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STATE OF WASHINGTON
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DEPUTY

No. 37170-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN C. GORDON,

Appellant.

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

The Honorable Brian Tollefson, Judge

APPELLANT JOHN GORDON'S OPENING BRIEF

KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant

RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

pm 11/3/08

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A ASSIGNMENTS OF ERROR

1. Under the rule of lenity and other rules of statutory construction, the statute defining second-degree felony murder did not not apply to the conduct in this case.

2. The second-degree felony murder conviction violated Gordon's rights to equal protection and principles of fundamental fairness.

3. The jury instructions for the aggravating factors were constitutionally insufficient and relieved the state of its full burden.

4. The aggravating factors did not apply.

5. Counsel was prejudicially ineffective.

6. RCW 9.94A.535, RCW 9.94A.537 and Gordon's Sixth Amendment and Article 1, § 22 rights were violated at sentencing. Finding 7 and Conclusions 9-14 of the Findings and Conclusions Regarding Exceptional Sentence (hereinafter "Findings") violated those statutes and rights. CP 1039-40.[1]

7. Gordon assigns error to the following portion of Finding 5:

> Th[e] standard range does not constitute an adequate length of incarceration.

CP 1039.

8. Gordon assigns error to Finding 7, which provides:

> The evidence that supported the jury's verdict and that also supports the court's conclusions of law includes: (a) The evidence from the medical examiner as to the location and severity of the injuries inflicted upon Brian Lewis; (b) the evidence from Detective Brian Johnson as to the location where the fatal beating took place and the positioning of his head as the source of the

[1]A copy of the findings and conclusions is attached hereto as Appendix B.

> blood spatter on the adjacent vans; (c) the evidence from paramedic Vi Diamond as to Mr. Lewis having died of the beating injuries *en route* to the hospital; (d) the evidence from Shecola Thomas and Anthony Knoefler as to the participation and positioning of the participants and as to Brian Lewis['] position as having been trapped between the two vans and restrained on the ground.

CP 1039.

9. Gordon assigns error to the Conclusions of Law contained in the Findings, in their entirety. CP 1038-41.

10. Gordon assigns error to Conclusion 9, which provides:

> The beating, stomping and kicking was directed deliberately and cruelly by the defendant and the other participants at the most vital and vulnerable parts of Mr. Lewis['] body.

CP 1040.

11. Gordon assigns error to Conclusion 10, which provides:

> The beating, stomping and kicking was deliberately and cruelly directed at the most visible areas of Mr. Lewis['] body with such force as to ensure that the damage would be lasting if not fatal.

CP 1040.

12. Gordon assigns error to Conclusion 11, which provides:

> The beating, stomping and kicking was deliberately and cruelly inflicted with gratuitous violence.

CP 1040.

13. Gordon assigns error to Conclusion 12, which provides:

> The beating[,] stomping and kicking continued long after Mr. Lewis was particularly vulnerable and incapable of resistance in that he had ceased to have the capacity to resist or fight back.

CP 1040.

14. Gordon assigns error to Conclusion 13, which provides:

> The beating[,] stomping and kicking continued long after Mr. Lewis was particularly vulnerable and incapable of resistance in that he was trapped between the two vans with no avenue of escape and with as many as five people attacking from both sides.

CP 1040.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The only way to avoid an absurd and nonsensical result and comply with the rule of lenity is to interpret the current second-degree felony murder statute so as to permit conviction based upon the predicate crime of assault is if the assault is not the conduct which results in the death. Should this Court so interpret the statute and should the conviction be reversed where the predicate assault in this case was the conduct which caused the death?

2. Under the current second-degree felony murder statute, the prosecution can choose to charge a defendant who commits third-degree assault which results in death either as second-degree murder or as second-degree manslaughter, a far lesser crime. Does this scheme violate equal protection where there is no limit to this discretion and no basis whatsoever, let alone a rational basis, for treating such similarly situated defendants differently? Further, does it offend fundamental principles of fairness to allow such unfettered discretion and to permit the prosecutor to prohibit defendants who commit essentially the same crime from presenting lesser included offense options to the jury under one charge but not the other and to select which defendant faces far greater punishment for the exact same act?

3. In Blakely v. Washington[2] and State v. Hughes,[3] it was established that the state and federal constitutional rights to due process and trial by jury require the prosecution to prove every fact upon which an exceptional sentence is based to the jury, beyond a reasonable doubt. RCW 9.94A.535 and RCW 9.94A.537 were enacted to ensure these requirements are satisfied. Did the sentencing court violate Gordon's rights and RCW 9.94A.535 and RCW 9.94A.537 by making its own factual findings and relying on them in imposing the exceptional sentence?

4. To constitute an aggravating factor, a fact must sufficiently distinguish the crime from the usual crime in the same category and must not have been considered by the Legislature in setting the presumptive range. Further, for the aggravating factors of "deliberate cruelty" and that the victim was "particularly vulnerable/incapable of resistance," there are other specific requirements which must be met. Were the jury instructions constitutionally deficient where they failed to inform the jury of the proper legal standards it was required to apply in order to determine whether the prosecution had met its burden of proving those aggravating factors? Further, were the instructions inadequate where they permitted the jury to find the aggravating factors even though they did not apply?

And if the failure to properly advise the jury on the prosecution's true burden of proving the aggravating factors is somehow deemed not to be constitutional error, was counsel prejudicially ineffective in failing to

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[2]542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

[3]154 Wn.2d 118, 110 P.3d 192 (2005), reversed in part and on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

propose proper instructions?

5. Gordon was accused of being involved with others in beating a man to death in a single incident. He was charged with second-degree felony murder based upon that assault and death. Was it error to impose an exceptional sentence based on the "deliberate cruelty" aggravating factor where there was no evidence of any act committed to cause physical, emotional or psychological pain as an end in and of itself and the violence used was inherent in the offense and did not significantly distinguish it from other crimes of the same type?

6. The man Gordon was accused of having beaten to death was neither very old nor very young, suffered from no physical infirmities and initially fought back. There was also no evidence that any "vulnerability" or "incapability" was a significant factor in the commission of the crime. Was it error to impose an exceptional sentence based on the aggravating factor that the victim was "particularly vulnerable" or "incapable of resistance"?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant John C. Gordon was charged by amended information with second-degree (felony) murder predicated on assault, with aggravating circumstances of "deliberate cruelty" and "particularly vulnerable victim." CP 665-66; RCW 9A.32.050(1)(b); RCW 9.94A.535(3)(a); RCW 9.94A.535(3)(b). Pretrial and trial proceedings were held before the Honorable Brian Tollefson on October 4 and 12,

2006, January 19, February 15, 21, March 9, 15, April 6, 10, 13, 18, May 7, 23, June 18, 26, July 10, September 6, October 9, 24, 29-31, November 1, 5-8, 13-15, 19-20, 2007, after which a jury found Gordon guilty as charged.[4] CP 970-71.

On December 21, 2007, Judge Tollefson imposed an exceptional sentence of 366 months in custody. CP 1002-13; RP 2351. Mr. Gordon appealed, and this pleading follows. See CP 1018-30.

2. Testimony at trial

On September 5, 2006, there was an incident at the Lakewood Garden Apartments and Brian Lewis ended up dead. RP 997-1002. According to Shecola Thomas, the incident started when she arrived at Charlotte Songer's apartment at 2 or 3 in the morning. RP 1071-72. Thomas claimed she lived at the apartment along with Songer and they allowed John Gordon and Charles Bukovsky, who were homeless, to stay. RP 1105-06, 1555-56.

Thomas, a crack addict who had smoked some earlier that day, said that Gordon was upset with her that night and was saying Thomas needed to leave because she had called police on him and gotten him "trespassed" from the apartments several days before. RP 1071-75, 1134. Thomas claimed that Lewis, who was also there that night, heard Gordon's raised voice from the back room of the apartment and came out to tell Gordon to "keep it down." RP 1077. According to Thomas, Gordon did not calm down so Lewis told Thomas to go back to the back room, offering to give

[4]Reference to the verbatim report of proceedings is explained in Appendix A.

her "something," which she assumed was cocaine. RP 1078.

Thomas went to the back room while Lewis went to get his briefcase. RP 1078. According to Thomas, Gordon then suddenly appeared in the back bedroom, climbing through the back window and saying Thomas needed to leave, that there was going to be blood on his "rag tonight." RP 1079.

At that point, Thomas said, Lewis asked if Thomas wanted to go for a ride and get out of the apartment because it seemed "obvious" Gordon was not going to "calm down." RP 1079-80. Thomas thought they would drive around and do drugs somewhere, with Songer coming along. RP 1081-83. They walked out the front door except for Gordon, whom Thomas said left out the back room window. RP 1207-1208.

John Vlahas, who was there that night, remembered things far differently. RP 1277. Vlahas was there when Thomas arrived and said Thomas beat on and kicked the apartment door for 5-10 minutes before she was finally let in. RP 1271, 1273. Once inside, Thomas started acting "really hyper," "stupid" and "spastic." RP 1271. Gordon was on the couch sleeping and Thomas went "at" Gordon, yelling. RP 1271, 1275. Gordon then got up and tried to get Thomas to stop and quiet down, but Thomas would not stop. RP 1274. As a result, Vlahas said, Gordon, being "the better man," left, trying to avoid further conflict. RP 1275, 1291, 1296. Gordon was "calm and collective" with Thomas, not "threatful" at all, and left through the front door. RP 1287.

It was at that point that Lewis then told Thomas, nicely, to leave.

RP 1276. Thomas did not comply, instead throwing a temper tantrum. RP 1276. Lewis eventually got Thomas out the door, leaving with her and Songer. RP 1276.

Songer also said everyone left at the same time and did not think Gordon went out a window. RP 1561. Songer disputed Thomas' testimony that Thomas lived there. RP 1065-69. In fact, Songer said, Songer had asked Thomas to leave and had told Gordon not to let Thomas in the apartment, because Thomas was always trying to stay there but never helped out with food or anything else. RP 1520-21, 1584.

Thomas' version of events differed at times. At trial, she testified that she had only smoked $10 worth of crack that day, at about 1 p.m. RP 1071. Indeed, she said, it would not have been possible for her to have used more, because she had just gotten out of custody and only had $10. RP 1144-46, 1158, 1179. The prosecution stipulated, however, that Thomas had told a prosecutor that she had used about $70-80 worth of crack that day, just before the incident. RP 2132-33. When confronted with that statement, Thomas claimed to have been talking about a totally different day, although she admitted the question she had been asked at the time was "[w]ere you using drugs that night," referring to the night of the incident. RP 1159, 1179-80, 1202, 1220.

Thomas also first claimed she had not called police on Gordon and gotten him "trespassed" but ultimately admitted that she had, in fact, gone to the apartment manager and told her that Bukovsky and Gordon had broken in, so that person had called the police. RP 1074-75, 1120-21.

Although Thomas testified that she had no trouble getting into the apartment that night when she arrived, she ultimately admitted that, in fact, she had told police that, when she arrived, an "Indian guy" had slammed the door in her face. RP 1083, 1139-42, 1204.

According to Thomas, once she, Lewis and Songer got outside, they went towards Lewis' van in the parking lot. RP 1084-85. Gordon, Bukovsky, and someone Thomas knew as "Tony," later identified as Anthony Knoefler, followed. RP 1084-85, 1401. Thomas said she had gotten into the van and had the door closed when Gordon arrived. RP 1089. Confusingly, she also said Gordon walked up to her, said, "I told you I was going to put hands on you and that's what I meant," and then punched her in the eye when she turned around. RP 1089. Thomas also said that Songer was in between Thomas and Gordon at one point, prior to Thomas getting hit. RP 1090. In her statement to police, Thomas claimed Gordon said she had "better be glad" Songer was in the middle of them because he could not get to her. RP 1091. At trial, in contrast, she said Gordon had said nothing. RP 1091.

Songer saw Gordon hit Thomas but thought he had only hit her in the shoulder. RP 1564.

Thomas testified that, as a result of being hit, she fell on the hood of a car parked by the van. RP 1093. She repeatedly denied that her vision was affected by it at all. RP 1143, 1145. Instead, she said, her eyes were just a little watery but she had no trouble seeing. RP 1145. When she spoke to police, however, she told them she had to "kind of" get

"focused" after being hit. RP 1145, 1146.

At trial, Thomas conceded that she did not have a "good memory" of the events of that night. RP 1144.

After Thomas was hit, Lewis confronted Gordon about it and Gordon then said Lewis needed to stay out of it. RP 1094-95. Lewis started threatening Thomas, saying friends of Lewis' were there with a gun, training a "red dot" gun sight on them. RP 1095. Songer and Knoefler also heard Lewis' threats about a gun and Knoefler also heard Lewis say he was going to beat the "asses" of everyone there. RP 1409-11, 1568.

At that point, Thomas said, Gordon then got into Lewis' "face" saying, "are you threatening me?" RP 1096. They kept arguing and, according to Thomas, the next thing she knew, Gordon was hitting Lewis in the face with a closed fist. RP 1097. In her statement to police, Thomas said that she did not see the first punch and just assumed Gordon had punched Lewis because she did not think Lewis was the type to throw the first punch. RP 1153-55.

At trial, Knoefler testified that he saw Gordon hit Lewis first. RP 1411-13, 1440. Knoefler did not recall ever saying to the contrary. RP 1457, 1469. Knoefler still claimed no recall of having said that Lewis, in fact, hit Gordon first, even when Knoefler was shown a prosecutor's notes recording that Knoefler had said "John socked female in the jaw. Lewis punched John in the face." RP 1469.

After the first hit, Knoefler said, Lewis turned and started running

at Knoefler, charging like he was going to attack. RP 1413-14. In response, Knoefler pushed Lewis, and Lewis then punched Knoefler before turning and running at Gordon. RP 1413. Knoefler then went around to the front of the van, where Lewis hit Knoefler again. RP 1413.

Lewis' van was parked next to another van, with about four feet of space between them, where the incident was occurring. RP 1024.

Knoefler was clear that, at this point, Lewis was fighting, swinging on Gordon and Knoefler and landing several blows on Gordon. RP 1415. Lewis was a "big guy," weighing approximately 224 pounds. RP 1863.

Knoefler said that, after Lewis hit Knoefler a second time, Knoefler then hit Lewis back, after which Gordon hit Lewis and Lewis fell. RP 1413. Lewis was trying to get up when Knoefler kicked him in the head. RP 1415. Knoefler claimed he did not kick with "extensive force" but admitted the kick caused Lewis to fall to the ground. RP 1416. Knoefler claimed he then backed up and Gordon and Bukovsky started punching and kicking Lewis. RP 1413, 1416. Knoefler thought Lewis was getting punched in both his face and body and kicked mostly in the body. RP 1417.

Thomas said she saw Gordon, Knoefler and Bukovsy hitting Lewis all over his body. RP 1097-98. Songer told Thomas, "let's just go back in the apartment" and then someone else, Jesie Puapuaga, joined in. RP 1098, 1168. Thomas testified that, as they were going back into the apartment, Thomas turned around and saw Puapuaga hit Lewis, after which Lewis fell to the ground. RP 1099-1100. When talking to police,

however, Thomas had said that she "never turned around" after Puapuaga arrived. RP 1146-47. Instead, she told officers that she saw Puapuaga show up and heard his voice but never saw him get involved. RP 1981-82.

Thomas initially did not remember telling police that Lewis was standing up when she left. RP 1147. She claimed at trial that Lewis was "already on the ground" at that point, although she told police to the contrary. RP 1147-48, 1160. Knoefler testified that, in fact, Lewis was already on the ground when Puapuaga arrived. RP 1472-73. Although Knoefler said in two different pretrial statements that Puapuaga grabbed Lewis and slammed him to the ground when Puapuaga arrived, Knoefler testified that it did not happen. RP 1472-73, 1477-78.

Before Puapuaga arrived, Knoefler said, Lewis did not really seem that injured, seemed only to have a bloody nose, and was able to talk, move and get up off the ground. RP 1417. When Puapuaga arrived, however, things suddenly changed. RP 1418, 1442. Puapuaga, a "big ass Samoan," was known as a "rough guy" and walked up, grabbed Lewis, got him in a choke hold and "basically held him down." RP 1419, 1442.

Knoefler first claimed that, when Puapuaga had Lewis in the choke hold, Gordon and Bukovsky were kicking Lewis, mostly in his body. RP 1421-22, 1481-84. Knoefler only saw Gordon kick Lewis once in the heard and did not see Bukovsky kick anywhere but the body. RP 1422. About 30 seconds later another man, Iosia Gisa, joined in. RP 1422-23. Gisa, also known as "Poncho," began landing heavy kicks on Lewis' body and head. RP 1423, 1471, 1479-80.

At trial, Knoefler initially claimed that Gordon and Bukovsky did not ever "break off" from hitting and kicking Lewis, even after Puapuaga and Gisa got involved. RP 1432. On cross-examination, however, Knoefler admitted that, after Puapuaga and Gisa got involved, Gordon was actually behind Lewis and Puapuaga, having moved out of the way and out of the vicinity of the fight. RP 1484. Bukovsky had also moved out from between the vans. RP 1484.

Indeed, Knoefler admitted, Gordon and Bukovsky had backed away from the fight when Gisa came. RP 1485. Gordon had "moved off to the side" and was just standing there watching. RP 1509. Bukovsky had also moved off. RP 1509. And Knoefler ultimately said that, when Puapuaga had Lewis in the choke hold, it was Gisa, not Gordon or Bukovsky, who was kicking Lewis. RP 1444, 1484. While Knoefler did not first recall telling police that Gisa came in and pushed him out of the way in order to participate, he finally conceded that had happened. RP 1443-44, 1480-84. According to Knoefler, Gisa would not stop kicking Lewis and Puapuaga just kept holding Lewis' face up for Gisa to get "clean shots" at it, which was when things started "getting bad." RP 1519.

Junior Ioane said he was with Puapuaga that night and saw Puapuaga punch some guy in the face, then pick him up and hold his arms behind his back while others, including Gordon and Bukovsky, punched and kicked him. RP 1230-39. At one point, the guy was on his knees trying to get up from the ground and Ioane saw Puapuaga "slam" the guy to the ground and put him in a choke hold. RP 1257. Ioane said, however,

that no one hit or kicked the guy in the head or face when he was on the ground. RP 1258.

Ioane, Gisa's older brother, denied that Gisa was at all involved. RP 1230-41, 1253, 1259-60. Although Ioane claimed he had only had 4-5 beers that night, he admitted to officers that he had actually consumed an entire 18-pack case of beer and at one point had passed out. RP 1250-51.

Songer did not remember seeing the fight or telling an officer that she had. RP 1570. She had been "using" that night and was still intoxicated when she talked to police. RP 1579-83. An officer who interviewed her confirmed that she appeared under the influence. RP 1661. Another officer said Songer had reported that Gordon, Knoefler and Bukovsky had Lewis pinned and were punching and kicking or "stomping" him. RP 1723.

According to Thomas, after she and Songer left the parking lot and went into the apartment, they peered through the blinds as Gordon, Bukovsky, Knoefler and Puapuaga kicked Lewis for about five to seven minutes. RP 1100. Thomas denied seeing Gisa do anything, however, and never saw Puapuaga put Lewis in any kind of choke hold. RP 1186.

Thomas claimed there was enough light for her to see what was going on between the two vans, and that she saw Lewis propped up against the van while he was being kicked. RP 1170-74. An officer reported that, in fact, the lighting was fairly poor and it was solely "ambient," with no direct light between the vans. RP 1014. Knoefler also admitted there was only a little bit of light and it was not "too bright" between the vans. RP

1442. Songer said that it was pretty dark outside and she could not really have seen anything by looking out the window. RP 1580. She did not look out the window and did not remember Thomas ever doing so. RP 1584.

Songer and Vlahas both testified that, once she got inside, Thomas went over to the phone, called someone and talked to them for a time. RP 1278-79, 1570. Thomas denied this, claiming she was watching out the window, not on the phone with her girlfriend. RP 1149-50. In Thomas' statement, however, she told police she had "laid down and talked to my girlfriend" on the phone after coming inside. RP 1149.

After awhile, Thomas and others went out, saw Lewis on the ground, and went to call police. RP 1106. Thomas claimed that they were unable to call out because Gordon was on the phone, telling Songer to get Thomas out of the apartment because Thomas was going to get the "same thing" that Lewis had gotten and Songer would, too, if Thomas did not leave. RP 1106-1107.

Thomas was convicted of a crime of dishonesty committed at around the same time as the incident. RP 1111. Thomas testified at trial that she had not had trouble for her drug addiction prior to age 25, but ultimately conceded that, in fact, that was not true. RP 1160-64. At trial, she repeatedly tried to deny saying things which were recorded in pretrial statements, declaring that one of the statements was "very inaccurate." See RP 1144, 1148, 1167-68, 1176, 1974-78. She admitted, however, that it was recorded by a court reporter. RP 1176.

Ioane said that, just after the incident, Puapuaga threatened him with a pistol, telling him he better not say anything about the incident. RP 1243. At trial, Ioane said that neither Gordon nor Bukovsky was there but in his statement to police, he said they were. RP 1243-48. Thomas also claimed Gordon had somehow threatened her with a gesture when she saw him at a bus stop after the incident. RP 1117. First, she was clear that it was "at least a week or two after the incident." RP 1116. Later, however, when describing the threat, she declared that it was "two to three days" after. RP 1157.

Knoefler admitted that he was testifying against Bukovsky and Gordon in exchange for a reduced charge and less jail time for himself. RP 1387-1401, 1428, 1441. He claimed that, after Thomas and the others initially went towards the van that night, Gordon, who was near Knoefler, had asked Bukovsky and Knoefler if they "had his back," but Knoefler had said he was not going to get involved in anything. RP 1407-1409. Knoefler did not explain why, if that was so, he ended up getting involved. RP 1407-1409.

Knoefler's girlfriend at the time said Knoefler told her, the night of the incident, that they had beat up some guy because the guy was "talking shit" to *Knoefler*. RP 1752-67.

At trial, Knoefler claimed that he did not ever use alcohol, meth and pot at the same time and that he had only smoked "2 bowls" of meth about three hours before the incident and was not high because a bowl only lasted about three hours. RP 1400-1403, 1439. Ultimately, however,

he admitted that, in pretrial statements, he had confessed to smoking his last bowl of methamphetamine only 1½ hours before the incident and conceded that he would in fact stay high from a bowl for 8 hours. RP 1401-1403, 1455. Knoefler also admitted to smoking meth and drinking three full 40 ounce beers that night, thus "mixing" drugs. RP 1454.

At the time of the incident, Knoefler, then a juvenile, had several recent convictions for crimes of dishonesty. RP 1401.

When paramedics arrived, they had to do everything by flashlight because it was so dark. RP 1527-29. Lewis' eyes were swollen shut and he was very "combative" about treatment. RP 1530. He went into cardiac arrest on the way to the hospital and ultimately died. RP 1535. The medical examiner said the death was likely caused by a combination of the multiple blows to the head and the chokehold. RP 1797-37. Lewis did not have any real injuries on his body or bruising which the examiner thought would be consistent with blows to that area. RP 1848-59.

An officer testified that most of the blood on the van was from a "convergence" area of about 8-14 inches off the ground. RP 1874-1913. A red bandana was found next to the vans, and Thomas claimed at trial that she had seen Gordon with such a bandana that night. RP 1034, 1108, 1110. She had told police, however, that she had never seen Gordon wear a "rag" before. RP 1151-52. She tried to explain this discrepancy by saying she meant only on his head, rather than in his pocket. RP 1152., 1193. Knoefler said that all of the other participants had red bandannas that night, but Vlahas said he never saw Gordon with a red bandana. RP

1286, 1431.

A few days after the incident, Bukovsky gave a statement in which he first denied being involved but then admitted having punched Lewis once. RP 1613-24, 1709. An officer testified that Bukovsky seemed "very smug" and "nonchalant," while another said he "kind of smirked" when shown a picture of Lewis' injuries. RP 1712-13. Bukovsky said he he had no control over others and was not going to tell them to stop what they were doing that night. RP 1715. When an officer asked if he wanted to give a taped statement, Bukovsky reportedly said, "no, I'm good. I know when I kill somebody." RP 1718.

Dr. David Moore, a licensed psychologist and chemical dependency professional, testified that drug intoxication can disrupt perception, thinking and learning and that a person may engage in "confabulation" to fill the resulting holes in their memory. RP 2030-2039. He noted that there was a lot of research indicating the impact of alcohol on memory and that other drugs can also cause such memory loss and "filling." RP 2043-51.

Cook drove Gordon to the police station at Gordon's request, about 2-3 days after the incident. RP 1317, 1324, 1325. During his interrogation, an officer said, Gordon seemed "resigned," "downcast" and "melancholy." RP 1334-35. Gordon told the officers that Lewis was known to be a "crackhead" and had approached them, making threats about having someone with a gun nearby. RP 1336. Gordon also reported seeing a "laser dot" on a friend, who then got "freaked out" by the threat.

RP 1338. The officer claimed Gordon said he did not hit Lewis but just kicked him when Lewis was standing up. RP 1339. The officer admitted he could not recall Gordon's actual words but did not think Gordon had instead said he did not even kick Lewis while Lewis was standing. RP 1353.

Gordon's hands were injured and he said it was because he had punched a car windshield. RP 1335. A physician's assistant who had treated him later for hand injury confirmed that Gordon had said the same to her and that his injuries were consistent with that claim. RP 1782.

D. ARGUMENT

1. THE CONVICTION FOR FELONY MURDER SHOULD BE REVERSED

a. Under the rule of lenity and other rules of statutory construction, RCW 9A.32.050(1)(b) did not apply to the conduct in this case

Gordon was accused and convicted of second-degree felony murder with a predicate crime of various degrees of assault. See CP 665-66, 969-70. Reversal of that conviction is required because, applying the rule of lenity and general rules of statutory construction, the conduct in this case did not amount to that offense.

In In re the Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), the Supreme Court interpreted a previous version of the second-degree felony murder statute which defined second-degree murder as occurring when a person was committing or attempting to commit certain felonies and, "in the course of and in furtherance of such crime or in immediate flight therefrom, he, or another participant, causes the death

of a person other than one of the participants." 147 Wn.2d at 608. The petitioner in Andress raised several challenges to that statute, arguing, *inter alia*, that allowing assault to serve as the predicate felony required ignoring plain language in the statute and led to an absurd, improper result. 147 Wn.2d at 607.

On review, the Court agreed. The statute could not be reasonably interpreted to allow assault to serve as the predicate felony, the court held, because the statute's plain language required that the death had to be "in the course of and in furtherance of" the predicate felony, "or in immediate flight therefrom." 147 Wn.2d at 609. The Court had previously examined the "in furtherance of" language in a different situation in State v. Leech, 114 Wn.2d 700, 790 P.2d 160 (1990), and had concluded that the language did not require that the death occur in promotion of or to advance the predicate felony. Leech, 114 Wn.2d at 706. The Leech defendant was accused of the murder with an arson predicate and had argued that the "in furtherance of" language should be construed to mean that the death had to further the arson, i.e., had to occur while the fire was being set, not simply at some point while the fire was ongoing. 114 Wn.2d at 706-707. The Court rejected this idea, holding that it would be contrary to the purposes of the felony murder scheme to limit the "in furtherance of" language to the narrow construction the defendant proposed. Leech, 114 Wn.2d at 709. Instead, in order to avoid absurd results, the Leech Court found that the "in furtherance of" language must be construed to mean that the death was "sufficiently close in time and place" to the underlying felony so as

"to be part of the *res gestae* of that felony." 114 Wn.2d at 706.

In Andress, the Court confirmed the holding of Leech, again refusing to reconsider the expansive definition of "in furtherance of" set forth in Leech. 147 Wn.2d at 610. The Andress Court nevertheless found that, even under that liberal construction, an assault could not be the predicate crime for the then-current second-degree felony murder statute. 147 Wn.2d at 610. To hold otherwise, the Andress Court noted, would be nonsensical and render the statutory "in furtherance of" language superfluous, because if assault could serve as the predicate:

> the statute would provide, essentially, that a person is guilty of second degree felony murder when he or she commits or attempts to commit assault on another, causing the death of the other, and the death was sufficiently close in time and place to that assault to be part of the *res gestae* of the assault. *It is nonsensical to speak of a criminal act - - an assault, that results in death as being part of the res gestae of that same criminal act since the conduct constituting the assault and the homicide are the same.* Consequently, in the case of assault there will never be a *res gestae* issue because the assault will always be directly linked to the homicide.

147 Wn.2d at 610 (emphasis added). As a result, the Court concluded, the statute would be absurd if assault were encompassed as a predicate felonies, because "the in furtherance of" language would be meaningless as to that predicate felony" as "the assault is not independent of the homicide." 147 Wn.2d at 610.

Thus, the Andress Court applied the general rule that, in interpreting a statute, a reviewing court must try to construe it in order to effect its purpose, but "'strained, unlikely, or absurd consequences resulting from a literal reading are to be avoided.'" Leech, 114 Wn.2d at

708-709, quoting, State v. Neher, 112 Wn.2d 347, 351, 771 P.2d 330 (1989). Further, the Andress Court applied the maxim that it is presumed that the Legislature does not intend absurd results, so courts will not construe a statute to allow such a result. Andress, 147 Wn.2d at 610; see State v. Vela, 100 Wn.2d 636, 641, 673 P.2d 185 (1985). Both of these rules led the Andress majority to the inescapable conclusion that the Legislature could not have meant to include assault as a predicate felony in the previous version of the statute, where the assault is the conduct which causes the death. Andress, 147 Wn.2d at 609-611.

A similar conclusion must be reached in order to make sense of the new version of the second-degree felony murder statute. That version now provides:

> A person is guilty of murder in the second degree when. . .he or she commits or attempts to commit any felony, *including assault,* other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants[.]

RCW 9A.32.050(1)(b) (emphasis added). The statutory amendment adding the "including assault" clause was made in response to the decision in Andress. See Laws of 2003, ch.3, § 1.

Nevertheless, the amended statute still suffers from the same infirmities which led to the conclusion in Andress. The statute still contains the same "in furtherance of" language which the Andress Court found would be rendered superfluous by allowing conviction for felony murder based upon an assault which causes death. 147 Wn.2d at 610. And the statutory language is still nonsensical if applied to such situations,

because it still speaks of "a criminal act - - an assault, that results in death as being part of the res gestae of that same criminal act," even though "the conduct constituting the assault and the homicide are the same." 147 Wn.2d at 610.

There is, however, a way to interpret the new version of the statute which does not render superfluous the "in furtherance of" language or require an absurd result, and which honors the Legislature's apparent desire to include at least *some* assaults as predicate felonies for second-degree felony murder. RCW 9A.32.050(1)(b) can be interpreted as permitting conviction for second-degree felony murder based upon an assault predicate if that assault is *not* the conduct causing the death. For example, second-degree felony murder with an assault predicate *would* be proper in a situation where a defendant was assaulting another, someone tried to intervene, and the defendant then shot and killed that person, or pushed him in front of a car which ran him over, or otherwise caused his death. The death would thus be caused by an act *separate* from the underlying assault, and the "in furtherance of" language would not be rendered meaningless. Nor would the statute be "nonsensical" as described in Andress, because the separation of the act causing the death from the predicate assault would make sense of the "res gestae" interpretation of Leech.

This interpretation of RCW 9A.32.050(1)(b) suggested by the very nature of the felony murder scheme. As the Supreme Court recently noted in In re the Personal Restraint of Bowman, 162 Wn.2d 325, 331, 172 P.3d

681 (2007), that scheme is intended to apply "when the underlying felony is distinct from, yet related to, the homicidal act." If the underlying felony is the assault which results in death, that distinction is lost. If, however, the underlying felony is an assault and a *different* act causes the death, the distinction - and the nature of the felony murder scheme - is retained.

In addition, this interpretation is consistent not only with the general rules of statutory construction but also with the rule of lenity. Under that rule, where a statute is ambiguous and thus subject to several interpretations, the Court is required to adopt the interpretation most favorable to the defendant. See State v. Roberts, 117 Wn.2d 576, 586, 817 P.2d 855 (1991). Here, the "including assault" language of RCW 9A.32.050(1)(b) is ambiguous because it is unclear whether it refers to an assault which is the cause of death or a separate assault. The most lenient interpretation in this case is that of referring only to an assault separate from the act which causes death. As a result, the assault here would not be included as a predicate felony for second-degree felony murder.

Notably, this interpretation is consistent with the Legislature's stated purpose in amending the statute to specifically refer to assaults. In making the amendment, the Legislature said that it believed the previous statute "clearly and unambiguously stated that any felony, including assault, can be a predicate offense for felony murder." Laws of 2003, ch. 3, §1. The Legislature also stated that the purpose of the second-degree felony murder statute was punishing those who "commit a homicide in the course *and in furtherance of* a felony," which the Legislature said meant

the death was to be "sufficiently close in time and proximity to the predicate felony." Laws of 2003, ch. 3, § 1 (emphasis added). That statement of Legislative purpose can be reconciled with Gordon's proposed interpretation of the statute, because that interpretation gives meaning to the plain language as described in Andress while honoring the Legislature's intent to include assault as a possible felony predicate for second-degree felony murder. In stark contrast, interpreting the statute to cover both assaults which result in the death and assaults which does not would render meaningless the "in furtherance of" language, as noted in Andress, even though the 2003 Legislature specifically retained that language for the new statute.

This Court should interpret RCW 9A.32.050(1)(b) in the only manner which will not render superfluous language of the statute or produce an absurd result, and should hold, consistent with the rule of lenity, that Gordon's conduct in this case did not amount to second-degree felony murder. Reversal of the conviction for that offense should therefore be granted.

b. Allowing prosecution for second-degree felony murder based upon the underlying crime of assault violated equal protection and fairness principles

If the new statute is interpreted to apply to the conduct in this case, reversal should still be granted based upon equal protection and fairness principles. First, the second-degree murder conviction in this case violated Gordon's rights to equal protection.

Both Article I, §12, of the Washington constitution and the

Fourteenth Amendment require that similarly situated individuals receive like treatment under the law. See Seeley v. State, 132 Wn.2d 776, 940 P.2d 604 (1997); Dandridge v. Williams, 397 U.S. 471, 518, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970).[5] When conducting an equal protection analysis, the first step is to determine the appropriate standard of review. See State v. Coria, 120 Wn.2d 156, 169, 839 P.2d 890 (1992). This is done by looking at the nature of the interests or class affected. See State v. Garcia-Martinez, 88 Wn. App. 322, 326, 944 P.2d 1104 (1997), review denied, 136 Wn.2d 1002 (1998). Although physical liberty is an important liberty interest, the Supreme Court has held that it implicates only the "rational relationship" test. See State v. Manussier, 129 Wn.2d 652, 674, 921 P.2d 473 (1996), cert. denied, 520 U.S. 1201 (1997). Under that test, the courts ask 1) whether the classification applies to all members of the class, 2) whether there was some rational basis for distinguishing between those within and those outside the class, and 3) whether the challenged classification bears a "rational relationship" to the legitimate state objective which must be the basis for the classification. See, In re Bratz, 101 Wn. App. 662, 669, 5 P.3d 755 (2000).

While identical treatment is not required in all circumstances, it is still required that any distinction "have some relevance to the purpose for which the classification is made." Baxstrom v. Herold, 383 U.S. 107, 111, 86 S. Ct. 760, 15 L. Ed. 2d 620 (1966). Further, even a seemingly valid

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[5]Washington courts have thus far construed the Washington clause as "substantially identical" to the federal clause, and use the same analysis. See State v. Shawn P., 122 Wn.2d 553, 559-60, 859 P.2d 1220 (1993).

law will violate equal protection if it is administered in a manner which unjustly discriminates between similarly situated people. State v. Handley, 115 Wn.2d 275, 289, 796 P.2d 1266 (1990).

Although the rational relationship standard is forgiving, it still cannot be met in this case. As a threshold matter, because the jury was not required to indicate upon which predicate crime its verdict was based, there is no way to know which of the many charged predicate kinds of assault the jury found. See, e.g., CP 925-67. As a result, the rule of lenity requires that this Court assume the verdict was rendered in the way most favorable to Gordon's argument. See State v. Kier, __ Wn.2d __, ___ P.3d ___ (2008 Wash. LEXIS 1030) (Oct. 8, 2008); State v. DeRyke, 110 Wn. App. 815, 823-24, 41 P.3d 1225 (2002), affirmed on other grounds, 149 Wn.2d 906, 73 P.3d 1000 (2003). For the purposes of this analysis, that means this Court must assume that the jury convicted Gordon based upon the predicate crime of third-degree assault. Gordon is thus a member of a class of defendants who commit third degree assault which results in death. For those people, under the current statutory scheme, the prosecution has an astounding choice. To commit second-degree felony murder based upon third-degree assault as a predicate crime, the prosecution had to prove that 1) with criminal negligence, Gordon caused bodily harm and 2) Lewis died as a result. RCW 9A.32.050(1)(b). But that same proof would also establish second-degree manslaughter, which is defined as, "with criminal negligence, causing the death of another." RCW 9A.32.070.

Thus, as the Supreme Court noted in Andress and again in Bowman, for the class of defendants within which Gordon falls, the prosecution can choose to charge either second degree felony murder or the far lesser crime of second degree manslaughter. See Andress, 147 Wn.2d at 615; Bowman, 162 Wn.2d at 334. The difference in punishment between the two crimes is stark. Under the statutes in effect for Gordon's case, the seriousness level for second-degree murder was XIV, with an accompanying standard range for Gordon's 0 offender score of 123-220 months. Former RCW 9.94A.515 (2006); RCW 9.94A.510. In contrast, for second-degree manslaughter, the seriousness level (VIII) results in a standard range for an offender score of) of only 21-27 months. Former RCW 9.94A.515 (2006); RCW 9.94A.510.

There is, however, no distinction whatsoever between the defendants who are charged with the lesser crime rather than the higher. Nothing in the statutory scheme provides any limit to the prosecutor's charging discretion, which may be exercised for *any* reason, even improper ones such as the defendant's race. There is *no* basis, let alone a rational basis, for distinguishing between those, like Gordon, who are charged with the far higher crime and those who commit exactly the same conduct but are charged with the far lesser crime. This complete lack of any standards for treating similarly situated defendants who commit exactly the same acts so differently cannot possibly serve any legitimate state objective. Thus the "rational relationship" test is not met.

A related area of the law is instructive. It is a well-settled rule in

this state that, "where a special statute punishes the same conduct which is punished under a general statute, the special statute applies and the accused can be charged only under that statute." State v. Shriner, 101 Wn.2d 576, 579, 681 P.2d 237 (1984), quoting, State v. Cann, 92 Wn.2d 193, 197, 595 P.2d 912 (1979); see State v. Danforth, 97 Wn.2d 255, 257-58, 643 P.2d 882 (1982). Part of the rationale for the rule is the need to limit the prosecutor's ability to choose to charge a higher crime over a lesser crime, at her unfettered discretion. Danforth, 97 Wn.2d at 258-59. The principles of equal protection also underlie the rule, because those principles are offended when the prosecutor is allowed to make a choice of which comparable crime to charge when one is far more serious. See State v. Pyles, 9 Wn. App. 246, 511 P.2d 1374, review denied, 82 Wn.2d 1013 (1973); see also, State v. Collins, 55 Wn.2d 469, 348 P.2d 214 (1960).

In addition to violating Gordon's equal protection rights, allowing the conviction here to stand also violates fundamental principles of fairness. As the Andress Court noted, allowing assault as a predicate felony for felony murder results in "much harsher treatment of criminal defendants" than previously recognized. 147 Wn.2d at 612-13. Because neither degree of manslaughter is a lesser degree or lesser included offense of second-degree felony murder, the jury in a second-degree felony murder case is not given the option of considering conviction on lesser crimes. See State v. Gamble, 154 Wn.2d 457, 459-60, 114 P.3d 646 (2005). Yet a person accused of having *intentionally* caused another's death (i.e., someone charged with intentional second-degree murder), *is* allowed have

the jury consider lesser offenses and convict for a lesser offense. Andress, 147 Wn.2d at 613-14. It is patently unfair that one who deliberately, intentionally takes another human life should be treated so much better than one who has no such vile intent but commits a felony which unintentionally results in death.

The Supreme Court has stated that, under equal protection principles, the prosecution should not be permitted the discretion to chose "different punishments or different degrees of punishment for the same act committed under the same circumstances by persons in like situations." Olsen v. Delmore, 48 Wn.2d 545, 550, 295 P.2d 324 (1956). That is exactly what happened in this case. Because the conviction for second-degree felony murder violated Gordon's rights to equal protection and fundamental principles of fairness under the law, this Court should reverse.

2. THE EXCEPTIONAL SENTENCE MUST BE REVERSED

Mr. Gordon was alleged to have committed the crime with aggravating factors, which were that Lewis was "particularly vulnerable/incapable of resistance" and that Gordon engaged in "deliberate cruelty." CP 665-66. At trial, although Gordon objected to the "particularly vulnerable" aggravator being submitted to the jury, the court nevertheless did so and the jury then entered special verdicts of "yes" for both aggravators. RP 2146; CP 964-67, 971. At sentencing, the court then relied on those findings and its own findings in imposing an exceptional sentence of 366 months, 144 months above the top of the standard range.

CP 1002-13.

On review, the exceptional sentence should be reversed, because the jury instructions on the aggravating factors were constitutionally insufficient, counsel was ineffective, the aggravators did not apply, and the trial court violated both Gordon's constitutional rights and the mandates of the sentencing statutes in imposing those sentences.

a. Gordon's rights under *Blakely* and both RCW 9.94A.535 and RCW 9.94A.537 were violated

Taking the last issue first, the sentencing court's acts in imposing the exceptional sentence violated both the applicable sentencing statutes and Gordon's constitutional rights. In Blakely, supra, and Hughes, supra, the state and federal Supreme Courts 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" and 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; Hughes, 154 Wn.2d at 125. Those cases clearly establish that 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.

Further, both RCW 9.94A.535 and RCW 9.94A.537, enacted to bring our state's sentencing statutes in line with the holdings of Blakely and Hughes, limit the trial court's authority to make factual findings in support of an exceptional sentence. RCW 9.94A.535(2) provides the exclusive list of aggravating circumstances a trial court is now authorized

to find. Those factors are 1) the defendant stipulates and the court finds that an exceptional sentence is in the interests of justice, 2) the defendant's prior unscored criminal history renders the standard range sentence "clearly too lenient" in light of the purposes of the SRA, 3) the existence of multiple current offenses and a high offender score means some current offenses would go unpunished without a higher sentence, and 4) the offender score does not include omitted criminal history and that omission results in a "clearly too lenient" presumptive sentence. RCW 9.94A.535(2). All other aggravating factors must be contained on the "exclusive list" of RCW 9.94A.535(3), and must be proven to and found by a jury, beyond a reasonable doubt. RCW 9.94A.537(3).

In this case, the aggravating factors, "deliberate cruelty" and "victim particularly vulnerable/incapable of resistance" are listed as proper aggravating factors under RCW 9.94A.535(3). However, those factors are *not* listed as factors a judge may find and must instead be proven to and found by a jury. See RCW 9.94A.535(3)(a) and (b).

Despite these clear constitutional and statutory mandates, the trial court in this case nevertheless made its own factual findings on the aggravating factors and relied on those findings in imposing the exceptional sentence. In Finding 7 the court detailed the evidence *it* found "supported the jury's verdict" on the aggravating factors. CP 1039. More specifically, it said those factors were supported by 1) the "location and severity of the injuries," 2) where the beating took place and "positioning of the head," 3) the testimony of the paramedic that Lewis died of his

injuries, 4) the testimony of Thomas and Knoefler about "the participation and positioning of the participants" and 5) Lewis' position as "trapped between the two vans and restrained on the ground." CP 1039. And in Conclusions 9-13, the court made factual findings when it declared that "[t]he beating, stomping and kicking" were 1) "directed deliberately and cruelly" at "the most vital and vulnerable" and "most visible" parts of Lewis' body, 2) done "with such force as to ensure that the damage would be lasting if not fatal," 3) involved "gratuitous violence," and 4) "continued long after" Lewis was "particularly vulnerable and incapable of resistance" both because "he had ceased to have the capacity to resist or fight back," and "he was trapped between the two vans with no avenue of escape and with as many as five people attacking from both sides." CP 1040.

All of these factual findings were in direct violation of RCW 9.94A.535 and .537 and Gordon's rights under Blakely. This is so even though some of the findings were listed as "conclusions" and included in the "conclusions" section of the findings document. A "determination whether the evidence showed something occurred or existed" is a finding of fact. State v. Niedergang, 43 Wn. App. 656, 658, 719 P.2d 576 (1986). A determination of the legal effect of those facts is, in contrast, a conclusion of law. See Leschi Improvement Council v. State Highway Comm'n., 84 Wn.2d 271, 273, 525 P.2d 774 (1974). The court's declarations, even those contained in the "conclusions" section, were determinations about what the evidence showed, independent of its legal

effect, and are thus findings of fact.

None of those "facts," however, was found by the jury. Nor was the jury ever *asked* to make such findings. See CP 925-67. Instead, the only "facts" found by the jury were the boilerplate, preprinted findings presented in the special verdict forms, i.e., that Gordon's conduct during the commission of the offense "manifested deliberate cruelty to Brian Lewis" and that Gordon knew or should have known that Lewis "was particularly vulnerable or incapable of resistance." CP 971. The jury never found anything about the location of the victim, or the nature of the kicks or punches, or any of the other "facts" upon which the court relied in its findings. CP 971; see 1038-1041.

The court's entry of and reliance on its own findings was not only unsupported by the statutes, it was a violation of Gordon's constitutional rights. Trial courts lack the authority to deviate from the exceptional sentencing scheme set forth by the Legislature. State v. Davis, 163 Wn.2d 606, 608, 184 P.3d 639 (2008). And where, as here, the statutes in question were specifically crafted in order to ensure a defendant's important constitutional rights under Blakely, the trial court's decision to violation those statutes not only exceeds its statutory authority but offends the very guarantees the court has sworn to uphold. See, e.g., Art. IV, § 28.[6]

It is true that even such blatant violations of statute and

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[6]Art. IV, § 28 requires every superior court judge to, *inter alia*, "take and subscribe an oath that he will support the Constitution of the United States and the Constitution of the State of Washington[.]"

constitution as occurred here have been deemed subject to principles of "harmless error." See State v. Suleiman, 158 Wn.2d 280, 291-94, 778 P.2d 1079 (1989). And at first glance, the errors in this case might appear "harmless," given that the jury also found the aggravating factors by special verdict. At a minimum, however, the improper findings made by the sentencing court must be completely disregarded by this Court on review, as those findings were improperly and unconstitutionally made. The trial court's findings therefore cannot be considered in any way in determining whether the exceptional sentence was supported or should be upheld in this case.

b. The jury instructions on the aggravating factors were constitutionally insufficient, the error is not harmless because the factors did not apply, and, in the alternative, counsel was ineffective

The jury's findings on the aggravating factors also do not support the exceptional sentence in this case, because the jury instructions on those factors were constitutionally insufficient in failing to properly inform the jury of the relevant legal standard required for the state to meet its constitutionally mandated burden of proof. Further, the constitutional errors in the instructions cannot be deemed harmless, because they not only relieved the prosecution of its burden but allowed the jury to find the factors even though those factors did not apply. In the alternative, counsel's failure to propose proper instructions independently supports reversal, because that failure was ineffective assistance of counsel.

First, the instructions were constitutionally deficient and relieved the prosecution of the full weight of its burden of proof. Due process

requires that the prosecution bear the burden of proving all the essential elements of the charges, beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 546, review denied, 115 Wn.2d 1029 (1990), cert. denied, 499 U.S. 948 (1991). It is now clear that aggravating factors used to impose a sentence above the standard range are "elements" of the aggravated version of the crime. See, Apprendi v. New Jersey, 530 U.S. 466, 494 n. 19, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2007). As a result, not only due process but also the state and federal rights to trial by jury mandate that the state prove factually- based aggravating factors to the jury, beyond a reasonable doubt.

Here, the jury instructions did not hold the state to those standards. To be constitutionally adequate, jury instructions must properly convey to the jury the state's constitutionally mandated burden of proof. See State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). In addition, instructions must, when taken as a whole, make the applicable legal standards "manifestly apparent to the average juror." State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Not only must the parties be able to argue their theories of the case from the instructions, the jury must also be properly told the standards it must apply in determining whether the state has met its burden of proof, so that the jury can make a proper decision. Failure to do so is an error of constitutional magnitude which is presumed prejudicial and may be raised for the first time on appeal. See

State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996).

In this case, the jury instructions on the aggravating factors failed to inform the jury of the relevant legal standard it was required to apply in order to determine whether the state had met its burden of proving that a fact amounts to an "aggravating factor." A fact does not meet that standard unless it is sufficiently "substantial and compelling" to distinguish the particular crime from others in the same category. State v. Cardenas, 129 Wn.2d 1, 8-9, 914 P.2d 57 (1996). Further, a fact does not meet that standard if it is something which was necessarily considered in computing the presumptive range for the offense. See State v. Grewe, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991).

Put another way, to amount to an aggravating factor, conduct must not simply be greater than required in order to commit the *minimum* version of the charged crime. See State v. Bourgeois, 72 Wn. App. 650, 652-53, 866 P.2d 43 (1994). Instead, it must be so much more egregious that it exceeds that which is typical for the average crime of the same category, distinguishing the crime significantly from others. See Grewe, 117 Wn.2d at 218. Thus, in Cardenas, although there were multiple, severe injuries, an exceptional sentence could not be upheld on those grounds because such injuries were "often" the result of the crime and did not "distinguish the crime from the typical vehicular assault." 129 Wn.2d at 6-9. In addition, the fact that the defendant was "reckless and drunk" when he committed the crime did not support the sentence, because there was no finding that the recklessness and drunkenness was somehow

atypical of the usual conduct of the crime. 129 Wn.2d at 9-10.

For the relevant aggravating factors relied on in this case, courts have further clarified the legal requirements of proof. For the "deliberate cruelty" aggravating factor, there must be significant violence "not usually associated with the commission of the offense in question" or "gratuitous violence or other conduct which inflicts physical, psychological, or emotional pain *as an end in itself.*" State v. Ferguson, 142 Wn.2d 631, 645, 15 P.3d 1271 (2001) (emphasis added); see State v. Strauss, 54 Wn. App. 408, 418, 773 P.2d 898 (1989). For the "particular vulnerability /incapable of resistance" factor, the victim must not simply have the typical vulnerability common to all crime victims but must in fact be unusually, particularly vulnerable or incapable of resistance. See Handley, 115 Wn.2d at 284-85; State v. Ramires, 109 Wn. App. 749, 765, 37 P.3d 343, review denied, 125 Wn.2d 1021 (2002). Further, the particular vulnerability or incapability must be a significant factor in the commission of the crime, such as when a person is selected as a victim *because* of that vulnerability or incapability. See Suleiman, 158 Wn.2d at 291-92; State v. Vermillion, 66 Wn. App. 332, 349, 832 P.2d 95 (1992).

In the past, when judges made the relevant factual findings in support of exceptional sentences, courts reasonably assumed that the sentencing judge would understand the legal standards for finding an aggravating factor. Judges were expected to be able to compare similar crimes, based upon their experience and knowledge, and reach reasoned decisions about whether the facts of the case were significantly more

egregious than the average crime of the same type or contemplated conduct not considered by the Legislature in setting the presumptive range. See, e.g., State v. Solberg, 122 Wn.2d 688, 707, 861 P.2d 460 (1993).

Those assumptions, however, no longer hold true. Not only is there a far higher standard of proof for aggravating facts (i.e. beyond a reasonable doubt rather than by a preponderance), but judges no longer make those kinds of factual findings after Blakely. Juries do.

As a result, in order to ensure that a jury applies the relevant legal standard and holds the state to its true burden of proving an aggravating fact beyond a reasonable doubt, the jury must now be properly instructed on that burden in order to make it - and the relevant legal standards the jury was required to apply - "manifestly apparent." See, e.g., State v. Stubbs, 144 Wn. App. 644, 648, 184 P.3d 660 (2008)[7] (jury was instructed it had to find that the "victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of Assault in the First Degree"). The standard for clarity is far higher than the standard applied to statutes, because a jury lacks the interpretive tools of statutory construction and thus must be given instruction which is "manifestly clear." LeFaber, 128 Wn.2d at 902.

The instructions in this case failed to meet those requirements. For the special verdicts, the instructions simply told the jury that the state had to prove beyond a reasonable doubt "that the defendant's conduct during the commission of the offense manifested deliberate cruelty to the victim"

[7]A petition for review is pending in that case on the issue of whether the aggravating factor was supported by the record. See State v. Stubbs, No. 81650-6.

(Instruction 32) and "that the defendant knew or should have known that the victim of the offense was particularly vulnerable or incapable of resistance" (Instruction 33). CP 960-61. And the special verdict forms merely asked the jury to answer "yes" or "no" to those questions. CP 967.

Aside from that, the jury was given *no* instructions on the relevant legal standards it had to apply in order to decide whether the state had met its burden of proving the aggravating factors. The jury was not told that the "deliberate cruelty" aggravating factor was not proven unless the cruelty was significantly more egregious than typical for the offense and involved "gratuitous violence" or other conduct which inflicted physical, psychological or emotional pain as an end in itself. CP 925-67. Nor was the jury instructed that it could not find the aggravating factor that Lewis was particularly "vulnerable" or incapable of resistance under the law unless they found he was significantly more vulnerable or incapable of resistance to the offense than usual for the crime. CP 925-67. And the jury was not told that the vulnerability and incapability not only had to be known by Gordon but also had to be a significant reason for the commission of the crime, as required. CP 925-67; see, e.g., Suleiman, 158 Wn.2d at 293.

Thus, the jury was left without any information as to the relevant legal standards it was required to apply in order to decide whether the state had met its constitutionally mandated burden. They were given no instruction as to how to make the required determination, nor were they informed that the normal violence, vulnerability or incapability was

insufficient. And they were not informed that they "necessarily" had to conduct a "factual comparison" to other, similar cases in order to find the conduct, vulnerability or incapability here far more egregious than typical, in order to find for the state. See Suleiman, 158 Wn.2d at 293, 294 n. 5.

Without such instruction, the jury was not properly informed of the state's constitutionally mandated burden of proof.

Several U.S. Supreme Court cases are instructive. In Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988), the aggravating circumstance supporting imposition of the death penalty was that the murder was "especially heinous, atrocious, or cruel." 486 U.S. at 364-65. This language was insufficiently specific to properly instruct the jury that it could not find the aggravating factor unless it found the case significantly distinct from other murders:

> To say that something is "especially heinous" merely suggests that the individual jurors should determine that the murder is more than just "heinous," whatever that means, *and an ordinary person could honestly believe that every unjustified, intentional taking of human life is "especially heinous."*

486 U.S. at 363-64 (emphasis added).

Similarly, in Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980), the jury found that the murder was "outrageously or wantonly vile, horrible or inhuman." This language was also insufficient to inform the jury about the need for a distinction between the ordinary case and one in which the highest penalty should be imposed:

> There is nothing in these few words [of outrageously or wantonly vile, horrible or inhuman] standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. *A person of ordinary sensibility could fairly characterize*

> *almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'* Such a view may, in fact, have been one to which the members of the jury in this case subscribed.

446 U.S. at 428-29 (emphasis added; footnote omitted). As a result, because the jury was given "no guidance" about how to make its determination of when the crime at issue met the required standards, the Court reversed. Id.

Likewise, here, a person of ordinary sensibility could reasonably believe that *anytime* someone hit and "stomped" another person with such force that the result was death, that was deliberately cruel. Indeed, such a person could easily find that hitting or kicking another person for *any* reason was cruel, or that continuing to do so after a person had a bloody nose or appeared hurt met that standard. And a person of ordinary sensibility would likely believe that *any* crime victim was vulnerable when they were hurt or outnumbered, not understanding that particular vulnerability or incapability of resistance required specific proof not only of greater vulnerability or incapability than the average victim but also that the vulnerability or incapability had to be a significant reason the crime occurred in the first place.

Without proper instruction on how to determine if the state had met its constitutionally mandated burden of proving the aggravating factors, the jury was unaware of the specific legal requirements and standards it needed to apply. As a result, it could easily - and likely did - decide to find the aggravating factors had been proven simply because of the type of crime with which Gordon was charged, not based upon a

proper finding that the state had actually met its true burden of proving those factors under the relevant law. Because the aggravating factors were found by a jury not properly instructed on the legal standards the prosecution was required to meet in order to satisfy its constitutionally mandated burden of proving those factors, the factors do not withstand review.

Nor can these errors be deemed "harmless." Even an error in instructing the jury on an element the prosecution must prove may be "harmless" so long as the jury is properly instructed on the state's burden of proof. See State v. Montgomery, 163 Wn.2d 577, 600, 183 P.3d 167 (2008). But it is reversible error to instruct the jury in a manner which relieves the state of that burden. See Bennett, 161 Wn.2d at 307. Here, because of the errors, the jury was not properly instructed on the state's burden. While the jurors knew the state had to prove the aggravating factors beyond a reasonable doubt, they did not know that the burden had not been met unless the specific legal requirements for those factors had been met. As a result, the instructional errors in this case cannot be declared "harmless."

Further, even if the failure to instruct the jury on how to properly evaluate whether the state had met its burden of proving the aggravating factors could somehow be construed as simply "misstating" an element, those errors would still not be harmless, because the factors used did not, in fact, apply. An error in misstating an element the prosecution has the burden of proving can only be deemed harmless if the prosecution can

convince this Court that, beyond a reasonable doubt, the errors could not have contributed to the verdict in any way. See State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). Further, the evidence supporting the misstated element must be "overwhelming." 147 Wn.2d at 341.

Neither of those standards is met here, because the errors in the instructions allowed the jury to find the state had proven the aggravating factors when they did not, in fact, apply. The legal adequacy of an aggravating factor "is a question of law," reviewed de novo. State v. Dunaway, 109 Wn.2d 207, 218, 743 P.2d 1237 (1988); Grewe, 117 Wn.2d at 215. Under the current sentencing statute, RCW 9.94A.585, the reviewing court uses the same standard of review for exceptional sentences as that which was used before former RCW 9.94A.210 was recodified into section .585. Like its predecessor statute, RCW 9.94A.585 still provides:

> (1) To reverse a sentence which is outside the standard sentence range, the reviewing court must find (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

RCW 9.94A.585; see former RCW 9.94A.210(4) (2002) (same).

Under subsection (a), there are two questions. See State v. Collicott, 118 Wn.2d 649, 662, 827 P.2d 263 (1992). The first question is factual, i.e., whether the record supports the reasons for imposing the sentence. Id., quoting, State v. Fisher, 108 Wn.2d 419, 423, 739 P.2d 683 (1987). The second question is legal and requires the reviewing court to

"determine independently, as a matter of law, if the . . .reasons justify the imposition of a sentence outside the presumptive range." Fisher, 108 Wn.2d at 423. To meet that standard, the reasons must be sufficiently "substantial and compelling" to distinguish this particular crime apart from others in the same category, and must take into account factors other than those which are necessarily considered in computing the presumptive range for the offense. See Grewe, 117 Wn.2d at 218.

The requirements that even statutorily authorized aggravating factors must take into account factors other than those considered by the Legislature in setting the presumptive range and must distinguish the crime from the average crime in the same category stem from the language of RCW 9.94A.585(1)(a). As a result, they have not changed despite the other changes to the sentencing scheme occasioned by the decision in Blakely. See RCW 9.94A.585(1)(a); former RCW 9.94A.535; former RCW 9.94A.537.

What *has* changed, however, is the standard of proof required for proving those factors. Rather than being required to be proved by a preponderance of the evidence, the existence of an aggravating factor must now be proved beyond a reasonable doubt. See State v. Borboa, 157 Wn.2d 108, 118, 135 P.3d 469 (2006). Thus, a reviewing court should use caution when examining pre-Blakely caselaw on the propriety of an aggravating factor, recognizing that the standard for proving such a factor is now far higher and greater care should therefore be taken in reviewing the legal adequacy of such standards. Put another way, because previous

cases were decided when the state had a far lesser burden of proving the aggravating factors, facts which were deemed legally sufficient to prove a factor by a "preponderance" of the evidence should not be automatically deemed to satisfy the more onerous burden of proving an aggravator beyond a reasonable doubt. Compare, In re Personal Restraint of Woods, 154 Wn.2d 400, 414, 114 P.3d 607 (2005), overruled in part and on other grounds by, Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006) ("preponderance of the evidence" standard is equivalent to "more likely than not"), with, State v. Hundley, 126 Wn.2d 418, 895 P.2d 403 (1995) ("beyond a reasonable doubt" is not just that something "could" or even probably happened; there must be a certitude).

In this case, neither of the factors was legally adequate. "Deliberate cruelty" does not exist simply because a death occurred, or because a defendant engaged in conduct which caused such grievous bodily harm that death resulted. Instead, there must be "gratuitous violence or other conduct which inflicts physical, psychological or emotional pain *as an end in itself*," over and above that which is normal for commission of the offense. State v. Berube, 150 Wn.2d 498, 514, 79 P.3d 1144 (2003) (emphasis added). The violence of the crime must "truly distinguish it from others in the same category" and not be of the type which normally inheres in the elements and thus was considered by the Legislature in setting the presumptive sentence range. State v. Tili, 148 Wn.2d 350, 368-71, 60 P.3d 192 (2003). Indeed, even under the old "preponderance" standard, the violence had to be atypical of the crime at

issue. See State v. Payne, 45 Wn. App. 528, 531-32, 726 P.2d 997 (1986).

Further, the "deliberate cruelty" aggravating factor does not support imposition of an exceptional sentence based upon the severity of the injuries, if that severity is an element of the crime. See Cardenas, 129 Wn.2d at 7-8.

Here, Mr. Gordon was charged with second-degree felony murder with first-, second- or third-degree assault as the predicate crimes. CP 665-66. To prove second-degree felony murder as a result, the prosecution had to show that Gordon committed or attempted to commit the underlying felony - here one of various degrees of assault - and in so doing caused Lewis' death. See RCW 9A.32.050(1)(b). And the jury was so instructed. CP 938, 943-47, 953-55, 958. But the jury was *not* instructed to inform the parties on which underlying felony it relied in finding Gordon guilty of the felony murder. CP 925-67. Nor were they given a special interrogatory asking them to provide that information. See, e.g., CrR 6.16.(b).

As a result, because there is no way to know which of the charged assaults the jury found as the predicate felony for the conviction, the rule of lenity requires this Court to assume that the jury's verdict was reached in the way most favorable to Gordon's argument. Kier, supra (2008 Wash. LEXIS 1030) (Oct. 8, 2008); DeRyke, 110 Wn. App. at 823-24.

Here, that construction is either that the jury found guilt based upon commission of first-degree assault by intentionally inflicting great bodily harm, or that it found guilt based upon the "torture" means of

committing second-degree assault. See CP 943 (instruction defining first-degree assault for this case); CP 944 (defining two means of second-degree assault); CP 958 ("to-convict). First, for the first-degree assault predicate, that crime necessarily requires proof of assault which causes injuries so severe they result in *death*. Indeed, first-degree assault requires the defendant to cause bodily injury "which creates a *probability of death*," "*serious permanent disfigurement*," or a "significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(c) (emphasis added); RCW 9A.36.011(1)(c); see CP 953. That conduct - and the crime of first-degree assault - contemplates the most egregious and violent of assaults, causing the most egregious and serious injuries. See, e.g., State v. Baird, 83 Wn. App. 477, 922 P.2d 157 (1996), review denied, 131 Wn.2d 1012 (1997). Thus, in Baird, the Court held that the conduct would *not* have supported an exceptional sentence for first-degree assault if all the defendant had done was beaten his wife unconscious. 83 Wn. App. at 479. It was his additional, gratuitous and deliberate violence of surgically disfiguring her face, cutting off her nose and slicing her eyelids but keeping her eyeballs intact so that she would always have to see her deformities, which supported the finding that his conduct was far more egregious than typical for first-degree assault. 83 Wn. App. at 487-88.

Again, it must be remembered that the question is *not* whether the violence or conduct exceeds the *minimum* required to commit the crime. See Bourgeois, 72 Wn. App. at 652-53. Instead, it must exceed that

typical for the average offense of the type - here, an extremely violent crime involving such severe injuries that permanent disfigurement or probable death result. Id.

To justify an exceptional sentence above the presumptive range for second-degree murder with the predicate crime of first-degree assault as alleged in this case, therefore, there had to be more than just violence so severe that it resulted in death. But here, there was no evidence of any such additional, gratuitous violence, over and above that constituting the first-degree assault. Nor was there *any* evidence that Gordon engaged in any additional acts which inflicted physical, emotional or psychological pain *as an end in itself.* The pain inflicted in this case was all part of the ongoing assault which resulted in death. The "deliberate cruelty" aggravating factor simply did not apply.

Similarly, the "deliberate cruelty" factor did not apply if the jury found guilt based upon one of the means of committing second-degree assault; the "torture" means. The jury was instructed on that means, as follows:

> A person commits the crime of Assault in the Second Degree when[,] under circumstances not amounting to assault in the first degree he:
>
> . . .
>
> (2) knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture.

CP 944. For this statute, "torture" includes "the infliction of severe or intense pain as punishment or for coercion, *or for sheer cruelty.*" See State

v. Peterson, 133 Wn.2d 885, 890, 948 P.2d 381 (1997) (emphasis added; quotations omitted). By definition, therefore, this means of committing second-degree felony murder necessarily involves knowing infliction of bodily harm which causes severe or intense pain for the purposes of punishment, coercion, or sheer cruelty, with the result of death. The Legislature thus already considered the type of conduct which might normally be seen as "deliberate cruelty," i.e., gratuitous violence inflicting pain as an end in itself, in setting the presumptive range for this offense. And the violence required to cause such pain for the purposes of the "torture" means of committing second-degree assault is already contemplated in the crime. Although Gordon maintains there was no evidence of any conduct designed to cause emotional, psychological or physical pain as an end itself in this case, the fact remains that the "torture" means of committing the crime already contemplated at least such conduct and easily encompassed the degree of violence used in this case. The "deliberate cruelty" aggravating factor therefore did not apply.

Neither did the "particularly vulnerable/incapable of resistance" factor. The operative word of this factor is *particularly*, so that the average, everyday vulnerability or incapability to resist violence does not suffice. See, e.g., Ramires, 109 Wn. App. at 765. Thus, in Vermillion, the trial court erred in relying on the "particularly vulnerable victims" aggravating factor even though the victims, female real estate agents, were "vulnerable" to the sexual assaults because they were in empty houses at the time, because there was no evidence they were "particularly"

vulnerable as opposed to the average victim of the crime. Vermillion, 66 Wn. App. at 349.

Indeed, the particularly vulnerable/incapable factor is usually intended to punish those who *select* their victims *because* of their infirmities or vulnerabilities, i.e., take advantage of the most helpless in our society and victimize those most in need of our protection, not to redress the general vulnerability inherent in being a crime victim. See, e.g., State v. Barnett, 104 Wn. App. 191, 16 P.3d 74 (2001) (factor generally applied to victims who are vulnerable at the time the attack begins); see also, State v. Ogden, 102 Wn. App. 357, 367, 7 P.3d 839 (2000), review denied, 143 Wn.2d 1012 (2001). This makes sense because otherwise the requirement that the particular vulnerability or incapability of resistance must actually be a significant factor in the commission of the crime is rendered meaningless. See Suleiman, 158 Wn.2d at 291-92 (noting that requirement). Here, there was no evidence that Lewis was "particularly vulnerable or incapable of resistance" before the beating began. He was not extremely old or young, nor was he disabled or infirm.

There are, however, a few very limited cases in which the courts have held that a victim may be rendered particularly vulnerable by the conduct during the crime. See Barnett, 140 Wn. App. at 204. Thus, in Baird, the court held that the fact that the wife had been beaten unconscious prior to the acts of mutilation was sufficient to support a finding of particular vulnerability for those acts. 83 Wn. App. at 488.

And in Ogden, where the victim was beaten over the head multiple times and rendered unconscious before the defendant robbed him, stabbed him at least six times on his chest, torso and calf, inflicted lacerations, contusions and abrasions on several parts of his body and carved an incision into his eyelid, the court did not err relying on the particularly vulnerable/incapable of resistance aggravating factor. 102 Wn. App. at 367-68.

These cases indicate that, under the old, pre- Blakely standards, where the victim was been rendered unconscious and unable to resist additional crimes, reviewing courts found that evidence sufficient to support a trial court's finding that a victim became "particularly vulnerable/incapable of resistance," by a preponderance of the evidence. Notably, however, in reaching its conclusion, the Ogden Court specifically rejected the idea that it was finding that any time a victim suffered multiple blows and thus was rendered more vulnerable than at the beginning of the commission of the crime, he or she was rendered "particularly vulnerable/incapable of resistence" for the purposes of applying the aggravating factor. 102 Wn. App. at 368-69. Instead, the Court said, it was simply honoring the discretion of the trial court to make its finding based on the facts of that particular case, taking into account the appropriate standards. 102 Wn. App. at 369.

Here, those standards are no longer in effect. The issue is no longer the trial court's discretion to find aggravating factors by a preponderance of the evidence and the accompanying highly deferential standard of review. It is thus questionable whether the holdings of Baird

and Ogden would be the same today.

In any event, this case did not involve a victim who was rendered unconscious and had additional crimes committed against them after that point, when they were completely vulnerable and unable to resist. All the evidence indicated that Lewis was *not* rendered unconscious, was a "big guy," and was in fact fighting back and landing punches himself for much of the assault. RP 1414-15, 1469, 1863. And while there were multiple assailants, Lewis was no more "particularly vulnerable or incapable of resistance" than any other person would have been in his situation. That aggravating factor did not apply, and this Court should so hold.

Not only did the factors not apply, but they were not supported by "overwhelming evidence," as required for the instructional errors to be deemed "harmless." The "overwhelming evidence" standard is *not* the same as the standard for finding evidence "sufficient." See State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002). For a "sufficiency of the evidence" challenge, the reviewing court looks at the evidence in the light most favorable to the state and decides whether any reasonable jury could have found guilt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In contrast, for the "overwhelming evidence" test, the Court must find that the evidence supporting the verdict is so overwhelming that it "necessarily" leads to a finding of guilt. Romero, 113 Wn. App. at 786. Romero is instructive on the differences between the two tests, because, in that case, the Court first found the evidence sufficient to withstand a "sufficiency" challenge, but then found that same evidence *insufficient* to

satisfy the "overwhelming evidence" test, especially in light of issues of credibility. Romero, 113 Wn. App. at 783-95; see also, State v. Keene, 86 Wn. App. 589, 938 P.2d 839 (1997) (although the untainted evidence was strong, the "overwhelming evidence" test was not met).

Here, there was not only no "overwhelming evidence" to support the findings of deliberate cruelty and that the victim was "particularly vulnerable/incapable of resistance," the evidence was insufficient to support those factors *at all*. The errors in failing to properly instruct the jury on the prosecution's burden of proving the aggravating factors cannot be deemed "harmless," and this Court should so hold. Further, because the aggravating factors did not apply, they should be stricken.

In response, the prosecution may attempt to convince this Court that the failure to properly advise the jury of the state's burden for the aggravating factors amounted to nothing more than a failure to define an element and is thus not an issue of constitutional magnitude. Even if this Court gave such an argument any currency, reversal would still be required based on counsel's ineffectiveness in failing to propose proper instructions on the aggravators.

Both the state and federal constitutions guarantee 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. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice.

State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Although there is a "strong presumption" that counsel's representation was effective, that presumption is overcome where counsel's conduct fell below an objective standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

Here, the strong presumption of effectiveness is overcome by counsel's unprofessional conduct in failing to propose proper instructions and allowing the aggravators to go to the jury without the jury being told of the state's true burden of proof. Counsel is ineffective when he fails to propose an instruction consistent with placing the proper burden of proof on the state. See State v. Carter, 127 Wn. App. 713, 715, 112 P.3d 56 (2005). Further, that unprofessional conduct is presumed prejudicial and cannot be deemed a legitimate trial strategy. See id. Thus, in Carter, where counsel proposed an instruction which improperly stated the prosecution's burden despite caselaw establishing that burden from a few years earlier, reversal was required. 127 Wn. App. at 715-717. Similarly, here, while Blakely and its progeny were only a few years old, no reasonably competent defense attorney could have failed to be aware of the significant changes they wrought. And the cases establishing the prosecution's burden for proving the aggravating factors even under the old, lesser standard of proof by a preponderance had been well-settled long before this trial. See, e.g., Vermillion, 66 Wn. App. at 349; Strauss, 54 Wn. App. at 418.

Indeed, counsel was himself clearly aware of the caselaw, at least

with regard to the "particular vulnerability" factor, because he referred to it at least in general in asking for dismissal of that aggravator. RP 2146. Yet counsel exerted no effort to have the jury properly informed of the standards the state had to meet in order to meet its burden on those aggravators.

It is well-settled that, while it is not error to fail to define terms or elements of common meaning or "ordinary understanding," if those terms have technical, legal meaning, the failure to provide such definition is error. See, e.g., State v. Allen, 101 Wn.2d 355, 358, 678 P.2d 798 (1984); State v. Davis, 27 Wn. App. 498, 618 P.2d 1034 (1980), overruled in part on other grounds by State v. Riker, 123 Wn.2d 351, 366 n. 6, 869 P.2d 43 (1994). Where "it cannot be said that the average juror knows, as a matter of common knowledge," the technical meaning of an element the state must prove, that element must be properly defined. See Davis, 27 Wn. App. at 505-506. As the Davis Court declared, "[i]t cannot be said that a defendant had a fair trial if the jury must guess at the meaning of an essential element of the crime with which the defendant is charged, or if the jury might assume that an essential element need not be proven" based on the instructions given. 27 Wn. App. at 506. Because the failure to provide the technical definition in Davis could have led the jury to believe the state had met its burden of proof even if it had not proven what was required to satisfy the technical, legal definition of the element, the failure to provide that definition was, in fact, constitutional error. 27 Wn. App. at 506.

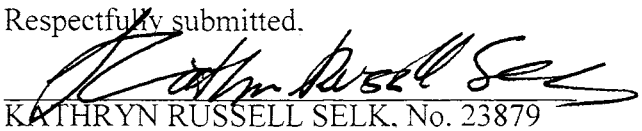
Here, there can be no question that the aggravating factors have technical, legal meaning which would not be common knowledge to the average juror. The average juror would not know that a factor is not legally an aggravating factor unless it contemplates conduct or facts not considered in setting the presumptive range, or involves conduct or facts far more egregious than that typical for the offense. See, e.g., Cardenas, 129 Wn.2d at 8-9. And for these aggravators, it could not be expected to be within the common knowledge of the average juror that "deliberate cruelty" required greater than average violence or violence done for the sole purpose of causing physical, mental or emotional pain "as an end in itself." Nor would the average juror commonly understand that "particular" vulnerability or incapability of resistance required more than just average victimization or incapability, or that the vulnerability /incapability had to be a significant factor in the commission of the crime. There could be no legitimate tactical reason for counsel to fail to propose instructions which would have provided the jurors with the proper understanding of what the prosecution actually had to prove in order to meet its burden of proving the aggravating factors. And the result was imposition of an unsupported, improper exceptional sentence on counsel's client. Reversal of the exceptional sentence is also required because of counsel's ineffectiveness.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and dismiss Gordon's conviction for second-degree felony murder. In the alternative, the exceptional sentence should be reversed and the aggravating factors stricken.

DATED this 3rd day of November, 2008.

Respectfully submitted,



KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

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, appellant, and the codefendant in the consolidated case by and through his counsel, 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 Mr. John C. Gordon, DOC 313223, WSP, 1313 N. 13th Ave., Walla Walla, WA. 99362.

to Mr. Gordon Bukovsky, c/o his appellate counsel, Ms. Sheri L. Arnold, P.O. Box 7718, Tacoma, WA. 98417.

DATED this 3rd day of November, 2008.

KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

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STATE OF WASHINGTON
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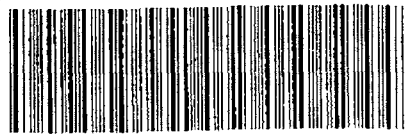
APPENDIX A:

REFERENCE TO THE VERBATIM REPORT OF PROCEEDINGS

The verbatim report of proceedings consists of 27 volumes, only 22 of which are chronologically paginated.

References to the proceedings in this brief are as follows:

-the 22 chronologically paginated volumes, as "RP;"
-October 12, 2006, as "1RP;"
-the volume containing the proceedings of February 12 and November 20, 2007, with each separately paginated therein, as follows:
February 12, 2007, as "2RP";
November 20, 2007, as "3RP;"
-the second portion of the a.m. proceedings of November 20, as "4RP;"
-the afternoon proceedings of November 20, as "5RP;"
-January 25, 2008, as "6RP."



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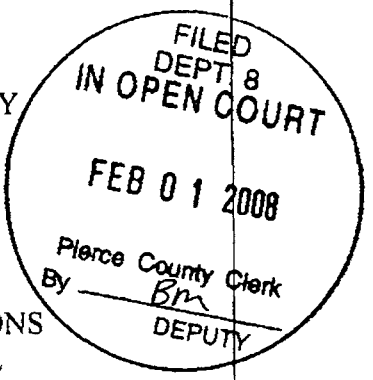
SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY



STATE OF WASHINGTON, Plaintiff, vs. JOHN CALDWELL GORDON, Defendant.	CAUSE NO. 06-1-04228-1 FINDINGS AND CONCLUSIONS REGARDING EXCEPTIONAL SENTENCE

THIS MATTER came before the court for sentencing on November 16, 2007. The trial of this case was previously completed with jury verdicts that were accepted by the court on November 20, 2007. At sentencing on December 21, 2007, the court made an oral ruling concerning an exceptional sentence above the standard range for Count Two. Now, therefore the court enters the following findings of fact and conclusions of law in conformity with *RCW 9.94A.535* and *537*:

I. FINDINGS OF FACT.

1. The defendant was convicted of the crime of Murder Second Degree with aggravating factors in the death of victim Brian Lewis He has been sentenced above the standard range.

2. As required by the Sixth Amendment the jury returned two special verdicts in which it found that two aggravating factors had been proved beyond a reasonable doubt.

3. In one of the special verdicts the jury made a factual finding that the defendant's conduct during the commission of the crime manifested deliberate cruelty to victim Brian Lewis.

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930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

4. In the other special verdict the jury made a factual finding that the defendant knew or should have known that victim Brian Lewis was particularly vulnerable or incapable of resistance.

5. The standard range for the crime committed by the defendant is listed in the Judgment and Sentence that was entered on December 21, 2007. That standard range does not constitute an adequate length of incarceration.

6. The purposes of the Sentencing Reform Act are stated in *RCW 9.94A.010.* They include the goals that punishment for a criminal offense should be proportionate to the seriousness of that offense and the offender's criminal history and that punishment promote respect for the law by providing punishment that is just.

7. The evidence that supported the jury's verdict and that also supports the court's conclusions of law includes: (a) The evidence from the medical examiner as to the location and severity of the injuries inflicted upon Brian Lewis; (b) the evidence from Detective Brian Johnson as to the location where the fatal beating took place and the positioning of his head as the source of the blood spatter on the adjacent vans; (c) the evidence from paramedic Vi Diamond as to Mr. Lewis having died of the beating injuries *en route* to the hospital; (d) the evidence from Shecola Thomas and Anthony Knoefler as to the participation and positioning of the participants and as to Brian Lewis position as having been trapped between the two vans and restrained on the ground.

II. CONCLUSIONS OF LAW.

8. Considering the purposes of the Sentencing Reform Act, the facts found by the jury in each special verdict individually constitute substantial and compelling reasons justifying an exceptional sentence above the standard range.

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Main Office: (253) 798-7400

9. The beating, stomping and kicking was directed deliberately and cruelly by the defendant and the other participants at the most vital and vulnerable parts of Mr. Lewis body

10. The beating, stomping and kicking was deliberately and cruelly directed at the most visible areas of Mr. Lewis body with such force as to ensure that the damage would be lasting if not fatal.

11. The beating, stomping and kicking was deliberately and cruelly inflicted with gratuitous violence.

12. The beating stomping and kicking continued long after Mr. Lewis was particularly vulnerable and incapable of resistance in that he had ceased to have the capacity to resist or fight back.

13. The beating stomping and kicking continued long after Mr. Lewis was particularly vulnerable and incapable of resistance in that he was trapped between the two vans with no avenue of escape and with as many as five people attacking from both sides.

14. Although not required, either of the aggravating factors found by the jury alone would constitute a substantial and compelling reason justifying the exceptional sentence imposed by the court in this case. Had the jury returned a single special verdict for one or the other of the aggravating factors the court would have imposed the same exceptional sentence.

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Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

15. A determinate sentence of ~~388~~ 364 months is the appropriate term of incarceration for the for the defendant in this case. This sentence consists of the following: The high end of the standard range, ~~244~~ 220 months, plus 144 months for the aggravating factors.

16. Defendant WAIVed His Presence for entry of these Findings and Conclusions ~~and he~~ And he requested that his lawyer not sign these Findings and Conclusions

DONE IN OPEN COURT this 1st day of February, 2008.

JUDGE

Presented by:

James Schacht
Michelle Hyer
Deputy Prosecuting Attorney
WSB#17298

Approved For Entry:

Mr Wagner was present in Open Court When these Findings & Conclusions were entered

~~James Schoenburger~~ Mark Wagner
Attorney for Defendant
WSB# _____

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FILED
DEPT. 8
IN OPEN COURT

FEB 01 2008

Pierce County Clerk
By BM
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Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400