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A ASSIGNMENTS OF ERROR

1. Anderson's state and federal due process rights to have the state prove its case against him beyond a reasonable doubt were violated by the prosecutor multiple times during closing argument.

2. Anderson's Article 1, § 22 and Sixth Amendment rights to effective assistance of counsel were violated.

3. The trial court erred in overruling counsel's objections to the prosecutor's misconduct during closing argument.

4. There is more than a reasonable probability that the prosecutor's misconduct in closing argument affected the outcome of the trial.

5. The prosecutor committed flagrant, prejudicial misconduct which could not have been cured by instruction.

6. The cumulative effect of the prosecutor's multiple acts of misconduct deprived Anderson of his constitutionally guaranteed right to a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. It is misconduct for a prosecutor to misstate the law. Such misconduct amounts to a constitutional violation when it directly impacts a constitutional right of the defendant.

a. The state and federal due process guarantees require the prosecution to prove every part of its case, beyond a reasonable doubt. Further, the presumption of innocence mandates that the jury must acquit unless and until the prosecution meets that burden of proof.

In this case, the prosecutor told the jury that it could not find Anderson not guilty unless the jurors could specifically state a reason that they doubted his guilt. Is reversal required based on the prosecutor's misstatement and minimization of his constitutionally mandated burden of proof?

b. The defendant has no burden of disproving the prosecution's case. Is reversal required where the prosecutor told the jury that the defendant had tried but failed to "create" any reasonable doubt as to his guilt?

c. Application of the standard of proof beyond a reasonable doubt is the means by which the constitutional presumption of innocence and the due process rights of the accused are guaranteed. Many courts have recognized that the certainty required to find that the state has proven its case beyond a reasonable doubt is far greater than the certainty people have when making everyday decisions, no matter how important.

The prosecutor repeatedly told the jury that they made decisions based upon application of the "beyond a reasonable doubt" standard every day of their lives. He then compared the decision jurors faced in this criminal trial with decisions such as whether to change lanes on the freeway, whether to have elective surgery after getting a second opinion, and whether to leave a child with a babysitter.

Is reversal required based upon this improper minimization and misstatement of the prosecution's constitutionally mandated burden of proof?

d. The U.S. Supreme Court has condemned the use of language describing the certainty jurors must have to find the state has meet its burden of proof as the same certainty they would have to have in order to be willing to act in other matters. Instead, the certainty is more properly described as that which would cause one to “hesitate to act.”

The prosecutor repeatedly compared the certainty jurors would have to have in order to find the state had proven its case against Anderson as the type of certainty which would make jurors willing to take action in their personal affairs. Is reversal required based upon this further misstatement and minimization of the proper standard of the prosecution’s constitutional burden?

e. Where a prosecutor commits misconduct which directly impacts a constitutional right, prejudice is presumed and reversal is required unless the prosecution can prove that the “overwhelming untainted evidence” is so strong that any reasonable jury would have convicted the defendant in the absence of the misconduct. Can the state meet that heavy burden where the prosecutor’s misconduct directly impacted the jury’s ability to evaluate all of the evidence and there was thus no evidence left “untainted” upon which the convictions can rely?

Further, could the state meet the constitutional harmless error test where there is conflicting testimony and the jury was required to make a credibility determination which was definitely affected by the misconduct?

f. In the unlikely event the Court finds that the constitutionally offensive misconduct could possibly have been cured by

objection and instruction, was counsel prejudicially ineffective in failing to seek such remedies?

2. It is completely improper for a prosecutor to misstate the jury's role and the law. Further, a public prosecutor is required to act in the interests of justice and refrain from exhorting the jury to decide a case on an improper basis.

In this case, the prosecutor told the jury that their role was to decide and "declare" the "truth," which was that Anderson was "guilty." He also told the jury their duty was to return a "just" verdict, that convicting Anderson of anything other than the highest offenses would not be "just," that their job was not to "nitpick" the state's case, that Anderson was trying to get jurors to feel sorry for him but that the area he was in at the time of the incident was "a more dangerous place" because of him, that the state's witnesses "were just telling the truth," that Anderson "didn't have the honesty" to admit what he had done, and that Anderson's testimony was "made up on the fly" and "utterly and completely preposterous.

Did the court err in overruling counsel's multiple objections to the prosecutor's repeated misconduct? Is reversal required because the prosecutor's misstatements of the jury's duty violated Anderson's constitutional due process rights? Further, does the cumulative effect of the many acts of misconduct the public prosecutor committed in this case compel reversal where the misconduct so clearly permeated the entire closing argument and prevented the jury from rendering an impartial,

proper verdict?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Daniel Anderson was charged by second amended information with first-degree robbery and second-degree assault. CP 46-47; RCW 9A.36.021(1)(a); RCW 9A.56.190; RCW 9A.56.200.

Motions were held on August 22, September 20 and 24, October 22, November 7, 13-15, 2007, and trial was held before the Honorable Frederick W. Fleming on November 19-21, 26, 27, 2007, after which a jury convicted Anderson as charged. CP 89-94.<sup>1</sup> The assault conviction was vacated on double jeopardy grounds, and, after sentencing hearings on January 18 and 23, 2008, Judge Fleming imposed a standard-range sentence. CP 247-56.

Anderson appealed, and this pleading follows. See CP 265-82.

2. Testimony at trial

In mid-morning on August 21, 2007, a man, later identified as Daniel Anderson, went into the “Save A Lot” grocery store in Tacoma and was seen grabbing several items and concealing them inside his sport coat.

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<sup>1</sup>The verbatim report of proceedings consists of 13 volumes, which will be referred to as follows:

August 22, 2007, as “1RP;”  
September 20, 2007, as “2RP;”  
September 24, 2007, as “3RP;”  
October 22, 2007, as “4RP;”  
November 7, 2007, as “5RP;”  
November 13, 2007, as “6RP;”  
November 14, 2007, as “7RP;”  
November 15, 2007, as “8RP;”  
the chronologically paginated proceedings of November 19-21, 26-27 and  
January 23, 2008, as “RP;”  
the proceedings of January 18, 2008, as “9RP.”

RP 46-60. The store manager, Joe Michael, claimed that he approached Anderson and asked him for a receipt for the items after Anderson passed by the cash registers and was near the front doors. RP 62-66. Dave Storaasli, the produce manager, was also there with Michael, but did not recall Michael saying anything to Anderson at that point. RP 108-112.

Anderson then ran at the front doors, which did not open right away. RP 64-66. He pushed them open and went through, leaving the store. RP 64-66. Michael admitted that he grabbed ahold of Anderson physically as Anderson reached the doors, but was unable to keep that hold once the men were outside. RP 66-67. Michael and Storaasli said that Anderson then started “swinging.” RP 66-67, 95-104.

According to Michael, Michael then started to grab Anderson and Anderson said “[m]other fucker, I got a gun.” RP 66-67. Storaasli did not hear Anderson say anything like that at that point. RP 105. Storaasli also said that Anderson managed to “land” a “good one” on Michael, meaning that Anderson had hit Michael hard. RP 67-85, 104-105. In contrast, Michael reported no such thing. RP 67-85, 104-105.

Storaasli said the items Anderson had taken, such as eggs and hot sauce, started falling out of Anderson’s coat as Anderson was swinging. RP 104-105. Michael did not agree, saying that happened later in the altercation. RP 80, 95-104.

Both Storaasli and Michael admitted that during the entire altercation Anderson was holding money out in one of his hands. RP 69-70, 87, 105, 118. Michael was sure it was in Anderson’s right hand and

Storaasli was sure it was in the left. RP 69-70, 87, 105, 118.

According to Michael, at that point, Anderson shook Michael off almost completely and, when Storaasli went to grab him, Anderson said he had a gun and a knife. RP 70, 106. In contrast, Storaasli said that Anderson only made a comment about having a gun later, when Michael and Storaasli had Anderson on the ground a second time. RP 105, 118-21.

Michael said that, after Storaasli tried to grab Anderson, Anderson was doing “everything he could” to try to get away from them. RP 69-70. Storaasli and Michael managed to get Anderson part of the way down to the ground but Anderson got back up, still holding money in his hand. RP 105. The two men then somehow got Anderson back down to the ground. RP 105, 118-21. It was only at that point, when Anderson was on the ground, lying on his stomach with his face pressed against the pavement and Michael and Storaasli on him, that Storaasli said that Anderson made the comment about having a gun. RP 116-18.

Michael said that, when Anderson shook him after they got him part of the way down the first time, Michael somehow went over the top of Anderson. RP 71. Michael landed on his back, cracking his knee and elbow on the concrete. RP 71. That was when, according to Michael, the items started falling out of Anderson’s pockets, not when Anderson had initially started swinging. RP 71, 80, 81, 92.

To get Anderson down to the ground the second time, Michael said, he grabbed Anderson from behind, yanking Anderson’s hand behind his back in a “chicken-wing” move. RP 71. Michael and Storaasli had

Anderson down on the ground again, with Michael on Anderson's back holding his arm up behind him and Storaasli trying to grab Anderson's other hand. RP 72. Anderson then stood up, trying to get away, and all three men fell into the street. RP 72-73. Michael had Anderson's arm up behind Anderson's back, locked in "pretty good," and Storaasli also "came up" onto Anderson's back and tried to grab Anderson's other hand, which Michael said was the hand with the money. RP 72.

At that point, Storaasli's arm was bitten. RP 72. Storaasli said that Anderson was lying down, "belly" first on the ground when he somehow bit Storaasli, breaking the skin. RP 106-108. After Storaasli was bit, he pulled away and then came back and started shoving Anderson's arm up, thinking to keep Anderson from getting any gun he might have. RP 106.

The bite mark on Storaasli's right arm did not cause him to miss any work but he had it bandaged for 2 or 2 ½ weeks and could still see a little bit of darkness on his skin where it had occurred. RP 108-12. He also reported scrapes on his shin and knee. RP 112. Michael denied that he suffered injuries from hitting Anderson, instead saying his scrapes and bruises came from when Michael had hit or scraped the ground during the incident. RP 81-84. All of Michael's injuries occurred after the items Anderson had in his pockets had fallen out onto the sidewalk. RP 91.

Storaasli admitted he was being aggressive during the incident but claimed he was trying to protect himself and keep Anderson from hurting them. RP 115. Michael admitted he was also being aggressive but said he

was trying to be “defensive” and prevent Anderson from getting his hand into his pocket when he had said he had a gun. RP 83-85. Michael also conceded that he was cursing at Anderson during most of the incident. RP 68.

Susan Murdock, the front end manager for the store, ran outside after a woman customer walked in and reported seeing a scuffle. RP 124-27. Murdock saw Michael and Storaasli with a man face down on the pavement. RP 127. Storaasli was “straddled” over the man holding his hands down and Michael was holding the man’s shoulders down, but they did not seem to have the man in their control. RP 127-28. Murdock saw splattered hot sauce and broken eggs on the sidewalk and then heard Storaasli yell to call 9-1-1. RP 128. Murdock saw that Storaasli had some blood on his arm before she ran back in the store to call police. RP 128-29.

Ronald Jones, the store’s meat manager, heard Murdock call within the store for assistance and went outside to the parking lot. RP 133-37. Once he was outside, Storaasli grabbed Jones’ arm, seeming upset and saying that he had just been bitten and the guy involved had said he had a gun. RP 133-38. Jones went to “assist,” putting his arm on Anderson’s back and tripping the whole “pile” in order to get them onto the ground. RP 140. Jones never heard Anderson say anything about having a gun but Michael kept yelling “he’s got a gun.” RP 140. Jones said that, at some point, Anderson said he had a knife and would “fucking cut” Jones. RP 150. Jones tried to “control” Anderson’s hands and felt something “solid”

in Anderson's pants, which later turned out to be a pager. RP 142. Jones also tried to trap Anderson's right hand underneath him while Jones held Anderson's left hand. RP 142. Jones also started yelling "[f]ind the gun, find the gun," based on what Michael had said. RP 142.

Jones said Storaasli was not in the altercation at that point and was instead standing on the sidewalk. RP 145. Jones recalled laying on top of Anderson and seeing Storaasli standing to the side. RP 145. Jones put all of his weight on top of Anderson, with both of Jones' hands underneath Anderson's body. RP 145.

Jones admitted that, ultimately, Michael had Anderson in a headlock. RP 146. Jones was not sure, however, whether Michael was choking Anderson or not. RP 146. Jones conceded that he heard Anderson complain about not being able to breathe. RP 146. Jones did not adjust his position in response to Anderson's complaint, nor did Jones say anything when Anderson was yelling "I can't f-ing breathe." RP 146. Jones thought he saw Michael roll over on Anderson a different way after Anderson said he could not breathe. RP 146. Jones admitted that, after that, Anderson may have repeated that he could not breathe, even though Jones did not recall hearing that. RP 146.

Michael claimed never to have heard Anderson saying that he could not breathe at any point during the altercation. RP 74.

Jones said that, as a result of his participation in the incident, he had a slight separation of his shoulder and a little cut on his right thumb. RP 152-53.

Jones thought the “oddest thing” about the incident was that Anderson had his left hand full of money and was extending it the entire time. RP 149.

Roy Judd, a store customer, was there that day and saw three guys on top of another guy, who appeared well-dressed. RP 171-73. A man Judd thought was the owner of the store asked for Judd’s help. RP 175. Judd put his groceries down and joined the fray, grabbing Anderson’s right fist while Anderson was swinging, after which Judd grabbed Anderson around the chest from behind and they ended up falling down together slowly. RP 175-76. Judd said they kept Anderson on the ground while waiting for police to arrive, wanting to “check him, frisk him, or something.” RP 176. Judd also said he heard someone say, “[c]an you please return our merchandise, or come back in and pay for it,” and that Anderson said “[l]eave me alone. I got a knife and a gun.” RP 178. At some point, Judd stepped back from the struggle, because he was concerned about exacerbating some medical problems he had. RP 179.

Judd claimed that Anderson kept trying to reach into his pocket. RP 178. Judd admitted, however, that he never saw Anderson put his hands in any pocket. RP 185-86. Michael was sure that Anderson actually never tried to get his hands near his pockets at any point during the incident. RP 85.

According to Judd, at some point Anderson yelled he had a knife and a gun so loudly that it could be heard inside the store. RP 180-81. Murdock, however, never reported hearing anyone say anything about a

gun or hearing anything similar when she was in the store, even near the front. RP 124-32.

Tacoma Police Department officer Jerry Wishard testified about the actions of his partner, Officer Long, when the two responded to Murdock's 9-1-1 call.<sup>2</sup> RP 213-15. Long arrived first and saw several people pinning someone face down, kneeling on him, on the pavement in the parking lot. RP 217. There were miscellaneous grocery items on the sidewalk. RP 217.

When the officers arrived, Anderson's left arm was behind his back and his right hand was next to his right side holding "a wad of cash next to his face." RP 217. Anderson had a cut on one of his fingers, abrasions and cuts along his knuckles, and a hole in the pants he was wearing. RP 218. His sunglasses were broken and twisted on the sidewalk and there was blood on his hands. RP 218.

Daniel Anderson testified that he had just moved from Indiana and had gone to the store to purchase some items. RP 220-21. He admitted that, at some point, he decided not to pay for the items. RP 221, 231-38. He apologized for that but said he had changed his mind just before leaving the store, near the pop machine in front. RP 221. Before he could take the items back, he looked over towards the cashier and saw a couple of guys running towards him. RP 222. He had heard about the area being "pretty much like a violent area up on the Hilltop" and did not know who the guys were who were running at him. RP 222-23. Because he was

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<sup>2</sup>Long was unavailable to testify at trial and the prosecution agreed to let Long's partner testify about Long's actions and police report. See RP 194-198.

alarmed, he ran. RP 222-23.

Neither of the men running at him asked him for a receipt or identified themselves as store employees. RP 229, 239. Anderson did not see any markings on Storaasli's shirt and it looked to him like the guys running towards him were wearing unmarked, regular clothing. RP 238.

Anderson said that, when he got outside the doors after first slamming into them, one of the guys got ahold of his jacket and all the stuff he had fell off him and hit the ground. RP 223-24. The guy slung him to the ground and they started wrestling. RP 224. Neither of the guys said anything to him but then he heard someone say "You get his legs. You get his arms." RP 223.

Anderson testified that he did not know if the guys were trying to rob him or what their intention was, so he kept trying to get away. RP 224. They managed to stand back up and then his suit jacket was over his head and he tried to get it down. RP 224. At that point, he heard someone ask someone else to help them "with this." RP 224. Someone then grabbed him around his neck and jumped on his back, causing everyone to fall down again. RP 225. They were on the ground wrestling again and someone was punching Anderson in his face, repeatedly, busting his lip. RP 225. Anderson was ducking his head down and someone grabbed his legs, while another grabbed his waist and a third person grabbed his neck. RP 225.

Anderson was trying to get through a "little hole" of people to get away, so he bit someone, although he was not sure who it was. RP 226.

He was hoping to get the people to “lighten up” on attacking him. RP 226. He apologized for having bitten whoever it was and said he had only done so out of fear. RP 259-64. He also said that he had only bitten someone because he had been getting repeatedly punched in the face. RP 259.

At that point, another guy grabbed him around the neck and was choking “the life” out of Anderson. RP 227. Anderson told the guy he could not breathe and the guy just said, “[s]o?” RP 227. The man’s grip then tightened so much on Anderson’s neck that he felt his life “flashing” before his eyes and was on the brink of blacking out. RP 227. At that point, Anderson heard someone saying to “lighten up on the grip.” RP 227.

Anderson said he was not yelling at anyone, never said he had a knife or a gun and never threatened to stab anyone. RP 227. He suffered a “busted” lip, smashed up and bloody fingers, swelling around his neck and a bruised hip. RP 227-28. He said he had to take pain medication for a month after being arrested. RP 227-28. In addition, his glasses were broken. RP 227-28. Anderson said the jail photo did not accurately show the swelling and other injuries he had suffered. RP 264.

Anderson agreed that he was not screaming for help the entire time but was just trying to get away. RP 244-51. He also said his wind was cut off when he was grabbed around the neck. RP 228. He was able to say “I can’t fucking breathe” very “tightly” at some point. RP 229.

Anderson said that he was in fear for his life but did not hit anyone or fight back. RP 253. He explained that, if he had, the store personnel

would have complained about having broken jaws and black eyes or “busted up” ribs. RP 253.

D. ARGUMENT

1. THE PROSECUTOR COMMITTED SERIOUS,  
CONSTITUTIONALLY OFFENSIVE MISCONDUCT  
AND COUNSEL WAS INEFFECTIVE

The correct standard of proof beyond a reasonable doubt is the “touchstone” of the criminal justice system. Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), overruled in part and on other grounds by Estelle v. McGuire, 502 U.S. 62, 73, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). Indeed, as the Supreme Court has recognized, correct application of the standard is the primary “instrument for reducing the risk of convictions resting on factual error.” Id.

In this case, reversal is required, because the prosecutor committed serious, prejudicial and constitutionally offensive misconduct by repeatedly misstating and minimizing his burden of proof and improperly shifting a burden to Mr. Anderson. Further, counsel was ineffective in response to these acts of misconduct. Because the prosecution cannot prove these constitutional errors harmless, this Court should reverse.

a. Relevant facts

In initial closing argument, the prosecutor told the jury that the standard of proof beyond a reasonable doubt was the highest burden of proof that is “put on any party in our court system.” RP 326. The prosecutor then said that, while the phrase “beyond a reasonable doubt” was not something the jurors said in daily conversation, the standard of

proof beyond a reasonable doubt was a standard they actually applied every day. RP 327.

The prosecutor next told the jurors they could not acquit Anderson unless they could specifically come up with a reason why they believed he was not guilty, stating:

A reasonable doubt is one for which a reason exists. That means, in order to find the defendant not guilty, you have to say, "I don't believe the defendant is guilty because," *and then you have to fill in that blank*. It is not something made up. It is something real, with a reason to it.

RP 328 (emphasis added). The prosecutor said a reasonable doubt would arise from the evidence if one of the store employees had testified that Anderson was *not* the person involved that night. RP 328. In contrast, the prosecutor said, "[a] reasonable doubt arising from the lack of evidence" was "simply a question of do you have enough?" RP 328. The prosecutor then declared that Anderson had done "everything he could to try to *create reasonable doubt by his testimony*," but that the testimony was "so preposterous" the jury should "reject it in its entirety." RP 328 (emphasis added).

A moment later, the prosecutor returned to the argument that proof beyond a reasonable doubt was akin to the proof jurors relied on in making everyday decisions:

And so, beyond a reasonable doubt is a standard that you apply every single day. Those of you who have children at one point made the decision to leave them alone with a babysitter for the very first time. You probably thought to yourself, I wonder if this kid is old enough to be a babysitter? I wonder if they know what to do in an emergency? I wonder if they're going to eat me out of house and home, have their boyfriend or girlfriend over? If those kinds of questions entered your mind, those are doubts, but

when you walked out the door and left your kids with that babysitter, *you were convinced beyond a reasonable doubt that that was the right decision to make.*

Choosing elective surgery, dental surgery, might get a second opinion. You might be worried, do I really need it? *If you go ahead and do it, you were convinced beyond a reasonable doubt.*

Something as simple as changing lanes on the freeway. You check your mirror. You check your other mirror. You might even glance over your shoulder. For just that one second as you start to move over, you think to yourself, I hope there's really no one there, *but you move, and so you are convinced beyond a reasonable doubt. That's the standard of proof that we're talking about here.*

RP 329 (emphasis added).

- b. The arguments were misconduct which misstated the prosecutor's constitutional burden and improperly shifted the burden of proof to Anderson

In making these arguments, the prosecutor committed serious, prejudicial misconduct, in violation of Anderson's due process rights. Improper statements of a prosecutor which mislead the jury as to the law are not only misconduct but also may result in a violation of the defendant's due process rights to a fair trial. State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

Further, under both the state and federal due process clauses, the prosecution bears the constitutional burden of proving every element of the crime charged beyond a reasonable doubt. See 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). Because the correct standard of reasonable doubt is the means by which the presumption of innocence is guaranteed,

it absolutely essential to ensure that the jury is not misled as to the correct standard. See State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). That standard has been subject to so many years of litigation and is now so carefully defined that our Supreme Court has recently warned against the “temptation to expand upon the definition of reasonable doubt,” because such expansion may well result in improper dilution of the prosecution’s constitutional burden and the presumption of innocence. Bennett, 161 Wn.2d at 317-18.

The prosecutor did not resist the temptation here, and the result was an improper dilution and minimizing of his constitutional burden, as well as a violation of Anderson’s due process rights to a fair trial. Not just once or twice but several times the prosecutor improperly minimized his burden, shifted a burden to Anderson or misled the jury as to its proper role.

First, the prosecutor committed serious misconduct and relieved himself of the full weight of his burden of proof in telling the jury that, “in order to find the defendant not guilty,” they had to be able to say, “I don’t believe the defendant is guilty because \_\_\_\_\_,” and “fill in that blank.” RP 328.

With this argument, the prosecutor turned the concept of proof beyond a reasonable doubt - and the jury’s proper role - on their heads. The argument told the jury they were required to *convict* unless they could find a specific reason not to do so. Further, the argument plainly implied that Anderson was responsible for supplying such a reason to the jurors in

order to avoid being convicted.

These arguments were clear misconduct. It is not the jurors' duty to presumptively *convict*; it is their duty to presumptively *acquit*, unless and until they find that the state has met its constitutionally mandated burden of proof. See State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995). Further, “[j]urors may harbor a valid reasonable doubt even if they cannot explain the reason for the doubt.” See State v. Medina, 147 N. J. 43, 52, 685 A.2d 1242, cert. denied, 519 U.S. 1135 (1996). Telling the jurors that they need to come up with a specific reason they believed Anderson was not guilty was the same as saying that there is a presumption of guilt, rather than a presumption of innocence. See, e.g., State v. Boswell, 170 W. Va. 433, 442-43, 294 S.E.2d 287 (1982); State v. Banks, 260 Kan. 918, 926-28, 927 P.2d 456 (1996). Such argument “fundamentally misstates the reasonable doubt standard” and “impermissibly risks” causing the jury to apply a standard of proof less than that mandated by the constitution. See Chalmers v. Mitchell, 73 F.3d 1262, 1274 (2<sup>nd</sup> Cir.), cert. denied, 519 U.S. 834 (1996) (Newman, J., dissenting).

This improper argument was only exacerbated by the prosecutor's comment which further shifted the burden of proof to Mr. Anderson. By declaring that Anderson was trying to “create reasonable doubt” with his testimony the prosecutor again placed in juror's minds the idea that “reasonable doubt” was something Anderson had to provide and something jurors had to specifically find in order to acquit. RP 328.

Again, the prosecutor's arguments misstated the jury's role and the standard of proof beyond a reasonable doubt. It was not the jury's duty to *convict* unless they have a "reasonable doubt" about guilt, nor was it Mr. Anderson's duty to "create" reasonable doubt. It was instead the jury's duty to *acquit* unless the prosecution had met its burden of proving guilt beyond a reasonable doubt. See, e.g., State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997).

Third, the prosecutor's arguments comparing the decision the jurors had to make with everyday decisions again unconstitutionally minimized the prosecutor's heavy burden of proving its case. Many courts have disapproved of comparing the decision-making which occurs in a criminal case with the decision-making that jurors engage in on a daily basis, even regarding important matters. More than 40 years ago, a federal court recognized that, while "[a] prudent person" acting in "an important business or family matter would certainly gravely weigh" the considerations and risks of such a decision, "such a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment." Scurry v. United States, 347 F.2d 468, 470 (U.S. App. D.C. 1965), cert denied sub nom Scurry v. Sard, 389 U.S. 883 (1967). Just a few years later, the highest court in Massachusetts found that comparing everyday decisions to the decision of a jury about whether the state had met its constitutional burden "understated and tended to trivialized the awesome duty of the jury to determine whether the defendant's guilt was proved beyond a reasonable doubt."

Commonwealth v. Ferreira, 364 N.E.2d 1264, 1272 (Mass. 1977).

Courts in federal jurisdictions and in other states such as Vermont, Massachusetts and California have also reached the same conclusion: that analogies to even important personal decisions improperly “trivialize[] the proof-beyond-a-reasonable-doubt standard” and create the impermissible risk of convictions based on something less than the constitutionally mandated standard. See, State v. Francis, 561 A.2d 392, 396 (Vt. 1989); see also, U.S. v. Noone, 913 F.2d 20, 28-29 (1<sup>st</sup> Cir. 1990), cert. denied, 500 U.S. 906 (1991); People v. Johnson, 119 Cal. App. 4<sup>th</sup> 976, 14 Cal. Rptr. 3d 780 (Cal. 2004); Commonwealth v. Rembiszewski, 461 N.E.2d 201, 207 (Mass. 1984).

Ferreira clearly illustrates the strength of the reasoning behind these cases. In Ferreira, the judge told the jury that proof beyond a reasonable doubt required the jury to be “as sure” to convict as they were when making “important decisions” in their own lives, such as

whether to leave school or to get a job or to continue with your education, or to get married or stay single, or to stay married or get divorced, or to buy a house or continue to rent, or to pack up and leave the community where you were born and where your friends are.

364 N.E.2d at 1271-72.

On review, the appellate court found that these examples “understated and tended to trivialized the awesome duty of the jury to determine whether the defendant’s guilt was proved beyond a reasonable doubt.” 364 N.E.2d at 1272. The court went on:

‘The inherent difficulty in using such examples is that, while they may assist in explaining the seriousness of the decision before the

jury, they may not be illustrative of the degree of certainty required.’ We think the examples used here, far from emphasizing the seriousness of the decision before them, detracted both from the seriousness of the decision and the Commonwealth’s burden of proof. . . *The degree of certainty required to convict is unique to the criminal law. We do not think that people customarily make private decisions according to this standard nor may it even be possible to do so. Indeed, we suspect that were this standard mandatory in private affairs the result would be massive inertia. Individuals may often have the luxury of undoing private mistakes; a verdict of guilty is frequently irrevocable.*

364 N.E.2d at 1273 (quotation omitted) (emphasis added). As the First Circuit has noted, “[t]he momentous decision to acquit or convict a criminal defendant cannot be compared with ordinary decision-making without risking trivialization of the constitutional standard.” Noone, 913 F.2d at 28-29.

Here, not only did the prosecutor compare the certainty required to convict with the certainty required to make *important* personal decisions; he also compared it to everyday, relatively trivial decisions, such as whether to change lanes on the freeway. RP 327, 329. Rather than reflecting the gravity of the decision the jurors had to make and the true weight of the prosecutor’s constitutional burden, the prosecutor’s arguments trivialized the juror’s decision into something far less. The analogies the prosecutor used effectively converted his burden from proof beyond a reasonable doubt to something more akin to proof by a preponderance of the evidence. See, Rembiszewski, 461 N.E.2d at 207 (noting such arguments have that improper effect). As a result, the jurors were misled about the proper standard to apply, believing they only had to be as sure of guilt to convict as they were sure that it was safe to change

lanes every day on the freeway. The prosecutor's arguments were thus highly improper and minimized his constitutionally mandated burden of proof.

Fourth, the prosecutor's arguments improperly minimized that burden by focusing on the degree of certainty jurors would have to have to be *willing* to act, rather than that which would cause them to *hesitate* to act. The U.S. Supreme Court has condemned the "willing to act" language, declaring the "hesitate to act" language far more proper. See Holland v. United States, 348 U.S. 121, 140, 75 S. Ct. 127, 99 L. Ed. 150 (1954). And since Holland, "courts have consistently criticized the 'willing to act' language" as inviting the jury to render a decision based on a standard less than that constitutionally required. See, e.g., Tillman v. Cook, 215 F.3d 1116, 1126-27 (10<sup>th</sup> Cir. 2000). As a result, "[b]eing convinced beyond a reasonable doubt cannot be equated with being 'willing to act. . . in the more weighty and important matters in your own affairs.'" Scurry, 347 F.2d at 470. By focusing on the degree of certainty jurors would need to take action, rather than that which would cause them to hesitate to act, the prosecutor again misstated and minimized his constitutionally mandated burden of proof.

Reversal is required. Because the prosecutor's multiple acts of misconduct misstated and minimized the prosecutor's constitutionally mandated burden of proof and the jury's proper role, the misconduct directly affected Anderson's constitutional due process rights to have the prosecution shoulder the burden of proving its case against him beyond a

reasonable doubt. As a result, the constitutional “harmless error” standard applies. See, e.g., State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). That standard requires the prosecution to shoulder a very heavy burden, which the prosecution cannot meet unless it can convince this Court that *any* reasonable jury would have reached the same result absent the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986).

The prosecution cannot meet that burden here. To prove that any jury would have reached the same result absent the error and the constitutionally offensive misconduct was thus “harmless,” the prosecution has to show that the untainted evidence against Anderson is so overwhelming that it “necessarily” leads to a finding of guilt. 104 Wn.2d at 425.

The difficulty for the prosecution here is that *none* of the evidence in this case was “untainted” by the prosecutor’s misstatements and minimizing of his constitutionally mandated burden of proof. The proper standard of proof beyond a reasonable doubt is the means of providing the “concrete substance for the presumption of innocence” guaranteed to all the accused. Winship, 397 U.S. at 363. Unless the jury properly understands the correct standard of proof beyond a reasonable doubt, the entire trial is affected, because a “misdescription of the burden of proof” will vitiate all the jury’s findings. See Sullivan v. Louisiana, 508 U.S. 275, 280-81, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

As a result, this is not a case where, as in Easter, the prosecutor's comments drew a negative inference on the defendant's exercise of a constitutional right but other evidence was unaffected by that improper inference. See, e.g., Easter, 130 Wn.2d at 242. Instead, here, the prosecutor's misconduct affected the jury's perception of *all* of the evidence, thus tainting the jury's entire decision-making process. The misconduct here was not limited in effect to simply part of the evidence - it went to the entire case against Mr. Anderson. There was no "untainted" evidence against Anderson and the error thus cannot be deemed "harmless."

In addition, even if there had been some "untainted" evidence here, the constitutional harmless error test could not be met. The standard of finding "overwhelming untainted evidence" is far different than the standard of establishing that there was "sufficient evidence" to support a conviction challenged for insufficiency on review. See State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002). In Romero, shots were fired in a mobile home park, Romero was seen in the area by officers and other witnesses, he ran from officers just after the crime, officers found a shotgun inside the mobile home where Romero was hiding, shell casings were found on the ground next to the mobile home's front porch, descriptions of the shooter identified Romero, and an eyewitness was "one hundred percent" positive the shooter was Romero. Romero, 113 Wn. App. at 783-84. There were a few minor problems with the identification and Romero himself denied being the shooter. 113 Wn. App. at 784. That

evidence was sufficient, the Romero Court found, to uphold the conviction against a challenge for insufficiency of the evidence. 113 Wn. App. at 797-98.

But that same evidence was not sufficient to satisfy the constitutional harmless error test, which applied because an officer made comments about Romero not speaking to police, in violation of Romero's Fifth Amendment rights. Despite the strong evidence supporting the conviction, the Court found, there was not "overwhelming evidence" of guilt, because there was conflicting evidence on certain points. 113 Wn. App. at 793. The Court could not "say that prejudice did not likely result due to the undercutting effect on Mr. Romero's defense." 113 Wn. App. at 794. Because the evidence was disputed, the jury was "[p]resented with a credibility contest," and "could have been swayed" by the sergeant's comment, "which insinuated that Mr. Romero was hiding his guilt." 113 Wn. App. at 795-96.

Here, the jury was also presented with a credibility contest. And there were significant differences in the versions of events given by state's witnesses, such as whether Michael was ever hit, where people were at relevant times, when Anderson made alleged threats or whether he made them at all, when things fell out of his pocket, whether Anderson was being choked, whether he managed to say he had trouble breathing, which crucial hand was holding money so that the other hand needed to be controlled, whether Anderson ever reached for his pockets, and other important facts. Anderson's testimony then provided further evidence

casting doubt on the state's official version of events. A jury which was not improperly misled as to the true burden of proof the prosecution had to shoulder could well have found that the state failed to prove Anderson's guilt beyond a reasonable doubt. It could well have evaluated credibility far differently and concluded that Anderson was, as he claimed, just trying to defend himself against attackers, unaware that those attackers worked at the grocery store.

Further, the jury's queries and the length of deliberations indicate that the jury had significant questions about guilt and whether Mr. Anderson had, in fact, committed the charged crimes. During deliberation, the jury asked for clarification of whether "resistance to the taking" was the same as "resistance to being detained for the taking." RP 359.<sup>3</sup> They asked about the requirements of proof for the type of force which was required to prove robbery. RP 390-91. The next day, still in deliberations, they asked for the legal definition of unlawful taking. RP 414. And they were still grappling with the "time frame" which applied to establish such a taking. RP 414. The prosecution could not show "overwhelming evidence" of guilt here, even if any of its evidence could be deemed "untainted" by the constitutionally offensive misconduct.

Notably, although this Court does not look at whether constitutional misconduct could have been cured by instruction when the constitutional harmless error standard is applied, it is worth noting that the error could not have been so cured in this case. The concept of reasonable

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<sup>3</sup>The jury questions were not filed in the court file as separate documents but were discussed in detail on the record. RP 359-61, 390-91, 397-427.

doubt is so complex that even learned judges have difficulty defining it. See State v. Castle, 86 Wn. App. 48, 51-56, 935 P.2d 656, review denied, 133 Wn.2d 1014 (1997), disapproved on other grounds by Bennett, supra. The prosecutor's minimization of his burden, using evocative and easy-to-understand comparisons, were extremely likely to stick with the jury, as was the idea that Anderson was somehow required to "create" reasonable doubt and the jury must find a specific reason for having such a doubt in order to acquit. No curative instruction could have remedied the pervasive corroding effect of the prosecutor's lengthy arguments here.

The correct standard of reasonable doubt is the very centerpiece of our entire criminal justice system, because it is the "prime instrument for reducing the risk of convictions resting on factual error." Cage, 498 U.S. at 40. The prosecutor's arguments here repeatedly told the jury that the prosecutor was not required to meet his constitutionally mandated burden of proof but rather something far more like a "preponderance" standard. The arguments also told the jury they had to come up with specific reasons for their doubts, implying that Anderson had some burden to "create" such a doubt. These serious constitutional errors were not harmless, and this Court should so hold and should reverse.

c. In the alternative, counsel was ineffective

In the unlikely event this Court finds that the prosecutor's repeated, comprehensive and compelling misstatements of the law and reduction of his constitutionally mandated burden of proof could have been cured if counsel had objected and requested curative jury

instructions, this Court should nevertheless reverse based on counsel's ineffectiveness. Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (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).

While in general, the decision whether to object or request instruction is considered "trial tactics," that is not the case in egregious circumstances if there is no legitimate tactical reason for counsel's failure. State v. Madison, 53 Wn. App. 754, 763-64, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989); see also Hendrickson, 129 Wn.2d at 77-78. In such cases, counsel is shown ineffective if there is no legitimate tactical reason for counsel's failure to object, an objection would likely have been sustained, and an objection would have affected the result of the trial. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Here, there could be no "tactical" reason for failing to object to the prosecutor's multiple, serious misstatements of his constitutional burden of proof. An objection to the misstatement would likely have been

sustained, because any reasonable trial court would have recognized that the prosecution's argument clearly minimized the prosecution's constitutionally mandated burden of proof.

Indeed, counsel herself obviously recognized the serious prejudice caused to her client by the prosecutor's misstatements, because, in closing, she told the jury that the burden of proof beyond a reasonable doubt was not the same standard as that which jurors used to make even important decisions. RP 333. Yet she did not ask the court to correctly instruct the jury, nor did she move for a mistrial, even though such a mistrial was very likely the only way her client would have gotten a constitutionally fair trial.

As a result of counsel's ineffectiveness, the jurors' minds were tainted with evocative images and ideas which allowed them to convict Anderson based on something far less than proof beyond a reasonable doubt. Counsel's ineffectiveness provides yet another ground upon which the constitutionally infirm convictions in this case should be reversed.

2. THE PROSECUTOR COMMITTED OTHER SERIOUS, PREJUDICIAL MISCONDUCT WHICH COMPELS REVERSAL

The prosecutor's misconduct was not limited to his repeated misstatements and minimizing of his constitutional burden. In addition, the prosecutor committed other serious, prejudicial misconduct, which also compels reversal.

a. Relevant facts

At the very beginning of initial closing argument, the prosecutor

told the jury that closing argument has a “purpose and a goal,” and that the “purpose” was to take the facts and fill in the law. RP 309. The prosecutor went on:

The goal of closing argument is to point you towards a just verdict; not just a verdict, but a just verdict. And I’m going to suggest to you in advance that the defense is going to be asking you to return just a verdict because - -

[DEFENSE COUNSEL]: I’m going to object to the word “just.” It is improper in closing.

[PROSECUTOR]: It is far from improper. It is their duty.

THE COURT: I’m going to allow it. It is closing argument.

[PROSECUTOR]: Lesser offenses, Theft in the Third Degree and Assault in the Fourth Degree, in this case, would not be justice.

The word “verdict” comes from the Latin word “veredictum,” which means to declare the truth. So, by your verdict in this case, you will declare the truth about what happened on August the 21<sup>st</sup> of 2007 at the Save A Lot store up here on 11<sup>th</sup> and Martin Luther King.

[DEFENSE COUNSEL]: Object to declaring the truth. It is not the standard here.

THE COURT: It is argument. I will allow it.

RP 309.

A few moments later, the prosecutor repeatedly described Mr. Anderson’s testimony as “ridiculous” and “preposterous,” in contrast with the state’s witnesses, who the prosecutor declared had answered defense counsel’s “questions as if they were coming from [the prosecutor].” RP 312, 315, 320. The prosecutor then declared that the state’s witnesses “were just telling the truth.” RP 312, 315, 320.

The prosecutor also declared that Anderson’s testimony was “made

up on the fly” and was “utterly and completely preposterous.” RP 323. The prosecutor then declared that Anderson “didn’t have the honesty” to tell the jurors that he had intentionally bit Storaasli, saying Anderson decided to “water it down” and try to make the biting “an accident.” RP 324. The prosecutor again declared the testimony of Anderson “preposterous.” RP 328.

In concluding his initial argument, the prosecutor told the jury their duty was “[v]erdictum,” i.e., to “[d]eclare the truth about what happened in this case.” RP 330. The prosecutor then said, “[t]he truth is, the defendant is guilty[.]” RP 330.

In rebuttal closing argument, the prosecutor ridiculed the defense argument as “absurd,” “nitpicking” and “lawyer speak,” telling the jury they “took an oath to render a true verdict according to the evidence, not to pick apart this thing.” RP 348. The prosecutor also told the jury that Anderson’s testimony about his fear due to what he had heard about Hilltop was an attempt by him to get the jurors to “feel sorry for him.” RP 352. The prosecutor then declared that the evidence showed that “the Hilltop was a more dangerous place because of the defendant and what he did at the Save A Lot store that day.” RP 352.

Once more, the prosecutor told the jurors that their job was to “declare the truth.” RP 353. He went on:

Folks, the truth of what happened is the only thing that really matters in this case. If you water down the defendant’s conduct to Robbery in the Second Degree or to Theft in the Third Degree, is that really doing justice?

[DEFENSE COUNSEL]: I’m going to object to the doing

justice.

[THE PROSECUTOR]: If you water it down - -

THE COURT: Overruled. It is argument.

[THE PROSECUTOR]: - - is that really doing justice? You took an oath to do your duty to declare a verdict according to the evidence you heard and the law of the State. These facts, this law, Robbery First Degree for the threatened use of a weapon and the infliction of bodily injury; Assault in the Second Degree for the infliction of temporary but substantial disfigurement, that's the truth of what happened August 21<sup>st</sup> from the evidence that you were presented. And that's the verdict that I would ask you to return in this case.

RP 353-54.

- b. The arguments were flagrant, prejudicial misconduct, the court erred in overruling the objections, and reversal is required

All of these arguments were misconduct, and reversal is required both based on the misconduct to which counsel objected and based on that to which counsel failed to object. Where counsel objects below, reversal is required if there is a reasonable probability the outcome of the trial would have been affected by the error. See State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Where counsel failed to object below, reversal is still required if the misconduct was so flagrant and prejudicial that it could not have been cured by instruction. Id.

Both standards are met in this case. First, the repeated arguments telling the jurors their job was to decide and declare the "truth" about what happened were highly improper and amounted to constitutionally offensive misconduct. See RP 309, 330, 353-54. The jury's role is not to decide the "truth" or declare who is telling the truth; it is to determine whether the

state has met its constitutional burden of proving guilt beyond a reasonable doubt. See, e.g., Wright, 76 Wn. App. at 826; State v. Barrow, 60 Wn. App. 869, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991). Similar arguments have been repeatedly condemned in this state as misstating the jurors' role and presenting them with a "false choice" i.e., requiring them to choose which witnesses are lying or telling the truth. See, Wright, 76 Wn. App. at 826. The choice is "false" because jurors need not decide that anyone is lying or telling the truth in order to perform its function, even if the versions of events seem to be inconsistent. Barrow, 60 Wn. App. at 876. As one court has noted:

[t]he testimony of a witness can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved. The testimony of two witnesses can be in some conflict, even though both are endeavoring in good faith to tell the truth.

State v. Casteneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991).

Casting the jurors' role as deciding and declaring the "truth" not only misstates that role but also improperly dilutes the prosecution's constitutionally mandated burden of proving guilt beyond a reasonable doubt. When the jury is told that their job is to decide the "truth," that invites a decision improperly based not upon the constitutional standard but rather on the jury's conclusion of which side the jurors believed. See, e.g., United States v. Pine, 609 F.2d 106, 108 (3<sup>rd</sup> Cir. 1979). Such arguments suggest "determining whose version of events is more likely true, the government's or the defendant's." See United States v.

Gonzalez-Balderas, 11 F.3d 1218, 1223 (5<sup>th</sup> Cir.), cert. denied, 511 U.S. 1129 (1994). As a result, the jury is misled into thinking they simply must decide which version of events is more likely and then base their decision on that determination, based upon a preponderance of the evidence. Id.

Thus, by repeatedly invoking the idea that jurors were supposed to decide and declare the “truth,” the prosecutor not only misstated the jury’s role but also his own burden of proof. As noted above, misstating and minimizing that constitutional burden is not just misconduct, it is misconduct directly impacting a constitutional right, which is presumed prejudicial. See, e.g., Easter, 130 Wn.2d at 242.

These improper arguments were further exacerbated by the prosecutor’s unprofessional declarations of his personal beliefs on the honesty of his witnesses and Mr. Anderson. It is completely inappropriate for a public prosecutor, with the weight of his office behind him, to tell the jury what he thinks about the veracity or credibility of any witness, especially the defendant. See State v. Case, 49 Wn.2d 66, 68, 298 P.2d 500 (1956). And again, the prosecutor’s comments cast the jury’s role into that of an arbiter of who was more *likely* telling the truth, distracting further from their proper role and the burden of proof.

Finally, the prosecutor’s exhortations to the jury that they would not be rendering a “just” verdict unless they convicted Anderson of the highest crimes charged was completely improper, as were the prosecutor’s declarations about Anderson making the Hilltop area more dangerous and his intimations that jurors would violate their “oath” and “duty” by

“water[ing] down” the convictions and convicting on a lesser offense. It is improper for a prosecutor to try to incite the jury to decide a case on an emotional basis. Belgarde, 110 Wn.2d at 507-508; State v. Powell, 62 Wn. App. 914, 918-19, 816 P.2d 86 (1991), review denied, 118 Wn.2d 1013 (1992). Such argument is improper because it may lead the jury to decide to convict not based upon the evidence properly before it but rather on how the jury *feels*. State v. Echevarria, 71 Wn. App. 595, 598-99, 860 P.2d 420 (1993). Further it is misconduct for the prosecutor to make comments which have the “clear import” of telling jurors they would violate their oaths if they failed to convict. See State v. Coleman, 74 Wn. App. 835, 838-39, 876 P.2d 458 (1994), review denied, 125 Wn.2d 1017 (1995). And it is improper for the prosecutor to express a personal opinion about the defendant’s credibility or guilt, which occurs when it is clear the prosecutor is not trying to convince the jury to draw certain conclusions from the evidence but is instead “expressing a personal opinion.” State v. Papdopoulos, 34 Wn. App. 397, 400, 662 P.2d 59, review denied, 100 Wn.2d 1003 (1983).

All of these principles were violated by the prosecutor’s arguments here. The entire point of the “just verdict versus just a verdict” argument was to sway the jury against the defense. The repeated references to Anderson’s testimony as “preposterous” were clearly personal opinions. The declaration that the state’s witnesses were “just telling the truth” while Anderson was making up his version of events “on the fly” and “didn’t have the honesty” to admit he had bitten Storassli were not only personal

opinions but improper attempts to prejudice the jury against Anderson. The exhortations for jurors not to “pick apart” the case as the defense had argued but rather to do their “duty” and satisfy their “oaths” by convicting, that it would not be doing “justice” or rendering “just” verdicts to convict of anything less than the highest crimes, and that the Hilltop was “more dangerous” because of Anderson - all were thinly veiled attempts by the prosecutor to prejudice the jurors against Anderson and incite them to decide the case on the improper basis of emotion, not evidence.

Reversal is required. The prosecutor’s arguments violated his duties as a “quasi-judicial” officer, to act “impartially and in the interests of justice and not as a ‘heated partisan.’” See State v. Huson, 73 Wn.2d 660, 662, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1989); State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415 (1993). More importantly, there is more than a reasonable probability that the prosecutor’s improper arguments affected the jury’s verdict. As noted above, the prosecution cannot satisfy the constitutional harmless error standard for its misconduct, including the constitutionally offensive misconduct of misstating the juror’s duty as a search for the “truth” between the versions of events. Further, given the conflicting nature of the evidence and the fact that the jury was faced with a credibility determination, the prosecutor’s misconduct was highly likely to have an impact on the jury’s determinations of guilt.

In addition, the arguments to which counsel did not object were flagrant, prejudicial misconduct which compel reversal. The comments

placed the weight of the prosecutor's office and personal opinion behind the "veracity" of the state's witnesses and against Mr. Anderson in highly emotional, evocative ways. The jury, already swayed to believe its burden was far less than that constitutionally required, could not help but be further swayed by the prosecutor's improper comments. The misconduct in this case compels reversal, and this Court should so hold.

3. THE CUMULATIVE EFFECT OF THE PROSECUTOR'S  
MANY ACTS OF MISCONDUCT COMPELS  
REVERSAL

Even if this Court were to find that none of the acts of misconduct compel reversal standing alone, reversal would nevertheless be required. Where a single act of misconduct standing alone would not compel reversal, reversal is required where the cumulative effect of all of the misconduct was "so ill-intentioned and flagrant as to have materially affected the outcome of the trial." State v. Henderson, 100 Wn. App. 794, 804-805, 998 P.2d 907 (2000). That is exactly what happened here. This is not a case where the prosecutor made a single slip of the tongue or even two. This is a case in which the prosecutor repeatedly misstated and minimized his constitutionally mandated burden of proof, repeatedly misled the jury about its proper role, implied that the defendant had a burden to disprove guilt, told the jury it would violate its oath if they did not convict of the highest crimes, said the Hilltop was more dangerous because of the defendant, and declared his personal opinions about his witnesses as telling the truth and Anderson as lying. This Court should not countenance the incredibly improper, pervasive misconduct which

occurred in this case. This Court should reverse.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 24<sup>th</sup> day of September, 2008.

Respectfully submitted,



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