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NO. 29915-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

BRIAN EGGLESTON,

Defendant/Appellant.

AMENDED OPENING BRIEF
(Clerk's Papers Numbers Assigned)

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FILED
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STATE OF WASHINGTON
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MISCELLANEOUS

5 Tegland, <u>Washington Practice</u> , Evidence 26, p. 97	49
5A Tegland, <u>Washington Practice</u> , § 607.7, at 320	53
Video of Rodney King assault, at http://www.citivu.com/ktla/sc-ch1.html	47

ASSIGNMENTS OF ERROR

1a. The trial court erred at trial, in admitting evidence and permitting argument that Mr. Eggleston premeditated.

1b. The trial court erred at trial, in admitting evidence and permitting argument that Mr. Eggleston knew or should have known that the intruder he killed was a law enforcement officer.

1c. The state erred in introducing evidence and arguing theories based on Mr. Eggleston's supposed premeditation, and knowing killing of a police officer, at both trial and sentencing.

2. The trial court erred in imposing an exceptional sentence based on Sub No. 895 (CP:932-936),¹ Findings Nos. I-X and Conclusions Nos. I-IV.

3. The trial court erred in excluding Exhibits Nos. 632, 633, 636, 637.

4a. The trial court erred in excluding defense-proffered impeachment evidence concerning the state's informant.

4b. The trial court erred in excluding defense expert testimony concerning the state of the crime scene and hence the impossibility of doing productive reenactment work.

4c. The trial court erred in excluding substantial defense-proffered testimony on evidentiary grounds throughout the trial.

5a. The state erred in offering evidence and arguing for conviction based on the sequence in which the bullets were fired.

¹ We understand that the RAP's require use of CP numbers, not Sub. Nos. We have used CP numbers for all documents previously designated, and have now filed a Supplemental Designation of Clerk's Papers to obtain CP numbers for all Superior Court documents not previously designated. We are retaining the cross-reference to the Sub. Nos. in the brief solely to make it easier to locate and reference documents in our office, given the enormity of the record.

5b. The trial court erred in admitting evidence and permitting argument based the sequence in which the bullets were fired.

6a. The state erred in offering evidence and arguing for conviction based on defendant's prior marijuana deals and possession, and current possession.

6b. The trial court erred in admitting defendant's prior marijuana deals and possession, and current possession.

7. The trial court erred in dismissing Jurors 4 and 7 mid-trial, without formal inquiry and without accommodating them with minor continuances.

8a. The trial court erred in failing to inform the defense about juror contact with the court during the trial.

8b. The trial court erred in dismissing juror Burrows.

8c. The trial court erred in entering Findings of Fact Nos. XI, XX and Conclusions of Law No. I-IV, Sub No. 894 (CP:921-931).

8d. The trial court erred in denying the Motion to Dismiss, Sub. No. 705 (CP:1532-1560) and the Motion to Recuse, Sub No. 848 (CP:845-846).

9. The trial court erred in permitting the state to use Deputy Garn's prior testimony, in his absence.

10a. The trial court erred in giving Jury Instructions Nos. 14-25 and 33-36 concerning self-defense.

10b. The trial court erred in excluding defense-proffered evidence concerning the illegality of the entry, raid and search, which was relevant to the claim of self-defense.

11. The trial court erred in resentencing Mr. Eggleston on all crimes in the Information, even those of which he had been previously convicted and previously sentenced.

12. The state erred in charging, and the court erred in re-entering judgment on, Counts 4 and 6.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Prior juries acquitted Mr. Eggleston of premeditated first-degree murder and of the aggravating factor that he knew or should have known that the person slain was an officer.

a. Did admission of evidence of premeditation at trial and sentencing, and basing an exceptional sentence on premeditation, violate double jeopardy and collateral estoppel protections? (Assignment of Error 1a, 1b, 1c, 2.)

b. Did admission of evidence that defendant knew or should have known that the person slain was an officer, and imposition of an exceptional sentence based on this, violate double jeopardy and collateral estoppel protections? (Assignment of Error 1a, 1b, 1c, 2.)

2. Did imposition of an exceptional sentence for the first time following appeal violate the North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), bar against vindictive sentencing; the “real facts” rule; and Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)? (Assignment of Error 2.)

3. The trial court excluded videos made by the state's expert, showing the officers who participated in the raid as they walked through the house and described what they saw and heard. Did exclusion violate state and U.S. constitutional rights to present a complete defense, ER 106, and the "rule of completeness"? (Assignment of Error 3.)

4. The trial court excluded much defense evidence, including impeachment evidence concerning the state's informant. Did this evidence violate Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d. 215 (1963), the constitutional right to present a complete defense, and state evidentiary rules? (Assignment of Error 4a, 4b, 4c.)

5. Did admission of expert opinion on the sequence in which bullets were fired violate the "law of the case"? (Assignment of Error 5a, 5b.)

6. The trial court admitted substantial evidence of Mr. Eggleston's prior marijuana deals and possession. Did admission of such "other crimes" evidence violate ER 404(b) or the due process right to a fair trial? (Assignment of Error 6a, 6b.)

7. Did the trial court's dismissal of Jurors 4 and 7, without formal inquiry and without attempting to accommodate them

with minor continuances, violate CrR 6.5 and RCW 2.36.110?
(Assignment of Error 7.)

8. The trial court failed to inform the defense about juror communications during the trial. Did this violate the right to be informed of juror communications, and the right to decision by the jury that was sworn to hear the case? (Assignment of Error 8.)

9. Did admission of Deputy Garn's prior testimony, despite questions about the duration and nature of the ailment supposedly rendering him unavailable, violate ER 804(a) and the confrontation clause? (Assignment of Error 9.)

10. The instructions on self-defense permitted the jury to find that Mr. Eggleston shot one whom he knew, or should have known, to be a law enforcement officer, precluded self-defense in that situation, and prevented the jury from considering whether the slain deputy was acting officially and lawfully.

10a. Did this violate double jeopardy and collateral estoppel protections, since prior juries rejected the state's claim that defendant knew the person slain was an officer? (Assignment of Error 10a, 10b.)

10b. Did this take an element of self-defense out of the jury's hands, in violation of United States v. Gaudin, 515 U.S. 506,

115 S.Ct. 2310, 132 L.Ed.2d 444 (1995)? (Assignment of Error 10a, 10b.)

10c. Did the trial court's related exclusion of evidence concerning the illegality of the raid violate these Constitutional protections? (Assignment of Error 10a, 10b.)

10d. Did these instructions bar Mr. Eggleston from presenting his defense, and shift the burden of proof to him?

11. Did resentencing on prior crimes for which sentence had already been imposed violate double jeopardy protections? (Assignment of Error 11.)

12. The court re-entered judgment on Counts 4 and 6 from the previous trial, and used both as criminal history, even though both charged possession and distribution of drugs at the same time and place. Did this violate double jeopardy protections? (Assignment of Error 12.)

STATEMENT OF THE CASE

I. PRODEDURAL HISTORY

A. The First Trial – All Charges

Brian Eggleston was originally charged on Oct. 31, 1995, with one count of aggravated first-degree murder, one count of first-degree assault, and several drug related charges; the state filed its

notice of intent to seek death on April 10, 1996. The aggravating factor was: “that the victim was a law enforcement officer ... who was performing his official duties at the time of the act resulting in death, and the victim was known or reasonably should have been known by the defendant to be such at the time of the killing.” Sub No. 348 (CP:1102-1107). Instruction No. 15 defined this aggravating factor in essentially the same language. Sub No. 386 (CP:1128-1179). The verdict form on the aggravating factor used similar language. Sub No. 384 (CP:1121-1127).²

The jury convicted Mr. Eggleston of several crimes, but deadlocked on premeditated murder and the aggravating factor. The verdict forms on murder and the aggravating factor are all contained at Sub No. 384 (CP:1121-1127).³

² Numerous pre-trial motions were filed. The defense sought suppression of evidence gained from the Eggleston home following the raid due to violation of knock and announce requirements, and constitutional violations. E.g., Sub Nos. 156-59 (CP:959-1095). Suppression was denied. Sub No. 245 (CP:1096-1097), 350 (CP:1117-1120), 351 (CP:1108-1116). The state moved in limine to exclude much defense evidence, Sub No. 253 (CP:1098-1099), and to permit introduction of evidence such as defendant’s prior marijuana use and sales, Sub No. 302 (CP:1101-1101); the court granted such motions, Sub No. 422 (CP:1216-1222).

³ The transcript of the return of the verdict, May 5, 1997, confirms that the jury did not reach a verdict on Count 1, “as to either the charged offense or the lesser included offense.” 5/5/97 VRP:5-6. The court ruled “that the jury has twice declared itself deadlocked to me since the last time that they appeared in open court, I find that extraordinary and striking circumstances exist, and I conclude that the administration of justice requires that the jury be discharged without returning a verdict as to Count 1.” Id., VRP:7.

B. The Second Trial – Homicide Only

A new trial was held on the aggravated first-degree murder, death penalty, count.⁴ The jury instructions included premeditated intent. Sub No. 590, Instruction No. 13 (CP:1478). The instruction defining the aggravating factor again stated that defendant knew or “reasonably should have known” the victim was an officer. Sub No. 590, Instruction No. 14 (CP:1479).

This time, the jury found Mr. Eggleston *not guilty* of premeditated murder and the aggravating factor. The jury convicted only on second-degree murder, with its requirement of intent but not premeditation. On Verdict Form A Murder in the First Degree (Sub No. 591 (CP:1494)), the jury wrote “Not Guilty.” The Special Verdict Aggravating Circumstance (Sub No. 592 (CP:1495)), asked the following question and received the following answer:

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.

⁴ Similar defense motions in limine, Sub No. 439 (CP:1223-1239), and pretrial motions to suppress, e.g., Sub No. 471 (CP:1240-1458), were made, and denied, e.g., Sub No. 534 (CP:1459-1460).

ANSWER: NO
(Yes/No)

On appeal, this Court reversed the assault and murder convictions but upheld the drug convictions. State v. Eggleston, 108 Wn. App. 1011, 2001 WL 1077846 (2001).

C. The Third Trial Now Under Review – Homicide and Assault

A third trial was then held on assault and second-degree murder. Sub No. 658 (CP:1-2). The defense once again moved to suppress evidence found as a result of unlawful entry and searches of the house, Sub No. 703-04 (CP:70-100), 706-07 (CP:101-199, CP:1561-1568). The state once again moved to admit evidence of Mr. Eggleston's prior marijuana crimes, Sub No. 709-10 (CP:200-211; CP:1560-1570) , and the defendant opposed, Sub No. 721 (CP:212-227). The trial court once again denied the motions to suppress and admitted all prior marijuana use and sales evidence. Sub No. 786 (CP:1591-1597). The court also precluded the defense from presenting evidence showing unlawfulness of the raid team's entry. Id.

This time, the state obtained convictions of second-degree murder and first-degree assault. Sub No. 838-41 (CP:810-813),

Sub. No. 884 (CP:878-894).

Most notably, however, the state relied on facts that prior juries had conclusively determined adversely to the state by rejecting the aggravating factor with its objective and subjective prongs and premeditation. It tried to prove that Mr. Eggleston knew and should have known that he was shooting an officer and doing so after considered thought. (We summarize these facts in Argument § I.)

The state did the same thing at sentencing. It obtained an exceptional sentence on the ground that Mr. Eggleston purposely killed Deputy Bananola at point-blank range, with full knowledge and awareness that Bananola was an officer. Sub No. 859, pp. 7-9 (CP:1601-1613), Sub No. 895 (CP:932-936).

II. FACTUAL SUMMARY OF THIRD TRIAL

In the early morning hours of Oct. 16, 1995, a tragedy was waiting to happen.

At about 6:30 a.m. at the Eggleston home, Brian Eggleston lay sleeping wearing his earplugs. He had been up late the night before, bartending at Magoo's. Although his girlfriend stayed up with him, she still woke up in the morning to go to work; at that time she also gave him his colitis medicine. Brian Eggleston, however,

went back to sleep. His mother, with whom he lived, lay sleeping in the other bedroom. His father, who did not live there but who had been visiting, lay asleep on the couch in the living room.⁵

At about the same hour across town, Pierce County Deputy Sheriffs were preparing to serve a search warrant for marijuana. They met for a briefing beforehand and learned for the first time that it was not an ordinary marijuana search. Instead, a deputy sheriff was believed to be involved. The deputy sheriff was Brent Eggleston, Brian's older brother. Relying on the word of an informant who was himself a drug dealer, at least some deputies had become convinced that Brent Eggleston, his wife and young daughter might also be in the house with Brian Eggleston and their mother, and that he possessed or sold marijuana. They had obtained a warrant to search the Eggleston home, believing all of these people and the young child might be there. 10/22/02 VRP:1423-43, 1459-70 (Benson's testimony about this prelude to the raid).

⁵ 11/7/02 VRP:3232-46 (testimony of Tiffany Patterson re time of going to sleep, waking up, and medicine); 12/2/02 VRP:5193, 5231-32 (testimony of Mrs. Linda Eggleston where people slept and being asleep on the morning of the raid); 12/9/02 VRP:5891-5902 (Brian Eggleston testimony).

The lives of the Egglestons and the deputy sheriffs clashed at approximately 7:00 a.m. By that time, the deputies had left their meeting area in their van; piled out of the van and towards the back door of the Eggleston home; and were about to enter. There were varied descriptions of what happened immediately before they entered. The deputies swore that they knocked and announced loudly, though their memories of when they knocked, how they knocked, how many times they knocked, and how long it took to knock and announce varied widely.⁶

The Egglestons swore that even though it was a tiny house and the head of Mrs. Eggleston's bed was almost flush with the entry door, they never heard a knock or announcement.⁷

⁶ E.g., 10/22/02 VRP:1414-17; (Deputy Ben Benson's testimony to this effect); VRP:1483-90 (Benson's testimony about how loudly they knocked, announced and entered); 10/23/02 VRP:1736-37, 1744-60 (testimony over objection of raid entry deputy Larsen, about his background training for always executing warrants in this manner, how loudly they knocked and announced, how clearly marked his clothing was as well as that of Bananola, how light it was in the house); 11/6/02 VRP:3028-80 (Deputy Reding testimony about the same things, including about how well marked Bananola's clothing was); 11/7/02 VRP:3277-3311 *et seq* (Deputy Reigle's testimony about his own markings and announcing as well as Bananola's; Bananola was announcing his presence when he turned the corner in front of him, "He was shouting," *id.* VRP:3311); 11/12/02 VRP:3515-15 (Deputy Gooch testifies, over strenuous objection, about Bananola's experience, specifically, how often Bananola was scheduled for training for serving warrants and how often he trained as part of the clandestine team for drug investigations).

⁷ 12/2/02 VRP:5193, 5230-32 (testimony of Mrs. Linda Eggleston); 12/9/02 VRP:5891-93 (Brian Eggleston testimony); 11/5/02 VRP:2918-19 (testimony of Tom Eggleston).

Several things were, however, clear about this entry. It was clear that the deputies were not in normal police uniforms, but were dressed largely in jeans and black and even had black hoods pulled over their faces. 10/22/02 VRP:1480, 1565-67 (Benson testimony). Even an Eggleston neighbor testified that the clothing worn by these deputies did not lead him to believe that they were officers, when he saw them swarming towards the Eggleston house.⁸ It was clear that the deputies chose this early hour in the hope of catching all occupants asleep and in bed. 10/22/02 VRP:1463-64. It was clear that they entered the home with guns drawn, all in their “low ready” position. E.g., 11/7/02 VRP:3300-03, 3311-20. It was clear that they fanned out in the tiny house and trained guns at whoever they saw – forcing the elder Tom Eggleston on the couch, for example, to raise his hands as soon as they saw him. Id.

And it was clear that gunfire burst out in the hallway just past the entry-kitchen, between the bedrooms and the living room. E.g., 11/7/02 VRP:3323.

⁸ 12/2/02 VRP:5148-53 (neighbor Elmer Kelly testified that he woke up around 6:30 a.m. on the date of the raid, saw the van pulling up to Eggleston’s house from his kitchen window, saw the officers get out, and “They were all civilian clothes. They were just plain clothes.”).

The bedroom is where Brian Eggleston was coming from. He kept a gun by his bed for protection. He testified that he was awakened by loud noises and commotion and grabbed his gun in self-defense, believing intruders were entering and fearing for himself and his family; that he left his bedroom and confronted a dark lurking shape in a dark hall, saw the flash of gunfire, and then fired in self-defense – and never entered the living room or fired from there with vision of who Deputy Bananola was.⁹ The deputies, in contrast, testified that any reasonable person would have heard them knocking and announcing because they were so loud; would have recognized that they were officers because they were so obviously dressed; and hence would not have fired to defend themselves.¹⁰

The people who could corroborate Mr. Eggleston's statements were his mother and father. The people who could corroborate the deputies' version were the other deputies.

⁹ 12/9/02 VRP:5891-5906 (Brian Eggleston testimony). Accord 12/4/02 VRP:5511-23, 5529-38 (testimony of defense expert Kay Sweeney about where Eggleston was positioned at the time the gunfire erupted, that is bedroom hallway, and about how all the shots into Bananola came from that hallway rather than from the living room); 12/2/02 VRP:5230-39 (testimony of Linda Eggleston re awakening to the noise of the deputies in the house, the lighting conditions and difficulty of seeing who the deputies were).

¹⁰ E.g., 10/22/02 VRP:1483-90.

The state, however, bolstered its case with some additional facts. It elicited substantial testimony about Brian Eggleston's marijuana possession and past marijuana sales, in an effort to argue that Mr. Eggleston's motive for purposely slaying Deputy Bananola, knowing that he was a deputy, was to protect the paltry marijuana stash that he kept in his house. (This testimony is all summarized in Argument § VI, below). It presented a supposed scene reconstruction expert who was able to "read" the scene, despite the way it was trashed, the amount of furniture that had been moved or taken, the walls that had been knocked down leaving drywall scattered about the floor, the shells that had been kicked, and the blood that had been stepped in. He testified to the sequence in which the shots in the house were fired – despite this Court's prior ruling in the last appeal against such speculative testimony. He concluded that Brian Eggleston stood over John Bananola from a point in the living room, where he was wide awake enough to know that he was firing at an officer and purposely continued to do so anyway, and fired three fatal shots in John Bananola's head as Bananola lay helpless on the floor. (This testimony is summarized in Argument § V, below.)

The defense would have bolstered its case with other facts, but the trial court excluded them. There were the videos of the raid deputies, made shortly after the raid by the state's own expert, showing where Bananola was standing when he was shot. They placed Bananola in the archway by the living room, falling in towards the living room after being hit, with an unseen assailant firing apparently from the bedroom hallway – not from the living room, and not from above him while his head was down on his arm on the floor. The trial court excluded the videos. (This evidence is summarized in Argument § III, below.) There was the defense expert testimony about how trashed the crime scene was, making it impossible for a reconstruction expert to draw the detailed conclusions that the state's expert claimed he could draw. The trial court excluded the most important evidence about how trashed the crime scene was. (The summary of this evidence is in Argument § IV, below.) There was proffered defense evidence about how the deputies failed to knock and announce their presence as required by law. The trial court exclude such evidence tending to undermine the lawfulness of the raid team's entry, thus eviscerating this portion of the self-defense case. (This is summarized in Argument § X, below).

The state made good use of the evidence that they were able to introduce. They told the jury in opening, and then summarized extensively in closing, about Eggleston's supposedly tawdry lifestyle and drug trade. (See summary in Argument § VI.) They argued that he knew and should have known that the person he was firing upon was an officer, and that he executed the officer nonetheless after consideration, and in cold blood. (See summary in Argument § I (E).) That was the heart of the state's case.

The jury convicted Mr. Eggleston as charged.

ARGUMENT

I. PRIOR JURIES ACQUITTED MR. EGGLESTON OF PREMEDITATING AND OF THE AGGRAVATING FACTOR THAT HE KNEW OR SHOULD HAVE KNOWN DEPUTY BANANOLA WAS AN OFFICER. DOUBLE JEOPARDY AND COLLATERAL ESTOPPEL BAR RELITIGATION OF THOSE FACTS, PREVIOUSLY DETERMINED ADVERSELY TO THE STATE.

A. The Prior Jury Verdict of Second-Degree Murder Is an Implied Acquittal of First-Degree Murder.

At a prior trial – the second one – the jury convicted Mr. Eggleston of the lesser-included offense of second-degree (intentional, but not premeditated) murder. The second-degree murder charge was clearly given to the jury as a lesser-included

offense of premeditated first-degree murder.¹¹ That conviction of the lesser charge constituted an acquittal of the greater crime.¹²

B. The Prior Jury Verdicts Were Also Implied Acquittals of the Aggravating Factor.

The jury's decision against convicting on the greater charge at that second trial also functioned as an acquittal of the aggravating factor. This is clear from the rule that collateral estoppel applies to special sentencing verdicts such as deadly weapon allegations, and not just to facts that are traditional elements of crimes. Santamaria v. Horsley, 138 F.3d 1280, 1290 (9th Cir.) (*en banc*), cert. denied, 525 U.S. 824 (1998).

This is also clear because courts hold that collateral estoppel principles apply to aggravating sentencing factors that enhance the penalty for murder to death, just like the aggravating factor in this case. Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989), cert. denied, 496 U.S. 929 (1990).

¹¹ Sub No. 590, Instruction 18 (CP:1483) (second-degree murder elements); Sub No. 593 (CP:1496) (Verdict Form second-degree murder).

¹² Price v. Georgia, 398 U.S. 323, 329, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970) ("this Court has consistently refused to rule that jeopardy for an offense continues after an acquittal, whether that acquittal is express or implied by a conviction on a lesser included offense when the jury was given a full opportunity to return a verdict on the greater charge."); State v. Hescoek, 98 Wn. App. 600, 989 P.2d 1251 (1999) (same).

And where as here the acquittal of the aggravating factor in a murder case occurred at the prior trial, courts have ruled that rejection of the aggravating factor – there, a factor necessarily involved finding that the defendant had not personally committed the killing – collaterally estopped the state from retrying the defendant based on the theory that he had perpetrated the killing. Pettaway v. Plummer, 943 F.2d 1041, 1048 (9th Cir. 1991), cert. denied, 506 U.S. 904 (1992).¹³

There is one more prior jury determination that constitutes an acquittal of the aggravating factor here. At the first trial, the jury “hung” on the aggravated murder count.¹⁴

¹³ Thus, it is unnecessary for this Court even to reach the issue of whether the aggravating factor is still a matter in aggravation of penalty rather than an element of the crime, as prior Washington cases have ruled, State v. Irizarry, 111 Wn.2d 591, 763 P.2d 432 (1988), or if that analysis is overruled by Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), holding that all such facts are essentially elements of the crime. Whether called an “element” or not, the decisions cited above show that for purposes of the double jeopardy protection, a murder aggravating factor *by any name* is subject to the collateral estoppel component of the double jeopardy bar.

¹⁴ During deliberations at the first trial, the jurors sent out a note stating that they could not reach a verdict on Counts 1 and 2, that is, the aggravated murder (death penalty) and first-degree assault counts. Sub No. 399 (CP:1180-1201) (“We the jury after long and exhausting discussions can not reach a conclusion on Count 1 and Count 2. What course of action would you like us to take.”); (“After looking at all of the instructions and information given to us we as a jury have been unable to come to a unanimous verdict on either Court 1 or 2 At this point I do not see any further deliberation will allow us to reach a decision...”). The court told them to keep deliberating. 5/1/97 VRP 139-42. The jurors then reported that they had achieved unanimity on one of those counts, but “We will not make any further progress on [remaining] count no matter how long we deliberate.” Sub No. 399 (CP:1180-1201). They deadlocked on the aggravated

But we now know that there is no such thing as a “hung” jury on an aggravating factor. In State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), the Washington Supreme Court held that *lack of jury unanimity on an aggravating factor functions as an acquittal of that aggravating factor in Washington*. The Supreme Court did not just reverse, *but vacated the aggravating factor finding*. The deadlock was a final verdict adverse to the state. Id., at 1096.

Thus, by the time of the third trial, Mr. Eggleston had already been acquitted of the aggravating factor of shooting one he knew or should have known to be a law enforcement officer – twice.

C. **A Prior Jury Also Wrote “No” and “Not Guilty” on the First-Degree Murder and Aggravating Factor Verdicts; Those Were Express Acquittals**

The jury at the second trial on this homicide, in addition to entering a verdict of “guilty” on the lesser offense, also handwrote in “Not guilty” on the first-degree murder verdict form (Sub No. 591 (CP:1494)) and “NO” on the aggravating factor special verdict form (Sub No. 592 (CP:1495)). The “Not guilty” is a clear acquittal of the greater crime, as is the “NO.”

If there is any question about whether “NO” means “NO” on

murder charge.

the aggravating factor verdict, since the jury did not have to reach that question, that is answered by recent, persuasive, federal authority arising in the same context. In Stow v. Murashige, 288 F.Supp.2d 1122 (D. Hawaii 2003), 2003 WL 22453781, the district court ruled that a notation on a jury form that a defendant was “not guilty” of attempted second-degree murder, even though they had found him guilty of attempted first-degree murder and hence did not need to reach the instruction on attempted second-degree murder, was still an acquittal. The Stow court relied on Fong Foo v. United States, 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962), for the rule that “even an erroneous acquittal [there, an acquittal based on the trial judge’s direction to the jury to return a verdict of acquittal because of prosecutorial misconduct] prevents a retrial,” so even if the jury had erroneously acquitted the defendant of murder, that erroneous acquittal nevertheless bound the state court under federal constitutional principles. The Stow court also cited United States v. Martin Linen Supply Co., 430 U.S. 564, 570, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977), for the rule that “what constitutes an “acquittal” is not to be controlled by the form of the judge’s action,” and that the acquittals following hung juries in that case “were acquittals ‘in substance as well as form’” even if done for incorrect

reasons. That federal constitutional law controls the outcome here: the second jury's handwritten verdict acquitting Eggleston of the aggravating factor was an acquittal.¹⁵

D. **The Acquittals Bar Relitigation of those Prior Factual Determinations – that No Premeditation Had Occurred and that no Knowing Killing of a Law Enforcement Officer Had Occurred.**

The collateral estoppel component of the double jeopardy clause precludes re-litigation of issues – not just charges – that were resolved against the state at a prior trial; “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.” Ashe v. Swenson, 397 U.S. 436, 443, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). See also Dowling v. United States, 493 U.S. 342, 110 S.Ct. 668, 673, 107 L.Ed.2d 708 (1990); Pettaway v. Plummer, 943 F.2d 1041, 1043-44; State v. Funkhouser, 30 Wn. App. 617, 637 P.2d 974 (1981) (adopting rule that “collateral estoppel bars any use in a subsequent criminal prosecution of evidence necessarily determined in the defendant’s

¹⁵ There is some older state law arising in a different context indicating that when the jury does not need to reach an issue, its “verdict” on the issue is “advisory surplusage.” State v. Robinson, 9 Wn. App. 644, 648, 513 P.2d 837 (1973). That may be true in some cases; but here, the meaning of the jury’s finding is a matter of federal constitutional law, not state judicial interpretation.

favor by a previous verdict of acquittal”) (citations omitted).¹⁶

Thus, the question here is what facts were decided by the prior verdicts. Under Supreme Court law, the answer is based on common sense, not “hypertechnical,” comparisons of the facts and issues in the prior and current cases.¹⁷

Looking at the facts, charges, and instructions of those cases in a commonsense, not “hypertechnical” manner, the only logical explanation is that the state failed to prove that Mr. Eggleston premeditated and failed to prove that he knew or should have known that he was killing a law enforcement officer.

There is no other way to explain the jury’s decision, at the second trial, to convict Mr. Eggleston of intentional but not premeditated murder. That shows agreement on the fact that Mr. Eggleston shot John Bananola, but rejection of the *mens rea* embodied in the greater charge and aggravating factor.

¹⁶ This state and federal constitutional protection does not turn on a state’s own interpretation of the doctrine of “collateral estoppel.” In Harris v. Washington, 404 U.S. 55, 92 S.Ct. 183, 30 L.Ed.2d 212 (1971), the defendant was tried for murdering one of two people killed by a letter bomb, and acquitted. The Washington Supreme Court would have permitted him to be retried for the murder of the second person, reasoning that the state’s definition of collateral estoppel was not satisfied because some evidence that was inadmissible at the first trial would be admissible at the second one, and therefore the issue of identity had not been “fully litigated” in the first trial. Id., 404 U.S. at 57-58. The Supreme Court summarily reversed, citing Ashe v. Swenson. Id., 404 U.S. at 57.

¹⁷ Ashe, 397 U.S. at 443.

This is clear from the instructions on premeditation at that second trial (Sub No. 590 (CP:1463-1493)); they told the jury to convict on that higher charge if they believed that he committed homicide with premeditation and knowingly killed an officer. That the jury failed to convict indicates that they did not find these facts or this *mens rea*.¹⁸

Similarly, two prior juries rejected the aggravating factor, with its objective as well as subjective prongs. Sub No. 592 (CP:1495) (aggravating factor verdict form from second trial); Sub No. 384 (CP:1121-1127) (aggravating factor verdict form from first trial). Since there is no doubt that Mr. Eggleston's gunshot did kill Jonn Bananola, the only plausible reason for rejecting the aggravating factor of *knowingly* killing a law enforcement officer is that he did not *know* it was a law enforcement officer – and no reasonable person would have *known* it, either.

A comparison with the collateral estoppel decisions of other courts confirms this common sense reading of the prior verdicts. In

¹⁸ Even the questions sent out by the hung jury at the first trial indicated that they acknowledged that Mr. Eggleston was the shooter but were struggling with whether his shooting of the deputy was justified. Sub No. 399 (CP:1180-1201) (Question: "If a person acting in Self Defense against an attacker becomes an aggressor or acts aggressively by pursuing the attacker, is he or she still considered by law to be acting in self defense?"); (Question: "To further understand the law as given to us, can 'his ground' as stated in Instruction 31 be interpreted to include the entire house.").

United States v. Romeo, 114 F.3d 141, 143 (9th Cir. 1997), the court held that a general verdict of acquittal of possession with intent to distribute – where the charge and the facts showed that the defendant was caught at the border with a large stash of marijuana in his trunk and the only real issue at the first trial was his *mens rea* – necessarily determined that issue of knowledge adversely to the government. The court therefore precluded the government from re-trying the defendant on importation charges that depended on proof of that same knowledge element. *Id.*, at 143-44. This is quite similar to our case, since many facts were litigated but the only real issue at both the prior and latter trials in for both defendants was *mens rea*.

In Ashe v. Swenson, 397 U.S. at 438-39 & n.203, the Court concluded that a prior acquittal of robbery of one player at a poker game meant that the government failed to prove the defendant was one of the masked robbers – and precluded a second trial for robbing another player. There were certainly other possible, speculative, scenarios that might have accounted for the acquittal – perhaps a technicality about this particular victim not being robbed. But the Court did not allow such speculation to enter into its collateral estoppel decision. It rested its decision on the most

logical factual explanation, that this defendant was not one of the robbers at all.

Numerous decisions bar relitigation of both *actus reus* and *mens rea* in criminal cases, where as here prior juries have returned general verdicts of not guilty without specifying the precise basis for their decisions. In United States v. James, 109 F.3d 597 (9th Cir. 1997), the court held that collateral estoppel barred 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. In United States v. Stoddard, 111 F.3d 1450 (9th Cir. 1997), the court ruled that the government was collaterally estopped from using defendant's ownership of \$74,000 to prove a charge of making false tax statements, where a prior jury had acquitted the defendant and therefore necessarily determined that the government failed to prove such ownership. In Harris v. Washington, 404 U.S. 55, 92 S.Ct. 183, 30 L.Ed.212 (1971), the Court ruled that the state was barred from prosecuting the defendant for the bombing murder of a second victim, where an earlier jury had acquitted the defendant of the bombing murder of a different victim – even though the acquittal was based on a general verdict so testimony and instructions had

to be examined to determine that the prior jury had decided that the state failed to prove that the defendant mailed the bomb. And in State v. Kassahun, 78 Wn. App. 938, 900 P.2d 1109 (1995), the court ruled that the state was barred from using assault on the victim's girlfriend to prove felony murder against the defendant, since an earlier jury had entered a general verdict of acquittal of the defendant of charge of assaulting the girlfriend.

In all these cases, the fact that the prior verdict was a general one did not bar application of collateral estoppel. Instead, the courts adopted the most logical reading of the jury's prior general verdict. The most logical reading of the jury's prior verdicts in Mr. Eggleston's cases is that the state failed to prove premeditation and failed to prove Eggleston knew or should have known Bananola was an officer. Thus, those are the issues that the state was precluded from re-litigating.

E. The Entire Basis of the State's Case and the Exceptional Sentence Was Mr. Eggleston's Supposed Premeditated Execution Style Murder of a Person He Knew to be Police Officer – Precisely the Facts that Could Not Be Relitigated.

But the entire basis of the state's case was that Mr. Eggleston knew that officers were entering his home, from the time

that they knocked and announced, and that he made a conscious decision – equivalent to a premeditated one – to protect his paltry stash of marijuana with blazing guns.

The state's opening *focused* on why Eggleston must have known that he shot an officer. The state argued that the conditions were light, the officers wore clearly marked Sheriff's outfits, they knocked and announced loudly, they clearly told Eggleston to put down his gun; the state even introduced its theory that Bananola's head was laying on his arm at the time he was shot in the head, thus indicating premeditated, execution-style knowing murder of a police officer. 10/21/02 VRP:1286, 1295, 1300, 1306.

The state then elicited testimony from all of its officers about how well marked their uniforms were, how light it was when they entered, how loudly they knocked, how they were trained to wear such outfits and enter so loudly and announce their presence, and hence how Eggleston must have known that it was officers entering his house. E.g., 10/22/02 VRP:1414-17; (Deputy Ben Benson's testimony to this effect); id., VRP:1483-90 (Benson's testimony about how loudly they knocked, announced and entered); 10/23/02 VRP:1736-37, 1744-60 (testimony over objection of raid entry deputy Larson, about his background training for always executing warrants

in this manner, how loudly they knocked and announced, how clearly marked his clothing was as well as that of Bananola, how light it was in the house); 11/6/02 VRP:3028-80 (Deputy Reding testimony about the same things, including about how well marked Bananola's clothing was).

The court permitted such testimony about how Bananola was clearly marked as a deputy and shouting his presence loudly.¹⁹

Eggleston's supposed knowledge that Bananola was an officer was the reason the state offered evidence of his marijuana sales and use. The state so argued in opposition to the defense motion in limine to exclude drugs and related paraphernalia: "certainly an inference can be drawn that he being an armed drug dealer would have been – would have found it unfortunate and distasteful to have deputies come into his house in order to stop his enterprise, search his house, and arrest him, et cetera, so he was willing to provide armed response to that." 9/27/02 VRP:78. See also id., VRP:91, 94. The court admitted the evidence for that

¹⁹ 11/7/02 VRP:3277-3311 *et seq* (Deputy Reigle's testimony about his own markings and announcing as well as Bananola's; Bananola was announcing his presence when he turned the corner in front of him, "He was shouting," id., VRP:3311); 11/12/02 VRP:3515-15 (Deputy Gooch testifies, over strenuous objection, about Bananola's experience, specifically, how often Bananola was scheduled for training for serving warrants and how often he trained as part of the clandestine team for drug investigations).

reason. *Id.*, VRP:95-96. Extensive evidence of such drug use and sales by Eggleston was then presented.²⁰ The court admitted evidence concerning Eggleston's meager work earnings for the same reason.²¹ The state was even permitted to elicit testimony from Eggleston's girlfriend at the time, Tiffany Patterson, about her marijuana use at the home, as relevant to his supposed decision to fire at those who he knew were officers to protect his marijuana.²² In fact, entire witnesses had the bulk of their testimony devoted to Eggleston's familiarity with marijuana. This was the case with Steve McQueen, the informant who told the officers that Eggleston was selling marijuana and who enabled them to get their search warrant. 11/4/02 VRP:2762 *et seq.*

The state also sought admission of the *procedures* used by

²⁰ *E.g.*, 1/22/02 VRP:1420-31, 1459-67 (Deputy Ben Benson's testimony about Eggleston's prior drug sales and possession).

²¹ *Id.*, VRP:163-68 (denying defense motion to preclude evidence of work earnings, offered to show that money found in his home was from drugs, because "as with the other issues regarding the drug dealing, that this is relevant. It supports the inference that he was dealing drugs, the combination of the money with the income and the living circumstances, so I'm going to allow this evidence ...").

²² 11/7/02 VRP:3215-20 (defense motion to exclude Patterson's marijuana use as irrelevant denied; admissible for same reasons that defendant's marijuana use admissible: "this was a search warrant for controlled substance violations; this is consistent with the obtaining of that search warrant; and it also tends to prove, which is the basis for relevancy, the defendant's intent to conceal drug activities and the motive for the shooting.").

the deputies for the same reasons – to show that they were trained to knock and announce their presence, so Eggleston *must have known* who was coming into his home.²³

The state’s reconstruction expert, Rod Englert, testified that Eggleston executed Deputy Bananola at point-blank range, with bullet shots to the head as Bananola lay on the ground with his head on his arm, after Eggleston had time to see and hear who this deputy was, from a position above Bananola in the living room rather than from the hallway as he exited his bedroom – a scenario that can be described as nothing other than premeditated, knowing murder of an officer. 11/25/02 VRP:4699-4723, 4834.

The state’s closing exploited this evidence by emphasizing Bananola’s status as a deputy, Eggleston’s knowledge of it, and Eggleston’s reflection and decision to execute him nonetheless: “You are entitled to find that Brian Eggleston knew Deputy Bananola was a law enforcement officer. You can reject his claim that he didn’t know” 12/12/02 VRP:6313. The state continued that Eggleston knew exactly who he was shooting and why: “... we’ve got one bullet

²³ E.g., 9/27/02 VRP:136 (state argues, “For example, official force is defined as wielded by someone which a citizen perceives to be a police officer. How the deputies announce their presence and why they announce as they do goes to whether or not it’s reasonably likely that the perception be – that they are police officers. Whether the defendant understood, he knew who was coming in his

hole right under the “H” and one bullet hole in the middle of the “R” in “sheriff” [on Bananola’s vest]. If you shoot someone in the letters, that are three inches high or so, the letters that portray you as a sheriff and you’re shot in the back in that vest, at that point, it’s reasonable to assume that the defendant knew you were a police officer, and if he knows at that point, he also knows at the point when he’s putting three bullets into his head.” Id., VRP:6322. “He’s not entitled to not hear what there is to be heard, and what was there to be heard was many people yelling ‘Police. Sheriff’s department,’ but especially immediately before his death, it was Deputy John Bananola telling him, ‘Police, Put the gun down.’” Id., VRP:6323. Then, completely contradicting the prior juries’ rejection of both the objective and subjective prongs of the aggravating factor for knowingly killing a law enforcement officer, the state argued: “you can and should find that a reasonably prudent person in those same circumstances would have known that Deputy Bananola was a deputy sheriff” Id., VRP:6323. “With some variation, all deputies described about the same thing. Deputy Larson described that he knocked five times. He said, ‘Police. Sheriff’s department. Search warrant,’ directing his voice at the door. ... He shouted again “ Id.,

house.”).

VRP:6331. Even Fajardo heard it from over at the van. Id. “I suggest to you that what happened in that very small house was loud and it was intelligible and that any reasonable person would have understood what was being said.” Id., VRP:6333.²⁴ The state even took time to emphasize Eggleston’s marijuana use and sales, explaining that this was the reason he kept the guns and contemplated – premeditated – killing an officer. Id., VRP:6382.

Similarly, the entire basis for the exceptional sentence was the judge’s conclusion that Mr. Eggleston did not just intentionally shoot Deputy Bananola, but did so purposefully and with knowledge that he was a law enforcement officer. Findings of Fact and Conclusions of Law Re: Exceptional Sentence, Sub No. 895 (CP:932-936).

F. The Remedy

The remedy is to reverse the convictions and remand for retrial without any evidence or argument that that Eggleston

²⁴ The rest of the closing continued in precisely the same vein, with the state emphasizing that Eggleston was in a position where “he could easily have seen the vest on Deputy Bananola as he laid on the floor.” Id., VRP:6345. See Id., VRP:6369-70 (“you have to believe that the defendant was in the living room where he could see that vest on John Bananola and where he put those bullets into John Bananola’s forehead.”).

premeditated, or that he knew or should have known he was shooting an officer.²⁵

II. EVEN IF COLLATERAL ESTOPPEL DID NOT PRECLUDE USE OF PREMEDITATION AND INTENTIONAL KILLING OF A POLICE OFFICER AT SENTENCING, APPRENDI, THE “REAL FACTS” LAW, AND NORTH CAROLINA V. PEARCE DO.

Even if collateral estoppel did not prevent the judge from relying upon premeditation and intentional killing of an officer to impose an exceptional sentence, other rules do.

A. The Apprendi Problem

First, there is Apprendi. It held, “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.*” Id., 530 U.S. 466, 490. (emphasis added).

Two factors here increased the penalty for Mr. Eggleston’s crime beyond the statutory maximum according to the trial judge who imposed the exceptional sentence: Mr. Eggleston’s premeditation and knowing execution of an officer. Sub No. 895 (CP: 932-936).

²⁵ State v. Funkhouser, 30 Wn. App. 617 (similar double jeopardy context: “If the State chooses to retry defendant on this charge following ... remand, the trial court must exclude all evidence which, if believed, would necessarily show defendant’s complicity ... [in facts of which he was acquitted].”).

Those facts were not, however, proven to the jury beyond a reasonable doubt. Appendi bars the trial court from considering those facts at sentencing – unless they do not increase the sentence above a statutory maximum.

We understand that in State v. Gore, 143 Wn.2d 288, 21 P.3d 262 (2001), the Court ruled that facts supporting an exceptional sentence do not raise the statutory maximum. The continuing validity of the Gore holding, however, is placed in doubt by two factors.

First is the fact, not considered by the Gore court, that Washington's SRA is different than the federal Sentencing Guidelines in a critical respect. In the federal system, Congress has by statute authorized promulgation of separate Guidelines for determining standard sentence ranges.²⁶ The federal Sentencing Guidelines are promulgated by a Sentencing Commission.²⁷ They are not statutes, but are akin to court rules or judicial guidelines.²⁸ In fact, the non-statutory nature of those guidelines, and the location of the Commission-drafters in the judicial, rather than legislative branch,

²⁶18 U.S.C. § 3553; 28 U.S.C. § 994(a).

²⁷28 U.S.C. § 991.

²⁸United States v. Mistretta, 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1998).

was critical to the Supreme Court's decision to uphold them against constitutional, separation of powers, challenges.²⁹ Thus, departures above the *federal* Sentencing Guidelines do not increase any *statutory* maximum range or sentence.³⁰

Washington is different. RCW 9.94A.310, a *statute* authored by the *legislature*, sets the standard sentencing range for a defendant. Another *statute* authored by the *legislature*, RCW 9.94A.120(2), sets the grounds for departures from that standard sentence range. This distinguishes the SRA from federal, nonstatutory, guidelines and makes departures from Washington's *statutorily prescribed* SRA ranges fit within the prohibition of Apprendi.

Second, the Gore case does not take account of a new development: the U.S. Supreme Court granted certiorari to review precisely this Apprendi issue in Blakely v. Washington, ___ U.S. ___, 124 S.Ct. 429, 2003 U.S. LEXIS 7709 (2003).

²⁹United States v. Mistretta, 488 U.S. 361.

³⁰United States v. Hernandez-Guardado, 228 F.3d 1017 (9th Cir. 2000) (no Apprendi error because two level increase in seriousness on Sentencing Guidelines grid, and corresponding increase in sentencing range, "did not result in a sentence that exceeded the 10-year statutory maximum" for the conviction).

B. The Real Facts Problem

Washington's statutory "real facts" doctrine provides:

In determining any sentence, the trial court may rely on no more information than is admitted by the plea agreement, *or admitted, acknowledged, or proved in a trial or at the time of sentencing*. Acknowledgment includes not objecting to information stated in the presentence reports. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point.

RCW 9.94A.370(2). This bars the trial court from relying upon "information" not "proved" at the "trial or at the time of sentencing," including the facts of a higher crime.³¹

The "information" about Mr. Eggleston premeditating, and supposedly knowing he was killing an officer, was not *properly* "proved" at "trial or at the time of sentencing." Since that "information" was not properly proved, as required by the "real facts" statute, it could not be considered at sentencing.

C. The North Carolina v. Pearce Problem

Finally, there is North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), holding that following retrial, a judge can impose a harsher sentence upon the defendant only if it is

³¹Accord State v. Barnes, 117 Wn.2d 701, 707, 818 P.2d 1088 (1991) (citing RCW 9.94A.370(2)) ("real facts" states, "facts that establish the elements of a more serious crime or additional crimes may not be used to go outside the presumptive sentence range").

based on new and different information arising after the first sentencing. *Id.*, 395 U.S. at 724-26. Where as here a judge at retrial imposes a harsher sentence, the new evidence supporting it must “affirmatively appear” on the record, and “Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant *occurring after the time of the original sentencing* proceedings.” *Id.* (emphasis added).

The sentence imposed after Mr. Eggleston’s first trial for assault and the drug crimes was 238 months – attributable to the assault and concurrent drug sentences – *and it was not an exceptional sentence.*³² The sentence imposed after Mr. Eggleston’s second trial, for murder in the second degree, was 288 + 60 months for the firearm enhancement (using the prior convictions as criminal history) – *and it was not an exceptional sentence.* Sub No. 622

³² Four Count II, assault, the court used an criminal history score of 4, a seriousness level XII, a standard range of 129-171 months and a firearm enhancement of 60 months, imposing a total sentence of 160 plus 60 months or 220 months. For Count III, the court used a criminal history score of 8, a seriousness level of III, a range of 67-81 months plus 24 months for the school zone enhancement, and imposed a sentence of 57 plus 24 months or 81 months. For Count IV, the court used a criminal history score of 8, a seriousness level of III, a standard range of 67-81 months plus 24 months for the school zone enhancement, and 18 months for a firearm enhancement; the court imposed a total sentence of 48 + 24 + 18 months, or 90 months. On Count V, the court used a criminal history score of 8, a seriousness level of III, a standard range of 43-57 months, and imposed 57 months. On Count VI, the court used an criminal history score of 4, a seriousness level of I and a range of 3-8 months, and then imposed only 3 months. Sub No. 417 (CP:1204-1215).

(CP:1520-1530).

After the last trial, however, the judge for the first time discovered reasons for an exceptional sentence. The sentence imposed at the last trial, for murder and assault, was 582 months – 399 of it for the murder (the exceptional sentence) and 183 months attributable to the consecutive assault count.³³

But the only factors the trial court cited for this exceptional sentence were premeditation and knowing killing of an officer. Sub No. 895 (CP:932-936). Since these facts were not new, North Carolina v. Pearce barred their use as basis for an exceptional

³³ For Count 1, murder 2, 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; she imposed an exceptional sentence of 339 months plus that 60-month enhancement. For Count 2, assault 1, the court use 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; she imposed a high end sentence of 123 + 60 or 183 months. For Count 3, delivery of marijuana in a school zone, 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; she imposed a sentence of 68 + 24 months, or 92 months. For Count 4, possession with intent to distribute marijuana in a school zone, the court again used a criminal history score of 9, an offense level III, and a standard range of 51-68 months plus the enhancements for a total range of 93-110 months; she imposed a sentence of 68 +18 + 24 months, or 110 months. For Count 5, delivery of marijuana, the court used a criminal history score of 9, an offense level III, a standard range of 51-68 months and a sentence of 68 months. For Count 6, possession of mescaline, the court used a criminal history score of 5, and offense level of I, a standard range of 4-12 months, and a sentence of 12 months. Counts I and II were ordered to run consecutively. Sub No. 884 (CP:878-894).

With respect to the sentencing enhancements, the J&S states at page seven that the enhancements on Counts 3 and 4 run concurrently, but the

sentence.³⁴

III. THE TRIAL COURT EXCLUDED VIDEOS MADE BY THE STATE OF ITS OWN OFFICERS SHOWING BY GESTURES, AT THE RAID SITE, WHAT OCCURRED – GESTURES CONSISTENT WITH THE DEFENSE RATHER THAN THE STATE’S THEORY. EXCLUSION OF THIS EXCULPATORY EVIDENCE VIOLATED STATE RULES AND THE RIGHT TO PRESENT A DEFENSE.

A. The Court’s Ruling Excluding the “Moving Videos.”

Several videos were made by state expert reconstructionist Rod Englert. They showed the deputies on the raid team, who had first-hand knowledge of what occurred inside the Eggleston home, on the morning of the raid.³⁵

The state moved in limine to exclude them, because they made everything appear too difficult to see, despite the fact that the videos were made at the exact same time of day as the raid. 10/21/02 VRP:1383-84.

The defense dealt with this objection by having the brightness

enhancements on Counts 1 and 2 run consecutive to the base sentences and consecutive to each other.

³⁴ See State v. Ameline, 118 Wn. App. 128, 75 P.3d 589 (2003) (imposition of exceptional sentence after third trial, following standard range sentences after first two trials, reversed due to Pearce, since trial judge failed to identify facts that were not available at first two sentencing hearings justifying the increase).

³⁵ Copies are in Exhibits: 550, Deputy Cindy Fajardo (2:14 minutes); 561, John Reding (7:17 minutes); 562, Jeff Reigle (5:57 minutes); 563 Warren Dogeagle; 564,

of the videos adjusted by an outside vendor. This resulted in the defense offering a series "Brightness Adjusted " videos of the same people, as Exhibit Nos. 632-37 and 735. The defense clarified that the main videos that it was offering were those of Reigle, Dogeagle, Reding and Larson. 10/28/02 VRP:2037.

Ex. No. 633, Jeff Reigle at House, Brightness Adjusted, 5:55 minutes, shows Reigle walking through with Englert. It is still difficult to see contrast, especially in the kitchen. Ex. No. 636 is Warren Dogeagle at 902 East 52nd, 7:11 minutes, Brightness adjusted; on this walk-through, the lighting is also dim, despite the adjustments. Nevertheless, in the bedroom, Dogeagle states that the light during the raid was "similar to this" – and it is dark in there, also. Ex. No. 735 is a shortened version of this tape. Ex. No. 632, Bruce Larson at House, Brightness Adjusted, 2:05 minutes, shows Larson walking through with Englert. It is difficult in parts to discern what people are wearing.

Then there is Ex. No. 637, entitled John Reding at House, 8:10 minutes, Brightness adjusted. There are some anomalies on the tape – the audio is off by a second or so, and there are some jerky stops and starts. But the important points are technically

Bruce Larson (2:12 minutes).

unobstructed. Reding states that when he was in the center of the living room and facing the person lying on the couch, he heard “multiple” shots to his left – and the positioning shows that he means the archway from the living room to the hallway. Reding continues that he saw Bananola at that living room archway opening; “he started to collapse or dive for the floor.” Reding explained that Bananola at that moment “gave kind of a grunt like ungh-h-h so I had an idea that he was hit.” Reding even positions someone as if they were Bananola falling into the living room; Reding says of Bananola that he was “starting to go down.” Reding further explains that although the person positioned as if he were Bananola, looks like he is stepping into the living room, actually Bananola, “wasn’t stepping”; “he was starting to tilt.”³⁶

This video supports the defense theory that Bananola was hit by bullets while in the hallway just entering the living room and while Eggleston was in the darkened hallway just outside his bedroom door. It supports the defense theory that Bananola was caught in bullets and “start[ed] to go down” or began “tilt[ing],” with his arms

³⁶ Ex. No. 634, Ben Benson at House, Brightness Adjusted, 3:10 minutes, shows Benson walking through with Englert; in this one, the lighting in the kitchen still looks dim. Ex. No. 635, entitled Cindy Fajardo at House, Brightness Adjusted, 2:15 minutes, shows her walking through with Englert and the same dim light that makes discerning particular clothing difficult.

beginning to flail, while the bullets were coming from the hallway, thus explaining how bullets could have entered his head without the execution style killing that the state's theory depended on.

The court excluded all the tapes *proffered by the defense*. When the state called Deputy Dogeagle on direct examination, however, a question arose about what his prior statement in the video meant and the state sought to admit the, shortened, brightened, Dogeagle walk-through tape – Ex. No. 735 – to clarify. The court admitted it at the state's request.³⁷

The defense then again offered the videos of Reding, Reigle, and the full video of Dogeagle during cross-examination of Englert. 11/26/02 VRP:4882-83. Despite the state's own offer and introduction of the abbreviated Dogeagle tape, the state objected to admission of any other tapes "regarding the lighting." *Id.*, VRP:4881. "We believe that the darkness of the videos is what predominantly displayed." *Id.* The state further objected that there was no need to cross-examine Englert on what these particular deputies told him: "There are many statements by many people in this case ...," so why permit cross-examination on these? *Id.*, VRP:4883.

³⁷ 11/21/02 VRP:4547-49 (tape played for court); *id.*, VRP:4552-53 (state offers Ex. No. 735, Dogeagle videotape); *id.*, VRP:4554 (videotape played for jury).

The court ruled that the quality of Ex. No. 633, Reigle, is poor, id., VRP:4887; that Ex. No. 735, Dogeagle, had already been played, id., VRP:4888; and that the critical Reding video repeated the same scenario two or three times, hence, “These videos have inherent problems that I have already articulated.” Id., VRP:4890.

The defense reiterated, “The interest we have in the videos is the positioning of Bananola, the positioning of Reding when he sees Brian Eggleston, the positioning of Reigle when he sees Dogeagle ...” Id., VRP:4891. The court nevertheless excluded these videos and directed the defense to “use the transcripts of Reigle and Reding of these videos” instead. Id., VRP:4895.

B. The Treatment of this Issue on the Prior Appeal.

Mr. Eggleston raised this issue on his prior appeal. This Court did not reach it, “because Eggleston has not made the videotapes part of the record on appeal.” Eggleston, 2001 WL 1077846, at * 29. All of those videos have now been designated for review.

C. Exclusion of Powerful, Exculpatory Evidence Violates the Right to Present a Defense.

“Few rights are more fundamental than that of an accused to present witnesses in his own defense.” Chambers v. Mississippi, 410

U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) (citations omitted). It is rooted in the due process right to present a defense, the Sixth Amendment right to “compulsory process,”³⁸ and the Sixth Amendment right to confrontation.³⁹ The right to present witnesses cannot be denied where the testimony is critical to the defense and directly relevant to guilt or innocence.⁴⁰ Additionally, “(1) the evidence sought to be admitted must be relevant; and (2) the defendant’s right to introduce relevant evidence must be balanced against the State’s interest in precluding [prejudicial] evidence.” State v. McDaniel, 83 Wn. App. 179, 185, 920 P.2d 1218 (1996), review denied, 131 Wn.2d. 1011 (1997).

These videos were the heart of the defense. John Reding’s walk-through in particular showed that these officers placed Deputy Bananola in the entryway to the living room when he was receiving the fatal shots, and that he was falling from the hallway into the living room with the shooter out of sight, presumably down the

³⁸ Perry v. Rushen, 713 F.2d 1447, 1450 (9th Cir. 1983), cert. denied, 469 U.S. 838 (1984).

³⁹ See Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). Accord Taylor v. Illinois, 484 U.S. 400, 408-09, 108 S.Ct. 646, 98 L.Ed.2d 798, rehearing denied, 485 U.S. 983 (1988) (fundamental Sixth Amendment right to present witnesses and a defense); Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

⁴⁰ Chambers v. Mississippi, 410 U.S. at 302.

hallway leading to the bedrooms. This is relevant, because the state's theory was that Mr. Eggleston was in the living room area and standing above Mr. Bananola while firing close-range shots into Bananola's head after he was already down on the floor with his head lying on his arm. The defense theory, in contrast, was that Eggleston was just emerging from his bedroom when he fired shots; and that Eggleston continued firing, but never at a downed man lying helpless on the floor and never from point-blank range. The Reding video supports this defense theory, impeaches Englert's statements about where Reding really positioned Bananola and what he heard, and impeaches Reding's testimony on those points. It has Reding not only pointing where Bananola was when he was hit by bullets and began falling, but also positioning an officer as if he were Bananola falling into the living room while suffering gunshots from behind – that is, from the hallway near the bedrooms and not from the living room at all.

The transcripts of these videos are not a sufficient substitute. The deputies making references to "here" and "there," without specificity. A picture, however, is worth a thousand words, as the video of the Rodney King assault ([see](http://www.citivu.com/ktla/sc-ch1.html) <http://www.citivu.com/ktla/sc-ch1.html>) showed.

The problem with using the transcripts alone is best shown by cross-examination of Englert. 11/26/02 VRP:4910. Englert claimed that when Reding stated that he saw Bananola dive and let out an “ugh,” Reding was not suggesting that Bananola had been hit. Id., VRP: 4911-12. The defense therefore renewed the motion to use the video: “I cannot effectively cross examine this witness without displaying what he has just referred to as ‘what I saw, what I heard.’” Id., VRP:4912-13. The motion was again denied. Id., VRP:4915. On further cross-examination, the defense asked Englert how Reding said Bananola was positioned. Id., VRP: 4917-19.

Q. And he [Reding] says, “he went ‘ugh’ like he got hit.” Does that not suggest to you that when he went “ugh,” he got hit?

A. No.

Id., VRP:4921. Instead, Englert claimed his impression was that Bananola was shot “immediately before that and that would be the shot into the foot,” and no other shots. Id., VRP:4921. And that afterwards, and after Reding left, then Bananola and Eggleston had a shootout in the living room. Id., VRP:4947. The court adhered to its ruling excluding the videotapes. Id., VRP:4972-73.⁴¹

⁴¹ The issue came up once again during the state’s cross-examination of defense expert Kay Sweeney, who testified about his own reliance upon the Englert videos, particularly the Englert video of Reding. The state attempted to impeach

D. Since the Videos in this Case Were the “Best Evidence” of What they Depicted, They Were Admissible Under the Best Evidence Rule.

Under ER 1002, “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” It continues, “The original is not required ... if: (a) ... All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith.” ER 1004; State v. Detrick, 55 Wn. App. 501, 503, 778 P.2d 529 (1989). The videotapes were not destroyed at all, much less in bad faith. The best evidence as to their contents therefore remains the videotape, not substitute testimony. Cf. id. at 503-04. Exclusion over the defense’s “best evidence” objection, 12/5/02, VRP:5661, therefore also violated ER 1002.

Sweeney’s reliance on what he claimed Reding showed in the video, 12/5/02, VRP:5661, by asking, “Didn’t Deputy Reding also state that he saw the defendant in the hallway moving from east to west when he went through the kitchen and fired his shots at the defendant?” Id. The defense objected, arguing that the video itself is the *best evidence* of what it contained. Id. The state continued attempting to discredit Sweeney’s claims about the Reding video. Id., VRP:5663. The defense further objected to cross-examination “about what these officers say that involves the use of these videos because I cannot go back and show the videos ...” Id., VRP:5671. The court ruled, “I have no problem with you using the transcript ...” Id., VRP:5673, and, the court overruled this objection. Id., VRP:5673-74.

E. The Videos Also Impeached the Trial Testimony of the Deputies and Was Admissible for That Reason, Also.

The videos also impeached the testimony of state expert Englert and the deputies. It was admissible for that reason, also.⁴²

F. Since Some Portions of “Moving Videos” Were Admitted, the Balance Were Also Admissible Under ER 106 and the Rule of Completeness.

ER 106 provides:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it.

(Emphasis added).⁴³ The remainder of a recording need only explain, modify, or rebut the admitted portion to be admissible under ER 106’s mandatory language – it need not be otherwise admissible under the normal rules of evidence. State v. LaPierre, 71 Wn.2d 385, 428 P.2d 579 (1967); 5 Teglund, Washington Practice, Evidence 26,

⁴² ER 613 (prior inconsistent statement admissible for impeachment); Olden v. Kentucky, 488 U.S. 227, 232, 109 S.Ct. 480, 102 L.Ed.2d 513 (1998) (right to confront witnesses violated by exclusion of impeachment evidenced with “strong potential to demonstrate the falsity” of alleged victim’s testimony).

⁴³ See State v. Stallsworth, 19 Wn. App. 728, 734-35, 577 P.2d 617 (1978) (if part of a defendant’s statement is introduced into evidence, the defendant has a right to have the balance of the statement introduced, especially when the full statement is of a totally different character than the edited version).

p. 97. The same protection is afforded by the common law “rule of completeness.” Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 161-70, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988).

This rule does not apply only to portions of a single “recorded statement.” ER 106 applies, by its terms, to “any other ... recorded statement” which ought to be considered together with the admitted portions, also.

In this case the Dogeagle video was admitted at the state’s request. The additional videos of the other officers, proffered by the defense and rejected by the trial court, are therefore “other ... recorded statement[s].” Because consideration of the single state-proffered recorded statement would be unfair, these rules require admission of the others.

IV. THE TRIAL COURT EXCLUDED OTHER PROFFERED, EXCULPATORY, EVIDENCE, IN VIOLATION OF BRADY AND THE RIGHT TO PRESENT A DEFENSE

A. Exclusion of Impeachment Evidence on the Informant Violates *Brady*.

Steve McQueen was the state’s informant-witness and drug dealer, who provided critical background information concerning Mr. Eggleston’s supposed prior drug-dealing. The state moved 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. 11/4/02 VRP:2798. The defense opposed, on the ground that the evidence tended to show McQueen's bias and interest. Id.⁴⁴

The state contended that evidence of McQueen's reduced charges did not show bias. The state admitted that prior to Mr. McQueen's testimony at the first trial, they entered into a plea bargain with him and reduced the number of charges against him – but contended that, in the state's opinion, this had nothing to do with gaining Mr. McQueen's testimony. 11/5/02 VRP:2849-50.

The question, however, is not whether the state believed that its deal with McQueen was intended to curry McQueen's favor, but whether McQueen could have perceived it that way. See Giglio v. United States, 405 U.S. 150, 153-55, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). It is therefore irrelevant that, as the state argued, it did not reduce the informant's charges because of his earlier promise to testify but reduced those charges for some other magnanimous

⁴⁴ The defense also sought to cross-examine McQueen about his prior convictions; the defense asked about his prior armed robbery from 1995 or 1996 and then about his dealings with the elected prosecutor at that time, Mr. Horne, in an attempt to show McQueen's knowledge of how the system works with deals. 11/4/02 VRP:2817. The state's objection was sustained, even though the defense explained that its purpose was impeachment by proof of bias in favor of the state. Id.

reason; the informant could have still construed the charge reduction as an incentive to testify in a certain manner. For that reason, all sorts of threats of government sanctions, and not just completed deals, are relevant impeachment.⁴⁵ A formal agreement is not necessary; even a hope of leniency is relevant. See United States v. Shaffer, 789 F.2d 682, 689-90 (9th Cir. 1986) (even “tacit agreements” between the witness and the government are Brady).

Thus, the fact than an original deal was made but not remade before each of Mr. Eggleston’s succeeding trials does not make the original deal irrelevant – the witness could have believed that he faced exposure to government reprisal, or even to charges of perjury, if his current testimony differed from his past testimony. “[T]he exposure of a witness’ motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.”⁴⁶ See Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L. Ed.2d 347 (1974).

⁴⁵ United States v. Osorio, 929 F.2d 753 (1st Cir. 1991) (pending charges, not just completed ones, must be disclosed). That is why the existence of upcoming hearings at which a witness would have the *opportunity* to seek leniency based on cooperation must be disclosed. Reutter v. Solem, 888 F.2d 578 (8th Cir. 1989).

⁴⁶ Id., at 316-17. See also, State v. Spencer, 111 Wn. App. 401, 45 P.3d 209 (2002), review denied, 148 Wn.2d 1009 (2003); State v. Roberts, 25 Wn. App.

B. Exclusion of the Defense Expert Testimony Concerning the Unreliability of the Conclusions Drawn by the State's Expert Violates Brady.

The trial court also excluded testimony from defense expert Kay Sweeney about how contaminated the crime scene was and, hence, about how the state expert's supposedly careful and detailed "reading" of the crime scene was based on a house of cards. The trial court stated that it would exclude all evidence of crime scene contamination, including evidence of people moving around in the house, performing aid, searching, taking things like chunks of the walls, without an offer of proof – because otherwise previously suppressed bullets might be discussed. 12/3/02 VRP:5353. This misses the point that this was defense inquiry, and the defense can open the door however they like.⁴⁷

The defense supplied its offer of proof. 12/3/02 VRP:5372.

830, 611 P.2d 1297 (1980); State v. Wilder, 4 Wn. App. 850, 854, 486 P.2d 319, review denied, 79 Wn.2d 1008 (1971) ("It is fundamental that a defendant charged with the commission of a crime should be given great latitude in the cross-examination of prosecuting witnesses to show motive or credibility."); 5A Teglund § 607.7 at 320 ("the defendant enjoys nearly an absolute right to demonstrate bias on the part of the prosecution witnesses").

⁴⁷ The defense responded by explaining why contamination of the crime scene is such a critical issue, because it affects the ability to reconstruct what actually occurred after such disruption and delay; it shows the poor quality of the state's initial investigation; and it caused the state to leave potentially important items at the scene, such as the gold chair with a hair later discovered on it and the glass table with blood spatter later discovered on it. Id., VRP:5365.

Sweeney identified photos of how the scene was trashed, and explained how that affected the ability to reconstruct. Id.

The court then ruled that Sweeney could testify about certain discrete areas of contamination, “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.” Id., VRP:5390. Critically, the trial court prevented Sweeney from testifying about how contaminated vast areas of the crime scene were from piles of sheetrock that were strewn over the house and therefore prevented the state’s reconstruction expert from testifying with any reliability about what occurred. Id., VRP:5391-92.

Exclusion of Sweeney’s testimony about the unreliability of the state’s expert’s conjecture denies the right to present a defense discussed above.

C. The Trial Court’s Erroneous Evidentiary Rulings Were So Numerous that They Implicated the Right to Present a Defense.

The trial court also made numerous evidentiary rulings excluding proffered defense impeachment evidence.

The trial court excluded evidence tending to show that any of the deputies were lying. For example, the defense moved to admit evidence that Deputy Benson lied in his affidavit in support of the

search warrant for the Eggleston home, about whether he really had a prior “controlled buy” with informant McQueen. The court ruled such evidence inadmissible, because the search had been upheld against constitutional challenges. The defense explained that the purpose of eliciting such information was not to challenge the warrant, but to show Benson’s lack of credibility. 9/27/02 VRP:43. The court nevertheless excluded the evidence. Id., VRP:47.⁴⁸

The trial court excluded evidence tending to show that Eggleston was awakened by the deputies. The defense sought to cross-examine Mr. Eggleston’s then-girlfriend Ms. Patterson about the fact that she woke him up to give him his colitis medication in the morning before she left for work, but that he went back to sleep after taking it to sleep through its ill effects. The court excluded such testimony on the ground that she had no personal knowledge

⁴⁸ The defense continued by requesting, on cross examination of Benson, to inquire “if he represented to Judge Steiner that that was a controlled buy, and knowing it not to be because that goes to his credibility in a matter that’s directly related to this case obviously, you’re taking an oath when you appear before a judge for purposes of making those statements.” 10/22/02 VRP:1544. The defense also sought to ask about matters that he failed to tell the search warrant judge, i.e., “that there were three other people there; that the second buy that he calls a controlled buy, there was somebody else in the car as well and ... that Steve McQueen is a person whom he knew to have an extensive criminal record.” Id., VRP:1545. The trial court denies this request, calling this an attack on the search warrant. Id., VRP:1547.

of this, even though the defense explained that she regularly gave him his medicine, and that he regularly went to sleep after taking it. 11/7/02 VRP:3272-73.

Deputy Reigle testified about the knock and announce entry. The defense sought to impeach him with prior testimony about the raid, in which he was asked to describe his entry, but left out anything about knocks and announces. The state objected, claiming that Reigle was asked only generally about entry, not specifically about knocks and announces, and that omission to say something cannot amount to a prior inconsistent statement. 11/7/02 VRP:3365-69. The trial court agreed, ruling, "I don't see the inconsistency here." Id., VRP:3369-71.⁴⁹

Exclusion of such evidence violates state evidentiary rules. ER 401; ER 406; ER 607, 613. Given the volume of the evidence thereby excluded, it also amounts to a due process violation. Tinsley v. Borg, 895 F.2d 520, 530 (9th Cir. 1990), cert. denied, 498 U.S. 1091 (1991).

⁴⁹ On redirect examination, Reigle testified that on 10/16/95, his emotional state was bad, because Bananola was his partner; he continued that when he was asked questions that day – the questions that the defense sought to impeach him with – he was not asked to describe the knock and announce entry. 11/7/02 VRP:3384. The defense was not allowed to place in evidence the transcript showing the he was asked an open ended question to describe the whole entry. See proffered Defense Ex. No. 653, the prior inconsistent statement.

V. IN CONTRAST, THE COURT ADMITTED STATE TESTIMONY THAT HAD PREVIOUSLY BEEN RULED INADMISSIBLE BY THIS COURT CONCERNING THE SEQUENCE OF THE SHOTS.

A. This Court's Prior Ruling Excluding Speculation on the Sequence of the Bullets and Evidence of the Bullets Lodged in the Walls.

On the prior appeal, this Court ruled that it was error to admit expert testimony on the sequence of the firing of the bullets, because that was totally speculative. Eggleston, 2001 WL 1077846, at * 15.

B. The Evidence Admitted at the Current Trial in Violation of this Court's Decision

The trial court admitted evidence offered by the state's expert concerning the sequence in which the shots were fired anyway, and did so over defense objections.⁵⁰ The state began by eliciting the "opinion of Deputy Bananola's position in the Eggleston residence that he went to after the prior exhibit that you saw." Id., VRP:4642. The defense objection was initially sustained, id., VRP:4642-43, but the court then indicated that it would actually permit some sequencing testimony. Id., VRP: 4646. So Englert went on to testify about

⁵⁰ 11/25/02 VRP:4632 *et seq* (defense objections); Id., VRP:4640 (Englert testimony from diagrams about who was in what position for the first set of shots, the next shots, etc.).

sequencing:

... After John Bananola, depicted on your left, is backing up from the original or the first photograph or the first diagram, his left foot is up against the wall, and there's a ricochet from Brian Eggleston's gun that follows this trajectory. It's very low to the floor and strikes the floor approximately 12 inches out from this wall, and ricochets and goes into the upper portion of his left foot

Id., VRP:4649-50. Englert continued testifying about this ricochet, Id., VRP:4652, then opined that Bananola thereafter turned the corner into the living room; he explained how he can tell by the sequence of the bullets. A defense objection due to violation of this Court's prior ruling was overruled, id., VRP:4656. The state specifically asked,

Q. And you talked about the next sequence or the shots that were fired in the living room. ... Does this exhibit [334] reflect with reasonable scientific certainty your opinion as to the shots that were fired by Deputy Bananola ...

A. Yes, it does.

Id., VRP:4657. Englert continued in this vein, describing what occurred in sequence before each shot was fired, and who fired each succeeding shot. Id., VRP:4658-4716. Englert expressed his opinion of the order in which each bullet was fired, until all were covered. Id., VRP:4723- 4736.

C. Admission of Such Evidence Violated Both the Law of the Case Doctrine and the Rights Protected By This Court's Prior Ruling.

This Court's original ruling barred both experts from discussing the sequence in which the shots in the house were fired as nothing more than conjecture. The trial court's decision to admit speculative sequencing testimony nonetheless undermines the protection that this Court put into place. It also violates the law of the case doctrine. Greene v. Rothschild, 68 Wn.2d 1, 10, 402 P.2d 356 (1965).

VI. THE COURT ADMITTED SUBSTANTIAL ER 404(b) EVIDENCE CONCERNING MR. EGGLESTON'S DRUG USE AND SALES – MATTERS IRRELEVANT TO THE QUESTION OF WHETHER HE SHOT IN SELF-DEFENSE OR WITH INTENT TO KILL.

A. The Trial Court Admitted Substantial Evidence and Permitted Substantial Argument About Mr. Eggleston's Drug Use and Sales.

The defense moved to exclude evidence that Eggleston had sold or possessed marijuana on previous occasions, and possessed a small amount of marijuana in his home at the time of the raid, on relevance grounds. The trial court denied the defense motion in limine on this point, and permitted the state to argue about Mr. Eggleston's drug habits in opening statement, and to

admit evidence of his past marijuana sales through several witnesses. The court's position was neatly summed up early on, in response to the defense motion in limine, that evidence of drug use is entirely relevant to this murder charge: "I think the fact that he was involved in drugs is the whole point of this case." 9/27/02 VRP:175-76. The court therefore ruled that evidence of drugs and paraphernalia is admissible. 10/4/02 VRP:268.

For example, the defense motion to exclude this from the testimony of Deputy Benson, who began the investigation into whether Eggleston was selling marijuana, was overruled. 10/22/02 VRP:1421. The court then admitted this testimony substantial drug testimony through Benson. Id., VRP:1421-35.

The defense again moved to exclude such evidence before the state's informant, Steve McQueen, testified about his supposed purchases of marijuana from Eggleston at Magoo's bar, where Eggleston worked, in the past and the fact that Eggleston's deputy brother, Brent Eggleston, was present at the Eggleston home during one of those purchases. 10/28/02 VRP:2114. The defense explained, "this case no longer is a case where his possession or distribution or delivery of drugs is at issue," id., and that the testimony at this point is also duplicative of Benson's. Id., VRP:2115. The

state, in contrast, argued that such evidence shows defendant's "pattern and practice of Mr. Eggleston being a dealer." Id., VRP:2123. The state continued that this evidence answered the question, "Why did they investigate this" Id., VRP:2124.

The court ruled that evidence of Eggleston's drug use and sales was relevant from informant McQueen, just as it had been relevant when introduced through other witnesses. 11/4/02 VRP:2750. The court stated that his testimony concerning marijuana was "for purposes of setting the context of why did they believe there were going to be drugs at this home on this particular day?" Id., VRP:2751. Informant McQueen then testified about marijuana deals with Eggleston at Magoo's, and one at the Eggleston home while someone whom he described as Deputy Brent Eggleston was there. Id., VRP:2762-88.

The trial court even overruled the defense objection (on grounds of relevance) to admitting evidence that Eggleston's girlfriend at the time of the raid, Ms. Patterson, also used marijuana. 11/7/02, VRP:3215-16. The court explicitly stated that she was denying the motion for the same reasons she had consistently denied such motions when raised about other witnesses: "this was a search warrant for controlled substance violations, this is consistent with the

obtaining of that search warrant, and it also tends to prove, which is the basis for relevancy, the defendant's intent to conceal drug activities and the motive for the shooting." *Id.*, VRP:3220.⁵¹

B. Admission of Such Prejudicial, Inflammatory Evidence Violated ER 404(b) and the Right to a Fair Trial.

1. The Violation of ER 404(b)

Drug evidence is admissible when drug use or distribution is the charged crime.⁵² Under ER 404(b), however, drug evidence is not necessarily admissible where as here the charged crime is not drugs, but murder.

Under this rule, evidence of prior drug possession or distribution is inadmissible, *even in a drug trial*, unless directly relevant to the charged crime. For example, in State v. DeVries, 149 Wn.2d 842, 848-49, 72 P.3d 748 (2003), the Court explained that where the defendant was charged with delivering amphetamines to another student, the trial court erred in admitting evidence that he gave two dissimilar pills to another student three

⁵¹ The court also admitted evidence of Eggleston's prior marijuana sales and use through a variety of deputies. For example, Deputy Dogeagle gave a long description of the drugs involved in prior controlled buys supposedly involving Eggleston. 11/20/02 VRP:4390-93.

⁵² *E.g.*, State v. Weiss, 73 Wn.2d 372, 377, 438 P.2d 610 (1968).

days earlier. Drug evidence is therefore not automatically admissible in a homicide prosecution where the only issues are self-defense or knowledge.

As discussed above, the state's argument and the judge's rationale in favor of admission was that drug use showed that Mr. Eggleston knowingly protected his stash from discovery by law enforcement officers. This factor, however, had been determined adversely to the state in prior prosecutions and was not up for debate again at this trial. This single proffered basis for admission of the marijuana evidence therefore fails.

2. The Violation of the Right to a Fair Trial.

The admission of objectionable evidence in a criminal trial can implicate much more than a state evidentiary rule – it can implicate a constitutional guaranty.⁵³ Evidentiary errors establish a federal

⁵³E.g., Miller v. Pate, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967) (admission into evidence of men's shorts with reddish brown stain held error warranting federal habeas corpus relief, because state knew at time of trial that the stain was not blood and, hence, conviction obtained by knowing use of false evidence); Thomas v. Lynaugh, 812 F.2d 225, 230 (5th Cir.), cert. denied, 484 U.S. 842 (1987) (dicta) (admission or exclusion of evidence may be actionable if the affected evidence is a "crucial, critical, or highly significant factor in the context of the entire trial"); Walker v. Engle, 703 F.2d 959, 963 (6th Cir.), cert. denied, 464 U.S. 962 (1983) (where the violation of state's evidentiary rule has resulted in denial of fundamental fairness, habeas corpus relief will be granted); Dickson v. Wainwright, 683 F.2d 348, 350 (11th Cir. 1982) (fundamentally unfair state evidentiary rulings are basis for habeas relief).

constitutional claim when the violation of the state evidentiary rule is so egregious that it renders the trial fundamentally unfair and jeopardizes the right to due process of law.⁵⁴ This rule applies to the situation presented here, that is, the improper admission of “other crimes” evidence.⁵⁵

The question this Court must ask is whether admission of the challenged evidence “render[ed] the trial so fundamentally unfair as to constitute a denial of federal constitutional rights”;⁵⁶ whether the

⁵⁴ Carter v. Armontrout, 929 F.2d 1294, 1296-1300 (8th Cir. 1991) (admission of inadmissible evidence is ground for habeas corpus relief if it renders whole trial fundamentally unfair and if, absent the evidence, “the verdict probably would have been different”; admission of hearsay not grounds for relief here because trial court sustained petitioner’s objection and gave curative instruction and because properly admitted evidence provided overwhelming proof of guilt) (numerous citations omitted); United States ex rel. Lee v. Flannigan, 884 F.2d 945, 953 (7th Cir. 1989), cert. denied, 497 U.S. 1027 (1990) (claim based upon “other crime” evidence not cognizable because error did not violate fundamental fairness); Amos v. Minnesota, 849 F.2d 1070, 1073 (8th Cir.), cert. denied, 488 U.S. 861 (1988) (“Questions concerning the admissibility of evidence are ... reviewable in federal habeas corpus proceedings to the extent that the alleged error infringed upon a constitutionally protected right or was so prejudicial that it constituted a denial of due process”).

⁵⁵ Tucker v. Makowski, 883 F.2d 877, 878, 881 (10th Cir. 1989) (improper admission of “other crimes” evidence rose to level of due process violation); United States ex rel. Lee v. Flannigan, 884 F.2d 945, 953. See also Estelle v. McGuire, 502 U.S. 62, 70, 72-73 & n.5, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) (reserving question whether “it is a violation of due process guaranteed by the Fourteenth Amendment for evidence that is not relevant to be received in a criminal trial,” and suggesting that instruction informing jury to consider evidence of prior crimes not found to have been committed by petitioner committed offense charged or informing jury to consider prior crimes evidence linked to petitioner as proof that he had “propensity” to commit offenses such as one charged would violate due process and justify habeas relief).

⁵⁶ Tucker v. Makowski, 883 F.2d at 881 (discussing standard for evaluating, in federal habeas corpus claim, alleged improper admission of “other crimes” evidence (numerous citations omitted)).

“evidentiary” decision was “so prejudicial that it amounts to a denial of due process.”⁵⁷ This Court therefore looks at the error in context and weighs its prejudice against any probative value.⁵⁸ The trial court's erroneous admission Eggleston's drug use and sales constituted federal constitutional error under this standard.

First, it lacked “probative value.” The state's theory was that those who seek to protect their drug stashes are more likely to premeditate and kill law enforcement officers – but these factors were irrelevant (see Argument § I). Even if this were a proper factor for the jury to consider, there was no real stash worth protecting here – the amount of drugs involved was relatively minimal.

Next, the sole issue was self-defense, so introduction of these other crimes gave the jury a different reason to convict – prejudice against marijuana – and hence undermined “a major part of the defense.” Further, it was highly prejudicial. A summary of the state's closing argument references to marijuana sales and use appears in Section 1(E). The state's evidence concerning lack of

⁵⁷Carter v. Armontrout, 929 F.2d 1294, 1296 (discussing alleged evidentiary error raised in petition for writ of habeas corpus) (numerous citations omitted).

⁵⁸Pierson v. O'Leary, 959 F.2d 1385, 1389 (7th Cir.), cert. denied, 506 U.S. 857 (1992) (explaining standard by which district court reviews claimed violation of state evidence rule on habeas review) (citations omitted).

self-defense was relatively weak absent the inadmissible evidence; hence, the drug evidence was not “merely cumulative.”

VII. THE TRIAL COURT DISMISSED JURORS 4 AND 7, MID-TRIAL, RATHER THAN ACCOMMODATE THEM WITH MINOR CONTINUANCES, IN VIOLATION OF CrR 6.5 AND RCW 2.36.110.

A. The Trial Court’s Mid-Trial Dismissal of Jurors 4 and 7.

Juror No. 7 took a tumble during the trial, forcing postponement of the site visit. Without inquiring of her, the judge initially stated, “I say call her an alternate and get rid of her and move on. It’s either that or we’re going to cancel court for the rest of the day if she can’t come in here.” 1/31/02 VRP:2611. The state agreed, but the defense said the court should wait a day and see how the healing process goes. Id., VRP:2616-17.

This juror thereafter told the court that she had made two medical appointments that would conflict with her duties as a juror, one of which was for the time of the postponed site visit and one of which was for the upcoming Friday. The court told counsel, “But Juror No. 7 scheduling a doctor’s appointment in Seattle this afternoon – I, quite frankly counsel, I’m done with Juror No. 7.” 11/4/02 VRP:2685.

The court brought this juror in; she described her injuries from a fall the preceding week; and she explained the medical appointment she had made for the afternoon. 11/4/02 VRP:2688. “Because of the swelling, it needs to be treated and not wait another week, and the office closes at 4:30.” Id., VRP:2690. The court excused juror No. 7 without further inquiry, even though she would leave only a half hour early, giving the following reason:

I’m going to excuse Juror No. 7 at this time. She doesn’t know between the doctor’s appointment that she has set for today and for Friday that it’s going to resolve the issue, and it’s going to potentially be an ongoing problem that has already had a significant impact on this trial, and we have four other alternates.

Id., VRP:2690-91. The defense argued that there was no showing that the injury from the fall would last any extended period of time. Id., VRP:2691.

Juror No. 4 posed a different problem. This juror had been sick and was vomiting, but called and promised to be in by noon. The state asked the court to excuse that juror anyway, and the court agreed: “Someone who is still vomiting this morning I don’t want to have come in, quite frankly, after noon. I don’t want to risk first of all, all the rest of us potentially getting ill. I mean, that’s never mind her own health.” 11/4/02 VRP:2692. The defense argued that the

solution to both problems was to postpone the site visit. Id.,

VRP:2693-94. The court excused both jurors anyway:

I think it's a very different matter when we've already postponed the site visit once at expense to the State and would have to do so again when there's no problem with the fact that we have ample jurors to continue the trial. We still have two alternates left even after excusing Juror No. 4 and Juror No. 7. So I'm going to excuse them at this time. ...

Id., VRP:2695.

The court then brought Juror No. 7 in to tell her about this decision, and No. 7 stated that she actually was able to stay that day and thus would be available for the site visit: "I was trying to reach my doctor again to see if he would see me at 4:45." "I was waiting for that, but you're –." Id., VRP:2696. The court interrupted this juror with, "Thank you very much," and dismissed her. Id.

With respect to Juror No. 4, the court had the JA "contact her and excuse her." Id., VRP:2698. The defense objected, stating, "If she's available to make a record, I think we should make a record. Id., VRP:2698. The judge dismissed No. 4 sight unseen. Id., VRP:2699-2700.

B. Mid-Trial Dismissal of Jurors, Absent Formal Inquiry and Cause, Violates RCW 2.36.110 and CrR 6.5.

RCW 2.36.110 states, "It shall be the duty of a judge to 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 or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service." CrR 6.5 provides: "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"

The court in State v. Jorden, 103 Wn. App. 221, 227, 11 P.3d 866 (2000), explained that CrR 6.5 does not necessarily require a hearing; but the rule does "contemplate a formal proceeding, which may include brief voir dire, before substituting a juror." Id. (citations omitted). Such a "formal proceeding" is needed to "verif[y] that the juror is unable to serve. Johnson, 90 Wn. App. at 73, 950 P.2d 981." Jorden, 103 Wn. App. at 227. The formality must include argument and witnesses; in Jorden itself, although the juror was not questioned, "the trial court heard argument from both parties and allowed both sides to call witnesses. The judge then read his notes about the juror's conduct." Id., at 227.

No formal proceeding was held here. Both jurors were not called in and questioned. Other witnesses were not called or sworn. One juror was dismissed sight unseen, and the other, upon dismissal, indicated that she was willing to change her appointment.

Further, the limited information that the trial court gleaned did not show “unfitness” to serve or inability to perform the duties of a juror – the standard required by both court rule and statute. Their continued presence might have required a short continuance in a lengthy trial. The federal courts hold that a juror who is unable to serve for just a day or so due to illness or temporary infirmity cannot be excused under comparable Rule 23(b), Fed. R. Crim P.⁵⁹

VIII. THE TRIAL COURT FAILED TO INFORM THE DEFENSE ABOUT IMPORTANT JUROR COMMUNICATIONS OCCURRING DURING THE TRIAL; THIS ERROR LED TO DEFENSE ACQUIESCENCE IN EXCUSING A JUROR AND, HENCE, LOSS OF THE JURY THAT WAS SWORN TO HEAR THE CASE.

A. Facts Surrounding The Dismissal of Juror Burrows.

⁵⁹ United States v. Tabacca, 924 F.2d 906 (9th Cir. 1991) (reversing conviction based on Rule 23(b) because excused juror would have been available the next day).

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. The defense agreed to dismissal based on the state's in-chambers proffer of these facts, which they said they had gleaned in part through Detective Ed Troyer.⁶⁰

As it turned out, however, these facts were not accurate or complete. Actually, juror Burrows had come forward to the Judicial Assistant (JA), mid-trial, after he had contact with people who came to watch the trial – Christy and Peter Bortel. (Burrows reported this to the JA.) Peter Bortel recognized Burrows from Magoo's; Christy

⁶⁰ Sub No. 858, p. 1 (CP:1598), the Declaration of deputy prosecutor Lilah M. Amos, summarizes the facts they "learned" and passed on to the judge in this conference:

... Detective Ed Troyer .. [told she and Jim Schacht] that his wife was told by one of the former owners of Magoo's Tavern, whom we believed to be Peter and Christy Bortel, that a person known to the Bortels as Tom Burrows was a juror on the Eggleston case. We were also informed that one of the owners had talked to Tom Burrows about the case and that Tom Burrows had been a frequent patron of Magoo's Tavern. Detective Troyer also informed us that Stan Mowre's wife had learned that the defendant had been a bartender at Magoo's Tavern. Stan Mowre represented to Detective Troyer that he knew nothing about the Eggleston case, and that his information about the occupation of the defendant, as well as the name of the juror and the juror's patronage of Magoo's Tavern, came from his wife's conversation with the owner.

relayed this a few weeks later to a coworker, Debbie Mowre; and Mowre relayed this to her husband, a former policeman, who thereafter told Pierce County investigator Ed Troyer.

The defense, however, was never informed that Burrows had come forward and reported this contact himself. The defense was never informed that Burrows went to Magoo's at a different time than did Eggleston and hence that they did not know each other; such knowledge was simply inferred by the state. The defense was never informed that rather than hiding things, as the state's information implied, Burrows had been forthright with the court throughout but the court had failed to pass on his contacts to the parties. In fact, as it turned out, Burrows had even reported another and more critical encounter to the JA: a contact with someone at the courthouse who Burrows claimed threatened him regarding the trial. The JA told Burrows that she would report this to the judge. The defense was never told.

The defense Motion for a New Trial (Sub No. 846 (CP:814-844)) explains this series of events. Mr. Olberz' affidavit, Appendix G, chronicles the prosecution's information given to the judge and defense in chambers, the judge's actions, and how they enticed the

defense into agreeing to release juror Burrows without investigation or inquiry. Sub No. 846, p. 1-2 (CP:832-833).

Mr. Olberz' affidavit concerning undisclosed juror contacts, Appendix I, explains what the defense discovered after the fact about Burrows' contacts with the Bortels, how innocent they were, and how Burrows had forthrightly told the JA about these contacts right when they occurred; it also explains the threat that Burrows received and passed on to the JA but that was never disclosed to the defense. Sub No. 846, pp. 2-3 (CP:840-841).

The affidavits from juror Burrows, from the Bortels, and from Mowre, confirm this. In the course of obtaining these affidavits, the defense in addition learned of other instances of jury misconduct – of jurors discussing the results of prior trials, of jurors discussing evidence before deliberations began, and of a juror withholding during voir dire her knowledge of the prior trials.⁶¹

⁶¹ Burrows' affidavit, Sub No. 846 (CP:818-820), Appendix A, states that he was contacted by two different people who came to see the trial, and he immediately told Judicial Assistant Pam Frank; that he was a customer of Magoo's but did not know Brian Eggleston from there; that he was never contacted by Ed Troyer about this incident; and that there was a threatening incident that he told JA Frank about, she assured him that she told the judge and not to worry about it. P. 2. In addition, he stated that juror Cassandra Chisolm called witness Tiffany Patterson, Eggleston's girlfriend, a liar; and about other jurors talking about the evidence before deliberations. P. 3 (CP:820). Juror Nikol Atkinson's affidavit. Sub. No. 846, (CP:821), Appendix B, shows that she overheard jurors "state that this case had been tried twice before and they wondered what had gone wrong to cause a third trial." Debbie Mowre's affidavit, Sub. No. 846 (CP:822-824),

The defense moved for recusal of the trial judge based on these developments. Sub No. 848 (CP:845-846). The defense also moved for a new trial, because these facts implicated the appearance of fairness, as well as the defendant's right to presence during communications with the jury under state and federal law. Sub No. 846 (CP:814-844).

Additional juror affidavits were then submitted, which detailed discussions that the jurors had had, mid-trial about the evidence, and information that had been passed on to them about Mr. Eggleston's prior trials and hung jury (that they were not supposed to be aware

Appendix C, showed that she works with Christy Bortel, who said she had seen Burrows when she went to see the Eggleston trial. She never told anyone that they had discussed evidence; she "had no information in any way that Thomas Burrows ever knew Brian Eggleston, and Christy Bortel (Robinson) never suggested that he did." P. 2 (CP:823). Also, she never discussed how Burrows might vote; Ed Troyer never questioned her about this. Christy Bortel, Sub. No. 846 (CP:825-827), Appendix D, stated that she works at Frank Russel, where Thomas Burrows worked "several years ago." P. 1 (CP:825). "There was never any discussion regarding any speculation as to whether Thomas Burrows would have been a favorable juror for Eggleston ..." P. 2 (CP:826). She bumped into him briefly when she went to see the trial, but that was it. "I have never discussed evidence with Thomas Burrows and the above is the only contact I have had with him since 1997." Id. Ed Troyer did call her and asked for her husband's number, but "made no effort to inquire beyond that. He did not ask me anything about conversations with Thomas Burrows." P. 3 (CP:827).

Peter Bortel's Affidavit, Sub. No. 846 (CP:828-829), Appendix E, shows that Burrows was a lunch customer at Magoo's. P. 2 (CP:829). He knows him as an acquaintance. He bumped into him when he went to see the trial, and that was it. Id. The Affidavit of investigator Pam Rogers, Sub. No. 846, (CP:830-831) (Appendix F) with regard to contact with Juror Dean Lee shows that he "was present and overheard him telling Pam Frank, the court's judicial assistant, about this conversation and that the person with whom he conversed had been in the

of). Sub No. 862 (CP:1614-1615). The trial court then took testimony from all 16 jurors on these subjects. Sub No. 894 (CP:921-931). The trial court never offered her own testimony or that of the JA on the critical question of undisclosed juror contacts with the court.

The judge held a hearing and inquired into three limited areas of alleged misconduct with all 16 jurors. Sub No. 894, p. 3 (CP:923). She did not permit inquiry on any other topics, most notably, on Burrows' allegation that he was threatened, that he told the judge's assistant about it, and that she assured him that the judge was told, but that the defense was never told about this. After reviewing the testimony, the judge denied the defense motions, finding no prejudice from any jury misconduct. Sub No. 894, pp. 6-11 (CP:927-931).

Weighing the receipt of this extrinsic material by only two jurors and the short time it was considered, the court concluded there was "no reasonable possibility that any reference to or disclosure of the results of the prior trials affected the verdict." Sub. No. 894, p. 10 (CP:930).

court room during the trial. Ms. Frank responded that she didn't think this was a problem, but that she would tell the judge." P. 1 (CP:830).

B. Dismissal of Juror Burrows Following Secret Communications With the Court Violated the Appearance of Fairness, the Right to Recusal, CrR 6.5 and RCW 2.36, the Right to Presence.

1. The Recusal and Appearance of Fairness Problem

The court's findings 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; had informed her of disturbing contacts including threats; and that this interaction was not revealed to the defense.

That alone requires reversal.

First, there is the problem of the judge's seeming involvement in this problem and her failure to recuse herself to address the problem. CJC 3(D)(1) requires disqualification not just where the judge actually "has a personal bias or prejudice." It also requires disqualification "in a proceeding in which their impartiality might reasonably be questioned...." The list of examples following that Canon is illustrative only and incomplete.⁶²

⁶²The Code of Judicial Conduct is obviously binding upon judges. See generally In re Anderson, 138 Wn.2d 830, 981 P.2d 426 (1999).

This Canon is consistent with the due process-based rule that a criminal defendant is entitled to not only a fair tribunal, but also to a tribunal with the “appearance of fairness,” in all proceedings.⁶³

How are we to know if the judge's impartiality in a particular matter might reasonably be questioned, such that the duty of disclosure or recusal kicks in? We know, first and foremost, that the appearance of fairness doctrine is especially important where as here the person with the allegedly disqualifying problem is the actual judge. State v. Post, 118 Wn.2d 596,618, 826P.2d172 (1992). Further, we know that prejudice is not to be presumed. Id., 118 Wn.2d at 618-19 & n. 9. In determining whether such a showing is made, it is important to note whether there is any documentation supporting the allegations. State v. Dominguez, 81 Wn. App. 325, 328, 914 P.2d 141 (1996). Our allegations are supported by the transcript of the hearing at which the jurors testified, and all of the affidavits. See Sub Nos. 846 (CP:814-844), 848 (CP:845-846).

Another important factor in determining whether sufficient evidence of an appearance of bias is submitted is to evaluate the time between the potentially disqualifying event and the challenged

⁶³ See generally In re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955); Offutt v. United States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11 (1954); Diimmel v. Campbell, 68 Wn.2d 697, 414 P.2d 1022 (1966); State v. Madry, 8 Wn. App. 61,

proceeding. Where the potentially biasing incident occurs “some seven years earlier,” *id.*, the evidentiary threshold for showing a nexus between the two is probably missing. *Id.* Presumably, where as here the potentially biasing event is current, this time requirement should be satisfied. Thus, both the documentary evidence and timeliness prerequisites are satisfied here.

2. The CrR 6.5 and RCW 2.36 Problem

Further, the court’s findings fail to address Burrows’ assertion that he never engaged in any juror misconduct warranting his dismissal, contrary to the state’s assertions. Dismissal of this juror, without the formality of a full hearing and witnesses, violates RCW 2.36 and CrR 6.5 as discussed in Section VII. Given the inability of the state to prove its assertions, dismissal was an abuse of discretion.

3. The Denial of Defendant’s Right to Presence Problem

Then there is the problem of the judge failing to inform the defense about the court’s and JA’s own contacts with juror Burrows, without counsel’s or defendant’s presence. The defendant, however, has a right to presence at every critical stage of the proceedings, and

504 P.2d 1156 (1972).

such court contact with a juror about a matter as sensitive as perceived threats is certainly such a critical state.⁶⁴ Failure to inform the defense about the precise sort of juror contact that occurred in this case – juror contact indicating possible influence or threat occurring during the course of the trial – is reversible error.⁶⁵

C. The Additional Jury Misconduct Requires Reversal.

Finally, there is the problem that true jury misconduct was revealed during the investigation and inquiry into the Burrows affair. One juror failed to reveal knowledge of Eggleston’s prior trials during voir dire, and other jurors discussed those prior trials and their outcome. Juror misconduct occurs when “extrinsic evidence,” that is, evidence outside the testimony or documents admitted at trial, is placed before the jury.⁶⁶ “[E]xtrinsic evidence is defined as

⁶⁴ State v. Wroth, 15 Wn. 621, 623-24, 47 P. 106 (1896); State v. Calguri, 99 Wn.2d 501, 508, 664 P.2d 466 (1983); State v. Rice, 110 Wn.2d 577, 613, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910 (1989).

⁶⁵ Remmer v. United States, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed.2d 654 (1954) (judge’s failure to inform defense of juror’s concern regarding possible influence; notice to the defendant and an opportunity for hearing necessary in this situation, even where the court and prosecutor concluded that the perceived threat had been a joke). Cf. Rushen v. Spain, 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983) (failure to disclose contact with juror about concern during trial can be evaluated for harmless error).

⁶⁶ State v. Balisok, 123 Wn.2d 114, 118, 866 P.2d 631 (1994), cert. denied, 536 U.S. 943 (2002); Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 271-72, 796 P.2d 737 (1990), review denied, 116 Wn.2d 1014, 807 P.2d 883 (1991);

information that is outside all the evidence admitted at trial, either orally or by document.”⁶⁷

Introduction of such extrinsic evidence is improper because it is not subject to objection, to cross-examination, to explanation, or to rebuttal.⁶⁸ It denies the due process right to an impartial jury.⁶⁹ It “undermines one of the most fundamental tenets of our justice system: that a defendant’s conviction may be based only on the evidence presented during the trial.”⁷⁰ It implicates the confrontation clause of the state and U.S. Constitutions; the juror with extrinsic information becomes a witness against the defendant, unsworn and without cross-examination.⁷¹ It also violates art. I, § 21 of the

Arthur v. Ironworks, 22 Wn. App. 61, 587 P.2d 626 (1978), review denied, 92 Wn.2d 1007 (1979).

⁶⁷Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. at 270.

⁶⁸State v. Balisok, 123 Wn.2d at 118; Halverson v. Anderson, 82 Wn.2d 746, 752, 513 P.2d 827 (1973).

⁶⁹Turner v. Louisiana, 379 U.S. 466, 472-73, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965).

⁷⁰United States v. Noushfar, 78 F.3d 1442, 1445 (9th Cir. 1996), amended by, 140 F.3d 1244 (9th Cir. 1998).

⁷¹Sassounian v. Roe, 230 F.3d 1097 (9th Cir. 2000) (“A juror’s communication of extrinsic facts implicates the Confrontation Clause”); Jeffries v. Wood, 114 F.3d 1484, 1490 (9th Cir. 1997) (*en banc*), cert. denied, 522 U.S. 1008 (1997) (when juror communicates extrinsic facts about defendant to other jurors, that juror becomes unsworn and uncross-examined witness against defendant).

Washington Constitution, that “the right of trial by jury shall remain inviolate.”⁷²

Jury misconduct creates a presumption of prejudice that the state can overcome only by showing that it was harmless beyond a reasonable doubt. Remmer v. United States, 347 U.S. at 229; State v. Murphy, 44 Wn. App. 290, 296, 721 P.2d 30, review denied, 107 Wn.2d 1002 (1986) (applying Remmer prejudice standard).⁷³ Thus, any doubt in whether extrinsic information affected the verdict must be resolved in favor of a new trial.⁷⁴ The number of jurors potentially affected by the extrinsic evidence is irrelevant; an effect on even one

⁷² State v. Tigano, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991), review denied, 118 Wn.2d 1021 (1992).

⁷³ State v. Kell, 101 Wn. App. 619, 5 P.3d 47 (2000) (juror misconduct raises “presumption of prejudice,” can be overcome only by “showing that the misconduct was harmless beyond a reasonable doubt (i.e., that the misconduct did not affect the verdict.)”); State v. Rose, 43 Wn.2d 553, 557, 262 P.2d 194 (1953) (“The burden was upon the state to show that no prejudice actually resulted.”). This is consistent with the prejudice standard embraced by federal courts. United States v. Littlefield, 752 F.2d 1429, 1431-32 (9th Cir. 1985) (explaining “continued vitality of the rule that the government must bear the burden of proof in showing that jury partiality was harmless”); United States v. Delaney, 732 F.2d 639, 642 (8th Cir. 1984) (government bears burden of rebutting presumption of prejudice resulting from juror misconduct); United States v. Hillard, 701 F.2d 1052, 1064 (2d Cir.), cert. denied, 461 U.S. 958 (1983) (presumption of prejudice can be rebutted only by showing information harmless).

⁷⁴ Adkins v. Aluminum Co., 110 Wn.2d 128, 137, n. 11, 750 P.2d 1257 (1988); State v. Briggs, 55 Wn. App. 44, 55-56, 776 P.2d 1347 (1989) (any reasonable doubt that misconduct affected verdict must be resolved in favor of new trial). Cf. State v. Carpenter, 52 Wn. App. 680, 685, 763 P.2d 455 (1988) (absent actual or probable prejudice, presence of extrinsic information in jury room does not require reversal).

requires reversal, because it implicates the right to an unbiased *panel* of jurors.⁷⁵

The trial court considered the fact that only a limited number of jurors considered the extrinsic evidence for a short period of time, during jury deliberations, as militating against prejudice. This was error: since prejudice is presumed, and even the tainting of a single juror requires reversal, while jury deliberations are the most sensitive portion of the trial, none of this reduced the presumption of prejudice.

In fact, the test of whether the misconduct requires reversal is an objective one. Richards, 59 Wn. App. at 273. The judge's conclusion that, based on the brief questions she asked the jurors, none of them were affected by the extrinsic evidence, is therefore incorrect. This was not a factual matter on which the jurors testimony could be considered, but a question of law.

⁷⁵ See Dyer v. Calderon, 151 F.3d 970, 973 (9th Cir.) (*en banc*) ("The Sixth Amendment guarantees criminal defendants a verdict by impartial, indifferent jurors. The bias or prejudice of even a single juror would violate Dyer's right to a fair trial."), cert. denied, 525 U.S. 1033 (1998); Dickson v. Sullivan, 849 F.2d 403, 408 (9th Cir. 1988) ("If only one juror was unduly biased or improperly influenced, Dickson was deprived of his sixth amendment right to an impartial panel.").

IX. THE TRIAL COURT EXCUSED DEPUTY GARN FROM ATTENDING TRIAL, AND ALLOWED THE STATE TO READ HIS PRIOR TESTIMONY, DUE TO HIS ALLEGED BUT UNPROVEN INABILITY TO TESTIFY WITHOUT BECOMING ANGRY, VIOLENT, AND UNPREDICTABLE; THIS VIOLATED STATE AND U.S. CONFRONTATION CLAUSE GUARANTIES.

A. The Trial Court's Decision to Allow the State to Read Deputy Garn's Prior Testimony.

Former Tacoma Police Department officer Garn testified at Mr. Eggleston's prior trials. He went to the crime scene and his testimony was critical to establishing the chain of custody on that crime scene evidence. 10/21/02 VRP1228-30. The state, however, asked that Garn be declared "unavailable" for the third trial because a car accident, recent pain, and a 30-year old diagnosis of PTSD distorted his memory and prevented him from attempting recall of the events surrounding the Bananola shooting without severe emotional trauma and acting out. Sub No. 783 (CP:1580-1590).

The court held a hearing on this issue, and Garn was available for that. He testified that he left the Department on August 30, 2001 – five years after the charged crime – when he had a car accident resulting in two neck surgeries. 10/21/02 VRP 1228. He continued that he still remembers going to the crime

scene and collecting evidence, but that he “lost a lot of the memory from the past, just don’t recall like I used to ... I have flashbacks from Vietnam, sometimes drastic, and that’s were I’m supposed to be today at the VA Hospital at the clinic in Seattle for PTSD.” He explained that the PTSD was not new; in fact, people had been trying to get him to seek treatment for thirty years. Id., VRP:1238. When asked whether he could look at “crime scene issues,” he said he “ can’t even watch the news right now without having some traumatic flashback or something.” When that occurs, he claimed that he “just go[es] off on whoever is around and whatever is around. ... I just have a severe reaction to anything. I can’t – I just can't cope with a lot of things right now.” Id., VRP:1231. He could not recall specifics about the evidence he collected, either. Id., VRP:1229-1231.

When asked about the expected duration of these problems, he replied that he was getting the next available bed at the hospital for treatment. Id., VRP:1223-33.

Even the judge indicated dissatisfaction with Garn’s testimony, stating that Garn refused to read the report on the incident, “and would not indicate why he could not read it ... that was somewhat troubling ...” Id., VRP:1370. The court declared him unavailable,

though, “based on his other testimony that the reason he couldn’t do that is because he had been told to avoid things that would cause him to have a reaction such as violent news stories” Id.

B. Permitting the State to Present this Evidence Through Prior Testimony Violated Confrontation Clause Guaranties.

Under ER 804(a)(4), a witness is “unavailable[e]” when he or she “persists in refusing to testify concerning the subject matter ... despite an order of the court to do so” or “is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity.” Under the confrontation clause, finding of unavailability requires that the government make “good faith effort to obtain [the witness’] presence at trial.” Ohio v. Roberts, 448 U.S. 56, 74, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) (citation omitted).

The psychological state of the witness can certainly be considered in whether the witness is available.⁷⁶ When the witness’ psychological state is at issue, however, the courts are unlikely to make a determination of unavailability based on self-serving lay

⁷⁶ State v. Foster, 81 Wn. App. 444, 915 P.3d 520(1996), aff’d, 135 Wn.2d 441 (1998); Alcala v. Woodford, 334 F.3d 862 (9th Cir. 2003) (witness deemed unavailable due to PTSD).

witness testimony alone.⁷⁷ Instead, such findings are generally reserved for the cases in which the witness' claim is supported by *independent medical corroboration*.⁷⁸ That was not presented here.

Even the trial court was dissatisfied with Garn's testimony alone, and said so on the record. Her subsequent determination of unavailability, without insisting on independent medical testimony concerning his continuing unavailability is error under ER 804(a) and the confrontation clauses of the state and U.S. constitutions.

X. THE JURY INSTRUCTIONS ON SELF-DEFENSE IMPROPERLY SHIFTED THE BURDEN TO MR. EGGLESTON ONCE AGAIN, JUST AS THEY DID IN THE LAST TRIAL.

A. The Erroneous Self-Defense Instructions

⁷⁷ See United States v. Ferdinand, 29 M.J. 164, 167-68 CMA (1989) (error to find that accused's 7-year old daughter was unavailable at trial on indecent acts charges, where there was no psychiatric determination that trial participation would be too traumatic for child).

⁷⁸ E.g., State v. Whisler, 61 Wn. App. 126, 810 P.2d 540 (1991) (94-year old witness unavailable; her doctor state she was too ill to travel to the trial and "[t]he State's duty to make a good faith effort does not require it to urge or attempt to compel a witness to testify at trial over the advice of the witness's doctors"); Finizie v. Principi, 69 Fed. Appx. 571 (3d Cir. (Pa.) 2003) (district court's reliance on declaration by witness' physician, which explained witness' medical condition and precisely why that medical condition rendered witness unavailable, supported finding of unavailability); People v. Gomez, 26 Cal. App. 3d 225, 240, 103 Cal.Rptr. 80 (1972) (based on testimony of two psychiatrists, court holds "illness or infirmity must be of comparative severity; it must exist to such a degree as to render the witness' attendance, or his testifying, relatively impossible and not merely inconvenient"); People v. Lombardi, 39 A.D.2d 700, 701, 332 N.Y.S.2d 749, 750-51 (1972) (psychiatrist's testimony was crucial to court's determination that witness unavailable, because testifying would endanger witness' mental and physical health).

In the last appeal, this Court ruled that instructions on self-defense – the “first aggressor” and provocation instructions – improperly denied Mr. Eggleston the ability to fully assert his self-defense claim. The error necessitated reversal. Eggleston, 2001 WL 1077846, at ** 2-4. The new self-defense instructions caused a similar problem.

The “to convict” instruction, Sub No. 836 (CP:763-809), No. 12 (CP:776), contained the elements that Eggleston “shot Deputy John Bananola”; that he acted “with intent”; and causation. A separate justifiable homicide instruction, Sub No. 836, No. 13 (CP:777), stated that homicide was justifiable when:

1. the slayer did not know that the person slain was a law enforcement officer;
2. the slayer reasonable 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.

But a separate instruction on justifiable homicide allowed the jury to find that Eggleston knew Bananola was an officer, and gave a much higher standard for proving self-defense in that situation:

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.

Sub No. 836, No. 15 (CP:779), defined what force the officer could use, apparently because of the excessive force prerequisite above, stating that the officer could basically use any force including deadly force when executing a search warrant – thus essentially depriving Mr. Eggleston of any claim of self-defense if he knew Bananola was an officer:

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.

Sub No. 836, No. 16 (CP:780) defined necessary, subjectively/objectively, “that, under the circumstances as they reasonably appeared to the actor at the time (1) no reasonably effective alternative to the use of force appeared to exist, and (2) the amount of force used was reasonable to effect the lawful purpose intended.”

Yet another instruction told the jury that it could essentially *presume* that Eggleston knew that Bananola was an officer. Sub No. 836, No. 17 (CP:781), stated:

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.

Sub No. 836, No. 19 (CP:783) explains further prerequisites to satisfying self-defense when the slayer knows the slain is an officer, ending with the conclusion that Eggleston really had no claim of self defense in this situation because, “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.” No. 20 (CP:784) made clear that a mistaken belief of actual danger could not justify self-defense when the slayer knows the person slain is an officer. Several instructions gave the jury similar information about applying self-defense to the assault charge. Sub No. 836, Nos. 33-36 (CP:797-800).

B. These Instructions Violate Double Jeopardy and Collateral Estoppel Protections, by Telling the Jury to Consider a Fact Rejected by Juries in Mr. Eggleston’s Prior Trials.

The most noteworthy fact about the instructions concerning the limited availability of self-defense when the shooter knows, or reasonably should have known, that he is shooting a law enforcement officer, is the fact that prior juries have already determined that Mr. Eggleston did not know and should not have known that. The instructions telling the jury to reconsider this fact violate double jeopardy and collateral estoppel protections, as explained in Argument § I.

C. These Instructions Along with the Court’s Pretrial Ruling Barring Evidence Undermining the Legality of the Search Take a Critical Element from the Jury: Whether the Officers Were Acting Lawfully.

In United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), the Court held that it is impermissible to take the element of materiality in a fraud prosecution out of the hands of the jury and have the judge make the decision – even though materiality is a question of law. Since it is an element of the crime, the defendant is entitled to a jury determination on it. Accord United States v. Gonzalez, 214 F.3d 1109 (9th Cir. 2000).

As this Court's prior decision in this case makes clear, the amount of force that a defendant can use depends on whether the intruder – here, Deputy Bananola – was using lawful and official force. Eggleston, 2001 WL 1077846, at ** 2-3.

Hence, the lawfulness and officialness of a slain officer's use of force is necessarily a jury determination under Gaudin.

In a pretrial ruling, however, the court rejected the defense attempt to introduce evidence tending to undermine the legality of the raid team's entry or execution of the search warrant. Sub No. 786 (CP:1591-1597) (granting state's motion to exclude assertion that warrant was unlawfully issued or served). This violated Gaudin and the right to a jury trial.

Further, these jury instructions prevented the jury from considering the legality of the officers' actions. They told the jury

that service of a search warrant was a presumptively lawful action no matter what, and that was the end of that inquiry. That also violated Gaudin and the right to a jury trial.

Finally, these instructions once again prevented Mr. Eggleston from presenting his self-defense claim, and relieved the state of proving absence of self-defense. They therefore violated the prior decision of this Court, the law of the case doctrine, and the rule against shifting the burden of proof. Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975).

D. The Remedy is Reversal

“An error affecting a defendant’s self-defense claim is constitutional in nature and cannot be deemed harmless unless it is ‘harmless beyond a reasonable doubt.’” Eggleston, 2001 WL 1077846, at * 5 (citation omitted). The remedy is to reverse both convictions.

XI. THE JUDGE’S DECISION TO RESENTENCE MR. EGGLESTON ON ALL CRIMES, EVEN THOSE OF WHICH HE HAD BEEN PREVIOUSLY CONVICTED AND PREVIOUSLY SENTENCED, VIOLATED DOUBLE JEOPARDY PROTECTIONS.

A. The Trial Court Decided to Resentence Mr. Eggleston on All Crimes, Even Those on Which He Had Been Previously Convicted and Previously Sentenced.

The trial court decided to re-sentence Mr. Eggleston on all crimes, even those on which he had been previously convicted in a separate trial and previously sentenced in a separate Judgment. The J&S, Sub No. 884 (CP:878-894), shows that the court recalculated, and re-entered judgment on the six crimes charged in the Second Amended Information, rather than just the murder that was the subject of the third trial.⁷⁹ The trial court then recalculated the criminal history scores of all the crimes on which sentence had previously been entered, using the previously reversed assault and murder convictions now as other current conviction and thereby increasing the criminal history score.⁸⁰

⁷⁹ The resulting sentencing calculations were more harsh than previous sentencing calculations had been. The offender scores used for the drug crimes after the first trial were 8 and 3. Sub No. 417 (CP:1204-1215). The offender scores used for the drug crimes after this third trial were 9 and 5, as discussed below. The final sentence imposed after the first trial was Count II, 160 months plus 60; Count III, 57 months plus 24; Count IV, 48 months, plus 24, plus 18; Count V, 57 months; Count VI, 3 months; all running concurrently for a total of 220 months. Id. The consecutive sentence imposed after the second trial was 288 plus 60 or 340 months. Sub Nos. 621 (CP:1518-1519), 622 (CP:1520-1530). The court rejected the state's request, Sub No. 613 (CP:1497-1517), for an exceptional sentence above the standard range.

The final sentence imposed after the third trial was 582 months. For Count 1, murder 2, 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; she imposed an exceptional sentence of 339 months plus that 60-month enhancement. For Count 2, assault 1, the court use 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; she imposed a high end sentence of 123 + 60 or 183 months. Sub No. 884 (CP:878-894)

⁸⁰ For Count 3, delivery of marijuana in a school zone, the court used a criminal

B. Resentencing on Crimes That Have Already Been the Subject of a Prior, Final, Judgment Violates Double Jeopardy.

Under both state and federal law, once a court imposes sentence, the sentence cannot be altered thereafter to the defendant's disadvantage. Reopening the final judgment in such a situation violates the prohibition of double jeopardy.⁸¹ Even under state law, the rule is that absent explicit statutory authority, a court

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; she imposed a sentence of 68 + 24 months, or 92 months. For Count 4, possession with intent to distribute marijuana in a school zone, the court again used a criminal history score of 9, an offense level III, and a standard range of 51-68 months plus the enhancements for a total range of 93-110 months; she imposed a sentence of 68 + 18 + 24 months, or 110 months. For Count 5, delivery of marijuana, the court used a criminal history score of 9, an offense level III, a standard range of 51-68 months and a sentence of 68 months. For Count 6, possession of mescaline, the court used a criminal history score of 5, and offense level of I, a standard range of 4-12 months, and a sentence of 12 months. Counts I and II were ordered to run consecutively. Sub No. 884 (CP:878-894).

⁸¹ See Hill v. United States ex rel. Wampler, 298 U.S. 460, 56 S.Ct. 760, 80 L.3d 1283 (1936) (addition of clause on commitment form which imposed further penalty – directing that defendant stand committed until fine is paid – is void because not included in trial court's initial pronouncement of sentence); Ex Parte Lange, 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1873) (double jeopardy bar prevents court from changing sentence, after payment of fine, from fine or imprisonment to fine and imprisonment; once the judgment of the court is entered, a second judgment on the same verdict is void); Johnson v. Mabry, 602 F.2d 167, 170 (8th Cir. 1979) ("It is well settled that a trial court lacks jurisdiction to alter a previously imposed valid sentence once the defendant begins to serve the sentence, and for the court to subsequently alter a sentence places the defendant in double jeopardy."). The only exception is for increases in sentence where the defendants lacked a legitimate expectation of finality as, for example, where there is a permissible government appeal of a sentencing issue. E.g., United States v. Difrancesco, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980). This case does not seem to fall into that category.

does not have the authority to modify a judgment once entered.

State v. Shove, 113 Wn.2d 83, 776 P.2d 132 (1989).

XII. COUNTS 4 AND 6, OF WHICH MR. EGGLESTON WAS CONVICTED IN A PRIOR TRIAL, CHARGED POSSESSION AND DISTRIBUTION OF DRUGS AT THE SAME TIME AND PLACE. THIS VIOLATED DOUBLE JEOPARDY, AND THE ERROR AFFECTED THE CRIMINAL HISTORY SCORE AT THE LATEST SENTENCING.

A. Counts 4 and 6 Charged Possession and Delivery Drug Crimes Occurring at the Same Time and Place, Separately.

The Third Information, Sub No. 348 (CP:1102-1107), charged two similar drug crimes in separate counts. Count 4 charged unlawful possession of marijuana with intent to deliver on Oct. 16, 1995, while armed with a firearm or knife. It charged "IN THE ALTERNATIVE" that Mr. Eggleston, on the same date, delivered marijuana (with the same weapons enhancements). Count 6 charged possession of mescaline on the same date, Oct. 16, 1995.

So Count 4 charged, alternatively, drug possession and delivery, while Count 6 charged drug possession, at the same time and place. The only difference is that Count 4 deals with marijuana and Count 6 deals with mescaline.

B. Convicting One of Possession and Delivery Crimes Involving the Same Drugs on the Same Date at the Same Place Violates Double Jeopardy Protections.

It is impermissible to convict a defendant of both a greater and lesser drug crime, involving the same drugs at the same time and place.⁸² Possession is a lesser-included offense of possession with intent to delivery and delivery.⁸³ Thus, convicting Mr. Eggleston of the crimes charged in Counts 4 and 6 violated double jeopardy protections – if this same analysis applies where the accused’s “stash” includes two different drugs rather than the same drugs.

We know convictions based on different controlled substances involved in same transaction constitute “same criminal conduct” for purposes of calculating offender score. State v. Garza-Villareal, 123 Wn.2d 42, 864 P.2d 1378 (1993). Even transactions in different drugs separated by just a short amount of time, are “same criminal conduct.” State v. Porter, 133 Wn.2d 177, 942 P.2d 974 (1997);

⁸² State v. Jones, 117 Wn. App. 721, 725-27, 72 P.3d 1110 (2003) (charging conduct occurring at same time and location as both attempted possession of cocaine and possession of cocaine violates double jeopardy protections).

⁸³ State v. Rodriguez, 48 Wn. App. 815, 816-17, 740 P.2d 904, review denied, 109 Wn.2d 1016 (1987) (citation omitted); State v. Johnson, 59 Wn. App. 867, 802 P.2d 137 (1990).

State v. Vike, 125 Wn.2d 407, 885 P.2d 824 (1994). We also know that double jeopardy bars multiple convictions of a defendant for possession of marijuana based on his stashing a drug in multiple places. State v. Adel, 136 Wn.2d 629, 965 P.2d 1072 (1998).

The same analysis should apply to the “unit of prosecution” issue where a single “stash” includes two different drugs. First, it is clear that possession of two different forms of a single drug, at the same time and place, forms only one crime.⁸⁴ In fact, the courts hold that where a statute prohibits “concealing any narcotic drug,” and the defendant conceals two separate narcotic drugs, morphine and opium, at the same time and place, the defendant can still be convicted of only one crime.⁸⁵

These cases are consistent with the rule that doubt about the unit of prosecution will be resolved against turning a single transaction into multiple offenses.⁸⁶

⁸⁴ United States v. Johnson, 909 F.2d 1517 (D.C. Cir. 1990) (defendant convicted of four counts of possession with intent to distribute marijuana, PCP-laced marijuana, PCP, and cocaine, in violation of 21 U.S.C. 841(a); reversing denial of post-trial motion to dismiss PCP-laced marijuana count as multiplicitous because of other marijuana count).

⁸⁵ Parmagini v. United States, 42 F.2d 721 (9th Cir. 1930), cert. denied, 283 U.S.C. 818 (1931). Accord Braden v. United States, 270 F. 441 (8th Cir. 1920) (possession of four different drugs a single offense).

⁸⁶ Bell v. United States, 349 U.S. 81, 82, 75 S.Ct. 620, 99 L.Ed. 905 (1955). See Heflin v. United States, 358 U.S. 415, 419-20, 79 S.Ct. 451, 3 L.Ed.2d 407

The Supreme Court's presumption "against turning a single transaction into multiple offenses" is especially appropriate where, as here, the alleged harm occurred simultaneously. See Bell v. United States, 349 U.S. at 84 (simultaneous transportation of victims across state lines constitutes one crime); United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 224-26, 72 S.Ct. 227, 97 L.Ed. 260 (1952) (simultaneous FLSA violations constitute one crime); United States v. Wiga, 662 F.2d 1325, 1336 (9th Cir. 1981), cert. denied, 456 U.S. 918 (1982) ("only one unit of prosecution for simultaneous possession" of firearms, unless they were stored or acquired at different times and places); United States v. Marino, 682 F.2d 449, 455 n.8 (3d Cir. 1982) (simultaneous possession of firearms constituted one offense; "A different question is posed when the Government presents evidence that the firearms were received or possessed at different times") (citations omitted).

In this case, the legislature did not make knowledge of the precise drug possessed or delivered an element of the crime. RCW 69.50.401(a) and (b) prohibits possession and distribution of controlled substances, generally, without listing any specific drugs

(1959) (same rule); Ladner v. United States, 358 U.S. 169, 173-77, 79 S.Ct. 209, 3 L.Ed.2d 1999 (1958) (same rule); Prince v. United States, 352 U.S. 322, 329, 77 S.Ct. 403, 1 L.Ed.2d 370 (1957) (same rule).

(except in RCW 69.50.401, simple possession of less than 40 gm. of marijuana, which is not at issue here).

Thus, differences in the identity of the drug possessed should not be the subject of different charges. The remedy is reversal of the extra conviction or, on this appeal where we raise this as a sentencing matter and these two drug crimes run concurrently, reduction of the criminal history score caused by the additional conviction and striking of any sentence enhancements associated with it.

XIII. CONCLUSION

For all of the foregoing reasons, the convictions should be vacated or, alternatively, resentencing should be ordered.

DATED this 3rd day of February, 2004.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on the 3rd day of February 2004, a true and correct copy of the foregoing AMENDED OPENING BRIEF was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

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