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I. STATEMENT OF THE CASE

For purposes of this motion, the Respondent adopts the Appellant's recitation of the facts as set forth in his statement of the case, with such additions as noted below in argument.

II. ARGUMENT

A. **RCW 69.50.408 requires the statutory maximum terms automatically become twice as long as would otherwise be authorized for a crime.**

RCW 69.50.408(1) states:

“Any person convicted of a second or subsequent offense under this chapter may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.”

It appears RCW 69.50.408 is neither discretionary nor a sentence enhancement, but rather a provision that automatically doubles the statutory maximum sentence for convictions under 69.50 when the defendant has a prior conviction under that statute. The Respondent concedes the record does not adequately establish that the Appellant's waiver of counsel was knowing and voluntary due to the trial court's failure to inform him of his maximum penalty on conviction.

- B. The prosecutor abided by the court's discovery order. Due process was not denied when the state possessed information that Calvin Brown was a confidential and reliable informant and the Appellant did not request disclosure of the confidential and reliable informant nor was disclosure material to the stated defense. The trial court did not abuse its discretion in concluding such.**

On January 26, 2005, following the Appellant's waiver of counsel and electing to proceed pro se, the Appellant claimed a jailhouse interview had taken place with Calvin Brown regarding the charges faced by the defendant. 10RP 194. The State responded it was aware who Calvin Brown was, but was unaware of his involvement in the case and did not intend on calling Calvin Brown as a witness. 10RP 194. The trial court ordered the State to send an email to the officers involved and see if there "was any statement from a Calvin Brown that has to do with this case." 10RP 195. The court then instructed if a statement from Calvin Brown exists the State must "make a determination whether that's discoverable." 10RP 195, CP 415. On February 15, 2005, one day prior to commencement of trial, the trial court held a hearing at the Appellant's request in order for the court to issue necessary subpoenas for the defense. 13RP 228. During the hearing, the Appellant disclosed his defense theory that he had vacated the storage unit in February, 2004 and that loose security at the facility left others the opportunity to access the storage unit.

13RP 229-231, 236-237, CP 415-416. No other information was presented by the Appellant regarding his defense theory. CP 416. Prior to commencement of the February 16, 2005 trial, the prosecution did not disclose Calvin Brown's involvement due to his status of confidential informant. CP 416. At trial, Sandra Gray, the Appellant's on-again/off-again girlfriend at the time, testified she allowed Calvin Brown access to storage unit #49 on February 6, 2004 in exchange for \$40. CP 416. Further, Roger Womack testified he assisted the Appellant in moving out of the storage unit at the end of January. 15RPB 793. The Appellant was subsequently convicted on February 18, 2006. CP 416.

On June 22, 2005, following several confusing post-conviction motions by the Appellant, an in camera hearing was held at the State's request in response to the trial court's inquiry into **any** involvement Calvin Brown had with the case. CP 416. At this hearing the State revealed to the trial court, Calvin Brown's identity as the confidential informant. CP 416. At the time Calvin Brown provided the confidential information, he implicated the Appellant as running the methamphetamine lab in the storage unit. CP 416. The trial court held that had Calvin Brown's identity as the confidential informant been revealed to the defense, it would not have been reasonably probable that the outcome of the trial would have

been different because the defendant was able to present his theory that Calvin Brown was the true perpetrator. CP 417. Secondly, the court held the informant's identity was not admissible under the informant privilege and therefore not admissible to support the Appellant's claim that Calvin Brown occupied storage unit #49 following the Appellant's departure. CP 417.

1. Disclosure was not warranted under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) as it was not material to the stated defense.

Due process requires the State to disclose evidence that is both favorable to the accused and material either to guilt or to punishment. In re PRP Gentry, 137 Wn.2d 378, 396, 972 P.2d 1250, 1260 (1999) (citing United States v. Bagley, 473 U.S. 667, 674, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)). In Bagley, the US Supreme Court reformulated the Agurs standards relied upon by the Appellant such that evidence is material and therefore must be disclosed under Brady "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. (citing Bagley, 473 U.S. at 682; In Re PRP Benn, 134 Wn.2d 868, 916, 952 P.2d 116 (1998)); In applying this reasonable probability standard, the question is not whether

the defendant more likely than not would have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. Id. (citing Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); Benn, 134 Wn.2d at 916).

Under Brady, due process is violated when, irrespective of good faith, the prosecution suppresses material evidence favorable to a defendant. Brady, 373 U.S. at 87. There are three components of a Brady violation: the evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching; the evidence must have been suppressed by the State, either willfully or inadvertently; and the evidence must be material, that is, suppression of the evidence must have resulted in prejudice to the accused. Strickler v. Greene, 527 U.S. 263, 281, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). Prejudice occurs "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. at 280. To be material, therefore, the evidence must be such that it undermines confidence in the outcome. Benn v. Lambert, 283 F.3d 1040, cert. denied, 537 U.S. 942, 123 S. Ct. 341, 154 L.Ed.2d 249 (9th Cir. 2002). Prejudice is determined

by analyzing the evidence withheld in light of the entire record. Id., at 1053.

The scope of discovery in criminal proceedings is a matter within the discretion of the trial court. State v. Blackwell, 120 Wn.2d 822, 826, 845 P.2d 1017 (1993). "The general rule with regard to whether or not a trial court will hold an in camera hearing to determine the scope of discovery of privileged records is that the decision is within the discretion of the trial court." State v. Diemel, 81 Wn. App. 464, 467, 914 P.2d 779 (1996). Judicial discretion is abused if exercised on untenable grounds or for untenable reasons. State v. Lawrence, 108 Wn. App. 226, 233, 31 P.3d 1198 (2001).

First, disclosure of Calvin Brown as the confidential informant is not favorable to the Appellant as it is not exculpatory or impeaching. It merely demonstrates that the Calvin Brown was aware of the Appellant's methamphetamine lab contained in storage unit #49. This knowledge came at a time the Appellant himself claims to have occupied storage unit #49. Secondly, while the State did elect to not disclose the information to the Appellant, it was because the information was not material to the Appellant and the Appellant had not requested disclosure of the informant. CP 416, 418. The trial court found that the identity of the informant was

not material as it was not reasonably probable that the results of the proceedings would have been different absent a request to disclose the informant. CP 417. Prior to trial, the defense stated the Appellant moved his belongings out of storage unit #49 in February, 2004 and that loose security could have allowed others access to the unit. At the time the confidential information was provided to law enforcement, the Appellant still occupied storage unit #49. Calvin Brown's identity as the informant was not material to that stated defense. The relevant time period of the Appellant's defense was following his departure from storage unit #49 in early February, 2004 until law enforcement secured the unit on February 15, 2004. Calvin Brown provided his statements within January 13-15, 2004. Third, the trial court held the Appellant was not prejudiced by the State's non-disclosure of Calvin Brown as the informant. The trial court held Calvin Brown's role as the informant was not admissible, under the informant privilege, and therefore not admissible to support the Appellant's claim that Calvin Brown occupied storage unit #49 following the Appellant's departure. CP 417.

The fact that Calvin Brown provided confidential information as an informant sometime within January 13-15 was not material to the Appellant's defense. The prosecution did not possess any exculpatory

evidence from the relevant time period that was not already disclosed to the Appellant. The informant's identity was not material. The Appellant received a fair trial. The trial court was proper in concluding as such. The trial court did not abuse its discretion.

2. The defense did not request disclosure of the identity of the confidential and reliable informant.

In general, the government is privileged to refuse to disclose the identity of informants who provide information of criminal violations.

State v. Petrina, 73 Wn. App. 779, 783, 871 P.2d 637, 639 (1994) (citing Rovario v. United States, 353 U.S. 53, 77 S. Ct. 623, 59 1 L. Ed. 2d 639 (1957)). In Washington, the privilege is codified at CrR 4.7(f)(2), which states:

“Disclosure of an informant’s identity shall not be required where the informant’s identity is a prosecution secret and a failure to disclose will not infringe on the constitutional rights of the defendant. Disclosure of the identity of witnesses to be produced at a hearing or trial shall not be denied.”

Id.

The purpose of this privilege is to further effective law enforcement and to encourage individuals to report criminal activity. Petrina, 73 Wn. App. at 783. The public interest in encouraging the free flow of information therefore "imposes unique procedural requirements and evidentiary burdens on the defendant . . ." United States v. Kiser, 716

F.2d 1268, 1271 (9th Cir. 1983). Disclosure should be denied without a hearing unless there is a preliminary showing, putting in issue the existence of the informant or the information given, or that police have relied on information they knew was patently unreliable. State v. Haywood, 38 Wn. App. 117; 684 P.2d 1337 (1984) (citing United States v. Danesi, 342 F. Supp. 889 (D. Conn. 1972); Rihl v. State, Ind. App., 413 N.E.2d 1046 (1980); Commonwealth v. Abdelnour, 11 Mass. App. Ct. 531, 534, 417 N.E.2d 463, 465 (1981); State v. Wright, 266 Or. 163, 511 P.2d 1223, 1225 (1973)). If the court is satisfied such a showing has been made, an in camera hearing may be held to investigate the defendant's claims. The court's determination will be reviewed only for an abuse of discretion. Id.

A **defendant's request** for disclosure raises constitutional issues of fundamental fairness and due process. Petrina, 73 Wn. App. at 783 (emphasis added). When a **defendant moves** to disclose an informant, “the trial court must balance the public interest in protecting the flow of information against an individual’s right to prepare his defense” in determining whether to disclose the informant. Id. (emphasis added). In doing so, the trial court must consider the facts of the case before it: the crime charged, possible defenses, the possible significance of the

informant's testimony, and other relevant factors. Petrina, 73 Wn. App at 784. The **burden is on the defendant** to overcome the government's privilege to withhold from disclosure the identity of an informant by showing that the above standards require disclosure. Id (citing State v. Massey, 68 Wn.2d 88, 92, 411, P.2d 422 (1966) (emphasis added).

Disclosure of an informant is only required when the informant's identity is relevant and helpful to the defense or essential to a fair determination of the charge. State v. Salazar, 59 Wn. App. 202, 214, 796 P. 2d 773, 780 (1990). If a court is to order an informant's identity revealed, the defendant bears the burden of showing the disclosure is required. Petrina, 73 Wn. App. at 784. Generally, the preferred procedure for making the determination is an in camera hearing. Salazar, 59 Wn. App at 214. No hearing is necessary, however, if the accused's reasons for seeking the informant's testimony are only speculative... Id.

Here, the record reveals the Appellant never requested disclosure of the informant. At the November 12, 2004 omnibus hearing, the Appellant submitted to the prosecution an Omnibus Application By Defendant. Question #14 requested the State to "state the name and address of the informant or claim privilege." CP 11. In response, the State claimed privilege. CP 6. Prior to proceeding pro se on January 26, 2005,

the Appellant was assigned counsel. At a December 28, 2004 hearing, the defense stated it was interested in an in-camera review regarding disclosure of the informant. 6RP 46-47. The trial court ordered the defense to make a motion to disclose the informant if they wished to proceed. 6RP 51. At the December 30, 2004 hearing, the defense changed tactics and stated it had decided requesting disclosure of the informant was not appropriate in this case. 7RP 66. After electing to proceed pro se, the Appellant requested that any evidence or information regarding Calvin Brown, **unless privileged**, be turned over to the defense. 11RP 211.

Clearly, the defense was informed of the State's desire to not reveal the identity of the informant as privilege was claimed. Not only did the State claim privilege, but the defense expressed its lack of desire to seek disclosure of the informant at the December 30, 2004 hearing. Subsequently, the Appellant, after proceeding pro se, requested all information regarding Calvin Brown, unless privileged. Not only did the Appellant concede privileged information was not to be included in discovery, but his request for any information or evidence regarding Calvin Brown was speculative as it asks for all information in a shotgun approach to elicit anything potentially useful outside of the stated defense. Finally, the trial court refused to provide the informant's identity to the

Appellant following the in camera hearing brought at the State's request.

The trial court did not abuse its discretion.

C. The trial court properly found the Appellant's motion for new trial or dismissal was without merit as the prosecutor's rebuttal closing argument did not contain a false statement of material fact to the tribunal. Prosecutorial misconduct did not occur.

A trial court's ruling on a claim of prosecutorial misconduct is reviewed under an abuse of discretion standard. State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830, 843 (2003) (citing State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999)). A trial court's denial of a motion for a new trial will not be reversed on appeal unless there is a clear showing of abuse of discretion. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). An abuse of discretion occurs when no reasonable judge would have reached the same conclusion. Id.

On May 26, 2005, a CrR 7.5 motion for new trial or dismissal was held in which the Appellant requested a new trial. At this hearing the Appellant presented 15 separate issues to the court, all of which were denied. CP 193-223, CP 364-365. Of note is issue #13 which claims prosecutorial misconduct occurred in the State's rebuttal closing. CP 220. The Appellant argued the prosecution claimed misconduct occurred when the prosecutor stated Calvin Brown did not exist, much like he does here.

CP 220. The State responded that the argument was in the context that Calvin Brown never existed as a renter of storage unit #49 following the Appellant's departure, as claimed by the Appellant. 21RP 1137. The court heard the motion and denied it, finding the Appellant's claim was without merit and concluding no prosecutorial misconduct occurred. CP 365, 366. The trial court did not abuse its discretion as a reasonable magistrate could come to a similar conclusion.

In several pre-trial requests to the court, the Appellant requested any information regarding Calvin Brown. In response, the state stated on several occasions that it was aware of Calvin Brown's existence. On January 26, 2005 the Appellant requested evidence of a jailhouse interview with Calvin Brown. 10RP 194. The prosecutor responded: "...I don't know anything about a Calvin Brown. I know who Calvin Brown is but there is no Calvin Brown connected to this case." 10RP 194. On February 3, 2005, the prosecutor states "I know who Mr. Brown is. I've prosecuted him in the past, and Mr. Brown currently is in prison." 11RP 210. Clearly, the State made it very clear that Calvin Brown existed and was aware of who he was.

In initial closing argument, the State did not address the Appellant's defense that Calvin was responsible for the evidence located

in storage unit #49. Only in the Appellant's closing argument was mention made of a person leasing storage unit #49 from Sandra Gray. 16RP 885, 893, 899, 908, 909, 920. The Appellant then spends the remainder of his closing attempting to position the evidence submitted in such a manner that it shows someone else was responsible for the contents of storage unit #49. The State responded to this argument in rebuttal closing argument by examining the inconsistencies of Gray's testimony. The argument is as follows:

"His defense is some other dude did it. Calvin did it. Who's Calvin? What does Calvin do?...Sandra Gray was up here. You heard Sandra Gray's story. Sandra Gray told you that she and the defendant broke up. We have dates when this occurred.

Defendant relies quite a bit on the time line. I didn't see a time line, I never heard one date about when the breakup occurred. The only thing I heard being elicited was, Do you remember Valentine's Day? That's all. There was no time line involved here.

Sandra Gray testified that she and the defendant broke up and that she rented the storage unit to Calvin. Do we know who Calvin is? I don't think so.

Sandra Gray also testified that she had Calvin take the defendant's personal effects, his photo albums, take 'em to the storage unit. That's how the defendant's stuff got there.

Well, she also testified that Calvin gave her two \$20 bills. However, I want you to recall what else Sandra Gray said. Sandra Gray said she couldn't even really remember what happened yesterday, much less a year ago, yet she is able to tell you those are the photo albums?

Oh yeah, he gave me two \$20 bills for the \$40. She stated she couldn't even remember what happened the day before, but she remembers the denominations of currency that was given to her.

Ladies and gentlemen, I submit to you that Calvin never existed, that those --- **what Sandra Gray testified to never took place**. You can determine that by Ms. Gray's credibility. I don't think I need to go into the statements that Ms. Gray made a year ago, that she made last December, that she made last month and she made yesterday, because she told you the statements she has made throughout the entire process have been falsehoods.... I submit to you that Ms. Gray is not a credible witness and that you can toss out everything that she said here..."

16RP 934-935 (emphasis added).

Where prosecutorial misconduct is claimed, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). To establish prejudice, the defense must demonstrate there is a substantial likelihood the misconduct affected the jury's verdict. State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). The Appellant has not done so.

In our present situation, one must look to the entire record to become familiar with the complete argument, the issues in the case, the evidence addressed in the argument, the instructions given to the jury, and the Appellant's lack of objection.

As stated above, the Appellant called Sandra Gray as a witness. Ms. Gray testified that she allowed “Calvin” to occupy storage unit #49 on February 6, 2004. 15BRP 684, 693, 699. A thorough review of the record of direct examination reveals Ms. Gray to be confused and unsure of several facts. During cross-examination, Ms. Gray stated she still loved the Appellant, “lied” to police, spoke to the Appellant about this case prior to trial, and admitted that shortly after the search warrant was executed she told police the Appellant was responsible for the contents of storage unit #49. 15BRP 740, 750, 741, 743. Additionally, Gray stated her memory was not fresh, has difficulty remembering the prior day, that her statement has changed every time she has been interviewed, and admitted her story had continued to change. 15BRP 745, 746, 750.

Further, under cross-examination Gray was asked a series of questions regarding Calvin’s use of storage unit #49:

Q. Now, when you were first speaking with officer(s) and making a statement, you never mentioned anything about this Calvin, did you?

A. I don’t remember what I mentioned. I mentioned what they were leading me to say.

Q. Okay. And that’s because this **Calvin never really existed in storage unit #49**, did he?

A. No, actually, Calvin did exist in unit #49 and in the same unit. He had a storage unit in the same hall.

Q. Okay. So now you’re saying --- you’ve been untruthful with the officers, and now you’re saying ---

A. (Inaudible)

Q. --- you're being truthful when you're talking about Calvin using the ---

A. Ab-

Q. --- storage unit #49?

A. Absolutely. You can – I don't expect anybody to ---

Q. Okay. Thank you ---

A. --- believe me.

15BRP 750-751 (emphasis added).

This exchange was followed up with several inconsistent statements by Gray. For example, Gray stated she was not aware the Appellant had moved out of the unit until she went to storage unit #49, following the Appellants departure, to pick something up. 15BRP 763. Gray was then presented with prior inconsistent statements where she claimed she had only been to the unit a total of three times to fetch and drop off the Appellant's laundry. 15BRP 765. Obviously, the defense relied on Gray's testimony that the Appellant had vacated storage unit #49 in order to demonstrate how Gray knew the unit was available to rent when approached by Calvin. However, the inconsistent statement demonstrates that this extremely important fact was not mentioned in prior interviews as Gray, when asked, did not claim to have been at the unit on that occasion. Gray admitted to making the prior inconsistent statement. 15BRP 766.

Further, Gray testified she provided Calvin a key to storage unit #49 so he would have access. 15BRP 699. Again, prior inconsistent

statements were presented whereby Gray had stated “in the beginning I did have a key, and that was just when I was gonna go to the storage unit and drop something off for him or something, and I would give it back to him.” 15BRP 769. When stating “him,” Gray was referring to the Appellant. The point of this cross-examination was that Gray did not possess a key to storage unit #49 which she could provide to Calvin. If she never knew the Appellant had vacated storage unit #49, she never could have retrieved the key from him. When questioned about this inconsistency, Gray claimed she was “lying in each and every one of those statements...”

Clearly, the State was forming an argument that Gray’s entire testimony was fabricated as nothing was consistent with statements made shortly after execution of the search warrant and interviews with investigators. The cross-examination elicited a strong inference that Calvin never existed as a renter of storage unit #49, as claimed by the Appellant. The State’s rebuttal closing argument focused on Calvin not existing as a renter of storage unit #49, not that Calvin Brown did not exist as a human being.

Secondly, the court instructed the jury that:

...the attorneys’ remarks, statements and arguments are intended to help you understand the evidence and the

law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.

16RP 848

The trial court properly instructed the jury to only consider the evidence submitted and not consider the attorneys' argument as evidence. In following these instructions, the jury would not somehow believe a brief statement in rebuttal closing argument was a fact. The argument could not have prejudiced the Appellant such that there was a substantially likelihood that the jury's verdict was affected.

Third, the Appellant did not object to the argument presented in rebuttal closing. Failure to object to an improper comment constitutes waiver of error unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury. Pirtle, 127 Wn.2d at 672. A new trial is not necessary if the trial court could have cured the misconduct by giving a curative instruction but the defendant did not request one. Id. The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). A

prosecuting attorney's alleged improper remarks during closing argument must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997) (citing Russell, 125 Wn.2d at 85).

In State v. Belgrade, 110 Wn.2d 504, 507, 755 P.2d 174 (1988), the prosecutor made comments that the court held could not have been neutralized by a curative instruction, even if there had been an objection at trial. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432, 442 (2003). In Belgrade, the prosecutor described members of the American Indian Movement (AIM) as a “deadly group of madmen,” “militant,” and “butchers that kill indiscriminately Whites and their own.” Id. He also asked the jury to remember the AIM's involvement in Wounded Knee and analogized the AIM to the Irish Republican Army's Sinn Fein and Libya's Kadafi. Id. Because the prosecutor's statements were a deliberate appeal to the jury's passion and could not have been neutralized even had there been an objection or a request for a curative instruction, the court vacated the judgment and remanded for a new trial. Id., at 579.

In Bains v. Cambra, 204 F.3d 964, 974 (9th Cir.) *cert. denied*, 531 U.S. 1037, 184 L. Ed. 2d 536, 121 S. Ct. 627 (2000), the Ninth Circuit

reviewed a case in which the prosecutor made generalizations about Sikh people in a closing argument, implying they had violent predispositions. Dhaliwal, 150 Wn.2d at 579. In closing, the prosecutor said, “if you do certain conduct with respect to a Sikh person’s female family member, look out. You can expect violence.” Id. The court found this statement was objectionable because it was an attempt to show that all Sikhs, including the defendant, are “irresistibly predisposed to violence when a family member has been dishonored.” Id. However, in this case the court found the error harmless. Id.

A prosecutor has wide latitude in closing argument to draw reasonable inferences to the jury. State v. Hoffman, 116 Wn.2d 51, 94, 804 P.2d 577 (1991). The inference that Calvin Brown never leased storage unit #49 from Gray is certainly allowed within the realm of the latitude permitted in closing argument. This statement does not come anywhere near the flagrant and ill-intentioned argument we see in Belgrade. It also is not anywhere as flagrant and ill-intentioned as the prosecutor’s comments in Bains, which the court held to be harmless.

Further, a lawyer shall not knowingly make a false statement of material fact or law to a tribunal. RPC 3.3(a)(1). The Appellant presumably argues that a false statement of material fact is so flagrant and

ill-intentioned that a curative instruction could not neutralize the comment. However, in this situation, a knowing false statement of material fact did not occur. The Rules of Professional Conduct Terminology states:

“knowingly” denotes actual knowledge of the fact in question. **A person’s knowledge may be inferred from circumstances.** (emphasis added).

As stated previously, the circumstances clearly demonstrate the argument was that Calvin Brown never leased storage unit #49 from Sandra Gray. The State previously stated on several occasions that Calvin Brown existed. Claiming Calvin did not exist as a person would make no sense. While the wording in rebuttal could have been clearer, it was in the context of Gray’s testimony.

Secondly, no material fact existed. A fact is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” Id. (citing Bagley, 473 U.S. at 682; In Re PRP Benn, 134 Wn.2d 868, 916, 952 P.2d 116 (1998)). As examined above, Calvin Brown existence as the informant was not material under Brady. Rebuttal closing argument is just that, argument. It is not evidence to be considered by the jury. The State never presented evidence during its case in chief that Calvin did not exist as a human being. Rather, the simple argument was made that Calvin did

not lease storage unit #49 from Gray. The Appellant was not prejudiced.
The trial court did not abuse its discretion.

III. CONCLUSION

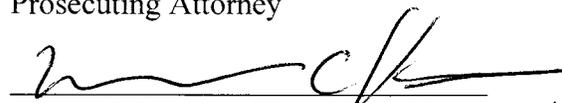
The Appellant's Assignments of Error #4, #5 and #6 are without merit. The trial court did not abuse its discretion in finding the Appellant's motion to for new trial or dismissal was without merit as prosecutorial misconduct did not occur. Further, the prosecution did not withhold evidence that was favorable to the accused and was material to guilt or punishment.

DATED this 7 day of ^{July} ~~May~~, 2006.

RESPECTFULLY SUBMITTED:

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