.06.

In this case, the court should have provided the full definition as well as the short firearm definition. *See* Note on Use, WPIC 2.06; Note on Use, WPIC 2.06.1. By failing to provide the full definition, the court relieved the state of its burden to prove that Mr. Maddaus assaulted Abear with a deadly weapon. If jurors were not convinced beyond a reasonable doubt that Mr. Maddaus assaulted Abear with a working firearm, they might still have voted to convict based on the documented injuries[58] allegedly caused by the paintball gun—but they had no instruction to guide their consideration of the paintball gun as a deadly weapon. *See* Instr., Supp. CP. Accordingly, the assault conviction violated Mr. Maddaus's Fourteenth Amendment right to due process. U.S. Const. Amend. XIV; *Winship, supra; Aumick, supra.* The conviction must be reversed and the case remanded for a new trial. *Id.*

E. The court's instructions relieved the state of its burden to prove that

[58] The prosecution introduced photographs depicting bruises that Abear claims were caused by the paintball gun. RP 666.

Mr. Maddaus engaged in conduct corroborating an intent to commit the specific crime of Kidnapping in the First Degree.

A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime. RCW 9A.28.020. A "substantial step" is "conduct strongly corroborative of the actor's criminal purpose." *State v. Workman*, 90 Wash.2d 443, 451, 584 P.2d 382 (1978); *Aumick, at* 427.

In this case, the trial court gave an instruction that differed from the definition of "substantial step" adopted by the *Workman* Court. The court's instruction defined "substantial step" (in relevant part) as "conduct that strongly *indicates a* criminal purpose..." Instr. No. 22, Supp. CP (emphasis added). This instruction was erroneous for two reasons.

First, the instruction requires only that the conduct *indicate* (rather than corroborate) a criminal purpose. The word "corroborate" means "to strengthen or support with *other* evidence; [to] make *more* certain." *The American Heritage Dictionary* (Fourth Ed., 2000, Houghton Mifflin Company), *emphasis added.* The *Workman* Court's choice of the word "corroborative" requires the prosecution to provide some independent evidence of intent, which must then be corroborated by the accused's conduct. Instruction No. 22 removed this requirement by employing the

word "indicate" instead of "corroborate;" under Instruction No. 22, there is no requirement that intent be established by independent proof and corroborated by the accused's conduct. Instr. No. 22, Supp. CP.

Second, Instruction No. 22 requires only that the conduct indicate *a criminal purpose,* rather than *the* criminal purpose. This is similar to the problem addressed by the Supreme Court in cases involving accomplice liability. *See State v. Roberts,* 142 Wash.2d 471, 513, 14 P.3d 713 (2000) (accomplice instructions erroneously permitted conviction if the defendant participated in "a crime," even if he was unaware that the principal intended "the crime" charged); *see also State v. Cronin,* 142 Wash.2d 568, 14 P.3d 752 (2000). As in *Roberts* and *Cronin*, the language used in Instruction No. 22 permits conviction if the accused person's conduct strongly indicates intent to commit *any* crime.

The end result was that the prosecution was relieved of its duty to establish by proof beyond a reasonable doubt every element of attempted kidnapping.[59] Under the instructions as given, the prosecution was not required to provide independent corroboration of Mr. Maddaus's alleged criminal intent; nor was it required to show that his conduct strongly

[59] This creates a manifest error affecting Mr. Maddaus's right to due process, and thus may be raised for the first time on review, pursuant to RAP 2.5(a)(3). Even if not manifest, the error may nonetheless be reviewed as a matter of discretion under RAP 2.5. *See Russell, at* 122. In addition, Mr. Maddaus argues that his attorney deprived him of the effective

(*Continued*)

corroborated his intent to commit the particular crime of Kidnapping in the First Degree. Because of this, the conviction must be reversed and the case remanded for a new trial. *Brown* I, *supra*.

XII. MR. MADDAUS WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wash.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wash.App. 29, 146 P.3d 1227 (2006).

B. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. This provision applies to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, "In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel...." Wash. Const. Article I, Section 22. The right to counsel is "one of the most fundamental

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assistance of counsel by failing to object or propose a proper instruction.

and cherished rights guaranteed by the Constitution." *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)); *see also State v. Pittman*, 134 Wash.App. 376, 383, 166 P.3d 720 (2006).

The strong presumption of adequate performance is only overcome when "there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach, at* 130. Any trial strategy "must be based on reasoned decision-making..." *In re Hubert,* 138 Wash.App. 924, 929, 158 P.3d 1282 (2007). In keeping with this, "[r]easonable conduct for an attorney includes carrying out the duty to research the relevant law." *Kyllo, at* 862. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the

introduction of evidence of... prior convictions has no support in the record.")

C. Defense counsel provided ineffective assistance by failing to object to the imposition of restraints on Mr. Maddaus during his trial.

The Sixth Amendment right to the effective assistance of counsel exists in order to protect an accused person's fundamental right to a fair trial. *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). This includes the right to appear in court free from restraint. *Wrinkles v. Buss*, 537 F.3d 804, 813-815 (2008) ("*Wrinkles* II"). In light of the wealth of case law prohibiting imposition of restraints without individualized justification, a failure to object "cannot be an objectively reasonable tack under prevailing norms of professional behavior." *Id, at* 815; *see also Roche v. Davis*, 291 F.3d 473, 483 (2002).

As noted in Section II, Mr. Maddaus appeared in court with a leg brace and shock device. RP 50-55. Nothing in the record suggests any reason why restraints were required, and the court failed to hold a *Finch* hearing. Despite this, defense counsel made a tepid objection, based solely on the possibility that jurors might see the restraints, which he then appeared to withdraw. RP 50-55, 628. Counsel's failure to cite a basis for the objection and demand a *Finch* hearing was objectively unreasonable. *Wrinkles* II; *Roche, supra.*

Mr. Maddaus was prejudiced by his attorney's deficient performance. Had counsel objected to the restraints, Mr. Maddaus would have received the *Finch* hearing to which he was entitled.[60] Furthermore, because nothing in the record supports imposition of restraints, he would have been able to appear at trial "with the appearance, dignity, and self-respect of a free and innocent man." *Finch, at* 844.

There is a reasonable possibility that jurors saw Mr. Maddaus's restraints, despite the arrangements made by the judge.[61] On the first day of jury selection, Mr. Maddaus sat at the defense table with a second table set up in an attempt to block jurors' views of his legs. RP 50-52. Despite this, Mr. Maddaus expressed concern day later that jurors would still be able to see his legs, and that the restraints were more visible because he was wearing tighter pants. RP 628. The judge agreed, and placed cardboard around the base of the defense table, so jurors could no longer see his legs. Thus jurors had a view of Mr. Maddaus's legs on the first day of trial, and could not help but notice the strategically placed sheets of cardboard on subsequent days. Even the prosecutor pointed out this risk:

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[60] Of course, the obligation to hold a hearing rests with the court; it is not up to counsel to demand a hearing. *Gonzalez, at* 901.

[61] The risk of prejudice is high when jurors see an accused person in restraints; absent appropriate admonishment from the court, jurors are likely to believe that the accused person is a dangerous threat to courtroom security and to society as a whole. *Finch, supra.* Thus, in the context of an ineffective assistance claim, prejudice can be established by some showing

(*Continued*)

"[N]ow we have these cardboard playthings masking his nether parts, so to speak, and I -- it may draw someone's attention to the fact we've got cardboard, which may or may not be innocuous." RP 630.

A reasonable attorney would have acted to protect her or his client's constitutional right to appear in court free from restraint. Because defense counsel failed to object, Mr. Maddaus was deprived of the effective assistance of counsel. *Wrinkles* II; *Roche.* His convictions must be reversed and the case remanded for a new trial. *Id.*

D. Defense counsel provided ineffective assistance by failing to object to inadmissible and prejudicial evidence.

1. Defense counsel should have objected to the admission of recordings obtained in violation of the Privacy Act.

Counsel failed to seek suppression of telephone calls recorded in violation of the Privacy Act. As described in Section V, the calls were played for the jury even though they violated the Privacy Act. There was no strategic reason for counsel's failure to object; the recordings were highly prejudicial because they allowed the prosecutor to argue that Mr. Maddaus conspired to introduce perjured testimony, and sought to establish a false alibi. A motion to suppress would likely have been granted, because Farmer, Grimes, and Leville did not give consent prior to being recorded (as outlined elsewhere in this brief). Counsel's failure to

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that jurors saw or were otherwise aware of the restraint. *Wrinkles* II, *at* 815.

object was unreasonable under the first prong of the *Strickland* test. *State v. Saunders*, 91 Wash.App. 575, 578, 958 P.2d 364 (1998).

The error was prejudicial, because the calls proved to be a significant part of the prosecution's case—not just as the basis for the tampering charges, but also as circumstantial evidence that Mr. Maddaus shot Peterson. The prosecutor discussed the recordings and even played them during closing argument, highlighting the conversations as proof of Mr. Maddaus's guilt. RP 1997-2014, 2076. Had the evidence been excluded, there is a reasonable probability that the outcome of the trial would have been different.

Accordingly, counsel's failure to seek suppression of the illegal recordings violated Mr. Maddaus's right to the effective assistance of counsel. *Saunders, at* 578.

2. Defense counsel provided ineffective assistance by failing to object when a prosecution witness bolstered Abear's testimony.

"Hearsay" is an out-of-court statement offered to prove the truth of the matter asserted. ER 801. Hearsay is generally inadmissible. ER 802. Evidence that conveys the substance of an out-of-court statement falls within the prohibition against hearsay, even if the statement is not quoted:

> [A] prosecutor may not "circumvent the hearsay prohibition through artful questioning designed to elicit hearsay indirectly."

Gochicoa v. Johnson 118 F.3d 440, 446 (5th Cir. 1997) (quoting *Schaffer*

v. Texas, 777 S.W.2d 111, 114-115 (1989) (en banc)).[62]

A prior consistent statement may qualify as non-hearsay, but only if "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." ER 801(d)(1). Prior consistent statements may only be used in this way when made "prior to the time that the motive to fabricate arose." *State v. Brown*, 127 Wash.2d 749, 758 n.2, 903 P.2d 459 (1995) ("*Brown* II"). This is because "[m]ere repetition of a statement made when the motive to fabricate was the same does nothing to establish veracity." *Id.*

In this case, Detective Johnstone was permitted to testify that he'd interviewed Abear and obtained a statement that was "similar to her testimony here at trial." RP 826. Defense counsel did not object, and the evidence was admitted without restriction.[63]

Defense counsel should have objected, because the evidence was inadmissible hearsay that bolstered Abear's testimony. It did not qualify as a prior consistent statement under ER 801(d)(1), because any motive to fabricate arose before the statement was provided. *Brown* II, *at* 758 n. 2.

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[62] *See also United States v. Sanchez*, 176 F.3d 1214, 1222 (9th Cir. 1999); *State v. Martinez*, 105 Wash.App. 775, 782, 20 P.3d 1062 (2001), *overruled on other grounds by State v. Rangel-Reyes*, 119 Wash.App. 494, 81 P.3d 157 (2003).

[63] Counsel did object to the prior question, which also addressed the prior consistent statement. The court sustained the objection. It is unclear why counsel abandoned his objection after the prosecutor rephrased the question. RP 825-826.

Mr. Maddaus denied assaulting or attempting to kidnap Abear, and the defense strategy involved discrediting her story. There was no strategic reason to allow Detective Johnstone to bolster Abear's testimony. Accordingly, counsel's failure to maintain his objection constituted deficient performance.

Counsel's deficient performance prejudiced Mr. Maddaus. Abear's testimony was the only direct evidence of the assault and attempted kidnapping charges. It also suggested that Mr. Maddaus was enraged and willing to use violence to discover who had robbed him, thus supporting the prosecution's allegation that he had murdered Peterson. Furthermore, Abear undermined Mr. Maddaus's testimony that he was not armed during the confrontation with Peterson, and that he was unaware of the firearm that was eventually found in his home. RP 1874-1875. By allowing Johnstone to bolster Abear's testimony through "mere repetition," defense counsel strengthened her story and significantly undermined the defense case. *Brown* II, *at* 758 n. 2.

Accordingly, counsel's failure to object deprived Mr. Maddaus of the effective assistance of counsel. *Saunders, supra.* His convictions must be reversed and the case remanded to the trial court for a new trial. *Id.*

E. Defense counsel provided ineffective assistance by failing to object to improper instructions and by failing to propose proper instructions.

The reasonable competence standard requires defense counsel to be familiar with the instructions applicable to the representation. *See, e.g., State v. Tilton*, 149 Wash.2d 775, 784, 72 P.3d 735 (2003); *State v. Jury*, 19 Wash. App. 256, 263, 576 P.2d 1302 (1978). A failure to propose proper instructions constitutes ineffective assistance of counsel. *State v. Woods*, 138 Wash. App. 191, 156 P.3d 309 (2007); *see also State v. Rodriguez*, 121 Wash. App. 180, 87 P.3d 1201 (2004).

1. Defense counsel unreasonably failed to object to Instruction No. 22 or to propose a proper instruction defining "substantial step."

In this case, the prosecution was required to prove that Mr. Maddaus took a substantial step toward the commission of second-degree kidnapping. RCW 9A.28.020. A reasonably competent attorney would have been familiar with the correct legal standard, and would have proposed instructions making clear that the prosecution bore the burden of proving that Mr. Maddaus engaged in conduct that was "conduct strongly corroborative of [his] criminal purpose"—that is, his intent to commit a kidnapping. *Workman, at* 451.

Defense counsel not only failed to propose a proper instruction, but also failed to object to the instruction that the court included in its instructions packet. RP 1946-1952; Defendant's Proposed Instr., Supp.

CP. There is "no conceivable legitimate tactic" explaining counsel's failure to object and failure to propose proper instructions. *Reichenbach, at* 130. Nor is there any indication in the record suggesting that counsel was actually pursuing a strategy that required him to refrain from objecting or proposing proper instructions. *See Hendrickson, supra.*

Furthermore, counsel's failure to propose a proper instruction prejudiced Mr. Maddaus. A reasonable juror could have entertained doubts about whether or not Mr. Maddaus took a substantial step toward kidnapping Abear. Some jurors might have believed that his conduct indicated nothing more than intent to assault Abear. This should have resulted in acquittal; however, the instruction allowed them to convict, because it did not require proof that his conduct corroborated his intent to kidnap her. *Compare Workman, at* 451, *with* Instr. No. 22, Supp. CP. Due to counsel's mistake, the jury could not properly evaluate this evidence.

The defense attorney's failure to object to Instruction No. 22 or to propose an instruction defining "substantial step" deprived Mr. Maddaus of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *Tilton.* Accordingly, the conviction for attempted kidnapping must be reversed and the charge remanded for a new trial. *Id.*

2. Defense counsel was ineffective for failing to propose a proper instruction defining "deadly weapon" for purpose of the second-degree assault charge.

The prosecution was to prove that Mr. Maddaus assaulted Abear with a deadly weapon. CP 22; RCW 9A.36.021. As noted in Section IX, the court did not define the phrase "deadly weapon" in keeping with the statute, and defense counsel did not propose an instruction to remedy this deficiency. RCW 9A.04.110(6); Instr., Supp. CP; Defendant's Proposed Instr., Supp. CP. Although jurors were told that a firearm is a deadly weapon, they were not instructed to determine how to evaluate other weapons. Instr. No. 30, Supp. CP.

A reasonably competent attorney would have been familiar with RCW 9A.04.110(6) and would have proposed an appropriate instruction defining "deadly weapon." In the absence of such an instruction, jurors were left to guess at the definition, and to decide on their own if the paintball gun and bear mace qualified as deadly weapons.

Counsel's failure to propose a proper instruction cannot be explained as a strategic choice, because there is no legitimate tactic that would allow the jury to find a deadly weapon and convict even absent proof that the paintball gun and bear mace qualified as deadly weapons. *Reichenbach, at* 130. Nor is there any indication that counsel was pursuing such a tactic. *See Hendrickson, supra.*

Counsel's deficient performance prejudiced Mr. Maddaus. Jurors likely had a reasonable doubt that Mr. Maddaus assaulted Abear with a

working firearm: the gun was never identified or test-fired, and Abear told the jury that nothing happened when Mr. Maddaus aimed at her foot and pulled the trigger. RP 654. There is a reasonable possibility that the outcome of the proceeding would have differed if the jury had been provided a proper instruction to guide their consideration of the paintball gun and the bear mace. *Reichenbach, at* 130.

Counsel's failure to propose an instruction defining "deadly weapon" deprived Mr. Maddaus of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *Tilton.* Accordingly, the assault conviction must be reversed and the charge remanded for a new trial. *Id.*

F. Mr. Maddaus was denied the effective assistance of counsel by his attorney's failure to object to prosecutorial misconduct in closing.

A failure to object to improper closing arguments is objectively unreasonable "unless it 'might be considered sound trial strategy.'" *Hodge v. Hurley*, 426 F.3d 368, 385 (C.A.6, 2005) (quoting *Strickland, at* 687-88). Under most circumstances,

> At a minimum, an attorney who believes that opposing counsel has made improper closing arguments should request a bench conference at the conclusion of the opposing argument, where he or she can lodge an appropriate objection out [of] the hearing of the jury.... Such an approach preserves the continuity of each closing argument, avoids calling the attention of the jury to any improper statement, and allows the trial judge the opportunity to make an appropriate curative instruction or, if necessary, declare a mistrial.

Hurley, at 386 (citation omitted).

In this case, defense counsel should have objected when Prosecutor Bruneau referred to defense testimony as "poppycock," "unreasonable under the law," and "crazy," when he suggested that the defense investigator had been "duped" by Mr. Maddaus, when he described defense counsel's arguments as a distraction, and when he referred to the defense argument as "the last effort to develop lies..." RP 1984, 2074, 2075, 2077. Because the prosecutor expressed personal opinions and disparaged the defense team, counsel's failure to object constituted deficient performance. At a minimum, defense counsel should have either requested a sidebar or lodged an objection when the jury left the courtroom. *Id.*

Counsel's failure to object prejudiced Mr. Maddaus, because the state's arguments increased the likelihood the jury would return guilty verdicts based on improper factors—the prosecutor's personal opinions and disrespect for the role of defense counsel. Had counsel objected, the court could have stricken the improper comments and instructed the jury to disregard them.

The failure to object deprived Mr. Maddaus of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *Hurley.* Accordingly, the convictions must be reversed and the case remanded for a new trial. *Id.*

XIII. THE FIREARM ENHANCEMENTS IMPOSED IN COUNTS I, III, AND IV VIOLATED MR. MADDAUS'S STATE AND FEDERAL RIGHT TO DUE PROCESS AND TO A JURY DETERMINATION OF FACTS USED TO INCREASE THE PENALTY BEYOND THE STANDARD RANGE.

A. Standard of Review

Constitutional violations and jury instructions are both reviewed *de novo*. *Schaler*, *at* 282; *Bashaw*, *at* 140. Instructions must be manifestly clear to the average juror. *Kyllo*, *at* 864.

B. Factual Basis

The state notified Mr. Maddaus of its intent to seek sentencing enhancements on Counts I, III, and IV (murder, attempted kidnapping, and second degree assault, respectively). CP 21-22. The operative language for each enhancement alleged that Mr. Maddaus, at the time of the commission of each crime, "was armed with a deadly weapon, a firearm." CP 21. The enhancement for the assault charge added "to wit: a semi-automatic pistol." CP 22.

The court instructed the jury to determine, for purpose of a special verdict, whether or not "the defendant was armed with a deadly weapon at the time of the commission of the crime." In the same instruction, the court also instructed jurors that "A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded." Instr. No. 31, Supp. CP. The court did not define the term "armed" for the jury.

All three special verdict forms shared the same basic format: "Was

the defendant... armed with a firearm at the time of the commission of the crime MURDER IN THE FIRST DEGREE WHILE ARMED WITH A DEADLY WEAPON-FIREARM as charged in Count I?" The jury answered "yes" to each special verdict, and the court imposed firearm enhancements. Special Verdict Forms (Counts1, III, IV), Supp. CP; CP 24-34.

C. The sentencing court was not authorized to impose firearm enhancements because Mr. Maddaus was not charged with firearm enhancements.

Any fact, besides the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *In re Personal Restraint of Delgado*, 149 Wash.App. 223, 232, 204 P.3d 936 (2009) (citing *Apprendi v. New Jersey,* 530 U.S. 466, 476, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and *Blakely v. Washington,* 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)).

The trial court may not impose a firearm enhancement when the state has charged a deadly weapon enhancement. *Delgado, at* 234 (citing *State v. Recuenco*, 163 Wash.2d 428, 180 P.3d 1276 (2008)). This is so for two reasons: (1) a person can only be convicted of and sentenced for enhancements actually charged by the prosecution, and (2) imposition of a firearm enhancement without prior notice violates due process. *Delgado,*

at 234-235. In addition, a firearm enhancement may not be imposed unless the state proves that the offender was armed with a working firearm. *Id.* Nor may a firearm enhancement be imposed when jury instructions outline the requirements for a deadly weapon special verdict. *Id.*

In *Delgado,* the state alleged that the defendant was "armed with a deadly weapon, to wit: a firearm." *Id, at* 235. The jury was instructed to answer "yes" on a special verdict form if it found that the defendant was armed with a deadly weapon. *Id.* Despite the clarity of the charges and instructions, some of the preprinted special verdict forms reflected jury findings that the defendant was armed with a *firearm*, rather than a deadly weapon. *Id, at* 235-236. The sentencing court imposed firearm enhancements rather than deadly weapon enhancements. *Id, at* 236.

In accordance with *Recuenco,* the Court of Appeals vacated Delgado's firearm enhancements and remanded for resentencing with deadly weapon enhancements. First, the Court noted that the jury findings were actually deadly weapon findings (even though some of the special verdict forms used the word "firearm" in place of the phrase "deadly weapon.") *Delgado, at* 237.[64] Second, the Court noted that the defendant

[64] Because jurors were never even provided the definition of a firearm, the findings could not be interpreted as anything but deadly weapon findings. *Delgado, at* 237. A firearm enhancement may arguably be imposed based on a deadly weapon special verdict if the enhancement is properly charged and the jury's guilty verdict on the substantive offense

(*Continued*)

was not charged with firearm enhancements, and thus could not receive firearm enhancements under the theory that the disparity between the instructions and the special verdicts created only harmless error. *Id, at* 237-238.

Under *Recuenco* and *Delgado*, Mr. Maddaus's firearm enhancements must be vacated and the case remanded for sentencing with deadly weapon enhancements. The Information alleged that Mr. Maddaus "was armed with a deadly weapon, a firearm," when he committed Counts I, III, and IV.CP 21-22. Upon a proper finding by the jury, this charging language authorized the sentencing court to impose deadly weapon enhancements; the sentencing court was not authorized to impose the lengthier firearm enhancements. *Recuenco, supra; Delgado, supra.* For this reason, Mr. Maddaus's firearm enhancements must be vacated. *Delgado, supra.*

D. The sentencing court was not authorized to impose firearm enhancements because the jury was instructed to determine whether or not Mr. Maddaus was armed with a deadly weapon, not a firearm.

As noted above, a sentencing enhancement may not be imposed absent proper instructions on the state's burden to prove the "elements" required in order for an affirmative finding on a special verdict. *See, e.g.,*

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necessarily establishes that the offender used a firearm. *In re Personal Restraint of Rivera,* 152 Wash.App. 794, 218 P.3d 638 (2009). This argument is inapplicable to this case, since

(*Continued*)

Recuenco, supra. Here, the court specifically directed jurors to determine whether or not Mr. Maddaus was armed with a deadly weapon on Counts I, III, and IV:

> For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crimes in Counts I, III and IV.
> A pistol, revolver, or any other firearm, is a deadly weapon whether loaded or unloaded.
> Instruction No. 31, Supp. CP.

Because the jury was instructed to determine whether or not Mr. Maddaus was armed with a deadly weapon, the sentencing court erred by imposing firearm enhancements. *Recuenco, supra.* The enhancements must be vacated and the case remanded for correction of the judgment and sentence.[65] *Id.*

E. The court's instructions relieved the prosecution of its burden to prove that Mr. Maddaus was "armed" with a firearm at the time of each crime.

Before imposing a sentencing enhancement, the trial court must instruct the jury on the state's burden to prove the "elements" required in order for the jury to return a "yes" verdict relating to the enhancement. *See, e.g., Recuenco, supra.* Firearm and deadly weapon enhancements

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Mr. Maddaus was not properly charged with a firearm enhancement. CP 21-22.

[65] Division I has applied a harmless error analysis under similar circumstances to uphold a firearm enhancement imposed after the jury was instructed regarding a deadly weapon enhancement. *See In re Personal Restraint of Rivera,* 152 Wash.App. 794, 218 P.3d 638 (2009). The *Rivera* decision appears to conflict with *Recuenco.* and should not be followed here.

may be imposed only if a person is "armed" with a firearm or deadly weapon. *See* RCW 9.94A.533; RCW 9.94A.825. A person is "armed" if the weapon is easily available, readily accessible, and has some nexus with the person and the crime. *State v. Brown*, 162 Wash.2d 422, 431, 173 P.3d 245 (2007) ("*Brown* III"). Proof of mere possession is insufficient by itself to establish that a person is "armed" under the statutes, and cannot support imposition of firearm or deadly weapon enhancements. *State v. Gurske*, 155 Wash.2d 134, 138, 118 P.3d 333 (2005).

In this case, the trial court failed to provide the legal definition of "armed." Instr., Supp. CP. Thus, the court's instructions allowed a "yes" verdict even if the jury found that Mr. Maddaus merely possessed a firearm at the time of each crime. *Gurske, at* 138.

This relieved the prosecution of its burden to establish beyond a reasonable doubt that Mr. Maddaus was armed at the time of each crime, and violated his Fourteenth Amendment right to due process. *Blakely, supra; Recuenco, supra.* Accordingly, the enhancements must be vacated and the case remanded to the trial court for correction. *Id.*

XIV. THE PROSECUTION DID NOT ESTABLISH THAT MR. MADDAUS HAS TWO PRIOR "STRIKE" CONVICTIONS.

A. Standard of Review

Constitutional violations are reviewed *de novo,* and may be reviewed for the first time on appeal if they had practical and identifiable

consequences at trial.[66] *Schaler, at* 282; *Nguyen, at* 433; RAP 2.5(a)(3). Review is also *de novo* for the interpretation of a statute, or the application of law to a particular set of facts. *Engel, at* 576; *Anderson, at* 555.

B. Factual Basis

Prior to sentencing, the prosecutor filed documents in support of their recommendations. Statement of Prosecuting Attorney, Plaintiff's Sentencing Memorandum, Supp. CP. To a memorandum, the prosecutor attached certified copies of Judgment and Sentence documents. Plaintiff's Sentencing Memorandum, Supp. CP. Included in the attachments were (1) a Judgment and Sentence indicating that "Robert J. Maddaus, Jr." pled guilty to Unlawful Possession of A Controlled Substance with Intent to Deliver while Armed with a Deadly Weapon (Ex. 4), and (2) a Judgment and Sentence indicating that "Robert John Maddaus, Jr." was convicted of Assault in the Second Degree (while armed with a deadly weapon – firearm) (Ex. 5). Plaintiff's Sentencing Memorandum, Supp. CP.

At the sentencing hearing on February 8, 2011, the trial judge asked: "Is there a dispute as to his criminal history?" RP (2/8/11) 124. Defense counsel responded: "No, Your Honor, there's not." RP (2/8/11) 124. The court did not review the issue with Mr. Maddaus, and no written

[66] The court also has discretion to review any issue argued for the first time on review. Russell, *at* 122.

stipulation was filed. *See* RP (2/8/11) *and* CP, *generally*. The prosecutor did not present further evidence establishing that Mr. Maddaus was the same person identified in the documents attached to the sentencing memorandum. RP (2/8/11).

C. The 1995 conviction is not a "most serious offense."

A statute that involves a deprivation of liberty must be strictly construed. *In re Detention of Hawkins*, 169 Wash.2d 796, 801, 238 P.3d 1175 (2010). In interpreting a statute, the court's duty is to "discern and implement the legislature's intent." *State v. Williams*, 171 Wash.2d 474, 477, 251 P.3d 877 (2011) ("*Williams* II"). The court's inquiry "always begins with the plain language of the statute." *State v. Christensen, at* 194.

Where the language of a statute is clear, legislative intent is derived from the language of the statute alone. *Engel, at* 578.[67] A court "will not engage in judicial interpretation of an unambiguous statute." *State v. Davis*, 160 Wash.App. 471, 477, 248 P.3d 121 (2011) ("*Davis* I").[68] Furthermore, under the rule of lenity, any ambiguity in a criminal statute must be interpreted in favor of the defendant. *Seattle v. Winebrenner*, 167 Wash.2d 451, 462, 219 P.3d 686 (2009); *see also State v. Failey*, 165 Wash.2d 673, 677, 201 P.3d 328 (2009). In other words, "an

[67]*See also State v. Punsalan*, 156 Wash.2d 875, 879, 133 P.3d 934 (2006) ("Plain language does not require construction.")

ambiguous criminal statute cannot be interpreted to increase the penalty imposed." *Id.*

In order to sentence Mr. Maddaus as a persistent offender, the court was required to find that he had previously been convicted of two "most serious" offenses. RCW 9.94A.030(37), RCW 9.94A.570. The phrase "most serious offense" includes any "felony with a deadly weapon verdict under RCW 9.94A.825." RCW 9.94A.030(32)(t). A separate section incorporates "[a]ny felony offense in effect at any time prior to December 2, 1993, that is comparable to a most serious offense under this subsection..." RCW 9.94A.030(32)(u).

The phrase "[any] felony with a deadly weapon verdict under RCW 9.94A.825" is unambiguous; accordingly, its plain language must be given effect. *Christensen, at* 194. Under the plain language of the statute, a felony with a deadly weapon enhancement is not a "most serious offense" unless it involved a "verdict" under "RCW 9.94A.825."

Mr. Maddaus's 1995 conviction does not qualify as a "most serious offense" under the statute.[69] First, he pled guilty to the offense and the enhancement; thus, there was no "verdict." Although his conviction

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[68] A statute is ambiguous when the language is susceptible to multiple interpretations. *Id.*

[69] Even if the statute were found to be ambiguous, the rule of lenity (and strict construction required under *Hawkins, supra*) would prohibit a finding that Mr. Maddaus's 1995 conviction qualified as a "most serious offense." *Winebrenner, at* 462; *Failey*, 165 *at* 677.

was for a felony offense, it was not for a "felony with a deadly weapon *verdict*..." RCW 9.94A.030(32)(t) (emphasis added).

Second, the enhancement was entered under RCW 9.94A.125, which governed imposition of deadly weapon enhancements at the time of his offense.[70] Plaintiff's Sentencing Memorandum-Ex. 5, Supp. CP. Thus, even if the conviction were considered a "felony with a deadly weapon verdict," it was not a "felony with a deadly weapon verdict *under RCW 9.94A.825*," as required. RCW 9.94A.030(32)(t) (emphasis added).

Third, the 1995 conviction did not qualify under RCW 9.94A.030(32)(u), because that subsection only covers offenses prior to December of 1993. *See, e.g., State v. Taylor*, 162 Wash.App. 791, ___ P.3d ___ (2011) (addressing a similar gap under RCW 9A.44.130, the statute criminalizing Failure to Register). Thus, even if the conviction is otherwise "comparable to a most serious offense under [RCW 9.94A.030(32)]," it still does not qualify as a "most serious offense" under the statute. RCW 9.94A.030(32)(u).

Because of this, Mr. Maddaus's persistent offender life sentence must be vacated and the case remanded for sentencing within the standard

[70] The statute was recodified as RCW 9.94A.825 in 2009. Laws 2009, ch. 28, § 41, eff. Aug. 1, 2009.

range. *State v. Mendoza*, 165 Wash.2d 913, 205 P.3d 113 (2009)

D. Identity of names is insufficient to prove that an offender has two prior "strike" convictions.

An offender has a constitutional right to remain silent pending sentencing, and the prosecution bears the burden of proving any prior convictions. *In re Detention of Post*, 145 Wash.App. 728, 758, 187 P.3d 803 (2008); *Mendoza, at* 920; *State v. Knippling*, 166 Wash.2d 93, 206 P.3d 332 (2009). Absent an admission or acknowledgment, the prosecution may not simply rely on a prosecutor's summary of criminal history. *State v. Hunley*, 161 Wash.App. 919, 927, 253 P.3d 448 (2011); *see also* RCW 9.94A.530(2) ("In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing...")[71]

Generally, identity of names is insufficient to prove that a document relates to the person before the court. *See, e.g., State v. Huber*, 129 Wash. App. 499, 502, 119 P.3d 388 (2005). After the SRA was enacted, the Supreme Court created an exception to this general rule,

[71] The statute also provides that "acknowledgment includes... not objecting to criminal history presented at the time of sentencing;" however, this provision was found unconstitutional in *Hunley*, along with another provision declaring that a prosecutor's summary of criminal history shall be *prima facie* evidence of criminal history. *Hunley, at* 927 (addressing provisions of RCW 9.94A.500(1) and .530(2)).

holding that identity of names is sufficient to establish an offender's criminal history to determine the standard range. *State v. Ammons*, 105 Wash.2d 175, 190, 713 P.2d 719 (1986). The *Ammons* rule required additional proof at sentencing (beyond mere identity of names), but only if the offender states under oath that s/he was not the person convicted.[72] *Id.* The *Ammons* rule predated the POAA (which was enacted in 1993).

The context in which the *Ammons* case was decided suggests that the balance struck by the Court regarding identity of names was not meant to apply where a sentence of life without parole is at issue. At the time *Ammons* was decided, career offenders could be sentenced as "habitual criminals" following a jury finding beyond a reasonable doubt that they qualified for such treatment. *See State v. Manussier*, 129 Wash.2d 652, 682, 921 P.2d 473 (1996) (outlining procedures under former RCW 9.92.080). The *Ammons* Court recognized that the relaxed procedures used for determining the presumptive standard range—including its own rule regarding identity of names—could not constitutionally be applied in habitual criminal proceedings: "[T]he SRA recognizes and relies upon the fundamental distinction between the more rigid procedural protections necessary in using a prior conviction to prove an element of a crime or of

[72] According to the Court, "[t]hese requirements achieve the proper balance." *Ammons*, *at* 190.

habitual criminal status on the one hand, and in using a prior conviction to help determine a presumptive standard sentence range on the other." *Petition of Williams*, 111 Wash.2d 353, 367, 759 P.2d 436 (1988) ("*Williams* III").

There is no indication that the *Ammons* Court intended identity of names to be sufficient proof of persistent offender status under the POAA. Furthermore, prior convictions are not used in persistent offender sentencing proceedings "to help determine a presumptive standard sentence range;" instead, they are used to eliminate judicial discretion, resulting in mandatory punishment more severe than any other punishment short of death. RCW 9.94A.570; *See Graham v. Florida*, ___ U.S. ___, ___, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (sentences of life without parole "share some characteristics with death sentences that are shared by no other sentences.")

Because of the parties' shared interest in an accurate determination of persistent offender status, the *Ammons* identity-of-names standard should not apply where the state seeks to incarcerate a person for life without the possibility of parole. Nor should an offender be required to state under oath that s/he is not the person named in a prior conviction. Instead, the state should be required to prove identity by independent evidence, such as by fingerprints or eyewitness testimony. *See, e.g.,*

Ammons, at 190 (outlining acceptable means of proving identity).

E. Mr. Maddaus did not waive his constitutional right to have the prosecution prove that he had two prior "strike" offenses.

Courts indulge every reasonable presumption against waiver of fundamental rights. *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). Waiver of a constitutional right must clearly consist of "an intentional relinquishment or abandonment of a known right or privilege." *Zerbst, at* 464. The "heavy burden" of proving a valid waiver of constitutional rights rests with the government. *Matter of James*, 96 Wash.2d 847, 851, 640 P.2d 18 (1982). Moreover, "[a]ny waiver of a right guaranteed by a state's constitution should be narrowly construed in favor of preserving the right." *Wilson v. Horsley*, 137 Wash.2d 500, 509, 974 P.2d 316 (1999).

Here, Mr. Maddaus did not waive his constitutional right[73] to have the prosecution prove that he had two prior "strike" offenses. First, there is no indication in the record that he intentionally relinquished or abandoned a known right or privilege. *Zerbst, at* 464. The brief colloquy between the court and defense counsel does not establish that counsel discussed the matter with Mr. Maddaus, or that Mr. Maddaus knew he had the right to demand the prosecution meet its burden of proof. His attorney's statement

[73] Guaranteed by both the state and federal constitutions. *See Mendoza, supra.*

does not constitute an effective waiver. *Id.*

Second, even if Mr. Maddaus had endorsed his attorney's statement (that there was no "dispute"), this statement did not excuse the prosecution from proving the alleged criminal history. The absence of a specific dispute is not an admission or an acknowledgment of criminal history, and does not relieve the prosecution of its duty to prove facts necessary to a finding of criminal history. Indeed, this principle is at the heart of both RCW 9.94A.530(2) (as modified by *Hunley*) and the Supreme Court's *Ammons* decision. Under these authorities, the prosecution must meet its burden to prove criminal history even if the defendant doesn't dispute the prosecutor's allegations; when the defendant *does* dispute the allegations, the prosecutor's burden increases. *See, e.g, Ammons, at* 190; RCW 9.94A.530(2); *Hunley, at* 927.

F. The prosecution failed to produce sufficient evidence to connect the alleged prior "strike" convictions to Mr. Maddaus.

In this case, the prosecution produced no evidence beyond identity of names to prove that the person named in the documents submitted to the court was the same Robert Maddaus who appeared in court.[74] Even if all of the documents pertained to one person, no evidence—such as

[74] Instead, as outlined above, the prosecutor relied on counsel's agreement—in response to a direct question from the bench—that there was no "dispute" as to criminal history. RP (2/8/11) 124.

testimony regarding Mr. Maddaus's birth date, ID number, or fingerprints—was introduced establishing that the documents pertained to the same Robert Maddaus who was convicted by the jury in this case. Because the evidence was insufficient, Mr. Maddaus's life sentence must be vacated and the case remanded for sentencing within the standard range. *In re Cadwallader*, 155 Wash.2d 867, 878, 123 P.3d 456 (2005).

XV. THE ARBITRARY CLASSIFICATION OF PRIOR CONVICTIONS AS "ELEMENTS" IN SOME CIRCUMSTANCES AND AS "SENTENCING FACTORS" IN OTHER CIRCUMSTANCES VIOLATES EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT AND WASH. CONST. ARTICLE I, SECTION 12.

A. Standard of Review

Constitutional violations are reviewed *de novo,* and may be reviewed for the first time on appeal if they had practical and identifiable consequences at trial.[75] *Schaler, at* 282; *Nguyen*, *at* 433; RAP 2.5(a)(3).

B. Equal protection guarantees like treatment for people who are similarly situated with respect to the law's purpose.

Equal protection requires that people who appear to be similarly situated must be treated alike. U.S. Const. Amend. XIV; Wash. Const. Article I, Section 12; *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *State v. Thorne,* 129 Wash.2d 736, 770-771, 921 P.2d 514 (1996). A statutory classification that implicates physical liberty is subject to rational basis

[75] The court also has discretion to review any issue argued for the first time on review.
(*Continued*)

scrutiny. *Thorne, at* 771.

Under the rational basis test, a statute is constitutional if (1) the legislation applies alike to all persons within a designated class; (2) reasonable grounds exist for distinguishing between those who fall within the class and those who do not; and (3) the classification has a rational relationship to the purpose of the legislation. A classification which is "purely arbitrary" violates equal protection. *State v. Smith*, 117 Wash.2d 117, 263, 279, 814 P.2d 652 (1991) (*Smith* II).

Where a prior conviction "alters the crime that may be charged," the prior conviction "is an essential element that must be proved beyond a reasonable doubt." *State v. Roswell*, 165 Wash.2d 186, 192, 196 P.3d 705 (2008). If a prior conviction elevates an offense from one offense category to another (i.e. from a misdemeanor to a felony), it "actually alters the crime" charged. *Id.* Under such circumstances, the prior conviction is an element and must be proven to the jury beyond a reasonable doubt. *Id.*

In *Roswell*, the defendant was charged with Communication with a Minor for Immoral Purposes under RCW 9.68A.090. The offense is a gross misdemeanor, unless the accused person has a prior felony sex offense conviction, in which case the charge is elevated to a felony.

Russell, *at* 122.

Roswell, at 190. The prior conviction is an element which the state must prove beyond a reasonable doubt. *Id, at* 192-194.

C. Equal protection requires that Mr. Maddaus be provided the same procedural protections as the defendant in *Roswell.*

Mr. Maddaus and the defendant in *Roswell* are similarly situated. First, as in *Roswell,* Mr. Maddaus's prior convictions elevated his offense from one category (a class B felony with a maximum punishment of ten years in prison) to another (a "super-felony," more serious than a mere Class A felony, with a mandatory penalty of life in prison without the possibility of parole). Second, as in *Roswell,* the purpose of proving prior convictions is to punish persistent offenders more harshly and to protect the public for a longer period of time.

There is no rational basis to provide greater procedural protections to offenders whose crimes are elevated from misdemeanor to felony (such as the defendant in *Roswell*), than to those offenders whose crimes are elevated from a class B felony to a "super-felony" (punished by a mandatory life sentence without the possibility of parole). *Smith* II, *at* 263. Nor is there a rational basis for classifying an offender's recidivism as an 'element' in certain circumstances and an 'aggravator' in others. *Id.*

Despite this, Mr. Maddaus did not receive the same treatment guaranteed those offenders impacted by the *Roswell* case. That is, he was not afforded a jury trial and the requirement of proof beyond a reasonable

doubt prior to being sentenced for the more serious crime of being a persistent offender. Mr. Maddaus's prior "strike" offenses operate in the precise fashion as the prior felony sex offense in *Roswell*. There is no basis for treating the prior conviction as an "element" in *Roswell*– with the attendant due process safeguards afforded "elements" of a crime – and as an "aggravator" in this instance. *Smith* II, *supra.*

Mr. Maddaus was denied the equal protection of the law. As a result, his persistent offender sentence must be vacated, and the case remanded for a new sentencing hearing. *Roswell, supra; Smith* II, *supra.*

D. This Court should not follow Division I's decision in *Langstead.*

Division I's recent opinion *Langstead* was wrongly decided, and should not be followed by Division II. *State v. Langstead*, 155 Wash.App. 448, 453-457, 228 P.3d 799 (2010). In *Langstead,* Division I concluded that persistent offenders "are not situated similarly to recidivists like Roswell." *Id, at* 456. The distinguishing characteristic, according to Division I, is that any crime that qualifies as a 'most serious offense' is a felony regardless of the offender's criminal history, while the communication charge in *Roswell* became a felony only upon proof of a prior conviction. *Id, at* 456-457. Because of this, Division I concluded, "recidivists whose conduct is inherently culpable enough to incur a felony sanction are, as a group, rationally distinguishable from persons whose

conduct is felonious only if preceded by a prior conviction for the same or a similar offense." *Id.*

This approach erroneously prioritizes the label assigned to offenses (misdemeanor or felony) over the actual, substantial difference in penalty. The penalty difference between a misdemeanor and a class C felony (one year for the former and five years for the latter) is constitutionally less significant than the difference between a class B felony (ten years maximum) and a "super-felony" (mandatory punishment of life without possibility of parole). Furthermore, under the *Langstead* approach, the legislature could circumvent the constitutionally-based rule in *Roswell* simply be redefining the term 'misdemeanor' to include crimes punishable by up to 5 years (or 10 years, or life) in prison, and reclassifying some—or even all—felony offenses as misdemeanors.

This Court should reject the *Langstead* approach and apply *Roswell* to Mr. Maddaus's case. His sentence must be vacated and the case remanded for a new sentencing proceeding, at which the prosecution will have an opportunity to prove to a jury beyond a reasonable doubt that Mr. Maddaus has two prior qualifying offenses. *Roswell, supra.*

XVI. MR. MADDAUS'S LIFE SENTENCE VIOLATED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A JURY DETERMINATION, BEYOND A REASONABLE DOUBT, THAT HE HAD TWO PRIOR QUALIFYING CONVICTIONS.

A. Any fact which increases the penalty for a crime must be found by a jury beyond a reasonable doubt.

The Sixth and Fourteenth Amendments guarantee an accused person the right to a trial by jury. U.S. Const. Amend. VI; U.S. Const. Amend. XIV; *Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). Any fact which increases the penalty for a crime must be found by a jury. *Blakely, supra*. This principle extends to facts labeled "sentencing factors" if those facts increase the maximum penalty. *Blakely, supra; Apprendi, at* 466, 490; *see also Ring v. Arizona,* 536 U.S. 584, 609, 122 S.Ct. 2428, 153 Ed.2d 556 (2002).

Arbitrary distinctions between sentencing factors and elements of the crime do not diminish the accused person's constitutional rights: "Merely using the label 'sentence enhancement'... does not provide a principled basis for treating [sentencing factors and elements] differently." *Apprendi, at* 476. The dispositive question is one of substance, not form: "If a State makes an increase in defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Ring, at* 602 (citing *Apprendi, at* 482-83).

B. *Almendarez-Torres* does not control Mr. Maddaus's case.

The U.S. Supreme Court has held that the prosecution need not allege prior convictions in a charging document, even if an accused person's criminal history increases the standard sentencing range. *Almendarez-Torres v. United States,* 523 U.S. 224, 246, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998).[76] The Washington Supreme Court has made note of the U.S. Supreme Court's failure to embrace the *Almendarez-Torres* decision in the wake of more recent decisions. *Smith* I (addressing *Ring*) *cert. denied sub nom Smith v. Washington,* 541 U.S. 909, 124 S.Ct. 1616, 158 L.Ed.2d 256 (2004) ("*Smith* III"); *State v. Wheeler,* 145 Wash.2d 116, 121-24, 34 P.2d 799 (2001) (addressing *Apprendi*). The Washington Supreme Court, however, has felt obligated to "follow" *Almendarez-Torres*. *Smith* III, *at* 143; *Wheeler*, *at* 123-24.

However, *Almendarez-Torres* does not control under the circumstances here. First, it does not address an offender's rights when the government seeks to change a crime from one punished by a determinate term with the possibility of early release to one punished by life in prison without the possibility of parole.

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[76] The *Almendarez-Torres* decision was based on four factors: (1) recidivism is a traditional basis for increasing an offender's sentence, (2) the increased statutory maximum was not binding upon the sentencing judge, (3) the procedure was not unfair because it created a broad permissive sentencing range, allowing for the exercise of judicial discretion, and (4) the statue did not change a pre-existing definition of the crime; thus Congress did not try to

(*Continued*)

Second, Washington has historically required a jury determination of prior convictions before a habitual offender sentence is given. *Manussier, at* 690-91 (Madsen, J., dissenting); *State v. Furth*, 5 Wash.2d 1, 18, 104 P.2d 925 (1940).

Third, *Almendarez-Torres* addresses only the requirement that elements be pled in the charging document; it does not address the burden of proof or jury trial right.[77] *Almendarez-Torres, at* 243-45. *Almendarez-Torres* is solely a Fifth Amendment charging case, and the Court explicitly reserved ruling on whether or not an offender had a right to a jury trial or to proof beyond a reasonable doubt. *Id, at* 248 ("we express no view on whether some heightened standard of proof might apply" at sentencing). Thus *Almendarez-Torres's* applicability is limited in Mr. Maddaus's case.

Fourth, the statute at issue in *Almendarez-Torres* (which expanded the permissive sentencing range) did "not itself create significantly greater unfairness" for the offender. This is because judges traditionally exercise discretion within broad statutory ranges. *Id, at* 245. Here, by contrast, Mr. Maddaus's prior convictions led to a mandatory sentence much higher than the maximum sentence under the sentencing guidelines. RCW 9.94A.570. Under the POAA, judicial discretion is eliminated for people

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"evade" the Constitution. *Almendarez-Torres, at* 244-45.

with Mr. Maddaus's criminal history.

For all these reasons, *Almendarez-Torres* does not apply to Mr. Maddaus's case. Under the logic of *Blakely,* he was entitled to a jury determination of his qualifying prior convictions, with proof beyond a reasonable doubt. Accordingly, his sentence must be vacated and the case remanded for a new sentencing hearing. *Blakely, supra.*

XVII. THE IMPOSITION OF A LIFE SENTENCE WITHOUT POSSIBILITY OF PAROLE VIOLATED MR. MADDAUS'S STATE CONSTITUTIONAL RIGHT TO DUE PROCESS.

A. Standard of Review

Constitutional violations are reviewed *de novo,* and may be reviewed for the first time on appeal if they had practical and identifiable consequences at trial.[78] *Schaler, at* 282; *Nguyen, at* 433; RAP 2.5(a)(3).

B. Article I, Section 3 requires, at minimum, that criminal procedures in Washington satisfy the balancing test used to evaluate government procedures affecting civil interests.

Wash. Const. Article I, Section 3 provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law." To determine whether existing procedures are constitutionally adequate to protect private interests in the civil arena, courts consider three factors. *Post v. City of Tacoma*, 167 Wash.2d 300, 313, 217 P.3d 1179 (2009)

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[77] The same is true of cases cited by the *Almendarez-Torres* Court.

[78] The court also has discretion to review any issue argued for the first time on review. Russell, *at* 122.

(citing *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). These include (1) the private interest at stake, (2) the risk of erroneous deprivation under the existing procedure and the probable value of additional or substitute procedures, and (3) the government's interest in maintaining the existing procedure. *Id.*

Although the state and federal rights to due process are generally coextensive, the Washington Supreme Court has, on occasion, found differences between the two.[79] *See, e.g., State v. Bartholomew*, 101 Wash.2d 631, 639-640, 683 P.2d 1079 (1984). Because Article I, Section 3 does not implicate federalism concerns, the *Patterson* standard is not an appropriate vehicle for Washington courts to test state criminal procedures against the state constitution's due process clause. Instead, *Gunwall* analysis suggests that criminal procedures must, at minimum, satisfy the

[79] Under the federal constitution, *Eldridge* does not provide the appropriate framework for analyzing state criminal procedures. *State v. Heddrick*, 166 Wash.2d 898, 904, n. 3, 215 P.3d 201 (2009) (citing *Medina v. California*, 505 U.S. 437, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992)). This is primarily a result of federalism: the U.S. Supreme Court has no desire to become "'a rule-making organ for the promulgation of state rules of criminal procedure.'" *Medina, at* 444 (quoting *Spencer v. Texas*, 385 U.S. 554, 564, 87 S.Ct. 648, 653, 17 L.Ed.2d 606 (1967)). This concern about intruding too heavily into a state arena persuaded the U.S. Supreme Court to adopt a far more deferential standard when evaluating state criminal procedures. *Medina, at* 445-446 (citing *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977)). Under that test, a federal court will not invalidate a state criminal procedure on due process grounds "unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Patterson, at* 201-202 (citations omitted).

balancing framework set forth in *Eldridge*,[80] in order to comport with procedural due process under the state constitution.[81]

The language of the state constitutional provision. Article I, Section 3 provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law." The strong, simple, and direct language suggests the framers were concerned with ensuring the rights of the individual. At the same time, the provision recognizes that deprivation of life, liberty, or property will at times be necessary. The provision focuses on balancing the rights of the individual against the needs of the government. Because of this, a balancing test such as *Eldridge* outlines is appropriate for determining the process due in a particular instance.

Comparison with federal provision. Although the state and federal constitutions include identical language, this does not end the inquiry. Instead, independent analysis under the state constitution is appropriate where federal court decisions are not grounded in logic,

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[80] Washington courts have consistently refused to directly apply *Apprendi* and *Blakely* to prior convictions, even in persistent offender cases. *See Thiefault*, *at* 418; *see also Langstead*, *at* 452-453. No published opinion in Washington has examined persistent offender sentencing under the balancing test outlined in this section.

[81] *Gunwall* analysis is not strictly necessary in this case, because Mr. Maddaus is arguing for application of the traditional federal standard for evaluating the constitutionality of a procedure under the federal due process clause. The U.S. Supreme Court's decision adopting the *Patterson* standard for state criminal court procedures in place of the traditional balancing test was based on federalism considerations that are inapplicable here. This is so because Mr. Maddaus's challenge involves a state court reviewing its own state's criminal procedures.

reason, precedent, and the policies underlying the specific constitutional guarantee at issue. *State v. Davis*, 38 Wash.App. 600, 605 n. 4, 686 P.2d 1143 (1984) ("*Davis* II"). Furthermore, state constitutional provisions other than the one analyzed "may require" that the provision in question "be interpreted differently" from its federal counterpart. *Gunwall, at* 61.

State constitutional and common law history. No legislative history from the constitutional convention suggests that the state and federal due process clauses are coextensive. Nor does common law history pose a barrier to an independent application of the state constitution.

Preexisting state law. Traditionally, recidivism in Washington under the Habitual Offender statute required proof to a jury beyond a reasonable doubt. *Furth, at* 11; *but see Smith* I, *at* 144-146. This mitigates in favor of the result sought by Mr. Maddaus. In addition, Washington courts are accustomed to applying balancing tests to criminal cases in a variety of contexts. *See, e.g., State v. Osman*, 168 Wash.2d 632, 640, 229 P.3d 729 (2010) (outlining situations in which courts balance competing interests); *State v. Bone-Club*, 128 Wash.2d 254, 259, 906 P.2d 325 (1995) (court must weigh competing interests prior to ordering courtroom closure). This weighs in favor of the procedure urged by Mr. Maddaus.

Structural differences between federal and state constitutions. The fifth *Gunwall* factor always points toward pursuing an independent

state constitutional analysis. *Young* II, *at* 180. Thus factor five favors Mr. Maddaus's position.

Particular state interest. State criminal procedure is a matter of local concern, as the U.S. Supreme Court noted in *Medina, supra.*

Accordingly, *Gunwall* analysis suggests that criminal procedures in Washington should be evaluated under the balancing test traditionally applied to civil cases under *Eldridge.*

C. Under the minimal due process balancing test used to protect civil interests, imposition of a life sentence is unconstitutional absent proof to a jury, beyond a reasonable doubt, that the offender qualifies as a persistent offender.

Under current practice, offenders are sentenced to prison for life (without possibility of parole) upon a judicial finding of two prior "strikes," using a preponderance of the evidence standard. *See, e.g., State v. Thiefault*, 160 Wash.2d 409, 418, 158 P.3d 580 (2007). But due process requires the government to satisfy a more stringent standard of proof, and demands fact-finding by a jury rather than a judge.

First, in *any* case leading to incarceration, the private interest at stake is that "most elemental of liberty interests," freedom from confinement; this interest has been described as "almost uniquely compelling." *Hamdi v. Rumsfeld*, 542 U.S. 507, 530, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004); *Ake v. Oklahoma*, 470 U.S. 68, 78, 105 S.Ct. 1087,

84 L.Ed.2d 53 (1985). When the term of imprisonment consists of life without possibility of parole, the private interest at stake weighs heavily in favor of providing additional procedural safeguards:

> [L]ife without parole is the second most severe penalty permitted by law. It is true that a death sentence is unique in its severity and irrevocability; yet life without parole sentences share some characteristics with death sentences that are shared by no other sentences...[T]he sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration...

Graham, *at* ___ (quotation marks and citations omitted).

Second, under the current procedure—judicial factfinding by only a preponderance of the evidence—the risk of an erroneous life term is not insignificant. By focusing on the quantity (rather than the quality) of the evidence, the current standard of proof "may misdirect the factfinder in the marginal case." *Santosky v. Kramer*, 455 U.S. 745, 764, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (citing *Winship*, *at* 371, n. 3 (Harlan, J., concurring)). The possibility of even occasional error mitigates in favor of a higher standard of proof. *See, e.g., United States v. Ruiz-Gaxiola*, 623 F.3d 684, 691-692 (9th Cir. 2010) (requiring a clear and convincing standard to protect the "significant liberty interests" implicated by an involuntary medication order).

Similarly, a jury of twelve might be better suited than a judge to resolve the disputed facts that arise at sentencing in a persistent offender

case. Juries are accustomed to finding the kinds of historical facts at issue in persistent offender sentencing hearings, including, for example: (1) the existence of the prior conviction, (2) the identity of the person previously convicted, or (3) the timing of the prior conviction in relation to the current offense and other "strike" offenses.

Third, the state has a strong interest in ensuring that only those offenders who actually qualify for life sentences under the statute receive them. This interest derives from the inherent prosecutorial commitment to justice[82] and from the state's need to allocate scarce prison resources to those offenders who actually qualify for life-long detention. This interest weighs in favor of the improved procedures.

On the other side of the equation are (1) the relatively minor costs required to present additional proof (to satisfy the higher evidentiary standard),[83] (2) the cost of convening a jury to decide facts in contested sentencing cases, and (3) the cost to society of allowing some offenders to serve only their standard range, even when they might have been in custody for life without parole if current procedures remained in effect.

On balance, the government's interest in maintaining the current

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[82] *See, e.g., Warren at* 27 ("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") *and* RPC 3.8.

[83] Because hearsay is generally admissible at sentencing, the state could theoretically establish prior convictions beyond a reasonable doubt without the need for live testimony.

procedure is minimal at best. This minimal interest is further reduced when weighed against the benefit that would accrue to the government following a change in procedure.

The enormous significance of the private interest in persistent offender cases, the likely benefits of additional procedural protections, and the government's minimal interest in maintaining the current procedure, all weigh in favor of requiring a jury to find facts beyond a reasonable doubt before a life sentence can be imposed. Article I, Section 3; *Post, supra.* The current procedure (under which Mr. Maddaus was sentenced) violates due process. His sentence must be vacated and the case remanded for a new sentencing hearing. *Id.*

CONCLUSION

For the foregoing reasons, Mr. Maddaus's convictions must be reversed. Counts VI and VII must be dismissed with prejudice, and the remaining counts must be remanded for a new trial, with instructions to avoid the errors set forth in this brief.

Respectfully submitted on September 27, 2011.

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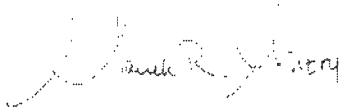

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

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and that I filed it electronically with the Court of Appeals, Division II, through the Court's online filing system on the same date

and that I had the document sent electronically to the Thurston County Prosecutor through the Court's online system on the same date.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 27, 2011.

Jodi R. Backlund, WSBA No. 22917
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