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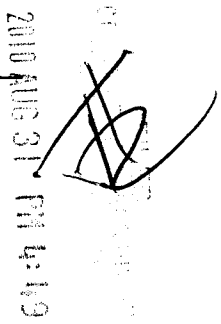
Nos. 63241-8-I
63709-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE



STATE OF WASHINGTON,

Respondent,

v.

CURTIS SHANE THOMPSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Palmer Robinson

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

In 2003, after appellant Curtis S. Thompson had served 18 years in prison, a jury found that he did not meet the criteria of a sexually violent predator and ordered his release. Following his release, Thompson faced a challenging adjustment to post-prison life. Labeled a level three sex offender, Thompson could not secure housing or consistent employment, and was subjected to death threats and acts of aggression in the community.

Ten months after his release, Thompson was arrested and ultimately charged in connection with three criminal incidents. Despite a complete breakdown in communications with his appointed attorney, the court denied his request for substitute counsel and barred him from representing himself at his trials.

Each of the three trials was separately infected with multiple errors that prevented him from receiving a fair trial. Thompson's convictions must be reversed and remanded for new trials at which Thompson will either be afforded the assistance of counsel required by the Sixth Amendment or permitted to go pro se.

B. ASSIGNMENTS OF ERROR[1]

Assignments of error common to both cause numbers

1. The trial court violated Thompson's right to the assistance of counsel protected by the Sixth Amendment and article I, sections 21 and 22 when it refused to appoint substitute counsel despite an irreconcilable conflict between Thompson and his attorney.

2. The trial court violated Thompson's right to self-representation protected by the Sixth Amendment and article I, section 22 when it denied his unequivocal requests to represent himself.

3. The trial court's order that Thompson be restrained during his trials denied him his right to a fair trial protected by the Fourteenth Amendment and article I, section 3 of the Washington Constitution.

4. The trial court's order that Thompson testify from counsel table prejudiced him before the jury in violation of his right to present a defense

[1] Thompson has appeals pending in two cause numbers: COA 63241-8-I and COA 63709-6-I. In COA 63241-8-I, Thompson appeals following convictions on 13 counts of a 14-count information. Counts 1-3 (involving an allegation of rape against Bernadette McDonald) were severed from counts 4-14 (involving allegations of unlawful imprisonment, assault, robbery, and burglary of Lisa Rice, Megan Krell, and Richard Blue) and tried separately. In COA 63709-6-I, Thompson was convicted in connection with the murder of Deborah Byars. The Brief of Appellant consolidates the assignments of error and argument regarding issues that are common to all three appeals and then deals individually with the issues arising from each trial in the order in which the trials were held: (1) the Rice/Krell/Blue convictions, (2) the Bernadette McDonald convictions; and (3) the Deborah Byars convictions.

and to a fair trial provided by the Sixth and Fourteenth Amendments and article I, sections 3 and 22 of the Washington Constitution.

5. To the extent that the finding of fact determines Thompson initiated a physical confrontation with court detail officers, the trial court erred in entering Finding of Fact 7 in support of its Order on Motion that Defendant be Restrained at Trial. 1CP 255.

6. To the extent that the finding of fact determines Thompson attempted to "strike" and "kick" jail correctional staff, the trial court erred in entering Finding of Fact 8 in support of its Order on Motion that Defendant be Restrained at Trial. 1CP 255.

7. The trial court erred in entering finding of fact 9 in support of its Order on Motion that Defendant be Restrained at Trial. 1CP 255.

8. The trial court erred in entering finding of fact 10 in support of its Order on Motion that Defendant be Restrained at Trial. 1CP 255-56.

9. The trial court erred in entering finding of fact 11 in support of its Order on Motion that Defendant be Restrained at Trial. 1CP 256.

10. The trial court erred in entering finding of fact 13 in support of its Order on Motion that Defendant be Restrained at Trial. 1CP 256.

11. The trial court erred in entering finding of fact 20 in support of its Order on Motion that Defendant be Restrained at Trial, to the extent that it speculates, "Mr. Thompson's threats against his attorney will be

repeated against any attorney whom the court and/or the Office of Public Defense may appoint to represent him." 1CP 257.

Assignments of Error relating to the Rice/Krell/Blue Counts.

12. The trial court denied Thompson his right to a unanimous jury verdict protected by article I, sections 21 and 22 of the Washington Constitution when it failed to issue Petrich instructions on counts III and IV of the second amended information, charging assault in the second degree, and with respect to the sexual motivation allegations linked to counts I and III - VII.[2]

13. In violation of due process, the State presented insufficient evidence to prove the allegation that one of the purposes for which Thompson committed count VIII of the second amended information, unlawful imprisonment of Richard Blue, was his sexual gratification.

Assignments of Error relating to the McDonald Counts.

14. RCW 10.58.090 violates the equal protection clauses of the Fourteenth Amendment and article I, section 9 of the Washington Constitution.

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[2] Prior to trial, the State amended the information to renumber the Rice/Krell/Blue counts to preclude the jury from speculating about other charged counts. The information was re-amended before trial on the McDonald counts to again renumber the counts for the same reason.

15. RCW 10.58.090 violates constitutional separation of powers principles.

16. The admission of evidence of prior bad acts under RCW 10.58.090 violated Thompson's right to a fair trial protected by the due process clauses of the Fourteenth Amendment and article I, section 3 of the Washington Constitution.

17. The trial court erred in concluding the evidence of prior bad acts was otherwise admissible under ER 404(b).

18. Jury instruction number 24 was a comment on the evidence, in violation to article IV, section 16 of the Washington Constitution. 1CP 598.

20. The State presented insufficient evidence to prove the essential elements of taking a motor vehicle without permission.

21. Multiple instances of prosecutorial misconduct during cross-examination and closing argument denied Thompson his right to a fair trial protected by the Fourteenth Amendment and article I, section 3 of the Washington Constitution.

Assignments of Error relating to the Byars counts.

22. The admission of evidence pursuant to RCW 10.58.090 violated Thompson's rights to equal protection and due process, and constitutional separation of powers protections.

23. The trial court erred in permitting the State to amend the information to add a sexual motivation allegation where the evidence supporting the allegation derived solely from extrinsic and otherwise inadmissible evidence.

24. The trial court erred in finding evidence of prior bad acts was admissible to prove modus operandi and identity pursuant to ER 404(b).

25. Evidence of other bad acts should have been excluded under ER 403.

26. In violation of due process, the State presented insufficient evidence to support the charged offense.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An accused person has the right under the Sixth Amendment and article I, section 22, to the assistance of conflict-free counsel. Where counsel or the defendant has alleged a breakdown in the attorney-client relationship, the court has the duty to inquire into the circumstances. Thompson's appointed counsel repeatedly petitioned the court to permit him to withdraw as counsel on the basis that a breakdown in communications between him and Thompson had given rise to an irreparable conflict. Did the trial court commit reversible error when it denied counsel's motion to withdraw without conducting any inquiry?

2. Despite a complete breakdown in communications and the court's implicit finding that Thompson had forfeited his right to the assistance of counsel, the court also found that Thompson had forfeited the right to represent himself. As a consequence, Thompson proceeded to trial without the assistance of counsel guaranteed by the federal and state constitutions. Did compelling Thompson to proceed to trial without the assistance of counsel violate due process?

3. The erroneous denial of the fundamental right to counsel can never be harmless. Does the trial court's erroneous denial of the right to counsel require reversal of Thompson's convictions?

4. The right to self-representation is implicitly protected by the Sixth Amendment and explicitly protected by article I, section 22 of the Washington Constitution. In Washington, a timely and unequivocal motion to go pro se must be granted as a matter of law. Thompson unequivocally requested to go pro se well before the commencement of trial. Does the denial of the request require reversal of Thompson's convictions?

5. A request to proceed pro se is unequivocal even when it is coupled with an alternative request for new counsel. Did the trial court err in concluding that Thompson's request to represent himself was equivocal because the request was coupled with a motion for new counsel?

6. Absent a finding that the conduct is intended to obstruct or delay proceedings, a criminal defendant's disruptive or obnoxious behavior cannot serve as a basis to deny a motion for self-representation. Did the trial court err in concluding that Thompson had "forfeited" his right to go pro se by his conduct where the court did not also find that the conduct was intended to obstruct or delay proceedings?

7. Although the appointment of standby counsel to assist a pro se litigant rests in the discretion of the trial court, when the court appoints such counsel, the Sixth Amendment and article I, section 22 require that standby counsel be conflict-free. Where Thompson had an irreconcilable conflict with appointed counsel, did the trial court violate his rights under the Sixth Amendment and article I, section 22 when it ordered that if he went pro se, appointed counsel would be his standby counsel?

8. Post hoc circumstances may not excuse an erroneous denial of a motion to go pro se. Should this Court reject any argument that Thompson's disruptive conduct during proceedings that succeeded the earlier, incorrect denials of Thompson's motions to represent himself justifies those erroneous rulings?

9. The Fourteenth Amendment right to a fair trial entitles an accused person to the physical indicia of innocence. Any order that the defendant be restrained undermines the presumption of innocence in

derogation of this right, and thus may only be entered where necessary to further an essential state interest. These concerns are particularly acute when the defendant testifies in his defense. The court (1) forced Thompson to testify from counsel table and prevented him from being able to rise when the jury entered the courtroom; (2) failed to consider other measures that would not be inherently prejudicial, such as the enhanced presence of courtroom deputies; and (3) did not consider the necessity of the restraints with respect to each trial. Did the trial court deny Thompson a fundamentally fair trial and undermine his right to be presumed innocent?

10. In Washington, an accused person is constitutionally guaranteed a unanimous jury verdict. If there is evidence of multiple acts in support of any element of the charged offense, then the prosecutor must elect which act the State is relying on for conviction or the court must instruct the jury that they must unanimously agree a particular act has been proven beyond a reasonable doubt. Where the State charged Thompson with two counts of second degree assault predicated on the felonies of robbery and indecent liberties, and no unanimity instruction was issued to the jury, was Thompson denied his right to a unanimous jury verdict?

11. Multiple acts could have supported the sexual motivation allegations with respect to counts I, VI, VII, and VIII of the

Rice/Krell/Blue charges. Does the absence of a unanimity instruction invalidate the jury finding of sexual motivation with respect to these counts?

12. Principles of due process require the State to prove the essential elements of a criminal charge beyond a reasonable doubt. To prove an allegation that a crime was committed with sexual motivation, the State must present evidence, based on conduct connected to the body of the underlying felony, that one of the purposes for the defendant's commission of the crime was his sexual gratification. In the Rice/Krell/Blue counts, the State charged Thompson with unlawfully imprisoning a good Samaritan who attempted to intervene in Thompson's altercation with two young women. Where the State presented no evidence showing a sexual purpose connected to Thompson's unlawful imprisonment of this individual, did the State present insufficient evidence to support the sexual motivation allegation connected to the charge?

13. The ex post facto clauses of the state and federal constitutions prohibit the State from enacting any law that imposes punishment for an act that was not punishable when committed, or increases the quantum of punishment annexed when the crime was committed. RCW 10.58.090, permitting the State to introduce evidence of other acts in sex crimes prosecutions, is no mere procedural rule, but substantively disadvantages

offenders and here was applied retrospectively to a crime committed before the statute's enactment. Did application of RCW 10.58.090 to Thompson's prosecution in the McDonald counts violate the ex post facto clauses?

14. Even if RCW 10.58.090 does not violate the federal constitution's ex post facto clause, should this Court conclude it violates the Washington Constitution's more protective counterpart?

15. The Washington Constitution vests the Supreme Court with the sole power to enact procedural rules. If RCW 10.58.090 is not substantive, but procedural, does its enactment by the Legislature violate constitutional separation of powers principles?

16. A court's failure to follow the requirements of an evidentiary rule may be an abuse of discretion. RCW 10.58.090(6) mandates the trial court make the determination that evidence proffered under the statute be (1) necessary and (2) admissible under ER 403. The trial court did not assess whether highly prejudicial other acts evidence was necessary, and accordingly conducted a deficient analysis of its admissibility under ER 403. Was the trial court's admission of the evidence an abuse of discretion?

17. To be admissible to prove "identity" under ER 404(b), other acts evidence must be so distinctive and unusual that a signature-like

similarity is evinced between the other acts and the charged offense. Moreover, the distinctive common features must be shared between the other acts and the charged crime. The State did not establish the existence of shared common features between other acts evidence and the charged crime, and did not show these features were so distinctive as to bear a signature-like similarity. Was the trial court's conclusion that the other acts evidence was admissible under ER 404(b) to prove identity an abuse of discretion?

18. The admission of prejudicial and irrelevant other acts evidence may so taint a jury's consideration of the charged allegations as to deny the defendant a fair trial. Did the admission of inflammatory other acts evidence in the McDonald counts deny Thompson a fair trial?

19. Judicial comments on the evidence are prohibited by article IV, section 16 of the Washington Constitution. A jury instruction may constitute a judicial comment on the evidence if it reveals the court's attitude toward the merits of the case, or the court's evaluation of a disputed issue. After she was sexually assaulted in her home, McDonald offered her assailant her car and told him where to find it. The Court instructed the jury:

> Permission means to consent to the doing of an act which, without such consent, would be unlawful. In order to consent to an act or transaction, a person must act freely

> and voluntarily and not under the influence of threats, force, or duress.

Did this instruction impermissibly reveal the court's attitude toward the merits of the charge and its evaluation of the disputed issue of whether the taking was without permission?

20. Alternatively, did the State present insufficient evidence to prove this essential element of the taking a motor vehicle charge?

21. A prosecutor commits misconduct that violates an accused person's right to due process of law and to confront witnesses when he argues facts not in evidence. In Thompson's prosecution for first degree rape, the prosecutor advised the court before trial that prior victim Virginia Bing would not testify in the trial. Nevertheless, the prosecutor cross-examined Thompson extensively regarding the Bing case and, even though Thompson professed a lack of memory, argued these "facts" in closing argument. Where the prosecutor knew he could not impeach Thompson with Bing's testimony and the alleged facts of her case involved significantly more violent and sadistic conduct than the crime for which Thompson was being prosecuted, did the prosecutor's misconduct deny Thompson a fair trial?

22. According to RCW 9.94A.835, the prosecutor shall file a special allegation that a crime was committed with a sexual motivation if

sufficient admissible evidence exists which, considered with reasonable defenses, would support the allegation beyond a reasonable doubt. The State wished to introduce evidence of other sex offenses to bolster its otherwise weak murder case. But the evidence necessary to prove the allegation that Thompson committed first degree murder with a sexual motivation was inadmissible unless the trial court granted the State's motion to add the allegation. Did the amendment violate separation of powers principles, the plain language of RCW 9.94A.835, and Thompson's due process right to a fair trial?

23. Where there were no shared distinctive features and substantial dissimilarities between the other sex offenses and the facts of the alleged homicide, did the trial court err in concluding the other acts evidence established a modus operandi and was probative of identity?

24. Where the sole probative value of the evidence of the other sex offenses was to induce the jury to set aside their doubts regarding the State's flimsy case and convict based on propensity, did the trial court err in concluding the evidence satisfied RCW 10.58.090's requirement that other acts evidence be more probative than prejudicial?

25. Did the State present insufficient evidence to prove the essential elements of first degree murder?

D. STATEMENT OF THE CASE[3]

1. Procedural overview in the trial court. Following his arrest on August 23, 2004, Curtis Thompson was charged by information in cause number 04-1-03199-7 SEA with criminal charges arising from two separate incidents. 1CP 291-98.[4] Three counts of the information concerned the alleged rape of Bernadette McDonald and 11 counts concerned the assaults and unlawful imprisonment of Lisa Rice, Megan Krell, and Richard Blue, the incident which preceded Thompson's arrest. Id. Thompson was subsequently linked to the murder of Deborah Byars, and in cause number 06-1-07090-5 SEA the State charged him with first degree murder. 2CP 1.[5]

Even though communication between Thompson and his appointed counsel, John Hicks, had completely broken down, and both Thompson

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[3] This statement of the case is intended to provide the Court with an understanding of the complex trial proceedings and ensuing posture on appeal. Given the number of issues on appeal and the length of the brief, facts relating to each issue are appended to the argument to which they pertain.

[4] Clerk's papers from cause number 04-1-03199-7 SEA are referenced herein as 1CP followed by page number. Clerk's papers from cause number 06-1-07090-5 SEA are referenced herein as 2CP followed by page number.

[5] Prior to trial, the State was permitted to amend the information in the Byars counts to charge Thompson in the alternative with premeditated first degree murder with sexual motivation and first degree felony murder predicated on rape. 2CP 91-92.

and Hicks repeatedly petitioned the court for substitute counsel, the court forced Thompson to proceed to trial with Hicks as his lawyer. 10/8 & 10/15/07 RP 30-32.[6] The court also denied Thompson's many requests to represent himself. Id. at 88; 2/28/08 RP 15.

Over Thompson's objection, the McDonald counts were severed from the Rice/Krell/Blue counts. Thompson was then tried separately for the two incidents charged in cause number 04-1-03199-7 SEA and then the incident charged in cause number 06-1-07090-5 SEA. Six of the convictions were qualifying offenses under the Persistent Offender Accountability Act (POAA), and, based on Thompson's prior convictions, the court sentenced Thompson to serve consecutive sentences of life without the possibility of parole.

2. Procedural posture on appeal. Thompson filed appeals in both cause numbers. These appeals were perfected separately; however, multiple hearings addressed issues in both cause numbers, and, in trying Cause Number 06-1-07090-5 SEA, the court referenced and relied upon rulings made in Cause Number 04-1-03199-7 SEA. Thompson sought and was granted this Court's permission to file a consolidated brief.

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[6] Citations to the verbatim report of proceedings generally are by date followed by page number. In cause number 06-1-07090-5 SEA, the court reporter bound together transcripts of multiple hearings into sequentially numbered volumes. Citations to these transcripts are by volume followed by page number, e.g., 2RP (Vol. 3) 25.

E. ARGUMENT PERTAINING TO ASSIGNMENTS OF ERROR 1- 11 (ERRORS COMMON TO BOTH CAUSE NUMBERS)

1. THE TRIAL COURT'S REFUSAL TO APPOINT NEW COUNSEL DESPITE THE IRREPARABLE CONFLICT BETWEEN THOMPSON AND HIS DEFENSE ATTORNEY DENIED THOMPSON HIS RIGHT TO COUNSEL GUARANTEED BY THE SIXTH AMENDMENT AND ARTICLE I, SECTION 22.

a. Thompson moved to discharge his counsel, and his counsel sought to withdraw, because the attorney-client relationship had completely broken down. When Thompson was first arrested and charged with criminal offenses, he was appointed counsel from the Defender Association ("TDA"), Richard Warner and Mark Adair. His relationship with Warner and Adair was not positive. TDA had previously represented Thompson on a matter in 1985 in which Thompson had pleaded guilty, and Thompson believed that TDA was conspiring with the King County Prosecutor's office to force him to plead guilty to the current charges. 3/1/06 RP 5. Additionally, Thompson believed TDA lawyers might be witnesses in his upcoming trial because they had represented him at his sex offender commitment trial, and for this reason they had a conflict of interest. 3/1/06 RP 4.

Thompson's TDA lawyers moved to withdraw before the Honorable Ronald Kessler, citing Thompson's dissatisfaction with them as

the reason. 3/1/06 RP 2. At that hearing, Judge Kessler expressed skepticism that Thompson would be content with any lawyer. Id. at 2-3. In response, TDA lawyer Mark Adair explained that Thompson specifically had a problem with TDA because TDA had represented him on his past matters when he pleaded guilty as well as the 2003 civil commitment proceeding. Id. at 3. Thompson himself explained that he distrusted public defender agencies and that because he was facing sentences of life without the possibility of parole, he wanted to make sure he was well-represented. Id. at 4-7.

The court appointed outside counsel, John Hicks, to represent Thompson. Id. at 7-8. Thompson suffered a poor relationship with Hicks nearly from the start of the representation. At a hearing on November 8, 2006, Hicks informed the court that his communication with Thompson had broken down. 11/8/06 RP 2. He posited that the deterioration in their relationship might be a consequence of mental illness. Id. Thompson himself advised the court, "The fact of the matter is I feel it's a conspiracy to have me killed by the prosecution, by my defense, by the State." Id. Based on Thompson's statements, the court ordered a competency evaluation. Id.

Beginning in late 2006, Thompson began to express anxiety that Hicks would not advance the mental defense that Thompson believed

should be his defense at his trials. 11/30/06 RP 15. At an ex parte hearing on September 14, 2007, Thompson reiterated these concerns and asked the court to allow him to co-counsel his cases. 9/14/07 RP 15. At the same hearing, defense counsel advised the court that his relationship with Thompson had deteriorated beyond repair. 9/14/07 RP 3. He told the court, "We have a fundamental and absolutely irreconcilable disagreement about what his defense should be." Id. at 14.

The court denied Thompson's request to appoint him as co-counsel, at which point Thompson advised the court that he could not work with Hicks and that he wanted Hicks removed as his lawyer. Id. at 15. The court denied this request as well. Id. In response to this ruling, Thompson stated, "No. This guy is gone. If I ever talk to him again, I will kill him." He told the court, "You can put that down in writing." Id. at 17.

From this point forward, the relationship between Thompson and Hicks was singularly marked by mutual antipathy and distrust. At another ex parte hearing on October 8, 2007, Hicks informed the court that Thompson's desired mental defense was not supportable. 10/8 & 10/15/07 RP 6. Hicks also noted that he had consulted with ethics expert John Strait, then-president of the Washington Association of Criminal Defense Lawyers Amanda Lee, and attorney Michael Mann. Id. at 19. He

stated that all of these attorneys were in agreement that he had a duty to withdraw from the representation. Id. at 20. Citing State v. Hegge, 53 Wn. App. 345, 766 P.2d 1127 (1989), he noted that communications had completely broken down, justifying termination of the representation. 10/8 & 10/15/07 RP 20. He pointed out that at the previous hearing, Thompson had leveled a death threat at him. Id.

The court denied Hicks' motion. Id. at 23. Thompson responded, "He is fired then. From now on we're not working together. I am pro se." He said, "Here is my motion." Id. at 23, 25. The court told Thompson his behavior was disruptive and disrespectful of the court and judicial proceedings, and admonished him that this would be a factor in deciding whether Thompson would be allowed to represent himself. Id. at 26.

Hicks again asked the court to permit him to withdraw as counsel. He stated his relationship with Thompson had become so acrimonious that "just about any lawyer may be able to do better." Id. Thompson confirmed he "will not work with this idiot," explaining, "[Hicks] contaminated my whole defense . . . and I will not work with him." Id.

At a hearing a week later, on October 15, 2007, Hicks again implored the court to allow him to withdraw. 10/8 & 10/15/07 RP 30. He stated that he had been a defense attorney for a long time, and had had many difficult relationships and been threatened in past, but that the

difference between those cases and this one was that those clients listened to him. He stated that Thompson did not, "to the point that the acrimony between us now is so great that I have determined, based on the case law I have studied, that I simply cannot provide him with effective assistance." Id. at 30-31. The court again denied Hicks' motion to withdraw. Id. at 32.

Thompson then addressed the court. He stated his primary request was for new counsel, but that if the court denied that motion, he wanted to go pro se. Id. He said, regarding Hicks, "if this individual continues to work for me, they may as well take me to the penitentiary right now, because I feel he is seeking a death penalty on me." Id. at 37. He reiterated, "[H]e is fired," and stated, "I would have a better chance with somebody else in the court than this idiot. Okay? He is off my case. He is fired." Id. at 38.

The court commented that Thompson had also fired his attorneys from TDA. Id. at 39. The court then commenced the pro se colloquy, but reconsidered, and ruled that Thompson's request to represent himself was equivocal because it was contingent on his motion for new counsel. Id. at 63, 75, 78. Thompson repeated that Hicks was "through" and that he did not want "to hear him say nothing to me." Id at 79. He stated,

> This idiot, he had better stay the fuck away from me. Do you understand that? I will kill him and any of his cronies, including, I hate to say it, any justices, cops, whoever, any

> of these idiots that work for these idiots in this corrupt system I will kill if they ever come around me.

Id. at 82.

The court removed Thompson from the courtroom. Hicks then stated,

> Your honor, I am sorry to beat this to death. I feel I just have to. Mr. Thompson and Mr. Thompson's case appear to be nothing less than a punishment from God for my 20s. I am convinced that if I proceed to trial as his attorney, it is going to be literally worse than if he was pro se, and I don't say that lightly.

Id. at 85.

He explained,

> I don't know what else to say except I don't want him to go pro se. I want him to have other counsel. But if not that, I am almost willing to think he would be better off going pro se for one simple reason: a jury is going to see me. They are going to see me unable to articulate what I want to articulate and do what I want to do, because he won't communicate with me, and they are going to see that.
>
> They are going to see a lawyer looking weak, unprepared, and it is only going to prejudice Mr. Thompson at his trial -- not to mention what is going to happen -- we all know what is going to happen, we have all been around. He is going to act out; he is going to turn over tables; he is going to toss stuff. It is going to be a disaster.
>
> I do ask you to reconsider giving him new counsel and allowing me to withdraw from the case. I don't do that lightly. I never have before -- except one time when I felt I had to to accommodate a much older lawyer's position I had with Matthew Bolar's case. I have never done it before.

Id. at 86-87.

The court opined that no other attorney would have better luck with Thompson. Id. at 87. The court expressed the belief that Thompson's request to go pro se was motivated by the court's denial of defense counsel's motion to withdraw, and that it feared appellate reversal. Id. at 88.

At hearings thereafter, Hicks renewed the motion to withdraw, and in written submissions Thompson renewed his motion to represent himself. 2/15/08 RP 16; 2/28/08 RP 23; 1CP 553. When the court again denied the motions, Thompson stated that the case did not have to go to trial, commenting, the court would "find out. All you got to do is push this issue a little further and you'll find out." 2/15/08 RP 14. Thompson also reiterated his potent hostility towards Hicks, stating, "I will kill this man if I ever get a chance." 2/15/08 RP 15. He said that Hicks had to "stay away," to which Hicks responded, "I'll agree." Id. Following these comments, the court ordered Thompson be removed from the courtroom. 2/15/08 RP 16. After Thompson's removal, the prosecutor noted for the record Thompson's "menacing" and "threatening" demeanor when he made the statements. Id. at 18.

Nevertheless, far from reconsidering its ruling, the court shifted the burden of its decision on Thompson. The court ruled,

> [B]ecause Mr. Hicks will remain as [Thompson's] counsel, that means we have put Mr. Hicks in the position of representing a person who will not talk to him and whose cooperation he will not give. And that is Mr. Thompson's choice.

2/28/08 RP 19. In response to this ruling, Hicks asked the court's permission to note a "running motion" to withdraw based on the breakdown in communications between him and Thompson. 2/28/08 RP 23.

As Thompson's frustration with Hicks increased, he had increasing difficulty managing his behavior in the courtroom. He explained to the court, however, "Your honor, my main conflict is with this attorney. If this attorney is removed from representing me, there will be no conflict no more." 7/11/08 RP 5. He opined that Hicks was "corrupt" and stated Hicks was not working for him. Id. at 10. The court, in response, again voiced the view that Thompson would have the same problems with any lawyer. Id. Thompson nevertheless continued to file written motions to remove Hicks as counsel because of the breakdown in communications between them. 1CP 285-86.

At a subsequent motion brought by the State and the King County Jail to restrain Thompson during his trial, the court observed that

Thompson had repeatedly threatened harm to his defense counsel and to the court, and was facing life imprisonment so had "little to lose." 7/24/08 RP 54. In fact, even as Thompson reiterated there was a "complete breakdown in communications" between him and Hicks, counsel for the Jail noted that Hicks had become so apprehensive of his client that he had placed a chair between himself and Thompson so Thompson could not easily reach him. 8/12/08 RP 5, 29. The court's written findings in favor of restraining Thompson during his trial documented the court's concern that, given an opportunity, Thompson would attempt to injure his attorney. 1CP 256; 1CP 547-50.

As matters continued to deteriorate, Hicks observed that Thompson had filed a bar complaint against him and that Thompson refused to speak to him. Id. at 46, 61. Hicks even requested the court appoint a second lawyer to convey the court's rulings to Thompson, because Thompson would become so agitated when Hicks attempted to meet with him that Hicks was not able to communicate anything to him. Id. at 61. The court did appoint another lawyer for the limited purpose of acting as "liaison counsel," who would communicate with Hicks in the event Thompson's disruptive behavior led to his removal to a video-feed courtroom. 1CP 260-61. Thompson refused to accept this substitute for

an attorney-client relationship, stating, "I don't need no middle man. This man is working against me in my defense." 9/4/08 RP 14.

b. An accused person has the Sixth Amendment and article I, section 22 right to conflict-free counsel. Accused persons are guaranteed the fundamental right to the assistance of counsel at all critical stages of the proceedings against them. United States v. Wade, 288 U.S. 218, 226, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); U.S. Const. amends. VI; XIV. The right to counsel is so "fundamental and essential to a fair trial" that it is binding on states through the doctrine of incorporation. Gideon v. Wainwright, 372 U.S. 335, 342-43, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

Although the Sixth Amendment does not guarantee a "meaningful relationship" between the accused and his counsel, Morris v. Slappy, 461U.S. 1, 13-14, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983), "[t]he Sixth Amendment right to counsel contains a correlative right to representation that is unimpaired by conflicts of interest or divided loyalties." Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991); see also Wheat v. United States, 486 U.S. 153, 159-60, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988) (right to effective assistance of counsel contemplates right to conflict-free counsel). Where a court "compel[s] one charged with [a] grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in [an] irreconcilable conflict [it] deprive[s] him of the

effective assistance of any counsel whatsoever." Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970). The failure to respect the elemental right to conflict-free counsel violates the defendant's right to due process, and can never be harmless. Wood v. Georgia, 450 U.S. 261, 271-72, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981); Chapman v. California, 386 U.S. 18, 23 & n. 8, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

c. The trial court denied Thompson his Sixth Amendment and article I, section 22 right to conflict-free counsel when it refused to discharge Hicks despite a complete breakdown in communications. To justify appointment of new counsel, a defendant "must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant." State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). Even if present counsel is competent, a complete breakdown in communications can result in an inadequate defense. United States v. Nguyen, 252 F.3d 998, 1003 (9th Cir. 2001). "Similarly, a defendant is denied his Sixth Amendment right to counsel when he is 'forced into a trial with the assistance of a particular lawyer with whom he [is] dissatisfied, with whom he [will] not cooperate, and with whom he [will] not, in any manner whatsoever, communicate.'" Id. (citation omitted); see also Douglas v. United States, 488 A.2d 121, 136

(D.C. App. 1985) (finding conflict of interest where defendant had filed complaint against his court-appointed attorney with the Office of the Bar Counsel).

In determining whether a motion to appoint new counsel should be granted, courts must give deference to the opinions of current counsel:

> [A]n attorney's request for the appointment of separate counsel, based on his representations as an officer of the court regarding a conflict of interests, should be granted[.] . . . An "attorney. . . in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial." . . . Second, defense attorneys have the obligation, upon discovering a conflict of interest, to advise the court at once of the problem . . . Finally, attorneys are officers of the court, and "when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath."

Holloway v. Arkansas, 435 U.S. 475, 485-86, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978) (citations omitted).

Hicks told the court on multiple occasions that his relationship with Thompson had degenerated to the point where he "simply [could not] provide [Thompson] with effective assistance." 10/8 & 10/15/07 RP 30-31. He said "just about any lawyer would be able to do better." Id. at 26. In support of his motion, Hicks cited the opinions of ethics experts who believed that he had an obligation to withdraw as Thompson's attorney. Id. at 19-20.

The court was aware that Thompson had filed a bar complaint against Hicks. 812/08 RP 46. The court was also aware that Thompson had threatened to kill Hicks on more than one occasion, that Hicks had stopped visiting Thompson at the jail, and that Hicks was so fearful of Thompson that he placed a barrier between himself and his client in open court. 1CP 256, 260-61; 8/12/08 RP 61. In a circumstance merely involving a breakdown in communications similar to what Hicks described to the court, the Ninth Circuit found there was "no question" that the attorney client relationship had irretrievably broken. Nguyen, 262 F.3d at 1004 (attorney acknowledged to court that client "just won't talk to me anymore").

A key issue about which Thompson and Hicks disagreed was how Thompson should be defended. Thompson wanted Hicks to pursue a mental defense which Hicks felt was no defense at all. 9/14/07 RP 13. Hicks informed the court, "We have a fundamental and absolutely irreconcilable disagreement about what [Thompson's] defense should be." 9/14/07 RP 14. Thompson was also frustrated by Hicks' decision to sever counts without Thompson's approval, Hicks' failure to move for a change of venue, and Hicks' failure to interview certain witnesses. 9/14/07 RP 7; 11/5/07 RP 3. Critical stages under the Sixth Amendment "can include steps in the proceedings . . . where available defenses may be irretrievably

lost." Smith v. Lockhart, 923 F.2d at 1319 (citing Hamilton v. Alabama, 368 U.S. 52, 54, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961)).

Under Holloway, once Hicks advised the trial court of the breakdown in communications, the court was obligated to take some responsive action to ensure Thompson's Sixth Amendment right to counsel was protected. See Mickens v. Taylor, 535 U.S. 162, 168, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002) (reaffirming that "a defense attorney is in the best position to determine when a conflict exists . . . he has an ethical obligation to advise the court of any problem, and . . . his declarations to the court are "virtually made under oath.") (quoting Holloway, 435 U.S. at 485-86). Instead of taking action in response to counsel's representations, however, the trial court refused to allow substitution. In peremptorily denying the motion to substitute counsel, the trial court violated Thompson's Sixth Amendment right and Art. I, section 22?.

i. The trial court failed to fulfill its duty to inquire into the conflict between Thompson and his counsel. Where the court learns of a conflict between an accused person and his attorney, the court has the "obligation to inquire thoroughly into the factual basis of the defendant's dissatisfaction." Smith v. Lockhart, 923 F.2d at 1320 (quoting United States v. Hart, 557 F.2d 162, 163 (8th Cir. 1977)). The

court "must conduct 'such necessary inquiry as might ease the defendant's dissatisfaction, distrust, and concern.'" United States v. Adelzo-Gonzalez, 268 F.3d 772, 777 (9th Cir. 2001) (quoting United States v. Garcia, 924 F.2d 925, 926 (9th Cir. 1991)). This inquiry should "provide a 'sufficient basis for reaching an informed decision.'" Id. (quoting United States v. McClendon, 782 F.2d 785, 789 (9th Cir. 1986)). Thus the court "may need to evaluate the depth of any conflict between defendant and counsel, the extent of any breakdown in communication, how much time may be necessary for a new attorney to prepare, and any delay or inconvenience that may result from substitution." Id.

On review of the denial of a motion to substitute counsel, the court considers three factors: "the adequacy of the [trial] court's inquiry, the extent of any conflict, and the timeliness of the motion." Id. In the absence of a sufficient inquiry, a trial court's denial of a motion to substitute counsel may require reversal.

For example, in Adelzo-Gonzalez, the defendant submitted three letters to the district court expressing his dissatisfaction with his appointed counsel. Id. The district court inquired into Adelzo-Gonzalez's first and last motions (although not the second). The Ninth Circuit concluded this inquiry was inadequate:

> The district court asked only open-ended questions and put the onus on defendant to articulate why the appointed counsel could not provide competent representation. While open-ended questions are not always inadequate, in most circumstances a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions.

Id. at 777-78. In contrast to the well-intentioned but insufficient effort of the district court in Adelzo-Gonzalez, the trial court here conducted no inquiry into the conflict between Thompson and Hicks whatsoever, even though Hicks's representations, as an officer of the court, were entitled to substantial deference. Holloway, 435 U.S. at 485-86.

United States v. D'Amore, 56 F.3d 1202 (9th Cir. 1995), is a case that presents similar facts to this case. In D'Amore, the Court of Appeals surmised that the district court had reached a tentative conclusion about the defendant's motion for substitution before it even held a hearing because at the start of the hearing, the district court indicated it had told defense counsel "yesterday" it expected the case to proceed as scheduled. Id. at 1205. On review, the Court chastised the district court, noting the court:

> conducted no inquiry of the defendant or his lawyer regarding the conflict between them or the length of the necessary delay. Instead, D'Amore was merely given a chance to speak, after which the court reiterated what it had told Crawford the day before--the case would proceed as scheduled.

Id.

The Ninth Circuit found this truncated inquiry unsatisfactory. Id. at 1205-07. Particularly in light of the absence of any adequate record to review the district court's decision, the Court concluded that it could not identify any "compelling purpose" that was served by denial of the motion. Id. at 1207.

In this case, the trial court asked no questions of Hicks or Thompson regarding the conflict between them that could have afforded any reasonable basis for its decision. The State may claim there was no error because the trial court's ruling was based on Judge Kessler's speculation that no new counsel should be appointed after Hicks. 3/1/06 RP 6-8. But because Judge Kessler was unaware of the circumstances of the attorney-client relationship between Hicks and Thompson, and the other judges who heard the motion to withdraw did not inquire into the circumstances, it cannot be said that this ruling was based on a proper exercise of judicial discretion.

"[E]ven when the motion is made on the day of trial, the court must make a balancing determination, carefully weighing the resulting inconvenience and delay against the defendant's important constitutional right to counsel of his choice." D'Amore, 56 F.3d at 1206. The trial court conducted no inquiry, balanced no interests, and, ultimately, failed to

meaningfully exercise its discretion. The trial court's ruling violated Thompson's Sixth and Fourteenth Amendment rights, and article I, sections 3, 21, and 22 of the Washington Constitution. Thompson is entitled to a new trial with substitute counsel.

ii. There is no basis on this record to conclude that Thompson forfeited his right to the assistance of counsel. Some federal courts have concluded that a defendant's extreme dilatory conduct can amount to forfeiture of the right to counsel. United States v. Bauer, 956 F.2d 693, 695 (7th Cir.), cert. denied, 506 U.S. 882 (1992). But see United States v. Allen, 895 F.2d 1577 (10th Cir. 1990) (failure to ensure waiver of right to counsel was knowing and voluntary rendered waiver invalid) and United States v. Goldberg, 67 F.3d 1092, 1094 (3rd Cir. 1995).

In Goldberg, despite (1) the defendant's refusal to meet with his lawyer; (2) the defendant's strong disagreement with the lawyer's trial strategy; (3) the defendant's frustration that the lawyer was not pursuing the defenses he wanted; and (4) threats by the defendant against his lawyer, the Court concluded that the district court erred in finding Goldberg had waived the right to counsel by his conduct. 67 F.3d at 1102-03. In so holding, the Court noted an "important distinction" between "the

ideas of 'waiver' and 'forfeiture,' and a hybrid of those two concepts, 'waiver by conduct.'" Id. at 1099.

A "waiver" requires "an intentional and voluntary relinquishment of a known right." Id. (citing Johnson v. Zerbst, 304 U.S. 458, 464-65, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938)). The Supreme Court "indulge[s] every reasonable presumption against waiver of fundamental constitutional rights." Johnson v. Zerbst, 304 U.S. at 464.

"Forfeiture" lies at "the other end of the spectrum." Goldberg, 67 U.S. at 1100. Unlike waiver, "forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right." Id.

Finally, "waiver by conduct" is a "hybrid situation" that "combines elements of waiver and forfeiture." Id. The Court described the application of this situation to the circumstance of the right to counsel as follows: "Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed pro se and, thus, as a waiver of the right to counsel." Id. (citing Bauer, 956 F.2d at 695 (failure to hire counsel despite financial ability to do so was waiver by conduct), and Allen, 895 F.2d at 1579). The Court in Goldberg cautioned, however, that "to the extent that the defendant's actions are examined under the doctrine of

'waiver,' there can be no valid waiver of the Sixth Amendment right to counsel unless the defendant also receives Faretta[7] warnings." 67 F.3d at 1100.

The Court concluded that "waiver by conduct" is a misnomer for the situations where a defendant has been warned of the consequences of his actions but persists in dilatory conduct. Id. at 1101. The Court opined, "A defendant who engages in dilatory conduct having been warned that such conduct will be treated as a request to proceed pro se cannot complain that a court is 'forfeiting' his right to counsel." Id.

The Court noted, as well, that characterizing "forfeiture" as "waiver by conduct" is problematic for appellate review, because "waiver by conduct" requires the defendant be given Faretta warnings. Id. In Goldberg, the district court had admonished the defendant, "The Court finds that you have manipulated the judicial system for your own benefit . . . The Court finds that by your conduct you have waived the right to proceed with counsel at this trial, and the Court simply will not tolerate that behavior." Id. at 1096. In response, Goldberg insisted that the finding of waiver was not valid and "in no way at all am I waiving my Sixth Amendment right to counsel." Id.

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[7] Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 262 (1975).

The Court of Appeals concluded that the district court incorrectly substituted "waiver" for forfeiture. Id. at 1102-03. The Court held that as a matter of law, there was insufficient evidence of abusive conduct to support a finding of forfeiture. Id. Finding the error was not susceptible of harmless error analysis, the Court reversed the conviction. Id. at 1103; accord Allen, 895 F.2d at 1579.

Only a couple of decisions have upheld the removal of counsel under the theory that the defendant had forfeited his right to counsel. In United States v. McLeod, 53 F.3d 322 (11th Cir. 1995), the district court permitted defense counsel to withdraw without appointing substitute counsel. Id. at 325-26. On review, the Court noted McLeod's behavior toward his counsel was "repeatedly abusive, threatening, and coercive." Id. at 326. The Court concluded that the district court did not err in granting defense counsel's motion to withdraw, but noted that it was "troubled by the fact that McLeod was not warned that his misbehavior might lead to pro se representation." Id.

In United States v. Thomas, 357 F.3d 357 (3rd Cir. 2004), the Court also found the defendant had waived his right to counsel by his conduct after four different attorneys were permitted to withdraw from the

case.[8] Id. at 359-60. When the fourth attorney was appointed, the court warned Thomas that the possible consequence of another breakdown in communications with his attorney would be that Thomas would be forced to represent himself. Id. at 360. This attorney indeed moved to withdraw, and the court found that Thomas had forfeited his right to counsel, and in the alternative that he had waived the right by his conduct. Id. at 360-61. The court ordered Thomas to proceed pro se and appointed standby counsel to assist him. Id. at 362.

In affirming the lower court's ruling, the court noted that Thomas had not simply engaged in serious misconduct, but, "most critically, Thomas engaged in this sort of misconduct not once, but in relationships with four attorneys." Id. at 363. The court also found the order that Thomas go pro se was properly entered. Id. at 363-64.

Here, the trial court did not make a finding of forfeiture or of waiver by conduct. Despite many requests by Hicks and Thompson that Hicks be permitted to withdraw and new counsel be appointed, the trial court expressly refused to remove Hicks. The court ruled that Thompson "chose" not to talk to or cooperate with his attorney. 2/28/08 RP 19. Save for referencing Judge Kessler's earlier "ruling" that Thompson would not

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[8] Thomas' first attorney was retained, not appointed, but withdrew because Thomas had not paid his fees. 357 F.3d at 359. Thomas opposed the motion to withdraw. Id.

again be allowed new counsel, the court conducted no inquiry into the circumstances underlying the breakdown in communications.

At other times during the pretrial and trial proceedings, the court expressly found that Thompson had waived fundamental constitutional rights through his conduct. See 2/18/08 RP 18, 7/11/08 RP 43 (right to pro se status); 8/12/08 RP 13 (right to be present in court for a change in his speedy trial expiration date); 9/18/08 RP 47 (right to be tried without being in restraints); 2/26/09 RP 35-36 (right to be present during trial). Here, by contrast, the court made no explicit finding on the question. Given the court's unmistakable understanding of its constitutional duties in other respects, the absence of an express finding signifies that the court avoided addressing the question.

d. The trial court's order denying Thompson's motion for substitute counsel constructively denied Thompson his Sixth Amendment right to counsel, in violation of due process. "[T]he right to counsel is "'so basic to a fair trial that [its] infraction can never be treated as harmless error.'" Penson v. Ohio, 488 U.S. 75, 88, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988) (quoting Chapman v. California, 386 U.S. 18, 23 n. 8, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). The Supreme Court has repeatedly held that a defendant's Sixth Amendment right to counsel is violated if the

defendant is unable to communicate with his counsel during key trial preparation times.

> [A] defendant's right to the effective assistance of counsel is impaired when he cannot cooperate in an active manner with his lawyer. The defendant must be able to provide needed information to his lawyer and to participate in the making of decisions on his own behalf.

Riggins v. Nevada, 504 U.S. 127, 144, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992) (citations omitted); see also United States v. Cronic, 466 U.S. 648, 659 n. 25, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) ("The Court has uniformly found constitutional error without any showing of prejudice when counsel was ... prevented from assisting the accused during a critical stage of the proceeding").

The constructive denial of counsel doctrine applies to cases where the defendant has an irreconcilable conflict with his lawyer, and the court has refused to grant a motion for substitution of counsel. Daniels v. Woodford, 428 F.3d 1181, 1197 (9th Cir. 2005). In Daniels, a capital case, Daniels was appointed a lawyer who was a former prosecutor after a lawyer who Daniels trusted was removed for a conflict. Daniels believed that there was a "conspiracy between the police, courts, and district attorney to prevent Daniels from presenting a defense and thereby ensure his execution." 428 F.3d at 1190. Daniels "believed his defense team was part of this conspiracy and that Jordon [the attorney] had been appointed

to hasten his conviction and death sentence." Id. The Ninth Circuit noted that Daniels' paranoid belief "may have been unwarranted." Id. at 1199. Nevertheless, "the [trial] court still had an obligation to try to provide counsel that Daniels would trust." Id.

Similar to Daniels, early in the proceedings Thompson voiced his belief that "The fact of the matter is I feel it's a conspiracy to have me killed by the prosecution, by my defense, by the State." 11/8/05 RP 2. The acuteness of Thompson's paranoia prompted the court to refer him for a competency evaluation. Id. At the October 15, 2007 motion for substitution of counsel, Thompson told the court, "if this individual continues to work for me, they may as well take me to the penitentiary right now, because I feel he is seeking a death penalty on me." 10/8 & 10/15/07 RP 37. By the time Thompson's first trial commenced, the rancor between him and Hicks had calcified to the point that Hicks and Thompson simply did not speak to one another, and Hicks assiduously avoided even the possibility of physical contact with his client. 7/11/08 RP 5-13; 8/12/08 RP 5, 29.

The appointment of counsel to act as a go-between for Thompson and Hicks did not resolve this crisis. That attorney, Phillip Tavel, was appointed for the limited purpose of serving "as liaison between Mr. Hicks and Mr. Thompson in the event Mr. Thompson is excluded from the

courtroom during trial." 1CP 261. Thompson correctly viewed Tavel as a "middle man", and distrusted him accordingly. 9/4/08 RP 14; 9/8/08 RP 17; 2/25/09 RP 32. Tavel was not co-counsel with influence over and insight into strategy. Tavel's sole role was to serve as a functional mouthpiece for Hicks. Id.

Hicks was entirely responsible for conducting Thompson's trials, and Thompson was deeply dissatisfied with Hicks' performance. As Hicks predicted at the October 15, 2007 hearing, Thompson could not refrain from displaying his contempt and dislike for Hicks before the jury. 9/17/08 RP 61-62 (Thompson warns Hicks to "stay the fuck away from me"); 9/24/08 RP 2 (Thompson states his "outbursts" in court are a consequence of Hicks' inadequate cross-examination); 2/17/09 RP 124-25 (Thompson repeatedly objects to Hicks interfering with his vision of McDonald during her testimony); 2/26/09 RP 32 (Thompson tells Hicks, during the prosecutor's closing argument, "You shut up. You're supposed to be objecting, punk").

The constructive denial of the Sixth Amendment right to counsel gives rise to a presumption of prejudice. Perry v. Leeke, 488 U.S. 272, 280, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989) ("'[a]ctual or constructive denial of the assistance of counsel altogether' is not subject to the kind of prejudice analysis that is appropriate in determining whether the quality of

a lawyer's performance itself has been constitutionally ineffective"); Penson, 109 S.Ct. at 88 ("a pervasive denial of counsel casts such doubt on the fairness of the trial process, that it can never be considered harmless error"). "Even if [trial] counsel is competent, a serious breakdown in communications can result in an inadequate defense." Daniels, 428 F.3d at 1198 (quoting Nguyen, 262 F.3d at 1003). This Court should conclude that the trial court's adamant refusal to remove counsel with whom Thompson had an irreconcilable conflict of interest resulted in a constructive denial of counsel. Prejudice must be presumed. Perry v. Leeke, 488 U.S. at 280. Thompson is entitled to reversal of his convictions.

2. THE ORDER DENYING THOMPSON'S MOTION TO REPRESENT HIMSELF VIOLATED HIS RIGHTS UNDER THE SIXTH AMENDMENT AND ARTICLE I, SECTION 22.

a. Thompson made timely and unequivocal requests to represent himself. When the court denied Hicks and Thompson's joint motion to allow Hicks to withdraw, Thompson requested the court appoint him as co-counsel. 11/30/06 RP 15. The court denied this request, ruling there is no right to hybrid representation in Washington. Id. After the court denied Hicks' subsequent request to withdraw on October 8, 2007, Thompson stated, "he is fired then. From now on we're not working

together. I am pro se." 10/8 & 10/15/07 RP 23. He told the court, "here is my [pro se] motion." Id. The court refused to rule on the motion because the hearing was ex parte. Id. at 25.

At a hearing one week later, Thompson explained that his primary request was for new counsel, however, if the court denied that request he wanted to go pro se. Id. at 32. He stated, "I know the law. I know the case -- Faretta. I know all them cases." Id. at 41. The court asked Thompson how much time he would need to prepare for trial if it permitted him to represent himself, and Thompson asked for at least six months. Id. at 63.

The court commenced the pro se colloquy, then stopped, then ruled that Thompson's request to represent himself was contingent on the court having denied Hicks' motion to withdraw, and for this reason Thompson's waiver of his right to counsel was not voluntary. Id. at 65-78. When Thompson learned Hicks would still represent him, he became enraged, and was removed from the courtroom. Id. at 79-82.

At a hearing on November 5, 2007, Thompson renewed his motion to go pro se. 11/5/07 RP 36. The court declined to address the motion, stating, "if this has already been addressed, and I think it was my misunderstanding that it had not been in this form, then I'm not going to take it up again." Id. at 42.

The next time Thompson's desire to represent himself was considered was at a hearing on February 15, 2008. The court prefaced the discussion of the motion with the observation:

> [T]he decision to grant pro se status is with the court and is not Mr. Thompson's decision. He can make the request, but it's not ultimately a defendant's decision. It's based on the court's assessment of whether that is an appropriate conclusion or ruling for the court to make.

2/15/08 RP 3.

The court then asked Thompson his reasons for wanting to represent himself. Thompson responded, "because of a serious conflict of interest on the part of my attorney, breakdown in communications, lack of investigation, turning over discovery that has been previously ordered, and my right to a fair trial." Id. The court ruled, "[T]hose are expressions of frustration rather than reasons for representing yourself." Id.

The court then attempted to conduct the pro se colloquy with Thompson, but Thompson was focused on his issues with Hicks and his trial-related motions. Id. at 5-6. The court warned him, "As long as you refuse to listen and refuse to engage in a discussion with me about this issue, I cannot find that you are capable of representing yourself." Id. at 7-8. In response, Thompson reiterated that he had the constitutional right to represent himself under Faretta. Id. at 9. When Hicks attempted to

interject, Thompson became agitated, and was removed from the courtroom. Id. at 14-16.

After Thompson was removed from the courtroom, the court ruled that Thompson could not be permitted to represent himself. Id. at 16. Defense counsel renewed his motion to withdraw, and suggested the court submit the pro se colloquy to Thompson in writing in advance of the hearing, so that he would be prepared to expect what needed to be done in order to represent himself. Id. The court observed that in Thompson's "current status" he would not be able to appear before a jury. Id. at 19. The court suggested that the next time, Hicks should absent himself during the pro se colloquy because Thompson reacted to Hicks so strongly. Id. at 24.

At a hearing on February 28, 2008 at which Hicks was present, the prosecutor contended that Thompson had forfeited his right to go pro se by his disruptive behavior. 2/28/08 RP 7. The court agreed with the prosecutor. Id. at 18. In response to the court's ruling, Thompson decided to leave the courtroom. Id. at 20. After Thompson left the courtroom, Hicks noted he had advised Thompson that if Thompson allowed the judge to go through the colloquy, he might well be awarded pro se status. Id. at 23. The court ruled that Thompson's behavior had overridden "the Faretta issue." Id. at 26. Hicks noted that Thompson's behavior had

become increasingly bizarre, and requested Thompson's competency to stand trial be evaluated. Id.; 3/13/08 RP 2.

Following another competency evaluation, Thompson again was found competent, and at a hearing on May 23, 2008, Hicks contended that Thompson had "new standing" to raise his pro se motion in light of the competency finding. 5/23/08 RP 14. On June 27, 2008, Thompson again asked the court to allow him to represent himself, to discharge defense counsel, and for the court to recuse itself. 6/27/08 RP 9. The court denied his motion to discharge his counsel and the motion to recuse, and Thompson lost his temper and called the judge a "bitch." Id. at 9-10. Thompson was removed from the courtroom.

At the next hearing, on July 11, 2008, Thompson assured the court there would be "no conflict no more" if Hicks was removed as his attorney. 7/11/08 RP 5. Hicks again formally moved to withdraw as counsel, and promised Thompson that if appointed as standby counsel, he would abide by Thompson's decisions subject to the constraints of ethical rules governing attorney practice and as otherwise ordered by the court following a closed hearing. Id. at 8. Thompson became enraged at the prospect of being forced to work with Hicks while pro se and was removed from the courtroom. Id. at 10-14.

Thompson renewed his motion to have Hicks removed as counsel before the commencement of trial on the Rice/Krell/Blue counts. 9/8/08 RP 5. The court denied his motion and Thompson proceeded to trial represented by Hicks. Throughout the proceedings, Thompson filed multiple pro se motions, pleadings, and proposed questions for the witnesses, reiterated his desire to represent himself, and repeatedly expressed his dissatisfaction with Hicks' performance. 1CP 281-90, 298-328.

Before his trial on the McDonald counts, Thompson again moved to discharge Hicks. 10/17/08 RP 11. He also brought a number of motions before the court but an acrimonious exchange led to Thompson again being removed from the courtroom. 12/17/08 RP 17-19. After Thompson was removed, the court denied his motions, ruling he was not entitled to make motions pro se. Id.

At a pre-trial hearing, Thompson renewed his pro se motions, asked the court for a ruling, and again asked the court to permit him to represent himself. 1/6/09 RP 11; 1/26/09 RP 26. He asked the court to dismiss Hicks, allow him to go pro se, and appoint Hicks' intermediary, Phillip Tavel, as his standby counsel. 1/26/09 RP 26. When the court denied his motions, Thompson became angry, cursed the court, and again threatened Hicks. Id. at 28-29.

Thompson again renewed his motion to represent himself on February 9, 2009. 2/9 & 10/09 RP 4. Thompson also raised a host of pro se motions. The court denied all motions. Id. at 8. Thompson accordingly proceeded to trial on the McDonald counts represented by Hicks. During the trial, he objected to Hicks' cross-examination of the complainant, and to the court denying his motion to go pro se. 2/17/09 RP 142-43. At this same proceeding, Thompson became agitated and the court ordered his removal from the courtroom. Id. at 143.

Prior to his trial in cause number 06-1-07090-5 SEA, Thompson again moved to go pro se. 3/26/09 RP 12. The court denied Thompson's motion based on his conduct during the two previous trials. Id. at 29. The court noted Thompson had been removed from the courtroom several times, and that if this were to be necessary again, there would be no one to represent Thompson in court. Id.

On May 4, 2009, Thompson again objected to the court's denial of his motion to go pro se. 2RP (Vol. 3) 9. During trial, Thompson also criticized Hicks' trial strategy and insufficient cross-examination of a key witness, and, frustrated, asked to be excused from the courtroom. Id. at 132-33. Thompson was removed from the courtroom. In further proceedings, Thompson attempted to make a number of objections to evidence admitted during the trial, but the court did not rule on

Thompson's objections, presumably because it had not permitted him to represent himself. 2RP (Vol. 4) 70-71, 205; 2RP (Vol. 5) 4; 2RP (Vol. 7) 46-47, 85, 126; 2RP (Vol. 8) 7, 89-90. Thompson also objected to defense counsel's failure to request a limiting instruction regarding certain prejudicial evidence that had been admitted for a limited purpose. 2RP (Vol. 7) 46-47. The court did not issue a limiting instruction.

b. The right to self-representation is protected by both the federal and state constitutions. "Criminal defendants have an explicit right to self-representation under the Washington Constitution and an implicit right under the Sixth Amendment to the United States Constitution." State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (2010) (citing Faretta, 422 U.S. at 819). U.S. Const. amend. XIV; Const. art. I, § 22. This right is "so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice." Madsen,168 Wn.2d at 503. The unjustified denial of the right to self-representation is a structural error that requires reversal of the conviction. Id.

c. In Washington, a timely and unequivocal request to go pro se must be granted. The Washington Constitution provides more expansive protection of the right to self-representation than the federal constitution. State v. Rafay, 167 Wn.2d 644, 650-51, 222 P.3d 86 (2009).

Thus, while courts are "required to indulge in 'every reasonable presumption' against a defendant's waiver of his or her right to counsel," this presumption "does not give a court carte blanche to deny a motion to proceed pro se." Madsen, 168 Wn.2d at 504. "The grounds that allow a court to deny a defendant the right to self-representation are limited to a finding that the defendant's request is equivocal, untimely, involuntary, or made without a general understanding of the consequences." Id. at 504-05 (emphasis added).

> A court may not deny a motion for self-representation based on grounds that self-representation would be detrimental to the defendant's ability to present his case or concerns that courtroom proceedings will be less efficient and orderly than if the defendant were represented by counsel. Similarly, concern regarding a defendant's competency alone is insufficient; if the court doubts the defendant's competency, the necessary course is to order a competency review.

Id. at 505. The value of respecting the right of self-representation "outweighs any resulting difficulty in the administration of justice." Id. at 509.

d. Thompson's requests were timely and unequivocal and had to be granted as a matter of law. In Madsen, the Court reiterated that an unequivocal request to go pro se should be evaluated along a continuum.

> If the demand for self-representation is made (1) well before the trial or hearing and unaccompanied by a motion for a continuance, the right of self representation exists as a matter of law; (2) as the trial or hearing is about to commence, or shortly before, the existence of the right depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter; and (3) during the trial or hearing, the right to proceed pro se rests largely in the informed discretion of the trial court.

Id. at 508 (emphasis in original); accord State v. Paumier, 155 Wn. App. 673, 686-87, 230 P.3d 312 (2010).

i. Thompson's unequivocal requests to represent himself were made well before trial. Thompson's first request to go pro se was made nearly a year before the commencement of trial on the Rice/Krell/Blue counts. 9/14/07 RP 15. Thompson renewed the motion to go pro se at nearly every subsequent court appearance thereafter,[9] long before a trial date was fixed in the Rice/Krell/Blue matter, which was the first case to go to trial.

In Madsen, the first request for self-representation was made in January 2006, nearly five months before trial commenced. Madsen, 168 Wn.2d at 501-03. The Supreme Court held:

> Madsen's motion for pro se status on January 24, 2006, was unequivocal, timely, voluntary, knowing, and intelligent.

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[9] These many requests, while they help to underscore the certainty and clarity of Thompson's wish to represent himself, were not required under Madsen. See Madsen, 168 Wn.2d at 507 ("There is no requirement that a request to proceed pro se be made at every opportunity").

> Thus, had Madsen's motion been denied, the trial court would have committed reversible error. Madsen clearly stated that he sought pro se status and never wavered from that position. As the case had not yet been set for trial, the only conclusion that can be drawn is that Madsen's motion was both unequivocal and timely.

Madsen at 4.

Although Thompson stated on October 15, 2007, in response to a question from the court, that he would like six months to prepare for trial, there is no indication in the record that the court perceived this potential delay to be a reason to deny the request. 10/8 & 10/15/07 RP 63. Thompson certainly was not advised that his candid response to the court's inquiry might adversely impact the court's discretionary authority to grant his motion. It would be grossly unfair to pretend in hindsight that Thompson's statement provides a post hoc justification for the court's failure to grant Thompson's motion.

As the court in Paumier observed, where there is no evidence that the motion is designed to delay the trial or that granting it would impair the orderly administration of justice, "'the timeliness requirement should not operate as a bar to a defendant's right to proceed pro se." Paumier, 155 Wn. App. at 687 (quoting State v. Breedlove, 79 Wn. App. 101, 109, 900 P.2d 586 (1995)). Thompson's timely and unequivocal request to

represent himself should have been granted as a matter of law. Madsen, 168 Wn.2d at 508-09.

ii. The trial court abused its discretion in concluding Thompson's first requests to go pro se were equivocal because they were combined with an alternative request for new counsel. The court denied Thompson's request to represent himself at the October 15, 2007 hearing because the court erroneously concluded Thompson's request was equivocal. 10/8 & 10/15/07 RP 73,78. The judge incorrectly believed that by denying Hicks' motion to withdraw, the court was "forcing" Thompson to go pro se. Id. at 73. But Madsen makes clear that such reasoning is fundamentally flawed:

> We have previously stated that an unequivocal request to proceed pro se is valid even if combined with an alternative request for new counsel. . . The argument that Madsen's request was equivocal because it was coupled with an alternative request is fallacious and ignores this court's precedent. Madsen twice invoked and cited, by article and section, his state constitutional right to represent himself. There was no equivocation. Madsen's inclusion of an alternative remedy is irrelevant to whether Madsen's request was unequivocal.

Madsen, 168 Wn.2d at 507.

Here, likewise, although Thompson's motion to represent himself was spurred by the court's denial of the joint motion for new counsel, the request itself was both knowing and unequivocal. 10/8 & 10/15/07 RP 32.

Thomspon told the court that his primary request was for new counsel, but that if this motion was denied, he wanted to go pro se. Id. Cf., Madsen. 168 Wn.2d at 502 (Madsen tells the court he is "forced" into moving to represent himself).

Madsen invoked his rights under article I, section 22 of the Washington Constitution. Thompson, similarly, said, "I know the law. I know the case – Faretta. I know all them cases." 10/8 & 10/15/07 RP 41. He reiterated that he had the "constitutional right" to represent himself "under Faretta" if he could not get adequate representation from his court-appointed attorney. 2/15/08 RP 9.

In Madsen, the Supreme Court criticized the Court of Appeals for concluding, based on the fact that Madsen sought the appointment of new counsel as an alternative remedy, that Madsen's request was equivocal. Madsen, 168 Wn.2d at 507. The Court found this was "improper legal reasoning" and that "reliance on such is an abuse of discretion." Id. It is true that Thompson's first choice would have been a new lawyer. But following the denial of that request, Thompson unequivocally and unambiguously sought to go pro se. The court abused its discretion in finding Thompson's request at the October 15, 2007 hearing was equivocal.

iii. The court wrongly weighed Thompson's reasons for wishing to represent himself against the unequivocal nature of the request. The court committed an additional error in evaluating the request. Even though the request was framed in unambiguous language and referenced Faretta and Thompson's "constitutional right", the trial court apparently believed that it had the duty to inquire into Thompson's reasons for wishing to represent himself. 2/15/08 RP 3. In response, Thompson explained, "because of a serious conflict of interest on the part of my attorney, breakdown in communications, lack of investigation, turning over discovery that has been previously ordered, and my right to a fair trial." Id. The court stated, "Those are expressions of frustration rather than reasons for representing yourself." Id. The court plainly believed that Thompson's personal reasons for wanting to represent himself should factor into "the court's assessment of whether [the decision to grant pro se status] is an appropriate conclusion or ruling for the court to make." 2/15/08 RP 3. Under Madsen, this effort to second-guess Thompson's unequivocal exercise of his right to represent himself was error. Madsen, 168 Wn.2d at 507.

iv. Whether Thompson was "disruptive" of court proceedings was not an appropriate basis to deny the request to go *pro se*. Concerns about the efficiency and orderliness of court proceedings are not

valid reasons to deny an accused person the right to go pro se. Madsen, 168 Wn.2d at 505. Here, however, the court concluded that Thompson had "forfeited" his right to represent himself because of his "disruptive" behavior. Under Madsen, this finding was an abuse of discretion.

In Madsen, the trial court entered a written order denying Madsen's request to go pro se which noted that Madsen "had been 'extremely disruptive,' 'repeatedly addressed the court at inopportune times,' and 'consistently showed an inability to follow or respect the court's directions.'" Madsen, 168 Wn.2d at 502-03. The trial court concluded that granting Madsen's request would "obstruct the orderly administration of justice." Id. In the Court of Appeals, the panel found that Madsen's "persistent disruptions" supported the trial court's decision. Id. at 509 (citation omitted).

The Supreme Court disagreed:

> Although the trial court's duties of maintaining the courtroom and the orderly administration of justice are extremely important, the right to represent oneself is a fundamental right explicitly enshrined in the Washington Constitution and implicitly contained in the United States Constitution. The value of respecting this right outweighs any resulting difficulty in the administration of justice.

Id.

On the specific question of Madsen's in-court behavior, the Supreme Court admonished, "a criminal defendant's right to pro se status

cannot be denied simply because affording the right will be a burden on the efficient administration of justice." Id. The Court noted,

> Though Madsen did interrupt the trial court on several occasions, Madsen was trying to address substantive issues that the record shows he clearly thought were unresolved and were not addressed by the court. A court may deny pro se status if the defendant is trying to postpone the administration of justice. Madsen never requested a continuance. A court may not deny pro se status merely because the defendant is unfamiliar with legal rules or because the defendant is obnoxious. Courts must not sacrifice constitutional rights on the altar of efficiency.

Id.

While it is undeniable that Thompson had difficulty controlling himself in court, there was no basis to conclude Thompson's "disruptions" during the pro se colloquy were for the purpose of delaying court proceedings. Like Madsen, Thompson sought to have the court address substantive issues. See e.g. 11/5/07 RP 22, 32-33; 6/27/08 RP 4-9. Thompson believed that Hicks was not acting as his advocate and that he had no recourse but to bring his substantive motions before the court himself. Thompson's behavior may have been "obnoxious," but this did not entitle the court to "sacrifice [his] constitutional rights on the altar of efficiency." Madsen, 168 Wn.2d at 509. The court erred in concluding Thompson had forfeited his right to go pro se.

v. Forcing Thompson to accept Hicks, who had a conflict of interest, as his standby counsel, was not a valid exercise of judicial discretion. Far from taking seriously Thompson's unequivocal and timely requests to represent himself, the trial court told him it would offer standby counsel, but that this attorney would be Hicks. 2/15/08 RP 12. This "offer" provoked a vehement and violent response from Thompson, who accused the court of bias and again threatened to kill Hicks. Id. at 14-15.

A court may appoint standby counsel to a pro se criminal defendant, even over the defendant's objections, to explain the court's rulings and to ensure that a defendant lacking in legal knowledge does not interfere with the administration of justice. McKaskle v. Wiggins, 465 U.S. 168, 177-78, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984). But "standby counsel still must be free from actual conflict." State v. McDonald, 143 Wn.2d 506, 512 n. 4, 22 P.3d 791 (2001).

The Court in McDonald explained:

> A defendant possesses a right to have conflict-free standby counsel because standby counsel must be (1) candid and forthcoming in providing technical information/advice, (2) able to fully represent the accused on a moment's notice, in the event termination of the defendant's self-representation is necessary, and (3) able to maintain attorney-client privilege.

Id. at 512-13.

The court did not disbelieve Hicks' representation that an irreconcilable conflict existed between himself and Thompson. The court did not disagree that the attorney-client relationship had completely broken down long before Thompson went to trial. Hicks eloquently and thoroughly detailed the shattered relationship in multiple hearings before the court notified Thompson that if he went pro se, he would be obligated to accept Hicks as standby counsel. Holloway, 435 U.S. at 486 (an attorney's declarations regarding a conflict "are virtually made under oath").

Thus, it was both cynical and malicious of the court to present Thompson with the Hobson's choice of proceeding to trial with Hicks' representation, or proceeding to trial pro se, with Hicks as standby counsel:

> [W]hen the trial court knows or should know of a conflict of interest between the defendant and standby counsel, it must conduct an inquiry into the nature and extent of the conflict. After such an inquiry, the court may remove standby counsel and then substitute or replace standby counsel, or take other appropriate action. Failure to make an inquiry and take appropriate action constitutes reversible error and prejudice will be presumed.

McDonald, 143 Wn.2d at 512.

The trial court's ruling that Thompson's decision to represent himself, which the court knew arose from Thompson's dissatisfaction with

Hicks, would result in Thompson being saddled with Hicks as standby counsel, was an abuse of discretion. Hicks and Thompson were not communicating at all, thus Hicks could not be "candid and forthcoming in providing technical information/advice." McDonald, 143 Wn.2d at 512. Because of the conflict between them, Hicks also could not "fully represent [Thompson] on a moment's notice, in the event termination of [Thompson's] self-representation was necessary." Id. at 512-13. And because of their toxic interactions, Hicks could not maintain attorney-client privilege. Id. at 513. Requiring Thompson to proceed to trial with counsel who had a conflict – or to go pro se with this person as standby counsel – was "reversible error" from which prejudice must be presumed. Id. at 512.

vi. Thompson's conduct at subsequent proceedings cannot serve as a post hoc justification for the court's earlier erroneous rulings. The court ultimately ruled that because of Thompson's disruptive conduct in later proceedings, he had forfeited the right to go pro se. 2/28/08 RP 18. As discussed in argument 2.c.iv, absent a finding that Thompson was deliberately seeking to delay or obstruct the proceedings, this was not a valid reason to deny his motion. Madsen, 168 Wn.2d at 508-09.

Prior to the trial on the Byars counts, the court ruled that it could not allow Thompson to go pro se because he had to be removed from the courtroom so many times, and if this happened again, there would be no one to represent him. 2RP (Vol. 1) 161. As noted, one of the purposes of standby counsel is to "represent the accused on a moment's notice, in the event termination of the defendant's self-representation is necessary." McDonald, 143 Wn.2d at 512-13. Had the court appointed Thompson conflict-free standby counsel, that individual could have stood in Thompson's shoes in the event the court determined he needed to be excused from the proceedings. However, to the extent Thompson's conduct caused him to be removed from the courtroom, Hicks could not have assumed this role because of the conflict between them.

The State may nonetheless claim that Thompson's conduct during pretrial proceedings and his trials justified the court's order barring Thompson from representing himself. Under Madsen, such a claim is unavailing.

Although Madsen had made unequivocal requests to represent himself and cited to article I, section 22 of the Washington Constitution on January 24 and March 7, 2006, the Court of Appeals concluded that because Madsen had waited over a month to renew the motion the request was equivocal. Madsen, 168 Wn.2d at 507. The Supreme Court

disagreed, stating, "[A] trial court's finding of equivocation may not be justified by referencing future events then unknown to the trial court. Such prophetic vision is impossible for the trial court." Id.

For the same reason, the trial court's erroneous initial rulings on October 15, 2007 and February 28, 2008 are stand-alone errors justifying reversal of Thompson's conviction. As explained in Madsen, the appellate court must "examine each motion independently to determine if the requirements for pro se status were met. If so, then deferring ruling on the motion is as erroneous as a denial." Id. at 505.

In sum, the fact of Thompson's disruptive conduct in later proceedings cannot excuse the court's abuse of discretion in the earlier hearings. Endowing the trial court with such "prophetic vision" would "make the right itself illusory." Madsen, 168 Wn.2d at 505. This Court should reject any claim that Thompson's conduct in proceedings held after the court improperly denied his timely and unequivocal requests to go pro se may serve as a justification for that denial.

d. The denial of the motion to go *pro se* forced Thompson to go to trial without the counsel guaranteed by the Sixth Amendment, in violation of due process. As established in argument 1, the trial court denied Hicks' motions to withdraw and Thompson's motions for substitute counsel because of Judge Kessler's earlier "ruling" and the

court's own opinion that Thompson would not get along with any lawyer, not because the court disagreed that the relationship had broken down. At the same time, however, the court barred Thompson from representing himself.

Just as the Sixth Amendment and article I, section 22 protect an accused person's right to the assistance of counsel, so too do the Sixth and Fourteenth Amendments include a "constitutional right to proceed without counsel when" a criminal defendant "voluntarily and intelligently elects to do so." Faretta, 422 U.S. at 807 (emphasis in original). "The Counsel Clause itself, which permits the accused 'to have the Assistance of Counsel for his defense,' implies a right in the defendant to conduct his own defense, with assistance at what, after all, is his, not counsel's trial." McKaskle, 465 U.S. at 174 (emphasis in original). "The right to appear pro se exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense." Id. at 176-77.

The trial court at once refused to permit Thompson to exercise his right to go pro se while at the same time it constructively denied Thompson the right to the assistance of counsel at the trial. The effect of the court's rulings was to compel Thompson to go to trial with no counsel at all. Perry v. Leeke, 488 U.S. at 280.

The Sixth and Fourteenth Amendments require at a minimum that the accused have the "assistance" of counsel. Cronic, 466 U.S. at 654. What occurred here, however, was a "complete denial of counsel." Id. at 659. "[N]o specific showing of prejudice [is] required," because the complete denial of counsel is a "constitutional error of the first magnitude." Id.; Penson, 109 S. Ct. at 88. Simply put, the deprivation of counsel, coupled with the denial of Thompson's motions to go pro se, denied Thompson his right to due process. Thompson's convictions must be reversed.

3. THE TRIAL COURT VIOLATED THOMPSON'S STATE AND FEDERAL RIGHTS TO DUE PROCESS AND TO THE PRESUMPTION OF INNOCENCE WHEN IT FORCED HIM TO BE RESTRAINED BEFORE THE JURY.

a. The court granted the King County Jail's motion to restrain Thompson during his trials. Prior to trial on the Rice/Krell/Blue counts, the King County Jail, represented by counsel from the King County Prosecutor's office, moved the court to restrain Thompson during the trial proceedings. 1CP 100-234. The jail cited as reasons for a restraint order:

> [Thompson's] attempt to escape Court Detail officers and ensuing resistant behavior immediately outside the courtroom, his in-court threats to the court, his long-standing and continuing threats to defense counsel, and his dangerous, assaultive and resistive behavior while

incarcerated.

1CP 211.

The court noted that Thompson had repeatedly threatened defense counsel and the court, and voiced the opinion that because Thompson was facing potential life sentences, he had little to lose. 7/24/08 RP 54. The court considered the various declarations submitted, videotapes of proceedings before other judges, and its own experiences, and ruled that Thompson should be restrained. 8/12/08 RP 47, 50, 53. To try to prevent jurors from seeing Thompson's actual restraints, the court elaborately barricaded him from the jury. 9/8/08 RP 4. The court indicated that bunting would be placed around the table at which Thompson was seated, the table itself would be angled, and a bookcase placed strategically between Thompson and the jurors to minimize what they would be able to see. Id.

Thompson complained that the restraints were cutting off his circulation, and contended that for witnesses to identify him while he was restrained would prejudice him. 9/8/08 RP 26. At this same hearing, Thompson became agitated and was removed from the courtroom. Id. at 34. After Thompson's removal the court noted that it had tried hard to hide his restraints and that "[Thompson] has threatened too many people in the courtroom too many times for me to find that he can be

unrestrained." Id. at 47.

At the conclusion of the Rice/Krell/Blue trial, Thompson noted that he had not been given an opportunity to contest his alleged misconduct in jail in open court. 12/16/08 RP 9. He noted that each time the jail alleged he had assaulted someone, he had been restrained. Id. Thompson stated he was prejudiced by having to testify from counsel table, and from being unable to rise when the jury entered and left the room. Id. at 10. He acknowledged he did not like defense counsel but stated he would not hurt him. Id. at 11. He requested the court allow him to be tried without restraints. The court refused to entertain Thompson's motion and reiterated its earlier findings of fact and conclusions of law. Id. at 15.

At a subsequent hearing, the court barred Thompson from presenting further argument on the question of his restraints. 12/17/08 RP 12. Thompson objected to the court's refusal to allow him to make his record, and defense counsel noted that at one point when he handed Thompson something, the restraints on Thompson's hands were visible. 1/26/09 RP 6-7.

During the trial on the McDonald counts, Thompson again objected to having to testify from counsel table. 2/25/09 RP 2. Thompson renewed his motion to represent himself on the Byars counts, but the court

denied the motion. 3/26/09 RP 28-29.

b. Requiring an accused person to appear before the jury in physical restraints or communicating to the jury that the accused is in custody violates the constitutional guarantee of a fair trial and the presumption of innocence. An accused person's right to a fair trial by an impartial jury is a fundamental liberty secured by the Fourteenth Amendment guarantee of due process. U.S. Const. amends. V, VI, XIV; Wash. Const. art. I, §§ 3, 22; Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). The presumption of innocence, although not explicitly stated in the constitution, is a basic component of this right to a fair trial, and requires courts be vigilant to factors that may undermine the fairness of the factfinding process. Estelle, 425 U.S. at 503. An indigent criminal defendant has the same right to the "unqualified presumption of innocence as one who can post bail." State v. Gonzalez, 129 Wn. App. 895, 897, 120 P.3d 645 (2005).

The accused is thus entitled to "the physical indicia of innocence," which include the right to be "brought before the court with the appearance, dignity, and self-respect of a free and innocent man." State v. Finch, 137 Wn.2d 792, 844, 975 P.2d 967 (1999). "Measures which single out a defendant as a particularly dangerous or guilty person threaten

his or her constitutional right to a fair trial." State v. Jaime, 168 Wn.2d 857, 862, 233 P.3d 554 (2010). Courts universally recognize "the substantial danger of destruction in the minds of the jury of the presumption of innocence where the accused is required to wear prison garb, is handcuffed or is otherwise shackled." Id. at 844-45 (citing cases) (see also State v. Hutchinson, 135 Wn.2d 863, 887, 959 P.2d 1061 (1998) (appearance of prison garb, shackles, or other restraints may "reverse the presumption of innocence" and thereby deny due process).

The Supreme Court has said that shackling and prison garb are "inherently prejudicial" because they are "unmistakable indications of the need to separate the defendant from the public at large." Holbrook v. Flynn, 475 U.S. 560, 567-68, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986). The "inherent prejudice" stems from the fact that "the practice will often have negative effects, but—like "the consequences of compelling a defendant to wear prison clothing" or of forcing him to stand trial while medicated—those effects "cannot be shown from a trial transcript." Deck v. Missouri, 544 U.S. 622, 635, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005) (quoting Riggins, 504 U.S. at 137).

The prejudice is "particularly apparent" when the defendant is charged with a violent crime, because shackling "is likely to lead the jurors to infer that he is a violent person disposed to commit crimes of the

type alleged." Finch, 137 Wn.2d at 845 (quoting People v. Duran, 16 Cal. 3d 282, 290, 545 P.2d 1322 (1976)). "When the court allows a defendant to be brought before the jury in restraints the 'jury must necessarily conceive a prejudice against the accused, as being in the opinion of the judge a dangerous man, and one not to be trusted, even under the surveillance of officers.'" Finch, 137 Wn.2d at 845 (quoting State v. Williams, 18 Wash. 47, 51, 50 P. 580 (1897)). Because of its inherent prejudice, a shackling order must be "justified by an essential state interest specific to each trial." Holbrook, 475 U.S. at 569 (emphasis added).

c. The order for restraints impeded Thompson's ability to testify before the jury in violation of his right to a fair trial. In an effort to "mask" Thompson's restraints, the court erected physical barricades between him and the jury and draped counsel table with bunting. Nevertheless, because of his restraints, Thompson was compelled to testify from counsel table, and could not rise when the jury entered or left the courtroom. 12/16/08 RP 10. Additionally, Thompson's restraints were visible to the jury at least once when Hicks handed Thompson something. 1/26/09 RP 6-7.

In each trial, a conviction depended on the jury crediting the prosecution witnesses' testimony over Thompson's. Thus, even if the jurors did not see Thompson's wrist restraints when he was handed

something by Hicks, the jury was sure to have observed the fact that Thompson, unlike every other witness, gave his testimony from his seat at counsel table, and that Thompson, unlike all the other personnel in the courtroom, did not rise for the jury.

The Supreme Court recognizes that "[shackles] can interfere with a defendant's ability to participate in his own defense, say, by freely choosing whether to take the witness stand on his own behalf." Deck, 544 U.S. at 631. And Courts in other jurisdictions have acknowledged the prejudice to a testifying defendant from having to testify from counsel table. See e.g. People v. Stevens, 218 P.3d 272 (Cal. 2009) (finding that trial court appropriately balanced safety concerns against potential prejudice to the accused's constitutional rights when it permitted him to testify from witness stand with courtroom deputy standing nearby, and distinguishing shackling cases); see also Duran, 16 Cal. 3d at 288 ("any order or action of the Court which, without evident necessity, imposes physical burdens, pains and restraints upon a prisoner during the progress of his trial, inevitably tends to confuse and embarrass his mental faculties, and thereby materially to abridge and prejudicially affect his constitutional rights of defense; and especially would such physical bonds and restraints in like manner materially impair and prejudicially affect his statutory privilege of becoming a competent witness and testifying in his own

behalf") (quoting People v. Harrington, 42 Cal. 165, 168 (1871)); accord Deck, 544 U.S. at 631.

The court's "core concern" must be to "avoid any procedure that undermines the presumption of innocence by conveying a message to the jury that the defendant is guilty." United States v. Larson, 460 F.3d 1200, 1215 (9th Cir. 2006), vacated in part in reh'g en banc, 495 F.3d 1094 (2007).[10] Specifically, "a trial practice cannot 'isolate[ ] the defendant from all others in a courtroom [nor] inevitably associate [ ] him or her with the charged conduct.'" Id. (court's emphasis, citation omitted). As stated by the Court in Deck, "where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation." 544 U.S. at 635.

c. The court failed to consider the adequacy of lesser security measures that would not have prejudiced Thompson during his testimony, requiring reversal. In light of the fact that the court knew Thompson intended to testify at his trials, the trial court did not give adequate consideration to lesser security measures, such as deploying armed guards within the courtroom. As the Supreme Court observed in

[10] The en banc Ninth Circuit vacated a portion of the Larson decision discussing a confrontation issue. The Court explicitly adopted the remainder of the panel's decision. Larson, 495 F.3d at 1099 n. 4.

Holbrook, this means of addressing security concerns is less inherently prejudicial than the use of shackles or other physical restraints:

> While shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable. Jurors may just as easily believe that the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence. Indeed, it is entirely possible that jurors will not infer anything at all from the presence of the guards. If they are placed at some distance from the accused, security officers may well be perceived more as elements of an impressive drama than as reminders of the defendant's special status.

Holbrook, 475 U.S. at 579.

The trial court in this matter opined that a sheriff's deputy with a Taser would not provide sufficient security in the courtroom. 1CP 548. Even assuming the validity of the court's security concerns, it is plain from the court's factual findings that the court simply did not consider increasing the number of courtroom deputies or requiring several deputies to sit behind Thompson as an alternative to using physical restraints.

The court found, prior to the first trial:

> Among the alternatives the court has considered are no restraints, "soft" restraints, the Oregon boot, hard restraints, the restraint chair, and the Band-It Prisoner Transport and Courtroom Control System.

1CP 256. The court noted that "Mr. Thompson has shown considerable

strength and shown that the threat of physical pain has not prevented him from initiating physical altercations with corrections officers in the past." 1CP 257 (Finding of Fact 18).

But the court did not afford Thompson the opportunity to testify about these incidents, nor did the court weigh the effect of its shackling order against the deleterious impact on Thompson's right to be presumed innocent and have his testimony evaluated on a par with that of other witnesses. See 1CP 549 (considering Thompson's right to testify only from the perspective of the potential danger he posed the jurors and bench). These errors were compounded by the court's failure to specifically consider the necessity of shackling with respect to each trial.

All defendants have the right to be presumed innocent at trial. Estelle, 425 U.S. at 503; Finch, 137 Wn.2d at 844. All defendants likewise have the right to present a defense, and to testify at their trials. U.S. Const. amend. VI. Thompson may have been contentious and occasionally difficult for the court to manage. Even so, the court unacceptably gave short shrift to how the restraints and physical restrictions were likely to impact the jury's consideration of Thompson's testimony.

In Deck, the Supreme Court rejected the contention that the failure to show the extent to which the jury was aware of the defendant's shackles

precluded appellate review. 544 U.S. at 634. Likewise – and similar to this case – the Court discredited the claim that the trial court acted within its discretion based on the absence of a showing that the trial court had in fact exercised its discretion. Id. Finally, in reversing, the Court reiterated that shackling is "inherently prejudicial." Id. at 635 (citing Holbrook, 475 U.S. at 568).

The trial court here did not evaluate whether utilizing courtroom deputies as a substitute for shackling could address the court's security concerns and the unavoidable prejudice to Thompson's defense from being compelled to testify from counsel table. The court thus failed to adequately take into account Thompson's fundamental rights and denied Thompson his due process right to a fair trial. Thompson's convictions must be reversed and remanded for a new trial.

F. ARGUMENT PERTAINING TO ASSIGNMENTS OF ERROR 12-13 (RICE/KRELL BLUE TRIAL ERRORS).

1. THOMPSON WAS DENIED HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT.

a. The State charged Thompson with crimes involving alternative acts but the court did not issue a *Petrich* instruction. The Rice/Krell/Blue charges arose from an incident on August 23, 2004. Lisa Rice, then 22, had several girlfriends over to her University District apartment for a party to celebrate her engagement. 9/17/08 RP 5-8.

Toward the end of the evening, Rice, Megan Krell, Jinie Cho, and Jennifer Tonumalapea went outside to smoke. 9/18/08 RP 38, 137. Thompson rode up on his bicycle and attempted to converse with them. 9/17/08 RP 10, 9/18/08 RP 38. 9/29/08 RP 14. He asked them for a cigarette, but the women thought he was "creepy" and ignored him. 9/17/08 RP 10; 9/29/08 RP 14.

Eventually Cho and Tonumalapea turned to leave, and Rice and Krell reentered the building. 9/17/08 RP 10; 9/29/08 RP 14. Thompson followed Rice and Krell. 9/17/08 RP 12. Rice turned to Thompson and told him she did not believe he lived there, and that he should ring the bell of the person he was there to visit or use his own key. Id. In response, according to Rice, Thompson reached out and stroked her bare arm. 9/17/08 RP 12. Krell tried to close the door on Thompson and, according to Rice, he grabbed her handbag and punched her in the chin. 9/17/08 RP 13. Krell kicked Thompson in the groin, but this had no discernible effect on him. 9/4/08 RP 34.[11]

Thompson had been drinking since noon that day and was extremely intoxicated. 9/29/08 RP 13, 91. He was annoyed that the women had refused to give him a cigarette, and thought that there was a

[11] Citations to Krell's testimony are to her September 4, 2008 deposition, rather than to the portion of the trial transcript in which her deposition testimony was played for the jury.

party going on in the apartment building. 9/29/08 RP 15, 18. He was also irritated that the women had told him he could not come into the building; he was under the impression the lobby was a "public access lobby." 9/29/08 RP 59.

The women were fearful of Thompson and ran into the elevator, but he followed them and prevented the elevator door from closing. 9/4/09 RP 35-36. According to Rice, he ordered them to "sit the fuck down." Thompson disputed this, although he acknowledged that he was angry at their "confrontational attitude." 9/29/09 RP 17. According to Thompson, Krell asked him what he wanted, and he reiterated that all he wanted was a cigarette. 9/29/09 RP 17.

A neighbor, Richard Blue, heard Krell and Rice screaming and came out of his apartment. 9/17/08 RP 18. He misread the situation and believing that Rice, who was sitting on the floor, was injured, attempted to offer her aid. 9/22/08 RP 79-82, 85. According to Blue, as he knelt down beside Rice, Thompson hit him with a left hook and then picked him up "like [he] was a sack of potatoes" and threw him into the elevator. 9/22/08 RP 86. Thompson disputed hitting Blue. 9/29/09 RP 19.

The witnesses also disagreed about Rice's property. Rice claimed Thompson rifled through her purse methodically. 9/17/08 RP 19-20. As he pulled things out he threw them at her, stating, "Is that all you have?"

Id. He noticed her engagement ring on her finger, and told her to give it to him. She complied. Id. at 23. According to Thompson, however, Rice handed her ring to him of her own accord, telling him it was the most valuable thing she had. 9/29/09 RP 21. But all Thompson wanted was a cigarette. Id. at 20.

All the while, Krell continued to aggressively confront Thompson. Id. at 22. He testified that "she wouldn't obey my telling her to sit down and relax so I for some reason thought well, the way to defuse this or to get her to calm down is to have her take her top off." Id. He explained he told her to take her shirt off "to control her and humiliate her, to try to get her to back down." Id. at 43. When she initially refused to remove her shirt, he told her he could kick her head through the wall, at which point she did as he asked her. Id. at 45-46.

Because Thompson felt Krell was still being aggressive and confrontational, he told her to remove her bra in order to humiliate her further. 9/29/08 RP 46-47. He did not have any intention to assault or sexually abuse her; he just wanted to socialize and go to a party. 9/29/08 RP 22. At that point, someone opened the elevator fire door, which Thompson had closed. 9/4/09 RP 54. Krell took this opportunity to sprint out the door and Thompson pursued her. Id. at 55. Thompson was tackled by police and eventually taken into custody. 9/29/09 RP 27.

Based on these events, the State charged Thompson with burglary in the first degree with sexual motivation, robbery in the second degree, two counts of assault in the second degree with sexual motivation, attempted indecent liberties, three counts of unlawful imprisonment with sexual motivation, two counts of assault in the third degree, and one count of attempting to disarm a police officer. 1CP 291-96. Both counts of assault in the second degree were elevated to felonies based on the allegation that they were committed "with intent to commit the felony of Robbery and Indecent Liberties." 1CP 293-94.

The to-convict instructions for these counts required the jury to find that Thompson assaulted Rice and Blue, respectively, and "[t]hat the assault was committed with intent to commit robbery in the second degree or indecent liberties." 1CP 375-76. No unanimity instruction was issued to the jury for purposes of these crimes, nor was the jury instructed they had to be unanimous with respect to the sexual motivation allegation.

During their deliberations, the jury expressed confusion regarding the instructions pertaining to the assault charges and the sexual motivation finding. The jury submitted an inquiry requesting "clarification count #IV p. 17, # 2: ...intent to commit robbery - 2nd degree or indecent liberties ... is this against Richard Blue or anyone?" 1CP 411; 10/1/08 RP 2. The court responded, "Read this instruction in conjunction with instructions 14

and 21."[12] 1CP 412. With respect to the sexual motivation allegation, the jury asked, "aggravating circumstance – clarification on count VI, VII, VIII. Unlawful imprisonment. Does the sexual motivation only refer to the specific person mentioned in the count?" 1CP 409; 10/3/08 RP 2. The court responded, "No." 1CP 410; 10/3/08 RP 2.

b. The failure to issue *Petrich* instructions deprived Thompson of a unanimous jury verdict. The Washington Constitution requires jury unanimity as to guilt. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984); Wash. Const. art. 1, §§ 21, 22. "When the prosecution presents evidence of multiple acts . . . any one of which could form the basis of a count charged, either the State must elect which of such acts is relied upon for a conviction or the court must instruct the jury to agree on a specific criminal act." State v. Coleman, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007); Petrich, 101 Wn.2d at 572. The right to jury unanimity may be violated where a to-convict instruction describes separate crimes or where a to-convict instruction describes separate means of committing a single crime. State v. Stephenson, 89 Wn. App. 217, 222, 948 P.2d 1321 (1997).

[12] Instructions 14 and 21 were the to-convict instructions for the robbery and attempted indecent liberties counts. 1CP 373, 380.

i. The assault charges required the jury to decide on the commission of separate acts to support an essential element, thus the court denied Thompson a unanimous jury verdict by failing to issue a *Petrich* instruction The State prosecuted Thompson for second-degree assault based upon RCW 9A.36.021(1)(e), which provides that a person is guilty of assault in the second degree if he or she "[w]ith intent to commit a felony, assaults another." The State theorized that either the robbery or attempted indecent liberties could be the "felony" necessary to elevate the offense from a simple assault to a second degree assault. 1CP 375-76. The State did not elect which of these acts it proved. To the contrary, in closing argument, the prosecutor told the jury, "we don't need to prove both, just one or the other." 9/30/08 RP 58.

The robbery plainly was a separate act from the indecent liberties: it involved a different victim – Lisa Rice – and was charged separately from the conduct supporting the indecent liberties allegation. 1CP 373, 380. The jury accordingly had to be instructed that they must be unanimous as to which act was the "felony" necessary to elevate the charge. Coleman, 159 Wn.2d at 513 (unanimity instruction must be given "when separate identifiable instances of criminal conduct are introduced in support of a single charge") (citation omitted).

ii. The sexual motivation finding could have been predicated on separate acts, thus a *Petrich* instruction should have been issued to ensure the jury was unanimous. The jury found that count I, burglary in the first degree, and counts VI – VIII, unlawful imprisonment, were committed with sexual motivation. At the same time, the jury was confused about what it had to find for purposes of a special verdict. Specifically, the jury wanted to know whether the sexual motivation referred only to "the specific person mentioned in the count." 1CP 409. The court answered this question, "no." 1CP 410; 10/3/08 RP 2.

The State presented evidence of two acts that arguably could have supported a finding of sexual motivation. The first was Thompson's alleged touching of Rice's arm. 9/17/08 RP 12. The second was his instruction to Krell to remove her blouse and bra. 9/4/08 RP 54-56. According to statute, "sexual motivation" means that "one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification." RCW 9.94A.030(43).

Because aggravating circumstances are elements, an accused person has the right under the Sixth and Fourteenth Amendments and article I, section 22, to a unanimous jury verdict. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); State v. Williams-Walker, 167 Wn.2d 889, 896-97, 225 P.3d 913 (2010). The jury

correctly identified that the problem with the court's instructions was they did not require the jury be unanimous as to the act alleged. The court "clarified" that this interpretation of the jury instructions was accurate. Because two different acts could have supported the sexual motivation allegation, Thompson was entitled to a Petrich instruction.

iii. The failure to ensure jury unanimity prejudiced Thompson. The failure to give a required unanimity instruction is a constitutional error that is harmless only if a rational trier of fact could have no reasonable doubt as to whether each act established the charged crime. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). This Court should conclude that Thompson was prejudiced by the absence of jury unanimity.

With respect to the assault in the second degree charges, the jury did not find by unanimous verdict that the crimes were committed with sexual motivation. The State alleged each assault was elevated to a felony by virtue of either (a) robbery or (b) indecent liberties. 1CP 375-76. Given the failure to return a special verdict, however, this Court cannot be confident that the jury was unanimous about Thompson's intent to commit indecent liberties. The prosecutor amplified the jury's confusion by telling them they need only find "one or the other," "not both." 9/30/08 RP 58.

With respect to the sexual motivation findings for counts I, VI, VII, and VIII, the evidence of sexual motivation was vigorously controverted. Thompson denied touching Rice. 9/29/08 RP 56. And he was adamant that he did not instruct Krell to remove her clothing for his sexual gratification; rather, he issued this directive "to control her and humiliate her, to try to get her to back down." Id. at 43.

The jury's inquiry established their uncertainty regarding which acts they had to find were proven for each count. Because the jury did not unanimously agree that Thompson had a sexual motivation for committing the assault, the jury may have believed Thompson's testimony that he ordered Krell to disrobe to humiliate her, not to gratify himself sexually. Or, based on the testimony, some jurors may have believed Thompson had a sexual motivation only with respect to one of the women, but not the other. Given the multiple acts, the conflicting verdicts, and the court's responses to the jury's inquiries, this Court should conclude that the failure to issue a unanimity instruction prejudiced Thompson.

2. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE THE SEXUAL MOTIVATION ALLEGATION WITH RESPECT TO RICHARD BLUE.

In count VIII of the second amended information, the State prosecuted Thompson for unlawful imprisonment of Richard Blue. 1CP

295-96. The State also alleged that one of the purposes for which Thompson committed the offense was his sexual gratification. Id. Although the State may have presented sufficient evidence to prove Thompson had a general sexual motivation with respect to the crimes involving Rice and Krell, the State did not prove that Thompson knowingly restrained Blue for his sexual gratification. The sexual motivation finding must be reversed and dismissed.

a. The State must prove the essential elements of a criminal offense. Consistent with due process, the State bears the burden of proving each element of a criminal charge beyond a reasonable doubt. Apprendi, 530 U.S. at 490; In Re Winship, 397 U.S. 359, 364, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970); State v. Cantu, 156 Wn.2d 819, 825, 132 P.3d 725 (2006); U.S. Const. amends. V, XIV; Const. art. I, § 3. When the sufficiency of the evidence is challenged on appeal, the Court examines all of the evidence and decides whether any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The evidence must viewed in the light most favorable to the State, with all reasonable inferences construed against the accused. Id.

b. The State did not prove that one of the purposes for which Thompson restrained Blue was his sexual gratification. An

allegation of sexual motivation requires the State to prove that one of the purposes for the defendant's commission of the charged offense was his sexual gratification. RCW 9.94A.030. The statute "requires evidence of identifiable conduct by the defendant while committing the offense which proves beyond a reasonable doubt the offense was committed for the purpose of sexual gratification." State v. Halstien, 122 Wn.2d 109, 120, 857 P.2d 270 (1993).

In Halstien, the Supreme Court considered vagueness and due process challenges to the sexual motivation aggravating circumstance in the context of a juvenile prosecution for burglary. Id. at 117-18. The Court analyzed the pertinent section of RCW 9.94A.030 and evaluated what the State must prove to sustain a sexual motivation allegation. The court rejected Halstien's claim that the statute impermissibly penalized a defendant for potentially innocent thoughts, on the basis that "[the] language of the statute provides the sexual motivation must be connected with the criminal conduct of the defendant." Id. at 120.

The Court explained:

> Inherent in this subsection is the requirement that the finding of sexual motivation be based on some conduct forming part of the body of the underlying felony. The statute does not criminalize sexual motivation. Rather, the statute makes sexual motivation manifested by the defendant's conduct in the course of committing a felony an aggravating factor in sentencing.

Id. (citation omitted, emphasis in original).

As the quoted language makes clear, the sexual motivation finding must be tied to the "underlying felony." Id. The State carries the burden of proof and must "present evidence of some conduct during the course of the offense as proof of the defendant's sexual purpose." Id. at 121. The Court in Halstien further explained:

> The sexual motivation statute is directed at the action or conduct of committing a crime because of the defendant's desire for sexual gratification. The statute does not punish a defendant for having sexual thoughts, but rather punishes the defendant for acting on those thoughts in a criminal manner. As noted above, that intent must be established by the defendant's conduct while committing the offense.

Id. at 123 (emphasis in original).

Rather than seeking to punish Thompson for his alleged conduct in committing the "underlying felony" of unlawful imprisonment of Blue, the State sought to penalize him for his general criminal scheme. The State's theory, essentially, was that the jury should find that because Thompson may have had a sexual purpose for committing crimes against Rice and Krell, that sexual purpose should be applied to Thompson's separate crime against Blue. This theory ran counter to the instruction telling the jury:

> A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

1CP 363.

Additionally, the State's theory rested on an overly-expansive view of its charging authority under RCW 9.94A.835. Halstien makes clear that to survive a due process challenge, a sexual motivation allegation must be tied to the underlying felony. There was no evidence that Thompson was sexually gratified by restraining Blue. The "sexual motivation" derived from the nebulous inference that because Blue happened to stumble upon Thompson's encounter with Krell and Rice, and ended up in the elevator with them, Thompson's crime against Blue was committed with sexual motivation. According to the same logic, the State could have attempted to attach a sexual motivation allegation to the charges of third-degree assault and attempting to disarm a police officer, which arose when Thompson fled the building. Under Halstien, however, neither theory survives scrutiny.

No evidence was presented to show Thompson was sexually gratified by restraining Blue. No evidence was presented to establish a sexual motivation connected to the "underlying felony," as required by Halstien. The trial court's response, therefore, to the jury's inquiry was incorrect to the extent that it misled the jury into believing they could consider conduct extraneous to the "underlying felony" in reaching their special verdict. This Court should conclude that even in the light most

favorable to the State, the State failed to present sufficient evidence to prove that Thompson had a sexual motivation with respect to count VIII of the second amended information.

G. ARGUMENT PERTAINING TO ASSIGNMENTS OF ERROR 14-21 (MCDONALD TRIAL ERRORS).

1. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF OTHER ACTS UNDER ER 404(b) AND RCW 10.58.090.[13]

a. The State sought to introduce evidence of other acts under RCW 10.58.090 and ER 404(b). In counts XII – XIV of the second amended information, the State prosecuted Thompson in connection with the rape of Bernadette McDonald.[14] Thompson was charged with first degree burglary with sexual motivation, first degree rape, and taking a motor vehicle without permission.

Prior to trial, the State contended it should be permitted to introduce evidence of Thompson's 1985 rape convictions under RCW 10.58.090. The State alleged that because McDonald's assailant ordered her not to look at him, identification became an issue in the trial

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[13] Constitutional challenges similar to those raised here have been rejected by this Court in State v. Scherner, 153 Wn. App. 621, 225 P.3d 248 (2009) and State v. Gresham, 153 Wn. App. 659, 223 P.3d 1194 (2009).

[14] Prior to trial, the State again amended the information to renumber the McDonald counts as counts I – III. 12/16/08 RP 33; 1CP 562-68.

warranting admission of the evidence. 12/17/08 RP 37. The State alternatively argued that the similarities between the prior and current offenses justified admission of the other acts evidence. Id. at 38.

The State enumerated the similarities between the offenses as follows: all the victims were white, in their early 20s, attacked in their homes, asleep when the attacks began, and attacked in the early morning hours. Id. The State alleged that in each instance, Thompson said things to the victims to lead them to believe that he had had prior contact with them. Id. He disabled the telephones of his prior victims; the State alleged he also took McDonald's cell phone and telephone. Id. The State alleged that Thompson touched the body of each of his victims in a way that was "extremely uncomfortable," in three out of four instances covering their mouths with his hand or covering them with a cloth. Id.

The State noted that each victim had her head covered and was tied with a ligature that originated at the scene. Id. at 39. All victims said that Thompson threatened to kill them. Id. The State noted that three of the four women were raped vaginally, two penetrated with fingers, and that in two instances Thompson ejaculated on the bed sheets and then took them. Id. The State argued evidence of the other sex offenses should be admitted under RCW 10.58.090. Id.

Hicks challenged RCW 10.58.090 on due process, ex post facto, separation of powers and equal protection grounds. Id. at 28-29. Hicks also disputed that the claimed similarities between the offenses were sufficiently unique to render the other acts evidence admissible. Id. at 51. He noted that motive was not relevant to prove either rape or burglary, and that identity was not an issue because the State intended to introduce DNA and fingerprint evidence to establish Thompson was at the scene. Id. at 51-53. He argued that because of the extremely prejudicial nature of other acts evidence in prosecutions for sex offenses, a limiting instruction would be "hollow." Id. at 52.

The court ruled that it was "struck" by the similarities between the offenses. Id. at 56. Although the court did not consider the fact that all of Thompson's victims were attractive females in their 20s to be particularly unique, the court found the following common points very probative: (1) that Thompson was in the victims' homes for a significant period of time before awakening them; (2) that he disabled their telephones; (3) that he covered their mouths with his hand; (4) his use of a ligature; (5) his penetration with fingers; (6) his taking of personal property; and (7) his ejaculation on victims' backs and bed sheets. Id. at 56-57. The court concluded the evidence was very probative, and not unfairly prejudicial. Id. at 57.

The court rejected constitutional challenges to RCW 10.58.090, and ruled the evidence would separately be admissible under ER 404(b) to prove identity, because McDonald's assailant told her not to look at his face. 12/17/08 RP 57-59. The court's ruling denied Thompson a fair trial on the charged counts.

b. Admitting propensity evidence in Thompson's trial pursuant to RCW 10.58.090 violated the state and federal constitutions' prohibitions against ex post facto laws. Article I, section 10 of the United States Constitution and article 1, section 23 of the Washington Constitution, the *ex post facto* clauses, forbid the State from enacting any law that imposes punishment for an act that was not punishable when committed, or increases the quantum of punishment annexed when the crime was committed. Collins v. Youngblood, 497 U.S. 37, 42, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990); State v. Ward, 123 Wn.2d 488, 496, 870 P.2d 295 (1994).

> A law violates the ex post facto clause if it: (1) is substantive, as opposed to merely procedural; (2) is retrospective (applies to events which occurred before its enactment); and (3) disadvantages the person affected by it.

State v. Hennings, 129 Wn.2d 512, 525, 919 P.2d 580 (1996) (citing Weaver v. Graham, 450 U.S. 24, 29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981); Collins, 497 U.S. at 45).

i. The Legislature has stated RCW 10.58.090 is substantive in nature. The Legislature has expressly provided that as an evidentiary rule, RCW 10.58.090 is substantive in nature. Laws 2008, ch. 90, §1. Although the Legislature's characterization of a statute does not necessarily control the constitutional *ex post facto* analysis, In re the Personal Restraint of Gronquist, 139 Wn.2d 199, 208, 986 P.2d 131 (1999), the statute is substantive as it does not square with the definition of a procedural statute.

> While . . . cases do not explicitly define what they mean by the word "procedural," it is logical to think that the term refers to changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes.

Collins, 497 U.S. at 45 (citing Dobbert v. Florida, 432 U.S. 282, 292, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977); Beazell v. Ohio, 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216 (1925); Mallett v. North Carolina, 181 U.S. 589, 597, 21 S.Ct. 730, 45 L.Ed. 1015 (1901)). RCW 10.58.090 does not merely define the procedure by which a case is adjudicated but rather redefines the bounds of relevancy for sex offenses. Thus, the Legislature appropriately recognized the substantive reach of the statute.

ii. RCW 10.58.090 applies to events occurring prior to its enactment. The statute also applies to events which occurred prior to its enactment. The Legislature specifically stated the statute

should apply to any case tried after its enactment without concern for when the alleged offense may have occurred. Laws 2008, ch. 90 § 3. But more importantly, Thompson's offenses occurred prior to the effective date of the statute. Thus the statute applies retrospectively.

iii. RCW 10.58.090 substantially disadvantages Thompson. RCW 10.58.090 allows evidence which is not admissible for a more limited purpose under ER 404(b) to be admitted for any purpose whatsoever. RCW 10.58.090(1). The State asked the jurors to use the evidence in this case as bald propensity evidence: evidence that because Thompson had raped in the past, he was likely to have raped McDonald. Washington courts have long excluded this class of evidence precisely because this propensity link was deemed unreliable, irrelevant, and overly prejudicial. See e.g. State v. Bokien, 14 Wash 403, 414, 44 P. 889 (1896).

More specifically, though, RCW 10.58.090 substantially disadvantaged Thompson. Under the test enunciated in Hennings, application of RCW 10.58.090 to offenses committed prior to its enactment, such as Thompson's, violates the ex post facto clause of the United States Constitution.

c. Even if application of RCW 10.58.090 to Thompson's case does not violate the federal ex post facto clause, it nonetheless violates the greater protections of Article I, section 23. Article I, section

10 of the United States Constitution provides, "No State shall . . . pass any Bill of Attainder, ex post facto law, or Law impairing the Obligation of Contracts." The Washington Constitution provides: "[n]o bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed." Const. art. I, § 23.

The Supreme Court long ago held the provisions of Article I, section 10 reach four classes of laws:

> 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive.

Calder v. Bull, 3 Dall. 386, 390-91, 1 L.Ed. 648 (1798). While the fourth category identified in Calder seems to clearly bar retroactive changes in the type of evidence which is admissible, the Supreme Court has concluded "[o]rdinary" rules of evidence do not implicate ex post facto concerns because they do not alter the standard of proof. Carmell v. Texas, 529 U.S. 513, 533 n.23, 120 S.Ct. 1620, 146 L.Ed.2d 577 (1999). The Court had previously held a law permitting the admission of a

defendant's letters to his wife for the purpose of comparing them to letters admitted into evidence was not an ex post facto violation because the change in law:

> did nothing more than remove an obstacle arising out of a rule of evidence that withdrew from the consideration of the jury testimony which, in the opinion of the legislature, tended to elucidate the ultimate, essential fact to be established, namely, the guilt of the accused. Nor did it give the prosecution any right that was denied to the accused. It placed the state and the accused upon an equality.

Thompson v. Missouri, 171 U.S. 380, 387-88, 18 S.Ct. 922, 43 L.Ed. 204 (1898).

Assuming this modification of the rule in Calder to bar the finding that RCW 10.58.090 violates the ex post facto clause of the federal constitution, this Court should conclude the statute violates the Washington Constitution's prohibition on ex post facto laws. The Washington clause is textually different from the federal clause and mirrors the provisions of the Oregon and Indiana Constitutions. Compare, Const. Art. I, § 23; Or. Const. Art. I, § 21; Ind. Const. art. I, § 24. Indeed, the Declaration of Rights, of which Article I, section 23 is a part, "was largely based upon W. Lair Hill's proposed constitution and its model, the Oregon Constitution." R. Utter and H. Spitzer, The Washington State Constitution, A Reference Guide, 9 (2002). Because it is borrowed from

the Oregon Constitution, which in turn took its ex post facto language from the Indiana Constitution,[15] it is useful to look to how the courts of those states have interpreted the relevant provisions of their constitutions. Biggs v. Dep't of Retirement, 28 Wn.App. 257, 259, 622 P.2d 1301 (1981) (turning to interpretations of the Indiana Constitution to interpret similar, although not identical, provisions of Washington Constitution) .

Applying an analysis similar to that set forth in State v. Gunwall,[16] the Oregon Supreme Court has determined the ex post facto protections of the Oregon Constitution are broader than the protections which the United States Supreme Court has recognized in the federal constitution.[17] State v. Fugate, 26 P.3d 802, 813 (Or. 2001). Specifically, the Oregon Court has interpreted the mirror provisions of the Oregon Constitution's ex post

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[15] State v. Cookman, 920 P.2d 1086, 1091 (Or. 1996).

[16] State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

[17] When determining whether a provision of the Oregon Constitution provides greater protection than does the federal constitution Oregon courts consider the provisions "specific wording, the case law surrounding it, and the historical circumstances that led to its creation." Priest v. Pearce, 840 P.2d 65, 67-69 (Or. 1992). By comparison, Gunwall directs a court to consider six nonexclusive factors: the textual language of the state constitution; significant differences in the texts of parallel provisions of the federal and state constitutions; state constitutional and common law history; preexisting state law; differences in structure between the federal and state constitutions; and matters of particular state interest or local concern. Gunwall, 106 Wn.2d at 61-62.

facto clause to prohibit the retroactive application of laws that alter the rules of evidence in a manner which favors only the prosecution. Id.

In reaching its conclusion, the Oregon court looked to Indiana's interpretation of its ex post facto protections. Prior to adoption of the Oregon Constitution the Indiana Supreme Court determined:

> [t]he words *ex post facto* have a definite, technical signification. The plain and obvious meaning of this prohibition is, that the Legislature shall not pass any law, after a fact done by any citizen, which shall have relation to that fact, so as to punish that which was innocent when done; or to add to the punishment of that which was criminal; or to increase the malignity of a crime; or to retrench the rules of evidence, so as to make conviction more easy.

Strong v. The State, 1 Blackf. 193, 196 (1822). Because that interpretation of Indiana's constitution was available to the framers of the Oregon Constitution when they chose to adopt the language of Indiana's ex post facto clause, the Oregon court interpreted the Oregon provisions as, "forbid[ding] *ex post facto* laws of the kind that fall within the fourth category in Strong and Calder, *viz.*, laws that alter the rules of evidence in a one-sided way that makes conviction of the defendant more likely." Fugate, 26 P.3d at 813. Fugate took pains to distinguish its analysis from changes in evidentiary rules which apply equally to both the defense and the prosecution, finding that type of law of general application was never

viewed as resulting in the evil to which the *ex post facto* clause is addressed. 26 P.3d at 813.

This same interpretation of the Indiana Constitution was also available to the framers of Washington Constitution in 1889. Rather than simply adopt the language of Article I, section 10 of the federal constitution, the framers instead chose to adopt the language of the Oregon and Indiana constitutions. By adopting the different language of the Oregon and Indiana Constitutions, the framers of the Washington Constitution signaled their intent that Article I, section 23 be interpreted differently from the federal Bill of Rights, as they used different language and the federal Bill of Rights did not then apply to the states. Utter, 7 U. Puget Sound L. Rev. 496-97; State v. Silva, 107 Wn.App. 605, 619, 27 P.3d 663 (2001) ("The decision to use other states' constitutional language also indicates that the framers did not consider the language of the U.S. Constitution to adequately state the extent of the rights meant to be protected by the Washington Constitution.").

In fact, two years after Washington became a state, the Supreme Court cited to Calder as providing "a comprehensive and correct definition" of what constitutes an ex post facto law. Lybarger v. State, 2 Wash. 552, 557, 27 P. 449 (1891). Applying an analysis that resembles that of Strong, the Court in Lybarger concluded the statute did not violate

ex post facto provisions, in part, because "[i]t does not change the rules of evidence to make conviction more easy." 2 Wash. at 559. Lybarger applied precisely the same analysis which the Oregon Supreme Court utilized in Fugate.

Aside from the textual differences and differences in the common-law and constitutional history, the United States Constitution is a grant of limited power to the federal government, whereas the Washington constitution imposes limitations on the otherwise plenary power of the state. Gunwall, 106 Wn.2d at 61. That fundamental difference generally favors a more protective interpretation of the Washington provision. So too does the fact that regulation of criminal trials is a matter of particular state concern. State v. Boland, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990).

The framers of Washington Constitution adopted language that differs from the language of the federal constitution; language that had been interpreted 67 years prior to its inclusion in the Washington Constitution to bar retroactive legislation which alters the rules of evidence in a one-sided fashion. The foregoing analysis demonstrates that by doing so, the framers intended to apply that same protection in Washington.

RCW 10.58.090 unquestionably alters the rules of evidence in a manner that makes convictions easier. RCW 10.58.090 violates Article I, section 23.

d. The Legislature's enactment of RCW 10.58.090 violates the separation of powers doctrine.

i. The state and federal constitutions prevent one branch of government from usurping the powers and duties of another.

> One of the fundamental principles of the American constitutional system is that the governmental powers are divided among three departments--the legislative, the executive, and the judicial--and that each is separate from the other.

Carrick v. Locke, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994) (citing State v. Osloond, 60 Wn. App. 584, 587, 805 P.2d 263, review denied, 116 Wn.2d 1030 (1991)). Neither the Washington nor federal constitutions specifically enunciate a separation of powers doctrine, but the notion is universally recognized as deriving from the tripartite system of government established in both constitutions. See, e.g., Const. Arts. II, III, and IV (establishing the legislative department, the executive, and judiciary); U.S. Const. Arts. I, II, and III (defining legislative, executive, and judicial branches); Carrick, 125 Wn.2d at 134-35. Carrick recognized that although the Washington Constitution contains no specific separation of powers provision, "the very division of our government into different

branches has been presumed throughout our state's history to give rise to a vital separation of powers doctrine." Carrick, 125 Wn.2d at 134-35 (citing Osloond, 60 Wn.App. at 587); In re Juvenile Director, 87 Wn.2d 232, 238-40, 552 P.2d 163 (1976).

The fundamental principle of the separation of powers is that each branch wields only the power it is given. State v. Moreno, 147 Wn.2d. 500, 505, 58 P.3d 265 (2002). Thus, courts have announced the following test for determining whether an action violates the separation of power:

> The question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.

Carrick, 125 Wn.2d at 135 (quoting Zylstra v. Piva, 85 Wn.2d 743, 750, 539 P.2d 823 (1975)).

ii. The Washington Constitution vests the Supreme Court with the sole authority to adopt procedural rules. Article IV, section 1 of the Washington Constitution vests the Washington Supreme Court with the sole authority to govern court procedures. City of Fircrest v. Jensen, 158 Wn.2d 384, 394, 143 P.3d 776 (2006); State v. Fields, 85 Wn.2d 126, 129, 530 P.2d 284 (1975). "[T]here is excellent authority from an historical as well as legal standpoint that the making of rules governing procedure and practice in courts is not at all legislative, but

purely a judicial function." State ex rel. Foster-Wyman Lumber Co. v. Superior Court for King County, 148 Wash. 1, 4, 9, 267 P. 770 (1928).

Thus, "when a court rule and a statute conflict, the nature of the right at issue determines which one controls." State v. W.W., 76 Wn.App. 754, 758, 887 P.2d 914 (1995). "If the right is substantive, then the statute prevails; if it is procedural, then the court rule prevails." Id.

iii. If RCW 10.58.090 is a procedural rule, its enactment violates the separation of powers doctrine. The legislative notes following RCW 10.58.090 assert that the act is substantive. If that is the case, then as argued above, the retroactive application of the substantive change violates the ex post facto provisions of the federal and state constitutions. In the alternative, if defining the bounds of the admissibility of evidence is a procedural function and one that lies at the heart of the judicial function, then the Legislature's effort to alter the rules of admissibility violates the separation of powers doctrine.

> Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.

State v. Smith, 84 Wn.2d 498, 501, 527 P.2d 674 (1974).

RCW 10.58.090 does not prescribe societal norms or establish punishments. Instead it alters the mechanism by which substantive rights, a person's guilt of crime, are effectuated by allowing admission of otherwise inadmissible evidence.

The legislative claim aside, RCW 10.58.090 appears to be a purely procedural statute, one which the legislature lacks the authority to enact. Because the legislature did not have the authority to enact RCW 10.58.090, the statute is void. State v. Thorne, 129 Wn.2d 736, 762, 921 P.2d 514 (1996). Because of the readily apparent prejudicial impact the statute had in Thompson's case, this Court must reverse his conviction.

e. The evidence was neither "necessary" under RCW 10.58.090 nor admissible under ER 404(b).

i. The court failed to find the evidence was "necessary" under RCW 10.58.090. RCW 10.58.090 provides that in a prosecution for a sex offense, "evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403." RCW 10.58.090(1). Before a court may admit propensity evidence under RCW 10.58.090, the statute requires:

> When evaluating whether evidence of the defendant's commission of another sexual offense or offenses should be

> excluded pursuant to Evidence Rule 403, the trial judge shall consider the following factors:
> (a) The similarity of the prior acts to the acts charged;
> (b) The closeness in time of the prior acts to the acts charged;
> (c) The frequency of the prior acts;
> (d) The presence or lack of intervening circumstances;
> (e) The necessity of the evidence beyond the testimonies already offered at trial;
> (f) Whether the prior act was a criminal conviction;
> (g) Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and
> (h) Other facts and circumstances.

RCW 10.58.090(6). The court did not enumerate these factors or make findings with regard to necessity.

The factors set forth in RCW 10.58.090 are not merely advisory.

> It is well settled that the word "shall" in a statute is presumptively imperative and operates to create a duty.... The word "shall" in a statute thus imposes a mandatory requirement unless a contrary legislative intent is apparent.

State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1995). Nothing in RCW 10.58.090 indicates the legislature intended "shall" to be merely advisory. For instance, subsection (g) mirrors the language of ER 403, a predicate for the admission of any evidence.

Despite the plain requirement that it determine the evidence was necessary before admitting it, the trial court did not do so. A court abuses its discretion when an "order is manifestly unreasonable or based on

untenable grounds." Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). A court abuses its discretion by using the wrong legal standard or by resting its decision upon facts unsupported by the record. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008); see also State v. Russell, 154 Wn. App. 775, 781, 225 P.3d 478 (2010) (failure to adhere to the requirements of an evidentiary rule can be an abuse of discretion); State v. Mail, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993) (failure to follow statutory procedure is legal error reviewable on appeal). The court's failure to employ the analysis required by RCW 10.58.090(6) constitutes an abuse of discretion.

ii. The evidence was not necessary. Even had the court considered the factor as required by RCW 10.58.090(6), the court could not have concluded the evidence was necessary. Absent a contrary legislative intent, statutory terms are given their ordinary meaning. Tommy P. v. Board of Cy. Comm'rs, 97 Wn.2d 385, 391, 645 P.2d 697 (1982).

> The rules of statutory construction require that we give undefined words their common and ordinary meaning. To ascertain the common and ordinary meaning of a term, we may use a dictionary.

State v. Agueta, 107 Wn.2d 532, 536, 27 P.3d242 (2001) (footnotes and citations omitted).

"Necessity" means:

> **1:** the quality or state or fact of being necessary as: **a:** a condition arising out of circumstances that compels to a certain course of action . . . **b:** INEVITABLENESS, UNAVOIDABILITY . . . **c:** great or absolute need : INDISPENSABILITY . . . **3:** something that is necessary: REQUIREMENT, REQUISITE . . . .

Webster's Third New International Dictionary 1511 (1993).

There was nothing in the testimony regarding the present charges against Thompson that required the introduction of the propensity evidence or made it necessary or indispensable. Indeed, the State was able to fully establish the present charges without the propensity evidence. Although the State claimed that identity was an issue in the case,[18] in point of fact, the State had both fingerprint and DNA evidence tying Thompson to the scene. 12/17/08 RP 37, 53; 2/23/09 55-57, 71.

While the evidence, if credited, established that Thompson had committed loosely similar rapes twenty years earlier, the similarities were not sufficiently distinct to create a modus operandi, and thus could not have been necessary to prove identity. See State v. Thang, 145 Wn.2d 630, 643, 41 P.3d 1159 (2002) (to prove "modus operandi," method used to commit one crime must be so unique that it makes it highly likely the defendant committed the other crime). Nor were they relevant to establish

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[18] The court's error in ruling the evidence was separately admissible to prove identity is addressed infra.

a common scheme or plan. State v. DeVincentis, 150 Wn.2d 11, 19-21, 74 P.3d 119 (2003) (common scheme or plan evidence requires prior acts to be probative of fact that defendant used a single plan repeatedly to commit separate, but very similar acts, requires substantial similarity between the prior and current acts, and may be utilized only where the existence of the charged crime is in question). Thus the claim that the evidence was "necessary" to prove Thompson's identity was nothing more than a convenient blind for using the inflammatory, devastatingly prejudicial evidence of prior acts to obtain a swift conviction in the instant case.

Nothing made the propensity evidence necessary. Had the court considered the factor according to all the mandatory criteria of RCW 10.58.090, it could not have found the evidence admissible. The admission of propensity evidence was an abuse of the court's discretion.

iii. The evidence was inadmissible under ER 404(b). The court ruled that the evidence of the prior rapes was also admissible under ER 404(b) to prove identity. 12/17/08 RP 59. This was an erroneous ruling and an abuse of judicial discretion.

ER 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for

> other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b).

As noted supra, when evidence of other crimes is admitted to prove identity,

> the evidence is relevant to the current charge "only if the method employed in the commission of both crimes is 'so unique' that proof that an accused committed one of the crimes creates a high probability that he also committed the other crimes with which he is charged."

Thang, 145 Wn.2d at 643 (citation omitted).

The device used must be "'so unusual and distinctive as to be like a signature.'" Id. (quoting State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984)). "The greater the distinctiveness, the higher the probability that the defendant committed the crime, and thus the greater the relevance." Id. "Moreover, to establish signature-like similarity, the distinctive features must be shared between the two crimes." Id. (emphasis added).

There is no indication in the record that the court gave any consideration to these requisite components of the ER 404(b) analysis. Had it done so, it would have ruled that the prior rapes were inadmissible to prove identity.

a) The so-called distinctive features were not shared between the crimes. Each of the rapes that the State sought to introduce differed in key ways from the charged offense, and, moreover, the most "distinctive" features of the rapes were not shared.

- Susan Dawson, a 1985 victim, was raped with her own vibrator. 2/23/09 RP 123. No vibrator or dildo was used in the McDonald rape or the other rapes.

- Dawson's assailant instructed Dawson to act like she enjoyed it. 2/23/09 RP 120. No similar directive was issued to the other victims.

- When Dawson's assailant attempted to bind her hands with a belt, she shoved him and he fell back and then fled. 2/23/09 RP 122.

- Marcia Powell, another 1985 victim, was tied with her own jump-rope and raped face-down. 2/23/09 RP 137, 145. Her assailant penetrated her vaginally and anally with his fingers and penis. 2/23/09 RP 142-43. The telephone lines in her apartment were cut and her sheets taken. 2/23/09 RP 145, 147. While bearing loose similarities to the McDonald rape, this offense did not share common features with the other offenses.

- Virginia Bing, another 1985 victim, was brutalized. She was sodomized with a broom handle. 2/25/09 RP 100. She was choked so hard that she defecated on herself. 2/25/09 RP 101. Her assailant raped her in front of her disabled daughter. Id. Although Dawson and Powell were forcibly restrained and assaulted, they were not tortured like Bing.

The distinctive factors in these three prior 1985 rapes were either not repeated in McDonald's assault, or were not common to all the crimes. For example, McDonald's assailant did not assault her with a vibrator or foreign object. In addition to penetrating her vaginally and anally – hardly

"distinctive" features in a rape – her assailant performed oral sex on her. 2/17/09 RP 39, 41, 52, 54. The most unusual feature of McDonald's rape was the assailant's use of bleach on and inside her body in an apparent effort to obliterate DNA evidence. 2/17/09 RP 60-61. This was not repeated in any of the other offenses.

b) The features common to the rapes were not unusual or distinctive. The common features to the rapes identified by the court were:

- that Thompson was in the victims' homes for a significant period of time before awakening them;
- that he disabled their telephones;
- that he covered their mouths with his hand;
- his use of a ligature;
- his penetration with fingers;
- his taking of personal property; and
- his ejaculation on victims' backs and bed sheets.

12/17/08 RP 57-58.

Although these features were present to some degree in most of the rapes, they were not present in all, and were not so unusual or distinctive that they could support the admission of the other acts evidence to prove identity. Certainly, it would not be surprising in a premeditated stranger

rape that an assailant might spend some time in his victim's home familiarizing himself with his environs. Nor is it unusual that a rapist intent on carrying out his objective without interruption or discovery would disable his victims' means of calling for help, cover their mouths so they could not raise an alarm, or use a ligature to bind them. Likewise, penetration with fingers is hardly unique, bizarre, or unusual.

In addition, the personal property taken in each instance differed. In the McDonald incident, hoping to save her own life, McDonald offered her assailant her car as a means of escape. The fact that Dawson and Powell's assailant took some personal memento is hardly comparable, or even similar. Finally, the fact that the assailant did not ejaculate inside his victims cannot be characterized as an unusual or distinctive feature of a sexual assault.

In Thang, the discrepancies between the other acts and the charged offense, considered together with the claimed similarities, defeated the contention that the other acts were admissible to prove identity:

> The shared features as represented to the court in this case are: (1) both cases involved theft of a purse and jewelry; (2) both victims were elderly; (3) in both cases, the perpetrator allegedly remarked that "the bitch is dead" and (4) both victims were kicked, Morgan three times and Klaus repeatedly. However, there are also several dissimilarities between the two crimes: (1) they occurred 18 months apart; (2) they took place in different parts of the state; (3) one victim was kicked three times and the other until she died;

> (4) In one case, entry occurred through a door, and in the other, through a window; (5) in one case, the perpetrators fled in the victim's car, and in the other case, on foot.

Thang, 145 Wn.2d at 645.

In criticizing the admission of other acts evidence in this circumstance, the Supreme Court remarked, "[t]he error was exacerbated by the prosecutor, who argued during closing argument: '[t]his is from a man that committed the same type of crime three years earlier.'" Id. Here, similarly, the prosecutor sought to capitalize on the Dawson, Powell, and Bing rapes 20 years earlier to persuade the jury that because Thompson had been convicted of rape in the past, he had raped again. 2/26/09 RP 62-64.

The court glossed over the lengthy gap between the prior and the current offenses on the basis that Thompson was out of custody "only" 10 months before he was arrested on the new offenses. 12/17/08 RP 55. This mistakes the analysis. The generation-long hiatus between the 1985 rapes and the current offense diminishes the probative value of the prior crimes, irrespective of Thompson's intervening circumstances. Compare Thang, 145 Wn.2d 645 (court finds the fact that Thang was imprisoned during the time intervening between the prior and current crimes should carry little weight in the question whether the prior crimes should be admissible). Moreover, 10 months is a substantial period of time, and, regardless of the

dissimilarities between the prior and current offenses, detracts from the conclusion that the prior crimes should be admitted. The conclusion that the prior offenses were admissible to prove identity was an abuse of discretion.

iv. The evidence was inadmissible under ER 403.

Given the absence of any showing that the evidence was necessary, and that the evidence's only probative value was to shore up the prosecution's theory that Thompson had a propensity for committing violent sex offenses, the court erred in concluding the evidence was more probative than prejudicial under ER 403.

Under ER 403, even relevant evidence must be excluded if its probative value is substantially outweighed by its prejudicial effect. ER 403. In a prosecution for a sex offense, probative value will be significant in cases where there is little proof that sexual abuse occurred. Russell, 154 Wn. App. at 783. The Court in Russell characterized the ER 403 balancing test in sex cases as "particularly delicate." Id. "A careful and methodical consideration of relevance, and an intelligent weighing of potential prejudice against probative value is particularly important in sex cases, where the prejudice potential of prior acts is at its highest." Id. (quoting State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982) (court's emphasis).

That the Legislature requires trial courts to engage in the ER 403 balancing analysis before admitting evidence under RCW 10.58.090 signals that the Legislature did not intend the statute serve as a carte blanche for prosecutors to taint trials with highly prejudicial other acts evidence. Here, however, the trial court gave the prosecutor free license to introduce exceptionally prejudicial evidence of Thompson's prior convictions, without evaluating necessity, without tying the evidence to a non-propensity purpose, and without assessing the devastating impact of such evidence on the jury. The evidence should have been excluded.

v. This court should reverse Thompson's conviction to allow him a trial free of the unwarranted prejudice of the improperly admitted propensity evidence. The erroneous admission of evidence requires reversal unless this Court can conclude that, within reasonable probabilities, the error did not materially affect the trial. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984); State v. Robtoy, 98 Wn.2d 30, 44, 653 P.2d 284 (1982). The erroneously admitted propensity evidence was not inconsequential to the State's case. Instead, the introduction of the evidence consumed a generous portion of the trial. Two witnesses, in addition to the complainant, testified about their personal experiences with being raped by Thompson, occupying nearly an entire day of testimony, on February 23, 2009. The prosecutor also dwelt

on this testimony, as well as the details of another rape, during his cross-examination of Thompson, and in his closing argument. 2/25/09 RP 100-111; 2/26/09 RP 62-64. This Court cannot conclude that the other acts evidence did not materially affect the outcome of the case.

f. Thompson's convictions must be reversed. Where a constitutional error occurs during a trial, the error is presumed to be prejudicial unless the State can prove beyond a reasonable doubt the jury would have reached the same verdict had the error not occurred. Chapman, 386 S. at 24. Thus, the State must convince this Court beyond a reasonable doubt that the guilty verdicts in this case were not attributable to the erroneously admitted evidence. Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). The State cannot meet that burden here. The jury heard an extensive amount of evidence regarding Thompson's prior convictions. That evidence was woven into the thread of argument presented by the State in closing. It is impossible to now remove the taint of that improperly included evidence or, more importantly, to guess at what the jury might have done without it.

The State cannot prove beyond a reasonable doubt that the jury's verdict was not attributable to the erroneously admitted evidence. This Court must reverse Thompson's conviction.

4. JURY INSTRUCTION 24, DEFINING "PERMISSION" FOR PURPOSES OF THE TAKING A MOTOR VEHICLE COUNT, MISSTATED THE LAW IN VIOLATION OF THOMPSON'S RIGHT TO A FAIR TRIAL AND WAS A COMMENT ON THE EVIDENCE.

McDonald testified that after herassailant concluded his sexual assault, he wandered around stating, "What am I going to do with you?" 2/17/09 RP 65. Worried for her safety, McDonald offered him her car and told him where to find it. 2/17/09 RP 66. The man took her keys and her phone and left. 2/17/09 RP 67. The car was recovered about two weeks later. 2/17/09 RP 99.

The State theorized that this conduct supported a charge of taking a motor vehicle without permission. The State contended that consent given under duress was not true consent. 2/24/09 RP 154. Although the State could not point to a Washington case that supported its interpretation, the State contended that the California and Georgia courts had construed permission according to the State's argument. Id.

Thompson moved to dismiss the taking a motor vehicle count on the basis that the State did not prove this essential element of the crime. 2/24/09 RP 155. The court denied the motion and over his objection instructed the jury:

> Permission means to consent to the doing of an act which, without such consent, would be unlawful. In order to

> consent to an act or transaction, a person must act freely and voluntarily and not under the influence of threats, force, or duress.

2/24/09 RP 155; 2/26/09 RP 4; 1CP 598. The jury convicted Thompson of this count as charged. 1CP 611.

b. The court's instruction defining "permission" was a judicial comment on the evidence. The Washington Pattern Instructions Committee does not propose an instruction on permission. Nevertheless, the trial court granted the State's request to instruct the jury on a "definition" of permission which was essential for the State to obtain a conviction, given that McDonald's assailant took her keys and car only when they were offered to him. This "definition" directed the jury's verdict on the charge and was a judicial comment on the evidence.

Judicial comments on the evidence are explicitly prohibited by the Washington constitution. Const. art IV, § 16.[19] The Supreme Court has interpreted this section as forbidding a judge from "conveying to the jury his or her personal attitudes toward the merits of the case" or instructing a jury that "matters of fact have been established as a matter of law." State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1231 (1997). A violation of the constitutional prohibition will arise not only where the judge's opinion is

[19] Article IV, section 16 provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

expressly stated but where it is merely implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006); State v. Jackman, 156 Wn.2d 736, 744, 132 P.3d 136 (2006). A judicial comment is presumed prejudicial. The presumption of prejudice may only be overcome if the record affirmatively shows no prejudice could have resulted. Levy, 156 Wn.2d at 725. "The State makes this showing when, without the erroneous comment, no one could realistically conclude that the element was not met." State v. Boss, 167 Wn.2d 710, 721, 223 P.3d 506 (2009).

A jury instruction may constitute a judicial comment on the evidence if "it reveals the court's attitude toward the merits of the case, or the court's evaluation of a disputed issue." State v. Hermann, 138 Wn. App. 596, 606, 158 P.3d 96 (2007) (citing State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995)). Jury instruction 24 falls into this category.

The question whether the State could prove McDonald's assailant took her vehicle without her permission was the sole disputed issue with respect to this charge. McDonald's assailant did not demand the vehicle or coerce her into allowing him to take it; to the contrary, McDonald offered him her vehicle and told him where to find it. 2/17/09 RP 66. As a simple semantic matter, there was no question of "consent" or "permission." McDonald sought to free herself and ensure her safety, and determined that if she provided her assailant with a means of escape, he

would not harm her further. Id. But the Court denied Thompson's motion to dismiss this charge for insufficient evidence and further granted the State's request to instruct the jury as to its "duress" theory of consent.

In Hermann, a prosecution for first-degree theft and trafficking in stolen property, the trial court instructed the jury, "Evidence of a retail price may be sufficient to establish value." 138 Wn. App. at 606. The Court held that this instruction improperly directed the jury to give greater weight to that evidence rather than the evidence of wholesale value. Id. at 607. The Court reasoned, "'[b]ecause the jury is the sole judge of the weight of the testimony, a trial court violates [the] prohibition [on judicial comments] when it instructs the jury as to the weight to be given certain evidence.'" Id. (quoting In re Detention of R.W., 98 Wn. App. 140, 144, 988 P.2d 1034 (1999)).

In R.W., an involuntary commitment proceeding, the trial court instructed the jury,

> A prior history of decompensation leading to repeated hospitalizations or law enforcement interventions should be given great weight in determining whether a new less restrictive alternative commitment is in the best interest of the respondent or others.

98 Wn. App. at 145.

On appeal, the Court held that this instruction was an impermissible comment on the evidence, and noted that the disputed

question at trial was whether R.W. was gravely disabled. Id. at 145-46. The instruction went to the heart of that issue and colored the jury's determination whether R.W. could safely be released into the community.

The instruction given by the trial court here similarly urged the jury to discount the evidence that McDonald herself decided to offer her assailant her car without instigation or suggestion by her assailant in favor of the State's theory that because of her circumstances, she was not exercising free will. As in Hermann and R.W., the instruction conveyed the court's attitude toward the merits of the case and instructed the jury as to the weight to be given certain evidence.

For the same reason, the instruction was not harmless. The State overcomes the presumption of prejudice from a judicial comment "when, without the erroneous comment, no one could realistically conclude that the element was not met." Boss, 167 Wn.2d at 721. In light of McDonald's testimony that she decided to offer her assailant her car, a reasonable juror realistically could conclude the State had not met its burden of proving beyond a reasonable doubt that the taking was "without" permission. Because of the Court's instruction, however, the jury was invited to disregard McDonald's exercise of free will and conclude that her circumstances negated the fact of her offer. The

improper judicial comment on the evidence requires reversal of Thompson's conviction.

c. The State presented insufficient evidence to prove the taking of the motor vehicle was without "permission." Even if this Court does not agree that the instruction was an impermissible judicial comment on the evidence, this Court should hold that the State presented insufficient evidence to prove the essential element that the taking of McDonald's motor vehicle was without her permission.

Principles of due process require the State to prove the essential elements of a criminal charge beyond a reasonable doubt. Apprendi, 530 U.S. at 490. On review of a challenge to the sufficiency of the evidence, the court construes the evidence in the light most favorable to the State to determine whether a reasonable fact-finder could conclude the element was proven beyond a reasonable doubt. Salinas, 119 Wn.2d at 192.

Even according to this deferential standard, no reasonable fact-finder could have concluded that McDonald's assailant took her car without her permission. McDonald's assailant did not take her car without her knowledge. He did not threaten her in order to secure it. Instead, McDonald considered her circumstances and determined that she would offer her assailant her car in order to secure her own safety. 2/17/09 RP 66. Not only did she give her "permission" to the taking, she came up

with the idea that her assailant should use her vehicle to escape. Based on this evidence, the State did not prove this essential element of the taking a motor vehicle charge beyond a reasonable doubt. Thompson's conviction should be reversed and dismissed.

5. PROSECUTORIAL MISCONDUCT IN CROSS-EXAMINATION AND CLOSING ARGUMENT DENIED THOMPSON HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

a. The prosecutor deliberately introduced and argued prejudicial facts not in evidence. Prior to trial, the prosecutor alerted the court that 1985 victim Virginia Bing was unwilling to testify. 12/17/08 RP 25. The prosecutor stated that he wished to introduce the fact of that conviction if Thompson opened the door. Id.

Thompson did testify in his defense. 2/25/09 RP 55-141. He acknowledged that in the 1980s he had been committing property and other minor offenses to support a drug habit, but that he was wrongly arrested on suspicion of the 1985 rapes. 2/25/09 RP 55-59. He explained that his prior convictions were based on "so-called voluntary confessions" without physical evidence. 2/25/09 RP 61. At some point during his investigation by law enforcement he realized that the State had "pulled the rug out from under" him and that he had no recourse but to go to prison. 2/25/09 RP 62. In prison, he turned to God. Id.

Thompson accrued good time, but when his release date drew near, the State sought to commit him as a sexually violent predator. 2/25/09 RP 66. Thompson was sent to McNeil Island where he remained for a year and a half, but despite the State's "spin doctors," the jury believed he was reformed and voted to release him. 2/25/09 RP 67-68.

However, once released, Thompson felt persecuted. He had to immediately register as a sex offender, and as a consequence he received death threats, the brake lines on his car were cut, he couldn't find housing, and he couldn't find steady employment. 2/25/09 RP 69-78. Thompson denied committing any of the crimes of which he had been accused. 2/25/09 RP 86.

On cross-examination the prosecutor pressed Thompson to admit that he believed the charges against him were "trumped up." 2/25/09 RP 89. Thompson responded that he had been "coerced and intimidated into confessing to things I did not do." 2/25/09 RP 90. He explained that when he took responsibility for the 1985 rapes during his civil commitment trial, he had been under "extreme duress." 2/25/09 RP 94.

The prosecutor then confronted Thompson with the unproven allegations involving Virginia Bing:

> Q (by the prosecutor): Let us talk about what you call your empathy for your victims. Do you remember a woman named Virginia Bing?

A (by Thompson): Did she testify?

Q: She was your rape victim number four in 1985.

A: Did she testify?

Q: Do you remember her?

A: No, not specifically.

Q: Well (inaudible) –

A: Did she – did she testify?

Q: Remember what you told the police about your empathy for her? Do you remember telling the police you put a broom handle into her vagina? Do you remember that?

A: Is that signed?

Q: Did you tell the police that?

A: Is that signed?

Q: (Inaudible) –

A: We can go round and round on this forever. Is that confession signed?

Q: (Inaudible) –

A: Is that signed by me? Is that confession a valid document?

Q: Do you remember (inaudible) –

A: If you're going to use it Mr. Prosecutor, is that confession signed by me?

The Court: Mr. Thompson, answer the question.

Mr. Thompson: I'm not answering anything about that confession or that conviction, for that matter.

Q: Do you remember, Mr. Thompson, telling the detectives that when you were putting the broom handle into the victim who you now feel empathy for, her disabled young daughter [wandered] into the room? Do you remember that?

A: (Laughter) I don't recall any of it. That was 20-something years ago. I paid my debt to society. I'm no – I'm no longer on trial for all this innuendo and all this prejudice he's trying to put before you. I'm no longer on trial for that information. I'm on trial for these counts today. He's trying to introduce all this prejudicial information that I've never even confronted the victim on. How are you going to introduce information that is hearsay? That's what I'd like to know.

Q: Do you remember, Mr. Thompson, with Ms. Bing, that you choked her so hard, that she defecated all over herself? Do you remember telling the detectives that?

A: I don't remember any of that conversation Mr. Prosecutor.

. . . .

Q: Now, with respect to Virginia Bing, do you recall telling the detectives that you rolled her onto the floor?

A: (No verbal response.)

Q: Do you recall putting Bernadette McDonald on the floor?

A: No I don't.

Q: And Virginia Bing, you covered with a blanket. Do you recall that?

A: (No verbal response.)

Q: Do you recall covering Bernadette McDonald with a blanket?

A: No I don't.

Q: You raped Virginia Bing vaginally from behind, didn't you?

A: (No verbal response.)

Q: Can you answer that question?

A: I don't know what you're talking about. So – so again, we can sit here all day. You're wasting everybody's time by continually prejudicing the jury with that information.

2/25/09 RP 100-01, 118-19.

The State did not call any witnesses or introduce documentary evidence to substantiate the evidence it sought to elicit from Thompson. Nevertheless, in closing argument, the prosecutor referenced Virginia Bing as one of Thompson's rape victims, and quoted testimony from his 2003 commitment trial that was never introduced into evidence. 2/26/09 RP 62-64.

a. Principles of due process forbid prosecutors from engaging in misconduct to obtain convictions. Prosecutors, as quasi-judicial officers, have the duty to seek verdicts free from prejudice and

based on reason. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). This is consistent with the prosecutor's obligation to ensure an accused person receives a fair and impartial trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314 (1935); State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978); U.S. Const. amends. V; XIV; Const. art. I, §§ 3, 22.

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger, 295 U.S. at 88.

Unless the misconduct infringes on a constitutional right, the defense bears the burden of proving a "substantial likelihood" that prosecutorial misconduct affected the jury. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). The allegedly improper arguments must be reviewed in the context of the total argument; (2) the issues in the case; (3) the instructions, if any, given by the trial court; and (4) the evidence

addressed in the argument. State v. Perez-Mejia, 134 Wn. App. 907, 916-17, 143 P.3d 838 (2006) (citing State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994)).

A claim of prosecutorial misconduct in closing argument is waived if defense counsel did not object and curative instructions would have obviated the prejudice from the remarks. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 154 (1988). However, "[a]ppellate review is not precluded if the prosecutorial misconduct is so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct." Id. (emphasis in original).

c. The prosecutor's misconduct in cross-examination and closing argument denied Thompson his due process right to a fair trial. Before trial commenced, the prosecutor informed the court and counsel that Virginia Bing did not wish to appear as a witness.12/17/08 RP 85. He knew he would not be calling Virginia Bing to testify at trial either in the State's case-in-chief or in rebuttal. He asserted that if Thompson opened the door, he would seek introduce the fact of that conviction. Id.

However the prosecutor went far further than introducing the fact of Thompson's conviction involving Bing. The prosecutor conducted a lengthy and argumentative cross-examination in which the prosecutor himself referenced the facts underlying that offense – facts which had not

been proven through direct testimony in the proceedings. The prosecutor's cross-examination alleged the commission of deeply shocking and sadistic acts. The prosecutor thereby introduced facts concerning a far more brutal rape than the crime for which Thompson was being prosecuted.

When the prosecutor was asking Thompson his inflammatory questions about Bing, the prosecutor was fully aware that he would not be able to impeach Thompson if Thompson denied the prosecutor's allegations. The prosecutor had explicitly acknowledged before trial that he would not call Bing as a witness. Where evidence is introduced solely to impeach, it must 1) be relevant for that purpose, and 2) be non-hearsay or subject to a hearsay exception. State v. Allen S., 98 Wn. App. 452, 466, 989 P.2d 1222 (1999) (citing ER 402; ER 802).

Moreover, Thompson professed a lack of memory of the acts about which the prosecutor was questioning him, thus there was no substantive evidence of the acts alleged. See Allen, 98 Wn. App. at 464-65. The Supreme Court has held that the introduction of "facts" not in evidence is misconduct because "such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury."

United States v. Young, 470 U.S. 1, 18, 105 S.Ct. 1038, 85 L.Ed.2d 1 (1985). The prosecutor's introduction of "facts" not in evidence was misconduct.

In State v. Jones, 144 Wn. App. 384, 183 P.3d 307 (2008), the Court concluded that a prosecutor who introduced facts not in evidence through her cross-examination and closing argument had committed reversible misconduct. Id. at 293-94. In so holding, the Court rejected the State's contention that Jones had opened the door to the improper questions:

> A criminal defendant can "open the door" to testimony on a particular subject matter, but he does so under the rules of evidence. A defendant has no power to "open the door" to prosecutorial misconduct.

Id. at 296.

The same prosecutor persisted in arguing the inadmissible facts and improper inferences in closing argument, and on appeal the State attempted to defend the improper argument as "invited error." Id. at 297-98. The Court reiterated, "even if Jones had 'opened the door' to evidence or examination of a particular subject at trial, the prosecutor is not absolved of her ethical duty to ensure a fair trial by presenting only competent evidence on this subject." Id. at 298 (emphasis in original).

Like Washington courts, in the federal courts prosecutorial misconduct that is "exceptionally flagrant" is reviewable on appeal even absent an objection below. United States v. Carter, 236 F.3d 777, 783 (6th Cir. 2001) (finding prosecutor's misstatement of material facts to be plain error meriting reversal notwithstanding defense counsel's failure to object). In Hodge v. Hurley, 426 F.3d 368 (6th Cir. 2005), the Court concluded that a prosecutor in a child rape case committed flagrant misconduct because his cross-examination of a key witness suggested "the prosecutor knew that his own later statements during closing arguments were, at the very least, a set of serious misrepresentations." Id. at 382. The Court characterized this misconduct as "inexcusable." Id.

"Such argument also violates the defendant's right to confrontation, as references to persons who do not testify at trial implicate the defendant's right "to be confronted with the witnesses against him." United States v. Weekes, 224 Fed. Appx. 200, 206 (3rd Cir. 2007); U.S. Const. amend. VI.

Here, similarly, the prosecutor knew when he started to cross-examine Thompson about the alleged events surrounding the Bing conviction that he could not prove the truth of the allegations if Thompson denied them. This did not deter the prosecutor from making sure the jury heard all of the brutal details of this rape, however. Nor was the

prosecutor dissuaded from referencing the Bing conviction in closing argument as well as testimony from Thompson's civil commitment trial, even though the prosecutor did not bother to introduce this evidence during his case in chief or in rebuttal. This Court should conclude the prosecutor engaged in flagrant misconduct that denied Thompson his rights to confrontation and to a fundamentally fair trial.

H. ARGUMENT PERTAINING TO ASSIGNMENTS OF ERROR 22-25 (BYARS TRIAL ERRORS).[20]

1. PERMITTING THE INFORMATION TO BE AMENDED TO ALLEGE SEXUAL MOTIVATION, WHERE THE INFERENCE OF A SEXUAL MOTIVATION DERIVED FROM EVIDENCE THAT COULD ONLY BE ADMITTED IF THE AMENDMENT WERE PERMITTED, VIOLATED THOMPSON'S RIGHT TO DUE PROCESS.

a. The State sought to introduce evidence of the other rapes of whichThompson had been convicted under RCW 10.58.090 and ER 404(b) to prove identity. In the Byars matter, the State initially charged Thompson with premeditated first degree murder but subsequently amended the information to allege, in the alternative, first degree felony murder predicated on rape and burglary. 2CP 1, 69.

[20] Pursuant to RAP 10.1(g), Thompson incorporates by reference his argument in section G, supra, pertaining to the unconstitutionality of RCW 10.58.090.

Deborah Byars was a drug addict and chat-line prostitute who was found murdered in her ground floor apartment near Lake Union on August 26, 2004. 2RP (Vol. 3) 33-38, 111, 151-57. She had been stabbed in the back of the head, neck, and clavicle with a screwdriver, apparently through a pillow. 2RP (Vol. 6) 37-43. Ligature marks and petechiae indicated that force had been applied to her neck. Id. at 45, 48. Injuries on her hands and disarray in her apartment suggested that she had struggled with her assailant before she was killed. 2RP (Vol. 4) 66; 2RP (Vol. 6) 55, 58.

Semen was detected on Byars' thighs and pubic area. 2RP (Vol. 6) 111. Forensic examiners identified at least three contributors to the semen, including Thompson. Id. at 122-23. Thompson's DNA was also located on a broken telephone cord in the apartment and on Byars' left and right wrists. Id. at 118-20, 131-32. Although Thompson's DNA was detected under Byars' left and right fingernails, the DNA of another individual was detected under the left fingernail as well. Id. at 136-37, 157.

127 latent print cards were taken from the home. 2RP (Vol. 5) 32. Thompson's fingerprints were not found anywhere; however, the prints of two other men, Charles Mosiman and Rex Kohlman, both of whom had been involved with Byars, were detected. Id. at 34, 52.

The likely murder weapon, a bloody screwdriver, was found in a closet near the main entrance to the apartment. 2RP (Vol. 4) 83; 2RP (Vol. 6) 121. Trace DNA was detected on the handle of the screwdriver, but could not be linked to any particular individual. 2RP (Vol. 6) 156.

Prior to trial, the State moved to admit evidence of Thompson's prior rape convictions, including the McDonald conviction, under RCW 10.58.090. 2CP 68-80. The State conceded:

> Ms. Byars' sexual history and lifestyle would allow the defendant to claim, either in testimony or by argument of counsel, that the forensic evidence establishes nothing more than that he had consensual sexual contact with her, and that when he left her residence, she was alive and well.

2CP 79.

The State contended that because the crime underlying the felony murder allegation was rape, the crime should be construed as a sex offense. 2CP 75. Thompson objected, citing State v. Thomas, 138 Wn.2d 630, 980 P.2d 1275 (1999), for the proposition that felony murder predicated on rape is not a sex offense. 2RP (Vol. 1) 34, 110.

In response, the State countered that the evidence should be admitted under ER 404(b), and argued in the alternative that it should be permitted to amend the information to allege sexual motivation, which would result in the crime being classified as a sex offense. Id. at 30. Thompson again objected, contending that a sexual motivation allegation

must be predicated on "sufficient admissible evidence," and that it would be improper for the court to consider otherwise-inadmissible evidence in determining whether to grant the amendment. Id. at 34, 110-13.

The court granted the State's motion to amend the information, ruled the other acts evidence was admissible under RCW 10.58.090, and that it also was admissible under ER 404(b) to prove modus operandi and identity. 2RP (Vol. 1) 118-19.

b. The trial court erred in allowing the State to amend the information to add an allegation of sexual motivation. Although the trial court has discretion to permit prosecutors to amend criminal charges prior to trial, the exercise of this discretion must be tempered by considerations of prejudice to the accused. CrR 2.1(d), pertaining to the amendment of criminal informations, provides, "The court may permit any information . . . to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced." Here, the ruling authorizing the amendment was extraordinarily prejudicial to Thompson, as it allowed the State to taint his trial with the evidence of his prior rape convictions. The State's motion to amend the information should have been denied.

i. The evidence supporting the amendment was not admissible. The prosecutor's authority to add a special allegation of sexual motivation is restricted by the admissibility of the evidence

supporting the allegation and the availability of defenses. According to former RCW 9.94A.835,

> The prosecuting attorney shall file a special allegation of sexual motivation in every criminal case, felony, gross misdemeanor, or misdemeanor, other than sex offenses . . . when sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding of sexual motivation by a reasonable and objective fact finder.

Former RCW 9.94A.835 (emphasis added).

The prosecutor's acknowledged purpose for pursuing the amendment was to guarantee that the State could introduce evidence of Thompson's other convictions under RCW 10.58.090. The court agreed with this theory, and alternately ruled that the other crimes evidence would be admissible to show modus operandi and identity. 2RP (Vol. 2) 119. Neither theory is sustainable.

The general prohibition on other acts evidence encompasses not only bad acts but "any evidence offered to "show the character of a person to prove the person acted in conformity" with that character at the time of a crime. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). As noted supra, identity and modus operandi are interrelated exceptions to ER 404(b)'s general exclusionary rule. Thang, 145 Wn.2d at 643; State v. Irving, 24 Wn. App. 370, 374, 601 P.2d 584 (1979), ("the primary purpose

[of modus operandi evidence] is to corroborate the identity of the accused as the person who likely committed the act charged") rev. denied, 93 Wn.2d 1007 (1980).

The evidence offered to prove identity through modus operandi must meet a "stringent test of uniqueness." Coe, 101 Wn.2d at 778. Where it is offered to prove modus operandi, "a prior act 'is not admissible . . . merely because it is similar, but only if it bears such a high degree of similarity as to mark it as the handiwork of the accused.'" Foxhoven, 161 Wn.2d at 176 (quoting Coe, 101 Wn.2d at 777). "The facts of both crimes must be 'so similar and peculiar in nature as to show a modus operandi.'" Irving, 24 Wn. App. at 374.

In evaluating the dissimilarities of the other acts evidence, it is worth contrasting the prosecutor's argument and offer of proof in this matter with his argument on the same point in the McDonald matter. In the McDonald matter, in addition to noting that each victim was white and female, the prosecutor argued:

> Each of the four victims, three from 1985 and one from 2004, was in her 20's. Each was attacked in her home. Each was asleep when the attacks began. All of the attacks were in the early morning hours. The defendant said things to the victims to lead them to believe that he had had prior contact with or about them. He disabled in each one of those cases their phones.
>
> . . .

> He, with respect to each of the victims, awakened them by touching or covering their body in a way that was extremely a discomfort [sic] to them. . . In three of the victims of the four, they awoke with the defendant's hand over their mouth. In two of the three, the defendant's hand was covered with a cloth of some type.
>
> . . .
>
> [E]ach of the four victims . . . had her face or head covered during the assault. Each of the victims was tied with a ligature. Each of the ligatures in every one of those cases originated at the scene.
>
> . . .
>
> He told each of the victims he would kill them. Three of the four were raped vaginally. Three were raped by his fingers. He took items of personal property. With respect to two of the four victims . . . the defendant ejaculated onto the victims and the bed sheets, and then took those bed sheets either with him to dispose of them or took them with him to try and clean them.

12/17/08 RP 38-39.

Comparing these alleged "similarities" to the Byars homicide, what is striking is the extent to which Byars' circumstances differed on nearly every major point. Byars was in her late thirties, not her twenties. Although she was attacked in her home, there was no evidence to suggest that she was asleep when the attack began. In fact, her friend Tammy Porter said that Byars telephoned her late at night on the evening she was presumed to have been killed, and woke her up. 2RP (Vol. 3) 71. Byars wanted Porter to talk with a man who was there, named "Dave" or David." 2RP (Vol. 3) 73. Byars indicated that they were going to get crack. 2RP (Vol. 3) 71.

With respect to nearly all of the other "similarities" cited by the prosecutor in the McDonald matter, there was no indication that Thompson had raped Byars and no evidence concerning the circumstances of their sexual contact. Although Byars apparently was stabbed through a pillow, there was no evidence to suggest that she had been sexually assaulted and the pillow used to silence her during this event.

Likewise, the prosecutor speculated that the broken piece of telephone cord had been used as a ligature, 2RP (Vol. 2) 23, but there was no conclusive evidence of this, and no ligature marks were found on Byars' hands or wrists. 2RP (Vol. 6) 74. By contrast, both McDonald and Powell testified that their wrists and ankles were bound, and Dawson testified that her assailant attempted to bind her wrist. 2/17/09 RP 47; 2/23/09 RP 122, 138. McDonald confirmed that the ligatures bruised and marked her wrists and legs. 2/17/09 RP 110-12.

The key "similarity" highlighted by the prosecutor was the presence of an uncapped bottle of bleach in Byars' kitchen, about 10-15 feet away from where her body was discovered. 2RP (Vol. 2) 24. However, there was no evidence that bleach was used to conceal or destroy evidence, as in the McDonald case. Furthermore, an open bottle of ammonia was found as well as bleach. 2RP (Vol. 4) 97.

Finally, the key "distinctive" fact about the Byars case was that Byars was brutally murdered. This fact was not duplicated in any other case and set Byars' circumstances apart from the prior offenses.

In sum, there was little basis for the court to conclude that the rapes shared unique common factors with the Byars homicide to justify their admission at Thompson's trial on the Byars matter. In addition, the claimed similarities identified by the prosecutor between the several crimes in the McDonald case shifted or disappeared when it came time to litigate the Byars case. Finally, while the rape convictions may have shared some loose similarities with one another, there was no single feature common to each crime that was also present in the Byars case except for the fact of sexual intercourse.

Thus, there was no basis to conclude that the evidence was admissible under ER 404(b). It certainly was not admissible under the stringent requirements of evidence of modus operandi to prove identity. For this reason, the evidence could not be considered in support of amending the murder charge to allege a sexual motivation.

ii. The amendment enabled the prosecutor to abuse the rules of evidence in order to enhance the prospect of conviction, in violation of due process and separation of powers principles. Motivated by the prospect of being able to introduce the highly prejudicial evidence

of Thompson's prior rape convictions under RCW 10.58.090, the prosecutor deliberately pursued an amendment to allege sexual motivation. Given the absence of unique similar factors between the several offenses, he correctly perceived an amendment to charge a sex offense as the vehicle to introduce evidence that might otherwise be subject to exclusion.

As the prosecutor well recognized, admission of this evidence was key to the State obtaining a conviction. There was little to no evidence tending to suggest that Byars had been raped or that her home had been feloniously entered, let alone that Thompson had done either of these things. Although a screen outside of Byars' window was bent up at the bottom, crime scene investigators could not say definitively that the screen had been pried open. 2RP (Vol. 7) 140. The medical examiner who performed Byars' autopsy noted some redness inside her vaginal wall and bruising around her anus, but acknowledged these were not inconsistent with consensual sex. 2RP (Vol. 6) 52-53, 76.

Three men who testified at trial acknowledged having had sexual relations with Byars around the time of her death. 2RP (Vol. 4) 177-85; 2RP (Vol. 5) 66-69, 212-18. One of these, David Nelson, behaved suspiciously when questioned by the police regarding his whereabouts on the night that Byars likely was murdered. 2RP (Vol. 4) 198.

The prosecutor admitted, "[T]he forensic evidence establishes nothing more than that [Thompson] had consensual sexual contact with her, and that when he left her residence, she was alive and well." 2CP 79. Without the evidence of Thompson's other rapes, there was abundant reason to doubt that Thompson had anything to do with Byars' murder.

In fact, this prosecutor's pursuit of the amendment illustrates the due process and separation of powers problems with RCW 10.58.090. RCW 9.94A.835 limits the prosecutor's ability to file a sexual motivation allegation by appropriately restricting the evidence that may be considered in support of the allegation to evidence that is admissible. Former RCW 9.94A.835. RCW 10.58.090 permits the introduction of propensity evidence in a prosecution for a sex offense that would be subject to a strict presumption of inadmissibility in a prosecution for any other kind of offense. This prosecutor's cynical manipulation of RCW 9.94A.835 evinces his understanding that by virtue of the amendment, he would be able to manipulate the ordinary rules of evidence so as to avail himself of the laxer procedures specified for sex offenses by RCW 10.58.090.

c. The error prejudiced Thompson. Without compelling evidence of actual similarities between the other offenses and the current accusation, the prosecutor sought to have the jury use Thompson's prior offenses solely as propensity evidence: that because Thompson had been

convicted of rape in the past, he had raped and murdered Byars. The admission of this evidence – with little but a tenuous link to connect it to the Byars homicide – virtually ensured a conviction. Unlike evidence admitted under ER 404(b), which is introduced at trial for a non-propensity purpose, evidence admitted under RCW 10.58.090 is expressly considered as probative of guilt of the charged offense. See RCW 10.58.090(1) (broadly providing that in a sex offense prosecution, "evidence of the defendant's commission of another sex offense or sex offenses is admissible"); cf. Russell, 154 Wn. App. at 786 (recognizing the prejudicial impact of admission of other acts evidence for substantive purposes in prosecutions for sex offenses).

The evidence was introduced and used for substantive purposes. Given the evidence's unusually provocative nature, the impact of the evidence was sure to outweigh any doubts the jury would otherwise have had regarding the State's proof. The amendment denied Thompson due process.

2. THE OTHER ACTS EVIDENCE SHOULD HAVE BEEN EXCLUDED UNDER ER 403.

As noted in Argument G, supra, even under RCW 10.58.090, the trial court must find that evidence of other sex offenses is more probative than prejudicial under ER 403 before admitting the evidence. Here, the

inflammatory other acts evidence was probative solely because it was likely to persuade the jury to cast aside their doubts regarding the State's weak case against Thompson and convict him on the basis of his past. Commensurately, the evidence was extraordinarily prejudicial for this same reason. Because the evidence was not probative for any legitimate purpose, it should have been excluded under RCW 10.58.090.

3. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE FELONY MURDER OR PREMEDITATED MURDER IN THE FIRST DEGREE.

The State's theory of felony murder in the first degree required the jury to conclude that Thompson had committed a homicide in the course of committing rape or burglary. But, even in the light most favorable to the State, there was no direct or circumstantial evidence of either crime. Law enforcement investigators could not say that the bent window screen had been pried open. 2RP (Vol. 7) 140. There were no other signs of forcible entry. There also was no evidence that Byars had been raped. Certainly there was ample evidence of sexual intercourse, but nothing suggested that the sexual contact had not been consensual.

The State sought to persuade the jury that because Thompson was a convicted rapist, he raped and murdered Byars. But, save for the evidence from Thompson's other convictions, there was little evidence to

support the conclusion that Thompson was guilty of either premeditated murder or felony murder beyond a reasonable doubt. This Court should find that the State did not present sufficient evidence to support Thompson's conviction under either of the State's alternative theories. The conviction should be reversed and dismissed.

I. CONCLUSION

This Court should conclude that Thompson was denied his right to the assistance of counsel and to due process of law when the trial court refused to either appoint him substitute counsel despite an irreconcilable conflict with his appointed attorney or permit him to go pro se. Because this error infected all of Thompson's trials, each case must be reversed and remanded. On remand, Thompson should appear before the jury without restraints. Evidence of other sex offenses should be excluded from Thompson's prosecutions. Finally, the sexual motivation allegation

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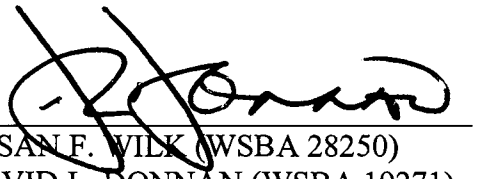
concerning Richard Blue should be stricken, and Thompson's convictions for taking a motor vehicle without permission and murder in the first degree should be reversed and dismissed.

DATED this 30th day of August, 2010.

Respectfully submitted:



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