

60265-9

60265-9

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NO. 60265-9-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KEVIN MONDAY,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF APPELLANT

NANCY P. COLLINS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

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A. SUMMARY OF ARGUMENT.

Because the warrant authorizing Kevin Monday's arrest and the search of his home was based on an affidavit that deliberately or recklessly omitted information undermining probable cause for the search and arrest, the court erred by denying his motion to suppress. Additionally, Monday was denied effective assistance of counsel by his attorney's request that the jury receive incorrect instructions defining self-defense. The prosecutor flagrantly and intentionally sought a verdict based on improper considerations such as the refusal of "black folk" to assist the prosecution and the "inherent unreliability" of all criminal defendants.

Furthermore, the court improperly imposed 60-month firearm enhancements when the jury was not accurately instructed on the legal elements of the enhancement and there is no statutory provision authorizing the court to submit this enhancement to the jury. Finally, the court violated Monday's rights under the Sixth and Fourteenth Amendments by increasing his sentence based on the judicial determination of a factual issue that the offenses were "separate and distinct" conduct.

B. ASSIGNMENTS OF ERROR.

1. The court erroneously refused to suppress evidence gathered as a result of the search and arrest warrant when the warrant was predicated on intentional and reckless disregard of the truth for information essential to the finding of probable cause.

2. The court erred and denied Monday his right to a meaningful appeal by failing to file written findings of fact as required by CrR 3.5 and CrR 3.6.

3. The court incorrectly defined the law of self-defense in Instruction 37 and erroneously provided Instruction 41.

4. Monday was denied effective assistance of counsel based upon his attorney's request that the court incorrectly explain the law of self-defense to the jury.

5. The prosecutor committed flagrant and ill-intentioned misconduct that prejudiced the fairness of the trial.

6. The court lacked authority to impose firearm sentencing enhancements when the jury was not correctly instructed on the essential elements of the firearm enhancement and the statute contains no procedure necessary for imposing this sentencing enhancement.

7. The court improperly increased Monday's sentence based on the factual determination that the offenses were separate and distinct, in violation of the Sixth and Fourteenth Amendments.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Evidence gathered as the result of a search or arrest warrant must be suppressed when the warrant authorizing the search and arrest was predicated upon an affidavit that contained intentional or reckless omissions of material facts that would undermine the probable cause determination. Here, the police intentionally or recklessly omitted critical information from the warrant affidavit. Is suppression required based on the reckless or intentional omissions of material information from the warrant affidavit that would have affected the determination of probable cause?

2. Defense counsel provides ineffective assistance of counsel when he proposes a clearly incorrect jury instruction defining the law of self-defense that dilutes the State's burden of disproving self-defense. Were the jury instructions that misstated the law of self-defense and have been uniformly condemned by prior cases, and which were proposed by defense counsel, reasonably likely to have affected the jury's deliberations?

3. A prosecutor commits flagrant and intentional misconduct depriving an accused person of a fair trial when he or she engages in repeated inflammatory and patently improper conduct. Here, the State committed numerous instances of misconduct, injecting extraneous and inflammatory information into the case and seeking a verdict based on the entirely improper racial stereotypes and derogation of criminal defendants. Did the prosecutor's plainly improper conduct deprive Monday of a fair trial?

4. The court lacks authority to impose 60-month firearm sentencing enhancements when the jury was not properly instructed on the definition of a firearm or the necessary elements of the firearm enhancement, and the underlying statute does not authorize procedures necessary to impose the enhancement. Did the court erroneously impose 60-month firearm enhancements in the case at bar based on the instructional error and lack of statutory procedure?

5. Under the Sixth and Fourteenth Amendments, a sentencing court may not increase an offender's sentence beyond that authorized by the jury's verdict by engaging in any judicial fact-finding. Here, the court increased Monday's sentence by finding three offenses committed at the exact same time and place

constituted "separate and distinct" conduct. Did the court violate Monday's rights to a fair trial by jury when it increased Monday's sentence based on a factual determination not made by the jury or proven beyond a reasonable doubt?

D. STATEMENT OF THE CASE.

Francisco Green was shot and killed after an argument with several people in Pioneer Square on April 22, 2006, shortly after 3 a.m. CP 104; 5/10/07RP 17, 25.¹ Chris Green, a friend of Francisco's but to whom he was not related, and Michael Gagney were also shot as they sat in a car. 5/16/07RP 80, 137, 142. Green and Gagney survived their injuries but neither person knew who shot them. 5/16/07RP 90, 156-57.

A nearby street performer turned his video camera to the unfolding street argument and ultimate shooting. 5/15/07RP 23, 58-59. The videotape is somewhat blurry and does not record the entirety of the incident, but shows a person firing a gun and contains a voice, purportedly Francisco's, announcing he had been shot.² 5/16/07RP 148-49.

¹ The verbatim report of proceedings (RP) will be referred to herein by the date of the proceeding followed by the page number.

² Because two principle figures in the event have the same last name, the brief will refer to both by their first names for purposes of clarity.

Antonio Saunders initiated the argument with Francisco. 5/17/07RP 37-41. One eyewitness told the police that Saunders was the shooter. 5/10/07RP 107-110, 127, 138. Saunders initially denied knowing anything about the shooting, but after he spent several weeks in jail having been identified as the shooter, Saunders told police that Kevin Monday shot Francisco. 5/17/07RP 29-30, 45. Saunders' girlfriend, Annie Sykes, also initially denied any knowledge of the shooting but ultimately told police Monday was the shooter. 5/21/07RP 157; 5/24/07RP 163, 169.

Monday was arrested based on the accusations by Saunders and Sykes. 5/1/07RP 135; 5/3/07RP 110. The police obtained a search warrant for his home and found .40 caliber bullets, some of which were from the same manufacturer as used in the shooting, a holster, and clothes similar to those worn by the shooter. 4/30/07RP 115-16. When arrested, Monday wore a large red shirt resembling the shirt worn by the shooter in the videotape. 5/2/07RP 10. Monday told police it was possible that it was the same shirt he wore to Pioneer Square on the night of the shooting. 5/3/07RP 202-03. After denying he was involved in the shooting and following several hours of questioning through the middle of

the night, Monday admitted he shot Francisco and said he did not mean to do so but believed Francisco was reaching for a gun and planned on shooting him. 5/7/07RP 45-47, 99, 121 (arrested at 9 p.m., police interview began at 11:35, ended at 4:30 p.m., all admissions came after 2 a.m.); 5/29/07RP 33-35, 52 (Monday's police statement).

Monday was charged with one count of first degree murder and two counts of first degree assault while armed with a firearm. CP 104-06. After a jury trial before Judge Michael Hayden, Monday was convicted of the charged offenses. CP 222-25. He was also charged with and convicted of unlawful possession of a firearm following a stipulated bench trial. 4/30/07RP 56-57. The court found the murder and two assaults were "separate and distinct" offenses and imposed consecutive sentences under RCW 9.94A.589(1)(b). CP 257. The court imposed a sentence of 773 months, including 120 months for firearm sentencing enhancements. CP 253-61.

The pertinent facts are discussed in further detail in the relevant argument sections below.

E. ARGUMENT.

1. WHERE THE SEARCH AND ARREST WARRANT RECKLESSLY OMITTED CRITICAL EVIDENCE UNDERMINING THE CLAIM OF PROBABLE CAUSE, THE UNLAWFULLY SEIZED EVIDENCE AND ITS FRUITS MUST BE SUPPRESSED

a. A warrant must be based upon probable cause

under the federal and state constitutions. The Fourth and Fourteenth Amendments of the United States Constitution and Article I, §§ 3 and 7 of the Washington Constitution protect citizens from unreasonable searches and seizures and provide that a search warrant may only be issued upon a showing of probable cause. Kyllo v. United States, 533 U.S. 27, 40, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001); State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999); U.S. Const. amends. IV³ & XIV; Wash. Const. Art. I, §§ 3,⁴ 7.⁵

³ The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

⁴ The Fourteenth Amendment and Article 1, § 3 guarantee due process of law.

⁵ Article 1, § 7 of the Washington Constitution states, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

When a warrant affiant uses intentional or reckless perjury to secure a warrant, “a constitutional violation obviously occurs” because “the oath requirement implicitly guarantees that probable cause rests on an affiant’s good faith.” State v. Chenoweth, 160 Wn.2d 454, 473, 158 P.3d 595 (2007), citing Franks v. Delaware, 438 U.S. 154, 155-56, 98 S.Ct 2674, 57 L.Ed.2d 667 (1978).

Recklessness may be shown by evidence that the affiant actually entertained serious doubts about the informant’s veracity. State v. Clark, 143 Wn.2d 731, 751, 24 P.3d 1005 (2001). Serious doubts of the informant’s veracity may be inferred from either the affiant’s actual thought process or the existence of obvious reasons to doubt the informant’s veracity or the information provided. Id.

The affidavit or other evidence submitted in an application for a search warrant must set forth the facts and circumstances the police assert create probable cause, so the issuing judge or magistrate may make a detached and independent evaluation of whether probable cause exists. Thein, 138 Wn.2d at 140.

Probable cause is established if a reasonable, prudent person would understand from the facts contained in the affidavit that the defendant is probably involved in criminal activity and that evidence

of the crime can be found in the place to be searched, at the time the search occurs. Id.

Because probable cause to issue a search warrant involves an issue of law, the appellate court reviews the probable cause determination *de novo*. Detention of Peterson, 145 Wn.2d 789, 799-800, 42 P.3d 952 (2002), citing Ornelas v. United States, 517 U.S. 690, 699, 116 S. Ct. 1657, 134 L. Ed. 2d 1657 (1996). Appellate courts review findings of fact for clear error. Ornelas, 517 U.S. at 699.⁶

b. The police intentionally or recklessly excluded information material to probable cause from the warrant affidavit. In order to challenge the validity of a warrant based on a misrepresentation of fact in the supporting affidavit, Franks requires a defendant to show by preponderance of the evidence that the warrant affiant made intentional falsehoods or omitted material facts with reckless disregard for the truth. Franks, 438 U.S. at 155-56. Misstatements or omissions as a result of simple negligence or innocent mistake are insufficient. Id. at 171; Chenoweth, 160 Wn.2d at 486. The defendant's showing must be based on specific

⁶ The trial court did not enter any written findings of fact pertaining to any of the suppression motions heard by the court.

facts and offers of proof. State v. Garrison, 118 Wn.2d 870, 827 P.2d 1388 (1992).

If the defendant establishes the affiant's intentional or reckless disregard for the truth by a preponderance of the evidence, the court must add the material omissions; and if the modified affidavit then fails to establish probable cause, the warrant is void. Franks, 438 U.S. at 155-56. The court must then suppress evidence obtained as a result of the warrant. Id.

i. The warrant affidavit did not mention the significant biases of the witnesses on which it relied. The warrant affidavit seeking to arrest Monday and search his home rested on two witnesses, Antonio Saunders and Annie Sykes, who identified Monday as the shooter in the Pioneer Square incident. CP 54-60 (copy attached as Appendix A); 5/1/07RP 139; 5/3/07RP 110. These witnesses were unnamed in the warrant affidavit based on the broadly stated claim that all witnesses referenced in the affidavit, "have been extremely reluctant to provide information, have expressed great concern for their safety if their cooperation with the investigation becomes known, and have strongly urged your affiant not to name them at this time." CP 55.

ii. Reckless or intentional omission of Saunders' bias and personal interest in the case. Most critically, the warrant application did not divulge the circumstances in which Monday's identification arose, and this identification was the critical proof connecting Monday to the shooting. The affidavit did not mention that Saunders told police Monday was the shooter only after Saunders had been held in jail for two weeks because a bystander had identified him as the shooter. CP 55-56.

Saunders had been arrested several days after the shooting when Hayes Murchison called 911 and solicited police officers patrolling the area to report he had been present during the shooting and he saw the shooter sitting in a nearby park. 5/1/07RP 103-04. The police first stopped one man but released that person when Murchison told police he was not the right person. 5/1/07RP 167-68. Shortly after, Murchison identified Saunders as the shooter. Id. Saunders was booked into jail on a Department of Corrections (DOC) warrant. 5/1/07RP 104.⁷

⁷ This "warrant" was further explained at trial as one manufactured by the arresting officer, who learned Saunders was on community custody, smelled alcohol on his breath, and contacted DOC for authorization to arrest him based on a violation of the condition of community custody. 5/10/07RP 139-40. There was no pre-existing warrant for Saunders' arrest prior to Murchison's identification of him as the shooter.

The affidavit mentions nothing of Saunders' present in-custody status. It cryptically states that the police "located" Saunders "at the Regional Justice Center in Kent," but does not mention that Saunders was an inmate in the jail, as opposed to a person attending court proceedings or otherwise involved in business or personal matters at the justice center. CP 56; 5/1/07 139; Pretrial Ex. 13, p. 4 (Saunders' criminal history, includes two firearm possession convictions).

The homicide detectives investigating the shooting, Allan Cruise and Rick Weklych, immediately interviewed Saunders. Saunders denied he was present during the shooting. 5/1/07RP 103-05. The affidavit cursorily acknowledged Saunders had initially "denied being at the shooting." CP 55. But it did not explain that the initial denial came the day after Saunders had been identified as the shooter, arrested, and jailed. This denial occurred even though the police had spoken with two people who said he was not only present during the shooting but actually involved in the incident. 5/1/07RP 103-04; 5/3/07RP 85-86.

Saunders changed his story only after his girlfriend, Annie Sykes, had a heated, day-long police interview in which she identified Monday as the shooter and then visited Saunders in jail.

5/3/07RP 103-04. The day after Sykes visited Saunders following her police interview, Sykes' mother contacted police. 5/1/07RP 125; 5/3/07RP 103. Sykes' mother told police that she and Sykes had visited Saunders in jail after Sykes' police interview, discussed the shooting with him, and Saunders wanted to give the police a new account of events. 5/3/07RP 103. Sykes' name for Saunders was "Baby." Pretrial Ex. 11, p. 2-3. The warrant affidavit contains no mention of how Saunders came to change his story and the direct connection between Sykes' identification and Saunders' prompt efforts to revise his story.

The warrant affidavit rested largely on Saunders' report of events to police but without any explanation that Saunders' change of heart and interest in cooperatively identifying Monday as the shooter occurred only after Saunders had spent two weeks in jail without any prospect of release, he had been identified by two witnesses as either the shooter or a person involved in the altercation that precipitated the shooting, his girlfriend who referred to him as "Baby," had been hounded by the police, and, after a contentious day-long interview, his girlfriend had just told police that Monday was the shooter. Sykes' interaction with police is discussed below.

iii. Reckless or intentional omission of material information casting doubt on Sykes' claims. The police began looking for Sykes as soon as they received her name from Saunders in his first police interview on April 27, 2006, as she had been identified by Nakita Banks as present during the argument and shooting. 5/3/07RP 85.

The warrant affidavit briefly summarized the evolution of Sykes' story during her police interview. But this summary significantly overstates Sykes's certainty of Monday's involvement and greatly distorts her credibility. The affidavit said Sykes was emotional, tearful, and frightened of retaliation during the interview, but implies this "fright" was a fear of Monday when her obstructionist demeanor was not simply due to such a fear. CP 55.

The warrant affidavit did not include the following information: Despite regularly visiting Sykes' home and leaving numerous messages with her mother, Georgia Brown, Sykes avoided the police for several weeks. On May 9, 2006, the police found Sykes leaving her home to take her daughter to school. She was "uncooperative" from the start, "very upset," and the police described their interview with her as "quite a battle" as they kept

“pressure” on her to change her story or provide information that thought was accurate. 5/3/07RP 22-23, 36.

The police interviewed Sykes for most of the day in a small room that may have been a holding cell. 5/3/07RP 20, 118; Pretrial Ex. 11 (interview began 9 a.m., taped statement ended 2:06 p.m.). They felt there was “reason to disbelieve” her until she identified Monday. 5/3/07RP 93. They continually told her to stop lying to them and she persistently complained that she should not be forced to talk to the police. Eventually Sykes said she was present for the shooting but insisted she did not know the shooter, and said, “I swear to God I never seen him before, I don’t know him.” 5/12/07RP 53, 56, 57. Sykes told police that the shooter was a person who knew Saunders and she met for the first time that night. 5/3/07RP 40-42. She said his name was “Infamous or Sunday or a day of the week.” 5/3/07RP 42.

The warrant affidavit did not accurately explain the equivocal nature of Sykes’ identification of Monday. The affidavit says Sykes told police “she knew him [the shooter] as ‘Monday.’” CP 55. Yet Sykes actually said she had no idea who the shooter was and, after further “pressure,” said it was the first time she had met the shooter and she was unsure of his name. 5/3/07RP 40. She said she had

heard on the street that his name was, "Infamous or Sunday or some day of the week," and "I think it's Monday," but did not know if that was a street name or his real name. 5/3/07RP 45; Pretrial Ex. 11, p. 20.

The only physical description Sykes gave of the shooter was "just kind of big and tall," although the warrant affidavit misleadingly asserts she "gave a physical description of this man" CP 55; Pretrial Ex. 11, p. 15.

According to the warrant affidavit, she "identified" Monday's photograph in a montage and only later, during a tape-recorded statement, she waffled and said the man's name was "'Monday,' 'Sunday,' or Infamous'" and was in one of two photographs in the montage. CP 55-56.

In fact, Sykes said from the outset, when shown a six person montage, that it was between two people and asked to pick both people . 5/1/07RP 77. She did not hesitate only when the tape recording occurred, but claimed she could not decided between two photographs throughout the detective's identification efforts. She further explained that she did not get a good look at the shooter's face and had never seen him before this incident. Pretrial Ex. 11, p. 15, 17. The affidavit greatly overstated the

strength and certainty, not to mention the underlying motive to lie, for Sykes's identification of Monday.

iv. Reckless disregard for the truth of additional facts in the warrant affidavit. The affidavit does not include information that Murchison told police he witnessed the shooting, described it, and identified Saunders as the shooter. It did not say that when interviewed about one week after identifying Saunders, Murchison recounted the shooting and reaffirmed his certainty that the person he identified, Saunders, was the shooter. 5/1/07RP 112. It also did not explain that while Murchison did not positively identify a photograph of Saunders two week after his on-the-street identification, Murchison also did not believe Monday was present during the shooting and selected another person in a police montage. 5/1/07RP 109.

The affidavit alleged Monday "may be involved" in other shooting incidents, including another homicide. CP 56; 5/1/07RP 143. However, the affidavit did not mention that Monday was "involved" as a victim in one incident. Other information most likely came from Saunders, who described Monday as having been shot while in Virginia, and purportedly indicated Monday had been involved in a homicide, although that is not contained in his taped

statement. 5/1/07RP 144, 147, 149; Pretrial Ex. 12, p.9. The sources of these allegations were vague, unconfirmed, and may have come from Saunders. 5/1/07RP 144-45, 153. While Monday had a prior conviction for an attempted drive-by shooting, the police were not certain if this was the same incident that purportedly established a history of violent acts or if there was another one. 5/1/07RP 146. The misleading information was presented vaguely in the affidavit, under the guise of "information" that "indicates" Monday "may be involved" in these other incidents but in fact, the implications of wide-ranging suspicion for shooting firearms at others was not supported by reasonable belief.

The affidavit did not mention that the police had been investigating other suspects identified as likely perpetrators by the decedent's family. In addition to Sykes's claim that the shooter was called "Infamous," Francisco's girlfriend and family also told police that they had been told "Infamous" was the shooter. 5/1/07RP 97-98. When interviewing "Infamous," or Anthony Adams, he told police that another person, "Get Money," had claimed he shot Francisco. 5/1/07RP 99-100. The warrant affidavit says nothing of these other suspects and their suspected or even admitted involvement.

c. The material omissions undermine the probable cause determination made by the court. An omission from a warrant is “material” if it would affect the finding of probable cause. State v. Copeland, 130 Wn.2d 244, 277, 922 P.2d 1304 (1996); State v. Gentry, 125 Wn.2d 570, 604, 888 P.2d 1105 (1995). Article I, § 7 of the Washington Constitution “requires that, in evaluating the existence of probable cause in relation to informants’ tips, the affidavit in support of the warrant must establish the basis of information and credibility of the informant.” State v. Jackson, 102 Wn.2d 432, 433, 688 P.2d 114 (1984).⁸

In Jackson, the Washington Supreme Court rejected the “totality of the circumstances” approach under Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), and affirmed the two-pronged Aguilar-Spinelli approach. Id. at 443. In rejecting the Gates approach, the Court reasoned,

To perform the constitutionally prescribed function, rather than being a rubber stamp, a magistrate requires an affidavit which informs him of the underlying circumstances which led the officer to conclude that the informant was credible and obtained the information in a reliable way. Only in this way (as the Court emphasized in Aguilar and Spinelli) can the magistrate make the proper independent judgment about the persuasiveness of

⁸ Citing Spinelli, 393 U.S. 410; Aguilar v. Texas, 378 U.S. 108.

the facts relied upon by the officer to show probable cause.

Jackson, 102 Wn.2d at 436-37. The two prongs of the Aguilar-Spinelli test have an independent status, and both are required to establish probable cause. Id. at 437.

Under the second, "credibility," prong an affiant for a search warrant based on an informant's claim of criminal activity must present the issuing magistrate with sufficient facts to determine the informant's credibility and reliability. State v. Huff, 33 Wn.App. 304, 307-08, 654 P.2d 1211 (1982). The search warrant affidavit must, within its four corners, establish the credibility of the informant.

Jackson, 102 Wn.2d at 433.

Different rules exist for establishing the credibility of an informant, depending on whether the informant is a professional informant or a private citizen. State v. Ibarra, 61 Wn. App. 695, 699, 812 P.2d 114 (1991), citing State v. Franklin, 49 Wn. App. 106, 108, 741 P.2d 83, review denied, 109 Wn.2d 1018 (1987).

When the informant is a "citizen informant," a presumption of reliability reduces the State's burden of demonstrating the informant's reliability. State v. Northness, 20 Wn.App. 551, 556-57, 582 P.2d 546 (1978).

In contrast, courts require a heightened showing of credibility where the informant is a criminal informant. State v. Rodriguez, 53 Wn. App. 571, 574-76, 769 P.2d 309 (1989). Courts presume criminal, or “professional”, informants to be unreliable because professional informants have ulterior motives for making an accusation. Northness, 20 Wn.App. at 557. The primary method to establish a criminal informant’s credibility is to require the affidavit to include facts showing the informant’s “track record”—a record that he or she provided accurate information to the police a number of times in the past. Jackson, 102 Wn.2d at 437.

While Saunders and Sykes were not promised a specific benefit for their “cooperation,” they had significant personal stakes in the outcome of the homicide investigation. Two bystanders with no apparent role in the incident had independently identified Saunders as the shooter or an accomplice involved in the fight that precipitated the shooting. Saunders was in jail because he had been identified as the shooter. Saunders and Sykes were in a long-term relationship, and while it was an “on and off” relationship, both called each other “baby” when speaking to the police and both communicated with the police through Sykes’s mother, thereby indicating a significant personal relationship. Saunders certainly

faced the potential of criminal charges as an accomplice, because he admitted knowing Monday had a gun before Saunders initiated the fight with Francisco and Monday joined in the fight to aid Saunders. Saunders kept himself from being an accomplice to the homicide only because he claimed he did not want Monday involved in the fight. Had Saunders admitted he encouraged or sought Monday's aid while knowing Monday was armed, Saunders would have admitted his complicity in the homicide.

Courts have long recognized the inherent credibility questions arising from a cohort's allegations against a suspect. See Lilly v. Virginia, 527 U.S. 116, 133, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999) (noting "presumptive unreliability" of suspect's non-self-inculpatory statements to police); see also Crawford v. Washington, 541 U.S. 36, 65-66, 124 S.Ct. 1354, 158 L.Ed.2d 117 (2004) (potential suspect's statement to police not reliable). Saunders and Sykes do not benefit from any presumption of veracity that may attach to an accomplice who gives statements against his or her own penal interests. See e.g., State v. Estgora, 60 Wn.App. 298, 304, 803 P.2d 813, rev. denied, 116 Wn.2d 1027 (1991) (statement against penal interest may enhance informant's credibility). Both steadfastly distanced themselves from the

shooting and did not admit to any encouragement of or aid in the shooting, despite their involvement in the fight that preceded the shooting.

Washington courts have also given increased credibility to informants who police designate by name in their search warrant applications. State v. O'Connor, 39 Wn. App. 113, 121, 692 P.2d 208 (1984). Here, Sykes especially complained that she did not want her name attached to any police report and the police did not name either person in the affidavit. While the police knew their names, the fact that they wished to hide their identities does not bolster their veracity.

The omitted information regarding Saunders' in-custody status is material because it is central to the question of his credibility as an informant under Aguilar-Spinelli. His continued and indefinite detention following Murchison's identification of him as the shooter is material because it suggests many ulterior motives for making a false accusation. His credibility could have been affected by deals with the police to gain his release. Sykes' visit the Saunders in jail the day before Saunders came forward with a new story inculcating Monday detracts from the credibility of

the identification based upon the significant reasons both had to inculcate someone else.

The court who granted the search and arrest warrant was unable to consider these potential ulterior motives in his evaluation of probable cause because he did not know Saunders was in custody after being identified as the shooter, or that he changed his story the day after his girlfriend visited him in jail and told him of the story she gave to police, or that Sykes gave a very equivocal identification of Monday, who she did not know before the incident, after a day of being pressured by the police. As Justice Sanders reasoned in his dissent in Chenoweth,

[T]he magistrate cannot determine if there is probable cause when the affidavit misinforms him of the underlying circumstances; the magistrate cannot judge whether the informant was credible or obtained the information in a reliable way. Only by ensuring the magistrate is presented with truthful and complete information can he make a proper and independent judgment and act with authority of law.

Chenoweth, 160 Wn.2d at 486 (Sanders, J., dissent). The court's determination of probable cause was meaningless because it was not based on truthful and complete information.

Furthermore, adding the omitted information to the warrant affidavit, the credibility of Monday's accusers and their identification

of him was simply too tenuous and unreliable to amount to probable cause. The omissions were material and Franks requires suppression of evidence resulting from the search and arrest warrant.

d. The court's failure to enter findings of fact undermines Monday's ability to meaningfully appeal his conviction.

When the court conducts an evidentiary hearing to resolve a motion to suppress evidence, the court "shall" file written findings of fact and conclusions of law. CrR 3.6(b); CrR 3.5(c). The rule is mandatory. See e.g., State v. Krall, 125 Wn.2d 146, 881 P.2d 1040 (1994) (the word "shall" in a statute is presumptively imperative and creates a duty); RAP 1.2(b) (when a word indicating "must" rather than "should" is used, the rule emphasizes that failure to perform act in timely way involves severe sanctions).

The purpose of written findings is not merely to assist, but to enable an appellate court's review of questions presented on appeal. Head, 136 Wn.2d at 622; State v. Alvarez, 128 Wn.2d 1, 16, 904 P.2d 754 (1995). The oral opinion has no binding effect unless expressly incorporated in to a final written judgment. Head, 136 Wn.2d at 622. The absence of findings of fact is interpreted as

a finding against the party with the burden of proof. State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997).

When the lack of written findings prejudices the defendant's right to appeal, reversal is the proper remedy. Head, 136 Wn.2d at 624; see State v. Dahl, 139 Wn.2d 678, 692-93, 990 P.2d 396 (1999) (Alexander J., dissenting) (grounds for finding prejudice include reliance on inadmissible evidence and lengthy delay in proceedings); State v. Witherspoon, 60 Wn.App. 569, 572, 805 P.2d 248 (1991) (late findings violate appearance of fairness and require reversal where remand is inadequate remedy based on lengthy delay and defendant's continued custody).

Here, the court's oral ruling was very brief and does not resolve the material, disputed evidence presented at the hearing. In light of the deficiencies in the court's oral ruling, permitting the prosecution to draft findings at this late date allows them another opportunity to litigate the case and to correct the court's inadequate legal analysis based on the complaints of Monday's appeal.

The findings required by CrR 3.5 and 3.6 are mandatory, and it is unfair to let the prosecution or court correct the errors made during the pretrial hearings one year after the hearing, during the appellate process. Furthermore, the absence of findings

makes it difficult for Monday to appeal when the trial court's ruling is vague and does not resolve numerous factual discrepancies. Merely remanding the case for the court to consider whether additional findings are appropriate is an inadequate remedy when no findings whatsoever have been entered. The resulting prejudice requires reversal. Witherspoon, 60 Wn.App. at 572.

2. WHERE THE COURT IMPROPERLY DEFINED A MATERIAL ELEMENT OF SELF-DEFENSE BECAUSE DEFENSE COUNSEL PROPOSED CLEARLY ERRONEOUS JURY INSTRUCTIONS, MONDAY WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

a. Monday has a constitutional right to effective assistance of counsel. A person accused of a crime has a constitutional right to effective assistance of counsel. United States v. Cronin, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); U.S. Const. amend. 6;⁹ Wash. Const. art. 1, § 22.¹⁰

To prevail in a claim of ineffective assistance of counsel, a defendant must show, "First, [that] counsel's performance was

⁹ The Sixth Amendment provides in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the Assistance of Counsel for his defense."

deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense.” Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). An attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical reason. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not tactical or strategic if it is not reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); see also Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003) (“[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms,” quoting Strickland, 466 U.S. at 688).

While an attorney’s decisions are treated with deference, his or her actions must be reasonable based on all circumstances. Wiggins, 123 S.Ct. at 2541; State v. Tilton, 149 Wn.2d 775, 72 P.2d 735 (2003). To assess prejudice, the defense must demonstrate grounds to conclude a reasonable probability exists of

¹⁰ Art. I, § 22 provides in part, “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, . . . [and] to have a speedy public trial by an impartial jury”

a different outcome, but need not show the attorney's conduct altered the result of the case. Tilton, 149 Wn.2d at 784.

b. Defense counsel's request that the court provide an incorrect and repeatedly criticized jury instruction defining self-defense constitutes deficient performance. Proposing an incorrect jury instruction is presumptively deficient. State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987) ("A reasonably competent attorney would have been sufficiently aware of relevant legal principles to enable him or her to propose an instruction based on pertinent cases."). There is no tactical or strategic reason to propose an instruction that incorrectly states the law. State v. Woods, 138 Wn.App. 191, 156 P.3d 309, 314 (2007) (in light of case law on issue, "there was no strategic or tactical reason for counsel's proposal of an instruction that incorrectly stated the law."); State v. Rodriguez, 121 Wn.App. 180, 187, 87 P.3d 1201 (2004) (no conceivable or strategic reason to propose incorrect and disfavored self-defense instruction). The doctrine of invited error doctrine does not prevent a claim of ineffective assistance of counsel based on an erroneous instruction. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

i. The appropriate jury instructions defining self-defense are clearly settled. All jury instructions setting forth the law of self-defense must make the relevant legal standard manifestly apparent to the average juror. State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996); see State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Because the jury is not expected to know which instruction is correct, a single incorrect instruction undermines the validity of the instructions as a whole. State v. Cowen, 87 Wn.App. 45, 50-52, 939 P.2d 1249 (1997) (ambiguity created by single incorrect self-defense instruction could affect verdict and requires reversal).

It is erroneous to instruct the jury that in order to find an accused person acted in self-defense, it must find he or she feared "great bodily harm." Even in a homicide case, a defendant does not have to establish that he reasonably feared "great bodily harm" to justify the use of deadly force. State v. Freeburg, 105 Wn.App. 492, 505, 20 P.3d 984 (2001). Instead, the use of deadly force is justified if he or she reasonably feared "great personal injury." Walden, 131 Wn.2d at 477; Freeburg, 105 Wn.App. at 505.

The "great bodily harm" standard used in the case at bar in Instruction 37 has been repeatedly criticized. CP 209; Walden,

131 Wn.2d at 475; Woods, 156 P.3d at 314; Freeburg, 105 Wn.App. at 505, 507; State v. Corn, 95 Wn.App. 41, 49-50, 975 P.2d 520 (1999) (using “great bodily harm” standard incorrectly increases threshold for establishing self-defense). “Great bodily harm” improperly increases the degree of injury a defendant must fear before his or her actions may be legally justified, and instead the court should use the phrase “great personal injury.” Freeburg, 105 Wn.App. at 504. The difference between the two phrases is that “great personal injury” requires an injury that would produce severe pain and suffering, while “great bodily harm” requires the probability of death or significant permanent impairment of a bodily function. Walden, 131 Wn.2d at 477; Freeburg, 105 Wn.App. at 504. Here, Instructions 41 and 42 defined both these phrases, so the jury was well aware that “great bodily harm” required the defendant confront deadly force to have acted in lawful self-defense. CP 213-24.

ii. Monday’s attorney asked the court to give incorrect definitions of self-defense that made it more difficult for the jury to find Monday acted in self-defense Here, defense counsel proposed an incorrect self-defense instruction and the

court gave the instruction as requested. CP 209 (Instruction 37);

CP 147 (Defense proposed instruction). Instruction 37 provided:

A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of **great bodily harm**, although it afterwards might develop that the person was mistaken as to the extent of the danger.

Actual danger is not necessary for a homicide to be justifiable.

CP 209 (emphasis added). Another instruction explained when a homicide is justifiable, including the requirement that:

- (1) the slayer reasonably believed that the person slain intended to inflict death or great personal injury;
- (2) the slayer reasonably believed that there was imminent danger of such harm being accomplished;

...

CP 207 (Instruction 35). The court provides the definitions of "great bodily harm" and separately defined "great personal injury." CP 209 (Instruction 41); CP 210 (Instruction 42).

In Freeburg, the court gave similar instructions. 105 Wn.App. at 503. The court defined justifiable homicide with the phrase "great personal injury" but the court also instructed the jury that a person is entitled to act on appearances in defending himself if he has reasonable grounds to believe that he is in danger of "great bodily harm." Id. at 505. The Freeburg Court found the

instruction using the “great bodily harm” language incorrectly altered the appropriate analysis for self-defense. Id.

The Freeburg Court warned that because the pattern jury instructions contained the incorrect “great bodily harm” language, “it is imperative that trial courts make the correction to the standard instructions that the Committee has not yet made.” Id. at 507 (emphasis added). The Court ruled that “in future justifiable homicide cases, courts should follow the advice set forth in the comment to WPIC 2.04.01 and replace the phrase 'great bodily harm' with the phrase 'great personal injury' in the act on appearances instruction.” Id. The court further noted that the “great bodily harm” standard would be especially harmful in cases involving deadly force against an unarmed assailant because the “great bodily harm” language “could cause a jury to reject self-defense without considering the defendant's right to act on appearances.” Id. at 506.

The line of cases criticizing the “great bodily harm” language in the “act on appearances” instruction demonstrates that no attorney who had properly researched the governing legal standard would propose such an instruction. See Freeburg, 105 Wn.App. at 505; Rodriguez, 121 Wn.App. at 187; see also Walden, 131 Wn.2d

a 477. The pattern jury instructions written in 1998 tell the court to substitute “great personal injury” for “great bodily harm” language. Rodriguez, 121 Wn.App. at 186. The trial in the case at bar was held in October 2005, one year after Rodriguez, four years after the decision in Freeburg, and many more years after the 1997 decision in Walden.

As the Freeburg Court noted, using the incorrect “great bodily harm” language creates a particularly acute error where the victim was unarmed and a juror could have doubted that the defendant faced a potentially deadly injury while still believing he or she faced a serious physical threat. 105 Wn.App. at 505. Because there is no conceivable tactical or strategic reason counsel would have requested this instruction and purposefully decreased the State’s burden to disprove self-defense, counsel’s performance was unreasonable and deficient. Rodriguez, 121 Wn.App. at 187 (finding “net effect” of proposing act on appearance instruction with great bodily harm language is to decrease State’s burden to disprove self-defense).

c. The incorrect jury instruction undermines confidence in the outcome of the case. An attorney’s deficient performance requires reversal when there is a reasonable

probability that the outcome could have been different without the error. Strickland, 466 U.S. at 694; In re Pers. Restraint of Hubert, 138 Wn.App. 924, 932, 158 P.3d 1282 (2007) (reversing for ineffective assistance where court's instructions did not make available defense "inevitabl[y]" apparent). A defendant is not required to prove that he would not have been convicted but for the error. See e.g., House v. Bell, 547 U.S. 518, 552-53, 126 S.Ct. 2064, 2086, 165 L.Ed.2d 1 (2006) (reversing for ineffective assistance based on new evidence where, even though jury might disregard new evidence, it "would likely reinforce doubts" as to defendant's guilt). The reasonable probability standard requires only that the error was sufficiently material that it undermines confidence in the jury's verdict. Nix v. Whiteside, 475 U.S. 157, 175, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986).

In Freeburg, the court found the great bodily harm language could not have affected the verdict because Freeburg claimed he was reacting to the victim pointing a firearm at him in very close range. The court found that when a defendant reacts to an armed victim pointing a loaded gun at him, the defendant's claim of self-defense would have satisfied even the incorrect standard indicated

by the “great bodily harm” instruction, and accordingly, the error could not have affected the outcome. 105 Wn.App. at 505.

In the case at bar, Monday believed Francisco was reaching for a firearm but Francisco did not actually try to shoot Monday with one and it was unclear whether anyone else had a gun. 5/29/07RP 33-35, 52. Monday said he feared Chris Green or Gagney were going to either give Francisco a gun or otherwise attack him, and that is what prompted him to shoot. The videotape itself shows Francisco running to Chris’s car and saying what sounds like, “Chris, get out of the car, get out of the car, they’re trying to jump me.” 5/16/07RP 149. Because Monday did not actually struggle over a firearm and necessarily face imminent deadly force as in Freeburg, the assessment of prejudice differs from Freeburg. While Freeburg faced the threat of actual deadly force, Monday’s self-defense rested upon his perception that he was about to either be confronted by a firearm or attacked by Francisco Green and the two men in the car, which would not meet the “great bodily harm” definition but could indeed have been a reasonable fear of serious injury as is required by “great personal injury.”

The self-defense instructions were plainly erroneous and have been repeatedly criticized as improperly diluting the State’s

burden of proof in a justifiable homicide case. The harm from the error is also plain, as the instructions made it impossible for the jury to find Monday acted in self-defense if he feared an injury less than the threat of death. The State's case against Monday was riddled with not only uncooperative, but also untrustworthy witnesses.

5/14/07RP 86. Even the people who were shot did not want to give the police any information about the incident or their roles in the incident. 5/14/07RP 85-88. While the case would have been impossible to prosecute without the videotape, the videotape does not capture the entire incident and therefore, it cannot cure the conflicting and unconvincing testimony offered by eyewitnesses. Because it is reasonably likely that the verdict would have been different had the court given clear and accurate instructions defining self-defense, reversal is required.

3. THE PROSECUTOR'S FLAGRANTLY
IMPROPER AND ILL-INTENTIONED
COMMENTS DURING CLOSING ARGUMENT
REQUIRE REVERSAL.

a. A prosecutor violates the bounds of fair conduct by aggressively deriding a defendant's credibility and continually injecting inflammatory claims based on information outside the record. A prosecutor, as a quasi-judicial officer, has a duty to act

impartially and to seek a verdict based on matters in the record.

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1934); State v. Echevarria, 71 Wn.App. 595, 598, 860 P.2d 420 (1993). As the Washington Supreme Court has said:

[T]he prosecutor represents the state, and in the interest of justice must act impartially. His trial behavior must be worthy of his office, for his misconduct may deprive the defendant of a fair trial. . . . We do not condemn vigor, only its misuse. . . . No prejudicial instrument, however, will be permitted. His zealotry should be directed to the introduction of competent evidence.

State v. Hunson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969); see also State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Prosecutorial misconduct may deprive a defendant of a fair trial, and only a fair trial is a constitutional trial. Donnelly v. DeChrisoforo, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

Prosecutorial misconduct requires reversal when the improper conduct is substantially likely to affect the jury's verdict. State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). Where improper statements are not objected to, reversal is still required when the misconduct is so flagrant and ill-intentioned that no jury

instruction would have cured the problem. 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

b. The prosecutor encouraged the jury to rely on his personal experience and his prosecutorial maxim that criminal defendants “are inherently unreliable.” A prosecutor’s personal beliefs or extrajudicial governmental experiences have no place in a deliberating jury’s assessment of whether the State met its burden of proof. See United States v. Brooks, 508 F.3d 1205, 1209-10 (9th Cir. 2007) (prosecutor “threatens integrity” of conviction by indicating information not presented to jury supports government’s case).

“It is always improper for a prosecutor to suggest that a defendant is guilty merely because he is being prosecuted.” Washington v. Hofbauer, 228 F.3d 689, 701-02 (6th Cir. 2000) (quoting United States v. Bess, 593 F.2d 749, 754 (6th Cir. 2000) (collecting cases)); see United States v. Young, 470 U.S. 1, 18, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) (prosecutor’s expression of personal opinion of guilt is improper). A prosecutor “carries a special aura of legitimacy” as a representative of the State. Bess, 593 F.2d at 755. Thus, “the prosecutor’s opinion carries with it the imprimatur of the Government and may induce the jury to trust the

Government's judgment rather than its own." Young, 470 U.S. at 18-19.

Additionally, a prosecutor's "position of trust and experience in criminal trials may induce the jury to accord unwarranted weight to his opinions regarding the defendant's guilt." United States v. Splain, 545 F.2d 1131, 1135 (8th Cir. 1976). The prosecutor may not suggest that his or her opinion rests on evidence beyond that presented at trial. Id.

The United States Supreme Court recognized long ago that a prosecutor acts improperly by giving the personal impression of the defendant's credibility even when such an impression was invited by defense counsel. Young, 470 U.S. at 17; see United States v. Cannon, 88 F.3d 1495, 1502 (8th Cir. 1996) ("Referring to defendants as 'bad people' simply does not further the aims of justice or aid in the search for truth, and is likely to inflame bias in the jury and to result in a verdict based on something other than the evidence.").

i. Injecting years of prosecutorial experience and the prestige of office. In the case at bar, the prosecutor began his closing argument by telling the jury of the "17 years and 11 months" of experience he had as a prosecutor, 15 years of which

he specialized in homicide cases. 5/30/07RP 26-27. He reminded jurors he served “at the pleasure of Norm Maleng.” Id. Maleng was the long-time and well-respected elected prosecutor of the county who had suddenly died only four days earlier.¹¹

The prosecutor then bragged to the jury about the “many murder cases” he had tried in the last 15 years. 5/30/07RP 27. He explained that when he started at the prosecutor’s office, “seventeen years and eleven months ago yesterday,” he learned “two tenets that all good prosecutors, I think, believe.” Id. The first tenet involved the prosecutor’s difficulty in creating a compelling closing argument in a “really, really, really strong case,” and the second tenet was that “the word of a criminal defendant is inherently unreliable.” Id. “Both of those tenets have proven true time and time again over the years, and they have done it specifically in this case” Id.

The prosecutor’s years of experience pursuing many murder cases, the judgments he gathered over those years, and the fact that his employer was the recently deceased prosecutor, were simply not evidence in the case. Rather, the prosecutor injected

¹¹ Steven Gutierrez, Tracy Johnson, and Levi Pulkkinen, Maleng Dead at 68, Seattle P.I., May 27, 2007 (available at: http://seattlepi.nwsourc.com/local/317243_maleng25.html).

his background as a way to encourage the jury to trust him and to have faith in his efforts prosecuting Monday. His years of experience and the wisdom he gained from such experience were in no way part of the evidence presented at trial, and the prosecutor's assertion of the importance of his background and skills was an improper effort to encourage the jury to decide the case based upon trust in the prosecution.

ii. Vouching that this is a "really, really, really strong case." The first "tenet" and "old adage" that the prosecutor learned almost 18 years earlier and that had been proven true "time and time again" was that it was very difficult to have a compelling closing argument when the case was "really, really, really strong." 5/30/07RP 27, 30. The prosecutor told the jury they could rest assured that this "old adage" applied in the case at bar and thus, he would not attempt a lengthy closing argument. 5/30/07RP 30. This case, the prosecutor explained, was one of those "really really good" cases where it was hard to create a compelling closing argument. Id. at 30. He also told the jury that this case was not "typical" of what you get in the courthouse but rather "the most fascinating" case around. 5/30/07RP 31.

By telling the jury that this was a “really good case,” the prosecutor was not relaying information pertinent to deliberation, but rather impressing upon the jury that it should excuse the prosecutor from his closing argument because it was a “tenet” of a good prosecutor that it would be hard for any such “good prosecutor” to deliver a good closing argument in a case like this one. 5/30/07RP 27, 30.

The prosecutor was not only trying to excuse any failings of his own performance, but more insidiously, he was explaining to the jury that, in his opinion, based on his years of prosecutorial experience, and drawing from the “old adage,” this was a “really, really good case.” Such personal opinions are improper devices to secure a conviction and impermissibly encourage a conviction based on the experienced prosecutor’s personal opinion. Brooks, 508 F.3d at 1210.

iii. Attesting to the inherently unreliable criminal defendant. In the case at bar, the prosecutor repeatedly, thematically, exclaimed that there is a truism among good prosecutors that all criminal defendants are always unreliable in whatever they say. 5/30/07 27, 43, 45, 59.

Not only did the prosecutor mention his "tenet" that a criminal defendant is "inherently unreliable," throughout his closing argument, he himself called it "the theme." 5/30/07RP 59 ("Remember the theme, the word of a criminal defendant is inevitably unreliable."). When he turned his attention to Monday's post-arrest statement to police, he described the statement as "inherently unreliable." 5/30/07RP 43, 45. He reminded the jury, "This goes to my second underlying tenet as a prosecutor, that as the murderer, the criminal defendant is inherently unreliable." 5/30/07RP 45.

The prosecutor explained that this inherent unreliability was a character trait of the defendant. The inherent unreliability was "not just because they know that they are being talked to by the police, and that they have got some motive to lie, or that they are in trouble." 5/30/07RP 45. The prosecutor did not elaborate upon the reasons why the criminal defendant is always unreliable but implied it was an undeniable fact borne out by his experience.

The tenet that a criminal defendant is inherently unreliable was repeated, broadly-stated, and directly drawn from the prosecutor's personal experience of almost 18 years as a "good prosecutor." 5/30/07RP 27. It applied to all criminal defendants,

without any room to consider the possibility that a “criminal defendant” might not be guilty. The prosecutor was not asking the jury to draw upon common sense or the notion that an accused person might have a special interest in not admitting the truth, but rather this tenet was presented as enduring, persistent, and well-established traits based upon extrajudicial experience asserted by the prosecutor. The prosecutor impressed upon the jury that they should dismiss out-of-hand an statements by a criminal defendant, based on their status, as experience had taught him and all “good prosecutors” that this rule would always be proven true.

c. The prosecutor belittled and improperly stereotyped “black folk.” A prosecutor may not seek a verdict based upon emotion rather than reason. See State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). This prohibition includes comments that indicate the accused is more likely to have committed the charged crime because of his membership in a certain group or his display of physical characteristics. State v. Clafin, 38 Wn.App. 847, 852, 690 P.2d 1186 (1984); State v. Petrich, 101 Wn.2d 2d 566, 576, 683 P.2d 173 (1984).

Remarks suggesting that the jury take race into account “can violently affect a juror’s impartiality and must be removed from the

courtroom proceeding to the fullest extent possible.” United States ex rel. Haynes v. McKendrick, 481 F.2d 152, 157 (7th Cir. 1973); see United States v. Hernandez, 865 F.2d 925, 928 (7th Cir. 1989) (noting that race-conscious arguments draw the jury's attention to a characteristic the federal constitution generally demands the jury ignore).

Here, the prosecutor claimed that none of the witnesses, including his own witnesses, testified that Monday was the shooter because they all followed the “code,” that “black folk don’t testify against black folk.” 5/30/07RP 29.

According to the prosecutor, none of the witnesses were exceptions to this “code that black folk don’t ID black folk in court . . .” 5/30/07RP 109-10. That code is a “rule” applicable to all witnesses. Id.¹² Notably, the prosecution’s case rested upon testimony from numerous African-American lay witnesses, and Monday is African-American. Exs. 23-30 (photographs of witnesses); Ex. 192 (photograph of Monday).

This characterization of a code of silence among African-American people was not the product of trial testimony. The State

called some African-American witnesses, including Nakita Banks and Georgia Brooks, who reached out to assist the police with their investigation. 5/14/07RP 74; 5/21/07RP 143; 5/22/07RP 212; 5/24/07RP 28-29. There was testimony that people on the street do not generally voluntarily involve the police with their problems but not that it was universally true. 5/23/07RP 82-83. For example, Sykes said police are not her friends, and she proved to be a reluctant witness, but she also denied that all people she knows will not speak with or assist police. 5/22/07RP 22-23.

The testimony regarding a "code" on the street was never confined to "black folk" or portrayed as something that only African-American people do. The testimony was not that black people refuse to talk to the police, but rather that people "on the street" do not want to be a "snitch." 5/22/07RP 19.

The prosecutor repeated his "black folk" "rule" on two occasions in his closing argument, enough to insidiously emphasize the racist undertones of his argument and to demonstrate his remarks were not a mistake, while trying to skirt scrutiny as overt and obvious racial slurs. 5/30/07RP 29, 109-10.

¹² The prosecutor said several times that Chris Green and Gagney were not "acceptions" to this rule. 5/30/07RP 110. From the context of the remarks, this appears to be a transcription error, and the term "exception," seems to be

The prosecutor said, "Code. It is all about the code." 5/30/07RP 37. And he explained that this "code" to which he referred was that "black folk don't testify against black folk." 5/30/07RP 29, 109-10. The "black folk" theory was racist, inappropriate, and not a proper inference from the trial testimony. It urged the jury to apply a different standard in measuring testimony by African-American people and to excuse the prosecution from its inability to offer more cogent and forthright testimony from witnesses based on their race-based predispositions. It also urged the jury to consider race in deciding the case, which is a fundamentally improper mode of analysis.

d. The prosecutor offensively affected an accent while questioning one witness. During the prosecutor's direct examination of Sykes, he affected an accent to ask her questions about her relationship with police, or "po-leese." The accent was dramatic enough for the court reporter to transcribe the remarks phonetically to explain the prosecutor's emphasis. Since the court reporter did not phonetically alter other witnesses' words, and only on certain occasions described the prosecutor as saying "po-

what the prosecutor said.

leese,” the record indicates the prosecutor intentionally adopted this affectation.

The prosecutor asked Sykes whether, “there is a code on the streets that you don’t talk to the po-leese?” (sic). 5/22/07RP 19. Sykes responded, and the prosecutor and Sykes continued discussing her relationship with police. Five questions later, the prosecutor again said, “Let me ask you this about your conversations with the po-leese (sic).” Id.

Two pages of transcripts later, the prosecutor asked whether her boyfriend’s involvement in the fight was, “one of the reasons that you stayed away and tried to avoid the po-leese (sic), right?” 5/22/07RP 22. Two questions later, the prosecutor asked again about whether “there is a code on the streets that you don’t call the po-leese. . . .” Id. at 23.

After a lengthy period of questioning Sykes without affecting an accent, the prosecutor returned to the “po-leese.” 5/22/07RP 51-53. He asked Sykes four additional times whether she did not want anyone to know she was cooperating “with the po-leese (sic).”

As mentioned above, a prosecutor carries with him special prestige and influence in the courtroom and in the eyes of the jury. The prosecutor’s dismissive tone and derogatory language lent an

appearance of racial bigotry in questioning an African-American witness and displayed an effort to urge the jurors to treat witnesses differently based on their race or class. Ex. 26 (photograph of Sykes).

e. The prosecutor injected himself into testimony as the seeker of truth. During the course of the trial, the prosecutor repeatedly portrayed himself as the person whose job it is to decide who is telling the truth.

In his opening statement, the prosecutor told the jury that the State goes to great lengths not to falsely accuse anyone. He said,

You're going to learn that we take absolutely every single measure we can think of to make sure that no man is falsely accused, and no man is falsely convicted of something he didn't do.

5/10/07RP(opening) 13. The defense objection to these comments was appropriately sustained, as it is improper to suggest to the jury that a person would not be prosecuted if the government was not certain of his guilt. 5/10/07RP 13; see Cannon, 88 F.3d at 1218 (improper and highly prejudicial to argue, "what would" prosecution and police "have to gain by even trying to convict in innocent person?"); Splain, 545 F.2d 1134-35 (statement that U.S.

Attorney's office does not file a case unless "we are convinced he has committed a crime" is serious transgression and "has no place in a criminal trial").

Yet the prosecutor was not discouraged by the objection from continually reminding the jury that he vetted the case for the truth during the trial. When questioning Sykes, he said, "my job is to point out to the jury which part of what you are saying is true and which part isn't." 5/21/07RP 50-51. The defense objection to the argumentative question was overruled. Id. Discussing a statement Sykes gave to the police, the prosecutor again stated, "I am trying to determine what was said here in this tape recorded statement on May 9." 5/21/07RP 173. He elaborated, "I am trying to decide how they [Sykes's statements to police] are different." 5/21/07RP 174.

The prosecutor also questioned Sykes about a police interview in which the prosecutor was present. The prosecutor asked the question, "I said to you [during this earlier interview] stop lying to us, we have it all on video." 5/21/07RP 182. The defense objected and the court instructed the prosecutor to "keep it down a little bit, and let the street language remain in the street. You don't have to buy into it." Id.

Turning to Sykes' statement during an interview by defense counsel, the prosecutor said, "Let's again, I am going to try to determine what was the truth and what wasn't the truth about what you told the detectives on May 9." 5/21/07RP 183). While the prosecutor was free to inquire about inconsistent statements, he was not the person "determining" the truth and he fundamentally misled the jury and improperly urged them to rely on his determinations of which testimony they should believe.

The prosecutor also injected himself into the proceedings unnecessarily. When questioning Sykes' mother Georgia Brooks, he asked whether she was present with Sykes for a police interview. 5/21/07RP 143. Brooks said, "I brought her down" for the interview. Id. The prosecutor responded, "You are exactly right, and that was April 6, right?" Id.

When questioning Sykes, he asked Sykes to explain what, "sweating me," means. 5/21/07RP 166. He then told Sykes, "I know what it means, but if some of these folks don't." Id.

These comments or asides to witnesses may not be flagrantly improper or unduly prejudicial in isolation, but they display a pattern of placing irrelevant information before the jury that served the purpose of flattering the prosecutor and portraying

the prosecutor as an unsworn witness who would prosecute only the guilty and would determine the truth of the allegations. Brooks, 508 F.3d at 1209-10; Splain, 545 F.2d 1134-35.

f. Prosecutorial misconduct requires reversal. The danger of prosecutorial misconduct is that it “may deprive the defendant of a fair trial. And only a fair trial is a constitutional trial.” State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978) (citing State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956)). Though individual errors may not alone be sufficient to warrant reversal, the cumulative effect of the errors may deprive a defendant of a fair trial. State v. Jerrels, 83 Wn.App. 503, 508, 925 P.2d 209 (1996). Where improper statements are not objected to, reversal is still required when the misconduct is so flagrant and ill-intentioned that no jury instruction would have cured the problem. Belgarde, 110 Wn.2d at 507.

In Case, defense counsel did not object to many instances of misconduct, but the Supreme Court found that the facts presented an occasion where the “cumulative effect of repetitive prejudicial error becomes so flagrant that no instruction or series of instructions can erase it and cure the error.” 49 Wn.2d at 73. The court in Case found that the prosecutor's unobjected to statement

of his personal belief in the accused's guilt "was not only unethical but extremely prejudicial," as an effort to impress upon the jury his personal opinion of the outcome of the case.

In the case at bar, the prosecutor engaged in numerous, pervasive instances of attempting to sway the jury based on matters that were both irrelevant and inflammatory. These comments were mostly not objected to, but this case presents one of those rare instances where despite the lack of objection, the prosecutor's remarks so flagrantly and intentionally disregarded well-established rules of permissible conduct, that when examined together they demonstrate an unpardonable effort to secure a conviction based on improper grounds.

Many of the egregious remarks arose as part of the prosecutor's planned argument and were intentional "themes" of the prosecutor's closing argument, not misstatements or spontaneous reactions to the defense argument.

These remarks were highly likely to influence the jury. The prosecutor's appeals to race-based evaluation of credibility in a case involving an African-American defendant and African-American witnesses were blatantly improper. His emphasis on the inherent unreliability of a criminal defendant, presented as a "tenet"

proven true time and time again, is again, flagrant, blatant, and intentional misconduct, as it is never proper to seek a conviction based on truisms or information known to a prosecutor from personal experience, especially such highly inflammatory rhetoric indicating that any person accused of a crime is never a witness with a shred of reliability.

While the videotape gave an outline of the events, even the police detectives conceded the videotape was blurry, the words spoken were difficult to discern, and it did not portray the action completely. 5/3/07RP 24-25 (Cruise admits videotape images “not really clear”); 5/3/07RP 110 (Cruise admits could not have arrested Monday on videotape alone).

A defendant has the right to have his or her guilt decided upon the evidence presented, not upon the prosecutor’s opinions or experiences in other cases. Moreover, this decision-making must be made in an arena free from racial stereotypes or belittling of witnesses based on their race. The broad array of misconduct committed by the prosecutor was flagrant and ill-intentioned. Because of its rampant nature, it could not have been cured by a limiting instruction. It undermines the integrity and fairness of the proceedings and requires a new trial.

4. WHERE THE JURY WAS NOT
INSTRUCTED ON THE ESSENTIAL
ELEMENTS OF THE STATUTORY FIREARM
ENHANCEMENT, THE COURT LACKED
AUTHORITY TO IMPOSE 60-MONTH
SENTENCING ENHANCEMENTS

In the case at bar, the court imposed three 60-month sentencing enhancements for Monday's possession of a firearm based on the jury's answers in a special verdict form. However, the governing statutory provisions lack the necessary procedure to impose such a sentencing enhancement, and moreover, the jury instructions setting forth essential elements of the special verdict did not define the essential elements of the firearm enhancement, thereby depriving the court of authority to impose the firearm enhancement.

a. The court lacked authority to impose firearm sentencing enhancements due to the lack of statutory procedure.

This Court has said:

Because we held in [*State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005)] that we would not imply a procedure by which a jury can find sentencing enhancements on remand, we remand for resentencing based solely on the deadly weapon enhancement which is supported by the jury's special verdict.

State v. Recuenco, 154 Wn.2d 156, 164, 110 P.3d 188 (2005)
overturned on other grounds, 548 U.S. 212, 126 S.Ct. 478, 163
L.Ed. 362 (2006).¹³ Since this Court found there was no procedure
by which a jury could impose a firearm enhancement, harmless-
error cannot apply.

RCW 9.94A.602 establishes a procedure by which a deadly
weapon enhancement is pled and proven to a jury, satisfying the
defendant's constitutional right to a jury trial. RCW 9.94A.602
provides:

In a criminal case wherein there has been a
special allegation and evidence establishing that the
accused . . . was armed with a deadly weapon at the
time of the commission of the crime, . . . the jury shall,
if it find[s] the defendant guilty, also find a special
verdict as to whether or not the defendant . . . was
armed with a deadly weapon at the time of the
commission of the crime.

For purposes of this section, a deadly weapon is
an implement or instrument with the capacity to inflict
death from the manner it was used, is likely to
produce or may easily and readily produce death.
The following instruments are included in the term
deadly weapon: . . . pistol, revolver, or any other
firearm

The Sentencing Reform Act (SRA) further outlines the punishment
associated with a deadly weapon special verdict finding. In

¹³ Recuenco is presently pending in the Washington Supreme Court
after remand. The United States Supreme Court expressly reserved the question
of whether the firearm sentencing enhancement was procedurally invalid as a

pertinent part, RCW 9.94A.533 (4) provides that additional time “shall” be added to the standard sentence if the offender was armed with a deadly weapon other than a firearm during the offense – two years for a class A felony, one year for a class B felony, and six months for a class C felony.¹⁴ RCW 9.94A.533(3) purports to establish the additional punishment to be imposed where an offender was armed with a firearm as defined in RCW 9.41.010 – five years for a class A felony, three years for a class B felony, and eighteen months for a class C felony.

But unlike the statutory procedure in place for obtaining a verdict on a deadly weapon enhancement, there is no corresponding statutory procedure in place for a firearm enhancement. In 1995, the Legislature enacted, without amendment, Initiative 159, the “Hard Time for Armed Crime” ballot initiative intended to increase sentences for armed crime. State v. Brown, 139 Wn.2d 20, 25, 983 P.2d 608 (1999) (citing Laws 1995, ch. 129; In re Charles, 135 Wn.2d 239, 246, 955 P.2d 798 (1998); Washington Sentencing Guidelines Comm’n, Adult Sentencing Guidelines Manual, cmt. at II-67 (1997)). This new law sought to

question for the state court to resolve upon remand. 126 S.Ct. at 2551 n.1.

¹⁴ RCW 9.94A.533 has replaced former RCW 9.94A.510, but the pertinent terms remain the same.

increase the punishment for armed crimes. Charles, 135 Wn.2d at 246. It also sought to differentiate between crimes committed with a firearm and those committed with some other deadly weapon. Id.; see also RCW 9.94A.533.

While the purpose of Initiative 159 was to increase punishment for armed crimes, the Legislature failed to create a statutory procedure by which a jury could find a firearm special verdict. See RCW 9.94A.602 (outlining procedure for deadly weapon special verdict). RCW 9.94A.602 provides a lawful avenue for the jury to make a finding as to whether the defendant was armed with a deadly weapon at the time of the offense, providing the defendant with due process of law, including notice and a jury finding. RCW 9.94A.533(4), in turn, provides that “if the offender . . . was armed with a deadly weapon other than a firearm,” additional time shall be added to his sentence. RCW 9.94A.533(3) provides for adding substantial time to an offender’s sentence if “armed with a firearm” at the time of the offense, but it is not rooted in a statutory procedure permitting the jury to enter a special verdict form, such as that set forth in RCW 9.94A.602.

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

Washington's exceptional sentence provisions, the Washington Supreme Court recognized,

Where the legislature has not created a procedure for juries to find aggravating factors and has, instead, explicitly provided for judges to do so, we refuse to imply such a procedure on remand.

To create such a procedure out of whole cloth would be to usurp the power of the legislature.

Hughes, 154 Wn.2d at 151. The Court's recognition of the limits on its authority follows its precedent which

"has consistently held that the fixing of legal punishments for criminal offenses is a legislative function." State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986). "[I]t is the function of the legislature and not of the judiciary to alter the sentencing process." State v. Monday, 85 Wn.2d 906, 909-10, 540 P.2d 416 (1975).

Hughes, 154 Wn.2d at 149.

Recuenco echoed this conclusion. Upon reversing Recuenco's firearm enhancement, rather than simply remand the matter to allow the question to be submitted to the jury, the Court further concluded the question could never be submitted to the jury.

Recuenco, 154 Wn.2d at 164. In concluding that the options on remand were limited solely to the imposition of the lesser enhancement, Recuenco recognized that, unlike the lesser deadly weapon enhancement, there is no statutory authority to submit a

firearm enhancement to a jury. If there were statutory authority for a firearm enhancement there was no need to imply one and thus no need for the Court to cite to Hughes in declining to do so. Unlike the provisions of RCW 9.94A.602 pertaining to a deadly weapon enhancement, there is no provision in Washington law for submitting the firearm question to the jury.¹⁵

Subsequent to Recuenco, lower courts have concluded that the provisions of RCW 9.94A.602 pertaining to deadly weapon enhancements permit submission of a verdict of the greater firearm enhancement to the jury as well. State v. Nguyen, 134 Wn.App. 863, 869-71, 142 P.3d 1117 (2006).¹⁶ Such a conclusion is contrary to Recuenco's interpretation of the statute, contrary to pre-Blakely construction of the relevant statutes, and contrary to the plain language of RCW 9.94A.602.

As discussed, if such a procedure existed the Supreme Court was wrong to conclude as it did that nothing permitted the submission of the question on remand. But rather than say the court was incorrect, Nguyen endeavored instead to artificially limit

¹⁵ It is axiomatic that even in the absence of statutory authority to submit the question to a jury the trial judge cannot make the finding herself as Recuenco held that procedure violates the Sixth and Fourteenth Amendments to the United States Constitution. Recuenco, 154 Wn.2d at 162-63.

the court's ruling, concluding Recuenco only concerned the question of what could occur on remand. Nguyen, 134 Wn.App. at 870-71 (citing Recuenco, 154 Wn.2d at 64). This reasoning means that one procedure exists in the SRA for an initial trial and sentencing and a second procedure exists for cases remanded from appellate courts. Yet there is no such a shadow procedure. Thus, there is either authority to submit the question to a jury or there is not.

Prior to Recuenco, the relevant statutes were interpreted as expressly reserving the firearm finding for a judicial determination. In State v. Meggyesy, 90 Wn.App. 693, 707-10, 958 P.2d 319, rev. denied, 136 Wn.2d 1028 (1998), the court concluded that the jury could be instructed on the lesser deadly weapon enhancement and the trial court in its discretion could make a finding that the deadly weapon was indeed a firearm. In State v. Rai, 97 Wn.App 307, 311-12, 983 P.2d 712 (1999), the court went further to conclude the unambiguous language of former RCW 9.94A.310(3), recodified as RCW 9.94A.533(3) reserved for the trial judge, not the jury, the ability to determine the evidence establishes the deadly weapon was a firearm, and required the judicial imposition

¹⁶ A petition for review has been filed in Nguyen, and the case has been

of such a sentence.¹⁷ But such judicial fact-finding would certainly violate the Sixth Amendment.

Further, the plain language of RCW 9.94A.602 undercuts the conclusion that it applies to firearm enhancements. RCW 9.94A.602 provides:

In a criminal case wherein there has been a special allegation and evidence establishing that the accused . . . was armed with a deadly weapon at the time of the commission of the crime, . . . the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant . . . was armed with a deadly weapon at the time of the commission of the crime.

Where a term is unambiguous, its meaning must be taken from its plain language. State v. Chester, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997) (citing Cherry v. Municipality of Metro. Seattle, 116 Wn.2d 794, 799, 808 P.2d 746 (1991)). The only special verdict form contemplated by RCW 9.94A.602 is for a deadly weapon enhancement. RCW 9.94A.602 was enacted well before the 1995 enactment of the firearm enhancement, and has not been amended to incorporate the newer enactment. As there was no firearm enhancement at the time of its enactment, the statute

stayed pending Recuenco. 107 Wash. LEXIS 102 (2007).

¹⁷ Because the procedure they created violated the Sixth and Fourteenth Amendments these cases were specifically overturned by Recuenco. Recuenco, 154 Wn.2d 162-63.

plainly did not contemplate any special verdict form other than for a deadly weapon. Indeed, as illustrated by Meggyesy and Rai, the pre-Blakely construction of this statute in no way contemplated submission of a firearm enhancement to the jury.

As there is no procedure by which a jury could have returned a constitutionally sufficient verdict supporting a firearm enhancement in Monday's case this court cannot apply harmless-error analysis to the error. Harmless-error analysis is not a tool to permit an appellate court to do that which the trial court could not. Because this Court has previously concluded there is no procedure by which a jury could consider the firearm enhancement on remand, the error in this case cannot be harmless.

b. If a statutory procedure exists to submit the firearm question to jury, the failure to comply with that procedure precludes harmless error. Assuming for argument, that cases such as Nguyen correctly found that RCW 9.94A.602 provides statutory authority to submit the firearm question to a jury, the statute was not complied with here. RCW 9.94A.533(3) provides for a five-year sentencing enhancement for an offender who "was armed with a firearm as defined in RCW 9.41.010," for an eligible class A felony.

RCW 9.41.010 (1) specifically defines a firearm as, “a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder.” Using a weapon that appears to be a firearm does not satisfy the essential elements of the firearm sentencing enhancement.

Here, the jury was not instructed as to the essential elements of the firearm sentencing enhancement and thus, the special verdict form cannot cure the instructional error. Instruction 46 was the only instruction containing any reference to the special verdict form whatsoever. CP 221. Instruction 46 provided as follows:

For purposes of the special verdict form the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crimes in counts I, II, III.

A person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt there was a connection between the weapon and the defendant. The State must also prove beyond a reasonable doubt that there was a connection between the weapon and the crime. In determining whether these connections existed, you should consider the nature of the crime, the type of weapon and the circumstances under which the weapon was found.

A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

CP 221.

The jury instruction explained to the jurors the essential requirements of a deadly weapon enhancement. It did not provide the elements of the firearm enhancement and did not provide the definition of a firearm that is critical to the imposition of the firearm enhancement. Instead, the instruction only asked the jury to determine whether Monday possessed a deadly weapon. But RCW 9.94A.533(3) permits a firearm enhancement only if the offender "was armed with a firearm as defined in RCW 9.41.010." There was no jury finding of this essential element.

This Court has routinely held that where a sentencing court fails to comply with the procedures of the SRA, and in the absence of an express waiver by the defendant, the remedy is either to remand for resentencing, or where a proper objection was raised in the trial court a reduction of the sentence. State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999).

In those instances in which courts have applied something akin to harmless-error analysis of sentencing errors, they have simply concluded the resulting sentence did not or would not change as a matter of law, and did not reweigh the evidence or otherwise assess the facts supporting sentence imposed. See

State v. Argo, 81 Wn.App. 552, 569, 915 P.2d 1103 (1996)

(concluding remand for resentencing was unnecessary where even if correct appellant's challenge to offender score calculation would only result in reduction from 16 points to 13) It is one thing for a reviewing court to conclude that an error reducing an offender score from 16 to 13 points was "harmless" because as a matter of law the standard sentence range does not change, but it is another for a court to say that despite some procedural error in the consideration of evidence the factfinder would have reached the same factual determination. In the former, the reviewing court is not assessing the evidence to determine if the sentencing court would have or even could have reached the same decision, i.e., an offender score of 16. Instead by saying the answer to the question of whether the score was correctly calculated is irrelevant, such a court is avoiding harmless-error analysis in the traditional sense all together. But in the latter, a reviewing court is reweighing the factual rather than legal underpinnings of the sentence. This scenario does not find support in Washington law.

Instead, where sentencing errors have turned on factual errors or errors in the procedure by which the sentencing court considered the proof, remand has always been required. State v.

Beals, 100 Wn.App. 189, 997 P.2d 941, rev. denied, 141 Wn.2d 1006 (2000). In Beals the appellant challenged the trial court's determination of the comparability of an out-of state offense and its reliance on that offense as a prior "most serious offense." Id. at 195. The state had provided and the trial court had considered the facts of the prior offense, but the state did not provide and the sentencing court failed to examine the actual language of the foreign statute. Id. The Court of Appeals concluded the failure to first consider the statutory language was error which required reversal saying:

While this court could locate the North Carolina statute then in effect and compare the elements of Beals' conviction with a potentially comparable Washington offense, we decline to do so. The proper forum for classification of out-of-state convictions is at the sentencing hearing, where the State can present necessary documentary evidence, the defendant can refute the State's evidence and arguments, and the court can then engage in the required comparison on the record to determine if the State met its burden of proof.

Id. at 196. If the State wishes to argue RCW 9.94A.602 provides authority to submit the firearm question to a jury and thus permits this Court to engage in harmless-error analysis of the constitutional violation, the separate violation of that statute demands remand to the trial court.

5. BY SUBSTANTIALLY INCREASING MONDAY'S SENTENCE BASED ON THE COURT'S FACUTAL DETERMINATION THAT THE OFFENSES WERE "SEPARATE AND DISTINCT," THE COURT VIOLATED MONDAY'S RIGHTS TO TRIAL BY JURY AND PROOF BEYOND A REASONABLE DOUBT.

a. Any factual determination that increases a defendant's punishment beyond the presumptive sentencing range requires a jury determination and proof beyond a reasonable doubt. In State v. Cubias, 155 Wn.2d 549, 120 P.3d 129 (2005), the Court decided a finding that crimes involve "separate and distinct" criminal conduct, triggering the imposition of consecutive sentences, need not be submitted to a jury and proven beyond a reasonable doubt under Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), holding *inter alia* that consecutive sentences do not implicate Blakely. The Court later abrogated this aspect Cubias in In re: Personal Restraint of VanDelft, 158 Wn.2d 731, 147 P.3d 573 (2006), holding a consecutive sentence that was based on the judge-made finding that concurrent sentences were "clearly too lenient" violated the defendant's Sixth and Fourteenth Amendment right to a jury determination of facts necessary to punishment. Monday

respectfully argues that Cubias is based upon an incorrect interpretation of recent United States Supreme Court law and should be reconsidered.¹⁸

As summarized in Ring v. Arizona, 536 U.S. 584, 602, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002):

if a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.

Ring is predicated upon the oft-repeated refrain from Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), "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." (emphasis added). This principle was further refined in Blakely, 542 U.S. at 303:

the "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.

(emphasis in original).

¹⁸ The United States Supreme Court recently granted certiorari in Oregon v. Ice, 170 P.3d 1079 (2007), cert. granted, 2008 U.S. LEXIS 2387 (2008), which poses the question of whether the imposition of consecutive sentences based on the court's finding that several sexual abuse offenses were not part of the same conduct violated the Sixth Amendment.

Washington presumes sentences for current offenses will be imposed concurrently, with limited exceptions. RCW 9.94A.589 (1)(a). The court lacks authority to deviate from these rules. State v. Ammons, 105 Wn.2d 175, 180-81, 713 P.2d 719 (1986) (sentencing authority derives strictly from statute); Hughes, 154 Wn.2d at 126.

In Cubias, the court concluded Apprendi and Blakely did not intend to include facts underlying consecutive sentences as those which must be found by a jury and proven beyond a reasonable doubt under the Sixth Amendment. 155 Wn.2d at 553-55. This analysis not only misconstrues but subverts those precedents.

Cubias ignores the critical concern expressed in Apprendi:

Despite what appears to us the clear “elemental” nature of the factor here, the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?

Apprendi, 530 U.S. at 494 (emphasis added). The Apprendi Court, citing principles more than 100 years old, explained:

Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and

precision. . . . If, then, “upon an indictment under the statute, the prosecutor prove the felony to have been committed, but fail in proving it to have been committed under the circumstances specified in the statute, the defendant shall be convicted of the common-law felony only.

Apprendi, 530 U.S. at 480-81(internal citations omitted).

Consequently, when the “particular circumstances” are not proven, the defendant must be punished for the lesser degree of punishment permitted by the jury’s findings, i.e., concurrent sentencing. Id.

Cubias cited a portion of the Apprendi decision that noted the possibility of imposing consecutive sentences was irrelevant to the ultimate decision in that case. Cubias, 155 Wn.2d at 554 (quoting Apprendi, 530 U.S. at 474). Yet Apprendi involved only the issue of the punishment for a single count. 530 U.S. at 474. The potential for consecutive sentences had no application to the case and was irrelevant to Apprendi for that simple reason. Id. Likewise, Cubias claimed Blakely pertains only to the question of increasing a sentence for one count, as the Blakely Court did not to take issue with the concurrent sentence imposed for Blakely’s assault conviction. 155 Wn.2d at 554. Yet the concurrent assault conviction was not part of the appeal in Blakely because no

additional factual findings affected the sentence imposed for that count.

Contrary to Cubias' strained attempts to claim otherwise, it is evident that the principles of Apprendi are far-reaching. See Ring, supra; Blakely, supra; United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621, 642 (2005). While Cubias stated it would be improper to "extend Apprendi's holding beyond the narrow grounds upon which it rested," this contention fundamentally misreads the substance and import of those decisions. Cubias, 155 Wn.2d at 554.¹⁹

Apprendi and later decisions by the Supreme Court protect the accused's right to jury trial and due process of law. Where punishment exceeds that otherwise authorized by the jury's verdict, the defendant's constitutional rights are violated. Because the SRA predicates the imposition of additional punishment, to wit, consecutive sentences, upon discrete factual findings, where those findings are made by a judge by a preponderance of the evidence,

the accused's right to jury trial and due process of law are violated. Apprendi, 530 U.S. at 490; Blakely, 124 S.Ct. at 2537; Ring, 536 U.S. at 602.

The Cubias majority enumerates multiple cases from other jurisdictions to support its conclusion that Apprendi, et al., are inapplicable to consecutive sentences. 155 Wn.2d at 555-56. Yet as Justice Madsen points out in the concurrence/dissent, the majority does not examine the sentencing schemes from those other jurisdictions, many of which are not like Washington and do not mandate concurrent sentences unless there are additional factual findings. 155 Wn.2d at 561; see e.g., Smylie v. Indiana, 823 N.E.2d 679, 686 (Ind. 2005) (broad judicial discretion to impose consecutive sentences). Several of the decisions relied upon by this Court are based on sentencing schemes which

¹⁹ See e.g., Douglas A. Berman, Punishment and Crime: Reconceptualizing Sentencing, 2005 U. Chi. Legal F. 1, 30, 34 ("Apprendi decision cast constitutional doubt on many sentencing statutes and guidelines enacted during the modern sentencing reform movement; 'the potential impact of Blakely on modern sentencing systems is truly staggering"); Steven L. Chanensen, Hoist with their Own Petard?, 17 Fed. Sent. Rev. 20 (2005) (Blakely "delivered a body blow that has dazed American criminal justice systems generally").

provide the sentencing court full discretion to impose consecutive or concurrent sentences.²⁰

In Washington, it is only where particular factual findings are made that sentences may be imposed consecutively. RCW 9.94A.589(1)(a). The principles underlying the proof beyond a reasonable doubt and jury trial provisions in the Constitution apply equally to consecutive sentence cases as single offense cases. The protections extend not only to procedures that determine a defendant's guilt or innocence, but also to those that merely determine the length of sentence. Apprendi, 530 U.S. at 484. Since the court imposed consecutive sentences based upon its additional factual findings, the sentence violates the Sixth Amendment.

b. Sentences imposed after a finding of "separate and distinct criminal conduct" require a factual determination that must be made by a jury with all procedural protections of a trial.

Under the SRA, a standard range is calculated based upon, 1) the

²⁰ See State v. Bramlett, 41 P.3d 796, 797 (Kan. 2002) (sentencing court discretion for concurrent or consecutive); State v. Senske, 692 N.W.2d 743 (Minn. Ct. App. 2005) (same); State v. Wagener, 752 N.E.2d 430 (Ill. 2001) (court's discretion to decide if nature of offense and offender's history merits consecutive sentence); State v. Jacobs, 644 N.W.2d 695 (Iowa 2001) (court may impose consecutive sentences); Cowens v. State, 817 N.E.2d 255 (Ind. Ct. App. 2004)(same).

severity of the crime, referred to as the offense's seriousness level, and 2) the length and seriousness of the offender's criminal history, known as the offender score. Dunaway, 109 Wn.2d at 214.

Sentences imposed under the presumptive method are based upon counting each prior and current conviction to generate the standard sentencing range for an individual conviction, and sentences for multiple offenses "shall be served concurrently." RCW 9.94A.589(1)(a).

An "exception" to this generally applicable method of calculating a standard range applies when the offenses are serious violent offenses, defined under RCW 9.94A.030, and the trial court finds the offenses arise from "separate and distinct criminal conduct." Tili, 139 Wn.2d at 120; RCW 9.94A.589(1). Upon finding "separate and distinct criminal conduct," the court uses an alternative form of calculating the offender score. Tili, 139 Wn.2d at 120. Mandatory consecutive sentences are required for serious violent offenses found to be "separate and distinct." RCW 9.94A.589(1)(a).

A trial court's determination of whether offenses are separate and distinct is reviewed under the abuse of discretion standard. Tili, 139 Wn.2d at 122. The court's failure to articulate a

viable basis to find the offender's conduct "separate and distinct" is an abuse of discretion. Id. at 124

The SRA does not define "separate and distinct criminal conduct." Tili, 139 Wn.2d at 122. Unlike the absence of a definition for "separate and distinct," the legislature defined "same criminal conduct" in another subsection of the statute. RCW 9.94A.589(1)(a). Since the statute provided no clear direction as to the precise meaning of "separate and distinct," the Tili Court considered whether Tili's offenses amounted to the "same criminal conduct." 139 Wn.2d at 122. The court reasoned that if Tili's conduct met the definition of "same criminal conduct," it could not be "separate and distinct," since the statutory scheme indicated the legislature did not intend the two categories to overlap. Id.

The analysis and holding of Tili has been misrepresented by other courts.²¹ While Tili articulated the principle that if two

²¹ Earlier case law defined separate and distinct as that which does not involve a criminal event intimately related or connected to another criminal event, and the extent to which the criminal intent, as objectively viewed, changed from one crime to the next. Dunaway, 109 Wn.2d at 214-15 n.5, (citing Washington Sentencing Guidelines Comm'n, Implementation Manual, section 9.94A.400, Comment 11-40 (1984)).

offenses fit within the definition of “same criminal conduct” they cannot also fall within the ambit of “separate and distinct” conduct, it did not say that the converse is always true, and all offenses that do not meet the definition of “same criminal conduct” are automatically “separate and distinct.” The court “looked to the factors” defining “same criminal conduct” in reaching its decision, but nowhere ruled that all offenses which were not the “same criminal conduct” were necessarily “separate and distinct.” Since the offenses in Tili were the “same criminal conduct,” the court did not need to explore whether they met the criteria of “separate and distinct.” Tili, 139 Wn.2d at 124.

Importantly, RCW 9.94A.589(1) does not require consecutive sentences for all serious violent offenses, or even all serious violent offenses which are not a part of the same criminal conduct. Instead it applies only to those serious violent offenses arising from “separate and distinct conduct.” Had the Legislature intended a broader application it presumably would have simply

Other cases have either cited Tili as authority or otherwise claimed without authority that there is an automatic rule that if crimes are not “same criminal conduct,” then they are “separate and distinct.” See e.g., State v. Brown, 100 Wn.App. 104, 114, 995 P.2d 1278 (2000), reversed on other grounds, 147 Wn.2d 330, 58 P.3d 889 (2002) (no authority cited); State v. Price, 103 Wn.App. 845, 855, 14 P.3d 841 (2000) (relying on Brown); In re Sarusad, 109 Wn.App. 824, 853, 39 P.3d 308 (2001) (relying on Brown; cert. granted on other grounds, sub nom Washington v. Sarusad, 2008 U.S. LEXIS 2518 (2008).

said “all serious violent offenses” or “all serious violent offenses not arising from the same criminal conduct.” Instead, the Legislature chose to employ a different term, and presumably intended a different result. State v. Beaver, 148 Wn.2d 338, 343, 60 P.3d 586 (2002).

The court is required to give meaning to every word in a statute if possible. Beaver, 148 Wn.2d at 343. When the Legislature uses different words in the same statute, courts recognize the legislature intended a different meaning. Id.; Haley v. Highland, 142 Wn.2d 135, 147, 12 P.3d 119 (2000) (Legislature’s use of different words demonstrates intent for different meanings to apply).

The “plain meaning” rule of statutory construction requires that where a statute’s meaning is plain on its face, the court must give effect to that plain meaning. State v. J.M., 144 Wn.2d 472, 480, 28 P.3d 720 (2001).

Under the “plain meaning” rule, examination of the statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the provision is found, is appropriate as part of the determination whether a plain meaning can be ascertained.

State, Dep't. of Ecology, v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 10, 43 P.3d 4 (2002). As argued, under the "plain meaning" rule, while the offenses committed were committed within seconds of each other, without any apparent distinction among the targets. These shootings were not separate or distinct, even though they impacted different people.

Statutes must be read so all of the words used by the Legislature are given effect; no part must be rendered redundant or superfluous. Bellevue v. Lorang, 140 Wn.2d 19, 25, 992 P.2d 496 (2000). Had the Legislature intended consecutive sentences be imposed in "all other cases" where crimes are not found to encompass the "same criminal conduct," it would have retained statutory language making this intent clear. Instead, the Legislature deleted this language and used a specific term, "separate and distinct," to denote when sentences must be served consecutively.

It subverts principles of statutory construction to say that serious violent offenses do not arise from the "same criminal conduct" are necessarily "separate and distinct." The plain language of the statute does not lead to this conclusion. Further, this conclusion allows the narrow exception to swallow the rule,

because it requires all serious violent offenses to be consecutive unless they meet the “same course of conduct” exception. It ignores the third alternative, that offenses may arise neither from the same course of conduct nor separate and distinct conduct, the very situation which falls within the general rule. Finally, the “intent” required is a general intent, not the specific intent required for an offense, otherwise there would never be “separate and distinct” violent offenses as each offense would necessarily involve a difference intent.

The dictionary definitions support this construction.

“Separate” is defined in part as,

1a: characterized by segregation from other people . .
. **c:** set or kept apart: standing alone . . . **2a:** not
shared with another . . **3a:** existing by itself:
AUTONOMOUS, INDEPENDENT, **b:** dissimilar in nature or
identity

Webster’s Third New International Dictionary, 269 (1993).

“Distinct” is defined as, “**1a:** discriminated by a visible sign: marked out: DISTINGUISHED, **b:** characterized by qualities individualizing or distinguishing as apart from, unlike, not identical with another or others” Id at 659.

In light of the meaning of the words “separate” and “distinct,” the mere fact that offenses do not satisfy a single factor of the

three part test of "same criminal conduct" cannot be enough to find the crimes separate and distinct.

In the case at bar, the offenses occurred at the same place and time, based on one stream of bullets fired by a shooter who was not even looking at his targets after the initial shots. The videotape of the shooting shows a man firing shots while walking away and while facing away from the shots after the first few were fired. Under Washington law, the jury did not need to find Monday intended, or even was aware, that his shots hit unintended victims in order to convict him of first degree assault. State v. Wilson, 125 Wn.2d 212, 214, 883 P.2 320 (1994) (assault statute provides that, "intent against one is intent against all."). The verdict therefore does not indicate that Monday intentionally or knowingly assaulted different people.

The jury's verdict alone does not plainly provide the necessary factual basis to impose the enhanced sentence based on "separate and distinct" criminal conduct. Accordingly, the sentence violated his right to a jury finding of any factual determination that increases his sentence beyond that otherwise authorized by statute. Absent a jury finding that the offenses were separate and distinct, Monday is entitled to concurrent sentences.

Hughes, 154 Wn.2d at 150-52.

F. CONCLUSION.

For the foregoing reasons, Kevin Monday respectfully requests this Court reverse his convictions, suppress the evidence seized as a result of the invalid warrant, and order new trial and sentencing proceedings.

DATED this 31st day of March 2008.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Nancy Collins", written in black ink.

NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

DISTRICT COURT FOR KING COUNTY
WEST DIVISION

STATE OF WASHINGTON)

NO.

: ss

COUNTY OF KING)

AFFIDAVIT FOR SEARCH WARRANT

The undersigned on oath states: I believe that:

- Evidence of the crime(s) of MURDER AND ASSAULT, and
- Contraband, the fruits of a crime, or things otherwise criminally possessed, and
- Weapons or other things by means of which a crime has been committed or reasonably appears about to be committed, and
- A person for whose arrest there is probable cause, or who is unlawfully restrained

is/are located in, on, or about the following described premises, vehicle or person:

4019 SW 337 Street, Federal Way Washington to include the residence including the garage any outbuildings, storage sheds and a 1976 boat model 11CBR. It appears to be a cabin cruiser approximately twenty-five feet long.

The person of Kevin J. Monday Jr. date of birth 4-7-1986

My belief is based upon the following facts and circumstances:

That your affiant is a homicide Detective assigned to investigate the homicide of Francisco Roche Green 1-13-1983, and the assaults on Christopher Louis Green 1-14-1976 and Michael Paul Gradney 3-10-1978; Seattle Police Department case number 06-159802. On 4-22-2006 at 0310 hours Francisco Roche Green was shot and killed near the corner of Yesler Ave and Occidental Ave in the City of Seattle, County of King and State of Washington. The suspect fired at least ten shots at Francisco Green as he stood near a vehicle and then ran. As the shots were being fired bullets struck the vehicle near Francisco Green. Victims Christopher L Green (no relation to Francisco Green) and Michael Gradney were the occupants of the vehicle. Christopher L Green suffered a gunshot wound to the leg. Michael Gradney suffered numerous gunshot wounds to the arms and torso. Both survived this incident. Christopher L Green and Michael Gradney both state the shooter was shooting at them from behind and they did not see him. A witness happened to be videotaping the area where the shooting occurred and your affiant has recovered this videotape. Your affiant has reviewed the videotape. Although it was made at night and its resolution is not optimal, it depicts the murder and the events preceding it.

According to his employer and an acquaintance, Green left his place of employment in Tukwila and was given a ride to Occidental Park on the morning of 4-22-2006 so that he could return to Reynolds work release where he was living. In Occidental Park, as the video shows, Green was assaulted by a number of individuals, and subsequently shot and killed near the corner of Yesler and Occidental. Green was unarmed at the time, and suffered at least some of his gunshot wounds while attempting to flee from the shooter.

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Copy: Police File
Copy: Judge's Copy

Affidavit for Search Warrant (continued)

The shooting took place after the local nightclubs had closed and while the "after hours clubs" were opening. There were many individuals congregating around Occidental Park at the time of the shooting and the preceding events. These individuals fled when the shooting began, and most of them remain unidentified. Many have refused to acknowledge that they were at the scene, even when confronted with strong evidence to the contrary. Those that have spoken to your affiant, as described herein, have been extremely reluctant to provide information, have expressed great concern for their safety if their cooperation with the investigation becomes known, and have strongly urged your affiant not to name them at this time. Your affiant knows their names these are not anonymous witnesses -, and no promises of any kind were made to any of them in exchange for any information.

The man who shot Green to death appears in the video several times before the shooting. He is apparently wearing white and red or black high-top athletic shoes, jean or denim shorts, a red hat, and a red shirt with some kind of design on the front. The shooter's clothing clearly distinguishes him from the numerous other individuals present at the time of the crime.

Before the shooting, the shooter can be observed on the video, advancing toward another man who was backing away from him. During his advance the shooter is lifting his shirt from his waistband area in the appearance of displaying a weapon. Your affiant has spoken to a man who recounted this episode, describing the shooter advancing toward him as depicted in the videotape (the witness has not seen the videotape).

A few moments later, the shooter reappears in the video. A car is seen pulling up to the intersection of Occidental and Yesler, and Green is seen approaching the car. Shortly thereafter, the shooter, standing behind Green, can be seen extending his arm with a handgun and firing at Green. Green is seen fleeing from the gunshots, and the shooter continues firing. It appears the shooter fires ten or eleven times, calmly and deliberately. After everyone has fled from view, the mortally wounded victim can be heard, crying for help.

During this investigation one woman called the homicide office and contacted Detectives giving her name and phone number, saying she was present during this homicide and had information she wanted to share. Your affiant contacted her by phone. On the phone she stated she was near the intersection of Yesler and Occidental during at the time, and saw a man, whom she claimed she did not know, shoot "Frisco." "Frisco" is a nickname used by Francisco Green. The woman identified a man who had been participated in the altercation with Green that preceded his death, and said he had been present there with his girlfriend.

Based on this information, your affiant contacted the man whom the woman had identified. He was located at the Regional Justice Center in Kent. At that time, the man denied being at the scene of the shooting. He did, however, identify his girlfriend.

Your affiant contacted the man's girlfriend, and questioned her. Initially, she too said she had not been present at the scene of the shooting. Then she said admitted that she heard gunshots and ran. Finally she said that she was there with her boyfriend, who had engaged in an argument with Green. She said that an altercation ensued. She said that suddenly the man wearing a red hat and a red shirt shot Green. The girlfriend gave a physical description of this man and also stated she knew him as "Monday." Detectives researched the name Monday and came up with a possible of Kevin J Monday Jr. who matched the physical description and is also a convicted felon and violent offender. Using Seattle Police Department resources Detectives completed a montage containing the photo of Kevin J Monday Jr. The montage number is 56070. She identified the photograph of Kevin Monday in the montage as the man who shot Francisco Green. During your affiant's interview with this witness, she was very emotional, tearful, and

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Affidavit for Search Warrant (continued)

frightened of retaliation for providing this information. After she identified Monday, your affiant attempted to preserve her identification in a tape-recorded interview, but the young woman began to waffle and said that the man's name was "Monday," "Sunday," or "Infamous," and said he was depicted in one of two photographs (including the photograph of Kevin Monday she had previously signed after identifying him).

Shortly thereafter, this young woman's mother telephoned your affiant. After a short discussion, the young woman's mother called again, and told your affiant that her daughter's boyfriend wished to speak to the detectives again.

Your affiant returned to the Regional Justice Center and asked the young man what he wanted to say. The man apologized for misleading your affiant earlier, and said he would tell the truth about what he had seen on the morning of the murder. He admitted that he was at the scene of the homicide with his girlfriend. He said that Kevin Monday shot Francisco Green. The man states that he has known Monday for the last two years and has been incarcerated with Monday in the same sleeping quarters at a State Detention Facility. The young man said that he saw Monday that morning near Occidental Park, and Monday displayed a .40 caliber handgun that he was carrying. [Green was shot with a .40 caliber handgun.]

The young man acknowledged that he had an altercation with Francisco Green near Occidental Park. He said that shortly after he saw Green, Monday approached him and offered to "take care of" Green for him. The young man thought that Monday was offering to fight Green, and declined, thinking he could take care of himself. The young man said that he was present when Monday shot Green. He said Green was unarmed at the time. He said he fled from the scene with his girlfriend.

After interviewing these witnesses, your affiant re-interviewed the woman who had originally called your affiant to report that she had witnessed the homicide, in an effort to determine whether she, too, could identify the shooter. This time, the woman was much less cooperative. She said that your affiant was going to "get [her] killed." She said that "these people" knew her family and where she lived, and that she knew her name would be disclosed to the shooter's lawyers. She said she wished she had never called in the first place. When your affiant displayed the photographs in the montage, she gave them a cursory glance and said, "He ain't there."

The individual identified, as the man who shot Green to death is Kevin J. Monday, Jr., date of birth 04-07-86. Criminal history records in Seattle and in Federal Way, and Department of Licensing records, and Police records of a shooting in which Monday was a victim which took place only a few days ago (5-7-06), and an address he provided during a traffic stop yesterday (05-09-06) all consistently list his address as: 4019 Southwest 337 St., Federal Way. Detectives have information that indicates Kevin J Monday Jr. may be involved in one other homicide and two other shooting incidents, one of which occurred in the State of Virginia.

Seattle Police Department Detectives have conducted a surveillance of the residence of Kevin J Monday at 4019 Southwest 337 St in Federal Way. A vehicle has been observed in the driveway that is registered to Kevin Monday Sr. Detectives observed a large boat in the driveway of that residence. According to registration records the boat is a 1976 Cave, model 11CBR. It appears to be a cabin cruiser approximately twenty-five feet long.

Detectives are requesting a search warrant for the residence of Kevin J Monday located at 4019 Southwest 337 St in Federal Way Washington to include the residence including the garage, the listed boat, any outbuildings, storage sheds or areas for:

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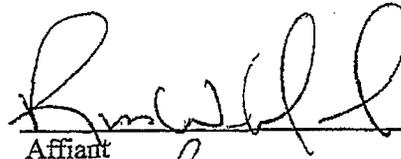
(continued next page)

Affidavit for Search Warrant,
Page _____ of _____

Original: Court File
Copy: Police File
Copy: Judge's Copy

Affidavit for Search Warrant (continued)

- Red shirt with design on front
- Red hat
- White and red or black athletic shoes
- Jean or denim shorts
- Handguns
- Ammunition, gun cleaning or storing equipment to include manuals or literature
- Any information, documents or records stored in any form, including digital, which contain evidence of dominion and control, or evidence of ownership or purchase of handguns, ammunition or gun paraphernalia.
- The person of Kevin J. Monday Jr. date of birth 4-7-1986



Affiant

Summer Line - 7250000000 4525

Agency, Title and Personnel Number

Subscribed and Sworn to before me this 10th day of May, 20 06.



Judge

Issuance of Warrant Approved:
NORM MALENG

By reviewed by DPA Jeff Baird WSBA #11731
Deputy Prosecuting Attorney

DISTRICT COURT FOR KING COUNTY
WEST DIVISION

STATE OF WASHINGTON) NO.
) ss.
COUNTY OF KING) SEARCH WARRANT

TO ANY PEACE OFFICER IN THE STATE OF WASHINGTON

Upon the sworn complaint made before me, the affidavit for which is incorporated by reference herein, there is probable cause to believe that the crime(s) of ^{murder} ~~homicide~~ has been committed and that evidence of that crime; or contraband, the fruits of crime, or things otherwise criminally possessed; or weapons or other things by means of which a crime has been committed or reasonably appears about to be committed; or a person for whose arrest there is probable cause, or who is unlawfully restrained is/are concealed in or on certain premises, vehicles or persons.

YOU ARE COMMANDED to:

1. Search within 5 days of this date, the premises vehicle or person described as follows:

4019 SW 337 Street, Federal Way Washington to include the residence including the garage any outbuildings, storage sheds and a 1976 boat model 11CBR. It appears to be a cabin cruiser approximately twenty-five feet long.

2. Seize if located, the following property or persons:

The person of Kevin J. Monday Jr. date of birth of 4-7-1986

- Red shirt with design on front
- Red hat
- White and red or black athletic shoes
- Jean or denim shorts
- Handguns
- Ammunition, gun cleaning or storing equipment to include manuals or literature
- Any information, documents or records stored in any form, including digital, which contain evidence of dominion and control, or evidence of ownership or purchase of handguns, ammunition or gun paraphernalia.

(continued next page)
Search Warrant
Page 1 of _____

Original: Court File 195
Copy: Police File
Copy: Judge's Copy
Copy: Left at premises searched

Search Warrant (continued)

3. Promptly return this warrant to me or the clerk of this court; the return must include an inventory of all property seized.

A copy of the warrant and a receipt for the property taken shall be given to the person from whom or from whose premises property is taken. If no person is found in possession, a copy and receipt shall be conspicuously posted at the place where the property is found

Date / Time: 5/10/06 1908 hrs

JUDGE



Printed or Typed Name of Judge

ARTHUR R CHAPMAN

This warrant was issued by the above judge, pursuant to the telephonic warrant procedure authorized by JCrR 2.10 and CrR 2.3, on _____, 20____ at _____.

Printed or Typed Name of Peace Officer, Agency
and Personnel Number

Signature of Peace Officer Authorized to Affix
Judge's Signature to Warrant

COURT FOR KING COUNTY

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

NO.
INVENTORY AND RETURN
OF SEARCH WARRANT

1. I received a search warrant for the premises, vehicle or person specifically described as follows:

4019 SW 337 Street, Federal Way Washington to include the residence including the garage any outbuildings, storage sheds and a 1976 boat model 11CBR. It appears to be a cabin cruiser approximately twenty-five feet long.

2. On the _____ day of _____, 20____, I made a diligent search of the above-described premises, vehicle or person and found and seized the items listed below in Item 7.

3. Name(s) of person(s) present when the property was seized:

4. The inventory was made in the presence of:

- The person(s) named in (3) from whose possession the property was taken.
- Others:

5. Name of person served with a copy or description of place where copy is posted:

6. Place where property is now stored:

7. Property and person(s) seized (Indicate location of property when seized):

Dated: _____

Signature of Peace Officer

Agency and Personnel Number

Printed or Typed Name