

No. 34861-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ROBERTA ELMORE

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Vicki Hogan,
the Honorable Rosanne Buckner, Judges

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Elmore's Sixth Amendment and Article 1, § 21 rights to trial by impartial jury were violated by the admission of an officer's testimony was an "explicit or almost explicit" opinion on Elmore's guilt and credibility.

2. The sentencing court erred in imposing a separate sentence for both felony murder and the predicate crime.

3. The conviction for kidnapping must be reversed because the restraint used was merely incidental to other crimes and thus was insufficient to support a separate conviction. The separate conviction also runs afoul of the state and federal prohibitions against double jeopardy, contained in the Fifth Amendment and Article I, § 9.

4. There was no statutory authority for submitting the aggravating factors to a jury under the 2005 "Blakely¹ fix" statute and the 2007 statutory amendments do not apply.

5. The due process prohibition on prosecutorial vindictiveness was violated when the prosecution increased the charges and sought to have a new firearm enhancement imposed against Elmore after her successful appeals.

6. Elmore's rights to be free from double jeopardy were violated when, on remand, she was placed in greater jeopardy.

7. The amendments to the charges violated CrR 4.3.1(b)(2), the mandatory joinder rule.

8. Elmore's Sixth Amendment and Article 1, § 22 rights to

¹Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

trial by jury and proof beyond a reasonable doubt were violated when the trial court made findings of fact using a “preponderance of the evidence” standard and relied on those facts in imposing exceptional sentences. Elmore assigns error to all the “Findings of Fact” contained in the Findings of Fact and Conclusions of Law for Exceptional Sentence (hereinafter “Findings and Conclusions”) in their entirety as violative of those rights. CP 644-52.

9. Appellant was deprived of her Article 1, § 22 and Sixth Amendment rights to effective assistance of counsel at both trials and in her previous appeal.

10. The “law of the case” doctrine is discretionary and does not divest this Court of the authority to address issues which should have been raised in the previous appeal but were not because of counsel’s ineffectiveness.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Improper opinion testimony is a constitutional error and violates the state and federal rights to trial by jury, if it is an “explicit or almost explicit” statement on guilt or credibility. Did an officer give such improper opinion testimony when, at trial, he described interviewing Elmore about her version of events and told the jury that Elmore was “at points being evasive,” that she was “being untruthful,” that he “sensed deception,” that he confronted her with his belief that she had participated in the crimes despite her claims to the contrary, and that there was “a lot of . . . “inconsistencies and evasiveness” in Elmore’s claim?

Further, is reversal required because the prosecution cannot prove

that the constitutional error was harmless, beyond a reasonable doubt, because there was not “overwhelming evidence” of guilt?

2. The imposition of multiple punishments implicates the state and federal rights to be free from double jeopardy. Under the sentencing “merger” doctrine, where a charge of felony murder is brought, if the predicate crime is also charged, that conviction merges into the felony murder for sentencing. Should the separate sentence imposed for the predicate crime of burglary have merged into the felony murder where the two crimes were alleged to be for the same acts? Further, where the burglary is an essential element of the charged crime, does the burglary “anti-merger” statute fail to apply?

3. Because many crimes involve some restraint, a separate conviction for a “restraint” crime like kidnapping will be dismissed if the restraint involved is merely incidental to the other crimes. This “incidental restraint” doctrine is grounded both in the rights to be free from multiple convictions for the same acts and the due process right to be free from conviction upon anything less than sufficient evidence.

The restraint upon which the prosecution relied for the kidnapping conviction occurred when a man who had pushed into a home pointed a gun at a person inside, ordered that person to the floor and told him not to move while the suspect and accomplices searched the house for a safe. Was that restraint merely incidental where there was no independent purpose for the restraint and it was only used to facilitate the other crimes?

4. Under State v. Hughes,² an exceptional sentence cannot be imposed by submitting aggravating factors to a jury, unless there is a valid statutory provision in place authorizing such submission. Under State v. Pillatos,³ 2005 amendments to the exceptional sentencing scheme granting such authorization only apply to cases in which trial had not yet begun prior to April 15, 2005. The statute is ambiguous, however, on whether it applies on remand or after retrial.

Should this Court hold that the 2005 amendments did not authorize the procedure and resulting exceptional sentence in this case where the plain language of the statute makes no reference to retrials, application of the rule of lenity requires interpreting the statute in Elmore's favor, and it is well-settled that an appellate court is prohibited from rewriting a statute to add language even if it believes a legislative omission was in error?

Further, can 2007 amendments to a statute apply to a case in which the trial and sentencing occurred prior to the amendments' effective date where such application would violate the constitutional doctrine of "separation of powers?" And if the 2007 amendments could apply, was the sentence still unauthorized to the extent it was based upon factors which were not relied upon by the superior court in imposing an exceptional sentence in previous proceedings?

5. The due process clauses prohibit the government from punishing a person for exercise of a right. Such "prosecutorial

²154 Wn.2d 118, 149, 110 P.3d 192 (2005), reversed on other grounds sub nom. Washington v. Recuenco, ___ U.S. ___, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

³159 Wn.2d 459, 150 P.3d 1130 (2007).

vindictiveness” is presumed where there is an increase in charges on remand after the defendant has appealed. When the presumption of vindictiveness applies, dismissal of the new charges is mandated and the court will consider dismissing the original charges as a deterrent to vindictiveness, unless the prosecution presents “objective evidence” providing a legitimate reason why the new charges or increased charges were not originally filed.

After her first successful appeal, instead of recharging Elmore with the crimes which were dismissed in exchange for her plea, the prosecution increased the charges by adding alternative means of committing the felony murder and kidnapping crimes, and a new firearm enhancement on the conspiracy charge. After the second successful appeal, the prosecution added an alternative charge for a different means of committing burglary, as well as “aggravating factors” for counts for which the prosecution had previously sought standard range sentences.

Did the prosecution fail to rebut the presumption of vindictiveness where it failed to provide any explanation for the increase in charges, let alone “objective evidence,” and all of the facts and evidence upon which the amended charges relied were known to the prosecution at the time of the original charging? Further, where the prosecution abandoned the new firearm enhancement charge in the first trial, was it improper vindictiveness to seek conviction for and sentence on that enhancement after Elmore’s successful second appeal?

6. The double jeopardy clauses prohibit the state from increasing the jeopardy a defendant faces on remand. Further, when

aggravating factors are added to a crime, the crime becomes the separate “enhanced crime” of the base crime + the aggravating factor. Were Elmore’s rights to be free from double jeopardy violated when, after a successful appeal, the prosecution increased the crimes against her from the lesser, non-aggravated offenses to greater offenses with addition of new aggravating factors?

7. Under the “mandatory joinder” rule, when a defendant has been tried for one offense, any later charges for related offenses must be dismissed with prejudice. Charges are “related” when they are within the jurisdiction and venue of the same court and arise from the same conduct. Did the amendments to the informations violate the mandatory joinder rule where those amendments added additional charges and allegations based upon exactly the same conduct as addressed in the original charges and there was no new evidence supporting the changes? Further, where the prosecution gave no reason justifying the increased charges and there were no “extraordinary circumstances,” is dismissal with prejudice required?

8. Under Blakely, a defendant is constitutionally entitled to have every fact upon which an exceptional sentence is based proven to a jury, beyond a reasonable doubt. Were these mandates violated when the trial court made multiple factual findings by a preponderance of the evidence and relied on those findings in imposing exceptional sentences?

9. Was trial counsel prejudicially ineffective in 1) failing to argue that the predicate crime merged into the felony murder, thus permitting a violation of his client’s rights and allowing her to be subjected to a greater sentence than she should have faced, 2) failing to

argue that the kidnapping conviction was unsupported because the restraint was incidental, thus allowing his client's due process and double jeopardy rights to be violated and making her subject to a greater sentence, 3) failing to object or even apparently to notice when the prosecution repeatedly increased the charges and proposed sentences against his client after she exercised her constitutional rights to appeal, thus allowing a violation of the due process prohibition against prosecutorial vindictiveness and resulting in his client going to trial on improper charges, 4) failing to object to the violation of his client's rights to be free from double jeopardy when she was put in jeopardy for greater offenses on remand, 5) failing to object to the violations of the mandatory joinder rule, so that his client faced more and greater offenses, and 6) failing to object when the sentencing court made its own factual findings, by a preponderance of the evidence, in violation of his client's rights under Blakely?

10. Was prior appellate counsel prejudicially ineffective in failing to raise multiple meritorious issues regarding trial errors even though those errors were likely to occur on remand and the remedy counsel sought was a new trial?

11. Should this Court decline any invitation to apply the discretionary "law of the case" doctrine to preclude consideration of issues which should have been raised in the previous appeal where applying the doctrine would perpetuate injustice because counsel's failures to raise the issues in the prior appeal amounted to ineffective assistance?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Roberta J. Elmore was charged in 1996 by second amended information with first-degree felony murder, first-degree burglary, first-degree kidnapping, second-degree assault, and conspiracy to commit first-degree robbery. CP 12-17; RCWs 9.41.010, 9A.08.020, 9A.28.040, 9A.32.030(1)(c), 9A.36.021(1)(c), 9A.40.020(1)(b), 9A.52.020(1)(a), 9A.56.190, 9A.56.200, 9.94A.310, 9.94A.370. Firearm enhancements were charged for all crimes but the conspiracy. CP 12-17.

On August 6, 1997, Elmore entered a plea to a Third Amended information alleging only first-degree felony murder. CP 18-27; 1RP 1-65.⁴ On June 23, 2000, this Court reversed the conviction and exceptional sentence of 400 months in custody, based upon the prosecution's violation of the plea agreement. CP 89-94.

On remand, Elmore withdrew her plea, and, in 2001, she was tried based on a Fifth Amended Information charging the felony murder, burglary, kidnapping, assault and conspiracies and adding a firearm enhancement for the conspiracy.⁵ CP 109-119, 684-707; see 2RP, 3RP 4RP. She was convicted as charged, except the jury found her guilty only of the lesser offense of conspiracy to commit second-degree robbery and no firearm enhancement was submitted to the jury on that count. CP 108-19.

⁴Citation to the record is explained in Appendix A.

⁵The changes the Fourth and Fifth Amended Informations made and the legal issues relating to those changes are discussed in more detail, *infra*.

In December of 2005, the Supreme Court overturned the convictions and an exceptional sentence of 797 months in custody, based upon the improper dismissal of a juror who wanted to vote to acquit at the 2001 trial. CP 193-296.

On remand in 2006, the prosecution filed sixth and seventh informations, amending the charges and adding “aggravating factors.”⁶ CP 237-42, 386-90, 5RP 1; see RP. Pretrial and trial proceedings for the second trial were held before the Honorable Vicki L. Hogan and the Honorable Rosanne Buckner on January 23, February 17, 27, March 6, 14, 20-22, 27-31, 2006. See RP. Elmore was convicted of charged first-degree felony murder, first-degree kidnapping, first-degree burglary, second-degree assault, and conspiracy to commit second-degree robbery, all with firearm enhancements. CP 588-601. After separate deliberation, the jury found also found aggravating factors for the burglary and conspiracy, but rejected factors for the other crimes. CP 588-601.⁷

On April 14, 2006, at the prosecution’s behest, the court imposed exceptional sentences on the burglary and conspiracy charges and standard range sentences for the other counts, resulting in a total term of confinement of 797 months. RP 1078-79; CP 611-23. Elmore appealed, and this pleading follows. CP 631-43.

2. Overview of facts relating to incident

On December 11, 1996, Scott Claycamp, an assistant for three disabled men who lived in a house together, was shot and killed. Another

⁶The specifics of the amendments to the charges are discussed in more detail, *infra*.

⁷More detail on the specifics of the charges and aggravating factors is provided, *infra*

assistant at the home, “Ernie” Schaef, told police that he heard a knock on the door at about 6:15 in the morning and answered the door to an unknown woman asking for directions. RP 581-82. Schaef thought something seemed odd so he tried to shut the door on the woman, but a man came from behind the door, forcing his way inside. RP 582.

The man pulled out a revolver, ordered Schaef to the ground, and demanded to know if anyone else was in the home. RP 582. The man then went to the back door of the home and let another man in. RP 582. The second man pulled a mask over his face, had some discussion with the first man about a safe, and then went into the back bedroom where one of the disabled men, Dennis Robertson, was living. RP 583. Robertson watched from the bed as the man came in, ordered Robertson’s assistant, Claycamp to get down on the ground, then shot Claycamp in the head and grabbed a safe Robertson had near his bed. RP 225, 580-72; Ex. 137.⁸ The two intruders then left, also taking a resident’s wallet as they walked out. RP 225, 580-89; Ex. 137.

The men involved were later identified as Gordon Crockett and Thorsten Jerde. RP 669. The woman who had knocked on the door was Carol Edwards. RP 669-70.

Police trying to figure out who was involved began investigating a woman named Roberta Elmore, who had been at the house recently as a worker for an escort company. RP 666. Schaef said there had been a dispute over money with Elmore and she had threatened them. RP 667. In

⁸Robertson’s testimony from the previous trial was read into the record but apparently not recorded for the purposes of transcription. The exhibit which was read, Ex. 137, has been designated to this Court.

fact, Schaef identified Elmore - incorrectly - as the woman who had knocked on the door the morning Claycamp was killed. RP 669-70, 675.

Officers set up surveillance of Elmore's home and arrested her later that day after a "traffic stop." RP 670-71, 677. Elmore was cooperative and told the officers she had been at the residence as an employee of an escort service but had left when she was asked to perform sexual acts on Robertson, which she refused to do. RP 679. She felt she was owed money for her time and told the officers she had contacted the Robertson home twice by phone to get paid. RP 679-80. She had also contacted the escort company to tell them if they did not pay her what she was due she was going to file a lawsuit and contact police. RP 679-80.

Elmore thought she knew, however, who might be involved. RP 680. She gave the police the first names of Crockett, Jerde, and Edwards, and told police she had talked with them about her dispute with Robertson over money. RP 680-73. She said her husband had joked about killing the people in the home, but Crockett had said, "no, we should rob them, and also rob the escort service." RP 680-73. Elmore said she had no idea they were actually going to commit a crime, and gave the officers information about the motel where Jerde and his girlfriend were likely living. RP 683.

Crockett and Jerde were ultimately caught based on that information and Jerde pointed to Elmore as the person who had instigated the crimes. RP 707. At trial, Jerde said Elmore drove them by the house "maybe three times," described the interior of the residence and said there was a safe with stacks of money. RP 364-65, 707. He later admitted that, in fact, he had previously said she drove them by the residence only once,

and, in another statement, two or three. RP 384, 394.

Jerde claimed Elmore said the people in the house were “laid up in bed and there would be no problem,” they could just run in, grab the money, and run out. RP 362, 710-12. Jerde also claimed Elmore understood that a gun was being taken for “intimidation,” that she gave him ammunition when he asked for it and was with the others when they went out to a rock quarry and did target practice. RP 368, 710-12. Elmore did not go to the quarry itself but went to the relative’s house nearby while Crockett and Jerde went off for a couple of hours and fired the gun. RP 386.

Jerde admitted, on cross-examination, that he had previously testified there was no discussion at all with Elmore involving a gun and the only discussion about guns was between Jerde and Crockett. RP 393. He also agreed no one said anything to Elmore about taking a gun to the house. RP 393.

Jerde thought Elmore said she wanted the people in the home to “hurt,” but told an officer Elmore never asked him to hurt anybody in the house. RP 366, 731. She never said anything about going in and beating anyone up, or shooting anyone, or anything like that. RP 384. She never suggested they “snap anybody’s neck,” and there were no discussions about hurting anybody. RP 385.

Jerde said he and Crockett and the others decided on the spur of the moment to commit the crimes, because they were “just high enough” on “crank” and alcohol. RP 369. Jerde had been on drugs and awake for what he said was about a full week. RP 387-88.

Jerde admitted they did not tell Elmore what they intended to do. RP 369. Elmore was not with them that morning or the previous night. RP 370. It was Crockett who shot Claycamp, and, when asked about the shot Jerde had heard, Crockett said, “[i]t just went off.” RP 378.

Jerde had 10 crimes of dishonesty from just the four years before the incident, including four forgeries five thefts. RP 356. He was originally charged with the same multiple crimes as Elmore but pled to second-degree murder and saved himself a lot of prison time in agreeing to testify against her. RP 386-87.

The gun was not recovered but officers traced it to Crockett’s giving it to someone the day after the crimes. RP 783-84. Crockett also gave that woman a safe, and said something that made her think some “shit went down.” RP 790-92. Elmore was not present. RP 799.

Jerde admitted that, when they all got back to the apartment with the safe, no one called Elmore to talk about anything and she was not there. RP 391-92.

A friend of Elmore’s claimed Elmore was very upset about not getting paid and said she was going to “get” the escort service and the people at the home. RP 819. He said she might have said she would “make them pay.” RP 819. He also opined that she said she wanted to rob them and she seemed “serious.” RP 822. The friend also claimed that, a little later, Elmore’s husband called and asked how much a “two-inch brick of twenties” would be, because “that paraplegic guy has two bricks and we are going to get them.” RP 823. Another man similarly claimed to have talked with Elmore and heard Elmore say she was going to make

them “pay” for not paying her what she was owed. RP 592-94.

Elmore ultimately admitted asking Crockett to go collect her money for her, the money she felt she was owed for her time. RP 645. She drove Crockett by the house where he would need to go, but wanted him only to collect her money, not commit crimes. RP 645. She had talked with people at the house and thought they were going to give her the money. RP 820-26. She never intended there to be any crimes committed and Crockett never gave her any indication he was going to do anything like this. RP 825.

Nothing related to the crimes in any way was found in a search of Elmore’s home. RP 676, 735. At Edwards’ house, police found checkbooks with all the checks removed and deposit slips in Robertson’s name. RP 736.

D. ARGUMENT

1. IMPROPER OPINION TESTIMONY DEPRIVED
ELMORE OF HER CONSTITUTIONAL RIGHTS TO
TRIAL BY JURY

The right to trial by jury contained in the Sixth Amendment and Article 1, § 21 guarantees that the jury is “the sole judge of the weight of the testimony” and credibility of witnesses. See State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995), quoting, State v. Crotts, 22 Wash. 245, 250-51, 60 P. 403 (1900). As a result, no lay or expert witness is permitted to offer testimony which amounts to an opinion “regarding the guilt or veracity of the defendant.” State v. Demery, 144 Wn.2d 753, 758-59, 30 P.3d 1278 (2001). Such testimony is unconstitutional and is unfairly prejudicial to the defendant, because it invades the “exclusive

province” of the jury to decide guilt or innocence. See State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

In this case, this Court should reverse, because an officer testified, repeatedly, about his opinion of Elmore’s guilt, and that testimony was explicit and improper opinion testimony.

a. Relevant facts

During his testimony at the second trial, an officer described telling Elmore she was a suspect in the crimes during the police interview. RP 697.⁹ He declared:

We were at a point where the interview was going back and forth, *and she was at points being evasive, being untruthful. I sensed deception*, and I finally got to the point where I confronted her that I believed that she participated in the robbery, and that was based upon the identification by Mr. Schaefer.

RP 687 (emphasis added).¹⁰

The officer also told the jury that, in the interview with Elmore, there were “a lot of . . . inconsistencies and evasiveness of the information that she was providing, provided us.” RP 689.

Counsel made no objections. RP 687, 689. In closing argument, the prosecution used Elmore’s alleged intentional deceptiveness to the officers in that interview as evidence of Elmore’s guilt. RP 876-77.

b. The comments were improper explicit or near explicit comments on Elmore’s guilt and credibility

This testimony was improper opinion testimony which compels

⁹The officer’s testimony at the original trial did not include the same language. See 3RP 344, 360.

¹⁰This belief was based upon the mistaken identification by Schaefer of Elmore as the woman who had knocked on the door the morning of the incident. RP 687; see RP 669-70.

reversal. The question of guilt is reserved solely for the jury and is not the proper subject of either lay or expert opinion. State v. Garrison, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967). Impermissible opinion testimony on guilt or credibility violates the defendant's constitutional right to a jury trial, which includes the right to an independent determination of the facts by the jury. State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

To amount to an impermissible opinion, a statement need not be direct; a mere "inference" of guilt may suffice. State v. Farr-Lenzini, 93 Wn. App. 453, 459-60, 970 P.2d 313 (1999). If a comment is not an "explicit or almost explicit witness statement on an ultimate issue of fact," however, the issue will not be deemed a manifest constitutional error which can be raised for the first time on appeal. Kirkman, 159 Wn.2d at 936-38.

In this case, Elmore's attorney stayed mute while the testimony was admitted. RP 687, 689. This issue is properly before this Court, however, because the testimony was improper opinion testimony which met the "explicit or almost explicit" requirement of Kirkman.

Logically, before this Court can answer the question of whether testimony meets that standard, it must first decide if the testimony amounted to an improper opinion on guilty or credibility. To make that determination, a reviewing court looks at the challenged testimony in light of 1) the type of witness involved, 2) the nature of the offending testimony, 3) the nature of the charges, 4) the type of defense, and 5) the other evidence before the trier of fact. Demery, 144 Wn.2d at 759, quoting Seattle v. Heatley, 70 Wn. App. 573, 579, 854 P.2d 658 (1993),

review denied, 123 Wn.2d 1011 (1994).

A review of those factors in this case leads to the inescapable conclusion that the testimony was not just improper opinion, it was improper opinion of the worst, most highly prejudicial kind. First, the witness giving the testimony was a police officer. It is well-settled that such testimony is especially likely to be highly regarded by and persuasive to jurors. See Kirkman, 159 Wn.2d at 928; Demery, 144 Wn.2d at 765; State v. Carlin, 40 Wn. App. 698, 703, 700 P.2d 323 (1985).

Second, the nature of the offending testimony was such that it was clearly an opinion on Elmore's guilt and credibility. The officer's testimony was not a mere inference or an explanation of an "interrogation technique." See, e.g., Kirkman, 159 Wn.2d at 928. Instead, it was a repeated statement of the officer's beliefs on Elmore's credibility and version of events. It cannot be reasonably argued that the officer was not making such statements where, as here, the officer told the jury the defendant was "evasive," and "being untruthful," and that he "sensed deception." RP 687, 689.

With these statements, the officer clearly gave improper opinion testimony which was an explicit or almost explicit comment on Elmore's guilt and credibility. State v. Jones, 117 Wn. App. 89, 68 P.3d 1154 (2003), is instructive. In Jones, the officer who conducted an interrogation of the defendant testified that, at some point, he "addressed the issue that, you know, I just didn't believe him." 117 Wn. App. at 90. On appeal, the prosecution tried to argue the testimony was not improper opinion testimony but instead just a discussion of "interrogation techniques." 117

Wn. App. at 90.

This Court saw through that effort. 117 Wn. App. at 91. “Clothing the opinion in the garb of an interviewing technique” did not somehow erase its impropriety, this Court found. 117 Wn. App. at 91. Indeed, the Court said,

We find no meaningful difference between allowing an officer to testify directly that he does not believe the defendant and allowing the officer to testify that he told the defendant during questioning that he did not believe him. In either case, the jury learns the police officer's opinion about the defendant's credibility.

117 Wn. App. at 91.

In this case, the opinion testimony was even more offensive and direct than that in Jones. The officer was not describing an interrogation technique when he testified. He was giving the jury his opinion that Elmore was being “evasive” and “untruthful,” and that he, a professional investigator, “sensed deception.” RP 687. It was only *after* the jury had heard these opinions that the officer talked about having “confronted” Elmore with his belief. RP 687. He did not state he was using an “interrogation technique” and even cited the reason he did not believe her. He was clearly stating his opinion then, and a moment later, when he said there “a lot of . . . inconsistencies and evasiveness of the information that she was providing, provided us.” RP 689.

Under Jones, the comments here were clearly direct comments on Elmore’s guilt, not to mention her credibility. See also, Kirkman, 159 Wn.2d at 931 (testimony indicating a witness’ belief about whether a person being interviewed was telling the truth or a belief in that person’s version of events would be impermissible opinion testimony).

The testimony here also was clearly improper in light of the charges, the type of defense, and the other evidence before the trier of fact. Except for the conspiracy, the charges here were all based upon claims that Elmore was legally responsible as an accomplice for acts which Crockett and Jerde committed when Elmore was not even present. See CP 386-90. Elmore's defense was that, while she talked with them about her frustration with not being paid, she never assisted or intended to aid Crockett and Jerde in planning or committing the crimes and had no idea they would actually commit them.

Thus, credibility was the crucial issue in the case - as the Supreme Court itself noted in a previous appeal. See State v. Elmore, 155 Wn.2d 758, 779, 123 P.3d 72 (2005). The officer's direct comments on Elmore's credibility and her version of events went to the heart of both the charges against Elmore and her defense.

The officer's opinions were not subtle; they were not indirect. Indeed, they were as explicit as such comments can get. The officer's testimony was improper opinion testimony which rose to the level of constitutional error under Kirkman, 159 Wn.2d at 928. This Court should so hold.

c. Reversal is required

Reversal is required. Where, as here, improper opinion testimony is admitted in violation of the defendant's constitutional rights, the prosecution bears the heavy burden of proving the constitutional error harmless beyond a reasonable doubt. See State v. Binh Thach, 126 Wn. App. 297, 312-13, 106 P.3d 782, review denied, 155 Wn.2d 1005 (2005).

The prosecution can only meet that burden if it can convince this Court that any reasonable jury would have reached the same result absent the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). And that standard is only met if the untainted evidence was so overwhelming that it “necessarily” leads to a finding of guilt. 104 Wn.2d at 425.

It is important to note that the “overwhelming evidence” test is *not* the same as the test used when a defendant argues that there is insufficient evidence to support a conviction. See State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002). Romero is instructive. In that case, the defendant was arrested and charged with first-degree unlawful possession of a firearm in an incident that occurred after there was a report of shots fired at a mobile home park in the middle of the night. 113 Wn. App. at 783-84. An officer using a flashlight responded and saw Romero coming around the front of a mobile home holding his right hand behind his body. Id.

The officer repeatedly ordered Romero to show his hands. Id. Romero refused and would not step away from the mobile home. Id. Finally, Romero ran around the side of the home and disappeared. Id. He was later found inside the home, as was a shotgun, and shell casings were found on the ground next to the home’s front porch. Romero, 113 Wn. App. at 783.

Descriptions of the shooter seemed to point to Romero, and an eyewitness also identified him. 113 Wn. App. at 784. Although the witness was “one hundred percent” positive about the identification, she

also said the shooter was wearing a blue-checked shirt. Id. Romero’s shirt was grey-checked, not blue, and another man seen with Romero that night had on a blue-checked shirt. Id. When shown the shirt Romero was wearing, however, the eyewitness identified it as that of the shooter. Id.

On appeal, the defendant argued both that there was insufficient evidence to support the conviction for unlawful firearm possession and that comments the officer had made in his testimony were constitutional error compelling reversal. 113 Wn. App. at 783-95. The Court found, taken in the light most favorable to the state, the evidence was sufficient to support the conviction. 113 Wn. App. at 794.

But that very same evidence was insufficient to satisfy the constitutional harmless error test. 113 Wn. App. at 794. Because the state’s evidence was disputed and the jury was “[p]resented with a credibility contest,” the Court held, the improper comments “could have” had an effect. 113 Wn. App. at 795-96. The Court could not say that “prejudice did not likely result due to the undercutting effect on Mr. Romero’s defense,” and the constitutional harmless error test was thus not met. Id.

State v. Keene, 86 Wn. App. 589, 938 P.2d 839 (1997), is also instructive on the standard of constitutional harmless error. In Keene, the Court reversed based upon application of that standard, despite the strength of the evidence against the defendant on trial for child rape. The constitutional error claimed was an isolated comment on the defendant’s exercise of Fifth Amendment rights. The untainted evidence consisted of a child’s testimony that she had been improperly touched in May or June

of 1990, and evidence that she had told her sister about it in 1991 and her friend, in 1994. 86 Wn. App. at 594-95. But she also told an investigating officer that it occurred when her father spent the night at a motel, and evidence established he had not done so during the relevant time. Keene, 86 Wn. App. at 594-95. There was also disputing evidence about whether the child had, as she claimed, reported the abuse to her teacher. 86 Wn. App. at 595.

In finding that the constitutional harmless error test was not satisfied, the Court noted that, despite the fact that the state's case was strong, there was also disputing evidence in the defendant's favor. 86 Wn. App. at 594-95. The prosecution's evidence thus did not "necessarily" lead to a finding of guilt as required to meet the "overwhelming evidence" standard, and the constitutional error was not, therefore, "harmless." 86 Wn. App. at 594-95.

Here, it is arguable whether there is enough evidence to withstand a challenge based on sufficiency of the evidence. But even if that minimal standard could be met, the constitutional harmless error standard could not. The evidence of Elmore's guilt was far from "overwhelming" under Romero and Keene. Not only was there conflicting evidence (such as the mistaken identification of Elmore as the woman who knocked on the door), but the prosecution's claims about Elmore's actual level of involvement were built on the claims of people who had a motive to lie as former codefendants and, unlike Elmore, had a history of committing crimes indicating a penchant for dishonesty. See, e.g., RP 356 (Jerde's ten crimes of dishonesty in the previous four years); CP 613-14 (Elmore

with 0 criminal history).

The prosecution cannot meet its heavy burden of proving that the admission of the officer's improper opinion testimony was harmless under the constitutional harmless error standard. As a result, because the officer's statements were explicit or near-explicit comments on Elmore's guilt and credibility, and because the state's evidence does not satisfy the "overwhelming evidence" standard, reversal of Elmore's convictions and remand for a new trial is required.

2. THE COURT ERRED IN IMPOSING A SEPARATE SENTENCE FOR BOTH THE PREDICATE CRIME AND THE FELONY MURDER AND ELMORE WAS DEPRIVED OF HER RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL

The sentencing "merger" doctrine prevents the prosecution from "pyramiding the charges" against a defendant and thereby gaining greater punishment. See State v. Johnson, 92 Wn.2d 671, 676, 600 P.2d 1249 (1979). The doctrine is a tool of statutory construction, designed to determine whether the Legislature intended that the defendant should be punished multiple times for a particular act. State v. Saunders, 120 Wn. App. 800, 86 P.3d 232 (2004). "Merger" analysis is a means of ensuring there is no violation of the constitutional prohibitions against double jeopardy. State v. Brett, 126 Wn.2d 136, 166, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996);¹¹ State v. Frohs, 83 Wn. App. 803, 924 P.2d 384 (1996). Put another way, the sentencing "merger" doctrine is the means by which a court may determine whether the imposition of

¹¹Mr. Brett later won reversal, on other grounds, on collateral review. See Personal Restraint of Brett, 142 Wn.2d 868, 16 P.3d 601 (2001).

multiple punishments violates the Fifth Amendment guarantee against double jeopardy; i.e., whether the legislative branch, acting within its own constitutional limitations, has authorized cumulative punishments.

83 Wn. App. at 811; see State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995).

As a result, despite some caselaw mistakenly declaring to the contrary, the issue is now recognized to be constitutional, involving the double jeopardy prohibition against multiple punishments. Frohs, 83 Wn. App. at 809-10. As such, this issue may be raised for the first time on appeal under RAP 2.5(a)(3), as “manifest” constitutional error. Frohs, 83 Wn. App. at 811 n.2., 812.¹² In this case, this Court should reverse the separate sentence imposed for the burglary, because it was the predicate crime for and merged with the first-degree felony murder conviction.

a. The predicate crime is an essential element of and merges into the felony murder for sentencing

This Court reviews the question of whether crimes merge de novo. See State v. Williams, 131 Wn. App. 488, 498, 128 P.3d 98 (2006), remanded for reconsideration in part and on other grounds, 158 Wn.2d 1006, 143 P.3d 596 (2006). By definition, the elements of felony murder include the requirement of commitment of another crime. Williams, 131 Wn. App. at 498. Indeed, the specific felony underlying a charge of felony murder is an “essential element” of the murder. State v. Bryant, 65 Wn. App. 428, 438, 828 P.2d 1121, review denied, 119 Wn.2d 1015 (1992).

As a result, where a defendant is charged with felony murder, if the

¹²Counsel’s ineffectiveness as an alternative vehicle for addressing this issue is discussed in more detail, *infra*, as is the law of the case doctrine.

underlying felony or “predicate” crime is also charged, that crime merges with the felony murder and a court may not impose a separate sentence on the predicate crime. State v. Fagundes, 26 Wn. App. 477, 614 P.2d 198 (1980), review denied, 94 Wn.2d 1014 (1981); see also, Johnson, 92 Wn.2d at 676.

Thus, in Fagundes, the defendant was convicted of first degree felony murder based upon a death which occurred during a first degree kidnapping or first-degree rape. 26 Wn. App. at 485. He was also convicted of the separate crimes of first degree kidnapping and first degree rape. 26 Wn. App. at 485-86. On appeal, he argued that proof of the predicate offense was an essential element of first-degree felony murder, so the predicate offense “merged” into the felony murder and could not be separately sentenced. Id.

The Court agreed. Because proof of an underlying felony was an essential element of the proof for elevating the death to a felony murder, the Court held, the underlying felonies charged against the defendant merged into the felony murder. 26 Wn. App. at 486. The Court reached this conclusion even though it agreed with the state that the underlying felony serves an additional purpose other than just elevating the murder charge. 26 Wn. App. at 486. The underlying or predicate felony also relieves the prosecution of the burden of proving the mental element normally required to prove first-degree murder. 26 Wn. App. at 486. Regardless of that additional function, however, because it was essential for elevating the death to a felony murder, the predicate or underlying felony merged into that felony murder and a separate sentence for the

predicate offense had to be dismissed. 28 Wn. App. at 486.

Similarly, in Williams, supra, the defendant was tried on first-degree felony murder with a predicate or underlying crime of robbery or attempted robbery. 131 Wn. App. at 497-98. On appeal, the prosecution argued that the robbery was “factually disconnected” and served “a different purpose or intent” than the murder, and thus did not merge. 131 Wn. App. at 498; see, e.g., State v. Peyton, 29 Wn. App. 701, 630 P.2d 1362, review denied, 96 Wn.2d 1024 (1981).

In rejecting the prosecution’s argument, the Williams Court first noted that two offenses merge if “to prove a particular degree of crime, the State must prove that the crime ‘was accompanied by an act which is defined as a crime elsewhere in the criminal statutes.’” Williams, 131 Wn. App. at 498, quoting, State v. Vladovic, 99 Wn.2d 413, 419 n. 2, 662 P.2d 853 (1983). Next, the Court looked at the statutes, “to determine whether the legislature intended to impose a single punishment for a homicide committed in furtherance of or in immediate flight from” the predicate offense. Williams, 131 Wn. App. at 498-99. Because the elements of the first degree felony murder statute specifically required proof of the predicate crime, the Court noted, to find the defendant guilty of the felony murder, the jury had to find him guilty of the underlying crime and of killing the victim in the course, furtherance, or immediate flight “therefrom.” 131 Wn. App. at 499. As a result, the predicate crime merged with the felony murder. Id.

In reaching its conclusion, the Williams Court rejected the argument that the “general merger law” applied and, under that law,

“criminal acts with a different purposes and effect do not merge,” regardless whether one is an element of the other. 131 Wn. App. at 498. Cases involving felony murder are different from regular “merger” cases, the Court held, because the lesser offense is “an essential element of the greater offense” under the felony murder statute. 131 Wn. App. at 499-500. Without proof of the underlying crime, there could be no first-degree murder conviction. 131 Wn. App. at 499-500. It was therefore improper to impose a separate sentence for the underlying or predicate felony, which merged into the felony murder offense. 131 Wn. App. at 499-500.

Turning to this case, Elmore was charged with and convicted of, *inter alia*, committing first-degree felony murder under RCW 9A.32.030(1)(c), by causing Claycamp’s death “while committing or attempting to commit the crime of . . . Burglary in the First Degree.” CP 386, 589-90. But she was also charged with, and convicted of, the very same first-degree burglary. CP 387-88, 591-94. As a result, the burglary should have been merged into the first-degree felony murder for sentencing. Williams, 131 Wn. App. at 498-99; Fagundes, 26 Wn. App. at 485-86.

In response, the prosecution may attempt to rely on Peyton, *supra*, and argue that this Court has declined to follow Fagundes. Any such argument should be rejected. In Peyton, this Court did not reject Fagundes completely. Instead, the Court simply held that, under the unique facts of Peyton, the crimes of robbery and felony murder were not “intertwined” and thus did not merge. Peyton, 29 Wn. App. at 719-20.

In Peyton, the defendants committed a robbery, fled in a car,

abandoned that car, continued to flee in another car, and, ultimately, ended up killing someone in a later shootout while trying to avoid apprehension for the robbery. 29 Wn. App. at 719-20. Unlike here, where the underlying felony is alleged to have been committed by essentially the same acts as the felony murder, in Peyton, the felony was over and the murder was an entirely separate act. 29 Wn. App. at 719-20.

Those facts distinguish Peyton from this case. Indeed, subsequent caselaw has made it clear that, rather than directly conflicting with Fagundes, Peyton simply addressed a different situation; where the underlying offense was *not* “intertwined,” factually, with the felony murder. See State v. McJimpson, 79 Wn. App. 164, 176-77, 901 P.2d 354 (1995), review denied, 129 Wn.2d 1013 (1996).

In addition, any attempts by the prosecution to rely on the burglary “anti-merger” statute, RCW 9A.52.050, should be rejected. The “anti-merger” statute provides that “[e]very person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately.” RCW 9A.52.050. The purpose of the statute is to allow separate punishment for the separate societal harm of the unlawful entry or remaining, in addition to any crime committed inside. See, e.g., State v. Sweet, 138 Wn.2d 466, 476-78, 980 P.2d 1223 (1999); State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). In addition, the statute ensures proportionality by ensuring that the entry, a separate harm, may be charged and punished separately by the sentencing court, if it so chose. Lessley, 118 Wn.2d at 781.

But the burglary anti-merger statute has not been applied where, as here, the burglary is an essential element of the charged crime. See, e.g., State v. Collicott, 118 Wn.2d 649, 657, 827 P.2d 263 (1992); State v. Roose, 90 Wn. App. 513, 517, 957 P.2d 232 (1998).

Because the burglary merged into the felony murder for which it was the predicate, as a matter of law, the sentencing court erred in imposing a separate sentence for the burglary. This Court should so hold and should reverse.

b. Counsel were ineffective and the “law of the case” doctrine should not apply

In response, the prosecution may attempt to prevent this Court from addressing these serious errors by arguing “waiver” based upon trial counsel’s failure to raise this issue at either trial and prior appellate counsel’s failure to raise it in the previous appeal. This Court should reject those efforts, because counsel were ineffective and the discretionary “law of the case” doctrine should not apply.

First, trial counsel was ineffective at both trials, for failing to raise the issue. Both the state and federal constitutions guarantee the accused the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); Sixth Amend.; Art. I, § 22. Counsel is ineffective if, despite a strong presumption of effectiveness, his performance is deficient and that deficiency prejudiced the defendant. Hendrickson, 129 Wn.2d at 78.

Counsel was ineffective in both of Elmore’s trials. Where, as here,

merger was proper, counsel's failure to raise the issue may give rise to a claim of ineffective assistance. See Saunders, 120 Wn. App. at 821-21; see also, State v. McKinnon, 110 Wn. App. 1, 5, 38 P.3d 1015 (2001) (error to fail to raise meritorious issue). In this case, had counsel raised the argument, it would have been error for the court to refuse to merge the predicate into the felony murder. See, e.g., Fagundes, 26 Wn. App. at 486.

Further, there can be no question that Elmore was prejudiced by counsel's failure to raise the issue. She was given a separate sentence for the burglary, and is spending greater time in custody as a result. See CP 611-23.

Prior appellate counsel was also ineffective in failing to raise the issue on appeal.¹³ Appellate counsel is ineffective if he fails to raise a meritorious issue and the result is prejudice to the defendant. See Personal Restraint of Maxfield, 133 Wn.2d 332, 343-44, 945 P.2d 196 (1977).

In the previous appeal, it appears appellate counsel chose to raise only a single issue - the improper reconstitution of the jury - instead of assigning error to all the errors which occurred at the first trial. See, e.g., State v. Elmore, 155 Wn.2d at 766. But the remedy counsel sought for improper reconstitution of a jury was remand for a new trial. 155 Wn.2d at 781. By the very nature of the argument he was raising, appellate counsel knew or should have known that it was necessary to raise trial errors which might occur on remand. Indeed, this Court routinely

¹³In the interests of full disclosure, current appellate counsel worked in the past on several cases with prior appellate counsel. See, e.g., State v. Smith, 144 Wn.2d 665, 30 P.3d 1245 (2002); In re the Personal Restraint of Johnson, 131 Wn.2d 558, 933 P.2d 1019 (1997).

addresses arguments on issues which are not dispositive on appeal but are likely to arise anew on remand. See e.g. State v. Powell, 139 Wn. App. 808, 818, 162 P.3d 1180 (2007).

By failing to raise the issue in the appeal from the first trial, prior appellate counsel not only ensured that his client's new trial would have the same errors as at the first trial. He also set up the argument the prosecution is sure to make - that the "law of the case" doctrine should apply and should prevent this Court from addressing this issue. The "law of the case" doctrine allows an appellate court to refuse to address issues raised and decided in a prior appeal, or those which might have been determined if they had been presented. Folsom v. County of Spokane, 111 Wn.2d 256, 264, 759 P.2d 1196 (1988). The doctrine is not mandatory, but rather a discretionary doctrine this Court may employ if it chooses, within the limits of RAP 2.5(c)(2). Folsom, 111 Wn.2d at 264.

This Court should decline any invitation to apply the discretionary "law of the case doctrine" here. The doctrine is "a mere rule of practice and not a limitation on the court's power." Highlands Plaza, Inc. v. Viking Inv. Corp., 2 Wn. App. 192, 197-98, 467 P.2d 378 (1970). As a result, the court has full discretion to "refuse to apply the doctrine" if to do so will perpetuate error. RAP 2.5(c)(2); Folsom, 111 Wn.2d at 264; see also, RAP 1.2(a) (requiring the Court to interpret the Rules of Appellate Procedure "liberally" and act to promote the interests of justice).

Here, application of the doctrine would only perpetuate the error already committed, and will not promote the interests of justice. Elmore should not be further punished for the ineffectiveness of appointed

counsel, over which she had no control.

Indeed, this Court has rejected the idea that the “law of the case” doctrine precludes the Court from considering issues neither explicitly or implicitly considered in a previous appeal. See State v. Trask, 98 Wn. App. 690, 698, 990 P.2d 976 (2000). Counsel were ineffective in failing to raise this issue and this Court should so hold and should reverse.

3. THE RESTRAINT WAS INCIDENTAL TO THE OTHER
CRIMES AND THUS DID NOT SUPPORT A
SEPARATE KIDNAPPING CONVICTION UNDER DUE
PROCESS AND DOUBLE JEOPARDY PRINCIPLES;
COUNSEL WERE AGAIN INEFFECTIVE

Many crimes involve some degree of “restraint.” See, Johnson, 92 Wn.2d at 676; State v. Korum, 120 Wn. App. 686, 86 P.3d 166 (2004), affirmed in part and reversed in part, 157 Wn.2d 614, 141 P.3d 13 (2007). As a result, because the kidnapping statutes are generally “broadly worded,” in this state a separate conviction for a “restraint” crime such as kidnapping cannot be upheld on appeal if the restraint used was merely “incidental” to the commission of another charged crime. State v. Green, 94 Wn.2d 216, 226-27, 616 P.2d 628 (1980); Johnson, 92 Wn.2d at 676. This is because the “mere incidental restraint and movement of the victim during the course of another crime which has no independent purpose or injury is insufficient to establish a kidnapping.” Brett, 126 Wn.2d at 166.

Put another way, if the restraint and movement of a victim are “merely incidental and integral to commission of another crime,” the restraint and movement “do not constitute the independent, separate crime of kidnapping” and the kidnapping charges must be dismissed. Korum, 120 Wn. App. at 703-704.

There are serious constitutional dimensions to the “incidental restraint” doctrine. Both the constitutional prohibition against double jeopardy and the constitutional due process right to be free from conviction upon less than sufficient evidence are implicated when a court examines whether a separate kidnapping charge should stand. See Brett, 126 Wn.2d at 174 (noting it as an issue of “whether the kidnapping will merge into a separate crime to avoid double jeopardy”); Green, 94 Wn.2d at 226-27 (addressing it as an issue of the right to have the state prove all the essential elements of the crime beyond a reasonable doubt); see Fifth Amend; Fourteenth Amend.; Art. I, §§ 3, 9. Because of its constitutional dimensions, the issue, like the related issue of “merger” at sentencing, may be raised under RAP 2.5(a)(3) for the first time on review as involving a manifest error affecting substantial constitutional rights. See, e.g., Frohs, 83 Wn. App. at 811.¹⁴ In addition, this Court should address the issue despite counsel’s failures below and in the previous appeal, because those failures were ineffective assistance and the “law of the case” doctrine should not apply.

- a. The restraint was incidental to the burglary/robbery and the separate conviction is not supported by the burglary anti-merger rule under the unique facts of this case

The question of whether restraint is “incidental” to another crime

¹⁴In Frohs, Division One noted that caselaw previously holding that there was no constitutional component to the sentencing “merger” doctrine was no longer good law, because that caselaw was developed when multiple convictions were not deemed to violate double jeopardy prohibitions if the relevant sentences were ordered to run concurrent. Frohs, 83 Wn. App. at 811 n.2, 812. In Washington, it is now recognized that multiple convictions themselves are a double jeopardy violation, regardless how the sentences run. See State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007); Calle, 125 Wn.2d at 776.

depends upon the facts of each case, but includes evaluation of 1) the relationship between the restraint and the other crime, 2) the distance the victim was moved while restrained, and 3) the time which passes between the act of restraint and the other crime. Saunders, 120 Wn. App. at 817.

Thus, where the defendant grabbed the victim, carried her 50 or 60 feet, placed her behind a building and then killed her, the restraint of grabbing and moving and secreting her did not support a separate kidnapping conviction because the “restraint” was incidental to the homicide. Green, 94 Wn.2d at 226-27. Similarly, where the defendant was charged with “home invasion” robberies during which the victims were bound and one victim was moved from a house to another location for the purpose of facilitating the robberies, the kidnaping charges were dismissed because the acts of restraint were “incidental to the robberies as a matter of law.” Korum, 120 Wn. App. at 689, 707.

And in a case where two girls voluntarily went to the defendant’s home, the restraint was incidental to rapes where the defendant took the girls into separate rooms, bound them, raped them, left to buy cigarettes, returned, and then took one of the girls to a wooded area where he raped her again. Johnson, 92 Wn.2d at 672-73. The Court found the restraint “incidental” because not only did the crimes occur at almost the same time and place but the sole purpose of the restraint was to facilitate the rapes. 92 Wn.2d at 673.

In this case, the restraint used for the alleged kidnapping of Schaeff was completely incidental to the burglary and robbery of the home. The kidnapping was alleged to have occurred when Schaeff was “intentionally

abducted” with the firearm. CP 387-88. At trial, the prosecution argued that Crockett had kidnapped Schaef when Crockett walked into the house, pointed a gun at Schaef’s head, and ordered Schaef to the ground in order to restrain him while they searched for the safe. RP 930.

Unlike in Johnson, supra, the crimes did not occur at *almost* the same time and place; they occurred at *exactly* the same time and place. There was no movement of Schaef to a different location, nor was there any different purpose for the restraint, other than to facilitate the burglary/robbery crimes. Compare, State v. Whitney, 44 Wn. App. 17, 720 P.2d 853 (1986), affirmed, 108 Wn.2d 506, 739 (1987) (where a defendant ordered the victim at knife point into her car, hid her, drove to another area, forced her to disrobe and then raped her, there was a kidnapping separate from and not incidental to the rape).

Indeed, the prosecution specifically relied on the fact that the restraint was committed with the intent to facilitate the burglary/robbery of the home, in arguing that the kidnapping had occurred. RP 930. And the prosecutor argued that Elmore was guilty as an accomplice because she must have known, in advance, that some restraint would be necessary to commit the burglary/robbery of the home. RP 931. Because she knew there were people at the home, the prosecutor argued, Elmore knew those people “would need to be restrained” in order for the perpetrators to secure their goal of taking the safe. RP 931; see also CP 386-90, 596-97.

Thus, even the prosecution’s own arguments prove that there was no “independent purpose” for pointing the gun at Schaef and ordering him to the floor - the acts alleged to be kidnapping. The only purpose was to

facilitate the burglary/robbery of the home.

In response, the prosecution may attempt to rely on the burglary “anti-merger” statute, RCW 9A.52.050. Any such reliance, however, would be misplaced. The burglary “anti-merger” statute ensures proportionality by allowing an entry into a building, a separate societal harm, to be punished separately by the sentencing court if it chooses to do so. Lessley, 118 Wn.2d at 781. But here, it is not the burglary which merges - it is the kidnapping. See State v. Weber, 159 Wn.2d 252, 149 P.3d 646 (2006), cert. denied, ___ U.S. ___, 127 S. Ct. 2986, 168 L. Ed. 2d 714 (2007) (“lesser” crime for the purposes of double jeopardy is the conviction carrying the lesser punishment); CP 614-16. Thus, the issue of proportionality underlying the burglary anti-merger statute is not at issue here, because the separate entry, the burglary, is punished.

More importantly, the burglary anti-merger rule is a limit on the charging authority of the prosecution and the “authority of the sentencing judge” under the SRA, not on the due process or double jeopardy rights of the defendant. See, e.g., Collicott, 118 Wn.2d at 657; Roose, 90 Wn. App. at 517. The anti-merger statute provides that, “[e]very person who, in the commission of a burglary shall commit any other crime, may be *punished* therefor as well as for the burglary, and may be *prosecuted* for each crime separately.” RCW 9A.52.050 (emphasis added). The statute thus provides authority for the prosecutor to charge both a burglary and another crime together and the sentencing court to punish both separately. But nothing in the statute states that it would be proper to *convict* for both charges if there is insufficient evidence, as a matter of law, to support both convictions.

The burglary anti-merger statute cannot override the constitutional rights implicated when there is a separate conviction for restraint which is merely incidental to the commission of another crime and had no separate purpose.

Finally, Sweet, supra, does not compel a different result. In Sweet, the Court addressed the validity of some *dicta* in Johnson regarding the correct interpretation of the burglary anti-merger statute about whether an assault which elevated a burglary to a first-degree burglary could also be separately punished under the anti-merger statute. 138 Wn.2d at 476-77. First noting that “merger” is a rule of statutory construction which only applies after conviction for two separate offenses, the Court concluded that the burglary anti-merger statute authorized the separate punishments for both an underlying assault and a burglary. 138 Wn.2d at 476-77. In reaching that conclusion, in *dicta*, the Court stated, “a defendant could be charged separately with burglary in the first degree, rape in the first degree, and kidnapping in the first degree, and, upon conviction, punished for each charge” under the anti-merger statute. Sweet, 138 Wn.2d at 477.

Sweet cited to Collicot for that broad statement. Sweet, 138 Wn.2d at 477. But Collicott did not so hold. In Collicott, the defendant broke into a counseling center and began collecting electronic equipment, apparently in order to steal it. 118 Wn.2d at 650. A woman sleeping in the center was awakened and spoke to the man, not knowing who he was, but then saw the electronic equipment and went to call police. Id. The defendant hit her on the head, displayed a knife, tied her up, demanded she give him her car keys and money, loaded the electronic gear into her car,

raped her, then took her to the car, drove around with her and finally left her alone in the car, at which point she escaped. Id.

Under the facts of that case, the Collicott Court found that the kidnapping which had occurred when the victim was moved to her car and driven around could be punished separately from the burglary of the center, under the burglary anti-merger rule. 118 Wn.2d at 650. But Collicott's conclusion on that point was not a principled finding that the "anti-merger" statute somehow trumped the constitutionally-grounded doctrine of "incidental restraint." Collicott did not address - nor did it involve- such restraint. 118 Wn.2d at 657.

Notably, at the time Collicott was decided, the constitutional implications of "merger" were different, because the Washington Supreme Court had not yet held that multiple *convictions* themselves were violations of double jeopardy, independent of multiple punishments. Frohs, 83 Wn. App. at 811 n.2, 812; see Calle, 125 Wn.2d at 776. .

Thus, Collicott reached a conclusion based upon very different facts, where the restraint involved was not "incidental" to but was separate from the other crimes. And Collicott did not address the constitutional implications at issue here. Nor did it address a situation, like the one here, where multiple Washington courts have held similar evidence of incidental restraint insufficient as a matter of law for a separate "restraint crime" conviction. The restraint used in this case was clearly incidental to the other crimes. The evidence was insufficient, as a matter of law, to support a separate conviction for kidnapping, and the double jeopardy was implicated as well. This Court should so hold and should reverse.

- b. Elmore was again deprived of her constitutionally guaranteed rights to effective assistance of counsel and the discretionary “law of the case” doctrine does not divest this Court of its authority

Again, trial counsel failed to raise an issue which, if raised, would have resulted in dismissal of a charge against his client. And again, prior appellate counsel failed to raise a valid issue on appeal, thus prejudicing his now former client and effectively ensuring that the error would be repeated on remand.

These failures of counsel were, again, ineffectiveness which prejudiced Elmore. Had trial counsel raised the issue below, it would have been error for the trial court to refuse to dismiss the kidnapping conviction when the restraint here was so clearly incidental to the commission of the other crimes. See, e.g., Saunders, 120 Wn. App. at 817. Had appellate counsel raised the issue on appeal, it would have been addressed by this Court and the kidnapping conviction would have been reversed, not submitted to the jury in the second trial.

As with the other issues appellate counsel failed to raise, discussed *infra*, this Court should decline to punish Elmore for counsel’s failures, by applying the completely discretionary “law of the case” doctrine. Counsel’s failures were not Ms. Elmore’s fault. She was entitled to a full, fair trial, with competent counsel. She was also entitled to a full, fair appeal. The fact that she was deprived of those rights does not support further depriving her of this Court’s review of this important issue. Because the restraint was incidental to the other crimes, the kidnapping conviction should be dismissed. This Court should so hold.

4. THE EXCEPTIONAL SENTENCES MUST BE REVERSED BECAUSE THE AGGRAVATING FACTORS WERE IMPROPERLY SUBMITTED TO THE JURY UNDER THE 2005 “BLAKELY FIX” STATUTE, WHICH DID NOT APPLY

Reversal of the exceptional sentences is also required, because there was no authority to submit the aggravating factors to the jury and impose the exceptional sentences, under the law applicable to Elmore’s case.

With Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the U.S. Supreme Court made it clear that the Sixth Amendment rights to trial by jury and proof beyond a reasonable doubt require that any aggravating factor upon which an exceptional sentence is based must be submitted to and found by a jury, using that high standard of proof. 542 U.S. at 311. In response to Blakely, in 2005, the Legislature significantly amended the Washington exceptional sentencing statutes. See Laws of 2005, ch. 68. The new statute, RCW 9.94A.537(1) (2005), amended the previous scheme found unconstitutional in Blakely, creating the authority for aggravating factors to be submitted to a jury for proof beyond a reasonable doubt.

Below, the parties argued about whether the 2005 amendments, known as the “Blakely fix,” could constitutionally apply to Elmore’s case and authorize submission of aggravating factors to the jury. See CP 300-17, 578-79. That issue has since been addressed, in part, by our Supreme Court. In State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007), the Court held that the new sentencing scheme applied to all cases in which trial had not yet begun or a plea not yet entered as of April 15, 2005, the

amendments' effective date. 159 Wn.2d at 465. For those defendants, the Court found no constitutional impediment to applying the "procedural" 2005 amendments, regardless of the date of the crime. 159 Wn.2d at 476-77.

For defendants whose trials *had* begun or pleas entered prior to the effective date of the statute, however, the statute did not apply. Pillatos, 159 Wn.2d at 476-77. As a result, because "trial courts do not have inherent authority to empanel sentencing juries," and the previous statute had "explicitly direct[ed] the trial court to make the necessary factual findings," for those whose trial had already begun or pleas already been entered before April 15, 2005, there was no authority to submit aggravating factors to a jury as constitutionally required. For those few, no exceptional sentence could be imposed. Pillatos, 159 Wn.2d at 470; see State v. Hughes, 154 Wn.2d 118, 149, 110 P.3d 192 (2005), reversed on other grounds sub nom, Washington v. Recuenco, ___ U.S. ___, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); see Womac, 160 Wn.2d at 663.

Elmore is one of those few, because, by their terms, the 2005 amendments did not apply to her case. Laws of 2005, ch. 68, provides that "[a]t any time prior to trial or entry of the guilty plea," the prosecution may give the required notice and a jury is authorized to consider aggravating factors. But the 2005 amendments do not define "trial," nor do they explain whether that term refers only to a first, original trial or also includes retrial after remand. See Laws of 2005, ch. 68.

The answer to a question of statutory interpretation starts with the statute's plain language. See State v. Smith, 117 Wn.2d 263, 270-71, 814

P.2d 619 (1991). If a statute is susceptible only to one meaning, that meaning applies and no further “interpretation” is required. Id. If, however, a statute’s language could be subject to more than one reasonable interpretation, the language is “ambiguous” and must be interpreted. See State v. Ollens, 89 Wn. App. 437, 442, 949 P.2d 407 (1998).

Here, there are several different, reasonable interpretations which could apply based upon the statute’s language. Is “prior to trial” limited so that it is only prior to an initial trial on the merits? Or is “prior to trial” interpreted expansively, to add the words, “or retrial,” which the Legislature did not include?

Because it is susceptible to more than one reasonable interpretation, the statute is ambiguous. See Ollens, 89 Wn. App. at 442. As a result, this Court is required to apply the “rule of lenity.” In re Personal Restraint of Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999). Under that rule, the Court must adopt the construction of an ambiguous statute which is most favorable to the defendant. See In re Post Sentencing Review of Charles, 135 Wn.2d 239, 249-50, 955 P.2d 798 (1988).

Here, the most favorable construction of the statute for Elmore is the one giving the plain language of the statute the greatest effect. “Prior to trial” should be interpreted as it reads - “prior to trial,” without adding language so that it reads “prior to trial *or retrial*.” Indeed, the Supreme Court has long declared the impropriety of such judicial rewriting of a statute. See In re Postsentence Review of Leach, 161 Wn.2d 180, 186,

163 P.2d 782 (2007).

Under the rule of lenity, therefore, because Elmore's case was before the court on *retrial*, the 2005 amendments do not, by their terms, apply. There was thus no authority for the aggravating factors to be submitted to the jury and the subsequent exceptional sentences to be imposed.

This interpretation of the 2005 amendments is also entirely consistent with subsequent Legislative acts. In response to Pillatos, the Legislature enacted EHB 2070. Laws of 2007, ch. 205. That bill specifically refers to Pillatos and its holding regarding when the 2005 amendments apply. Laws of 2007, ch. 205, § 1. The Legislature wrote the 2007 statute to change the 2005 amendments in light of Pillatos and grant authority for a superior court to "impanel [sp] juries to find aggravating circumstances in all cases that come before the courts for trial or sentencing, regardless of the date of the original trial or sentencing." Laws of 2007, ch. 205, § 1. The Legislature also added a subsection to RCW 9.94A.537 which provided:

In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel [sp] a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon the superior court in imposing the previous sentence, at the new sentencing hearing.

Laws of 2007, ch. 205, § 2.

The 2007 Legislature thus was concerned with fixing the flaws revealed by Pillatos. And one of those flaws was the gaping hole in the application of the 2005 amendments - cases on remand. This focus in

2007, and the 2007 amendments themselves, indicate that the 2005 amendments applied only if the first trial or first plea was entered after its effective date, not to cases on remand for retrial. See, e.g., In re the Personal Restraint of Stewart, 115 Wn. App. 319, 330, 75 P.3d 521 (2003).

Based on the plain language of the 2005 amendments, there was no authority to submit the aggravating factors to the jury and the subsequent exceptional sentences must be reversed.¹⁵

On remand, no exceptional sentence may be imposed, because the 2007 amendments to the exceptional sentencing scheme cannot apply. It is clear from the language of the 2007 amendments that the Legislature wanted to retroactively authorize the empaneling of juries to impose exceptional sentences in cases Pillatos found were not covered by the 2005 amendments. See Laws of 2007, ch. 205. Despite that intent, it cannot.

In general, statutes are presumed to operate prospectively, i.e., only to events occurring after the statute's effective date. State v. Blank, 131 Wn.2d 230, 248, 930 P.2d 1213 (1997). This presumption is indeed an "essential thread in the mantle of protection that the law affords the individual," and is "deeply rooted in our jurisprudence." Smith, 144 Wn.2d at 673. It can be overcome only if it is shown 1) that the legislature intended the amendment to apply retroactively, 2) the amendment is "curative," or 3) the amendment is "remedial." Stewart, 115 Wn. App. at

¹⁵The 2007 amendments to the statutory scheme were not in effect until after the second trial in this case was complete. See Laws of 2007, ch. 205, § 3 (the amendments take effect "immediately" in 2007); RP 997 (date of argument on aggravating factors, March 31, 2006).

332. Even if one of those three conditions is met, however, there is the additional restriction that a statutory amendment cannot be applied retroactively if to do so would violate a “constitutional prohibition.” 115 Wn. App. at 332-33; Pillatos, 159 Wn.2d at 473.

One of those constitutional prohibitions is the doctrine of separation of powers. See In re Detention of Brooks, 145 Wn.2d 275, 285, 36 P.3d 1034 (2001), reversed on other grounds by, In re the Detention of Thorell, 149 Wn.2d 724, 752-53, 72 P.3d 708 (2003), cert. denied, 541 U.S. 990 (2004); State v. Dunaway, 109 Wn.2d 207, 216 n. 6, 743 P.2d 1237 (1987). That doctrine preserves the constitutional division between the branches of government by ensuring that the activity of one does not threaten “the independence or integrity or invade[] the prerogatives of another.” Carrick v. Locke, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994), quoting, Zylstra v. Piva, 85 Wn.2d 743, 539 P.2d 823 (1975).

Thus, when an appellate court has interpreted a statute, the separation of powers doctrine prohibits the Legislature from trying to retroactively amend the statute to contravene a judicial construction. In re F.D. Processing, 119 Wn.2d 452, 461, 832 P.2d 1303 (1992); Dunaway, 109 Wn.2d at 216 n. 6. An attempt to do so is “disturbing in that it would effectively be giving license to the [L]egislature to overrule” the Court, raising separation of powers problems. Magula v. Benton Title Co., Inc., 131 Wn.2d 171, 182, 930 P.3d 307 (1997), quoting, Johnson v. Morris, 87 Wn.2d 922, 926, 557 P.2d 1229 (1976).

Stewart, supra, is instructive. In Stewart, the Legislature declared its intent to “clarify” a statute with amendments, rewriting the statute in a

way to contravene a judicial interpretation and even referring to the specific case in question in writing the bill. 115 Wn. App. at 330. On review, the Court first rejected the idea that the legislation was merely “curative,” instead holding that:

Legislative enactments which respond to judicial interpretations of a prior statute, and which materially and affirmatively change that prior statute, are not “clarifications” of original intent. Rather, such enactments are amendments to the statute itself.

115 Wn. App. at 340, quoting, Marine Power & Equip. Co. v. Washington State Human Rights Comm’n Hearing Tribunal, 39 Wn. App. 609, 614-15, 694 P.2d 697 (1985). It would violate the separation of powers to permit retroactive application of the amendments, because the amendments contravened the court’s “construction of the original statute, which must be followed.” Stewart, 115 Wn. App. at 339.

Here, as in Stewart, the 2007 amendments were not “curative.” They were a specific Legislative response to Pillatos and an attempt to overrule the holding in that case that those whose trial commenced or pleas were entered prior to April 15, 2005, could not be subjected to an exceptional sentence. Indeed, the Legislature *referred* to overruling Pillatos in enacting the amendments. Laws of 2007, ch. 205, § 1.

Thus, the Legislature clearly intended to amend the statute to change it in response to the interpretation of the Supreme Court in Pillatos. And that amendment applies not just prospectively by changing the law for future cases but also retroactively, reaching back to those whose trials began or pleas were entered before April 15, 2005, and authorizing the exceptional sentence scheme which Pillatos held was *not* authorized under

the previous statute.

The statute runs afoul of the doctrine of separation of powers, at least if applied here. The Legislature is not “empowered to retroactively ‘clarify’ an existing statute when that clarification contravenes the construction placed upon that statute” by the Supreme Court. Johnson, 87 Wn.2d at 925-26. And it is neither the function of the legislature nor constitutionally permissible for an amendment to overrule a prior judicial interpretation of a statute in this way. 87 Wn.2d at 925.

There is no question that the legislature is permitted to amend statutes prospectively. Pillatos, 159 Wn.2d at 473. But “even a remedial amendment will be applied prospectively only if it contradicts a previous interpretation of the amended statute” by the appellate court. Pillatos, 159 Wn.2d at 473; see Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803); Overton v. Econ. Assistance Auth., 96 Wn.2d 552, 558, 637 P.2d 652 (1981). Because it would violate the doctrine of separation of powers to apply the 2007 amendments to this case, those amendments cannot be relied on by the prosecution on remand.

Nor could the prosecution rely on those amendments as supporting the exceptional sentence now, in this appeal. The amendments did not even exist until after trial and sentencing. But even if they had, there still would have been serious problems for the prosecution. Under RCW 9.94A.537(2) (2007), in any case where an exceptional sentence above the standard range was imposed and a new sentencing hearing is required, the superior court is permitted to empanel a jury “to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), *that were relied*

upon by the superior court in imposing the previous sentence, at the new sentencing hearing.” RCW 9.94A.537(2) (2007) (emphasis added).

Here, the prosecution exceeded the scope of its authority under even the 2007 amendments. In arguing for the exceptional sentence after the first trial, in 2001, the prosecution urged the court to impose an exceptional sentence on the felony murder and the burglary *only*. CP 754-792. The aggravating factors upon which the prosecution relied were:

- high degree of planning and sophistication
- particularly vulnerable victims
- presence of residents / caretakers during the burglary
- “foreseeable” severe impact of the crimes.

CP 754-55. The court found those factors for the burglary and murder and relied on them in imposing the sentences requested by the prosecution. CP 124-58.

But the aggravating factors alleged on remand by the prosecution were not limited to the factors “that were relied upon by the superior court in imposing the previous sentence,” as required under RCW 9.94A.537(2) (2007). Instead, the prosecution added, for the first time, allegations of aggravating factors for the kidnapping, conspiracy, and, initially, the assault. CP 237-42, 386-90. Those factors were not relied upon in imposing the previous sentence, and thus could not support the exceptional sentence under RCW 9.94A.537(2) (2007); *see, e.g., State v. T.E.C.*, 122 Wn. App. 9, 24, 92 P.3d 263, review denied, 152 Wn.2d 1012 (2004) (improper for a court to “base an aggravating factor” on a count other than the count for which the exceptional sentence is imposed).

The 2005 amendments did not support submission of the aggravating factors to the jury in this case. The 2007 amendments cannot and do not completely support the procedure used, either. As a result, because there is no valid, constitutionally applicable statute authorizing the submission of the aggravating factors to the jury, the only possible remedy is reversal and remand for imposition of a sentence within the standard range for each offense. This Court should so hold.

5. THE PROSECUTION'S AMENDMENT OF THE CHARGES VIOLATED THE DUE PROCESS PROHIBITION ON PROSECUTORIAL VINDICTIVENESS, ELMORE'S CONSTITUTIONAL RIGHTS TO BE FREE FROM DOUBLE JEOPARDY, AND THE MANDATORY JOINDER RULE AND COUNSEL WERE AGAIN INEFFECTIVE

a. Relevant facts

1) Amendment of charges after first appeal

Before entry of the plea, the charges against Elmore and the others had been increased from three to the five contained in the "Second Amended Information." CP 1-17. Those charges were as follows:

First-degree felony murder: Elmore, "together with another,"¹⁶ committed the crime by shooting Claycamp, thereby causing his death, while committing or attempting to "commit the crime of Robbery in the First Degree,"; while armed with a firearm;

First-degree burglary: committed with intent to commit "a crime" and while "armed with a handgun, a deadly weapon;"

First-degree kidnapping: intentionally abducting Schaef, with intent to facilitate commission of or flight from first-degree robbery; while armed with a firearm;

Second-degree assault: assault of Schaef with a deadly weapon "to wit: a handgun."

¹⁶Named were Crockett, Jerde, Edwards and Wilms. CP 14.

Conspiracy to commit first-degree robbery.

CP 12-17.

As part of the plea agreement, a “third amended information” was filed, alleging only the first-degree murder. CP 27. In 2001, Elmore was allowed to withdraw the plea as a result of the prosecution’s violation of the plea agreement. CP 683; see CP 89-94.

At the time of the withdrawal, there was some discussion about what the court and prosecution thought was the “third amended information.” 2RP 5-6. The prosecution told the court the new information did not add “any additional charges to the original information” but only “added some alternatives to the charge of murder in the first degree and the charge of kidnapping in the first degree and changed the date of the criminal conspiracy to commit robbery in the first degree.” 2RP 6.

Counsel raised no objections and entered “pleas” of not guilty to the new information on his client’s behalf. 2RP 7.¹⁷

Due to a misunderstanding in the correct numbering for the amended informations, the court was later concerned about whether Elmore had been properly arraigned. 2RP 147. After a recess, the

¹⁷The information discussed by the parties, however, was not actually filed until 02/12/01, nor was it actually the third amended information. CP 95-99. The real Third Amended Information was the information filed as part of the plea agreement. See CP 27. The information discussed on remand in January of 2001 was actually the Fourth Amended Information, as the prosecution apparently discovered prior to its filing. See CP 27, 95-99.

prosecutor told the court that Elmore had been arraigned on March 23rd¹⁸ on a “fourth” amended information but the prosecution thought it should have been the “fifth” amended information. 2RP 149. Because of the confusion, the prosecutor asked the court to allow filing of a “fifth amended information,” which the prosecutor claimed was “identical” to the “fourth amended information” previously filed. CP 684-707; 2RP 149.

Counsel said he was “certainly aware of the charges” and was “sure” he got a copy of the “fourth amended information back then, which is now the fifth amended information.” 4RP 2. He waived formal reading of the charges and “any advisement of rights” and entered pleas of not guilt. 4RP 3.

The Fourth Amended Information and Fifth Amended Information both amended the first-degree murder charges. As in the second amended information, there was an allegation that the murder was committed while committing or attempting to commit first-degree robbery. CP 12-13, 95-96, 684-707. The Fourth and Fifth, however, added allegations that the crime was committed while committing or attempting to commit the additional possible underlying crimes of attempted second-degree robbery and/or first-degree burglary. CP 94-97, 684-707.

The Fourth and Fifth Amended Informations also changed the

¹⁸That hearing, an omnibus hearing, was not on the record. The clerk indicated that the notes from the omnibus hearing did not indicate any arraignment had occurred. 2RP 147-49. The court later managed to locate its “docket sheet” for that date and had an indication that the court “did accept a fourth amended information at that point in time.” 4RP 4.

kidnapping charge from involving only intent to commit first-degree robbery as charged in the Second Amended Information to also having the intent to commit second-degree robbery, “and/or” first-degree burglary. CP 95-97, 684-707.

Although the prosecutor had represented them as “identical,” the Fourth Amended Information only charged the conspiracy, but the Fifth added the allegation that “a participant was to be armed with a deadly weapon, to wit: a firearm, and/or intending to inflict bodily injury.” CP 97-99, 689-90.

The prosecutor never sought, however, a firearm or other enhancement on the conspiracy charge and said, at sentencing, that documents indicating that charge had a firearm enhancement were in error, because “there was no firearm enhancement.” 3RP 1224; CP 744-45.

At sentencing in 2001, the prosecution argued that standard range sentences were appropriate for the kidnaping and conspiracy counts. CP 754-56. The prosecution also conceded that the assault was the “same criminal conduct” as the kidnaping and should not be separately sentenced. CP 754-56. The prosecution then asked the court to impose exceptional sentences on both the burglary and felony murder. CP 754-56. The aggravating factors upon which the prosecution relied were:

- high degree of planning and sophistication
- particularly vulnerable victims
- presence of residents / caretakers during the burglary

-“foreseeable” severe impact of the crimes.

CP 754-56.

In imposing the sentences, the court agreed that the assault was the “same criminal conduct” as the kidnapping and that standard range sentences were proper for the kidnapping and conspiracy counts. CP 154-58. The court also imposed the requested exceptional sentences for the burglary and felony murder, relying on all of the aggravating factors urged by the prosecution. CP 124-58.

2) Amendment of charges after second appeal

After Elmore won reversal of her convictions in the Supreme Court in 2005, on remand, the state filed a Sixth Amended Information (“6AI”). CP 237-42; 5RP 1. At the “rearraignment,” on January 23, 2006, the prosecutor told the court that the new information simply “adds and alleges aggravating circumstances for each count.” 5RP 3. Counsel told the court that Elmore’s position was that the state was “barred from adding aggravating factors on this case,” and that the parties had an argument on that issue set before Judge Hogan for February 17th. 5RP 3-4; CP 300-317. With that, the court accepted the Sixth Amended Information and Elmore’s pleas of not guilty to the new information. 5RP 4.

When the parties appeared on February 17th, the court first rejected Elmore’s efforts to have new counsel appointed. RP 3-12. The prosecution also discussed filing a Seventh Amended Information, with the understanding that the Blakely issue was going to be argued still and the Seventh Amended Information was “more of a cleaning it up for purposes of trial.” RP 13-14. Counsel was unprepared to argue the

Blakely issue and the matter was set over. RP 13-15.

On February 27, 2006, after discussing juror selection, counsel agreed to submit the issue of “aggravating circumstances” on the briefing. RP 21-33. Counsel’s brief raised only issues relating to Blakely and 2005 statutory amendments to the exceptional sentencing scheme. CP 300-17.

On March 6, 2006, the court ruled it was proper for the prosecution file the Seventh Amended Information. RP 44. The court granted the state’s request based upon the court’s “interpretation of the legislative change, commonly referred to as the Blakely fix,” and the court’s belief that the 2005 amendments applied and authorized submitting the aggravating factors to the jury. RP 44-50.

The Sixth Amended Information added an alternative charge to the burglary, setting forth a new means of having committed the crime by having assaulted Claycamp and Schaefer inside the home. CP 237-42. The original charge of having committed the crime by being armed with a firearm while inside was realleged. CP 237-42.

The Sixth Amended Information and Seventh Amended Informations added and subtracted allegations of aggravating factors for all of the offenses, summarized as follows:

	<u>Sixth Amend. Info.</u>	<u>Seventh Amend. Info.</u>
Felony murder:	high degree of planning/ sophistication, foreseeable severe impact on Robertson/ Schaefer, presence of three physically handicapped persons/ caregivers during the crime	deleted all but high degree of planning/ sophistication

Burglary: (both alternative means):	particularly vulnerable, high degree of planning/ sophistication, foreseeable severe impact on Robertson/ Schaef, presence of three physically handicapped/ caregivers	deleted the “severe impact” factor and the presence factor; added that the victim of the burglary was present
Kidnapping:	high degree of planning/ sophistication, foreseeable severe impact on Robertson/ Schaef, presence of three physically handicapped/ caregivers	deleted all factors except “high degree of planning/ sophistication
Assault:	high degree of planning/ sophistication foreseeable severe impact on Schaef, presence of three physically handicapped/ caregivers	deleted all
Conspiracy:	particularly vulnerable, foreseeable severe impact on Robertson, presence of physically handicapped/ caregivers	deleted “severe impact” factor, “presence” factor, added “particularly vulnerable victim, “high degree of planning/ sophistication

CP 237-42; 386-90.

The jury found that the prosecution had not proven the “high degree of planning or sophistication” aggravator for any of the counts. CP 590-601. For the burglary and conspiracy, the jury found the aggravator of a particularly vulnerable victim and, for the burglary, that it had occurred while people were present. CP 592-94, 600-601. The court imposed exceptional sentences on those counts, for those reasons. CP 647-52.

b. The amendments violated the due process prohibition on prosecutorial vindictiveness

Both the state and federal due process clauses guarantee that a

defendant will not be punished by the state for lawfully exercising a constitutional or even procedural right. State v. Lee, 69 Wn. App. 31, 35, 847 P.2d 25, review denied, 122 Wn.2d 1003 (1993); Blackledge v. Perry, 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974); North Carolina v. Pearce, 395 U.S. 711, 723-25, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969); Fourteenth Amend.; Art. 1, § 3. Further, it is “patently unconstitutional” to chill the exercise of constitutional rights by penalizing those who choose to exercise them. United States v. Jackson, 390 U.S. 570, 581, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968); Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965); see also, State v. Eide, 83 Wn.2d 676, 679, 521 P.2d 706 (1974), questioned on other grounds by, State v. Blank, 131 Wn.2d 230, 247, 930 P.2d 1213 (1997).

As a result, due process protects against “prosecutorial vindictiveness,” which is defined as increasing the accusations against a defendant in retaliation for the defendant’s exercise of a procedural or constitutional right. See, State v. Bonisisio, 92 Wn. App. 783, 790-92, 964 P.2d 1222 (1998), review denied, 137 Wn.2d 1024 (1999).

In this case, Elmore’s due process rights to be free from prosecutorial vindictiveness were repeatedly violated when, on remand after Elmore’s successful appeals, the prosecution increased the charges and allegations against her.

1) A presumption of vindictiveness applies

Prosecutorial vindictiveness is presumed in situations where the circumstances surrounding the prosecutorial decision at issue create the “appearance of vindictiveness.” Thigpen v. Roberts, 468 U.S. 27, 30-31,

104 S. Ct. 2916, 82 L. Ed. 2d 23 (1984); see, United States v. Groves, 571 F.2d 450, 453 (9th Cir. 1978).

One of those situations is where, as here, the prosecution increases the case against the defendant on retrial after a successful appeal. Blackledge, 417 U.S. at 27-28. The presumption of vindictiveness applies in such cases because the prosecution had a “considerable stake” in discouraging appeals. Id. That “stake” creates a very real risk that, “if the prosecutor has the means readily at hand to discourage such appeals - - by ‘upping the ante,’” the state will be able to discourage appeals by all but the most “hardy” defendants. Blackledge, 417 U.S. at 27-28. An increase in charges in such situations is much more likely to be motivated by an improper purpose than in other situations, such as when amendments are made pretrial after failed plea negotiations. United States v. Goodwin, 457 U.S. 368, 376-81, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982).

The U.S. Supreme Court crafted the presumption because it recognized the difficulty a defendant would have in showing actual “vindictiveness.” 457 U.S. at 376-77. Motives are “complex and difficult to prove,” so requiring defendants to shoulder the burden of proving actual vindictiveness in a situation where there is an appearance of vindictiveness would not adequately address the problem. Id. Further, the Court was not solely concerned with *actual* vindictiveness. Id. If people have the fear that they will be punished by the government for exercising a right, that fear will prevent them from freely doing so. Id. This “chilling effect” of even the *apprehension* of vindictiveness was part of the reason for creating the presumption of vindictiveness. Goodwin, 457 U.S. at 376-77. As a

result, even with proof that the prosecutor had no “subjective animus or ill will toward the defendant,” where there is an increase in charges after a successful appeal, the presumption of prosecutorial vindictiveness applies and the new allegations must be dismissed with prejudice unless the prosecution meets the burden of proving sufficient “objective evidence” to rebut the presumption. Goodwin, 457 U.S. at 376-77; Korum, 157 Wn.2d at 672.

2) The presumption was not rebutted

The prosecution did not even attempt to meet that burden here, nor could it. There does not appear to be caselaw in this state defining what “objective evidence” is required to rebut the presumption. In some jurisdictions, the presumption can only be rebutted by evidence the new charges could not have been brought prior to the exercise of the defendant’s rights. See, U.S. v. Goodwin, 637 F.2d 250 (4th Cir. 1981) ; Others look for reasonable, permissible explanation to explain why the new allegations were not originally charged. See, e.g., State v. Cady, 955 F. Supp. 164, 165-66 (N.D. N.Y., 1997). Newly discovered evidence, for example, can serve as a valid explanation for amendments. See U.S. v. Krezdorn, 693 F.2d 1221 (5th Cir. 1982).

But where the new charges are imposed after the initial complete trial, are filed more than two years later, are not based upon new evidence or a change in circumstances and do not involve a separate event from that addressed in the original charges, the presumption of vindictiveness has not been overcome. See United States v. Wood, 36 F.3d 945, 946-47 (10th Cir. 1994).

In this case, there was not sufficient “objective evidence” to rebut the presumption of vindictiveness, for any of the amendments. Further, both trial counsel and prior appellate counsel were again ineffective.

At the outset, Elmore is not arguing that the prosecution had to return to the Third Amended Information, the one to which she plead. It is not improper for a prosecutor to reinstate dismissed charges after a defendant succeeds in winning an appeal and withdrawing a plea. In that situation, the prosecution is entitled to add back the parts of its case that it chose to bargain away in exchange for a plea which no longer exists.

While reinstating the *original* charges against the defendant after a successful appeal gives rise to no presumption of vindictiveness, however, increases do. With an increase, the defendant is not returned to the same position he was in before the successful appeal. See Delony v. Estelle, 713 F.2d 1080, 1083 (5th Cir. 1983) (permissible to return to the confines of the original indictment). Instead, he faces increased charges. And those increases have occurred after exercise of a right - in Washington, a constitutional right, the right to appeal. See Article 1, § 22; see e.g., Seattle v. Klein, 161 Wn.2d 554, 166 P.3d 1419 (2007) (emphasizing the “sanctity” of the constitutional right to appeal).

Even the prosecution’s substantial charging discretion cannot justify adding new charges after a successful appeal when all the facts and evidence were already known. Notably, that discretion was given due consideration by the courts in crafting the presumption. See, e.g., Blackledge, 417 U.S. at 28. On balance, however, the courts concluded that the prosecution’s right to exercise charging discretion is far

outweighed in this situation by the due process issues at stake. See Blackledge, 417 U.S. at 28, quoting Pearce, 395 U.S. at 725.

Put another way, the prosecution's power to "reopen a previously completed exercise of discretion" after a successful appeal is limited in circumstances where the presumption applies. Krezdorn, 693 F.2d at 1228.

Here, the prosecution gave no reason for adding the new predicate crimes to the felony murder and kidnapping after the first successful appeal. See 2RP 6, 147-49, 4RP 2-4. And the prosecution did not even acknowledge the amendment in the Fifth Amended Information adding a deadly weapon/firearm enhancement to the conspiracy charge, let alone provide an objective reason supporting that addition.¹⁹ 2RP 6, 147-49, 4RP 2-4.

There is nothing in the record providing any justification for the addition of the new predicates and the new firearm enhancement after Elmore's first successful appeal. The prosecution has not and cannot meet its burden of rebutting the presumption for those amendments.

It also cannot rebut the presumption for the amendments after the second successful appeal, and the prosecution's use of those charges. The amendments to the informations added a new alternative means of committing the burglary, allege a firearm enhancement for the conspiracy, and add aggravating factors to *all* the charges, even those for which the prosecution had previously only sought sentences within the standard

¹⁹The prosecution's subsequent efforts to seek such an enhancement are discussed, *infra*.

range. See CP 237-42, 386-90, 684-707.

Again, the prosecution gave no explanation for the changes in the charges, except to describe them. CP 243-50. There was no claim that the prosecution had not previously known about the facts it claimed supported charging the new aggravating factors for the kidnapping, conspiracy and, originally, the assault. There was no explanation at all for why the prosecution was suddenly asking for exceptional sentences on counts it had previously sought to have punished with standard range sentences.

The prosecution's actions regarding the conspiracy count provide insight into whether there was vindictiveness against Elmore for having filed and won her appeal. Despite the language in the Fifth Amended Information, the prosecution never sought an enhancement on the conspiracy count at the first trial. See CP 711-753. Indeed, at sentencing, the prosecutor specifically told the court there was an error in some of the documentation because it indicated that the conspiracy was "with a firearm" and, the prosecutor said, "there was no firearm enhancement." 3RP 1224.

Despite that, after the successful appeal, before the second trial, the prosecution suddenly decided to keep the enhancement in the information - and to *pursue that charge*. Elmore was faced with 18 months more time in custody as a result, and the prosecution provided no objective evidence that its acts were not vindictive retaliation for the appeal.

The facts of this case fall far, far short of providing any "objective evidence" to rebut the presumptiveness of vindictiveness.

The next question is the remedy. In Korum, this Court held it may be proper to dismiss not only the additional allegations but even the *original* allegations, to deter future acts of vindictiveness. 120 Wn. App. at 718-19. This Court deemed that remedy necessary because otherwise, “[i]f in cases of vindictive prosecution the trial judge may only dismiss the additional charge, the prosecutor will have nothing to lose by acting vindictively.” 120 Wn. App. at 719. The Court found it appropriate to dismiss the newly added allegations and to remand to the trial court for a determination of which, if any, of the original charges should also be dismissed in order to serve that deterrence function. 120 Wn. App. at 719-20.

That remedy was never passed on by the Supreme Court in reversing this Court’s decision in Korum. See Korum, 157 Wn.2d at 614-637. It is a remedy this Court should consider here. In addition to dismissing the additional charges, the possibility of dismissing one or all of the original charges should be addressed.

This is now Elmore’s third appeal. The first appeal was necessary because of the prosecution’s misconduct in arguing for an exceptional sentence it had promised not to seek. CP 89-94. The second appeal was necessary because of the improper dismissal of a juror who wanted to acquit. State v. Elmore, 155 Wn.2d 758, 123 P.3d 72 (2005).

Each time Elmore has appealed, without objection or even apparently notice by counsel,²⁰ the prosecution has “upped the ante,”

²⁰Counsel’s ineffectiveness on this point is discussed, *infra*.

refining and increasing its case against her. The prosecution has not - and cannot - rebut the presumption of vindictiveness for any of the amendments in this case. The repeated increases smack of continued retaliation for exercise of the constitutional right to appeal, and, under Blackledge, at a minimum, reversal of the new charges is required.

3) Counsel were again ineffective

Once again, Elmore's counsel were ineffective. Trial counsel again sat mute nearly every time the prosecution amended the information and increased its case against his client. And appellate counsel failed to raise this issue despite its obvious merit and the perils of failing to do so.

It may be that trial counsel believed that he knew what was in the amendments based upon speaking with the prosecution. But regardless what the prosecution *said*, counsel had an independent duty of his own to protect his client's interests. It is counsel, not the prosecution, who has a duty to make reasonable factual and legal investigations into the matters of defense. See Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); In re Davis, 152 Wn.2d 647, 10 P.3d 1 (2004). And it is counsel, not the prosecution, who is supposed to stand with the defendant against all of the superior forces of the state, to ensure her rights are not violated. Strickland, 466 U.S. at 685 (counsel's role is "critical to the ability of the adversarial system to produce just results). Neither trial nor prior appellate counsel performed their constitutional function in this case. As a result, Elmore was the victim of prosecutorial vindictiveness. This Court should not compound the error by declining to address this issue. The added charges and additional enhancements were

all added in violation of the due process prohibition on prosecutorial vindictiveness, and Elmore's constitutional right to appeal. This Court should so hold.

c. The aggravating factor amendments violated Elmore's rights to be free from double jeopardy and counsel was again ineffective

The state and federal double jeopardy clauses prohibit the prosecution from placing a defendant "twice. . . in jeopardy of life or limb for the same offense." See State v. Bobic, 140 Wn.2d 250, 260, 990 P.3d 210 (2000); Fifth Amend.; Art. I, § 9. Under those clauses, when a defendant has been convicted of an offense, the government may not use its resources and power to attempt to prosecute her again for that offense, or for one which is greater. See, State v. Roybal, 82 Wn.2d 577, 579, 512 P.2d 718 (1973); Brown v. Ohio, 432 U.S. 161, 169, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977).

Thus, on remand after the successful appeal of a conviction, under double jeopardy prohibitions, the prosecution must limit itself to retrial for the same offense or a lesser offense than that originally submitted to the jury. See Brown, 432 U.S. at 169; Pearce, 395 U.S. at 717; State v. Culp, 30 Wn. App. 879, 881, 639 P.2d 766 (1982).

In this case, the prosecution did not so limit itself.

Under Blakely and its progeny, it is now clear that aggravating factors are no longer simply viewed as sentencing enhancements but instead are "the functional equivalent of an element of a greater offense." Ring v. Arizona, 536 U.S. 584, 602, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002); see Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L.

Ed. 2d 435 (2000).

Put another way, an underlying offense such as “murder” is a “distinct, lesser included offense of ‘murder plus one or more aggravating circumstances.’” Sattazahn v. Pennsylvania, 537 U.S. 101, 111-12, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003). The addition of aggravating factors change the crime from the base crime (for example, kidnapping), to a separate, “enhanced” crime (for example, kidnapping which is committed against a particularly vulnerable victim), of which the base crime is a lesser included offense. 537 U.S. at 111.

As a result, when the defendant has been charged with and convicted of a base crime and that conviction is set aside on appeal, the prosecution is prohibited by principles of double jeopardy from seeking a conviction for the higher, enhanced crime of the base crime with a new aggravator. See, e.g., Sattazahn, 537 U.S. at 111-12 (“no principled reason to distinguish” between what constitutes an offense for purposes of the Sixth Amendment right to a jury trial under Blakely and what constitutes an offense for Fifth Amendment double jeopardy purposes); Arizona v. Rumsey, 467 U.S. 203, 209-210, 104 S. Ct. 2305, 81 L. Ed. 2d 164 (1984) (double jeopardy protections attach to sentencing proceedings where those proceedings are like a trial, i.e., involve submission of evidence, fact-finding and proof beyond a reasonable doubt).

Here, the prosecution had already tried Elmore - and had her sentenced - based upon the kidnapping, assault and conspiracy as base crimes, with no aggravating factors. Yet on remand after a successful appeal, it suddenly charged not only the base crimes but base crimes plus

aggravating factors - thus increasing each offense.

There is no question that, at the time of the first trial, the prosecution was not yet required by caselaw to charge aggravating factors or prove them to a jury beyond a reasonable doubt, as Blakely had not yet been decided. And Elmore is not arguing that the prosecution should have anticipated Blakely and charged all the aggravating factors in 2001. Nor is she arguing that the state could not seek to have the court impose exceptional sentences on the same counts as before and on the same grounds.

But the prosecution did not seek to convict Elmore as before. It sought to convict her of *enhanced* versions of the conspiracy, kidnapping and, originally, assault.

The prohibition against double jeopardy serves as a limit on the government's immense power:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957). Elmore was placed in direct peril of being convicted and punished in the first trial. She was already forced to run the gauntlet of a trial and sentencing, based upon her alleged role in the crimes Jerde and Crockett committed on December 11, 1996. The prosecution's addition of new aggravating factors on remand violated the prohibition against double

jeopardy, and this Court should so hold.

Because this issue only arose in the second trial, there is no potential “law of the case” issue or argument regarding prior appellate counsel. But the issue of ineffectiveness still remains. There could be no tactical reason for failing to object to such a flagrant violation of your client’s constitutional rights. Counsel was again ineffective, and again, Ms. Elmore was prejudiced.

d. The amendments violated the mandatory joinder rule and counsel was ineffective

The mandatory joinder rule, CrR 4.3.1, is a limit on the prosecution’s usually broad charging discretion. Under the rule, when a defendant has been tried for one offense, he may “thereafter move to dismiss a charge for a related offense.” State v. Anderson, 96 Wn.2d 739, 740-741, 638 P.2d 1205 (1982), cert. denied, 459 U.S. 842 (1982); State v. Downing, 122 Wn. App. 185, 93 P.3d 900 (2004), review denied, 153 Wn.2d 1014 (2005). The motion must be granted unless the case presents the very unique situation of meeting a limited exception for the “ends of justice.” See Anderson, 96 Wn.2d at 740.

In this case, this Court should reverse, because the amendments to the informations charging Elmore were made in violation of the mandatory joinder rule, and no exception applied. Further, counsel were again ineffective.

1) The amendments were all “related” under the rule

The first question in any mandatory joinder case is to determine whether the relevant added offenses are “related” under the rule. Offenses

are “related” if they are “within the jurisdiction and venue of the same court and are based on the same conduct.” CrR 4.3.1(c)(1); State v. Lee, 132 Wn.2d 498, 500, 939 P.2d 1223 (1997).

Here, the offenses were all filed in and passed on by Pierce County Superior Court. There is thus no question that they were all within the jurisdiction and venue of the same court for CrR 4.3.1(c)(1) purposes.

Further, the offenses all arose from the same conduct. “Same conduct” is defined expansively. Lee 132 Wn.2d at 503, 503 n. 2. To amount to the “same conduct,” offenses need not even arise from “the same criminal incident.” 132 Wn.2d at 503, 503 n.2. Offenses based upon a series of acts may all amount to the same conduct even if they are committed over a period of time and in more than one place. Id. The example the Supreme Court has used is when one defendant is alleged to have “committed the offense at the instigation of another.” Lee, 132 Wn.2d at 503, 503 n.2.

This case matches that example. Elmore was nowhere near Robertson’s house on the morning of the incident. The prosecution’s theory of her guilt was that she was responsible for having been the “mastermind” of the robbery, somehow convincing Jerde, Crockett and the others to act at her behest.

The amendments to the information which occurred both after the first and second appeals were all for “related” offenses under the mandatory joinder rule. Taking the first appeal first, the new predicate crime of first-degree burglary both to the felony murder and kidnapping was clearly “related” to the originally charged crimes. They were based on

the exact same conduct. See, e.g., State v. Russell, 101 Wn.2d 349, 678 P.2d 332 (1984). Further, the new deadly weapon/firearm allegation to the conspiracy charge was based on the exact same conduct as that previously charged. CP 12-17, 95-99, 684-707.

The amendments which were made after the second appeal were equally “related.” The addition of the new alternative means of committing the burglary was, again, based upon exactly the same conduct as the previously-filed charges. Where the prosecution files “new charges based upon an alternative means” of committing the originally charged crime, mandatory joinder requires dismissal of those charges, which could have been brought in the original information. State v. Dallas, 126 Wn.2d 324, 329, 892 P.2d 1082 (1995).

Because the amendments were all “related,” the requirements of the mandatory joinder rule applied.

2) The “ends of justice” exception did not apply

The only exception to the mandatory joinder rule is the limited “ends of justice” exception. See State v. Carter, 56 Wn. App. 217, 223, 783 P.2d 589 (1989). Under that exception, a court may waive the provisions of the mandatory joinder rule, but only in “extraordinary circumstances.” Dallas, 126 Wn.2d at 333; Carter, 56 Wn. App. at 223. The circumstances must involve “reasons which are extraneous to the action of the court or go to the regularity of its proceedings.” Dallas, 126 Wn.2d at 324.

Here, the “ends of justice” did not justify increasing the charges against Elmore in violation of the mandatory joinder rule, after her

successful appeals. It appears the failure to originally charge in the alternative and with greater clarity was simple prosecutorial error. But such mistakes are not “extraordinary circumstances” justifying violation of the mandatory joinder rule. Dallas, 126 Wn.2d at 324; see Carter, 56 Wn. App. at 223. There were not grounds to apply of the “ends of justice” exception here and the strictures of the mandatory joinder rule thus apply.

3) Counsel were ineffective in relation to these issues

In addition, counsel again failed Ms. Elmore, both at trial and in the second appeal. Counsel’s failure to raise a valid mandatory joinder objection amounts to ineffective assistance. See State v. Carter, 56 Wn. App. 217, 218, 783 P.2d 589 (1989) (majority opinion). Dismissal is automatic under the mandatory joinder rule, and the provisions of the rule trump even the broad prosecutorial discretion to amend charges under CrR 2.1. Carter, 56 Wn. App. at 219. Further, “if an amendment invokes an uncharged or not joined related offense as contemplated by CrR 4.3, then a ‘substantial right of the defendant’” has been prejudiced by the amendment. Carter, 56 Wn. App. at 222.

Thus, there is no “reason why a defendant would fail to move for dismissal” of new charges under the rule. Carter, 56 Wn. App. at 221-22, quoting, ABA Standards Relating to Joinder and Severance, § 1.3(c), Commentary at 23-24 (Approved Draft, 1968). Counsel was ineffective in not knowing about the mandatory joinder rule, even though he was “presumed to know the rules of the court.” Carter, 56 Wn. App. at 225.

In finding that the deficiencies of counsel were prejudicial, the Carter majority pointed out that it was not required that a defendant

“show that counsel’s deficient conduct more likely than not altered the outcome in the case.” Carter, 56 Wn. App. at 225, quoting, State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Instead, she only had to show a “reasonable probability,” sufficient to “undermine confidence in the outcome,” that counsel’s performance had such an effect, because:

[h]ad counsel made the motion to dismiss, unless the prosecution could have come up with better reasons for its decision not to originally charge the assault, as it had all the facts and evidence at hand at that time, the motion would have been granted as a matter of law. We cannot second guess what the prosecutor would have argued, nor can we know how the trial court would have ruled, had the motion been made. However, considering the mandatory nature of the rule, combined with the facts and circumstances of this case, our confidence in the outcome is sufficiently undermined to warrant application of the prejudice element of the Strickland and Thomas cases on ineffective assistance of counsel

Carter, 58 Wn. App. at 225.

Not only was trial counsel ineffective in failing to move to dismiss under mandatory joinder during the first and second trial proceedings, appellate counsel in the second appeal was again ineffective, for the same reason as before. Again, appellate counsel’s failure to raise a meritorious issue on his client’s behalf makes no sense in light of the remedy he was seeking - remand for retrial. Knowing that further trial was the goal, by definition counsel should have raised all trial issues which arose, in order to prevent their reoccurrence on remand. See Maxfield, 133 Wn.2d at 343-44. Counsel’s failures to raise this issue resulted in Elmore standing trial on and being convicted on counts which should have been dismissed. This Court should not exercise its discretion to apply the “law of the case doctrine,” and should address this issue and reverse.

6. THE EXCEPTIONAL SENTENCE WAS IMPOSED IN VIOLATION OF ELMORE'S SIXTH AMENDMENT AND ARTICLE 1, SECTION 21 RIGHTS

Finally, Elmore's Sixth Amendment and Article 1, § 21 rights were violated in the imposition of the exceptional sentence. In Blakely, supra, the Court held that a defendant's rights to trial by jury and proof beyond a reasonable doubt are violated when a judge makes factual findings regarding "aggravating factors" by a preponderance of the evidence, then relies on those findings in exceeding the maximum sentence which could have been imposed based on just the jury's verdict. Blakely, 542 U.S. at 311-14. Instead, a defendant is constitutionally entitled to have every fact upon which a court relies in imposing an exceptional sentence found by a jury and proved beyond a reasonable doubt. Id.

Here, in deciding to impose the exceptional sentences on the burglary and conspiracy, the sentencing court made and relied on multiple factual findings, all of which it made using the "by a preponderance of the evidence" standard of proof. CP 644-52. Those findings included findings on whether Elmore had been to Robertson's home, the disease from which Robertson suffered, whether Robertson had use of his arms and legs, whether Elmore knew Robertson was quadriplegic and "had a serious illness," whether she knew he was confined to a wheelchair, could not speak and was "incapable of resisting," whether Elmore had entered Robertson's bedroom on December 11, 1996, and seen Robertson naked in his bed, unable to communicate, whether Elmore had told Crockett and Jerde about Robertson's condition and that of others in the residence,

whether Robertson and others were present during the burglary, and whether Elmore notified Jerde there would be people inside the house when the crimes were committed. CP 644-46.

None of those “facts,” however, was found by the jury. And the court specifically declared that it was making its findings by the wrong standard - preponderance of the evidence. CP 644-52.

Counsel failure to notice even this glaring error is unfathomable. Counsel had himself *cited* Blakely below. CP 300-317. Yet apparently the central holding of that case - about the right to have the jury find certain facts beyond a reasonable doubt - was not in his mind when he reviewed the lengthy, improper findings entered by the Court.

Ultimately, this Court may deem this error “harmless.” At first glance, it may seem so. A jury did find the aggravating factors, and it was told the proper standard to use.

But this error also serves as an indication of not only counsel’s lack of attention to the crucial details of his client’s case. It is yet another constitutional violation in a case riddled with them. At some point, with so many errors, it becomes questionable whether the right to a fair trial could have possibly been honored. Regardless of the heinous nature of the crimes with which she was accused, Elmore was entitled to a fair trial, with effective counsel. She was entitled to a fair, full appeal. She got neither. This Court should reverse.

E. CONCLUSION

For the reasons stated herein, this Court should grant Elmore the relief to which she is entitled.

DATED this 14th day of November, 2007.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;
to Ms. Roberta Elmore, DOC 769182, at her current address in
DOC.

DATED this 14th day of November, 2007.


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APPENDIX A

The verbatim report of proceedings in this case consists of multiple volumes, which will be referred to as follows:

FIRST PROCEEDING TRANSCRIPTS

the volume containing the transcripts from the competency hearing, plea and sentencing hearings of June 25, August 6, October 22 and November 5, 1997, transferred from 22647-2-II, as "1RP";

SECOND PROCEEDING TRANSCRIPTS (trial 1)

the volume containing the withdrawal of the plea and arraignment of January 12, 2001, as "2RP;"

the 17 volumes containing the transcripts from the pretrial, trial and sentencing proceedings for the first trial, held May 11 and 17, June 1, September 7, 17, 24-25, October 1-4, 8-9, 12, 15-16, and November 30, 2001, as "3RP"

the volume containing the supplemental transcript completing the proceedings on the day of September 17, 2001, as "4RP;"

THIRD PROCEEDING TRANSCRIPTS (trial 2)

the volume containing the arraignment of January 23, 2006, as "5RP;"
the volumes containing the pretrial, trial and sentencing proceedings of January 27, February 17 and 27, March 6, 14, 20-22, 27, 28, 29, 30, 31, 2006, and April 14, 2006, as "RP."

CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached pages of appellant's Opening Brief amended solely to substitute the new clerk's papers citations for the "Supp. CP" cites in the original and to retain pagination in the original to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. , Esq., Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;

to Ms. Roberta Elmore, DOC 769182, at her current address in DOC.

DATED this 18th day of October, 2007.



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