

X

NO. 77756-0

**THE SUPREME COURT
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

BRIAN EGGLESTON, PETITIONER

FILED
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CLERK OF SUPREME COURT
STATE OF WASHINGTON

Court of Appeals, Division II
No. 29915-1

Superior Court of Pierce County
The Honorable Stephanie Arend
No. 95-1-04883-0

RESPONSE TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT.

Respondent is the State of Washington.

B. RELIEF REQUESTED.

The State respectfully requests that the court enter a ruling denying review.

C. COURT OF APPEALS DECISION.

The Court of Appeals unanimously held that under Dowling v. United States, 493 U.S. 342, 350, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990), and Santamaria v. Horsley, 133 F.3d 1242, 1247 (9th Cir. 1998), the State was entitled to introduce evidence in defendant's third trial that he intended to kill Deputy Bananola because Bananola was a police officer. The Court explained that although the State used the same evidence in attempting to prove premeditation at second trial, the defendant's knowledge of Deputy Bananola's official status was not an ultimate fact the State had to prove in order to convict the defendant of either first or second degree murder. Thus, the State could use the same evidence in the third trial to prove Eggleston's intent.

The Court of Appeals also rejected defendant's challenges to the self-defense instructions, various evidentiary rulings, the dismissal of jurors,

and jury misconduct. The Court of Appeals affirmed the defendant's convictions but remanded for resentencing pursuant to Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Court of Appeals Opinion attached as Appendix A.

D. ISSUES PRESENTED FOR REVIEW.

1. Should this Court deny the petition for review when the defendant has failed to establish that the decision of the Court of Appeals conflicts with current Washington case law?
2. Should this Court deny the petition for review when the defendant's collateral estoppel claim was not raised before the trial court?
3. Should this Court deny the petition for review when the defendant has failed to demonstrate why the evidence he asserts was improperly admitted in the third trial to prove he intentionally killed Deputy Bananola, would not have been admitted to prove the defendant intentionally assaulted Deputy Dogeagle?

E. STATEMENT OF THE CASE.

The facts of the case are adequately set forth in the Court of Appeals' opinion, and the State's Response Brief filed in the Court of Appeals. Appendix A and B.

F. ARGUMENT WHY REVIEW SHOULD BE DENIED.

1. THE PETITION FOR REVIEW SHOULD BE DENIED BECAUSE THE DEFENDANT FAILS TO ESTABLISH THAT THE COURT OF APPEALS' OPINION CONFLICTS WITH PUBLISHED CASE LAW.

The Rules of Appellate Procedure govern this court's determination whether or not to accept review of a decision terminating review:

A petition for review will be accepted by the Supreme Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition for review involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). In the present case, the defendant fails to cite any of the above subsections as grounds for his petition for review. The defendant

alleges that the Court of Appeals' decision below conflicts with numerous State and Federal cases. Defendant's argument fails. The Court of Appeals addressed each of defendant's assignments of error and its opinion does not conflict with existing State or Federal Law.

The State will not address each of defendant's claims in the amended petition for review, except as noted below, because the Court of Appeals' opinion does so in a thorough and complete manner.

2. THE COURT SHOULD DENY REVIEW OF DEFENDANT'S COLLATERAL ESTOPPEL CLAIM BECAUSE IT WAS NOT RAISED IN THE TRIAL COURT, AND DEFENDANT HAS FAILED TO ESTABLISH IT INVOLVES A MANIFEST CONSTITUTIONAL ERROR.

The Court of Appeals observed in its opinion that the defendant never raised collateral estoppel below. Slip Opinion at 17. The Court of Appeals then engaged in an analysis as to whether or not the defendant had demonstrated a manifest error affecting a constitutional right with respect to a collateral estoppel objection to certain jury instructions. The Court of Appeals concluded that the defendant did not show "that the third jury's verdict was the result of any alleged error in the self-defense instructions." Slip Opinion at 17.

The Court of Appeals, however, did not engage in this analysis of collateral estoppel with respect to the admission of evidence.

Defendant asserts that the trial court erred when it permitted the introduction of evidence that he premeditatedly shot Deputy John Bananola, and that he knew or should have known that Deputy John Bananola was a law enforcement officer. Defendant's objection is based on the legal principle of collateral estoppel. Defendant never asserted this objection at trial. "The failure to make a timely objection to the admission of evidence at trial precludes appellate review." State v. O'Neill, 91 Wn. App. 978, 993, 967 P.2d 985 (1998)(citing State v. Florczak, 76 Wn. App. 55, 72, 882 P.2d 199 (1994)).

Under RAP 2.5(a), claims of error raised for the first time on appeal will be considered if the claimed error concerns (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. The RAP 2.5 exception is construed narrowly. State v. WWJ Corp., 138 Wn.2d 595, 980 P.2d 1257 (1999)(citations omitted). An objection to the admissibility of evidence must be made to the trial court in order to preserve a claim of error on appeal. ER 103(a); State v. Davis, 141 Wn.2d 798, 850, n. 287, 10 P.3d 977 (2000). If not raised below, the defendant bares the burden of demonstrating that a claim of error is both constitutional and manifest. "The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually

affected the defendant's rights; it is this showing of actual prejudice that makes the error 'manifest', allowing appellate review." State v. McDonald, 138 Wn.2d 680, 691, 981 P.2d 443 (1999)(citations omitted). Defendant has failed to even address this requirement, and therefore has failed to carry his burden of proof.

Collateral estoppel cannot be raised for the first time on appeal. State v. Bryant, 78 Wn. App. 805, 812, 901 P.2d 1046 (1995); In re Marriage of Knutson, 114 Wn. App. 866, 870, 60 P.3d 681 (2003)(see also, Cunningham v. State, 61 Wn. App. 562, 566, 811 P.2d 225 (1991), where court held party against whom collateral estoppel was applied in the trial court, could not argue application of a prong of the test on appeal he did not argue below).

Even if the court were to consider reviewing the constitutional nature of the claim, defendant cannot prove the trial court committed manifest constitutional error. While collateral estoppel is a principle based on the federal constitutional prohibition against double jeopardy, that does not automatically make the claim one of constitutional magnitude. For example, it has long been the law in this State, and elsewhere that the exclusionary rule may not be invoked for the first time on appeal. State v. Mierz, 127 Wn.2d 460, 468, 901 P.2d 286 (1995)(a defendant who fails to move to suppress allegedly illegal evidence waives

any error associated with the admission of the evidence); State v. Baxter, 68 Wn.2d 416, 423, 413 P.2d 638 (1966)("The exclusion of improperly obtained evidence is a privilege and can be waived.").

The proper way to approach claims of constitutional error asserted for the first time on appeal is as follows. First, the appellate court should satisfy itself that the error is truly of constitutional magnitude -- that is what is meant by "manifest". If the asserted error is not a constitutional error, the court may refuse review on that ground. If the claim is constitutional, then the court should examine the effect the error had on the defendant's trial according to the harmless error standard set forth in Chapman v. California, supra.

State v. Scott, 110 Wn.2d 682, 689-688, 757 P.2d 492 (1988)(citing Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). The prohibition against raising claims of error on appeal exists is because "[t]he appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial." Scott, 110 Wn.2d at 685 (citing Seattle v. Harclan, 56 Wn.2d 596, 597, 354 P.2d 928 (1960)).

Numerous cases have looked at claims of error which on the surface may appear to be constitutional, but fail to meet the higher standard applied to claims of error made for the first time on appeal. A court's refusal to instruct the jury on a lesser included offense is not an

error of constitutional magnitude. State v. Lord, 117 Wn.2d 829, 880, 822 P.2d 177 (1991). The erroneous admission of ER 403 and 404(b) evidence is not an error of constitutional magnitude. State v. Elmore, 139 Wn. 2d 250, 283, 985 P.2d 289 (1999), cert. denied, 531 U.S. 837, 121 S. Ct. 98, 148 L. Ed. 2d 57 (2000). The admission of hearsay, absent a timely objection, will not warrant reversal if the declarant is available for examination. State v. Warren, 55 Wn. App. 645, 779 P.2d 1159 (1989), review denied, 114 Wn.2d 1004, 788 P.2d 1078 (1990).

The Court of Appeals has observed that failure to provide argument and analysis as to why a claim raised for the first time on appeal warrants review, will foreclose the issue from being reviewed. State v. Avila, 78 Wn. App. 731, 738, 899 P.2d 11 (1995).

In the present case, the challenge is not of constitutional magnitude because the collateral estoppel component of the Double Jeopardy Clause is not implicated. In Santamaria v. Horsley, 138 F.3d 1280 (9th Cir.)(*en banc*), cert. denied, 525 U.S. 824, 142 L. Ed.2d 53, 119 S. Ct. 68 (1998), the court dealt with issue directly. Santamaria had been convicted of murder and robbery, but the jury answered a sentencing enhancement special verdict "not true," finding the defendant did not personally use a deadly weapon (a knife) in the commission of the crime. Id. at 1280. A state appellate court reversed the murder conviction, holding that an 11-

day continuance during jury deliberations was prejudicial error. Id. On remand, Santamaria filed a motion to, among other things, "preclude [the] prosecution's reliance on theory adjudicated in defendant's favor at first trial." Id. The court was faced with one question: "The sole issue we address is whether the jury's verdict of 'not true' on the use of a knife on a weapon enhancement charge precludes the State from presenting evidence and arguing in a retrial that Santamaria used the knife to commit murder." Id.

The Santamaria court held that if the use of the knife was not an ultimate fact necessary for a murder conviction under California law, "then collateral estoppel will not preclude the government from introducing evidence that Santamaria stabbed the victim, because collateral estoppel does not 'exclude in all circumstances . . . relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted.'" Id. (quoting Dowling v. United States, 493 U.S. 342, 348, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990); citing United States v. Watts, 519 U.S. 148, 136 L. Ed. 2d 554, 117 S. Ct. 633, 637 (1997) (per curiam)).

Like the California murder statute evaluated in Santamaria, the Washington murder statute does not require the special verdict finding at

issue in this appeal in order to convict defendant of murder in the second degree. The Washington murder statute does not require that a defendant know the victim was a law enforcement officer who was performing his official duties at the time of the act resulting in his death. RCW 9A.32.050(1)(a). Therefore, the collateral estoppel component of the Double Jeopardy clause did not preclude the State from introducing evidence that defendant shot Deputy John Bananola knowing he was a deputy. Because collateral estoppel does not exclude in all circumstances relevant and probative evidence that is otherwise admissible under the Rules of Evidence, defendant has failed to prove a constitutional error occurred.

Because defendant failed to object to the introduction of the challenged evidence at the trial court, and he has not established a manifest error affecting a constitutional right, he is precluded from raising his collateral estoppel challenge for the first time on appeal. The petition for review should be denied because the defendant is asking this court to conclude that evidence should have been excluded at the trial court when no motion to exclude such evidence was ever made.

3. THE COURT SHOULD DENY REVIEW OF THE COURT OF APPEALS' DECISION BECAUSE THE DEFENDANT HAS FAILED TO DEMONSTRATE WHY THE EVIDENCE HE ALLEGES WAS IMPROPERLY ADMITTED, WOULD NOT HAVE BEEN ADMISSIBLE TO PROVE HE INTENTIONALLY ASSAULTED DEPUTY DOGEAGLE.

As noted above, when the defendant fails to make a timely objection to admission of evidence, he cannot prevail for the first time on appeal unless the error was manifest affecting a constitutional right. For the error to be manifest, the defendant must show how he was prejudiced. Obviously, if the evidence was otherwise admissible, any error would not be manifest because there would be no prejudice.

Every piece of evidence defendant asserts should not have been admissible to prove he intentionally shot Deputy Bananola, would have been admissible to prove the defendant intentionally assaulted Deputy Dogeagle. The defendant's third trial related not only to the murder of Deputy Bananola, but also to the defendant's assault of Deputy Dogeagle. Because these two crimes were committed at the same time (defendant shot at Deputy Dogeagle within seconds of killing Deputy Bananola), they were tried in one trial. Evidence of the deputies knock-and-announce, their loud calls announcing their presence in the house, their clothing, and every other piece of evidence the defendant asserts should not have been

permitted before the jury with respect to his murder of Deputy Bananola, would have been properly before the jury with respect to the assault charge involving Deputy Dogeagle. Because this evidence would have necessarily been admitted at the trial regardless of any collateral estoppel claim, the defendant cannot prove a manifest error occurred, because he cannot prove he was prejudiced.

This argument was not made in the State's briefing to the Court of Appeals, but was made at oral argument. The Court of Appeals did not need to use the argument because it found that collateral estoppel did not apply to the challenged evidence. However, it is clear that the petition for review should be denied relative to the collateral estoppel claim because the defendant cannot establish the evidence should be suppressed even if collateral estoppel applied, and because there was not a manifest error involving a constitutional right.

G. CONCLUSION.

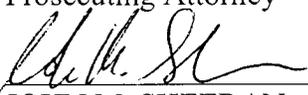
Defendant fails to establish that the Court of Appeals' opinion which affirmed his conviction, but remanded him for resentencing,

conflicts with decisions of other divisions of the Court of Appeals and the Washington State Supreme Court.

The petition for review should be denied.

DATED: NOVEMBER 15, 2005.

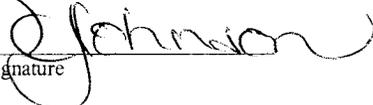
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11/15/05 
Date Signature

APPENDIX “A”

Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531,
159 L. 3d. 2d 403 (2004)

Service: **Get by LEXSEE®**
Citation: **124 S. Ct. 2531**

*542 U.S. 296, *; 124 S. Ct. 2531, **;
159 L. Ed. 2d 403, ***; 2004 U.S. LEXIS 4573*

RALPH HOWARD BLAKELY, Jr., Petitioner v. WASHINGTON

No. 02-1632

SUPREME COURT OF THE UNITED STATES

542 U.S. 296; 124 S. Ct. 2531; 159 L. Ed. 2d 403; 2004 U.S. LEXIS 4573; 72 U.S.L.W.
4546; 17 Fla. L. Weekly Fed. S 430

March 23, 2004, Argued
June 24, 2004, Decided

NOTICE:

The LEXIS pagination of this document is subject to change pending release of the final published version.

SUBSEQUENT HISTORY: US Supreme Court rehearing denied by *Blakely v. Wash.*, 159 L. Ed. 2d 851, 125 S. Ct. 21, 2004 U.S. LEXIS 4887 (U.S., Aug. 23, 2004)

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WASHINGTON, DIVISION 3. *State v. Blakely*, 111 Wn. App. 851, 47 P.3d 149, (2002)

DISPOSITION: Reversed and remanded.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner pled guilty to kidnapping his estranged wife. Pursuant to state law, the trial court imposed an "exceptional" sentence of 90 months after making a judicial determination that he acted with deliberate cruelty. Petitioner appealed, arguing the sentencing procedure violated his Sixth Amendment right to trial by jury. The State Court of Appeals affirmed, and the Washington Supreme Court denied discretionary review. Certiorari was granted.

OVERVIEW: Petitioner was sentenced to more than three years above the 53-month statutory maximum of the standard range because he had acted with "deliberate cruelty." The facts supporting that finding were neither admitted by petitioner nor found by a jury. The judge in the case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea. Those facts alone were insufficient because a reason offered to justify an exceptional sentence could be considered only if it took into account factors other than those which were used in computing the standard range sentence for the offense, which in this case included the elements of second-degree kidnapping and the use of a firearm. Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed. The jury's verdict alone did not authorize the sentence. The judge acquired that authority only upon finding some additional fact. Because the State's sentencing procedure did not comply with the Sixth Amendment, petitioner's sentence was invalid.

OUTCOME: The judgment of the Washington Court of Appeals was reversed, and the case was remanded for further proceedings.

CORE TERMS: sentence, sentencing, guideline, prosecutor, exceptional, kidnaping, aggravating, determinate sentencing, factfinding, disparity, statutory maximum, indictment, common-law, offender, jury trial, maximum, indeterminate, departure, firearm, label, second-degree, uniformity, accusation, robbery, felony, gun, plea bargaining, criminal conduct, judicial power, bargaining

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[Criminal Law & Procedure](#) > [Sentencing](#) > [Sentencing Guidelines Generally](#) 

HN1  In Washington, second-degree kidnapping is a class B felony. Wash. Rev. Code Ann. § 9A.40.030(3). [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Criminal Law & Procedure](#) > [Sentencing](#) > [Sentencing Ranges](#) 

HN2  See Wash. Rev. Code Ann. § 9A.20.021(1)(b). [Shepardize: Restrict By Headnote](#)

[Criminal Law & Procedure](#) > [Sentencing](#) > [Sentencing Ranges](#) 

HN3  Washington's Sentencing Reform Act specifies, for an offense of second-degree kidnapping with a firearm, a "standard range" of 49 to 53 months. Wash. Rev. Code Ann. § 9.94A.320. A judge may impose a sentence above the standard range if he finds substantial and compelling reasons justifying an exceptional sentence. Wash. Rev. Code Ann. § 9.94A.120(2). The Act lists aggravating factors that justify such a departure, which it recites to be illustrative rather than exhaustive. Wash. Rev. Code Ann. § 9.94A.390. Nevertheless, a reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Criminal Law & Procedure](#) > [Sentencing](#) > [Adjustments](#) 

[Criminal Law & Procedure](#) > [Appeals](#) > [Standards of Review](#) > [Clearly Erroneous Review](#) 

HN4  When a judge imposes an exceptional sentence, he must set forth findings of fact and conclusions of law supporting it. Wash. Rev. Code Ann. § 9.94A.120(3). A reviewing court will reverse the sentence if it finds that under a clearly erroneous standard there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence. Wash. Rev. Code Ann. § 9.94A.210(4). [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Criminal Law & Procedure](#) > [Sentencing](#) > [Imposition](#) > [Factors](#) 

HN5  Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Criminal Law & Procedure](#) > [Trials](#) > [Defendant's Rights](#) > [Right to Jury Trial](#)

HN6  The truth of every accusation against a defendant should afterwards be confirmed by the unanimous suffrage of 12 of his equals and neighbors. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Criminal Law & Procedure](#) > [Sentencing](#) > [Imposition](#) > [Factors](#) 

HN7  An accusation which lacks any particular fact which the law makes essential to the punishment is no accusation within the requirements of the common law, and it is no

accusation in reason. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

Criminal Law & Procedure > Sentencing > Imposition > Factors 

HN8  The "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

Criminal Law & Procedure > Sentencing > Imposition > Factors 

HN9  For Apprendi purposes, the relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

Criminal Law & Procedure > Sentencing > Departures 

HN10  Wash. Rev. Code Ann. § 9.94A.390(2)(h)(i)-(iii) lists domestic violence as grounds for departure only when combined with some other aggravating factor. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

Constitutional Law > Criminal Process > Impartial Jury 

HN11  The Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

Criminal Law & Procedure > Sentencing > Adjustments 

Criminal Law & Procedure > Sentencing > Imposition > Factors 

HN12  When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding. If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty. Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his interest if relevant evidence would prejudice him at trial. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

Criminal Law & Procedure > Sentencing > Imposition > Factors 

Constitutional Law > Criminal Process > Impartial Jury 

HN13  Every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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SYLLABUS: [*409]** Petitioner pleaded guilty to kidnaping his estranged wife. The facts admitted in his plea, standing alone, supported a maximum sentence of 53 months, but the judge imposed a 90-month sentence after finding that petitioner had acted with deliberate cruelty, a statutorily enumerated ground for departing from the standard range. The Washington Court of Appeals affirmed, rejecting petitioner's argument that the sentencing procedure deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence.

Held:

Because the facts supporting petitioner's exceptional sentence were neither admitted by petitioner nor found by a jury, the sentence violated his Sixth Amendment right to trial by jury.

(a) This case requires the Court to apply the rule of *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S. Ct. 2348, that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The relevant statutory maximum for *Apprendi* purposes is the maximum a judge may impose based solely on the facts reflected in the jury verdict or admitted by the defendant. Here, the judge could not have imposed the 90-month sentence based solely on the facts admitted in the guilty plea, because Washington law requires an exceptional sentence to be based on factors other than those used in computing the standard-range sentence. Petitioner's sentence is not analogous to those upheld in *McMillan v. Pennsylvania*, 477 U.S. 79, 91 L. Ed. 2d 67, 106 S. Ct. 2411, and *Williams v. New York*, 337 U.S. 241, 93 L. Ed. 1337, 69 S. Ct. 1079, which were not greater than what state law authorized based on the verdict alone. Regardless of whether the judge's authority to impose the enhanced sentence depends on a judge's finding a specified fact, one of several specified facts, or *any* aggravating fact, it remains the case that the jury's verdict alone does not authorize the sentence.

(b) This Court's commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the fundamental constitutional right of jury trial.

*****410** (c) This case is not about the constitutionality of determinate sentencing, but only about how it can be implemented in a way that respects the Sixth Amendment. The Framers' paradigm for criminal justice is the common-law ideal of limited state power accomplished by strict division of authority between judge and jury. That can be preserved without abandoning determinate sentencing and at no sacrifice of fairness to the defendant. 111 Wn. App. 851, 47 P.3d 149

, reversed and remanded.

COUNSEL: Jeffrey L. Fisher argued the cause for petitioner.

John D. Knodell, Jr. argued the cause for respondent.

Michael R. Dreeben argued the cause for the United States, as amicus curiae, by special leave of court.

JUDGES: Scalia, J., delivered the opinion of the Court, in which Stevens, Souter, Thomas, and Ginsburg, JJ., joined. O'Connor, J., filed a dissenting opinion, in which Breyer, J., joined, and in which Rehnquist, C. J., and Kennedy, J., joined except as to Part IV-B. Kennedy, J., filed a dissenting opinion, in which Breyer, J., joined. Breyer, J., filed a dissenting opinion, in which O'Connor, J., joined.

OPINIONBY: SCALIA

OPINION: [*298] ****2534** Justice **Scalia** delivered the opinion of the Court.

*****LEdHR1A** [1A]† Petitioner Ralph Howard Blakely, Jr., pleaded guilty to the kidnaping of his estranged wife. The facts admitted in his plea, standing alone, supported a maximum sentence of 53 months. Pursuant to state law, the court imposed an "exceptional" sentence of 90 months after making a judicial determination that he had acted with "deliberate cruelty." App. 40, 49. We consider whether this violated petitioner's Sixth Amendment right

to trial by jury.

I

Petitioner married his wife Yolanda in 1973. He was evidently a difficult man to live with, having been diagnosed at various times with psychological and personality disorders including paranoid schizophrenia. His wife ultimately filed for divorce. In 1998, he abducted her from their orchard home in Grant County, Washington, binding her with duct tape and forcing her at knifepoint into a wooden box in the bed of his pickup truck. In the process, he implored her to dismiss the divorce suit and related trust proceedings.

When the couple's 13-year-old son Ralphy returned home from school, petitioner ordered him to follow in another car, threatening to harm Yolanda with a shotgun if he did not do so. Ralphy escaped and sought help when they stopped at a gas station, but petitioner continued on with Yolanda to a friend's house in Montana. He was finally arrested after the friend called the police.

The State charged petitioner with first-degree kidnaping, Wash. Rev. Code Ann. § 9A.40.020 (1) (2000). n1 Upon reaching a plea agreement, however, it reduced the charge to second-degree kidnaping involving domestic violence and use [*299] of a firearm, see §§ 9A.40.030(1), 10.99.020(3)(p), 9.94A.125. n2 Petitioner entered a guilty plea [**2535] admitting [***411] the elements of second-degree kidnaping and the domestic-violence and firearm allegations, but no other relevant facts.

----- Footnotes -----

n1 Parts of Washington's criminal code have been recodified and amended. We cite throughout the provisions in effect at the time of sentencing.

n2 Petitioner further agreed to an additional charge of second-degree assault involving domestic violence, Wash. Rev. Code Ann. §§ 9A.36.021(1)(c), 10.99.020(3)(b) (2000). The 14-month sentence on that count ran concurrently and is not relevant here.

----- End Footnotes-----

[***LEdHR2] [2] [***LEdHR3] [3] The case then proceeded to sentencing. ^{HN1}In Washington, second-degree kidnaping is a class B felony. § 9A.40.030(3). State law provides that ^{HN2}"[n]o person convicted of a [class B] felony shall be punished by confinement . . . exceeding . . . a term of ten years." § 9A.20.021(1)(b). Other provisions of state law, however, further limit the range of sentences a judge may impose. ^{HN3}Washington's Sentencing Reform Act specifies, for petitioner's offense of second-degree kidnaping with a firearm, a "standard range" of 49 to 53 months. See § 9.94A.320 (seriousness level V for second-degree kidnaping); App. 27 (offender score 2 based on § 9.94A.360); § 9.94A.310 (1), box 2-V (standard range of 13-17 months); § 9.94A.310(3)(b) (36-month firearm enhancement). n3 A judge may impose a sentence above the standard range if he finds "substantial and compelling reasons justifying an exceptional sentence." § 9.94A.120(2). The Act lists aggravating factors that justify such a departure, which it recites to be illustrative rather than exhaustive. § 9.94A.390. Nevertheless, "[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense." *State v. Gore*, 143 Wn.2d 288, 315-316, 21 P.3d 262, 277 (2001). ^{HN4}When a judge imposes an exceptional sentence, he must set forth findings of fact and conclusions of law supporting it.

§ 9.94A.120(3). A reviewing **[*300]** court will reverse the sentence if it finds that "under a clearly erroneous standard there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence." *Gore, supra*, at 315, 21 P.3d, at 277 (citing § 9.94A.210(4)).

----- Footnotes -----

n3 The domestic-violence stipulation subjected petitioner to such measures as a "no-contact" order, see § 10.99.040, but did not increase the standard range of his sentence.

----- End Footnotes-----

[*LEdHR4A]** [4A] Pursuant to the plea agreement, the State recommended a sentence within the standard range of 49 to 53 months. After hearing Yolanda's description of the kidnaping, however, the judge rejected the State's recommendation and imposed an exceptional sentence of 90 months --37 months beyond the standard maximum. He justified the sentence on the ground that petitioner had acted with "deliberate cruelty," a statutorily enumerated ground for departure in domestic-violence cases. § 9.94A.390(2)(h)(iii). n4

----- Footnotes -----

[*LEdHR4B]** [4B]

n4 The judge found other aggravating factors, but the Court of Appeals questioned their validity under state law and their independent sufficiency to support the extent of the departure. See 111 Wn. App. 851, 868-870, and n 3, 47 P.3d 149, 158-159, and n 3 (2002). It affirmed the sentence solely on the finding of domestic violence with deliberate cruelty. *Ibid.* We therefore focus only on that factor.

----- End Footnotes-----

Faced with an unexpected increase of more than three years in his sentence, petitioner objected. The judge accordingly conducted a 3-day bench hearing featuring testimony from petitioner, Yolanda, Ralphy, a police officer, and medical experts. After the hearing, he issued 32 findings of fact, concluding:

"The defendant's motivation to commit kidnaping was complex, contributed to by his mental condition and personality disorders, the **[***412]** pressures of the divorce litigation, the impending trust litigation trial and anger over his troubled interpersonal relationships with his spouse and children. While he misguidedly intended to forcefully reunite his **[**2536]** family, his attempt to do so was subservient to his desire to terminate lawsuits and modify title ownerships to his benefit.

[*301] "The defendant's methods were more homogeneous than his motive. He used stealth and surprise, and took advantage of the victim's isolation. He immediately employed physical violence, restrained the victim with tape, and threatened her with injury and death to herself and others. He immediately coerced the victim into providing information by the threatening application of a knife. He violated a subsisting restraining order." App. 48-49.

The judge adhered to his initial determination of deliberate cruelty.

Petitioner appealed, arguing that this sentencing procedure deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence. The State Court of Appeals affirmed, 111 Wn. App. 851, 870-871, 47 P.3d 149, 159 (2002), relying on the Washington Supreme Court's rejection of a similar challenge in *Gore, supra*, at 311-315, 21 P.3d, at 275-277. The Washington Supreme Court denied discretionary review. 148 Wn. 2d 1010, 62 P.3d 889 (2003). We granted certiorari. 540 U.S. 965, 540 U.S. 965, 157 L. Ed. 2d 309, 124 S. Ct. 429 (2003).

II

*****LEdHR5** [5]↑ *****LEdHR6** [6]↑ *****LEdHR7A** [7A]↑ This case requires us to apply the rule we expressed in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000): **HN5**↑ "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." This rule reflects two longstanding tenets of common-law criminal jurisprudence: that **HN6**↑ the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours," 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769), and that **HN7**↑ "an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements **[*302]** of the common law, and it is no accusation in reason," 1 J. Bishop, *Criminal Procedure* § 87, p 55 (2d ed. 1872). n5 These principles have been acknowledged by courts and treatises *****413** since the earliest days of graduated sentencing; we compiled the relevant authorities in *Apprendi*, see ****2537** 530 U.S., at 476-483, 489-490, n 15, 147 L. Ed. 2d 435, 120 S. Ct. 2348; *id.*, at 501-518, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (Thomas, J., concurring), and need not repeat them here. n6

----- Footnotes -----

n5 Justice Breyer cites Justice O'Connor's *Apprendi* dissent for the point that this Bishop quotation means only that indictments must charge facts that trigger statutory aggravation of a common-law offense. *Post*, at _____, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403, 437 (dissenting opinion). Of course, as he notes, Justice O'Connor was referring to an entirely different quotation, from *Archbold's* treatise. See 530 U.S., at 526, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (citing J. Archbold, *Pleading and Evidence in Criminal Cases* 51, 188 (15th ed. 1862)). Justice Breyer claims the two are "similar," *post*, at _____, 159 L. Ed. 2d, at 437, but they are as similar as chalk and cheese. Bishop was not "addressing" the "problem" of statutes that aggravate common-law offenses. *Ibid.* Rather, the entire chapter of his treatise is devoted to the point that "every fact which is legally essential to the punishment" must be charged in the indictment and proved to a jury. 1 J. Bishop, *Criminal Procedure*, ch. 6, pp 50-56 (2d ed. 1872). As one "example" of this principle (appearing several pages before the language we quote in text above), he notes a statute aggravating common-law assault. *Id.*, § 82, at 51-52. But nowhere is there the slightest indication that his general principle was *limited* to that example. Even Justice Breyer's academic supporters do not make *that* claim. See Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 Yale L. J. 1097, 1131-1132 (2001) (conceding that Bishop's treatise supports *Apprendi*, while criticizing its "natural-law theorizing").

[*LEdHR7B]** [7B]✎

n6 As to Justice O'Connor's criticism of the quantity of historical support for the *Apprendi* rule, *post*, at _____, 159 L. Ed. 2d, at 425-426 (dissenting opinion): It bears repeating that the issue between us is not *whether* the Constitution limits States' authority to reclassify elements as sentencing factors (we all agree that it does); it is only which line, ours or hers, the Constitution draws. Criticism of the quantity of evidence favoring our alternative would have some force if it were accompanied by *any* evidence favoring hers. Justice O'Connor does not even provide a coherent alternative meaning for the jury-trial guarantee, unless one considers "whatever the legislature chooses to leave to the jury, so long as it does not go too far" coherent. See *infra*, at _____ - _____, 159 L. Ed. 2d, at 415-416.

- - - - - End Footnotes - - - - -

[*303] *Apprendi* involved a New Jersey hate-crime statute that authorized a 20-year sentence, despite the usual 10-year maximum, if the judge found the crime to have been committed "with a purpose to intimidate . . . because of race, color, gender, handicap, religion, sexual orientation or ethnicity." *Id.*, at 468-469, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (quoting N. J. Stat. Ann. § 2C:44-3(e) (West Supp. 1999-2000)). In *Ring v. Arizona*, 536 U.S. 584, 592-593, and n 1, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002), we applied *Apprendi* to an Arizona law that authorized the death penalty if the judge found one of ten aggravating factors. In each case, we concluded that the defendant's constitutional rights had been violated because the judge had imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding. *Apprendi, supra*, at 491-497, 147 L. Ed. 2d 435, 120 S. Ct. 2348; *Ring, supra*, at 603-609, 153 L. Ed. 2d 556, 122 S. Ct. 2428.

[*LEdHR1B]** [1B]✎ **[***LEdHR8]** [8]✎ In this case, petitioner was sentenced to more than three years above the 53-month statutory maximum of the standard range because he had acted with "deliberate cruelty." The facts supporting that finding were neither admitted by petitioner nor found by a jury. The State nevertheless contends that there was no *Apprendi* violation because the relevant "statutory maximum" is not 53 months, but the 10-year maximum for class B felonies in § 9A.20.021(1)(b). It observes that no exceptional sentence may exceed that limit. See § 9.94A.420. Our precedents make clear, however, that ^{HNS}✎ the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. See *Ring, supra*, at 602, 153 L. Ed. 2d 556, 122 S. Ct. 2428 ("the maximum he would receive if punished according to the facts reflected in the jury verdict alone" (quoting *Apprendi, supra*, at 483, 147 L. Ed. 2d 435, 120 S. Ct. 2348)); *Harris v. United States*, 536 U.S. 545, 563, 153 L. Ed. 2d 524, 122 S. Ct. 2406 (2002) (plurality opinion) (same); cf. *Apprendi, supra*, at 488, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (facts admitted by the defendant). In other words, ^{HN9}✎ the relevant "statutory maximum" is not the maximum sentence a judge **[***414]** may impose **[*304]** after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," *Bishop, supra*, § 87, at 55, and the judge exceeds his proper authority.

[*LEdHR1C]** [1C]✎ The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea. Those facts alone were insufficient because, as the Washington Supreme Court has explained, "[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense," **[**2538]** *Gore*, 143 Wn.2d, at 315-316, 21 P.3d, at 277, which in this case included the elements of second-degree kidnaping and the use of a firearm, see §§

9.94A.320, 9.94A.310(3)(b). n7 Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed. See § 9.94A.210(4). The "maximum sentence" is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or death in *Ring* (because that is what the judge could have imposed upon finding an aggravator).

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n7 The State does not contend that the domestic-violence stipulation alone supports the departure. That the ^{HN10} statute lists domestic violence as grounds for departure only when combined with some other aggravating factor suggests it could not. See §§ 9.94A.390(2)(h)(i)-(iii).

----- End Footnotes-----

The State defends the sentence by drawing an analogy to those we upheld in *McMillan v. Pennsylvania*, 477 U.S. 79, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986), and *Williams v. New York*, 337 U.S. 241, 93 L. Ed. 1337, 69 S. Ct. 1079 (1949). Neither case is on point. *McMillan* involved a sentencing scheme that imposed a statutory *minimum* if a judge found a particular fact. 477 U.S., at 81, 91 L. Ed. 2d 67, 106 S. Ct. 2411. We specifically noted that the statute "does not authorize a sentence in excess of that otherwise allowed for [the underlying] offense." *Id.*, [***305**] at 82, 91 L. Ed. 2d 67, 106 S. Ct. 2411; cf. *Harris, supra*, at 567, 153 L. Ed. 2d 524, 122 S. Ct. 2406. *Williams* involved an indeterminate-sentencing regime that allowed a judge (but did not compel him) to rely on facts outside the trial record in determining whether to sentence a defendant to death. 337 U.S., at 242-243, and n 2, 93 L. Ed. 1337, 69 S. Ct. 1079. The judge could have "sentenced [the defendant] to death giving no reason at all." *Id.*, at 252, 93 L. Ed. 1337, 69 S. Ct. 1079. Thus, neither case involved a sentence greater than what state law authorized on the basis of the verdict alone.

[*****LEdHR9A**] [9A] Finally, the State tries to distinguish *Apprendi* and *Ring* by pointing out that the enumerated grounds for departure in its regime are illustrative rather than exhaustive. This distinction is immaterial. Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge [*****415**] acquires that authority only upon finding some additional fact. n8

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[*****LEdHR9B**] [9B]

n8 Nor does it matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence.

----- End Footnotes-----

[*****LEdHR1D**] [1D] [*****LEdHR10A**] [10A] Because the State's sentencing procedure did not comply with the Sixth Amendment, petitioner's sentence is invalid. n9

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[***LEdHR10B] [10B]↕

n9 The United States, as *amicus curiae*, urges us to affirm. It notes differences between Washington's sentencing regime and the Federal Sentencing Guidelines but questions whether those differences are constitutionally significant. See Brief for United States as *Amicus Curiae* 25-30. The Federal Guidelines are not before us, and we express no opinion on them.

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III

[***LEdHR1E] [1E]↕ Our commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is [*306] no mere procedural formality, but a fundamental reservation of [*2539] power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. See Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in 2 *The Complete Anti-Federalist* 315, 320 (H. Storing ed. 1981) (describing the jury as "secur[ing] to the people at large, their just and rightful controul in the judicial department"); John Adams, Diary Entry (Feb. 12, 1771), reprinted in 2 *Works of John Adams* 252, 253 (C. Adams ed. 1850) ("[T]he common people, should have as complete a control . . . in every judgment of a court of judicature" as in the legislature); Letter from Thomas Jefferson to the Abbe Arnoux (July 19, 1789), reprinted in 15 *Papers of Thomas Jefferson* 282, 283 (J. Boyd ed. 1958) ("Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative"); *Jones v. United States*, 526 U.S. 227, 244-248, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999). *Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.

Those who would reject *Apprendi* are resigned to one of two alternatives. The first is that the jury need only find whatever facts the legislature chooses to label elements of the crime, and that those it labels sentencing factors--no matter how much they may increase the punishment--may be found by the judge. This would mean, for example, that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it--or of making an illegal lane change while fleeing the death scene. Not even *Apprendi*'s critics would advocate this absurd result. Cf. 530 U.S., at 552-553, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (O'Connor, J., dissenting). The jury could not function as circuitbreaker in the State's machinery of justice if it were [*307] relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the [*416] crime the State *actually* seeks to punish. n10

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n10 Justice O'Connor believes that a "built-in political check" will prevent lawmakers from manipulating offense elements in this fashion. *Post*, at _____, 159 L. Ed. 2d, at 425. But the many immediate practical advantages of judicial factfinding, see *post*, at _____ - _____, 159 L. Ed. 2d, at 422-423, suggest that political forces would, if anything, pull in the opposite direction. In any case, the Framers' decision to entrench the jury-trial right in the

Constitution shows that they did not trust government to make political decisions in this area.

----- End Footnotes-----

The second alternative is that legislatures may establish legally essential sentencing factors *within limits*--limits crossed when, perhaps, the sentencing factor is a "tail which wags the dog of the substantive offense." *McMillan*, 477 U.S., at 88, 91 L. Ed. 2d 67, 106 S. Ct. 2411. What this means in operation is that the law must not go *too far*--it must not exceed the judicial estimation of the proper role of the judge.

The subjectivity of this standard is obvious. Petitioner argued below that second-degree kidnaping with deliberate cruelty was essentially the same as first-degree kidnaping, the very charge he had avoided by pleading to a lesser offense. The court conceded this might be so but held it irrelevant. See 111 Wn. App. , at 869, 47 P.3d, at 158. n11 Petitioner's 90-month sentence [****2540**] exceeded the 53-month standard maximum by almost 70%; the Washington Supreme Court in other cases has upheld exceptional sentences 15 times the standard maximum. See *State v. Oxborrow*, 106 Wn.2d 525, 528, 533, 723 P.2d 1123, 1125, 1128 (1986) (15-year exceptional sentence; 1-year standard maximum sentence); [****308**] *State v. Branch*, 129 Wn.2d 635, 650, 919 P.2d 1228, 1235 (1996) (4-year exceptional sentence; 3-month standard maximum sentence). Did the court go *too far* in any of these cases? There is no answer that legal analysis can provide. With *too far* as the yardstick, it is always possible to disagree with such judgments and never to refute them.

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n11 Another example of conversion from separate crime to sentence enhancement that Justice O'Connor evidently does not consider going "too far" is the obstruction-of-justice enhancement, see *post*, at ____ - ____, 159 L. Ed. 2d, at 423. Why perjury during trial should be grounds for a judicial sentence enhancement on the underlying offense, rather than an entirely separate offense to be found by a jury beyond a reasonable doubt (as it has been for centuries, see 4 W. Blackstone, Commentaries on the Laws of England 136-138 (1769)), is unclear.

----- End Footnotes-----

Whether the Sixth Amendment incorporates this manipulable standard rather than *Apprendi's* bright-line rule depends on the plausibility of the claim that the Framers would have left definition of the scope of jury power up to judges' intuitive sense of how far is *too far*. We think that claim not plausible at all, because the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury.

IV

[****LEdHR11**] [11] By reversing the judgment below, we are not, as the State would have it, "find[ing] determinate sentencing schemes unconstitutional." Brief for Respondent 34. This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment. Several policies prompted Washington's adoption of determinate sentencing, including proportionality to the gravity of the offense and parity among defendants. See Wash. Rev. Code Ann. § 9.94A.010 [****417**] (2000). Nothing we have said impugns those salutary objectives.

[*LEdHR12]** [12]↗ **[***LEdHR13]** [13]↗ Justice O'Connor argues that, because determinate sentencing schemes involving judicial factfinding entail less judicial discretion than indeterminate schemes, the constitutionality of the latter implies the constitutionality of the former. *Post*, at _____ - _____, 159 L. Ed. 2d, at 420-426. This argument is flawed on a number of levels. First, ^{HN11}↗ the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. **[*309]** Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence--and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence--and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.

[2541]** But even assuming that restraint of judicial power unrelated to the jury's role is a Sixth Amendment objective, it is far from clear that *Apprendi* deserves that goal. Determinate judicial-factfinding schemes entail less judicial power than indeterminate schemes, but more judicial power than determinate *jury*-factfinding schemes. Whether *Apprendi* increases judicial power overall depends on what States with determinate judicial-factfinding schemes would do, given the choice between the two alternatives. Justice O'Connor simply assumes that the net effect will favor judges, but she has no empirical basis for that prediction. Indeed, what evidence we have points exactly the other way: When the Kansas Supreme Court found *Apprendi* infirmities in that State's determinate-sentencing regime in *State v. Gould*, 271 Kan. 394, 404-414, 23 P.3d 801, 809-814 (2001), the legislature responded not by reestablishing indeterminate sentencing but by applying *Apprendi*'s requirements to its current regime. See Act of May 29, 2002, ch. 170, 2002 Kan. Sess. **[*310]** Laws pp 1018-1023 (codified at Kan. Stat. Ann. § 21-4718 (2003 Cum. Supp.)); Brief for Kansas Appellate Defender Office as *Amicus Curiae* 3-7. The result was less, not more, judicial power.

[*LEdHR14]** [14]↗ **[***LEdHR15]** [15]↗ **[***LEdHR16A]** [16A]↗ Justice Breyer argues that *Apprendi* works to the detriment of criminal defendants who plead guilty by depriving them of the opportunity to argue sentencing factors to a judge. *Post*, at _____ - _____, 159 L. Ed. 2d, at 431. But nothing prevents a defendant from waiving his *Apprendi* rights. ^{HN12}↗ When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant **[***418]** either stipulates to the relevant facts or consents to judicial factfinding. See *Apprendi*, 530 U.S., at 488, 147 L. Ed. 2d 435, 120 S. Ct. 2348; *Duncan v. Louisiana*, 391 U.S. 145, 158, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968). If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty. Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his interest if relevant evidence would prejudice him at trial. We do not understand how *Apprendi* can possibly work to the detriment of those who are free, if they think its costs outweigh its benefits, to render it inapplicable. n12

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[*LEdHR16B]** [16B]↗

n12 Justice Breyer responds that States are not *required* to give defendants the option of waiving jury trial on some elements but not others. *Post*, at ____ - ____, 159 L. Ed. 2d, at 433-434. True enough. But why would the States that he asserts we are coercing into hard-heartedness--that is, States that *want* judge-pronounced determinate sentencing to be the norm but we won't let them--want to prevent a defendant from *choosing* that regime? Justice Breyer claims this alternative may prove "too expensive and unwieldy for States to provide," *post*, at ____, 159 L. Ed. 2d, at 434, but there is no obvious reason why forcing defendants to choose between contesting all elements of his hypothetical 17-element robbery crime and contesting none of them is less expensive than also giving them the third option of pleading guilty to some elements and submitting the rest to judicial factfinding. Justice Breyer's argument rests entirely on a speculative prediction about the number of defendants likely to choose the first (rather than the second) option if denied the third.

----- End Footnotes-----

[*311] Nor do we see any merit to Justice Breyer's contention that *Apprendi* is unfair to criminal defendants because, if States respond by enacting "17-element robbery crime[s]," prosecutors will have more elements with which to bargain. *Post*, at ____ - ____, ____, 159 L. Ed. 2d, at 431, 434 (citing *Bibas*, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 *Yale L. J.* 1097 (2001)). Bargaining already exists with regard to sentencing factors because defendants can either stipulate or contest the facts that make them applicable. If there is any difference between **[**2542]** bargaining over sentencing factors and bargaining over elements, the latter probably favors the defendant. Every new element that a prosecutor can threaten to charge is also an element that a defendant can threaten to contest at trial and make the prosecutor prove beyond a reasonable doubt. Moreover, given the sprawling scope of most criminal codes, and the power to affect sentences by making (even nonbinding) sentencing recommendations, there is already no shortage of *in terrorem* tools at prosecutors' disposal. See King & Klein, *Apprendi* and Plea Bargaining, 54 *Stan. L. Rev.* 295, 296 (2001) ("Every prosecutorial bargaining chip mentioned by Professor *Bibas* existed pre-*Apprendi* exactly as it does post-*Apprendi*").

Any evaluation of *Apprendi*'s "fairness" to criminal defendants must compare it with the regime it replaced, in which a defendant, with no warning in either his indictment or plea, would routinely see his maximum potential sentence balloon from as little as five years to as much as life imprisonment, see 21 U.S.C. §§ 841(b)(1)(A), (D), [21 USCS §§ 841(b)(1)(A), (D)] n13 based not on **[*312]** facts proved to his peers beyond a **[***419]** reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong. We can conceive of no measure of fairness that would find more fault in the utterly speculative bargaining effects Justice Breyer identifies than in the regime he champions. Suffice it to say that, if such a measure exists, it is not the one the Framers left us with.

----- Footnotes-----

n13 To be sure, Justice Breyer and the other dissenters would forbid those increases of sentence that violate the constitutional principle that tail shall not wag dog. The source of this principle is entirely unclear. Its precise effect, if precise effect it has, is presumably to require that the ratio of sentencing-factor add-on to basic criminal sentence be no greater than the ratio of caudal vertebrae to body in the breed of canine with the longest tail. Or perhaps no greater than the average such ratio for all breeds. Or perhaps the median. Regrettably, *Apprendi* has prevented full development of this line of jurisprudence.

----- End Footnotes-----

The implausibility of Justice Breyer's contention that *Apprendi* is unfair to criminal defendants is exposed by the lineup of *amici* in this case. It is hard to believe that the National Association of Criminal Defense Lawyers was somehow duped into arguing for the wrong side. Justice Breyer's only authority asking that defendants be protected from *Apprendi* is an article written not by a criminal defense lawyer but by a law professor and former prosecutor. See *post*, at ____ - ____, 159 L. Ed. 2d, at 431 (citing *Bibas, supra*); Association of American Law Schools Directory of Law Teachers 2003-2004, p 319.

Justice Breyer also claims that *Apprendi* will attenuate the connection between "real criminal conduct and real punishment" by encouraging plea bargaining and by restricting alternatives to adversarial factfinding. *Post*, at ____ - ____, ____ - ____, 159 L. Ed. 2d, at 433, 435. The short answer to the former point (even assuming the questionable premise that *Apprendi* does encourage plea bargaining, but see *supra*, at ____, 159 L. Ed. 2d, at 417-418, and n 12) is that the Sixth Amendment was not written for the benefit of those who choose to forgo its protection. It guarantees the *right* to jury trial. It does not guarantee that a particular number of jury trials will actually take place. That more defendants elect to waive that right (because, for example, government at the moment is not particularly oppressive) does not prove that a constitutional provision guaranteeing *availability* of that option is disserved.

Justice Breyer's more general argument--that *Apprendi* undermines alternatives **[**2543]** to adversarial factfinding--is **[*313]** not so much a criticism of *Apprendi* as an assault on jury trial generally. His esteem for "non-adversarial" truth-seeking processes, *post*, at ____, 159 L. Ed. 2d, at 436, supports just as well an argument against either. Our Constitution and the common-law traditions it entrenches, however, do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury. See 3 Blackstone, Commentaries, at 373-374, 379-381. Justice Breyer may be convinced of the equity of the regime he favors, but his views are not the ones we are bound to uphold.

[*LEdHR17]** [17]¶ Ultimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice. One can certainly argue that both these values would be better served by leaving justice entirely in the hands of professionals; many nations of the world, particularly those following civil-law traditions, take just that course. There is not one shred **[***420]** of doubt, however, about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury. As *Apprendi* held, **HN13**¶ every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment. Under the dissenters' alternative, he has no such right. That should be the end of the matter.

* * *

[*LEdHR1F]** [1F]¶ Petitioner was sentenced to prison for more than three years beyond what the law allowed for the crime to which he confessed, on the basis of a disputed finding that he had acted with "deliberate cruelty." The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbours," **[*314]** 4 Blackstone, Commentaries, at 343, rather than a lone employee of the State.

The judgment of the Washington Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

DISSENTBY: O'CONNOR; KENNEDY; BREYER

DISSENT: Justice **O'Connor**, with whom Justice **Breyer** joins, and with whom the **Chief Justice** and Justice **Kennedy** join as to all but Part IV-B, dissenting.

The legacy of today's opinion, whether intended or not, will be the consolidation of sentencing power in the State and Federal Judiciaries. The Court says to Congress and state legislatures: If you want to constrain the sentencing discretion of judges and bring some uniformity to sentencing, it will cost you--dearly. Congress and States, faced with the burdens imposed by the extension of *Apprendi* to the present context, will either trim or eliminate altogether their sentencing guidelines schemes and, with them, 20 years of sentencing reform. It is thus of little moment that the majority does not expressly declare guidelines schemes unconstitutional, *ante*, at _____, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403, 416 (2004); for, as residents of "*Apprendi*-land" are fond of saying, "the relevant inquiry is one not of form, but of effect." *Apprendi v. New Jersey*, 530 U.S. 466, 494, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000); *Ring v. Arizona*, 536 U.S. 584, 613, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002) (Scalia, J., concurring). The "effect" of today's decision will be greater judicial discretion and less uniformity in sentencing. Because I find it implausible that the Framers would have considered such a **[**2544]** result to be required by the Due Process Clause or the Sixth Amendment, and because the practical consequences of today's decision may be disastrous, I respectfully dissent.

I

One need look no further than the history leading up to and following the enactment of Washington's guidelines **[*315]** scheme to appreciate the damage that today's decision will cause. Prior to 1981, Washington, like most other States and the Federal **[***421]** Government, employed an indeterminate sentencing scheme. Washington's criminal code separated all felonies into three broad categories: "class A," carrying a sentence of 20 years to life; "class B," carrying a sentence of 0 to 10 years; and "class C," carrying a sentence of 0 to 5 years. Wash. Rev. Code Ann. § 9A.20.020 (2000); see also Sentencing Reform Act of 1981, 1981 Wash. Laws, ch. 137, p 534. Sentencing judges, in conjunction with parole boards, had virtually unfettered discretion to sentence defendants to prison terms falling anywhere within the statutory range, including probation--*i.e.*, no jail sentence at all. Wash. Rev. Code Ann. §§ 9.95.010-.011; Boerner & Lieb, *Sentencing Reform in the Other Washington*, 28 *Crime and Justice* 71, 73 (M. Tonry ed. 2001) (hereinafter Boerner & Lieb) ("Judges were authorized to choose between prison and probation with few exceptions, subject only to review for abuse of discretion"). See also D. Boerner, *Sentencing in Washington* § 2.4, pp 2-27 to 2-28 (1985).

This system of unguided discretion inevitably resulted in severe disparities in sentences received and served by defendants committing the same offense and having similar criminal histories. Boerner & Lieb 126-127; cf. S. Rep. No. 98-225, p 38 (1983) (Senate Report on precursor to federal Sentencing Reform Act of 1984) ("[E]very day Federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances. . . . These disparities, whether they occur at the time of the initial sentencing or at the parole stage, can be traced directly to the unfettered discretion the law confers on those judges and parole authorities responsible for imposing and implementing the sentence"). Indeed, rather than reflect legally relevant criteria, these disparities too often were correlated with constitutionally suspect variables such as race. Boerner & Lieb **[*316]** 126-128. See also Breyer, *The Federal Sentencing Guidelines and Key Compromises Upon Which They Rest*, 17 *Hofstra L. Rev.* 1, 5 (1988) (elimination of racial disparity one reason behind Congress' creation of the Federal Sentencing Commission).

To counteract these trends, the state legislature passed the Sentencing Reform Act of 1981. The Act had the laudable purposes of "mak[ing] the criminal justice system accountable to the public," and "[e]nsur[ing] that the punishment for a criminal offense is proportionate to the seriousness of the offense . . . [and] commensurate with the punishment imposed on others committing similar offenses." Wash. Rev. Code Ann. § 9.94A.010 (2000). The Act neither increased any of the statutory sentencing ranges for the three types of felonies (though it did eliminate the statutory mandatory minimum for class A felonies), nor reclassified any substantive offenses. 1981 Wash. Laws ch. 137, p. 534. It merely placed meaningful constraints on discretion to sentence offenders within the statutory ranges, and eliminated parole. There is thus no evidence that the legislature was attempting to manipulate the statutory elements of criminal offenses or to circumvent the procedural protections [****2545**] of the Bill of Rights. Rather, lawmakers were trying to bring some much-needed uniformity, transparency, and accountability to an otherwise "'labyrinthine' sentencing and corrections [*****422**] system that 'lack[ed] any principle except unguided discretion.'" Boerner & Lieb 73 (quoting F. Zimring, *Making the Punishment Fit the Crime: A Consumers' Guide to Sentencing Reform*, Occasional Paper No. 12, p 6 (1977)).

II

Far from disregarding principles of due process and the jury trial right, as the majority today suggests, Washington's reform has served them. Before passage of the Act, a defendant charged with second degree kidnaping, like petitioner, had no idea whether he would receive a 10-year sentence [***317**] or probation. The ultimate sentencing determination could turn as much on the idiosyncracies of a particular judge as on the specifics of the defendant's crime or background. A defendant did not know what facts, if any, about his offense or his history would be considered relevant by the sentencing judge or by the parole board. After passage of the Act, a defendant charged with second degree kidnaping knows what his presumptive sentence will be; he has a good idea of the types of factors that a sentencing judge can and will consider when deciding whether to sentence him outside that range; he is guaranteed meaningful appellate review to protect against an arbitrary sentence. Boerner & Lieb 93 ("By consulting one sheet, practitioners could identify the applicable scoring rules for criminal history, the sentencing range, and the available sentencing options for each case"). Criminal defendants still face the same statutory maximum sentences, but they now at least know, much more than before, the real consequences of their actions.

Washington's move to a system of guided discretion has served equal protection principles as well. Over the past 20 years, there has been a substantial reduction in racial disparity in sentencing across the State. *Id.*, at 126 (Racial disparities that do exist "are accounted for by differences in legally relevant variables--the offense of conviction and prior criminal record"); *id.*, at 127 ("[J]udicial authority to impose exceptional sentences under the court's departure authority shows little evidence of disparity correlated with race"). The reduction is directly traceable to the constraining effects of the guidelines--namely, its "presumptive range[s]" and limits on the imposition of "exceptional sentences" outside of those ranges. *Id.*, at 128. For instance, sentencing judges still retain unreviewable discretion in first-time offender cases and in certain sex offender cases to impose alternative sentences that are far more lenient than those contemplated by the guidelines. To the extent that unjustifiable racial disparities have persisted in Washington, it [***318**] has been in the imposition of such alternative sentences: "The lesson is powerful: racial disparity is correlated with unstructured and unreviewed discretion." *Ibid.*; see also Washington State Minority and Justice Commission, R. Crutchfield, J. Weis, R. Engen, & R. Gainey, *Racial/Ethnic Disparities and Exceptional Sentences in Washington State*, Final Report 51-53 (1993) ("[E]xceptional sentences are not a major source of racial disparities in sentencing").

The majority does not, because it cannot, disagree that determinate sentencing schemes, like Washington's, serve important constitutional values. *Ante*, at _____, 159 L. Ed. 2d, at

416. Thus, the majority says: **[***423]** "[t]his case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment." *Ibid.* But extension of *Apprendi* to the present context will impose **[**2546]** significant costs on a legislature's determination that a particular fact, not historically an element, warrants a higher sentence. While not a constitutional prohibition on guidelines schemes, the majority's decision today exacts a substantial constitutional tax.

The costs are substantial and real. Under the majority's approach, any fact that increases the upper bound on a judge's sentencing discretion is an element of the offense. Thus, facts that historically have been taken into account by sentencing judges to assess a sentence within a broad range--such as drug quantity, role in the offense, risk of bodily harm--all must now be charged in an indictment and submitted to a jury, *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970), simply because it is the legislature, rather than the judge, that constrains the extent to which such facts may be used to impose a sentence within a pre-existing statutory range.

While that alone is enough to threaten the continued use of sentencing guidelines schemes, there are additional costs. For example, a legislature might rightly think that some factors bearing on sentencing, such as prior bad acts or criminal history, should not be considered in a jury's determination of **[*319]** a defendant's guilt--such "character evidence" has traditionally been off limits during the guilt phase of criminal proceedings because of its tendency to inflame the passions of the jury. See, e.g., *Fed. Rule Evid.* 404; 1 E. Imwinkelried, P. Giannelli, F. Gilligan, & F. Leaderer, *Courtroom Criminal Evidence* 285 (3d ed. 1998). If a legislature desires uniform consideration of such factors at sentencing, but does not want them to impact a jury's initial determination of guilt, the State may have to bear the additional expense of a separate, full-blown jury trial during the penalty phase proceeding.

Some facts that bear on sentencing either will not be discovered, or are not discoverable, prior to trial. For instance, a legislature might desire that defendants who act in an obstructive manner during trial or post-trial proceedings receive a greater sentence than defendants who do not. See, e.g., *United States Sentencing Commission, Guidelines Manual*, § 3C1.1 (Nov. 2003) (hereinafter USSG) (2-point increase in offense level for obstruction of justice). In such cases, the violation arises too late for the State to provide notice to the defendant or to argue the facts to the jury. A State wanting to make such facts relevant at sentencing must now either vest sufficient discretion in the judge to account for them *or* bring a separate criminal prosecution for obstruction of justice or perjury. And, the latter option is available only to the extent that a defendant's obstructive behavior is so severe as to constitute an already-existing separate offense, unless the legislature is willing to undertake the unlikely expense of criminalizing relatively minor obstructive behavior.

Likewise, not all facts that historically have been relevant to sentencing always will be known prior to trial. For instance, trial or sentencing proceedings of a drug distribution defendant might reveal that he **[***424]** sold primarily to children. Under the majority's approach, a State wishing such a revelation to result in a higher sentence within a pre-existing statutory range either must vest judges with sufficient discretion **[*320]** to account for it (and trust that they exercise that discretion) *or* bring a separate criminal prosecution. Indeed, the latter choice might not be available--a separate prosecution, if it is for an aggravated offense, likely would be barred altogether by the *Double Jeopardy Clause*. *Blockburger v. United States*, 284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 (1932) (cannot **[**2547]** prosecute for separate offense unless the two offenses both have at least one element that the other does not).

The majority may be correct that States and the Federal Government will be willing to bear some of these costs. *Ante*, at ____ - ____, 159 L. Ed. 2d, at 417. But simple economics dictate that they will not, and cannot, bear them all. To the extent that they do not, there will be an inevitable increase in judicial discretion with all of its attendant failings. n1

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n1 The paucity of empirical evidence regarding the impact of extending *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), to guidelines schemes should come as no surprise to the majority. *Ante*, at _____, 159 L. Ed. 2d, at 417. Prior to today, only one court had ever applied *Apprendi* to invalidate application of a guidelines scheme. Compare *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), with, e.g., *United States v. Goodine*, 326 F.3d 26 (CA1 2003); *United States v. Luciano*, 311 F.3d 146 (CA2 2002); *United States v. DeSumma*, 272 F.3d 176 (CA3 2001); *United States v. Kinter*, 235 F.3d 192 (CA4 2000); *United States v. Randle*, 304 F.3d 373 (CA5 2002); *United States v. Helton*, 349 F.3d 295 (CA6 2003); *United States v. Johnson*, 335 F.3d 589 (CA7 2003) (*per curiam*); *United States v. Piggie*, 316 F.3d 789 (CA8 2003); *United States v. Toliver*, 351 F.3d 423 (CA9 2003); *United States v. Mendez-Zamora*, 296 F.3d 1013 (CA10 2002); *United States v. Sanchez*, 269 F.3d 1250 (CA11 2001); *United States v. Fields*, 346 U.S. App. D.C. 226, 251 F.3d 1041 (CADDC 2001); *State v. Dilts*, 336 Ore. 158, 82 P.3d 593 (2003); *State v. Gore*, 143 Wn.2d 288, 21 P.3d 262 (2001); *State v. Lucas*, 353 N.C. 568, 548 S.E.2d 712 (2001); *State v. Dean*, 2003 Minn. App. LEXIS 686, No. C4-02-1225, 2003 WL 21321425 (Minn. Ct. App., June 10, 2003) (unpublished opinion). Thus, there is no map of the uncharted territory blazed by today's unprecedented holding.

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III

Washington's Sentencing Reform Act did not alter the statutory maximum sentence to which petitioner was exposed. See Wash. Rev. Code Ann. § 9A.40.030 (2003) (second [*321] degree kidnaping class B felony since 1975); see also *State v. Pawling*, 23 Wn. App. 226, 228-229, 597 P.2d 1367, 1369 (1979) (citing second degree kidnaping provision as existed in 1977). Petitioner was informed in the charging document, his plea agreement, and during his plea hearing that he faced a potential statutory maximum of 10 years in prison. App. 63, 66, 76. As discussed above, the guidelines served due process by providing notice to petitioner of the consequences of his acts; they vindicated his jury trial right by informing him of the stakes of risking trial; they served equal protection by ensuring petitioner that invidious characteristics such as race would not impact his sentence.

Given these observations, it is difficult for me to discern what principle besides doctrinaire formalism actually motivates today's decision. The majority chides the *Apprendi* dissenters for preferring a nuanced interpretation of the Due Process Clause and Sixth Amendment jury trial guarantee that would generally defer to legislative labels while acknowledging the existence of constitutional constraints--what the majority calls the "the law must not go [***425] too far" approach. *Ante*, at _____, 159 L. Ed. 2d, at 416 (emphasis deleted). If indeed the choice is between adopting a balanced case-by-case approach that takes into consideration the values underlying the Bill of Rights, as well as the history of a particular sentencing reform law, and adopting a rigid rule that destroys everything in its path, I will choose the former. See *Apprendi*, 530 U.S., at 552-554, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (O'Connor, J., dissenting) ("Because I do not believe that the Court's 'increase in the maximum penalty' rule is required by the Constitution, I would evaluate New Jersey's sentence-enhancement statute by analyzing the factors we have examined in past cases" (citation omitted)).

[**2548] But even were one to accept formalism as a principle worth vindicating for its own sake, it would not explain *Apprendi's*, or today's, result. A rule of deferring to legislative labels has no less formal pedigree. It would be more [*322] consistent with our decisions

leading up to *Apprendi*, see *Almendarez-Torres v. United States*, 523 U.S. 224, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998) (fact of prior conviction not an element of aggravated recidivist offense); *United States v. Watts*, 519 U.S. 148, 136 L. Ed. 2d 554, 117 S. Ct. 633 (1997) (*per curiam*) (acquittal of offense no bar to consideration of underlying conduct for purposes of guidelines enhancement); *Witte v. United States*, 515 U.S. 389, 132 L. Ed. 2d 351, 115 S. Ct. 2199 (1995) (no double jeopardy bar against consideration of uncharged conduct in imposition of guidelines enhancement); *Walton v. Arizona*, 497 U.S. 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990) (aggravating factors need not be found by a jury in capital case); *Mistretta v. United States*, 488 U.S. 361, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989) (Federal Sentencing Guidelines do not violate separation of powers); *McMillan v. Pennsylvania*, 477 U.S. 79, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986) (facts increasing mandatory minimum sentence are not necessarily elements); and it would vest primary authority for defining crimes in the political branches, where it belongs. *Apprendi, supra*, at 523-554, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (O'Connor, J., dissenting). It also would be easier to administer than the majority's rule, inasmuch as courts would not be forced to look behind statutes and regulations to determine whether a particular fact does or does not increase the penalty to which a defendant was exposed.

The majority is correct that rigid adherence to such an approach *could conceivably* produce absurd results, *ante*, at _____, 159 L. Ed. 2d, at 415; but, as today's decision demonstrates, rigid adherence to the majority's approach *does and will continue* to produce results that disserve the very principles the majority purports to vindicate. The pre-*Apprendi* rule of deference to the legislature retains a built-in political check to prevent lawmakers from shifting the prosecution for crimes to the penalty phase proceedings of lesser included and easier-to-prove offenses--*e.g.*, the majority's hypothesized prosecution of murder in the guise of a traffic offense sentencing proceeding. *Ante*, at _____, 159 L. Ed. 2d, at 415. There is no similar check, however, on application of the majority's "any fact that increases the upper bound of judicial discretion" by courts.

[*323] The majority claims the mantle of history and original intent. But as I have explained elsewhere, a handful **[***426]** of state decisions in the mid-19th century and a criminal procedure treatise have little if any persuasive value as evidence of what the Framers of the Federal Constitution intended in the late 18th century. See *Apprendi*, 530 U.S., at 525-528, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (O'Connor, J., dissenting). Because broad judicial sentencing discretion was foreign to the Framers, *id.*, at 478-479, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (citing J. Archbold, *Pleading and Evidence in Criminal Cases* 44 (15th ed. 1862)), they were never faced with the constitutional choice between submitting every fact that increases a sentence to the jury or vesting the sentencing judge with broad discretionary authority to account for differences in offenses and offenders.

IV

A

The consequences of today's decision will be as far reaching as they are disturbing. Washington's sentencing system is by no means unique. Numerous other States have enacted guidelines systems, as has the Federal Government. See, *e.g.*, **[**2549]** Alaska Stat. § 12.55.155 (2003); Ark. Code Ann. § 16-90-804 (Supp. 2003); Fla. Stat. § 921.0016 (2003); Kan. Stat. Ann. § 21-4701 *et seq.* (2003); Mich. Comp. Laws Ann. § 769.34 (West Supp. 2004); Minn. Stat. § 244.10 (2002); N. C. Gen. Stat. § 15A-1340.16 (Lexis 2003); Ore. Admin. Rule § 213-008-0001 (2003); 204 Pa. Code § 303 *et seq.* (2004), reproduced following 42 Pa. Cons. Stat. Ann. § 9721 (Purden Supp. 2004); 18 U.S.C. § 3553; [18 USCS § 3553] 28 U.S.C. § 991 *et seq.* [28 USCS §§ 991 *et seq.*]. Today's decision casts constitutional doubt over them all and, in so doing, threatens an untold number of criminal judgments. Every sentence imposed under such guidelines in cases currently pending on direct appeal is in jeopardy. And, despite the fact that we hold in *Schriro v Summerlin*, 542

U.S. 348, 159 L. Ed. 2d 442, 124 S. Ct. 2519, that *Ring* (and *a fortiori Apprendi*) does not apply retroactively on habeas review, all criminal sentences imposed **[*324]** under the federal and state guidelines since *Apprendi* was decided in 2000 arguably remain open to collateral attack. See *Teague v. Lane*, 489 U.S. 288, 301, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989) (plurality opinion) ("[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final"). n2

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n2 The numbers available from the federal system alone are staggering. On March 31, 2004, there were 8,320 federal criminal appeals pending in which the defendant's sentence was at issue. Memorandum from Carl Schlesinger, Administrative Office of the United States Courts, to Supreme Court Library (June 1, 2004) (available in Clerk of the Court's case file). Between June 27, 2000, when *Apprendi* was decided, and March 31, 2004, there have been 272,191 defendants sentenced in federal court. Memorandum, *supra*. Given that nearly all federal sentences are governed by the Federal Sentencing Guidelines, the vast majority of these cases are Guidelines cases.

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The practical consequences for trial courts, starting today, will be equally unsettling: How are courts to mete out guidelines sentences? Do courts apply the guidelines as to mitigating factors, but not as to aggravating factors? Do they jettison the guidelines altogether? The Court ignores the havoc it is about to wreak on trial courts across the country.

B

It is no answer to say that today's **[***427]** opinion impacts only Washington's scheme and not others, such as, for example, the Federal Sentencing Guidelines. See *ante*, at _____, n 9, 159 L. Ed. 2d, at 415 ("The Federal Guidelines are not before us, and we express no opinion on them"); cf. *Apprendi, supra*, at 496-497, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (claiming not to overrule *Walton, supra*, soon thereafter overruled in *Ring*); *Apprendi, supra*, at 497, n 21, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (reserving question of Federal Sentencing Guidelines). The fact that the Federal Sentencing Guidelines are promulgated by an administrative agency nominally located in the Judicial Branch is irrelevant to the majority's reasoning. The Guidelines have the force of law, see *Stinson v. United States*, 508 U.S. 36, 123 L. Ed. 2d 598, 113 S. Ct. 1913 (1993); and Congress has unfettered control to reject or **[*325]** accept any particular guideline, *Mistretta*, 488 U.S., at 393-394, 102 L. Ed. 2d 714, 109 S. Ct. 647.

The structure of the Federal Guidelines likewise does not, as the Government half-heartedly suggests, provide any grounds for distinction. Brief for United States as *Amicus Curiae* 27-29. Washington's scheme is almost identical to the upward departure regime established by 18 U.S.C. § 3553(b) [18 USCS § 3553(b)] and implemented in USSG § 5K2.0. If anything, the structural differences that do exist make the Federal Guidelines more vulnerable to attack. The provision struck down here provides for an increase in the upper bound of the presumptive **[**2550]** sentencing range if the sentencing court finds, "considering the purpose of [the Act], that there are substantial and compelling reasons justifying an exceptional sentence." Wash. Rev. Code Ann. § 9.94A.120 (2000). The Act elsewhere provides a nonexhaustive list of aggravating factors that satisfy the definition. § 9.94A.390. The Court flatly rejects respondent's argument that such soft constraints, which still allow Washington judges to exercise a substantial amount of discretion, survive *Apprendi*. *Ante*, at _____ - _____, 159 L. Ed. 2d, at 414-415. This suggests that the hard constraints found throughout chapters 2 and 3 of the Federal Sentencing Guidelines, which require an increase

in the sentencing range upon specified factual findings, will meet the same fate. See, e.g., USSG § 2K2.1 (increases in offense level for firearms offenses based on number of firearms involved, whether possession was in connection with another offense, whether the firearm was stolen); § 2B1.1 (increase in offense level for financial crimes based on amount of money involved, number of victims, possession of weapon); § 3C1.1 (general increase in offense level for obstruction of justice).

Indeed, the "extraordinary sentence" provision struck down today is as inoffensive to the holding of *Apprendi* as a regime of guided discretion could possibly be. The list of facts that justify an increase in the range is nonexhaustive. The State's "real facts" doctrine precludes reliance by sentencing [*326] courts upon facts that would constitute the elements of a different or aggravated offense. See Wash. Rev. Code Ann. § 9.94A.370(2) (2000) (codifying "real facts" doctrine). If the Washington scheme does not comport with the Constitution, it is hard to imagine a guidelines scheme that would.

* * *

What I have feared most has now [***428] come to pass: Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy. *Apprendi*, 530 U.S., at 549-559, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (O'Connor, J., dissenting); *Ring*, 536 U.S., at 619-621, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (O'Connor, J., dissenting). I respectfully dissent.

Justice **Kennedy**, with whom Justice **Breyer** joins, dissenting.

The majority opinion does considerable damage to our laws and to the administration of the criminal justice system for all the reasons well stated in Justice O'Connor's dissent, plus one more: The Court, in my respectful submission, disregards the fundamental principle under our constitutional system that different branches of government "converse with each other on matters of vital common interest." *Mistretta v. United States*, 488 U.S. 361, 408, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989). As the Court in *Mistretta* explained, the Constitution establishes a system of government that presupposes, not just "autonomy" and "separateness," but also "interdependence" and "reciprocity." *Id.*, at 381, 102 L. Ed. 2d 714, 109 S. Ct. 647 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 96 L. Ed. 1153, 72 S. Ct. 863 (1952) (Jackson, J., concurring)). Constant, constructive discourse between our courts and our legislatures is an integral and admirable part of the constitutional design. Case-by-case judicial determinations often yield intelligible patterns that can be refined by legislatures and codified into statutes or rules as general standards. As these legislative enactments are followed by incremental judicial interpretation, the legislatures [*327] may respond again, and the cycle repeats. This recurring dialogue, an essential source for the elaboration and the evolution of the law, is basic constitutional theory in action.

[**2551] Sentencing guidelines are a prime example of this collaborative process. Dissatisfied with the wide disparity in sentencing, participants in the criminal justice system, including judges, pressed for legislative reforms. In response, legislators drew from these participants' shared experiences and enacted measures to correct the problems, which, as Justice O'Connor explains, could sometimes rise to the level of a constitutional injury. As *Mistretta* recognized, this interchange among different actors in the constitutional scheme is consistent with the Constitution's structural protections.

To be sure, this case concerns the work of a state legislature, and not of Congress. If anything, however, this distinction counsels even greater judicial caution. Unlike *Mistretta*,

the case here implicates not just the collective wisdom of legislators on the other side of the continuing dialogue over fair sentencing, but also the interest of the States to serve as laboratories for innovation and experiment. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 76 L. Ed. 747, 52 S. Ct. 371 (1932) (Brandeis, J., dissenting). With no apparent sense of irony that the effect of today's decision is the destruction of a sentencing scheme devised by democratically elected legislators, the majority shuts down alternative, nonjudicial, sources of ideas and experience. It does so under a faintly disguised distrust of judges and their purported usurpation of the jury's function in criminal trials. It tells *****429** not only trial judges who have spent years studying the problem but also legislators who have devoted valuable time and resources "calling upon the accumulated wisdom and experience of the Judicial Branch . . . on a matter uniquely within the ken of judges," *Mistretta, supra*, at 412, 102 L. Ed. 2d 714, 109 S. Ct. 647, that their efforts and judgments were all for naught. Numerous States that have enacted sentencing guidelines similar to the one in Washington **[*328]** State are now commanded to scrap everything and start over.

If the Constitution required this result, the majority's decision, while unfortunate, would at least be understandable and defensible. As Justice O'Connor's dissent demonstrates, however, this is simply not the case. For that reason, and because the Constitution does not prohibit the dynamic and fruitful dialogue between the judicial and legislative branches of government that has marked sentencing reform on both the state and the federal levels for more than 20 years, I dissent.

Justice **Breyer**, with whom Justice **O'Connor** joins, dissenting.

The Court makes clear that it means what it said in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000). In its view, the Sixth Amendment says that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury." *Ante*, at _____, 159 L. Ed. 2d, at 412 (quoting *Apprendi, supra*, at 490, 147 L. Ed. 2d 435, 120 S. Ct. 2348). "[P]rescribed statutory maximum" means the penalty that the relevant statute authorizes "solely on the basis of the facts reflected in the jury verdict." *Ante*, at _____, 159 L. Ed. 2d, at 413 (emphasis deleted). Thus, a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the way in which the offender carried out that crime.

It is not difficult to understand the impulse that produced this holding. Imagine a classic example--a statute (or mandatory sentencing guideline) that provides a 10-year sentence for ordinary bank robbery, but a 15-year sentence for bank robbery committed with a gun. One might ask why it should matter for jury trial purposes *****2552** whether the statute (or guideline) labels the gun's presence (a) a *sentencing fact* about the way in which the offender carried out the *lesser* crime of ordinary bank robbery, or (b) a factual *element* of **[*329]** the *greater* crime of bank robbery with a gun? If the Sixth Amendment requires a jury finding about the gun in the latter circumstance, why should it not also require a jury to find the same fact in the former circumstance? The two sets of circumstances are functionally identical. In both instances, identical punishment follows from identical factual findings (related to, *e.g.*, a bank, a taking, a thing-of-value, force or threat of force, and a gun). The only difference between the two circumstances concerns a legislative (or Sentencing Commission) decision about which *label* ("sentencing fact" or "element of a greater crime") to affix to one of the facts, namely, the presence of the gun, that will lead to the greater sentence. Given the identity of circumstances apart from the label, the *****430** jury's traditional factfinding role, and the law's insistence upon treating like cases alike, why should the legislature's labeling choice make an important Sixth Amendment difference?

The Court in *Apprendi*, and now here, concludes that it should not make a difference. The Sixth Amendment's jury trial guarantee applies similarly to both. I agree with the majority's analysis, but not with its conclusion. That is to say, I agree that, classically speaking, the

difference between a traditional sentencing factor and an element of a greater offense often comes down to a legislative choice about which label to affix. But I cannot jump from there to the conclusion that the Sixth Amendment always requires identical treatment of the two scenarios. That jump is fraught with consequences that threaten the fairness of our traditional criminal justice system; it distorts historical sentencing or criminal trial practices; and it upsets settled law on which legislatures have relied in designing punishment systems.

The Justices who have dissented from *Apprendi* have written about many of these matters in other opinions. See 530 U.S., at 523-554, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (O'Connor, J., dissenting); *id.*, at 555-566, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (Breyer, J., dissenting); *Harris v. United States*, 536 U.S. 545, 549-550, 556-569, 153 L. Ed. 2d 524, 122 S. Ct. 2406 (2002) (Kennedy, J.); *id.*, at 569-572, 153 L. Ed. 2d 524, 122 S. Ct. 2406 **[*330]** (Breyer, J., concurring in part and concurring in judgment); *Jones v. United States*, 526 U.S. 227, 254, 264-272, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999) (Kennedy, J., dissenting); *Monge v. California*, 524 U.S. 721, 728-729, 141 L. Ed. 2d 615, 118 S. Ct. 2246 (1998) (O'Connor, J.); *McMillan v. Pennsylvania*, 477 U.S. 79, 86-91, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986) (Rehnquist, C. J.). At the risk of some repetition, I shall set forth several of the most important considerations here. They lead me to conclude that I must again dissent.

I

The majority ignores the adverse consequences inherent in its conclusion. As a result of the majority's rule, sentencing must now take one of three forms, each of which risks either impracticality, unfairness, or harm to the jury trial right the majority purports to strengthen. This circumstance shows that the majority's Sixth Amendment interpretation cannot be right.

A

A first option for legislators is to create a simple, pure or nearly pure "charge offense" or "determinate" sentencing system. See Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, **[**2553]** 17 *Hofstra L. Rev.* 1, 8-9 (1988). In such a system, an indictment would charge a few facts which, taken together, constitute a crime, such as robbery. Robbery would carry a single sentence, say, five years' imprisonment. And every person convicted of robbery would receive that sentence--just as, centuries ago, everyone convicted of almost any serious crime was sentenced to death. See, e.g., Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About Apprendi*, 82 *N. C. L. Rev.* 621, 630 (2004).

Such a system assures uniformity, but at intolerable costs. First, simple determinate sentencing systems impose **[***431]** identical punishments on people who committed their crimes in very different ways. When dramatically different conduct **[*331]** ends up being punished the same way, an injustice has taken place. Simple determinate sentencing has the virtue of treating like cases alike, but it simultaneously fails to treat different cases differently. Some commentators have leveled this charge at sentencing guideline systems themselves. See, e.g., Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 *Am. Crim. L. Rev.* 833, 847 (1992) (arguing that the "most important problem under the [Federal] Guidelines system is not too much disparity, but rather excessive uniformity" and arguing for adjustments, including elimination of mandatory minimums, to make the Guidelines system more responsive to relevant differences). The charge is doubly applicable to simple "pure charge" systems that permit no departures from the prescribed sentences, even in extraordinary cases.

Second, in a world of statutorily fixed mandatory sentences for many crimes, determinate sentencing gives tremendous power to prosecutors to manipulate sentences through their choice of charges. Prosecutors can simply charge, or threaten to charge, defendants with crimes bearing higher mandatory sentences. Defendants, knowing that they will not have a

chance to argue for a lower sentence in front of a judge, may plead to charges that they might otherwise contest. Considering that most criminal cases do not go to trial and resolution by plea bargaining is the norm, the rule of *Apprendi*, to the extent it results in a return to determinate sentencing, threatens serious unfairness. See Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 *Yale L. J.* 1097, 1100-1101 (2001) (explaining that the rule of *Apprendi* hurts defendants by depriving them of sentencing hearings, "the only hearings they were likely to have"; forcing defendants to surrender sentencing issues like drug quantity when they agree to the plea; and transferring power to prosecutors).

[*332] B

A second option for legislators is to return to a system of indeterminate sentencing, such as California had before the recent sentencing reform movement. See *Payne v. Tennessee*, 501 U.S. 808, 820, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991) ("With the increasing importance of probation, as opposed to imprisonment, as a part of the penological process, some States such as California developed the 'indeterminate sentence,' where the time of incarceration was left almost entirely to the penological authorities rather than to the courts"); Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 *Boston College L. Rev.* 255, 267 (2004) ("In the late 1970s, California switched from an indeterminate criminal sentencing scheme to determinate sentencing" (footnote omitted)). Under indeterminate systems, the length of the sentence is entirely or almost entirely within the discretion of the judge or of the parole board, which typically has broad **[**2554]** power to decide when to release a prisoner.

When such systems were in vogue, they were criticized, and rightly so, for producing unfair disparities, including race-based disparities, in the **[***432]** punishment of similarly situated defendants. See, e.g., *ante*, at ____ - ____, 159 L. Ed. 2d, at 420-421 (O'Connor, J., dissenting) (citing sources). The length of time a person spent in prison appeared to depend on "what the judge ate for breakfast" on the day of sentencing, on which judge you got, or on other factors that should not have made a difference to the length of the sentence. See Breyer, *supra*, at ____ - ____, 159 L. Ed. 2d, at 431 (citing congressional and expert studies indicating that, before the United States Sentencing Commission Guidelines were promulgated, punishments for identical crimes in the Second Circuit ranged from 3 to 20 years' imprisonment and that sentences varied depending upon region, gender of the defendant, and race of the defendant). And under such a system, the judge could vary the sentence greatly based upon his findings about how the defendant had committed the crime—findings that might not have been **[*333]** made by a "preponderance of the evidence," much less "beyond a reasonable doubt." See *McMillan*, 477 U.S., at 91, 91 L. Ed. 2d 67, 106 S. Ct. 2411 ("Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all" (citing *Williams v. New York*, 337 U.S. 241, 93 L. Ed. 1337, 69 S. Ct. 1079 (1949))).

Returning to such a system would diminish the "reason" the majority claims it is trying to uphold. *Ante*, at ____, 159 L. Ed. 2d, at 412 (quoting 1 J. Bishop, *Criminal Procedure* § 87, p 55 (2d ed. 1872)). It also would do little to "ensur[e] [the] control" of what the majority calls "the peopl[e]," i.e., the jury, "in the judiciary," *ante*, at ____, 159 L. Ed. 2d, at 415, since "the peopl[e]" would only decide the defendant's guilt, a finding with no effect on the duration of the sentence. While "the judge's authority to sentence" would formally derive from the jury's verdict, the jury would exercise little or no control over the sentence itself. *Ante*, at ____, 159 L. Ed. 2d, at 415. It is difficult to see how such an outcome protects the structural safeguards the majority claims to be defending.

C

A third option is that which the Court seems to believe legislators will in fact take. That is the

option of retaining structured schemes that attempt to punish similar conduct similarly and different conduct differently, but modifying them to conform to *Apprendi's* dictates. Judges would be able to depart *downward* from presumptive sentences upon finding that mitigating factors were present, but would not be able to depart *upward* unless the prosecutor charged the aggravating fact to a jury and proved it beyond a reasonable doubt. The majority argues, based on the single example of Kansas, that most legislatures will enact amendments along these lines in the face of the oncoming *Apprendi* train. See *ante*, at _____ - _____, 159 L. Ed. 2d, at 417 (citing *State v. Gould*, 271 Kan. 394, 404-414, 23 P.3d 801, 809-814 (2001); Act of May 29, 2002, ch. 170, 2002 Kan. Sess. Laws pp 1018-1023 (codified at Kan. Stat. Ann. § 21-4718 (2003 Cum. Supp.)); Brief for Kansas Appellate Defender Office as *Amicus Curiae* 3-7). It is therefore **[*334]** worth exploring how this option could work in practice, as well as the assumptions on which it depends.

[*433]** 1

This option can be implemented in one of two ways. The first way would be for legislatures to subdivide each crime into a list of complex crimes, each of which would be defined to include commonly found sentencing factors such as drug quantity, type **[**2555]** of victim, presence of violence, degree of injury, use of gun, and so on. A legislature, for example, might enact a robbery statute, modeled on robbery sentencing guidelines, that increases punishment depending upon (1) the nature of the institution robbed, (2) the (a) presence of, (b) brandishing of, (c) other use of, a firearm, (3) making of a death threat, (4) presence of (a) ordinary, (b) serious, (c) permanent or life threatening, bodily injury, (5) abduction, (6) physical restraint, (7) taking of a firearm, (8) taking of drugs, (9) value of property loss, etc. Cf. United States Sentencing Commission, Guidelines Manual § 2B3.1 (Nov. 2003) (hereinafter USSG).

This possibility is, of course, merely a highly calibrated form of the "pure charge" system discussed in Part I-A, *supra*. And it suffers from some of the same defects. The prosecutor, through control of the precise charge, controls the punishment, thereby marching the sentencing system directly away from, not toward, one important guideline goal: rough uniformity of punishment for those who engage in roughly the same *real* criminal conduct. The artificial (and consequently unfair) nature of the resulting sentence is aggravated by the fact that prosecutors must charge all relevant facts about the way the crime was committed before a presentence investigation examines the criminal conduct, perhaps before the trial itself, *i.e.*, before many of the facts relevant to punishment are known.

This "complex charge offense" system also prejudices defendants who seek trial, for it can put them in the untenable **[*335]** position of contesting material aggravating facts in the guilt phases of their trials. Consider a defendant who is charged, not with mere possession of cocaine, but with the specific offense of possession of more than 500 grams of cocaine. Or consider a defendant charged, not with murder, but with the new crime of murder using a machete. Or consider a defendant whom the prosecution wants to claim was a "supervisor," rather than an ordinary gang member. How can a Constitution that guarantees due process put these defendants, as a matter of course, in the position of arguing, "I did not sell drugs, and if I did, I did not sell more than 500 grams" or, "I did not kill him, and if I did, I did not use a machete," or "I did not engage in gang activity, and certainly not as a supervisor" to a single jury? See *Apprendi*, 530 U.S., at 557-558, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (Breyer, J., dissenting); *Monge*, 524 U.S., at 729, 141 L. Ed. 2d 615, 118 S. Ct. 2246. The system can tolerate this kind of problem up to a point (consider the defendant who wants to argue innocence, and, in the alternative, second-degree, not first-degree, murder). But a rereading of the many distinctions made in a typical robbery guideline, see *supra*, at _____, 159 L. Ed. 2d, at 433, suggests that an effort to incorporate any real set of guidelines in a complex statute would reach well beyond that point.

The majority announces that there really is no problem here because "States may continue to

offer judicial *****434** factfinding as a matter of course to all defendants who plead guilty" and defendants may "stipulat[e] to the relevant facts or consen[t] to judicial factfinding." *Ante*, at _____, 159 L. Ed. 2d, at 418. The problem, of course, concerns defendants who do not want to plead guilty to those elements that, until recently, were commonly thought of as sentencing factors. As to those defendants, the fairness problem arises because States may very well decide that they will *not* permit defendants to carve subsets of facts out of the new, *Apprendi*-required 17-element robbery crime, seeking a judicial determination as to some of those facts and a jury determination as to others. Instead, States may simply require defendants to plead guilty ****2556** to all ***336** 17 elements or proceed with a (likely prejudicial) trial on all 17 elements.

The majority does not deny that States may make this choice; it simply fails to understand *why* any State would want to exercise it. *Ante*, at _____, n 12, 159 L. Ed. 2d, at 418. The answer is, as I shall explain in a moment, that the alternative may prove too expensive and unwieldy for States to provide. States that offer defendants the option of judicial factfinding as to some facts (*i.e.*, sentencing facts), say, because of fairness concerns, will also have to offer the defendant a second sentencing jury--just as Kansas has done. I therefore turn to that alternative.

2

The second way to make sentencing guidelines *Apprendi*-compliant would be to require at least two juries for each defendant whenever aggravating facts are present: one jury to determine guilt of the crime charged, and an additional jury to try the disputed facts that, if found, would aggravate the sentence. Our experience with bifurcated trials in the capital punishment context suggests that requiring them for run-of-the-mill sentences would be costly, both in money and in judicial time and resources. Cf. Kozinski & Gallagher, *Death: The Ultimate Run-On Sentence*, 46 *Case W. Res. L. Rev.* 1, 13-15, and n 64 (1995) (estimating the costs of each capital case at around \$1 million more than each noncapital case); Tabak, *How Empirical Studies Can Affect Positively the Politics of the Death Penalty*, 83 *Cornell L. Rev.* 1431, 1439-1440 (1998) (attributing the greater cost of death penalty cases in part to bifurcated proceedings). In the context of noncapital crimes, the potential need for a second indictment alleging aggravating facts, the likely need for formal evidentiary rules to prevent prejudice, and the increased difficulty of obtaining relevant sentencing information, all will mean greater complexity, added cost, and further delay. See Part V, *infra*. Indeed, cost and delay could lead legislatures ***337** to revert to the complex charge offense system described in Part I-C-1, *supra*.

The majority refers to an *amicus curiae* brief filed by the Kansas Appellate Defender Office, which suggests that a two-jury system has proved workable in Kansas. *Ante*, at _____ - _____, 159 L. Ed. 2d, at 417. And that may be so. But in all likelihood, any such workability reflects an uncomfortable fact, a fact at which the majority hints, *ante*, at _____, 159 L. Ed. 2d, at 417-418, but whose constitutional implications it does not seem to grasp. The uncomfortable fact that could make the system seem workable--even desirable *****435** in the minds of some, including defense attorneys--is called "plea bargaining." See Bibas, 110 *Yale L. J.*, at 1150, and n 330 (reporting that in 1996, fewer than 4% of adjudicated state felony defendants have jury trials, 5% have bench trials, and 91% plead guilty). See also *ante*, at _____, 159 L. Ed. 2d, at 418 (making clear that plea bargaining applies). The Court can announce that the Constitution requires at least two jury trials for each criminal defendant--one for guilt, another for sentencing--but only because it knows full well that more than 90% of defendants will not go to trial even once, much less insist on two or more trials.

What will be the consequences of the Court's holding for the 90% of defendants who do not go to trial? The truthful answer is that we do not know. Some defendants may receive bargaining advantages if the increased cost of the "double jury trial" guarantee makes prosecutors more willing to cede certain sentencing issues to the defense. Other defendants

may be hurt if a "single-jury-decides-all" approach makes them more reluctant to risk a trial--perhaps because they want to argue **[**2557]** that they did not know what was in the cocaine bag, that it was a small amount regardless, that they were unaware a confederate had a gun, etc. See *Bibas*, 110 Yale L. J., at 1100 ("Because for many defendants going to trial is not a desirable option, they are left without any real hearings at all"); *id.*, at 1151 ("The trial right does little good when most defendants do not go to trial").

[*338] At the least, the greater expense attached to trials and their greater complexity, taken together in the context of an overworked criminal justice system, will likely mean, other things being equal, fewer trials and a greater reliance upon plea bargaining--a system in which punishment is set not by judges or juries but by advocates acting under bargaining constraints. At the same time, the greater power of the prosecutor to control the punishment through the charge would likely weaken the relation between real conduct and real punishment as well. See, e.g., *Schulhofer*, 29 Am. Crim. L. Rev., at 845 (estimating that evasion of the proper sentence under the Federal Guidelines may now occur in 20%-35% of all guilty plea cases). Even if the Court's holding does not further embed plea-bargaining practices (as I fear it will), its success depends upon the existence of present practice. I do not understand how the Sixth Amendment could *require* a sentencing system that will work in practice only if no more than a handful of defendants exercise their right to a jury trial.

The majority's only response is to state that "bargaining over elements . . . probably favors the defendant," *ante*, at ____, 159 L. Ed. 2d, at 418, adding that many criminal defense lawyers favor its position, *ante*, at ____, 159 L. Ed. 2d, at 419. But the basic problem is not one of "fairness" to defendants or, for that matter, "fairness" to prosecutors. Rather, it concerns the greater fairness of a sentencing system that a more uniform correspondence between real criminal conduct and real punishment helps to create. At a minimum, a two-jury system, by preventing a judge from taking account of an aggravating fact without the prosecutor's acquiescence, would undercut, if not nullify, legislative efforts to ensure through guidelines that punishments **[***436]** reflect a convicted offender's real criminal conduct, rather than that portion of the offender's conduct that a prosecutor decides to charge and prove.

Efforts to tie real punishment to real conduct are not new. They are embodied in well-established pre-guidelines sentencing **[*339]** practices--practices under which a judge, looking at a presentence report, would seek to tailor the sentence in significant part to fit the criminal conduct in which the offender actually engaged. For more than a century, questions of *punishment* (not those of guilt or innocence) have reflected determinations made, not only by juries, but also by judges, probation officers, and executive parole boards. Such truth-seeking determinations have rested upon both adversarial and non-adversarial processes. The Court's holding undermines efforts to reform these processes, for it means that legislatures cannot *both* permit judges to base sentencing upon real conduct *and* seek, through guidelines, to make the results more uniform.

In these and other ways, the two-jury system would work a radical change in pre-existing criminal law. It is not surprising that this Court has never previously suggested that the Constitution--outside the unique context of the death penalty--might require bifurcated jury-based sentencing. And it is the impediment the Court's holding poses to legislative efforts to achieve that greater systematic fairness that casts doubt on its constitutional validity.

[2558]** D

Is there a fourth option? Perhaps. Congress and state legislatures might, for example, rewrite their criminal codes, attaching astronomically high sentences to each crime, followed by long lists of mitigating facts, which, for the most part, would consist of the absence of aggravating facts. *Apprendi*, 530 U.S., at 541-542, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (O'Connor, J., dissenting) (explaining how legislatures can evade the majority's rule by making yet another

labeling choice). But political impediments to legislative action make such rewrites difficult to achieve; and it is difficult to see why the Sixth Amendment would require legislatures to undertake them.

It may also prove possible to find combinations of, or variations upon, my first three options. But I am unaware of any [*340] variation that does not involve (a) the shift of power to the prosecutor (weakening the connection between real conduct and real punishment) inherent in any charge offense system, (b) the lack of uniformity inherent in any system of pure judicial discretion, or (c) the complexity, expense, and increased reliance on plea bargains involved in a "two-jury" system. The simple fact is that the design of any fair sentencing system must involve efforts to make practical compromises among competing goals. The majority's reading of the Sixth Amendment makes the effort to find those compromises--already difficult--virtually impossible.

II

The majority rests its conclusion in significant part upon a claimed historical (and therefore constitutional) imperative. According to the majority, the rule it applies in this case is rooted in "longstanding tenets of common-law criminal jurisprudence," *ante*, at _____, 159 L. Ed. 2d, at 412: that every accusation against a [***437] defendant must be proved to a jury and that "an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason," *ibid.* (quoting Bishop, Criminal Procedure § 87, at 55). The historical sources upon which the majority relies, however, do not compel the result it reaches. See *ante*, at _____, 159 L. Ed. 2d, at 425 (O'Connor, J., dissenting); *Apprendi*, 530 U.S., at 525-528, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (O'Connor, J., dissenting). The quotation from Bishop, to which the majority attributes great weight, stands for nothing more than the "unremarkable proposition" that where a legislature passes a statute setting forth heavier penalties than were available for committing a common-law offense and specifying those facts that triggered the statutory penalty, "a defendant could receive the greater statutory punishment only if the indictment expressly charged and the prosecutor proved the facts that made up the statutory offense, as opposed to simply those facts that made up [*341] the common-law offense." *Id.*, at 526, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (O'Connor, J., dissenting) (characterizing a similar statement of the law in J. Archbold, Pleading and Evidence in Criminal Cases 51, 188 (15th ed. 1862)).

This is obvious when one considers the problem that Bishop was addressing. He provides as an example "statutes whereby, when [a common-law crime] is committed with a particular intent, or with a particular weapon, or the like, it is subjected to a particular corresponding punishment, heavier than that for" the simple common-law offense (though, of course, his concerns were not "limited to that example," *ante*, at _____ - _____, n 5, 159 L. Ed. 2d, at 412-413. Bishop, *supra*, § 82, at 51-52 (discussing the example of common assault and enhanced-assault statutes, e.g., "assaults committed with the intent to rob"). That indictments historically had to charge all of the statutorily labeled elements [**2559] of the offense is a proposition on which all can agree. See *Apprendi*, *supra*, at 526-527, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (O'Connor, J., dissenting). See also J. Archbold, Pleading and Evidence in Criminal Cases 44 (11th ed. 1849) ("[E]very fact or circumstance which is a necessary ingredient in the offence must be set forth in the indictment" so that "there may be no doubt as to the judgment which should be given, if the defendant be convicted"); 1 T. Starkie, Criminal Pleading 68 (2d ed. 1822) (the indictment must state "the criminal nature and degree of the offence, which are conclusions of law from the facts; and also the particular facts and circumstances which render the defendant guilty of that offence").

Neither Bishop nor any other historical treatise writer, however, disputes the proposition that judges historically had discretion to vary the sentence, within the range provided by the statute, based on facts not proved at the trial. See Bishop, *supra*, § 85, at 54 ("[W]ithin the

limits of any discretion as to the punishment which the law may have allowed, the judge, when he pronounces sentence, may suffer his discretion to be influenced by matter shown in aggravation or mitigation, not covered by the allegations of the indictment"); [*342] K. Stith & J. Cabranes, *Fear of Judging: Sentencing Guidelines* [***438] in the Federal Courts 9 (1998). The modern history of pre-guidelines sentencing likewise indicates that judges had broad discretion to set sentences within a statutory range based on uncharged conduct. Usually, the judge based his or her sentencing decision on facts gleaned from a presentence report, which the defendant could dispute at a sentencing hearing. In the federal system, for example, Federal Rule of Criminal Procedure 32 provided that probation officers, who are employees of the Judicial Branch, prepared a presentence report for the judge, a copy of which was generally given to the prosecution and defense before the sentencing hearing. See Stith & Cabranes, *supra*, at 79-80, 221, note 5. See also *ante*, at _____, 159 L. Ed. 2d, at 420-421 (O'Connor, J., dissenting) (describing the State of Washington's former indeterminate sentencing law).

In this case, the statute provides that kidnaping may be punished by up to 10 years' imprisonment. Wash. Rev. Code Ann. §§ 9A.40.030(3), 9A.20.021(1)(b) (2000). Modern structured sentencing schemes like Washington's do not change the statutorily fixed maximum penalty, nor do they purport to establish new elements for the crime. Instead, they undertake to structure the previously unfettered discretion of the sentencing judge, channeling and limiting his or her discretion even *within* the statutory range. (Thus, contrary to the majority's arguments, *ante*, at _____ - _____, 159 L. Ed. 2d, at 417, kidnapers in the State of Washington know that they risk up to 10 years' imprisonment, but they also have the benefit of additional information about how long--within the 10-year maximum--their sentences are likely to be, based on how the kidnaping was committed.)

Historical treatises do not speak to such a practice because it was not done in the 19th century. Cf. *Jones*, 526 U.S., at 244, 143 L. Ed. 2d 311, 119 S. Ct. 1215 ("[T]he scholarship of which we are aware does not show that a question exactly like this one was ever raised and resolved in the period before the framing"). This makes [*343] sense when one considers that, prior to the 19th century, the prescribed penalty for felonies was often death, which the judge had limited, and sometimes no, power to vary. See Lillquist, 82 N. C. L. Rev., at 628-630. The 19th century saw a movement to a rehabilitative mode of punishment in which prison terms became a norm, shifting power to the judge to impose a longer or shorter term within the statutory maximum. See [**2560] *ibid*. The ability of legislatures to guide the judge's discretion by designating presumptive ranges, while allowing the judge to impose a more or less severe penalty in unusual cases, was therefore never considered. To argue otherwise, the majority must ignore the significant differences between modern structured sentencing schemes and the history on which it relies to strike them down. And while the majority insists that the historical sources, particularly Bishop, should not be "limited" to the context in which they were written, *ante*, at _____ - _____, n 5, 159 L. Ed. 2d, at 412-413, it has never explained why the Court *must* transplant those discussions to the very different context of sentencing schemes designed to structure judges' discretion within a statutory sentencing range.

Given history's silence on the question of laws that structure a judge's [***439] discretion within the range provided by the legislatively labeled maximum term, it is not surprising that our modern, *pre-Apprendi* cases made clear that legislatures could, within broad limits, distinguish between "sentencing facts" and "elements of crimes." See *McMillan*, 477 U.S., at 85-88, 91 L. Ed. 2d 67, 106 S. Ct. 2411. By their choice of label, legislatures could indicate whether a judge or a jury must make the relevant factual determination. History does not preclude legislatures from making this decision. And, as I argued in Part I, *supra*, allowing legislatures to structure sentencing in this way has the dual effect of enhancing and giving meaning to the Sixth Amendment's jury trial right as to core crimes, while affording additional due process to defendants in the form of sentencing [*344] hearings before judges--hearings the majority's rule will eliminate for many.

Is there a risk of unfairness involved in permitting Congress to make this labeling decision? Of course. As we have recognized, the "tail" of the sentencing fact might "wa[g] the dog of the substantive offense." *McMillan, supra*, at 88, 91 L. Ed. 2d 67, 106 S. Ct. 2411. Congress might permit a judge to sentence an individual for murder though convicted only of making an illegal lane change. See *ante*, at _____, 159 L. Ed. 2d, at 415 (majority opinion). But that is the kind of problem that the Due Process Clause is well suited to cure. *McMillan* foresaw the possibility that judges would have to use their own judgment in dealing with such a problem; but that is what judges are there for. And, as Part I, *supra*, makes clear, the alternatives are worse--not only practically, but, although the majority refuses to admit it, constitutionally as well.

Historic practice, then, does not compel the result the majority reaches. And constitutional concerns counsel the opposite.

III

The majority also overlooks important institutional considerations. Congress and the States relied upon what they believed was their constitutional power to decide, within broad limits, whether to make a particular fact (a) a sentencing factor or (b) an element in a greater crime. They relied upon *McMillan* as guaranteeing the constitutional validity of that proposition. They created sentencing reform, an effort to change the criminal justice system so that it reflects systematically not simply upon guilt or innocence but also upon what should be done about this now-guilty offender. Those efforts have spanned a generation. They have led to state sentencing guidelines and the Federal Sentencing Guideline system. *E.g., ante*, at _____ - _____, 159 L. Ed. 2d, at 420-421 (O'Connor, J., dissenting) (describing sentencing reform in the State of Washington). These systems are imperfect and they yield far from perfect results, but I cannot believe the Constitution **[*345]** forbids the state legislatures and Congress to adopt such systems and to try to improve them **[**2561]** over time. Nor can I believe that the Constitution hamstringing legislatures in the way that Justice O'Connor and I have discussed.

IV

Now, let us return to the question I posed at the outset. Why does the Sixth Amendment permit a jury trial right (in respect to a particular fact) **[***440]** to depend upon a legislative labeling decision, namely, the legislative decision to label the fact a *sentencing fact*, instead of an *element of the crime*? The answer is that the fairness and effectiveness of a sentencing system, and the related fairness and effectiveness of the criminal justice system itself, depends upon the legislature's possessing the constitutional authority (within due process limits) to make that labeling decision. To restrict radically the legislature's power in this respect, as the majority interprets the Sixth Amendment to do, prevents the legislature from seeking sentencing systems that are consistent with, and indeed may help to advance, the Constitution's greater fairness goals.

To say this is not simply to express concerns about fairness to defendants. It is also to express concerns about the serious practical (or impractical) changes that the Court's decision seems likely to impose upon the criminal process; about the tendency of the Court's decision to embed further plea bargaining processes that lack transparency and too often mean nonuniform, sometimes arbitrary, sentencing practices; about the obstacles the Court's decision poses to legislative efforts to bring about greater uniformity between real criminal conduct and real punishment; and ultimately about the limitations that the Court imposes upon legislatures' ability to make democratic legislative decisions. Whatever the faults of guidelines systems--and there are many--they are more likely to find their cure in legislation emerging from the experience of, and discussion among, all elements of the **[*346]** criminal justice community, than in a virtually unchangeable constitutional decision of this

Court.

V

Taken together these three sets of considerations, concerning consequences, concerning history, concerning institutional reliance, leave me where I was in *Apprendi*, *i.e.*, convinced that the Court is wrong. Until now, I would have thought the Court might have limited *Apprendi* so that its underlying principle would not undo sentencing reform efforts. Today's case dispels that illusion. At a minimum, the case sets aside numerous state efforts in that direction. Perhaps the Court will distinguish the Federal Sentencing Guidelines, but I am uncertain how. As a result of today's decision, federal prosecutors, like state prosecutors, must decide what to do next, how to handle tomorrow's case.

Consider some of the matters that federal prosecutors must know about, or guess about, when they prosecute their next case: (1) Does today's decision apply in full force to the Federal Sentencing Guidelines? (2) If so, must the initial indictment contain all sentencing factors, charged as "elements" of the crime? (3) What, then, are the evidentiary rules? Can the prosecution continue to use, say presentence reports, with their conclusions reflecting layers of hearsay? Cf. *Crawford v. Washington*, 541 U.S. ___, ___, ___-___, 541 U.S. 36, 158 L. Ed. 2d 177, 124 S. Ct. 1354 (2004) (clarifying the Sixth Amendment's requirement of confrontation with respect to testimonial hearsay). Are the numerous cases of this Court holding that a sentencing judge may consider virtually any reliable information still good law when juries, not judges, are **[**2562]** required to determine **[***441]** the matter? See, *e.g.*, *United States v. Watts*, 519 U.S. 148, 153-157, 136 L. Ed. 2d 554, 117 S. Ct. 633 (1997) (*per curiam*) (evidence of conduct of which the defendant has been acquitted may be considered at sentencing). Cf. *Witte v. United States*, 515 U.S. 389, 399-401, 132 L. Ed. 2d 351, 115 S. Ct. 2199 (1995) (evidence of uncharged criminal conduct used in determining sentence). (4) How are juries to deal with highly complex **[*347]** or open-ended Sentencing Guidelines obviously written for application by an experienced trial judge? See, *e.g.*, USSG § 3B1.1 (requiring a greater sentence when the defendant was a leader of a criminal activity that involved four or more participants or was "*otherwise extensive*" (emphasis added)); §§ 3D1.1-3D1.2 (highly complex "multiple count" rules); § 1B1.3 (relevant conduct rules).

Ordinarily, this Court simply waits for cases to arise in which it can answer such questions. But this case affects tens of thousands of criminal prosecutions, including federal prosecutions. Federal prosecutors will proceed with those prosecutions subject to the risk that all defendants in those cases will have to be sentenced, perhaps tried, anew. Given this consequence and the need for certainty, I would not proceed further piecemeal; rather, I would call for further argument on the ramifications of the concerns I have raised. But that is not the Court's view.

For the reasons given, I dissent.

REFERENCES: ♦ [Go To Full Text Opinion](#)

♦ [Go to Supreme Court Brief\(s\)](#)

♦ [Go to Supreme Court Transcripts](#)

[21A Am Jur 2d, Criminal Law §§ 1077, 1079](#); [75A Am Jur 2d, Trial §§ 732, 733, 840, 841](#)

[USCS, Constitution, Amendments 6, 14](#)

L Ed Digest, Jury § 33

L Ed Index, Jury and Jury Trial; Sentence or Punishment

Annotation References

Limitations, under Federal Constitution's guaranty of due process of law, as to consideration of personal information about accused in imposition of initial sentence for criminal offense-- federal cases. 63 L Ed 2d 872.

Due process requirements of presentence procedure following conviction. 3 L Ed 2d 1808.

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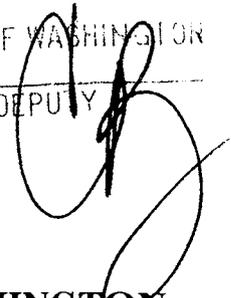
APPENDIX “B”

Court of Appeals Opinion
State v. Brian Eggleston

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STATE OF WASHINGTON
BY _____
DEPUTY



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

STATE OF WASHINGTON,

Respondent,

v.

BRIAN EGGLESTON,

Appellant.

No. 29915-1-II

PART-PUBLISHED OPINION

ARMSTRONG, J. -- Brian Eggleston appeals his convictions of second degree murder and first degree assault following shootings that occurred during the execution of a search warrant at his residence on October 16, 1995. We affirm the convictions but vacate Eggleston's sentences and remand for resentencing.

FACTS

In August 1995, Pierce County Deputy Sheriff Ben Benson began investigating Eggleston's marijuana dealing based on information he received from Steve McQueen. McQueen said that Eggleston's brother was a deputy sheriff and was present during one buy at Eggleston's house. Benson confirmed that Deputy Sheriff Brent Eggleston shared his brother's address.

Benson then arranged for McQueen to buy marijuana from Eggleston. In early October 1995, McQueen bought marijuana from Eggleston twice. On October 9, Benson obtained a

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warrant to search Eggleston's home. He decided to serve the warrant early on October 16, before Eggleston was fully awake and before children arrived at the elementary school across the street from the Eggleston residence.

The entry team included Deputies John Bananola, Warren Dogeagle, Jeff Reigle, John Reding, Cynthia Fajardo, Martin Kapsh, and Bruce Larson. Benson was to provide perimeter surveillance. The team wore marked jackets that identified them as sheriff deputies. Bananola wore a reflective vest that had four inch letters stating "Sheriff" on the front and back. He also had long hair and facial hair because of his undercover work. Reding wore a vest with "Sheriff" on the front and back, a helmet with a face shield, and black pants. Dogeagle wore a hooded mask because he was working undercover on a case involving heroin dealers in the same neighborhood. He also wore a cap with a sheriff's insignia and a green raid jacket with "Sheriff" on the front and back. Fajardo wore a black uniform that said "Narcotics" and her name on the front, and Reigle wore a green raid jacket with "Sheriff" on the front and back.

The deputies entered the unlocked back door of the residence using the knock and announce procedure. Reding went in first and saw Thomas Eggleston, Eggleston's father, on the couch in the living room. Bananola followed and turned down a hallway. As Reigle prepared to follow Bananola, gunfire erupted. Reigle saw Bananola heading toward the front door of the residence in a low position. Reigle then saw Linda Eggleston open a door into the kitchen and look at him. He heard Thomas Eggleston tell her to put the gun down.

While covering Thomas Eggleston in the living room, Reding heard the shots and turned to see Bananola coming from the hallway in an upright position and then start to stumble. Reding retreated toward the back door and saw Eggleston move toward the living room with a gun in his hands. Reding fired three shots at him.

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As the deputies withdrew, Dogeagle heard Bananola say, "Put the gun down. Police." Report of Proceedings (RP) at 4419-21. Dogeagle was still in the kitchen when Eggleston came through a door and started shooting at him. Dogeagle returned fire and Eggleston fell backward.

Reding returned to the van to retrieve a ballistic shield and entered the house with the other deputies behind him. They saw Bananola lying face down on the living room floor. He had been shot seven times, with three shots to the head and shots to the shoulder, arm, chest, and foot. Eggleston suffered five gunshot wounds, including wounds to his chest, lower right side, abdomen, groin and knee. Eggleston recovered; Bananola died.

In addition to evidence of the shootings, Tacoma police officers found drugs, drug paraphernalia and cash in Eggleston's bedroom.

The State charged Eggleston by amended information with aggravated murder in the first degree, alleging that he knew or should have known that Bananola was a law enforcement officer performing his duties at the time of his death; assault in the first degree based on his shooting at Dogeagle and/or Reding; unlawful delivery of a controlled substance (marijuana) on October 7, 1995; unlawful possession of a controlled substance with intent to deliver (marijuana) on October 16, 1995; unlawful delivery of a controlled substance (marijuana) on October 5, 1995; and unlawful possession of a controlled substance (mescaline) on October 16, 1995. Several of these counts included sentence enhancements.

These charges resulted in three trials. The first jury returned guilty verdicts on all counts except count I, murder in the first degree. The jury hung on the murder count and the court declared a mistrial. The trial judge sentenced Eggleston on the five counts for which he had been convicted.

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The State tried Eggleston again on the first degree murder charge, and the jury found him guilty of the lesser included offense of murder in the second degree. The court had explicitly instructed that if the jury found Eggleston guilty of murder in the first degree, it was to fill out two special verdict forms: one on the aggravating factor (whether he knew or reasonably should have known that Bananola was an officer), and another on the weapons enhancement (whether he used a deadly weapon). In contrast, if the jury found Eggleston guilty of murder in the second degree, it was to fill out only the weapons enhancement special verdict form. Despite its acquittal of the first degree murder charge, the jury answered “no” to the aggravating circumstance special verdict. Clerk’s Papers (CP) at 1495.

Further, the aggravating factor special verdict form expressly stated:

We, the jury, *having found the defendant guilty of Murder in the First Degree*, make the following answer to the question submitted by the court:

Question: Has the State proven the existence of the following aggravating circumstance beyond a reasonable doubt?

That Deputy John Bananola was a law enforcement officer who was performing his official duties at the time of the act resulting in death and that Deputy John Bananola was known or reasonably should have been known by the defendant to be such at the time of the killing.

Answer: No.

CP at 1495 (emphasis added).

On appeal, we reversed Eggleston’s murder and assault convictions but affirmed his drug convictions. *State v. Eggleston*, No. 22085-7-II, No. 23499-8-II, 2001 WL 1077846 (Wash. Ct. App. Sept. 4, 2001) (unpublished). We found error in the aggressor and provocation instructions; we also found juror misconduct in the second trial and error in certain evidentiary rulings.

At Eggleston’s third trial, the State’s reconstruction expert, Rod Englert, opined that Eggleston fired into Bananola’s head as Bananola lay on the living room floor. The defense

reconstruction expert, Kay Sweeney, opined that Eggleston was in the hallway when he fired and killed Bananola. In December 2002, the jury again convicted Eggleston of second degree murder and first degree assault.

In this appeal, Eggleston argues that the second jury's verdict and answer to the special verdict barred the State from presenting evidence in his third trial that he knew Bananola was a police officer or that he premeditated the murder. He also questions the self-defense instructions; various evidence rulings; the dismissal of three jurors; jury misconduct; resentencing on his drug convictions; and his exceptional sentence.

ANALYSIS

I. COLLATERAL ESTOPPEL

Eggleston argues that the collateral estoppel component of the double jeopardy clause precluded the State from introducing evidence that he knew Bananola was an officer performing official duties because previous juries acquitted him of first degree murder and the aggravating factor after being presented with that evidence.¹

A. Collateral Estoppel as a Component of Double Jeopardy Clause

The United States and Washington Constitutions' double jeopardy clauses are "identical in thought, substance, and purpose." *State v. Schoel*, 54 Wn.2d 388, 391, 341 P.2d 481 (1959); see WASH. CONST. art. I, § 9; U.S. CONST., amend. V. They both "protect against multiple punishments for the same offense, as well as against a subsequent prosecution for the same

¹ At the first and second trials, the State argued that Eggleston knew the officers were police officers and, therefore, fired to protect his drug operations. Because Eggleston's argument that the drug evidence should have been barred by collateral estoppel is inextricably linked to his argument that evidence of knowledge should have been excluded as well, our discussion of evidence of knowledge necessarily includes the drug evidence. Thus, we do not discuss it separately.

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offense after acquittal or conviction.” *State v. Graham*, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005) (quoting *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004)). Where the language of the state constitution is similar to that of the federal constitution, we give the same interpretation to the state constitutional provision as the United States Supreme Court has given the federal constitution. *State v. Linton*, 122 Wn. App. 73, 76, 93 P.3d 183 (2004) (citing *Schoel*, 54 Wn.2d at 391), *review granted*, 153 Wn.2d 1017 (2005).

The doctrine of collateral estoppel is embodied in the constitutional guaranty against double jeopardy. *Ashe v. Swenson*, 397 U.S. 436, 442-43, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). Collateral estoppel means that when an issue of ultimate fact has once been determined by a “valid and final judgment,” that issue cannot be litigated again between the same parties in any future lawsuit. *Ashe*, 397 U.S. at 443. But it does not always bar the later use of evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted. *See Dowling v. United States*, 493 U.S. 342, 350, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990).

Collateral estoppel in criminal cases is “not to be applied with a hypertechnical and archaic approach . . . but with realism and rationality.” *Ashe*, 397 U.S. at 444. It exists where “a fact necessarily determined in the defendant’s favor by his earlier acquittal [makes] his conviction on the challenged second trial . . . impossible unless the fact could be relitigated and determined adversely to the defendant.” *United States v. James*, 109 F.3d 597, 601 (9th Cir. 1997) (quoting *Pettaway v. Plummer*, 943 F.2d 1041, 1046 (9th Cir. 1991)), *overruled on other grounds*, *Santamaria v. Horsley*, 133 F.3d 1242, 1245 (1998); *United States v. Head*, 697 F.2d 1200, 1205 (4th Cir. 1982). In contrast, “double jeopardy guarantees are not engaged by collateral estoppel which, if applied, would merely restrict proof but not make conviction impossible.” *James*, 109 F.3d at 601 (quoting *Pettaway*, 943 F.2d at 1046). The preclusive

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effect of a jury's verdict is a question of law that we review de novo. *See State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996) (stating that we review issues of law de novo).

The State argues that Eggleston must satisfy the collateral estoppel test as laid out in *State v. Tili*, 148 Wn.2d 350, 361, 60 P.3d 1192 (2003). There, the court cited a collateral estoppel test, in which the court held that each of the following questions must be answered affirmatively before a court applies collateral estoppel:

- (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question?
- (2) Was there a final judgment on the merits?
- (3) Was the party against whom the plea of collateral estoppel is asserted a party or in privity with the party to the prior adjudication?
- (4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied?

Tili, 148 Wn.2d at 361 (citing *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983)).

Only factor (1) is at issue here, whether the third jury necessarily decided the same issue the first jury decided. Because Eggleston analyzes the issue within the framework of federal law and we have found no Washington case on point, we resolve the question on the basis of the federal cases.

B. Relitigating Ultimate Facts

After a jury determines an issue by its verdict, the State cannot “constitutionally hale [a defendant] before a new jury to litigate that issue again.” *Ashe*, 397 U.S. at 446. In *Ashe v. Swenson*, three or four armed and masked men robbed six men who were playing poker. *Ashe*, 397 U.S. at 437. The State charged Ashe with the robbery of one of the victims. *Ashe*, 397 U.S. at 438. At trial, the judge instructed the jury that if it found that Ashe was one of the participants in the robbery, he was guilty even if he had not personally robbed the victim. *Ashe*, 397 U.S. at 439.

A jury acquitted Ashe, and the State then charged and convicted him of robbing another one of the previously named victims. *Ashe*, 397 U.S. at 439. Applying collateral estoppel, the Supreme Court reversed, holding that Ashe's acquittal in the first trial foreclosed the second trial because the acquittal verdict could have meant only that the jury was unable to conclude beyond a reasonable doubt that Ashe was one of the bandits. *Ashe*, 397 U.S. at 445. And to convict at the second trial, the jury would have had to reach a conclusion "directly contrary" to the first jury's decision. *Dowling*, 493 U.S. at 348 (citing *Ashe*, 397 U.S. at 445).

The Supreme Court limited *Ashe* in *Dowling* where it held that acquittal in a criminal case does not preclude the prosecution from offering evidence from the acquittal trial in a later action if the ultimate fact issues are not the same and the government does not have to prove beyond a reasonable doubt in the second trial the very issue it failed to prove beyond a reasonable doubt in the first trial. *Dowling*, 493 U.S. at 348-49. Furthermore, evidence tending to prove an issue is admissible when an acquittal on a criminal charge in an earlier proceeding did not necessarily represent a jury determination of that issue. *See Dowling*, 493 U.S. at 350.

A jury convicted Dowling of robbing a bank while wearing a ski mask and carrying a pistol after the government introduced testimony from a woman who claimed that Dowling, similarly masked and armed, was one of two intruders who entered her home two weeks after the bank robbery--even though Dowling had previously been acquitted of the charges in that case. *Dowling*, 493 U.S. at 344-45. The government relied on Federal Rules of Evidence 404(b), which provides that evidence of other crimes, wrongs, or acts may be admissible against a defendant for purposes other than character evidence. *See Dowling*, 493 U.S. 345. It used the woman's testimony to strengthen its identification of Dowling as the bank robber and to link him to another person implicated in the bank robbery. *Dowling*, 493 U.S. 345.

The Supreme Court held that admitting the woman's testimony did not violate the collateral estoppel component of the double jeopardy clause because the prior acquittal did not determine an issue of ultimate fact actually decided in the bank robbery case. *Dowling*, 493 U.S. at 348. While *Dowling*'s previous acquittal established that there was a "reasonable doubt" as to whether he was the masked man who entered the woman's house, in the context of the robbery trial, the government did not have to prove that he was one of the intruders beyond a reasonable doubt. *Dowling*, 493 U.S. at 348. The Court reasoned that because a jury might reasonably conclude that *Dowling* was the man who entered the woman's home, even if it did not believe beyond a reasonable doubt that he committed the crimes charged at the first trial, the collateral estoppel component of the double jeopardy clause was inapposite.² *Dowling*, 493 U.S. at 349.

Later, in *Santamaria v. Horsely*, the Ninth Circuit clarified that "collateral estoppel does not 'exclude in all circumstances . . . relevant and probative evidence that is otherwise admissible under the Rules of Evidence.'" *Santamaria v. Horsely*, 133 F.3d 1242, 1247 (9th Cir. 1998) (citing *Dowling*, 493 U.S. at 348). In that case, a jury found a defendant guilty of murder and

² Eggleston cites to *State v. Funkhouser*, 30 Wn. App. 617, 637 P.2d 974 (1981), a case from this court, for the opposite premise. Currently, no court, state or federal, has commented on *Funkhouser*. In *Funkhouser*, we held that retrial for keeping a false account after acquittal of charges of misappropriating public funds did not subject a defendant to double jeopardy because keeping a false account is not a lesser included offense to misappropriation of public funds. *Funkhouser*, 30 Wn. App. at 623-24. This rule comports with the current cases. But we also held that if the State chose to retry the defendant on the false account charge following remand, the trial court must exclude all evidence which, if believed, would necessarily show defendant's complicity, either as principal or accomplice, in the misappropriation of public funds. *Funkhouser*, 30 Wn. App. at 630. This rule conflicts with the *Dowling* rule. Indeed, *Funkhouser* precedes *Dowling*, and the *Funkhouser* court supports its ruling with federal circuit cases. Thus, the *Funkhouser* case, while not overturned by any court, is arguably no longer accurate law as to this issue.

robbery but found “not true” a sentence enhancement charge that he personally used a knife in the commission of a felony. *See Santamaria*, 133 F.3d at 1244.

A state appellate court reversed Santamaria’s murder conviction, and on remand, the trial court granted Santamaria’s motion to preclude evidence that he personally used the knife during the killing. *See Santamaria*, 133 F.3d at 1244. The trial court agreed with Santamaria that the collateral estoppel component of the double jeopardy clause barred evidence that he used a knife because a jury had already decided that issue in his favor in the first trial. *Santamaria*, 133 F.3d at 1244.

But the Ninth Circuit held that the first jury could have grounded its verdict on an issue other than that which Santamaria sought to foreclose from consideration in the second trial. *Santamaria*, 133 F.3d at 1246. Specifically, even though Santamaria had been acquitted of using a knife, the State was not required to prove beyond a reasonable doubt that he used a knife to obtain a conviction for murder under California law. *Santamaria*, 133 F.3d at 1247. Thus, whether he used a knife was not relitigated under the same standard at the retrial, and the State could not be precluded from presenting otherwise admissible evidence that he stabbed the victim. *Santamaria*, 133 F.3d at 1247.³

Eggleston argues that because in the second trial the State offered evidence that he knew Bananola was a police officer in order to prove premeditation and the second jury acquitted him of premeditated first degree murder, the third trial court should have precluded the State from

³ *Santamaria* also relied on *United States v. Watts*, 519 U.S. 148, 117 S. Ct. 633, 126 L. Ed. 2d 554 (1997), in which the Supreme Court stated that “an acquittal is not a finding of any fact. An acquittal can only be an acknowledgement that the government failed to prove an essential element of the offense beyond a reasonable doubt.” *Santamaria*, 133 F.3d at 1246.

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using evidence that he knew Bananola was a police officer.⁴ He also points out that the second jury specifically rejected the aggravating factor by answering “no” to the special verdict question of whether the State had proven that Eggleston knew Bananola was a police officer. Eggleston reasons that because of these decisions, the State improperly relitigated the aggravating factor at the third trial, citing *Pettaway v. Plummer*, 943 F.2d 1041 (9th Cir. 1991).

In *Pettaway*, the jury convicted the defendant of murder and attempted murder but found in a special verdict that he had not personally shot the deceased. *Pettaway*, 943 F.2d at 1043. The Court of Appeals reversed the murder conviction. *Pettaway*, 943 F.2d at 1043. On remand, Pettaway moved to preclude the State from prosecuting him on the theory that he personally fired the fatal shot. *Pettaway*, 943 F.2d at 1043. The trial judge granted the motion. *Pettaway*, 943 F.2d at 1043. The Ninth Circuit upheld that ruling, holding that the first jury necessarily decided that Pettaway did not personally shoot the victim and that the State could not prosecute him on a theory that would require the second jury to decide that he did shoot the victim. *Pettaway*, 943 F.2d at 1046. But the Ninth Circuit reversed *Pettaway* in *Santamaria*, explaining that although the ultimate fact of whether the State had proven the weapon use beyond a reasonable doubt for the weapons enhancement had been determined, that determination did not necessarily mean that the jury had found Pettaway guilty of murder only as an aider and abetter. *Santamaria*, 133 F.3d at 1245-46. Similarly, *Pettaway* does not prevent the State from offering evidence that Eggleston intended to kill Bananola because he was a police officer.

⁴ He complains that the State offered evidence that Bananola was wearing a vest marked “SHERIFF” across the chest and shouting loudly; that Eggleston was a drug dealer who would want to protect his reputation and drugs; that Eggleston had meager work earnings; and that Eggleston shot Bananola at close range and through the letters H and R on Bananola’s vest.

1. The Effect of the Second Jury's Acquittal of First Degree Murder

In the second trial, the State offered evidence that Eggleston knew Bananola was a police officer in order to prove premeditation. But the State did not have to prove that Eggleston knew Bananola was a police officer to establish premeditation. Premeditated killing is an intentional killing where the defendant, however briefly, considers the consequences of his acts. *See State v. Brooks*, 97 Wn.2d 873, 876, 651 P.2d 217 (1982) (explaining that the verb "premeditate" encompasses the mental process of thinking beforehand for a period of time, deliberation, reflection, weighing or reasoning for a period of time, however short); *but see* RCW 9A.32.020(1) (the premeditation required in order to support a conviction of the crime of first degree murder must involve more than a moment in point of time).

Unlike in *Ashe* where the jury necessarily decided that Ashe was not one of the participants in the robbery, the jury in Eggleston's second trial could have found that Eggleston did not know that Bananola was a police officer and still convicted him of premeditated, intentional killing. Conversely, it could have found that he knew Bananola was a police officer and intentionally killed him without the time or opportunity to premeditate. Thus, the second jury's first degree murder acquittal does not alone mean the jury necessarily decided whether Eggleston knew Bananola was a police officer.

Nor did the third jury necessarily decide whether Eggleston knew Bananola was a police officer. In the third trial, the State charged Eggleston with second degree murder. A person commits second degree murder when "with *intent to cause the death* of another person but *without premeditation*, he or she causes the death of such person unless the killing is justifiable." CP at 774 (emphasis added); *cf.* RCW 9A.32.050. Again, the third jury could have decided that Eggleston intentionally killed Bananola without knowing whether he was a police officer or an

intruder. Regardless, under cases like *Dowling* and *Santamaria*, the State was not barred from using evidence that was relevant to showing premeditation for first degree murder, including evidence that he knew Bananola was an officer if it was also relevant and admissible to showing intent for second degree murder.

2. The Effect of the Second Jury's Answer on the Special Verdict Form

Although the court instructed the second jury to answer the special verdict only if it convicted Eggleston of first degree murder, the second jury answered the special verdict after acquitting Eggleston of first degree murder. Specifically, the jury found that the State had not proved beyond a reasonable doubt that Eggleston knew Bananola was a police officer. The question is whether the jury's gratuitous answer is a decision on an issue of ultimate fact that bars a later jury from considering the same ultimate fact.⁵

Here, the second jury's answer is a bar only if it answered an issue of ultimate fact necessary to a valid and final judgment. *See James*, 109 F.3d at 601; *cf. Ashe*, 397 U.S. at 443 (discussing issues of ultimate fact determined by valid and final judgment). In *Ashe*, the jury rendered general verdicts. In considering whether the first jury decided the same issue as the second jury, the Court had to determine whether the first jury actually decided the issue to reach its verdict. *Ashe*, 397 U.S. at 445; *see also Dowling*, 493 U.S. at 348. As part of this inquiry, the Court asked whether the issue in the first trial was an issue of ultimate fact that the jury had to

⁵ Even a clearly erroneous acquittal bars retrial. *Fong Foo v. United States*, 369 U.S. 141, 143, 82 S. Ct. 671, 7 L. Ed. 2d 629 (1962) (holding that in criminal cases, even an erroneous acquittal prevents a retrial); *Dunn v. United States*, 284 U.S. 390, 394, 52 S. Ct. 189, 76 L. Ed. 356 (1932), *overruled on other grounds*, *Sealfon v. United States*, 332 U.S. 575, 68 S. Ct. 237, 92 L. Ed. 180 (1948).

resolve to reach a general verdict of "guilty" or "not guilty." *See Ashe*, 397 U.S. at 443; *see also Dowling*, 493 U.S. at 348.

While the *Ashe* Court may have formulated this test solely to determine which issues the first jury actually decided, the Ninth Circuit has reiterated that the collateral estoppel rule is limited to questions "necessarily decided" in the first case. *Cf. Hernandez*, 572 F.2d at 220; *Schwartz*, 785 F.2d at 681; *James*, 109 F.3d at 600. In other words, an initial jury's response to a question it does not legally have to decide does not preclude a later jury from considering the same issue.⁶ Here, the second jury did not legally have to decide the aggravating factor. In fact, it did so in violation of the court's instructions. Arguably then, the second jury's answer to the special verdict question was not a decision on an issue of ultimate fact that precluded the third jury from considering the same issue.

Even if the jury's answer on the aggravating factor was a binding decision on an issue of ultimate fact, Eggleston has not shown that the third jury decided the same issue differently. The third jury found that Eggleston intentionally shot and killed Bananola. It could have reached this decision without deciding whether he knew Bananola was a police officer. Eggleston may have intentionally shot Bananola, knowing that he was a police officer, to avoid arrest and prosecution. Or he could have shot Bananola, believing him to be an intruder, to protect his

⁶ Unless present charges were "issues of ultimate fact or elements essential to conviction that were 'necessarily decided'" in a previous case, the doctrine of collateral estoppel neither bars the charges nor precludes the government from litigating those issues. *See United States v. Martinez*, 785 F.2d 663, 667 (9th Cir. 1986) (citing *United States v. Hernandez*, 572 F.2d 218, 220 (9th Cir. 1978)); *see also United States v. McCoy*, 721 F.2d 473, 475 (4th Cir. 1983) (stating that an "acquittal can only be explained as the resolution favorably to the accused of a necessary element of proof of the second charge").

stash of drugs. Nothing in the third jury's verdict tells us that the third jury necessarily decided the special verdict question differently than the second jury.

Under *Dowling* and *Santamaria*, the State was entitled to show in Eggleston's third trial that he intended to kill Bananola because Bananola was a police officer. And although the State used the same evidence in attempting to prove premeditation at second trial, Eggleston's knowledge of Bananola's official status was not an ultimate fact the State had to prove in order to convict Eggleston of either first or second degree murder. Thus, the State could use the same evidence in the third trial to prove Eggleston's intent.⁷

3. Self-Defense Instructions

Eggleston argues that the trial court erred when it instructed the jury that if he knew or should have known that Bananola was a police officer, he could use deadly force to defend himself only if he was in actual and imminent danger of death or great bodily harm. Under this instruction, Eggleston could not rely on a reasonable belief that he was in danger; he had to be in actual danger to justify the use of deadly force. Again, he argues that the second jury decided that the State failed to prove he knew Bananola was a police officer and that the challenged instructions erroneously allowed the third jury to decide the same issue differently.

Eggleston's self-defense theory was that he thought the deputies were thugs who were threatening his life and his family and that he was entitled to use deadly force in self-defense.

⁷ Eggleston attempts to distinguish *Dowling* by asserting that premeditation concerns *mens rea* and not evidence of prior crimes under ER 404(b). But the *Dowling* rule is not limited to evidence admitted under ER 404(b). “[C]ollateral estoppel does not ‘exclude in all circumstances . . . relevant and probative evidence that is otherwise admissible under the Rules of Evidence.’” *Santamaria*, 133 F.3d at 1247 (citing *Dowling*, 493 U.S. at 348). As the *Santamaria* Court noted, if relevant and probative evidence is not used to prove an issue of ultimate fact that was already decided in a prior trial, collateral estoppel will not preclude the government from introducing that evidence. *Santamaria*, 133 F.3d at 1247.

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He maintained that he used reasonable force under the circumstances.⁸ The State's rebuttal theory was that Eggleston had no right to use any force against the deputies who entered his house because he knew they were law enforcement officers and because they used lawful force in performance of a lawful duty--serving a search warrant.

Accordingly, the court gave the jury two alternative instructions on self-defense. Instruction 13 explained that homicide is justifiable when it is committed in the lawful defense of the slayer, and

- (1) *the slayer did not know that the person slain was a law enforcement officer;*
- (2) the slayer reasonably believed that the person slain intended to commit a felony or to inflict death or great personal injury;
- (3) the slayer reasonably believed that there was imminent danger of such harm being accomplished[.]

CP at 777 (emphasis added).

Instruction 14 explained that homicide is justifiable when,

- (1) *the slayer knew that the person slain was a law enforcement officer;*
.....
- (3) the slayer was in actual and imminent danger of death or great bodily harm[.]

CP at 778 (emphasis added).

Eggleston has the burden of showing that the second and third juries decided the same issue differently to establish a collateral estoppel/double jeopardy violation. *See James*, 109 F.3d at 601. But because the jury returned a general verdict on second degree murder in the third trial, we do not know which self-defense theory the State overcame. The third jury may have agreed

⁸ Eggleston argued that the evidence showed that he and his family were asleep when the deputies entered the house and that when they heard noises, Eggleston grabbed his gun and went into the doorway of his bedroom to defend himself and his parents.

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with the second jury that the State had not proven that Eggleston knew Bananola was a police officer. Even so, the third jury could have easily believed that Eggleston executed Bananola with two shots to the head after Bananola was down and seriously disabled. If so, the jury could have concluded that Eggleston faced neither actual nor apparent harm when he killed Bananola. Again, Eggleston has failed to show that the third jury decided the same issue of ultimate fact differently than the second jury.

Moreover, Eggleston did not challenge the self-defense instructions on this basis at the trial court, nor did he make any claim of error based on collateral estoppel. Generally, we will not address a new issue on appeal unless the defendant can demonstrate that it involves a manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Under RAP 2.5(a)(3), a defendant must show how an alleged constitutional error actually affected his rights at trial. *See McFarland*, 127 Wn.2d at 334. It is this showing of actual prejudice that makes the error “manifest.” *McFarland*, 127 Wn.2d at 333 (citing *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988)). A “manifest” error is “unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed.” *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest. *McFarland*, 127 Wn.2d at 333 (citing *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)). “An appellant who claims manifest constitutional error must show that the outcome likely would have been different, but for the error.” *State v. Jones*, 117 Wn. App. 221, 232, 70 P.3d 171 (2003).

Eggleston has not shown that the third jury’s verdict was the result of any alleged error in the self-defense instructions. A reasonable jury could have concluded that Eggleston was not

acting in self-defense, regardless of whether he knew Bananola was an officer. The State presented evidence that Eggleston shot Bananola in the head while he lay disabled on the floor. If the jury accepted this, it could reasonably find that Bananola posed neither an actual nor apparent threat of harm to Eggleston. Accordingly, Eggleston has not shown that he was actually prejudiced by instruction 14 or the admission of evidence that he knew Bananola was an officer; therefore, he has not demonstrated manifest constitutional error.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

II. JURY INSTRUCTIONS

Eggleston argues that instructions 14, 15, 17, 19, and 20 deprived him of his self-defense claim. In addition, he asserts that these instructions, along with the court's pretrial ruling barring evidence undermining the legality of the search, "[took] a critical element from the jury: whether the officers were acting lawfully." Br. of Appellant at 90.⁹

⁹ For the first time in his reply brief, Eggleston argues that the jury instructions were erroneous because they did not follow the self-defense rule as articulated in *State v. Valentine*, 132 Wn.2d 1, 20-21, 935 P.2d 1294 (1997). In the alternative, he argues that *Valentine* was not even the law in effect at the time of the crime; instead, *State v. Rousseau*, 40 Wn.2d 92, 241 P.2d 447 (1952), controlled. Further, he argues that when the *Valentine* Court overruled *Rousseau*, it changed the law to Eggleston's disadvantage. He maintains that under the ex post facto clause he is entitled to apply the law in existence at the time of the crime, and therefore, this court should apply the law of *Rousseau*.

In general, an issue raised and argued for the first time in a reply brief is too late to warrant consideration. *State v. Tjeerdsma*, 104 Wn. App. 878, 886, 17 P.2d 678 (2001). Furthermore, in our first decision, we relied on *Valentine* in explaining the law of self-defense. See *Eggleston*, 2001 WL 1077846, at *3. Thus, on retrial, Eggleston was aware of *Valentine*, its date of decision, and that the trial court was following it. Yet he makes his ex post facto argument only cursorily at the end of his reply brief; we decline to consider it.

We review alleged errors of law in a trial court's jury instructions de novo. *State v. Willis*, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005). Instructions are inadequate if they prevent a party from arguing its theory of the case, mislead the jury, or misstate the applicable law. *Barrett*, 152 Wn.2d at 266 (citing *Bell v. State*, 147 Wn.2d 166, 176, 52 P.3d 503 (2002)); see also *State v. Tili*, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). Failure to permit instructions on a party's theory of the case, where there is evidence supporting the theory, is reversible error. *Barrett*, 152 Wn.2d at 266-67 (citing *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997)). Further, a jury instruction misstating the law of self-defense amounts to error of constitutional magnitude and is presumed prejudicial. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997) (citing *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996)).

A. The Law of Self-Defense

Self-defense has at least the following elements:

(1) At the time of the event the defendant must subjectively believe that he or she is (a) in imminent danger of great personal injury and (b) responding with only that degree of force necessary to repel the danger; and (2) these subjective beliefs must be such that a reasonable person considering only the circumstances known to the defendant at the time would also have entertained them.

State v. Bergeson, 64 Wn. App. 366, 370, 824 P.2d 515 (1992).

Police officers are entitled to use reasonable force in performing their legal duties. See RCW 9A.16.020(1). Serving a search warrant is a lawful duty. See chapter 10.79 RCW; *State v. Richards*, 136 Wn.2d 361, 371, 962 P.2d 118 (1998). An arrestee may defend against official force only when he is about to be seriously injured or killed. See *Valentine*, 132 Wn.2d at 20-21 (citing *State v. Westlund*, 13 Wn. App. 460, 467, 536 P.2d 20(1975)). In a lawful arrest, the arrestee is not entitled to rely on appearances. *State v. Ross*, 71 Wn. App. 837, 842, 863 P.2d

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102 (1993) (citing *Westlund*, 13 Wn. App. at 466); cf. *City of Seattle v. Cadigan*, 55 Wn. App. 30, 37, 776 P.2d 727 (1989) (concerning the requirement of actual danger).

A reasonable but mistaken belief that the arrestee is about to be seriously injured or that the arrestee is entitled to protect himself from such danger is insufficient. *Ross*, 71 Wn. App. at 842 (citing *Westlund*, 13 Wn. App. at 466); *Cadigan*, 55 Wn. App. at 37. Rather, an arrestee is justified in resisting a police officer's excessive force in making a lawful arrest only if he is actually about to be seriously injured. *Ross*, 71 Wn. App. at 842 (citing *Cadigan*, 55 Wn. App. at 37); see also *State v. Holeman*, 103 Wn.2d 426, 430, 693 P.2d 89 (1985) (citing *Westlund*, 13 Wn. App. at 467).

To raise self-defense before a jury, "a defendant bears the initial burden of producing some evidence which tends to prove that the killing occurred in circumstances amounting to self[-]defense." *State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993) (citing *State v. Acosta*, 101 Wn.2d 612, 619, 683 P.2d 1069 (1984); *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983) (plurality by Williams, J.)). For instance, the defendant must produce some evidence regarding the statutory elements of a reasonable apprehension of great bodily harm and imminent danger. *Janes*, 121 Wn.2d at 237 (citing RCW 9A.16.050¹⁰). Then the burden shifts to the State to prove the absence of self-defense beyond a reasonable doubt. *State v. Graves*, 97

¹⁰ RCW 9A.16.050 states:

Homicide is . . . justifiable when committed either:

- (1) In the lawful defense of the slayer, or his or her husband, wife, parent, child, brother, or sister, or of any other person in his presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished; or
- (2) In the actual resistance of an attempt to commit a felony upon the slayer, in his presence, or upon or in a dwelling, or other place of abode, in which he is.

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Wn. App. 55, 61-62, 982 P.2d 627 (1999) (citing *State v. Miller*, 89 Wn. App. 364, 367-68, 949 P.2d 821 (1997)).

B. Arguments

1. Deprivation of Self-Defense Claim

Eggleston asserts that instructions 14 and 15 deprived him of a self-defense claim because they stated that an officer “could basically use any force including deadly force when executing a search warrant;” moreover, if he believed that Bananola and the others were officers, “he could do nothing to protect himself even if they fired the first shot to serve [the] warrant.” Br. of Appellant at 88; Reply Br. of Appellant at 21.

Instruction 14 states in relevant part that homicide is justifiable when,

- (1) the slayer knew that the person slain was a law enforcement officer;
- (2) the law enforcement officer used excessive force;
- (3) the slayer was in actual and imminent danger of death or great bodily harm; and
- (4) the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him at the time of the incident.

CP at 778.

Instruction 15 states:

The use of deadly force by a law enforcement officer is not excessive when necessarily used by a law enforcement officer to overcome actual resistance to the execution of the legal process, mandate, or order of a court or officer, or in the discharge of a legal duty. The service of a search warrant is a legal duty of a law enforcement officer.

CP at 779.¹¹

¹¹ Instruction 16 explained that “necessary” means “under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force

Not only do instructions 14 and 15 accurately state the law, they allowed Eggleston to argue his theory of the case. So did instruction 13; which explained that homicide is justifiable when committed in the lawful defense of the slayer, and

- (1) the slayer did not know that the person slain was a law enforcement officer;
- (2) the slayer reasonably believed that the person slain intended to commit a felony or to inflict death or great personal injury;
- (3) the slayer reasonably believed that there was imminent danger of such harm being accomplished; and
- (4) the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him at the time of the incident.

CP at 777.

At trial, Eggleston maintained that he did not know that the officers were police; he thought they were thugs threatening him and his family and that his response was reasonable under the circumstances as they appeared to him. Instructions 14 and 15 did not prohibit him from arguing this theory; they simply provided the jury with an additional theory to consider, and Eggleston does not argue that instructions 14 and 15 misled the jury.

Eggleston also claims that instruction 17 erroneously "told the jury that it could . . . presume that Eggleston knew that Bananola was an officer." Br. of Appellant at 89. Instruction 17 reads:

A person knows or acts knowingly or with knowledge that another person is a law enforcement officer when he is aware of that fact or circumstance.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which indicate that another person is a law enforcement officer, the jury is permitted but not required to find that he acted with knowledge that another person is a law enforcement officer.

appeared to exist, and (2) the amount of force used was reasonable to effect the lawful purpose intended." CP at 780.

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CP at 781.

Instruction 17 comports with Washington law and allowed Eggleston to argue his theory of self-defense. *See* RCW 9A.08.010(1)(b).¹² It did not tell the jury it could presume that Eggleston knew Bananola was an officer. It simply provided a definition of knowledge that was necessary to interpret instructions 13, 14 and 15. Under that definition, Eggleston could argue that a reasonable person in his situation would not have known that Bananola was a law enforcement officer. If the State failed to prove that he knew Bananola was an officer, the jury would have analyzed his self-defense claim under instruction 13.

Finally, Eggleston asserts that under instructions 19 and 20, even if the jury found he held a reasonable but mistaken belief that he was in imminent danger, he would have no self-defense claim. Instruction 19 states:

Homicide or the use of deadly force involving the killing of a person whom the slayer knew was a law enforcement officer is not justifiable unless the slayer was in actual and imminent danger of death or great bodily harm. A reasonable but mistaken belief of imminent danger is an insufficient justification for the use of force against a known law enforcement officer who was engaged in the execution of the legal process, mandate, or order of a court or officer, or in the discharge of a legal duty.

CP at 783.

Instruction 20 states:

A person is entitled to act on appearances in defending himself or another, against a person not known to be a law enforcement officer, if that person believes in good faith and on reasonable grounds that he or another is in actual

¹² RCW 9A.08.010(1)(b) states:

KNOWLEDGE. A person knows or acts knowingly or with knowledge when:
(i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or
(ii) he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.

danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for a homicide or a use of deadly force to be justifiable.

A person is not entitled to act on appearances in defending himself or another against a person known to be a law enforcement officer.

CP at 784.

Instructions 19 and 20 accurately stated the law and permitted Eggleston to argue his defense theory. Together they explain that when a person claims self-defense against a known law enforcement officer, he must be in actual or imminent danger of death or great bodily harm. *Cf. Valentine*, 132 Wn.2d at 20-21; *Ross*, 71 Wn. App. at 842; *see also Holeman*, 103 Wn.2d at 430; *Cadigan*, 55 Wn. App. at 30; *Westlund*, 13 Wn. App. at 466-67. Eggleston could have argued that he was in *actual imminent danger* of death or great bodily harm when he shot Bananola.

2. Whether the Officers Were Acting Lawfully

Eggleston also argues that the jury instructions, along with the court's pretrial ruling, prohibited him from challenging the legality of the search in front of the jury, which impermissibly removed an element of his self-defense claim from jury consideration. The State counters that whether the search warrant was properly issued was a legal question for the court, not a factual question for the jury.

Eggleston claims that under *United States v. Gaudin*, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995), a jury necessarily determines the lawfulness of a slain officer's use of force. The *Gaudin* Court explained that "the Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." *Gaudin*, 515 U.S. at 511. There, the defendant was convicted of making material false statements on loan documents. *Gaudin*, 515 U.S. at 508. The Court said that "materiality" was

an element of the offense and part of what the government had to prove. *Gaudin*, 515 U.S. at 509. As such, the Court held that the defendant had a right to have the jury decide materiality. *Gaudin*, 515 U.S. at 511.

Here, the legality of the search warrant was not an element of Eggleston's self-defense claim. The State had to prove beyond a reasonable doubt that the officers were acting according to a "legal duty," or a court order such as a warrant, not whether the search warrant would survive an appeal. Chapter 10.79 RCW; *cf. State v. Richards*, 136 Wn.2d 361, 371, 962 P.2d 118 (1998). Moreover, we held in our first opinion that the search warrant was valid. *Eggleston*, 2001 WL 1077846, at *26 (holding that probable cause supported the warrant).

III. EVIDENTIARY ISSUES

A. Did the Trial Court Err in Excluding Certain Evidence?

Eggleston contends that the trial court erred in excluding evidence of: (1) Rod Englert's "moving statement" videotapes; (2) Steve McQueen's alleged deal with the State; (3) Kay Sweeney's testimony about the effect of the crime scene contamination on Englert's conclusions; (4) Deputy Benson's alleged lies in the search warrant affidavit; (5) Tiffany Patterson's testimony about Eggleston's habit of falling asleep after she gave him his morning medication; and (6) Deputy Reigle's prior statement omitting any reference to a "knock and announce" entry into the Eggleston house.

A trial court has broad discretion in ruling on evidentiary matters; we will overturn such rulings only for an abuse of discretion. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). A trial court abuses its discretion when it takes a view no reasonable person would take or applies the wrong legal standard. *Finch*, 137 Wn.2d at 810. A constitutional evidentiary error is harmless only if, beyond a reasonable doubt, any reasonable jury would have reached the same

result without the error. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). We will reverse non-constitutional evidentiary error only if it prejudiced the defendant. *See State v. Acosta*, 123 Wn. App. 424, 438, 98 P.3d 503 (2004).

1. Videotapes

At issue here is the admissibility of the “moving statement” videotapes made at the direction of Rod Englert, the State’s crime reconstructionist. Taken at the Eggleston home in April 1996, these videotapes showed Deputies Dogeagle, Larson, Reigle, Fajardo, and Reding reenacting their movements during the shooting while Englert interviewed them and asked questions about their actions. Englert used these videotapes to help form his opinions about the shooting. In each of Eggleston’s trials, the defense sought to introduce the videotapes during Englert’s cross-examination.

The State objected to the tapes in the first two trials because the tapes were too dark. During the first trial, the trial court refused to play the videotapes for the jury because the lighting did not “in any sense” replicate the lighting in the house at the time of the shootings. RP at 1385. The court concluded that the defense could cross-examine Englert from a transcript of the videotapes. The judge at the second trial reached the same conclusion.

When the State again sought to exclude the videotapes in the third trial, the defense announced that it had lightened the tapes and would file the lightened copies the following day.

One week later, the parties and the court viewed the lightened Reding videotape but the voice and the movements were not synchronized. The defense explained that it wanted to use the videos to cross-examine some of the deputies and Englert because “we believe . . . what they told him is inconsistent with what he reports and what his opinion is.” RP at 2034. The parties then viewed the Dogeagle tape, after which the defense stated that it was not particularly

interested in the video. The court asked the parties to review the lightened videos and present argument at another time.

During redirect examination of Deputy Dogeagle, the last deputy to testify, the State asked him about the two transcripts of the video (apparently, the State and the defense had prepared their own transcripts) and a discrepancy in their punctuation. When the State asked the court to display on a screen the parts of the two transcripts it was referring to, the defense objected, arguing that the best evidence would be the video itself. The parties eventually agreed to show the jury Exhibit 735, a shortened version of the lightened Dogeagle tape.¹³ After both parties questioned Dogeagle about the video, the court admitted it for illustrative purposes only since Dogeagle had acknowledged the statements he made therein.

The court then asked about the other videotapes that the defense wanted to introduce, and the parties viewed the videos of Reigle, Larson, and Reding. After the State again objected to their introduction, the defense announced that it wanted to use only the tapes of Reigle, Reding, and Dogeagle: “Those videos are fundamental to my cross-examination of the timing and sequence of shots in this case.” RP at 4885.¹⁴ The defense explained:

This expert has testified . . . about where shots were fired . . . and his theory about the timing of the shots is totally ridiculous when you look at certain parts of the evidence.

This witness has testified that this shooting occurred over a minute and 15 seconds period of time. When you look at what these people do on the videos, when you look at what they say and their movements through this little house, you realize and the jury will realize. . . that this opinion is fundamentally flawed.

¹³ The shortened tape is approximately two minutes long.

¹⁴ The defense did not specify, as Eggleston claims on appeal, that it sought to introduce the full-length Dogeagle videotape.

RP at 4893. The court responded that the jury had already seen the Dogeagle video and that its would admit only the Reigle and Reding transcripts.¹⁵

During its cross-examination of Englert, the defense asked him about Reding's statement on the videotape transcript concerning Bananola's utterance of "ugh" as he started to collapse into the living room. RP at 4911. The issue was whether Bananola was shot before or as he was falling to the floor. The defense again sought to introduce the videotape itself. The State responded that the defense was simply ignoring the deputy's testimony and that the video would not help. The court adhered to its earlier ruling, explaining:

I think they're very misleading, particularly the tape of Deputy Reigle. . . . [O]nce he walks into the kitchen, all you can see of him is a silhouette. All I can see of him is a silhouette, and yet I know if I had been standing there in the position of the cameraman, I would not have seen a silhouette. . . my recollection of the videotape is Mr. Englert specifically instructed each of the deputies to take their time, go through in slow motion and act it out[.] [That] is not an accurate reflection of the time.

With respect to movements . . . this jury has already heard the testimony of these witnesses who have told the jury where they were standing, and I think that the defense counsel is adequately able to make their point without using the video in that regard. I think that the tape is very misleading.

In addition to all of that, it clearly shows . . . a large hole in the wall. The large hole in the wall was . . . not caused by the gunfire itself, but rather was caused by the State's investigators who removed a section of the wall to retrieve the bullets. The Court of Appeals has suppressed the bullets. . . . So we leave ourselves . . . in the very difficult position of having a hole in the wall that would again be misleading to the jury because the jury could be left with the impression that that was caused from the gunfire itself[.] [W]e're not in a position to explain to them why there is this hole in the wall because the bullets are suppressed.^[16]

RP at 4972-75.

¹⁵ The trial court also explained that it had admitted the Dogeagle video because neither party had objected.

¹⁶ This court suppressed three bullets that investigating officers dug out of the wall because their seizure exceeded the scope of the drug warrant and the plain view doctrine.

During the cross-examination of Kay Sweeney, the defense reconstruction expert, the State asked what Reding said about the sequence of events during the shooting. The defense objected, stating that the best evidence of what Reding said was in the video. When the State asked more questions about the deputies' statements on the videotape, the defense again objected on the grounds that it could not show the videos to Sweeney to clarify and support his testimony. The State responded that it was asking only about the deputies' statements, and the court again ruled that the defense could use the transcripts of the videos.

Eggleston argues on appeal that when the court excluded the videotapes during Englert's cross-examination, it violated his right to present a defense.¹⁷ The trial court has discretion to determine the scope of cross-examination; we will reverse a trial court's rulings on that scope only for a manifest abuse of discretion. *State v. McDaniel*, 83 Wn. App. 179, 184-85, 920 P.2d 1218 (1996); ER 611(b).

The Sixth Amendment to the United States Constitution and Washington Constitution article 1, section 22 guarantee criminal defendants the right to confront and cross-examine adverse witnesses. *McDaniel*, 83 Wn. App. at 185. Although the right is constitutional, it is subject to limitations: (1) the offered evidence must be relevant; and (2) the defendant's right to introduce relevant evidence must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process. *McDaniel*, 83 Wn. App. at 185. "[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not

¹⁷ Contrary to the statement in the appellant's brief, Eggleston never sought to use the videos in cross-examining the deputies. The defense did ask Reding, Fajardo, and Reigle to show the jury their movements by using diagrams of the house's interior.

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cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985). Any attempt to limit meaningful cross-examination, however, must be justified by a compelling state interest. *State v. Hudlow*, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983) (citing *People v. Redman*, 112 Mich. App. 246, 255, 315 N.W.2d 909 (1982)).

The trial court may admit demonstrative evidence if the experiment was conducted under conditions reasonably similar to those existing at the actual event. Whether the similarity is sufficient is for the trial court's discretion. *State v. Stockmyer*, 83 Wn. App. 77, 83, 920 P.2d 1201 (1996). When evidence is not entirely accurate, the court may exclude it to avoid confusing the jurors. 5 KARL TEGLAND, WASHINGTON PRACTICE: EVIDENCE § 403.4, at 368-69 (4th ed. 1999).

A review of the three videotapes at issue shows that the darkness problem identified in Eggleston's two previous trials was largely overcome. Problems with synchronizing the voice and the movements in the Reding tape do exist, however, and the trial court was correct that Deputy Reigle appears as a silhouette in much of his videotape.¹⁸ Moreover, the Reigle tape clearly shows the hole in the wall left from the removal of the subsequently suppressed bullets. And, as the trial court mentioned, Englert instructs each deputy to repeat his actions in slow motion.

Eggleston now argues that excluding the tapes was error under the best evidence rule and the rule of completeness. ER 1002, ER 106. Generally, a party who wants to prove the contents of a writing, recording, or photograph must use the original. ER 1002; 5C KARL TEGLAND,

¹⁸ The Reding videotape is approximately seven minutes long; the Reigle tape is approximately five minutes long.

WASHINGTON PRACTICE: EVIDENCE § 1002.1, at 238 (4th ed. 1999). And if a party introduces part of a writing or recorded statement, the opposing party may require the introduction of any other part “which ought in fairness to be considered contemporaneously with it.” ER 106; 5 KARL TEGLAND, WASHINGTON PRACTICE: EVIDENCE § 106.1, at 115 (4th ed. 1999). Eggleston did not refer to the best evidence rule until the cross-examination of defense witness Kay Sweeney, which was well after the court made its ruling concerning the videotapes, and the record does not show that he ever argued that excluding the tapes violated the rule of completeness. *See, e.g.*, ER 1002; ER 106. A party may assign error on appeal only on the specific ground of the evidentiary objection made at trial, and that objection must be timely. *See Guloy*, 104 Wn.2d at 422; *State v. Avendano-Lopez*, 79 Wn. App. 706, 710, 904 P.2d 324 (1995).

Even if we consider Eggleston’s new arguments concerning the court’s ruling, we find no harmful error. Eggleston does not explain why the Dogeagle and Reigle tapes were essential to his impeachment of Englert. His discussion of Reding’s statements mirrors that made during trial, but he does not point to any flaw in the trial court’s reasoning that the video would not have helped determine whether Reding meant that Bananola was shot before or as he was falling. Moreover, the trial court had valid concerns about the quality of the videotapes, their potential exposure of suppressed evidence, and the deputies’ slow-motion reenactments of their movements. These concerns, coupled with the jury’s visit to the house and the defense counsel’s use of the video transcripts to cross-examine Englert, persuade us that the trial court did not abuse its discretion in limiting Eggleston’s use of the videotapes during Englert’s cross-examination.

2. Steve McQueen--Evidence of Bias

McQueen, a convicted felon, provided the information that launched the Eggleston investigation. When the State sought to prevent the defense from asking about McQueen's original charges, as opposed to those to which he pleaded guilty, the defense responded that the issue went to bias. The matter was left unresolved until the defense asked McQueen on cross-examination if he knew "Mr. Horne." RP at 2817. When the court sustained the State's objection, the defense explained outside the jury's presence that it wanted to ask McQueen whether Horne appeared at his 1996 sentencing and made statements about his cooperation in the Eggleston case.

The State responded that when McQueen pleaded guilty to "several counts of robbery in the first degree" in 1996, it explained to him that reducing the number of charges was unrelated to his testimony in the Eggleston case. RP at 2849. The State told the defense at the time that for McQueen's safety in prison, it would separate him from Eggleston, and that it would tell the sentencing judge that McQueen had cooperated in the Eggleston case. McQueen testified at Eggleston's second and third trials without receiving any benefit. The State took the position that what happened in 1996 was not relevant to McQueen's testimony in 2002, and the defense made no further argument.

Eggleston now argues that the trial court erred in excluding evidence that the State reduced the charges against McQueen in exchange for his testimony against Eggleston. The defendant has a right to cross-examine a witness about possible bias, but the scope or extent of such cross-examination is within the trial court's discretion. *State v. Roberts*, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980). The trial court may prohibit further questioning where the claimed bias is speculative or remote. *State v. Benn*, 120 Wn.2d 631, 651, 845 P.2d 289 (1993). Where a

case stands or falls on the credibility of essentially one witness, that witness's credibility or motive must be subject to close scrutiny. *Roberts*, 25 Wn. App. at 834; *see also Giglio v. United States*, 405 U.S. 150, 155, 92 S. Ct 763, 31 L. Ed. 2d 104 (1972) (new trial required where State did not disclose promise of leniency to key witness).

Although Eggleston argues that excluding the evidence of McQueen's bias is analogous to the exclusion of the "deal" in *Giglio*, important differences exist. Any evidence of bias here is both speculative and remote; it concerns a promise of leniency that occurred six years before the testimony at issue and that the State largely denies. Moreover, McQueen was not a key witness; he did not testify about the officers' entry into the Eggleston home or the gun battle. His testimony merely set the stage for Deputy Benson's investigation. The trial court did not abuse its discretion in excluding the evidence of McQueen's alleged bias.

3. Kay Sweeney--Contamination Evidence

During Sweeney's direct examination, the defense sought to question him about how the State's investigation contaminated the crime scene and adversely affected the opinions of the State's expert, Rod Englert, about what happened during the shootings. Defense counsel contended that "[o]nce you destroy or modify a scene, the conclusions become unreliable." RP at 5366. The State objected and asked for an offer of proof explaining how the alleged contamination affected the crime scene reconstruction efforts, arguing that Sweeney could not testify simply that the ability to reconstruct the crime scene was hampered because of what the State had done. "It needs to be tied to specific elements of reconstruction and specific items that we're talking about." RP at 5369. The court ruled that Sweeney could testify how the debris left

on the gold chair in the living room could have contaminated the evidence found thereon¹⁹; it also ruled that he could explain how moving items during the investigation might have resulted in blood transfers. The court agreed, however, that the defense had to make an offer of proof about how removing the sheetrock from portions of the wall affected the subsequent bloodstain analysis. (The parties had already stipulated to DNA results showing that certain bloodstains came from Bananola and others from Eggleston.)

In his offer of proof, Sweeney explained that the particulate matter from the removed bloodstained sheetrock could have been spread throughout the house during the investigation, but he acknowledged that he was concerned about only one area of blood in the hallway. He also admitted that he had been able to form opinions about what happened during the shooting despite the crime scene alterations. He did not specifically challenge any of Engler's conclusions.

Following that offer of proof, the court ruled:

Okay . . . [w]ith respect to his comments on the DNA . . . he's not qualified to speak to this issue, but also it flies in the face of the stipulation. . . . So it's inconsistent with the defense's position in signing the stipulation, it seems to me, to have their own expert then attacking the stipulation that they signed and that's already been read to the jury. So I don't want you eliciting any testimony from him in that regard.

[Y]ou can . . . elicit . . . testimony with respect to the chair, [and] with respect to . . . the south facing portion of the north section of the archway. . . . He can talk about any mixtures of blood that weren't stipulated to as to how they could have come to be there by activities that may have occurred after the actual shooting took place . . . but I don't want general, broad testimony of it affecting all of the reliability of all the conclusions, because that's not what, in fact, he has indicated in his testimony.

With respect to the sheetrock, I'm still not going to allow it in. He . . . stated that it didn't change his opinion as to the donor or identity of the blood that was in the north-south hallway which is where the sheetrock is. Although, I understand you want him to talk about how removing it can transfer blood and

¹⁹ A pubic hair was found on the chair early in 1998.

there's some potential there of saying well, somebody else's blood was on the wall, the wall was knocked out, that blood was then dissipated or dispersed somewhere else and therefore this portion of the puzzle we can't put together because we don't know if it was originally on the wall or not, but I didn't hear him testify to that.

Now, if you were going to elicit that type of testimony, that was your opportunity to do so, or I would . . . have him come back in. Unless he's going to testify to something like that, I heard him very clearly that the blood that was on the floor, he doesn't take any issue with the identity of the donor of that blood despite the issue of the sheetrock. . . . [N]obody has testified . . . that somebody else's blood was on that wall that may have changed how this is being reconstructed by him or by Mr. Englert; it's only misleading and prejudicial and gets us into opening the door to evidence that was suppressed.

RP at 5389-92. On appeal, Eggleston claims that this ruling prevented Sweeney from testifying about how sheetrock strewn over the house contaminated vast areas of the crime scene and therefore prevented him from testifying with any reliability about what occurred.

This claim largely ignores the trial court's ruling regarding Sweeney's offer of proof and it overlooks as well the detail with which Sweeney testified "with reasonable scientific certainty" about what happened during the shooting. RP at 5508-33. Eggleston has not shown that the trial court abused its discretion in restricting Sweeney's testimony about the effect of contamination on Englert's reconstruction efforts.

4. Deputy Benson--Evidence of Lying

Eggleston argues that the trial court erred in excluding evidence that Deputy Benson lied in the search warrant affidavit when he described witnessing two controlled buys between McQueen and Eggleston. The State objected to this proposed line of testimony because this court ruled that the affidavit was valid in Eggleston's previous appeal. The State contended that Eggleston was simply attempting to argue once again that the affidavit and search warrant were invalid. (In upholding the affidavit, we found that it did not refer to the first buy and that

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Benson's failure to mention that Eggleston's girlfriend was present during the second buy was not a material omission.)

The defense argued that it was challenging only Benson's credibility, but the State disagreed: "How can the jury be the judge of Benson's credibility unless they know what the legal standard is for issuance of a warrant and the requirements for what's included in a search warrant affidavit." RP at 50. The trial court agreed. But on cross-examination, the court allowed the defense to ask Benson whether the buy he witnessed was technically a controlled buy. Benson admitted here, as he had in prior proceedings, that the transaction was not actually a controlled buy. The defense then sought to cross-examine Benson about whether he lied to the judge to whom he applied for a search warrant about the buy and whether he told the judge that there were other people present. The trial court sustained the State's objection to the question, explaining that it would not allow any attack on the search warrant.

Eggleston now argues that this ruling "violates state evidentiary rules," but he does not explain how such a violation occurred. Generally, a party may not impeach a witness on a collateral matter. *See State v. Griswold*, 98 Wn. App. 817, 831, 991 P.2d 657 (2000). Whether Benson misrepresented the facts of the drug purchases from Eggleston in his search warrant affidavit is collateral to the core issue of how the shootings occurred. The trial court did not err in limiting the defense cross-examination on the issue.

5. Tiffany Patterson--Habit Evidence

Eggleston contends that the trial court erred in not allowing the defense to cross-examine his girlfriend, Tiffany Patterson, about whether Eggleston tended to fall asleep after she gave him his medicine in the morning before she left for work.

Patterson testified on direct that she gave Eggleston his medicine before she left the house on October 16, 1995, and that she did not know whether he was awake afterward. When the defense sought to ask whether the medication consistently made him sleepy, the court ruled against it. “[T]o the extent that you’re trying to show that he acted in conformity with what he may have done in the past in response to medication, I’m not going to allow it. She has no personal knowledge of it.” RP at 3273. The court did, however, allow the defense to refresh her memory with a prior inconsistent statement made during Eggleston’s previous trial. When questioned about her prior testimony that Eggleston went back to sleep after receiving his medicine on October 16, Patterson acknowledged that “he laid back down.” RP at 3275.

Because Patterson had already testified that she did not know whether Eggleston had fallen asleep after she gave him his medicine on October 16, the trial court did not err in preventing her from testifying that he usually did go back to sleep. Habitual behavior consists of semi-automatic and specific responses to specific stimuli. *Wash. State Physicians Ins. Exchange & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 325, 858 P.2d 1054 (1993); *see also* ER 406. Patterson’s direct testimony did not support a conclusion that Eggleston’s sleepiness after receiving his morning medicine was habitual. In any event, this questioning was aimed at showing that the deputies awakened Eggleston on October 16, and the defense introduced evidence to that effect when the trial court allowed it to use Patterson’s prior testimony.

6. Deputy Reigle--Prior Inconsistent Statement

During his direct examination, Deputy Reigle testified about the “knock and announce” procedure the deputies employed in entering the Eggleston house on October 16, 1995. RP at 3297-3300. The defense then attempted to cross-examine him about a statement he gave on November 2, 1995, in which he did not mention the knock and talk procedure. This statement

was intended to clarify a statement Reding gave on the day of the shooting. The State objected, arguing that Reigle's earlier statement was not inconsistent with his trial testimony because he had not been asked about the entry procedure in giving the earlier statement. The court agreed and sustained the objection. Reigle testified during cross-examination that he announced his presence when he entered the Eggleston home, and he explained on redirect that he did not describe the entry procedure in the statement he gave on October 16 because he was not asked about it. The trial court did not abuse its discretion in holding that Eggleston's November statement, which was intended to clarify his October statement, was not inconsistent with his trial testimony. *See Finch*, 137 Wn.2d at 810.

B. Did the Trial Court Err in Admitting Certain Evidence?

1. Sequence Testimony

Eggleston argues that because our earlier opinion held that neither the State nor the defense expert had a sufficient factual basis to support an opinion about the sequence of shots, the trial court erred in allowing Englert to testify about the sequence of the gunfire between Eggleston and Bananola. In our first opinion we said:

The trial court did not err in admitting most of the crime-scene-reconstruction testimony. . .

We take issue, however, with the testimony offered by both reconstruction experts concerning the sequence of the shots fired during the gun battle between Bananola and Eggleston . . .

Both of these conclusions are completely speculative. The expert testimony as to who fired first is mere conjecture and should have been excluded.

Eggleston, 2001 WL 1077846, at *15 (footnote omitted).

Englert attempted to testify in this trial about exhibits showing how the events of October 16 unfolded. The defense objected, arguing that the exhibits would illustrate the sequence of shots in violation of our first opinion. The court ruled that the deputies had already testified

about the sequence of gunfire and that Englert was barred from testifying only as to who fired first.

When Englert continued to testify about the movements of Eggleston and Bananola and the sequence of their shots and injuries, the defense moved for a mistrial, arguing that Englert could not testify regarding the sequence of gunfire. The trial court agreed with the State that Englert could testify about the movement of persons as evidenced by the physical evidence in the house and as independently verified by eyewitnesses.

I am interpreting the Court of Appeals opinion as excluding either Mr. Englert or Mr. Sweeney from testifying as to who fired the first shot. . . . [T]o the extent that they are able to talk about other shots due to ballistic evidence, due to blood spatter, or due to trajectory analysis, they may do so, and the Court of Appeals specifically acknowledged that they could testify as to where people were, which is what I understood this testimony to be.

RP at 4646. When the defense continued to object, the court responded:

I don't know how to make it any more clear than that. They can't say this is Shot No. 5. This is Shot No. 6. This is the order in which the shots occurred[.] [B]ut they can talk about the shots occurred in the hallway first then this is where we believe based on this evidence that Deputy Bananola moved, this is where we believe Eggleston moved based on all of this evidence, the testimony, the trajectory analysis, the location of the ballistic evidence, the blood spatter and so forth.

RP at 4649.

Eggleston claims on appeal that Englert testified about "the order in which each bullet was fired, until all were covered," thus violating the law of the case doctrine. Br. of Appellant at 58; *see Greene v. Rothschild*, 68 Wn.2d 1, 10, 414 P.2d 1013 (1965) (law of the case doctrine binds parties and courts to prior appellate holdings until they are overruled).

This claim misrepresents the record. Englert did not testify about the numerical sequence of the shots Eggleston and Bananola fired. Rather, he used the prior testimony about their

injuries and their movements to offer opinions concerning where Eggleston was when he fired at Bananola and what position Bananola was in when Eggleston shot him in the head. This testimony did not violate this court's admonitions about the proper scope of the sequencing evidence. The trial court did not err in allowing Englert to testify as he did about the gunfire between Eggleston and Bananola.

2. Evidence of Eggleston's Drug Dealing

Eggleston contends that the trial court erred in admitting evidence of his drug use, drug dealing, and the drugs found in his home after the shooting.

In Eggleston's previous appeal, we affirmed his convictions for unlawful delivery of a controlled substance (two counts), unlawful possession of a controlled substance with intent to deliver, and unlawful possession of a controlled substance. Before his third trial began, the defense moved to exclude evidence of Eggleston's drug dealing.

The State explained that it wanted to introduce evidence of his drug dealing, and his convictions, to provide a context for the search warrant and the entry into the Eggleston home. The State argued that this evidence was admissible as *res gestae* and to show Eggleston's motive in shooting at the officers. The defense acknowledged that the jury needed to know why the deputies were at the house on October 16, but argued that the drug buys, as well as the drug evidence found in the house, were irrelevant.

The court denied the defense motion, ruling that the drug evidence was relevant to show intent, *res gestae*, and to refute Eggleston's self-defense claim. The court found "the prejudice, if any, to the defendant is very slight." RP at 96.

Under ER 404(b), evidence of other crimes, wrongs, or acts is inadmissible to prove character and to show action in conforming with it. *State v. Thatch*, 126 Wn. App. 297, 106 P.3d

782, 789 (2005). Such evidence may be admissible, however, for other purposes “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b). If admitted for other purposes, a trial court must identify that purpose and determine whether the evidence is logically relevant to a material issue. “Evidence is relevant and necessary if the purpose of admitting it is of consequence to the action and makes the existence of the identified fact more probable.” *Powell*, 126 Wn.2d at 259. If relevant, the court also must determine whether the probative value of the evidence outweighs its prejudicial effect. *State v. Barragan*, 102 Wn. App. 754, 758, 9 P.3d 942 (2000).

The drug evidence was admissible to prove Eggleston’s motive and intent.²⁰ Motive is what prompts a person to act; intent is the state of mind with which the act is done. *See Powell*, 126 Wn.2d at 261. Motive demonstrates an impulse, desire, or any other moving power that causes someone to act. *Powell*, 126 Wn.2d at 259 (citing *State v. Tharp*, 96 Wn.2d 591, 597, 637 P.2d 961 (1981)). We found evidence of a defendant’s status as a gang member and drug dealer admissible to prove his intent and motive to commit murder in *State v. Campbell*, 78 Wn. App. 813, 821-22, 901 P.2d 1050 (1995). “The challenged evidence clearly was highly probative of the State’s theory--that Campbell was a gang member who responded with violence to challenges to his status and to invasions of his drug sales territory.” *Campbell*, 78 Wn. App. at 822.

Similarly, evidence that the defendant had sold marijuana the day before he shot a police officer was relevant to show motive in *State v. Lyons*, 459 S.E.2d 770, 782-83 (N.C. 1995).

²⁰ Although the trial court did not base its admission of the drug evidence on the motive exception, we can affirm a trial court on any grounds supported by the record. *State v. Frodert*, 84 Wn. App. 20, 25, 924 P.2d 933 (1996).

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There, the State's theory of the case was that defendant, a known drug dealer, had a motive to kill a law enforcement officer. The court found the drug dealing evidence admissible under ER 404(b). *Lyons*, 459 S.E.2d at 782-83 (evidence of narcotics activities on the premises admissible to show motive and to disprove defense claim that officer executing search warrant was shot in a case of mistaken self-defense).

Evidence of Eggleston's drug dealing, possession, and use before the shooting was also relevant to explain intent to shoot. The evidence supported the State's theory that Eggleston intentionally killed either a law enforcement officer to avoid arrest and prosecution or an intruder to protect his drugs. Given the defense concession that some evidence of Eggleston's drug dealing was admissible, the trial court did not err in finding that the probative value of the evidence outweighed its prejudicial effect. Thus, trial court did not abuse its discretion in admitting the evidence of Eggleston's drug use and dealing.

C. Did the Trial Court Err in Finding Ted Garn Unavailable to Testify?

Ted Garn, a Tacoma Police Department forensic investigator, was assigned to collect evidence from the Eggleston home after the shooting. Under the direction of Detective Melvin Margeson, he measured and photographed the interior of the residence; photographed and collected items of ballistic evidence; and collected Bananola's bloody clothing, the guns Bananola and Eggleston used, the firearms found in Eggleston's bedroom, and blood samples.

At Eggleston's first two trials, Garn testified about collecting the ballistic evidence and blood samples. Defense counsel cross-examined him each time.

In 2001, Garn sustained serious, disabling injuries in a car accident. When the prosecuting attorneys learned that he might not be able to testify at Eggleston's third trial, they talked with Garn to encourage his cooperation. Garn explained that he could not remember any

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of the details of the Eggleston investigation and did not recognize the reports he had prepared. He also said that he had begun receiving treatment for post-traumatic stress caused by his Vietnam service.

Despite his reluctance to testify, Garn responded to a subpoena. He testified at a hearing that he believed he collected evidence at the Eggleston residence, but he could not recall picking up bullets and did not recognize a photograph that he took. Nor could he remember preparing reports. He said that he was experiencing severe pain and tremors as he testified, and he listed six medications that he was taking. Garn explained that he had been receiving counseling and medication for a post-traumatic stress disorder and would be entering the VA hospital for treatment as soon as a bed was available. He told defense counsel that he did not think reviewing documents would refresh his memory; and he could not bring himself to read a paragraph from one of his reports when the prosecuting attorney asked him to do so.

His wife, a registered nurse for 20 years, testified at the same hearing that Garn becomes traumatized and reacts violently when viewing violence on television; he has been told to avoid newspapers, television news, war movies, and crime dramas; and he is in constant pain from his neck and spinal surgeries. "He has a stainless steel plate with six screws on the front side of his neck, and the back of where the spinal column is, they put in some bone donor and some more screws and they wrapped his neck with stainless steel wire so he has no mobility." RP at 1247.

The State also presented a note from Garn's surgeon stating that Garn could not testify at Eggleston's trial due to his neck condition.

The State argued that Garn could not testify because of his memory loss and his physical and mental problems. The defense complained that it had no medical documentation of Garn's difficulties; the State explained that none would be available until after his VA evaluation, which

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would take at least two weeks. The court declined to continue the trial, ruling that Garn was unavailable and that his prior testimony was admissible.

Eggleston now argues that the trial court should have required independent medical corroboration that Garn was unavailable to testify.

Under ER 804 a court may admit former testimony when the declarant is “[i]s unable to be present or to testify at the hearing because of . . . then existing physical or mental illness or infirmity.”²¹ ER 804(a)(4), (b)(1); *State v. Whisler*, 61 Wn. App. 126, 131-32, 810 P.2d 540 (1991). If the witness is unavailable because of illness or infirmity, the illness or infirmity must render the witness’ attendance relatively impossible and not merely inconvenient. *Whisler*, 61 Wn. App. at 132 (citing *People v. Stritzinger*, 668 P.2d 738, 746 (Cal. 1983)). The court has a measure of discretion in determining whether the declarant’s infirmity is sufficient to justify a finding of unavailability. 5D KARL TEGLAND, COURTROOM HANDBOOK ON EVIDENCE, Rule 804, at 424 (2005).

In *Whisler*, where the 94-year-old forgery victim had a heart condition, the trial court allowed the State to read her deposition testimony instead of forcing her to testify in person. *Whisler*, 61 Wn. App. at 131. When *Whisler* complained on appeal that no competent expert had testified about the victim’s physical condition, Division One found adequate proof in an affidavit summarizing a conversation her doctor had with the prosecuting attorney, coupled with her daughter’s testimony about her mother’s medical condition. *Whisler*, 61 Wn. App. at 138-39. The court rejected *Whisler*’s complaint that the daughter’s testimony was incompetent because she was not a medical expert: “[She] was certainly competent to testify about facts of her

²¹ Because Garn was subject to cross-examination, admission of his prior testimony does not run afoul of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 1374, 158 L. Ed. 2d 177 (2004).

mother's condition that do not require medical expertise to ascertain." *Whisler*, 61 Wn. App. at 140; *see also Alcala v. Woodford*, 334 F.3d 862, 880 (9th Cir. 2003) (expert medical testimony not essential to establish the existence of a mental infirmity and thus witness unavailability).

Here, the State produced a note from Garn's doctor and Garn's wife testified about his neck surgery, ongoing pain, and his "acting out" as the result of trauma. Additionally, Garn testified that he could not remember much of his investigation, was unable to recognize or review his reports, was experiencing pain, and was taking six medications. In light of this foundation, the trial court did not abuse its discretion in finding him unavailable to testify and in admitting his former testimony under ER 804.

IV. JURY ISSUES

A. Discharge of Jurors 4 and 7

1. Background

On Thursday, October 31, 2002, juror 7 fell and injured herself. The court had scheduled a jury visit to the crime scene that day, but rescheduled it for the following Monday to accommodate juror 7's injury. The court expressed concern about scheduling the site visit soon because of possible vandalism to the house. Rescheduling the site visit involved canceling and rescheduling a bus, adding and rescheduling staff, and juggling witnesses.

On the day of the rescheduled site visit, juror 7 notified the trial court that she had seen a doctor the previous Friday and that she had another appointment in Seattle that afternoon, which would potentially conflict with the site visit. She also told the court that although she thought her injury would be resolved after this doctor visit and another one on Friday, she was still experiencing a lot of pain.

The trial court discussed these conflicts with counsel. Eggleston argued that the court should not discharge the juror until after her Friday doctor's appointment when they might have a better idea of the potential impact of her injury.

Citing the burden of rescheduling the site visit and the risk that juror 7's ongoing medical appointments could further impede her participation in the trial, the trial court decided to discharge juror number 7.²² When the court explained this to her, she said she had been trying to reschedule her appointment for later that day.²³ The court then discharged juror 7 and replaced her with an alternate.

That same day, juror 4 told the court's judicial assistant that she could not get there until noon because she had been vomiting all night and all morning. The State asked the court to discharge the juror. Eggleston argued that the court should postpone the site visit until the juror had recovered and asked the court to contact the ill juror to make a record of the discharge. Aware of the difficulty of rescheduling the site visit and concerned that the ill juror would make the others sick, the court discharged juror 4 without talking with her again; the court replaced her with an alternate.

2. Discussion

Eggleston contends that the trial court erred when it discharged jurors 4 and 7 mid-trial. He argues that the court (1) abused its discretion in finding these jurors unable to fulfill their

²² The court also noted that this was not the first time issues involving juror 7 had arisen.

²³ Eggleston asserts that the juror told the court that she was able to reschedule her appointment and would be able to stay for the site visit. But the record shows that juror 7 merely told the court she had been trying to contact her doctor to see if she could get a later appointment, not that she successfully rescheduled the appointment.

duties and (2) failed to comply with the procedural requirements of CrR 6.5²⁴ and RCW 2.36.110.²⁵ Eggleston maintains that short trial continuances could have accommodated the jurors.

CrR 6.5 and RCW 2.36.110 allow the trial court to replace a juror with an alternate if the juror becomes unable to serve. We review a trial court's decision to remove a juror for abuse of discretion. *State v. Ashcraft*, 71 Wn. App. 444, 461, 859 P.2d 60 (1993). We find none here.

Although a continuance may have accommodated juror 4's illness and reduced the impact of juror 7's injuries, the trial court properly considered the possible consequences of a continuance. The court expressed concern about the difficulty, cost, and vandalism risk in further delaying the site visit. Additionally, the court considered the likelihood that even with a continuance, juror 7's future medical needs might affect her ability to serve. These facts support the trial court's decision to discharge both jurors.

²⁴ CrR 6.5 provides for the selection of alternate jurors, for replacing excused jurors with alternates both before and after the jury begins its deliberations, and for the temporary discharge of alternate jurors after the jury begins its deliberations. It states in part:

If at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged, and the clerk shall draw the name of an alternate who shall take the juror's place on the jury.

Alternate jurors who do not replace a regular juror may be discharged or temporarily excused after the jury retires to consider its verdict. When jurors are temporarily excused but not discharged, the trial judge shall take appropriate steps to protect alternate jurors from influence, interference or publicity, which might affect that juror's ability to remain impartial and the trial judge may conduct brief voir dire before seating such alternate juror for any trial or deliberations. Such alternate juror may be recalled at any time that a regular juror is unable to serve, including a second phase of any trial that is bifurcated. If the jury has commenced deliberations prior to the replacement of an initial juror with an alternate juror, the jury shall be instructed to disregard all previous deliberations and begin deliberations anew.

²⁵ The court should "excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical . . . defect or by reason of conduct or practices incompatible with proper and efficient jury service." RCW 2.36.110.

These discharges did not violate any procedural requirements. Although CrR 6.5 contemplates some sort of formal proceeding, it does not require one. *Ashcraft*, 71 Wn. App. at 462. Such a proceeding is required only when the case has gone to the jury and the alternates have already been temporarily excused.²⁶ *State v. Johnson*, 90 Wn. App. 54, 72, 950 P.2d 981 (1998). Here, the trial court removed jurors 4 and 7 and replaced them with alternates *before* the jury began its deliberations; thus, the court was not required to hold any formal proceedings.²⁷

Further, Eggleston cannot establish that seating alternate jurors amounted to a constitutional error because a defendant has no constitutional right to be tried by a jury that includes a specific juror. *State v. Jorden*, 103 Wn. App. 221, 229, 11 P.3d 866 (2000) (citing *State v. Gentry*, 125 Wn.2d 570, 615, 888 P.2d 1105 (1995)).

B. Motion for New Trial Based on Juror Misconduct

1. Background

At some point during the trial, juror Thomas Burrows apparently reported to the judicial assistant that he had had brief, passing contact with a man and a woman who had been observing the trial and that he believed he knew these people. The man and woman had apparently been witnesses or listed as witnesses in one of the earlier trials. Burrows also apparently reported that he had been threatened. Neither the court nor the judicial assistant reported this information to counsel.

After Burrows reported these contacts, the prosecutor learned that Burrows might have been a customer at the tavern where Eggleston had worked and that Burrows might have

²⁶ The purpose of a formal proceeding is to verify that the discharged juror was unable to serve and to demonstrate that the alternate is still impartial. *Jorden*, 103 Wn. App. at 227.

²⁷ Eggleston's reliance on *United States v. Tabacca*, 924 F.2d 906, 913 (9th Cir. 1991) (discussing discharge of juror under Fed. R. Crim. P. 23(b)), is also misplaced as that case involved removing and not replacing a juror *after* jury deliberations had started.

communicated with these former witnesses. Before the jury started deliberating, Eggleston stipulated to Burrows's discharge.²⁸ The court discharged Burrows and replaced him with an alternate.

After the verdict, Eggleston discovered Burrows's disclosures to the judicial assistant and learned that although Burrows had been a customer at the tavern, he had not had any contact with Eggleston. After learning this, Eggleston moved for a new trial. In supporting affidavits, other jurors revealed that they had possibly discussed Eggleston's prior trials and the results of those trials during deliberation.

In his motion, Eggleston argued that had he known all the facts, he might not have agreed to dismiss Burrows. In a supplemental pleading, he argued juror misconduct during deliberations. Eggleston also moved to recuse the trial judge, asserting that recusal was appropriate because the judge and her judicial assistant could be witnesses. Before the motion hearing, the trial court limited the hearing to three areas of misconduct: (1) possible discussion of the evidence by members of the jury before deliberations began; (2) possible discussion of a witness by members of the jury before deliberations began; and (3) whether the jurors considered extrinsic evidence during deliberations.²⁹

After hearing testimony from the 16 empanelled jurors, the trial court denied Eggleston's motion for a new trial. In its written findings of fact and conclusions of law, the trial court found that (1) the fact of the prior trials was not extrinsic evidence; (2) communicating the results of the prior trials during deliberation was juror misconduct; and (3) a new trial was not appropriate

²⁸ Burrows was also reported to have been sleeping during part of the proceedings.

²⁹ Eggleston does not raise any issues related to the first two issues on appeal. The record does not show when or why the trial court restricted the hearing to these three issues, excluding the issues related to its discharge of Burrows.

because there was no reasonable probability that this information had affected the verdict.³⁰ The court found that knowledge of the prior trials was not extrinsic evidence because these facts had been introduced as evidence during the trial and Eggleston had not objected or requested any curative action.

But the court found that “[t]he communication of results of prior trials by one juror to a few other members of the jury during deliberations constituted juror misconduct.” CP at 928. The court also found, however, no reasonable probability that this information had affected the verdict because: (1) only three of the jurors recalled hearing such statements during deliberation; (2) the information about the results of the prior trials was inconsistent, with two jurors hearing that there had been a hung jury and an overturned conviction and one juror hearing that there had been a hung jury and a mistrial; (3) none of the jurors identified the outcome of any specific charge; (4) the information was available to the jury for only a short period of time; and (5) the jury was legitimately aware of the prior trials and the time that had passed between the incident and the current trial, so it was likely that the jury could conclude there had been inconclusive results in the prior trials.

In addition, the trial court found that the juror who had apparently introduced the extrinsic information had not been deceptive during voir dire. Instead, it concluded that this juror, who had disclosed during voir dire that she knew of the previous trials, likely recalled additional details about the earlier trial results as she heard the evidence in the current trial. The court also concluded that other jurors had disclosed knowledge of the earlier trial outcomes during voir dire and that these jurors were excused only if they “so firmly were convinced of the

³⁰ The trial court misnumbered conclusions of law V and VI as III and IV. References are to the correct numbers.

guilt or innocence of Mr. Eggleston that they could not put aside their prior knowledge.” RP at 6607. In fact, during the trial, defense counsel did not challenge an alternate juror after she revealed that she had inadvertently heard about an earlier trial outcome.

2. Failure to Recuse

Eggleston argues that the trial court should have recused itself from hearing the motion for new trial.

The Code of Judicial Conduct (CJC) Canon 3(D)(1)(d)(iii) requires a judge to disqualify herself from a proceeding if her “impartiality might reasonably be questioned,” including instances where the judge is “likely to be a material witness in the proceeding.” Here, although the trial court or its staff could have been witnesses to whether Burrows reported information to the judicial assistant that was not communicated to the parties, the trial court did not address this issue at the motion hearing. The court addressed only issues that did not involve the court or court staff. And, as discussed below, because the trial court properly discharged Burrows and replaced him with an alternate, there was no reason for the trial court to investigate the alleged communications between Burrows and the judicial assistant. Because Eggleston fails to show that the court or its staff were potentially witnesses, he fails to show any violation of CJC Canon 3(D)(1)(d)(iii).

3. Right to be Present

Eggleston next argues that the trial court violated his right to be present at every critical stage of the proceedings when it failed to report Burrows’s contacts with the judicial assistant.

“The core of the constitutional right to be present is the right to be present when evidence is being presented.” *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994) (citing *United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985))

(per curiam)). In addition, the defendant has a “right to be present at a proceeding ‘whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.’” *Lord*, 123 Wn.2d at 306 (citing *Gagnon*, 470 U.S. at 526). Accordingly, a defendant does not have the right to be present during in-chambers or bench conferences between the court and counsel on legal matters where those matters do not require a resolution of disputed facts. *Lord*, 123 Wn.2d at 306 (citing *People v. Dokes*, 79 N.Y.2d 656, 584 N.Y.S.2d 761, 595 N.E.2d 836 (1992)) (right to be present during hearing on admissibility of prior conviction).

Because the trial court dismissed Burrows and replaced him with an alternate before deliberations, Burrows’s communications to the judicial assistant did not impact Eggleston’s opportunity to defend himself against the charge. Nor did the dismissal require a resolution of disputed facts. Furthermore, the dismissal posed no risk to the fundamental fairness of Eggleston’s trial.

4. Ex Parte Contacts

Eggleston also argues that he was entitled to a new trial because of Burrows’s ex parte contacts with the judicial assistant.

When a trial participant has ex parte contact with the court and the defendant raises the possibility of prejudice, the State has the burden of proving that the communication was harmless beyond a reasonable doubt. *State v. Bourgeois*, 133 Wn.2d 389, 407, 945 P.2d 1120 (1997). Here, Eggleston fails to raise the possibility of prejudice. He argues only that had he been fully aware of the alleged ex parte contacts he would not necessarily have stipulated to Burrows’s dismissal. Although this assertion shows that Eggleston was potentially denied the

opportunity to make an informed decision, it fails to establish how this prejudiced him because Burrows was replaced with an alternate juror before deliberations.

5. Burrows's Discharge

Eggleston argues further that the trial court's findings failed to address Burrows's assertion that he never engaged in juror misconduct warranting his dismissal. He again asserts that a full hearing was required under RCW 2.36.110 and CrR 6.5. Finally, he argues that the discharge was an abuse of discretion.

Because the trial court discharged Burrows before the jury began its deliberations, no formal proceeding was required. Further, because the parties stipulated to the discharge, Eggleston cannot show that the trial court abused its discretion in discharging Burrows. Additionally, even if the discharge was in error, Eggleston can not show prejudice because the court replaced Burrows with an alternate prior to deliberations.

6. Other Jury Misconduct

Eggleston also contends that the trial court erred when it denied his motion for a new trial based on juror misconduct. He argues that he was entitled to a new trial because the juror who allegedly disclosed the results of earlier trials failed to disclose in voir dire her knowledge of the previous trial results. He maintains that juror discussions during deliberations of the facts and results of his earlier trials amounted to introducing extrinsic evidence and justified a new trial.

(a) Standards

We review a trial court's determination of whether juror misconduct warrants a new trial for an abuse of discretion. A trial court abuses its discretion if the decision is manifestly unreasonable or based on untenable grounds. *State v. Barnes*, 85 Wn. App. 638, 669, 932 P.2d

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669 (1997). Eggleston has the burden of showing that the misconduct occurred. *Barnes*, 85 Wn. App. at 668.

“It is misconduct for a juror to fail to disclose material information when asked; to extrajudicially acquire case-specific information during the course of the trial, especially where the judge . . . has given an instruction expressly prohibiting that; and to inject into deliberations extraneous, case-specific information learned outside the trial.” *State v. Tigano*, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991) (citations omitted). But only juror misconduct that prejudices the defendant warrants a new trial. *Tigano*, 63 Wn. App. at 341.

Generally, once misconduct is shown, we presume prejudice and the State bears the burden of overcoming this presumption beyond a reasonable doubt. *State v. Brenner*, 53 Wn. App. 367, 372, 768 P.2d 509 (1989) (citing *State v. Murphy*, 44 Wn. App. 290, 296, 721 P.2d 30 (1986)). But, in deciding whether to grant a new trial, the court must find “[s]omething more than a possibility of prejudice.” *State v. Hall*, 40 Wn. App. 162, 169, 697 P.2d 597 (1985) (quoting *State v. Lemieux*, 75 Wn.2d 89, 91, 448 P.2d 943 (1968)). Misconduct causes prejudice only if we conclude that the withheld or extraneous information could have affected the jury’s deliberations. *Barnes*, 85 Wn. App. at 669.³¹ With these rules in mind, we examine Eggleston’s specific claims of juror misconduct.

(b) Failure to Disclose

Although a juror’s failure to disclose material facts can amount to prejudicial error, a juror’s failure to disclose knowledge of the earlier trials and their outcomes would not warrant a

³¹ Eggleston asserts that the trial court erred by considering subjective evidence when determining whether he was entitled to a new trial. But the record shows that although the trial court questioned the jurors on whether they kept an open mind, the trial court based its decision on proper objective factors as outlined in *Dickson v. Sullivan*, 849 F.2d 403 (9th Cir. 1988).

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new trial unless this information would have supported a challenge for cause. *State v. Cho*, 108 Wn. App. 315, 323, 30 P.3d 496 (2001); *Tigano*, 63 Wn. App. at 342. Here, the trial court specifically found that other jurors with similar knowledge were not challenged for cause or dismissed unless the juror was unable to put aside this information. Eggleston does not challenge this finding, thus it is a verity on appeal. *See State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). And nothing in the record suggests that this knowledge impaired any juror's ability to be impartial. Accordingly, the trial court did not abuse its discretion in refusing to grant a new trial on this basis.

(c) Fact of Prior Trials

As to the fact of the earlier trials, the trial court found that this was not extrinsic evidence. The trial court found, instead, that this information was presented to the jury during the course of the trial. Eggleston does not challenge this finding; thus, it is a verity. *See O'Neill*, 148 Wn.2d at 571. The trial court did not err in concluding that the information was not extraneous evidence.

(d) Outcome of Prior Trials

Finally, the trial court found that because the parties had revealed during voir dire and through the evidence that this was not Eggleston's first trial, any juror discussion of the earlier trial results did not prejudice Eggleston. The court reasoned that because the jurors knew of the earlier trials and knew that considerable time had passed between the incident and the current trial, the jurors could have easily deduced that Eggleston's previous trials had ended either in hung juries, mistrials, or reversals on appeal; accordingly the court found that this additional information did not prejudice Eggleston. We find no abuse of discretion in this line of reasoning.

V. RESENTENCING ON ALL CRIMES

Eggleston argues that the third trial court erred when it resentenced him on the drug crimes following his third trial. Specifically, he claims that the court should not have recalculated his offender scores on those crimes to include the new murder conviction obtained in the third trial, thereby increasing his criminal history scores for each drug crime. The State argues that the judgments and sentences imposed after the first and second trials were vacated by this court's previous opinion; thus, there was no valid judgment and sentence, and the trial court was obligated to resentence Eggleston for those offenses.

We did not vacate the judgment and sentence for the drug convictions in our previous opinion. *Eggleston*, 2001 WL 1077846, *33. Because we reversed the assault conviction, there was no remaining issue about running the firearm sentence enhancements for assault and one of the drug convictions consecutively. We also clarified that "the drug *convictions* are unaffected by our decision." *Eggleston*, 2001 WL 1077846 at *33-34 (emphasis added). Ultimately, we reversed the assault and murder convictions, affirmed the drug convictions, and remanded for further proceedings. *Eggleston*, 2001 WL 1077846, *33-34.

A. Background

After the first trial, the court sentenced Eggleston on counts II-VI, the assault and the drug crimes.³² The total sentence was 238 months. The court ordered each of the base sentences

³² On count II (assault I), the court calculated an offender score of 4, a seriousness level of XII, a standard range of 129-171 months, and 60 months for the firearms enhancement. The court imposed 160 months plus 60 for that offense. On both counts III and IV (delivery of marijuana in a school zone possession with intent to distribute marijuana in a school zone), the offender score was 8, the seriousness level was III, the standard range was 67-81 months, and the school zone enhancement was 24 months. The court imposed 57 months plus 24 on count III and 48 months, plus 24, plus 18 on count IV. On count V (delivery of marijuana), the court calculated an offender score of 8, a seriousness level of III, and a standard range of 43-57 months. The

to be served concurrently, the firearm enhancements on counts II and IV to be consecutive, and the school zone enhancements on counts III and IV to be concurrent. The offender scores on counts III through VI were 8, 8, 8, and 4, respectively.

After the second trial, the State argued that the court should resentence Eggleston on all crimes. Specifically, it argued that the court should act as if there had been a single trial and sentencing hearing on all counts. The State conceded that it had not found a case or statute to support this recommendation. Instead, it reasoned that “[t]he fortuity of the mistrial on count I caused . . . Eggleston to be sentenced on different days for count I and the remainder of his offenses.” CP at 1508. Thus, it argued that resentencing on all crimes “is the most logical since it minimizes the effect of the mistrial on the length of the defendant’s sentence.” CP at 1509. The trial judge rejected the State’s recommendation and imposed a sentence for count I, running it consecutively to the previous sentence for count II, the assault conviction, and concurrently with the previous sentences for counts III-VI, the drug convictions. In total, the court imposed 288 months plus the 60 months or 348 months. The court rejected the State’s request for an exceptional sentence.

At the sentencing hearing following Eggleston’s conviction of second degree murder and of first degree assault at the third trial, the State reiterated its argument that the court should treat all of his convictions as though they were rendered in the same proceeding. The State argued that it was “more fair” to “*ignore* the fact that the convictions came out of three separate proceedings and sentence the defendant as though he were convicted in a single trial of all the

court imposed 57 months. On count VI (possession of mescaline) the court calculated the offender score at 4, the seriousness level at I, and the standard range at 3-8 months. The court imposed a sentence of 3 months for that offense.

counts that were charged in this case.” RP at 6642 (emphasis added).

The trial judge agreed, sentenced Eggleston on counts I and II, and re-sentenced him on counts III through VI, raising the offender scores to 9, 9, 9, and 5, respectively, and lengthening the sentences on all four counts.³³ Accordingly, the total sentence was 582 months with counts I and II running consecutively.

B. Sentencing and Resentencing in Washington

Eggleston argues that the trial judge’s resentencing violates double jeopardy principles. He may be correct, but we do not reach a constitutional issue if we can resolve the question on statutory grounds. *See Isla Verde Int’l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 753, 752, 49 P.3d 867 (2002). The Sentencing Reform Act of 1981 (SRA) prevents a trial judge from resentencing as the court did here for crimes that were not reversed on appeal.

The meaning of a statute is a question of law we review de novo. *State v. Thomas*, 150 Wn.2d 666, 670, 80 P.3d 168 (2003); *see also Bishop v. Miche*, 137 Wn.2d 518, 523, 973 P.2d 465 (1999). Whether a trial court exceeded its statutory authority under the SRA is an issue of

³³ On count I the court used a criminal history score of 4, an offense level of XIII, a standard range of 165-219 months, and a firearm enhancement of 60 months. It imposed an exceptional sentence of 339 months plus the 60-month enhancement. On count II the court used a criminal history score of 0, an offense level of XII, a standard range of 93-123 months, and a firearm sentence enhancement of 60 months. It imposed a high end sentence of 123 + 60 or 183 months. On count III the court used a criminal history score of 9, an offense level of III, a standard range of 51-68 months, and an enhancement of 24 months for a range of 75-92 months; it imposed a sentence of 68 +24 months or 92 months. On count IV the court again used a criminal history score of 9, an offense level of III, and a standard range of 51-68 months plus the enhancements for a total range of 93-110 months--the court imposed a sentence of 68, plus 18, plus 24 months, or 110 months. For count V the court used a criminal history score of 9, and offense level of III, a standard range of 51-68 months and a sentence of 68 months. On count VI the court used a criminal history score of 5, an offense level of I, a standard range of 4 to 12 months, and a sentence of 12 months.

law, “which we review independently.” *State v. Murray*, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

Under the SRA, the court first calculates the sentencing range. 13B SETH A. FINE & DOUGLAS J. ENDE, WASHINGTON PRACTICE: CRIMINAL LAW § 3501, at 277 (2d ed. 1998). To compute this range, the trial court must “(1) determine the seriousness level; (2) compute the offender score; and (3) modify the resulting range.” 13B WASHINGTON PRACTICE § 3501, at 277. Although ascertaining the seriousness level is a simple matter of consulting a table, computing the offender score is more complex. 13B WASHINGTON PRACTICE § 3501, at 277. In general, courts consider the nature of the present conviction, prior convictions, and current offenses. *See* 13B WASHINGTON PRACTICE § 3501, at 277; *see also* RCW 9.94A.525. “A prior conviction is a conviction which exists *before the date of sentencing* for the offense for which the offender score is being computed.” RCW 9.94A.360(1) (*recodified as* RCW 9.94A.525 by LAWS OF 2001, ch. 10, § 6, and referencing subsection 589 for “other current offenses”) (emphasis added). “Convictions entered or sentenced *on the same date* as the conviction for which the offender score is being computed shall be deemed ‘other current offenses’ within the meaning of RCW 9.94A.400.” RCW 9.94A.360(1) (emphasis added).

A sentencing court may consider subsequent convictions entered *before* the date of sentencing in determining a defendant’s offender score. *State v. Worl*, 91 Wn. App. 88, 93, 955 P.2d 814 (1998) (citing *State v. Collicott*, 118 Wn.2d 649, 664-68, 827 P.2d 263 (1992)) (emphasis added). The offender score includes all prior convictions existing at the time of that particular sentencing without regard to when the underlying incidents occurred, the chronology

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of the convictions, or the sentencing or resentencing chronology.³⁴ *State v. Shilling*, 77 Wn. App. 166, 175, 889 P.2d 948 (1995).

Assault is the only crime “current” with the drug offenses because it was the only other conviction obtained on the same day as the drug convictions. Although the original assault conviction was reversed, Eggleston never asked us to vacate the drug sentences and remand for resentencing in light of that reversal. Accordingly, we never vacated those sentences.

The State cites to *State v. Collicott*, 118 Wn.2d 649, 827 P.2d 263 (1992) to support the proposition that the trial court properly included the murder conviction from the third trial when it resentenced the defendant on the drug charges. However, in *Collicott*, the Supreme Court expressly vacated the sentences at issue and remanded for resentencing. *Collicott*, 118 Wn.2d at 651-52. The Court held that a conviction on another charge that was entered in the interim between sentencing and remand for resentencing was a prior conviction that could be used in calculating defendant’s new sentence. *Collicott*, 118 Wn.2d 665. Here, we did not reverse Eggleston’s drug convictions or vacate the drug sentences in the first appeal. Rather, we affirmed the drug convictions and left the drug sentences intact. The third trial court had no authority to resentence Eggleston on the drug convictions.

C. The Sentences for the Drug Crimes Were Never Found Erroneous

The State contends that when a sentence is not in accordance with the law, the sentencing court has both the authority and the duty to correct it, citing *State v. Pringle*, 83 Wn.2d 188, 193, 517 P.2d 192 (1973). However, quoting *McNutt v. Delmore*, 47 Wn.2d 563, 565, 288 P.2d 848 (1955), the *Pringle* court clarified,

³⁴ Excluding, of course, prior convictions that have “washed” under the SRA rules. *See, e.g.*, RCW 9.94A.525; *In re Jones*, 121 Wn. App. 859, 869-70, 88 P.3d 424 (2004).

When a sentence has been imposed for which there is no authority in law, the trial court has the power and duty to correct the [e]rroneous sentence, when the error is discovered. This does not, of course, affect the finality of a correct judgment and sentence that was valid at the time it was pronounced.

Pringle, 83 Wn.2d at 193. At the time the State obtained the drug convictions, it had not obtained a conviction on the murder charge. Thus, the court did not include the murder in its calculation of the offender scores. But this was not error; it was correct. Because this sentencing was correct, *Pringle* does not apply.

Here, the sentences for the drug crimes, as calculated and entered by the first trial court, were valid. We affirmed the drug convictions and expressly declared that they were unaffected by our decision. *Eggleston*, 2001 WL 1077846 at *33. Although the SRA required the third sentencing court to treat these convictions as part of Eggleston's history in sentencing him for murder and assault, the court lacked authority to resentence him on the previously obtained drug convictions to include the murder conviction in the drug crime offender scores. Thus, the sentences for the drug crimes must be reversed, and Eggleston's previous sentences on those counts must be reinstated.

VI. COLLATERAL ESTOPPEL ON COUNTS IV AND VI

Eggleston argues that counts IV (possession of marijuana with intent to distribute in a school zone) and VI (possession of mescaline) were the same criminal conduct; thus, convicting and sentencing him on both crimes violated double jeopardy protections and the same criminal conduct rules for sentencing.³⁵ But these issues are not properly before us. These convictions

³⁵ Although generally the sentencing court determines the sentence range for each current offense by counting all other current and prior convictions as if they were prior convictions for the purpose of the offender score, if the court finds that some of the current offenses encompass the same criminal conduct, the court counts those offenses as one crime. RCW 9.94A.589(1)(a).

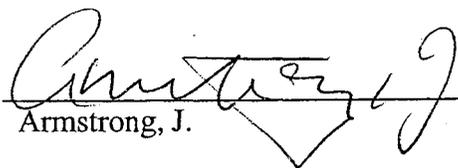
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and sentences followed the first trial. Eggleston may attack those convictions in a personal restraint petition or collateral attack under RAP 16, but he may not challenge them as part of this appeal.

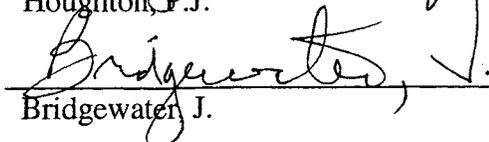
VII. THE EXCEPTIONAL SENTENCE UNDER BLAKELY

Eggleston argues that the trial court erred in imposing an exceptional sentence based on facts the jury did not decide beyond a reasonable doubt: i.e., “[Eggleston’s] knowledge that the person at whom he was shooting, and whom he killed by firing three shots into his head, one fired from a distance of 18-24 inches, was a law enforcement officer.” Br. of Appellant at 34-36. The State concedes that *Blakely v. Washington*, 124 U.S. 2531, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), requires us to vacate the exceptional sentence and remand for resentencing. We agree. We remand to the trial court for resentencing consistent with *Blakely* and SB 5477, 59th Legislature, Regular Session (Wash. 2005) (conforming the Sentencing Reform Act, chapter 9.94A RCW, to comply with *Blakely*).

We affirm the murder conviction, vacate the exceptional sentence on the murder conviction, and remand for resentencing in accordance with *Blakely*. We affirm the assault sentence and vacate the sentences on the drug crimes; and we reinstate the first court’s sentences for those convictions.


Armstrong, J.

We concur:


Houghton, P.J.

Bridgewater, J.

APPENDIX “C”

State’s Response Brief
State v. Brian Eggleston

NO. 29915-1

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

BRIAN THOMAS EGGLESTON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stephanie Arend

No. 95-1-04883-0

BRIEF OF RESPONDENT

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COPY

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Appendices

Appendix A

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly allow the State to adduce evidence showing that defendant knew or should of known the victim was a law enforcement officer when defendant killed him?

2. Does defendant's failure to raise his collateral estoppel claim in the trial court, as well as his failure to meet the four prong collateral estoppel test, preclude review of this claim of error?

3. Has defendant failed to show that the collateral estoppel doctrine is applicable when it is premised upon an erroneously completed special verdict form in a previous trial and when the finding on the special verdict is not a material element of the current charge?

4. Did the trial court properly exclude videotapes of poor quality?

5. Did the trial court properly limit defense counsel from attempting to impeach a State's witness with statements a prosecutor made at that witness's sentencing hearing six years earlier?

6. Did the trial court properly limit defense counsel's attempt to impeach a State's witness with information he received a "deal" when there was never any evidence such a deal existed?

7. Did the trial court properly exclude a defense expert's testimony regarding speculative matters and matters contrary to the parties' stipulation?

8. Did the trial court properly limit defense counsel from impeaching State's witnesses with prior statements when the prior statements were not inconsistant with their testimony?

9. Did the trial court properly exclude evidence regarding the defendant's sleep routine when it did not qualify as evidence of habit?

10. Did the trial court properly admit expert opinion when the opinions were supported by scientific evidence generally accepted in the relevant community, and when the experts did not speculate as to who fired the first shot?
11. Did the trial court properly admit evidence of defendant's drug dealing and drug possession when it was relevant to prove motive, intent, absence of mistake, *res gestae*, and to disprove self-defense?
12. Did the trial court properly admit former testimony of a witness who was unavailable at the time of this retrial?
13. Did the trial court's jury instructions properly articulate the law of self-defense, and allow defendant to argue his theory of the case?
14. Did the trial court properly exercise its discretion when it dismissed jurors who could not carry out their duties, and when it dismissed a juror the parties stipulated should be dismissed?
15. Did the trial court properly exercise its discretion when it concluded beyond a reasonable doubt that there was no reasonable possibility that the juror misconduct impacted the verdict?
16. Has defendant failed to show the trial court violated the double jeopardy clause when it sentenced defendant on drug charges that were not part of the third trial, but were part of the first trial, and the judgment and sentence from that first trial was voided by this court's opinion in defendant's first appeal?
17. Did the trial court properly find that two of defendant's drug convictions were not the same criminal conduct when defendant stipulated to his offender score below, and never raised a same criminal conduct argument before the court after his first, or third trials?
18. Must this case be remanded for resentencing pursuant to Blakely v. Washington, when the basis for the exceptional sentence was not found by the jury?

B. STATEMENT OF THE CASE.

1. Procedure

On October 27, 1995, Brian Thomas Eggleston, hereinafter "defendant," was charged with one count of unlawful delivery of a controlled substance. CP 1621. On October 31st, defendant was charged, by amended information, with murder in the first degree with aggravating circumstances, assault in the first degree, unlawful delivery of a controlled substance, and unlawful possession of a controlled substance with intent to deliver. CP 1622-30. The amended information alleged that the defendant committed the murder knowing, or reasonably should have know, that the victim, John Bananola, was a law enforcement officer who was performing his duties at the time of the act resulting in his death. The amended information also alleged that the assault in the first degree was committed against Warren Dogeagle, that the delivery of the controlled substance was within 1000 feet of a school, and that the unlawful possession of the controlled substance was committed while defendant was armed with a firearm.

The murder occurred when members of the Pierce County Sheriff's Department (PCSD) were serving a search warrant at defendant's residence. CP 1626-30. The search warrant was being executed because the defendant had sold marijuana to an informant. The Sheriff's Department was particularly concerned because the defendant's brother is

a Pierce County Sheriff's Deputy and had been living with defendant during the period when defendant had been reportedly selling marijuana out of the house. CP 1626-30.

Ron Englert, a criminal reconstructionist, was hired to assist the State in this case. RP 4627-28. In April of 1996, Mr. Englert went to the Eggleston residence with the surviving deputies who served the search warrant. RP 1383. The deputies were told to tell Mr. Englert what they remember occurred, and were videotaped as they related what they each recalled. RP 1383.

On February 24, 1997, the State filed another amended information. CP 1102-07. This information charged six counts. Count One charged defendant with committing murder in the first degree, with the same aggravating circumstance alleged in the previous amended information, as well as a firearm sentencing enhancement. Count Two charged assault in the first degree, with a firearm sentencing enhancement, occurring on October 16, 1995. Count Three charged the defendant with unlawful delivery of a controlled substance, marijuana, on October 7, 1995. This amended information also alleged this delivery occurred within 1000 feet of a school.

Count Four alleged defendant committed the crime of unlawful possession of a controlled substance with intent to deliver, marijuana, on October 16, 1995. This count carried with it two enhancements: that the possession occurred within 1000 feet of a school, and that defendant was

armed with a firearm at the time of the crime. Count Four also alleged in the alternative, that defendant was in possession of more than 40 grams of marijuana, and did so while armed with a firearm. Count Five of the amended information alleged defendant had committed the crime of delivery a controlled substance, marijuana, on October 5th, 1995. Count Six charged the defendant with unlawful possession of a controlled substance, mescaline, on October 16, 1995. CP 1102-07.

Defendant was tried on this amended information, and on May 7, 1997, the jury returned verdicts of guilty to all counts except to Count One, Murder in the First Degree. CP 1121-27, 1640-31. The jury hung on the murder charge and the court declared a mistrial.

On June 12, 1997, the trial court sentenced defendant on the five counts for which he had been convicted. CP 1204-15. On Count Two, the assault in the first degree conviction, the court sentenced defendant to 160 months, plus 60 months for the firearm enhancement. The court calculated defendant's offender score as four for this count, assessing one point for each of the other current convictions. Defendant had no prior felony convictions. CP 1205. Defendant was sentenced to 57 months, plus 24 months for the school zone enhancement on Count Three. Defendant's offender score for this count and Count Five was eight: one point for the assault conviction, one point for the possession conviction (Count Six), and three points each for the current delivery and possession with intent convictions.

On Count Four the court sentenced defendant to 48 months, plus 24 months for the school zone enhancement and an additional 24 months for the firearm enhancement. The court calculated defendant's offender score for this count as eight: one point for the assault conviction, one point for the possession conviction (Count Six), and three points each for the two current delivery convictions. The court sentenced defendant to 57 months on Count Five, and three months on Count Six. The court had the opportunity to conclude that any of the above convictions encompassed the same criminal conduct and did not do so. CP 1205.

The following year defendant was retried on the murder in the first degree charge. On May 20, 1998, the jury returned a verdict of guilty to the lesser included offense of murder in the second degree, having found defendant not guilty of murder in the first degree. CP 1494, 1496. The jury returned a special verdict finding that defendant committed the crime while armed. CP 1641. The court entered these verdicts. The court observed that the jury also completed the aggravating circumstance verdict, but that it had no significance to the verdict the jury returned. CP 1496; RP 5/20/98, pp. 8501-09; Appendix A. The jury answered the aggravating circumstance verdict in the negative.

On July 2, 1998, the trial court sentenced defendant to 288 months for the murder, plus 60 months for the firearm enhancement, and ran that sentence consecutive to the assault in the first degree conviction, but concurrent to the drug convictions. CP 1520-30.

On September 14, 2001, in an unpublished consolidated opinion, this Court overturned defendant's murder and assault convictions, but affirmed his drug convictions. State v. Eggleston, No. 22085-7-II, No. 23499-8-II.

On September 27, 2002, defendant's third trial began with pretrial motions before the Honorable Stephanie Arend. RP 1. At a pretrial hearing the State moved the court to permit it to present evidence by way of prior testimony, because Tacoma Police Department forensics officer Ted Garn was unavailable to testify. CP 1655-65. Accompanying the motion was a note from Garn's Doctor which read, "Mr. Garn physically can not (sic) be expected to testify @ trial due to his neck condition." CP 1665. The court heard testimony from Mr. Garn, who explained he was suffering from post traumatic stress syndrome and suffered memory loss. RP 1228-42. The court also heard testimony from Mr. Garn's wife, Ruth Garn, who explained that Mr. Garn becomes violent, depressed, and paranoid, and that he experiences hallucinations when exposed to things relating to violence. RP 1242-48. The court concluded that Mr. Garn was unavailable to testify and the State would be permitted to use his prior testimony in lieu of his testimony at trial. RP 1366-72. The court concluded that Mr. Garn was unavailable because he lacked memory of the events in question, and his current mental condition prevented him from testifying.

After a lengthy trial, on December 16, 2002, defendant was again convicted of murder in the second degree, and assault in the first degree. CP 810-13; RP 6519-23. The jury returned special verdicts indicating that defendant was armed with a firearm when he committed both of these crimes. Id.

After the trial defendant brought a motion for a new trial based on juror misconduct. CP 847-66. The court held a hearing and heard testimony from all twelve jurors. RP 6527-6612. The trial court concluded that juror misconduct occurred when two jurors heard of results of a prior trial, but concluded beyond a reasonable doubt there was no reasonable possibility that the verdict was affected by the misconduct. CP 921-31.

On January 9th, 2003, defendant was sentenced for the third time. Defense counsel stipulated that the State's calculation of the offender score on the murder conviction was correct. RP 6636. Defense counsel did object, however, to the court re-sentencing defendant on the drug convictions. RP 6640-41. The State noted that the drug sentences imposed after the first trial were incorrect because that judgment and sentence had run the enhancements consecutively and they should have been run concurrently. RP 6643-46. The court proceeded to sentence defendant on all counts.

The court sentenced defendant to an exceptional sentence of ten years above the standard range on the murder conviction, concluding that

defendant knew Deputy Bananola was a law enforcement officer at the time of the murder. The court sentenced defendant within the standard range on all other counts. CP 878-94. The total sentence imposed was 583 months.

This timely appeal followed. CP 895-920.

2. Facts

In early August 1995, Deputy Ben Benson began an investigation into defendant's marijuana sales. RP 1418-19. A man named Steve McQueen had come to the PCSD office and told Deputy Benson and Deputy Bananola about a marijuana grow on the Key Peninsula, in the Gig Harbor area. RP 1420. Mr. McQueen went with the deputies to the Key Peninsula, and showed them the marijuana grow. RP 2764. Mr. McQueen also told the deputies that he bought marijuana from defendant. RP 1421, 2764-66. Mr. McQueen told the deputies that he was buying marijuana from a person whose brother was a deputy sheriff, and this brother was present when McQueen bought marijuana from defendant at defendant's house. RP 2765. Mr. McQueen told the deputies where defendant lived and Deputy Benson confirmed that a sheriff's deputy listed that address as his home address in the Department's records. The sheriff's deputy was Brent Eggleston, defendant's brother. RP 1423.

Deputy Benson began to conduct surveillance of the Eggleston residence and viewed the house on approximately ten different occasions.

Deputy Benson observed Deputy Eggleston at the residence on one occasion, but never saw his patrol car at the house. RP 1433. Deputy Benson informed his supervisors of what he had learned. RP 1435.

Deputy Benson then arranged controlled buys, during which Mr. McQueen would buy marijuana from defendant. RP 1437. Mr. McQueen was to be a “confidential informant,” conducting the buys but not expected to testify if a case went to trial. RP 1438. On October 5, 1995, Mr. McQueen participated in a controlled buy, buying \$120 worth of marijuana from defendant outside Magoo’s Tavern, where defendant worked as a bartender. RP 1442. At about 11:00 p.m., Deputy Benson observed Mr. McQueen and defendant exit the tavern, and get into defendant’s car with two other people. RP 1444. The defendant was in the driver’s seat and the car pulled away from the tavern. The car was only gone for a few minutes, just long enough to drive around the block. RP 1445. While the car was out of sight of Deputy Benson, Mr. McQueen bought three \$40 bags of marijuana from defendant. RP 2791.

On October 7, Mr. McQueen bought \$240 worth of marijuana during a second controlled buy. RP 1449. On October 9th, Deputy Benson used the information he had collected to obtain a search warrant for defendant’s residence. RP 1459-60. Deputy Benson determined he would have the search warrant served on Monday morning because he had information that defendant received deliveries of marijuana on the weekend and sold it during the week. RP 1461.

It was the standard practice of the Sheriff's Department to serve drug search warrants during daylight hours, and the preference was to do so early in the morning because drug dealers are usually asleep and sober at that time. RP 1463-64. Deputy Benson also wanted to serve the warrant before the children arrived at the elementary school directly across the street from the Eggleston residence. By the time the deputies were prepared to serve the warrant Deputy Benson had determined that Deputy Eggleston did not live at the residence, but the entry team prepared for his presence in case he was there at the time the warrant was served. RP 1465, 1478-79. If Deputy Eggleston's patrol vehicle was at the residence, the entry team would not conduct the entry as planned. RP 1478-79.

On the morning of October 16th, the narcotics team prepared for the raid of the Eggleston residence by meeting at a Parkland fire station. RP 1464. Deputy Benson gave the entry team some background information about his investigation, informing them that defendant had sold marijuana, and that they had a search warrant for the house. RP 1468-69. Deputy Benson informed the team that he expected the defendant to be present, his girlfriend, his mother, and possibly a small child. RP 1469. Deputy Benson also related that the information he had was that defendant had a handgun and a shotgun in his bedroom. RP 1470.

The entry team consisted of Deputies Bananola, Dogeagle, Reigle, Reding, Fajardo, Kapsh and Larson. RP 1473-74. Deputy Benson was to

remain outside the house providing perimeter surveillance while the warrant was served by the entry team. RP 1474. As the team approached the residence in the van, there were other PCSD officers who followed in other vehicles. One was a deputy in full uniform, driving a marked patrol car. This was done in order to let any observers know it was a police operation. RP 1479-80.

Deputy Larson was assigned to do the 'knock and announce' because he has a very loud voice. RP 1472. Deputy Dogeagle had the responsibility of ramming the door with the ram if that was necessary. RP 1472.

The team pulled up to the Eggleston residence shortly before 8:00 in the morning. RP 1480. The sun was up, and the entry was conducted during day light hours. RP 1508, 1747, 1750. The entry team van did not have its headlights on when it went to the Eggleston residence. RP 1508. All of the entry team members wore items, which identified themselves as members of the PCSD. Deputy Benson wore a green jacket, which identified him as a PCSD deputy, and had his badge affixed to the front of the jacket. RP 1501; Exhibits 15, 16. Deputy Larson was wearing a vest and jacket, as well as his badge, which clearly indicated that he was with the Sheriff's Department. RP 1744; Exhibits 309, 310. John Bananola wore black fatigues with a reflective vest material on the front and back. RP 1746; Exhibit 110. The jacket had four inch letters stating "SHERIFF" on the front and back. RP 3556.

Deputy Reding wore a heavy tactical vest with "SHERIFF" written on the front and back, a ballistic helmet with a face shield, and black pants. RP 3036-39; Exhibits 311, 312. Deputy Reigle wore a jacket that identified him as a Sheriff's Department deputy. RP 3289-90; Exhibits 31, 32. Deputy Kapsh also wore a jacket, which identified him as a Pierce County Sheriff's Deputy. RP 3660; Exhibits 227, 228. Deputy Fajardo was wearing a BDU uniform that identified her as a PCSD deputy. RP 3961; Exhibits 267, 268. Deputy Dogeagle wore items which identified him as a sheriff's deputy, and also wore a hooded mask because he was working undercover on another case involving heroin dealers who lived in the same neighborhood, and he could not afford to be identified as a deputy by them. RP 4400-01, 4406; Exhibits 280, 281.

Deputy Benson parked the van in the back of the residence. RP 1481-82. The team exited the van and approached the backdoor of the house because this was the door Deputy Benson had observed being the one most frequently used during his surveillance. RP 1432, 1482. Deputy Larson was first to the back door, and knocked loudly five to six times. RP 1483-84. Deputy Larson "knocked and then announced, 'Police. Sheriff's Department. Search Warrant.'" RP 1484. Deputy Larson did this at the top of his voice, then waited a few seconds and repeated the 'knock and announce.' After the second knock and announce, one of the deputies tried the door and it was unlocked, so he opened the door. RP 1485, 1758, 3048. After the door was opened, Deputy Larson again

announced loudly, "Police. Sheriff's Department. We have a search warrant." RP 1486, 1759. As the deputies prepared to enter the house there was a marked patrol car in the backyard with its emergency lights on. RP 3601.

Linda Eggleston, defendant's mother, awoke to a noise, and called out to her son. Defendant told her to stay in her room, and "I'll handle this." RP 3628.

The deputies then waited five to ten seconds before Deputy Reding entered the house. RP 1759-60. Between thirty and forty-five seconds elapsed between the first knock and Deputy Reding's entry. RP 1579. Deputy Reding entered the house, into the kitchen. RP 3051. Deputy Reding observed defendant's father, Tom Eggleston, on the couch in the living room and ordered him to show his hands. RP 3065. Deputy Reding approached him with his gun pointed at Tom Eggleston. RP 3066. When Tom Eggleston complied with the order, Deputy Reding took his finger off the trigger of his gun, and returned the gun to a low ready position. RP 3074.

As the deputies entered the house, they continued to announce "Sheriff's Department. Search Warrant." RP 3093-3103. Deputy Reding did it three times in a loud voice as he went from the kitchen to where Tom Eggleston lay. RP 3093.

Deputy Reigle followed Deputy Bananola into the residence. He observed Deputy Reding make initial contact with Tom Eggleston and saw

Tom Eggleston put his hands up. RP 3302. Deputy Reigle came off Deputy Reding's hip, following Deputy Bananola to the next unsecured area. RP 3304. The team members continued to loudly announce their presence: "Sheriff's Department. Search Warrant." RP 3304-07. Deputy Reigle made this announcement and heard Deputy Bananola make the same announcement as he approached the hallway. RP 3311.

Immediately after Deputy Bananola rounded the corner of the hallway, Deputy Reigle prepared to enter the hallway by raising his gun from the low ready position. RP 3322. Gunfire erupted just as Deputy Reigle started around the corner of the hallway. RP 3323-24. Deputy Reigle spun around, believing the gunfire came from the couch area he had just past, but realized it was not coming from there. RP 3323-25. Deputy Reigle saw Deputy Bananola heading towards the front door of the residence, moving low, not standing, and not crawling. RP 3325-26. Deputy Reigle heard Tom Eggleston tell Linda Eggleston, defendant's mother, to "put the gun down." RP 3333. Deputy Reigle then retreated back out the backdoor he had entered. RP 3332-34.

While covering Tom Eggleston, Deputy Reding heard this volley of gunshots. RP 3076. Deputy Reding turned toward the hallway to his right and saw Deputy Bananola coming from the hallway, wearing his clearly visible vest that said "sheriff" on it. RP 3079. Deputy Reding saw Deputy Bananola up-right and then start to stumble. RP 3080. After this initial gunfire, Reding heard Bananola let out an "ugh." RP 3081. As

Deputy Reding retreated towards the back door, he continued to face the hallway from which Deputy Bananola had come. RP 3083-84. Reding saw defendant as he moved towards the living room, past the organ. RP 3083. The defendant moved purposely, and did not appear to be injured. RP 3085. Defendant had a gun in his hands and Deputy Reding opened fire, firing three shots. RP 3086. Deputy Reding's shots did not hit defendant. RP 3086.

Deputy Larson entered the house and observed Deputy Reding make his initial contact with Tom Eggleston. RP 1763-64. Deputy Larson then observed Deputy Bananola as he went around the corner of the hallway. RP 1766-67. Deputy Larson heard gunfire and saw muzzle flash and numerous starbursts. RP 1768. Deputy Larson saw Deputy Bananola running out of the hallway and towards the living room. RP 1769.

Deputy Dogeagle went to the backdoor with the ram, an item used to breach the door if necessary. RP 4395, 4408. Deputy Dogeagle heard Deputy Larson pound on the back of the residence, and announce "Police. Sheriff's Department. Search Warrant." RP 4410. Deputy Dogeagle observed Deputy Larson do this two times. After the second 'knock and announce' the door was opened, and Deputy Larson again loudly announced "Sheriff's Department. Search Warrant." RP 4410. Deputy Dogeagle heard the deputies announce "Police. Search warrant. Sheriff's Department," as they entered the house. RP 4412. Deputy Dogeagle followed Deputies Reding, Bananola, Reigle, and Larson into the house.

RP 4411. Deputy Dogeagle stepped through the entry and into the kitchen and could see Tom Eggleston on the sofa when he heard gunfire. RP 4413.

During the initial gunfire, Deputy Dogeagle could hear “Police, put the gun down.” RP 4417. Deputy Dogeagle observed Deputies Reigle and Larson withdraw after the gunfire. RP 4418. Deputy Dogeagle watched as these two deputies exited and then saw Deputy Reding pass by him. After the first gunshots Deputy Dogeagle heard Deputy Bananola say, “Put the gun down. Police.” RP 4421. Reding fired several shots, “I believe three,” before he exited. RP 4419. Deputy Dogeagle could not tell at what Reding was shooting. RP 4420. After Deputy Reding had fired his three shots there were more gunshots. RP 4420.

Deputy Dogeagle was still in the kitchen, covering two doorways in the house, believing the threat was coming from that direction. RP 4425-26. The defendant came through one of the two doors and started to shoot at Deputy Dogeagle. RP 4426. The defendant raised his gun, pointed it in the direction of Deputy Dogeagle and pulled the trigger. RP 4427. Deputy Dogeagle raised his gun and returned fire. RP 4427. Deputy Dogeagle fired several shots and defendant fell back into the hallway. Deputy Dogeagle remained in the kitchen until the deputies outside re-grouped and re-entered the house.

When the team initially entered the house, Deputy Fajardo entered the residence behind Deputy Dogeagle. RP 3972. She came through the

door and into the foyer and then the kitchen, stopping at the side of the dishwasher. RP 3974-75. Deputy Fajardo yelled, "Sheriff's Department. Search Warrant," and heard Deputy Reding ordering Tom Eggleston to put his hands up. RP 3975-76. Deputy Fajardo then heard gunfire erupt and saw Deputy Reigle retreating towards her. RP 3977. After this initial exchange of gunfire, Deputy Fajardo heard Deputy Bananola say something but could not make out what exactly he said. RP 3983. There was then a second volley of gunfire. RP 3981-83.

Deputy Reding exited the house and retrieved the ballistic shield from the entry team van. As Deputy Reding exited the house he heard more gunfire. RP 3089-90. Deputy Reding re-entered the house with other deputies following him. They re-entered the house and immediately detained Tom Eggleston. RP 3108-09. Deputy Reding observed John Bananola laying face down on the ground, still wearing his reflective vest. RP 3108. Deputy Reding rolled Deputy Bananola onto his back and noticed a 9 mm brass spent casing at Deputy Bananola's waistline. RP 3109, 3112-14. Deputy Reding observed a bullet entry wound between Bananola's right eye and temple, and immediately started performing CPR. RP 3110-12. Deputy Reding and Deputy Kapsh performed CPR until the paramedics relieved them. RP 3112. After the paramedics relieved the deputies, Deputy Reding was standing with Deputy Fajardo at Bananola's feet. Deputy Fajardo observed Deputy Reding bend down and

pickup a piece of metal. RP 4002-03. Deputy Reding commented that it looked like a 9 mm and put it on the arm of the sofa. RP 4003.

Other deputies went down the hallway and detained Mrs. Eggleston and defendant.

Doctor Emmanuel Lacsina, a forensic pathologist who works for the Pierce County Medical Examiner's Office, conducted the autopsy on Deputy John Bananola. RP 2551, 2563. Dr. Lacsina observed thirteen total injuries on Deputy Bananola's body. Seven of the wounds were entrance wounds, two were re-entrance wounds, and four were exit wounds. RP 2576. The doctor detailed the injuries, but could not determine a chronological order. The first wound was labeled gunshot wound A. RP 2576. This injury was a gunshot to John Bananola's head, just below the top of the head, on the left side. RP 2576-78. The bullet traveled from back to front, left to right and downward. *Id.* The bullet was recovered from the soft tissue of the right side of the neck, close to the jaw line. RP 2578. This bullet injury was sufficient to cause the death of Deputy Bananola. RP 2581. There was no gunshot residue associated with gunshot wound A, so the shot was fired from more than 24 inches from Deputy Bananola's head. RP 2582.

Gunshot wound B entered the top of Deputy Bananola's head, slightly in the back, and traveled left to right in a downward path, perforating the skull, through the right lobe of the brain, and exited through the right ear. RP 2584. This bullet created an exit wound, wound

C. The injury from this gunshot was also a deadly injury. RP 2588. The exit wound for this injury was very irregular, with abrasions around the margins of the wound. RP 2589. The most common reason for an exit wound with abrasions such as these is that the body would be resting against a surface such as a wall or tight clothing. RP 2589. This type of wound is referred to as a shored or supported exit wound. RP 2589.

Gunshot wound D was also located on the top of the head. RP 2590. The wound was on the frontal, left side of the head, in the hairline. RP 2590. The stippling and tattooing, and skull fractures associated with this injury demonstrate this bullet was fired from within 18 to 24 inches of Deputy Bananola's head. RP 2592, 2595. The bullet exited the body, creating injury E. This exit wound also showed areas of abrasion margins, indicating that when the bullet was exiting, that part of the head was in contact with another object. RP 2595. This shoring of the exit wound could have been caused by contact with skin. RP 2597. The same bullet left Deputy Bananola's head and entered his right upper arm, wound H. RP 2596. The bullet was recovered from his arm. RP 2599. The arm also had stippling injuries associated with the gunshot that created gunshot wound D. RP 2599. This bullet was shot from less than 24 inches away, hit Deputy Bananola's head, exited his head which was supported, and entered his arm. RP 2650.

Gunshot wound F was to the right back shoulder of Deputy Bananola. RP 2601. This bullet traveled through soft tissue and exited a

little bit below and to the back of his right armpit. The exit wound associated with gunshot wound F, was wound G. These were superficial wounds that would probably not have been fatal, or incapacitating. RP 2603-06. The sharply downward trajectory lead Dr. Lacsina to believe this injury was probably sustained while Deputy Bananola was crouching. RP 2604. There was no evidence of shoring on exit wound G. RP 2628.

Gunshot wound J entered Deputy Bananola's left arm, and exited as wound K. RP 2631. This bullet then re-entered Deputy Bananola in the left side of his chest. The arm injury was superficial, and showed no signs of stippling so the gunshot was more than 18-24 inches from the injury. The bullet entered the chest, traveling from left to right, and downwards. RP 2632. The re-entry injury was labeled wound L. RP 2631. The bullet traveled between the fifth and sixth rib, nearly grazing the left lung, and grazing the heart, before lodging in the right front of Deputy Bananola's chest. RP 2633. Assuming Deputy Bananola received immediate medical attention, this injury would not have been fatal, and probably would not have had severely restricted his motor functions. RP 2634.

Gunshot wound M entered Deputy Bananola's left chest area and exited after traveling a short distance from where it entered; creating exit wound N. PR 2635-36. Wound M appeared to have portions of Deputy Bananola's Kevlar vest sticking to it. This did not appear to be a fatal

injury, and the gun was probably fired more than 24 inches from the injury. RP 2637.

Gunshot wound O was to the front, inside of Deputy Bananola's left foot. RP 2638, 2648-49. The oblong shape of the bullet indicates it struck something before it hit Deputy Bananola's foot. RP 2639. Dr. Lacsina recovered the bullet from Bananola's foot. While the bullet hit and fractured the bones in Deputy Bananola's foot, the doctor could not say how much mobility he would have lost, but the injury was not fatal. RP 2640-41. This bullet was fired by defendant, hit the floor and then hit Deputy Bananola's foot, while he and the deputy were in the hall, earlier in the incident. RP 4650-52; Exhibit 331.

Deputy Bananola was also shot in the back twice, but the bulletproof vest stopped these bullets, and the only injuries were bruising. RP 2644- 47. One of these bullets traveled through the R in SHERIFF on the vest. RP 2647.

Doctor John Howard, the Pierce County Medical Examiner and a forensic pathologist testified that the successive bullets, which hit Deputy Bananola's head, would have caused immediate incapacitation. RP 4197-98, 4222. The effect of the first of these gunshots, no matter which of the three, would make the body go limp and cause Deputy Bananola to lose all voluntary muscle control within a second. He would have instantly lost his ability to stand and would collapse. RP 4222. If Deputy Bananola was in a crouched position when he was hit by the first of the three fatal

gunshots, he would lose all ability to maintain a crouched position and collapse to the ground. RP 4228. The other injuries could have been incapacitating; such incapacity would have taken a few minutes. RP 4228-29.

Dr. Howard testified with reasonable scientific certainty, that there were no inconsistencies with the theory that Deputy Bananola's arm was in contact with his head when he suffered the gunshot injury that penetrated his skull, exited his head, and lodged in his arm. RP 4237-39. The stippling patterns on the head and arm of Deputy Bananola were consistent with the arm being against the face when the shot was fired. RP 4267.

Mr. Englert testified as to his findings after reconstructing the scene using the statements of the officers, the autopsy report, crime scene reports, diagrams, a video of the scene, numerous photographs, and having visited the scene of the crime. RP 4627-28. From his training and experience, Mr. Englert was able to form an opinion with reasonable scientific certainty about what occurred at the Eggleston residence on the morning of October 16, 1995. RP 4628-29; Exhibits 330-342.

Mr. Englert explained that Deputy Bananola was in the hallway and fired a shot that went through the bathroom door, while defendant fired a shot that ricochet off the floor. RP 4641, 4697. As Deputy Bananola collided with the organ, his gun fired sending another bullet through the wall, through a closet door, and into the dresser. RP 4653,

4697. Deputy Bananola exited the hallway as described by Deputy Reding. RP 4655. Defendant then came into view of Deputy Reding and Reding fired three shots towards defendant. RP 4655. Mr. Englert indicated that the location of Deputy Bananola's body, when found after the gunfire ceased, indicated that he went around the corner into the living room in the period of time relative to Deputy Reding firing at defendant. RP 4655-57.

Deputy Bananola fired his weapon several times while in the living room. RP 4657. Deputy Bananola fired a shot that went through the front door. RP 4658. The deputy then fired another shot into the love seat and another into the television. RP 4658. Deputy Bananola also fired a shot into the ceiling. RP 4669. A trajectory analysis done by Jim Krylo revealed these shots all came from where Mr. Englert placed Deputy Bananola in Exhibit 334. RP 4668-59. The placement of Deputy Bananola at this time was also aided by the autopsy report which indicated that the gunshot injury to his right shoulder was at a very steep angle. RP 4669-70. This is only possible in Mr. Englert's opinion, if the deputy had been very low to the floor.

Mr. Englert explained that the bullet that caused the injury to the shoulder was the same casing Deputy Reding picked up off the floor. RP 4672. He came to this conclusion because the bullet had red oak flooring on it and BDU fibers consistent with Deputy Bananola's clothing. RP

4673. It was also found in the area, there was a bullet like defect in the red oak flooring, and it was the only bullet unaccounted for.

Mr. Englert conclude that Deputy Bananola shot defendant in the groin just prior to defendant putting his bloody hand on the chair in the living room. It was the defendant's blood on the chair and there was a pubic hair found on the chair. RP 4676-78; Exhibits 334, 335. Mr. Englert took into account the trajectories from Deputy Bananola's shots, the blood on the chair, and the castoff blood of defendant, and established that after he had been shot, defendant came around the chair, or somehow came back towards Deputy Bananola who was on the floor. RP 4680.

Deputy Bananola was then shot on the left side of his body. According Jim Krylo's findings, the bullets that hit Deputy Bananola in the back, and lodged in his vest, came from the left and went in at an angle of 15 to 75 degrees. RP 4682. These bullets were fired from the area near the chair. RP 4684. Mr. Englert explained that the evidence supported his contention that these shots occurred in the living room, rather than the hallway, because the wall in the hallway made it impossible for the injuries to be inflicted as the trajectories indicate they were inflicted. RP 4686.

By reviewing Dr. Lacsina's report regarding the shored exit wounds and the re-entry wound, the blood back spatter going up underneath the glass table, the very acute projected blood stains on the wall, the elongated stains of blood on the love seat, and the acute angle of

the blood spatter on the archway, Mr. Englert was able to demonstrate that Deputy Bananola was laying on the living room floor with his head on top of his right arm when he was shot in the head. RP 4699-71, 4718-19; Exhibit 337. Further, the south face of the north archway had blood spatter with Deputy Bananola's brain tissue in it. RP 4706.

The blood spatter on the archway and west wall was the result of three gunshot wounds to John Bananola's head. RP 4708-09. Defendant was in front of Deputy Bananola, shooting down, from the left side. RP 4714. The gunshot that inflicted the head injury that was shored by Deputy Bananola's arm was fired only 18 to 24 inches from his head.

After shooting Deputy Bananola in the head three times, defendant touched the south archway wall and transferred blood onto it and the chair. RP 4722-35; Exhibit 338. Defendant then came into view of Deputy Dogeagle, fired one shot and was shot by Deputy Dogeagle. RP 4696-97, 4735-36; Exhibit 339. This conclusion was supported by the high velocity mist of blood, approximately chest high on the wall, in the area defendant came into Deputy Dogeagle's view. RP 4736. Mr. Englert concludes that defendant then went down the hallway to the bedroom. RP 4736. This conclusion was supported by the drops of blood close to the right side of the wall in the hallway, and the bloody transfer on the bed from defendant's right hand. RP 4736, 4747-48; Exhibit 340.

Mr. Englert testified that the location of the shell casings supported his conclusions as to where the participants were when they each fired

their respective weapons. RP 4740-44; Exhibit 342. The entire gun battle was over in 60 to 75 seconds. RP 4745.

Deputy Bananola fired seven times total, and defendant fired eleven times. RP 4697-98.

C. ARGUMENT.

1. COLLATERAL ESTOPPEL DOES NOT APPLY TO A PREVIOUSLY ANSWERED SPECIAL VERDICT WHEN THE JURY ANSWERED THE SPECIAL VERDICT IN THE PREVIOUS TRIAL CONTRARY TO THE COURT'S INSTRUCTIONS, DEFENDANT NEVER RAISED COLLATERAL ESTOPPEL IN THE SUBSEQUENT TRIAL, THE SPECIAL VERDICT WAS NOT NECESSARY FOR THE JURY TO ACQUIT DEFENDANT IN THE PREVIOUS TRIAL, AND DEFENDANT HAS FAILED TO SATISFY THE FOUR PART COLLATERAL ESTOPPEL TEST.

The second trial jury found the defendant not guilty of murder in the first degree, but guilty of murder in the second degree. That jury also answered a special verdict finding that defendant committed the crime while armed with a firearm. CP 1641. Another special verdict was submitted to the jury, an aggravating circumstance special verdict, which read as follows:

We, the jury, having found the defendant guilty of Murder in the First Degree, make the following answer to the question submitted by the court:

QUESTION: Has the State proven the existence of the following aggravating circumstance beyond a reasonable doubt?

That Deputy John Bananola was a law enforcement officer who was performing his official duties at the time of the act resulting in death and that Deputy John Bananola was known or reasonably should have been known by the defendant to be such at the time of the killing.

ANSWER: _____

CP 1495. The jury filled out the form to this special verdict, answering the question, "no." The court accepted the guilty verdict and the deadly weapon special verdict, but not the aggravating circumstance special verdict. The following is the trial court accepting the verdict at the end of the second trial:

THE COURT: Mr. Greer, are you the presiding juror?

JUROR GREER: Yes, I am.

THE COURT: And has the jury reached a verdict?

JUROR GREER: Yes, we have.

THE COURT: If you'd hand the verdict forms to Mrs. Rose, the judicial assistant.

I'll read the verdicts. Verdict form A, murder in the first degree. We the jury find the defendant not guilty of murder in the first degree, of the crime of murder in the first degree as charged. Verdict form B, murder in the second degree. We the jury, having found the defendant not guilty of the crime of murder in the first degree as charged, or being unable to unanimously agree as to that charge, find the defendant guilty of the lesser included crime of murder in the second degree. Special verdict form, deadly weapon. We the jury return a special verdict by answer as follows: Was the defendant armed with a deadly weapon, pistol, revolver, or any other firearm, at the time of the commission of the crime of murder in the first degree or murder in the second degree? Answer, yes. Both verdict

forms were - - all three verdict forms that I referred to have been signed by the presiding juror.

Report of Proceedings (5/20/98) 8501-02; Appendix A.

Judge Kruse then polled each of the jurors, and each of the twelve confirmed that the verdicts read by the court were their personal verdicts, and the verdicts of the jury. After polling the jury the court accepted the verdicts:

THE COURT: The verdicts will be accepted by the court. I do want to indicate that special verdict form, aggravating circumstances, was also filled out by the jury, but it really has no significance to the verdict that the jury rendered. Ladies and gentlemen of the jury, you are discharged from your duties as jurors in this cause. I will be the sentencing judge in this matter, so I'm not going to say a heck of a lot this afternoon, except to thank you for your unusual and lengthy service as jurors in this cause. I may be in touch with you in the future.

Report of Proceedings (5/20/98) 8505-06; Appendix A.

The court's observations are consistent with the court's instructions. The instructions told the jury to fill out the aggravating circumstance special verdict form only if it convicted defendant of murder in the first degree. CP 1491-93; Instruction 28.

- a. Defendant failed to raise the collateral estoppel challenge below and is therefore precluded from raising this issue on appeal.

Defendant asserts that the trial court erred when it permitted the introduction of evidence that he premeditatedly shot Deputy John Bananola, and that he knew or should have known that Deputy John Bananola was a law enforcement officer. Defendant's objection is based on the legal principle of collateral estoppel. Defendant never asserted this objection at trial. "The failure to make a timely objection to the admission of evidence at trial precludes appellate review." State v. O'Neill, 91 Wn. App. 978, 993, 967 P.2d 985 (1998)(citing State v. Florczak, 76 Wn. App. 55, 72, 882 P.2d 199 (1994)).

Under RAP 2.5(a), claims of error raised for the first time on appeal will be considered if the claimed error concerns (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. The RAP 2.5 exception is construed narrowly. State v. WWJ Corp., 138 Wn.2d 595, 980 P.2d 1257 (1999)(citations omitted). An objection to the admissibility of evidence must be made to the trial court in order to preserve a claim of error on appeal. ER 103(a); State v. Davis, 141 Wn.2d 798, 850, n. 287, 10 P.3d 977 (2000). If not raised below, the defendant bares the burden of demonstrating that a claim of error is both

constitutional and manifest. "The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error 'manifest,' allowing appellate review." State v. McDonald, 138 Wn.2d 680, 691, 981 P.2d 443 (1999)(citations omitted). Defendant has failed to even address this requirement, and therefore has failed to carry his burden of proof.

Collateral estoppel cannot be raised for the first time on appeal. State v. Bryant, 78 Wn. App. 805, 812, 901 P.2d 1046 (1995); In re Marriage of Knutson, 114 Wn. App. 866, 870, 60 P.3d 681 (2003)(see also Cunningham v. State, 61 Wn. App. 562, 566, 811 P.2d 225 (1991), where court held party against whom collateral estoppel was applied in the trial court, could not argue application of a prong of the test on appeal he did not argue below).

Even if the court were to consider reviewing the constitutional nature of the claim, defendant cannot prove the trial court committed manifest constitutional error. While collateral estoppel is a principle based on the federal constitutional prohibition against double jeopardy, that does not automatically make the claim one of constitutional magnitude. For example, it has long been the law in this State, and elsewhere that the exclusionary rule may not be invoked for the first time

on appeal. State v. Mierz, 127 Wn.2d 460, 468, 901 P.2d 286 (1995)(a defendant who fails to move to suppress allegedly illegal evidence waives any error associated with the admission of the evidence); State v. Baxter, 68 Wn.2d 416, 423, 413 P.2d 638 (1966)("The exclusion of improperly obtained evidence is a privilege and can be waived.").

The proper way to approach claims of constitutional error asserted for the first time on appeal is as follows. First, the appellate court should satisfy itself that the error is truly of constitutional magnitude -- that is what is meant by "manifest". If the asserted error is not a constitutional error, the court may refuse review on that ground. If the claim is constitutional, then the court should examine the effect the error had on the defendant's trial according to the harmless error standard set forth in Chapman v. California, supra.

State v. Scott, 110 Wn.2d 682, 689-688, 757 P.2d 492 (1988)(citing Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). The prohibition against raising claims of error on appeal exists is because "[t]he appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial." Scott, 110 Wn.2d at 685 (citing Seattle v. Harclao, 56 Wn.2d 596, 597, 354 P.2d 928 (1960)).

Numerous cases have looked at claims of error which on the surface may appear to be constitutional, but fail to meet the higher

standard applied to claims of error made for the first time on appeal. A court's refusal to instruct the jury on a lesser included offense is not an error of constitutional magnitude. State v. Lord, 117 Wn.2d 829, 880, 822 P.2d 177 (1991). The erroneous admission of ER 403 and 404(b) evidence is not an error of constitutional magnitude. State v. Elmore, 139 Wn. 2d 250, 283, 985 P.2d 289 (1999), cert. denied, 531 U.S. 837, 121 S. Ct. 98, 148 L. Ed. 2d 57 (2000). The admission of hearsay, absent a timely objection, will not warrant reversal if the declarant is available for examination. State v. Warren, 55 Wn. App. 645, 779 P.2d 1159 (1989) review denied, 114 Wn.2d 1004, 788 P.2d 1078 (1990).

The Court of Appeals has observed that failure to provide argument and analysis as to why a claim raised for the first time on appeal warrants review, will foreclose the issue from being reviewed. State v. Avila, 78 Wn. App. 731, 738, 899 P.2d 11 (1995).

In the present case, the challenge is not of constitutional magnitude because the collateral estoppel component of the Double Jeopardy Clause is not implicated. In Santamaria v. Horsley, 138 F.3d 1280 (9th Cir.) (*en banc*), cert. denied 525 U.S. 824, 142 L. Ed.2d 53, 119 S. Ct. 68 (1998), the court dealt with issue directly. Santamaria had been convicted of murder and robbery, but the jury answered a sentencing enhancement special verdict "not true," finding the defendant did not personally use a

deadly weapon (a knife) in the commission of the crime. Id. at 1280. A state appellate court reversed the murder conviction, holding that an 11-day continuance during jury deliberations was prejudicial error. Id. On remand, Santamaria filed a motion to, among other things, "preclude [the] prosecution's reliance on theory adjudicated in defendant's favor at first trial." Id. The court was faced with one question: "The sole issue we address is whether the jury's verdict of 'not true' on the use of a knife on a weapon enhancement charge precludes the State from presenting evidence and arguing in a retrial that Santamaria used the knife to commit murder." Id.

The Santamaria court held that if the use of the knife was not an ultimate fact necessary for a murder conviction under California law, "then collateral estoppel will not preclude the government from introducing evidence that Santamaria stabbed the victim, because collateral estoppel does not 'exclude in all circumstances . . . relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted.'" Id. (quoting Dowling v. United States, 493 U.S. 342, 348, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990); citing United States v. Watts, 519 U.S. 148, 136 L. Ed. 2d 554, 117 S. Ct. 633, 637 (1997) (per curiam)).

Like the California murder statute evaluated in Santamaria, the Washington murder statute does not require the special verdict finding at issue in this appeal in order to convict defendant of murder in the second degree. The Washington murder statute does not require that a defendant know the victim was a law enforcement officer who was performing his official duties at the time of the act resulting in his death. RCW 9A.32.050(1)(a). Therefore, the collateral estoppel component of the Double Jeopardy clause did not preclude the State from introducing evidence that defendant shot Deputy John Bananola knowing he was a deputy. Because collateral estoppel does not exclude in all circumstances relevant and probative evidence that is otherwise admissible under the Rules of Evidence, defendant has failed to prove a constitutional error occurred.

Because defendant failed to object to the introduction of the challenged evidence at the trial court, and he has not established a manifest error affecting a constitutional right, he is precluded from raising his collateral estoppel challenge for the first time on appeal.

- b. The court specifically instructed the jury to answer the special verdict only if it convicted defendant of murder in the first degree, and therefore by answering the special verdict the jury disregarded the court's instructions and the answer should be ignored as surplusage.

“Superfluous answers, proffered in violation of trial court's instructions, are not part of special verdict and must be disregarded as surplusage.” Floyd v. Laws, 929 F.2d 1390, 1397 (U.S. App.,1991) (see also Tanno v. S.S. President Madison Ves, 830 F.2d 991, 993 (U.S. App. , 1987)). Floyd and Tanno were civil cases in which special verdicts were contrary to the general verdicts. The principle is equally applicable to criminal law. When a jury fails to follow the court's instructions the special verdict is surplusage and can not carry any weight.

In this case the jury was instructed that it should only answer the aggravating circumstance special verdict if it convicted defendant of murder in the first degree. Because the jury ignored the court's instructions, the verdict form was completed in error. The defendant raised no objection at the time the court entered the verdicts and cannot now assert that this verdict, which the court did not enter, had a binding collateral estoppel effect on future proceedings. Defendant might have a different argument if he had requested the aggravating special verdict be answered by the jury regardless of its decision with respect to murder in

the first degree, but that is not the case. The answer was surplusage and must be disregarded.

- c. Defendant has failed to demonstrate that the jury's finding on the aggravating circumstance special verdict meets the four prong collateral estoppel test.

Defendant asserts the principles of collateral estoppel prohibited the State from using evidence defendant knew or should have known Deputy Bananola was a law enforcement officer carrying out his duties. Defendant has failed, however, to even address the standard four part collateral estoppel analysis required for application of the doctrine. Because it is defendant's burden to establish collateral estoppel is applicable, this failure alone should end the analysis.

Before collateral estoppel is applied, affirmative answers must be given to each of the following questions: (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea of collateral estoppel is asserted a party or in privity with the party to the prior adjudication? (4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied? Rains v. State, 100 Wn.2d 660, 665, 674 P.2d 165 (1983).

State v. Tili, 148 Wn.2d 350, 360-361, 60 P.3d 1192 (2003).

The party asserting collateral estoppel bears the burden of proving all four of these questions are answered in the affirmative. State v. Vasquez, 148 Wn.2d 303, 308, 59 P.3d 648 (2002); Thompson v. Dep't of

Licensing, 138 Wn.2d 783, 790, 982 P.2d 601 (1999); Nielson v. Spanaway Gen. Med. Clinic, Inc., 135 Wn.2d 255, 262-63, 956 P.2d 312 (1998); State v. Williams, 132 Wn.2d 248, 254, 937 P.2d 1052 (1997).

Because defendant has not even addressed the four prong test, he has failed to meet his burden and this assignment of error should be rejected. His failure to address the test may be explained by his obvious inability to meet the test as detailed below.

- i. Defendant cannot demonstrate that he meets the first prong of the test because he cannot prove that the special verdict finding is identical with the one litigated in the third trial.**

The issue in the second trial was whether or not defendant committed a premeditated murder and knew the victim was a law enforcement officer. The issue in the third trial was whether or not the defendant committed intentional murder. Admission of evidence is not the same as an identical issue. The cases cited by defendant, with one exception noted below, deal with collateral estoppel being applied to criminal prosecutions that required proof of the issue previously litigated in order to prove an element of the charge in the subsequent proceeding.

The theory that evidence of previously litigated issues was inadmissible in subsequent trials was put to rest in Dowling v. United

States, 493 U.S. 342, 350, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990). The Supreme Court in Dowling concluded that the collateral estoppel aspect of the double jeopardy clause was not violated when evidence of a prior crime was admitted as evidence even though Dowling had been acquitted of that prior crime. In its decision, the Supreme Court limited the scope of constitutional collateral estoppel.

In Dowling, a man wearing a ski mask and carrying a small gun robbed a bank. The government called a witness who testified that two weeks after the robbery, the defendant, while wearing a ski mask and carrying a small gun, burglarized her home. The defendant, relying on Ashe v. Swenson, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970), argued that the use of such evidence violated collateral estoppel because he had been acquitted of the burglary before the robbery trial. The Supreme Court held that the evidence was not barred by collateral estoppel because the "prior acquittal did not determine an ultimate issue in the present case." Dowling, 493 U.S. at 348. The court declined

to extend Ashe v. Swenson and the collateral-estoppel component of the Double Jeopardy Clause to exclude in all circumstances . . . relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted.

Dowling, 493 U.S. at 348. The court reasoned that "because a jury might reasonably conclude that Dowling was the masked man who entered [the victim's] home, even if it did not believe beyond a reasonable doubt that Dowling committed the crimes charged at the first trial, the collateral-estoppel component of the Double Jeopardy Clause is inapposite."

Dowling, 493 U.S. at 348-49.

Defendant cites Pettaway v. Plummer, 943 F.2d 1041 (1991), cert. denied 506 U.S. 904 (1992), for the proposition that rejection of the aggravating factor prohibits the government from proceeding on the same theory at a subsequent trial. Pettaway was convicted of murder, but the jury answered a special verdict asking whether the government had proven Pettaway had personally shot the victim "not proven." The Pettaway court concluded that "[i]f the state is allowed to proceed on the theory that Pettaway pulled the trigger himself, it is possible that the second jury would convict Pettaway by reaching a conclusion directly contrary to that reached by the jury in the first trial. This possibility is abhorrent to the principles underlying the Double Jeopardy Clause." 943 F.2d at 1047.

Defendant fails to note that Pettaway was reversed by Santamaria v. Horsley, 138 F.3d 1280 (9th Cir.1998). Santamaria was convicted of murder and robbery, but the jury answered "not true" to a sentence

enhancement charge, that he personally used a knife in the commission of a felony. The Santamaria court overruled Pettaway concluding that:

The second jury, if it convicted Pettaway on retrial based partially (or even solely) on evidence that he shot the victim, would be concluding only that Pettaway committed murder.

...

In this case, the State failed to prove beyond a reasonable doubt the ultimate fact that Santamaria used a knife for the weapon enhancement in the first trial. However, to convict him of murder under California law, the State is not required to prove beyond a reasonable doubt that Santamaria used a knife. Therefore, the use of a knife is not an ultimate fact for the retrial, and the State cannot be precluded from presenting evidence that Santamaria stabbed the victim.

Santamaria v. Horsley, 138 F.3d at 1280.

Defendant also relies on United States v. Romeo, 114 F.3d 141 (9th Cir. 1997), for the proposition that a prior general verdict prohibits a subsequent trial based on the same mens rea for a related crime. Romeo was charged with: (1) the importation of marijuana, and (2) possession of marijuana with intent to distribute. After a trial by jury, Romeo was acquitted, by a general verdict, of the possession with intent to distribute count, but the jury deadlocked on the importation count, as to which a mistrial was declared. Romeo, 114 F.3d at 142. “The only contested element, and the only contested issue argued to the jury, was Romeo's knowledge - whether or not he knew that there was marijuana in the car.” Id. The Romeo court held that knowledge was an “an essential element of

the count remaining for retrial, the importation of marijuana. . . . Because the government is foreclosed by collateral estoppel from relitigating the element of knowledge, the district court erred in denying Romeo's motion to dismiss the remaining count.” Romeo, 114 F.3d at 143-144.

Romeo is not analogous to the present case because the aggravating circumstance special verdict in this case did not settle whether or not defendant intentionally killed Deputy John Bananola, but only addressed a sentencing enhancement. The special verdict in this case did not speak to any element the State needed to prove to convict defendant of murder in the second degree.

Defendant cites United States v. James, 109 F.3d 597 (1997), for the same proposition: that collateral estoppel bars “the government from using three robberies as overt acts in a subsequent conspiracy prosecution, where the defendant was acquitted by general verdict of the robberies at prior trials.” Brief of Appellant, at 26. James was actually convicted by the jury of the three robberies, but the convictions were overturned because the government failed to produce any evidence that the banks James was convicted of robbing were insured by the Federal Deposit Insurance Corporation. James, 109 F.3d at 599. After the case was remanded, the government charged James with conspiracy to commit bank robbery. The James court found that the prior robberies were not admissible to prove the overt acts (an element of the crime) necessary for the government to convict James of conspiracy to commit robbery. 109

F.3d at 602. However, the court permitted the government to proceed on the conspiracy charge and said nothing with respect to whether evidence of the three bank robberies could be used in some other manner (e.g. as ER 404(b) evidence). The courts holding was simply that the crimes of which defendant was acquitted could not be the basis of an element of the new crime.

Similarly, the court in United States v. Stoddard, 111 F.3d 1450 (1997), found that where ownership of \$74,000 had been determined adversely to the government in a prior prosecution, the government could not prosecute Stoddard for tax evasion for the same \$74,000. 111 F.3d at 1459-60. The court held that the government was precluded from relitigating ownership of the \$74,000 where that ownership was necessary to prove an element of the new offense. Id. If the elements of tax evasion could be proven by evidence other than Stoddard's alleged ownership of the \$74,000, collateral estoppel would not bar prosecution. Id. In the present case no element of the charge is dependent upon the aggravating circumstance special verdict. The State had to prove defendant intentionally murdered John Bananola. No element of that charge was determined adversely to the State in a prior proceeding.

Defendant's reliance on State v. Kassahun, 78 Wn. App. 938, 900 P.2d 1109 (1995), is equally misplaced. Kassahun was charged with murder in the second degree, by alternative means of intentional murder and felony murder. Id. at 939-40. The predicate felony for the felony

murder alternative was assault in the second degree of the murder victim. Kassahun was also charged with assault in the second degree of a second victim. The jury “hung” on the second degree murder charge and acquitted Kassahun of the second degree assault charge. At the re-trial, the jury was given a felony murder instruction that permitted it to convict Kassahun of felony murder, even if the predicate felony was the second degree assault perpetrated upon the second victim, an assault for which he had already been acquitted. The court found that this error violated the collateral estoppel component of the Double Jeopardy Clause. Id. at 951. In doing so, the court held that the evidence of the assault on the second victim was admissible, but that Kassahun could not be convicted of felony murder when an element of the crime had been previously adjudicated in his favor. Id.

In Harris v. Washington, 404 U.S. 55, 92 S. Ct. 183, 30 L. Ed. 2d 212 (1971), the Supreme Court reaffirmed the principle “that collateral estoppel ‘means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.’” Harris, 404 U.S. at 56 (quoting Ashe v. Swenson, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970)). After a letter bomb exploded and killed two people Harris was tried for the murder of one of the victims, and acquitted. Harris was then charged with murder of the second victim of the same bombing. The Supreme Court concluded that the issue of ultimate fact,

who sent the bomb, had been decided by the first trial, and therefore, could not be relitigated. Id. In Harris, the first jury determined that the State had not proven the element necessary to convict defendant: that he mailed the bomb. The second jury would have been asked to answer the same question. In Harris the elements the jury would have been asked to evaluate were identical between the first and proposed second trial. In the present case, the issue as to whether or not defendant knew John Bananola was a law enforcement officer, was not an element necessary for conviction. See Instruction 12; CP 775.

The only case that comes close to supporting defendant's position is State v. Funkhouser, 30 Wn. App. 617, 637 P.2d 974 (1981). Funkhouser was charged with four counts of misappropriating public funds and one count of keeping a false account. The jury acquitted Funkhouser of all four misappropriation charges but convicted him of keeping a false account. However, the trial court set aside the guilty verdict due to an instructional error. Defendant was tried again on the false account charge and convicted a second time. Id. at 621. The court of appeals determined that the trial court erred when it overruled defendant's objections to admission of evidence in the second trial "which, if believed, would necessarily show defendant's complicity, either as principal or accomplice in the misappropriation of public funds." Id. at 630. In the case at bar, defendant raised no such objection at his trial.

In the 22 years since it was published, no court has since cited Funkhouser for the proposition that collateral estoppel prohibits admission of evidence which, if believed, would necessarily show complicity in previously charged crimes which have resulted in acquittals. Further, Funkhouser rests its rationale on federal cases and was decided before Dowling v. United States, 493 U.S. 342, 350, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990). As detailed above, Dowling specifically permits the introduction of relevant evidence even if the defendant has been previously acquitted of the criminal activity to which the evidence relates.

Defendant has failed to meet the first prong of the collateral estoppel test that the finding in the second trial was identical to the element litigated in the third trial. Defendant's collateral estoppel claim, therefore, cannot prevail.

ii. Defendant has failed to prove that the aggravating special verdict form amounts to a final judgment on the merits.

The rule of collateral estoppel applies only if an issue was "necessarily decided" in the first case. United States v. McLaurin, 57 F.3d 823, 826 (9th Cir. 1995).

First, defendant asserts the first trial's hung jury had the effect of being an acquittal on the aggravating circumstance special verdict. Brief of Appellant, at 20. Defendant cites State v. Goldberg, 149 Wn.2d 888, 72

P.3d 1083 (2003), for this proposition. That case is entirely different from this one. In Goldberg the jury actually convicted Goldberg of murder in the first degree. The jury came into court and returned its verdict of guilty, and also answered the aggravating circumstance special verdict “No.” Id. at 891. The trial court then polled the jury and learned that the jury was not unanimous with respect to the special verdict. Id. The court ordered the jury to continue to deliberate with respect to the special verdict. The Washington Supreme Court concluded that this was error. “Here, the jury performed as it was instructed. It returned a verdict of guilty as to the crime, for which unanimity was required, and it answered “no” to the special verdict form, where under instruction 16, unanimity is not required in order for the verdict to be final.” Goldberg, 149 Wn.2d at 894.

In defendant’s first trial the jury never “hung” on the special verdict. The jury “hung” on the charge of murder in the first degree and never reached the aggravating circumstance special verdict form. See Verdict Forms A-1, A-2, A-3. CP 1122-24. Because the jury never reached the question of the aggravating circumstance in the first trial, it never answered the question. This is very different from Goldberg where the jury actually answered the special verdict and the court attempted to require unanimity with respect to the special verdict which did not require unanimity. “The constitutional double jeopardy provisions do not bar retrial following a mistrial granted because a jury was unable to reach a

verdict. The double jeopardy provisions require a final adjudication to bar retrial of a charge.” State v. Ahluwalia, 143 Wn.2d 527, 538, 22 P.3d 1254 (2001)(citing Arizona v. Washington, 434 U.S. 497, 505, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978). “A retrial of an action proceeds de novo and places the parties in the same position as if there had been no trial in the first instance.” State v. Kinsey, 7 Wn. App. 773, 774-775 (1972), review denied, 82 Wn.2d 1002, 1973 (1973). There is no law supporting defendant’s proposition that the double jeopardy clause prohibits the use of a special verdict in a subsequent proceeding when the jury “hangs” on the substantive charge.

The real issue is the applicability of the second trial’s aggravating special verdict form in the third trial. Defendant has failed to prove that this special verdict established anything applicable to the third trial, nor that anything it did decide was identical to the issue in the third trial. First, defendant has failed to demonstrate this is actually a finding. The trial court did not accept this verdict. In fact it specifically noted that the jury had returned verdicts that it was entering, and that the special verdict “had no significance to the verdict that the jury rendered.” RP (5/20/98) 8505; Appendix A. The court was observing that the jury had rendered a verdict and that the special verdict was completed contrary to the court’s instructions. The court did not accept this verdict. Defendant did not object to that decision. Therefore, there is no “prior judgment” upon

which defendant can make his case that the issue was decided in a prior proceeding.

Further, when the special verdict form is read, it is clear that the jury improperly answered the form. The special verdict starts with the following sentence, “We, the jury, having found the defendant guilty of Murder in the First Degree, make the following answer to the question submitted by the court:”. The completed special verdict form is indefinite at best. For defendant to argue that the special verdict demonstrates that there was a prior judgment in his favor is the equivalent to the State asserting that the special verdict actually proves that the State proved murder in the first degree. Such ambiguity cannot be the foundation for a collateral estoppel claim. If it is not clear whether an issue was actually litigated, or if the judgment is ambiguous or indefinite, application of collateral estoppel is not proper. State v. Barnes, 85 Wn. App. 638, 651, 932 P.2d 669, review denied 133 Wn.2d 1021, 948 P.2d 389 (1997)(citing Mead v. Park Place Prop., 37 Wn. App. 403, 407, 681 P.2d 256, review denied, 102 Wn.2d 1010 (1984)).

Defendant has failed to satisfy the second prong of the collateral estoppel test, that the improperly answered special verdict amounts to a final judgment on the merits. Therefore, defendant cannot prevail on his claim that collateral estoppel precluded the State from presenting evidence that he knew Deputy Bananola was a law enforcement officer.

iii. Application of the doctrine of collateral estoppel at this juncture would create a great injustice upon the State.

It is defendant's burden to demonstrate that application of the collateral estoppel doctrine would not work an injustice on the State. Defendant has failed to even attempt to assert such. The injustice factor recognizes the significant role of public policy. State v. Williams, 132 Wn.2d 248, 257, 937 P.2d 1052 (1997). The courts may qualify or reject collateral estoppel when its application would contravene public policy. State v. Dupard, 93 Wn.2d 268, 275-76, 609 P.2d 961 (1980). "The judicially created doctrine of collateral estoppel evolved in response to the need to conserve judicial resources and to provide finality for litigants." State v. Barnes, 85 Wn. App. 638, 652-653, 932 P.2d 669 (1997)(citing State v. Dupard, 93 Wn.2d 268, 272, 609 P.2d 961 (1980)).

Given defendant failed to raise this issue below, application at this juncture would create a great injustice on the State. The State would be required to try a very lengthy case for the fourth time. This is one reason the issue must be raised at the trial court. To apply collateral estoppel after the defendant lets the case be tried, would permit the defendant to take his chances on a favorable verdict, and then challenge such on appeal. This defeats the purpose of the collateral estoppel principal: that litigants

not be put through multiple trials. It would contravene public policy to permit defendant to succeed on this claim having not raised it below.

Defendant has waived his collateral estoppel claim of error by not raising it before the trial court. Further, he has failed to demonstrate this claim of error is constitutional and manifest, failed to explain how the special verdict is not surplusage, and failed to satisfy the four prong collateral estoppel test. This claim of error must, therefore, be rejected.

2. THE TRIAL COURT PROPERLY EXERCISED
ITS DISCRETION WHEN IT MADE THE
CHALLENGED EVIDENTIARY RULINGS.

Defendant has assigned error to the trial court's decision to exclude poor quality video tapes, exclude irrelevant testimony, admit relevant crime scene reconstruction testimony, admit testimony of defendant's drug dealing, admit testimony of a prior witness who was unavailable at trial, and exclude evidence that the search was executed illegally after this court held the search was legal.

A party may only assign error on appeal based on the specific ground of the evidentiary objection at trial. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 89 L. Ed. 2d 321, 106 S. Ct. 1208 (1986). Further, an objection to the admission of evidence at trial based on relevance fails to preserve the issue for appellate

review based on ER 404(b) grounds. State v. Jordan, 39 Wn. App. 530, 539, 694 P.2d 47 (1985), review denied, 106 Wn.2d 1011 (1986), cert. denied, 479 U.S. 1039, 93 L. Ed. 2d 847, 107 S. Ct. 895 (1987).

“A trial court has ‘broad discretion in ruling on evidentiary matters and will not be overturned absent manifest abuse of discretion.’ When it takes a view no reasonable person would take, or applies the wrong legal standard to an issue, a trial court abuses its discretion.” State v. Spangler, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000)(quoting Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 662-63, 935 P.2d 555 (1997)(other citations omitted).

Appellate courts will not disturb a trial court's rulings on a motion in limine or the admissibility of evidence absent an abuse of the court's discretion. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

It is incumbent upon trial counsel to make timely and specific objections. General objections are insufficient to preserve the claim of error on appeal. Objections must be timely and specific. State v. Avendano-Lopez, 79 Wn. App. 706, 710, 904 P.2d 324 (1995). In general, “the appellate court may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a). These rules are intended “to afford the trial court an opportunity to correct any error,

thereby avoiding unnecessary appeals and retrials.” Avendano-Lopez 79 Wn. App. at 710 (quoting Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983)).

- a. The court properly ruled that the poor quality of the video tapes made by Mr. Englert when he watched the deputies describe what happened in the Eggleston residence, warranted their exclusion. Further, the court’s decision to permit defendant to use the transcripts of the tapes, and ask questions of Mr. Englert as to what happened on the tapes permitted defendant to impeach Mr. Englert to the fullest extent permitted by the rules, even absent the playing of the video tapes.

In April of 1996, crime scene reconstructionist Rod Englert went to the Eggleston residence with the entry team deputies. RP 1383. The deputies were instructed to tell Mr. Englert what they remembered about the entry including where they were and what they saw during the entry. Some of these discussions were recorded on videotapes. In the first two trials defendant attempted to introduce these tapes and the prior judges had refused to permit their admission because the poor quality of the tapes made their introduction more prejudicial than probative. RP 1384-86. In this case, the State moved in limine to exclude the tapes because the lighting was very poor and their admission would be more prejudicial than probative. CP 1642-54. In response to the State’s objection regarding the

lighting on the tapes defense counsel had the tapes altered so that the content of the tapes did not appear as dark as the originals. RP 1388.

The court watched the tape of Deputy Reding, and could tell there were problems with the tape. RP 2032; Exhibit 637. The tape had “some glitches” and defense counsel was concerned they might be caused by the VCR. RP 2032-33. The court then watched the videotape of Deputy Dogeagle’s discussion with Mr. Englert. RP 2034. Defense counsel then told the court “We’re not particularly interested in the video.” The parties then agreed to look at all the tapes and try and determine why the quality of the tapes was so poor. RP 2036. The defense told the court that it wanted to use the tapes involving Deputies Reigle, Dogeagle, Reding and Larson. RP 2037. Court was adjourned for the morning with the understanding that the issue would be raised again before the defense used the tapes.

Use of the video tapes was not raised again for three weeks, during Deputy Dogeagle’s testimony, but after the other deputies testified. RP 4469-70, 4535-50. Exhibit 735, the video tape of Deputy Dogeagle’s conversation with Mr. Englert, was played for the jury. RP 4554. Defense counsel did not object to the playing of Exhibit 735. This exhibit was shown to the jury to clarify the witness’s statements which had been made to Mr. Englert, transcribed from the video tape and referenced

during Deputy Dogeagle's cross-examination. RP 4554-55. Defense counsel then asked questions regarding the video on re-cross-examination. RP 4571-80.

That afternoon the court reviewed the video tapes of Deputies Riegle, Larson and Redding. RP 4585-86. Later in the trial defense counsel offered into admission the video tapes of Deputies Reding, Reigle, and Dogeagle. RP 4882-83. The stated purpose for admission was to cross-examine Mr. Englert and challenge the basis of his opinion. RP 4885-87. The court concluded that the poor quality of the videos made it inappropriate for admission of the video tapes. The court noted that the videos were only a portion of the expert's opinion and that defense counsel could use the transcripts of the tapes and the numerous other statements made by the deputies to impeach Mr. Englert's conclusions. RP 4887-90, 4895-96.

An accused's constitutional right to confront witnesses includes the opportunity for cross-examination. Delaware v. Van Arsdall, 475 U.S. 673, 678-79, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). However, the right to cross-examine is limited to "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent the defense might wish." Delaware v. Fensterer, 474 U.S. 15, 20, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985); State v. Hudlow, 99

Wn.2d 1, 14-15, 659 P.2d 514 (1983). "[T]he accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." Montana v. Egelhoff, 518 U.S. 37, 116 S. Ct. 2013, 2017, 135 L. Ed. 2d 361 (1996) (quoting Taylor v. Illinois, 484 U.S. 400, 410, 108 S. Ct. 646, 653, 98 L. Ed. 2d 798 (1988)). Cross-examination to elicit bias, prejudice, or interest is generally a matter of right. Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). However, the right is subject to limitation. The evidence sought to be introduced must be relevant; and the defendant's right to introduce relevant evidence must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process. State v. McDaniel, 83 Wn. App. 179, 185, 920 P.2d 1218 (1996).

Under ER 403, the court may exclude relevant evidence that will be confusing to the jury. "Evidence may ... be regarded as confusing because it is not entirely accurate, thus leading to potential confusion among the jurors." Karl Tegland, 5C Washington Practice § 403.4 at 368-69 (2000), citing King v. Ford Motor Co., 597 F.2d 436, 445 (5th Cir. 1979). King was a product liability case that involved litigation of a Ford-manufactured chassis. The appellate court held that the trial court properly exercised its discretion when it refused to admit a picture of a chassis that was similar, but not identical to the chassis at issue in the trial, because the picture might confuse the jury. Id. A Washington court has

similarly ruled that when a video recreation of the crime is made and is not an exact recreation, it is within the trial court's discretion to refuse to admit the video. State v. Stockmyer, 83 Wn. App. 77, 82-85, 920 P.2d 1201 (1996).

In the case at bar, the trial court excluded the videotapes because the poor quality and repetitive nature of the tapes made them not worthy of admission. RP 4889, 4896. With respect to the videotape of Deputy Reigle, the court said, "It was difficult to see anything, and I find it impossible to believe that that was in any way representative of what this witness (Mr. Englert) saw when the videotape was taking place, which I understood you just to say is that the jury could see what it was that he was viewing." RP 4896. After a renewed motion by defense counsel to use the videotapes the court reconsidered the issue and made a lengthy ruling:

There were two prior courts that both ruled that the videotape was misleading and inappropriate to be shown. I don't know if those issues were raised before the Court of Appeals, but the Court of Appeals didn't say anything about it in their decision. So arguably there was an opportunity for the defense to have raised that issue and if they did, the Court of Appeals didn't rule on it so have acquiesced in that ruling by their silence, if it in fact was raised. I see no reason to deviate from the prior court rulings despite the fact that I'm told by defense counsel that these videotapes, the lighting has been enhanced. I think they're misleading, particularly the tape of Deputy Reigle, for the purpose that I stated yesterday, which is that once he walks into the kitchen, all you can see of him is a silhouette. All I can see of him is a silhouette, and yet I

know if I had been standing there in the position of the cameraman, I would not have seen a silhouette. I was told by defense counsel that it was important for purposes of time. I believe Mr. Olbertz said that two different times to impeach this witness for how much time it actually took for this to take place, but when I questioned him on it, he backed off as a purpose for these being necessary. In fact, my recollection of the videotape is Mr. Englert specifically instructed each of these deputies to take their time, go through in slow motion and act it out is not an accurate reflection of the time. For that purpose, it doesn't assist the defense at all.

With respect to movements, I can appreciate the defense's argument that in some respects, the transcript leaves one wondering when they say well, I was standing here and that person was standing there; however, this jury has already heard the testimony of these witnesses who have told the jury where they were standing, and I think that the defense counsel is adequately able to make their point without using the video in that regard. I think that the tape is very misleading.

In addition to all of that, it clearly shows, in the videotape of Deputy Reigle, a large hole in the wall. The large hole in the wall was not - - to my understanding was not caused by the gunfire itself, but rather was caused by the State's investigators who removed a section of the wall to retrieve the bullets. The Court of Appeals has suppressed the bullets, said that the State acted beyond its authority in removing that section of the wall. So we leave ourselves, if we were to show the videotape, in a very difficult position of having a hole in the wall that would again be misleading to the jury because the jury could be left with the impression that that was caused from the gunfire itself because we're not in a position to explain to them why there is this hole in the wall because the bullets are suppressed.

For all of those reasons and the reasons that were articulated by the Court on March 26, 1997, in the verbatim report of proceedings that were provided to me, the videotapes will not be played.

RP 4972-75.

The March 26, 1997, ruling the court referenced was Judge McPhee's oral decision in the first trial excluding the videotapes. Judge McPhee ruled:

I am satisfied that it would be inappropriate - - completely inappropriate to play the videos of these interviews for the jurors. They are conducted under circumstances that cannot, in any sense, be said to be an accurate replication of the lighting that was present in the house at the time of the incident. And looking at the video, that, of course, is the most salient feature of those videos. All other considerations pale in comparison to the light that is visible through the camera lens, including a figure with a vest on it similar to - - or perhaps identical to the vest worn by Deputy Bananola on the morning of the incident. The issue at this point for me is to what extent the audio portion or the transcribed portion of these statements should be presented to the jury during cross-examination of Mr. Englert, and it is that issue that I wish to address at this point.

...

In viewing the videotapes and listening to the audio portion of those tapes, I am satisfied that the information conveyed there, in the audio portion, is entirely sufficient to understand the information given to Mr. Englert. The jury has heard all of the entry team officers, and they have been subject to rigorous cross-examination.

Where reference is made to positioning within the house, or features in the house, or where movements are described which would be better understood if they could see the picture visually, I am satisfied that, because of the jury's prior exposure to these witnesses, their movements, testimony and cross-examination, that all aspects of the

information conveyed to Mr. Englert is understood satisfactorily just by listening to the audio portion.

Report of Proceedings March 26, 1997, pp. 3950-51; CP 1642-54.

The videos would have confused the jury. Thus, the trial court properly exercised its discretion when it excluded the videotapes and limited defense counsel to using the transcripts of the statements in the video. Even if the court permitted the use of the videotapes, they were certainly hearsay, and therefore, only admissible to impeach witnesses.

How much of defendant's objection to the court's ruling has been properly preserved for appeal is questionable. ER 103(a)(2) states: "In case the ruling is one excluding evidence, the substance of the evidence [must be] made known to the court by offer or was apparent from the context within which the questions were asked." The questions were never asked, therefore, defense counsel had to make an offer of proof in order to preserve this assignment of error. When presented with an opportunity to make an offer of proof, defense counsel flat out refused. "I'm not going to sit here and explain my entire cross examination to the defense (sic) before I do it, and that's what they're suggesting." RP 4887. The exclusion of testimony will not be considered on appeal in the absence of an offer of proof showing the substance of that testimony. State v. Negrin, 37 Wn. App. 516, 525, 681 P.2d 1287, review denied, 102 Wn.2d 1002 (1984); Ralls v. Bonney, 56 Wn.2d 342, 343, 353 P.2d 158 (1960); Sutton v. Mathews, 41 Wn.2d 64, 67, 247 P.2d 556 (1952). The

reason for requiring an offer of proof under ER 103 pertains to judicial economy. The offer of proof allows the trial court to properly exercise its discretion when reviewing, reevaluating, and revising its rulings if necessary. State v. Ray, 116 Wn.2d 531, 538-539, 806 P.2d 1220 (1991) (citing Cameron v. Boone, 62 Wn.2d 420, 425, 383 P.2d 277 (1963)). If the party fails to aid the trial court, then the appellate court will not make assumptions in favor of the rejected offer. Smith v. Seibly, 72 Wn.2d 16, 18, 431 P.2d 719 (1967)(citations omitted). It is not the place of a reviewing court to speculate as to what the excluded evidence would have been. Tumelson v. Todhunter, 105 Wn.2d 596, 605, 716 P.2d 890 (1986). Without an offer of proof of the substance of the expert's testimony, it is impossible to determine if defendant was prejudiced by any error pertaining to admissibility. Without prejudice, relief is not warranted. ER 103(a)(2).

Defendant never made an offer of proof with respect to impeaching any of the deputies. On appeal defendant assigns error to the court's exclusion of all of the videotapes but only supports the assignment of error with respect to Deputy Reding's tape. Defendant fails to support the assignment of error regarding any of the other tapes with argument, or citation to the record. Defendant has failed to explain what portions of the tapes of the other deputies would have provided impeachment evidence for any witness.

With respect to the one tape for which defendant does provide argument, defense counsel was able to describe everything in the videotape and question Mr. Englert with respect to every movement on the tape. RP 4902-29. For the most part Mr. Englert agreed with defense counsel's description of what Deputy Redding said happened, and where he was positioned, and what he saw and heard. By using a transcript of the video defendant was able to impeach the witness. Defendant's complaint is that "[t]he transcripts of these videos are not a sufficient substitute [for the playing of the videos]. The deputies making references to 'here' and 'there,' without specificity". Brief of Appellant, at 46. However, Mr. Englert did not deny Reding made the statements, nor where he was standing when making the statements, nor where he was indicating "here" and "there." RP 4902-29.

Defendant relates that the Reding video showed that Bananola was in the entryway to the living room when he was being shot. Brief of Appellant, at 45. Defendant argues this was relevant because it supported his theory of the case, and that it impeached Mr. Englert's conclusion. However, defendant asked Mr. Englert about the very thing he raises on appeal, and Mr. Englert agreed with most of defense counsel's representations as to what Reding said on the video. RP 4907-10. If there is more on the video that defense counsel did not address at trial, that is the fault of counsel, not the court. Defense counsel could have asked any

number of questions that would have elicited the information depicted on the video.

Defendant has cited only one specific instance where defense counsel made a request to play the tape relative to a specific disagreement counsel had with what Mr. Englert indicated the tape related. This following exchange took place before the jury, between defense counsel and Mr. Englert:

Q: Okay. Reding sees Mr. Bananola in archway; is that accurate?

A: Falling in the archway, yes, and groaning.

Q: Okay. In fact, he says - -
So then - - and there's shooting going on.

A: Shooting had occurred when Reding sees Bananola dive into the living room.

Q: But Reding says he sees him coming in, falling, going to the ground, correct?

A: Yes, and he had heard shots fired.

Q: And he hears an "ugh" so he knows he's hit.

A: I don't know that he knows that, but he hears "ugh."

Q: Lets take a look. I would suggest to you that these are transcripts of the video tape that you - -

A: Which one, do you want me to look at Reding?

Q: I want you to look at Reding's.

...

Q: On page 5 - - you were standing in the living room watching Reding describe the events to you, correct?

A: Yes, I was following - -

Q: Line 2, Reding says, "And he started to collapse or dive for the floor, and he gave out a kind of grunt like 'ugh,' so I had an idea that he was hit."

Now that suggests to me that he got shot when he let out that "ugh;" is that what that suggests to you?

A: Yes.

- Q: So he's getting shot as he's, according to Reding, starting to collapse or dive to the floor, correct?
- A: Well, wait a minute. Are you saying that he was shot at that time, is that what you are suggesting to me?
- Q: I'm saying that Bananola was shot.
- A: At that time when he's diving?
- Q: Yes. When "he let out a grunt so I had an idea he was hit." Reding is suggesting to you that Bananola was hit when he let out the grunt, correct?
- A: No, absolutely not. That's incorrect.
- Q: That's not what he is suggesting on the videotape?
- A: No, not at all. That's not true. I never suggested that. That's not what my opinion was, and that doesn't fit the evidence.
- Q: I know that's not your opinion, and I know it doesn't fit the evidence you care - -

Ms. Amos (prosecutor):
Objection, argumentative.

Q: (by Mr. Olbertz) Care to look at it. I'm - -

Ms. Amos (prosecutor):
Objection, argumentative.

The Court: Sustained.

- Q: (By Mr. Olbertz) So you're saying that Reding said, "... gave out like a 'ugh' so I had an idea that he was hit." You're saying that Bananola was not hit, that Reding was not saying that he was hit when he gave out the grunt; is that your testimony?
- A: No. My impression from listening to him was that he heard shots, he looks to the left, he's with the father, glances to his left and sees Bananola diving in like he'd been hit. He didn't say "like he'd been hit. He said "is hit," and that's the impression - -

Mr. Olbertz: Your honor - - I'm sorry. I didn't mean to interrupt you.

Witness: That's the impression I had in this interview. Never did I get the impression that he was shot while he was diving.

Mr. Olbertz: Could I make a motion your honor?

RP 4909-12.

After the court excused the jury, defense counsel renewed his motion to play the video of the interview. The court denied the motion.

RP 4915.

Defense counsel had not provided the court with a valid basis to reverse its earlier decision. Defense counsel was attempting to use the video to assert that what Reding meant was that John Bananola was hit as he dove back to the living room. Whether Reding meant that or not was irrelevant. Because the tape was only relevant to impeach the witness's findings, what was relevant was whether or not Mr. Englert understood Reding to mean such.

Further, defense counsel never even made an offer of proof that the video demonstrated that Reding meant that John Bananola was shot while he going to the floor. RP 4912-13. He wanted to show the video and let the jury speculate as to what Reding meant. There was no reason for the court to conclude that the video would show that Reding meant what counsel wanted Mr. Englert to say it meant. In fact, defendant does not

even make that claim in his brief to this court. Defendant has not demonstrated that had the video been played it would have offered more impeachment value than the transcript of the video.

Finally, if counsel wished to challenge the validity of the witness's conclusion that Reding meant that John Bananola had already been hit when he entered the living room, he could easily have called Reding to the stand to testify.

Given the court's grave concerns that the video would mislead the jury, it cannot be said that the court abused its discretion in excluding it. Given the inability of defendant to articulate how the video would have improved his cross-examination, defendant cannot show that his right to cross-examine the witness was violated.

Defendant's reliance on the best Evidence Rule is misplaced. ER 1002 states: "To prove the content of a writing, recording, or photograph, the original writing, recording or photograph is required, except as otherwise provided in these rules or by rules adopted by the Supreme Court of this state or by statute." There was never a question as to the content of the tape. There was never a challenge to the accuracy of the transcript of the tape. This rule is inapplicable to the circumstances to this case.

Even if the rule were applicable, however, defense counsel did not make his objection on this basis until the State was cross-examining the defense expert. RP 5661. This objection was not made in a timely manner relative to defendant's current claim of error, that the video tapes were admissible to impeach the State's witnesses. ER 103 requires all evidentiary objections to be timely and specific. Failure to raise an objection at the trial court precludes a party from raising it on appeal. DeHaven v. Gant, 42 Wn. App. 666, 669, 713 P.2d 149 (1986). Even if an objection is made at trial, a party may assign error in the appellate court only on the specific ground made at trial. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). Defendant did not make a timely Best Evidence Rule objection and it is therefore waived.

Defendant's reliance on ER 106, the Rule of Completeness, is equally misplaced. Defendant never raised this ground for admission below and it is therefore waived. Even if it were raised below, defendant's failure to cite to the record as to where that objection was made and preserved waives it on appeal. RAP 10.3(a)(5); State v. Cox, 109 Wn. App. 937, 943, 38 P.3d 371 (2002); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); Hurlbert v. Gordon, 64 Wn. App. 386, 400, 824 P.2d 1238 (1992).

Even if preserved defendant has failed to explain how the admission of Deputy Dogeagle's statement required the admission of other

statements. Defendant has not even bothered to explain which statements should have been included and what the would have done to alleviate any unfairness created by Deputy Dogeagle's statement. Finally, defendant has not explained how the trial court abused its discretion when it did not apply the Rule of Completeness.

The trial court did not err when it determined that the video tapes would confuse the jury, and certainly did not abuse its discretion when it ruled in the same manner as two previous judges. Three judges looked at the video tapes and determined that it would be improper to play them before the jury. Defendant has failed to prove that his right to confront the witness was violated because he has failed to show how the use of the transcripts was insufficient to properly impeach the witness.

- b. The trial court did not err when it did not permit defense counsel to attempt to impeach State's witness McQueen with information that a prosecuting attorney appeared at McQueen's sentencing six years earlier to inform the court that McQueen needed to be sentenced in a manner which would protect his safety because he had testified in defendant's first trial.

"Trial courts have discretion to determine the scope of cross-examination and to prohibit further questioning where the claimed bias is speculative or remote." State v. Benn, 120 Wn.2d 631, 651, 845 P.2d 289 (1993)(citing State v. Young, 89 Wn.2d 613, 628, 574 P.2d 1171, cert.

denied, 439 U.S. 870 (1978); State v. Guizzotti, 60 Wn. App. 289, 293, 803 P.2d 808, review denied, 116 Wn.2d 1026 (1991); see also Davis v. Alaska, 415 U.S. 308, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974)).

Defendant appears to attempt to assign error to two distinct decisions by the court with respect to Mr. McQueen's cross-examination. First, he spends two and a half pages discussing the State's attempt to "exclude the fact that McQueen originally faced higher charges but that after agreeing to testify for the state, he was able to plead guilty to reduced charges." Brief of Appellant, at 50-51. Defendant does not cite any testimony, nor offer proof, in the record that shows McQueen received any consideration for his testimony, nor does he really even allege this to be the case. Defendant simply says that bias evidence is properly elicited under cross-examination.

The State asked the court to limit defense counsel's cross-examination to relevant information. Defense counsel began to allege that McQueen made a deal with the prosecutor for testimony in this case, but got sidetracked by the judge and the issue was never raised again. RP 2798-99. McQueen did not receive a reduction in his 1996 case in exchange for his testimony, and defense counsel never provided the court with any proof to the contrary. RP 2849. Counsel never asked the questions on cross-examination, even though the court never excluded any evidence on the topic of a deal for testimony. Nor did counsel ever make

an offer of proof. Defendant cannot assign error to a decision the court never made.

The second instance defendant raises with respect to cross-examination of Steve McQueen, is that the court sustained the State's objection when defense counsel attempted to inquire about a prosecutor appearing at Mr. McQueen's 1996 sentencing on several robbery convictions. Brief of Appellant, at 51, fn. 44; RP 2817, 2848-49. Defendant does not bother developing this argument during the body of brief, but makes an important error in the footnote. Defendant asserts that defense counsel was attempting "to show McQueen's knowledge of how the system works with deals." *Id.* There is no evidence in the record that this is what defense counsel was attempting to elicit. The following day defense counsel made a record of the reason for his question. "[M]y next question was going to be 'did he [DPA Horne] appear at your sentencing' which occurred in, I think it was, '96, and make statements on your behalf that related to your cooperation in this case, and was that case pending at the time that you testified in this matter on behalf of the State." RP 2848-49.

What the State pointed out to the court was that DPA Horne appeared at the sentencing to inform the sentencing court that Mr. McQueen would be testifying against a person who had killed a police

officer, so his safety in prison would need to be addressed. RP 2849. Defendant failed to convince the court that this was relevant six years later, after defendant had been released from prison. That six years earlier a deputy prosecutor informed a sentencing court that McQueen was at risk in prison was hardly relevant to his testimony in this case. Even if the trial court erred, it cannot be said that the trial court abused its discretion when it attempted to limit cross-examination to relevant impeachment, and prohibited speculative or remote testimony.

Finally, even if the court abused its discretion and improperly limited the impeachment evidence, defendant has failed to explain how he was prejudiced. Defendant has failed to articulate what testimony McQueen gave which was particularly damaging to his case. Mr. McQueen's testimony was largely *res gestae* evidence, explaining defendant's drug dealing, that he had guns and that he knew how to use them. Much of this testimony was admitted through other witnesses as well. Even if the court abused its discretion, the low level of import to Mr. McQueen's testimony relative to the other witnesses makes any error harmless. "The denial of a criminal defendant's right to adequately cross-examine an essential State witness as to relevant matters tending to establish bias or motive will violate the Sixth Amendment's right of confrontation, made applicable to the states by the Fourteenth

Amendment.” State v. Roberts, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980)(citing Davis v. Alaska, 415 U.S. 308, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974))(emphasis added). Mr. McQueen was far from an essential State witness. While the State maintains that the court did not err, and that defense counsel failed to explain why Mr. Horne’s presence at a sentencing six years earlier was relevant, any error was harmless given the limited value this ‘bias’ testimony would have had and the minor role this witness played in the State’s case.

- c. The trial court did not err when it limited defense expert Kay Sweeney’s impeachment testimony to relevant evidence, and excluded testimony which was contrary to the parties stipulation, contrary to defendant’s offer of proof, and merely speculative.

Defendant contends that the trial court erred when it limited Mr. Sweeney’s testimony about contamination of the crime scene. Defendant asserts this testimony would have shown that Mr. Englert ’s reconstruction of the “crime scene was based on a house of cards.” Brief of Appellant, at 53. Defendant alleges the court prohibited his expert from testifying about two specific points: (1) that “people moving around the house, performing aid, searching, taking things like chunks of the walls” contaminated the crime scene, and (2) sheetrock that was strewn over the house prevented

Mr. Englert from testifying with any reliability. Brief of Appellant, at 53-54.

The court's ruling on this was very specific and addressed the issues defendant raises. First, the trial court did permit questioning with respect to the first point. Second, the court did exclude testimony about contamination that was not supported by the offer of proof. The court even invited defense counsel to put Mr. Sweeney back on the stand to further develop the offer of proof.

Okay. Okay. With respect to his comments on the DNA, it seems to me, number one, he's not qualified to speak to this issue, but it also flies in the face of the stipulation, because even if he's talking about a sample that wasn't covered by the stipulation, not all of those samples were tested; a DNA test was done on them. So, it's inconsistent with the defense's position in signing the stipulation, it seems to me, to have their own expert then attacking the stipulation that they signed and that's already been read to the jury. So I don't want you eliciting any testimony from him in that regard.

With respect to the rest of his testimony, as I previously indicated, you can testify - - elicit from him testimony with respect to the chair, with respect to the I think he called it Area 24, which I understand to be the south facing portion of the north section of the archway, and he can talk about that. He can talk about any mixtures of blood that were not stipulated to as to how they could have come to be there by activities that may have occurred after the actual shooting took place, which is what I understand is part of the defense's argument here, but I don't want general, broad testimony of it affecting all of the reliability of all the conclusions, because that not what, in fact, he has indicated in his testimony.

With respect to the sheetrock, I'm still not going to allow it in. He indicated or stated that it didn't change his opinion as to the donor or identity of the blood that was in the north-south hallway which is where the sheetrock is. Although, I understand you want him to talk about how removing it can transfer blood and there's some potential there of saying well, somebody else's blood was on the wall, the wall was knocked out, that blood then was dissipated or dispersed somewhere else and therefore this portion of the puzzle we can't put together because we don't know if it was originally on the wall or not, but I did not hear him testify to that.

Now, if you were going to elicit that type of testimony, that was your opportunity to do so, or I would ask you to invite me to have him come back in. Unless he's going to testify to something like that, I heard him very clearly that the blood that was on the floor, he doesn't take any issue with the identity of the donor of that blood despite the issue of the sheetrock, and so on balance and weighing the issue of the Court of Appeals having excluded the bullets that were in the wall, misleading the jury by getting into the whole issue of the sheetrock, compared to a lack of any evidence, it's mere speculation at this point because nobody has testified to it that somebody else's blood was on that wall that may have changed how this is being reconstructed by him or by Mr. Englert; its only misleading and prejudicial and gets us into opening the door to evidence that was suppressed, so in - - I haven't looked at all those pictures that you showed him, but the pictures that have those piles of sheetrock, we're not going to go there, whichever numbers those were.

RP 5389-92.

The court observed that Mr. Sweeney did not say that the conclusions or opinions of Mr. Englert were impacted by the sheetrock. Therefore, Mr. Sweeney was not going to testify as defendant now claims he should have been permitted to testify. The court did a simply balancing

of prejudice versus probabiveness of the offered testimony and concluded that because the testimony was not supported by the witness's own opinion, it would have been more prejudicial than probative to permit defense counsel to proceed with this line of questioning. The court properly weighed the issue and made the proper conclusion. The court even invited counsel to expand on the offer of proof and counsel did not do so. Counsel probably did not do so because he had no reason to believe Mr. Sweeney would ever testify that the existence of the sheetrock actually impacted any of Mr. Englert's conclusions.

Defendant has failed to cite any portion of the offer of proof which would lead this court to conclude that the trial court abused its discretion when it determined that the offer of proof was insufficient for Mr. Sweeney to testify that the sheetrock debris contaminated the scene. The failure to develop this argument precludes review of this issue.

- d. The trial court did not err when it did not permit the introduction of testimony which was not admissible.

Defendant asserts the trial court erred when it did not permit (1) impeachment of Deputy Benson by use of a statement in his affidavit for the search warrant, (2) testimony that defendant regularly went back to sleep after his girlfriend gave him his medicine, and (3) the defense to

introduce a prior statement made by Deputy Reigle which did not mention the knock and announce procedure used the morning in question. Brief of Appellant, at 54-56.

With respect to his attempt to impeach Deputy Benson, defendant's premise is false. Defendant fails to articulate how Deputy Benson lied in the affidavit for the search warrant. There is no evidence Deputy Benson made a false statement in the affidavit. The crux of defendant's argument is that Deputy Benson referenced a 'controlled buy' in the affidavit for a search warrant, but that it was not really a controlled buy.

The term 'controlled buy' is clearly a term of art and has meanings which are dependent upon the circumstance. The 'controlled buy' in question was the first one Deputy Benson observed between Mr. McQueen and defendant. The deputy explained on cross-examination that he did consider the exchange a controlled buy for the purposes of what he was attempting to use it for, the application for a search warrant. RP 1528. The deputy further explained that his reference to it in a prior proceeding as not a 'controlled buy' was that it would not have been sufficient to charge defendant with delivery of a controlled substance because Mr. McQueen was being used as a confidential informant and would not testify at a trial. RP 1258. Without the belief Mr. McQueen

would testify at trial, the State could not charge defendant. Because defense counsel did not prove Deputy Benson lied when he completed the affidavit, the court did not err in preventing this line of impeachment.

Further, it is clear from Deputy Benson's testimony that he did not believe the statement in the affidavit to have been a false statement, therefore, counsel would have been left with the answer and no means by which he could impeach the deputy's conclusion that it was a false statement. RP 1514-17, 1525-28. The long standing rule is that if the witness denies the specific instance of conduct being alleged, the inquiry is at an end. Extrinsic evidence is not permitted to be introduced to contradict the witness. See State v. Simonson, 82 Wn. App. 226, 234, 917 P.2d 599 (1996). The cross-examiner must "take the answer" of the witness and may not call a second witness to contradict the first witness. State v. Barnes, 54 Wn. App. 536, 540, 774 P.2d 547 (1989). Given this rule, there was no means by which defendant could impeach Deputy Benson's conclusion that he was not dishonest in the affidavit, therefore, the court's ruling had no impact on the veracity of the witness.

With respect to Ms. Patterson's testimony, the trial court properly concluded that absent personal knowledge as to whether defendant went to sleep after she gave him his medicine, the witness should not be permitted to testify that defendant did go to sleep. Defendant appears to assert that

Ms. Patterson should have been permitted to testify that defendant was in the habit of going back to sleep after she gave him the medicine.

However, there was insufficient evidence before the court to establish a habit.

Evidence Rule 406 states, “Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.”

“Although the rule does not define habit, ‘habitual behavior’ has been described as ‘consisting of semi-automatic, almost involuntary and invariabl[y] specific responses to fairly specific stimuli.’ ‘As with most evidentiary questions, determination of admissibility of habit evidence is within the trial court's discretion.” Degel v. Buty, 108 Wn. App. 126, 132 29 P.3d 768 (2001)(quoting Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 325, 326, 858 P.2d 1054 (1993)(other citations omitted).

Counsel’s offer fell short of establishing a habit sufficient to be admissible under ER 406. Defense counsel told the court that Ms. Patterson regularly gave defendant his medicine and it makes him sleepily and he likes to sleep through the bad effects of the medication. RP 3269,

3273. This is not an offer of proof that establishes a habit that everytime defendant takes the medication he goes back to sleep. The offer only demonstrated what defendant likes to do, not what he does with such regularity that it is a habit. This is particularly true when the lack of information as to how long and how often defendant has taken the medication is added to the equation. There was no testimony as to how many times Ms. Patterson had given the medicine to defendant, therefore, there was no way for the court to conclude that the witness had sufficient information to conclude that he was in the habit of falling asleep after he got the medicine.

In fact, the witness had already testified that she did not know whether or not defendant went back to sleep after she gave him his medicine. RP 3247. Finally, any error on this point was made harmless by what the witness did testify to on cross-examination. The following exchange occurred on cross-examination of Ms. Patterson:

Q : Were you asked the question, "Do you recall what he did after he took the medication on October 16th?" And your answer was, "To my knowledge, he laid back down and went to sleep." And the question was, "Did you observe that?" and your answer was, "Yes, I observed him lay back down." Do you recall giving - - being asked those questions and giving those answers?

A : Yes.

Q : And is that - - does that assist you in refreshing your recollection of what you did observe on October 16th?

A : Yes, it refreshes my memory. Is that what you mean?

Q : Refreshes you memory. That's probably a better way to put it.

A : Okay.

Q : Does it do so?

A : Yes.

Q : Is that an accurate statement of what you did observe on October 16th, 1995?

A : Yes, he laid back down.

RP 3274-75.

The trial court did not err when it determined that defendant had not established a habit pursuant to ER 406, and it cannot be said that it abused its discretion when it made this ruling. Defendant does not even assert that the trial court abused its discretion. Even if the court abused its discretion, defendant has failed to show that any error was prejudicial in light of the testimony elicited on cross-examination.

Defendant's assertion that the court erred when it excluded impeachment of Deputy Reigle by a prior inconsistent statement is erroneous. Defense counsel used an interview of Deputy Reigle soon after the event to impeach him. RP 3360-63. The interview soon after the murder was conducted by Tacoma Police Department and Pierce County Sheriff's Department detectives. They asked Deputy Reigle very specific questions: "Do you recall who was first up to the door?" and "Do you

recall how the door was opened or did you see who was opening?" RP 3366.

Inconsistency between the prior statement and the witness's testimony at trial is determined "not by individual words or phrases alone, but the whole impression or effect of what has been said or done." State v. Newbern, 95 Wn. App. 277, 294, 975 P.2d 1041, review denied, 138 Wn.2d 1018, 989 P.2d 1142 (1999)(citations omitted). In the earlier interview, the deputy was not asked if there was a knock and announce, nor was he asked what happened before the door was opened. At trial, the deputy detailed how he entered the residence. Defense counsel was alleging that the answers the deputy gave to the detectives was inconsistent with the testimony. There was no inconsistency; the questions were different. The court did not err when it concluded that there was not an inconsistency by which defendant could properly impeach the witness. RP 3369. Even if it the trial court erred, it did not abuse its discretion when it concluded that there was not an inconsistency.

Finally, because "[i]mpeaching evidence is not substantive evidence," defendant cannot establish he was prejudiced by the exclusion of the evidence. State v. Stewart, 2 Wn. App. 637, 639, 468 P.2d 1006 (1970). Every deputy called to the stand indicated that the deputies knocked and announced and entered the residence after hearing no

response. There was nothing in the statement Deputy Reigle gave to the detectives that the court excluded, which would impeach his testimony at trial. The trial court did not err, and certainly did not abuse its discretion, but even if it did, defendant cannot prove he was prejudiced.

- e. The trial court properly permitted the parties' experts to give their opinions about what happened in the house after the first exchange of gunfire, because the opinions were supported by scientific evidence generally accepted in the relevant community, and the experts did not speculate as to who fired the first shot.

Defendant contends that “[o]n the prior appeal, this Court ruled that it was error to admit expert testimony on the sequence of the firing of the bullets, because it was totally speculative.” Brief of Appellant, at 57. This is not an accurate reflection of the court’s ruling on the prior appeal. This Court only prohibited the experts from testifying as to who fired first:

Opinion testimony is not excluded merely because it embraces an ultimate issue to be decided by the trier of fact. ER 704. Furthermore, an expert may express an opinion even though it may be qualified or indefinite. 5B Tegland, supra, sec.702.22 at 82. As long as the scientific methods used to form the opinion are generally accepted within the relevant community, an expert's lack of certainty does not render the evidence inadmissible. State v. Warness, 77 Wn. App. 636, 643, 893 P.2d 665 (1995).

An opinion based on the opinion of another expert also is admissible, so long as the testifying expert 'reasonably relied' on that opinion, as required by ER 703.

5B Tegland, supra, at sec.703.6 at 220. ER 703 does not confer any value, however, on an opinion that is wholly lacking some factual basis. 5B Tegland, supra, at sec.703.8 at 223; see also Queen City Farms, Inc. v. Central Nat'l Ins. Co., 126 Wn.2d 50, 102-03, 882 P.2d 703 (1994). Where there is no basis for the expert opinion other than theoretical speculation, the expert testimony should be excluded. Queen City Farms, Inc., 126 Wn.2d at 103.

The trial court did not err in admitting most of the crime-scene-reconstruction testimony on the grounds that it would be helpful to the jury. Englert was able to 'read' the physical evidence and draw his conclusions only as a result of his experience and training, with those conclusions being beyond common knowledge. See Coleman, 348 S.E.2d at 72.

Here, as in Coleman, 'absent an explanation of the physical evidence found at the crime scene, the jury would have been faced with translating seemingly meaningless facts into possibly erroneous conclusions, or ignoring the physical evidence altogether.' Coleman, 348 S.E.2d at 72.

We take issue, however, with the testimony offered by both reconstruction experts concerning the sequence of the shots fired during the gun battle between Bananola and Eggleston. Englert's testimony that Eggleston fired first and hit Bananola in the foot is supported primarily by his testimony that Bananola was backing up when he was hit in the foot and that he would not have fired while backing up. Sweeney's testimony that Bananola fired first is supported by the testimony that when Eggleston was hit in the groin, he doubled up, leaving his weapon close to the floor. According to Sweeney, Eggleston then fired and the shot ricocheted off the floor into Bananola's foot.

Both of these conclusions are completely speculative. Although both experts cite evidence, none of it even tends to prove which shot was fired when. Although bloodspatter and trajectory analysis can help establish the location from which a shot was fired as well as a victim's location when wounded, such evidence

provides no support for the temporal sequence of gunfire. The expert testimony as to who fired first is mere conjecture and should have been excluded. See Walker v. State, 67 Wn. App. 611, 620, 837 P.2d 1023 (1992), rev'd on other grounds, 121 Wn.2d 214, 848 P.2d 721 (1993) (court properly excluded expert testimony stating that accident occurred when decedent drove to the right to let a car pass because there was no evidence regarding decedent's thought processes); see also Riccobono v. Pierce County, 92 Wn. App. 254, 268, 966 P.2d 327 (1998)(expert opinion was based on assumption for which there was no factual basis and should have been excluded).

Eggleston, No. 22085-7-II, at 46-49.

It is clear that this Court concluded that the testimony of both experts was admissible, and that the problem the Court had was with the speculative nature of the conclusions each had with respect to who fired the first shot, Deputy Bananola or defendant. As noted above, this Court concluded that the first and second trial courts did not err in admitting most of the crime-scene-reconstruction testimony on the grounds that it would be helpful to the jury. The only testimony the court held inadmissible was the expert testimony as to who fired first because it was mere conjecture.

If this Court believed all of the sequencing of shots testimony should have been excluded it could certainly have said so, but it is obvious that this was not necessary because the balance of the testimony was based on proper expert opinions. Each time Mr. Englert testified as to where the

participants were he explained upon what evidence he was relying. RP 4654-87, 4693-4761.

The trial court and counsel spent a significant amount of time discussing what this Court meant in the earlier opinion. RP 4630-39. It was clear to the trial court that this Court was prohibiting the witnesses from testifying as to who shot first, but forensic evidence and witness statements could be used to determine what happened after the initial exchange of fire in the hallway. The trial court noted:

[The Court of Appeals opinion] doesn't say that no one can testify that after there was a gunfight in the hallway that Mr. Eggleston is believed to have moved in this direction and Mr. Bananola is believed to have moved in this direction, based upon blood spatter, based upon the testimony of the people who are able to testify or any other evidence that they have, the shell casings, the bullets that are allowed to be admitted.

RP 4638. The trial court did not err when it came to this conclusion because it is consistent with the holding of this Court's ruling. Further, the trial court did not abuse its discretion when it admitted the evidence because it was based on the experts' opinions that were founded on methods generally accepted within the relevant community.

- f. The trial court properly concluded that evidence of defendant's drug dealing and drug possession was admissible to prove motive, intent, absence of mistake, res gestae, and to disprove self-defense.

In the first trial defendant was convicted of unlawful possession of a controlled substance with intent to deliver (marijuana), unlawful delivery of a controlled substance (marijuana), and unlawful possession of a controlled substance (mescaline). CP 1204-05. The trial court concluded that evidence of defendant's drug dealing and possession of controlled substances was relevant to prove defendant's motive for killing Deputy Bananola, absence of mistake, the res gestae of the crime and why the deputies were serving the search warrant, and his intent in that the State needed to disprove self-defense. RP 95-96.

Evidence Rule 404(b) states, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

We have held that when the State seeks admission of evidence under ER 404(b), that the defendant has committed bad acts that constitute crimes other than the acts charged, the trial court must (1) find by a preponderance of the evidence that the uncharged acts probably occurred before admitting the evidence; (2) identify the purpose for which the evidence will be

admitted; (3) find the evidence materially relevant to that purpose; and (4) balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the fact-finder. State v. Pirtle, 127 Wn.2d 628, 649, 904 P.2d 245 (1995).

State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002).

Defendant does not assert that the trial court did not follow the proper procedure, only that the court came to the incorrect conclusion. Defendant does not challenge the fact that the State proved, by a preponderance of the evidence, that defendant committed the acts, which is logical in that he was convicted beyond a reasonable doubt of having done so.

The trial court held that the evidence was properly admitted to prove defendant's intent and preparation. RP 95. The court further ruled that the evidence was admissible to provide the res gestae of the crime, and that it was part of the same transaction as the crime. Id. The court also ruled that it was relevant and admissible to demonstrate the absence of mistake and to disprove defendant's claim of self-defense. The court concluded that "there's no other way of telling the jury this story without providing the evidence of the drug dealing, so I think the prejudice, if any, to the defendant is very slight, and I'm going to allow its admission." RP 96.

Evidence is relevant if it has any tendency to make any fact that is of consequence to the case more or less likely than without the evidence. ER 401. Relevant evidence is admissible unless its probative value is outweighed by prejudice or has a tendency to confuse the issues, mislead the jury, cause undue delay, or is an unnecessary presentation of cumulative evidence. ER 403; Thomas v. State, 150 Wn.2d 821, 858, 83 P.3d 970 (2004). The threshold for relevancy is low, and "[e]ven minimally relevant evidence is admissible." State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

The evidence of defendant's drug dealing and drug possession was relevant for all of the reasons the court admitted the evidence. It was relevant to show why the deputies were executing a search warrant at the Eggleston residence. It was relevant to show how the deputies prepared for the execution of the warrant. It was relevant to explain why the narcotics team executed the warrant rather than the S.W.A.T. team. In other words, the evidence was admissible to complete the res gestae of the incident. Where the defendant's acts are part of the "same transaction" and show a "continuing course of provocative conduct," evidence is admissible "[t]o complete the story of the crime on trial by proving its immediate context of happenings near in time and place." State v. Lane, 125 Wn.2d 825, 831-33, 889 P.2d 929 (1995)(quoting State v. Tharp, 27 Wn. App. 198, 205-06, 616 P.2d 693 (1980), affirmed, 96 Wn.2d 591, 637 P.2d 961

(1981), and State v. Thompson, 47 Wn. App. 1, 733 P.2d 584, review denied, 108 Wn.2d 1014 (1987)).

The evidence was probative of the State's contention that defendant was responding as a drug dealer would to police entering his house, as opposed to how an ordinary person would respond. Alternatively, it was relevant to demonstrate that defendant was acting with the intent to kill whoever was there to steal his drugs. This made the evidence relevant to defendant's intent and relevant to disprove defendant's claim of self-defense. Absent the evidence of drug dealing the State would have been precluded from explaining why defendant acted as he did. The State would not have been able to explain why defendant's house was the subject of a search warrant, nor why he had guns to protect his criminal enterprise. The trial court certainly did not err when it concluded that the evidence was relevant.

In State v. Campbell, this Court held that evidence of the defendant's gang membership was admissible under ER 404(b) where the State's theory of the case was that the alleged murder was in response to invasions of drug sales territory. 78 Wn. App. 813, 821-22, 901 P.2d 1050 (1995). The Campbell court concluded that the evidence was relevant and because it was "highly probative of the State's theory - that Campbell was a gang member who responded with violence to challenges

to his status and to invasions of his drug sales territory,” the trial court did not err by admitting the evidence. Id. at 822.

The legal issue presented in the case at bar is very similar to Campbell. The State’s theory of why defendant reacted to the entry of the deputies as he did was directly related to his drug dealing. Defendant’s own argument as to why the evidence was prejudicial demonstrates why it was particularly probative. Defendant concludes that the evidence was too prejudicial because without it the State could not prove the absence of self-defense. Brief of Appellant, at 65-66. This is one very important reason it was probative. Without the evidence, the State’s ability to disprove self-defense would have been much more difficult to prove.

It is questionable whether the ER 404(b) analysis was even necessary in this case. The State is unaware of any case that prohibits the introduction of relevant information in a subsequent trial proven at the prior trial. Defendant’s theory of admissible evidence would mean the State would be precluded from offering evidence of criminal activity the State proved during the first trial. The State, in other words, would be in a worse position at the outset of the second trial because it succeeded on some counts in the first trial. It would be illogical to make the State’s case less strong in a second trial as a result of convictions obtained in the first trial.

A review of this Court's decision in State v. Eggleston, No. 22085-7-II, is helpful. In that decision, this Court noted that the trial court in the first trial did not err in denying defendant's motion to sever. Id. at 82-86. Part of the analysis included the fact that the trial court did not err when it concluded that the evidence of drug dealing would be admissible in the murder trial even if the cases had been severed. "The trial court also observed that the evidence would be cross-admissible, as the earlier drug sales and subsequent search warrant were connected to the entry and shooting. Again, we find no abuse of discretion." Id. at 84. If the evidence would have been cross-admissible in severed trials, defendant cannot now claim the trial court abused its discretion when it concluded that it was admissible in the subsequent trial.

Defendant's constitutional claim, that the trial court's error in admitting the evidence was so egregious as to render the trial fundamentally unfair, is baseless. A constitutional challenge to the admission of the evidence presumes the admission of the evidence was improper. This is clearly not the case. The trial court followed the prescribed method by which it should determine admissibility and properly concluded that the evidence was admissible.

- g. The trial court did not err when it determined Mr. Garn was unavailable to testify and his prior testimony would be admissible.

Tacoma Police Department forensic officer Ted Garn testified in the first two trials, but was unable to testify at the third trial because he lacked memory of the subject matter and his post traumatic stress disorder prevented him from reviewing the documents that might refresh his recollection. RP 1369-71. The trial court concluded that Mr. Garn's prior testimony could be used in his absence. RP 1371-72.

Evidence Rule 804(b)(1) states:

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Evidence Rule 804(a) defines unavailable as follows:

- (3) Testifies to a lack of memory of the subject matter of the declarant's statement; or
(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity;

These evidence rules present a two prong test. First, is the witness unavailable? Second, is the offered substitute testimony "former

testimony”? Both prongs of the test were met and the trial court properly admitted the evidence.

Defendant only challenges the admissibility of Mr. Garn’s prior testimony on the basis of the first prong of the test. It is clear that the substitute testimony offered was “former testimony” under the rule, in that it was Mr. Garn’s testimony at a previous trial involving the same parties, the same incident, and the same crimes.

Mr. Garn was unavailable for two reasons. He was unable to remember the events about which he would have been asked to testify. RP 1229, 1231-32. While Mr. Garn remembered going to the scene of this crime, and believed he collected evidence, he had “lost a lot of memory from the past,” due to an accident he had been in while on duty, and post traumatic stress syndrome related to his service in Vietnam. RP 1228-31. Mr. Garn testified that he did not recall what he did on October 16, 1995. RP 1231. Mr. Garn indicated that he could not recall the scene of the crime, even when shown a photograph. RP 1231; Exhibit 78. Mr. Garn could not recall if he had ever seen the property sheet used to document what was collected at the scene of the crime. RP 1232; Exhibit 628. He could not even remember the documents he helped prepare, nor could he remember preparing those documents. RP 1234-36, 1240; Exhibit 629. Mr. Garn did not even remember the deputy prosecutors offering him the

reports to read when they went to his house a few weeks before trial. RP 1241, 1246. On cross-examination Mr. Garn indicated that records of his work would not help him remember what particular work he did on this case. RP 1240.

Mr. Garn was also unavailable because he was suffering from “a then existing physical or mental illness or infirmity.” Mr. Garn testified that he could not read his reports of the work he did at the Eggleston residence. RP 1241-42.

Q (by DPA): I would like you to read the paragraph at the bottom - - toward the bottom of the page of Exhibit 629 to yourself, please.

A: I’m sorry. I can’t do it. I just can’t do it. I just can’t do it.

Q: Why not Mr. Garn?

A: I just - - I just can’t do it. Not that I don’t want to, I just can’t do it.

Q: Why not Mr. Garn?

A: I don’t - - it just - - I just can’t do it. It’s - - huh-uh.

RP 1241-42.

Mr. Garn explained that he was about to enter the VA hospital that day, or as soon as a bed was available for treatment of his PTSD, and that he has been receiving counseling and taking medication for the disorder.

RP 1232-34.

Mr. Garn’s wife testified that when he watches things on television that contain some violence, “[h]e becomes violent. He becomes extremely

depressed. He hallucinates. He has paranoia that people are coming to kill him or that he needs to go kill someone.” RP 1243. After episodes, Mr. Garn has no memory of what has just happened. RP 1244. Mr. Garn had been told by his doctors to avoid newspapers, the news, war movies, and crime drama television shows. If he does expose himself to these things he has episodes during which he experiences depression, paranoia and violent outbursts. RP 1243-45. These episodes can last from a few minutes, to a few days, to weeks. RP 1244. Mrs. Garn reported that Mr. Garn’s condition worsened since his second surgery which he had about four months before this court appearance. RP 1245. Mrs. Garn was a registered nurse for 20 years. RP 1248.

Mrs. Garn recalled the deputy prosecutors coming to the Garn house a few weeks before their court appearance. She recalled that the prosecutors showed Mr. Garn reports he had prepared. “He just - - he actually had no idea what those (the reports he had prepared) were, and I recall you specifically asking him what one specific thing was, and he had no idea.” RP 1246.

“A trial court's finding of unavailability is a matter within the sound discretion of the trial court and will not be reversed absent abuse of discretion.” State v. Whisler, 61 Wn. App. 126, 137, 810 P.2d 540 (1991)

(citing In re Estate of Foster, 55 Wn. App. 545, 554, 779 P.2d 272 (1989), review denied, 114 Wn.2d 1004 (1990)).

In the context of Evidence Rule 804(a), the confrontation clauses of the both federal constitution and the state constitution are satisfied if the State has made “a good faith effort to obtain” the presence of the witness. Whisler, 61 Wn. App. at 138. This is consistent with the Supreme Court’s interpretation of the federal constitution’s confrontation clause. The basic litmus of Sixth Amendment unavailability is established if “the prosecutorial authorities have made a good-faith effort to obtain” the witness’s presence at trial. Ohio v. Roberts, 448 U.S. 56, 74, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980) *overruled on other grounds by* Crawford v. Washington, 158 L. Ed. 2d 177, 124 S. Ct. 1354 (2004).

The trial court in the present case properly determined that Mr. Garn was unavailable because he could not remember the subject of his testimony and his mental illness prevented him from testifying. It would have been improper of the court to require Mr. Garn to testify when it obviously would have grave consequences on his mental well-being, and possibly on the proceedings. The court certainly did not abuse its discretion when it made these determinations. Because the witness was procured, the defendant’s right to confront the witness was not abridged.

3. THE TRIAL COURT'S INSTRUCTIONS TO THE JURY PROPERLY ARTICULATED THE LAW OF SELF-DEFENSE AND ALLOWED DEFENDANT TO ARGUE HIS THEORY OF THE CASE.

Defendant assigns error to the court's jury instructions. Defendant appears to make three arguments with respect to the jury instructions. Defendant's first argument is that Instructions 14, 15, 16, 17 and 19 deprived defendant of his claim of self-defense. His second argument is that the prior jury verdicts prohibited the State from asserting defendant knew or should have known that Deputy Bananola was a law enforcement officer. His third argument is that the trial court's pretrial ruling which prohibited him from challenging the legality of the search impermissibly removed a material element from the jury's consideration: whether Deputy Bananola was carrying out a legal duty at the time of his murder.

- a. The jury instructions were a proper statement of the law of self-defense when a law enforcement officer is the victim of the murder.

Appellate courts review a trial court's jury instructions under the abuse of discretion standard. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). A trial court does not abuse its discretion in instructing the jury if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and (3) when read as a whole,

properly inform the trier of fact of the applicable law. State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). Reversal is not required unless prejudice can be shown. Thomas v. French, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983). An error is not prejudicial unless it affects or presumably affects the trial outcome. Thomas, 99 Wn.2d at 104. A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

To raise self-defense before a jury, a defendant bears the initial burden of producing some evidence that his or her actions occurred in circumstances amounting to self-defense. i.e., the statutory elements of reasonable apprehension of great bodily harm and imminent danger. State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993).

“[T]he established rule for use of force in self-defense cases involving arrests requires the person face a situation of actual, imminent danger, not just apparent, imminent danger.” State v. Bradley, 141 Wn.2d 731, 738, 10 P.3d 358 (2000)(citing State v. Valentine, 132 Wn.2d 1, 20-21, 935 P.2d 1294 (1997)).

Defendant cites to the jury instructions he finds offensive, but fails to make any citation to authority as to why the given self-defense instructions were improper.¹

“This court will not review a claimed error unless it is (1) included in an assignment of error or clearly disclosed in the associated issue pertaining thereto, and (2) supported by argument and citation to legal authority. Vern Sims Ford, Inc. v. Hagel, 42 Wn. App. 675, 683, 713 P.2d 736 (1986); RAP 10.3(a)(5); B.C. Tire Corp. v. GTE Directories Corp., 46 Wn. App. 351, 355, 730 P.2d 726 (1986); State v. Cox, 109 Wn. App. 937, 943, 38 P.3d 371 (2002); RAP 10.3(a)(5).

Even if this court were to ignore defendant’s failure to cite to legal authority, and review the instructions, it would conclude that they were proper. The trial court had to address two possibilities. Did defendant kill Deputy Bananola, knowing he was a law enforcement officer, or did he do so not knowing he was a law enforcement officer?

First, defendant claims that Instruction 15 deprived him of his right to claim self-defense if he was aware Deputy Bananola was a law enforcement officer when he shot him three times in the head. Brief of

¹ Defendant does provide citation to legal authority with respect to his claim that he should have been permitted to argue the legality of the search warrant to the jury (addressed below), but none for his argument that the self-defense instructions given were improper.

Appellant, at 88.

The use of deadly force by a law enforcement officer is not excessive when necessarily used by a law enforcement officer to overcome actual resistance to the execution of the legal process, mandate, or order of a court or officer, or in the discharge of a legal duty. The service of a search warrant is a legal duty of a law enforcement officer.

CP 779; Instruction 15.

This instruction did not prevent defendant from arguing his theory of the case. Defendant argued the State did not prove he did not act in self-defense. If the jury had concluded that defendant knew Deputy Bananola was a law enforcement officer, but that the State failed to prove that Deputy Bananola's decision to fire was not necessary to overcome resistance, defendant would have been acquitted. This actually provided defendant a broader theory than the one he was employing.

At trial defendant was claiming that he did not know the John Bananola was a law enforcement officer. The court's instructions permitted the jury to conclude that even if defendant knew John Bananola was a law enforcement officer, he could still use deadly force in self-defense if Deputy Bananola was using excessive force, i.e. an amount of force in excess of that necessary to overcome actual resistance. This instruction was an accurate statement of the law and permitted defendant to argue his theory of the case.

Defendant next contends that the “knowledge” instruction permitted the jury to presume defendant knew Deputy Bananola was a law enforcement officer. The following is Instruction 17:

A person knows or acts knowingly or with knowledge that another person is a law enforcement officer when he is aware of that fact or circumstance.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which indicate that another person is a law enforcement officer, the jury is permitted but not required to find that he acted with knowledge that another person is a law enforcement officer.

CP 781. Both of the trial court’s justifiable homicide jury instructions (numbers 13 and 14) included an element of knowledge. It was proper for the court to instruct the jury as to what knowledge meant. The court’s instruction used the standard definition of knowledge as set forth in RCW 9A.08.010(1)(b):

A person knows or acts knowingly or with knowledge when:

- (i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or
- (ii) he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.

The Washington Supreme Court has already determined that the section of this definition to which defendant objects, the second part which permits a jury to infer knowledge from the circumstances, is constitutionally permissible because it still requires the jury to make a

specific finding with respect to the particular defendant. State v. J.M., 144 Wn.2d 472, 481, 28 P.3d 720 (2001) (See also State v. Johnson, 119 Wn.2d 167, 174-175, 829 P.2d 1082 (1992)).

This makes sense. If the jury could not infer knowledge from the circumstances, the State could not prevail, absent a confession by the defendant that he did in fact know of the circumstance the State had to prove. This is not the law, and for good reason; the State would never be able to satisfy the element of knowledge. It is only through the application of common sense that the State can prove knowledge. The State must prove circumstances that show that a reasonable person in the defendant's situation would know of the relevant facts in existence. The instruction was a proper statement of the law and permitted defendant to argue his theory of the case to the jury. There was no error in giving the knowledge instruction to the jury.

Defendant next complains that Jury Instructions 19 and 20 eliminated his self-defense claim if the jury concluded that he knew Deputy Bananola was a law enforcement officer. This is not true. The instructions stated correctly that when a person is claiming self defense against one whom he knows is a law enforcement officer, he must be in actual and imminent danger of death or great bodily injury. A reasonable but mistaken fear of such is insufficient.

Homicide or the use of deadly force involving the killing of a person whom the slayer knew was a law enforcement officer is not justified unless the slayer was in actual and imminent danger of death or great bodily harm. A reasonable but mistaken belief of imminent danger is an insufficient justification for the use of force against a known law enforcement officer who was engaged in the execution of the legal process, mandate, or order of a court or officer, or in the discharge of a legal duty.

CP 783; Jury Instruction 19.

It is well settled that this is an accurate statement of the law. A citizen may defend against official force only when in actual danger of death or great harm. State v. Valentine, 132 Wn.2d 1, 20, 935 P.2d 1294 (1997)(quoting State v. Westlund, 13 Wn. App. 460, 467, 536 P.2d 20 (1975)). "Official force" means force wielded by someone whom the citizen perceives to be a police officer. State v. Bradley, 96 Wn. App. 678, 683, 980 P.2d 235 (1999), aff'd, 141 Wn.2d 731, 10 P.3d 358 (2000).

A reasonable but mistaken belief of imminent danger is an insufficient justification for use of force against a law enforcement officer engaged in the performance of official duties. Valentine, 132 Wn.2d at 20-21; Bradley, 96 Wn. App. at 683. Thus, to justify the use of force against a law enforcement officer engaged in the performance of official duties, a finding of actual danger of serious injury under an objective standard is required. Bradley, 96 Wn. App. at 685; Valentine, 132 Wn.2d

at 20-21; State v. Holeman, 103 Wn.2d 426, 430, 693 P.2d 89 (1985);
State v. Ross, 71 Wn. App. 837, 843, 863 P.2d 102 (1993).

The stricter self-defense standard is in place to protect law enforcement officers and third parties from the dangers of physical violence related to arrests. Bradley, 96 Wn. App. at 683; Ross, 71 Wn. App. at 840-43; Valentine, 132 Wn. 2d at 20.

Defendant had two very real self-defense theories available to him, the absence of both of which the State had to prove beyond a reasonable doubt. First, if the defendant reasonably did not know Deputy Bananola was a law enforcement officer, and defendant reasonably believed he was in imminent danger of serious bodily harm, he would have been justified in his use of deadly force. Secondly, even if defendant knew Deputy Bananola was a law enforcement officer, and defendant was in actual imminent danger of serious bodily harm because the deputy was using excessive force, he would have been justified in his use of deadly force. The State had to disprove beyond a reasonable doubt both of these theories. The instructions given were an accurate statement of the law and permitted defendant to argue his theory of the case. The court did not err when it instructed the jury.

- b. The trial court properly instructed the jury because the prior verdicts did not implicate the doctrine of collateral estoppel.

Defendant asserts the prior verdicts in this case prohibited the court from instructing the jury on whether defendant knew or should have known Deputy Bananola was a law enforcement officer. The State has responded to this argument above. In short, defendant failed to raise this issue in the trial court, and has failed to argue the elements of collateral estoppel, much less satisfy them. Therefore, he cannot prevail on this claim of error on appeal.

- c. The trial court properly prohibited defendant from arguing the validity of the search warrant to the jury.

Defendant claims that the trial court's ruling which prohibited him from challenging the legality of the search in front of the jury impermissibly removed an element of his self-defense claim from jury consideration. This claim is erroneous because the court correctly concluded that the question of whether the search warrant was properly issued was a legal question for the court, not a factual question for the jury. If defendant wanted to challenge whether Deputy Bananola used force "in the discharge of a legal duty" by his entry into the Eggleston residence, he could have challenged whether the deputies were executing a

search warrant. In other words, he could have claimed a search warrant was never issued. However, a deputy acts within the legal duties of his job when he carries out the orders of the court. The legality of the order is a question of law properly answered by the court.

Questions of law are the province of the court and questions of fact are for the jury. State v. Chambers, 81 Wn.2d 929, 931-32, 506 P.2d 311 (1973)(See also Sparf v. United States, 156 U.S. 51, 82-87, 39 L. Ed. 343, 15 S. Ct. 273 (1895)). “What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged, and must persuade the factfinder ‘beyond a reasonable doubt’ of the facts necessary to establish each of those elements.” Sullivan v. Louisiana, 508 U.S. 275, 277-278, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (citations omitted).

Defendant asserts that “the lawfulness and officialness of a slain officer’s use of force is necessarily a jury determination under Gaudin.” Brief of Appellant, at 91. (Citing United States v. Gaudin, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed.2d 444 (1995)). In Gaudin the defendant had been convicted of making material false statements on loan documents. 515 U.S. 507-08. The trial judge refused to submit the question of “materiality” to the jury. Id. It was uncontested that conviction required that the statements be “material”, and that “materiality” is an element of the offense that the Government had to prove. Id. at 509. The Supreme

Court held:

Thus far, the resolution of the question before us seems simple. The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged; one of the elements in the present case is materiality; respondent therefore had a right to have the jury decide materiality.

Gaudin, 515 U.S. at 511.

The issue of Deputy Bananola's use of force is entirely different. The State had to disprove defendant's self-defense claim. Part of the State's case in doing so rested on the premise that Deputy Bananola was using deadly force, and permitted to do so when overcoming "actual resistance to the execution of the legal process, mandate, or order of a court or officer, or the discharge of a legal duty. The service of a search warrant is a legal duty of a law enforcement officer." CP 779; Jury Instruction 15. The deputy did not have to be serving a search warrant that would sustain a suppression motion in order for the defendant to be required to submit to the legal process. The issuance of the search warrant satisfies the requirement that the deputy be acting pursuant to the discharge of his legal duty.

Even if the search warrant had later been determined to be lacking probable cause or in some other way defective, that does not give the defendant the right to use force in resisting its execution. A person being

arrested does not have the right to resist, even if the arrest is unlawful. State v. Valentine, 132 Wn.2d 1, 21, 935 P.2d 1294 (1997). An occupant, confronted with a valid search warrant, has no right to refuse admission to police officers. State v. Richards, 136 Wn.2d 361, 374, 962 P.2d 118 (1998).

The legality of the search warrant is not an element of the self-defense claim. The element is whether the deputy was engaged in the discharge of his legal duty: the service of a search warrant. If the deputy had not been serving a search warrant, defendant might have been able to avail himself of a claim that the deputy was not acting in the discharge of his legal duty. But under the facts of this case, there is no claim that he was acting outside the scope of the search warrant. That the State proved this element, the existence of the search warrant, and defendant chose not to challenge it, does not mean that defendant had a right to challenge the legality of the warrant.

Finally, whether the search warrant was lawfully issued is a question of law, and one that this court has already answered. This court concluded that the search warrant was valid. Eggleston, No. 22085-7-II, at 66-82. The idea that a jury should determine the validity of a search warrant has no support in case law. The question for the jury, the element of the self-defense claim, was whether the deputy was carrying out a legal

duty. Once the court signs the search warrant, the deputy has a legal duty to serve it.

4. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DISMISSED JURORS 4 AND 7, AS WELL AS JUROR BURROWS.

- a. The removal of Jurors Number Four and Seven was appropriate and the court did not abuse its discretion by dismissing jurors who could not be present for testimony.

On the sixteenth day of trial Juror Number Seven fell and hurt her right knee, her back, arms and hand. RP 2610-15; 2688. The court had scheduled a visit to the scene of the crime for that afternoon and had to reschedule it due to the injury. RP 2608. Juror Number Seven indicated that she was having trouble walking and was icing her knee. The State's attorney made a record that Juror Number Seven was in obvious discomfort and appeared to believe she had suffered more than just a scraped knee. RP 2621. The court reviewed RCW 2.36.110 and CrR 6.57, and after discussion with counsel determined that even though the site visit would have to be rescheduled, Juror Seven would remain on the panel. RP 2617-21. The court indicated that if it thought Juror Seven's ability to give her attention to the testimony was impacted Juror Seven would be excused. RP 2620.

Rescheduling the site visit required canceling and rescheduling a bus, getting a second judicial assistant, rescheduling other personnel, and juggling the witnesses. RP 2680. The State reported that the site visit could not be put off indefinitely because there were concerns that transients would break back into the house. RP 2680. The trial court recognized the concern and reset the site visit for four days later, Monday afternoon.

On Monday morning Juror Number Seven informed the court that she had seen the doctor on Friday and had another appointment that afternoon. RP 2685. The court was very concerned that Juror Number Seven had scheduled an appointment that would conflict with the taking of testimony and the rescheduled site visit. RP 2685. The court decided that it was going to excuse Juror Number Seven, observing that the medical appointments could be an ongoing problem. RP 2690.

The same morning, Juror Number Four called the court to report that she had been vomiting all night and was still vomiting that morning. RP 2684. The court indicated that the juror had said that she would try to make it to court that afternoon, but the court told her to stay home and try to get better. The court concluded that it would not be sensible to have a juror who has been vomiting in the morning to come to court that afternoon. RP 2692. The court expressed concern that the juror could end up getting all of the people in the courtroom sick, and there was no assurance the juror would be ready to proceed that afternoon. The court

was aware of the expense another site visit delay would cost, as well as the extensive scheduling problems inherent in delaying the proceedings any further.

An appellate court reviews a trial court's decision to remove a juror for an abuse of discretion. State v. Ashcraft, 71 Wn. App. 444, 461, 859 P.2d 60 (1993); State v. Hughes, 106 Wn.2d 176, 204, 721 P.2d 902 (1986). CrR 6.5 allows the court to replace a juror with an alternate juror, before the submission of the case to the jury, if the juror becomes unable to serve. In the case of a deliberating jury, although CrR 6.5 does not specifically require a hearing, some sort of formal proceeding is contemplated by the rule. Ashcraft, 71 Wn. App. at 462. But such a proceeding is only required when the case has already gone to the jury and the alternates have been temporarily excused. State v. Johnson, 90 Wn. App. 54, 72, 950 P.2d 981 (1998). The purpose of a formal proceeding is to verify that the juror is unable to serve and to demonstrate that the alternate is still impartial. State v. Jorden, 103 Wn. App. 221, 227, 11 P.3d 866 (2000), review denied, 143 Wn.2d 1015, 22 P.3d 803 (2001). There is no language in the rule which implies the court should hold a hearing before dismissing a juror prior to the case being given to the jury.

RCW 2.36.110 requires the court to excuse from service any juror who, in the opinion of the judge, is unfit or unable to serve for a number of listed reasons, including ill health. The court has a statutory duty to

excuse a juror who is too ill to serve. RCW 2.36.110. In Jorden, the court did take testimony because the parties disputed whether a juror was falling asleep. Jorden, 103 Wn. App. at 224-26.

Defendant has cited no case where the court was found to have abused its discretion in a case such as the one at bar. Both jurors were excused well before the parties rested, and both presented possible continuing delays. The Jorden court concluded that it was not an abuse of discretion to dismiss a juror who had been inattentive and appeared to be very tired. 103 Wn. App. at 226. The Johnson court found no abuse of discretion when the trial court replaced a juror after deliberations began with an alternate because the dismissed juror called to tell the court that she could no longer continue deliberating. 90 Wn. App. at 73.

In a footnote defendant cites United States v. Tabacca, 924 F.2d 906 (9th Cir. 1991), for the proposition that a juror's one day absence is insufficient to dismiss the juror. This case is not at all like the one at bar. In Tabacca, the juror informed the court that he would be absent that day because his wife took the car keys and he would not be able to get to the courthouse. Id. at 913. The Tabacca court concluded that given the jury had already started deliberations, the shortness of the trial (only two and a half days), and the determinate length of the absences (only one day), the court did not have "just cause" to dismiss the juror. The Tabacca court noted that other cases where the continuances would have been for

unspecified periods of time, the jury had not been given the case, and the trial was longer, the rule was not violated by the trial courts dismissal of jurors. Id. at 914-15.

In the present case, the court did not need to find “just cause” to dismiss the juror. The statute and court rule instruct the court “[i]f at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged.” CrR 6.5.

Because the court dismissed the juror before the case was given to the jury, and each dismissed juror was replaced with an alternate, defendant’s right to an impartial jury was not violated. The court had a duty to dismiss jurors who could not continue to carryout their duty. The court concluded that the Juror Number Seven’s absence was going to be expensive and delay the proceedings for the second time in a matter of days. The court was also concerned that there may very well be further delays caused by treatment for this juror’s injuries. It was clear that the juror was not going to be able to carry out her duties as a juror, therefore the court had a duty to dismiss the juror. Even if the court was incorrect in its assessment, it cannot be said that the court abused its discretion when it concluded that the juror had to be dismissed because her inability to attend the proceedings would have resulted in a second expensive and troublesome delay.

Dismissal of Juror Number Four was also appropriate. The court concluded that the juror should not come to court and possibly infect everyone in the courtroom. It was not an abuse of discretion to dismiss the sick juror, particularly when the court rule requires the court to do so: “If at anytime before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged.” CrR 6.5. The juror was sick and unable to attend. How soon the juror was going to be able to participate was unknowable. The possible infection of the other jurors and participants made discharge of Juror Number Four proper, and certainly not an abuse of discretion.

- b. The trial court did not err when it dismissed Juror Burrows with the consent of both parties.

Defendant states that “Juror Thomas Burrows was dismissed by the court towards the end of the trial, following information given by the state to the court in chambers, that Burrows was actually a customer of Magoo’s, the tavern at which Mr. Eggleston worked.” Brief of Appellant, at 71. Defendant admits that he stipulated to the dismissal of Juror Burrows. *Id.* Juror Burrows was dismissed from the case because he had contact and conversations with a witness who had been a witness in the case, but not called in this particular trial. RP 6132. Juror Burrows was

also observed to be sleeping during some of the proceedings. RP 6134. Juror Burrows was working at night and hearing testimony during the day, and therefore may have been sleep deprived and unable to pay attention to trial testimony. RP 6135. Defense counsel stipulated to Juror Burrows' dismissal. RP 6135. Juror Burrows was dismissed before the court read the jury instructions and before the case was given to the jury.

Defendant fails to explain why this decision was erroneous, or how the court abused its discretion by doing what both parties agreed should be done.

Defendant alleges that the information given to the court was erroneous and that Juror Burrows had informed the court that he had come into contact with people whom he recognized from his patronage of Magoo's Tavern. The only evidence defendant presents on appeal is an affidavit of Juror Burrows which states that he informed the court of such, and this affidavit was obtained after the jury returned its verdict. CP 818-20.

Defendant has failed to present any record that this contact between the juror and the court existed other than the juror's affidavit. The defense did not provide testimony or statements from the judicial assistant, nor the court. The defense has failed to cite to the record where

this issue was raised below before the court and failed to demonstrate how the court erred when it dismissed Juror Burrows.

Even if the court had communicated with Juror Burrows about his prior dealings with persons at Magoo's Tavern, it has not been demonstrated that the court abused its discretion by dismissing the juror prior to the beginning of deliberations. Given that Juror Burrows appeared to have friends who were familiar with the case, and with whom he had contact during the trial, the judge would have been well within her discretion to dismiss Juror Burrows. Even if this were not the case, however, the fact that Juror Burrows was sleeping during some of the testimony also warranted his dismissal from the case.

Defendant observes that the trial court's findings regarding juror misconduct "fail to address Burrows' now uncontradicted assertion, supported by another juror's declaration, that he had contacted the judge through her Judicial Assistant during the trial." Brief of Appellant, at 76. Defendant fails to note that there is no record that defense counsel raised this issue before the court at the hearing involving the juror misconduct. The findings of fact and conclusions of law prepared after the juror misconduct hearing were tailored for the issues raised at the hearing: whether jurors discussed the evidence before deliberation began, whether jurors discussed a witness's veracity before deliberations began, and

whether jurors discussed the prior trials. Defendant has failed to provide a record sufficient for review of this issue.²

Defendant also complains that the trial court erred when it failed to recuse itself. Defendant fails to cite to the record where the court made this decision, and he has, therefore, failed to provide a record sufficient for review of this claim of error. State v. Cox, 109 Wn. App. 937, 943, 38 P.3d 371 (2002).

Defendant complains that the trial court's failure to hold a hearing before dismissing Juror Burrows violated CrR 6.5 and RCW 2.36. Brief of Appellant, at 78. As noted above, a hearing is only contemplated if the juror is being dismissed after the jury has begun deliberations. But this ignores the point, if the parties are stipulating that the juror should be removed, a hearing is a waste of time. Defendant cannot agree to a juror being dismissed, and then claim such was error on appeal. The invited error doctrine prohibits a party from setting up an error in the trial court then complaining of it on appeal. In re Pers. Restraint of Tortorelli, 149 Wn.2d 82, 94, 66 P.3d 606 (2003) (See, e.g., State v. Henderson, 114

² Defendant asserts that the trial court did not permit inquiry regarding Burrow's allegation that he was threatened, that he told the judicial assistant about it, and that she assured him that the judge was told. Brief of Appellant, at 75. Defense counsel never made a request at this hearing to inquire of the jurors about this allegation. Therefore, defendant's assertion that the trial court did not permit this line of inquiry cannot be a legitimate claim of error.

Wn.2d 867, 870, 792 P.2d 514 (1990); State v. Neher, 112 Wn.2d 347, 352-53, 771 P.2d 330 (1989)).

Finally, defendant asserts that the trial court's failure to inform defense counsel of Juror Burrows comments to the judicial assistant violated his right to be present at every stage of the proceeding. This presupposes that the contact occurred. While defendant provided an affidavit of Juror Burrows, he has failed to present any citation to the record where the court addressed his contention. Further, defendant has failed to explain which alleged contacts with the court would warrant a finding of prejudice. If defendant did raise this below, the trial court would have addressed it and made a ruling as to whether a new trial was warranted, something the trial court was in the best position to determine. Defendant's failure to cite to the record, and failure to provide a record sufficient for review of this issue, constitutes a waiver of this claim of error. Given that Juror Burrows was dismissed before deliberations began, it is difficult to speculate as to how defendant was prejudiced.

Defendant cites State v. Wroth, 15 Wn. 621, 47 P. 106 (1896), for the proposition that the contact alleged in this case is error requiring reversal. The law in Washington, however, requires the defendant to at least allege prejudice before reversal is even considered. State v. Caliguri, 99 Wn.2d 501, 509, 664 P.2d 466 (1983). Defendant has not even alleged

prejudice, much less detailed how he was prejudiced by the court's alleged contact with the juror. It is nearly impossible for defendant to allege prejudice in this case because Juror Burrows was removed before the case went to the jury.

Because defendant stipulated to the removal of Juror Burrows, he cannot claim the trial court erred in dismissing Juror Burrows. Even if his removal was not necessary because of his contacts with the witness, his falling asleep was a legitimate reason for his removal and the court did not abuse its discretion by dismissing him. Additionally, defendant's failure to present a record sufficient for review precludes appellate review of defendant's motion for the trial court to recuse itself. Finally, defendant has failed to even allege prejudice, therefore, he cannot prevail on his claim that any judge-juror contact warrants a new trial.

5. THE TRIAL COURT DID NOT ERR WHEN IT CONCLUDED THAT THERE WAS NO REASONABLE POSSIBILITY THAT ALLEGED JUROR MISCONDUCT IMPACTED THE VERDICT.

Defendant alleges two bases for reversal based on juror misconduct: that a juror failed to reveal knowledge of Eggleston's prior trials, and other jurors discussed those prior trials and their outcome. The trial court held a hearing on these claims of jury misconduct and had each

of the jurors testify as witnesses. RP 6527-6599. The court detailed its findings and conclusions on the record, and then memorialized these in written findings of fact and conclusions of law. RP 6600-12; CP 921-31.

With respect to defendant's first claim of error, the trial court concluded that knowledge of the existence of prior trials was not extrinsic evidence, because the fact that there were prior trials was expressed by counsel during questioning of witnesses, and witnesses testified to such. CP 927. The trial court concluded that in voir dire some jurors admitted knowledge of the results of the prior trials but they were not disqualified for such "so long as the juror could put aside that prior knowledge and judge the case fairly and impartially." CP 927. There was no evidence the juror who shared the information about the results of the prior trials intentionally mislead counsel or the court during voir dire. CP 926.

With respect to defendant's second claim, the trial court concluded that the extrinsic evidence of knowledge of the prior verdict did constitute juror misconduct. The court found "that extrinsic evidence regarding some results of prior trials was received by a few members of the jury." CP 927. The court also found that there was no indication that the extrinsic evidence identified which charge in the prior trials resulted in a hung jury, mistrial or conviction. CP 927. The court concluded that "[t]he communication of the results of prior trials by one juror to a few other

members of the jury during deliberations constituted misconduct.” CP 928.

After hearing from the jury, the court began its analysis by looking at relevant case law. After looking at the other claimed areas of juror misconduct, the court addressed the one challenged on appeal, the interjection of extrinsic evidence. RP 6600-01. The trial court observed that when this Court was faced with a similar issue after defendant’s second trial, it looked to United States v. Keating, 147 F.3d 895 (9th Cir. 1998). RP 6602; Eggleston, at 23.

This court held: “Given the court's failure to conduct any inquiry and the difficulty of concluding that the misconduct could not have affected the verdict, we are compelled to hold that the trial court erred in failing to grant a new trial because of juror misconduct.” Eggleston at 24-25.

The trial court took this ruling to heart and after a hearing, during which each juror was examined, it applied the facts of this case to the holding in Keating. RP 6602. The court looked at Keating and applied the “reasonable possibility” standard Keating enunciated, as set forth in Dickson v. Sullivan, 849 F.2d 403 (9th Cir. 1988). Keating, 147 F.3d at 900-02.

The Dickson factors are:

1. whether the material was actually received, and if so, how;
2. the length of time it was available to the jury;
3. the extent to which the juror discussed and considered it;
4. whether the material was introduced before a verdict was reached, and if so at what point in the deliberations; and
5. any other matters which may bear on the issue of the reasonable possibility of whether the extrinsic material affected the verdict.

Keating, 147 F.3d at 902 (citing Dickson, 849 F.2d at 406; Marino v. Vasquez, 812 F.2d 499, 506 (9th Cir. 1987)).

The trial court applied these factors and concluded: “Under an objective standard, there is no reasonable possibility that any reference to or disclosure of the results of the prior trials affected the verdict.” CP 930. The court further concluded, “there is no reasonable possibility that juror misconduct prejudiced the defendant or affected the jury’s verdict. There is no reasonable doubt about the lack of effect of juror misconduct on the verdict.” CP 931.

A trial court's ruling on a motion for a new trial will not be reversed on appeal absent a showing of abuse of discretion. State v. Balisok, 123 Wn.2d 114, 117, 866 P.2d 631 (1994). “[U]ltimately the

determination of whether juror misconduct in interjecting evidence outside of the record affected the verdict is within the discretion of the trial court.” Richards v. Overlake Hosp. Medical Center, 59 Wn. App. 266, 272, 796 P.2d 737 (1990).

It is firmly established that a jury’s consideration of extrinsic evidence may warrant a new trial. Balisok, 123 Wn.2d at 118; State v. Rinkes, 70 Wn.2d 854, 862, 425 P.2d 658 (1967). Extrinsic evidence “is defined as information that is outside all the evidence admitted at trial, either orally or by document.” Richards, 59 Wn. App. at 270. “Such evidence is improper because it is not subject to objection, cross examination, explanation or rebuttal.” Balisok, 123 Wn.2d at 118 (citing Halverson v. Anderson, 82 Wn.2d 746, 752, 513 P.2d 827 (1973)). Thus, when extrinsic evidence has been introduced, the question is not whether error has occurred, but whether the defendant has been prejudiced by the error. See Rinkes, 70 Wn.2d at 862.

A new trial should be granted when there are reasonable grounds to believe that the defendant may have been prejudiced by the extrinsic evidence in question. State v. Cummings, 31 Wn. App. 427, 430, 642 P.2d 415 (1982). In making this determination, courts employ an objective standard:

The court must make an objective inquiry into whether the extraneous evidence could have affected the jury's verdict, not a subjective inquiry into the actual effect.

Allyn v. Boe, 87 Wn. App. 722, 729, 943 P.2d 364 (1997), review denied, 134 Wn.2d 1020 (1998)(emphasis in original). Each case must be decided on its own facts. Cummings, 31 Wn. App. at 429. Moreover, “something more than a possibility of prejudice must be shown.” Id. at 430 (citing State v. Lemieux, 75 Wn.2d 89, 448 P.2d 943 (1968)). On the other hand, any reasonable doubt as to the effect of the evidence must be resolved against the verdict. Allyn, 87 Wn. App. at 730; Cummings, 31 Wn. App. at 430. “Not all instances of juror misconduct merit a new trial; there must be prejudice.” State v. Barnes, 85 Wn. App. 638, 669, 932 P.2d 669, review denied, 133 Wn.2d 1021, 948 P.2d 389 (1997), citing State v. Tigano, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991), review denied, 118 Wn.2d 1021, 827 P.2d 1392 (1992)).

The question of whether a defendant has been prejudiced by extrinsic evidence is addressed to “the sound discretion of the trial court, who saw both the witnesses and the trial proceedings, and had in mind the evidence.” Allyn, 87 Wn. App. at 730. Although the trial court's decision is always reviewed for abuse of discretion, a decision to grant a new trial is afforded greater deference from the appellate courts:

If misconduct is found, great deference is due the trial court's determination that no prejudice occurred. However, greater weight is owed a decision to grant a new trial than a decision not to grant a new trial.

Richards, 59 Wn. App. at 271. In State v. Rose, 43 Wn.2d 553, 557, 262 P.2d 194 (1953), the court concluded that the burden is upon the State to show that no prejudice actually resulted. Rose, however, was addressing a circumstance where the jury violated a statute which prohibited them from separating. The court observed that prejudice was presume because of the statutory violation, and in the absence of the statute, prejudice would not have been presumed. 43 Wn.2d at 557 (citing State v. Pepon, 62 Wash. 635, 114 Pac. 449 (1911)). In State v. Murphy, 44 Wn. App. 290, 721 P.2d 30 (1986) the court clarified the standard.

Communications by or with jurors constitute misconduct. Once established, it gives rise to a presumption of prejudice which the State has the burden of disproving beyond a reasonable doubt. However, this presumption is not conclusive and may be overcome if the trial court determines such misconduct was harmless to the defendant.

State v. Murphy, 44 Wn. App. at 296 (citing Remmer v. United States, 347 U.S. 227, 229, 98 L. Ed. 654, 74 S. Ct. 450 (1954); State v. Rose, 43 Wn.2d 553, 557, 262 P.2d 194 (1953); State v. Saraceno, 23 Wn. App. 473, 475, 596 P.2d 297, review denied, 92 Wn.2d 1030 (1979); State v. Forsyth, 13 Wn. App. 133, 136-37, 533 P.2d 847 (1975).

The trial court in this case, unlike defendant's second trial court, conducted a hearing and questioned each juror. The court made findings of fact and conclusions of law. The only finding of fact to which defendant assigned error is Findings of Fact XX. Importantly, defendant did not assign error to the court's Finding of Fact XXI, which states:

"During voir dire, jurors disclosed some knowledge of the results of prior trials. This knowledge was not a disqualification of that juror so long as the juror could put aside that prior knowledge and judge the case fairly and impartially." This finding makes clear that the parties were aware before the jury was empanelled that a juror might know of the results of the prior trials.

Defendant has failed to explain how the court abused its discretion when it concluded there was no reasonable possibility that the extrinsic evidence of defendant's prior conviction overturned on appeal, which was heard by only one or two jurors, affected the verdict. The court's inquiry of each juror revealed that even though one of the jurors mentioned the overturned conviction, only one juror recalled hearing the statement and there was no discussion of the subject. CP 925-27; Findings of Fact XII-XXI.

The court instructed the jury that "[t]he only evidence you are to consider consists of the testimony of the witnesses and the exhibits

admitted into evidence.” CP 764; Jury Instruction Number One. “Courts generally presume jurors follow instructions to disregard improper evidence.” State v. Russell, 125 Wn.2d 24, 84-85, 882 P.2d 747 (1994) (citing State v. Swan, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046, 112 L. Ed. 2d 772, 111 S. Ct. 752 (1991)).

Defendant does not even claim that the verdict was impacted by the knowledge of these two jurors, he simply says prejudice is presumed, and the trial court erred in not applying an objective standard. Brief of Appellant, at 82. While the State is required to disprove prejudice, it can do so by a showing to the trial court that the extrinsic evidence had no impact on the verdict. The trial court heard all of the trial testimony, reviewed the testimony of the jurors and the affidavits submitted by defendant, and came to the following conclusion: “There is no reasonable possibility that juror misconduct prejudiced the defendant or affected the jury’s verdict. There is no reasonable doubt about the lack of effect of misconduct on the verdict.” CP 931. The court clearly did conclude that there was no prejudice beyond a reasonable doubt that the jury misconduct had no impact on the verdict, and defendant does not explain how this finding was an abuse of discretion.

Defendant’s claim that the trial court erred by not applying an objective standard to its findings is also erroneous. The trial court

concluded: “Under an objective standard, there is no reasonable possibility that any reference to or disclosure of the results of the prior trials affected the verdict.” CP 930.

While the court did conclude that there was extrinsic evidence before some of the jurors, it was obvious this extrinsic evidence was not prejudicial to defendant receiving a verdict from an impartial jury. Only one juror reported that he heard about the prior conviction, and said that another juror informed him of such. There was no discussion of the prior verdict during deliberations. The other jurors did not even hear the statement and never discussed it.

The court’s diligent application of the Dickson factors is detailed in its Conclusions of Law IV. CP 928-30. The trial court found that the information was known by two jurors, and communicated by another juror. This factor, the court concluded, weighed in favor of a new trial. CP 928. The information appeared to have been communicated on the second and final day of deliberations, and this weighed against a new trial. CP 928. “There was no discussion or consideration of the result of the prior trials by any members of the jury. Only two jurors heard the extrinsic information.” CP 929. The trial court concluded this weighed against a new trial. CP 929. The information was related in the middle of deliberations, as opposed to prior to deliberations beginning and the court

considered this to weigh in neither the favor of, nor against, a new trial. CP 929. The court concluded that the juror who related the information did not mislead the court during voir dire, and may have recalled something during the trial, or learned of the information during the trial. This did not weigh in favor of a new trial. CP 929. "Other jurors reported knowledge of the result of the prior trials during voir dire, and one juror was told of a portion of the result between voir dire and the commencement of testimony. Those jurors were not challenged for cause by the defendant and were allowed to remain on the jury. This factor weighs against the granting of a new trial." CP 929. The court also found that given the questions by defense counsel and answers of witnesses that were not the subject of a motion to strike, it was reasonable for a juror to conclude that a prior trial had been held and some result had been achieved. This factor weighed against a new trial. CP 929-30. The court found that some of the reported extrinsic evidence was prejudicial to the State, and this weighed against a new trial. CP 930. The court also held that because the jury was never aware of what charges defendant had previously been convicted, this weighed against a new trial. CP 930. And the court found that the information the jurors related about the prior trials results (conviction, mistrial and hung jury), demonstrated the extraneous

information was ambiguous and inconsistent, and this weighed against a new trial. CP 930.

Defendant has not explained which of these findings was incorrect, or which was an abuse of discretion.

If this court were to conclude that the trial court abused its discretion in finding there was no reasonable possibility that the extrinsic evidence impacted the verdict, it would be concluding that no conviction could be sustained when a couple of jurors knew of a prior conviction. It would be a grave mistake to come to this conclusion. The result would be that the State could never retry a high profile case. There are a number of cases each year which have so much publicity that it would be impossible for a court to empanel a jury on retrial without a juror or two having not heard about the prior conviction. For example, if Robert Yates' conviction was overturned, and the case retried, it would be preposterous to believe that a jury could be seated in which at least a couple of jurors never heard of his earlier conviction. If Gary Ridgeway successfully withdrew his guilty pleas to the Green River murders, it would be equally ridiculous to believe a jury could be empanelled without a juror or two knowing he had pleaded guilty to those murders.

The trial court observed as much when it made Conclusion of Law IV(c):

During testimony before the jury, witnesses and defense counsel indicated on numerous occasions that there had been prior trials. Defense counsel did not request a mistrial, a curative instruction, or that the information be stricken. This information was properly before the jury for consideration, and a reasonable inference from that information is that there had been some previous result, given the seven-year period between the incident and this trial and the period of five years since the first trial and four years since the second trial. This factor weighs against the granting of a new trial.

CP 929-30.

This court should not ignore the obvious. If a person is on trial for the murder of a police officer which was committed seven years ago, and the jury is aware of prior trials, a juror or two will presume a prior conviction was overturned. Jurors are members of the community who understand the legal process well enough to know such. The legal system should not presume jurors live in a vacuum, or are so unintelligent as to not come to such conclusions on their own. Jurors may truthfully tell the court during voir dire that they have no memory of the prior verdict. That does not mean that after two months of testimony they will not figure out that a prior trial resulted in a conviction that was later overturned. When trying a case as old as this one, the law should not require a trial court to seat only jurors so far removed from reality that they are unable to deduce the obvious. In this case, the question is whether that knowledge impacted the verdict. After hearing all of the jurors testify, the trial court concluded

beyond a reasonable doubt this jury's verdict was not affected by a couple of jurors knowing about a prior conviction, particularly when this information was not part of the deliberations. This finding was not an abuse of discretion, and is supported by the findings of fact.

The law does not require reversal when a jury has information that a prior conviction resulted from a prior trial on the same charges. Reversal is only required if the trial court concludes that the State has not demonstrated that there is no reasonable possibility that such had an impact on the jury's verdict. This Court does not review the question de novo. It must conclude that no reasonable trial court would have found as this trial court ruled. Given these circumstances, that high threshold cannot be met by defendant. Defendant has not demonstrated that the trial court abused its discretion in its conclusion that the jury's verdict was not impacted by two jurors' knowledge of defendant's prior conviction. The fact that the knowledge was not related to the entire jury, and was not discussed at all in deliberations, weighs heavily in favor of the court's determination. The trial court properly applied the Dickson factors and determined there was no reasonable possibility that the verdict was impacted by the extrinsic evidence. The trial court did not abuse its discretion when it came to this conclusion.

6. THE TRIAL COURT DID NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE WHEN IT SENTENCED DEFENDANT ON DRUG CHARGES THAT WERE NOT SUBJECT OF THE APPEAL.

Defendant contends that the trial court violated his double jeopardy rights by sentencing him on the drug convictions. Defendant fails to note however, that the judgments and sentences imposed after the first and second trials were vacated by the Court of Appeals opinion. There was no valid judgment and sentence, therefore the court had to resentence defendant on the drug charges. In fact, in defendant's first appeal the State has conceded that the original judgment and sentence contained an error when it mandated that the drug conviction sentence enhancements ran consecutive to each other rather than concurrent with each other. Defendant had to be resentence on the drug counts, regardless of the outcome in the third trial.

Where a sentence is not in accordance with the law, the sentencing court has both the authority and the duty to correct the sentence. State v. Pringle, 83 Wn.2d 188, 193, 517 P.2d 192 (1973). Further, where the defendant's confinement is not in accordance with a valid judgment and sentence, the resentencing does not impact the defendant's double jeopardy rights. Pringle, 83 Wn.2d at 193-94. There is no expectation in

finality of a sentence, for double jeopardy purposes, that is pending an appeal. State v. Hardesty, 129 Wn.2d 303, 312, 915 P.2d 1080 (1996).

In the present case, defendant did not have an expectation in the finality of his sentence on the drug charges because he filed an appeal of his conviction on those charges as well as all of the other counts. The trial court could not let his original judgment and sentence stand because it included counts that had been reversed, and enhancements that were erroneously run consecutively rather than concurrently. That judgment and sentence was therefore, voided by this court's opinion in Eggleston, No. 22085-7-II.

When the trial court sentenced defendant it was required to include all of defendant's convictions in its determination of his offender score. RCW 9.94A.360(1) provides the basis for determining what convictions properly may be included as a prior offense in calculating an offender score:

(1) A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed "other current offenses" within the meaning of RCW 9.94A.400.

The trial court properly included the convictions from the first trial when it sentenced defendant on the drug charges. See State v. Collicott, 118 Wn.2d 649, 827 P.2d 263 (1992).

Defendant does not raise the issue directly but the real question may be which judge had the authority to impose the sentence on the drug charges. It may very well be that the judge who presided over the first trial, Judge McPhee, should have imposed the sentence on the drug convictions. Because this case will need to be remanded for resentencing (see Argument Section 8 below), the State invites defendant to express to this Court whether he wants Judge McPhee to enter the sentence on the drug convictions, or whether he acquiesces to Judge Arend imposing sentence on all counts.

7. THE TRIAL COURT DID NOT ERR WHEN IT CALCULATED DEFENDANT'S OFFENDER SCORE AND DID NOT FIND TWO OF THE DRUG CONVICTIONS TO BE THE SAME CRIMINAL CONDUCT.

Defendant has waived this claim of error. Defendant stipulated to his offender score at sentencing and cannot now complain that some of the prior criminal history amounted to the same criminal conduct. RP 6636. The Washington Supreme Court observed that a defendant generally cannot waive a challenge to an incorrect offender score. In re Personal

Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002).

Exceptions to this rule exist, however, where the alleged error involves a stipulation to incorrect facts or a matter of trial court discretion. Goodwin, 146 Wn.2d at 874. The same criminal conduct doctrine involves both factual determinations and matters of trial court discretion. Goodwin, 146 Wn.2d at 875. Thus, a defendant may waive an alleged error regarding same criminal conduct if he fails to assert this argument at sentencing. Goodwin, 146 Wn.2d at 875 (favorably citing State v. Nitsch, 100 Wn. App. 512, 997 P.2d 1000, review denied, 141 Wn.2d 1030 (2000)). By stipulating to his criminal history, and by agreeing with the State's calculation of his offender score defendant waived his right to challenge the offender score and to argue that reduced standard ranges should apply based on the same criminal conduct rule. See Nitsch, 100 Wn. App. at 521-22; see also In re Personal Restraint of Connick, 144 Wn.2d 442, 464, 28 P.3d 729 (2001)(once a defendant agrees to an offender score that counts his prior offenses separately, he cannot subsequently challenge the sentencing court's failure to consider some of those prior offenses as the same criminal conduct).

In this case, the waiver is even more apparent. Defendant was convicted of these crimes in the first of his three trials. Defendant has failed to cite when, after any of these trials, he raised the same criminal

conduct challenge. The proper place to raise it would have been after the first trial. If defendant had done so, Judge McPhee could have addressed the challenge and made a decision. Defendant's failure to do so then, precludes him from raising it later. Defendant's failure to raise this issue in his first appeal further waived review of this issue.

Finally, the appeal in this case comes from a trial that does not include the drug convictions. The drug convictions had already been scored as separate criminal conduct by the two preceding judges. CP 1204-15, 1520-30. This appeal relates to the decisions of the court after the third trial. This appeal is the wrong place and time to challenge the earlier findings that the convictions did not amount to the same criminal conduct.

Defendant cannot be heard to complain that this court erred when it followed his recommendation with respect to his offender score, and he failed to challenge the separate criminal conduct findings of the court which heard the evidence of the criminal conduct at issue.

8. BLAKELY v. WASHINGTON REQUIRES THIS COURT TO VACATE DEFENDANT'S EXCEPTIONAL SENTENCE.

On June 25, 2004 defendant filed a Statement of Supplemental Authority citing Blakely v. Washington, No. 02-1632, 2004 U.S. LEXIS

4573 (2004). The United States Supreme Court decided this case on June 24, 2004, and the State concedes this decision requires defendant's sentence be vacated, and this case remanded for resentencing.

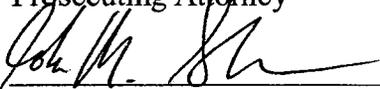
State contests defendant's assertion that the doctrine of collateral estoppel prevented the trial court from imposing an exceptional sentence on the basis of the defendant's knowledge that the victim was a law enforcement officer at the time of the murder. In light of the Blakely decision, however, this issue is moot and the State will not present further argument unless instructed to do so by this court.

D. CONCLUSION.

For the aforementioned reasons, the State respectfully requests that this court affirm the defendant's convictions, and remand for resentencing.

DATED: JULY 9, 2004

GERALD A. HORNE
Pierce County
Prosecuting Attorney



JOHN M. SHEERAN
Deputy Prosecuting Attorney
WSB # 26050

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7/9/04
Date

J. Johnson
Signature

APPENDIX "A"

*Verbatim Report of Proceedings,
May 20, 1998*

1 May 20, 1998

2 THE COURT: I'd ask everyone in the
3 courtroom to remain seated at all times during these
4 proceedings this afternoon, do not stand for the jury.

5 Ms. Ross has the jury, presiding juror advised you
6 that the jury has reach a verdict?

7 THE JUDICIAL ASSISTANT: Yes, they have,
8 Your Honor.

9 THE COURT: If you'll escort the jury into
10 the courtroom, please.

11 (The following occurred in the
12 presence of the jury.)

13 THE COURT: Mr. Greer, are you the presiding
14 juror?

15 JUROR GREER: Yes, I am.

16 THE COURT: And has the jury reached a
17 verdict?

18 JUROR GREER: Yes, we have.

19 THE COURT: If you'd hand the verdict forms
20 to Mrs. Ross, the judicial assistant.

21 I'll read the verdicts. Verdict form A, murder in
22 the first degree. We the jury find the defendant not
23 guilty of murder in the first degree, of the crime of
24 murder in the first degree as charged. Verdict form B,
25 murder in the second degree. We the jury, having found

1 the defendant not guilty of the crime of murder in the
2 first degree as charged, or being unable to unanimously
3 agree as to that charge, find the defendant guilty of
4 the lesser included crime of murder in the second
5 degree. Special verdict form, deadly weapon. We the
6 jury return a special verdict by answer as follows:
7 Was the defendant armed with a deadly weapon, pistol,
8 revolver, or any other firearm, at the time of the
9 commission of the crime of murder in the first degree
10 or murder in the second degree? Answer, yes. Both
11 verdict forms were -- all three verdict forms that I
12 referred to have been signed by the presiding juror.

13 Ladies and gentlemen of the jury, I'm going to ask
14 each of you two questions. One, whether these are the
15 verdicts of the jury, and whether these verdicts are
16 your personal verdict, that is you voted in the way
17 that I have read the verdicts, personally. The purpose
18 of that is to make sure the record discloses that the
19 verdict is unanimous.

20 Miss Brokaw, are these the verdicts of the jury?

21 JUROR BROKAW: Yes.

22 THE COURT: Are these your personal
23 verdicts?

24 JUROR BROKAW: Yes.

25 THE COURT: Mr. Peterson, are these the

1 verdicts of the jury?

2 JUROR PETERSON: Yes.

3 THE COURT: Are these your personal
4 verdicts?

5 JUROR PETERSON: Yes, sir.

6 THE COURT: Mrs. DeWitt, are these the
7 verdicts of the jury?

8 JUROR DEWITT: Yes.

9 THE COURT: Are these your personal
10 verdicts?

11 JUROR DEWITT: Yes.

12 THE COURT: Mr. Greer, are these the
13 verdicts of the jury?

14 JUROR GREER: Yes.

15 THE COURT: Are these your personal
16 verdicts?

17 JUROR GREER: Yes.

18 THE COURT: Mr. Ryan, are these the verdicts
19 of the jury?

20 JUROR RYAN: Yes.

21 THE COURT: Are these your personal
22 verdicts?

23 JUROR RYAN: Yes.

24 THE COURT: Mrs. Reynolds, are these the
25 verdicts of the jury?

1 JUROR REYNOLDS: Yes.

2 THE COURT: Are these your personal
3 verdicts?

4 JUROR REYNOLDS: Yes.

5 THE COURT: Mr. Imhof, are these the
6 verdicts of the jury?

7 JUROR IMHOF: Yes.

8 THE COURT: Are these your personal
9 verdicts?

10 JUROR IMHOF: Yes.

11 THE COURT: Mr. Sabol, are these the
12 verdicts of the jury?

13 JUROR SABOL: Yes.

14 THE COURT: Are these your personal
15 verdicts?

16 JUROR SABOL: Yes.

17 THE COURT: Mr. Pena, are these the verdicts
18 of the jury?

19 JUROR PENA: Yes.

20 THE COURT: Are these your personal
21 verdicts?

22 JUROR PENA: Yes, sir.

23 THE COURT: Mr. Griffin, are these the
24 verdicts of the jury?

25 JUROR GRIFFIN: Yes.

1 THE COURT: Are these your personal
2 verdicts?

3 JUROR GRIFFIN: Yes.

4 THE COURT: Mrs. Hurt, are these the
5 verdicts of the jury?

6 JUROR HURT: Yes, sir.

7 THE COURT: Are these your personal
8 verdicts?

9 JUROR HURT: Yes.

10 THE COURT: And Mr. Walker, are these the
11 verdicts of the jury?

12 JUROR WALKER: Yes.

13 THE COURT: Are these your personal
14 verdicts?

15 JUROR WALKER: Yes.

16 THE COURT: The verdicts will be accepted by
17 the court. I do want to indicate that special verdict
18 form, aggravating circumstances, was also filled out by
19 the jury, but it really has no significance to the
20 verdict that the jury has rendered.

21 Ladies and gentlemen of the jury, you're discharged
22 from your duties as jurors in this cause. I will be
23 the sentencing judge in this matter, so I'm not going
24 to say a heck of a lot this afternoon, except to thank
25 you for your unusual and lengthy service as jurors in

1 the last trial, a presentence report was prepared. Do
2 you wish that report updated or --

3 MR. HESTER: I think we can update you. I
4 don't think we need a new one, unless the court feels
5 compelled to do one because of the case.

6 THE COURT: I'm not compelled. The
7 defendant has a right to have a presentence report
8 prepared.

9 MR. HESTER: We can supplement.

10 THE COURT: If that's the case, we should be
11 able to have sentencing prior to July 13th.

12 MR. HESTER: That's certainly an option,
13 yeah.

14 THE COURT: I'm available any time in the
15 month of July. And I would be available any time you
16 determine you wish this done. If I'm gone, I'm not
17 very far away. Would you like it earlier than that
18 date?

19 MR. HESTER: I was -- if we could set it
20 like -- what day do we want to do it on?

21 THE COURT: Doesn't make any difference to
22 me. Early July would be fine.

23 MR. HESTER: How about --

24 THE COURT: Or any time.

25 MR. HESTER: How about the second of July,

1 9:00 o'clock?

2 THE COURT: The second of July, is that
3 acceptable Miss Amos?

4 MS. AMOS: Yes, Your Honor.

5 THE COURT: Now, I think we should have a
6 waiver of Mr. Eggleston's right to a presentence report
7 on the record.

8 MR. HESTER: We can do that.

9 THE COURT: Do you want to inquire of your
10 client, Mr. Hester?

11 MR. HESTER: I can do that. We have a right
12 to a full presentence report. You have a right to
13 supplement the presentence report that's been made
14 previously. Will you waive both of those
15 opportunities?

16 THE DEFENDANT: I understand.

17 THE COURT: You're doing this freely and
18 voluntarily?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Do you have any question about
21 that process, Mr. Eggleston?

22 THE DEFENDANT: No, sir.

23 THE COURT: The court will approve a waiver
24 of a written presentence report. Obviously if the
25 defense wishes to submit sentencing information to me,

1 or the state, please feel free to do so. I'd like it
2 at least a week before the date of sentencing. So
3 sentencing will be set for July the second at 9:00 a.m.
4 I cannot tell you it will be in this courtroom. I kind
5 of go where I'm told.

6 MR. HESTER: Most of us do.

7 MS. AMOS: You said 9:00 o'clock, is that
8 correct?

9 THE COURT: Yes. I think that would fit the
10 schedule in Pierce County Superior Court.

11 MS. AMOS: That's customary, yes.

12 MR. HESTER: Everybody is here. Could I ask
13 that he have the opportunity to be dressed in clothes
14 like he's wearing today at that time?

15 THE COURT: That's fine with me. I've
16 signed an order setting the matter for sentencing July
17 2nd, 1998 at 9:00 a.m., in such courtroom as may be
18 directed. Court will be at recess.

19 (Court recessed.)
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