THE QUEST FOR JUSTICE

Prosecutorial Ethics And Professionalism

The Kitsap County Prosecuting Attorney s Office

Presentation On

THE QUEST FOR JUSTICE

Prosecutorial Ethics And Professionalism

A Washington Association of Prosecuting Attorneys
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SUMMARY CONTENTS

CONTENTS

INTRODUCTION

What Should I Do?

We have studied ethics in law school, and gone to seminars on the topic. Yet, the study of ethics and the Rules of Professional Conduct focuses almost exclusively on the minimum standards below which no lawyer may ethically fall. While concentrating on what an attorney can do is certainly an appropriate starting point in learning the basic rules, the far more difficult task is to teach, and learn, professionalism, or what a lawyer should do.

For prosecutors, the task is perhaps even more difficult since we represent the public, who appropriately demand the highest standard of professionalism of their servants.

The Preamble to the Rules of Professional Conduct discusses the concept that lawyers are the guardians of the law playing a vital role in the preservation of society. Such a noble cause, and responsibility, cannot be taken lightly.

The Preamble continues: Each lawyer must find within his or her own conscience the touchstone against which to test the extent to which his or her actions should rise above minimum standards.

How should one search his or her conscience, and act accordingly? We have many, many court rules and cases describing a myriad of procedural matters (the number of days notice required, discovery requirements, etc.). A prosecutor could ethically follow these rules exactly, and likely decrease the respect for law among the criminal justice system participants and the public.

We are the guardians of the law, and must begin discussing our professional responsibility by asking What should I do?

Why Study Ethics and Professionalism?

Before Watergate, little if anything was discussed about an attorney s ethical and professional responsibility. Then, many lawyers in President Nixon s administration were convicted and imprisoned. The President, himself an attorney, was impeached. Spiro Agnew, the Vice President, pleaded nolo contendere and was convicted of income tax evasion.

The bar soon recognized the public s outrage at attorneys and the need to deal with ethics. So law school courses were developed and an ethics component was added to the bar examination.

Eventually, ethics was added as a mandatory continuing legal education requirement.

Law school and CLE courses now teach the black letter law on ethics. Do not do this, or this, or this. Professionalism, though, is often ignored by these courses because the topic is much more difficult to teach since deciding how one should act will ultimately rest on one s own values.

Despite the efforts of many, it is certainly safe to say that the public s respect for lawyers has not increased since Watergate days. I submit that without serious discussion and development of a moral code concerning whether an attorney should take a particular action, the public s confidence in lawyers will continue to erode. As guardians of the law, we all share the blame.

Why Did You Become A Lawyer?

I believe that most people who go to law school do so with an aspiration towards making a difference by helping people seek justice. Yet law school focuses on teaching the rules, the black letter law. This methodical training of the rules can have the result of teaching adherence to the rules at all costs. After all, we are taught by experiencing the cross-examination technique of the Socratic Method to learn the rules. And if this cross-examination technique is a bit uncomfortable for the law student, well, too bad.

So when lawyers deal with each other in the heat of battle, it is almost instinctual to treat each other and the opposing party as we were taught. Effective cross-examination, after all, is supposed to be the best method of seeking truth from a witness. And if the witness and opposing counsel need to be cross-examined ala Socrates to get to the truth and justice, so be it.

Yet use of this heat of the battle means to achieve the end of truth and justice is fraught with abuse, righteous indignation, and insolence by attorneys. I submit that our role as guardians of the law cannot allow us to achieve justice at the expense of personal attack and indignity along the way. The quest for justice, or the means, must be as righteous as the goal itself. Anything less demeans the law and our profession.

What Is Your View Of Being An Attorney?

How do you describe your view of being a lawyer? Is your job an occupation? A profession? A vocation?

oc-cu-pa-tion. 1. an activity in which one engages

pro-fes-sion. 4. a: a calling, requiring specialized knowledge and often long and intensive academic preparation

b: a principal calling, vocation, or employment

vo-ca-tion. 1. a summons or strong inclination to a particular state or course of action

WEBSTER S NINTH NEW COLLEGIATE DICTIONARY (1991), at 817, 939, 1320

Do you simply occupy your time as a prosecutor, for a paycheck? Or is being a prosecutor a calling; a state of mind singularly focused on a passion for justice?

You probably know attorneys and prosecutors in each category. Which definition best describes you?

Why Don t People Like Lawyers? Our Moral Ambiguity.

Most attorneys have a set of values and beliefs that are followed at home and in their personal lives. Yet, often these values are ignored when dealing with opposing counsel and parties. Do you perceive a tension between your own values and how you act in court?

The public pays a significant amount of taxes to support the criminal justice system. It expects its public servants to act morally, ethically, and based on reason, not emotion. Yet it sees examples to the contrary, from the Rodney King incident in California to prosecutors and police being criminally tried in DuPage County, Illinois for obtaining a death sentence against two people while allegedly knowing the suspects did not commit the vicious murder of a ten year old girl.

One of the main reasons the public dislikes and distrusts attorneys is our moral ambiguity. We have been trained to zealously represent clients within ethical rules. Yet these what can I do rules (or from the public perspective what can I get away with rules) fail to in any way take into account one s own values and belief system. We applaud ourselves for meeting the minimum standards of our ethical rules. Yet this thoughtless allegiance to the minimum standards hardly increases the public s faith in our profession s alleged claim to maintain the highest standards of ethical conduct proclaimed by the Preamble of the Rules of Professional Conduct.

It is this moral ambiguity that the public notes when we tout our self-regulation. The public snickers because the public does not respect morally ambiguous positions. Children are taught right from wrong and to follow the Golden Rule when dealing with others. Yet even these basic concepts of treating others with respect and dignity appear lost on lawyers and prosecutors in almost any courtroom on any given day.

Our focus on following the letter of the law and instinctive adherence to its rules does not translate into what the public perceives as commonsense and right versus wrong. Yet commonsense and right versus wrong is precisely what we prosecutors daily rely upon when arguing a case to a jury.

Prosecutors take an oath to support the constitutions and laws of the United States and the State of Washington, yet case law is filled with examples of prosecutorial misconduct during all phases of a criminal case. How can such examples exist if we are seeking justice, not merely convictions? Does the desire to convict the bad guys to protect the public justify use of improper tactics? As discussed previously, even given the legitimate goal of public safety, use of tainted methods does not result in justice.

I think that the embarrassingly high volume of reported cases citing prosecutorial misconduct exist because the prosecutor failed to ask in good conscience Should I do this? A most difficult question a prosecutor must always remember is

Can I restrain my justifiable appetite to convict bad guys by using only proper ethical and professional means to do so?

Prosecutorial Challenges

The public s perception of prosecutors is our reality. We are the one s exercising this incredible power against the citizenry in the name of public safety. You are the prosecutor s office when anyone deals with you. What message do your activities send?

Prosecutors inherently serve two masters society and justice. Yet, society s desire for a conviction in a particular case often directly conflicts with a prosecutor s duty to seek justice in obtaining a verdict free of prejudice and passion, and based solely on admissible evidence and reason. GERSHMAN, PROSECUTORIAL MISCONDUCT, at viii-x (1996).

It is easy to deal professionally with an opponent who treats one with respect and courtesy, and who does not use the rules as a sword to attack at any cost. Yet it is hardly virtuous to treat another with respect only when treated similarly.

The challenge to one s professionalism comes when dealing with the opponent who lacks a moral compass. It is at this time that a prosecutor s true moral character is put to the test. Your response will ultimately determine whether the means you use to obtain a conviction are tainted, or whether justice is truly realized.

Supervisors also must be mentioned. Do you work for honest people who seek justice by encouraging professional conduct of subordinates? Or does your supervisor s desire for aggressive prosecutors translate into obtaining convictions at any cost, even if you have to cheat?

> Each prosecuting attorney must recognize that slavish attendance to rules absent a personal ethical sense is almost worthless. Certain conduct may not violate the letter of any rule but may destroy a reputation. Rules and sanctions can be enumerated, but absent a sense of fair play and honesty they are minimally helpful. The rest is up to the individual conscience.

Susan J. Noonan, Senior King County Deputy Prosecuting Attorney, WAPA Presentation on Ethical Considerations, April 1995, at 5.

The ABA Standards for Criminal Justice

So where does a prosecutor go to seek guidance in what should be done? I submit that any analysis of a prosecutor s ethics and professionalism must begin with the nationally recognized 1 AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, (2d ed. 1986) [hereinafter ABA Standards]. Why the ABA Standards? A quick search of case law using the query Standards for Criminal Justice resulted in **78 separate Washington State cases** relying on the ABA Standards.

Our courts consistently cite the ABA Standards with approval, and will look to them as a reference guide in determining proper ethical and professional conduct. A prosecutor can be assured that consistent adherence to the ABA Standards will result in fulfillment of our duty towards society to attain justice through proper means.

The materials herein are organized using CHAPTER 3 THE PROSECUTION FUNCTION of the ABA Standards as the model for appropriate conduct to be followed by prosecutors. A brief synopsis of each standard is provided, followed by selected quotes from the Commentary to the ABA Standard. Relevant case law and/or additional information is thereafter provided for each topic.

Justice; Not Merely Convictions

As the first ABA Standard carefully points out, a prosecutor s duty is to seek justice and not merely convictions. The Commentary to the ABA Standard says

> ...it is fundamental that the prosecutor s obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public...

Prosecutors in Washington have been delegated tremendous power by the citizenry. Washington is not a grand jury state, and a prosecutor can subject anyone to criminal charges and possible arrest and jail based solely on his or her signature. This awesome power must be wielded impartially, and success cannot be measured by one s conviction ratio.

While it has been difficult for me to appreciate after a hard fought trial, a jury s decision to acquit is no less of a just result than had it voted to convict. Under our system of justice, to argue otherwise demeans the incredible role the people play when acting as jurors standing between the power of the government and the presumption of innocence of the individual.

New Prosecutors Must Be Careful

In preparing these materials and researching prosecutorial misconduct, I am struck by the volume of case law on the topic and the number of convictions reversed as a result of a prosecutor s improper conduct. Since a criminal defendant may appeal as a matter of right, appellate courts are constantly being asked to review the acts and omissions of prosecutors to determine whether the defendant received the constitutional due process right to a fair trial. Recent prosecutorial misconduct cases are beginning to evidence a trend against finding harmless error, especially for misconduct during closing argument.

The remedies for prosecutorial misconduct range from imposition of terms to declaration of a mistrial; from reversal of a conviction on appeal to possible disbarment. The stakes are high for the prosecutor, as they should be since prosecutors have the power to make decisions that can result in destruction of a person's life, career, reputation, and family.

These materials are not exhaustive. Each prosecutor must develop a framework for the resolution of ethical issues. Often, though, prosecutorial misconduct is inadvertent, especially for the newer prosecutor.

These materials quote extensively from case law to assist the newer prosecutor in understanding the judicial branch's perspective on the executive branch's duty to seek justice, not merely convictions. Hopefully, knowledge of this historical perspective will help avoid traps for the unwary when responding to new situations.

Beware of Bar Discipline!

Last year at the annual summer WAPA conference in Chelan, the ethics speaker discussed the Bar Association's increased awareness of prosecutorial misconduct. The Bar has hired additional counsel to review advance sheets, published and unpublished, looking for instances of misconduct by both prosecutors and defense counsel. While your conviction may be affirmed, the Bar may well institute its own investigation into your conduct.

Prosecutors Versus Defense Lawyers

Being a prosecutor should be difficult on the conscience since one chooses the job knowing that justice inherently involves often difficult moral decision-making. A prosecutor's sole focus must be on justice within the rules. Defense counsel, on the other hand, satisfies his or her duty through zealous representation of a client by ensuring the prosecutor meets the burden of proof beyond a reasonable doubt through admissible evidence. Criminal defense counsel, unlike other attorneys, may even ethically raise non-meritorious claims and contentions in the representation of a criminal defendant. RPC 3.1.

It can be a most difficult task to uphold the law without losing sight of our oath to protect individual rights of defendants who we believe committed the charged crimes. Added to this task are federal and state constitutions that were deliberately designed to limit government's (i.e. your) exercise of power against the individual.

Sometimes prosecutors are pressured by victims and law enforcement who may be focused on obtaining a conviction at all cost since the suspect did it. It is often, when all is said and done, a prosecutor's job to say no to prosecution due to lack of admissible evidence and proof beyond a reasonable doubt even when the prosecutor believes the crime occurred and was committed by the suspect. Justice under our system of laws demands that we say no to prosecution in such situations. For if we do not, who will?

Anger and Emotion

One should not overlook the impact of emotion, especially anger, on one's ethics and professionalism. Excessive prosecution caseloads, constant deadlines, and the severity and brutality of certain crimes create pressure and stress that will inevitably lead to mistakes, both by prosecutors and staff. This pressure, coupled with a less-than-professional opponent who may as a tactic be trying to get the prosecutor angry so mistakes will be made, may result in prosecutor heat of the moment retaliation against defense counsel by filing additional charges against a defendant and/or increasing sentence recommendations and/or arguing a plethora of motions and objections which may technically be permitted by case law and court rules but hardly serve the interests of justice.

If you have had a bad experience with defense counsel, you must avoid trying to get even by retaliating against a defendant. You know that such actions are wrong even if technically permitted by the rules. Perhaps you should try to see your actions through the eyes of defense counsel, the defendant, and the judge. It never ceases to amaze me how similar both lawyers truly are to each other when battling every minutiae at all costs. If the roles were reversed, each lawyer would probably treat the other just as contemptuously. Are you often in tit-for-tat battles with counsel? Do you get along with any defense counsel? Why not? Is your moral compass such that you would likely treat prosecutors with similar contempt if you were a member of the defense bar?

Another emotion I have seen is supreme arrogance solely because one is a prosecutor. This type of prosecutor does a great disservice to the public since every action taken is put in terms of good (me) versus the enemy (anyone interfering with conviction of an obviously guilty person). Such a prosecutor frequently becomes upset when things do not proceed favorably, and often grumbles and complains about the outrageousness of the perceived improper action to anyone who will listen. Do you ever get angry at defense counsel's actions or a judge's rulings? Are you just as contemptuous of defense counsel as they are of you? What is justice and humility for you?

One Final Question

This is your time to do what is right and seek justice. Change is always a constant. One election result or new job opportunity in the private sector may end your prosecutorial career. While perhaps just an old naive law school dream, you can obtain justice through your ethical and professional representation of the State of Washington. So long as you ask yourself Can I do this ethically? and Should I do this professionally? your quest for justice will be successful.

One final question, though, is worth posing

If exhibiting professionalism and ethics were against the law,
is there enough evidence of your conduct to support a conviction?

As part of my *mea culpa* and community service for an easy acquittal, I offer these materials.

On Appeals to Passion and Sympathy (1899)

> Language which might be permitted to counsel in summing up a civil action cannot with propriety be used by a public prosecutor, who is a quasi-judicial officer, representing the People of the state, and presumed to act impartially in the interest only of justice. If he lays aside the impartiality that should characterize his official action to become a heated partisan, and by vituperation of the prisoner and appeals to prejudice seeks to procure a conviction at all hazards, he ceased to properly represent the public interest, which demands no victim, and asks no conviction through the aid of passion, sympathy or resentment.

People v. Fielding, 158 N.Y. 542, 547, 53 N.E. 497, 46 L.R.A. 641 (1899) (Emphasis added.), quoted with approval in *State v. Case*, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956) and *State v. Reed*, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984) (*Case* and *Reed* convictions reversed due to prosecutorial misconduct).

On Prowess of the Savage (1909)

> It is not our purpose to condemn the zeal manifested by the prosecuting attorney in this case. We know that such officers meet with many surprises and disappointments in the discharge of their official duties. They have to deal with all that is selfish and malicious, knavish and criminal, coarse and brutal in human life. But the safeguards which the wisdom of ages has thrown around persons accused of crime cannot be disregarded, and such officers are reminded that a fearless, impartial discharge of public duty, accompanied by a spirit of fairness toward the accused, is the highest commendation they can hope for. Their devotion to duty is not measured, like the prowess of the savage, by the number of their victims.

State v. Montgomery, 56 Wash. 443, 447-48, 105 P. 1035 (1909) (conviction reversed due to prosecutorial misconduct).

On the Role of the Prosecutor (1935)

> The United States Attorney 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 v. U.S., 295 U.S. 78, 88, 79 L.Ed.2d 1314, 55 S.Ct. 629, 633 (1935) (conviction reversed due to prosecutorial misconduct).

On Conviction of the Innocent (1976)

> A prosecutor must always remember that he or she does not conduct a vendetta when trying any case, but serves as an officer of the court and of the state with the object in mind that all admissible evidence and all proper argument be made, but that inadmissible evidence and improper argument be avoided. We recognize that the conduct of a trial is demanding and that if prosecutors are to perform as trial lawyers, a zeal and enthusiasm for their cause is necessary. However, each trial must be conducted within the rules and each prosecutor must labor within the restraints of the law to the end that defendants receive fair trials and justice is done. If prosecutors are permitted to convict guilty defendants by improper, unfair means then we are but a moment away from the time when prosecutors will convict innocent defendants by unfair means. Courts must not permit this to happen, for when it does the freedom of each citizen is subject to peril and chance.

State v. Torres, 16 Wn.App. 254, 263, 554 P.2d 1069 (Div. 1 1976) (conviction reversed due to prosecutorial misconduct).

On Wielding Power (1987)

> Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in the criminal investigation and adjudication is a wrenching disruption of everyday life. For this reason, we must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice.

Young v. U.S. ex rel. Vuitton et Fils S.A, 481 U.S. 787, 95 L.Ed.2d 740, 107 S.Ct. 2124, 2141 (1987) (contempt finding reversed due to conflict of interest created by court's appointing opposing counsel to prosecute contempt).

As I read the quote I was struck by the simplicity and clarity with which it set out our responsibility in the discharge

of our duties as prosecutors. I know each of you are guided by this principle as you make decisions daily that effect people s lives; however, it never hurts to reflect on our awesome power and the need to wield that power responsibly.

Jeffrey C. Sullivan, Yakima County Prosecutor, in an October 24, 1992 memorandum to all staff attorneys.

On Use of Illegitimate Means to Convict (1992)

A prosecutor's use of illegitimate means to obtain a verdict brings his office and our system of justice into disrepute.

Northern Mariana Islands v. Mendiola, 976 F.2d 475, 487 (9th Cir. 1992), *overruled on other grounds by George v. Camacho,* 119 F.3d 1393 (9th Cir. 1997) (court s warning to prosecutor).

On Treatment of the Disadvantaged (1995)

It is well-established that appeals to nationality or other prejudices are highly improper in a court of justice, and evidence as to the race, color, or nationality of a person whose act is in question is generally irrelevant and inadmissible if introduced for such a purpose. &

The true test of our criminal justice system lies in how we treat the foreigner, the poor, and the disadvantaged, both in how we treat those born in this country, the wealthy or the respectable established citizenry. The dark shadow of arrogant chauvinism would eclipse our ideal of justice for all if we allowed juries to infer that immigrants, legal or illegal, were more likely to have committed crimes.

State v. Avendano-Lopez, 79 Wn.App. 706, 722-23, 904 P.2d 324 (Div. 2 1995), *review denied,* 129 Wn.2d 1007 (1996) (prosecutorial misconduct found, harmless error).

On the Close Case and Improper Tactics (1996)

We agree with the comment of defendant Lee s counsel in his brief that trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case.

State v. Fleming, 83 Wn.App. 209, 215, 921 P.2d 1076 (Div. 1 1996), *review denied,* 131 Wn.2d 1018 (1997) (conviction reversed due to prosecutorial misconduct).

On Legal Ethics

Usages and customs among members of the legal profession, involving their moral and professional duties toward one another, toward clients, and toward the courts. That branch of moral science which treats of the duties which a member of the legal profession owes to the public, to the court, to his professional brethren, and to his client &

BLACK S LAW DICTIONARY, at 804 (5th ed. 1979)

On Professionalism

The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and the capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.

In fulfilling professional responsibilities, a lawyer necessarily assumes various roles that require the performance of many difficult tasks. Not every situation which a lawyer may encounter can be foreseen, but fundamental ethical principles are always present as guidelines. With the framework of these principles, a lawyer must with courage and foresight be able and ready to shape the body of the law to the ever-changing relationships of society.

The Rules of Professional Conduct point the way to the aspiring and provide standards by which to judge the transgressor. Each lawyer must find within his or her own conscience the touchstone against which to test the extent to which his or her actions should rise above minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of the legal profession and the society which the lawyer serves that should provide to a lawyer

the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.

Preamble to Rules of Professional Conduct

Oath of Attorney

State of Washington, County of _____ ss.

I, _____, do solemnly declare:

1. I am fully subject to the laws of the State of Washington and the laws of the United States and will abide by the same.

2. I will support the constitution of the State of Washington and the constitution of the United States.

3. I will abide by the Rules of Professional Conduct approved by the Supreme Court of the State of Washington.

4. I will maintain the respect due to the courts of justice and judicial officers.

5. I will not counsel, or maintain any suit, or proceeding, which shall appear to me to be unjust, or any defense except as I believe to be honestly debatable under the law, unless it is in defense of a person charged with a public offense. I will employ for the purpose of maintaining the causes confided to me only those means consistent with truth and honor. I will never seek to mislead the judge or jury by any artifice or false statement.

6. I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with the business of my client unless this compensation is from or with the knowledge and approval of the client or with the approval of the court.

7. I will abstain from all offensive personalities, and advance no fact prejudicial to the honor or reputation of a party or witness unless required by the justice of the cause with which I am charged.

8. I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay unjustly the cause of any person.

_____
Signature

Subscribed and sworn to before me this _____ day of _____, _____.

_____
Judge

Admission to Practice Rule 5(d)

PART I. GENERAL STANDARDS

1.1 The function of the prosecutor

(a) office of prosecutor has responsibility for prosecutions in jurisdiction

(b) prosecutor is both administrator of justice and advocate, and must exercise sound discretion in the performance of these functions

(c) duty of prosecutor is to seek justice, not merely to convict

(d) duty of prosecutor to know and be guided by legal professions code of professional conduct

Excerpt from Commentary to ABA Standard

&it is fundamental that the prosecutor s obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public. &

RCW 36.27.020 Duties of a Prosecuting Attorney

(1) legal advisor to the legislative authority

(2) legal advisor to all county and precinct officers and school directors

(3) represent the state, county and all school districts in all criminal and civil proceedings

(4) prosecute or defend all criminal and civil actions in which the state or county is a party

(5) attend and give advice to grand jury

(6) institute and prosecute felony proceedings for the arrest of suspects

(7) carefully tax all cost bills in criminal cases and take care that no useless witness fees are taxed as costs

(8) receive all criminal cost bills before district judges where prosecutor not present at trial

(9) present all election law violations to proper jury

(10) annually examine official bonds of all county and precinct officers and report to legislative authority

(11) annually report to governor the nature of business transacted with suggestions deemed useful

(12) annually report to liquor control board all such prosecutions brought

(13) seek to reform and improve the administration of criminal justice and stimulate efforts to remedy inadequacies or injustice in substantive or procedural law

See also city attorney duties, RCW 35.23.111

RPC 3.8 Special Responsibilities of a Prosecutor

(a) probable cause required to file charges

(b) reasonable efforts that accused advised of right and procedure to obtain counsel

(c) not seek to obtain waiver of important pretrial right from pro se defendant

(d) timely disclosure of all exculpatory evidence and sentencing mitigation

(e) reasonable care to prevent investigators, etc. from making extrajudicial statement prosecutor prohibited from making by RPC 3.6

Case Law Recoupment of Indigent Appellate Costs

State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997) (RCW 10.73.160 recoupment statute that allows appellate court to order convicted indigent defendants to pay appellate costs, including appointed counsel fees, is constitutional).

1.2 Conflicts of interest

prosecutor should avoid appearance or reality of conflict of interest

Excerpt from Commentary to ABA Standard

> &When the possibility of a conflict of interest arises, the prosecutor should recuse himself or herself and make appropriate arrangements for the handling of the particular matter by other counsel &It is of the utmost importance that the prosecutor avoid participation in a case in circumstances where any implication of partiality may cast a shadow over the integrity of the office. &

Rules of Professional Conduct

1.7 Conflict of Interest; General Rule

1.8 Conflict of Interest; Prohibited Transactions; Current Client

1.9 Conflict of Interest; Former Client

1.10 Imputed Disqualification; General Rule

1.11 Successive Government and Private Employment

Case Law Criminal Prosecution of Former Client

***Stenger* Analysis.** *State v. Stenger,* 111 Wn.2d 516, 760 P.2d 357 (1988) appears to allow an attorney to prosecute a former client for incidents unrelated to the former representation but the Court did note some policy concerns about information learned from the client due to the former representation.

> As a corollary of this general rule, a prosecuting attorney is disqualified from acting in a criminal case if the prosecuting attorney has previously personally represented or been consulted professionally by an accused with respect to the offense charged or in relationship to matters so closely interwoven therewith as to be in effect a part thereof.

Stenger, 111 Wn.2d at 520 (prosecutor s office disqualified in potential death penalty case since prosecutor had previously represented defendant).

After discussing policy concerns that the prosecuting attorney s prior representation would likely provide the attorney with some knowledge of facts upon which the prosecution is predicated or which are closely related thereto, the Court noted the general rule allowing an attorney to prosecute a former client for new criminal law violations

> Under the facts of this case, and based on the foregoing rules, the prosecuting attorney would not have been disqualified from prosecuting the murder in the first degree charge against the defendant since that charge by itself is unrelated to the accused s previous crimes concerning which the prosecuting attorney represented him.

Stenger, 111 Wn.2d at 521.

Stenger disallowed the representation, though, since the offense was a death penalty case and the prosecuting attorney could have been aware of factual information obtained while representing the defendant which had the potential to be used in making the decision to seek the death penalty.

The policy concern noted in *Stenger* is present in virtually all criminal cases involving a former public defender who prosecutes a former client for a new offense. Courts of limited jurisdiction typically are concerned about recidivism, alcoholism and/or batterer s treatment, as well as other rehabilitation issues. A deputy prosecutor is expected to make recommendations to the court on these sentencing issues. The attorney, in forming an opinion concerning proper punishment and rehabilitation, very well might have information from the former representation that could be used either for or against the former client.

This being the case, *Stenger* could be read narrowly to allow the attorney to prosecute a former client so long as the case does not involve the death penalty, or be read broadly to prohibit the attorney s involvement in any future prosecution of that former client since the attorney s knowledge from the former representation including information about the defendant s background and earlier criminal and antisocial conduct, is information closely interwoven with the prosecuting attorney s exercise of discretion in seeking the penalty sought. *Stenger,* 111 Wn.2d at 521-22.

***Greco* Analysis.** *State v. Greco,* 57 Wn.App. 196, 201, 787 P.2d 940, *review denied,* 114 Wn.2d 1027 (Div. 2 1990) sheds little light on this issue since the representation of the county auditor in his official capacity did not provide the prosecuting attorney with any information personal to Greco. The Court concluded, accordingly, that no conflict of interest arose since the prosecuting attorney could not have used improperly obtained information to prosecute Greco.

The Court of Appeals implies, though, that the issue is to be resolved on a case-by-case basis depending on a defense showing of how information obtained from the prior representation was being improperly used in the current prosecution

> Neither is any information Griffies [prosecuting attorney] obtained in the previous cases shown to be interwoven with the facts of this case. Thus, Griffies did not have a conflict of interest.

Greco, 57 Wn.App. at 201.

***Ladenburg* Analysis.** *State v. Ladenburg,* 67 Wn.App. 749, 840 P.2d 228 (Div. 2 1992) involved the prosecution of a prosecuting attorney s nephew. Division 2 found no conflict of interest existed for the following reasons

Not a death penalty case

No RPC specifically prohibited prosecution of a family member or relative

No suggestion that the prosecuting attorney had any prior professional relationship where information could have been obtained and used to the nephew s disadvantage

No indication that the prosecuting attorney actively participated in the case

The prosecutor s office was large

No evidence that the deputy prosecutor s judgment was influenced by prosecuting attorney

Division 2 s rejection of a per se disqualification rule does not resolve the issue presented herein since Prosecutor Ladenburg was not in any way involved in the prosecution.

***Dominguez* Analysis.** Although not directly on point, a recent judicial disqualification case provides some insight. In *State v. Dominguez,* 81 Wn.App. 325, 914 P.2d 141 (Div. 3 1996), a former client challenged a judge for potential bias since the judge could have had information obtained from the former representation (and prior prosecution of the former client) which could be used to the former client s disadvantage. Division 3 upheld the judge s refusal to disqualify himself, saying

&the mere fact that the judge earlier acted once for Mr. Dominguez and once against him, both times in his professional capacity as an attorney, does not establish potential bias. Generally, disqualification is required when a judge has participated as a lawyer in the case being adjudicated; however, unless there is a specific showing of bias, a judge is not disqualified merely because he or she worked as a lawyer for or against a party in a previous, unrelated case &

Had Mr. Dominguez presented sufficient evidence of potential bias for the appearance of fairness doctrine to apply, we would then consider whether it was violated. The test is whether a reasonably prudent and disinterested observe would conclude Mr. Dominguez obtained a fair, impartial, and neutral trial.

Dominguez, 81 Wn.App. at 329-30.

Case Law Deputy Prosecutor as Witness

State v. Bland, 90 Wn.App. 677, 679-80, 953 P.2d 126, *review denied,* 136 Wn.2d 1028 (Div. 1 1998) (disqualification of entire prosecutor s office and appointment of special prosecutor not required when deputy prosecutor testified as state s witness in her dual capacity as a social worker).

Under RPC 3.7, the advocate-witness rule, a lawyer may not act as an advocate in a trial in which another lawyer from the same firm is likely to testify because there are difficulties in cross-examining or impeaching an interested witness and the roles of advocate and witness are inherently inconsistent. The State first argues that rule does not apply to attorneys in the prosecutor s office because it is not a law firm as defined in the rule. A law firm is a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization. While it is not specifically mentioned, nothing in this definition precludes inclusion of the prosecutor s office. To do so would exclude that office from the operation of other rules such as RPC 1.10, imputed disqualification, and RPC 1.12, the former judge rule. We do not believe this was the intent of the drafting committee. Therefore, we agree with Bland that RPC 3.7 applies to public law offices such as the prosecutor s office.

But we reject his contention that the rule mandates disqualification of the entire office in this case. A deputy prosecutor does not represent a client in the traditional sense, and the deputy has no financial interest in the outcome of the case. Therefore, a more flexible application of the RPCs is appropriate where a public law office is concerned. Trial courts should consider whether the testifying deputy can be an objective witness, whether the dual positions artificially bolster the witness s credibility or make it difficult for the jury to weight the testimony, and whether the dual role raises an appearance of unfairness. If, after considering those factors, the court concludes the defendant will not be prejudiced, it need not order disqualification. But if the deputy is personally involved in prosecuting the case or has another personal interest which would raise a conflict of interest or appearance of unfairness, the office should be disqualified, and the trial court should appoint a special prosecutor for the case.

U.S. v. Edwards, 154 F.3d 915, 921-23 (9th Cir. 1998) (Defendant convicted in federal district court of poss/cocaine with intent to distribute. The key evidence was cocaine found in a black bag. After defense opening statement where defense said no evidence tying defendant to the bag, assistant AG who was trying the case notified defendant that he had found a bail receipt (with officers present) in the bag under a cardboard liner with defendant s name on it. The bag had been in police custody for two years with this evidence not found. Held: conviction reversed).

It is well settled that a prosecutor in a criminal case has a special obligation to avoid improper suggesstions, insinuations and especially assertions of personal knowledge. A prosecutor may not impart to the jury his belief that a government witness is credible. Such improper vouching may occur in at least two ways. The prosecutor may either place the prestige of the government behind the witness or ... indicate that information not presented to the jury supports the witness s testimony. When the credibility of witnesses is crucial, improper vouching is particularly likely to jeopardize the

fundamental fairness of the trial.

Akin to the rule against vouching is the advocate-witness rule, under which attorneys are generally prohibited from taking the witness stand to testify in a case they are litigating. As with vouching, the policies underlying the application of the advocate-witness rule in a criminal case are related to the concern that jurors will be unduly influenced by the prestige and prominence of the prosecutor s office and will base their credibility determinations on improper factors. Moreover,

> the rule reflects a broader concern for public confidence in the administration of justice, and implements the maxim that justice must satisfy the appearance of justice. This concern is especially significant where the testifying attorney represents the prosecuting arm of the federal government.

...From the cases on vouching and the advocate-witness problem, it is clear that both of these rules were designed to prevent prosecutors from taking advantage of the natural tendency of jury members to believe in the honesty of lawyers in general, and government attorneys in particular, and to preclude the blurring of the fundamental distinctions between advocates and witnesses. Although the circumstances of this case do not fit neatly under either rule, there can be no question that the policies underlying both rules were directly contravened by the prosecutor s continued representation of the government in Edwards s criminal prosecution. Once the members of the jury learned that the prosecutor found the evidence, it is almost certain that they attributed the authority of the prosecutor s office to the receipt s discovery....

The vouching in this case was far more serious than in the ordinary circumstances. The prosecutor did not simply make one or two isolated statements regarding the credibility of a particular witness. Instead, he repeatedly vouched for the reliability of a key piece of evidence, both by presenting witnesses to verify that the receipt was not planted and by arguing that it was a bona fide piece of evidence. In effect, the prosecutor functioned throughout the second half of trial as a silent witness for the prosecution. Unlike other witnesses, however, he was not subject to cross-examination and the jury members never had the opportunity to evaluate for themselves whether his story was to be believed.

(Citations omitted.)

Case Law The Appearance of Fairness Doctrine

The appearance of fairness doctrine applies to prosecuting attorneys, at least insofar as to events leading up to the bringing of charges. *State v. Ladenburg,* 67 Wn.App. 749, 840 P.2d 228 (Div. 2 1992).

> Here, there is no showing, other than that these two women were friends and that they met on a regular basis, that there was any influence brought by the victim's second cousin or her family on the prosecutor in bringing these charges. It is true that after trial the two women took a vacation to Hawaii with two other people and among gifts Ms. Upton brought home was a T-shirt for M.; that is neither unusual nor improper conduct. It is not unusual for prosecuting attorneys and law enforcement officers to be friends, be they male or female. The contention made here is built solely on speculation and conjecture. There is no evidence to support any improper conduct. There was no error.

State v. Perez, 77 Wn.App. 372, 377, 891 P.2d 42, *review denied,* 127 Wn.2d 1014 (Div. 3 1995*). See also Young v. United States ex rel. Vuitton et Fils S.A.,* 481 U.S. 787, 807, 107 S.Ct. 2124, 2137, 95 L.Ed.2d 740, 758 (1987), quoted with approval in *Perez,* 77 Wn.App. at 376.

State v. Tolias, 84 Wn.App. 696, 929 P.2d 1178 (Div. 3 1997), *reversed on other grounds,* 135 Wn.2d 133, 954 P.2d 907 (1998) (prosecutor allegedly attempted to mediate neighborhood dispute and when mediation efforts failed, filed second degree assault charges arising out of the same controversy; Held by Div. 3: prosecutor violated appearance of fairness doctrine, conviction reversed and remanded for new trial) (Supreme Court reversed Div. 3 because defendant found to have waived appearance of propriety objection by his failure to raise the issue in the trial court; Held: conviction affirmed)

> A judicial proceeding is valid under the appearance of fairness doctrine only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing. *State v. Ladenburg,* 67 Wn.App. 749, 754-55, 840 P.2d 228 (Div. 2 1992); *State v. Post,* 118 Wn.2d 596, 618, 826 P.2d 172, 837 P.2d 599 (1992). The doctrine is directed at the evil of a biased or potentially interested judge or quasi-judicial decision maker. *Post,* 118 Wn.2d at 619; *see also State v. Perez,* [*supra*]. A prosecutor is a quasi-judicial officer, and in the interest of justice must act impartially. *Ladenburg,* 67 Wn.App. at 751. The appearance of fairness doctrine, therefore, applies to a prosecutor, at least up to and including the decision to file criminal charges against a defendant. *Id.* at 754. &
>
> We hold that the actions of the Yakima County Prosecutor, while motivated by the laudable intention of defusing a volatile situation, created an appearance of unfairness. &
>
> Our holding is not intended to suggest that a prosecutor may not in appropriate circumstances engage in mediation as an alternative to prosecution. Nor do we suggest that a prosecuting attorney s role in mediation will inevitably preclude a subsequent prosecution arising from the same controversy. When a prosecuting attorney engages in mediation, however, his or her entire office should be disqualified from participating in subsequent prosecution unless that prosecuting attorney

separates himself or herself from all connection with the case and delegates full authority and control over the case to a deputy prosecuting attorney. & *State v. Stenger,* 111 Wn.2d 516, 522, 760 P.2d 357 (1988).

Tolias, 84 Wn.App. at 698-700, 702.

Effective Screening The Chinese Wall

Stenger, 111 Wn.2d at 522, and *Tolias,* 84 Wn.App. at 702, noted that a prosecuting attorney might well screen himself or herself from the prosecution and thus make it unnecessary to disqualify the entire office. The creation of a Chinese Wall between the prosecuting attorney or deputy prosecuting attorney who has a conflict should suffice so long as RPC 1.10(b) is satisfied.

Significantly, it should be noted that RPC 1.10 does not require that the former client consent to the erection of the Chinese Wall, nor does RPC 1.10 give a former client a veto power over the decision to screen the disqualified attorney instead of transferring the case to another firm. Such a veto power would run afoul of the rule that an accused does not have the right to choose his or her prosecutor. *State v. Cook,* 84 Wn.2d 342, 350, 525 P.2d 761 (1974).

Kitsap Prosecutor s Office Conflict of Interest Screening Process

When creation of a Chinese Wall is necessary, our office (1) stamps the outside of our office file with the words RESTRICTED FILE in green ink; (2) places a florescent yellow sheet of paper listing the restrictions in the appropriate file; the yellow sheet must always be kept as the top document in the file; and (3) the disqualified prosecutor completes an affidavit evidencing the nature of the conflict and restriction, with a copy filed with the court and served on the defendant and defense counsel. While *Stenger* does not detail the specifics of the screening process, our office is confident [hopeful?] that these efforts will suffice.

Case Law Defense Counsel Conflict of Interest Duty of Court to Inquire

In re Richardson, 100 Wn.2d 669, 677-79, 675 P.2d 209 (1983)(court commits reversible error if it knows or reasonably should know of a particular conflict of interest on part of counsel into which it fails to inquire; no prejudice need be shown, and rule is not limited to joint representation of codefendants, but includes representation of both defendant and witness)

> First, a trial court commits reversible error if it knows or reasonably should know of a particular conflict into which it fails to inquire. Second, reversal is always necessary where a defendant shows an actual conflict of interest adversely affecting his lawyer's performance. In neither situation need prejudice be shown.
>
> The application of these rules is not limited to joint representation of codefendants. While most of the cases have involved that fact situation, the rules apply to any situation where defense counsel represents conflicting interests. *See, e.g.,* [*Wood v. Georgia,* 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981)], 101 S.Ct. at 1100 (defense counsel paid by defendant's employer); [*Cuyler v. Sullivan,* 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)], 100 S.Ct. at 1712 (representation of codefendants in separate trials); *Alexander v. Housewright,* 667 F.2d 556, 558 (8th Cir. 1981) (previous representation of prosecution witness in action against defendant); *Stephens v. United States,* 595 F.2d 1066, 1070 (5th Cir. 1979) (simultaneous representation of prosecution witness and defendant); *Castillo v. Estelle,* 504 F.2d 1243, 1245 (5th Cir. 1974) (simultaneous representation of defendant in criminal trial and prosecution witness in unrelated civil litigation). That simultaneous representation of a defendant and a witness with opposing interests is such a situation is self-evident--indeed, we only recently suspended an attorney from the practice of law for placing himself in a virtually identical situation. *See In re McMurray,* 99 Wn.2d 920, 665 P.2d 1352 (1983) (violation of DR 5-105 to represent defendant after prior representation of prosecution witness in unrelated civil proceeding).
>
> In the present case, the trial court had a duty to inquire into the possibility of conflict. Mr. Clemmer stated in open court that Mr. Richardson's attorney was also his. The court itself recognized the danger of conflict arising from this joint representation, as is demonstrated by its proper refusal to allow Mr. Richardson's attorney to advise Mr. Clemmer about his testimony.
>
> Yet the court made no further inquiry into this apparent conflict despite the fact that Mr. Richardson's attorney completely dropped his line of questioning about the alleged skimming by Mr. Blackwood. Indeed, the court affirmatively cut off Mr. Clemmer's explanation of his relationship with defense counsel. To paraphrase the Supreme Court: "The possibility of the [conflict of interest] was brought home to the court, but instead of jealously guarding [Mr. Richardson's] rights, the court may fairly be said to be responsible for creating a situation which resulted in the impairment of those rights." *Glasser v. United States,* 315 U.S. 60, 71, 62 S.Ct. 457, 465, 86 L.Ed. 680 (1942). While the court's action in the present case may be more accurately characterized as benign neglect, it still falls far short of the active protection required by *Holloway*, *Sullivan*, and *Wood*.
>
> Unfortunately, because Mr. Clemmer was cut off by both defense counsel and the trial court, the record does not reveal the precise nature of Mr. Clemmer's relationship with defense counsel. This information is necessary to resolve the present case, for the conflict of which the trial court reasonably should have known must also actually exist. *See Wood,* at 273, 101 S.Ct. at 1104 (remanding for hearing "to determine whether the conflict of interest that this record strongly suggests actually existed"). Mr. Richardson has, however, established a prima facie case of error based on the record

before us.

State v. Hunsaker, 74 Wn.App. 38, 44-45, 873 P.2d 540 (Div. 1 1994) (appellate court adopts the more demanding factual context test in analyzing conflict of interest issues; Held: trial court order prohibiting prosecution witness from testifying reversed since defendant did not show how cross examination of witness would involve confidences or secrets previously revealed to counsel as opposed to impeachment information obtained through discovery)

> If the patently clear test is applied, the court only considers whether the issues involved are identical or essentially the same. Application of the factual contexts test is more painstaking. C. Wolfram, Modern Legal Ethics § 7.4.3 at 371 (1986). The court must consider whether the factual contexts of the two representations are similar or related. As the court in *Koch* [*v. Koch Indus.,* 798 F.Supp. 1525 (D.Kan. 1992)] explained:
>
> > [a] commonality of legal claims or issues is not required. At a functional level, the inquiry is whether "the attorneys were trying to acquire information vitally related to the subject matter of the pending litigation." To accomplish this inquiry, the court must be able to reconstruct the attorney's representation of the former client, to infer what confidential information could have been imparted in that representation, and to decide whether that information has any relevance to the attorney's representation of the current client. What confidential information could have been imparted involves considering what information and facts ought to have been or would typically be disclosed in such a relationship. Consequently, the representations are substantially related if they involve the same client and the matters or transactions in question are relevantly interconnected or reveal the client's pattern of conduct.
>
> (Citations and footnote omitted.) *Koch,* 798 F.Supp. at 1536.
>
> In Modern Legal Ethics, Professor Wolfram describes the applicable analysis as a three-stage inquiry.
>
> > First, the court reconstructs the scope of the facts involved in the former representation and projects the scope of the facts that will be involved in the second representation. Second, the court assumes that the lawyer obtained confidential client information about all facts within the scope of the former representation. Third, the court then determines whether any factual matter in the former representation is so similar to any material factual matter in the latter representation that a lawyer would consider it useful in advancing the interests of the client in the latter representation.
>
> (Footnotes omitted.) C. Wolfram, Modern Legal Ethics § 7.4.3 at 370 (1986).

State v. Robinson, 79 Wn.App. 386, 394, 902 P.2d 652 (Div. 1 1995) (joint representation)

> Joint representation is not a per se violation of the right to effective assistance of counsel. But if the defendant raises an actual or potential conflict by objection at trial, the trial court errs when it fails "either to appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel." If no objection to joint representation is raised until after trial, the presumption of prejudice does not arise unless the defendant is able to demonstrate that "an actual conflict of interest adversely affected his lawyer's performance."

(Citations omitted.)

State v. White, 80 Wn.App. 406, 410-11, 907 P.2d 310 (Div. 2 1995), *review denied,* 129 Wn.2d 1012 (1996)

> The Sixth Amendment affords a criminal defendant the right to effective assistance of counsel, free from conflicts of interest. *Wood v. Georgia,* 450 U.S. 261, 271, 101 S.Ct. 1097, 1103, 67 L.Ed.2d 220 (1981); *State v. Myers,* 86 Wn.2d 419, 424, 545 P.2d 538 (1976). We review a challenge to the effective assistance of counsel de novo. *Mannhalt v. Reed,* 847 F.2d 576, 579 (9th Cir.), *cert. denied,* 488 U.S. 908, 109 S.Ct. 260, 102 L.Ed.2d 249 (1988).
>
> An attorney's conflict of interest may create reversible error in two situations without a showing of actual prejudice. First, "reversal is always necessary where a defendant shows an actual conflict of interest adversely affecting his lawyer's performance." In addition, a trial court commits reversible error if it "knows or reasonably should know of a particular conflict into which it fails to inquire." These general rules are applicable to any situation where a defendant alleges ineffectiveness of counsel related to counsel's representation of conflicting interests. *Richardson.*

(Citations omitted.)

State v. Ramos, 83 Wn.App. 622, 629-30, 632-33, 922 P.2d 193 (Div. 1 1996) (trial court erred in holding that public defender had conflict of interest solely due to counsel's previous representation of a witness)

> The determination of whether a conflict exists precluding continued representation of a client is a question of law and is reviewed de novo. *State v. Hunsaker,* 74 Wn.App. 38, 41-42, 873 P.2d 540 (1994); *Teja v. Saran,* 68 Wn.App. 793, 796, 846 P.2d 1375, *review denied,* 122 Wn.2d 1008 (1993).
>
> Under RPC 1.10, if one member of a law firm is precluded from representing a client by RPC 1.9, all of the members of the firm are similarly precluded from representing the client. RPC 1.10; *Hunsaker,* 74 Wn.App. at 42 (citing *State v. Hatfield,* 51 Wn.App. 408, 412, 754 P.2d 136 (1988)). Public Defender agencies are considered "law firms" for purposes

of application of the RPC. *Hunsaker,* 74 Wn.App. at 42.

In the present case, neither party contends that the PDA's prior representation of Holdman on her theft charge is substantially related to the current prosecution of Ramos for his alleged violation of the Uniform Controlled Substances Act, and nothing in the record would support such a contention. Even if the matters were substantially related, the record does not indicate that Ramos' interests are "materially adverse" to Holdman's. Compare the instant case with *Hatfield,* 51 Wn.App. at 412 (holding that the defendant's interests were adverse to those of defense counsel's former client who was called as State's witness when both had an interest in blaming the other for the charged assault). Moreover, even if the matters were substantially related and Ramos's interests were adverse to those of Holdman, Holdman appeared in court with her counsel and waived her attorney-client privilege arising from the previous representation. We conclude that withdrawal and substitution was not warranted under RPC 1.9(a).

Because RPC 1.9(a) and (b) are written in the disjunctive, we next examine whether withdrawal was warranted under RPC 1.9(b), i.e., whether the PDA's continued representation of Ramos would have involved inquiry into confidences and secrets relating to the prior representation of Holdman to Holdman's disadvantage. Although Ramos successfully argued below that the PDA's continued representation of him would have involved such an inquiry, nothing in the record supports this argument.

Here, the record fails to support Ramos's claim that an actual conflict of interest existed. Moreover, even if the trial court had conducted an adequate inquiry and an actual conflict had been shown, Holdman appeared in open court with her counsel and affirmatively waived her attorney-client privilege. The privilege belongs to the client whose prior representation gave rise to the conflict of interest. RPC 1.9; 1.6. Once Holdman waived the privilege, Ramos's PDA counsel was freed from any restraints on cross-examination of her which might otherwise have arisen based on the prior representation. Ramos's constitutional right to effective counsel was, therefore, not in jeopardy based on the prior representation. That Ramos might have felt some lingering, subjective lack of confidence in his court-appointed counsel's undivided loyalty based on the prior representation does not change our analysis. An accused has the constitutional right to effective assistance of counsel, not to a subjective sense of confidence in court-appointed counsel. *Cf. State v. Sinclair,* 46 Wn.App. 433, 436, 730 P.2d 742 (1986) (defendant's failure to articulate anything more than general discomfort with court-appointed counsel does not justify appointment of substitute counsel), *review denied,* 108 Wn.2d 1006 (1987). The trial court erred by ordering the withdrawal and substitution of counsel on grounds that substitution was necessary to preserve Ramos's right to effective assistance of counsel.

Case Law Defense Counsel Conflict of Interest Duty of Prosecutor to Notify Court

United States v. Iorizzo, 786 F.2d 52 (2nd Cir. 1985) (appellate court chastising prosecutor for merely advising trial judge of potential conflict, and not also filing motion for disqualification).

Mannhalt v. Reed, 847 F.2d 576, 583-84, *cert. denied,* 488 U.S. 908, 109 S.Ct. 260, 102 L.Ed.2d 249 (9th Cir. 1988) (appellate court chastising prosecutor for not bringing potential conflict to the attention of trial court and for not moving for disqualification of defense counsel).

United States v. Friedman, 854 F.2d 535, 572 (2nd Cir. 1988) (prosecutor's interest in avoiding conflicts that might place any conviction it obtains at risk gives it standing to bring disqualification motions even if defendant wishes to privately retain counsel).

Kitsap Prosecutor's Office Sample Waiver of Defense Counsel's Conflict of Interest by Defendant

As the above authority indicates, prosecutors have a duty to notify the court of any potential conflict of interest defense counsel may have in order to protect the defendant's constitutional right to counsel. This places the prosecutor in the unenviable position of seeking to remove a defense attorney from the case, often over the defendant's objection.

While the exact role of the prosecutor in such a situation is not completely defined by case law, our office has the following pleading that we ask the court to discuss with any defendant who may seek to waive a conflict of interest in defense counsel's involvement in the case.

Of course, the potential witness who created the conflict will need to waive the conflict as well since failure to do so would prohibit defense counsel from proceeding. Use of this pleading will ensure that a complete appellate record is made should the defendant raise the issue on appeal

The Sixth Amendment guarantees that [i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence. The Sixth Amendment right to counsel is the right to representation that is free from conflicts of interest. *Wood v. Georgia,* 450 U.S. 261, 271, 67 L.Ed.2d 220, 101 S.Ct. 1097, 1103 (1981).

In a criminal case, a defense counsel's loyalty to his or her client can be compromised in a variety of ways. It has long been recognized, for example, that when a defense attorney represents two or more jointly charged defendants, there is a significant risk that

the lawyer will be unable to adequately serve the interests of both defendants. A conflict of interest can arise in a criminal case when a defense attorney is called upon to cross-examine another client or a former client.

An individual can voluntarily waive his or her right to conflict free representation, but there are potential dangers and disadvantages of doing so. The following questions must be filled in so that the Court can determine that your decision to waive your right to conflict free representation is knowingly made.

1. My true name is: _____.
2. My age is: _____.
3. I went through the _____ grade.
4. Do you understand that you are charged with the crime of _____?
5. Do you understand that the maximum penalty for the crime of _____ is ____ days in jail and/or a fine of $_____, plus restitution and costs? _____. Do you understand that a conviction for this crime may also have an impact upon your employment, your right to bear arms, and other aspects of your life? _____.
6. Do you understand that you have the right to representation by a lawyer and that if you cannot afford to pay for a lawyer, one will be provided at no expense to you? _____.
7. Do you understand that you have the right to representation by an attorney who has no conflicts of interest? _____.
8. Do you understand that [defense counsel] has been retained to represent you? _____.
9. Do you understand that [defense counsel] has also been retained to represent other individuals, specifically by _____, who have been charged with similar crimes arising from the same incident? _____. [modify as needed depending on conflict raised]
10. Do you realize that any confidences or secrets that _____ provide to [defense counsel] cannot be disclosed by [defense counsel] without their permission? _____. RPC 1.6. "'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely to be detrimental to the client." RPC 1.1.
11. Do you realize that even after an attorney/client relationship is ended that the attorney still has a duty to not "[u]se confidences or secrets relating to the representation to the disadvantage of the former client", RPC 1.9(b), without the client's permission? _____.
12. Do you realize that [defense counsel] might receive information from one of the other participants in the crime that might benefit your case but that [defense counsel] cannot reveal to the court or the prosecution during plea negotiations or trial without the other participant's permission because of [defense counsel] duty of loyalty to the other participant? _____.
13. Do you realize that [defense counsel] might receive a plea offer from the State with regard to you or any other participant to the offense that might provide a tangible benefit in exchange for testimony at trial and that [defense counsel] might not be able to help you or the other participants properly evaluate such an offer because of his duty of loyalty to his other clients? _____.
14. Do you realize that any attorney who represents you will be entitled to cross-examine all of the witnesses for the State, including any of the other participants to the crime, regarding their testimony, their credibility, and their biases? _____.
15. Do you realize that "[i]t is . . . improper for counsel to represent a defendant where he also represents, or has represented, a witness for the prosecution", 3 C. Torcia, Wharton's Criminal Procedure § 372 at 386-403 (13th ed. 1991), because counsel's ability to cross-examine the witness might be impaired by counsel's duty of loyalty to the former witness? _____.
16. Do you realize that if you waive [defense counsel] conflict of interest that arises from his representation of _____ that, if convicted, you will not be able to claim on direct appeal, in a state collateral attack, or in a federal habeas corpus proceeding that [defense counsel] provided you with ineffective assistance of counsel because of the conflict? _____.
17. Do you realize that you have the right to consult with an attorney other than [defense counsel] before deciding whether you wish to waive your right to conflict free representation? _____. Do you wish the court to provide you with outside counsel? _____.
18. Did you have an adequate amount of time to discuss whether you should waive your right to conflict free representation with [defense counsel] and/or outside counsel? _____.
19. Has any one has threatened harm of any kind to you or to any other person to cause you to waive your right to conflict free representation? _____.
20. Has any person made any promises of any kind to cause you to waive your right to conflict free representation? _____.
21. In your own words explain the disadvantages of waiving your right to conflict free representation _____.
22. In your own words explain why you wish to waive your right to conflict free representation _____.
23. Do you have any questions you wish to ask the court before you decide whether to waive your right to conflict free representation? _____.
24. Do you wish to waive the right to conflict free representation? _____.

_____
Defendant

I have read and discussed this form with the defendant and I believe that the defendant is competent and fully understands the consequences of waiving his right to conflict free representation.

_____
[defense counsel]

WSBA No.
Attorney for Defendant

I have read and discussed this form with the defendant and I believe that the defendant is competent and fully understands the consequences of waiving his right to conflict free representation.

_____
WSBA No.
Independent Counsel for Defendant

The foregoing waiver was signed by the defendant in open court in the presence of the defendant's lawyer and the undersigned judge. The defendant asserted that [check appropriate box]:

The defendant had previously read the entire statement above and that the he understood it in full; or

The defendant's lawyer had previously read to him or her the entire statement above and that the defendant understood it in full, or

The defendant's independent counsel had previously read to him or her the entire statement above and that the defendant understood it in full.

I find _____ decision to waive his right to conflict free representation to be knowingly, intelligently and voluntarily made. This finding is based upon the above written waiver and _____ answers to my oral questions.

Dated this ____ day of _____, 19_____.

_____
Judge

Recent Case Law Civil Conflicts

Westerman v. Cary, 125 Wn.2d 277, 892 P. 2d 1067 (1994). A public defender challenged a district court order requiring all domestic violence offenders to be detained in custody without bail pending their first court appearance. The prosecutor advised the sheriff to disregard the order believing it would violate arrestees constitutional rights and subject the county to liability. The prosecutor advised the district court he would not defend the order. The district court concluded that the prosecutor s representation of the sheriff created a conflict of interest and hired outside independent counsel to represent the district court. The prosecutor appeared and represented the district court, yet continued to represent the sheriff s actions in failing to follow the district court order. The prosecutor advocated and maintained a position directly contradictory to the district court s order, stating that the order was unconstitutional. Ultimately, the superior court appointed a special prosecutor to represent the district court pursuant to RCW 36.27.030.

Held, 125 Wn.2d at 298-302, that prosecutor had a conflict of interest where representation of two different public bodies requires the prosecutor to take directly adversary positions in the same case. Superior court had authority under statute to appoint special prosecutor at public expense where the prosecutor is disabled as a result of a conflict.

Osborn v. Grant County, 130 Wn.2d 615, 926 P. 2d 911 (1996). A county clerk sought a declaration that county commissioners had no authority to withhold payment of wages to a temporary employee who was on suspension from a district court job but hired by the clerk to work in the clerk s office in a position that had previously been budgeted for by the county commission. The clerk also sought the appointment of a private law firm as a special prosecutor to represent her in the action because the prosecutor refused to give advise to the clerk due to a potential conflict with the commissioners. The superior court granted the clerk s request, appointed a private law firm to represent the clerk, and awarded public monies to pay the special prosecutor.

Held, 130 Wn.2d at 624-630, that while the prosecutor clearly had a conflict of interest in representing the clerk in a position contrary to the commissioners, the Prosecutor has no duty to bring litigation on behalf of a county officer against the county. Appointment of a special prosecutor was improper, so superior court award of public monies for attorney s fees reversed.

1.3 Public statements

(a) prosecutor should not exploit office by means of personal publicity

(b) prosecutor should comply with trial publicity standards

(c) prosecutor and police should cooperate in achieving compliance with trial publicity standards to ensure a fair trial

Excerpt from Commentary to ABA Standard

&The very nature of the prosecutor s function as an administrator of justice requires that the prosecutor unselfishly avoid personal publicity in connection with the cases he or she prosecutes. &

RPC 3.6 Trial Publicity

A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

Guidelines for Applying RPC 3.6

Statements which may potentially prejudice criminal proceedings

character, credibility, reputation or criminal record of suspect

possibility of a guilty plea, or the existence of confession, admission or statement given by suspect, or suspect s refusal to make statement

suspect s performance or results of any examination or test such as a polygraph or laboratory test, or the failure to submit to an examination or test

any opinion of guilt or innocence of a suspect

credibility or anticipated testimony of prospective witness

information this is likely inadmissible as evidence at trial

Permitted statements, without elaboration

general nature of charge or defense

information contained in the public record

scheduling of any stop in litigation

Permitted statements to inform public about threats to its safety

investigation in progress, including general scope, and except where prohibited by law the identify of persons involved

request for assistance in obtaining evidence

warning of danger where likelihood of substantial harm to individual or public

identity, residence, occupation and family status of accused

information necessary to aid in apprehension of accused

fact, time and place of arrest

identity of investigating and arresting officers or agencies, and the length of investigation

Bench Bar Press Committee Statement of Principles and Considerations

For additional information, see the Bench Bar Press Committee Statement of Principles and Considerations, Washington Court Rules, p. 579 (1999).

1.4 Duty to improve the law

important function of prosecutor is to seek reform and improve administration of criminal justice, including stimulating efforts to address inadequacies or injustices in substantive or procedural law

Excerpt from Commentary to ABA Standard

&In recent years, moreover, increasing numbers of lawyers have recognized their responsibility in the administration of criminal justice. Prosecutors should take advantage of this climate of professional concern by assuming leadership to improve the quality and efficiency of criminal justice.

It is in the public interest for the prosecutor to foster good working relationships with the defense bar, including defender agencies, and to participate in such activities as criminal law sections of the organized bar and joint seminars on criminal law sections & Reforms and improvements in the criminal law will more readily gain the approval of legislative bodies and the public if they are the joint work product of both prosecutors and defense lawyers.

RCW 36.27.020(13)

The prosecuting attorney shall [s]eek to reform and improve the administration of criminal justice and stimulate efforts to remedy inadequacies or injustice in substantive or procedural law.

PART II. ORGANIZATION OF THE PROSECUTION FUNCTION

2.1 Prosecution authority to be vested in a public official

prosecution function should be performed by public prosecutor who is a lawyer subject to standards of professional conduct and discipline

Excerpt from Commentary to ABA Standard

&The participation of a responsible public officer in the decision to prosecute and in the prosecution of the charge gives greater assurance that the rights of the accused will be respected. &The absence of a trained prosecution official risks abuse or casual and unauthorized administrative practices and dispositions that are not consonant with our traditions of justice. &

&This standard is not intended to discourage the adoption of a system under which a complainant may move for prosecution before a magistrate when a prosecutor has declined to proceed, provided this right is limited to significant criminal conduct and provided that the actual conduct of the case is by a public prosecutor. &

Citizen Complaint

See CrRLJ 2.1(c) for the process authorized under Washington law for a citizen to institute a criminal non-felony action where the prosecuting authority has declined to proceed.

It is our office's position that CrRLJ 2.1(c) is a judicial usurpation of a legislative and executive function, and accordingly violates the separation of powers doctrine. We have been successful in getting citizen complaints dismissed by our District Court bench based on this argument. *See Lorraine Kirtley v. Diane Frost, Carol Rainey, Michael Stowell, and Does 1-100,* Kitsap County District Court No. 9800 00004. The following memorandum of authorities is from the Kirtley case--

THE CITIZEN COMPLAINT RULE IS AN UNCONSTITUTIONAL USURPATION BY THE JUDICIAL BRANCH OF THE EXECUTIVE BRANCH'S POWER TO DECIDE WHO IS OR IS NOT CHARGED WITH VIOLATION OF THE CRIMINAL LAWS

The separation of powers doctrine is not expressly set forth in either the United States or Washington constitution, but is nonetheless considered a fundamental tenet of our political structure. *In re Juvenile Director,* 87 Wn.2d 232, 237-245, 552 P.2d 163 (1976) (lengthy historical discussion of separation of powers and checks and balances doctrines). The separation of powers doctrine has some different meanings depending upon context, but its core concern is with protecting the powers and duties of the three branches of government. Although some small overlap can occur without violating the doctrine, one branch of government can not assume or exercise the power or duties of another branch, nor act to deprive the others of their lawful powers. *Id.; State Bar Association v. State,* 125 Wn.2d 901, 907, 890 P.2d 1047 (1995); *State v. Blilie,* 132 Wn.2d 484, 939 P.2d 691 (1997).[1]

The criminal prosecution function is an executive branch responsibility. Both the county Prosecuting Attorney and the state Attorney General are executive officials. *See, e.g.,* Wash. Const. Art. III, §1 (Attorney General is member of executive branch); *State v. Campbell,* 103 Wn.2d 1, 25-26, 691 P.2d 929 (1984), *cert. denied,* 471 U.S. 1094, 105 S.Ct. 2169, 85 L.Ed.2d 526 (1985) (recognizing prosecuting attorney as executive branch official); *State ex rel. Schillberg v. Cascade District Court,* 94 Wn.2d 772, 781-782, 621 P.2d 115 (1980) (same); *State v. Thorne,* 129 Wn.2d 736, 762, 921 P.2d 514 (1996) (same). The courts, of course, are members of the judicial branch of government. Wash. Const. Art. IV, §1.

The decision to file or not file charges, or the number of such charges, is a matter left to the discretion of the prosecuting attorney. *State v. Ammons,* 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796, *cert. denied,* 479 U.S. 930, 107 S.Ct. 398, 93 L.Ed.2d 351 (1986); *State v. Lewis,* 115 Wn.2d 294, 797 P.2d 1141 (1990). The prosecutor is given wide discretion since he must necessarily consider both the strength of the case and the public interest before making the charging decision. *Bordenkircher v. Hayes,* 434 U.S. 357, 54 L.Ed.2d 604, 98 S.Ct. 663 (1978); *State v. Judge,* 100 Wn.2d 706, 713, 675 P.2d 219 (1984).

The Constitution of this state authorized the Legislature to establish the powers and duties of the county prosecutor. Wash. Const. Art. XI §5. It has responded by adopting chapter 36.27 RCW. One of the express duties imposed is to Prosecute *all* criminal and civil actions in which the state or county may be a party &. RCW 36.27.020(4) (emphasis added). No legislation has been found that grants any portion of that power to the judiciary or to a private citizen of this state.[2] The Legislature however has seen fit to

[1] Court rulings, including the common law as well as court rules and regulations, are subject to constitutional challenges. *Gossett v. Farmers Insurance,* 133 Wn.2d 954, 975, 948 P.2d 1264 (1997).

[2] A territorial statute which survived until modern times authorized an indictment obtained by a private prosecutor and also made the complainant liable for costs if maliciously brought. *See* former RCW 10.28.160; repealed by c. 67, 1971 ex. Sess., §20. The only case construing that statute arose after a jury acquitted the defendant, assessed costs against the complaining witness, and then jailed him pending payment. *In re Permstick,* 3 Wash. 672, 29 Pac. 350 (1892).

authorize another executive branch officer, the Attorney General, to seek criminal prosecution in some instances. *See* RCW 43.10.232; RCW 10.01.190.

CrRLJ 2.1 violates the separation of powers doctrine on two levels. First, it appears that the judiciary, through its own rule, is taking on the executive function of filing and prosecuting criminal charges, or is asserting that it can delegate that authority to a private citizen, who may or may not even be an attorney. This is a clear invasion of executive authority. *State v. Lewis, supra.* The Legislature has not seen fit to give this power or oversight to the judicial branch. The judiciary can not assume this power on its own.

Second, if the rule is interpreted to mean that the court can order the prosecutor s office to act upon the newly filed charge, it fails since the court has not been granted such authority by the Legislature, nor does it have inherent authority to do so. *Westerman v. Cary,* 125 Wn.2d 277, 298, 885 P.2d 827 (1994); *Ladenburg v. Campbell,* 56 Wn.App. 701, 784 P.2d 1306 (Div. 2 1990) (district court judge had no power to appoint special prosecutor to handle case that prosecutor refused to proceed with). Indeed, since the power to initiate charges is exclusively an executive one, the courts simply could not claim such authority. *State v. Lewis, supra* (number and nature of charges left to the prosecuting attorney).

The policy argument that a judicial citizen review process is a necessary check on the prosecutor s powers is one which must be addressed to the Legislature, not the courts. *See, e.g., Waggoner v. Ace Hardware,* 134 Wn.2d 748, 755, 953 P.2d 88 (1998). To the extent such a check was seen as necessary, the Legislature has provided for the Attorney General to intervene in appropriate criminal cases. RCW 43.10.232. The Legislature has not seen fit to give the courts that power.[3]

CrRLJ 2.1(c) is a judicial usurpation of a legislative branch decision to delegate to the executive branch the power to decide who is or is not charged with violation of Washington s criminal laws. CrRLJ 2.1(c) violates the separation of powers doctrine, and accordingly is unconstitutional.

[3] The Legislature knows how to do so when it desires, as can be seen in another statute dating from territorial days, RCW 10.16.110. There the Legislature empowered the superior court to direct a prosecutor to proceed with a case after an indictment has been returned by a grand jury if the court is not satisfied with the prosecutor s written reasons for refusing to prosecute. The Legislature has not seen fit to create a similar check on the prosecutor s decision not to file an information or complaint.

2.2 Interrelationship of prosecution offices within a state

(a) local authority and responsibility is properly vested in district, county, or city attorney

(b) in some states, conditions such as geographic area and population make it appropriate to create a statewide system of prosecution

(c) a state council of prosecutors should be established so that there will be coordination of prosecution policies to improve the administration of justice and assure the maximum practicable uniformity in the enforcement of criminal law throughout state

(d) prosecutors should consult and advise with the attorney general where questions of law of statewide interest or concern arise

(e) a central pool of supporting resources, including laboratories, investigators, and other experts should be maintained by state government and be available to all local prosecutors

Excerpt from Commentary to ABA Standard

Basic Units of Prosecution. &Familiarity with the community aids the prosecutor in gathering evidence, in allocating resources to the various activities of the office, and in appraising the disposition appropriate to particular offenses and offenders. &

Statewide System. Several states for example, Alaska, Delaware, and Rhode Island have statewide systems of prosecution. &The possibility of moving to a system of statewide administration of the prosecution function should not be disregarded.

Statewide Coordination. Increased state coordination may provide the only means of overcoming the problems inherent in local autonomy. & Prosecutors should avoid joint participation with laypersons and organizations such as associations of police officers in group activities concerned with problems of law enforcement. This is essential to maintain the detached professional judgment required of prosecutors in such matters and to avoid identification with legislative or other recommendations on which they may be outvoted and which, from the prosecution point of view, may be ill-advised. &

Prosecution Resources Pool. &Few local prosecution offices can support, either in volume of activity or in financial terms, the full complement of technical and professional experts necessary for effective investigation and prosecution under modern conditions. &Counsel with experience in certain types of litigation &can also be provided by a state agency to assist in local prosecutions where the local office does not have sufficient resources to develop specialized personnel in these fields.

2.3 Assuring high standards of professional skill

(a) public prosecution requires highly developed professional skills; continuity of service and broad experience promotes this objective

(b) the office and staff should be full-time if feasible

(c) professional competence should be the only basis for selection of staff without regard to partisan political influence

(d) to achieve professionalism and encourage competent lawyers to accept such offices, compensation for prosecutors and staffs should be commensurate with the high responsibilities of the office and comparable to compensation in the private sector

Excerpt from Commentary to ABA Standard

Career Service. &It is true that a young lawyer can acquire wide trial experience in a relatively short period in a prosecution office, but there is a limit to how much turnover of personnel is tolerable and consistent with effective prosecution The most efficient prosecution offices are built on career-type service. &Some turnover at lower levels of the staff is probably desirable in order to maintain a steady infusion of new blood and new ideas and to supply a source from which senior prosecutors can be promoted.

Full-Time Occupation. &Apart from the problem of conflicts of interest, which raises ethical problems, there is a great risk that the part-time prosecutor will not give sufficient energy and attention to official duties. Since the part-time prosecutor s salary is a fixed amount, and his or her total earnings depend on what can be derived from private practice, there is a continuing temptation to give priority to private clients. &

Selection of the Prosecutor and Staff. Opinion has long been divided on the question of whether the office of prosecutor should be appointive or elective. &Whether the prosecutor is elected or appointed, the ultimate goal is to remove the office from politics. To do this requires the support and cooperation of the bar and political parties. &

Compensation. &Under no circumstances should prosecutors be paid in part through fees on a case-by-case basis. It is clear that fee systems of remuneration for prosecuting attorneys raise serious ethical and perhaps constitutional problems, and are total unacceptable.

RCW 36.27.050 Special emoluments prohibited

No prosecuting attorney shall receive any fee or reward from any person, on behalf of any prosecution, or for any of his official services, except as provided in this title, nor shall he be engaged as attorney or counsel for any party in any action depending upon the same facts involved in any criminal proceeding.

RCW 36.27.060 Private practice prohibited in certain counties Deputy prosecutors

(1) The prosecuting attorney, and deputy prosecuting attorneys, of each county with a population of eighteen thousand or more shall serve full time and except as otherwise provided for in this section shall not engage in the private practice of law.

(2) Deputy prosecuting attorneys in a county with a population of from eighteen thousand to less than one hundred twenty-five thousand may serve part time and engage in the private practice of law if the county legislative authority so provides.

(3) Except as provided in subsection (4) of this section, nothing in this section prohibits a prosecuting attorney or deputy prosecuting attorney in any county from:

(a) Performing legal services for himself or herself or his or her immediate family; or

(b) Performing legal services of a charitable nature.

(4) The legal services identified in subsection (3) of this section may not be performed if they would interfere with the duties of a prosecuting attorney, or deputy prosecuting attorney and no services that are performed shall be deemed within the scope of employment of a prosecutor or deputy prosecutor.

2.4 Special assistants, investigative resources, experts

(a) funds should be provided to enable a prosecutor to appoint special assistants from the bar as needed

(b) funds should be provided to enable a prosecutor to employ a regular staff of investigative personnel under the prosecutor s direct control, and for the employment of qualified experts as needed

Excerpt from Commentary to ABA Standard

Special Assistant Prosecutors. &The incidence of crime is not sufficiently predictable to permit reliable calculation of the staff needs at every moment during the year. It is important that the prosecutor have flexibility in meeting this situation, so that the office is not forced to dispose of cases on a basis not fully compatible with the interests of the public merely because of an unusually heavy workload. &

Investigative and Other Supporting Personnel and Experts. &[T]he prosecutor may need to conduct investigations that the police are unable or unwilling to undertake, such as investigations of public officials, including the police themselves. & the prosecutor should be provided with independent professional investigative personnel who are subject to his or her supervision. &In addition &a prosecution office, like any other law office, needs sufficient supporting personnel to permit it to operate efficiently. There is no saving to the taxpayer if relatively highly paid professionals are forced to perform stenographic and clerical duties because of a lack of secretarial personnel. &The prosecutor must also be provided with expert scientific assistance to keep pace with the need for effective investigation and prosecution of criminal activities &just as they should be provided to the defense.

2.5 Prosecutor s handbook; policy guidelines and procedures

(a) prosecutor should develop statement of policies to guide exercise of discretion and office procedures to achieve fair, efficient, and effective enforcement of criminal law

(b) an office handbook satisfies the interests of continuity and clarity, which should be available to the public (except confidential matters that would adversely affect the prosecution function by public disclosure)

Excerpt from Commentary to ABA Standard

Policy Guidelines. &[T]he very process of articulating policies in itself contributes to the formulation of sound policies by compelling consideration and evaluation of practices that may have outlived their usefulness. &

Office Handbook. &They serve to maintain consistent practices and continuity despite changing personnel and tend to assure that policies adopted at the highest levels of the office are observed by the staff. Perhaps of equal importance is the function of such a handbook as a teaching tool by which the accumulated experience of many is preserved and transmitted. &

Kitsap Prosecutor s Office Mission Statement & Standards and Guidelines

Our office, in conjunction with recommendations from a citizen s advisory committee comprised of pastors, crime victims, defense attorneys and other interested persons, and borrowing from guidelines adopted by the Prosecutor s Offices of King and Snohomish Counties, has developed a 23-page manual. If you would like a copy, though, please contact me.

RCW 9.94A.430 *et seq.* Recommended Prosecuting Standards for Charging and Plea Dispositions

See also RCW 9.94.430 et seq. for state policy and charging guidelines.
See also § 3.9 Discretion in the charging decision, supra.

2.6 Training programs

training programs should be established for new personnel and for continuing education within the prosecutor s office, and public funds should be provided to enable prosecutors to attend continuing education programs

Excerpt from Commentary to ABA Standard

&Training within the prosecutor s office also should emphasize professional responsibility and conduct in the courtroom and in relations with the court and opposing counsel. &

2.7 Relations with police

(a) legal advice concerning police functions and duties in criminal matters should be provided to the police

(b) prosecutor should cooperate with police in providing the prosecutor s staff to aid in training police in the performance of their function

Excerpt from Commentary to ABA Standard

Role as Legal Advisor. &the prosecutor should endeavor to establish and maintain a relationship of mutual confidence and cooperation with the police. &

Role in Police Training. Many of the problems that have plagued the police and indeed the public in recent years can be traced to mistakes of the police, often entirely inadvertent, in carrying out such routine duties as securing warrants, making arrests, executing warrants, interrogating persons in custody, and conducting lineups for identification purposes. This training cannot be casual or occasional but must be carefully organized and presented. &This function of the prosecutor is so important that allowance must be made in the budget for whatever personnel are required to perform effective police training.

2.8 Relations with the courts and bar

(a) unprofessional conduct to intentionally misrepresent matters of fact or law to the court

(b) prosecutors should carefully strive to preserve the appearance as well as the reality of the correct relationship with judges

(c) unprofessional conduct to engage in unauthorized ex parte discussions with or submission of materials to a judge relating to a case which is or may come before the judge

(d) prosecutors should strive to avoid the appearance as well as the reality of any relationship with the bar which would tend to cast doubt on the independence and integrity of the office

Excerpt from Commentary to ABA Standard

Misrepresentation. &[T]he prosecutor must be scrupulously candid and truthful in his or her representations in respect of any matter before the court. &

Preserving Correct Relationships. &Opposing counsel and the public cannot fail to be disturbed by the existence or the appearance of a close social relationship between one of the contending advocates and the umpire. Often this kind of relationship develops innocently and gradually without an awareness on the part of the judge or prosecutor and indeed without a scintilla of actual impropriety. The appearance, however, can assume the importance of reality &and even at the risk of giving offense, the prosecutor should exercise great care not to allow any relationship to develop that casts doubt on the administration of justice or the independence of the court and of the prosecutor.

Ex Parte Contacts with the Court. There are, of necessity, occasions when a judge must discuss problems with the prosecutor and staff. The need for such appropriate discussions with a judge in chambers or in the courtroom should not be permitted to give rise to ex parte discussion concerning a particular case that is or may come before the court. &

Relations with Members of the Bar. &Whenever defense counsel is regularly sought out by accused persons because it is thought the defense counsel has a special relationship with the prosecutor or the judge, the symptoms of illness are present and the courts, the bar, and the public may mistake the symptoms for the disease. &Prosecutors, of course, need not avoid friendly contacts with defense lawyers or participation in social and professional activities of bar groups.

2.9 Prompt disposition of criminal charges

(a) a prosecutor should not intentionally use procedural devices for delay absent a legitimate basis

(b) the prosecution function should be so organized and supported with staff and facilities as to enable it to dispose of all criminal charges promptly; prosecutors should be punctual in attendance in court and in submission of pleadings, and should emphasize the importance of punctuality to all witnesses

(c) unprofessional conduct to intentionally misrepresent facts or otherwise mislead court to obtain a continuance

Excerpt from Commentary to ABA Standard

Exploitation of Delay for Unjustified Tactical Advantage. The problem must be attacked by direct sanctions against both prosecutors and defense counsel who exploit or abuse delay as a tactical weapon. &Judges are best able to detect these abuses, and a heavy responsibility rests on them to separate legitimate use of procedural devices from abusive use calculated to obtain an unjustified delay.

Prompt Disposition. &the interests of the public and defendants are best served by prompt disposition of criminal charges. The prophylactic effect of criminal sanctions is dissipated by delay in bringing them to bear upon offenders. &In many prosecution offices, trial assistants are charged with caseloads of as many as sixty or seventy cases. This is an intolerable and unmanageable burden. Among other adverse consequences, cases are not adequately prepared and the prosecutor tends to consent to unwarranted continuances, simply because of insufficient time to prepare for trial. &

Continuances; Misrepresentation. Heavy caseloads in most prosecution offices sometimes have led to abuses in obtaining continuances of proceedings prior to trial and of the trial itself. With adequate staff and resources, it should be unnecessary for the prosecutor to ask for continuances except for good cause arising from unforeseen circumstances. &

Case Law Preaccusatorial Delay

United States v. Lovasco, 431 U.S. 783, 52 L.Ed.2d 542, 97 S.Ct. 2044 (1977). Preaccusatorial delay may violate a defendant s right to Due Process, but the Due Process Clause

> does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor s judgment as to when to seek an indictment. Judges are not free, in defining due process, to impose on law enforcement officials our personal and private notions of fairness and to disregard the limits that bind judges in their judicial function.

Lovasco, 431 U.S. at 790 (quoting *Rochin v. California,* 342 U.S. 165, 170, 96 L.Ed. 183, 72 S.Ct. 205, 25 A.L.R.2d 1396 (1952)).

State v. Lidge, 111 Wn.2d 845, 850, 765 P.2d 1292 (1989)

> Allowing prosecutors broad discretion to delay the filing of charges until they are "completely satisfied that [they] should prosecute and will be able promptly to establish guilt beyond a reasonable doubt", *Lovasco,* 431 U.S. at 795, 97 S.Ct. at 2051, serves important societal interests. Forcing prosecutors to proceed precipitously may waste scarce resources on cases in which the defendant's guilt cannot be established beyond a reasonable doubt. More devastating, however, is the risk that incomplete police investigation will result in charges being brought against innocent persons. These are costs that society should not bear. *Lovasco,* at 793-94, 97 S.Ct. at 2050-51.

State v. Dixon, 114 Wn.2d 857, 863, 792 P.2d 137 (1990) (held that preaccusatorial delay due to State's desire to prosecute codefendant first in order to obtain his testimony against defendant on the issue of intent did not violate defendant's rights, even though it resulted in a loss of juvenile court jurisdiction).

State v. Nordby, 122 Wn.2d 258, 858 P.2d 210 (1993)

> The defendants assert that even if they must meet an initial burden of showing actual prejudice, the court can infer prejudice from the prefiling delay alone. We reject this argument. The mere possibility of prejudice is not sufficient to meet the burden of showing actual prejudice. A mere allegation that witnesses are unavailable or that memories have dimmed is insufficient; the defendant must specifically demonstrate the delay caused actual prejudice to his defense. A court will presume prejudice if the juvenile court loses jurisdiction over a defendant as a result of a preaccusatorial delay. *Dixon,* 114 Wn.2d at 860-61. None of the defendants in this case, however, alleges the loss of juvenile court jurisdiction.

(Citations omitted.)

State v. Gidley, 79 Wn.App. 205, 210-11, 901 P.2d 361 (Div. 1 1995)

> It is well established that the State has no special duty to disrupt the orderly administration of the judicial process to give special advantage in the system to any particular suspect or to assure that a case is filed in juvenile court prior to a defendant's eighteenth birthday. The delay in this case stemmed from standard police investigatory procedure requiring that the accused be interviewed before the case was submitted for a filing decision. By following standard procedure, the

detective here was able to confirm with the accused an important element of the crime intercourse. Had the detective referred the matter for filing without attempting to interview the accused, the prosecutor would have lacked this significant piece of information. We cannot say that an investigatory police procedure requiring that the police interview the accused before referring a matter for filing is flawed, particularly when a premature referral could result in a wrongful charge. &

(Citations omitted.)

State v. Frazier, 82 Wn.App. 576, 592, 918 P.2d 964 (Div. 2 1996) (trial court s dismissal of adult felony charges affirmed due to prosecutor s negligence in failing to review report for 8 weeks prior to defendant s 18th birthday)

In the present case, however, the trial court determined that both Frazier and the State have strong interests in the process of administering justice so that fundamental conceptions of fairness are properly served. The State has no interest in processing the accused in an unjustifiably negligent fashion. Moreover, the State's interests in fairly administering justice can only be served when such fairness is maintained. This reasoning is sound. The trial court did not err in concluding that the delay was unjustified.

Case Law Post-Charging Delay in Bringing Defendant Before Court The *Striker* and *Peterson* Rules

State v. Striker, 87 Wn.2d 870, 875, 557 P.2d 847 (1976) (The *Striker* Rule If a long and unnecessary delay occurs in bringing a defendant who is amenable to process before the court for his or her first appearance, CrR 3.3 s 104-day time-for-trial period [90 days plus 14 days of constructive arraignment] is deemed to commence at the time the information or complaint was filed.).

State v. Peterson, 90 Wn.2d 423, 431, 585 P.2d 66 (1978) (The *Peterson* Rule Speedy trial begins to run on all crimes based on the same conduct or arising out of the same criminal incident from the time the defendant is first held to answer for any of the charges)

&The new assault charge filed in 1977 was also properly dismissed by the trial court. The judge determined that, because the new charge arose out of the same offense and incident as the old one, the time limits of CrR 3.3 began running on the new offense as well as the old one in January 1975. CrR 3.3 does not expressly so provide. However, because we find therein no provisions which contemplate separate charges from the same conduct filed years apart, we look to ABA standards to provide supplemental interpretation. Standard 2.2 recommends that the time within which trial must be held should begin on all crimes "based on the same conduct or arising from the same criminal incident" from the time the defendant is held to answer any charge with respect to that conduct or episode. CrR 4.3(c), particularly subsection (3), appears supportive of the ABA standard here, as it expresses a preference for a single disposition of all charges arising from one incident. We apply that standard here.

State v. Fladebo, 113 Wn.2d 388, 391-94, 779 P.2d 707 (1989) (defendant arraigned on DUI charge in Mt. Vernon Municipal Court on October 27, 1986, and charged with possession of heroin in Skagit County Superior Court on February 17, 1987; Held: Peterson rule does not apply because the two different charges arose from different jurisdictions with separate prosecutorial responsibilities.).

State v. Greenwood, 120 Wn.2d 585, 600-1, 845 P.2d 971 (1993) (application of the *Striker* rule mandates that a prosecutor has a duty to exercise good faith and due diligence to make reasonable efforts to obtain defendant s timely presence before court to answer for the charge previously filed; criminal speedy trial rules prohibit long and unnecessary periods of delay in brining defendants before the court to answer charges filed against them; defendant waives challenge if failure to timely object or delay a result of defendant s fault or connivance).

State v. Anderson, 121 Wn.2d 852, 864, 855 P.2d 671 (1993) (Interstate Agreement on Detainers)

&[F]undamental fairness requires that Washington prosecuting authorities act in good faith and with due diligence in bringing a defendant to trial in this state once it has been brought to their attention that the defendant "is detained in jail or prison outside the state of Washington or in a federal jail or prison" and the defendant is "subjected to conditions of release not imposed by a court of the State of Washington". CrR 3.3(g)(6).

Good faith and due diligence requires that Washington prosecuting authorities undertake to obtain the presence of a defendant for trial in this state by extradition or interstate compact. The Interstate Agreement on Detainers should be utilized for filing detainers so that defendants may avail themselves of demands for speedy trial. Failure of the State to do this results in inapplicability of the exclusion from computation of the speedy trial period under CrR 3.3(g)(6) and possible dismissal with prejudice under CrR 3.3(i).

Seattle v. Bonifacio, 127 Wn.2d 482, 900 P.2d 1105 (1995) (issuance of citation, regardless of whether it is subsequently filed, starts running of clock under time for trial rule; Held: prosecution of defendant was barred as proceedings did not commence within 110 days of issuance of citation even though less than 110 days had elapsed since filing of complaint by city attorney).

State v. Jones, 79 Wn.App. 7, 11-13, 901 P.2d 1057 (Div. 1 1995), *review denied,* 128 P.2d 1009 (1996) (Held: prosecutor's failure to take additional steps after summons sent by certified mail was returned as unclaimed required dismissal)

In *State v. Williams,* 74 Wn.App. 600, 875 P.2d 1222 (1994), the State sent a summons to the defendant by certified mail ordering him to appear for arraignment on a charge of first degree theft. Several facts parallel this case. Although the State possessed the defendant's correct address, the summons was returned as "unclaimed." Also, the defendant never received the summons and he remained unaware of the charge until he was arrested on the bench warrant over 3 years later. Finally, once the summons was returned, neither the investigating agency nor the prosecutor took any further steps either to notify the defendant of the charge or to serve the bench warrant.

This court rejected the State's argument that under [*State v. Perry,* 25 Wn.App. 621, 612 P.2d 4 (Div. 1 1980)] it exercised due diligence by sending a letter to the defendant's last known address. The court distinguished Perry because in that case the defendant knew of the pending charges and he changed his location without providing the State with accurate information of his whereabouts. In those circumstances, sending a letter to his last known address constituted due diligence. But in Williams, as here, the defendant did not know of the charges. Therefore, the court rejected the "the bald assertion made by the State that, after a summons is 'properly sent' and the defendant fails to respond, the prosecutor is not required take further steps to locate the defendant...." *Williams,* at 604. The court affirmed the trial court's dismissal of the charge.

In *State v. Kitchen,* 75 Wn.App. 295, 877 P.2d 730 (Div. 3 1994), the case turned upon whether defendant had actual notice. Although the summons was mailed to his correct address, the defendant filed an affidavit averring that he did not receive it. The court noted: "The State may assume, and the trial courts should presume, that a letter sent by regular first-class mail to the defendant's correct address and not returned to the sender was delivered, and that the defendant was given notice of the charge filed against him." *Kitchen,* at 298. But the presumption is rebuttable. Thus, if a defendant convinces the court that he or she was without fault in failing to appear at arraignment, the court must then examine the State's diligence in attempting to notify the defendant. Because the trial court failed to take facts on this specific issue, this court remanded for a finding regarding whether defendant received actual notice of the original arraignment.

This court issued several warnings during the course of its decision. It noted that because the actual-notice presumption is rebuttable, "the State should exercise caution in failing to take any further steps to notify defendants who fail to appear at their scheduled arraignments." *Kitchen,* at 298, n. 1. Also, the court was "not inclined" to agree that simply mailing a notice to a correct address constitutes due diligence. Instead, other factors, including other information regarding defendant's location which the State possesses, may have an impact on the due diligence analysis. *Kitchen,* at 299-300.

In this case, the State diligently sent the summons by certified mail to Jones ordering him to appear for arraignment. This summons was returned as "unclaimed." Because it was not "rejected" or "undeliverable," the State was alerted that Jones simply did not receive it. When Jones failed to appear at arraignment, the State took no further steps to either notify Jones of the charge or to serve the bench warrant. Yet, the State possessed his correct address and a message telephone number. The State knew that his employment frequently took him out of state, but that the absences were temporary and that his residence was in Seattle. In these circumstances, the State failed to diligently act upon the information it had regarding Jones' whereabouts.

(Emphasis added.)

State v. Simon, 84 Wn.App. 460, 464, 928 P.2d 449 (Div. 1 1996) (prosecutor can defer to another state to file its detainer first, but prosecutor's failure for nearly a year to inquire about defendant's availability for trial after resolution of charges in another state breached duty to exercise good faith and due diligence in attempt to secure defendant's presence, and, thus, speedy trial provision excluding period of detention in another state was inapplicable; Held: prosecution dismissed).

State v. Harris, 130 Wn.3d 35, 39-44, 921 P.2d 1052 (1996) (defendant prosecuted on NVOL charge in December 1993, and for taking a motor vehicle in February 1994 for facts arising out of same incident; Held: taking motor vehicle charge properly dismissed due to speedy trial violation)

&JuCR 7.8 does not expressly address situations involving multiple charges that stem from the same criminal conduct or criminal episode. Defendant is correct, however, when he claims *State v. Peterson,* 90 Wn.2d 423, 585 P.2d 66 (1978), supports his reading of JuCR 7.8.

> In 1975, Peterson was charged in district court with assault for shooting at police officers when fleeing from a bank robbery. Peterson was tried and convicted on federal bank robbery charges, but the State failed to prosecute the assault charge. While in the federal penitentiary, Peterson successfully moved to dismiss the assault charge under the Interstate Agreement on Detainers Act, RCW 9.100. In 1977, the State filed two new assault charges against Peterson in superior court, with both charges stemming from the same shooting incident.

> One charge was identical to the previously dismissed 1975 charge, and the other assault charge merely named a different police officer as the victim. This court dismissed the second charge for violation of the speedy trial rule:
>
> > The new assault charge filed in 1977 was also properly dismissed by the trial court. The judge determined that, because the new charge arose out of the same offense and incident as the old one, the time limits of CrR 3.3 began running on the new offense as well as the old one in January 1975. CrR 3.3 does not expressly so provide. However, because we find therein no provisions which contemplate separate charges from the same conduct filed years apart, we look to ABA standards to provide supplemental interpretation. Standard 2.2 recommends that the time within which trial must be held should begin on all crimes "based on the same conduct or arising from the same criminal incident" from the time the defendant is held to answer any charge with respect to that conduct or episode. CrR 4.3(c), particularly subsection (3), appears supportive of the ABA standard here, as it expresses a preference for a single disposition of all charges arising from one incident. We apply that standard here.

Peterson, 90 Wn.2d at 431 (emphasis added) (quoting ABA Standards Relating to Speedy Trial Std. 2.2 (Approved Draft 1968)). The ABA standard cited in Peterson currently exists as 2 American Bar Ass'n, Standards for Criminal Justice Std. 12-2.2 (2d ed. 1980).

The ABA standard adopted by Peterson has been cited as controlling law in many subsequent cases. *See, e.g., State v. Fladebo,* 113 Wn.2d 388, 392, 779 P.2d 707 (1989); *State v. Anderson,* 94 Wn. 2d 176, 183, 616 P.2d 612 (1980); *State v. Austin,* 59 Wn. App. 186, 201, 796 P.2d 746 (1990); *State v. Bradley,* 38 Wn.App. 597, 599, 687 P.2d 856, *review denied,* 102 Wn.2d 1024 (1984). Even though the ABA standard adopted in *Peterson* cannot be found in CrR 3.3, standard 12-2.2 has been incorporated into the rules through Peterson 's adoption of the standard and *Fladebo 's* continued adherence to it. CrR 1.1 ("These rules ... shall be interpreted and supplemented in light of the common law and the decisional law of this state." (emphasis added)); *see also State v. Greenwood,* 120 Wn.2d 585, 595, 845 P.2d 971 (1993).

The juvenile court speedy trial rule is to be read in conjunction with the superior court rules where consistent. JuCR 1.4(b) ("The Superior Court Criminal Rules shall apply in juvenile offense proceedings when not inconsistent with these rules and applicable statutes."); *State v. Mack,* 89 Wn.2d 788, 792-93, 576 P.2d 44 (1978); State v. Wilcox, 71 Wn.App. 116, 118, 856 P.2d 1104 (1993). Under JuCR 1.4(b), the ABA standard adopted by Peterson in the context of CrR 3.3 equally applies to JuCR 7.8.

In its supplemental brief, the State wisely concedes the NVOL and TMV arose from the same criminal conduct. Accordingly, under the Peterson rule, the State had to bring Defendant to trial on the TMV charge within 60 days after Defendant was held to answer on the NVOL charge. The speedy trial period for the TMV expired on February 21, 1994. The TMV charge was filed on May 10, 1994, 139 days after Defendant appeared in district court on the NVOL charge, and long after the speedy trial period expired.

The Court of Appeals declined to apply the Peterson rule to Defendant's situation, basing its reasoning on language in *State v. Fladebo,* 113 Wn.2d 388, 779 P.2d 707 (1989). The court held Peterson does not apply in situations where multiple but related criminal charges are filed in different courts. *State v. Harris,* No. 35205-9-I, slip op. at 9 (Wn.App. July 31, 1995). *Fladebo* does not support the Court of Appeals' holding in this case.

In *Fladebo* the defendant was involved in a car accident, and she appeared to be under the influence of drugs at the scene. An officer arrested her and gave her a municipal court citation for driving while under the influence (DWI), in violation of the local municipal code. The officer also found in the defendant's purse a drug kit containing four hypodermic needles, a spoon, and some cotton covered with brown residue. These items were sent to a crime laboratory for testing. *Fladebo,* 113 Wn.2d at 390.

On October 27, 1986, Fladebo was arraigned in the local municipal court on the DWI charge. On December 2, 1986, the county prosecutor received the crime lab report indicating that the substance in Fladebo's purse was heroin. Some time later, on February 17, 1987, the prosecutor finally charged defendant in superior court with felony possession of heroin. She moved to dismiss this second charge for violation of the speedy trial rule. Her motion was denied and she was found guilty. *Fladebo,* 113 Wn.2d at 391.

Fladebo acknowledged the *Peterson* rule, but the court held the standard did not apply to the facts because the two different charges arose from "different jurisdictions with separate prosecutorial responsibilities." *Fladebo,* 113 Wn.2d at 392. Fladebo's DWI charge was heard in municipal court, and the municipal court had exclusive jurisdiction over that charge. RCW 3.46.030 ("A municipal department shall have exclusive jurisdiction of matters arising from ordinances of the city...."). The illegal possession charge was heard in superior court where it was prosecuted by the county prosecutor on behalf of the state.

The facts in this case are distinguishable from the facts of *Fladebo*. Defendant's two charges were prosecuted by the same prosecutorial authority, the King County Prosecuting Attorney, and both charges were brought in state courts. Even though the NVOL was filed in district court and the TMV was filed in superior court, the superior court has jurisdiction over both charges. See RCW 2.08.010 (superior court has original jurisdiction over all felonies and all misdemeanors not otherwise provided for by law); RCW 3.66.060 (district court has concurrent jurisdiction with superior court over all misdemeanors).

Fladebo did not signal a relaxation of the Peterson rule, as suggested by *State v. Wilton,* 57 Wn.App. 606, 608, 789 P.2d 800, *review denied,* 115 Wn.2d 1005 (1990); rather, *Fladebo* merely indicates the *Peterson* rule does not apply to situations where multiple charges are brought in different courts with exclusive jurisdictions, and the charges are prosecuted by different prosecutorial authorities. Since the two charges filed against Defendant were prosecuted by the same authority, and the superior court had original jurisdiction over both charges, we hold the *Peterson* rule, embodying ABA standard 12-2.2, applies to this case.

Fladebo did not purport to overturn or limit prior case law involving the Peterson rule, and prior case law supports our application of the rule to the facts of this case. Before *Fladebo* was decided, courts consistently applied the Peterson rule to multiple charges, even when the charges were split between district and superior courts. *See State v. Peterson,* 90 Wn.2d 423, 585 P.2d 66 (1978); *State v. Bradley,* 38 Wn.App. 597, 599, 687 P.2d 856 (remanding for computation of the speedy trial time under the *Peterson* rule), *review denied,* 102 Wn.2d 1024 (1984); *State v. Wilke,* 28 Wn.App. 590, 594, 624 P.2d 1176, *review denied,* 95 Wn.2d 1026 (1981).

The purpose of JuCR 7.8 "is to ensure prompt resolution of juvenile offense proceedings, which in turn promotes rehabilitation of the juvenile offender." *State v. Wilcox,* 71 Wn.App. 116, 119, 856 P.2d 1104 (1993). *See also State v. Adamski,* 111 Wn.2d 574, 761 P.2d 621 (1988). "While the specific rights conferred by the rule are not of constitutional magnitude, the rule emanates from state and federal constitutional guaranties." *Adamski,* 111 Wn.2d at 582 (citations and footnote omitted). Court rules should be construed to foster the purposes for which they were enacted. *State v. Greenwood,* 120 Wn.2d 585, 593, 845 P.2d 971 (1993). Unless the speedy trial rule is strictly applied, "the right to a speedy trial as well as the integrity of the judicial process, cannot be effectively preserved." *State v. Striker,* 87 Wn.2d 870, 877, 557 P.2d 847 (1976). "This court has consistently interpreted CrR 3.3 so as to resolve ambiguities in a manner which supports the purpose of the rule in providing a prompt trial for the defendant once prosecution is initiated." *State v. Edwards,* 94 Wn.2d 208, 216, 616 P.2d 620 (1980) (citations omitted).

Applying the *Peterson* rule to this case serves the purpose of the speedy trial rule. The policy behind the *Peterson* rule is similar to the policy behind mandatory joinder. *Peterson*, 90 Wn.2d at 431; *State v. McNeil,* 20 Wn.App. 527, 532, 582 P.2d 524 (1978). Joinder principles are designed to protect defendants from

> "successive prosecutions based upon essentially the same conduct, whether the purpose in so doing is to hedge against the risk of an unsympathetic jury at the first trial, to place a 'hold' upon a person after he has been sentenced to imprisonment, or simply to harass by multiplicity of trials."

McNeil, 20 Wn.App. at 532 (footnote omitted) (quoting Commentary to ABA Standards Relating to Joinder and Severance § 1.3, at 19 (Approved Draft 1968)). The Peterson rule prevents prosecutors from harassing a defendant by bringing successive charges over a long span of time even though all charges stem from the same criminal episode. When multiple charges stem from the same criminal conduct or criminal episode, the State must prosecute all related charges within the speedy trial time limits. This ensures a prompt resolution of all criminal matters that stem from one episode. If the State needs extra time to complete an investigation, the speedy trial rule allows for continuances in such circumstances. *See* JuCR 7.8(e)(2)(ii).

Defendant was held to answer for his NVOL on December 22, 1993. He began to serve out the conditions of his sentence and work towards rehabilitation. The 60-day juvenile court speedy trial limit ran out on February 21, 1994. Then, 78 days later, the State charged Defendant with the TMV. Defendant was found guilty on the TMV charge on July 21, 1994--150 days after the speedy trial period expired and 237 days after Defendant was first arrested. The late TMV charge blatantly violates the spirit of the speedy trial rule.

State v. Hudson, 130 Wn.2d 48, 57-58, 921 P.2d 538 (1996) (defendants were in Arizona and Puerto Rico when charges filed; Held: *Striker* rule applies only when the defendant is amenable to process, and does not apply when an accused is out of this state and not incarcerated; prosecutors duty under Anderson to use Interstate Agreement on Detainers Act when defendant is known to be detained in jail outside of this state will not be extended to cases in which the defendant is out of state and not in custody, even though prosecutor can seek extradition under Uniform Criminal Extradition Act.)

&The primary reason for our decision in Anderson was that if the State does not file a detainer, the incarcerated defendant has no possible way to return to the state for a timely trial. We decline to extend the Anderson ruling to cases in which the defendant is not in custody.

We recognize that a prosecutor of this state may seek extradition under the Uniform Criminal Extradition Act. However, since an out-of-state accused is not "amenable to process" in the usual sense of being amenable to arrest or summons by the state of Washington, we decline to impose a duty on the State in every case to attempt to extradite a defendant from another jurisdiction. We conclude the State does not have such a duty under CrR 3.3.

The defense asks this court to impose a duty on the State under CrR 3.3 to send a letter or notification of charges to an out-of-state defendant when the defendant's address is known. We decline to add such a requirement to CrR 3.3 but note that it would be a prudent practice for purposes of a constitutional speedy trial challenge. In the present cases, the defendants raise only rule challenges to this Court. The time for trial provisions of CrR 3.3 are procedural rules providing defendants with a right which is separate from the constitutional right to a speedy trial. Greenwood, 120 Wn.2d at 611 (citing State v. White, 94 Wn.2d 498, 501, 617 P.2d 998 (1980)). Whether the State had sent a notice to a defendant's known out-of-state address may be relevant to a constitutional speedy trial challenge.

CONCLUSION

The speedy trial rule, CrR 3.3, does not establish a set number of days between charging and arraignment for a defendant who is not held in custody. The *Striker/Greenwood* rule which addresses that time period only applies when a defendant is amenable to process. A defendant is not amenable to process while absent from the state. Therefore, the Striker rule, which requires diligence in bringing a defendant before the court, does not apply to the periods of time while a defendant is out of state and not in custody. The periods of time while Hudson and Cintron-Cartegena were outside of the state of Washington were properly excluded from the time for trial calculation set by CrR 3.3. We therefore affirm the Court of Appeals in both cases.

(Footnote omitted.)

State v. Stewart, 130 Wn.2d 351, 922 P.2d 1356 (1996) (defendant left state to attend school in Arizona after receiving permission from probation officer; defendant gave probation new address and maintained contact, defendant charged with unrelated felony after he left for Arizona and when he failed to appear, a warrant was issued, defendant arrested on warrant in Arizona but released since Washington would not extradite from Arizona; Held: prosecution did not have to exercise good faith and due diligence even though probation officer knew location of defendant since *Striker* rule does not apply when a defendant is not amenable to process, conviction affirmed).

State v. Monson, 84 Wn.App. 703, 710, 712, 929 P.2d 1186, *review denied,* 133 Wn.2d 1015 (Div. 3 1997) (defendant brought to court 13 years after charging documents filed; Held: prosecution s good faith and due diligence in bringing defendant to court is irrelevant since defendant resided in New York for 13 years, *Striker* rule not triggered since defendant not amenable to process)

&It is clear after Stewart and Hudson that while Mr. Monson was living in New York, he was not amenable to process and the Striker rule did not apply. As in Stewart, neither the State nor Mr. Monson utilized the IAD and he was only briefly detained while the New York officers checked on extradition. Accordingly, his CrR 3.3 speedy trial period began when he first appeared in Washington &

Since Mr. Monson failed to report to his probation officer and left the jurisdiction without permission, his probationary period was tolled until he was returned to Washington in 1994. *Gillespie v. State,* 17 Wn.App. 363, 366, 563 P.2d 1272, *review denied,* 89 Wn.2d 1008 (1977). His probation revocation hearing was continued until after trial on the rape charges. As long as Mr. Monson is being held on the criminal charges, it is permissible and appropriate to delay the revocation of probation hearing. *State v. Valentine,* 20 Wn.App. 511, 514-15, 580 P.2d 1119 (1978).

State v. Duffy, 86 Wn.App. 334, 936 P.2d 444 (Div. 3 1997) (Defendant booked in jail on felony elude and was given a citation charging him with DUI in Spokane Municipal Court and setting an arraignment date of April 24. The city attorney thereafter decided not to prosecute the DUI, referred the matter to the county prosecutor, and sent a letter to defendant and his attorney notifying them of his decision to decline prosecution. The municipal court arraignment date was canceled by the city attorney, and the municipal case was closed on April 20. The county prosecutor filed felony elude, DUI and hit and run-attended charges in superior court on August 21; Held: county prosecutor prohibited from charging DUI and hit and run-attended gross misdemeanor charges since Spokane Municipal Court case was not dismissed, and speedy trial ran prior to county prosecutor filing charges in superior court)

The issue in this case is whether an order of dismissal without prejudice must be entered in municipal court before the speedy trial period is tolled, or whether this period is tolled by events which the State argues are equivalent of a dismissal. It is clear that nothing less than an order of dismissal without prejudice stops the speed trial clock until such

time as charges are refiled. CrRLJ 3.3(g)(4) provides that the time between the dismissal of a charge and the defendant s arraignment or rearraignment in court following the refiling of the same charge will be excluded from the computation for a speedy trial. CrR 3.3(c)(2) is quite specific in its requirement that the entry of a order of dismissal is required before the speedy trial clock will be stopped. &

&When the city decided not to prosecute the DWI charge, it had an obligation to have the matter dismissed from municipal court as required by the terms of CrRLJ 3.3(g)(4) and CrR 3.3(c)(2)(ii). Mr. Duffy should not be required to know what the city attorney was thinking when he sent the letter indicating that the city declined to prosecute the case. Similarly, Mr. Duffy should not be required to obtain and decipher notations in court records that may not have been authorized by a judge. &

The State contends the hit-and-run charge occurred in the course of the eluding incident. The eluding charge was within the exclusive jurisdiction of the superior court and was timely. If the eluding charge was timely, the State argues, then the hit-and-run charge was also timely.

DWI and hit-and-run attended are gross misdemeanors which are violations of city ordinances and are within the jurisdiction of the municipal court. &

When multiple offenses arise out of the same criminal episode or transaction, there can only be one triggering date for calculating the time for trial of all offenses. *State v. Erickson,* 22 Wn.App. 38, 44, 587 P.2d 613 (1978). The speedy trial period should begin for all crimes based on the same conduct or arising from the same criminal incident from the time the defendant is held to answer any charge with respect to that conduct or episode. *State v. Peterson,* 90 Wn.2d 423, 431, 585 P.2d 66 (1978) (quoting ABA Standards Relating to Speedy Trial, Std. 2.2 (Approved Draft, 1968)) This standard does not apply in situations where multiple charges are brought in different courts with exclusive jurisdiction by different prosecutorial authorities. *State v. Fladebo,* 113 Wn.2d 388, 392, 779 P.2d 707 (1989). These cases interpret superior court joinder rule CrR 4.3. The Peterson rule has recently been applied in juvenile court proceedings pursuant to JuCR 1.4(b). *State v. Harris,* 130 Wn.2d 35, 921 P.2d 1052 (1996).

The charges against Mr. Duffy all arise out of the events that occurred on the night of April 9, 1995. The State argues the conduct that resulted in the hit-and-run charge was related to the conduct that served as the basis of the eluding charge rather than the conduct that served as the basis of the DWI charge. The State cites no authority to support this narrow interpretation. All of the facts necessary to charge Mr. Duffy with hit-and-run were available to the city attorney immediately and to the State as soon as the case was forwarded to them. This is not a situation where prosecutors needed time for drug analysis or to obtain additional information before a charge could be brought against the defendant on some part of his conduct arising out of one incident. &

2.10 Supersession and substitution of prosecutor

(a) legislation should be enacted to empower the governor or other elected state official to suspend and supersede a local prosecutor upon a public finding, after reasonable notice and hearing, that prosecutor is incapable of fulfilling duties of office

(b) governor or other elected official should be empowered to substitute special counsel in place of local prosecutor in particular case or category of cases upon public finding that this is required for protection of the public interest

Excerpt from Commentary to ABA Standard

Supersession. &Some form of summary action for emergencies and some procedures for supersession for particular cases are needed. &Physical disability to discharge the duties of office, dereliction of duty, and other grounds encompassed in the traditional notion of cause should be considered grounds on which the governor or other designated official or public entity may act under appropriate procedures affording due process. &The action should not be made subject to court approval initially, since the matter is one within the functions and responsibilities of the executive branch of government.

Substitution. A substitution may be called for in circumstances where supersession is not necessary. A temporary need may arise when a prosecutor asks to be relieved because of a conflict of interest or, where a prosecutor declines to do so, when substitution appears necessary. &

Const. art. 4, § 9 Removal of Judges, Attorney General, Etc.

Any judge of any court of record, the attorney general, or any prosecuting attorney may be removed from office by joint resolution of the legislature, in which three-fourths of the members elected to each house shall concur, for incompetency, corruption, malfeasance, or delinquency in officer, or other sufficient cause stated in such resolution. But no removal shall be made unless the officer complained of shall have been served with a copy of the charges against him as the ground of removal, and shall have an opportunity of being heard in his defense. &

RCW 43.10.090 Criminal investigations Supervision

Upon written request of the governor the attorney general shall investigate violations of the criminal laws within this state.

If, after such investigation, the attorney general believes that the criminal laws are improperly enforced in any county, and that the prosecuting attorney of the county has failed or neglected to institute and prosecute violations of such criminal laws, either generally or with regard to a specific offense or class of offenses, the attorney general shall direct the prosecuting attorney to take such action in connection with any prosecution as the attorney general determines to be necessary and proper.

If any prosecuting attorney, after the receipt of such instructions from the attorney general, fails or neglects to comply therewith within a reasonable time, the attorney general may initiate and prosecute such criminal actions as he shall determine. &

Conflict of Interest

For a detailed discussion of conflict of interest or disability of prosecuting attorney issues, see RCW 36.27.030 and section 1.2 *supra*.

PART III. INVESTIGATION FOR PROSECUTION DECISION

3.1 Investigative function of prosecutor

(a) although prosecutor ordinarily relies on police and other investigative agencies, prosecutor has an affirmative responsibility to investigate suspected illegal activity when not adequately dealt with by other agencies

(b) unprofessional conduct for prosecutor to knowingly use illegal means to obtain evidence or to employ, instruct, or encourage others to do so

(c) prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel; unprofessional conduct for prosecutor to advise any person to decline to give information to the defense which such person has the right to give

(d) unprofessional conduct for prosecutor to secure attendance of persons for interviews by use of any communication which has appearance of subpoena or other similarly judicial process unless authorized to do so

(e) unprofessional conduct for prosecutor to promise not to prosecute for prospective criminal activity except where such activity is part of officially supervised investigative and enforcement program

(f) prosecutor should avoid interviewing prospective witness except in presence of third person unless prosecutor is prepared to forgo impeachment by the prosecutor s own testimony or to seek leave to withdraw from case in order to present impeaching testimony

Excerpt from Commentary to ABA Standard

Affirmative Responsibility to Investigate. &It is important, therefore, that in some circumstances the prosecutor take the initiative to investigate suspected criminal acts independent of citizen complaints or police activity. &

Illegality in Obtaining Evidence. &Prosecutors, as representatives of the people in upholding the law, should take the lead in assuring that investigations of criminal activities are conducted in accordance with the safeguards of the Bill of **Rights as implemented by legislation and the decisions of the courts.**

Obstructing Communications Between Witnesses and the Defense. Prospective witnesses are not partisans. They should be regarded as impartial and as relating the facts as they see them. &In the event a witness asks the prosecutor or defense counsel, or a member of their staffs, whether it is proper to submit to an interview by opposing counsel or whether it is obligatory, the witness should be informed that, although there is no legal obligation to submit to an interview, it is proper and may be the duty of both counsel to interview all persons who may be witnesses and that it is in the interest of justice that the witness be available for interview by counsel. Counsel may properly request an opportunity to be present at opposing counsel s interview of a witness, but counsel may not make his or her presence a condition of the interview. It is proper to call the attention of the witness to the problem of subscribing to a statement prepared by another person. &

Use of Colorable Judicial Process. &Absent specific statutory subpoena power, a prosecutor s communication requesting a person to appear for an interview should be couched in terms of a request; it should not simulate a process or summons that the prosecutor does not have power to issue.

Promise Not to Prosecute. &[T]his standard recognizes that it is not improper for a prosecutor to promise not to prosecute an informant for specific criminal activity in which the informant may engage as part of a supervised effort to obtain evidence of crime committed by other actors. &

Interviews by the Prosecutor Personally. &The more frequently encountered problem is impeachment of an adverse witness whose testimony varies from what the witness gave the prosecutor before trial. It is here that there may be need to conduct interviews of witnesses with a third person present, since hostile witnesses do not often sign written statements for opposing counsel. Use of a third person is virtually the only effective means of later impeaching such a witness. &Although a lawyer is sometimes permitted to withdraw in order to testify, this is largely a matter entrusted to the court s discretion &It is normally not appropriate for a lawyer to offer impeachment testimony and also remain in the case as counsel for the defendant. &

RPC 3.4 (a) Fairness to Opposing Party and Counsel

A lawyer shall not: (a) Unlawfully obstruct another party s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act &

WSBA Published Informal Opinion 88-2

Advice by Prosecuting Attorneys to Prospective Witnesses

(1) May a prosecutor discourage witnesses from talking with a defense attorney or investigator? After citing the above ABA Standard and Commentary, the Opinion noted: &[A] prosecutor who discourages or otherwise obstructs witnesses from consenting to defense interviews would violate RPC 3.4.

The Opinion additionally cites CrR 4.7(h) s prohibition on any party impeding an investigation, and *State v. Burri,* 87 Wn.2d 175, 550 P.2d 507 (1976) (prosecutor instructed alibi witnesses in special inquiry not to discuss their testimony with defense counsel; the Supreme Court affirmed the trial court s dismissal of the case, noting a defendant s constitutional right to make a full investigation of the facts and applicable law).

(2) May a prosecutor encourage witnesses not to be interviewed unless a prosecutor is present? We believe that encouraging witnesses not to be interviewed unless a prosecutor is present constitutes obstructing access to the witness, which is prohibited by RPC 3.4.

(3) May a prosecutor advise a witness of his or her right to be represented by a person of the witness s choice during a defense interview? We believe it is permissible for the prosecutor to advise a witness of his or her rights as a witness. Those rights include the right, if the witness chooses, to have the prosecution present at a defense interview. The above ABA Standard and Commentary were cited in support of this Opinion.

Case Law Misconduct to Advise Witness Not to Speak with Defense Counsel Unless Prosecutor is Present

State v. Hofstetter, 75 Wn.App. 390, 402-3, 878 P.2d 474, *review denied,* 125 Wn.2d 1012 (Div. 2 1994) (prosecutor engaged in misconduct when he advised witnesses, who, as coconspirators, entered into plea bargains, not to speak with defense counsel unless prosecutor was present, but misconduct did not warrant reversal)

Following the foregoing principles and authorities, we hold that it is improper for a prosecutor to instruct or advise a witness not to speak with defense counsel except when a prosecutor is present. We further hold, a fortiori, that it is improper for a prosecutor to plea bargain in such a way as to impose such instructions or advice on a witness. At least in the absence of extraordinary circumstances, the fact the State is prosecuting a case against the witness does not alter the State's duty not to obstruct access to the witness in the case against the defendant.

Nothing herein is intended to imply that a prosecutor may not inform a witness of his or her right to choose whether to give a pre-trial interview, or of his or her right to determine who shall be present at the interview; like several of the courts quoted above, we recognize that giving information about the existence of a right is different from instructing or advising on how it should be exercised. Nothing herein is intended to imply that a trial court may not reasonably control access to a witness under appropriate circumstances, assuming of course that each party has notice and an opportunity to be heard. Nothing herein is intended to imply that only the prosecutor is bound by the principles we have discussed; we assume, though we need not hold, that defense counsel is bound as well, except when the witness is his or her client. &

In the present cases, the prosecutor not only advised Chambliss and Leonard not to speak with defense counsel unless a prosecutor was present, he also threatened that if they did, the State would withdraw its plea bargain and bring some of [its] focus back onto them. Measured by the principles discussed above, this was prosecutorial misconduct.

(Citations omitted.)

Case Law Prejudicing Defense Witnesses

State v. Kearney, 11 Wn.App. 394, 396-97, 523 P.2d 443 (Div. 2 1974) (prosecutor committed misconduct in advising several of defendant's listed witnesses that defendant had refused to submit to a lie detector test; Held: under the circumstances the charges had to be dismissed since the overly zealous action of the prosecutor effectively denied defendant an opportunity to present his own defense)

It is vital, of course, for prosecuting officials to become aware of all the facts which bear upon the guilt or innocence of a party charged with having committed a crime. Accordingly, those officials may probe the mind of a listed defense

witness to determine what bias or prejudice may lie therein. However, it is singularly inappropriate for such an official to implant in the mind of a potential witness a suspicion that the accused really did commit the crime as evidenced by his refusal to submit to a process which the official knew the accused could refuse with absolute impunity. *See State v. Rowe,* 77 Wn.2d 955, 468 P.2d 1000 (1970). That would be an attempt to implant a bias or prejudice where presumably none existed. We believe the prosecution's approach to all three of these potential witnesses was patently improper. &

Indeed, there is no way to isolate the prejudice resulting from this prosecutorial activity. The defendant has been effectively deprived of character witnesses in a proceeding in which credibility is a most significant factor. In addition, at least a modest notoriety has undoubtedly occurred subsequent to his conviction and incarceration. There is little likelihood that upon retrial, which we would ordinarily order, the defendant could obtain the effective assistance of character witnesses. In our opinion, the totally unwarranted prosecutorial action vitiates the whole proceeding. *State v. Cory,* 62 Wn.2d 371, 382 P.2d 1019 (1963).

We do not, by this opinion, imply that the deputy prosecutor unlawfully tampered with a witness, but we do firmly believe that his overly zealous action effectively denied this defendant an opportunity to present his only defense.

3.2 Relations with prospective witnesses

(a) unprofessional conduct to compensate a witness, other than an expert, for giving testimony; but not improper to reimburse an ordinary witness for reasonable expenses, provided there is not attempt to conceal the fact of reimbursement

(b) prosecutor should advise witness concerning possible self-incrimination and possible need for counsel whenever a prosecutor believes a witness to be interviewed may be the subject of a criminal prosecution

Excerpt from Commentary to ABA Standard

Compensation of Witnesses. Because of the risk of encouraging perjury, or appearing to do so, witnesses may not be compensated by the parties for their testimony but may be paid ordinary witness fees. & As a matter of sound trial tactics, it may be advisable to disclose whatever payments are made.

Self-Incrimination of Witnesses. &[P]rosecutors and their investigators cannot conceal information concerning law violations that come to their attention. & Given the difficulty of predicting the course of future judicial action, and in fairness to the persons interviewed, it is recommended that prosecutors and their investigators warn potential defendants of the privilege against self-incrimination and the possible need for counsel.

SRA Charging and Plea Disposition Standards RCW 9.94A.440(2) Pre-Filing Discussions with Victim(s)

Discussions with the victim(s) or victims representatives regarding the selection or disposition of charges may occur before the filing of charges. The discussions may be considered by the prosecutor in charging and disposition decisions, and should be considered before reaching any agreement with the defendant regarding these decisions.

Sample Memorandum Prosecutor s Duty to Warn Witnesses Concerning Self-Incrimination and Right to Counsel

The following is from a memorandum written in response to a defense motion to disqualify the Kitsap Prosecutor s Office or in the alternative to dismiss due to a witness refusing to testify for the defense and asserting his right against self-incrimination after an interview with a prosecutor wherein the prosecutor warned the witness of potential criminal charges based on the witness s statements

A Prosecutor Has a Duty to Warn a Witness That He or She May Be Subject to Criminal Prosecution Based on the Witness s Probable Testimony. The Defendant is either seeking to dismiss this case or remove the entire Kitsap County Prosecutor s Office based upon the assertion that the deputy prosecuting attorney acted improperly during contact with a potential defense witness. The Defendant s underlying rationale for this motion is the assertion that a deputy prosecuting attorney commits misconduct by informing a defense witness that he or she may be charged with a crime based upon the witness s anticipated testimony that he or she lied to a police officer at the time of the incident or in fact committed the crime, and the defense witness in response to this information chooses to assert his or her constitutional right against self-incrimination.

This very issue arose in *State v. Carlisle,* 73 Wn.App. 678, 871 P.2d 174 (Div. 1 1994).

> Carlisle claims the prosecutor threatened Nathan Wiley with prosecution if he testified for the defense. He argues that the prosecutor s threats resulted in Wiley s decision not to testify, denying him compulsory and due process.

Carlisle, 73 Wn.App. at 679.

Division 1 began its analysis by citing *State v. Burri,* 87 Wn.2d 175, 550 P.2d 507 (1976) (prosecutor instructed alibi witnesses in special inquiry not to discuss their testimony with defense counsel; the Supreme Court affirmed the trial court s dismissal of the case, noting a defendant s constitutional right to make a full investigation of the facts and applicable law), concerning a defendant s right to compulsory process.

Carlisle, supra, continues that if a defense witness is threatened, and those threats effectively keep that witness off the stand, the defendant is deprived of due process of law, citing to federal case law. This did not end the inquiry in Carlisle, though, nor does it here.

> However, a prosecutor should advise a witness of the right against self-incrimination when the prosecutor knows or has reason to believe that the witness may be the subject of a criminal prosecution. 1 American Bar Ass n, Standards for Criminal Justice, Std. 3-3.2(b) (2d ed. 1980). Where the prosecutor simply provides the witness with a truthful warning, no constitutional violation occurs. Thus, a prosecutor s warning to counsel advising of the client s potential liabilities if the client s testimony provides incriminating evidence is not improper.

Carlisle, 73 Wn.App. at 679-80. (Citation omitted.)

The deputy prosecutor herein had a duty under *Carlisle* to warn the witness of his or her right against self-incrimination. He provided a truthful warning to the witness of the consequences of the anticipated testimony.

The Defendant in essence argues that the deputy prosecutor should have said nothing to the witness, allowed the witness to take the stand and incriminate himself or herself, and then charge the witness with a crime based upon the witness testimony. Such a choice by the deputy prosecutor would have been improper under Carlisle, and would have allowed the witness to quite properly

complain in his or her subsequent criminal prosecution that he or she should have been warned by the deputy prosecutor that the witness may be incriminating himself or herself in the trial in this case. Carlisle has eliminated this Hobson's Choice[4] for deputy prosecutors. The deputy prosecutor herein acted properly.

If the Deputy Prosecutor Herein Acted Improperly, the Remedy is Disqualification of That Deputy, Not the Entire Office. In *State v. Stenger,* 111 Wn.2d 516, 760 P.2d 357 (1988), the Supreme Court held in a death penalty case that where the prosecutor, as opposed to a deputy prosecutor, had previously represented the defendant in other criminal cases, the proper remedy was disqualification of the entire office and appointment of a special prosecutor where the State failed to show that it had taken steps to create a "Chinese Wall" between the prosecutor and those in charge of the death penalty case.

> Where the prosecuting attorney (as distinguished from a deputy prosecuting attorney) has previously personally represented the accused in the same case or in a matter so closely interwoven therewith as to be in effect a part thereof, the entire office of which the prosecuting attorney is administrative head should ordinarily also be disqualified from prosecuting the case and a special deputy prosecuting attorney appointed. This is not to say, however, that anytime a prosecuting attorney is disqualified in a case for any reason that the entire prosecuting attorney's office is also disqualified. Where the previous case is not the same case (or one closely interwoven therewith) that is being prosecuted, and where, for some other ethical reason the prosecuting attorney may be totally disqualified from the case, if that prosecuting attorney separates himself or herself from all connection with the case and delegates full authority and control over the case to a deputy prosecuting attorney, we perceive no persuasive reason why such a complete delegation of authority and control and screening should not be honored if scrupulously maintained.
>
> There is a difference between the relationship of a lawyer in a private law firm and a lawyer in a public law office such as prosecuting attorney, public defender, or attorney general; accordingly, where a deputy prosecuting attorney is for any reason disqualified from a case, and is thereafter effectively screened and separated from any participation or discussion of matters concerning which the deputy prosecuting attorney is disqualified, then the disqualification of the entire prosecuting attorney's office is neither necessary nor wise.
>
> Under the facts of the case before us, although the prosecuting attorney did eventually delegate handling of the case to a deputy prosecuting attorney in his office, he did not effectively screen and separate himself from the case but instead maintained quite close contact with it. We need go no further in this capital case in order to conclude that it is appropriate that a special prosecuting attorney be appointed to handle and control the case.
>
> In fairness to the Clark County Prosecuting Attorney, we expressly observe that there is absolutely no question but that he acted in good faith throughout and had only the best interest and motivation for his actions. Under the law relating to professional conflicts of interest, however, that is not material to disqualification on the ground stated.

Stenger, 111 Wn.2d at 522-23. (Footnotes omitted.) (Emphasis added.) *See also State v. Ladenburg,* 67 Wn.App. 749, 840 P.2d 228 (Div. 2 1992) (Pierce County Prosecutor's Office not disqualified from prosecuting nephew of the Prosecutor where the Prosecutor did not have direct involvement in the case, which did not involve the death penalty).

If a deputy prosecutor is found to have acted improperly, the remedy is to remove him or her from the prosecution of the Defendant's case, with another deputy prosecutor assigned to the case with a "Chinese wall" erected between the removed deputy prosecutor and the new deputy prosecutor assigned to the case. The Defendant's motion to disqualify the Kitsap County Prosecutor's Office and/or to dismiss the case must be denied.

Const. art. 1, § 35 Victims of Crimes Rights

> Effective law enforcement depends on cooperation from victims of crime. To ensure victims a meaningful role in the criminal justice system and to accord them due dignity and respect, victims of crime are hereby granted the following basic and fundamental rights.
>
> Upon notifying the prosecuting attorney, a victim of a crime charged as a felony shall have the right to be informed of and, subject to the discretion of the individual presiding over the trial or court proceedings, attend trial and all other court proceedings the defendant has the right to attend, and to make a statement at sentencing and at any proceeding where the defendant's release is considered, subject to the same rules of procedure which govern the defendant's rights. In the event the victim is deceased, incompetent, a minor, or otherwise unavailable, the prosecuting attorney may identify a representative to appear to exercise the victim's rights. This provision shall not constitute a basis for error in favor of a defendant in a criminal proceeding nor a basis for providing a victim or the victim's representative with court appointed counsel.

[4] Warn the witness and face a constitutional challenge by the defendant; fail to warn the witness and face a constitutional challenge by the witness in subsequent prosecution of the witness.

RCW 7.69.030 Rights of victims, survivors, and witnesses

There shall be a reasonable effort made to ensure that victims, survivors of victims, and witnesses of crimes have the following rights:

(1) With respect to victims of violent or sex crimes, to receive, at the time of reporting the crime to law enforcement officials, a written statement of the rights of crime victims as provided in this chapter. The written statement shall include the name, address, and telephone number of a county or local crime victim/witness program, if such a crime victim/witness program exists in the county;

(2) To be informed by local law enforcement agencies or the prosecuting attorney of the final disposition of the case in which the victim, survivor, or witness is involved;

(3) To be notified by the party who issued the subpoena that a court proceeding to which they have been subpoenaed will not occur as scheduled, in order to save the person an unnecessary trip to court;

(4) To receive protection from harm and threats of harm arising out of cooperation with law enforcement and prosecution efforts, and to be provided with information as to the level of protection available;

(5) To be informed of the procedure to be followed to apply for and receive any witness fees to which they are entitled;

(6) To be provided, whenever practical, a secure waiting area during court proceedings that does not require them to be in close proximity to defendants and families or friends of defendants;

(7) To have any stolen or other personal property expeditiously returned by law enforcement agencies or the superior court when no longer needed as evidence. When feasible, all such property, except weapons, currency, contraband, property subject to evidentiary analysis, and property of which ownership is disputed, shall be photographed and returned to the owner within ten days of being taken;

(8) To be provided with appropriate employer intercession services to ensure that employers of victims, survivors of victims, and witnesses of crime will cooperate with the criminal justice process in order to minimize an employee's loss of pay and other benefits resulting from court appearance;

(9) To access to immediate medical assistance and not to be detained for an unreasonable length of time by a law enforcement agency before having such assistance administered. However, an employee of the law enforcement agency may, if necessary, accompany the person to a medical facility to question the person about the criminal incident if the questioning does not hinder the administration of medical assistance;

(10) With respect to victims of violent and sex crimes, to have a crime victim advocate from a crime victim/witness program present at any prosecutorial or defense interviews with the victim. This subsection applies if practical and if the presence of the crime victim advocate does not cause any unnecessary delay in the investigation or prosecution of the case. The role of the crime victim advocate is to provide emotional support to the crime victim;

(11) With respect to victims and survivors of victims, to be physically present in court during trial, or if subpoenaed to testify, to be scheduled as early as practical in the proceedings in order to be physically present during trial after testifying and not to be excluded solely because they have testified;

(12) With respect to victims and survivors of victims, to be informed by the prosecuting attorney of the date, time, and place of the trial and of the sentencing hearing for felony convictions upon request by a victim or survivor;

(13) To submit a victim impact statement or report to the court, with the assistance of the prosecuting attorney if requested, which shall be included in all presentence reports and permanently included in the files and records accompanying the offender committed to the custody of a state agency or institution;

(14) With respect to victims and survivors of victims, to present a statement personally or by representation, at the sentencing hearing for felony convictions; and

(15) With respect to victims and survivors of victims, to entry of an order of restitution by the court in all felony cases, even when the offender is sentenced to confinement, unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment.

RCW 7.69A.030 Rights of child victims and witnesses

In addition to the rights of victims and witnesses provided for in RCW 7.69.030, there shall be every reasonable effort made by law enforcement agencies, prosecutors, and judges to assure that child victims and witnesses are afforded the rights enumerated in this section. The enumeration of rights shall not be construed to create substantive rights and duties, and the application of an enumerated right in an individual case is subject to the discretion of the law enforcement agency, prosecutor, or judge. Child victims and witnesses have the following rights:

(1) To have explained in language easily understood by the child, all legal proceedings and/or police investigations in which the child may be involved.

(2) With respect to child victims of sex or violent crimes or child abuse, to have a crime victim advocate from a crime victim/witness program present at any prosecutorial or defense interviews with the child victim. This subsection applies if practical and if the presence of the crime victim advocate does not cause any unnecessary delay in the investigation or prosecution of the case. The role of the crime victim advocate is to provide emotional support to the child victim and to promote the child's feelings of security and safety.

(3) To be provided, whenever possible, a secure waiting area during court proceedings and to have an advocate or support person remain with the child prior to and during any court proceedings.

(4) To not have the names, addresses, nor photographs of the living child victim or witness disclosed by any law enforcement agency, prosecutor's office, or state agency without the permission of the child victim, child witness, parents, or legal guardians to anyone except another law enforcement agency, prosecutor, defense counsel, or private or governmental agency that provides services to the child victim or witness.

(5) To allow an advocate to make recommendations to the prosecuting attorney about the ability of the child to cooperate with prosecution and the potential effect of the proceedings on the child.

(6) To allow an advocate to provide information to the court concerning the child's ability to understand the nature of the proceedings.

(7) To be provided information or appropriate referrals to social service agencies to assist the child and/or the child's family with the emotional impact of the crime, the subsequent investigation, and judicial proceedings in which the child is involved.

(8) To allow an advocate to be present in court while the child testifies in order to provide emotional support to the child.

(9) To provide information to the court as to the need for the presence of other supportive persons at the court proceedings while the child testifies in order to promote the child's feelings of security and safety.

(10) To allow law enforcement agencies the opportunity to enlist the assistance of other professional personnel such as child protection services, victim advocates or prosecutorial staff trained in the interviewing of the child victim.

(11) With respect to child victims of violent or sex crimes or child abuse, to receive either directly or through the child's parent or guardian if appropriate, at the time of reporting the crime to law enforcement officials, a written statement of the rights of child victims as provided in this chapter. The written statement shall include the name, address, and telephone number of a county or local crime victim/witness program, if such a crime victim/witness program exists in the county.

RCW 7.69A.040 Liability for failure to notify or assure child's rights

The failure to provide notice to a child victim or witness under this chapter of the rights enumerated in RCW 7.69A.030 shall not result in civil liability so long as the failure to notify was in good faith and without gross negligence. The failure to make a reasonable effort to assure that child victims and witnesses are afforded the rights enumerated in RCW 7.69A.030 shall not result in civil liability so long as the failure to make a reasonable effort was in good faith and without gross negligence.

RCW 7.69A.050 Rights of child victims and witnesses

At the time of reporting a crime to law enforcement officials and at the time of the initial witness interview, child victims or child witnesses of violent crimes, sex crimes, or child abuse and the child's parents shall be informed of their rights to not have their address disclosed by any law enforcement agency, prosecutor's office, defense counsel, or state agency without the permission of the child victim or the child's parents or legal guardian. The address may be disclosed to another law enforcement agency, prosecutor, defense counsel, or private or governmental agency that provides services to the child. Intentional disclosure of an address in violation of this section is a misdemeanor.

RCW 10.99.060 Notification of victim of prosecution decision Description of criminal procedures available

The public attorney responsible for making the decision whether or not to prosecute shall advise the victim of that decision within five days, and, prior to making that decision shall advise the victim, upon the victim's request, of the status of the case. Notification to the victim that charges will not be filed shall include a description of the procedures available to the victim in that jurisdiction to initiate a criminal proceeding.

[Note This statute applies only when a domestic violence crime is committed by one family or household member against another. See RCW 10.99.020 for definition of domestic violence crimes and family or household member]

3.3 Relations with expert witnesses

(a) a prosecutor should respect the independence of a retained expert and not seek to dictate the formation of the expert s opinion; a prosecutor should explain the role as being an impartial expert called to aid the fact finders

(b) unprofessional conduct to pay excessive fee to influence expert s testimony or to fix fee contingent upon expert s testimony or result in the case

Excerpt from Commentary to ABA Standard

Advising the Expert Witness. &Nothing should be done by a prosecutor to cast suspicion on the process of justice by suggesting that the expert color an opinion to favor the interests of the prosecutor. &The prosecutor should also explain that the expert is to testify in accordance with the standards of the expert s discipline without regard to what is best for the prosecution.

Fees to Experts. It is important that the fee paid to an expert not serve to influence the substance of the expert s testimony. &

3.4 Decision to charge

(a) decision to institute criminal proceedings should be initially and primarily the responsibility of the prosecutor

(b) no arrest or search warrant should issue without the prosecutor s approval absent exceptional circumstances

(c) prosecutor should establish standards and procedures for evaluating complaints to determine whether to institute criminal proceedings

(d) where law permits citizen to complain directly to judicial officer or grand jury, the citizen should be required to present the complaint for prior approval to the prosecutor

Excerpt from Commentary to ABA Standard

Initiation by Prosecutor. Whatever may have been feasible in the past, modern conditions require that the authority to commence criminal proceedings be vested in a professional, trained, responsible public official. &

Arrest Warrants and Search Warrants. &The prosecutor and police should cooperate to establish workable procedures to this end. &The importance of the prosecutor s approval of applications for arrest warrants applies with at least the same force to applications for search warrants. &

Screening Procedures. &Vesting the primary responsibility for the decision to prosecute in the prosecutor s office requires that orderly procedures be established for the screening of cases initiated by the police. It is highly desirable, as is done in some of the larger prosecution offices, that a complaint unit and an indictment unit serve these functions. &If the prosecutor s screening processes are effective, acquittals should not be frequent. In fact, a high acquittal rate is probably a prime indicator of either inadequate exercise of discretion in making a charge or inadequate preparation for or presentation at trial. But it is the duty of the prosecutor to do justice, not merely to win convictions. &

Citizen Complaints. &Where a magistrate has the power to issue a warrant on the complaint of a citizen, it is desirable that a public prosecutor either endorse the magistrate s approval or be afforded the means of recording his or her reasons for declining prosecution.

SRA Charging and Plea Disposition Standards RCW 9.94A.440(2) Police Investigation

A prosecuting attorney is dependent upon law enforcement agencies to conduct the necessary factual investigation which must precede the decision to prosecute. The prosecuting attorney shall ensure that a thorough factual investigation has been conducted before a decision to prosecute is made. In ordinary circumstances the investigation should include the following: (1) The interviewing of all material witnesses, together with the obtaining of written statements whenever possible; (2) The completion of necessary laboratory tests; and (3) The obtaining, in accordance with constitutional requirements, of the suspect s version of the events.

If the initial investigation is incomplete, a prosecuting attorney should insist upon further investigation before a decision to prosecute is made, and specify what the investigation needs to include.

Exceptions. In certain situations, a criminal complaint may be filed prior to a complete investigation if (1) probable cause exists to believe the suspect is guilty; (2) the suspect presents a danger to the community or is likely to flee if not apprehended; or (3) the arrest of the suspect is necessary to complete the investigation of the crime.

If the exception to the standard is applied, the prosecuting attorney shall obtain a commitment from the law enforcement agency to complete the investigation in a timely manner, and if the subsequent investigation does not produce sufficient evidence to meet the normal charging standard, the complaint should be dismissed.

Citizen Complaint

See CrRLJ 2.1(c) for the process authorized under Washington law for a citizen to institute a criminal non-felony action where the prosecuting authority has declined to proceed.

It is our office s position that CrRLJ 2.1(c) is a judicial usurpation of a legislative and executive function, and accordingly violates the separation of powers doctrine. We have been successful in getting citizen complaints dismissed by our District Court bench based on this argument. *See Lorraine Kirtley v. Diane Frost, Carol Rainey, Michael Stowell, and Does 1-100,* Kitsap County District Court No. 980000004. A memorandum of authorities from the *Kirtley* case is provided at **2.1 Prosecution authority to be vested in a public official.**

Case Law Agreement to Not Prosecute by Police

State v. Reed, 75 Wn.App. 742, 745-46, 879 P.2d 1000 (Div. 1 1994), *review denied,* 125 Wn.2d 1016 (1995) (defendant had agreement with police to drop charges on some drug sales in return for his assistance in making narcotics arrests, but arrests did not occur; Held: absent evidence of detrimental reliance, agreement not enforceable to prohibit prosecutor from filing charges)

> [T]he prosecuting attorney was not a party to the agreement in this case. We hold that the promise by police to "drop charges" exceeded their authority and that, without the involvement of the county prosecutor, such an agreement cannot be enforced as a contract.
>
> The police have no authority to make prosecutorial decisions. The county prosecutor is charged with prosecution of all criminal actions in which the state is a party. RCW 36.27.020(4). The decision whether to file criminal charges is within the prosecutor's discretion. *State v. Judge,* 100 Wn.2d 706, 713, 675 P.2d 219 (1984) (citing *Bordenkircher v. Hayes,* 434 U.S. 357, 365, 98 S.Ct. 663, 669, 54 L.Ed.2d 604 (1978)). The prosecutor may make enforceable agreements to reduce or dismiss charges, *see State v. Sonneland,* 80 Wn.2d 343, 494 P.2d 469 (1972), but because the police did not first obtain the approval or consent of the prosecutor, they had no authority to enter into an enforceable agreement not to prosecute Reed. *State v. Hull,* 78 Wn.2d 984, 989, 481 P.2d 902 (1971) (a police promise that a cooperative witness would not have to testify was held unenforceable because the police had no authority to grant such immunity).
>
> The record is sufficient to establish that Snohomish County prosecutors usually follow charging recommendations made by police pursuant to an agreement between the police and a confidential informant. However, this practice does not convert the police into agents having the power to legally bind the prosecutor to such agreements.
>
> Our holding does not mean that a defendant may never have a remedy if the police breach such a confidential informant agreement. Depending on the nature of the police conduct, an unenforceable agreement with police may be the basis for dismissal under CrR 8.3(b). The trial court properly analyzed Reed's motion under CrR 8.3(b) and under the doctrine of detrimental reliance. The trial court's finding that Reed failed to establish detrimental reliance made it unnecessary for the court to decide the legal issue of whether the doctrine of detrimental reliance applies to such police/informant agreements. Reed has not assigned error to the court's finding that he failed to show detrimental reliance. Thus, we are not required in this case to decide whether the doctrine of detrimental reliance should be extended to apply to such agreements.

Case Law Defendant s Constitutional Right to Notice of the Essential Elements of the Crime *Leach*/*Kjorsvik* Motions

State v. Leach, 113 Wn.2d 679, 782 P.2d 552 (1989) ((1) public indecency complaint was constitutionally defective for failure to specify whether misdemeanor (victim 14 or older) or gross misdemeanor (victim under 14) was being charged and omitting essential facts from which defendant could have made such a determination; Held: conviction on gross misdemeanor reversed. (2) DWI. Held: misdemeanor citation describing offense charged as DWI and listing code section violated was constitutionally sufficient, conviction affirmed)

State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991) (1 robbery charge, where information alleged unlawful taking of property from a person by force, but failed to include intent, information challenged for first time on appeal; Held: intent is a case-created necessary element of robbery, but under *Kjorsvik* post-verdict liberal construction rule, unlawful sufficiently gives notice of intent, conviction affirmed)

ISSUE ONE

> &All essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him.
>
> This conclusion is based on constitutional law and court rule. Const. art. 1, § 22 (amend. 10) provides in part:
>
> > In criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation against him, ...
>
> U.S. Const. amend. 6 provides in part:
>
> > In all criminal prosecutions, the accused shall ... be informed of the nature and cause of the accusation; ...
>
> CrR 2.1(b) provides in part that
>
> the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

Although our robbery statute, RCW 9A.56.190, does not include an intent element, our settled case law is clear that "intent to steal" is an essential element of the crime of robbery. At issue is whether this nonstatutory element should have been included in the information in order to fully inform the defendant of the accusation made against him.

In the case of *State v. Leach,* 113 Wn.2d 679, 689, 782 P.2d 552 (1989), we recently stated that "the 'essential elements' rule requires that a charging document allege facts supporting every element of the offense, in addition to adequately identifying the crime charged". This core holding of Leach requires that the defendant be apprised of the elements of the crime charged and the conduct of the defendant which is alleged to have constituted that crime. Leach explains that merely reciting the statutory elements of the crime charged may not be sufficient.

> Because statutory language may not necessarily define a charge sufficiently to apprise an accused with reasonable certainty of the nature of the accusation against that person, to the end that the accused may prepare a defense and plead the judgment as a bar to any subsequent prosecution for the same offense, mere recitation of the statutory language in the charging document may be inadequate.

Leach, 113 Wn.2d at 688. We have recently reiterated that it is sufficient to charge in the language of a statute if the statute defines the offense with certainty. &

The primary goal of the "essential elements" rule is to give notice to an accused of the nature of the crime that he or she must be prepared to defend against. In Leach, we noted that defendants are entitled to be fully informed of the nature of the accusations against them so that they can prepare an adequate defense.

It is neither reasonable nor logical to hold that a statutory element of a crime is constitutionally required in a charging document, but that an essential court-imposed element of the crime is not required, in light of the fact that the primary purpose of such a document is to supply the accused with notice of the charge that he or she must be prepared to meet. Statutory elements are, of course, easier to ascertain since the statutes are usually cited in the charging document, whereas court-imposed elements must be discovered through at least cursory legal research. This court has stated that defendants should not have to search for the rules or regulations they are accused of violating. We therefore conclude that the correct rule is that all essential elements of an alleged crime must be included in the charging document in order to afford the accused notice of the nature of the allegations so that a defense can be properly prepared.

ISSUE TWO

&Charging documents which are not challenged until after the verdict will be more liberally construed in favor of validity than those challenged before or during trial. We hold that, viewed in this light, the defendant in the present case was afforded adequate notice of the nature and cause of the charge against him and affirm his conviction.

In this case, the defendant did not challenge the sufficiency of the charging document until he appealed following his conviction at a jury trial. Before discussing whether the defendant was afforded adequate notice of the elements of the charge against him, it is first necessary to clarify the standard of appellate review to be used in such cases. Once again, there also exists a significant split of authority among the divisions of the Court of Appeals on the standard of review for challenges to a charging document first raised on appeal.

A challenge to the constitutional sufficiency of a charging document may be raised initially on appeal. However, the question posed here is whether a different standard of review should be applied when, as here, the accused first raises the issue on appeal. &

A different standard of review should be applied when no challenge to the charging document has been raised at or before trial because otherwise the defendant has no incentive to timely make such a challenge, since it might only result in an amendment or a dismissal potentially followed by a refiling of the charge. Applying a more liberal construction on appeal discourages what Professor LaFave has described as "sandbagging". He explains this as a potential defense practice wherein the defendant recognizes a defect in the charging document but foregoes raising it before trial when a successful objection would usually result only in an amendment of the pleading.

Under this rule of liberal construction, even if there is an apparently missing element, it may be able to be fairly implied from language within the charging document. Many cases utilize the *Hagner* [*v. United States,* 285 U.S. 427, 76 L.Ed. 861, 52 S.Ct. 417 (1932)] standard and hold that if the necessary facts appear in any form, or by a fair construction can be found within the terms of the charge, then the charging document will be upheld on appeal. Thus, when an objection to an indictment is not timely made the reviewing court has considerable leeway to imply the necessary allegations from the language of the charging document. &

We hereby adopt the federal standard of liberal construction in favor of the validity of charging documents where

challenges to the sufficiency of a charging document are initially raised after verdict or on appeal, but we further include in that standard both an essential elements prong and an inquiry into whether there was actual prejudice. Not all of the federal cases appear to overtly require both inquiries but the leading case of *Hagner* so suggests. In addition, a number of federal courts in dealing with this issue have gone on to question whether the accused was prejudiced by the inartful or vague language in the charging document.

A close reading of the federal cases shows that the federal standard is, in practice, often applied as a 2-prong test: (1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?

The standard of review we here adopt will require at least some language in the information giving notice of the allegedly missing element(s) and if the language is vague, an inquiry may be required into whether there was actual prejudice to the defendant. The second prong--allowing the defendant to show that actual prejudice resulted from inartful or vague language--affords an added layer of protection to a defendant even where the issue is first raised after verdict or on appeal.

The first prong of the test--the liberal construction of the charging document's language--looks to the face of the charging document itself. The second or "prejudice" prong of the test, however, may look beyond the face of the charging document to determine if the accused actually received notice of the charges he or she must have been prepared to defend against. It is possible that other circumstances of the charging process can reasonably inform the defendant in a timely manner of the nature of the charges. This 2-prong standard of review strikes a balance: on the one hand it discourages the defense from postponing a challenge to the charge knowing the charging document is flawed; on the other hand, it insures that the State will have given fair notice of the charge to the defendant. &

We conclude that the 2-prong standard of postverdict review enunciated herein fairly balances the right of a defendant to proper and timely notice of the accusation against the defendant and the right of the State not to have basically fair convictions overturned on delayed postverdict challenges to the sufficiency of a charging document.

Applying this 2-prong standard of review to the present case, our first inquiry is whether the nonstatutory element of "intent to steal" appears in any form, or by fair construction can be found in this information. In this connection, we observe that it has never been necessary to use the exact words of a statute in a charging document; it is sufficient if words conveying the same meaning and import are used. This same rule applies to nonstatutory elements. It is therefore not fatal to an information or complaint that the exact words of a case law element are not used; the question in such situations is whether all the words used would reasonably apprise an accused of the elements of the crime charged. Words in a charging document are read as a whole, construed according to common sense, and include facts which are necessarily implied.

The State argues that the word "unlawfully" sufficiently alleges the intent to steal element of the crime of robbery. Authority is divided on whether the allegation that an act was done feloniously or unlawfully is a sufficient allegation of criminal intent. This inquiry turns on the elements of the particular crime charged and the meaning to be derived from the language of the charging document. &

In *State v. Hicks,* 102 Wn.2d 182, 683 P.2d 186 (1984), this court found that intent to steal was an essential element of the crime of robbery and if the defendant thought (as was the explanation of the defendant in that case) that he was merely retrieving his own property, that would have constituted a defense to the robbery charge. Under the facts of Hicks, the property taken by the defendant might have been his own property, hence the taking was arguably a lawful taking. Accordingly, this court reversed the conviction for failure of the information to include the "intent to steal" element of robbery and because of a refusal by the trial judge to instruct on this element.

In the present case, however, the information charged that the defendant unlawfully, with force, and against the baker's will, took the money while armed with a deadly weapon. It is hard to perceive how the defendant in this case could have unlawfully taken the money from the cash register, against the will of the shopkeeper, by use (or threatened use) of force, violence and fear while displaying a deadly weapon and yet not have intended to steal the money. The case before us is thus clearly distinguishable from *Hicks.* Giving the information charging this defendant a liberal construction in favor of its validity, reading it as a whole and in a common sense manner, we conclude that it did inform the defendant of all the elements of robbery.

Since we have determined that all of the essential elements of robbery were contained in the charging document, we turn to the second prong of the inquiry and ask whether the defendant has shown that he was nonetheless prejudiced by any

vague or inartful language in the charge. The defendant did not, and does not, make any argument that he had a claim of right to the property taken from the cash register; his defense was simply that he didn't do it. The certificate of probable cause stated that the defendant entered the donut shop at midnight, pulled a knife, held it to the baker's throat and stated, "This is a robbery." In the trial court's "to convict" instruction to the jury setting forth the elements of the offense that had to be proved by the State, the common law intent element was included. Under the facts of this case, we conclude that there was no prejudice to the defendant due to any vague or inartful language in the charging document.

Since we conclude that the robbery charge was sufficient to give the defendant reasonable notice of the elements of the charge against him, and that he suffered no prejudice from the manner in which the crime was charged, there is no reversible error.

Conviction affirmed.

(Citations omitted.) (Footnotes omitted.)

State v. Kitchen, 61 Wn.App. 915, 812 P.2d 888, *review denied*, 117 Wn.2d 1019 (Div. 3 1991) (you delivered controlled substance not enough to convey guilty knowledge, Held: conviction reversed).

State v. Sanchez, 62 Wn.App. 329, 814 P.2d 675 (Div. 3 1991) (Vehicular homicide, Held: causation sufficiently charged under *Kjorsvik* liberal construction rule.)

State v. Dukowitz, 62 Wn.App. 418, 814 P.2d 234 (Div. 1 1991), *review denied,* 118 Wn.2d 1031 (1992) (simple assault conveys all elements, and need not include statement that assault charged is not 1 , 2 or 3 ; assault by definition includes intentional act).

State v. Rhode, 63 Wn.App. 630, 821 P.2d 492 (Div. 1 1991), *review denied,* 118 Wn.2d 1022 (1992) (attempted 1 murder, Held: under *Kjorsvik* liberal construction rule, attempt encompasses substantial step).

State v. Zamora, 63 Wn.App. 220, 817 P.2d 880 (Div. 3 1991) (School zone enhancement elements must be plead and proven beyond a reasonable doubt, Held: sentence enhancement reversed), *abrogated on another ground by State v. Silva-Baltazar,* 125 Wn.2d 472, 886 P.2d 138 (1994) (School zone allegation is a sentencing enhancement, not a definition of an offense).

State v. Hopper, 118 Wn.2d 151, 158-59, 822 P.2d 775 (1992) (*Kjorsvik* post-verdict liberal construction rule; Held: (1) assault includes the element of intent, and therefore construed liberally also includes the knowledge element which was an essential element in this case, (2) technical defect by citing wrong statute is not of constitutional magnitude absent a showing of prejudice by the defendant).

State v. Ferro, 64 Wn.App. 195, 823 P.2d 526 (Div. 1 1992) (Public indecency, where in space for crime description (See notes) was inserted, Held: while documents may be incorporated by reference, See notes not specific enough as to what documents are being incorporated, conviction reversed).

State v. Graham, 64 Wn.App. 305, 824 P. 2d 502 (Div. 1 1992) (2 robbery, Held: non-statutory element of ownership of property taken is someone other than defendant is sufficiently conveyed by unlawfully under *Kjorsvik* liberal construction rule.)

State v. Sanders, 65 Wn.App. 28, 827 P.2d 354, *review denied,* 119 Wn.2d 1024 (Div. 1 1992) (3 malicious mischief where no $$$ amount was alleged and defendant convicted of misdemeanor, Held: Leach distinguished since it is obvious that defendant was charged with misdemeanor since no $$$ alleged [$50 or more is gross misdemeanor], since $$$ not an element of misdemeanor 3 malicious mischief, conviction affirmed).

State v. Gallegos, 65 Wn.App. 230, 828 P.2d 37, *review denied,* 119 Wn.2d 1024 (Div. 1 1992) (Attempted 2 rape, Held: engaging in intercourse is not an element of attempted 2 rape, conviction affirmed).

State v. Hartz, 65 Wn.App. 351, 828 P. 2d 618 (Div. 1 1992) (1 felony murder by robbery, Held: robbery is essential element, but the elements of robbery are not, conviction affirmed).

State v. Bryant, 65 Wn.App. 428, 828 P.2d 1121, *review denied,* 119 Wn.2d 1015 (Div. 1 1992) (2 felony murder, Held: alternative means of proving underlying felony are not elements).

State v. Berglund, 65 Wn.App. 648, 829 P.2d 247, *review denied*, 119 Wn.2d 1021 (Div. 1 1992) (Attempted 2 burglary, Held: attempt is sufficient to convey substantial step under *Kjorsvik* liberal construction).

State v. Johnson, 119 Wn.2d 143, 149-50, 829 P.2 d 1078 (1992) (several defendants charged with unlawful delivery of a controlled substance, and before trial unsuccessfully moved to dismiss contending that the informations were constitutionally defective because they only alleged the defendants unlawfully delivered cocaine and did not specify the defendant knew the identity of the substance delivered; Held: Unlawful delivery of a controlled substance has a necessary element of knowledge and under pre-verdict strict construction rule, convictions must be reversed)

&Nevertheless, when an information is challenged pretrial, defendants need not show they were prejudiced by missing elements. Whether a defendant was prejudiced by a defective information is only to be considered if the information is challenged for the first time after a verdict. *See Kjorsvik,* 117 Wn.2d at 106, 812 P.2d 86; *State v. Hopper,* 118 Wn.2d

151, 155-56, 822 P.2d 775 (1992). Were we to accept the probable lack of prejudice as a justification for finding these informations sufficient, we would encourage defendants with questionable charging documents to defer their motions until after trial. Such "sandbagging" is exactly what we sought to avoid by allowing a liberal construction of informations challenged initially on appeal. *Kjorsvik,* 117 Wn.2d at 103. *See United States v. Hooker,* 841 F.2d 1225, 1230 (4th Cir. 1988).

While it is true informations challenged for the first time after verdict are reviewed for validity under a liberal standard, the same is not true for informations challenged, as these were, before trial. *See Kjorsvik,* 117 Wn.2d at 105. The charging documents in these cases are not to be examined to determine whether the missing elements appear in any form, or by fair construction can be found, and the language must not be "inartful or vague" with respect to the elements of the crime. *See Kjorsvik,* at 106. Rather, due to the context of a pretrial challenge, we construe the charging language strictly; because each petitioner was simply charged with "unlawfully deliver[ing] a controlled substance", the informations failed to contain language clearly suggesting the requisite criminal intent. *See Hooker,* 841 F.2d at 1233 ("[A] facial deficiency in [an information] is even more intolerable because the government had actual notice of the defect well before trial ..."). We decline to find "unlawfully" has the same meaning and import as "knowingly"; "unlawfully", standing alone, is insufficient.

Why the State did not move to amend the informations in these cases and add, at least, that each defendant knew the substance delivered was cocaine is a mystery. Whether motivated by obstinacy or advocacy, the State failed to take advantage of CrR 2.1(e), which allows motions to amend an information at any time prior to the final verdict, as long as substantial rights of the defendant are not prejudiced. Amendments are liberally allowed, with continuances granted to a defendant if necessary to prepare to meet the altered charge. *State v. Pelkey,* 109 Wn.2d 484, 490, 745 P.2d 854 (1987). It is obvious the State could easily have done so with little or no delay in the scheduled trials.

A bright line rule mandating dismissal of defective informations challenged before trial is workable and not unduly harsh, given the liberal amendment rule and the ease with which prosecutors can discern the elements of most common crimes. *See Kjorsvik,* 117 Wn.2d at 102 n. 14, 812 P.2d 86. In addition, such a rule will guide prosecutors and provide them with an incentive to see to it that the charging document is constitutionally sufficient from the time of filing and beyond. This should result in fewer dismissals, since the prosecutors will presumably be more careful if they know an error could result in dismissal of the charge. *Kjorsvik,* 117 Wn.2d at 119 (Utter, J., dissenting).

(Bold emphasis added.)

State v. Sims, 119 Wn.2d 138, 829 P.2d 1075 (1992) (possession of a controlled substance with intent to manufacture or deliver, Held: that common-law element of "guilty knowledge," consisting of understanding of identity of product that is required for offense of unlawful delivery of controlled substance, is not additional element which must be proved to convict of unlawful possession of controlled substance with intent to manufacture or deliver controlled substance, convictions affirmed)

&It is impossible for a person to intend to manufacture or deliver a controlled substance without knowing what he or she is doing. By intending to manufacture or deliver a controlled substance, one necessarily knows what controlled substance one possesses as one who acts intentionally acts knowingly. RCW 9A.08.010(1)(a) & (2). Without knowledge of the controlled substance, one could not intend to manufacture or deliver that controlled substance. Therefore, there is no need for an additional mental element of guilty knowledge.

Where one merely possesses a controlled substance without the statutory element of intent, one is guilty of simple possession under RCW 69.50.401(d), absent unwitting possession. *See State v. Cleppe,* 96 Wn.2d 373, 378-81, 635 P.2d 435 (1981), *cert. denied,* 456 U.S. 1006, 73 L.Ed.2d 1300, 102 S.Ct. 2296 (1982).

Auburn v. Brooke, 119 Wn.2d 623, 627, 635-40, 836 P.2d 212 (1992) (defendants charged by citation with disorderly conduct and hit and run-attended; Held: non-felony defendants charged by citation or complaint have constitutional right to notice of all essential elements of charge in the charging document, convictions reversed without prejudice)

&The essential elements rule applies to all charging documents, including citations used as final charging documents; the recitation of no more than a numerical code section and the title of an offense does not satisfy that rule unless such abbreviated form contains all essential elements of the crime(s) charged. &

&The citation in Brooke simply stated:

"9.40.010(A)(2) Disorderly Conduct."

It is not even apparent from the citation that the numerical section cited refers to the former Auburn City Code, though the parties agree that it does. &

The City of Auburn concedes that the citation did not specify the elements of the offense alleged in the citation.

&Mr. Wandler argues that the citation issued to him, also used as the final charging document, was a complaint and not a citation since he refused to sign it--and also because it was initialed by a city attorney as well as being signed by the issuing police officers.

The critical difference between a citation and a complaint is that a citation is issued by a police officer whereas a complaint is issued and signed by a prosecutor. An officer is allowed to issue a citation without prior approval of a prosecutor, and when signed and certified by the officer and properly filed, it is deemed a lawful complaint for the purpose of initiating prosecution. The signature of the accused thereon is just a promise to appear and allows an officer to release the individual based on that promise.

The charging document in the *Leach* case (Elverston portion) was also unsigned by the accused and signed by both a prosecutor and the issuing police officer. In Leach, we treated that document as a citation rather than a complaint. The Court of Appeals decision in Wandler correctly concluded that lack of the defendant's signature and the presence of a prosecutor's initials did not convert the charging document from a citation into a complaint. However, as noted, even a citation must comport with the essential elements rule.

The charging document in Wandler stated:

"11.56.420 Hit/Run; Attended".

The parties agree the numerical citation refers to the Seattle Municipal Code. &

The City of Seattle also concedes that the citation did not specify the elements of the alleged offense.

&Applying the first prong of *Kjorsvik*, it is apparent from the record that in each of the cases before us the necessary elements of the offenses alleged do not appear in any form in the charging documents. Hence, we do not reach the second or prejudice prong of *Kjorsvik*. And since the essential elements rule applies to misdemeanor and gross misdemeanor citations, the citations herein are defective as final charging documents and the convictions based thereon must be reversed and the charges dismissed without prejudice.

&Furthermore, even if a conviction is reversed due to an insufficient charging document, the result is a dismissal without prejudice to the right of the municipality or state to recharge and retry if it so chooses. Our state and federal constitutions both permit retrial after a conviction is reversed due to a defect in a charging document. Similarly, statutes of limitation usually do not bar recharging a defendant whose conviction has been reversed due to a defective charging document.

Based on the foregoing, petitioner James A. Brooke's conviction for disorderly conduct and petitioner Casper S. Wandler's conviction for hit and run driving are reversed and remanded for dismissal of the charges without prejudice to the refiling of the charges against them.

State v. Davis, 119 Wn.2d 657, 663, 835 P.2d 1039 (1992) (4 assault. Held: *Kjorsvik* post-verdict liberal construction rule; (1) assault reasonably includes the non-statutory element of intent, (2) common law methods of committing assault are not elements, conviction affirmed).

State v. Plano, 67 Wn.App. 674, 838 P.2d 1145 (Div. 1 1992) (4 assault, Held: name of victim is not an element).

State v. Simon, 120 Wn.2d 196, 840 P.2d 172 (1992) (Promoting prostitution of person under 18, Held: age is a necessary element, and under *Kjorsvik*, dismissed without prejudice).

State v. Craven, 67 Wn.App. 921, 841 P.2d 774 (Div. 1 1992) (3 assault; Held: assault sufficient to allege intent under *Kjorsvik* liberal construction).

State v. Schaffer, 120 Wn.2d 616, 845 P.2d 281 (1993) (3 malicious mischief over $50 amended before state rested to misdemeanor charge to conform with proof, Held: amendment charging lesser degree before state rested proper).

State v. Gurrola, 69 Wn.App. 152, 848 P.2d 199, *review denied*, 121 Wn.2d 1032 (Div. 3 1993) (sexual gratification is not an element of child rape).

State v. Armstrong, 69 Wn.App. 430, 848 P.2d 1322, *review denied*, 122 Wn.2d 1005 (Div. 1 1993) (after jury selected, defense moved to dismiss, state sought to amend to add essential element and defense objected, trial court refused to allow amendment, Held: defense objection to amended information was invited error, and court will not review on appeal.).

State v. Johnson, 69 Wn.App. 935, 851 P.2d 701 (Div. 1 1993) (Delivery of controlled substance: Held: unlawful implies guilty knowledge under *Kjorsvik* liberal construction).

Seattle v. Lewis, 70 Wn.App. 715, 718-19, 855 P.2d 327 (Div. 1 1993), *review denied*, 123 Wn.2d 1011 (1994) (Held: charging document need not allege absence of defense).

State v. VanValkenburgh, 70 Wn.App. 812, 856 P.2d 407 (Div. 3 1993) (2 malicious mischief, Held: name of specific property owner not an element).

State v. Valdobinos, 122 Wn.2d 270, 284-88, 858 P.2d 199 (1993) (Conspiracy to deliver controlled substance, Held: conspiracy does not include guilty knowledge element).

State v. Cozza, 71 Wn.App. 252, 858 P.2d 270 (Div. 3 1993) (Indecent liberties, child victim's inability to specify exact date over 3 year period does not violate due process by depriving defendant of reasonable opportunity to raise alibi defense, conviction affirmed).

State v. Wallway, 72 Wn.App. 407, 865 P.2d 531 (Div. 2 1994) (Unlawful manufacture of controlled substance, Held: assuming knowledge is an element, unlawful and manufacture sufficiently convey mens rea under *Kjorsvik* liberal construction, conviction affirmed).

State v. Arseneau, 75 Wn.App. 747, 879 P.2d 1003 (Div. 1 1994), *review denied*, 126 Wn.2d 1006 (1995) (1 incest, Held: a descendent being under age 18 is a defense, but not an element of the crime, *Kjorsvik* liberal construction).

State v. Roberts, 76 Wn.App. 192, 883 P.2d 349 (Div. 1 1994), *review denied*, 126 Wn.2d 1011 (1995) (Drug burn statute, Held: information charging defendant with offering to deliver controlled substance and delivering another substance sufficient under *Kjorsvik* liberal construction to convey element of delivery of non-controlled substance).

State v. Vangerpen, 125 Wn.2d 782, 787-91, 794-95, 888 P.2d 1177 (1995) (defendant charged with attempted 1 murder, but information lacked the necessary element of premeditation, defendant moved to dismiss after the state rested; Held: Johnson pre-verdict strict construction rule applies, and conviction reversed without prejudice for state to refile charges)

> &We have repeatedly and recently insisted that a charging document is constitutionally adequate only if all essential elements of a crime, statutory and non-statutory, are included in the document so as to apprise the accused of the charges against him or her and to allow the defendant to prepare a defense. This "essential elements rule" has long been settled law in Washington and is based on the federal and state constitutions and on court rule. Merely citing to the proper statute and naming the offense is insufficient to charge a crime unless the name of the offense apprises the defendant of all of the essential elements of the crime. Error in a numerical statutory citation is not reversible error unless it prejudiced the accused.
>
> The instructions in this case properly instructed the jury on all the elements of the crime of attempted murder in the first degree. However, proper jury instructions cannot cure a defective information. Jury instructions and charging documents serve different functions.
>
> Although this court has recently liberalized the standard of review for charging documents which are first challenged on appeal, no decision has questioned the constitutionally mandated rule that all essential elements of a charged crime must be included in the charging document. In this case, the sufficiency of the Information was challenged prior to verdict and therefore the liberalized standard of review announced in *State v. Kjorsvik,* 117 Wn.2d 93, 812 P.2d 86 (1991) does not apply.
>
> With the "essential elements rule" in mind, the issue in the present case is whether the information was amended too late in the trial process. The amendment here occurred after both the State and the defendant had rested their cases. The amendment of informations is controlled by former CrR 2.1(e) and cases interpreting that rule. Former CrR 2.1(e) states:
>
> 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.
>
> In *State v. Pelkey,* 109 Wn.2d 484, 491, 745 P.2d 854 (1987), this court held that an information may not be amended after the State has rested its case in chief unless the amendment is to a lesser degree of the same crime or a lesser included offense. Any other amendment is deemed to be a violation of the defendant's article 1, § 22 (amend. 10) right to demand the nature and cause of the accusation against him or her. The *Pelkey* majority stated that such a violation necessarily prejudices this substantial constitutional right within the meaning of CrR 2.1(e). This court therefore held that the trial court committed reversible error when it allowed a midtrial amendment from the crime of bribery to the crime of trading in special influence.
>
> In *Pelkey,* we pointed out that the amendment of an information to charge a different crime after trial has begun is much more likely to cause prejudice to a defendant than is a pre-trial amendment which should be liberally granted. In *Pelkey*, we explained that all the pretrial motions, voir dire of the jury, opening argument, questioning and cross examination of witnesses are based on the precise nature of the charge alleged in the information.
>
> In *State v. Markle,* 118 Wn.2d 424, 823 P.2d 1101 (1992), the trial court had allowed an amendment of the charge from the crime of statutory rape to indecent liberties after the State had rested its case. The State acknowledged that in Pelkey this court held it is automatic reversible error for a trial court to allow the midtrial amendment of an information after the State has rested where the amended charge is a crime that is neither a lesser included offense nor an offense of

lesser degree. In *Markle*, the State asked us to overrule *Pelkey* to the extent of that holding. We unanimously declined to overrule *Pelkey* and held that the midtrial amendment was, under *Pelkey*, "reversible error per se even without a defense showing of prejudice." *Markle*, 118 Wn.2d at 437.

In *State v. Schaffer,* 120 Wn.2d 616, 845 P.2d 281 (1993), we declined to find any per se rule prohibiting amendments during the presentation of the State's case. We explained in *Schaffer* that *Pelkey* only prohibits amendments after the State has rested its case because the likelihood of prejudice is so great. We reiterated the bright line *Pelkey* rule in *Schaffer* when we explained that "[t]here is no need to redraw the line established in *Pelkey* to a point earlier in the criminal process." *Schaffer*, 120 Wn.2d at 622.

In this case, the State argues that this court should hold that *Pelkey* does not prevent the State from amending an information when the amendment corrects an omission of a statutory element when the defendant cannot show any prejudice from the amendment. As noted above, we rejected this argument in *Pelkey* and again in *Markle*; we again do so here.

The State argues that the omission of the element of "premeditation" was only a "scrivener's" error and relies on the cases which hold that technical defects can be remedied midtrial. Convictions based on charging documents which contain only technical defects (such as an error in the statutory citation number or the date of the crime or the specification of a different manner of committing the crime charged) usually need not be reversed. However, omission of an essential statutory element cannot be considered a mere technical error. Sometimes errors made in charging documents are oversights in omitting an element of the crime, but for sound policy reasons founded in our state and federal constitutions, this court has nonetheless consistently adhered to the essential elements rule.

In the present case, the information alleged only intent to cause death, not premeditation. Therefore, the State failed to charge one of the statutory elements of first degree murder and instead included only the mental element required for second degree murder. The State seeks to distinguish *Pelkey* and *Markle* on the basis that in those cases the State sought to change the crime charged after the State had rested, while in this case the State merely seeks to add an essential element. The fallacy in this argument is that by adding an element, the State changed the crime charged from attempted murder in the second degree to attempted murder in the first degree.

This court drew a bright line in *Pelkey*, which we adhered to in *Markle* and in *Schaffer*. The rule that any amendment from one crime to a different crime after the State has rested its case is per se prejudicial error (unless the change is to a lesser included or lesser degree crime) protects the constitutional right of the accused to be informed of the nature of the offense charged. A change in the rule would necessitate a reversal of both *Pelkey* and *Markle* and this we decline to do. &

&When a conviction is reversed due to an insufficient charging document, the result is a dismissal of charges without prejudice to the right of the State to recharge and retry the offense for which the defendant was convicted or for any lesser included offense. &

&We decline the invitation to find the defendant guilty of attempted murder in the second degree, because that is not the crime which the jury found the defendant had committed. In a case where there is sufficient evidence to support the jury's verdict, as the trial court ruled there was here, it would be a usurpation of the jury's function for an appellate court to find the defendant guilty of a different crime than that returned in the jury's verdict. Additionally, it would result in overruling the recent cases from this court discussed above. If we were to remand for imposition of a conviction of attempted murder in the second degree, it would set a troublesome precedent. If we were to so rule, then in a future case, no matter how serious the crime, if the charging document omitted one or more elements of a more serious crime and inadvertently listed only the elements of a minor crime, the appellate court would have to remand for imposition of a sentence for only the minor crime. No precedent has been cited or located for such a result. This court and the United States Supreme Court have consistently held that the State is not foreclosed from refiling charges when a conviction is reversed because of an insufficient charging document.

Additionally, it is possible for a charging document to inadvertently omit one or more elements of the crime sought to be charged and succeed in charging no crime at all. In that case, under existing law, the defendant could be recharged with the crime originally sought to be charged. It would result in an anomalous situation if we accepted the request that the defendant be convicted of only attempted murder in the second degree in this case. In future cases, an information which happened to charge a lesser crime than intended by the State would result in the defendant being sentenced only on the lesser crime. However, a reversal of a conviction based on an information which charged no crime at all would result in a dismissal that allowed the State to refile corrected charges. We cannot countenance such an anomalous result. We refuse

the defendant's request to remand this case for imposition of sentence for the crime of attempted murder in the second degree. Rather, we reverse the defendant's conviction and dismiss the charges without prejudice to the right of the State to recharge and retry if it so chooses.

(Footnotes omitted.)

State v. Brett, 126 Wn.2d 136, 154-55, 892 P.2d 29 (1995), *cert. denied,* 516 U.S. 1121, 133 L.Ed.2d 858, 116 S.Ct. 931 (1996) (Held: aggravated circumstances are not elements of the crime, but rather aggravation of penalty factors).

State v. Holland, 77 Wn.App. 420, 891 P.2d 49, *review denied*, 127 Wn.2d 1008 (Div. 3 1995) (Child molestation with 3 counts alleged over 3 separate periods of time, Held: defendant given adequate notice of 3 charges and 3 time periods, state not required to fix an exact time of offense when it cannot reasonably do so, *Kjorsvik* liberal construction).

State v. Tang, 77 Wn.App. 644, 893 P.2d 646, *review denied*, 127 Wn.2d 1017 (Div. 1 1995) (Vehicular homicide. Held: information alleging defendant drove DUI and thereby caused death is sufficient under *Vangerpen* strict construction to advise defendant of the need to prove a causal connection between driving and death).

State v. Rodriguez, 78 Wn.App. 769, 771, 898 P.2d 871 (Div. 1 1995), *review denied*, 128 Wn.2d 1015 (1996) (Held: rule that right to be informed of nature of charges is not violated when defendant is found guilty as accomplice even though information did not expressly charge aiding or abetting or refer to other persons applies with equal force following amendment to accomplice liability statute).

> &An accused has a constitutional right to be informed of the nature of the charges against him or her. Washington courts have held that this right is not violated when a defendant is found guilty as an accomplice even though the information did not expressly charge aiding or abetting or refer to other persons. *See, e.g., State v. Davenport,* 100 Wn.2d 757, 764-65, 675 P.2d 1213 (1984); *State v. Carothers,* 84 Wn.2d 256, 260, 525 P.2d 731 (1974), *overruled on other grounds, State v. Harris,* 102 Wn.2d 148, 685 P.2d 584 (1984); *State v. Frazier,* 76 Wn.2d 373, 375-77, 456 P.2d 352 (1969); *State v. Thompson,* 60 Wn.App. 662, 666, 806 P.2d 1251 (1991).

State v. Bacani, 79 Wn.App. 701, 703, 902 P.2d 184 (1995), *review denied*, 129 Wn.2d 1001 (1996) (Held: attempted 1 robbery has an essential nonstatutory element that ownership of the property taken was in some person other than the defendant, and under Vangerpen pre-verdict strict construction rule, unlawful and steal do not convey essential nonstatutory ownership element, conviction reversed and dismissed without prejudice to refile). Note Judge Grosse s concurring opinion concerning the 1903 authority that steal does not include the property was owned by someone other than the defendant

> &The reasoning supporting the 1903 decision in *State v. Morgan,* 21 Wash. 226, 71 P.2d 723 (1903), is as dead as the judges who authored it.

State v. Tunney, 129 Wn.2d 336, 340-41, 917 P.2d 95 (1996) (3 assault, Held: without deciding whether knowledge that the victim is a police office is an element, conviction affirmed under *Kjorsvik* liberal construction rule)

> &In this case, the information omitted the element that Mr. Tunney knew the victim was a police officer. We agree with the Court of Appeals that the information was nonetheless sufficient under the liberal construction rule because knowledge of the victim's status can be fairly implied from the information. An information that alleges assault can be fairly construed as also alleging the mental element of intent or knowledge. *Hopper,* 118 Wn.2d at 158-59. When the crime is defined by an act and result, as in this case, the mental element relates to the result as well as the act. Here, the mental element (knowledge) relates to both the act (assault) and the result (assault of a police officer). Moreover, the charge specifically refers to the victim's status in three separate places and states the victim was "a law enforcement officer who was performing official duties at the time of the assault." Clerk's Papers at 15. It can be fairly implied from the references to the victim as a police officer and the use of the term assault that knowledge of the victim's status is an element of the crime. Under the liberal construction, Mr. Tunney was given sufficient notice of the charge.

State v. Hull, 83 Wn.App. 786, 800, 924 P.2d 375 (Div. 3 1996), *review denied,* 131 Wn.2d 1016 (1997) (state amended after resting to allege a statutory element, Held: per se reversible to allow state after resting to amend to add an uncharged element, dismissed without prejudice)

> &The *Pelkey* court articulated a bright-line rule: "A criminal charge may not be amended after the State has rested its case in chief unless the amendment is to a lesser degree of the same charge or a lesser included offense." *Id.* at 491. An amendment under these circumstances is reversible error per se, and the defense is not required to show prejudice. *State v. Markle,* 118 Wn.2d 424, 437, 823 P.2d 1101 (1992); *cf. State v. Schaffer,* 120 Wn.2d 616, 621, 845 P.2d 281 (1993) (distinguishing between mid-trial amendments before and after the close of the State's case in chief).
>
> The State argues the bright-line *Pelkey* rule should not apply in this case, because the final amendment of the information did not allege a new and different crime, but merely added the word "required," which had been omitted inadvertently in the earlier informations.

The Supreme Court rejected this argument in *State v. Vangerpen,* 125 Wn.2d 782, 888 P.2d 1177 (1995), in which an information purporting to allege attempted first-degree murder inadvertently omitted the statutory element of premeditation.

State v. Williamson, 84 Wn.App. 37, 924 P.2d 960 (Div. 2 1996) (Obstructing a public servant by hinder, delay, obstruct charged for defendant s statement that he was Christopher Columbus, Held: evidence did not prove conduct of hinder, delay or obstruct, but uncharged alternative means of false statement, reversed even under *Kjorsvik* liberal construction, and dismissed without prejudice).

State v. Chaten, 84 Wn.App. 85, 925 P.2d 631 (Div. 1 1996) (defendant moved to dismiss 2 assault charge after state rested, claiming necessary element of intent not included in information; Held: *Vangerpen* pre-verdict strict construction rule applies, and even though 2 assault has a necessary element of intent, the term assault is commonly understood as an intentional act, so conviction affirmed).

State v. Ralph, 85 Wn.App. 82, 930 P.2d 1235 (Div. 3 1997) (defendant moved to dismiss theft of a firearm charge after both sides had rested challenging the sufficiency of the charging document; Held: *Vangerpen* pre-verdict strict construction rule is controlling and information strictly construed, information alleging defendant did steal firearms was inadequate to set forth essential elements of (1) ownership by someone other than the defendant and (2) an intent to deprive, conviction reversed and dismissed without prejudice to refile).

State v. Bandura, 85 Wn.App. 87, 94-97, 931 P.2d 174, *review denied,* 132 Wn.2d 1004 (Div. 2 1997) (defendant asserted that he had a right to be not be tried on lesser included offenses until he knowingly and voluntarily consented on the record, and that since he did not waive this right on the record, he received ineffective assistance of counsel when his attorney submitted lesser included offense instructions; Held: a defendant has no constitutional right to be tried only for the specific offense charged since he has notice not only of the specific offense, but of any lesser included offenses)

> &The constitution does not support Bandura's premise. Although an accused has a constitutional right to notice of the crime with which he or she is charged, this right does not include a right to be tried for only the specific crime charged, or, concomitantly, a right not to be tried for a lesser included offense. Because a defendant is deemed to have notice not only of the specific crime charged, but also of any lesser included offenses, the right to notice is only a right to be tried on a charge "contained in" the indictment or information. It precludes the State from charging one offense and then convicting "of a separate and distinct or a nonincluded offense." It does not, however, preclude the State from charging one offense and then convicting of a lesser included offense.
>
> Additionally, history and the case law refute Bandura's premise. "At common law the jury was permitted to find the defendant guilty of any lesser offense necessarily included in the offense charged." The purpose was to aid the prosecution when its proof failed to establish some element of the specific crime charged. Congress codified the common law by statute in 1872, and by court rule in 1944. Washington Territory codified the common law in 1854 and 1881, and Washington State codified it again, at least partially, in 1909. Today, as a general rule, a court can give an otherwise appropriate lesser included offense instruction on request of either the state or the accused, or even on the court's own initiative. Clearly, this history is inconsistent with the accused's having a right to be tried only on the specific crime charged, or, conversely, a right not to be tried on a lesser included offense. We conclude that Bandura's premise is false, and that nothing in the present record indicates ineffective assistance of counsel.

(Bold emphasis added.) (Footnotes omitted.)

State v. Medlock, 86 Wn.App. 89, 935 P.2d 693, *review denied,* 133 Wn.2d 1012 (Div. 3 1997) (defendant moved prior to verdict to dismiss information charging 1 felony murder with robbery as the felony, or in the alternative 2 felony murder, with assault as the felony, claiming that the information was defective since it did not list the elements of the predicate felonies; Held: elements of underlying felonies are not elements of the crime of felony murder, conviction affirmed.)

> &When an information is challenged pretrial it is strictly construed. *State v. Johnson,* 119 Wn.2d 143, 150, 829 P.2d 1078 (1992). An information is insufficient when it does not set forth all the necessary elements of a charge. Id. In Washington, the elements of the underlying felony are not elements of the crime of felony murder. Although the underlying crime itself is an element in felony murder, the defendant is not actually charged with that crime. The predicate felony is a substitute for the mental state which the prosecution would otherwise be obligated to establish. The information did not have to set forth the elements of either of the predicate felonies to be sufficient. Thus, the court did not err in denying the motion to dismiss.

(Citations omitted.)

State v. Taylor, 91 Wn.App. 606, 958 P.2d 1032 (Div. 2 1998), *review granted,* 137 Wn.2d 1007 (1999) (Fourth degree assault, where charging document failed to include intent element; Held: charging document defective, conviction reversed).

State v. Moavenzadeh, 135 Wn.2d 359, 956 P.2d 1097 (1998) (Ten of 18 possession of stolen property, theft and conspiracy

convictions reversed; Held: possession of stolen property includes nonstatutory element of knowledge property is stolen, allegation of theft in second, without any mention of value of property stolen, is insufficient, and conspiracy charge requires allegation of an agreement to commit a crime and the taking of a substantial step towards the completion of that agreement).

Kitsap Prosecutor s Office Sample Follow-up Request

OFFICE OF THE
KITSAP COUNTY PROSECUTING ATTORNEY
Russell D. Hauge, Prosecuting Attorney

Criminal & Administrative Divisions
Kitsap County Courthouse, 614 Division Street, MS-35
Port Orchard, Washington 98366-7148
(360) 337-7174; Fax No. (360) 337-4949

Bremerton Municipal Court Division
239 Fourth Street
Bremerton, Washington 98337
(360) 478-2334; Fax No. (360) 478-2303

REQUESTEQUEST EQUEST FOREQUEST FOR FOLLOW-UPUP INVESTIGATION

Bainbridge Island PD. Fax # (206) 780-8596	Humane Society. Fax # 698-9668	Suquamish PD. Fax # (360) 598-4414
Bremerton PD (Det. _____ _____ _____ __) Inter-office mail	KCSO. Inter-office mail. MS-37	WSP. Inter-office mail
Bremerton PD (Officer ___ _____ _____ __) Inter-office mail	NCIS. Fax # 476-8849	WSP. (Lab Analysis) Inter-office mail
CPS. 3423-6th Street, Ste 217, Bremerton, WA 98312	Port Orchard PD. Inter-office mail	Other. _____
Fish & Wildlife. Fax # (360) 902-2942	Poulsbo PD. Fax # (360) 779-4433	

From: _____, DPA [Direct # _____]
Date of Request: _____ Incident Date: _____
Suspect: _____ Our File #:_____
Report No: _____ Officer/Detective: _____ Badge #: _____
Request for Follow-up Investigation; Date Sent _____

InvestigationInvestigation Investigation Requested
_____
_____

LabLab Lab Analysis Lab Analysis Lab Analysis Requested
_____
_____

Please Note. Need one week before hearing/trial, which is scheduled for _____

3.5 Relations with grand jury

(a) where a prosecutor is authorized to act as legal advisor, the prosecutor may explain the law and express an opinion of the legal significance of evidence, but should give due deference to its status as an independent legal body

(b) prosecutor should not make statements or arguments that would be impermissible at a jury trial

(c) prosecutor s communications and presentations should be on the record

Excerpt from Commentary to ABA Standard

&[A] prosecutor must not take advantage of his or her role as the ex parte representative of the state before the grand jury to unduly or unfairly influence it in voting on charges brought before it. &

3.6 Quality and scope of evidence before grand jury

(a) prosecutor should only present evidence which would be admissible at trial; however, prosecutor may present witnesses to summarize evidence which prosecutor believes he or she will be able to present at trial

(b) prosecutor shall not knowingly fail to disclose evidence which will tend substantially to negate guilt

(c) prosecutor should recommend not to indict if it is believed that the evidence does not warrant indictment under the law

(d) prosecutor should not seek to compel potential defendant s testimony without informing witness that charges may arise and that the witness should seek independent legal advice concerning rights

(e) prosecutor should not compel appearance of witness who states in advance an intent to exercise constitutional privilege not to testify, unless prosecutor intends to seek a grant of immunity

Excerpt from Commentary to ABA Standard

&The need to use a summary of available evidence may arise in cases involving voluminous records or where an absent witness has given a written statement but is unavailable and circumstances justify prompt grand jury action. &The obligation to present evidence that substantially tends to negate the guilt of the accused flows from the basic duty of the prosecutor to seek justice. &

3.7 Quality and scope of evidence for information

where prosecutor is empowered to charge by information, the prosecutor s decisions should be governed by 3.6 and 3.9

3.8 Discretion as to noncriminal disposition

(a) prosecutor should explore availability of noncriminal disposition, including programs of rehabilitation, in deciding whether to press criminal charges; the nature of the offense, especially in the case of a first offender, may warrant noncriminal disposition

(b) prosecutors should be familiar with social agency resources which can assist in the evaluation of cases for diversion from the criminal process

Excerpt from Commentary to ABA Standard

&National studies of the criminal justice system have repeatedly recommended diversion to other community resources of offenders in need of assistance for whom criminal prosecution is unwarranted. &Another technique of long standing is for prosecutors not to prosecute an offender who has agreed to enter the military service, who has obtained new employment, or has embarked in some other manner on what can broadly be considered a rehabilitative program. &

&Prosecution, meanwhile, should be deferred or dismissed when a case is turned over to a probation or parole department. Hopefully, a combination of jobs and counseling will give the charged person a stable base in the community. Where diversion of the defendant is successful, the dismissal of charges or the suspension of sentence will be appropriate.

Deferred Prosecution RCW 10.05

RCW 10.05 authorizes a court to continue a non-felony case for 2 years upon defendant s petition under oath that the wrongful conduct charged is the result of or caused by alcoholism, drug addiction, or mental problems for which the person is in need of treatment and unless treated the probability of further reoccurrence is great & RCW 10.05.020(1). Upon successful completion of the two-year treatment program, the court shall dismiss the charges pending against the defendant. RCW 10.05.120.

Abad v. Cozza, 128 Wn.2d 575, 587, 589, 911 P.2d 376 (1996)

Deferred prosecution is a special preconviction sentencing alternative that is available to petitioners who acknowledge their culpability and need for treatment. As a condition for the granting of a deferred prosecution, the petitioner must state under oath the wrongful conduct charged took place and resulted from a condition amenable to treatment. The petitioner acknowledges advisement of rights as an accused. The petitioner knowingly and voluntarily stipulates to the admissibility of the facts in the police report, and acknowledges the report and sworn statement will be admitted in any postrevocation trial or hearing and used to support a finding of guilty. Plainly, this means that the petitioner agrees to waive the right to raise other defenses, to introduce other evidence, to question or call witnesses, and to a jury. This is the import of the Legislature's strong statutory waiver language and the abbreviated structure of the postrevocation trial.

The Legislature determined that deferred prosecution is a valuable preconviction sentencing alternative for people who are culpable, but require treatment. RCW 10.05.020. But as an alternative to a formal trial, sentencing, and, in many cases, incarceration, the Legislature has conditioned the grant of deferred prosecution to these persons upon a waiver of the rights to a jury and to present evidence in a postrevocation trial if the deferred prosecution order is revoked because they are unable or unwilling to carry out treatment or they commit a new crime. The Legislature may condition the privilege of deferred prosecution on such a waiver so long as the petitioner is fully advised of the consequences of his or her participation in the deferred prosecution program. The Spokane County District Court deferred prosecution form adopted pursuant to local rule is consistent with the statute.

State ex rel. Schillberg v. Cascade Dist. Court, 94 Wn.2d 772, 621 P.2d 115 (1980) (RCW 10.05.030 requires prosecutor s consent as a precondition of entry into deferred prosecution; Held: provision unconstitutional since power to continue arraignment and refer a person for diagnostic evaluation under statute permitting deferral of prosecution for person whose wrongful conduct was result of or caused by alcohol problems was essentially judicial, and (2) delegation of legislative authority to prosecutor by requiring prosecutor's consent to deferral of prosecution for person whose wrongful conduct was caused by or result of alcohol problems was unconstitutional, in that delegation was not accompanied by any standards to guide exercise of such authority.)

State v. Glasser, 37 Wn.App. 131, 678 P.2d 827, *review denied*, 102 Wn.2d 1008 (Div. 1 1984) (trial court lacks authority to defer a prosecution after a defendant has been tried and convicted).

State v. Hayes, 37 Wn.App. 786, 788, 683 P.2d 237, *review denied,* 102 Wn.2d 1008 (Div. 1 1984) (a superior court lacks authority to defer a prosecution under RCW 10.05; It is clear that the Legislature intended that deferred prosecution be made available in misdemeanor cases only at the district court level.).

State v. Kuhn, 74 Wn.App. 787, 875 P.2d 1225 (Div. 2 1994), *review denied*, 127 Wn.2d 1017 (1995) (Subsequently convicted, for purposes of statute requiring revocation of deferred prosecution if defendant is subsequently convicted of similar

offense while in deferred prosecution program, means that defendant is adjudged guilty of subsequent similar offense, and does not require that subsequent conviction be fully reviewed and upheld on appeal; Held: trial court must revoke a deferred prosecution if the defendant is subsequently convicted of a similar offense).

State v. Rushing, 77 Wn.App. 356, 890 P.2d 1077 (Div. 3 1995) (defendant is not denied equal protection by prosecutor s decision to file felony elude and DUI charges in superior court, thereby precluding defendant from seeking deferred prosecution)

State v. Higley, 78 Wn.App. 172, 186, 902 P.2d 659, *review denied*, 128 Wn.2d 1003 (Div. 2 1995) (trial court has authority under CrRLJ 8(a) to dismiss a deferred prosecution without prejudice to the State filing vehicular assault charges)

> An order terminating deferred prosecution is different from an order dismissing without prejudice. An order terminating deferred prosecution does not disturb the underlying charges and moves the case forward to trial or plea. An order of dismissal without prejudice annuls the underlying charges and ends the case, subject to refiling.
>
> A motion for an order terminating deferred prosecution is governed, at least in part, by RCW 10.05.090 and RCW 10.05.100. RCW 10.05.090 permits the court to terminate a defendant's treatment plan if he or she fails or neglects to perform it. RCW 10.05.100 requires the court to terminate a defendant's treatment plan if he or she is convicted of a new similar offense.
>
> A motion for an order dismissing without prejudice is governed by CrRLJ 8.3(a). That rule provides:
>
> > The court may, in its discretion, upon motion of the prosecuting authority setting forth the reasons therefor, dismiss a complaint or citation and notice.
>
> Here, we are dealing with a motion to dismiss without prejudice. Thus, CrRLJ 8.3(a) applies. The State gave a valid reason for dismissal when it showed that it was reasonably unaware of Dixon's injuries when Higley was granted deferred prosecution, and that based on new information it now wished to file a felony charge in Superior Court.

State v. Hahn, 83 Wn.App. 825, 924 P.2d 392 (Div. 2 1996), *review denied,* 131 Wn.2d 1020 (1997) (RCW 10.05.010 providing for deferred prosecution program for those charged with misdemeanor or gross misdemeanor limits eligibility for deferred prosecution to one time in five-year period, and treats voluntary withdrawals from program no differently than involuntary terminations therefrom).

Compromise of Misdemeanors RCW 10.22

RCW 10.22.010 authorizes the court to dismiss certain types of non-felony cases where the person injured by the act constituting the offense has a civil remedy except when the offense was committed (1) by or upon an officer while in the execution of the duties of his or her office; (2) riotously; (3) with an intent to commit a felony, or (4) by one family or household member against another as defined in RCW 10.99.020(1) and was a crime of domestic violence as defined in RCW 10.99.020(2).

> The policy of the compromise of misdemeanor statute is to avoid prosecution of minor offenders and to provide restitution to crime victims, as well as favoring the vesting of discretion in the trial courts to compromise minor offenses. The vesting of a discretionary power in the district courts operates as a check and balance against the much greater discretionary power of the police to decide when to arrest and of the prosecutor when to prosecute. A trial court s impartial judgment in determining whether to dismiss the charge when based upon restitution brings to bear many factors important in the furtherance of justice which are not within the purview of the police and prosecutor.

Ferguson, Wash.Crim.Prac. and Proc., § 702, at 122-23.

RCW 10.22 applies to gross misdemeanor as well as misdemeanor offenses. *State v. Britton,* 84 Wn.App. 146, 925 P.2d 1295 (Div. 1 1996) (3 theft).

RCW 10.22 does not apply to juvenile offender proceedings, including diversion. RCW 13.04.450.

RCW 10.22 is not appropriate for reckless driving charges. Compromise of misdemeanor should be permitted only for traffic offenses whose elements include injury to persons or property. *Seattle v. Stokes,* 42 Wn.App. 498, 712 P.2d 853 (Div. 1 1986).

Kitsap Prosecutor s Office Pretrial Diversion Agreement

While the Kitsap Prosecutor s Office does not have a pre-charging diversion program for adult offenders, we do offer a pre-trial diversion agreement in some charged misdemeanor and gross misdemeanor cases when evidentiary problems make conviction on the original charge doubtful and/or a request from the victim is made which is not the result of pressure from the defendant and the defendant has minimal prior criminal activity.

These agreements have been especially useful in encouraging perpetrators in domestic violence cases to agree to be supervised by our probation department and to commit to the successful completion of alcohol/drug treatment and/or domestic violence perpetrator s counseling where the victim has recanted or is otherwise unavailable, evidentiary problems exist, and/or the family intends on remaining together.

We have two types of agreements one where the charges are reduced at the end of the diversion period and the defendant agrees to plead guilty; and the other where the charges are dismissed at the end of the diversion period.

Many prosecutors offices use continuances for dismissal, but have difficulty if the defendant breaches the agreement since the

evidentiary problems still exist or have gotten worse over time. Our PDA avoids this problem by requiring the defendant to waive virtually every constitutional right, and upon a breach the case is handled similarly to revoked deferred prosecutions under RCW 10.05.

I am providing the PDA to amended charges version. The PDA to dismissal is in the same format except the portion concerning what is to occur upon the defendant s compliance.

Pretrial Diversion Agreement

COMES NOW the Plaintiff, STATE OF WASHINGTON, by and through _____, Deputy Prosecuting Attorney, and the Defendant, by and through his/her attorney _____, and hereby enter the following pretrial diversion agreement (hereafter Agreement)

Defendant s Agreement

1. **Waiver of Speedy Trial (CrRLJ 3.3(j)).** The Defendant understands that he/she has the right to be tried within 90 days following his/her arraignment date. He/she further understands that if he/she does not receive a trial within this time period that this case may be dismissed with prejudice unless he/she waives this right. The Defendant hereby waives his/her right to speedy trial to _____.

2. **Waiver of Jury Trial (CrRLJ 6.1.1(a)).** The Defendant understands that he/she has the right to trial by jury unless he/she waives the right to a jury trial. The Defendant hereby waives his/her jury trial right and requests that his/her guilt or innocence be decided by a judge.

3. **Stipulation to Admissibility of Reports (CrRLJ 6.1.2(b)).** The Defendant wishes to submit the case on the record. He/she understands that this means that if a judge finds that the Defendant is in breach of this Agreement, the judge will read the police reports and other materials submitted by the prosecuting authority and, based solely upon that evidence, the judge will decide if the Defendant is guilty or not guilty of the crime(s) charged herein. The Defendant understands that it is very likely the judge will find the Defendant guilty since the only evidence the judge will consider are the reports and other materials submitted by the prosecuting authority.

The Defendant understands that, by this process, he/she is giving up the constitutional right to a jury trial, the right to hear and question witnesses, the right to call witnesses in his/her own behalf, and the right to testify or not to testify.

The Defendant understands that the maximum sentence for the crime(s) charged of

_____ is/are _____ days in jail and/or a $_____ fine,
_____ is/are _____ days in jail and/or a $_____ fine,

plus costs and assessments, and that the judge can impose any sentence up to the maximum, no matter what the prosecution or the defense recommends.

No one has made any threats or promises to get the Defendant to submit this case on the record other than the Plaintiff s promises made in this Agreement.

4. **Waiver of Defendant s Right to be Present in Court.** The Defendant understands and agrees that he/she shall be present in court at all future court hearings herein. The Defendant understand that he/she has the right to be present in court on any motion to revoke this Agreement, and/or at a subsequent trial to determine the Defendant s guilt if this Agreement is found by the Court to have been violated by the Defendant. If the notice requirements as discussed in the following paragraphs are satisfied, the Defendant hereby waives his/her right to be present in court (1) on any motion to revoke this Agreement and/or (2) at a subsequent trial to determine the Defendant s guilt.

The Defendant further understands and agrees that the Court may proceed without the Defendant being present in court if the Plaintiff files a motion to revoke this Agreement and the Defendant fails to appear at the hearing on the motion so long as a notice of the hearing date is sent to the Defendant s attorney or the Defendant s last known address if the Defendant is not represented by an attorney.

The Defendant further understands and agrees that the Court may proceed to determine the Defendant s guilt or innocence on the criminal charge(s) herein, and enter judgment and sentence against the Defendant if he/she is found guilty, all without the Defendant being present in court [trial in absentia] if the Court revokes this Agreement after the Plaintiff files a motion to revoke, and the Defendant fails to appear at any hearing on the motion as discussed in the previous paragraphs.

Prosecution s Agreement

1. **Amendment of Charge(s).** The Plaintiff agrees to move to amend the charge(s) herein [and the Defendant agrees to plead guilty] to _____ at a hearing to be scheduled in approximately [one year] [two years] [five years] from the signing of this Agreement upon the Defendant satisfying the following conditions

The Defendant shall have no criminal law violations; and

The Defendant shall pay court costs of [$500] [$_____]; and

The Defendant shall pay any bench warrant costs imposed herein; and

Restitution. The Defendant agrees to pay the following restitution to the Court Clerk, who shall disseminate the moneys collected as follows

$ Amount	Name	Address, City, Zip Where Restitution to be Sent

The Defendant shall pay the total financial obligation agreed to herein at [$75] [$_____] per month by the 5th of each month beginning on _____. **Payments shall be made to Kitsap County District Court, 614 Division Street, MS-25, Port Orchard, WA 98366.** Any check should include the Defendant s full name and case number.

Probation Supervision. The Defendant agrees that compliance with this Agreement shall be monitored by the probation department of the court. The Defendant agrees to contact probation within one (1) day of the signing of this Agreement, make all appointments with probation, and abide by all probation rules.

Community Service. Within _____ days, the Defendant shall successfully perform _____ hours of community service.

DUI Victim s Panel. Within ninety (90) days, the Defendant shall attend a DUI victim s panel.

Alcohol/Drug Treatment. Within ninety (90) days, the Defendant shall obtain an alcohol/drug evaluation from a state-certified agency, and thereafter successfully comply with all treatment recommendations.

Ignition Interlock Device. The Defendant shall agree to entry of an Order Prohibiting Defendant From Operating Any Vehicle That Is Not Equipped with a Functioning Ignition Interlock Alcohol Device in accordance with RCW 46.20.720.

Drinking and Driving. The Defendant shall not drive or be in actual physical control of a motor vehicle while having an alcohol concentration of 0.04 or more within two hours after driving or being in physical control. The Defendant shall not refuse to submit to a test of his/her breath or blood to determine alcohol and/or drug concentration upon request of a law enforcement officer who has reasonable grounds to believe that the Defendant was driving or in actual physical control of a motor vehicle while under the influence of an intoxicating liquor and/or drugs.

Liquor Prohibited. The Defendant shall not possess or consume liquor as defined in RCW 66.04.010 as now or hereafter amended, or be in a business establishment where liquor is served.

DV Perpetrators Program. Within ninety (90) days, the Defendant shall obtain a domestic violence perpetrator s treatment evaluation from a state-certified agency, and thereafter successfully comply with all treatment recommendations.

DV Parenting Class. The Defendant shall attend and successfully complete a parenting class / counseling for a minimum 20 hours that includes discussion concerning the effects of domestic violence on children.

No Contact. The Defendant shall not make any attempts (including but not limited to directly or indirectly, in person, in writing, by telephone, or through other persons) to contact the following person(s) _____.

Anger Management Course. The Defendant shall attend and successfully complete an anger management course.

Psycho-sexual Evaluation. The Defendant obtain a psycho-sexual evaluation from a state-certified agency, and thereafter successfully comply with all treatment recommendations.

Contribution. Within ninety (90) days, the Defendant agrees to make a $100 contribution to the following agency

Mothers Against Drunk Driving

YWCA Alive Shelter

Payments shall be made to MADD or YWCA Alive Shelter, and paid through the Kitsap County Prosecutor s Office. Any check should include the Defendant s full name and case number.

_____.

_____.

_____.

2. **Procedure on Defendant s Compliance with Agreement.** Upon the Defendant s compliance with this Agreement and entry of a guilty plea to the amended charge(s) as discussed above, the Plaintiff will make the following recommendation to the judge

_____ days in jail with _____ suspended for [five years] [two years] [one year]
$ _____ fine with $ _____ suspended
The defendant shall have no violation of any criminal laws

Probation shall be [supervised] [unsupervised]

3. **Procedure on Defendant s Breach of Agreement.** The Plaintiff reserves the right to prosecute the Defendant upon any breach of the terms or conditions of this Agreement in accordance with the procedures in *State v. Marino*, 100 Wn.2d 719, 674 P.2d 171 (1984) and *State v. Kessler*, 75 Wn.App. 634, 879 P.2d 333 (1994).

DATED this _____ day of _____, _____.

_____
DEFENDANT

_____
WSBA NO. _____
Deputy Prosecuting Attorney

_____
WSBA NO. _____
Attorney for Defendant
I have read and discussed this Agreement with the defendant and believe that the defendant is competent and fully understands this Agreement.

Order of Continuance

THIS MATTER having come on regularly before the undersigned Judge of the above-entitled Court by agreement of the parties for an Order of Continuance; the Court having considered the motion and the files and records herein, and being fully advised in the premises; now, therefore, it is hereby

ORDERED that the above-entitled matter shall be continued to a date set by separate order. It is further

ORDERED that the Defendant shall appear at the next scheduled hearing.

DONE IN OPEN COURT this _____ day of _____, _____.

_____
DEFENDANT

_____
JUDGE

PRESENTED BY:

APPROVED FOR ENTRY:

_____
WSBA NO. _____
Deputy Prosecuting Attorney

_____
WSBA NO. _____
Attorney for Defendant

Sample Memorandum Motion to Revoke Pretrial Diversion Agreement

The Kitsap County Prosecutor s Office

Pretrial Diversion Agreement

Prosecutorial discretion in the charging process has historically provided a basis for informal diversion from the criminal justice system, including noncriminal disposition and pretrial diversion:

(a) The prosecutor should explore the availability of noncriminal disposition, including programs of rehabilitation, formal or informal, in deciding whether to press criminal charges. Especially in the case of a first offender, the nature of the offense may warrant noncriminal disposition.

(b) Prosecutors should be familiar with the resources of social agencies which can assist in the evaluation of cases for diversion from the criminal process.

American Bar Association Standards for Criminal Justice, Chapter 3 The Prosecution Function, Standard 3-3.8.

The Commentary to the ABA Standard provides guidance to prosecuting authorities concerning proper exercise of this discretion.

> The opportunity to dispose of a case by resort to other corrective social processes, before or after formal charge or indictment without pursuing the criminal process, should be given careful consideration in appropriate situations. National studies of the criminal justice system have repeatedly recommended diversion to other community resources of offenders in need of assistance for whom criminal prosecution is unwarranted. Moreover, it has long been the practice among experienced prosecutors to defer prosecution upon the fulfillment of certain conditions, such as a firm arrangement for the offender to seek psychiatric assistance where the disturbed mental condition may have contributed to the aberrant behavior. Another technique of long standing is for the prosecutors not to prosecute an offender who has agreed to enter the military service, who has obtained new employment, or has embarked in some other manner on what can broadly be considered a rehabilitative program....Where diversion of the defendant is successful, the dismissal of charges or the suspension of sentence will be appropriate.

The Legislature has recognized the propriety of pretrial diversion or deferred prosecution programs for misdemeanor and gross misdemeanor offenses:

RCW 10.05 Deferred Prosecution. RCW 10.05 authorizes a court to continue a non-felony case for two years (extended to five years beginning January 1, 1999) upon a defendant s petition under oath that the wrongful conduct charged is the result of or caused by alcoholism, drug addiction, or mental problems for which the person is in need of treatment and unless treated the probability of further reoccurrence is great... RCW 10.05.020(1). Upon successful completion of the two (five year) treatment program, the court shall dismiss the charges pending against the defendant. RCW 10.05.120.

RCW 10.22 Compromise of Misdemeanors. RCW 10.22.010 authorizes the court to dismiss certain types of non-felony cases where the person injured by the act constituting the offense has a civil remedy except when the offense was committed (1) by or upon an officer while in the execution of the duties of his or her office; (2) riotously; (3) with an intent to commit a felony, or (4) by one family or household member against another as defined in RCW 10.99.020(1) and was a crime of domestic violence as defined in RCW 10.99.020(2).

While the Kitsap County Prosecutor s Office does not have a pre-charging diversion program for adult offenders, the office does offer a pretrial diversion option in some charged misdemeanor and gross misdemeanor cases when the defendant has minimal prior criminal history, evidentiary problems make conviction on the original charge doubtful, or a request is made from the victim which is not the result of pressure from the defendant.

The current pretrial diversion process and agreement arose from the Kitsap County Prosecutor s Office s response to domestic violence cases where the victim recanted or was otherwise unavailable, evidentiary problems existed, and/or the family intended on remaining together. A pretrial diversion agreement encouraged perpetrators in domestic violence cases to agree to be supervised by the probation department and to commit to the successful completion of alcohol and/or drug treatment and domestic violence perpetrator s counseling.

As the number of adult criminal misdemeanor cases occurring in Kitsap County increased to previously unimaginable levels, use of the pretrial diversion agreement was expanded to include crimes in addition to those involving domestic violence.

Most prosecutor s offices use a form of pretrial diversion in misdemeanor cases. Some call it a stipulation or continuance on agreed terms. Often, though, these agreements are short one-page documents that do not clearly spell out the parameters of the pretrial diversion agreement. The Kitsap County Prosecutor s Office s pretrial diversion agreement is much more extensive than these one-page efforts so that the Defendant, defense counsel, and the trial court can be assured of a complete understanding of the terms of the agreement.

The specific pretrial diversion agreement form used by the Kitsap County Prosecutor s Office was modeled after the deferred prosecution statute and the requirements of RCW 10.05.020 (acknowledgment and waiver of right to testify, right to present evidence in defendant s defense, right to jury trial, and a stipulation to the admissibility and sufficiency of the facts contained in the written police report).

Three Part Procedure Upon Alleged Breach of a Pretrial Diversion Agreement

Step One Was a violation of the terms of the PDA proven by a preponderance of the evidence?

General Process Contract Law

A pretrial diversion agreement, like a plea bargain agreement, is a **contract** between the prosecution and defendant. *State v. Talley,* 134 Wn.2d 176, 182, 949 P.2d 358 (1998) (plea bargain agreement is a contract, with the defendant giving up constitutional rights in exchange for the prosecution s agreement to recommend a specific sentence); *State v. Wakefield,* 130 Wn.2d 464, 474, 925 P.2d 183 (1996).

In 1984, the Supreme Court was presented with the question of the proper role of the court when the prosecution sought to terminate a pretrial diversion agreement. *State v. Marino,* 100 Wn.2d 719, 674 P.2d 171 (1984). After examining the similar rights at stake in probation revocations, plea bargain agreements and pretrial diversion agreements, the Court concluded that a defendant is entitled under the Due Process Clause to have factual disputes concerning an alleged violation of the terms of a pretrial diversion agreement resolved by a neutral fact finder rather than the prosecuting authority. This includes an independent determination that the deferred prosecution agreement was violated, by a preponderance of the evidence with the burden of proof on the State. *Marino,* 100 Wn.2d at 725.

> ...This requirement best safeguards the [defendant s] right to have the agreement administered equitably, with full protection of the constitutional rights relinquished in the bargain. The State is not unduly burdened as it has no interest in proceeding to prosecution in any case unless a violation has, in fact, occurred.

Id.

Preponderance of the evidence means that sufficient evidence exists to be persuaded that a claim is more probably true than not true. *See, e.g.* WPIC 17.06.01 (2nd ed.).

Duty of Good Faith

Every contract has an implied duty of good faith and fair dealing.

> There is in every contract an implied duty of good faith and fair dealing. This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance.

Badgett v. Security State Bank, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). (Citations omitted.)

Contract Interpretation The Parties Intent

The touchstone of a court s interpretation of a contract is the parties intent. *Tanner Elec.Co-op. v. Puget Sound Power & Light Co.,* 128 Wn.2d 656, 911 P.2d 1301 (1996).

> &In Washington, the intent of the parties to a particular agreement may be discovered not only from the actual language of the agreement but also from viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.

Tanner, supra. (Citations omitted.)

In order for a court to determine the parties intent, courts traditionally look through the form of the transaction and consider its substance. *Zachman v. Whirlpool Acceptance Corp.,* 120 Wn.2d 304, 314, 841 P.2d 27 (1992). (Citations omitted.)

Evidence Rules and Hearsay

ER 1101(c)(1) provides that the Evidence Rules (except with respect to privileges) do not apply in various circumstances, including preliminary determinations in criminal cases and sentencing or granting or revoking probation. As noted in *Marino,* a revocation of a pretrial diversion agreement involves similar rights at stake in probation revocation hearings and plea bargain agreements.

Washington case law has long held that a probationer s right of confrontation is limited and accordingly allows admission of hearsay evidence at a probation revocation hearing. *State v. Nelson,* 103 Wn.2d 760, 763-64, 697 P.2d 579 (1985). This holding is in accord with the minimal due process rights granted to a probationer or parolee. *Morrissey v. Brewer,* 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); *Gagnon v. Scarpelli,* 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973); *In re Boone,* 103 Wn.2d 224, 691 P.2d 964 (1984).

> ...The current test is a balancing one in which the probationer s right to confront and cross-examine witnesses is balanced against any good cause for not allowing confrontation. Good cause has thus far been defined in terms of difficulty and expense of procuring witnesses in combination with demonstrably reliable or clearly reliable evidence.

Nelson, 103 Wn.2d at 765.

Evidence which is demonstrably reliable has been found to constitute good cause for admitting hearsay evidence of a letter from a drug treatment program officer to a probation officer, letters of vocational instructors and caseworkers, official reports from program officials, victims statements corroborated by other witnesses, a therapist s statements corroborated by others, admissions of the probationer, and evidence from court files and state probation reports. *Nelson,* 103 Wn.2d at 764-65.

Hearsay documents including urinalysis test results and a lab supervisor s letter were sufficiently reliable so as to be admissible in a community supervision violation hearing. *State v. Anderson,* 88 Wn.App. 541, 945 P.2d 1147 (Div. 2 1997) (expense factors weigh against requiring the prosecution to present live witnesses since reliability of a lab is clear given its independent and neutral role in testing samples and providing analysis).

The Defendant shall have no criminal law violations.

Resolution of a New Criminal Law Violation is Not Required

The trial court s role in a hearing on the prosecution s motion to revoke a pretrial diversion agreement is to determine whether the prosecution has proven a violation of a pretrial diversion agreement by a preponderance of evidence.

Often, one of the prosecution s allegations for asserting a breach of a pretrial diversion agreement concerns a defendant s violation of the criminal law.

A defendant may assert that the new criminal law violation is merely an allegation of criminal conduct entitling the defendant to continue or delay the motion to revoke the pretrial diversion agreement until the new criminal law violation allegation is resolved. While the trial court has discretion to continue a prosecution s motion to revoke a pretrial diversion agreement under this situation, such a decision was not as contemplated by the parties nor specifically agreed to by the prosecution in the pretrial diversion agreement.

The issue is whether the prosecution has proven a subsequent violation of the criminal law by a preponderance of the evidence. A defendant s acquittal on or dismissal of the new charges will not prohibit the prosecution from going forward on the alleged breach

of the pretrial diversion agreement nor prohibit the trial court from finding that a breach occurred, allowing termination of the agreement and bench trial as contemplated by the pretrial diversion agreement. *State v. Cyganowski,* 21 Wn.App. 119, 121, 584 P.2d 426 (Div. 2 1978) (no constitutional requirement that a trial be held prior to a revocation hearing on the same acts; even if revocation hearing delayed, an acquittal would not prevent a revocation of probation due to the differing standards of proof); *McGautha v. California,* 402 U.S. 183, 28 L.Ed.2d 711, 91 S.Ct. 1454 (1971); *Standlee v. Smith,* 83 Wn.2d 405, 518 P.2d 721 (1974); *State v. Kuhn,* 81 Wn.2d 648, 503 P.2d 1061 (1972).

Additionally, whether a defendant is ever convicted of the subsequent criminal law violation is inapposite since a pretrial diversion agreement does not require a defendant to have no criminal law convictions. Since the form of the pretrial diversion agreement was patterned after Washington s deferred prosecution statute, RCW 10.05, it is instructive to examine when a defendant may be revoked from a deferred prosecution based upon a new criminal law violation.

RCW 10.05.100 specifically requires the trial court to remove a defendant from the deferred prosecution file and proceed to judgment pursuant to RCW 10.05.020 if a defendant is subsequently convicted of a similar offense while in a deferred prosecution program. A conviction is a judgment that the accused is guilty as charged. *State v. Kuhn,* 74 Wn.App. 787, 791-92, 875 P.2d 1225, *review denied,* 127 Wn.2d 1017 (Div. 2 1994) (trial court need not wait until subsequent conviction has been fully reviewed and upheld on appeal to revoke deferred prosecution based upon subsequent conviction; To hold otherwise would mean that a petitioner subsequently convicted of a similar offense could avoid revocation and, therefore, punishment, until the subsequent conviction had completed appellate review. Such an interpretation does little to protect the public from the risks presented by the deferred prosecution petitioner who continues to use intoxicants in violation of the petitioner s deferred prosecution conditions. ; citing to *Black s Law Dictionary* for definition of conviction).

While the sole fact that a defendant is arrested for a subsequent criminal law violation is insufficient to prove a failure to maintain good behavior, *Seattle v. Lea,* 56 Wn.App. 859, 786 P.2d 798 (Div. 1 1990) (if the only evidence of a criminal law violation was the fact of an arrest, the evidence is insufficient to support a probation violation; some underlying evidence concerning the basis of alleged criminal law violation is required), proof that a defendant was convicted is not required to show a criminal law violation.

Unlike the word conviction which requires a judgment that an accused is guilty, violation means a breach of a right, duty or law. *Black s Law Dictionary* 1741 (4th ed. 1968).

The prosecution need not prove a conviction of the criminal law to successfully seek revocation of a pretrial diversion agreement by a defendant s failure to have no criminal law violations. A violation is shown with proof by a preponderance of the evidence that a defendant breached the criminal law.

A continuance to allow a defendant to litigate his or her new criminal law violation serves no purpose as contemplated by the parties when they enter a pretrial diversion agreement. A defendant promises to abide by various conditions, and if he or she successfully does so, the prosecution promises to amend or dismiss the charge(s).

There could be no more clear evidence of the parties intent to proceed to a relatively quick disposition of a prosecution s motion to revoke a pretrial diversion agreement than the provisions concerning a defendant s failure to appear at a subsequent revocation hearing or trial. A defendant, as part of any pretrial diversion agreement, waives his or her right to be present in court at a subsequent revocation or trial by his or her failure to appear. This provision of the agreement allows the prosecution to proceed to judgment by trial *in absentia* precisely because the parties contemplate minimal delay from the allegation of a breach of a pretrial diversion agreement through resolution of the alleged breach.

Step Two Was the prosecution s decision to terminate the PDA not unreasonable?

Once the trial court has resolved the factual disputes concerning whether a violation of the pretrial diversion agreement occurred, the trial court should assess the reasonableness of the prosecution s decision to terminate the pretrial diversion agreement. ...Clearly, the court is not in a position to require that prosecution be recommended. Discretion to finally bring the case to trial still rests with the prosecutor. Other options may still be open in a particular case, such as reducing charges if a plea bargain is reached, offering a new diversion agreement, or dismissing charges where appropriate. We therefore hold that the court s review of a prosecutor s termination decision should consist of assessing its reasonableness in light of the facts the trial court determines at hearing.

Id.

The trial court s decision upon reviewing the reasonableness of the prosecution s decision to terminate a pretrial diversion agreement is more like a legal conclusion, or a mixed question of fact and law, than an additional finding of fact. *State v. Kessler,* 75 Wn.App. 634, 639, 879 P.2d 333 (Div. 1 1994). While the trial court may not agree with the prosecution s decision to terminate the agreement, the trial court s function is to determine if the prosecutor s decision to terminate was not unreasonable. *Id.*

A prosecutor s decision to terminate a pretrial diversion agreement for nonpayment of therapy bills will not be upheld as reasonable where the underlying problem is hardship and inability to pay, *United States v. Snead,* 822 F.Supp. 885, 888 (D. Conn. 1993). A willful non-payment, though, resulting from a defendant s choice to make this financial obligation a low priority will support the decision to terminate the agreement. *Kessler,* 75 Wn.App. at 640.

> ...The determination as to whether termination is reasonable for these violations is *analogous to the determination in a breach of contract case* of whether a breach is material, thus warranting a remedy. It depends on the circumstances of each particular case.

Kessler, 75 Wn.App. at 640-41. (Italics added.)

A violation of a pretrial diversion agreement need not be criminal in nature to justify termination. The issue for the trial court to determine is the **materiality** of the violations to the intent of the parties when the agreement was entered, which inherently depends on the particular provisions of the pretrial diversion agreement. *Kessler,* 75 Wn.App. At 641.

Step Three Did the prosecution prove beyond a reasonable doubt that the defendant was guilty of the underlying charge?

The Kitsap County Prosecutor s Office s pretrial diversion agreement clearly sets forth what will occur if the prosecution s decision to terminate or revoke the pretrial diversion agreement is approved by the trial court.

In exchange for the prosecution s agreement to amend or dismiss the charges upon the defendant s satisfying various conditions, PDA, Prosecution s Agreement, pp. 2-3, the defendant agrees to waive his or her speedy trial and jury trial rights, stipulate to the admissibility of the police reports and other materials submitted by the prosecution, and stipulate that the defendant wishes to submit the case on the record and stipulates that sufficient facts exist for a finding of guilt. The defendant also waives his or her right to hear and question witnesses, the right to call witnesses in his or her own behalf, and the right to testify or not to testify. Pretrial Diversion Agreement, Defendant s Agreement, pp. 1-2. *See* substantially similar language of CrRLJ 6.1.2(b) (Statement of Defendant on Submittal or Stipulation to Facts) which is specifically referenced in the pretrial diversion agreement.

> ...[a] guilty plea...is functionally and qualitatively different from a stipulation. A guilty plea generally waives the right to appeal. A guilty plea has been said to be itself a conviction; nothing remains but to give judgment and determine punishment.
>
> A stipulation, on the other hand...is only an admission that if the State s witnesses were called, they would testify in accordance with the summary presented by the prosecutor. The trial court must make a determination of guilty or innocence. More importantly, a stipulation preserves legal issues for appeal and can operate to keep potentially prejudicial matters from the jury s consideration.

State v. Johnson, 104 Wn.2d 338, 341, 705 P.2d 773 (1985) (Citations omitted.); *See* also *State v. Smith,* 134 Wn.2d 849, 953 P.2d 810 (1998); *State v. Mierz,* 127 Wn.2d 460, 469, 901 P.2d 286 (1995); *State v. Halgren,* 87 Wn.App. 525, 531-32, 942 P.2d 1027 (Div. 1 1997), *reversed on other grounds,* 137 Wn.2d 340, 971 P.2d 512 (1999) (future dangerousness aggravating factor may not be applied in non-sex offense case).

Once a trial court finds that a violation of the pretrial diversion agreement occurred by a preponderance of the evidence, and that the prosecution s decision to terminate the agreement was not unreasonable, the pretrial diversion agreement makes clear that the case proceeds to a bench trial based upon stipulated evidence and the defendant s admission that sufficient facts exist for a finding of guilt.

Waiver of the Defendant s Right to be Present
Motion to Revoke and/or Trial *in Absentia*

A criminal defendant s failure to appear for trial is not considered a valid waiver of his or her court rule right to be present. *Crosby v. United States,* 506 U.S. 255, 113 S.Ct. 748, 753, 122 L.Ed.2d 25 (1993) (Federal Rule of Criminal Procedure 43. Court refuses to reach issue whether trial *in absentia* is prohibited by the Constitution); *United States v. Mezzanatto,* 513 U.S. 196, 115 S.Ct. 797, 802, 130 L.Ed.2d 697 (1995) (explaining that *Crosby* held that a defendant s failure to appear for trial cannot be considered a valid knowing and voluntary waiver of the court rule right to be present for trial); *State v. Hammond,* 121 Wn.2d 787, 790-91, 854 P.2d 637 (1993) (*Crosby s* textual analysis of FRCP 34 found persuasive, and adopted for interpretation of CrR 3.4; Court refuses to reach issue whether trial *in absentia* is prohibited by the Constitution).

A defendant s midtrial flight, though, acts as a knowing and voluntary waiver of the right to be present, and the trial may proceed without the defendant s presence. *Crosby,* 113 S.Ct. at 751-53.

> ...Moreover, a rule that allows an ongoing trial to continue when a defendant disappears deprives the defendant of the option of gambling on an acquittal knowing that he can terminate the trial if it seems that the verdict will go against him an option that might otherwise appear preferable to the costly, perhaps unnecessary, path of becoming a fugitive from the

outset.

Crosby, 113 S.Ct. at 753.

Like the most fundamental constitutional protections afforded a criminal defendant, any court rule is subject to a defendant's knowing and voluntary waiver with court permission. *Mezzanatto,* 115 S.Ct. at 801-02 (string cite of cases showing a criminal defendant's ability to knowingly and voluntarily waive double jeopardy, privilege against compulsory self-incrimination, right to jury trial, right to confront one's accusers, and right to counsel).

The state and federal constitutional rights to be present at trial may be waived, provided the waiver is voluntary and knowing. *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461, 146 A.L.R. 357 (1938); *State v. Rice,* 110 Wn.2d 577, 619, 757 P.2d 889 (1988), *cert. denied,* 491 U.S. 910, 109 S.Ct. 3200, 105 L.Ed.2d 707 (1989); *State v. Thompson,* 123 Wn.2d 877, 880, 872 P.2d 1097 (1994) (trial court's decision to continue with trial when defendant took flight after the trial had begun is affirmed).

Section 4 of the pretrial diversion agreement makes clear that a defendant understands he or she shall be present in court at all future court hearings, and that the trial court may proceed with a motion to revoke the pretrial diversion agreement and trial if the defendant fails to appear as required.

By agreeing to a pretrial diversion agreement, a defendant knowingly and voluntarily waives his or her right to be present at a hearing on the prosecution's motion to revoke a pretrial diversion agreement or subsequent trial if the defendant fails to appear for those hearings after notice of the hearing date is sent to the Defendant's attorney or the Defendant's last known address if the Defendant is not represented by an attorney. Pretrial Diversion Agreement, Section 4, Presence of the Defendant.

A trial court may proceed with a motion to revoke a pretrial diversion agreement and subsequent trial if a defendant fails to appear after notice of the motion is sent as required by the pretrial diversion agreement.

The Case at Bar

[insert analysis]

3.9 Discretion in the charging decision

(a) unprofessional conduct to institute criminal charges not supported by probable cause; a prosecutor should not institute criminal charges in the absence of sufficient admissible evidence to support a conviction

(b) prosecutor not obliged to present all charges evidence might support; prosecutor may in some circumstances decline to prosecute notwithstanding that sufficient evidence may exist which would support a conviction. Factors to be considered in exercising charging discretion are

prosecutor s reasonable doubt accused is in fact guilty

extent of harm caused by offense

disproportion of authorized punishment in relation to particular offense or offender

possible improper motives of complainant

reluctance of victim to testify

cooperation of accused in apprehension or conviction of others

availability and likelihood of prosecution by another jurisdiction

(c) no weight to the personal or political advantages or disadvantages, nor to a desire to enhance his or her record of convictions should be given

(d) in cases involving serious threat to community, prosecutor should not be deterred from prosecution by fact that juries have tended to acquit in similar circumstances

(e) prosecutor should not bring charges greater in number or degree than can reasonably be supported with evidence at trial.

Excerpt from Commentary to ABA Standard

Basic Criteria. &The broad discretion given to a prosecutor in deciding whether to bring charges and in choosing the particular charges to be made requires that the greatest effort be made to see that this power is used fairly and uniformly. &A prosecutor ordinarily should prosecute if, after full investigation, it is found that a crime has been committed, the perpetrator can be identified, and there is sufficient admissible evidence available to support a verdict of guilty. &

Facts That May Properly Be Considered. It is axiomatic that all crimes cannot be prosecuted even if this were desirable. &A prosecutor must adopt a first things first policy, giving greatest concern to those areas of criminal activity that power a threat to the security and order of the community.

> Nor is it desirable that the prosecutor prosecute all crimes at the highest degree available. &The public interest is best served and evenhanded justice best dispensed not by the mechanical application of the letter of the law, but by a flexible and individualized application of its norms through the exercise of a prosecutor s thoughtful discretion.
>
> If prosecution is sought by a private party out of malice or to exert coercion on the defendant, as is sometimes the case in matters involving sexual offenses or debt collection, for example, the prosecutor may properly decline to prosecute.

Personal Advantage Not to Be Considered. A prosecutor should avoid measuring his or her record by the conviction rate of the office. &

Community Indifference to Serious Crime. There are cases where, even if convictions seem quite unlikely, perhaps because of hostile community attitudes toward the victims, a prosecutor should proceed if satisfied that a serious crime has been committed, the offender has been identified, and the necessary evidence is available. &

Discretion in Selecting the Number and Degree of Charges. &Defense counsel often complain that prosecutors charge a number of different crimes, that is, overcharge, in order to obtain leverage for plea negotiations &the heart of the criticism is the belief that prosecutors bring charges not in the good faith belief that they are appropriate under the circumstances and with an intention of prosecuting them to a conclusion, but merely as a harassing and coercive device in the expectation that they will induce the defendant to plead guilty. &The line separating so-called overcharging from the sound exercise of prosecutorial discretion is necessarily indefinite and subjective &

RPC 3.8(a) Probable Cause Required

The prosecutor in a criminal case shall &[r]efrain from prosecuting a charge that the prosecutor knows is not supported by probable cause &

RPC 3.8(a) Probable Cause Required Qualified Immunity for Prosecutor Who Endorses Facts Supporting Probable Cause

Kalina v. Fletcher, 522 U.S. 118, 118 S.Ct. 502, 509-10, 139 L.Ed.2d 471 (1997) (Section 1983 action brought against deputy prosecutor who had prepared application for arrest warrant (that included inaccurate facts) by individual against whom charges had been dropped following his arrest in connection with a second degree burglary; Held: only qualified immunity when prosecutor acts as a complaining witness rather than a lawyer).

These cases make it quite clear that petitioner s activities in connection with the preparation and filing of two of the three charging documents the information and the motion for an arrest warrant are protected by absolute immunity. Indeed, except for her act in personally attesting to the truth of the averments in the certification, it seems equally clear that the preparation and filing of the third document in the package was part of the advocate s function as well. The critical question, however, is whether she was acting as a complaining witness rather than a lawyer when she executed the certification [u]nder penalty of perjury. ...

Although the law required that document to be sworn or certified under penalty of perjury, neither federal nor state law made it necessary for the prosecutor to make that certification. In doing so, petitioner performed an act that any competent witness might have performed. Even if she may have been following a practice in King County, Washington, that practice is surely not prevalent in other parts of the country and is not even mandated by law in King County. Neither petitioner nor amici argue that prosecutors routinely follow the King County practice. Indeed, tradition, as well as the ethics of our profession, generally instruct counsel to avoid the risks associated with participating as both advocate and witness in the same proceeding.

...Testifying about facts is the function of the witness, not of the lawyer. No matter how brief or succinct it may be, the evidentiary component of an application for an arrest warrant is a distinct and essential predicate for a finding of probable cause. Even when the person who makes the constitutionally required Oath or affirmation is a lawyer, the only function that she performs in giving sworn testimony is that of a witness.

(Citations omitted.)

SRA Charging and Plea Disposition Standards RCW 9.94A.440(1) Decision Not to Prosecute or to Dismiss

A prosecuting attorney may decline to prosecute, even though technically sufficient evidence to prosecute exists, in situations where prosecution would serve no public interest, would defeat the underlying purpose of the law in question or would result in decreased respect for the law.

Examples given in RCW 9.94A.440(1) of reasons not to prosecute are

contrary to legislative intent

antiquated statute that (i) has not been enforced for many years and (ii) most members of society act as if no longer in existence and (iii) it serves no deterrent or protective purpose in today s society and (iv) it has not been recently reconsidered by the legislature. This reason is not to be construed as a basis to decline cases because the law in question is unpopular or because it is difficult to enforce

de minimus violation

confinement on other charges where accused sentenced on another charge to lengthy period of confinement and (i) conviction on new offense not merit additional direct or collateral punishment and (ii) new offense is either misdemeanor or a felony which is not particularly aggravated and (iii) conviction of new offense would not serve any significant deterrent purpose

pending conviction on another charge where accused is facing pending prosecution in same or another county and (i) conviction of new offense not merit an additional direct or collateral punishment and (ii) conviction in pending prosecution is imminent and (iii) new offense is either misdemeanor or felony which is not particularly aggravated and (iv) conviction of new offense not serve any significant deterrent purpose

high disproportionate cost of prosecution where cost of locating, transporting or burden on prosecution witnesses is highly disproportionate to importance of offense and case is minor

improper motives of complainant and prosecution serves no public purpose, would defeat the underlying purpose of the law or would result in decreased respect for the law

immunity

victim request in (i) assault crimes where victim suffered little or no injury or (ii) property crimes not involving violence where no major loss suffered or (iii) crimes where declining to prosecute would not jeopardize the safety of society; care should be taken to insure victim s request is freely made and not product of threat or pressure by accused

The presence of these factors may also justify the decision to dismiss a prosecution which has been commenced.

The prosecutor is encouraged to notify the victim, when practical, and the law enforcement personnel, of the decision not to prosecute.

Kitsap Prosecutor s Office Decline to Prosecute Notice

OFFICE OF THE
KITSAP COUNTY PROSECUTING ATTORNEY
Russell D. Hauge, Prosecuting Attorney

Criminal & Administrative Divisions
Kitsap County Courthouse, 614 Division Street, MS-35
Port Orchard, Washington 98366-7148
(360) 337-7174; Fax No. (360) 337-4949

Bremerton Municipal Court Division
239 Fourth Street
Bremerton, Washington 98337
(360) 478-2334; Fax No. (360) 478-2303

Decline Decline Decline to Decline to Decline to Prosecute Decline to Prosecute Decline

Bainbridge Island PD. Fax # (206) 780-8596	Humane Society. Fax # 698-9668	Suquamish PD. Fax # (360) 598-4414
Bremerton PD (Det. _____ _____ _____ __) Inter-office mail	KCSO. Inter-office mail. MS-37	WSP. Inter-office mail
Bremerton PD (Officer ___ _____ _____ __) Inter-office mail	NCIS. Fax # 476-8849	WSP. (Lab Analysis) Inter-office mail
CPS. 3423-6th Street, Ste 217, Bremerton, WA 98312	Port Orchard PD. Inter-office mail	Other. _____
Fish & Wildlife. Fax # (360) 902-2942	Poulsbo PD. Fax # (360) 779-4433	

Felony Gross Misdemeanor/Misdemeanor Our Decline Code _____

From: _____, DPA [Direct # _____]

Date:_____ Our File #: _____ Officer: _____ Badge #:_____

Suspect: _____ Report No: _____

Decline Letter to Victim? Not Applicable; Yes; No; Date Sent _____

Decline to Prosecute Notice to Law Enforcement; Date Sent _____

Seized Property? None; Return to Owner; Destroy; Forfeiture Action; Other _____

Seized Firearm? None; Firearm to be Retained by Law Enforcement. File to DPA _____ to Review for Possible Forfeiture Action

Reason(s) Reason(s) Reason(s) for Reason(s) for Reason(s) for Failure Reason(s) for Failure Re

_____

_____

_____

_____

Unable to locate: Suspect has moved from our State and/or cannot be located.

Under 12: Per RCW 9A.04.050, a child under 12 is presumed to be incapable of committing a crime. However, if subsequent charges are received, they will be considered for filing.

Over 18: The suspect reached his/her 18th birthday before the referral could be processed by Juvenile Court. You may proceed on the basis that the suspect is an adult.

Inappropriate Jurisdiction. Per RCW 13.04.030, any non-felony traffic, boating, game and/or fish violations committed by juveniles age 16 or 17 should be sent to the appropriate adult court.

After speaking with DPA who declined case, law enforcement may appeal decline decision to
Chris Casad [felony adult], Greg Hubbard [juvenile], Jeff Jahns [misdemeanor adult] or Russ Hauge.

SRA Charging and Plea Disposition Standards RCW 9.94A.440(2) Decision to Prosecute

See statute for prioritization of crimes against persons, crimes against property, and other classified felonies

SRA Charging and Plea Disposition Standards RCW 9.94A.440(2) Selection of Charges/Degree of Charge

(1) The prosecutor should file charges which adequately describe the nature of defendant s conduct. Other offenses may be charged only if they are necessary to ensure that the charges: (a) Will significantly enhance the strength of the state s case at trial; or (b) Will result in restitution to all victims.

(2) The prosecutor should not overcharge to obtain a guilty plea. Overcharging includes: (a) Charging a higher degree; (b) Charging additional counts.

This standard is intended to direct prosecutors to charge those crimes which demonstrate the nature and seriousness of a defendant s criminal conduct, but to decline to charge crimes which are not necessary to such an indication. Crimes which do not merge as a matter of law, but which arise from the same course of conduct, do not all have to be charged.

Case Law Prosecutorial Discretion Charging Decision

Bordenkircher v. Hayes, 434 U.S. 357, 54 L.Ed.2d 604, 98 S.Ct. 663, 668 (1978) (so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.).

State v. Judge, 100 Wn.2d 706, 713, 675 P.2d 219 (1984)

Prosecutors are vested with wide discretion in determining whether to charge suspects with criminal offenses. *Bordenkircher v. Hayes;* [*supra*], *State v. Pettitt,* 93 Wn.2d 288, 294, 609 P.2d 1364 (1980). Exercise of this discretion involves consideration of factors such as the public interest as well as the strength of the case which could be proven. *United States v. Lovasco,* 431 U.S. 783, 794, 52 L.Ed.2d 752, 97 S.Ct. 2044 (1977); *Pettitt*, at 295. The exercise of a prosecutor s discretion by charging some but not others guilty of the same crime does not violate the equal protection clause of U.S. Const. amend. 14 or Const. art. 1, § 12 so long as the selection was not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.

(Citations omitted.)

State v. Talley, 122 Wn.2d 192, 214-15, 858 P.2d 217 (1993) (where there are differing elements between offenses the prosecutor s discretion is limited by consideration of which elements [can be proved in the particular case] , quoting *Kennewick v. Fountain,* 116 Wn.2d 189, 193, 802 P.2d 1371 (1991).

Case Law Prosecutorial Discretion Charging Decision Civil Contempt and/or New Crime

State v. Horton, 54 Wn.App. 837, 776 P.2d 703 (Div. 1 1989) (defendant charged with crime of violation of protection order, rather than seeking contempt under RCW 7.20.020; Held: prosecutor s decision to seek criminal charges rather than contempt did not violate equal protection clause).

Case Law Prosecutorial Discretion Charging Decision Crime and/or Infraction

State v. Ankney, 53 Wn.App. 393, 766 P.2d 1131 (Div. 1 1989) (ordinance allowing citing dog owner for infraction or crime based on same conduct, dog biting someone, held no violation of equal protection clause when animal control violation resulted in civil or criminal penalty or both).

State v. Pollnow, 69 Wn.App. 160, 848 P.2d 1265, *review denied,* 121 Wn.2d 1030 (Div. 3 1993) (enactments permitting prosecution to seek a criminal or civil penalty or both for the violation of a statute or ordinance do not violate a criminal defendant s constitutional right to equal protection.)

Case Law Prosecutorial Discretion Crimes Including Identical Elements

State v. Eakins, 73 Wn.App. 271, 274-75, 869 P.2d 83 (Div. 2 1994), *affirmed,* 127 Wn.2d 490, 902 P.2d 1236 (1995) (defendant convicted of two counts of second degree assault with special verdict findings imposing deadly weapon enhancement; defendant contended equal protection was violated because second degree assault bears a more severe penalty than exhibiting a firearm, and he is being punished for the same act; Held: offenses have different elements, so no equal protection violation, but conviction reversed on other grounds)

He relies on the often repeated rule that statutes imposing different punishments for the same act, violate the equal

protection clause of the Fourteenth Amendment and article 1, section 12 of the Washington State Constitution when they purport to authorize the State to charge one person with a felony and another with a misdemeanor for the same act committed under the same circumstances. *Olsen v. Delmore,* 48 Wn.2d 545, 295 P.2d 324 (1956). *See also State v. Leech,* 114 Wn.2d 700, 711, 790 P.2d 160 (1990); *State v. Dictado,* 102 Wn.2d 277, 687 P.2d 172 (1984). &

It is firmly established that the identity of elements in two criminal statutes with disparate penalties does not violate the equal protection clause of the Fourteenth Amendment.

> [A] decision to proceed under [a statute with a greater penalty] does not empower the Government to predetermine ultimate criminal sanctions. Rather, it merely enables the sentencing judge to impose a longer prison sentence than [a statute with a lesser penalty] would permit.... More importantly, there is no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements. In the former situation, once he determines that the proof will support conviction under either statute, his decision is indistinguishable from the one he faces in the latter context. The prosecutor may be influenced by the penalties available upon conviction, but this fact, standing alone, does not give rise to a violation of the Equal Protection or Due Process Clause.

United States v. Batchelder, 442 U.S. 114, 125, 99 S.Ct. 2198, 2204, 60 L.Ed.2d 755 (1979). *See Kennewick v. Fountain,* 116 Wn.2d 189, 802 P.2d 1371 (1991) (*overruling State v. Zornes,* 78 Wn.2d 9, 475 P.2d 109 (1970)), which was characterized as holding that statutes defining the same offense for the same conduct, but prescribing different punishments, violate an individual's right to equal protection).

Case Law Prosecutorial Discretion Number of Counts

State v. Lewis, 115 Wn.2d 294, 299, 797 P.2d 1141 (1990)

[T]he prosecutor had no duty to charge the defendant after the first delivery to the King County Police informant. Likewise, in his discretion, the prosecutor could charge as separate counts each of the deliveries made by the defendant. This court has held that [w]hether the incidents are to be charged separately or brought as one charge is a decision within the prosecutorial discretion. *State v. Petrich,* 101 Wn.2d 566, 572, 683 P.2d 173 (1984). In this case, charges were filed that were necessary to reflect the nature and extent of the defendant s criminal activity.

State v. Knutson, 64 Wn.App. 76, 80, 823 P.2d 513 (Div. 1 1991) (In addition, a prosecutor has broad discretion in charging a suspect with a violation of the law and in choosing what charges to make.).

Case Law Limitation on Charging Decision After Mistrial

State v. Anderson, 96 Wn.2d 739, 740-42, 638 P.2d 1205, *cert. denied,* 459 U.S. 842, 103 S.Ct. 93, 74 L.Ed.2d 85 (1982) (prosecutor prohibited from filing additional related charges after mistrial due to failure to join offenses in first trial)

Dismissal is mandated by the State's failure to comply with Superior Court Criminal Rules CrR 4.3 relating to joinder of offenses. CrR 4.3(c)(1) provides that offenses are related if based upon the same conduct and are within the jurisdiction and venue of the same court.

The consequences of the State's failure to join related offenses are set forth in CrR 4.3(c)(3):

> A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense ... The motion to dismiss ... shall be granted unless the court determines that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.

&The protection against double jeopardy protects a citizen from being placed in the hazardous position of standing trial more than once for the same offense. *Green v. United States,* 355 U.S. 184, 187, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957). If the appellate court reverses a conviction and remands for a new trial, the double jeopardy clause is ordinarily not offended. *United States v. Tateo,* 377 U.S. 463, 84 S.Ct. 1587, 12 L.Ed.2d 448 (1964). Nor is the protection offended when the first trial is on a defective information. *State v. Burns,* 54 Wash. 113, 102 P. 886 (1909). However, if an appellate court reverses a conviction based upon insufficiency of the evidence, a retrial is not permissible under this doctrine. *Hudson v. Louisiana*, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981); *Burks v. United States,* 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). If the reversal is not for insufficiency of evidence, the defendant may be retried for the convicted offense and any lesser included offenses. Defendant may not, however, be retried on an offense of a higher degree because he has implicitly been acquitted of the higher degrees of the crime. *See State v. Schoel,* 54 Wn.2d 388, 341 P.2d 481 (1959); State v. Murphy, 13 Wash. 229, 43 P. 44 (1895); 3 C. Torcia, Wharton on Criminal Evidence § 655 (13th ed. 1972).

Case Law Limitation on Charging Decision Delay in Adding Charges Which Prejudices Defendant by Forcing Speedy Trial Waiver to be Adequately Prepared

State v. Michielli, 132 Wn.2d 229, 937 P.2d 587 (1997) (trial court s dismissal of three counts of trafficking in stolen property upheld under CrR 8.3(b) where prosecutor waited until 3 business days before trial to amend charges, resulting in defendant having to choose between going to trial unprepared or waiving his right to a speedy trial and asking for a continuance)

Two things must be shown before a court can require dismissal of charges under CrR 8.3(b). First, a defendant must show arbitrary action or governmental misconduct. *State v. Blackwell,* 120 Wn.2d 822, 831, 845 P.2d 1017 (1993) (citing *State v. Lewis,* 115 Wn.2d 294, 298, 797 P.2d 1141 (1990)). Governmental misconduct, however, need not be of an evil or dishonest nature; simple mismanagement is sufficient. *Blackwell,* 120 Wn.2d at 831 (emphasis added). Absent a showing of arbitrary action or governmental misconduct a trial court cannot dismiss charges under CrR 8.3(b) &

The second necessary element a defendant must show before a trial court can dismiss charges under CrR 8.3(b) is prejudice affecting the defendant s right to a fair trial. *See State v. Cannon,* 130 Wn.2d 313, 328, 922 P.2d 1293 (1996). Such prejudice includes the right to a speedy trial and the right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense. & *State v. Price,* 94 Wn.2d 810, 814, 620 P.2d 994 (1980).

A trial court s power to dismiss charges is reviewed under the manifest abuse of discretion standard. *See State v. Warner,* 125 Wn.2d 876, 882, 889 P.2d 479 (1995). &

A brief review of the pleadings and the record before the court shows Defendant successfully supported his CrR 8.3(b) claim. Defendant proved the two elements which must be shown for a court to dismiss charges.

Defendant failed to convince the trial court that the prosecutor s late amendment of the charges was due to prosecutorial vindictiveness. However, simple governmental mismanagement satisfies the misconduct element. *Blackwell,* 120 Wn.2d at 831. The facts of this case demonstrate governmental mismanagement. &

&Despite this [having all facts necessary to charge additional counts months earlier], the State filed only one theft charge in July and delayed over three months before adding the four other charges, just five days before trial was scheduled to begin. **These facts strongly suggest that the prosecutor s delay in adding the extra charges was done to harass Defendant.** There appears to be no other reasonable explanation for why the prosecutor waited until five days before trial to add the new charges, when the prosecutor admittedly possessed all the information and evidence to support those charges in July 1993, if not earlier.

A deputy prosecutor submitted an affidavit in which he states, Having been informed that this case absolutely would be going to trial I made a tactical decision regarding what charges would have the best chance of success in front of a jury. Clerk s Papers at 20. However, the State knew as of September 2, 1993, that Defendant desired a trial. Nonetheless, the State delayed eight more weeks before adding the four charges for which the State had long possessed all the evidence. **The long delay, without any justifiable explanation, suggests less than honorable motives.**

Normally, the court may permit the State to amend the information any time before a verdict if such amendment does not prejudice the substantial rights of the defendant. CrR 2.1(d). Such prejudice is present in this case, thereby warranting a CrR 8.3(b) dismissal.

Defendant was prejudiced in that he was forced to waive his speedy trial right and ask for a continuance to prepare for the surprise charges brought three business days before the scheduled trial. &The prosecutor delayed adding four serious charges until three business days before the trial without any justification, thereby giving Defendant the choice of going to trial unprepared, or waiving his right to a speedy trial and asking for a continuance. &

Defendant s being forced to waive his speedy trial right is not a trivial event. This court, as a matter of public policy[,] has chose to establish speedy trial time limits by court rule and to provide that failure to comply therewith requires dismissal of the charge with prejudice. *State v. Duggins,* 68 Wn.App. 396, 399-400, 844 P.2d 441 (1993). The State s delay in amending the charges, coupled with the fact that the delay forced Defendant to waive his speedy trial right in order to prepare a defense, can reasonably be considered mismanagement and prejudice sufficient to satisfy CrR 8.3(b).

The State argued to the trial court that prosecutors have almost unfettered discretion to charge those things that it thinks it can prove. Although prosecutors are allowed much discretion, CrR 8.3(b) exists to see that one charged with crime is fairly treated. *State v. Whitney,* 96 Wn.2d 578, 580, 637 P.2d 956 (1981) (emphasis added). In this case the State expressly admits that it had all of the information and evidence necessary to file all of the charges in July 1993. Despite

this, the State delayed bringing the most serious of those charges for months, and did so only five days (three business days) before the scheduled trial. Even though the resulting prejudice to Defendant s speedy trial might may not have been extreme, the State s dealing with Defendant would appear unfair to any reasonable person. &

(Bold emphasis added.) (Citations omitted.)

State v. Teems, 89 Wn.App. 385, 948 P.2d 1336 (Div. 3 1997), *review denied,* 136 Wn.2d 1003 (1998) (trial court s dismissal of felony possession of marijuana case affirmed; Held: State s act of giving notice of filing of charges to defense attorney after mistrial, where prosecutor previously signed order allowing counsel to withdraw, constituted misconduct where defense attorney not appointed until 12 days before trial).

State v. Pettus, 89 Wn.App. 688, 951 P.2d 284, *review denied,* 136 Wn.2d 1010 (Div. 2 1998) (trial court denial of motion to dismissed upheld)

> Generally, the court may allow amendment of a criminal charge at any time before verdict, provided the amendment does not prejudice the substantial rights of the defendant. CrR 2.1(d); *State v. Pelkey,* 109 Wn.2d 484, 490-91, 745 P.2d 854 (1987)....
>
> Here, the court granted several continuances. During one of these continuances, the State moved to amend the information to add the delivery charge. As the continuances tolled the running of the speedy trial period, the State added the new charge within the speedy trial period.

State v. Ralph Vernon G., 90 Wn.App. 16, 950 P.2d 971 (Div. 3 1998) (some convictions for child sex abuse reversed) (here, unlike in *Michielli*, trial court did not grant defense motion to dismiss but Div. 3 reversed convictions reasoning that the delay in bringing additional charges while hold-back charges were being used to persuade defendant to take plea offer or waive speedy trial is a failure to act with due diligence).

State v. Miller, 92 Wn.App. 693, 702-3, 964 P.2d 1196 (Div. 2 1998).

> Before charges can be dismissed under CrR 8.3(b), the defendant must show (1) arbitrary action or governmental misconduct and (2) prejudice affecting the defendant s right to a fair trial. *State v. Michielli,* 132 Wn.2d 229, 239-40, 937 P.2d 587 (1997); *State v. Koerber,* 85 Wn.App. 1, 4, 931 P.2d 904 (1997). The trial court s ruling on such a motion to dismiss is discretionary and reviewable only for manifest abuse of discretion, i.e. the trial court s decision is manifestly unreasonable, is exercised on untenable grounds, or for untenable reasons. *Michielli,* 132 Wn.2d at 240; State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993); *State v. Barnes,* 85 Wn.App. 638, 655, 932 P.2d 669, *review denied*, 133 Wn.2d 1021 (1997). Dismissal is an extraordinary remedy, not warranted unless the defendant shows prejudice....
>
> Here, Miller was not prejudiced by the trial court s refusal to dismiss the remaining charges. First, he did not accept the plea bargain. Second, the State was not allowed to amend the information to include second degree assault, and the unlawful possession of a firearm charge was dismissed. Third, the charges of attempted theft of a firearm and third degree assault are supported by the evidence. Therefore, we find no abuse of discretion in the trial court s refusal to dismiss all of the charges.

(Citations omitted.)

Case Law Limitation on Charging Decision General v. Specific Crimes

State v. Shriner, 101 Wn.2d 576, 580, 681 P.2d 237 (1984) (defendant who failed to return rental car was improperly charged and convicted under first-degree theft statute, since he should have been charged under special criminal possession of a rented motor vehicle statute)

> It is a well established rule of statutory construction that where a special statute punishes the same conduct which is punished under a general statute, the special statute applies and the accused can be charged only under that statute. *State v. Cann,* 92 Wn.2d 193, 197, 595 P.2d 912 (1979). It is not relevant that the special statute may contain additional elements not contained in the general statute; i.e., notice. The determining factor is that the statutes are concurrent in the sense that the general statute will be violated in each instance where the special statute has been violated.

State v. Mierz, 127 Wn.2d 460, 478, 901 P.2d 286 (1995)

> Where conduct falls within the scope of two criminal statutes, the accused only may be charged under the more specific (or special) statute and may not be charged under the more general statute.

State v. Rainford, 86 Wn.App. 431, 440-41, 936 P.2d 1210, *review denied,* 133 Wn.2d 1019 (Div. 2 1997) (special statute setting forth offense of possession of controlled substance by prison inmate was not concurrent with general statute setting forth offense of possession of a controlled substance).

> If a general and a special statute are concurrent, the accused can be charged only under the special statute. Criminal statutes are considered concurrent if a general statute is violated whenever a special statute is violated, regardless of

whether the special statute may contain additional elements not contained in the general statute. In other words, the special statute will supersede the general statute [s]o long as it is not possible to commit the special crime without also committing the general crime. Violation of this rule can result in an equal protection violation because the State, by selecting the crime charged, can obtain varying degrees of punishment while proving identical criminal elements.

(Citations omitted.)

State v. Smeltzer, 86 Wn.App. 818, 939 P.2d 1235 (Div. 3 1997) (defendant charged with first degree escape for failure to return from furlough; Held: specific crime of failure to return from furlough should have been charged, conviction reversed).

State v. Dorn, No. 22025-3-II, ___ Wn.App. ___, 969 P.2d 129 (Div. 2 Jan. 8, 1999) (defendant charged with first degree escape for failure to return from medical furlough; Held: all convicted felons, even those sentenced to county jails, are under the authority of the Department of Corrections, accordingly, the State was required to charge defendant under failure to return from furlough statute; conviction reversed).

Case Law Limitation on Charging Decision Mandatory Charging Policy Based on Fixed Formula Prohibited

State v. Pettitt, 93 Wn.2d 288, 296, 609 P.2d 1364 (1980) (prosecutor had mandatory policy of filing habitual criminal complaints against all defendants with 3 or more prior felonies; Held: In our view, this fixed formula which requires a particular action in every case upon the happening of a specific series of events constitutes an abuse of the discretionary power lodged in the prosecuting attorney.).

State v. Massey, 60 Wn.App. 131, 138-39, 803 P.2d 340, *review denied,* 115 Wn.2d 1021 (Div. 2 1990), *cert. denied,* 499 U.S. 960, 111 S.Ct. 1584, 113 L.Ed.2d 648 (1991) (defense claim that prosecutor had mandatory policy of seeking declination hearing in all juvenile cases involving first degree murder rejected due to evidence that a declination hearing was not sought in a first degree murder case involving a 12 1/2 year old defendant).

Case Law Limitation on Charging Decision Selective Prosecution Prohibited

United States v. Armstrong, 517 U.S. 456, 134 L.Ed.2d 687, 116 S.Ct. 1480, 1486 (1996) (defendant not entitled to discovery on a claim that he was singled out for prosecution on basis of race because he failed to make threshold showing that Government declined to prosecute similarly situated suspects of other races)

A selective-prosecution claim asks a court to exercise judicial power over a special province of the Executive. The Attorney General and United States Attorneys retain broad discretion to enforce the Nation s criminal laws. &

Of course, a prosecutor s discretion is subject to constitutional constraints. One of these constraints, imposed by the equal protection component of the Due Process Clause of the Fifth Amendment is that the decision whether to prosecute may not be based on an unjustifiable standard such as race, religion, or other arbitrary classification. A defendant may demonstrate that the administration of a criminal law is directed so exclusively against a particular class of persons & with a mind so unequal and oppressive that the system of prosecution amounts to a practical denial of equal protection of the law. *Yick Wo v. Hopkins,* 118 U.S. 356, 373, 6 S.Ct. 1064, 1073, 30 L.Ed. 220 (1886).

(Citations omitted.)

Case Law Limitation on Charging Decision Vindictive Prosecution

State v. Bonisisio, 92 Wn.App. 783, 964 P.2d 1222 (Div. 2 1998) (Defendant convicted of multiple counts of burglary and unlawful possession of firearms, and trafficking. Original plea offer was for county jail time. Court imposed exceptional sentence below 252 month standard range; Held: convictions affirmed, remanded for resentencing]

Prosecutorial vindictiveness is [the] intentional filing of a more serious crime in retaliation for a defendant s lawful exercise of a procedural right. But an initial charging decision does not freeze prosecutorial discretion. A prosecutor may increase an initial charge when a fully informed and represented defendant refuses to plea guilty to a lesser charge. *United States v. Goodwin,* 457 U.S. 368, 378-80, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982). Nonetheless, a defendant in an appropriate case might prove objectively that the prosecutor s charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do.

In federal courts, the treatment of a vindictiveness claim varies depending upon whether the defendant raises the claim pretrial, or upon appeal or retrial. Although there is a presumption of vindictiveness when a prosecutor files an indictment in response to a defendant s filing of an appeal, there is no such presumption in a pretrial setting.

A defendant in a pretrial setting bears the burden of proving either (1) actual vindictiveness, or (2) a realistic likelihood of vindictiveness which will give rise to a presumption of vindictiveness. Once the defendant makes the required showing, the prosecution must justify its decision with legitimate, articulable, objective reasons for its

actions.

The case law does not specify when a trial court must grant a request for an evidentiary hearing to examine a claim of prosecutorial vindictiveness. We conclude, however, that it is reasonable to apply the same analysis as is used for selective prosecution claims. That is what the trial court did and, in oral argument before this court, defense counsel conceded that prosecutorial vindictiveness is a subcategory of selective prosecution.

A defendant seeking discovery on a claim of selective prosecution must produce some evidence that the government could have prosecuted similarly situated defendants but chose not to do so. The evidence must tend to show the existence of the elements of the claim.

The only evidence that Bonisisio presented suggesting prosecutorial vindictiveness was defense counsel s assertion that in approximately 18 years of practice in Kitsap County he had never had charges this severe brought against any individual charge with crimes where no one was physically harmed. Conspicuously absent was any evidence regarding Kitsap County s treatment of similarly situated defendants. There was not a single description of a specific incident where Kitsap County failed to charge a defendant suspected of multiple burglaries after the defendant rejected a plea bargain. Nor was there data indicating that the Kitsap County prosecutor s office deviated from its normal practice and procedures in pursuit of Bonisisio. Given the absence of evidence supporting the prosecutorial vindictiveness claim, the trial court did not err in denying Bonisisio an evidentiary hearing.

(Citations omitted.)

3.10 Role in first appearance and preliminary hearing

(a) a prosecutor who is present at the first appearance before judicial officer should not communicate with accused unless waiver of counsel is entered, except to aid in obtaining counsel or arranging for pretrial release of the accused

(b) prosecutor should cooperate in good faith in arrangements for pretrial release under prevailing system

(c) prosecutor should not encourage uncounseled accused to waive preliminary hearing

(d) prosecutor should not seek continuance solely to moot preliminary hearing by securing indictment

(e) except for good cause, prosecutor should not seek delay in preliminary hearing after arrest made if accused in custody

(f) prosecutor should be present at preliminary hearing

Excerpt from Commentary to ABA Standard

&The prosecutor should not ask for excessive bail to prevent release. &Since the function of the preliminary examination is to determine whether there is probable cause to hold the accused for charge by indictment or otherwise, the prosecutor should avoid delay that would cause a person to be kept in custody pending a determination that there is probable cause to hold such person. &

3.11 Disclosure of evidence by the prosecutor

(a) unprofessional conduct to intentionally fail at the earliest feasible opportunity to make disclosure to the defense of the existence of evidence which tends to negate the guilt of the accused or which would tend to reduce the punishment of the accused

(b) prosecutor should comply in good faith with discovery procedures

(c) unprofessional conduct to intentionally avoid pursuit of evidence because prosecutor believes it will damage case or aid accused

Excerpt from Commentary to ABA Standard

Withholding Evidence of Innocence. The standard adopts the definition of exculpatory material contained in the Supreme Court s decision in *Brady v. Maryland,* [373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963)], that is, material that tends to negate guilt or reduce punishment. Although the test necessarily presents some questions of relevance, prosecutors are urged to disclose all material that is even possibly exculpatory as a prophylactic against reversible error and possible professional misconduct. &

Compliance with Discovery. &Independent of any rules or statutes making prosecution evidence available to discovery processes, many experienced prosecutors have habitually disclosed most if not all of their evidence to defense counsel. This practice, it is believed, often leads to guilty pleas in cases that would otherwise be tried. A defense preview of a strong prosecution case, for example, frequently strengthens the posture of a defense lawyer who is trying to persuade the defendant that a guilty plea is in the defendant s best interest. &

Intentional Ignorance of Facts. &The duty of the prosecutor is to acquire all the relevant evidence without regard to its impact on the success of the prosecution.

Constitutional Duty to Disclose Exculpatory Evidence [Evidence That Tends to Negate Guilt or Reduce Punishment]

Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194, 1196-97 (1963) (prosecutor s failure to disclose co-defendant s confession violated Due Process, and necessitated new penalty phase in death penalty case)

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.
>
> The principle & is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: The United States wins its point whenever justice is done its citizens in the courts. A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not the result of guile, to use the words of the Court of Appeals. &

(Citations omitted.) (Footnote omitted.)

Wood v. Bartholomew, 516 U.S. 1, 133 L.Ed.2d 1, 116 S.Ct. 7, 10 (1995) (prosecutor s failure to disclose fact that witness had failed polygraph test did not deprive defendant of material evidence under Brady rule, absent reasonable likelihood that disclosure of polygraph results would have resulted in different outcome at trial)

> [E]vidence is material under Brady, and the failure to disclose it justifies setting aside a conviction, only where there exists a reasonable probability that had the evidence been disclosed the result at trial would have been different. *Kyles v. Whitley,* 514 U.S. ___, 115 S.Ct. 1555, 1565-66, 131 L.Ed.2d 490 (1995); *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 3383-84, 87 L.Ed.2d 481 (1985) (opinion of Blackmun, J.); *id.,* at 685, 105 S.Ct., at 3385 (White, J., concurring in part and concurring in judgment). To begin with, on the Court of Appeals own assumption, the polygraph results were inadmissible under state law, even for impeachment purposes, absent a stipulation by the parties, see 34 F.3d, at 875 (citing *State v. Ellison, supra*), and the parties do not contend otherwise. The information at issue here, then the results of a polygraph examination of one of the witnesses is not evidence at all. Disclosure of the polygraph results, then, could have had no direct effect on the outcome of trial, because respondent could have made no mention of them either during argument or while questioning witnesses.

State v. Luvene, 127 Wn.2d 690, 704, 903 P.2d 960 (1995) (prosecutor s failure to reveal exculpatory evidence violates a defendant s due process rights).

RPC 3.8(d)

> The prosecutor in each case shall (d) Make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal. &

Court Rule Duty to Disclose All Material Evidence CrR 4.7(a)(3) and CrRLJ 4.7(a)(3)

CrRLJ 4.7(a)(3)

> Except as is otherwise provided as to protective orders, the prosecuting attorney shall disclose to defendant s counsel any material or information within the prosecuting attorney s knowledge which tends to negate defendant s guilt as to the offense charged.

State v. Oughton, 26 Wn.App. 74, 79, 612 P.2d 812, *review denied*, 94 Wn.2d 1005 (Div. 2 1980) (state criminal discovery rules make no distinction between inculpatory and exculpatory evidence)

> &The prosecuting attorney elected to keep this information from defense counsel and from the trial judge until Terry Johnson revealed it on the stand. This tactic not only falls within conduct barred by CrR 4.7(h)(2), it also runs contrary to the principles behind broad criminal discovery accepted in this state. See State v. Nelson, 14 Wn.App. 658, 662-63, 545 P.2d 36, 39 (1975). The United States Supreme Court has expressed the philosophy behind rules such as 4.7(h)(2) in language particularly appropriate in this case.
>
> > The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played.
>
> *Williams v. Florida,* 399 U.S. 78, 82, 90 S.Ct. 1893, 1896, 26 L.Ed.2d 446 (1970).
>
> (Quoted with emphasis in *State v. Nelson, supra,* [14 Wn.App. 658, 545 P.2d 36 (Div. 2 1975)], at 663, 545 P.2d at 39.)
>
> The State would have us make a distinction between inculpatory and exculpatory evidence and find no duty to produce the former. CrR 4.7(a)(i) makes no such distinction and neither do we.

State v. Brush, 32 Wn.App. 445, 455-56, 648 P.2d 897 (Div. 3 1982), *review denied*, 98 Wn.2d 1017 (1983) (prosecutor has continuing duty to disclose newly discovered evidence, even if it was discovered during trial and is intended to be used during rebuttal).

State v. Coe, 101 Wn.2d 772, 784, 684 P.2d 668 (1984) (while prosecutor has no obligation to turn over police reports, misconduct to fail to disclose that witnesses statements were a result of hypnosis; cumulative error requires reversal).

State v. Dunivin, 65 Wn.App. 728, 733, 829 P.2d 799, *review denied*, 120 Wn.2d 1016 (Div. 2 1992) (prosecutor s obligation to disclose not limited to use in state s case-in-chief, but includes disclosure of evidence intended to be used for impeachment or rebuttal purposes)

> It is the long settled policy in this state to construe the rules of criminal discovery liberally in order to serve the purposes underlying CrR 4.7, which are to provide adequate information for informed pleas, expedite trial, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process ... *State v. Yates,* 111 Wn.2d 793, 797, 765 P.2d 291 (1988) (quoting Criminal Rules Task Force, Washington Proposed Rules of Criminal Procedure 77 (West Pub. Co. ed. 1971)). To accomplish these goals, it is necessary that the prosecutor resolve doubts regarding disclosure in favor of sharing the evidence with the defense. Where, as here, the State has made a promise of confidentiality to a witness, the State, at a minimum, must present its dilemma to the trial court for resolution. Absent a contrary ruling by the trial judge, we find that a prosecutor intends to use a document, for purposes of CrR 4.7(a)(1)(v), in any situation where the State is aware of the document and there is a reasonable possibility that the document will be used during any phase of the trial.
>
> *State v. Hutchinson,* 111 Wn.2d 872, 877-78, 766 P.2d 447 (1989)
>
> CrR 4.7 is procedural rather than substantive. It provides for the accelerated disclosure of information which ultimately must be revealed at trial and its purpose is to prevent last-minute surprise, trial disruption and continuances. State v. Wilson, 29 Wn. App. 895, 901, 626 P.2d 998, review denied 96 Wn. 2d 1022 (1981); *State v. Nelson,* 14 Wn.App. 658, 545 P.2d 36 (1975). As stated in *State v. Boehme,* 71 Wn.2d 621, 632, 430 P.2d 527 (1967), *cert. denied,* 390 U.S. 1013, 88 S.Ct. 1259, 20 L.Ed.2d 164 (1968):

[T]he rules of discovery are designed to enhance the search for truth in both civil and criminal litigation. And, except where the exchange of information is not otherwise clearly impeded by constitutional limitations or statutory inhibitions, the route of discovery should ordinarily be considered somewhat in the nature of a 2-way street, with the trial court regulating traffic over the rough areas in a manner which will insure a fair trial to all concerned, neither according to one party an unfair advantage nor placing the other at a disadvantage.

(Citations omitted.)

State v. Blackwell, 120 Wn.2d 822, 828, 845 P.2d 1017 (1993)

A defendant's constitutional due process right to disclosure relates only to evidence which is favorable to the defendant and material to guilt or punishment. *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 1197, 10 L.Ed.2d 215 (1963); *see also State v. Mak,* 105 Wn.2d at 704, 718 P.2d 407. CrR 4.7(a) lists the prosecutor's obligations in engaging in criminal discovery. If an accused requests disclosure beyond what the prosecutor is obliged to disclose, he or she must show that the requested information is material to the preparation of his or her defense. *Mak,* 105 Wn.2d at 704, 718 P.2d 407 (citing CrR 4.7(e)(1)).

As we stated in *Mak,* [t]he mere possibility that an item of undisclosed evidence might have helped the defense or might have affected the outcome of the trial ... does not establish 'materiality' in the constitutional sense. *Mak,* at 704-05, 718 P.2d 407; *accord, State v. Bebb,* 108 Wn.2d 515, 523, 740 P.2d 829 (1987).

(Footnote omitted.)

Case Law Duty to Disclose Agreement With Witness for Favorable Testimony

State v. Vavra, 33 Wn.App. 142, 146, 652 P.2d 959 (Div. 3 1982) (agreement between prosecutor and witness that if witness testified favorably, prosecutor would make statement on witness s behalf in witness s unrelated sentencing in another county; Held: conviction reversed since agreement not disclosed to defense counsel)

We must reverse the conviction. Such an understanding or agreement between the prosecutor and the only independent critical witness which linked defendant Vavra with the actual robbery should have been disclosed to defense counsel for the purpose of possible impeachment. The jurors may well have found that the leniency and favoritism shown to the critical independent witness whose testimony was required to link Vavra with the crime made him less believable, and thus it was error not to disclose the terms of this arrangement to defense counsel.

In re Pirtle, 136 Wn.2d 467, 477-78, 965 P.2d 593 (1998) (Murder convictions affirmed, defendants allegations of undisclosed agreement not supported by evidence).

In every criminal trial, the State faces the well established discovery obligation to turn over to the defense evidence in its possession or knowledge both favorable to the defendant and material to guilt or punishment. Therefore, the State must disclose any favorable treatment accorded witnesses for their testimony and may not permit a false view of that treatment to go before the jury.

(Citations omitted.)

Case Law Duty to Disclose If There is a Mere Possibility that the Prosecution Intends to Use Evidence During Any Stage of a Trial

State v. Linden, 89 Wn.App. 184, 191-95, 947 P.2d 1284 (Div. 1 1997), *review denied,* 136 Wn.2d 1018 (1998) (trial court acted within its discretion in ordering continuance rather than mistrial for prosecutor s violation of its discovery obligation by failing to immediately disclose to defense that prosecution had obtained police report regarding defendant s arrest for another drug offense).

And in *Dunivin* [*State v. Dunivin,* 65 Wn.App. 728, 829 P.2d 799 (1992)], we again affirmed a trial court s discretion under CrR 4.7(h)(7)(i). *Dunivin* involved a police informant who was also a defense witness. The prosecution impeached the witness by questioning him about his contact with the police and showing him a receipt for the fee he received for supplying information. This was the first time the defendant learned of his witness s informant role. The court granted a mistrial, finding the violation materially affected the trial s fairness....

We then held that intends to use under the rule contemplates any situation where the State is aware of the document and there is a reasonable possibility that the document will be used during any phase of the trial. Although the State expected it could avoid using the impeaching questioning and evidence, the mere reasonable possibility that the witness s testimony might take this path mandated CrR 4.7 disclosure. Moreover, we found no different result where the evidence is intended only for rebuttal or impeachment evidence.

Despite this clear case law, the State argues that the commentary to the ABA Standards Relating to Discovery and Procedure Before Trial supports its position that the phrase intends to use at trial applies only to the prosecutor s case-in-chief and that this case law holding otherwise is misguided. The State complains that CrR 4.7 does not apply to

information in otherwise inadmissible documents, and that under *Dunivin s* reasonable possibility standard, it was not required to disclose the report..

...Thus, we find that CrR 4.7 discovery requirements apply to rebuttal and impeachment evidence; consequently, the State violated its obligations when it unintentionally failed to disclose the police report to Linden as soon as the State confirmed the report s existence.

(Footnotes omitted.)

Case Law Duty to Disclose Witness s Convictions

State v. Copeland, 89 Wn.App. 492,497-98, 949 P.2d 458 (Div. 2 1998) (prosecution failed to disclose that complaining witness in rape case had a felony theft conviction occurring two years earlier in same county; Held: prosecutorial misconduct, conviction reversed and remanded for new trial)

A deputy prosecutor, who is a member of the prosecuting attorney s staff, engages in misconduct when he or she fails to disclose prior criminal convictions of witnesses intended to be called for trial if that information is within the knowledge, control or possession of the deputy prosecutor or of other members of the prosecuting attorney s staff, regardless of whether the deputy prosecutor has actual knowledge of the information.

Query Does a prosecutor s office s access to electronic data from the Judicial Information System (discis, scomis, juvis) require the office to look in the database for its witnesses prior convictions, and then disclose the information to the defense?

Case Law Preservation of Evidence

State v. Straka, 116 Wn.2d 859, 884, 886, 810 P.2d 888 (1991) (defense sought dismissal due to state s failure to preserve invalid sample error message on breath testing instrument s screen; Held: *State v. Wright,* 87 Wn.2d 783, 557 P.2d 1 (1976) and *State v. Vaster,* 99 Wn.2d 44, 659 P.2d 528 (1983) overruled insofar as they are inconsistent; holding based solely on federal due process analysis).

State v. Wittenbarger, 124 Wn.2d 467, 474-76, 880 P.2d 517 (1994) (Held: state s failure to preserve maintenance and repair records of breath testing instrument did not require suppression of BAC result)

In recent years we have left open the question of whether the due process clause of our state constitution places more stringent requirements on the State in the area of preservation of evidence for the defense. *See State v. Furman,* 122 Wn.2d 440, 858 P.2d 1092 (1993); *State v. Ortiz,* 119 Wn.2d 294, 831 P.2d 1060 (1992); *State v. Straka,* 116 Wn.2d 859, 810 P.2d 888 (1991). Today, after consideration of the 6 factors set out in *State v. Gunwall,* 106 Wn.2d 54, 720 P.2d 808 (1986), we hold that the state due process clause affords the same protection regarding a criminal defendant s right to discover potentially exculpatory evidence as does its federal counterpart.

The Fourteenth Amendment requires that criminal prosecutions conform with prevailing notions of fundamental fairness, and that criminal defendants be given a meaningful opportunity to present a complete defense. *California v. Trombetta,* 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). To comport with due process, the prosecution has a duty to disclose material exculpatory evidence to the defense and a related duty to preserve such evidence for use by the defense. See Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *California v. Trombetta, supra.*

Two Supreme Court cases, *California v. Trombetta, supra,* and *Arizona v. Youngblood,* 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988), developed a test to determine whether the government s failure to preserve evidence significant to the defense violates a defendant s due process rights. It is clear that if the State has failed to preserve material exculpatory evidence criminal charges must be dismissed. Recognizing that the right to due process is limited, however, the Court has been unwilling to impos[e] on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution. *Youngblood,* 488 U.S. at 58, 109 S.Ct. at 337. A showing that the evidence might have exonerated the defendant is not enough. In order to be considered material exculpatory evidence, the evidence must both possess an exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. *Trombetta,* 467 U.S. at 489, 104 S.Ct. at 2534.

In *Trombetta*, the evidence at issue consisted of several DWI defendants breath test samples tested by the State and then discarded. Applying its test, the Court held that the destroyed breath samples were not material exculpatory evidence and reinstated the DWI convictions. The Court found the exculpatory value of the samples to be quite low, pointing out that given the accuracy of California's Intoxilyzer the breath test samples would have been much more likely to be inculpatory than exculpatory. *Trombetta,* 467 U.S. at 489-90, 104 S.Ct. at 2534. Furthermore, the Court found that the defendants had means, other than retesting the original breath samples, to demonstrate their innocence. *Trombetta,* 467 U.S. at 490, 104 S.Ct. at 2535.

In similar circumstances, we held in *State v. Straka, supra,* that due process did not require the State to generate and preserve records of invalid message codes on the DataMasters. These messages appear to alert the operator that the DataMaster is unable to perform a reliable test due to either an electrical misadjustment or the presence of mouth alcohol. *Straka,* 116 Wn.2d at 879, 810 P.2d 888. We found the invalid sample messages were not material exculpatory evidence because they do not confirm or deny the accuracy of a particular breath test and, thus, are not directly related to guilt or innocence of an individual charged under the DWI statute. *Straka,* 116 Wn.2d at 885, 810 P.2d 888.

State v. Smith, 130 Wn.2d 215, 215, 225, 922 P.2d 811 (1996) (failure to preserve portable breath test results did not violate due process)

Smith invokes the *Brady/Wittenbarger* rule and argues the State deprived him of due process in failing to preserve the PBT results: To comport with due process, the prosecution has a duty to disclose material exculpatory evidence to the defense and a related duty to preserve such evidence for use by the defense. *State v. Wittenbarger,* 124 Wn.2d 467, 475, 880 P.2d 517 (1994), citing *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). But:

> A showing that the evidence might have exonerated the defendant is not enough. In order to be considered material exculpatory evidence, the evidence must both possess an exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

Wittenbarger, 124 Wn.2d at 475, 880 P.2d 517, citing *California v. Trombetta,* 467 U.S. 479, 489, 104 S.Ct. 2528, 2534, 81 L.Ed.2d 413 (1984). Likewise, in *State v. Copeland,* 130 Wn.2d 244, 922 P.2d 1304 (1996), we held the failure of the State to preserve certain DNA materials for testing did not violate *Brady/Wittenbarger.* We drew a careful distinction there between potentially useful evidence and material exculpatory evidence. In the absence of police bad faith, there is no denial of due process in failing to preserve the former.

(Emphasis in original.)

Case Law No Duty to Search for Exculpatory Evidence

State v. McNichols, 128 Wn.2d 242, 249, 906 P.2d 329 (1995)

While the State must afford a DWI suspect a reasonable opportunity, under the circumstances, to obtain additional tests, *Blaine,* 93 Wn.2d at 725-26, 612 P.2d 789, this does not require the State to administer additional tests. *State v. Stannard,* 109 Wn.2d 29, 36, 742 P.2d 1244 (1987). Moreover, the State has no duty to aid the accused in obtaining exculpatory evidence. *State v. Entzel,* 116 Wn.2d 435, 442, 805 P.2d 228 (1991); *see also State v. Judge,* 100 Wn.2d 706, 717, 675 P.2d 219 (1984); *State v. Howard,* 52 Wn.App. 12, 16, 756 P.2d 1324 (1988), *review denied*, 112 Wn.2d 1010 (1989). Defense counsel, not the State, is the appropriate person to advise the DWI suspect of the best means of gathering potentially exculpatory evidence because a DWI suspect is entitled to be advised of his or her right to counsel prior to a state-administered test. *State v. Entzel,* 116 Wn.2d at 443, 805 P.2d 228; *State v. Staeheli,* 102 Wn.2d 305, 309, 685 P.2d 591 (1984); *State ex rel. Juckett v. Evergreen Dist. Court,* 100 Wn.2d 824, 831, 675 P.2d 599 (1984); CrRLJ 3.1(a) and (b).

State v. Martinez, 78 Wn.App. 870, 877, 899 P.2d 1302 (Div. 2 1995), *review denied*, 128 Wn.2d 1017 (1996) (arson defendant asserted that prosecution had duty to seek out and retain a furnace held and ultimately destroyed by insurance company that defense claimed started fire; Held: no duty by prosecution to obtain exculpatory evidence held by others during investigation).

Case Law No Duty to Ascertain True Identity of Witness

State v. Ramos, 83 Wn.App. 622, 635-36, 922 P.2d 193 (Div. 1 1996) (trial court s dismissed case after finding prosecutorial mismanagement and discovery violation; Held: reversed, no duty to determine true identity of witness)

The record contains no evidence that information in the prosecutor's office, readily available or otherwise, established Holdman's true surname. Based on the record before this court, we remain uncertain even today of Holdman's true surname. Unfortunately, many people who are brought before the criminal courts prefer to utilize aliases and may, as seemingly occurred here, persuade police and prosecutors that their true names are something other than their actual true names. Fingerprint databases, mugshots, conviction records, "rap" sheets and other resources available to the State may tie a given defendant to any number of aliases, but rarely will confirm his or her true legal name. Requiring the State to ascertain with certainty and notify the defense of the true name of every co-defendant and potential witness known or suspected to be using an alias would be an impossible burden. It is one we decline to impose. Too often, a co-defendant's or witness's true name might be known only to that person and his or her mother.

Here, the State provided the defense during discovery with both variations of Ms. Holdman's name and with both birthdates contained in the police reports. Although the State had some indication at the omnibus hearing that Holdman

might turn State's evidence, Holdman did not reveal her actual intention to do so until the day before trial. Until she actually signed the plea bargain and entered her guilty plea on the morning of the first day of trial, the State had no way of knowing that she would, in fact, be available as a witness. Until that moment, Holdman was a co-defendant in the VUCSA case. Although the State utilized the name Holden in the conflicts report, it did so under the good faith misapprehension that such was Holdman's true name. On these facts, we can only conclude that the State honored the letter and spirit of the discovery rules. Moreover, the defense had both surnames and birthdates in its possession by virtue of discovery, and could have checked for conflicts at any time. That a co-defendant might turn State's evidence is not unforeseeable. The record in this case does not support the trial court's finding of mismanagement.

Case Law Continuing Duty to Promptly Disclose

State v. Garcia, 45 Wn.App. 132, 136, 724 P.2d 412 (Div. 1 1986)

&Criminal Rule 4.7(h)(2) makes clear that the prosecutor's obligation is ongoing:

> Continuing Duty To Disclose. If, after compliance with these standards or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, he shall promptly notify the other party or his counsel of the existence of such additional material, and if the additional material or information is discovered during trial, the court shall also be notified.

(Emphasis added.) This court has stated that promptly, as used in CrR 4.7(h)(2) means at the moment of discovery or confirmation . *State v. Oughton,* 26 Wn.App. 74, 79, 612 P.2d 812 (Div. 2 1980).

State v. Linden, 89 Wn.App. 184, 191-95, 947 P.2d 1284 (Div. 1 1997), *review denied,* 136 Wn.2d 1018 (1998) (trial court acted within its discretion in ordering continuance rather than mistrial for prosecutor s violation of its discovery obligation by failing to immediately disclose to defense that prosecution had obtained police report regarding defendant s arrest for another drug offense).

> And in *Dunivin* [*State v. Dunivin,* 65 Wn.App. 728, 829 P.2d 799 (1992)], we again affirmed a trial court s discretion under CrR 4.7(h)(7)(i). *Dunivin* involved a police informant who was also a defense witness. The prosecution impeached the witness by questioning him about his contact with the police and showing him a receipt for the fee he received for supplying information. This was the first time the defendant learned of his witness s informant role. The court granted a mistrial, finding the violation materially affected the trial s fairness....
>
> We then held that intends to use under the rule contemplates any situation where the State is aware of the document and there is a reasonable possibility that the document will be used during any phase of the trial. Although the State expected it could avoid using the impeaching questioning and evidence, the mere reasonable possibility that the witness s testimony might take this path mandated CrR 4.7 disclosure. Moreover, we found no different result where the evidence is intended only for rebuttal or impeachment evidence.
>
> Despite this clear case law, the State argues that the commentary to the ABA Standards Relating to Discovery and Procedure Before Trial supports its position that the phrase intends to use at trial applies only to the prosecutor s case-in-chief and that this case law holding otherwise is misguided. The State complains that CrR 4.7 does not apply to information in otherwise inadmissible documents, and that under *Dunivin s* reasonable possibility standard, it was not required to disclose the report...
>
> ...Thus, we find that CrR 4.7 discovery requirements apply to rebuttal and impeachment evidence; consequently, the State violated its obligations when it unintentionally failed to disclose the police report to Linden as soon as the State confirmed the report s existence.

(Footnotes omitted.)

Case Law Duty to Obtain Material Held by Others Upon Defense Request

CrR 4.7(d) says

> Upon defendant s request and designation of material or information in the knowledge, possession or control of other persons which would be discoverable if in the knowledge, possession or control of the prosecuting attorney, the prosecuting attorney shall attempt to cause such material or information to be made available to the defendant. If the prosecuting attorney's efforts are unsuccessful and if such material or persons are subject to the jurisdiction of the court, the court shall issue suitable subpoenas or orders to cause such material to be made available to the defendant.

State v. Sherman, 59 Wn.App. 763, 767-70, 801 P.2d 274 (Div. 1 1990) (prosecutor agreed to obtain IRS records of complaining witness, but failed to do so; Held: trial court dismissal upheld)

> This distinction is important, because case law sets forth certain requirements for CrR 8.3(b) dismissals. The Supreme Court has interpreted CrR 8.3(b) to require a showing of arbitrary action or governmental misconduct before

dismissal of a prosecution is appropriate. *Dailey,* 93 Wn.2d at 457, 610 P.2d 357; *State v. Burri,* 87 Wn.2d 175, 183, 550 P.2d 507 (1976). Thus, if there is evidence of arbitrary action or governmental misconduct, we will not reverse absent an abuse of discretion. *State v. Sulgrove,* 19 Wn.App. 860, 863, 578 P.2d 74 (1978). In addition, "governmental misconduct need not be of an evil or dishonest nature; simple mismanagement also falls within [the] standard." *Sulgrove,* 19 Wn.App. at 863; *accord Dailey,* 93 Wn.2d at 457.

Notwithstanding this deferential standard of review,

> [d]ismissal of charges is an extraordinary remedy. It is available only when there has been prejudice to the rights of the accused which materially affected the rights of the accused to a fair trial and that prejudice cannot be remedied by granting a new trial.

State v. Baker, 78 Wn.2d 327, 332-33, 474 P.2d 254 (1970). When they deem it necessary, Washington appellate courts have not hesitated in overturning a trial court's dismissal of charges. *See, e.g., State v. Getty,* 55 Wn.App. 152, 777 P.2d 1 (1989) (dismissal of juvenile action reversed because even if government did commit misconduct, defendant suffered no prejudice); *State v. Coleman,* 54 Wn.App. 742, 775 P.2d 986, *review denied*, 113 Wn.2d 1017 (1989) (dismissal overturned because State's dilatory actions produced no demonstrable prejudice to defendant); *State v. Clark,* 53 Wn.App. 120, 124-25, 765 P.2d 916 (1988), *review denied*, 112 Wn.2d 1018 (1989) (trial court's dismissal of charges inappropriate when sex abuse victim refused to give any statements to the defense in pretrial interviews, and the State had not interfered in the interviews in any way).

With those principles in mind, we turn to the merits of the appeal. The trial court cited four grounds for its ruling: the State's failure to produce the IRS records, its late amendment of the information, its late motion to reconsider the omnibus order, and its attempt to expand the witness list on the day of trial. The State contends that none of the grounds relied upon by the trial court, either individually or collectively, justifies the extraordinary remedy of dismissal.

We disagree. The State's failure to produce the IRS records, in and of itself, is a sufficient ground on which to affirm the dismissal. In the April 14 omnibus order, the State agreed to undertake production of the IRS records of the complaining witness. In spite of this agreement, the State failed to produce the records, and then waited until the day after trial was to have begun to seek reconsideration of the order.

The State argues that its failure to produce the records does not warrant dismissal because it attempted in good faith to obtain the records, which were not in its control, and that the defense should have made an independent effort to obtain the records. The State further argues that the defense should have sought a continuance to allow time to produce the records, and because it did not, dismissal is an inappropriate remedy.

The fact that the State did not have physical control of the records, or that the defense did not independently attempt to locate the records, does not excuse the State's actions. The omnibus order, agreed to by the prosecution, specifically placed the onus on the State to give the IRS records to the defense prior to trial. The defense had no obligation to attempt to get the records from the State's complaining witness, because the State had agreed to provide them. Further, although the material was not in the hands of the State, it was available to its chief witness, the employer. While the employer did unsuccessfully attempt to locate the records in his files, the State failed to follow up to ensure that the records were produced in a timely fashion. As a result, the employer did not request copies of the records from the IRS until the week before the hearing on the motion to dismiss, 10 days after trial was originally scheduled to start.

Nor do we find persuasive the State's argument that the defendant should have sought a continuance to allow time for the State to produce the records. Here, the speedy trial expiration date had been extended a total of seven times, and was scheduled to expire again on the day the case was dismissed. To require Mead to request a continuance under these circumstances would be to present her with a Hobson's choice: she must sacrifice either her right to a speedy trial or her right to be represented by counsel who had sufficient opportunity to prepare her defense. The Supreme Court recognized this problem in *State v. Price,* 94 Wn.2d 810, 814, 620 P.2d 994 (1980):

> We agree that if the State inexcusably fails to act with due diligence, and material facts are thereby not disclosed to defendant until shortly before a crucial stage in the litigation process, it is possible either a defendant's right to a speedy trial, or his right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense, may be impermissibly prejudiced. Such unexcused conduct by the State cannot force a defendant to choose between these rights.

(Emphasis added.) In circumstances such as these, we do not believe a defendant should be asked to choose between two constitutional rights in order to accommodate the State's lack of diligence.

(Footnote omitted.)

State v. Blackwell, 120 Wn.2d 822, 829-32, 845 P.2d 1017 (1993) (CrR 4.7(d) provides that upon request, prosecutor has a duty to obtain material held by third parties, and if unsuccessful, subpoenas or other orders may be issued; defense failed to make specific showing of materiality of police personnel records, though, to justify disclosure)

Defense counsels broad, unsupported claim that the police officers personnel files may lead to material information does not justify automatic disclosure of the documents. *See State v. Kaszubinski,* 177 N.J.Super. 136, 140-41, 425 A.2d 711 (1980) (defendant not entitled to even an in camera inspection of police officer s personnel file without a showing that the file contained material information that might bear on the officer's credibility); *People v. Gissendanner,* 48 N.Y.2d 543, 423 N.Y.S.2d 893, 399 N.E.2d 924 (1979) (defendant made no factual showing that it was reasonably likely the police officer's personnel file contained relevant and material information); *People v. Condley,* 69 Cal.App.3d 999, 138 Cal.Rptr. 515, *cert. denied,* 434 U.S. 988, 98 S.Ct. 619, 54 L.Ed.2d 483 (1977) (defendant made no showing of good cause or plausible justification for inspection); *State ex rel. Johnson v. Schwartz,* 26 Or.App. 279, 552 P.2d 571 (1976) (that defendant's attorney heard of an other similar incident is not a sufficient showing); *State v. Sagner,* 18 Or.App. 464, 525 P.2d 1073 (1974) (whether the information exists is purely conjecture).

A defendant must advance some factual predicate which makes it reasonably likely the requested file will bear information material to his or her defense. A bare assertion that a document might bear such fruit is insufficient. Our review of the record indicates that no such showing of materiality was made in this case. &

We have interpreted CrR 8.3(b) to require a showing of arbitrary action or governmental misconduct before dismissal of a prosecution is appropriate. *State v. Lewis,* 115 Wn.2d 294, 298, 797 P.2d 1141 (1990). Defendants correctly argue that governmental misconduct need not be of an evil or dishonest nature; simple mismanagement is sufficient. *See Dailey,* 93 Wn.2d at 457. Citing *State v. Sherman,* 59 Wn.App. 763, 801 P.2d 274 (1990), defendants contend the prosecutor's failure to obtain the requested discovery amounts to mismanagement of the case and justifies dismissal. We disagree.

In *Sherman,* the Court of Appeals affirmed the trial court's dismissal of a criminal prosecution pursuant to CrR 8.3(b). In that case, the State charged the defendant with first degree theft, alleging that she had stolen money from her employer. *Sherman,* at 765. The trial court entered an omnibus order requiring the State to provide the defendant with several items, including all records submitted by the employer to the IRS during the defendant's employment. A deputy prosecutor approved the order but failed to provide the requested discovery.

Sherman is distinguishable from this case. In *Sherman,* the State agreed to provide the requested discovery, including the IRS records, even though the State did not have physical control of the records. *Sherman,* at 768-69. In spite of its agreement, the State in *Sherman* failed to produce the records and then waited until the day after trial was to have begun to seek reconsideration of the order. The *Sherman* court found the State's actions to be prejudicial to the defense, especially since the defense had emphasized the importance of these records weeks prior to trial. *Sherman*, at 771. Importantly, the *Sherman* court found that the combined actions by the State the late amendment of the information, the failure to produce a separate witness list, and the motion to add an expert witness on the day of trial--demonstrated the extent of the State's mismanagement of its case. *Sherman*, at 772. There is no such record of mismanagement here.

Unlike *Sherman*, the trial court in this case made no findings that the prosecutor's actions prejudiced the defendants. Our review of the record indicates that the prosecutor's actions were reasonable. The prosecutor filed a motion for reconsideration of the trial court's order based on CrR 4.7(d). The prosecutor advised both the court and defense counsel of his efforts to obtain the documents and even suggested that the court issue a subpoena duces tecum. There was no showing of "game playing", mismanagement, or other governmental misconduct on the part of the State that prejudiced the defense.

Case Law Sanctions for Discovery Violation

CrR 4.7(g)(7) Sanctions

(i) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.

(ii) The court may at any time dismiss the action if the court determines that failure to comply with an applicable discovery rule or an order issued pursuant thereto is the result of a willful violation or of gross negligence and that the defendant was prejudiced by such failure.

(iii) A lawyer s willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may

subject counsel to appropriate sanctions by the court.

State v. Laureano, 101 Wn.2d 745, 762-63, 682 P.2d 889 (1984), *overruled on other grounds by State v. Brown,* 111 Wn.2d 124, 761 P.2d 588 (1988), *adhered to on reh g,* 113 Wn.2d 520, 782 P.2d 1013, 787 P.2d 906 (1989)

A prosecuting attorney is required to disclose to the defendant the names and addresses of persons whom the prosecuting attorney intends to call at trial. CrR 4.7(a)(1)(i). This obligation is of a continuing nature. CrR 4.7(h)(2). Failure to comply with CrR 4.7 may result in an order compelling discovery, a continuance, or dismissal of the action. CrR 4.7(h)(7)(i). Suppression of evidence is not one of the sanctions available for failure to comply with the discovery rules. *State v. Thacker,* 94 Wn.2d 276, 280, 616 P.2d 655 (1980); *State v. Lewis,* 19 Wn.App. 35, 47-48, 573 P.2d 1347 (1978).

CrR 8.3(b) authorizes a trial court to dismiss any criminal prosecution "on its own motion in the furtherance of justice". The trial court's power to dismiss is discretionary and is reviewable only for manifest abuse of discretion. *State v. Dailey,* 93 Wn.2d 454, 456, 610 P.2d 357 (1980); *State v. Burri,* 87 Wn.2d 175, 183, 550 P.2d 507 (1976). To justify dismissal of a prosecution, the record must show " 'governmental misconduct or arbitrary action' ". *State v. Burri,* 87 Wn.2d at 183, 550 P.2d 507 (quoting *State v. Starrish,* 86 Wn.2d 200, 205, 544 P.2d 1 (1975)). " '[G]overnmental misconduct' need not be of an evil or dishonest nature, simple mismanagement is sufficient." *State v. Dailey,* 93 Wn.2d at 457, 610 P.2d 357; *State v. Sulgrove,* 19 Wn.App. 860, 863, 578 P.2d 74 (1978). Nevertheless, dismissal of charges remains an extraordinary remedy, *see State v. Whitney,* 96 Wn.2d 578, 580, 637 P.2d 956 (1981), and is appropriate only if the defendant's right to a fair trial has been prejudiced in a manner which could not be remedied by a new trial. State v. *Whitney, supra; State v. Baker,* 78 Wn.2d 327, 332-33, 474 P.2d 254 (1970).

State v. Ray, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991) (trial court committed reversible error when it suppressed proferred defense testimony because court believed defendant had violated discovery rule requiring disclosure of prospective witness and substance of testimony at time no later than omnibus hearing)

Suppression of evidence is not one of the sanctions available for failure to comply with discovery rules and the trial court, therefore, erred when it suppressed Bogart's testimony because the court believed Ray violated CrR 4.7(b). *State v. Thacker,* 94 Wn.2d 276, 280, 616 P.2d 655 (1980).

State v. Blackwell, 120 Wn.2d 822, 829-30, 832, 845 P.2d 1017 (1993) (prosecutor's failure to obtain personnel records of arresting officers after a defense request did not warrant dismissal)

CrR 8.3(b) provides that "[t]he court on its own motion in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution and shall set forth its reasons in a written order." We have repeatedly stressed that " 'dismissal of charges is an extraordinary remedy available only when there has been prejudice to the rights of the accused which materially affected his or her rights to a fair trial.' " *Spokane v. Kruger,* 116 Wn.2d 135, 144, 803 P.2d 305 (1991) (quoting *Seattle v. Orwick,* 113 Wn.2d 823, 830, 784 P.2d 161 (1989)).

We have interpreted CrR 8.3(b) to require a showing of arbitrary action or governmental misconduct before dismissal of a prosecution is appropriate. *State v. Lewis,* 115 Wn.2d 294, 298, 797 P.2d 1141 (1990). Defendants correctly argue that governmental misconduct need not be of an evil or dishonest nature; simple mismanagement is sufficient. *See Dailey,* 93 Wn.2d at 457, 610 P.2d 357. Citing *State v. Sherman,* 59 Wn.App. 763, 801 P.2d 274 (1990), defendants contend the prosecutor's failure to obtain the requested discovery amounts to mismanagement of the case and justifies dismissal. We disagree. &

The prosecutor advised both the court and defense counsel of his efforts to obtain the documents and even suggested that the court issue a subpoena duces tecum. There was no showing of "game playing", mismanagement, or other governmental misconduct on the part of the State that prejudiced the defense.

The trial court abused its discretion by dismissing this prosecution on untenable grounds. "[W]here there is no evidence of arbitrary prosecutorial action or governmental misconduct (including mismanagement of the case ...), the court's dismissal will be reversed." *State v. Underwood,* 33 Wn.App. 833, 837, 658 P.2d 50, *review denied*, 99 Wn.2d 1012 (1983) (citing *State v. Starrish,* 86 Wn.2d 200, 206-07, 544 P.2d 1 (1975)). Even if there were governmental misconduct, dismissal is not required absent a showing of prejudice to the defense. *See Orwick,* 113 Wn.2d at 830-31, 784 P.2d 161. There was no such showing here.

State v. Cannon, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996) (state crime lab mishandled some evidence, and FBI slow to produces test results; Held: discovery violation not sanctionable since defense did not show prejudice, and even if state did violate discovery rules, dismissal would not be appropriate, as defense counsel was placed on notice from time of charging that state intended to introduce scientific evidence relating to blood samples and paint chips, and defendant failed to show that timing of his receipt of

relevant final reports interfered with his ability to investigate procedures employed therein).

State v. Hutchinson, 135 Wn.2d 863, 880-84, 959 P.2d 1061 (1998), *cert. denied,* ___ U.S. ___, 119 S.Ct. 1065, ___ L.Ed.2d ___ (1999) (suppression upheld as a remedy for defense counsel violation of discovery rules).

While the Defendant objected to the trial court's exclusion of testimony, CrR 4.7 and the cases interpreting it were never cited or brought to the court's attention. The Defendant does not argue this is a constitutional issue which can be raised for the first time on appeal. In fact, exclusion does not violate the Sixth Amendment. *Taylor v. Illinois,* 484 U.S. 400, 412-13, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). The Defendant does not argue the state constitution provides greater protection. We nevertheless reach the issue, as the Court of Appeals opinion addressed it substantively.

We construe CrR 4.7 in light of the United States Supreme Court's decision in *Taylor v. Illinois,* which permits exclusion of defense witness testimony as a sanction for discovery violations. While CrR 4.7(h)(7)(i) does not enumerate exclusion as a remedy, it does allow a trial court to "enter such other order as it deems just under the circumstances." This language allows the trial court to impose sanctions not specifically listed in the rule. *State v. Jones,* 33 Wn.App. 865, 868, 658 P.2d 1262, *review denied,* 99 Wn.2d 1013 (1983). The State argues the rule should be read to encompass exclusion of evidence and applied narrowly to discovery violations such as this.

Cases interpreting CrR 4.7(h)(7)(i) have typically involved the failure to produce evidence or identify witnesses in a timely manner. *See, e.g., State v. Linden,* 89 Wn.App. 184, 947 P.2d 1284 (1997) (holding trial court acted within its discretion when granting continuance to defense for prosecution's late disclosure of information). Violations of that nature are appropriately remedied by continuing trial to give the nonviolating party time to interview a new witness or prepare to address new evidence. Where the State's violation of the rule is serious, mistrial or dismissal may be appropriate. *See, e.g., Jones,* 33 Wn.App. at 868-69, 658 P.2d 1262 (holding State's numerous failures to adhere to trial judge's discovery orders justified mistrial).

But where, as here, the discovery violation is the defendant's ongoing refusal to undergo a court-ordered examination, none of those remedies is meaningful. A continuance, as shown here, would serve no purpose unless the defendant who had refused to cooperate could be compelled to submit to an examination during the delay. Holding the defendant in contempt might result in compliance in some situations but would have little or no effect on a defendant charged with a capital crime, as here. Dismissal, obviously, would only unfairly penalize the State.

* * *

Exclusion or suppression of evidence is an extraordinary remedy and should be applied narrowly. Discovery decisions based on CrR 4.7 are within the sound discretion of the trial court, *State v. Yates,* 111 Wn.2d 793, 797, 765 P.2d 291 (1988), and the factors to be considered in deciding whether to exclude evidence as a sanction are: (1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the prosecution will be surprised or prejudiced by the witness's testimony; and (4) whether the violation was willful or in bad faith. *Taylor,* 484 U.S. at 415 n. 19, 108 S.Ct. 646 (citing *Fendler v. Goldsmith,* 728 F.2d 1181, 1188-90 (9th Cir.1983)).

In this case, the factors weigh in favor of exclusion. Less severe sanctions, as we stated above, would not be effective. The impact of witness preclusion in this case was significant. Marsha Hedrick, a clinical psychologist, would have testified to the Defendant's history of abuse as a child, his paranoid schizophrenia, and his low IQ, concluding he was highly unlikely to have premeditated the action. Defense counsel made offers of proof that Dr. George Christian Harris, a psychiatrist, would have testified: "We are talking about major mental disorders here with major [e]ffects on the mental machinery.... I think you have substantial impairment of ability, or capability of formulating intent." Clerk's Papers at 309. Monty Scott, a neuropsychologist, would have expressed his "very strong opinion" that the Defendant was not "capable of premeditating the act of murder on that date[.]" Clerk's Papers at 313. Exclusion of the foregoing testimony was nevertheless ameliorated by the allowance of Dr. Halpern's and several lay witnesses' testimony regarding the Defendant's diminished capacity at the time of the crime.

Having been notified of the proposed witnesses' expected testimony, the State may not have been "surprised" at trial. It would, however, have been prejudiced by the inability to counter the testimony with any affirmative evidence.

Finally, the discovery violation was willful. As the trial court noted in denying one of the motions for reconsideration, the Defendant's "continual refusal" to undergo an examination was marked by repeated "defiance." Verbatim Report of Proceedings at 1479 (June 15, 1989). We hold exclusion of the Defendant's experts was warranted in this case.

Sample Memorandum Response to Defense Request for a Bill of Particulars

Our office has recently received many defense requests for bills of particulars, especially in obstructing a law enforcement officer cases. Frequently the defense is seeking to require us to disclose our theory of the case under the guise of a discovery motion for bill of particulars. This is not the proper use of a bill of particulars procedure.

Additionally, the motion may be really a pretrial challenge of the State's evidence to establish a prima facie case for all of the elements of the charge, but not in the format required by *State v. Knapstad,* 107 Wn.2d 346, 729 P.2d 48 (1986). Hopefully this sample memorandum will be helpful

Response to Request for Bill of Particulars

An Accused Has a Constitutional Right to be Informed of the Nature and Cause of the Criminal Accusation. A defendant has a constitutional right to be informed of the nature and cause of the accusation against him or her to enable the defendant to prepare his defense and to avoid a subsequent prosecution for the same crime.[5]

> Our prior cases indicate that an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as those words themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished. Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged.

Hamling v. United States, 418 U.S. 87, 41 L.Ed.2d 590, 94 S.Ct. 2887, 2907-08, *rehearing denied,* 419 U.S. 885, 42 L.Ed.2d 129, 95 S.Ct. 157 (1974). (Citations omitted.)

This Right is Ordinarily Satisfied by a Sufficiently Definite Charging Document. This constitutional right of a criminal defendant to be appraised with reasonable certainty as to the charges against him is ordinarily satisfied by a charging document which charges a crime in the language of the statute, where the crime is defined with certainty within the statute. *State v. Merrill,* 23 Wn.App. 577, 580, 597 P.2d 446, *review denied*, 92 Wn.2d 1036 (Div. 3 1979); *State v. Grant,* 89 Wn.2d 678, 686, 575 P.2d 210 (1978).

> A charging document is generally constitutionally sufficient if it notifies a criminal defendant of the nature of the accusation with reasonable certainty, thereby permitting the defendant to develop a proper defense and to offer any resulting judgment as a bar to a second prosecution for the same offense. When a statute sets forth alternative means by which a crime can be committed, the charging document may charge none, one, or all of the alternatives, provided the alternatives are not repugnant to one another. If the information alleges only one alternative, however, it is error for the factfinder to consider uncharged alternatives, regardless of the strength of the evidence presented at trial.

State v. Williamson, 84 Wn.App. 37, 924 P.2d 960, 962 (1996). (Citations omitted.)

The omission of any element of the charged crime, statutory or otherwise, renders the charging document constitutionally defective. *State v. Kjorsvik,* 117 Wn.2d 93, 97, 812 P.2d 86 (1991). Charging documents which are not challenged until after the verdict will be more liberally construed in favor of validity than those challenged before or during trial. *Kjorsvik,* 117 Wn.2d at 102.

> In *Kjorsvik* we abandoned the traditional analysis applied under Const. art. I, Sec. 22 (amend. 10) and adopted an analysis consistent with the federal standard of review for sufficiency of information challenges raised for the first time on appeal. That analysis requires us to determine whether the information is sufficient by asking: (1) do the necessary elements appear in any form, or by fair construction can they be found, in the information; and, if so, (2) can the defendant show he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice.

State v. Tunney, 129 Wn.2d 336, 917 P.2d 95 (1996).

When a conviction is reversed due to an insufficient charging document, the result is a dismissal of charges without prejudice to the right of the State to recharge and retry the offense for which the defendant was convicted or for any lesser included offense. *State v. Vangerpen,* 125 Wn.2d 782, 791, 888 P.2d 1177 (1995).

In judging the sufficiency of a charging document, though, the law is clear that the prosecuting authority need not allege its supporting evidence, theory of the case or whether or not it can prove its case. *United States v. Buckley,* 689 F.2d 893 (1982), *cert. denied,* 460 U.S. 1086, 103 S.Ct. 1778, 76 L.Ed.2d 349 (1983); *State v. Bates,* 52 Wn.2d 207, 324 P.2d 810 (1958).

A Bill of Particulars May Clarify a Constitutionally Sufficient but Vague Charging Document. If the charging document states each element, but is vague as to some other matter significant to the defense, a bill of particulars is capable of amplifying or clarifying particular matters that are essential to the defense. *State v. Holt,* 104 Wn.2d 315, 320, 704 P.2d 1189 (1985); CrRLJ 2.4(e).

> A defendant is ordinarily entitled to the specific date and time of the offense, its location, the name of the complainant and victim, and the means by which the defendant allegedly committed the offense if such information is

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[5] The Sixth Amendment to the United States Constitution provides that [i]n all criminal prosecutions, the accused shall enjoy the right & to be informed of the nature and cause of the accusation &.

Article 1, § 22 of the Washington State Constitution, which contains language almost identical to the federal constitution, provides: [i]n all criminal prosecutions the accused shall have the right & to demand the nature and cause of the accusation against him. &

> necessary for the defense. This serves to minimize surprise and assists a defendant in his preparation for trial, particularly when the charge is stated in general terms.

Ferguson, Wash.Crim.Prac. and Proc., § 2003, p. 387.

In determining whether to order a bill of particulars in a specific case, a court should consider whether the defendant has been advised adequately of the charges through the charging document and all other disclosures made by the government since full discovery obviates the need for a bill of particulars. *United States v. Long,* 706 F.2d 1044 (9th Cir. 1983); *United States v. Giese,* 597 F.2d 1170 (9th Cir.), *cert. denied,* 444 U.S. 979, 100 S.Ct. 480. 62 L.Ed.2d 405 (1979).

The furnishing of a bill of particulars is discretionary with the trial court, whose ruling will not be disturbed on appeal absent a showing of an abuse of discretion. *State v. Noltie,* 116 Wn.2d 831, 844, 809 P.2d 190 (1991); *State v. Devine,* 84 Wn.2d 467, 527 P.2d 72 (1974).

A Bill of Particulars is Unnecessary if the Defense Has Full Discovery. A bill of particulars is not necessary when the means of obtaining the facts are readily accessible to the defendant or the facts are already known to him or her. *See United States v. Kaplan,* 470 F.2d 100 (7th Cir. 1972), *cert. denied,* 410 U.S. 966, 35 L.Ed.2d 701, 93 S.Ct. 1443 (1973).

In *State v. Paschall,* 197 Wash. 582, 85 P.2d 1046 (1939), the court held that it was not prejudicial error to deny a motion for a bill of particulars when the state's attorney had disclosed to the defendant's attorney practically all of the facts concerning which evidence the government intended to use at trial.

> Nor was it error to deny the motions for a bill of particulars and to make the information more definite and certain. It was not made to appear that the state had knowledge of any ultimate facts of which appellants themselves were not cognizant. As a matter of fact, it would appear from the record that, prior even to the filing of the information, the state's attorneys disclosed to appellants or their counsel practically all of the facts concerning which evidence was adduced at the trial. Certainly appellants suffered no prejudice by the denial of the motions.

Paschall, 197 Wash. at 588.

See also the following cases

Merrill, 23 Wn. App. at 580 (court denied motion for bill of particulars where the defendant was made aware through discovery of all the information available to the prosecutor for proving the offense);

Grant, 89 Wn.2d at 686-687 (court denied motion for bill of particulars stating "the officer's report is about as much as the court could compel the prosecutor to furnish (the defendant)");

State v. Dictado, 102 Wn.2d 277, 286, 687 P.2d 172 (1984) (court denied motion for bill of particulars stating "nothing in the record indicates what information, beyond that already provided, the State could have furnished to give additional notice of the charges");

State v. Clark, 21 Wn.2d 774, 778, 153 P.2d 297 (1944), *cert. denied,* 325 U.S. 878, 65 S.Ct. 1554, 89 L.Ed.2d 1994 (1945) (court denied motion for bill of particulars stating case was based on defendant's confession and a bill of particulars could not provide the defendant with any more information that was not already locked up in defendant's own "breast").

The Precise Time of the Criminal Activity Generally Need Not be Shown by the Government. The precise time that a crime has been committed need not be stated in the charging document unless the time is a material ingredient, and the information is not thereafter subject to attack for imprecision. *State v. Gottfreedson,* 24 Wash. 398, 64 P. 523 (1901); *State v. Myrberg,* 56 Wash. 384, 105 P. 622 (1909); *State v. Oberg,* 187 Wash. 429, 60 P.2d 66 (1936).

In *State v. Pitts,* 62 Wn.2d 294, 382 P.2d 508 (1963), the court said

> The State's inability or failure to specify a precise time for the commission of an offense has not been found to violate any rights of a defendant in cases dealing with periods far longer than the 3 hour period in the instant case. *See, e.g., State v. Jordan,* 6 Wn.2d 719, 108 P.2d 657 (1940) (information alleged that the defendant committed the crime of carnal knowledge alleged that the defendant committed the crime of carnal knowledge between July 15, 1939 and September 15, 1939); *State v. Cozza,* 71 Wn.App. 252, 858 P.2d 270 (1993) (information alleged that defendant committed a sexual offense between June 1, 1984, and March 31, 1987).

The Government May Rely on Proof of a Continuing Course of Conduct Rather than an Isolated Act. The prosecuting authority's reliance on a continuing course of conduct instead of an isolated act is also not improper.[6] *See, e.g.*

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[6] While not implicated at this stage of the proceeding, a defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the charging document has been committed. *Love*, 80 Wn.App. at 360. Where the prosecuting authority charges one count of criminal conduct and presents evidence of more than one criminal act, there is a danger that a conviction may not be based on a unanimous jury finding that the defendant committed any given single act. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988).

In order to ensure jury unanimity, the prosecuting authority must elect a single act upon which it will rely for conviction, or the jury must be instructed that all must agree as to what act or acts were proved beyond a reasonable doubt. *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984).

However, where the prosecuting authority presents evidence of multiple acts which indicate a continuing course of conduct, neither an election nor a unanimity instruction is required. *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). But one continuing offense must be distinguished from several distinct acts, each of which could be the basis for a criminal charge. *Petrich*, 101 Wn.2d at 571.

State v. Stockmyer, 83 Wn.App. 77, 87, 920 P.2d 1201 (Div. 2 1996) (State did not have to identify a specific incident in the two hour period as the basis for assault and manslaughter charges);

State v. Gooden, 51 Wn.App. 615, 745 P.2d 1000, *review denied*, 111 Wn.2d 1012 (Div. 1 1988) (no need to specifically identify which acts of prostitution were being relied upon when there is a continuing course of conduct);

State v. Love, 80 Wn.App. 357, 908 P.2d 395, *review denied,* 129 Wn.2d 1016 (Div. 1 1996) (multiple instances of drug possession may constitute a continuing course of conduct forming the basis for a single charge of possession of a controlled substance with intent to deliver).

The continuing course of conduct doctrine is the underlying reason why the government need not identify a specific punch at a particular moment in time in a fight to prove assault or the exact penetration at a particular moment in time to prove rape.

[**Elements of _____.** [Insert Analysis]]

[**Elements of Obstructing a Law Enforcement Officer.** The Defendant is charged with Obstructing a Law Enforcement Officer. The motion at issue here involves a claim that a bill of particulars is needed concerning the obstructing count.

> RCW 9A.76.020(1) states that a person is guilty of the crime of obstructing a law enforcement officer when the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.

Hinder means to make slow or difficult the course or progress of: RETARD, HAMPER & to keep from occurring, starting, or continuing: hold back: PREVENT, CHECK & to interfere with the activity of & to delay, impede or prevent action: be a hindrance. *State v. Hudson,* 56 Wn.App. 490, 498, fn. 3, 784 P.2d 533, *review denied,* 114 Wn.2d 1016 (Div. 1 1990), quoting Webster s Third New International Dictionary of the English Language 1070 (1969).

Delay means to stop, detain, or hinder for a time: check the motion of, lessen the progress of, or slow the time of arrival of & to cause to be slower or to occur more slowly than normal: RETARD. *Id.,* quoting Webster s, at 595.

In *Hudson,* the defendant and two other juveniles were stopped after the officers discovered that the car Hudson was driving had a license plate registered to another type of vehicle. Hudson was ordered out of the car at gun point. Hudson exited, looked at the uniformed officer, and fled. In upholding the obstructing conviction, the court said

> The established rule is that flight constitutes obstructing, hindering, or delaying within the meaning of statutes comparable to RCW 9A.76.020(3).

Hudson, 56 Wn.App. at 497. (Citation omitted.)

Hudson also contended that the officers were not performing official duties because they exceeded the scope of a valid investigatory stop.

> We conclude the officers were performing official duties because there is no evidence they were acting in bad faith. An agent, even if effecting an arrest without probable cause, is still engaged in the performance of his official duties, provided he is not on a frolic of his own. The three officers who stopped Hudson were not on a frolic of their own because they were acting in good faith. The use of drawn guns is appropriate whenever police have a reasonable apprehension of fear. *See State v. Belieu,* 112 Wn.2d 587, 773 P.2d 46 (1989). A founded suspicion is all that is necessary, some basis from which the court can determine that the detention was not arbitrary or harassing. *Belieu,* at 601-02, quoting *Wilson v. Porter,* 361 F.2d 412, 415 (9th Cir. 1966).

Hudson, 56 Wn.App. at 496-97. (Citations omitted.) (Emphasis in original.)]

The Bill of Particulars. Case law is clear that a bill of particulars is unnecessary if full discovery has been provided to the defense. Full discovery has been provided to the defense herein. The defense request for a Bill of Particulars should be denied.

Where evidence involves conduct at different times and places, or different defendants, then the evidence tends to show several distinct acts. *Handran*, 113 Wn.2d at 17; *Petrich*, 101 Wn.2d at 571. On the other hand, if the criminal conduct occurred in one place during a short period of time between the same aggressor and victim, then the evidence tends to show one continuing act. *Handrin, supra*.

A continuing course of conduct requires an ongoing enterprise with a single objective. State v. *Gooden*, 51 Wn.App. at 619-20. Common sense must be utilized to determine whether multiple acts constitute a continuing course of conduct. *Handran*, 113 Wn.2d at 17.

See also WPIC 4.25 Jury Unanimity Several Distinct Criminal Acts *Petrich* Instruction, and comment thereto.

PART IV. PLEA DISCUSSIONS

4.1 Availability for plea discussions

(a) prosecutor should make known a general policy of willingness to consult with defense counsel concerning disposition of charges by plea

(b) unprofessional conduct to engage in plea discussions with an accused who is represented by counsel except with counsel s approval; where the defendant has properly waived counsel, the prosecutor may engage in plea discussions with the defendant but a verbatim record of such discussions should be made and preserved

(c) unprofessional conduct to knowingly make false statements or representations during plea negotiations

Excerpt from Commentary to ABA Standard

Availability of Prosecutor. &Effective discussion is best conducted in a calm, unhurried, and private atmosphere, rather than at the last moment in a courtroom or courthouse corridor, although there should be no barrier to disposition by plea at any stage. Of course, willingness to discuss a possible disposition by plea imposes no obligation to make concessions.

Discussion Through Counsel. &Indeed, it has been held to be a denial of the right to counsel for the prosecutor to negotiate directly with the defendant in the absence of the defense attorney. &Given the unequal bargaining positions between prosecutor and defendant [where defendant has properly waived right to counsel], the requirement of a verbatim record is necessary to protect the prosecutor from charges of exerting undue influence. &

Misrepresentation by Prosecutor to Defense Counsel. &Not only does misrepresentation reflect on the integrity of the prosecutor and jeopardize the achievement of justice, but it also frustrates dispositions by plea, since lawyers are understandably reluctant to negotiate with a prosecutor who cannot be trusted.

Plea Agreements RCW 9.94A.080

The prosecutor and the attorney for the defendant, or the defendant when acting pro se, may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea to a charged offense or to a lesser or related offense, the prosecutor will do any of the following:

(1) Move for dismissal of other charges or counts;

(2) Recommend a particular sentence within the sentence range applicable to the offense or offenses to which the offender pled guilty;

(3) Recommend a particular sentence outside of the sentence range;

(4) Agree to file a particular charge or count;

(5) Agree not to file other charges or counts; or

(6) Make any other promise to the defendant, except that in no instance may the prosecutor agree not to allege prior convictions.

In a case involving a crime against persons as defined in RCW 9.94A.440, the prosecutor shall make reasonable efforts to inform the victim of the violent offense of the nature of and reasons for the plea agreement, including all offenses the prosecutor has agreed not to file, and ascertain any objections or comments the victim has to the plea agreement.

The court shall not participate in any discussions under this section.

SRA Charging and Plea Disposition Standards RCW 9.94A.450 Plea Dispositions

(1) Except as provided in subsection (2) of this section, a defendant will normally be expected to plead guilty to the charge or charges which adequately describe the nature of his or her criminal conduct or go to trial

Subsection (2) describes various circumstances where a plea agreement to a charge(s) which may not fully describe the nature of the criminal conduct is proper, including

evidentiary problems which make conviction on original charge doubtful

defendant s willingness to cooperate in investigation or prosecution of others whose criminal conduct is more serious or represents a greater public threat

request by victim when it is not the result of pressure from defendant

discovery of facts which mitigate the seriousness of defendant s conduct
correction of errors in initial charging decision
defendant s criminal activity history
nature and seriousness of offense or offenses charged
probable effect on witnesses

Case Law Propriety of Plea Bargaining

Bordenkircher v. Hayes, 434 U.S. 357, 54 L.Ed.2d 604, 98 S.Ct. 663, 667-68 (1978)

We have recently had occasion to observe: [W]hatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country s criminal justice system. Properly administered, they can benefit all concerned. The open acknowledgment of this previously clandestine practice has led this Court to recognize the importance of counsel during plea negotiations, *Brady v. United States,* 397 U.S. 742, 758, 90 S.Ct. 1463, 1474, 25 L.Ed.2d 747, the need for a public record indicating that a plea was knowingly and voluntarily made, *Boykin v. Alabama,* 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274, and the requirement that a prosecutor s plea-bargaining promise must be kept, *Santobello v. New York,* 404 U.S. 257, 262, 92 S.Ct. 495, 498, 30 L.Ed.2d 427. &

To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort. But in the give-and-take of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution s offer.

Plea bargaining flows from the mutuality of advantage to defendants and prosecutors, each with his own reasons for wanting to avoid trial. Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation. Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process. &

(Emphasis added.) (Citations omitted.)

Santobello v. New York, 404 U.S. 257, 30 L.Ed.2d 427, 92 S.Ct. 495, 498 (1971) (plea bargaining is an accepted feature of the criminal justice system, and, [p]roperly administered, it is to be encouraged.).

Case Law Plea Proposal Prosecutor Revocation Prior to Entry of Guilty Plea

State v. Bogart, 57 Wn.App. 353, 356-58, 788 P.2d 14 (Div. 3 1990) (Held: prosecutor s amendment to higher degree prior to defendant s attempted guilty plea to lesser degree proper since defendant failed to show detrimental reliance on plea proposal)

&A criminal defendant has no constitutional right to a plea bargain. *Weatherford v. Bursey,* 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977); *State v. Robtoy,* 98 Wn.2d 30, 45, 653 P.2d 284 (1982); *State v. Wheeler,* 95 Wn.2d 799, 804, 631 P.2d 376 (1981). The State can revoke a plea proposal offered to a criminal defendant until such time as the defendant enters a plea or has made some act in detrimental reliance upon the offer. Wheeler, at 803; *State v. Marler,* 32 Wn.App. 503, 507, 648 P.2d 903, *review denied*, 98 Wn.2d 1007 (1982). *Wheeler* concluded 95 Wn.2d at 805:

> [A]bsent a guilty plea or some other detrimental reliance by the defendant, the prosecutor may revoke any plea proposal. Since the defendant has alleged only "psychological" reliance on the prosecutor's offer, and without a showing that the prosecutor has abused its discretion by routinely rescinding its offers, the trial court correctly declined to enforce it.

(Some italics ours.)

The trial court in such a situation must resolve the factual issues of (1) how far the State's offer extended and (2) what the parties' reasonable expectations were. *Marler,* 32 Wn.App. at 507, (citing *United States v. Mooney,* 654 F.2d 482 (7th Cir. 1981) and *United States v. Arnett,* 628 F.2d 1162 (9th Cir. 1979)). Once it is established that a plea bargain has been confirmed by the defendant entering a guilty plea, the State is obligated to fully comply with the terms of the agreement. *State v. Hall,* 104 Wn.2d 486, 490, 706 P.2d 1074 (1985) (citing *Santobello v. New York,* 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971)). The remedy for such a breach may include specific performance of the agreement. *See In re Palodichuk,* 22 Wn.App. 107, 111, 589 P.2d 269 (1978).

The distinction between a plea proposal and a plea agreement or bargain is that the agreement takes effect upon some action of the defendant, *e.g.,* pleading guilty to a lesser charge. The detrimental reliance factor typically arises subsequent to the guilty plea, where pursuant to the agreement the defendant renounces his right to a jury trial in exchange for whatever bargain has been struck. Wheeler, 95 Wn.2d at 803, leaves open the possibility that detrimental reliance other than the act of entering a guilty plea is possible, but notes enforcing bargains prior to the plea would inhibit the prosecutor's

use of plea bargaining; at this stage, the defendant has waived no rights and still enjoys an adequate remedy to proceed with a jury trial. *See Government of the Virgin Islands v. Scotland,* 614 F.2d 360, 365 (3d Cir. 1980). Accordingly, the defendant has the burden of establishing detrimental reliance; if he attempts to do so when he has not yet entered a guilty plea, he must establish he relied on the bargain in such a way that a fair trial is no longer possible. *Scotland,* at 365.

Here, the issue of detrimental reliance arises in the pre-guilty plea setting. Ward contends he would have pleaded guilty to second degree robbery if his appointed attorney had been present when he was first arraigned with his cousin, Scott. He initially indicates his attorney relied on the personal promise from the deputy prosecuting attorney before going on vacation. The detrimental reliance is implied from the difference in the sentencing range between first and second degree robbery.

Given *Wheeler,* we are constrained to find these contentions are unpersuasive. There are no facts to support prosecutorial bad faith, nor of prosecutorial abuse of discretion through a repetitive practice of rescinding offers. *Wheeler,* 95 Wn.2d at 805. Nor has there been a showing that Ward was unable to get a fair trial as a result of the prosecutor's action. As *United States v. Crusco,* 536 F.2d 21, 24 (3d Cir. 1976) noted, "cases of disappointed but unfounded expectations must be carefully distinguished from those in which the defendant's expectations ... are predicated upon promises" by the prosecution. Whether the court would have accepted Ward's guilty plea at his June 24 arraignment, in light of its comments in footnote 3, is speculative. The court could have declined to approve the plea bargain. RCW 9.94A.090(1).

Here, the prosecutor's offer required only one act from Ward that he plead guilty to second degree robbery. At arraignment awaiting the return of his attorney, he pleaded not guilty. It is possible the public defender, who was present, had not discussed the case with Ward and the plea of not guilty was entered because of the necessity for some plea. Even if he had entered no plea, the court may have entered a not guilty plea in his behalf.

Ward asserts *Wheeler* is distinguishable. He would read more into the "confirmation" letter from the prosecution than did the trial court, i.e., make it the equivalent of an option contract. Plea agreements take the form of a unilateral contract. *Wheeler,* 95 Wn.2d at 803. As noted in *Mabry v. Johnson,* 467 U.S. 504, 511, 104 S.Ct. 2543, 2548, 81 L.Ed.2d 437 (1984), which affirmed the holding of *Government of the Virgin Islands v. Scotland, supra,* relied on in *Wheeler*: "The Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty."

Case Law Plea Proposal Promising Leniency to Witness

United States v. Singleton, 165 F.3d 1297, 1299-1302 (10th Cir. 1999) (prosecution did not violate 18 U.S.C. Section 201(c)(2), the anti-gratuity statute which prohibits promising anything of value for testimony to a witness on penalty of two years in prison, when it offered leniency to a co-defendant in exchange for truthful testimony).

> The prosecutor, functioning within the scope of his or her office, is not simply a lawyer advocating the government's perspective of the case. Indeed, the prosecutor's function is far more significant. Only officers of the Department of Justice or the United States Attorney can represent the United States in the prosecution of a criminal case. Indeed, a federal court cannot even assert jurisdiction over a criminal case unless it is filed and prosecuted by the United States Attorney or a properly appointed assistant....
>
> ...*In The Dollar Savings Bank v. United States,* 86 U.S. (19 Wall.) 227, 22 L.Ed. 80 (1873), the Court instructed:
>
> > It is a familiar principle that the King is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests....The rule thus settled respecting the British Crown is equally applicable to this government, and it has been applied frequently in the different States, and practically in the Federal courts. It may be considered as settled that so much of the royal prerogatives as belonged to the King in his capacity of *parens patriæ,* or universal trustee, enters as much into our political state as it does into the principles of British constitution.
>
> *Id.* at 239 (footnote omitted)...
>
> From the common law, we have drawn a longstanding practice sanctioning the testimony of accomplices against their confederates in exchange for leniency. Indeed,
>
> > [n]o practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence.
>
> *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987)....

This ingrained practice of granting lenience in exchange for testimony has created a vested sovereign prerogative in the government. It follows that if the practice can be traced to the common law, it has acquired stature akin to the special privilege of kings. However, in an American criminal prosecution, the granting of lenience is an authority that can only be exercised by the United States through its prosecutor; therefore, any reading of section 201(c)(2) that would restrict the exercise of this power is surely a diminution of sovereignty not countenanced in our jurisprudence....

Our conclusion in no way permits an agent of the government to step beyond the limits of his or her office to make an offer to a witness other than one traditionally exercised by the sovereign. A prosecutor who offers something other than a concession normally granted by the government in exchange for testimony is no longer the alter ego of the sovereign and is divested of the protective mantle of the government. Thus, fears our decision would permit improper use or abuse of prosecutorial authority simply have no foundation.

(Citations omitted.) (Footnotes omitted.)

Case Law Plea Proposal Waiver of Right to Appeal

State v. Lee, 132 Wn.2d 498, 939 P.2d 1223 (1997).

...Further, there is nothing per se wrong with the State negotiating for a plea agreement which includes an agreement to waive the right to appeal a criminal conviction. *State v. Perkins,* 108 Wn.2d 212, 737 P.2d 250 (1987). The court in *Perkins* observed that discouragement of plea negotiations, including an agreement by a defendant to waive the right to appeal, would operate as a disincentive to prosecutors to offer what particular defendants and their counsel might regard as worthwhile inducements to forgo that right. Further, the policy of settlement of litigation is served, provided the administration of such a settlement is fair, free from oppressiveness, and sensitive to the interests of both the accused and the State. The court in *Perkins* further noted that while there is a constitutional right to appeal in this state, there is no valid reason why that right cannot be waived as in the case of other constitutional rights. Waiver of the right to appeal must be made intelligently, voluntarily, and with an understanding of the consequences.

(Citations omitted.)

Case Law Prosecutorial Vindictiveness Pre-trial Threat of Risk of More Severe Punishment if Plea Offer Rejected

State v. McKenzie, 31 Wn.App. 450, 452, 642 P.2d 760, *review denied*, 96 Wn.2d 1024 (Div. 1 1981).

Prosecutorial vindictiveness is [the] intentional filing of a more serious crime in retaliation for a defendant's lawful exercise of a procedural right.

Bordenkircher v. Hayes, 434 U.S. 357, 54 L.Ed.2d 604, 98 S.Ct. 663, 668-69 (1978) (defendant indicted by grand jury on charge of uttering a forged instrument; prosecutor offered to recommend five years if guilty plea, but threatened if plea offer rejected to seek grand jury indictment as habitual criminal which carried mandatory life imprisonment sentence; plea offer rejected, defendant convicted on all charges, and sentenced to life imprisonment; Supreme Court upheld convictions)

While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant s assertion of his trial rights, the imposition of these difficult choices [is] an inevitable and permissible attribute of any legitimate system which tolerates and encourages the negotiation of pleas. It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor s interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty. &

There is no doubt that the breadth of discretion that our country s legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse.

> [Footnote. This potential has led to many recommendations that the prosecutor s discretion should be controlled by means of either internal or external guidelines. See ALI Model Code of Pre-Arraignment Procedure for Criminal Justice §§ 350.3(2)-(3) (1975); ABA Project on Standards for Criminal Justice, The Prosecution Function §§ 2.5, 3.9 (App. Draft 1971); Abrahams, Internal Policy: Guiding the Exercise of Prosecutorial Discretion, 19 UCLA L. Rev. 1 (1971)]

And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise. We *hold only that the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment.*

(Emphasis added.) (Citations omitted.)

United States v. Goodwin, 457 U.S. 368, 73 L.Ed.2d 74, 102 S.Ct. 2485, 2942-43 (1982)

For just as a prosecutor may forego legitimate charges already brought in an effort to save the time and expense of trial, a prosecutor may file additional charges if an initial expectation that a defendant would plead guilty to lesser charges proves unfounded. &

A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct. As we made clear in *Bordenkircher,* the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution.

State v. Serr, 35 Wn.App. 5, 11, 664 P.2d 1301, *review denied*, 100 Wn.2d 1024 (1983) (mere fact that defendant refuses to plead guilty and forces government to prove its case is insufficient to warrant presumption that subsequent changes in charging decision are unwarranted).

State v. McDowell, 102 Wn.2d 341, 342-47, 685 P.2d 595 (1984) (no presumption of prosecutorial vindictiveness where prosecutor filed more serious charge after juvenile refused to enter into diversionary program on complaint alleging less serious charge).

State v. Soderholm, 68 Wn.App. 363, 842 P.2d 1039 (Div. 1 1993) (misdemeanor charges dismissed and felony charges filed after defendant rejected plea offer; Held: felony conviction affirmed because there was no proof of actual prosecutorial vindictiveness; mere appearance of vindictiveness is insufficient).

State v. Lee, 69 Wn.App. 31, 35, 847 P.2d 25, *review denied*, 122 Wn.2d 1003 (Div. 1 1993) (Prosecutorial vindictiveness must be distinguished, however, from the rough and tumble of legitimate plea bargaining. ; conviction affirmed).

Case Law Prosecutorial Vindictiveness Post-trial Presumption of Prosecutorial Vindictiveness

Blackledge v. Perry, 417 U.S. 21, 40 L.Ed.2d 628, 94 S.Ct. 2098, 2102-03 (1974) (defendant convicted of misdemeanor, sentenced to 6 months, and appealed, seeking a trial de novo in superior court as authorized by North Carolina law; prosecutor thereafter obtained felony indictment charging defendant with assault with deadly weapon based on same incident; defendant plead guilty to felony, was sentenced to a term of five to seven years, and sought habeas corpus review)

A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial de novo in the Superior Court, since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant s conviction becomes final, and may even result in a formerly convicted defendant s going free. And, if the prosecutor has the means readily at hand to discourage such appeals by upping the ante through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy the State can insure that only the most hardy defendants will brave the hazards of a de novo trial. &

Due process of law requires that such a potential for vindictiveness must not enter into North Carolina's two-tiered appellate process. We hold, therefore, that it was not constitutionally permissible for the State to respond to Perry's invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial de novo.

4.2 Fulfillment of plea discussions

(a) unprofessional conduct to make any promise or commitment concerning the sentence imposed; prosecutor may properly advise the defense what position will be taken concerning disposition

(b) unprofessional conduct to imply a greater power to influence disposition of case than is actually possessed

(c) unprofessional conduct to fail to comply with plea agreement unless defendant fails to comply with plea agreement or other extenuating circumstances are present

Excerpt from Commentary to ABA Standard

Misrepresentation of Intention or Power. &[I]f a plea is entered as the result of a prosecutor s promising concessions beyond his or her power to fulfill, the plea is involuntary and the defendant is entitled to withdraw it. Sometimes it may not be a matter of intentional deception by the prosecutor, but rather a failure to make clear that the prosecutor is without power to effect a particular disposition by the court. It is therefore important that the prosecutor make clear that he or she is not able to assure the judicial.

Honoring Plea Agreements. The refusal to honor an agreement concerning a recommendation to the court after a guilty plea is made undermines the voluntariness of the plea and result in fundamental unfairness to the defendant &*Santobello v. New York* [404 U.S. 257, 30 L.Ed.2d 427, 92 S.Ct. 495 (1971)] &

Case Law Duty to Honor Plea Agreement

United States v. Benchimol, 471 U.S. 453, 85 L.Ed.2d 462, 105 S.Ct. 2103,, 2105 (1985) (defendant appealed his sentence following a plea of guilty, contending that the prosecutor had breached the plea agreement by failing to "enthusiastically" support the recommendation; Ninth Circuit agreed, concluding that the prosecutor had breached the plea agreement because it "made no effort to explain its reasons for agreeing to recommend a lenient sentence but rather left an impression with the court of less-than-enthusiastic support for leniency."; Held: prosecutor fulfilled duty with regard to a promise to make a recommendation with respect to sentence by making the promised recommendation, but need not do so with enthusiasm)

The Court of Appeals relied on cases such as *United States v. Grandinetti,* 564 F.2d 723 (CA5 1977), and *United States v. Brown,* 500 S.2d 375 (CA4 1974), for the conclusion it reached with respect to the requirement of enthusiasm, but it appears to us that in each of these cases the Government attorney appearing personally in court at the time of the plea bargain expressed personal reservations about the agreement to which the Government had committed itself. This is quite a different proposition than an appellate determination from a transcript of the record made many years earlier that the Government attorney had left an impression with the court of less-than-enthusiastic support for leniency. &

&The Government suggests that spreading on the record its reasons for agreement to a plea bargain in a particular case for example, that it did not wish to devote scarce resources to a trial of this particular defendant, or that it wished to avoid calling the victim as a witness would frequently harm, rather than help, the defendant s quest for leniency. These may well be reasons why the defendant would not wish to exact such a commitment from the Government, but for purposes of this case it is enough that no such agreement was made in fact.

In re Palodichuk, 22 Wn.App. 107, 109-10, 589 P.2d 269 (Div. 2 1978) (prosecutor made plea offer recommendation, but expressed second thoughts due to recently discovered parole history; Held: Due Process violated by prosecutor s failure to wholeheartedly make plea recommendation as contemplated by plea offer)

Due process requires that the prosecutor adhere to the terms of a plea bargain agreement. *Santobello v. New York,* 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). If the prosecutor breaches the agreement, deliberately or otherwise, the accused may be allowed to withdraw the guilty plea or specific performance of the agreement may be ordered by the state court. *Santobello v. New York,* 404 U.S. at 263, 92 S.Ct. 495. The purpose of this rule is to deter prosecutorial misconduct in order to preserve the integrity of the plea bargaining process. "(T)his is in no sense to question the fairness of the sentencing judge; the fault here rests on the prosecutor, not on the sentencing judge." *Santobello v. New York,* 404 U.S. at 263, 92 S.Ct. at 499.

State v. Peterson, 37 Wn.App. 309, 312-13, 680 P.2d 445 (Div. 3 1984) (at original sentencing, trial court refused to permit prosecutor to explain plea recommendation; Held in *State v. Peterson,* 97 Wn.2d 864, 651 P.2d 211 (1982) that defendant s right of allocution includes right to have prosecutor explain sentence recommendation; case remanded for resentencing, wherein prosecutor abided by plea offer but underlying reasons given for recommendation were unfavorable; this appeal taken from resentencing)

If Mr. Peterson's contention were to prevail, a prosecutor would be placed in an impossible position. For example, supposing a prosecutor's docket is overloaded and in order to meet the time constraints of the speedy trial rule, he agrees to

a plea bargain recommending probation or perhaps reducing the charge. How should the prosecutor advocate for this bargain? If the basis for the bargain is explained, it becomes clear but for a crowded calendar there would be no bargain. In these circumstances, a mere statement of the recommendation is the best advocacy a prosecutor can make for the bargain. Surely a defendant cannot expect a prosecutor to hide or distort the true reason for the bargain!

Mr. Peterson was carefully warned by the prosecuting attorney and the court that he took a "calculated risk" the explanation of the prosecutor might not be as favorable as he desired. Having elected to take that risk, he cannot now complain.

State v. Coppin, 57 Wn.App. 866, 874, 791 P.2d 228, *review denied*, 115 Wn.2d 1011 (Div. 2 1990)

In our judgment the imposition of a duty of advocacy does little more than erode the confidence of the court in such recommendations as well as impose a potentially conflicting duty upon prosecutors. We conclude, therefore, that the terms of a plea agreement do not include an implied promise to affirmatively advocate an agreed upon sentence recommendation. Accordingly, a prosecutor fulfills its duty under the plea agreement by simply making the promised recommendation.

State v. Gutierrez, 58 Wn.App. 70, 791 P.2d 275 (Div. 1 1990) (prosecutor, who recommended that defendant be sentenced to 31 months on Sentencing Reform Act counts and minimum terms of 31 months on pre-SRA counts, to run concurrently, did not violate plea bargain by arguing that defendant was not amenable to treatment in sexual offender treatment program in response to defense request for treatment).

State v. Jerde, No. 22610-3-II, ___ Wn.App. ___, 970 P.2d 781, 784-85 (Div. 2 January 29, 1999) (Second degree murder plea. Prosecutors highlighted aggravating factors, including adding an aggravating factor not discussed in presentence report, but recommended 346 month standard range sentence pursuant to plea agreement. Court imposed exceptional 497 month sentence. Held: prosecutors breached plea agreement, sentence vacated and case remanded.)

The State enters into a contract with a defendant when it offers a plea bargain and the defendant accepts. Because a defendant gives up important rights by agreeing to a plea bargain, the State must adhere its terms by recommending the agreed upon sentence....

At the same time, the State is obligated not to undercut the plea bargain by explicitly or by conduct evidencing an intent to circumvent the terms of the plea agreement. ...The test is whether the prosecutor contradicts, by word or conduct, the State s recommendation for a standard range sentence....

Similarities appear between *Sledge* [*State v. Sledge,* 133 Wn.2d 828, 947 P.2d 1199 (1977)] and this case: (1) both prosecutors unnecessarily commented on a written presentence report that was already before the court; (2) the prosecutors underscored aggravating factors; and (3) the prosecutors maintained that the State was adhering to its plea agreement but clearly behaved otherwise. The court in *Sledge* found the actions of the prosecutor to be a transparent attempt to sustain an exceptional sentence.

An objective view of the entire sentencing record suggests that the two prosecutors effectively undercut the plea agreement in a transparent attempt to sustain an exceptional sentence....Without prompting from the court, the first prosecutor laid the foundation by articulating several factual and legal arguments that would support an exceptional sentence. To do so was completely unnecessary in light of the State s mid-range recommendation. When it cam to Jerde s individual sentencing, the second prosecutor picked up where the first left off by reemphasizing the aggravating circumstances.

(Citations omitted.)

State v. Shineman, No. 22891-2-II, ___ Wn.App. ___, 971 P.2d 94 (Div. 2 February 5, 1999) (State agreed to recommend dismissal and expungement of assault charge at the end of one year if compliance; Held: State must abide by agreement even though RCW 10.97.060 does not give court the power to order expungement of records. The State should expunge or delete all mention of defendant s assault charge in this case from any state record open to the public. The records need not be destroyed, but they must be stored in such a way that members of the general public have no access to them, and all mention of the charge must be removed from his permanent record.).

Case Law Duty to Honor Plea Agreement Enthusiastic Recommendation Not Required

State v. Sledge, 133 Wn.2d 828, 840, 947 P.2d 1199 (1997) (prosecutor not obliged to make disposition recommendation enthusiastically; *State v. Peterson,* 97 Wn.2d 864, 651 P.2d 211 (1982) abrogated, but here prosecutor breached plea agreement by conduct at disposition hearing).

Case Law Plea Agreement Breach by Defendant Remedy

State v. Thomas, 79 Wn.App. 32, 36-37, 39, 899 P.2d 1312 (Div. 2 1995)

Just as a defendant has the option to specifically enforce or rescind a plea agreement after a breach by the State, *State v. Miller,* 110 Wn.2d 528, 531, 756 P.2d 122 (1988), *State v. Tourtellotte,* 88 Wn.2d 579, 585, 564 P.2d 799 (1977), the State has the option to specifically enforce or rescind a plea agreement after a breach by the defendant.

> It is now well settled that, when the government breaches a plea agreement, a defendant's remedy is either specific performance of the plea agreement or an opportunity to withdraw his guilty plea. *Santobello v. New York,* 404 U.S. 257, 263-63, 92 S.Ct. 495, 499, 30 L.Ed.2d 427 (1971); *United States v. Brody,* 808 F.2d 944, 947 (2d Cir. 1986); *see also United States v. Abbamonte,* 759 F.2d [1065] at 1071-72 [2d Cir. 1985]. The question presented for review today is whether, when the situation is reversed and it is the defendant who has breached the agreement, specific performance is a possible remedy for the government. We hold that it is.

United States v. Alexander, 869 F.2d 91, 94 (2d Cir. 1989). &

In the present case, the State unequivocally elected to enforce rather than rescind the plea agreement. It so stated to the trial judge on February 18, 1993, and to this court during oral argument. Moreover, it manifested its election by opposing, successfully, Thomas' motion to withdraw his plea.

The State having elected to specifically enforce the plea agreement, its rights are measured by the terms thereof. In general, we read those terms as we would a contract. *United States v. Alexander,* 869 F.2d at 95; *see State v. Hall,* 104 Wn.2d 486, 706 P.2d 1074 (1985) ("petitioner had a right analogous to a contract right once the plea bargain was entered"). However, we cannot read any term in a way the defendant did not understand at the time of the entry of the plea. "Unlike some commercial contracts, plea agreements must be construed in light of the rights and obligations created by the Constitution," *Ricketts v. Adamson,* 483 U.S. at 16, 107 S.Ct. at 2689 (Brennan, J., dissenting), and under the Constitution a plea is valid only if the defendant understands its consequences at the time it is entered. *Haring v. Prosise,* 462 U.S. 306, 319, 103 S.Ct. 2368, 2376, 76 L.Ed.2d 595 (1983) (quoting *Brady v. United States,* 397 U.S. 742, 748, 90 S.Ct. 1463, 1468, 25 L.Ed.2d 747 (1970)).

Case Law Plea Agreement Breach by Prosecutor Remedy

State v. Miller, 110 Wn.2d 528, 535-37, 756 P.2d 122 (1988) (prosecutor inadvertently told the defendant that he could receive a sentence of less than 20 years for a first degree murder conviction; after defendant pled guilty he learned that a statute mandated at least a 20-year sentence. He tried to withdraw his guilty plea, but the trial court denied his motion; Held: defendant could withdraw his plea or have the plea agreement specifically enforced)

[T]he defendant's choice of remedy controls, unless there are compelling reasons not to allow that remedy.

State v. Schaupp, 111 Wn.2d 34, 41-42, 757 P.2d 970 (1988)

Two remedies are available for breach of a plea bargain--withdrawal of the plea and specific performance. *State v. Miller, supra* 110 Wn.2d at 535, 756 P.2d 122. The defendant's choice of remedy controls, absent compelling reasons to the contrary. *Miller,* at 535. The defendant here seeks specific performance. Schaupp was not at fault for any error in the plea and therefore that is the requisite remedy. As noted in *Tourtellotte*, "[t]o place the defendant in a position in which he must again bargain with the state is unquestionably to his disadvantage. The security he had gained as a result of the plea negotiation from being charged with the more grievous offense would be lost.... The defendant is entitled to the benefit of his original bargain."

(Citations omitted.)

Case Law Court Reneges on Promised Sentence Remedy

State v. Wakefield, 130 Wn.2d 464, 475, 925 P.2d 183 (1996) (defendant not entitled to specific performance where court induces plea by promising certain sentence, and then reneges; withdrawal of plea appropriate)

There appear to be no reported cases from either this jurisdiction or any other jurisdiction in which a trial judge promised a particular sentence before the defendant accepted a plea bargain, and then reneged on that promise at the time of sentencing. We are mindful of the fact that a trial judge's promise of a standard range sentence could easily sway a defendant to plead guilty. In the present case, the trial judge's involvement in the plea negotiations casts significant doubt on the voluntariness of Wakefield's plea. Given these circumstances, we hold that Wakefield may withdraw her plea and remand to the trial court for a hearing to give Wakefield this opportunity.

Case Law Duty to Advocate Court s Position on Appeal

State v. Arko, 52 Wn.App. 130, 132-34, 758 P.2d 522 (Div. 1 1988) (prosecutor was not precluded from filing brief in support of exceptional sentence imposed by trial court as result of its agreeing in plea bargain to recommend sentence within standard range)

> Plea bargains are favored in the law because they allow more efficient use of the criminal justice system, because of their ability to protect the public from those who would continue criminal conduct while in pretrial release, and because they enhance the rehabilitative prospects of those who plead guilty. The prosecutor is obliged to give full and wholehearted compliance with the plea bargain, *State v. Hall,* 104 Wn.2d 486, 490, 706 P.2d 1074 (1985); *In re Palodichuk,* 22 Wn.App. 107, 110, 589 P.2d 269 (1978), although he need not elaborate on the recommendation unless the defendant so requests, *State v. James,* 35 Wn.App. 351, 356-57, 666 P.2d 943 (1983) &. The State s duty under the plea bargain extends to resentencing, at which it must make the same recommendation before the new sentencing judge. *James,* 35 Wn.App. at 355.
>
> Similarly, here, the State fulfilled its obligation under the plea bargain when it advocated a sentence within the standard range. Once it did so, it had met the terms of its agreement and was not obliged to do more. After sentencing the State s obligation is to become an advocate for the court s position and thus to argue in favor of the sentence imposed to the extent that such arguments are supportable. This court then has the benefit of full briefing on the issue which is necessary to provide effective review.

(Citations omitted.)

State v. Poupart, 54 Wn.App. 440, 449, 773 P.2d 893, *review denied*, 113 Wn.2d 1008 (Div. 1 1989) (State's promise to recommend a particular sentence did not preclude it from arguing for the manifest injustice on appeal).

Case Law Duty to Sentencing Court to Conduct Hearing if Requested

State v. Sledge, 133 Wn.2d 828, 840, 947 P.2d 1199 (1997) (prosecutor not obliged to make disposition recommendation enthusiastically; *State v. Peterson,* 97 Wn.2d 864, 651 P.2d 211 (1982) abrogated, but here prosecutor breached plea agreement by conduct at disposition hearing).

State v. Talley, 134 Wn.2d 176, 186, 949 P.2d 358 (1998) (defendant entered *Alford* plea, and prosecutor participated in evidentiary hearing to present evidence that could have supported factual findings justifying imposition of exceptional sentence; Held: prosecution s actions proper).

> Although we conclude that the prosecutor s participation in an evidentiary hearing does not, by itself, violate the plea agreement, we recognize that the State could violate the agreement by advocating for an exceptional sentence in the way that it presents evidence at the evidentiary hearing and in making its sentencing recommendation to the court. While, as we have observed, merely presenting evidence to the sentencing court and responding to its inquiries is an appropriate fulfillment of the prosecutor s duty as an officer of the court, a deputy prosecutor could easily undercut the plea agreement by placing emphasis on the evidence that supports findings that aggravating factors are present.
>
> Indeed, that is precisely what happened in *State v. Sledge,* 133 Wn.2d 828, 947 P.2d 1199 (1997), a case that was very recently before this court. In *Sledge*, the deputy prosecutor had agreed to recommend a standard range sentence for a juvenile defendant. At a disposition hearing, in addition to submitting a probation counselor s manifest injustice report for the court s consideration, the deputy prosecutor also called the probation counselor to testify about the report. The deputy prosecutor then led the counselor through her report, extensively examining her about the factors that caused her to recommend an exceptional sentence. The deputy prosecutor also presented testimony by the juvenile s parole office who testified about the defendant s prior problems at a juvenile institution. Finally, the deputy prosecutor gave a detailed and lengthy summary of the aggravating factors that supported an exceptional sentence. The effect of the deputy prosecutor s presentation, we concluded, was to undermine the plea agreement. In reaching this conclusion, we emphasized the point that if the State s purpose was to have the sentencing court impose a standard range sentence, there was no need for the State to insist upon a hearing with witnesses, as the probation counselor s report was before the court.
>
> We wish to stress that we are not indifferent to the difficulties the State may face in maintaining a balance between, on the one hand, its duty to present relevant evidence and respond to the sentencing court s inquiries, and on the other, its equally important obligation not to undercut the plea agreement. Although we are not able to forge a rule of general application that establishes a bright line between adherence and undercutting, we can indicate that the State will not violate its duty of good faith and fair dealing by participating in an evidentiary hearing and presenting evidence to assist the sentencing court, so long as it does not, by its words and conduct at that hearing, contradict its recommendation for a standard range sentence.

(Citations omitted.)

4.3 Record of reasons for nolle prosequi disposition

prosecutor should make a record of the reasons whenever felony criminal charges are dismissed

Excerpt from Commentary to ABA Standard

&Whether or not judicial consent is required, a public record should be made of the reasons for the prosecutor s action. This requirement would perhaps be unduly onerous in relation to misdemeanors &

PART V. THE TRIAL

5.1 Calendar control

trial calendar control should be vested in the court; the prosecutor should advise the court of facts relevant in determining the order of cases on the calendar

Excerpt from Commentary to ABA Standard

The vesting of calendar control in the court avoids even the appearance of a lack of fair and evenhanded administration of the docket. Ultimate responsibility for determining which cases are to be tried and when should be recognized as a judicial function, although the court obviously should receive relevant information from both the prosecution and the defense in establishing priorities. &

RCW 10.46.085 Continuances not permitted in certain cases

When a defendant is charged with a crime which constitutes a violation of RCW 9A.64.020 or chapter 9.68, 9.68A, or 9A.44 RCW, and the alleged victim of the crime is a person under the age of eighteen years, neither the defendant nor the prosecuting attorney may agree to extend the originally scheduled trial date unless the court within its discretion finds that there are substantial and compelling reasons for a continuance of the trial date and that the benefit of the postponement outweighs the detriment to the victim. The court may consider the testimony of lay witnesses and of expert witnesses, if available, regarding the impact of the continuance on the victim.

RCW 9A.64.020 Incest

RCW 9.68 Obscenity and Pornography

9.68A Sexual Exploitation of Children

9A.44 Sex Offenses [Rape, Rape of a Child, Child Molestation, Sexual Misconduct with a Minor, Indecent Liberties, Sexually Violating Human Remains, Registration of Sex Offenders]

Case Processing Time Standards

On May 15, 1992 (revised September 1997), the Board for Judicial Administration endorsed various case processing time standards for informational purposes as a benefit to the bench and bar. Washington Court Rules State 1999, pp. 583-86 (West 1998).

The standards provide for the following Filing to Resolution Time Standards:

	90%	98%	100%
Superior Court Criminal	4 mo.	6 mo.	9 mo.
Superior Court RALJ	4 mo.	5 mo.	6 mo.
Ct/Limited Juris Criminal	3 mo.	6 mo.	9 mo.

Case Law Court Discretion to Dismiss under CrR 8.3(b) Delay in Adding Charges Which Prejudices Defendant by Forcing Speedy Trial Waiver to be Adequately Prepared

State v. Michielli, 132 Wn.2d 229, 937 P.2d 587 (1997) (trial court's dismissal of three counts of trafficking in stolen property upheld under CrR 8.3(b) where prosecutor waited until 3 business days before trial to amend charges, resulting in defendant having to choose between going to trial unprepared or waiving his right to a speedy trial and asking for a continuance)

Case Law Court Discretion to Dismiss under CrR 8.3(b) Illness of Critical State Witness

State v. Koerber, 85 Wn.App. 1, 3-5, 931 P.2d 904 (Div. 1 1997) (trial court dismissed case after being informed by the State the night before trial that a critical witness was ill and the State did not know when the witness would become available; Held: CrR 8.3(b) dismissal not warranted, dismissal reversed and remanded)

&Criminal convictions should not be dismissed for minor acts of negligence by third parties that are beyond the State's direct control when there is no material prejudice to the defendant. The State did not engage in any unfair "gamemanship," or intentional acts, to prevent the court from administering justice. The State's conduct did not warrant dismissal of its case against Koerber, and was an untenable ground for dismissal.

The trial judge ignored reasonable alternatives when he readily ordered the extraordinary remedy of dismissal.

Dismissal of a criminal case is a remedy of last resort, and a trial judge abuses discretion by ignoring intermediate remedial steps. We hold that the trial judge abused his discretion.

If analyzed as a CrR 8.3(b) dismissal (despite the trial court's disavowal of this basis for the dismissal), we would nevertheless conclude that reversal is required. In considering whether a criminal case may be dismissed under CrR 8.3(b), the trial court must determine: (1) whether there has been any governmental misconduct or arbitrary action, and (2) whether there has been prejudice to the rights of the accused.

The trial court's authority under CrR 8.3(b) to dismiss has been limited to "truly egregious cases of mismanagement or misconduct by the prosecutor." Dismissal of a criminal proceeding is an extraordinary remedy. Absent a finding of prejudice to the defendant, dismissal of a criminal case is not warranted. Fairness to the defendant underlies the purpose of CrR 8.3(b).

Even if the State's conduct in handling Koerber's case rose to the level of "arbitrary action or governmental conduct" warranting dismissal, dismissal would still be inappropriate because the record does not establish that there was any prejudice to Koerber resulting from that conduct. The only mention of prejudice to Koerber came from his attorney, who told the court that Koerber would be prejudiced by a continuance because of his schedule of working nights and attending court in the day. The judge responded that Koerber's work schedule was not his concern, but that continuing the case would be an inconvenience to the jury. The trial court abused its discretion when it dismissed without finding prejudice to Koerber.

(Footnotes omitted.)

5.2 Courtroom decorum

(a) prosecutor should support the authority of the court by strict adherence to rules of decorum and by manifesting an attitude of professional respect toward the judge, opposing counsel, witnesses, defendants, jurors, and others in the courtroom

(b) prosecutor should address the court, not opposing counsel, when court is in session on all matters relating to the case

(c) unprofessional conduct to engage in behavior or tactics purposefully calculated to irritate or annoy the court or opposing counsel

(d) prosecutor should promptly comply with all orders and directives of the court; but prosecutor has duty to have record reflect adverse rulings and has right to seek reconsideration of adverse rulings

(e) prosecutor should be punctual in all court appearances and in submission of all pleadings

(f) prosecutor should cooperate with court and bar in developing codes of decorum and professional etiquette

Excerpt from Commentary to ABA Standard

Generally. &Basic to an efficient and fair functioning of our adversary system of justice is an atmosphere of mutual respect by all participants. &There is no place and no occasion for rudeness or overbearing, oppressive conduct. &The objective of such standards is to keep the understandably contentious spirit of the opposing advocates within appropriate bounds and constructive channels, in order that issues may be resolved on the merits and proceedings not be diverted by the intrusion of factors such as personality, acrimonious exchanges between advocates or between advocates and witnesses, and histrionics in an effort to sway jurors by other than legitimate evidence. &Lawyers must expect that every intrusion of bad manners or other rudeness into a trial will be dealt with swiftly and sternly by the presiding judge. &

Exchanges Between Lawyers. A breach of courtroom decorum occurs when lawyers address each other directly rather than through the court. &Sometimes a lawyer will deliberately bait a less-experienced opponent to shake the opponent s composure or to impress the jury. In the courtroom, as in legislative bodies and where other formal proceedings occur, the surest protection against the degeneration of the controversy into personal acrimony is the requirement that the participants address the presiding officer and do so in certain prescribed forms. &The need to curb direct exchanges between counsel is greatest when a jury is present, since there is substantial risk that the jury will be distracted from its task by the spectacle created by the lawyers.

Respect for the Judge, Opposing Counsel, and Witnesses. &A restrained, respectful attitude on the part of each advocate toward the other helps reinforce the concept that the adversary system, although based on contention, depends on evidence and the rule of law, not vituperation or personality conflicts. &Public respect for the law derives in large measure from the image that the administration of justice presents. It is not enough that justice be done; there must be the appearance of justice. &[T]he prosecutor may [not] make a farce of the trial or undermine the dignity of the legal process by excessive histrionics. &Ultimately an experienced and vigilant trial judge will draw such a line if the advocates fail to say within reasonable bounds. &

Compliance with Court Orders. &Corresponding to the prosecutor s obligation to accede to the court s command in good grace is the duty of the court to permit an adequate record to be made of the court s order and the circumstances under which it was made, as seen by counsel.

Prompt Disposition; Punctuality. Lack of punctuality in attendance at court &waste[s] time of lawyers, witnesses, jurors, and the judge and staff. &As a corollary to counsel s own responsibility to be punctual, it is incumbent on counsel to do all within his or her power to see to it that the client and witnesses are punctual in their attendance at court. &

Code of Decorum. &A lawyer is entitled to know what standards of decorum are expected in a particular court, especially with regard to the use of conventional forms of address, when the lawyer is required to stand, where he or she is allowed to be in the courtroom during trial, and other such matters. To avoid misunderstanding between court and lawyer concerning such formalities &lawyers, including prosecutors, should take the lead in developing rules governing these matters.

Case Law Disobedience of Court Ruling

State v. Tweedy, 165 Wash. 281, 288, 5 P. 2d 335 (1931) (reversed due to prosecutor s disobedience of court rulings; defendant denied fair trial)

Thus it appears that the state finally succeeded in introducing testimony which the court on three prior occasions

ruled was incompetent and inadmissible. It is obvious that the prosecuting attorney believed that by bringing to the attention of the jury the fact that Newell was then lodged in the King county jail would prejudice the appellant in the eyes of the jury, and thereby better aid the state in procuring a conviction. The prosecuting attorney thrice ignored the rulings of the trial judge. His persistence in that regard, we are sure, was not intended as an exhibition of disrespect of the court, but indicates a belief on his part that the testimony would greatly assist him in discrediting the appellant before the jury. We find this testimony was prejudicial, and that the injury or harm was not cured even though stricken by the court, and the jury instructed to disregard it.

It must always be remembered that public prosecutors are quasi judicial officers. While they may prosecute vigorously, yet, in doing so, they shall not be permitted to disregard the rulings of trial courts. The attitude of the prosecuting attorney in this instance was not brought about in the heat of forensic battle. The record shows that up to the time the sheriff was called as a witness the trial had proceeded in an orderly fashion. Hence all the more reason why the learned prosecutor should have observed the rulings of the court.

State v. Smith, 189 Wash. 422, 428-29, 65 P.2d 1075 (1937) (court granted defense motion in limine to prohibit questioning concerning defendant s having deserted from military; prosecutor asked defendant in violation of order why defendant left military; Held: prejudicial. reversed and remanded for new trial).

State v. Ransom, 56 Wn.App. 712, 715, fn. 1, 785 P.2d 469 (Div. 2 1990) (conviction reversed on other grounds)

Ransom also complains that the prosecutor violated an order in limine that precluded the introduction of prejudicial matter. We are inclined to agree, and we expect the prosecutor to obey the court's order on retrial. We remind all attorneys that stringent remedies are sometimes necessary where attorneys cannot understand the need to adhere to such orders. *See State v. Stephans,* 47 Wn.App. 600, 736 P.2d 302 (1987).

Case Law Encouraging Witness to Disobey Court Order

State v. Stephans, 47 Wn.App. 600, 604-5, 736 P.2d 302 (Div. 2 1987) (despite agreeing to order authorizing defense to interview and conduct expert examination of child witnesses, prosecutor told both sets of parents that she knew of no authority for the court to order these evaluations and that if the parents wanted to protect their children the prosecutor would do its best to support them in that endeavor; Held: case dismissed)

There is no doubt that difficulty and confusion attended the efforts by both sides to prepare for trial. At some point, however, confusion and difficulty will not suffice to excuse non-compliance with court orders. It is the State, after all, that filed the charges and must present a case. The defendant cannot prepare a defense without knowing what the State's case will be, and cannot know that without at least being formally advised as to the State's witnesses. *See* CrR 4.7(a)(1)(i); [*State v. Dailey,* 93 Wn.2d 454, 610 P.2d 357 (1980)], at 456-58. The State's failure to supply a formal witness list was symptomatic of the State's poor management of this case. Even so, we would be inclined to hold that dismissal was too drastic a remedy but for the State's conduct concerning the court's order for evaluation of the child witnesses.

We cannot characterize the State's actions concerning that order as other than egregious misconduct. The State's advice to the children's custodians cannot be interpreted as other than encouragement to disobey a court order. The effect was to frustrate the defense in its attempt to evaluate the credibility of the victims.

We do not say that a prosecuting attorney or any lawyer, for that matter is barred from discussing a court order with a potential witness. We would hope that any such discussion would be conducted on a professional basis, and that it would be well seasoned with common sense. We do say that under no circumstances may a prosecuting attorney counsel, or suggest his approval of, disobedience. It should not be necessary to point out that the proper avenue to vindicate a disagreement with an order is an appeal. Finally, we see no remedy that would have served the interests of justice short of dismissal. The trial court had already warned counsel that disobedience of the order would result in dismissal and, at the time the dismissal was granted, Stephans had been in jail, only because of these charges, for about six months, but the case was no nearer to trial than it had been at the start. In fact, it is hard to see from the record when or if it would ever be ready. The trial court recognized this; it properly exercised its discretion under CrR 8.3(b).

(Footnotes omitted.)

5.3 Selection of jurors

(a) prosecutor should be prepared prior to trial to discharge effectively the prosecution function in selection of jury and exercise of challenges for cause and peremptory challenges

(b) whenever necessary to conduct a pretrial background investigation of jurors, investigatory methods should neither harass nor unduly embarrass potential jurors or invade their privacy, and should be restricted to records and sources of information already in existence

(c) voir dire should be used solely to obtain information for intelligent exercise of challenges; prosecutor should not intentionally use voir dire to present factual matters which prosecutor knows will not be admissible at trial, or to argue the prosecution s case to the jury

Excerpt from Commentary to ABA Standard

Preparation for Jury Selection. &[I]n the selection of the jury the advocate s decisions must be made under time pressure. &Thus, the prosecutor needs to prepare carefully for the exercise of challenges for cause and peremptory challenges.

Pretrial Investigation of Jurors. Pretrial investigation of jurors may permit a more informed exercise of challenges than reliance solely on voir dire affords. The practice of conducting out-of-court investigations of jurors presents serious problems, however. It may have a tendency to make jury service, already unpopular with many persons, even more onerous because of the fear of invasion of privacy. It may also have the appearance, even if unintended, of an effort to intimidate jurors. &

Use of Voir Dire. &In those jurisdictions that retain the practice of permitting the lawyer to conduct all of the questioning of jurors, the responsibility must rest with the lawyer, supervised by the court, to limit questions to those that are designed to lay a basis for the lawyer s challenges. &The use of voir dire to inject inadmissible evidence into the case is a substantial abuse of the process. &

Const. art. 1, § 11 Religious Freedom

Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment: Provided, however, That this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional, and mental institutions, or by a county's or public hospital district's hospital, health care facility, or hospice, as in the discretion of the legislature may seem justified. *No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.*

(Emphasis added.)

Case Law Purpose of Voir Dire

State v. Laureano, 101 Wn.2d 745, 757-58, 682 P.2d 889 (1984), *overruled on other grounds by State v. Brown,* 111 Wn.2d 124, 761 P.2d 588 (1988), *adhered to on reh g,* 113 Wn.2d 520, 782 P.2d 1013, 787 P.2d 906 (1989)

We cannot say that the trial court abused its discretion by refusing to allow individual voir dire of each prospective juror. The limits and extent of voir dire examination lie within the discretion of the trial court. *State v. Robinson,* 75 Wn.2d 230, 231-32, 450 P.2d 180 (1969). However, the defendant should be permitted to examine prospective jurors carefully, "and to an extent which will afford him every reasonable protection." *State v. Tharp,* 42 Wn.2d 494, 499, 256 P.2d 482 (1953). The scope of voir dire should be coextensive with its purpose.

> The purpose of the inquiry is to enable the parties to learn the state of mind of the prospective jurors, so that they can know whether or not any of them may be subject to a challenge for cause, and determine the advisability of interposing their peremptory challenges.

42 Wn. 2d at 499-500; *State v. Hunter,* 183 Wash. 143, 153, 48 P.2d 262 (1935). On retrial this test should be used to determine the extent of voir dire to be allowed.

State v. Frederiksen, 40 Wn.App. 749, 752-54, 756, 700 P.2d 369, *review denied,* 104 Wn.2d 1013 (Div. 1 1985)

Moreover, it is not "a function of the [voir dire] examination ... to educate the jury panel to the particular facts of the

case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law." (Citation omitted.) *People v. Williams,* 29 Cal.3d 392, 174 Cal.Rptr. 317, 325, 628 P.2d 869 (1981).

"[T]he defendant should be permitted to examine prospective jurors carefully, 'and to an extent which will afford him every reasonable protection.' " (Citation omitted.). However, the limits and extent of voir dire examination fall within the trial court's discretion. The trial court's exercise of discretion is limited only by the need to assure a fair trial by an impartial jury. *United States v. Jones,* 722 F.2d 528, 529 (9th Cir. 1983). &

Three situations require specific voir dire questions because of a real possibility of prejudice: (1) when the case carries racial overtones; (2) when the case involves other matters (e.g., the insanity defense) concerning which either the local community or the population at large is commonly known to harbor strong feelings that may stop short of presumptive bias in law yet significantly skew deliberations in fact; and (3) when the case involves other forms of bias and distorting influence which have become evident through experience with juries (e.g., the tendency to overvalue official government agents' testimony). &

Voir dire as to self-defense in general does not fall within one of the three classes raising a real possibility of bias so that specific questions are required. Thus the defendant bore the burden of showing a reasonable possibility of prejudice, i.e., that the proposed question was "reasonably calculated to discover an actual and likely source of prejudice, rather than pursue a speculative will-o-the-wisp."

Here no showing was made that prejudice against a self-defense claim was likely to be encountered in the community from which the veniremen were drawn. In the absence of such a showing, the trial court did not abuse its discretion in disallowing questions on the subject.

(Citations omitted.) (Footnotes omitted.)

Case Law Improper Questioning

State v. Badda, 63 Wn.2d 176, 179-80, 385 P.2d 859 (1963) (Held: cumulative error required reversal; new trial ordered)

> Q. [Juror No. 1], do you realize that the State has little or no choice in the cases which it brings to trial, so long as we believe that a felony has been committed and we know the persons who perpetrated the felony. Do you understand that, sir &

&The remarks made by the prosecuting attorney in the instant case go beyond expressions of belief in the guilt or innocence of the party on trial, statements uniformly held by the courts to be improper. The prosecuting attorney's assertion implies that there reposes in the state a wisdom or knowledge superior to and apart from that of its officers a knowledge, both impersonal and damning, which sets in motion the inexorable process of prosecution where guilt is known. The statements were not only prejudicial, but curious indeed when considered in light of the circumstance that all of the evidence submitted by the state to connect the appellant with the crime came from an admitted accomplice to the robbery who not only was not brought to trial but was suffered to enter a plea of guilty to a markedly less serious offense.

The error here called at least for a pointed admonition to the jury to disregard the remarks. Moreover, neither counsel should declare his personal opinion as to the guilt or innocence of the accused.

Case Law Polling Jury

State v. Havens, 70 Wn.App. 251, 257, 852 P.2d 1120, *review denied*, 122 Wn.2d 1023 (Div. 3 1993)

Further, any defect in the voting procedure was cured by the jury poll. " '[S]ince the jury was polled, there is no doubt that the verdict was unanimous and was the result of each juror's individual determination.' " (Italics omitted.) *State v. Badda,* 63 Wn.2d 176, 182, 385 P.2d 859 (1963); *Butler v. State,* 34 Wn.App. 835, 838, 663 P.2d 1390 (jury poll is tantamount to a final vote), *review denied*, 100 Wn.2d 1009 (1983); RCW 4.44.390 (if the number of jurors required for verdict answer that it is the verdict said verdict shall stand).

Case Law Peremptory Challenges Based on Race

Batson v. Kentucky, 476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712, 1716-19, 1724 (1986) (prosecutor struck all black jurors from the venire; Held: reversed since defendant made prima facie showing of discrimination and prosecutor failed to meet its burden in showing racially neutral reason for use of peremptory challenges to exclude minority veniremen)

More than a century ago, the Court decided that the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded. *Strauder v. West Virginia,* 10 Otto 303, 100 U.S. 303, 25 L.Ed. 664 (1880) [Court invalidated a state statute that provided that only white men could serve as jurors]. That decision laid the foundation for the Court's unceasing efforts to eradicate racial

discrimination in the procedures used to select the venire from which individual jurors are drawn. In *Strauder*, the Court explained that the central concern of the recently ratified Fourteenth Amendment was to put an end to governmental discrimination on account of race. *Id.,* at 306-307. Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.

In holding that racial discrimination in jury selection offends the Equal Protection Clause, the Court in *Strauder* recognized, however, that a defendant has no right to a "petit jury composed in whole or in part of persons of his own race." *Id.,* at 305. "The number of our races and nationalities stands in the way of evolution of such a conception" of the demand of equal protection. But the defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria. The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, *Strauder, supra,* 100 U.S., at 305, or on the false assumption that members of his race as a group are not qualified to serve as jurors &

Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure. "The very idea of a jury is a body ... composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." *Strauder, supra,* 100 U.S., at 308. The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge. Those on the venire must be "indifferently chosen," to secure the defendant's right under the Fourteenth Amendment to "protection of life and liberty against race or color prejudice." *Strauder, supra,* 100 U.S., at 309.

Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial. A person's race simply "is unrelated to his fitness as a juror." As long ago as *Strauder,* therefore, the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror.

The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. Discrimination within the judicial system is most pernicious because it is "a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others." *Strauder,* 100 U.S., at 308. &

Accordingly, the component of the jury selection process at issue here, the State's privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause. Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges "for any reason at all, as long as that reason is related to his view concerning the outcome" of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant. &

The reality of practice, amply reflected in many state- and federal-court opinions, shows that the challenge may be, and unfortunately at times has been, used to discriminate against black jurors. By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice. In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.

(Citations omitted.) (Footnotes omitted.)

Purkett v. Elem, 514 U.S. 765, 131 L.Ed.2d 834, 115 S.Ct. 1769, 1770-71 (1995) (race-neutral explanation tendered by proponent of peremptory challenge need not be persuasive, or even plausible, and prosecutor's proffered explanation for peremptory challenge of black male, that juror had long, unkempt hair, a mustache and a beard, was race-neutral and satisfied prosecution's burden of articulating nondiscriminatory reason for the strike)

Under our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step 1), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If a race-neutral explanation is tendered, the trial court must then decide (step 3) whether the opponent of the strike has proved purposeful racial discrimination. The second step of this process does not demand an explanation that is persuasive, or even plausible. "At this [second] step of the inquiry, the issue is the facial validity of the

prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."

The Court of Appeals erred by combining *Batson's* second and third steps into one, requiring that the justification tendered at the second step be not just neutral but also at least minimally persuasive, i.e., a "plausible" basis for believing that "the person's ability to perform his or her duties as a juror" will be affected. It is not until the third step that the persuasiveness of the justification becomes relevant the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination. At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination. But to say that a trial judge may choose to disbelieve a silly or superstitious reason at step 3 is quite different from saying that a trial judge must terminate the inquiry at step 2 when the race-neutral reason is silly or superstitious. The latter violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.

The Court of Appeals appears to have seized on our admonition in *Batson* that to rebut a prima facie case, the proponent of a strike "must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges," and that the reason must be "related to the particular case to be tried." This warning was meant to refute the notion that a prosecutor could satisfy his burden of production by merely denying that he had a discriminatory motive or by merely affirming his good faith. What it means by a "legitimate reason" is not a reason that makes sense, but a reason that does not deny equal protection.

The prosecutor's proffered explanation in this case that he struck juror number 22 because he had long, unkempt hair, a mustache, and a beard is race-neutral and satisfies the prosecution's step 2 burden of articulating a nondiscriminatory reason for the strike. "The wearing of beards is not a characteristic that is peculiar to any race." And neither is the growing of long, unkempt hair. Thus, the inquiry properly proceeded to step 3, where the state court found that the prosecutor was not motivated by discriminatory intent.

(Citations omitted.) (Footnotes omitted.) (Emphasis in original.)

State v. Luvene, 127 Wn.2d 690, 903 P.2d 960 (1995) (upon exercising challenge to African-American juror in capital case, prosecutor immediately offered two race-neutral explanations (1) juror's brother had been convicted of an armed robbery and had been committed to the Washington Department of Corrections; and (2) challenged juror was very vague on the topic of the death penalty; the prosecutor mentioned that he did not intend to exercise a peremptory challenge against the other African-American person in the venire; challenge found to be race-neutral).

State v. Wright, 78 Wn.App. 93, 896 P.2d 713, *review denied,* 127 Wn.2d 1024 (Div. 1 1995) (African-American and Hispanic-American jurors comments indicating possible anti-police bias held to be a legitimate reason to excuse any juror).

State v. Medrano, 80 Wn.App. 108, 906 P.2d 982 (Div. 3 1995) (African-American juror had considerable professional experience with people suffering from the effects of drugs and alcohol; prosecutor s explanation for use of peremptory, especially given diminished capacity defense based on alcohol and drug misuse, found to be a race-neutral and non-pretextual reason for striking a juror).

State v. Rhodes, 82 Wn.App. 192, 201-3, 917 P.2d 149 (Div. 1 1996) (prosecutor s striking sole African-American juror upheld based on explanation that juror had been improperly stopped by police due to race)

There is no question that Juror No. 10 is a member of a constitutionally cognizable racial group. The issue thus becomes whether this fact, together with other relevant circumstances, establishes a prima facie case that the prosecutor's challenge was motivated by a discriminatory purpose. Rhodes argues that the trial court erred in concluding that a single challenge, even to the only African-American juror on a panel, cannot constitute a pattern. Even if the challenged juror is the only African-American juror on the panel, we have generally been reluctant to find that exclusion of a single juror establishes a pattern or to find discriminatory motivation based on numbers alone. However, we have also recognized that the prosecutor's dismissal of the only eligible African-American juror may imply a discriminatory act or motive. &[S]ee *also United States v. Armstrong,* ___ U.S. ___, 116 S.Ct. 1480, 1487, 134 L.Ed.2d 687 (1996) ("the significance [of a challenge to a black juror] may differ if the venire consists mostly of blacks or of whites"). Because Juror No. 10 was the only African-American juror on the panel, the trial court should have continued with the next step of the analysis and asked the prosecutor to articulate the reason for the challenge. The trial court should then have determined, based on the circumstances and that explanation, whether purposeful discrimination did in fact occur. Although here the trial court did not make such a finding, the prosecutor did state his reasons for challenging Juror No. 10 for the record. This, together with the other evidence in the record, permits us to conclude that the challenge was not exercised on discriminatory grounds.

The prosecutor said that he challenged Juror No. 10 because he was improperly stopped by the police. Rhodes

himself concedes Juror No. 10 was the only juror among the 30 members of the panel who had been stopped for something he didn't do. The prosecutor's follow-up question, "What do you think about the officer who incorrectly picked you up?" was directed simply at further exploring the juror's reaction to an unpleasant experience. The State may properly inquire about any potential bias against its main witnesses who were police officers. Although Juror No. 10 stated that he believed the experience would not affect his ability to be impartial, his spontaneous description of the event included the statement that the incident scared both him and his friend because of the apparent nervousness of the officer with the handgun and that "it was kind of weird." In the context of a case where the defense is that the defendant was mistakenly accused of committing the crime simply because he happened to be at the scene, this was a legitimate basis for exercising a peremptory challenge.

Contrary to Rhodes' contention that the prosecutor improperly focused on race, it was defense counsel who prodded Juror No. 10 about the degree to which he felt his race had played a role in the improper stop. As this court noted in Wright, the *Batson* court was concerned with purposeful discrimination by the prosecutor. It is thus significant that Juror No. 10's comments about race, except as an element of the description of the two people the Denver police were seeking at the time they made the stop, were all elicited not by the prosecutor but by defense counsel. Even if this were not the case, a prosecutor may legitimately be more concerned about an individual who has personally experienced being singled out by the police, based on his race, for something he did not do than about jurors of any race who think, in the abstract, that the police stop African-Americans more often than whites.

Although there is no question that Juror No. 10 was a member of a constitutionally cognizable racial group, neither the prosecutor's questions nor his explanation of the reasons for his challenge raises an inference that that challenge was motivated by a discriminatory purpose.

(Citations omitted.) (Footnotes omitted.)

Campbell v. Louisiana, 523 U.S. 392, 118 S.Ct. 1419, 140 L.Ed.2d 551 (1998) (Second degree murder conviction reversed. Held: white defendant had standing under due process and equal protection to challenge grand jury system which systematically excluded blacks in the selection of grand jury foreperson) (Thomas, J., dissent, joined by Scalia, J. I fail to understand how the rights of blacks excluded from jury service can be vindicated by letting a white murderer go free.)

Case Law Peremptory Challenges Based on Gender

J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 128 L.Ed. 2d 89, 114 S.Ct. 1419, 1425-27, 1430 (1994) (at petitioner's paternity and child support trial, respondent State used 9 of its 10 peremptory challenges to remove male jurors resulting in an all-female jury; Held: the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case solely because that person happens to be a woman or a man; Respondent's rationale that its decision to strike virtually all males in this case may reasonably have been based on the perception, supported by history, that men otherwise totally qualified to serve as jurors might be more sympathetic and receptive to the arguments of a man charged in a paternity action, while women equally qualified might be more sympathetic and receptive to the arguments of the child's mother is virtually unsupported and is based on the very stereotypes the law condemns)

We need not determine, however, whether women or racial minorities have suffered more at the hands of discriminatory state actors during the decades of our Nation's history. It is necessary only to acknowledge that "our Nation has had a long and unfortunate history of sex discrimination," a history which warrants the heightened scrutiny we afford all gender-based classifications today. Under our equal protection jurisprudence, gender-based classifications require "an exceedingly persuasive justification" in order to survive constitutional scrutiny. Thus, the only question is whether discrimination on the basis of gender in jury selection substantially furthers the State's legitimate interest in achieving a fair and impartial trial. In making this assessment, we do not weigh the value of peremptory challenges as an institution against our asserted commitment to eradicate invidious discrimination from the courtroom. Instead, we consider whether peremptory challenges based on gender stereotypes provide substantial aid to a litigant's effort to secure a fair and impartial jury. &

Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process. The litigants are harmed by the risk that the prejudice which motivated the discriminatory selection of the jury will infect the entire proceedings. The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders.

When state actors exercise peremptory challenges in reliance on gender stereotypes, they ratify and reinforce prejudicial views of the relative abilities of men and women. Because these stereotypes have wreaked injustice in so many

other spheres of our country's public life, active discrimination by litigants on the basis of gender during jury selection "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law." The potential for cynicism is particularly acute in cases where gender-related issues are prominent, such as cases involving rape, sexual harassment, or paternity. Discriminatory use of peremptory challenges may create the impression that the judicial system has acquiesced in suppressing full participation by one gender or that the "deck has been stacked" in favor of one side. &

Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system. It not only furthers the goals of the jury system. It reaffirms the promise of equality under the law that all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy. When persons are excluded from participation in our democratic processes solely because of race or gender, this promise of equality dims, and the integrity of our judicial system is jeopardized.

In view of these concerns, the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case for no reason other than the fact that the person happens to be a woman or happens to be a man. As with race, the "core guarantee of equal protection, ensuring citizens that their State will not discriminate ..., would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' [gender]."

(Citations omitted.) (Footnotes omitted.)

State v. Burch, 65 Wn.App. 828, 830 P.2d 357 (Div. 1 1992) (pre- *J.E.B. v. Alabama ex rel. T.B.;* Held: gender-based challenges violated Equal Protection clause and violated Washington Equal Rights Amendment, Const. art. 31, which provides that "[e]quality of rights and responsibility under the law shall not be denied or abridged on account of sex."; male had standing to assert female juror s equal protection violation; reversed and remanded for new trial).

Case Law Peremptory Challenges Based on Sexual Orientation

While the political arena is currently debating the rights and responsibilities to be accorded to persons based on sexual orientation, I believe that case law will prohibit a prosecutor s decision to strike a potential juror based on sexual orientation for the same reason courts have so held with race and gender, i.e. protecting the equal protection rights of the potential juror against stereotypes based on classification with a particular group. *See Romer v. Evans,* 517 U.S. 620, 134 L.Ed.2d 855, 116 S.Ct. 1620 (1996) (amendment to Colorado Constitution that prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination held to violate equal protection).

5.4 Relations with jury

(a) unprofessional conduct for prosecutor to communicate privately with persons summoned for jury duty concerning a case prior to or during trial; prosecutor should avoid the reality or appearance of any such improper communications

(b) prosecutor should treat jurors with deference and respect, avoiding the reality or appearance of currying favor by a show of undue solicitude for their comfort or convenience

(c) unprofessional conduct for prosecutor after discharge of jury to make comments to or ask questions of juror for purpose of harassing or embarrassing the jury in any way which will tend to influence judgment in future jury service

Excerpt from Commentary to ABA Standard

Communication with Jurors Before or During Trial. &Courts have sometimes considered the broader question of the propriety of any conversation, however innocent in purpose or trivial in content, between counsel and juror during trial, since the mere fact that counsel is seen conversing with a juror may raise the question of whether the juror reached the verdict solely on the evidence. &

Attitude Toward Jury. &Referring to individual jurors by name during trial has been ruled unethical, and courts also have condemned the practice. Just as respect for the position of the judge requires that the judge be addressed formally as your honor, the jury s symbolic position as representing the community in the court requires that a degree of formality be observed in addressing the jury. The typical form of address is, of course, ladies and gentlemen of the jury or members of the jury.

Posttrial Interrogation. Since it is vital to the functioning of the jury system that jurors not be influenced in their deliberations by fears that they subsequently will be harassed by lawyers or others who wish to learn what transpired in the jury room, neither defense counsel nor the prosecutor should discuss a case with jurors after trial in a way that is critical of the verdict. &

Communication with Jury

CrR 6.15(f) Instructions and Argument
(f) Additional or Subsequent Instructions.

(1) After retirement for deliberation, if the jury desires to be informed on any point of law, the judge may require the officer having them in charge to conduct them into court. Upon the jury being brought into court, the information requested, if given, shall be given in the presence of, or after notice to the parties or their counsel. Any additional instruction upon any point of law shall be given in writing.

(2) After jury deliberations have begun, the court shall not instruct the jury in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate.

CrR 3.4 Presence of the Defendant
(a) When Necessary. The defendant shall be present at the arraignment, at every stage of the trial including the empaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules, or as excused or excluded by the court for good cause shown.

(b) Effect of Voluntary Absence. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine only, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence.

(c) Defendant Not Present. If in any case the defendant is not present when his personal attendance is necessary, the court may order the clerk to issue a warrant.

State v. Saraceno, 23 Wn.App. 473, 474-75, 596 P.2d 297 (Div. 3 1979) (error for court to respond to jury question without counsel, and presumed to be prejudicial; Held: prosecutor met burden of showing error harmless)

The jury in this case retired to deliberate about 5 p. m. At approximately 11:15 p. m., the jurors requested the bailiff to provide them with a definition of "resistance." The bailiff telephoned the judge who instructed him to give the definition of "resistance" from Webster's New Collegiate Dictionary, which he did. Thereafter, the jurors again asked the bailiff if he could define "passive resistance" for them. The bailiff again contacted the judge, explaining to him that the jury was having difficulty in understanding the difference between active and passive resistance. The trial judge instructed the

bailiff to advise the jury that "any words and acts can manifest resistance." The bailiff informed the jury of this definition and then told them "if you scratch your head it is not necessarily resistance, you had to complete the act." Neither the defendant nor counsel were notified of these incidents by the court. Later, the jury retired for the night and did not resume deliberation until the following morning; they reached a verdict mid morning. Immediately following the jury's verdict the court made a record of the additional instructions of the previous night. The issue on appeal is whether the giving of the instructions without the presence of the defendant or counsel was prejudicial error.

There is no question that the instructing of the jury, during their deliberation, on the definition of "resistance," without consulting either counsel or the appellant, was error. At one time in the jurisprudence history of this state the giving of additional jury instructions during deliberation without the presence of the accused and his counsel was conclusively presumed to be prejudicial..

Today it appears that both federal and state jurisdictions accept the concept that communications with a jury, while error, may be harmless error.

In *Remmer v. United States,* 347 U.S. 227, 74 S.Ct. 450, 451, 98 L.Ed. 654 (1954), the court stated:

> In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during the trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

(Citations omitted.)

State v. Brenner, 53 Wn.App. 367, 372, 768 P.2d 509, *review denied*, 112 Wn.2d 1020 (Div. 1 1989) (juror s daily luncheons with police officer not misconduct since no evidence defendant s case was discussed)

Communications between a third person and a juror about an ongoing trial constitute misconduct which warrants a new trial if such communications prejudice the defendant. *State v. Murphy,* 44 Wn. App. 290, 296, 721 P.2d 30 (1986); *see State v. Lemieux,* 75 Wn. 2d 89, 91, 448 P.2d 943 (1968); *see also State v. Saraceno,* 23 Wn.App. 473, 474-75, 596 P.2d 297 (1979). Once misconduct is shown, prejudice is presumed. The State has the burden to overcome this presumption by proof beyond a reasonable doubt. *Murphy,* 44 Wn.App. at 296, 721 P.2d 30.

State v. Bourgeois, 133 Wn.2d 389, 945 P.2d 1120 (1997) (aggravated first degree murder and first degree assault case; spectator misconduct of staring down victim and making gesture as if to shoot victim is significant, and constituted spectator misconduct; Held: while this irregularity was fairly serious, there was no indication that defendant directed spectator to make threat and defendant not prejudiced).

Protective Orders for Jurors

If you have the need for a jury protective order, please contact Pamela Loginsky at WAPA or me for briefing.

5.5 Opening statement

prosecutor s opening statement should be confined to a brief statement of the issues in the case and to remarks on evidence the prosecutor intends to offer which the prosecutor believes in good faith will be available and admissible; unprofessional conduct to allude to any evidence unless a good faith and reasonable basis for believing that such evidence will be tendered and admitted in evidence

Excerpt from Commentary to ABA Standard

The purpose of opening statement is narrow and limits the prosecutor to a brief statement of the issues and an outline of what the prosecutor believes can be supported with competent and admissible evidence. In that statement the prosecutor should be scrupulous to avoid any utterance that cannot be supported later with such evidence. &

Case Law Purpose of Opening Statement

State v. Campbell, 103 Wn.2d 1, 15-17, 691 P.2d 929 (1984), *cert. denied,* 471 U.S. 1094, 85 L.Ed.2d 526, 105 S.Ct. 2169 (1985)

A prosecutor's opening statement should be confined to a brief statement of the issues of the case, an outline of the anticipated material evidence, and reasonable inferences to be drawn therefrom. *State v. Kroll,* 87 Wn.2d 829, 834-35, 558 P.2d 173 (1976); 1 American Bar Ass'n, Standards for Criminal Justice, Std. 3-5.5 (2d ed. 1980). Testimony may be anticipated so long as counsel has a good faith belief such testimony will be produced at trial. *State v. Grisby,* 97 Wn.2d 493, 499, 647 P.2d 6 (1982) cert. denied, 459 U.S. 1211, 103 S.Ct. 1205, 75 L.Ed.2d 446 (1983). The trial court has wide discretion in determining the good faith of the prosecutor. *State v. Lyskoski,* 47 Wn.2d 102, 107, 287 P.2d 114 (1955). *See* Annot., 16 A.L.R. 4th 810 § 7(a), (b) (1982). The burden of showing bad faith is upon the defendant. *State v. Parker,* 74 Wn.2d 269, 274-75, 444 P.2d 796 (1968), *overruled on other grounds in State v. Gosby,* 85 Wn.2d 758, 767, 539 P.2d 680 (1975).

We find the prosecutor's opening statement in totality to have been brief, and rather mild considering the gruesomeness of the murders. &Moreover the jury was admonished by the prosecutor and trial judge that counsel's remarks were not evidence. *State v. Grisby, supra,* 97 Wn.2d at 497. These admonishments, along with the actual testimony of Kedziorski, diluted the impact of the prosecutor's statement and in fact worked to the State's disadvantage. We hold the opening statement was made in good faith.

5.6 Presentation of evidence

(a) unprofessional conduct to knowingly offer false evidence, or fail to seek withdrawal thereof upon discovery of its falsity

(b) unprofessional conduct to knowingly ask legally objectionable questions for the purpose of bringing inadmissible matters to the attention of the judge or jury, or to make other impermissible comments or arguments in the presence of the judge or jury

(c) unprofessional conduct to permit any tangible evidence to be displayed in the view of the judge and jury until such time as a good faith tender of such evidence is made

(d) unprofessional conduct to tender tangible evidence in view of the judge or jury unless there is a reasonable basis for its admission in evidence; when there is any substantial doubt about the admissibility of evidence, it should be tendered by an offer of proof and a ruling obtained

Excerpt from Commentary to ABA Standard

False Evidence or Known Perjury. It is axiomatic that a prosecutor, in common with all other advocates, is barred from introducing evidence that is known to be false. & Even if the false testimony is volunteered by the witness and takes the prosecutor by surprise, if the prosecutor knows it is false, it is the prosecutor s obligation to see that it is corrected. &

Presenting Inadmissible Evidence. The mere offer of known inadmissible evidence or asking a known improper question may be sufficient to communicate to the trier of fact the very material the rules of evidence are designed to keep from the fact finder. Moreover, the damage may only be emphasized by an objection to the evidence, so that the offer of inadmissible matter may leave opposing counsel with no effective remedy. & Many cases have held that such conduct is ground for declaring a mistrial or granting a new trial.

> A prosecutor should exercise great care in deciding what evidence to use. A strong case should not be jeopardized by introducing evidence that is essentially cumulative but that may bring about a reversal. It is obviously not easy to forgo using reliable and probative evidence when it is at hand, but the prosecutor must do so in many instances. &

Display and Tender of Tangible Evidence. & Tangible evidence requires special treatment because such evidence is immediately subject to scrutiny once it is brought into the courtroom. & The premature display of a tangible article in the courtroom may be unduly inflammatory even though it is later admitted. Hence, such an article should not be exposed to view until it is formally offered for admission in evidence. &

RPC 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not &

(b) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) Knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) In pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, or assert personal knowledge of facts in issue except when testifying as a witness; or

(f) In trial, state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused, but the lawyer may argue, on his or her analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

5.7 Examination of witnesses

(a) witness interrogation should be conducted fairly, objectively, and with due regard for the dignity and legitimate privacy of the witness, and without seeking to intimidate or humiliate the witness unnecessarily

(b) a prosecutor s belief that the witness is telling the truth does not preclude cross-examination, but may affect the method and scope of cross-examination; a prosecutor should not use the power of cross-examination to discredit or undermine a witness if the prosecutor knows the witness is testifying truthfully

(c) a prosecutor should not call a witness knowing the witness will claim a valid privilege not to testify for the purpose of impressing upon the jury the fact of the claim of privilege; in some instances doing so is unprofessional conduct

(d) unprofessional conduct to ask a question which implies the existence of a factual predicate for which a good faith belief is lacking

Excerpt from Commentary to ABA Standard

Character and Scope of Direct Examination and Cross-Examination. The ethic of our legal tradition has long recognized that there are limitations on the manner in which witnesses should be examined beyond those contained in rules of evidence. &Ultimately, a lawyer must always exercise discretion in determining the extent to which damage done to the reputation of a witness is justified by the contribution that a particular line of questioning may make to the truth-finding function of the trial.

Undermining a Truthful Witness. &Where the prosecutor knows that the testimony of the witness is accurate, paragraph (b) adopts the view that the power of cross-examination may not be invoked to destroy or undermine the truth. In this regard, it is believed that the duty of the prosecutor differs from that of the defense lawyer, who on occasion may be required to put the state to its proof.

Forcing a Claim of Privilege Before the Jury. &If the prosecutor is informed in advance that the witness will claim a privilege and wishes to contest the claim, the matter should be treated without the presence of the jury and a ruling obtained. &Since the prosecutor is precluded from calling a person who will claim a privilege, the defense counsel is under a correlative obligation not to argue any inference from the absence of the person as a witness. &

Unfounded Questions. It is an improper tactic for the prosecutor to attempt to communicate impressions by innuendo through questions that would be to the defendant s advantage to answer in the negative, for example, Have you ever been convicted of the crime of robbery? &or Did you tell Mr. X that &? when the questioner has no evidence to support the innuendo. &

Case Law Direct Examination Awards or Commendations Received by Witness

State v. Smith, 67 Wn.App. 838, 842-43, 841 P.2d 76 (Div. 1 1992) (erroneous admission of evidence of arresting officer's awards and commendations was not prejudicial)

Smith contends that evidence of commendations and awards is not probative of the officer's truthfulness, is particularly likely to taint the jury, and is improper as character evidence. The State argues that the questions were normal introductory foundation questions any expert would be asked regarding his qualifications and expertise in a given field. &

Evidence of a witness' credibility may be supported under ER 608(a), but only if the evidence refers to the witness' truthfulness or untruthfulness, and only after the witness' truthfulness has been attacked. Here, there was no testimony about what the awards or commendations were for. Thus, there was no basis on which one could consider a particular commendation and treat it as logically bearing on Grady's credibility as a witness. To the extent that Officer Grady's commendations and awards were meant to support his truthfulness, the evidence was not admissible under ER 608(a) because the State has not shown that the evidence was germane to Officer Grady's truthfulness, and the parties do not argue that Grady's reputation for truthfulness had been attacked. &

It is well established that the State may introduce a police officer's experience and training to reinforce the basis of his knowledge as a witness, or establish the reliability of his testimony concerning police procedure and criminal practices. Smith does not deny this. But here, the State's professed purpose in presenting the evidence of awards was to lay background in presenting expert witnesses under ER 702. Everything Grady testified to was supported by his training and experience, and needed no extra foundation from the awards and commendations. More importantly, Grady's function at trial was not as an expert expressing opinions on police procedure, but rather, as the primary witness testifying to the facts surrounding Smith's arrest and search. We find in these circumstances ER 702 offers no justification for evidence of Grady's awards and commendations.

(Footnotes omitted.)

Case Law Direct Examination Bolstering or Vouching For a Witness s Credibility

State v. Kron, 63 Wn.App. 688, 700, 821 P.2d 1248, *review denied*, 119 Wn.2d 1004 (Div. 2 1992) (prosecutor, during his direct examination of Les McVay, in attempting to show that McVay had not received leniency or any promises in return for his testimony, asked this question: "In fact, during [McVay's prior] sentencing hearing, the prosecutor, myself, asked that you be put to death; isn't that correct?"; Held: improper question was misconduct, but not sufficient to merit new trial).

State v. Alexander, 64 Wn.App. 147, 154, 822 P.2d 1250 (Div. 1 1992) (conviction reversed due to multiple errors)

> Next, Alexander assigns error to the prosecutor's questioning Bennett about whether M gave any indication that she was lying about the abuse. As in most sexual abuse cases, credibility was a crucial issue here because the testimony of M and Alexander directly conflicted. *See State v. Fitzgerald,* 39 Wn.App. 652, 657, 694 P.2d 1117 (1985). An expert may not offer an opinion on an ultimate issue of fact when it is based solely on the expert's perception of the witness' truthfulness. 39 Wn.App. at 657. That is precisely what Bennett did in this case. By stating that he believed M was not lying, Bennett effectively testified that Alexander was guilty as charged. An expert's opinion as to the defendant's guilt invades the jury's exclusive function to weigh the evidence and determine credibility. *Fitzgerald,* 39 Wn.App. at 657, 694 P.2d 1117; *State v. Carlin,* 40 Wn.App. 698, 701, 700 P.2d 323 (1985). Because the accumulation of this and other trial errors denied the defendant his right to a fair and impartial jury trial, *State v. Coe,* 101 Wn.2d 772, 789, 684 P.2d 668 (1984), we cannot conclude that the error was harmless beyond a reasonable doubt. &

State v. Bourgeois, 133 Wn.2d 389, 945 P.2d 1120 (1997) (error to admit witness s fear of defendant absent an attack on witness s credibility; Held: harmless)

> While we feel certain that the testimony of a witness regarding his or her fear or reluctance to testify might have a bearing on a juror s evaluation of that witness s credibility, such evidence might also have another effect. It could lead the jurors to conclude that the witness is fearful of the defendant. In that sense, the testimony would have to be viewed as substantive evidence of the defendant s guilt because evidence that a defendant threatened a witness is normally admissible to imply guilt. *State v. Kosanke,* 23 Wn.2d 211, 215, 160 P.2d 541 (1945). Here, however, no connection was established between Bourgeois and the reluctance of any witness to testify. Thus, is should not have been admitted for that purpose. The trial court apparently understood that and, consequently, instructed the jury that it could consider a witness s reluctance or fear only in evaluating his or her credibility.
>
> Bourgeois argues that the jury should not have been allowed to consider the testimony even for this limited purpose. That is so, he posits, because it had the additional effect of improperly bolstering the credibility of those witnesses.
>
> Insofar as the testimony of [witness X, Y, and Z], Bourgeois correctly observes that the State should not have been permitted to bolster their testimony by bringing out testimony that they were reluctant or fearful to testify. That is so because in the absence of an attack on credibility[,] no sustaining evidence is allowed. ...
>
> Here, there was no attack on the credibility of [witness X, Y, and Z], nor could the State reasonably anticipate that there would be when the prosecution asked these witnesses about their fear or reluctance to testify. Nor was their credibility an inevitable, central issue of this case.

(Citations omitted.)

Case Law Direct Examination Defendant s Demeanor on Arrest

State v. Perrett, 86 Wn.App. 312, 936 P.2d 426, *review denied,* 133 Wn.2d 1019 (Div. 2 1997) (2 assault with deadly weapon, Held: accumulation of non-reversible errors may deny a defendant a fair trial, conviction reversed)

> Perrett assigns error to the admission of his statement to Deputy Barrett that the last time the sheriffs took his guns, he didn t get them back. The State claimed the evidence was necessary to show Perrett s uncooperative attitude on arrest. The court admitted the statement, explaining that [d]emeanor is always, totality of the circumstances is very important in judging the question of demeanor.
>
> But Perrett s demeanor on arrest was not relevant to any element of the offense charged. The issues in the case were whether Perrett pointed the gun at Johnston, and if so, whether he was justified by the law of self-defense in doing so. Furthermore, the statement was unfairly prejudicial; it raised the inference that Perrett had committed a prior crime involving a gun, thereby making it more likely he had done so again. & We conclude the trial court abused its discretion in admitting Deputy Barrett s statement.

(Citations omitted.) (Footnote omitted.)

Case Law Direct Examination Defendant s Pre-Arrest Silence

State v. Easter, 130 Wn.2d 228, 243, 922 P.2d 1285 (1996) (vehicular assault case where officer testified that defendant did not answer and looked away during initial questioning, and officer testified that defendant was smart drunk meaning defendant s evasive behavior and silence when interrogated; Held: prejudicial error to comment on pre-arrest silence in case-in-chief, where defendant did not take the stand; reversed and remanded for new trial)

> The Fifth Amendment right to silence extends to situations prior to the arrest of the accused. An accused's right to remain silent and to decline to assist the State in the preparation of its criminal case may not be eroded by permitting the State in its case in chief to call to the attention of the trier of fact the accused's pre-arrest silence to imply guilt.
>
> Nothing in our conclusion, however, prevents the State from introducing pre-arrest evidence of a non-testimonial nature about the accused, such as physical evidence, demeanor, conduct, or the like. Our opinion does not address the right of the State under state and federal due process principles to impeach the accused's testimony where the accused testifies and puts his or her credibility before the trier of fact.

United States v. Oplinger, 150 F.3d 1061, 1066-67 (9th Cir. 1998) (Bank fraud case. Defendant remained silent in response to accusations by his supervisor. Prosecutor commented on this silence during closing argument. Held: conviction affirmed).

> Although the Supreme Court has held that the government may comment of a defendant s pre-arrest silence for impeachment purposes, *see Jenkins v. Anderson,* 447 U.S. 231, 239, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980), it has yet to rule on the constitutionality of the use of pre-arrest, pre-*Miranda* silence as substantive evidence of guilt. Despite the reservation of this issue in *Jenkins*, however, we are not completely without guidance from the Court. Justice Stevens wrote that he would have rejected the defendant s Fifth Amendment claim simply because the privilege against compulsory self-incrimination is irrelevant to a citizen s decision to remain silent when he is under no official compulsion to speak. *See Jenkins,* 447 U.S. at 241 (Stevens, J., concurring)....
>
> In so holding, we respectfully disagree with the First, Seventh, and Tenth Circuits, which have all held that pre-arrest silence comes within the proscription against commenting on a defendant s privilege against self-incrimination laid down in *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

(Citations omitted.)

State v. Keene, 86 Wn.App. 589, 938 P.2d 839 (Div. 2 1997) (detective s testimony and prosecutor s argument to jury about defendant s failure to contact detective constituted impermissible comments on defendant s right to silence in violation of Fifth Amendment; Held: conviction reversed and remanded for new trial).

Case Law Direct Examination Defendant s Post-Arrest Silence

State v. Davis, 38 Wn.App. 600, 686 P.2d 1143 (Div. 1 1984) (use of a defendant's postarrest silence, regardless of whether such silence follows *Miranda* warnings, is fundamentally unfair and violates the due process clause of the Const. art. 1, § 3).

State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996)

> At trial, the right against self-incrimination prohibits the State from forcing the defendant to testify. *State v. Foster,* 91 Wn.2d 466, 473, 589 P.2d 789 (1979); *Miranda* [*v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)], 384 U.S. at 461, 86 S.Ct. at 1620-21. Moreover, the State may not elicit comments from witnesses or make closing arguments relating to a defendant's silence to infer guilt from such silence. As the United States Supreme Court said in *Miranda*, "[t]he prosecution may not... use at trial the fact [the defendant] stood mute or claimed his privilege in the face of accusation." *Miranda,* 384 U.S. at 468 n. 37, 86 S.Ct. at 1624 n. 37. The purpose of this rule is plain. An accused's Fifth Amendment right to silence can be circumvented by the State "just as effectively by questioning the arresting officer or commenting in closing argument as by questioning defendant himself." *State v. Fricks,* 91 Wn.2d 391, 396, 588 P.2d 1328 (1979).
>
> Courts have generally treated comments on post-arrest silence as a violation of a defendant's right to due process because the warnings under *Miranda* constitute an "implicit assurance" to the defendant that silence in the face of the State's accusations carries no penalty. The use of silence at the time of arrest and after the *Miranda* warnings is fundamentally unfair and violates due process. *Brecht v. Abrahamson,* 507 U.S. 619, 628, 113 S.Ct. 1710, 1716-17, 123 L.Ed.2d 353 (1993); Doyle v. Ohio, 426 U.S. 610, 617, 96 S.Ct. 2240, 2244-45, 49 L.Ed.2d 91 (1976).

State v. Perrett, 86 Wn.App. 312, 936 P.2d 426, *review denied,* 133 Wn.2d 1019 (Div. 2 1997) (2 assault with deadly weapon, Held: accumulation of non-reversible errors may deny a defendant a fair trial, conviction reversed)

> Perrett claims the court erroneously denied his motion for mistrial after Deputy Potts testified that Perrett invoked his right to remain silent. &

A. After Deputy Barrett read him his rights and he said he had nothing to say, he did ask that we &

The comment on Perrett s exercise of his Fifth Amendment right was improper. The trial judge sustained the objection, but refused to grant a mistrial. The court said he would strike the comment if Perrett desired. The court warned, however, that to strike is to simply raise the issue to the mind of the jury. Perrett opted not to strike the comment.

(Citations omitted.)

State v. Keene, 86 Wn.App. 589, 938 P.2d 839 (Div. 2 1997) (detective s testimony and prosecutor s argument to jury about defendant s failure to contact detective constituted impermissible comments on defendant s right to silence in violation of Fifth Amendment; Held: conviction reversed and remanded for new trial).

Case Law Direct Examination Fact of the Complaint Hearsay Exception

State v. Alexander, 64 Wn.App. 147, 151-52, 822 P.2d 1250 (Div. 1 1992) (conviction reversed due to multiple errors)

In criminal trials involving sex offenses, the prosecution may present evidence that the victim complained to someone after the assault. *State v. Ferguson,* 100 Wn.2d 131, 135, 667 P.2d 68 (1983); *State v. Murley,* 35 Wn.2d 233, 237, 212 P.2d 801 (1949). However, this narrow exception allows only evidence establishing that a complaint was timely made. Evidence of the details of the complaint, including the identity of the offender and the specifics of the act, is not admissible. Ferguson, 100 Wn.2d at 135-36.

In *Murley*, the court held that "the credibility of the complaining witness, irrespective of whether it is assailed or unassailed, may be supported by evidence of her timely prior out-of-court complaint." 35 Wn.2d at 236-37. The court explained the history behind the "hue and cry" doctrine, as it was formerly known. When the State made no showing as to when the victim first complained, the omission raised the inference that she did not complain at all and that she therefore fabricated her allegations. The existence of this inference required the State to prove affirmatively in its case in chief that the victim timely complained. While the State no longer bears such a burden, the Murley court acknowledged that, if the State were to remain silent as to when the victim complained, the inference of fabrication could still exist. Thus, the court ruled that, because the inference "affects [her] credibility generally," evidence of when the victim first complained is admissible. 35 Wn. 2d at 237; *see also State v. Fleming,* 27 Wn.App. 952, 957, 621 P.2d 779 (1980), *review denied*, 95 Wn.2d 1013 (1981). Applying that rule to this case, the fact of M's prior disclosure was admissible even though the defendant did not expressly raise as an issue the timeliness of her complaint.

Case Law Direct Examination Fear of Defendant

State v. Bourgeois, 133 Wn.2d 389, 945 P.2d 1120 (1997) (error to admit witness s fear of defendant absent an attack on witness s credibility; Held: harmless)

While we feel certain that the testimony of a witness regarding his or her fear or reluctance to testify might have a bearing on a juror s evaluation of that witness s credibility, such evidence might also have another effect. It could lead the jurors to conclude that the witness is fearful of the defendant. In that sense, the testimony would have to be viewed as substantive evidence of the defendant s guilt because evidence that a defendant threatened a witness is normally admissible to imply guilt. *State v. Kosanke,* 23 Wn.2d 211, 215, 160 P.2d 541 (1945). Here, however, no connection was established between Bourgeois and the reluctance of any witness to testify. Thus, is should not have been admitted for that purpose. The trial court apparently understood that and, consequently, instructed the jury that it could consider a witness s reluctance or fear only in evaluating his or her credibility.

Bourgeois argues that the jury should not have been allowed to consider the testimony even for this limited purpose. That is so, he posits, because it had the additional effect of improperly bolstering the credibility of those witnesses.

Insofar as the testimony of [witness X, Y, and Z], Bourgeois correctly observes that the State should not have been permitted to bolster their testimony by bringing out testimony that they were reluctant or fearful to testify. That is so because in the absence of an attack on credibility[,] no sustaining evidence is allowed. ...

Here, there was no attack on the credibility of [witness X, Y, and Z], nor could the State reasonably anticipate that there would be when the prosecution asked these witnesses about their fear or reluctance to testify. Nor was their credibility an inevitable, central issue of this case.

(Citations omitted.)

Case Law Direct Examination Leading Questions

State v. Torres, 16 Wn.App. 254, 258-59, 554 P.2d 1069 (Div. 1 1976) (cumulative effect of misconduct mandated reversal)

During the presentation of evidence, the prosecutor persisted despite warnings in asking leading questions during the examination of the victim. As stated in *Locken v. United States,* 383 F.2d 340 (9th Cir. 1967):

The prosecution undertook to prove the contrary, principally by oral declarations which government witnesses testified that the appellant and Kidd had made. As these witnesses were examined, the prosecuting attorney repeatedly suggested his desired answers. Time after time, objections to the leading questions were sustained, yet the prosecutor persevered. Ultimately, the court was required to find him contemptuous, stating 'you have constantly and continuously engaged in this leading question business after I have repeatedly warned you and warned you and warned you. You leave me no alternative.

While the asking of leading questions is not prejudicial error in most instances, the persistent pursuit of such a course of action is a factor to be added in the balance. State v. Swanson, 73 Wn.2d 698, 440 P.2d 492 (1968); 5 R. Meisenholder, Wash. Prac. § 261, at 225 (1965).

Case Law Direct Examination Opinion on Defendant s Guilt

State v. Thompson, 90 Wn.App. 41, 950 P.2d 977, *review denied,* 136 Wn.2d 1002 (Div. 3 1998) (police officer permitted to testify that defendant drove in a reckless manner in vehicular assault case; Held: harmless error)

It is well settled that a witness, whether lay or expert, may not give an opinion as to the defendant s guilt, whether by direct statement or inferences. Such testimony is inherently prejudicial because it invades the jury s role to make an independent evaluation of the facts. Further, an opinion as to the defendant s guilt is particularly prejudicial when it is expressed by a government official, such as a police officer.

State v. Farr-Lenzini, No. 21969-7-II, ___ Wn.App. ___, 970 P.2d 313 (Div. 2 Jan. 8, 1999) (trooper testified in elude case that defendant s driving pattern exhibited an attempt to get away, knowing the trooper was pursuing; Held: conviction reversed since trooper gave opinion on ultimate issue of fact and was not qualified as expert witness under ER 702).

Case Law Direct Examination Privilege Calling Witness Knowing Privilege Will Be Invoked in Jury s Presence

State v. Smith, 74 Wn.2d 744, 758, 446 P.2d 571 (1968) (defendant not permitted to call co-defendant in joint trial for purpose of having co-defendant assert right against self-incrimination in front of jury), *judgment vacated in part sub nom. Smith v. Washington,* 408 U.S. 934, 92 S.Ct. 2852, 33 L.Ed.2d 747 (1972), *overruled on other grounds by State v. Gosby,* 85 Wn.2d 758, 539 P.2d 680 (1975)

It is forbidden for a prosecutor to call a witness, knowing that the witness will invoke the privilege, for the purpose of having the jury see the witness exercise his constitutional right. It is also error for the prosecutor to call a codefendant, knowing that he will invoke the privilege. *See State v. Tanner,* 54 Wn.2d 535, 341 P.2d 869 (1959). There is no reason for distinguishing these cases on the basis that the party calling the witness was the government. The fundamental point is that the exercise of the privilege is not evidence to be used in the case by any party. As the court said &

(A)n interrogating official himself gravely abuses the privilege against self incrimination when, believing a truthful answer will incriminate a witness, he nevertheless insists on asking the incriminating question with a view to eliciting a claim of privilege and thereby creating prejudice against the witness or some other party concerned.

(Citations omitted.)

State v. Charlton, 90 Wn.2d 657, 661-62, 585 P.2d 142 (1978) (improper prosecutorial comment concerning defendant's exercise of statutory marital privilege was mindful, flagrant, and ill-intentioned conduct, and thus defendant did not waive his right to object to such conduct on appeal by failing to request curative instruction following the comment; Held: prejudice shown, conviction reversed and remanded for new trial)

The prosecutor was unquestionably aware of this statutory privilege since it is an elementary rule of evidence. Presumably, he, like most prosecutors, was acquainted with existing and long-standing case law in which we have criticized various practices by which the jury's attention is focused upon the fact that the defendant is exercising the marital privilege. *State v. McGinty,* 14 Wn.2d 71, 126 P.2d 1086 (1942); *State v. Tanner,* 54 Wn.2d 535, 341 P.2d 869 (1959). Over 30 years ago, in McGinty, we condemned the prosecutor's practice of calling a defendant's spouse to the witness stand in order to force the defendant to assert the marital privilege in the jury's presence.

There is little, if any, practical difference between the conduct condemned in McGinty and the prosecutor's comment in the instant case. Both the conduct and the comment make members of the jury critically aware that the defendant has exercised the marital privilege. Previous cases have made it clear, however, that the state is prohibited from taking actions which increase jurors' awareness of the defendant's assertion of the marital privilege. *State v. McGinty, supra; State v. Tanner, supra; State v. Swan,* 25 Wn.2d 319, 171 P.2d 222 (1946); *State v. Gant,* 6 Wn.App. 263, 492 P.2d 571 (1971); State v. Torres, 16 Wn.App. 254, 554 P.2d 1069 (1976).

In likening the statutory marital privilege to the constitutional privilege against self-incrimination, we have explained the reasoning behind this prohibition. The reasoning which sustains both the prohibition against comment upon the constitutional privilege, as well as this statutory privilege, is that the state cannot and will not be permitted to put forward an inference of guilt, which necessarily flows from an imputation that the accused has suppressed or is withholding evidence, when by statute or constitution he simply is not compelled to produce the evidence. *State v. Tanner, supra,* 54 Wn.2d at 538.

(Footnote omitted.)

Case Law Direct Examination Repeated Improper Questioning

State v. Alexander, 64 Wn.App. 147, 154-55, 822 P.2d 1250 (Div. 1 1992) (conviction reversed due to multiple errors, including prosecutor s repeated improper questioning after defense objections sustained)

&Alexander maintains this was misconduct despite the fact that the trial court sustained his objections to the improper questions. As we concluded above, the prosecutor s questions in this regard were improper. They left the jury with the impression that [victim s counselor] had a great deal of knowledge favorable to the State which, but for the court s rulings, would have been revealed. The pattern of repeatedly asking the same question has the effect of telling the jury the answer to it even when all the defense counsel s objections are sustained.

Case Law Direct Examination Statistics

State v. Copeland, 130 Wn.2d 244, 286-87, 922 P.2d 1304 (1996)

"[T]here is no prohibition against using well-founded statistics to establish some fact that will be useful to the trier of fact." The product rule is used to calculate the joint probability of a series of independent events as the product of the probabilities of each event, but it may not be used where there is no showing of the independence of the individual events. However, there is a difference between calculating probabilities of events, which concern the likelihood of the result, and statistics which speak in terms of certitude, not likelihood. David McCord, A Primer for the Nonmathematically Inclined on Mathematical Evidence in Criminal Cases: People v. Collins and Beyond, 47 Wash. & Lee L.Rev. 741, 742 (1990).

When estimates of statistical probabilities lack foundation and involve the identification of a defendant as the offender, convictions have been reversed in some cases. However, we conclude that error in this case, if any, was harmless. The composite did look like Copeland, and the jury could easily see that. Further, Taff identified Copeland in trial as the man she had seen to a "99 percent certainty." Within reasonable probabilities, the outcome of the trial was not affected by the alleged error.

(Citations omitted.)

Case Law Direct Examination Subterfuge to Elicit Inadmissible Testimony

ER 607 provides that [t]he credibility of a witness may be attacked by any party, including the party calling the witness. However, in the context of criminal cases, a prosecutor may not impeach its own witness for the primary purpose of eliciting inculpatory evidence against the defendant under the guise of impeachment.

State v. Lavaris, 106 Wn.2d 340, 344-45, 721 P.2d 515 (1986) (no error in admission of out-of-court statements since testimony on direct provided important circumstantial evidence of the events leading up to the crime).

State v. Hancock, 109 Wn.2d 760, 748 P.2d 611 (1988) (no error since defendant s wife was logical witness for either prosecution or defense in trial concerning improper physical contact crimes with nephew);

United States v. Gomez-Gallardo, 915 F.2d 553 (9th Cir. 1990) (reversible error even without defense objection when Government knew in advance that the witness would testify falsely and used its ability to question him about unrelated crimes to show that his defense of the defendant was false; no defense case put forward, yet Government created a defense theory and alibi for defendant in order to prove his guilt by refuting it);

United States v. Gilbert, 57 F.3d 709 (9th Cir. 1995) (conviction affirmed where two eyewitnesses called by Government; impeachment proper concerning defendant s use of gun since primary purpose in calling witnesses was not to impeach).

Case Law Cross Examination Alcohol or Drug Usage

State v. Tigano, 63 Wn.App. 336, 344-45, 818 P.2d 1369 (Div. 2 1991), *review denied*, 118 Wn.2d 1021 (1992) (defendant sought to admit evidence of drug addition and usage to impeach witness; Held: such evidence generally inadmissible)

For evidence of drug use to be admissible to impeach, there must be a reasonable inference that the witness was under the influence of drugs either at the time of the events in question, or at the time of testifying at trial. *State v. Brown,* 48 Wn.App. 654, 658, 739 P.2d 1199 (1987), citing 2 C. Torcia, Wharton on Criminal Evidence § 459, at 398 (13th ed. 1972); *State v. Hall,* 46 Wn.App. 689, 692, 732 P.2d 524, *review denied*, 108 Wn.2d 1004 (1987), see also, E. Cleary, McCormick

on Evidence, § 45, (3rd ed. 1984); 5A K. Tegland, Wash.Prac., Evidence Law and Practice, § 226(4) (3d ed. 1989). Evidence of drug use on other occasions, or of drug addiction, is generally inadmissible on the ground that it is impermissibly prejudicial. *State v. Renneberg,* 83 Wn.2d 735, 737, 522 P.2d 835 (1974). &

Tigano further contends that he should have been allowed to present expert testimony that Poli's general pattern of drug use could have affected his perception of the events about which he testified. Whether or not such testimony might have been permissible if there had been evidence of drug use by Poli at the time of the events or the time of trial, *State v. Brown, supra,* it was impermissibly prejudicial absent such evidence, *see State v. Renneberg,* 83 Wn.2d at 737, 522 P.2d 835, and the trial judge did not err by excluding it.

(Footnotes omitted.)

State v. Russell, 125 Wn.2d 24, 83, 882 P.2d 747 (1994), *cert. denied,* 514 U.S. 1129, 131 L.Ed.2d 1005, 115 S.Ct. 2004 (1995). (It is well settled in Washington that evidence of drug use is admissible to impeach the credibility of a witness if there is a showing that the witness was using or was influenced by the drugs at the time of the occurrence which is the subject of the testimony.).

State v. Stockton, 91 Wn.App. 35, 42, 955 P.2d 805 (Div. 1 1998) (Possession of firearm conviction reversed, error not harmless).

The State also contends that neither ER 608 nor ER 609 prohibit the testimony because the prosecutor s question did not impeach Stockton and did not elicit evidence of prior misconduct. Although the prosecutor did not refer directly to Stockton s prior conviction or drug use, her question was clearly intended to elicit an admission that he was a drug user. It was directed at prior misconduct and is therefore impeachment governed by ER 608.

Under ER 608, evidence of prior misconduct is admissible only if probative of a witness s character for truthfulness. Drug possession and use are not probative of truthfulness because they have little to do with a witness s credibility. This is particularly true if the jury has heard evidence about other convictions which are per se probative of truthfulness. Stockton admitted to prior convictions [taking a motor vehicle, burglary, possession of stolen property], and the additional evidence about his prior drug use was unduly prejudicial and cumulative.

Case Law Cross Examination Defendant Remarks by Defense Counsel

State v. Williams, 79 Wn.App. 21, 28-31, 902 P.2d 1258 (Div. 2 1995) (Omnibus Stipulation; prosecutor cross-examined defendant about omnibus stipulation asserting general denial/entrapment defense after defendant testified that someone else committed crime; defense counsel objected, claiming defendant did not see omnibus stipulation and indicating it was counsel s error in writing entrapment ; Held: inconsistent statement by counsel was inadmissible hearsay, and necessitated new trial when used as the truth of the matter asserted to impeach defendant)

Generally, an attorney representing a client in litigation is authorized to speak for the client concerning that litigation. Thus, an attorney's statement concerning the litigation sometimes qualifies, when offered against the client, as the admission of a party opponent. *Acosta,* 34 Wn.App. at 392, 661 P.2d 602; *State v. Dault,* 19 Wn.App. 709, 715-18, 578 P.2d 43 (1978); *Seattle v. Richard Bockman Land Corp.,* 8 Wn.App. 214, 216, 505 P.2d 168 (quoting *Brown v. Hebb, 167* Md. 535, 175 A. 602 (1934)), *review denied*, 82 Wn.2d 1003 (1973). In criminal cases, however, this rule should be applied with caution, in part due to the danger of impairing the right to counsel. *United States v. Harris,* 914 F.2d 927, 931 (7th Cir. 1990); *United States v. Valencia,* 826 F.2d 169, 172 (2d Cir. 1987).

Although an attorney's statement may sometimes qualify as an admission of the client when offered against the client, it does not qualify when the attorney is pleading alternatively or inconsistently on the client's behalf. Thus, a leading commentator states:

It can readily be appreciated that pleadings of this nature are directed primarily to giving notice and lack the essential character of an admission. To allow them to operate as admissions would frustrate their underlying purpose. Hence the decisions with seeming unanimity deny them status as judicial admissions, and generally disallow them as evidentiary admissions.

McCormick on Evidence § 257, at 150-51 (4th ed. 1992) &

In this case, defense counsel was asserting alternative and inconsistent defenses when he said in the omnibus stipulation, "General denial, entrapment". By saying "general denial", he was saying that Williams had not committed the act charged. By saying "entrapment", he was saying that Williams had committed the act charged, but only because he had been lured or induced into doing so. See RCW 9A.16.070(1). In Washington, the inconsistency of these statements has been recognized in a number of cases holding that evidence is insufficient to support an entrapment instruction if the defendant denies committing the crime. We conclude that the statement in issue did not qualify as the admission of a party opponent, it was not exempted from the basic hearsay definition in ER 801(c), and it was erroneously admitted.

Nothing said herein means that the statement of a defense attorney can or cannot be used against his or her client under circumstances in which the attorney has not asserted alternative and inconsistent defenses. Accordingly, we have no quarrel with *Dault,* 19 Wn.App. at 715-18, or *Acosta,* 34 Wn.App. at 391-92. In those cases, each attorney simply asserted one fact or defense--that his client had not been present at the time of the crime. No attorney asserted inconsistent or alternative defenses, which is the crux of the problem here.

Nor does anything said herein grant a criminal defendant the right to plead alternatively or inconsistently at an omnibus hearing. That question is not before us, because the adequacy of Williams' omnibus answer was never contested. We hold only that when an attorney is permitted to state alternative or inconsistent defenses on behalf of his or her client, the statement does not qualify as the admission of a party opponent. &

[The State argues that admission of the omnibus stipulation "is at worst harmless error." The error here was evidential, and evidential error is not harmless if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.

The real issue at trial was whether Castro had purchased drugs from Williams or someone else. When Castro bought drugs on November 19, several other people were in the house. The record does not show who was present on November 26. The police could not see Castro while he was inside the house. As a result, the only evidence that Castro purchased from Williams, as opposed to someone else, was Castro's own testimony.

Williams testified that Ray Curry sold to Castro. Castro, according to his own testimony, initially told Officer Steele that he had purchased from a person named Ray. Castro was a paid informant, and the jury deadlocked on the December 3 transaction, even though Castro said he had purchased from Williams on that occasion. The case was a contest between Williams' and Castro's credibility, and we cannot say that using the omnibus stipulation to impeach Williams was an error without effect.

(Citations omitted.) (Footnotes omitted.)

State v. Rivers, 129 Wn.2d 697, 708-9, 921 P.2d 495 (1996) (Opening Statement; during opening statement, defense counsel told jury that the defendant did not rob anyone, asserting a mistaken identification defense; on cross examination, prosecutor allowed to ask defendant whether he heard counsel's opening statement and whether he made a statement in the investigation admitting to taking the money; Held: proper cross examination)

Defendant Rivers argues that this cross examination was improper because statements made by counsel are not evidence and that a defendant's interpretation of those arguments is irrelevant and inadmissible.

The State counters that where contradictory or inconsistent statements are made by a defendant (through counsel) in opening argument and in a defendant's testimony, the statements are admissible for impeachment or to discredit the defendant's case. *See State v. Dault,* 19 Wn.App. 709, 718-19, 578 P.2d 43 (1978) (attorney's statement at an omnibus hearing regarding the general nature of the defense to the crime charged was admissible on cross examination of defendant to discredit and impeach defendant's testimony).

Case Law Cross Examination Impeachment by Contradiction

A situation may arise where a witness previously made a statement against the defendant but then testifies (usually for the defense) to the contrary at trial. Great care should be used in impeaching this witness with his or her prior out-of-court statement (proof of statement by another witness, usually a police officer) that is in essence being offered as the truth (substantive evidence) against the defendant. In actuality, what's being offered is substantive rebuttal evidence, and must be admissible as such. Accordingly, the usual test is to ask Could the contradicting fact be offered as evidence for any purpose other than mere contradiction of the witness? If yes, admissible.

The Washington courts follow the usual rule that a witness may be impeached by introducing evidence to contradict the witness on a material fact, but that the witness cannot be contradicted on a collateral matter.

The rule is often confusing to new lawyers, but most of the confusion is the result of the mistaken assumption that the contradictory evidence is being offered to impeach the witness. It is true that the term impeachment is often used to describe the result of contradicting a witness, but in this context, the term is a misnomer. &

Most of the mysteries surrounding impeachment by contradiction disappear when the evidence is viewed as simply substantive, rebuttal evidence, rather than as evidence offered for the purpose of attacking the credibility of the witness. &

As mentioned at the beginning of this section, the process loosely referred to as impeachment by contradiction is actually the process of offering relevant, substantive evidence to rebut the opponent's evidence. Consequently, the contradictory evidence must be admissible under the usual rules of evidence. If the contradictory evidence is hearsay, or if

it is objectionable under some other rule, it may be excluded.

5A K. Tegland, Washington Practice, Evidence § 227-229 (3d ed. 1989).

Example. Witness tells officer that DUI defendant is alcoholic, but does not believe defendant is intoxicated. Witness called by defense, and denies defendant has alcohol problem in response to prosecutor questioning. Prosecutor thereafter seeks to call officer to contradict witness's testimony about defendant's alcoholism. Evidence collateral as impeachment, but significant to defendant. Since evidence of defendant's alcoholism is not admissible [see Case Law Cross Examination Alcohol or Drug Usage, *supra*], improper to seek this testimony in rebuttal.

Case Law Cross Examination Impeachment Failure to Present Impeachment Evidence

State v. Grover, 55 Wn.App. 923, 936, 780 P.2d 901 (Div. 1 1989), *review denied*, 114 Wn.2d 1008 (1990) (prosecutor asked witness if she had been threatened by defendant prior to testifying, and witness denied; Held: improper for prosecutor to fail to call impeachment witness and submit evidence probative of alleged threats, but error held harmless)

> A prosecutor has a duty to refrain from using statements which are not supported by the evidence and which tend to prejudice the defendant. *State v. Hamilton,* 47 Wn.App. 15, 18, 733 P.2d 580 (1987).

State v. Avendano-Lopez, 79 Wn.App. 706, 713, 904 P.2d 324 (Div. 2 1995), *review denied*, 129 Wn.2d 1007 (1996) (misconduct, but harmless)

> It is axiomatic that counsel cannot ask questions of a witness that have no basis in fact and are merely intended to insinuate the existence of facts to a jury.

(Footnote omitted.)

Case Law Cross Examination Liar Questions Asking a Witness to Comment on Veracity of Another

State v. Green, 71 Wn.2d 372, 381, 428 P.2d 540 (1967) (misconduct for prosecutor to ask witness if police are mistaken or lying; Held: error not require new trial).

State v. Casteneda-Perez, 61 Wn.App. 354, 360, 810 P.2d 74, *review denied*, 118 Wn.2d 1007 (Div. 1 1991) (repeated attempts to have defendant and co-defendant call State's police witnesses liars constituted prosecutorial misconduct; Held: harmless error)

> Lying is stating something to be true when the speaker knows it is false. As the word "lie" was used by the prosecutor, it meant giving testimony which the officer witness knew to be false for the purpose of deceiving the jury. The tactic of the prosecutor was apparently to place the issue before the jury in a posture where, in order to acquit the defendant, the jury would have to find the officer witnesses were deliberately giving false testimony. Since jurors would be reluctant to make such a harsh evaluation of police testimony, they would be inclined to find the defendant guilty. While such a prosecutorial tactic would be totally unavailing in a bench trial, we cannot be confident it would not be effective with some jurors. With the prosecutor persistently seeking to get the witnesses to say that the officer witnesses were lying, and doing so with the trial court's apparent approval, it is readily conceivable that a juror could conclude that an acquittal would reflect adversely upon the honesty and good faith of the police witnesses.

State v. Padilla, 69 Wn.App. 295, 302, fn. 1, 846 P.2d 564 (Div. 1 1993) (repeated prosecution attempts to have defendant call State's police witness a liar constituted prosecutorial misconduct; Held: reversed and remanded for new trial).

> We note that the prosecuting attorney at trial does not represent the State in this appeal and, indeed, is not a regular member of the prosecutor's office, having received a special appointment as part of a program that gives young attorneys in private firms the opportunity to prosecute routine drug cases. We also note that the error here may underscore a need for some training prior to assigning cases to unexperienced attorneys.

State v. Suarez-Bravo, 72 Wn.App. 359, 368, 864 P.2d 426 (Div. 3 1994) (repeated attempts to have defendant call the State's police witnesses liars constituted prosecutorial misconduct; Held: reversed and remanded for new trial despite defendant's failure to object)

> The police work here was competent and professional. The evidence gathered may well have been sufficient to convict Suarez-Bravo, but there exists a substantial likelihood that the jury's verdict was affected by the State's examination regarding Suarez-Bravo's residence, job and ethnic heritage.

State v. Neidigh, 78 Wn.App. 71, 76-77, 79-80, 895 P.2d 423 (Div. 1 1995) (Held: harmless error since no objection)

> It was misconduct for the prosecutor to ask Neidigh whether the informant was "absolutely lying", whether testimony was "invented", and whether witnesses were "conspiring to get old Mr. Neidigh." This type of question "places irrelevant information before the jury and potentially prejudices the defendant."

The court at oral argument asked why prosecutors continue to pose "liar" questions notwithstanding the cases cited above. Mr. Chambers, on behalf of the State, responded, "it's always been found to be harmless error" when no objection is raised and that this kind of cross examination is "never really very important to the case."

The practice of asking one witness whether another is lying "is contrary to the duty of prosecutors, which is to seek convictions based only on probative evidence and sound reason." &

But the State is incorrect in its view that improper cross examination of this type is "never really very important to the case." As a practical matter, if that were so, prosecutors would not waste their time planning such questions. As a legal matter, as shown by the result in *Padilla* and *Suarez-Bravo,* courts recognize that forcing the defendant into the role of accuser has the potential for turning a close case against the defendant.

And so we reject the suggestion, implicit in the State's argument, that courts must and do wink at intentional and repeated unfair questioning by prosecutors under the rubric of harmless error. The tactics at issue are creating problems on appeal in far too many cases. Questions designed to force witnesses to accuse each other are out of bounds as are inflammatory remarks, incitements to vengeance, exhortations to join the war against crime or drugs, comparisons to notorious criminals, name-calling, appeals to prejudice, patriotism, wealth, or class bias, comments on the defendant's failure to testify or exercise another constitutional right, improper remarks about defense counsel, and hints of violence, crimes, or important inculpating information that has been kept out of evidence.

The most obvious responsibility for putting a stop to such conduct lies with the State, in its obligation to demand careful and dignified conduct from its representatives in court. Equally important, defense counsel should be aware of the law and make timely objection when the prosecutor crosses the line.

When the prosecutor fails to exercise restraint, and the defense lawyer fails to object, should the trial court intervene? The answer necessarily depends on the circumstances. Our comments on this subject should serve as a reminder of the responses available to trial judges within the present framework. They are not to be taken as a holding nor as an indication of movement toward a different rule of law. It would be unwise to require a trial court to intervene without an invitation by defense counsel, since the absence of a defense objection may be the result of a deliberate defense strategy to let the State embarrass itself. Sometimes, however, the absence of a defense objection may be the result of incompetence, or may stem "from the attorney's fear that an objection would only focus attention on an aspect of the case unfairly prejudicial to his client." *United States v. Sawyer,* 347 F.2d 372, 374 (4th Cir. 1965). Where this is manifestly the case a judge may choose "to interrupt, admonish the offender and instruct the jury to disregard the improper argument." *Sawyer,* at 374. A different approach is "to call the prosecutor to the bench, admonish him, and ask defense counsel if he wishes an instruction." A third approach is an order in limine against specific misconduct that the trial court may be able to anticipate based on its own experience or the tendencies of the case.

Misconduct that occurs in the face of a warning is a violation that the trial court may address with contempt sanctions. See RCW 7.21.050. The virtue of contempt as a sanction is that it "can be easily administered, interferes only marginally with the criminal proceeding, punishes the prosecutor rather than society, and can be adjusted according to the severity of the misconduct." A further virtue is that the appellate court then has the opportunity to affirm the application of an effective remedy without circumventing or altering the harmless error inquiry.

(Citations omitted.) (Bold emphasis added.)

State v. Wright, 76 Wn.App. 811, 821-23, 888 P.2d 1214, *review denied*, 127 Wn.2d 1010 (Div. 1 1995) (mistaken questions may be permissible in limited situations)

With this in mind, we first address Wright's argument that the prosecutor committed misconduct by eliciting testimony from him that the officers' versions of events conflict with his because they had "got it wrong". As we noted above, the *Casteneda-Perez* court held it was misconduct for a prosecutor to ask a witness to express an opinion as to whether another witness is lying because it invades the province of the jury and is misleading and unfair. In State v. Walden, 69 Wn.App. 183, 847 P.2d 956 (1993), we held that it was misconduct for a prosecutor to ask a witness to express an opinion as to whether or not another witness is lying or mistaken. We reasoned that this was misconduct because it is improper to invite a witness to comment on another witness' accuracy or credibility.

While we agree with *Casteneda-Perez* that it is misconduct to ask one witness whether another is lying, we disagree that a primary reason for prohibiting these types of questions is that they invade the province of the jury. In our view, the primary and more fundamental rationale for disallowing this type of cross examination is because it places irrelevant information before the jury and potentially prejudices the defendant. To the extent they do in fact prejudice the defendant, we agree that such questions are misleading and unfair. What one witness thinks of the credibility of another witness'

testimony is simply irrelevant. In addition, requiring a defendant to say that other witnesses are lying is prejudicial because it puts the defendant in a bad light before the jury. We further disagree with the conclusion in *Walden* that cross examination about whether another witness was mistaken or "got it wrong" constitutes misconduct. Rather, such questions are merely objectionable to the extent that they are irrelevant and not helpful to the jury. Therefore, a trial court should sustain an objection to this type of cross examination on that ground. Unlike questions about whether someone is lying which are unfair to the witness because there may be other explanations for discrepancies in testimony, *Casteneda-Perez,* 61 Wn.App. at 362-63, questions about whether another witness was mistaken do not have the same potential to prejudice the defendant or show him or her in a bad light. In addition, questions about whether another witness was mistaken may, under certain circumstances, be relevant and probative. Where, for example, there are conflicts between part but not all of various witnesses' versions of the events, such cross examination may be relevant and helpful to the jury in its efforts to sort through conflicting testimony. So long as they are relevant, questions about whether another witness was mistaken or had "got it wrong" are not objectionable or improper.

In this case, the cross examination was not misconduct because the prosecutor did not ask Wright if the officers were lying. It was, however, objectionable because there was nothing in the officers' or Wright's testimony which required clarification. Both versions of the events were completely at odds and either the police or Wright was correct about what had transpired that night. Because there was nothing to clarify, the questions were irrelevant. Although we conclude that the questions were objectionable because they elicited irrelevant evidence, Wright cannot challenge his conviction on this basis because his attorney failed to object to the questions.

State v. Jerrels, 83 Wn.App. 503, 507-8, 925 P.2d 209 (Div. 2 1996) (cross-examination that sought to compel a witness to say whether another witness was lying or telling truth deprived defendant of fair trial; Held: reversed and remanded for new trial)

A prosecutor commits misconduct when his or her cross examination seeks to compel a witness' opinion as to whether another witness is telling the truth. *State v. Suarez-Bravo,* 72 Wn. App. 359, 366, 864 P.2d 426 (1994); *State v. Padilla,* 69 Wn.App. 295, 299, 846 P.2d 564 (1993). Such questioning invades the jury's province and is unfair and misleading. *State v. Casteneda-Perez,* 61 Wn.App. 354, 362, 810 P.2d 74, *review denied*, 118 Wn.2d 1007. The questions asked of Mrs. Jerrels were clearly improper because the prosecutor inquired whether she believed the children were telling the truth; thus, misconduct occurred. In another sexual abuse case, we held recently that reversible error occurred when a pediatrician was allowed to testify that, based on the child's statements, she believed the child had been abused. *State v. Carlson,* 80 Wn.App. 116, 122, 129, 906 P. 2d 999 (1995).

Case Law Cross Examination Prior Conviction ER 404(a)

ER 404(a) concerns the admissibility of character evidence evidence of a person s general disposition and tendencies.

State v. Avendano-Lopez, 79 Wn.App. 706, 713, 904 P.2d 324 (Div. 2 1995), *review denied*, 129 Wn.2d 1007 (1996) (misconduct, but harmless)

The question regarding prior sales activity constituted misconduct because evidence of other crimes, wrongs, or acts is inadmissible to show action in conformity with the prior crimes, wrongs, or acts. Prosecutors are prohibited from inquiring into inadmissible matters. "It is axiomatic that counsel cannot ask questions of a witness that have no basis in fact and are merely intended to insinuate the existence of facts to a jury." The question, aside from being improper, was also irrelevant; whether or not Avendano-Lopez had previously sold narcotics had no legitimate bearing on whether, on the date in question, he possessed with intent to deliver. &

ER 404(a) allows the use of prior bad acts to prove the character of the accused, but only if the accused has offered evidence of that trait. But Avendano-Lopez did not place his character in issue when he testified that he had not sold drugs with Vargus. "To open the door, the defendant, or a witness brought forward by the defendant, must first testify to a trait of character."

(Footnotes omitted.)

Case Law Cross Examination Prior Conviction ER 609(a)(1)

ER 609 concerns impeachment by evidence that a witness had been convicted of a crime.

State v. Rivers, 129 Wn.2d 697, 705-6, 921 P.2d 495 (1996) (error held harmless)

In *State v. Alexis,* 95 Wn.2d 15, 19, 621 P.2d 1269 (1980) this court held that a trial court exercising its discretion under ER 609(a)(1) must not only weigh the prejudicial effect of the prior conviction against the probative value of the evidence but must additionally consider and weigh the following factors:

(1) the length of the defendant's criminal record; (2) remoteness of the prior conviction; (3) nature of the prior crime; (4) the age and circumstances of the defendant; (5) centrality of the credibility issue; and (6) the

impeachment value of the prior crime.

In exercising its discretion, the trial court is required to follow the balancing procedure in a meaningful way. Further, the trial court must articulate, for the record, the factors which favor admission or exclusion of prior conviction evidence under ER 609(a)(1). *State v. Jones,* 101 Wn.2d 113, 122, 677 P.2d 131 (1984), *overruled on other grounds by State v. Brown,* 111 Wn.2d 124, 761 P.2d 588 (1988), *adhered to on reh'g,* 113 Wn.2d 520, 782 P.2d 1013, 80 A.L.R.4th 989, *corrected,* 787 P.2d 906 (1990); *State v. Gomez,* 75 Wn.App. 648, 651, 880 P.2d 65 (1994).

The responsibility of the trial court to state the factors considered under the Alexis test for the record is mandatory. *Jones,* 101 Wn.2d at 122; *Gomez,* 75 Wn.App. at 651. Failure to engage in this process on the record is an abuse of discretion. *Jones,* at 122-23. Admission of a felony as "unnamed" is not a substitute for the balancing process required under *Alexis*. *Gomez,* 75 Wn.App. at 655.

Although the trial court was aware of Defendant Rivers' prior criminal history, and the nature and dates of prior convictions, the court did not complete the required analysis of the Alexis factors on the record. Its failure to do so constituted an abuse of discretion. *Jones,* 101 Wn.2d at 122-23; *Gomez,* 75 Wn.App. at 656 n. 11.

(Emphasis in original.)

State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996) (during cross-examination, the prosecutor asked a defense witness about his 1988 assault conviction: "You beat her [the victim, and defense witness s wife] black and blue and you burned her abdomen with a cigar, didn't you?"; Held: misconduct, but not reversible error due to court s instruction to disregard)

Under ER 609(a), cross-examination regarding prior convictions is limited to the fact of the conviction, the type of crime, and the punishment. *State v. Coe,* 101 Wn.2d 772, 776, 684 P.2d 668 (1984). "Cross examination exceeding these bounds is irrelevant and likely to be unduly prejudicial, hence inadmissible." *Id.* at 776. ER 609(a) applies to all witnesses. The prosecutor's question was improper.

State v. Calegar, 133 Wn.2d 718, 947 P.2d 235 (1997) (in possession of controlled substance by means of a forged prescription case, trial court admitted prior felony conviction for possession of a controlled substance to impeach defendant s testimony; Held: probable that outcome of trial would have been different had jury not known of prior improperly admitted drug conviction, reversed and remanded for new trial.)

State v. Saunders, 91 Wn.App. 575, 958 P.2d 364 (Div. 2 1998) (Drug convictions overturned due to ineffective assistance of counsel in eliciting on direct examination of defendant that he had prior possession of drug conviction. ER 609(a)(1) clearly does not permit such evidence. *State v. Hardy,* 133 Wn.2d 701, 709-10, 946 P.2d 1175 (1997).

Case Law Cross Examination Prior Conviction ER 609(a)(2)

ER 609(a)(2) concerns impeachment by evidence that a witness was convicted of a crime involving dishonesty or false statement.

In determining whether a prior conviction is one of dishonesty or false statement, a court should not inquire into the facts and circumstances surrounding the conviction, but rather only consider the elements and date of the prior conviction, the type of crime that it was, and the punishment imposed. If this limited information does not show that the crime involved dishonesty or false statement, the conviction is not admissible under ER 609(a)(2). *State v. Newton,* 109 Wn.2d 69, 743 P.2d 254 (1987).

An exception is made for burglary convictions, and the court may look beyond the conviction to determine whether the burglary involved theft or some other type of crime. *State v. Schroeder,* 67 Wn.App. 110, 116-20, 834 P.2d 105 (Div. 2 1992).

Convictions held to involve crimes of dishonesty

Theft. *State v. Ray,* 116 Wn.2d 531, 543-46, 806 P.2d 1220 (1991) (1 theft).

Burglary, but only if the burglary charge resulted from entry into a building to commit theft as opposed to entry into a building to commit an act of violence or some other crime not involving theft. *State v. Schroeder,* 67 Wn.App. 110, 115-16, 834 P.2d 105 (Div. 2 1992); *State v. Black,* 86 Wn.App. 791, 938 P.2d 362 (Div. 1 1997), *review denied,* 133 Wn.2d 1032 (1998).

Robbery and attempted robbery. *State v. Rivers,* 129 Wn.2d 697, 921 P.2d 495 (1996)

Possession of stolen property. *State v. McKinsey,* 116 Wn.2d 911, 913-14, 810 P.2d 907 (1991).

Unlawful Issuance of bank check. *State v. Smith,* 56 Wn.App. 909, 911, 786 P.2d 320 (Div. 3 1990).

Forgery. *State v. Jones,* 101 Wn.2d 113, 123, 677 P.2d 131 (1984) (dicta), *overruled on other grounds by State v. Brown,* 111 Wn.2d 124, 761 P.2d 588 (1988), *adhered to on reh'g,* 113 Wn.2d 520, 782 P.2d 1013, 787 P.2d 906 (1989).

Fraudulent insurance claim. *State v. Pfeifer,* 42 Wn.App. 459, 463, 711 P.2d 1100 (Div. 1 1985).

Intimidation of witness. *State v. Delker,* 35 Wn.App. 346, 349, 666 P.2d 896, *review denied,* 100 Wn.2d 1016 (Div. 1 1983).

Joyriding. *State v. Trepanier,* 71 Wn.App. 372, 858 P.2d 511 (Div. 1 1993) (taking motor vehicle without permission admissible, even if defendant a passenger).

Convictions held to not involve crimes of dishonesty

Assault. *State v. Rhoads,* 101 Wn.2d 529, 533, 681 P.2d 841 (1984).

Burglary, when not involving theft. *State v. Watkins,* 61 Wn.App. 552, 556-57, 811 P.2d 953 (Div. 1 1991).

Rape. *State v. Alexis,* 95 Wn.2d 15, 621 P.2d 1269 (1980).

Criminal trespass. *State v. Brittain*, 38 Wn.App. 740, 744, 689 P.2d 1095 (Div. 3 1984).

Drug use or sale. *State v. Calegar,* 133 Wn.2d 718, 947 P.2d 235 (1997); *State v. Hardy,* 133 Wn.2d 701, 946 P.2d 1175 (1997).

State v. Perrett, 86 Wn.App. 312, 936 P.2d 426, *review denied,* 133 Wn.2d 1019 (Div. 2 1997) (2 assault with deadly weapon, Held: accumulation of non-reversible errors may deny a defendant a fair trial, conviction reversed)

Perrett assigns error to the exclusion of Gray s prior conviction for shoplifting. During an interview with the prosecutor and Perrett s attorney, Gray admitted to a shoplifting conviction in Arizona. Perrett sought to use the conviction under ER 609(a)(2) during cross examination. Absent a certified copy of the conviction, the court stated it would prohibit introduction of the evidence. It is not uncommon for people to be confused about the status of convictions &, the court explained.

Shoplifting is a crime of theft that is per se admissible under ER 609(a)(2). *See State v. Ray,* 116 Wn.2d 531, 545, 806 P.2d 1220 (1991). And such convictions may be introduced if elicited from the witness. ER 609(a). The court s concern that the witness might be confused about the conviction was not a reason to exclude the testimony. Moreover, nothing in the record suggests that the witness was confused she admitted the conviction to both the prosecutor and defense counsel. Further, there was no possible prejudice to Perrett. *See, e.g., State v. Martz,* 8 Wn.App. 192, 195-96, 504 P.2d 1174 (1973) (decided under former RCW 10.52.030 (1983)). In *Martz*, a prosecutor questioned a defendant about a prior offense without producing any record of the conviction. We held that the prosecutor s failure to produce the record was not error because the defendant had answered affirmatively. But we went on to warn that the prosecutor had risked reversible error because, in the fact of defendant s specific denial of a prior conviction, the State must substantiate its question. *Martz*, 8 Wn.App. at 195-96. The concerns raised in *Martz* are not present here. Because Gray was a nonparty witness, Perrett would not have been prejudiced by her unperfected impeachment. We conclude the trial court abused its discretion in refusing the offered testimony.

(Footnote omitted.)

Case Law Cross Examination Prior Conviction ER 609(b) Ten Year Time Limit Tolled if Fugitive From Justice

State v. Clarke, 86 Wn.App. 447, 936 P.2d 1215, *review denied,* 133 Wn.2d 1018 (Div. 1 1997) (ten-year time limit on introducing prior conviction to attack defendant s credibility was tolled while defendant was a fugitive from justice).

Case Law Cross Examination Tailoring Testimony to Evidence

State v. Smith, 82 Wn.App. 327, 334-35, 917 P.2d 1108 (Div. 1 1996), *review denied,* 130 Wn.2d 1023 (1997) (prosecutor did not impermissibly comment on defendant's right to be present at trial by suggesting during cross-examination of defendant that defendant constructed his account of his encounter with victim to fit photographs of crime scene, which he had viewed during trial)

Smith contends these questions infringed upon the exercise of his constitutional rights to confront his accusers and view the evidence against him. In *State v. Johnson* [80 Wn.App. 337, 908 P.2d 900, *review denied*, 129 Wn.2d 1016 (Div. 1 1996)], the prosecutor argued in closing that the defendant had the opportunity to "tailor his testimony to what came before" because he was "the only one witness that could watch the entire proceeding take place." This court held that the prosecutor's comments about the defendant's "unique opportunity to be present at trial and hear all the testimony against him" impermissibly infringed on his exercise of his Sixth Amendment rights.

Under *Johnson*, the State may not argue that a defendant, by sitting in the courtroom throughout the trial, has gained the unique opportunity to tailor his testimony. But the holding in Johnson does not prevent the State from arguing that a defendant has tailored his testimony to the State's proof. The constitutional right is to be present at trial and confront witnesses. It is not a right to be insulated from suspicion of manufacturing an exculpatory story consistent with the available facts.

The State's questions in this case raised an inference from Smith's testimony; they were not "focused on the exercise

of the constitutional right itself." The State could have asked the same questions of any witness aware of the State's evidence. We hold the questions did not constitute misconduct.

(Footnotes omitted.)

Case Law Cross Examination Use of Court Pleadings

State v. Williams, 79 Wn.App. 21, 26-30, 902 P.2d 1258 (Div. 2 1995) (prosecution used omnibus order signed by defense counsel claiming general denial/entrapment to impeach defendant who denied involvement; Held: conviction reversed and remanded for new trial)

A witness own prior inconsistent statement is not offered to prove the truth of the matter asserted to the extent it is offered to case doubt on the witness credibility. To say that a witness prior statement is inconsistent is to say it has been compared with, and found different from, the witness trial testimony. This comparison, without regard to the truth of either statement, tends to cast doubt on the witness credibility, for a person who speaks inconsistently is thought to be less credible than a person who does not. Thus, to the extent that a witness own prior inconsistent statement is offered to cast doubt on his or credibility, it is not offered to prove the truth of the matter asserted, it is nonhearsay, and it may be admissible to impeach.

This reasoning does not extent to situations in which the prior inconsistent statement was made by someone other than the trial witness. If A s out-of-court statement is inconsistent with B s trial testimony, A s statement casts doubt on B s credibility if A s statement is true; but A s statement does not cast doubt on B s credibility of A s statement is not true. In this situation, A s statement is offered to prove the truth of the matter asserted, even though it also is offered to impeach B....

In this case, the statement at issue was not made by Williams, but by his attorney. Thus, even though it was offered to impeach Williams, it was also offered to prove the truth of the matter asserted, and it was inadmissible unless exempted or excepted from the basic definition of hearsay....

Generally, an attorney representing a client in litigation is authorized to speak for the client concerning that litigation. Thus, an attorney s statement concerning the litigation sometimes qualifies, when offered against a client, as the admission of a party opponent. In criminal cases, however, this rule should be applied with caution, in part due to the danger of impairing the right to counsel.

Although an attorney s statement may sometimes qualify as an admission of the client when offered against the client, it does not qualify when the attorney is pleading alternatively or inconsistently on the client s behalf....

In this case, defense counsel was asserting alternative and inconsistent defenses when he said in the omnibus stipulation, General denial, entrapment. By saying general denial, he was saying that Williams had not committed the act charged. By saying entrapment, he was saying that Williams had committed the act charged, but only because he had been lured or induced into doing so. In Washington, the inconsistency of these statements has been recognized in a number of cases holding that evidence is insufficient to support an entrapment instruction if the defendant denies committing the crime. We conclude that the statement did not qualify as the admission of a party opponent, it was not exempted from the basic hearsay definition in ER 801(c), and it was erroneously admitted.

(Citations omitted.) (Emphasis omitted.)

State v. Johnson, 90 Wn.App. 54, 64-65, 950 P.2d 981 (Div. 2 1998) (as a sanction for defendant s late disclosure of alibi, court permitted prosecution to cross examine alibi witness with defendant' statement in omnibus order of a claim of self defense; Held: conviction reversed due to cumulative error).

We conclude that the substantive use of Johnson s omnibus order under the facts here was improper. When defense counsel pleads alternative and inconsistent defenses on behalf of his client at an omnibus hearing, the State may not use the attorney s pleadings against the defendant as substantive evidence that the defendant committed the charged criminal act. Williams, 79 Wn.App. at 30.

Case Law Failure to Call Subpoenaed Witness Duty to Advise of Witness s Whereabouts

State v. Simonson, 82 Wn.App. 226, 233, 917 P.2d 599, *review denied,* 130 Wn.2d 1012 (Div. 2 1996) (error not prejudicial since testimony would have been inadmissible)

Defense counsel told the prosecutor, in open court, that even though he had not subpoenaed Scott, he wanted to call her. Later the same day, the witness appeared at court and, in the manner of a reasonable and experienced witness, waited outside the courtroom. The prosecutor saw her, and knew or should have known that defense counsel had not. At that

point, in our view, the prosecutor had an obligation to do more than tell the witness he would not call her (and, implicitly, invite her to leave). Specifically, he had an obligation to advise the court and counsel of her presence because he knew, from earlier discussion in open court, that the defense wanted to call her. By failing to discharge his obligation, he created circumstances in which it was an abuse of discretion not to grant a continuance within which Simonson could relocate Scott and resecure her attendance.

Case Law Reopening Prosecution s Case to Answer Jury Question

State v. Brinkley, 66 Wn.App. 844, 845-46, 848, 851, 837 P.2d 20 (Div. 2 1992) (Held: prosecution could reopen its case, after defense rested and jury deliberations began, to address juror's question)

> The trial court then read the juror's written question to both counsel, outside the presence of the jury. The juror's question was as follows:
>
> > In the case of the missing jewelry and Mickey Mouse watch, were they returned to the victim, Mr. Phillips? If not, how come he is (sic) wearing the Mickey Mouse watch when he testified?
>
> Upon hearing the question, the State moved to reopen its case in order to respond to the juror's question. It indicated that the crime victim, Phillips, would testify that he had purchased a Mickey Mouse watch after the incident, to replace the one that had been taken from him. &
>
> Because the prosecution may properly be allowed to present additional evidence to resolve deficiencies in its case pointed out by the defendant, and to address the trial court's questions in a bench trial after both sides have rested, we see no logical basis for concluding that it is a per se abuse of discretion to allow the State to reopen, after the defense has rested its case, to address a juror's question. &
>
> There is no indication that the State took the action it did to put Brinkley at a disadvantage. Nor is there any indication that it engaged in trickery or made a calculated decision to hold evidence back. In short, Brinkley was faced with evidence which could have been presented during the State's case in chief and there is no suggestion that the impact of this additional evidence was intensified due to the timing of its presentation.
>
> Based on the foregoing, we conclude that the trial court's decision to allow the State to reopen its case did not put Brinkley at an unfair disadvantage nor did it cause him unfair prejudice. The trial court did not abuse its discretion in allowing the State to reopen.

(Citations omitted.)

State v. Luvene, 127 Wn.2d 690, 711, 903 P.2d 960 (1995) (defense motion to reopen case to present additional evidence denied; Held: motion to reopen a proceeding for purpose of introducing additional evidence is addressed to sound discretion of court; no error).

5.8 Argument to the jury

(a) prosecutor may argue all reasonable inferences from evidence in the record; unprofessional conduct to intentionally misstate the evidence or mislead jury as to inferences it may draw

(b) unprofessional conduct to express personal belief or opinion as to the truth or falsity of any evidence, or the guilt of the defendant

(c) prosecutor should not use arguments calculated to inflame the passions or prejudices of jury

(d) prosecutor should refrain from an argument diverting the jury from its duty to decide case on evidence, by injecting issues broader than guilt under controlling law, or by making predictions of consequences of jury s verdict

(e) court s responsibility to ensure final argument is kept within proper, accepted bounds

Excerpt from Commentary to ABA Standard

General. &Prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor s arguments, not only because of the prestige associated with the prosecutor s office, but also because of the fact-finding facilities presumably available to the office. &

Inferences Warranted by the Evidence; Misrepresentation. The most elementary rule governing the limits of argument is that it must be confined to the record evidence and the inferences that can reasonably and fairly be drawn therefrom. Assertions of fact not proven amount to unsworn testimony of the advocate and are not subject to cross-examination. &

Personal Belief. The prohibition pertains to the advocate s personally endorsing, vouching for, or giving an opinion. The cause should turn on the evidence, not on the standing of the advocate, and the testimony of witnesses must stand on its own.

Appeals to Passion or Prejudice. Arguments that rely on racial, religious, ethnic, political, economic, or other prejudices of the jurors introduce into the trial elements of irrelevance and irrationality that cannot be tolerated. &[W]here the jury s predisposition against some particular segment of society is exploited to stigmatize the accused or the accused s witnesses, such argument clearly trespasses the bounds of reasonable inference or fair comment on the evidence. &

Injection of Extraneous Issues. &Predictions as to the effect of an acquittal on lawlessness in the community also go beyond the scope of the issues in the trial and are to be avoided. &Of course, the restriction must be reciprocal; a prosecutor may be justified in making a reply to an argument of defense counsel that may not have been proper if made without provocation. The better solution to this problem, however, lies in adequately instructing advocates on the limits of proper argument and on the willingness of trial judges to enforce fair rules pertaining to such limits.

The Supreme Court Warning

State v. Belgarde, 110 Wn.2d 504, 516-20, 755 P.2d 174 (1988) (comment from J. Callow s opinion dissenting in part, concurring in part)

In general, during closing argument a prosecutor may state the law as set forth by the court in the instructions, *State v. Mak,* 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied,* ___ U.S. ___, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986), and has wide latitude to argue the facts in evidence and reasonable inferences therefrom. *State v. Mak, supra,* at 698, 726, *State v. Papadopoulos, 34* Wn.App. 397, 401, 662 P.2d 59 (1983). We have consistently held improper, however, arguments which introduce extraneous inflammatory rhetoric, personal opinion, or facts unsupported by the record. See State v. *Reed*, 102 Wn.2d 140, 684 P.2d 699 (1984); *State v. Music,* 79 Wn. 2d 699, 489 P.2d 159 (1971); *State v. Huson, supra; State v. Rose, supra; State v. Case,* 49 Wn. 2d 66, 298 P.2d 500 (1956); *State v. Reeder, supra. See also State v. Claflin,* 38 Wn.App. 847, 690 P.2d 1186 (1984), *review denied*, 103 Wn.2d 1014 (1985); RPC 3.4(e), (f). Appeals to jury passion and prejudice are clearly improper. *State v. Claflin, supra.* As observed in *State v. Case, supra*:

> Language which might be permitted to counsel in summing up a civil action cannot with propriety be used by a public prosecutor, who is a quasi-judicial officer, representing the People of the state, and presumed to act impartially in the interest only of justice. If he lays aside the impartiality that should characterize his official action to become a heated partisan, and by vituperation of the prisoner and appeals to prejudice seeks to procure a conviction at all hazards, he ceases to properly represent the public interest, which demands no victim, and asks no conviction through the aid of passion, sympathy or resentment.
>
> * * *
>
> The district attorney is a high public officer, representing the state, which seeks equal and impartial

> justice, and it is as much his duty to see that no innocent man suffers as it is to see that no guilty man escapes. In the discharge of these most important duties he commands the respect of the people of the county and usually exercises a great influence upon jurors. In discussing the evidence he is ... given the widest latitude within the four corners of the evidence by way of comment, denunciation or appeal, but he has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider.

Case, 49 Wn.2d at 70-71 (quoting People v. Fielding, 158 N.Y. 542, 547, 53 N.E. 497, 46 L.R.A. 641 (1899)).

However, at no time during closing argument did defense counsel object or seek other corrective action from the court. To preserve improper argument as error on appeal, counsel must timely object, move for mistrial, or request a curative instruction or admonition. *State v. Dunaway,* 109 Wn.2d 207, 221, 743 P.2d 1237 (1987); *State v. Charlton, supra; State v. Kendrick,* 47 Wn.App. 620, 638, 736 P.2d 1079, *review denied*, 108 Wn.2d 1024 (1987). The only exception to this rule exists when the misconduct is so flagrant and ill-intentioned that timely objection and curative instructions could not have obviated the resulting prejudice. *State v. Dunaway, supra; State v. Charlton, supra.* &

In the past it has been the rule that appellate courts would review alleged misconduct only if the defense objected to the misconduct at trial and requested a corrective instruction. Prosecutors and trial courts who rely hereafter on the defense to have any responsibility to guide prosecutorial conduct delude themselves.

The majority now sends a clear message prosecutors stray from the law and the evidence at your peril; trial judges control the prosecutor within those boundaries and expect nothing from the defense or face reversal of a guilty verdict no matter how conclusive the proof or how meticulously conducted the trial.

I disagree with the opinion that this court does not have responsibility to review the entire record in any case of reversal to ascertain whether there is overwhelming evidence of guilt. I cannot concur in a rule which shifts the defense counsel's responsibility for correcting a prosecutor's misconduct entirely to the trial judge.

(Bold Emphasis Added.)

Case Law Acquit Rather Than Convict on Lesser Arguments Permitted

State v. Fortune, 77 Wn.App. 628, 635-36, 893 P.2d 670 (Div. 1 1995), *affirmed on other grounds,* 128 Wn.2d 464, 909 P.2d 930 (1996) (prosecutor urged jury to acquit rather than convict of lesser; Held: no misconduct)

Fortune contends that the prosecutor committed misconduct during closing argument by urging the jury to ignore the instruction regarding the lesser included crime of second degree murder. The challenged passage reads:

> The second thing I want to say about lesser included offenses is this: Do not compromise this case. In the face of this evidence, if you have a reasonable doubt as to whether the State has proved this, or this, you can walk Mr. Fortune out of here. Don't compromise this case.

This argument, he contends, was tantamount to telling the jury to disregard the court's instruction on applicable law and appealed to the passion and prejudice of the jury. *See State v. Claflin,* 38 Wn.App. 847, 850, 690 P.2d 1186 (1984), *review denied*, 103 Wn.2d 1014 (1985). We reject Fortune's argument that the prosecutor committed misconduct in making this argument. It does not tell the jury to ignore the court's instructions or Fortune's theory of the case, i.e., that he had committed only second degree murder. Rather, the prosecutor simply advised the jury that the State sought either a first degree murder conviction or an acquittal but did not want a second degree murder conviction. The comment was made near the beginning of the State's closing argument, and the remainder addressed the State's theory that Fortune had committed first degree murder. The challenged argument came during the State's closing, and the defense was able to rebut it and argue its own theory of the case. There was no misconduct.

Case Law Appeals to Sympathy or Prejudice Arguments Prohibited

State v. Brown, 35 Wn.2d 379, 385-86, 213 P.2d 305 (1949) (prosecution on sodomy charges; prosecutor's argument that this will become a city of sodomy if jury acquits improper, but not reversible).

State v. Huson, 73 Wn.2d 660, 662-3, 440 P.2d 192 (1968), *cert. denied,* 393 U.S. 1096, 21 L.Ed.2d 787, 89 S.Ct. 886 (1969) (prosecutor's comments to effect that jury would be responsible for many, many killings of innocent people if they said a jealous husband or suitor could go out and commit cold-blooded murder and that defendant had gotten away with being a criminal for 25 years were improper; Held: objections to argument were waived where defense counsel made no objection and requested no curative instruction but adopted strategy of telling jury, which could have but did not return death verdict, that prosecutor was unfair and that his argument was an inflammatory tirade)

> In California it is almost impossible to get a jury that doesn't have sex perverts on it. That is why California has lots of trouble.
>
> (I)f this jury lets down their bars and says a jealous husband, a jealous suitor, can go out and commit cold-

blooded murder, you, as members of this City of Seattle are going to be responsible for many, many killings of innocent people.

(A)nd our juries have been entirely too soft. They are made of jelly.

(A)nd he (the defendant) is trying to bamboozle you the same as he has done Judges for the past twenty-five years.

(A)nd this man has been a criminal for twenty-five years. And he has got away with it.

(A)nd this hoodlum here run(s) out upstairs and out through the front door and disappear(s) in the darkness of the night.

I say to you, ladies and gentlemen of the jury, that there is only one thing to do with a man that does what he did in this case, is send him to fantasy land.

And I want you to remember that when you get into the jury room, that any man who takes blood, by man shall his blood take.

State v. Claflin, 38 Wn.App. 847, 850-51, fn. 3, 690 P.2d 1186 (Div. 2 1984), *review denied*, 103 Wn.2d 1014 (1985) (conviction reversed in rape case due to prosecutor s reading of poem describing rape's emotional effect on its victims)

Here, if the State's charges were true, defendant had engaged in a pattern of repulsive sexual and physical abuse of young girls over a long period of time. In such an emotionally charged trial, the use of a poem utilizing vivid and highly inflammatory imagery in describing rape's emotional effect on its victims was nothing but an appeal to the jury's passion and prejudice In addition, the poem contained many prejudicial allusions to matters outside the actual evidence against Claflin. In short, the reading of the poem was so prejudicial that no curative instruction would have sufficed to erase the prejudice it was bound to engender in the minds of the jurors.

[Footnote 3] Here is the poem:

There is no difference between being raped and being pushed down a flight of cement steps except that the wounds also bleed inside.

There is no difference between being raped and being run over by a truck except that afterward men ask if you enjoyed it.

There is no difference between being raped and being bit on the ankle by a rattlesnake except that people ask if your skirt was short and why you were out alone anyhow.

There is no difference between being raped and going head first through a windshield except that afterward you are afraid not of cars but half the human race.

The rapist is your boyfriend's brother. He sits beside you in the movies. Rape fattens on the fantasies of the normal male like a maggot in garbage.

Fear of rape is a cold wind blowing all of the time on a woman's hunched back. Never to stroll alone on a sand road through pine woods never to climb a trail across a bald mountain without that aluminum in the mouth when I see a man climbing toward me.

Never to open the door to a knock without that razor just grazing the throat. The fear of the dark side of hedges, the back seat of the car, the empty house, rattling keys like a snake's warning. The fear of the smiling man in whose pocket is a knife. The fear of the serious man in whose fist is hatred.

All it takes to cast a rapist is to be able to see your body as jackhammer, as blowtorch, as adding-machine-gun. All it takes is hating that body your own, your self, your muscle that softens to fat.

All it takes is to push what you hate, what you fear onto the soft alien flesh. To bucket out invincible as a tank armored with treads without senses to possess and punish in one act, to rip up pleasure, to murder those who dare live in the leafy flesh open to love.

(Citations omitted.) (Footnote omitted.)

State v. Belgarde, 110 Wn.2d 504, 507-9, 755 P.2d 174 (1988) (misconduct is so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct; Held: conviction reversed)

These inflammatory comments were a deliberate appeal to the jury's passion and prejudice and encouraged it to render a verdict based on Belgarde's associations with AIM [American Indian Movement] rather than properly admitted evidence. The remarks were flagrant, highly prejudicial and introduced "facts" not in evidence.

A prosecutor cannot be allowed to tell a jury in a murder case that the defendant is "strong in" a group which the prosecutor describes as "a deadly group of madmen", and "butchers that kill indiscriminately". The prosecutor likened the American Indian movement members to "Kadafi" and "Sean Finn" of the IRA. This court will not allow such testimony,

in the guise of argument, whether or not defense counsel objected or sought a curative instruction. An objection and an instruction to disregard could not have erased the fear and revulsion jurors would have felt if they had believed the prosecutor's description of the Indians involved in AIM. This court cannot assume jurors did not believe the prosecutor's description. We have repeatedly explained that the question to be asked is whether there was a "substantial likelihood" the prosecutor's comments affected the verdict. There is a substantial likelihood this egregious departure from the role of a prosecutor did affect the verdict. "If misconduct is so flagrant that no instruction can cure it, there is, in effect, a mistrial and a new trial is the only and the mandatory remedy."

The prosecutor's argument invited the jury to return to the jury room and discuss Wounded Knee. A prosecutor has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider. Not only did the prosecutor say the defendant belonged to a group of butchers and madmen who killed indiscriminately, but in so doing he also testified as to facts outside the record. He told the jury that AIM was a "deadly group of madmen", "the people are frightened of AIM", and that AIM is "something to be frightened of when you are an Indian and you live on the reservation". The defendant described AIM as a group organized to protect Indian rights. The prosecution's statements that AIM is a group of terrorists (which he based on his own memory of the events at Wounded Knee) constituted not argument, but testimony refuting the defendant's description.

(Citations omitted.)

Northern Mariana Islands v. Mendiola, 976 F.2d 475, 487 (9th Cir. 1992) *overruled on other grounds by George v. Camacho,* 119 F.3d 1393 (9th Cir. 1997) (court's warning to prosecutor)

While commentary on a defendant's future dangerousness may be proper in the context of sentencing, it is highly improper during the guilt phase of a trial. The prosecutor's suggestions that Mendiola would walk out of the courtroom right behind them, if acquitted, and presumably retrieve the missing murder weapon was particularly improper because the prosecutor knew that his witness, the informer Reyes, was responsible for the missing gun.

State v. Russell, 125 Wn.2d 24, 89, 882 P.2d 747 (1994), *cert. denied,* 514 U.S.1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995) (future dangerousness of defendant: Held: not reversed, but close call)

We find more serious a later comment made by the prosecutor:

> Mr. Russell was going to go to California, San Diego, I think he said. If you have a reasonable doubt that he killed these women, let him go. He'll find new friends. There is no shortage of naieve [sic], trusting, foolish young people in the cities of this country. He will settle in. He will begin looking for work. You could say he will be hunting for a job and he will find it. If you have a reasonable doubt that he's the killer, let him go.

Russell made no objection to these comments, but he did refer to them in his motion for a mistrial. He argues that the comments were a deliberate appeal to the jury's fears and thus inappropriate. *See State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); *State v. Claflin,* 38 Wn.App. 847, 851, 690 P.2d 1186 (1984), *review denied*, 103 Wn.2d 1014 (1985). In *Belgarde*, the court found that the prosecutor's inflammatory comments were a deliberate appeal to the jury's passion and prejudice, encouraging it to render a verdict based on the defendant's associations rather than on the evidence. Since an objection and instruction to disregard could not have erased the fear and revulsion jurors would have felt, a new trial was the mandatory remedy for such misconduct. *Belgarde*, 110 Wn.2d at 508, 755 P.2d 174.

While egregious, it is doubtful that the prosecutor's statements herein created a sense of revulsion. Moreover, defense counsel repeated the California remark in her closing argument: "The state suggested Mr. Russell killed three people in Bellevue, he was on the way to California and he would kill again." This statement was made to illustrate how the State was trying to identify Russell as a serial killer. The incorporation of this statement into the defense argument weakens the contention that it denied Russell a fair trial. While we do not approve of the prosecutor's statement, we do not find it sufficiently flagrant under the facts presented to warrant a new trial. *See Darden v. Wainwright,* 477 U.S. 168, 179-82, 106 S.Ct. 2464, 2470-72, 91 L.Ed.2d 144 (1986) (remarks about a defendant's future dangerousness were criticized but not regarded as reversible error).

(Citation omitted.)

State v. Gaff, 90 Wn.App. 834, 954 P.2d 943 (Div. 1 1998) (Sexual predator commitment. Prosecutor's emotional appeal to society's general fear of crime (equating uneasy sleep and noises in the night to the fear of someone like respondent) and use of civil commitment as a tool to impose further punishment (send a message argument) was misconduct; Held: judgment affirmed since no objection by defense counsel and comment).

Case Law Arguing Inconsistent Theories In Separate Trials of Co-Defendants

Thompson v. Calderon, 120 F.3d 1045 (9th Cir. 1997) (15 years after crime, 13 years after conviction, and 7 years after first habeas petition, Ninth Circuit granted relief in capital case 2 days before scheduled execution), *reversed on other grounds,* 523 U.S. 538, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998) (5-4 decision holding habeas petition barred by Antiterrorism and Effective Death Penalty Act of 1996 as successive petition), *conviction affirmed on remand,* 151 F.3d 918 (9th Cir. 1998), *cert. denied,* ___ U.S. ___, 119 S.Ct. 3, 141 L.Ed.2d 765 (1998).

> We are left with a picture of the prosecutor s temporary abandonment during Thompson s trial of the theory he presented, and supported with evidence, at the preliminary hearing, in the pretrial motions, and again at and after Leitch s [co-defendant] trial. The prosecutor manipulated evidence and witnesses, argued inconsistent motives, and at Leitch s trial essentially ridiculed the theory he had used to obtain a conviction and death sentence at Thompson s trial. The question before us is whether this prosecutorial misconduct violated Thompson s right to due process and a fair trial.
>
> The Supreme Court has long emphasized our Constitution s overriding concern with the justice of finding guilt. In particular, the Due Process Clause guarantees for every defendant the right to a trial that comports with basic tenets of fundamental fairness.
>
> The prosecutor, as the agent of the people and the State, has the unique duty to ensure fundamentally fair trials by seeking not only to convict, but also to vindicate the truth and to administer justice.
>
> The court has reaffirmed that this duty of further just convictions is [the prosecutor s] highest purpose. In *United States v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993), we further stated:
>
> > While lawyers representing private parties may indeed must do everything ethically permissible to advance their clients interests, lawyers representing the government in criminal cases serve truth and justice first. The prosecutor s job isn t just to win, but to win fairly, staying well within the rules.
>
> This is so because [s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of justice suffers when any accused is treated unfairly.
>
> The prosecutor may not [become] the architect of a proceeding that does not comport with the standards of justice. The prosecutor, therefore, violates the Due Process Clause if he knowingly presents false testimony whether it goes to the merits of the case or solely to a witness s credibility. Moreover, the prosecutor has a constitutional duty to correct evidence he knows is false, even if he did not intentionally submit it.
>
> From these bedrock principles, it is well established that when no new significant evidence comes to light a prosecutor cannot, in order to convict two defendants at separate trials, offer inconsistent theories and facts regarding the same crime. Then-judge Kennedy wrote for our court that when there are claims of inconsistent prosecutorial conduct, reversal is not required where the underlying theory remains consistent. Here, little about the trials remained consistent other than the prosecutor s desire to win at any cost.

Thompson, 120 F.3d at 1057-59. (Citations omitted.) (Footnotes omitted.) *See also Thompson,* 151 F.3d at 931, f.n. 2 (Reinhardt, C.J., concurring and dissenting) (The Supreme Court decision reversing our judgment did not reach the merits of Thompson s constitutional claims.)

Case Law Arousing Natural Indignation Arguments Permitted

State v. Gentry, 125 Wn.2d 570, 644, 888 P.2d 1105 (1995), *cert. denied,* 516 U.S. 843, 116 S.Ct. 131, 133 L.Ed.2d 79 (1995) (argument proper) (citing with approval *State v. Rice,* 110 Wn.2d 577, 606-9, 757 P.2d 889 (1988), *cert. denied,* 491 U.S. 910 (1989) (a prosecuting attorney is not muted because the acts committed arouse natural indignation)

> The Defendant additionally argues that the tone of the prosecuting attorney's closing argument unfairly appealed to the jury's emotions because it included a lengthy and graphic description of the victim's death and a detailed and speculative vision of her future.
>
> The prosecuting attorney's argument did detail the circumstances of the crime. This is permissible so long as the argument does not invite an irrational or purely subjective response.

Case Law Constitutional Right Impingement Argument

Right to be Present at Trial

Right to Confront Witnesses

State v. Johnson, 80 Wn.App. 337, 339-41, 908 P.2d 900, *review denied*, 129 Wn.2d 1016 (Div. 1 1996) (prosecutor's comments about defendant's unique opportunity to be present at trial and hear all the testimony against him impermissibly infringed his exercise of his Sixth Amendment rights to be present at trial and confront witnesses, but error harmless)

> Members of the jury, I would like to submit to you that the one and only witness who had a bird's eye view of everything that happened, the only one witness that could watch the entire proceeding take place, to fit his testimony to suit the evidence that was entered earlier, and that's the defendant.
>
> Before the defendant took the stand, he heard testimony on Wednesday and on Thursday. We retired on Thursday at 3:30. He had all the time from Thursday from 3:30 to Monday, today, at 1:30 to decide what his testimony would be.

A prosecutor may comment on a witness's credibility so long as the remarks are based on the evidence and are not a personal opinion. *State v. Graham,* 59 Wn.App. 418, 427, 798 P.2d 314 (1990). A prosecutor may argue that the evidence does not support the defense theory, id. at 429, 798 P.2d 314, and may respond to defense counsel's arguments. *State v. Russell,* 125 Wn.2d 24, 87, 882 P.2d 747 (1994), *cert. denied,* ___ U.S. ___, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995). A prosecutor is prohibited, however, from arguing unfavorable inferences from the exercise of a constitutional right and may not argue a case in a manner which would chill a defendant's exercise of such a right. *State v. Rupe,* 101 Wn.2d 664, 705, 683 P.2d 571 (1984) (comment on possession of legal weapons); *State v. Fiallo-Lopez,* 78 Wn.App. 717, 728, 899 P.2d 1294 (1995) (comment on the defendant's failure to testify).

The prosecutor's comments about the defendant's unique opportunity to be present at trial and hear all the testimony against him impermissibly infringed his exercise of his Sixth Amendment rights to be present at trial and confront witnesses. He did not merely argue inferences from the defendant's testimony, but improperly focused on the exercise of the constitutional right itself.

State v. Jones, 71 Wn.App. 798, 809, 863 P.2d 85 (Div. 1 1993), *review denied*, 124 Wn.2d 1018 (1994) (defendant brought to the court's attention the fact that the prosecutor inadvertently blocked his view of the witness, and prosecutor, in closing argument, contrasted the defendant's professed love of the child with his demand to see her face during her testimony; Held: prosecutor impermissibly invited the jury to draw a negative inference from the defendant s exercise of his constitutional right to confrontation).

Right to Remain Silent [Failure to Testify]

Burden of Proof

Undisputed Evidence Argument Permitted

[But Be Very Careful Since Comments Impinging on Right to Remain Silent and Shifting Burden of Proof to Defendant are Strictly Prohibited]

Griffin v. California, 380 U.S. 609, 614, 14 L.Ed.2d 106, 85 S.Ct. 1229 (1965) (comment on defendant s refusal to testify; Held: conviction reversed)

> For comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' *Murphy v. Waterfront Comm.,* 378 U.S. 52, 55, 84 S.Ct. 1594, 1596, 12 L.Ed.2d 678, which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly.

(Footnote omitted.)

Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602, 1624-25 fn. 37, 10 A.L.R.3d 974 (1966)

> [Footnote 37] &In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. Cf. *Griffin v. State of California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); *Malloy v. Hogan,* 378 U.S. 1, 8, 84 S.Ct. 1489, 1493, 12 L.Ed.2d 653 (1964); Comment, 31 U.Chi.L.Rev. 556 (1964); Developments in the Law Confessions, 79 Harv.L.Rev. 935, 1041--1044 (1966). *See also Bram v. United States,* 168 U.S. 532, 562, 18 S.Ct. 183, 194, 42 L.Ed. 568 (1897).

But see State v. Easter, 130 Wn.2d 228, 237, 922 P.2d 1285 (1996) (defendant's right to silence was violated by officer's testimony that, prior to arrest, defendant did not answer and looked away without speaking when officer first questioned him about

whether he had been drinking, and by officer's testimony and prosecution's argument that defendant was evasive and a "smart drunk")

> The cases that have permitted testimony about the defendant's silence have done so only for the limited purpose of impeachment after the defendant has taken the stand, and not as substantive evidence of guilt when the defendant has not testified. *Fletcher v. Weir,* 455 U.S. 603, 606-07, 102 S.Ct. 1309, 1311-12, 71 L.Ed.2d 490 (1982) (post-arrest silence could be used for impeachment when no *Miranda* warnings given); *Jenkins v. Anderson,* 447 U.S. 231, 239, 100 S.Ct. 2124, 2129-30, 65 L.Ed.2d 86 (1980) (pre-arrest silence can be used to impeach defendant's exculpatory testimony); *Raffel v. United States,* 271 U.S. 494, 46 S.Ct. 566, 70 L.Ed. 1054 (1926) (silence at first trial permissible to impeach defendant's testimony at second trial). *See also State v. Watkins,* 53 Wn.App. 264, 273, 766 P.2d 484 (1989); *State v. Hamilton,* 47 Wn.App. 15, 20-21, 733 P.2d 580 (1987). *See generally,* Barbara Rook Snyder, A Due Process Analysis of the Impeachment Use of Silence in Criminal Trials, 29 WM. & MARY L. REV. 285 (1988).

(Footnote omitted.)

But see also United States v. Oplinger, 150 F.3d 1061, 1066-67 (9th Cir. 1998) (Bank fraud case. Defendant remained silent in response to accusations by his supervisor. Prosecutor commented on this silence during closing argument. Held: conviction affirmed).

> Although the Supreme Court has held that the government may comment of a defendant s pre-arrest silence for impeachment purposes, *see Jenkins v. Anderson,* 447 U.S. 231, 239, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980), it has yet to rule on the constitutionality of the use of pre-arrest, pre-*Miranda* silence as substantive evidence of guilt. Despite the reservation of this issue in *Jenkins*, however, we are not completely without guidance from the Court. Justice Stevens wrote that he would have rejected the defendant s Fifth Amendment claim simply because the privilege against compulsory self-incrimination is irrelevant to a citizen s decision to remain silent when he is under no official compulsion to speak. *See Jenkins,* 447 U.S. at 241 (Stevens, J., concurring)....
>
> In so holding, we respectfully disagree with the First, Seventh, and Tenth Circuits, which have all held that pre-arrest silence comes within the proscription against commenting on a defendant s privilege against self-incrimination laid down in *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

(Citations omitted.)

State v. Ashby, 77 Wn.2d 33, 459 P.2d 403 (1969)

> So I say it is not disputed that he sold those articles to the defendant, Mr. Ashby. Members of the jury, that testimony also is undisputed. Consider it just for a few moments. Has anyone disputed that particular evidence that those articles were sold to Mr. Ashby?

Defendant reasons that, since he is the only person who could have disputed that fact, the comment constituted a reference to his failure to testify. He states that he is constitutionally entitled to refrain from testifying and that his exercise of that right cannot be the subject matter of comment by the prosecutor.

We are of the view that the prosecutor's statement was not such that it necessarily drew the attention of the jury to the fact that defendant did not testify. Persons other than defendant could have conceivably denied that Clifford Stone sold the property in question to defendant. Such testimony could have come from another who ostensibly bought the articles in good faith, who observed the sale to a different person or who might testify that he saw the items destroyed prior in time to the alleged sale to defendant. The prosecutor's comment could have applied equally well to them.

The rule enunciated by this court in *State v. Litzenberger,* 140 Wash. 308, 248 P. 799 (1926), that 'Surely the prosecutor may comment upon the fact that certain testimony is undenied, without reference to who may or may not be in a position to deny it, and, if that results in an inference unfavorable to the accused, he must accept the burden, because the choice to testify or not was wholly his' is still good law.

Further, any prejudicial effect to the defendant that may have been occasioned by the prosecutor's comment was eliminated by the trial judge when he instructed the jury that 'Every defendant in a criminal case has the absolute right not to testify. You must not draw any reference of guilt against the defendant because he did not testify.'

State v. Cozza, 19 Wn.App. 623, 627-28, 576 P.2d 1336 (Div. 3 1978) (the prosecutor's comment upon the failure of the defendant to call Norris to corroborate his defense theory, was not improper because (1) Norris was peculiarly available to defendant and would have been able to elucidate the events of the morning of the 27th, (2) Norris had pleaded guilty to the commission of the January 26 burglary on the condition that he would not be prosecuted for either of the two January 27 attempts, and (3) the defendant repeatedly attempted to place the responsibility for the charged incident on Norris).

State v. Crawford, 21 Wn.App. 146, 151-52, 584 P.2d 442 (Div. 2 1978), *review denied*, 91 Wn.2d 1013 (1979) (during closing argument, without objection, prosecutor referred in general terms to certain evidence that was "undisputed" and "unrefuted)

> At no time did the prosecutor refer directly to the defendant's failure to testify. There is some decisional language

suggesting that if defendant was the only person who could have contradicted the State's testimony, a prosecutor's comment that this testimony has not been disputed May improperly draw attention to defendant's failure to testify. The test employed to determine if defendant's Fifth Amendment rights have been violated is whether prosecutor's statement was of such character that the jury would naturally and necessarily accept it as a comment on the defendant's failure to testify. *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); *State v. Ashby,* 77 Wn.2d 33, 459 P.2d 403 (1969). Defendant has not indicated that persons other than defendant could not have conceivably denied the testimony that the prosecutor claimed as unrefuted. However, even if he had done so, we are convinced that the prosecutor's statements in this case, standing alone, were so subtle and so brief that they did not "naturally and necessarily" emphasize defendant's testimonial silence. *See Kelly v. Stone,* 514 F.2d 18 (9th Cir. 1975) (illustrating cumulative instances of prosecutorial misconduct).

(Citations omitted.)

State v. Bebb, 44 Wn.App. 803, 815-16, 723 P.2d 512 (Div. 3 1986), *affirmed,* 108 Wn.2d 515, 740 P.2d 829 (1987) (approved prosecutor's comment on defendant's failure to present handwriting testimony)

> The handwriting evidence is interesting, isn't it? There is no evidence before you at all that this is not the handwriting of Robert Ray Bebb.... The defense did not call anyone to tell you that this is not his handwriting. What they chose to do, instead, was to quarrel with Homer Pointer, ... [the State's expert]

A prosecutor can comment on the accused's failure to present evidence on a particular issue if persons other than the accused or his spouse could have testified for him on that issue. Here, Mr. Bebb could have produced a handwriting expert or even a lay witness familiar with his handwriting to rebut the State's expert's testimony. The prosecutor's argument, when read in context, was an effort on his part to contrast Mr. Bebb's failure to present evidence on the handwriting issue with the fact he did present expert evidence on the fingerprint issue. It is unlikely the jury would have interpreted the prosecutor's remarks as a comment on Mr. Bebb's own failure to testify. We find no error.

(Citations omitted.)

State v. Dickerson, 69 Wn.App. 744, 747, 850 P.2d 1366, *review denied,* 122 Wn.2d 1013 (Div. 1 1993) (improper for co-defendant s counsel to comment on defendant s failure to testify; Held: error harmless)

Numerous Washington cases have held that comments by the prosecutor on a defendant's failure to testify constitute error and may require reversal. Counsel does not cite nor has our research discovered any Washington case dealing with such comments made by counsel for a co-defendant rather than the prosecutor. However, other courts have recognized that such a comment can, under certain circumstances, deprive a non-testifying defendant of a fair trial.

(Footnotes omitted.)

State v. Brett, 126 Wn.2d 136, 176-77, 892 P.2d 29 (1995), *cert. denied,* 516 U.S. 1121, 116 S.Ct. 931, 133 L.Ed.2d 858 (1996)

> "Surely the prosecutor may comment upon the fact that certain testimony is undenied ...; and, if that results in an inference unfavorable to the accused, he must accept the burden, because the choice to testify or not was wholly his"....

Prosecutors may also comment on the defendant's failure to present evidence on a particular issue if persons other than the accused could have testified as to that issue.

Brett asserts the standards set forth in *Ashby, Crawford,* and *Litzenberger* are no longer viable because they were decided prior to *Doyle v. Ohio,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). We disagree. Doyle held that a defendant's post-arrest silence could not be used to impeach a defendant's exculpatory explanation subsequently given at trial. Doyle does not alter the standard for determining what types of comments by a prosecutor violate a defendant's due process rights.

(Citations omitted.)

State v. Fiallo-Lopez, 78 Wn.App. 717, 728-29, 899 P.2d 1294 (Div. 1 1995) (prosecutor argued that there was absolutely no evidence to explain why defendant was present at locations where drug deals occurred; Held: prosecutorial misconduct since no one other than defendant could have offered explanation prosecutor sought, error held harmless)

A prosecutor violates a defendant's Fifth Amendment rights if the prosecutor makes a statement "of such character that the jury would 'naturally and necessarily accept it as a comment on the defendant's failure to testify.' " *State v. Ramirez,* 49 Wn.App. 332, 336, 742 P.2d 726 (1987) (quoting *State v. Crawford,* 21 Wn.App. 146, 152, 584 P.2d 442 (1978), *review denied*, 91 Wn.2d 1013 (1979)). The prosecutor may say that certain testimony is undenied as long as he or she does not refer to the person who could have denied it. *Ramirez,* 49 Wn.App. at 336.

Here, the prosecutor stated in closing argument that there was "absolutely" no evidence to explain why Fiallo-Lopez

was present at the restaurant and at Safeway precisely when Lima and Cooper were there for the drug transaction or why he had contact with Lima at both places. Moreover, the prosecutor argued that there was no attempt by the defendant to rebut the prosecution's evidence regarding his involvement in the drug deal. Despite the prosecutor's passing reference to the fact that the defense had no burden to explain Fiallo-Lopez' actions, the State's argument highlighted the defendant's silence. In this case, no one other than Fiallo-Lopez himself could have offered the explanation the State demanded. Because the argument improperly commented on the defendant's constitutional right not to testify and impermissibly shifted the burden of proof to the defendant, it was misconduct.

State v. Keene, 86 Wn.App. 589, 938 P.2d 839 (Div. 2 1997) (detectives testimony and prosecutors argument to jury about defendants failure to contact detective constituted impermissible comments on defendants right to silence in violation of Fifth Amendment; Held: conviction reversed and remanded for new trial).

Missing Witness Doctrine

Defendant s Failure to Call Witness Permitted

[read *Blair* and *Russell* very carefully before trying this]
[probably a good idea to seek court permission outside jury s presence prior to making argument]

State v. Blair, 117 Wn.2d 479, 485-92, 816 P.2d 718 (1991) (defendant testified that names and numbers on slips of paper represented personal loans and amounts owed him from card games and not a list of drug customers; prosecutor commented on defendants failure to call these persons; Held: that prosecutor's comments during closing argument, that defendant should have called persons whose names appeared on list found at his apartment if jury was to believe that numbers on lists corresponding with names actually represented personal loans and gambling debts as defendant alleged, did not present error but were consistent with missing witness rule)

Under the "missing witness" or "empty chair" doctrine,

> it has become a well established rule that where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and, ... he fails to do so, the jury may draw an inference that it would be unfavorable to him.

The majority of jurisdictions permit the missing witness inference in criminal cases where the defense fails to call logical witnesses.

When faced with a situation similar to that in this case, however, this court found that prosecutorial misconduct occurred. In *State v. Fowler,* 114 Wn.2d 59, 785 P.2d 808 (1990), the defendant was convicted of second degree assault while armed with a deadly weapon and a firearm. His conviction arose out of a confrontation which resulted when three occupants of another vehicle tried to pass defendant's car. Defendant took the stand and gave his version of events; all three occupants of the other car also testified. The prosecutor remarked in closing argument that the defense had the power to subpoena witnesses, that all three occupants of the second vehicle testified there was a passenger in defendant's car, and then said that if defendant's story was true, and if he had a friend in his car who presumably observed the events, where was that person? This court held that the prosecutor committed error. Fowler, at 66. The court did not address the missing witness doctrine, nor did it analyze the circumstances of the case within that doctrine. To the extent Fowler might be read as inconsistent with the analysis herein, it is disapproved.

The Court of Appeals has found the missing witness doctrine applicable where the inference was drawn based on defendant's failure to call a particular witness. *See State v. Contreras,* 57 Wn.App. 471, 788 P.2d 1114, *review denied*, 115 Wn.2d 1014) *State v. Cozza,* 19 Wn.App. 623, 627, 576 P.2d 1336 (1978); State v. Green, 2 Wn.App. 57, 69-70, 466 P.2d 193 (1970). In *Contreras,* 57 Wn.App. at 476, 788 P.2d 1114, the court held that it is permissible for the prosecutor to comment on the defendant's failure to call a witness provided that it is clear the defendant was able to produce the witness and the defendant's testimony unequivocally implies that the absent witness could corroborate his theory of the case.

The recent opinion in *State v. Barrow,* 60 Wn.App. 869, 872-73, 809 P.2d 209 (1991) lists a number of cases permitting prosecutorial comment on defendant's failure to produce evidence, reasoning that, despite the analysis in *Traweek* (upon which the Court of Appeals relied here), in limited situations such comments are permissible. The court in *Barrow* distinguished *Traweek* on the basis that there the defendant did not testify nor did he put on a defense. The court in Barrow therefore rejected defendant's argument that the prosecutor's comments impermissibly shifted the burden of proof.

We agree with the majority of the courts addressing this issue and hold under the circumstances of this case that the

missing witness doctrine applies and that under the doctrine no error occurred. There are, however, limitations on the doctrine which are particularly important when a criminal defendant's failure to call particular witnesses is the subject of prosecutorial comment.

Washington courts have said, in the context of failure of the State to call certain witnesses, that the inference arises "only where, under all the circumstances of the case, such unexplained failure to call the witnesses creates a suspicion that there has been a willful attempt to withhold competent testimony." *State v. Baker,* 56 Wn.2d 846, 859-60, 355 P.2d 806 (1960); *see State v. Nelson,* 63 Wn.2d 188, 191-92, 386 P.2d 142 (1963). Defendant has argued that this requirement is not satisfied here because there is no evidence of willful misconduct.

However, in a later case, *State v. Davis, supra,* 73 Wn.2d at 279-80, the requirement was explained as not meaning that in order to obtain the benefit of the missing witness rule in a criminal case one must prove facts sufficient to establish a deliberate suppression of evidence. Instead, the requirement means that

> one must establish such circumstances which would indicate, as a matter of reasonable probability, that the prosecution [the party against whom the missing witness rule was sought to be applied in the case] would not knowingly fail to call the witness in question unless the witness's testimony would be damaging. In other words, "the inference is based, not on the bare fact that a particular witness is not produced as a witness, but on his non-production when it would be natural for him to produce the witness if the facts known by him had been favorable."

Davis, at 280 (quoting Wigmore § 286). Given this explanation of the requirement, there is little merit to defendant's claim that the doctrine does not apply in the absence of a showing of willful misconduct.

A second limitation on the rule is that the inference is not permitted when the witness is unimportant, or the testimony would be cumulative. *Davis,* at 278; 2 K. Tegland, § 85(4), at 248; 2 J. Wigmore § 287. The importance of the witness's testimony depends upon the facts of the case. *Davis,* at 278. There is no doubt that the persons named on the slips of paper found in defendant's apartment are the kind of witnesses contemplated by the rule.

If a witness's absence can be satisfactorily explained, no inference is permitted. *E.g., State v. Lopez,* 29 Wn.App. 836, 631 P.2d 420 (1981) (missing witnesses were transients who left town and could not be located); *State v. Richards,* 3 Wn.App. 382, 475 P.2d 313 (1970). Defendant has maintained that the State made no showing it attempted to establish any reason for the absence of the witness. However, it is the party against whom the rule would operate who is entitled to explain the witness's absence and avoid operation of the inference. 2 J. Wigmore § 290, at 216.

If a witness is not competent to testify, or some privilege applies so that the witness's testimony is protected, then the inference is not proper. *E.g., State v. Charlton,* 90 Wn.2d 657, 585 P.2d 142 (1978) (marital privilege); *State v. Torres,* 16 Wn.App. 254, 259-61, 554 P.2d 1069 (1976) (same); *United States v. Saa,* 859 F.2d 1067 (2d Cir. 1988) (confidential informant), *cert. denied,* 489 U.S. 1089, 109 S.Ct. 1555, 103 L.Ed.2d 858 (1989). There is no indication that any person on the list would be an incompetent witness or one whose testimony is privileged.

In a similar vein, it is possible that a witness's testimony, if favorable to the party who failed to call the witness, would necessarily be self-incriminatory. Some courts therefore hold that the inference is not available if the witness's testimony would necessarily be self-incriminatory if favorable to the party who could have called the witness; however, the fact that the testimony might be self-incriminatory if adverse to the party not calling the witness does not preclude use of the missing witness inference. *United States v. Pitts,* 918 F.2d 197 (D.C.Cir. 1990). Here, there is no indication that any of the uncalled witness's testimony, if favorable to the defense, would be self-incriminatory.

Most courts hold that the doctrine does not apply if the uncalled witness is equally available to the parties. *E.g., United States v. Anchondo-Sandoval,* 910 F.2d 1234 (5th Cir. 1990). This is the accepted rule in this state. *State v. Davis,* 73 Wn.2d 271, 276-78, 438 P.2d 185 (1968). This question of availability does not mean that the witness is in court or is subject to the subpoena power.

> For a witness to be "available" to one party to an action, there must have been such a community of interest between the party and the witness, or the party must have so superior an opportunity for knowledge of a witness, as in ordinary experience would have made it reasonably probable that the witness would have been called to testify for such party except for the fact that his testimony would have been damaging.

Davis, at 277, 438 P.2d 185; *accord, United States v. MMR Corp (LA),* 907 F.2d 489 (5th Cir. 1990). The rationale for this requirement is that a party will likely call as a witness one who is bound to him by ties of affection or interest unless the testimony will be adverse, and that a party with a close connection to a potential witness will be more likely to determine in advance what the testimony would be. *Davis,* 73 Wn.2d at 277 (quoting 5 A.L.R.2d 895 (1949)).

Here, defendant testified that at the time he was arrested he could have located the people named on the list. His relationship with them was a business relationship or a personal one in that he claimed the people owed him money on personal loans or gambling debts from card games. Many of the names were first names only, thus known to defendant alone.

Defendant has argued, however, that the State could have investigated and tried to locate the witnesses itself, but it did not demonstrate any attempt to do so, nor did the State offer any proof it had tried to identify or subpoena the witnesses. The requirement, however, is, as one court has put it, that the party seeking benefit of the inference must show the "absent witness was peculiarly within the other party's power to produce". *United States v. Williams,* 739 F.2d 297, 299 (7th Cir. 1984).

Here, the prosecutor pointed out in his closing remarks that the defendant was the only one who could reasonably determine who the people on the slips were, given the first names listed. The prosecutor also pointed out that defendant could locate the people when he was arrested. Defendant's own testimony supported these remarks. Thus, the prosecutor showed the peculiar availability of the witnesses to the defense within the context of the missing witness doctrine.

Of course, the missing witness doctrine is improper if the prosecutor's comments infringe on the defendant's constitutional rights, for example, the right to remain silent.

We do not agree, however, that any comment referring to a defendant's failure to produce witnesses is an impermissible shifting of the burden of proof. To the extent *State v. Traweek,* 43 Wn.App. 99, 715 P.2d 1148, *review denied,* 106 Wn.2d 1007 (1986) indicates that the State may never comment on the defendant's failure to call witnesses or produce evidence, it is overly broad. It is disapproved to the extent it is inconsistent with our analysis herein. Here, nothing in the prosecutor's comments said that the defendant had to present any proof on the question of his innocence. The prosecutor was entitled to argue the reasonable inference from the evidence presented. Defendant testified. In so doing, he waived his right to remain silent. He specifically testified about the notations on the slips of paper. He testified he knew, at the time he was arrested, how to locate the people listed on the slips. Only their first names were listed, and according to his testimony he had a business or personal relationship with the people listed. Under these circumstances, the prosecutor's comments about defendant's failure to call the witnesses were not error.

Moreover, we note the trial court properly instructed the jury that counsel's remarks are not evidence; and that the State has the burden of proof and the defendant is presumed innocent.

There is no merit to defendant's contention that some of the prosecutor's comments constituted impermissible comment on facts not in evidence or impermissible evidence of uncharged crimes. A police officer testified for the State that the slips of paper constituted "crib sheets" as "a crude business ledger" of drug deals. This evidence carried the inference that notations on the papers represented specific drug transactions. The prosecutor did no more than argue this inference in the context of the missing witness rule. The inference was the one which the doctrine permits.

Finally, defendant maintains that credibility was central in this case, and therefore reversal is required due to the prejudicial effect of the prosecutor's remarks. This argument is premised on the conclusion that the prosecutor's comments were erroneous. As we have explained, the comments did not constitute error. The missing witness inference, if permissible in light of the limitations discussed in this opinion, is not impermissible simply because credibility is a central issue.

We do not rule out the possibility that there may be circumstances where comments by a prosecutor may in fact constitute prosecutorial misconduct by raising the inference that defendant has the burden of proof on an issue. This is not that case.

(Citations omitted.) (Footnotes omitted.) (Bold emphasis added.)

State v. Russell, 125 Wn.2d 24, 89, 882 P.2d 747 (1994), *cert. denied,* 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995) (defendant did not testify, but presented several witnesses; prosecutor in closing asked why defense did not call additional witnesses to support defense witnesses testimony; Held: prosecution did not impermissibly comment on defendant's invocation of right to remain silent, by posing questions for defense in closing argument as to why defendant had not brought somebody down from Canada to support contention that murder victim's ring, which defendant had given to friend, had been purchased in Canada; prosecution was making proper use of missing witness doctrine by questioning why evidence within control of defendant had not been submitted).

Case Law Defendant s Post-Arrest Silence Arguments Prohibited

State v. Davis, 38 Wn.App. 600, 686 P.2d 1143 (Div. 1 1984) (use of a defendant's postarrest silence, regardless of whether such silence follows *Miranda* warnings, is fundamentally unfair and violates the due process clause of the Const. art. 1, § 3).

State v. Belgarde, 110 Wn.2d 504, 511, 755 P.2d 174 (1988)

It is settled that the State may not, consistent with due process, use post-arrest silence following *Miranda* warnings to impeach a defendant's testimony at trial. *Doyle v. Ohio,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). *State v. Evans,* 96 Wn.2d 1, 3, 633 P.2d 83 (1981) stated:

> [T]he use, for impeachment purposes, of defendant's silence following receipt of *Miranda* warnings is fundamentally unfair and therefore violates the due process clause of the Fourteenth Amendment since the giving of the warnings implicitly assures defendant that silence will carry no penalty.

Silence in the wake of such warnings is "insolubly ambiguous" and may merely reflect reliance on the right to remain silent rather than a fabricated trial defense. *Doyle,* 426 U.S. at 617, 96 S.Ct. at 2244. Further, *Miranda* warnings impliedly assure that a defendant's silence will not be used against him at trial. *Doyle,* at 618, 96 S.Ct. at 2245.

State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996) (vehicular assault case where officer testified that defendant did not answer and looked away during initial questioning, and officer testified that defendant was smart drunk meaning defendant s evasive behavior and silence when interrogated, and prosecutor repeatedly emphasized smart drunk as a central theme in closing; Held: prejudicial error to comment on pre-arrest silence in case-in-chief, where defendant did not take the stand; reversed and remanded for new trial)

At trial, the right against self-incrimination prohibits the State from forcing the defendant to testify. *State v. Foster,* 91 Wn.2d 466, 473, 589 P.2d 789 (1979); *Miranda* [*v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)], 384 U.S. at 461, 86 S.Ct. at 1620-21. Moreover, the State may not elicit comments from witnesses or make closing arguments relating to a defendant's silence to infer guilt from such silence. As the United States Supreme Court said in *Miranda*, "[t]he prosecution may not ... use at trial the fact [the defendant] stood mute or claimed his privilege in the face of accusation." *Miranda,* 384 U.S. at 468 n. 37, 86 S.Ct. at 1624 n. 37. The purpose of this rule is plain. An accused's Fifth Amendment right to silence can be circumvented by the State "just as effectively by questioning the arresting officer or commenting in closing argument as by questioning defendant himself." *State v. Fricks,* 91 Wn.2d 391, 396, 588 P.2d 1328 (1979).

Courts have generally treated comments on post-arrest silence as a violation of a defendant's right to due process because the warnings under *Miranda* constitute an "implicit assurance" to the defendant that silence in the face of the State's accusations carries no penalty. The use of silence at the time of arrest and after the *Miranda* warnings is fundamentally unfair and violates due process. *Brecht v. Abrahamson,* 507 U.S. 619, 628, 113 S.Ct. 1710, 1716-17, 123 L.Ed.2d 353 (1993); *Doyle v. Ohio*, 426 U.S. 610, 617, 96 S.Ct. 2240, 2244-45, 49 L.Ed.2d 91 (1976).

But see State v. Easter, 130 Wn.2d 228, 237, 922 P.2d 1285 (1996)

The cases that have permitted testimony about the defendant's silence have done so only for the limited purpose of impeachment after the defendant has taken the stand, and not as substantive evidence of guilt when the defendant has not testified. *Fletcher v. Weir,* 455 U.S. 603, 606-07, 102 S.Ct. 1309, 1311-12, 71 L.Ed.2d 490 (1982) (post-arrest silence could be used for impeachment when no *Miranda* warnings given); *Jenkins v. Anderson,* 447 U.S. 231, 239, 100 S.Ct. 2124, 2129-30, 65 L.Ed.2d 86 (1980) (pre-arrest silence can be used to impeach defendant's exculpatory testimony); *Raffel v. United States,* 271 U.S. 494, 46 S.Ct. 566, 70 L.Ed. 1054 (1926) (silence at first trial permissible to impeach defendant's testimony at second trial). *See also State v. Watkins,* 53 Wn.App. 264, 273, 766 P.2d 484 (1989); *State v. Hamilton,* 47 Wn.App. 15, 20-21, 733 P.2d 580 (1987). See generally, Barbara Rook Snyder, A Due Process Analysis of the Impeachment Use of Silence in Criminal Trials, 29 WM. & MARY L. REV. 285 (1988).

(Footnote omitted.)

State v. Keene, 86 Wn.App. 589, 938 P.2d 839 (Div. 2 1997) (detective s testimony and prosecutor s argument to jury about defendant s failure to contact detective constituted impermissible comments on defendant s right to silence in violation of Fifth Amendment; Held: conviction reversed and remanded for new trial).

Case Law Defendant s Pre-Arrest Silence

State v. Easter, 130 Wn.2d 228, 243, 922 P.2d 1285 (1996) (vehicular assault case where officer testified that defendant did not answer and looked away during initial questioning, and officer testified that defendant was smart drunk meaning defendant s evasive behavior and silence when interrogated, and prosecutor repeatedly emphasized smart drunk as a central theme in closing; Held: prejudicial error to comment on pre-arrest silence in case-in-chief, where defendant did not take the stand; reversed and remanded for new trial)

The Fifth Amendment right to silence extends to situations prior to the arrest of the accused. An accused's right to remain silent and to decline to assist the State in the preparation of its criminal case may not be eroded by permitting the State in its case in chief to call to the attention of the trier of fact the accused's pre-arrest silence to imply guilt.

Nothing in our conclusion, however, prevents the State from introducing pre-arrest evidence of a non-testimonial nature about the accused, such as physical evidence, demeanor, conduct, or the like. Our opinion does not address the right of the State under state and federal due process principles to impeach the accused's testimony where the accused testifies and puts his or her credibility before the trier of fact.

But see State v. Easter, 130 Wn.2d 228, 237, 922 P.2d 1285 (1996)

The cases that have permitted testimony about the defendant's silence have done so only for the limited purpose of impeachment after the defendant has taken the stand, and not as substantive evidence of guilt when the defendant has not testified. *Fletcher v. Weir,* 455 U.S. 603, 606-07, 102 S.Ct. 1309, 1311-12, 71 L.Ed.2d 490 (1982) (post-arrest silence could be used for impeachment when no *Miranda* warnings given); *Jenkins v. Anderson,* 447 U.S. 231, 239, 100 S.Ct. 2124, 2129-30, 65 L.Ed.2d 86 (1980) (pre-arrest silence can be used to impeach defendant's exculpatory testimony); *Raffel v. United States,* 271 U.S. 494, 46 S.Ct. 566, 70 L.Ed. 1054 (1926) (silence at first trial permissible to impeach defendant's testimony at second trial). *See also State v. Watkins,* 53 Wn. App. 264, 273, 766 P.2d 484 (1989); *State v. Hamilton,* 47 Wn.App. 15, 20-21, 733 P.2d 580 (1987). See generally, Barbara Rook Snyder, A Due Process Analysis of the Impeachment Use of Silence in Criminal Trials, 29 WM. & MARY L. REV. 285 (1988).

(Footnote omitted.)

State v. Keene, 86 Wn.App. 589, 938 P.2d 839 (Div. 2 1997) (detectives testimony and prosecutors argument to jury about defendants failure to contact detective constituted impermissible comments on defendants right to silence in violation of Fifth Amendment; Held: conviction reversed and remanded for new trial).

Case Law Defendants Testimony Partial Silence Arguments Permitted

State v. Belgarde, 110 Wn.2d 504, 511-12, 755 P.2d 174 (1988)

However, once a defendant waives the right to remain silent and makes a statement to police, the prosecution may use such a statement to impeach the defendant's inconsistent trial testimony. This exception to the rule in *Doyle v. Ohio,* supra, [*Doyle v. Ohio,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)] was set forth in *Anderson v. Charles,* 447 U.S. 404, 100 S.Ct. 2180, 65 L.Ed.2d 222 (1980). *Accord, State v. Seeley,* 43 Wn.App. 711, 719 P.2d 168, *review denied*, 107 Wn.2d 1005 (1986); *State v. Hatley,* 41 Wn.App. 789, 801, 706 P.2d 1083, *review denied*, 104 Wn.2d 1024 (1985); *State v. Cosden,* 18 Wn.App. 213, 568 P.2d 802 (1977), *review denied*, 89 Wn.2d 1016, *cert. denied,* 439 U.S. 823, 99 S.Ct. 90, 58 L.Ed.2d 115 (1978). In particular, the State may question a defendant's failure to incorporate the events related at trial into the statement given police or it may challenge inconsistent assertions. Such was the situation in *Cosden* where the defendant had not remained silent, but had uttered a denial in one form and on trial asserted a different excuse. This "partial silence" at the time of the initial statement is not insolubly ambiguous, but "strongly suggests a fabricated defense and the silence properly impeaches the later defense." *Cosden,* at 221. Such questioning does not violate due process as the defendant has waived the right to remain silent concerning the subject matter of his statement. *Anderson,* 447 U.S. at 408, 100 S.Ct. at 2182.

Case Law

Defense Argument Responses Permitted

Invited Error Rule

[But be very careful, and read *Young* and *Sargent* first]

United States v. Young, 470 U.S. 1, 84 L.Ed.2d 1, 105 S.Ct. 1038, 1042-46 (1985) (Chief Justice Burgers outrage at improper tactics by both sides, with emphasis directed at prosecutors use of invited error rule to commit error; Held: reversal of conviction not required, but counsels conduct inexcusable)

The principal issue to be resolved is not whether the prosecutor's response to defense counsel's misconduct was appropriate, but whether it was "plain error" that a reviewing court could act on absent a timely objection. Our task is to decide whether the standard laid down in *United States v. Atkinson,* 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936), and codified in Federal Rule of Criminal Procedure 52(b), was correctly applied by the Court of Appeals.

Nearly a half century ago this Court counselled prosecutors "to refrain from improper methods calculated to produce a wrongful conviction...." *Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629, 633, 74 L.Ed. 2d 1314 (1935). The Court made clear, however, that the adversary system permits the prosecutor to "prosecute with earnestness and vigor." Ibid. In other words, "while he may strike hard blows, he is not at liberty to strike foul ones." Ibid.

The line separating acceptable from improper advocacy is not easily drawn; there is often a gray zone. Prosecutors sometimes breach their duty to refrain from overzealous conduct by commenting on the defendant's guilt and offering

unsolicited personal views on the evidence. Accordingly, the legal profession, through its Codes of Professional Responsibility, and the federal courts, have tried to police prosecutorial misconduct. In complementing these efforts, the American Bar Association's Standing Committee on Standards for Criminal Justice has promulgated useful guidelines, one of which states that

> "[i]t is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant." ABA Standards for Criminal Justice 3-5.8(b)(2d ed. 1980).

It is clear that counsel on both sides of the table share a duty to confine arguments to the jury within proper bounds. Just as the conduct of prosecutors is circumscribed, "[t]he interests of society in the preservation of courtroom control by the judges are no more to be frustrated through unchecked improprieties by defenders." *Sacher v. United States*, 343 U.S. 1, 8, 72 S.Ct. 451, 455, 96 L.Ed. 717 (1952). Defense counsel, like the prosecutor, must refrain from interjecting personal beliefs into the presentation of his case. See, e.g., ABA Model Code of Professional Responsibility DR 7-106(C)(3) and (4) (1980), quoted in n. 3, supra; ABA Model Rules of Professional Conduct, Rule 3.4(e)(1984). Defense counsel, like his adversary, must not be permitted to make unfounded and inflammatory attacks on the opposing advocate.

The kind of advocacy shown by this record has no place in the administration of justice and should neither be permitted nor rewarded; a trial judge should deal promptly with any breach by either counsel. These considerations plainly guided the ABA Standing Committee on Standards for Criminal Justice in laying down rules of trial conduct for counsel that quite properly hold all advocates to essentially the same standards. Indeed, the accompanying commentary points out that "[i]t should be accepted that both prosecutor and defense counsel are subject to the same general limitations in the scope of their argument," ABA Standards for Criminal Justice 4-7.8, p. 4.97, and provides the following guideline:

> "The prohibition of personal attacks on the prosecutor is but a part of the larger duty of counsel to avoid acrimony in relations with opposing counsel during trial and confine argument to record evidence. It is firmly established that the lawyer should abstain from any allusion to the personal peculiarities and idiosyncrasies of opposing counsel. A personal attack by the prosecutor on defense counsel is improper, and the duty to abstain from such attacks is obviously reciprocal." Id., at 4.99 (footnotes omitted).

These standards reflect a consensus of the profession that the courts must not lose sight of the reality that "[a] criminal trial does not unfold like a play with actors following a script." *Geders v. United States,* 425 U.S. 80, 86, 96 S.Ct. 1330, 1334, 47 L.Ed.2d 592 (1976). It should come as no surprise that "in the heat of argument, counsel do occasionally make remarks that are not justified by the testimony, and which are, or may be, prejudicial to the accused." *Dunlop v. United States,* 165 U.S. 486, 498, 17 S.Ct. 375, 379, 41 L.Ed. 799 (1897).

We emphasize that the trial judge has the responsibility to maintain decorum in keeping with the nature of the proceeding; "the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct." *Quercia v. United States,* 289 U.S. 466, 469, 53 S.Ct. 698, 77 L.Ed. 1321 (1933). The judge "must meet situations as they arise and [be able] to cope with ... the contingencies inherent in the adversary process." *Geders v. United States, supra,* 425 U.S., at 86, 96 S.Ct., at 1334. Of course, "hard blows" cannot be avoided in criminal trials; both the prosecutor and defense counsel must be kept within appropriate bounds. *See Herring v. New York,* 422 U.S. 853, 862, 95 S.Ct. 2550, 2555, 45 L.Ed.2d 593 (1975).

The situation brought before the Court of Appeals was but one example of an all too common occurrence in criminal trials the defense counsel argues improperly, provoking the prosecutor to respond in kind, and the trial judge takes no corrective action. Clearly two improper arguments two apparent wrongs do not make for a right result. Nevertheless, a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial. To help resolve this problem, courts have invoked what is sometimes called the "invited response" or "invited reply" rule, which the Court treated in *Lawn v. United States,* 355 U.S. 339, 78 S.Ct. 311, 2 L.Ed.2d 321 (1958).

The petitioners in Lawn sought to have the Court overturn their criminal convictions for income tax evasion on a number of grounds, one of which was that the prosecutor's closing argument deprived them of a fair trial. In his closing argument at trial, defense counsel in Lawn had attacked the Government for "persecuting" the defendants. He told the jury that the prosecution was instituted in bad faith at the behest of federal revenue agents and asserted that the Government's key witnesses were perjurers. The prosecutor in response vouched for the credibility of the challenged witnesses, telling the jury that the Government thought those witnesses testified truthfully. In concluding that the prosecutor's remarks, when viewed within the context of the entire trial, did not deprive petitioners of a fair trial, the Court pointed out that defense

counsel's "comments clearly invited the reply." *Id.,* at 359-360, n. 15, 78 S.Ct., at 322-323, n. 15.

This Court's holding in Lawn was no more than an application of settled law. Inappropriate prosecutorial comments, standing alone, would not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding. Instead, as Lawn teaches, the remarks must be examined within the context of the trial to determine whether the prosecutor's behavior amounted to prejudicial error. In other words, the Court must consider the probable effect the prosecutor's response would have on the jury's ability to judge the evidence fairly. In this context, defense counsel's conduct, as well as the nature of the prosecutor's response, is relevant. *See United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 242, 60 S.Ct. 811, 853, 84 L.Ed. 1129 (1940); *Crumpton v. United States,* 138 U.S. 361, 364, 11 S.Ct. 355, 356, 34 L.Ed. 958 (1891). Indeed most Courts of Appeals, applying these holdings, have refused to reverse convictions where prosecutors have responded reasonably in closing argument to defense counsel's attacks, thus rendering it unlikely that the jury was led astray.

In retrospect, perhaps the idea of "invited response" has evolved in a way not contemplated. Lawn and the earlier cases cited above should not be read as suggesting judicial approval or encouragement of response-in-kind that inevitably exacerbates the tensions inherent in the adversary process. As Lawn itself indicates, the issue is not the prosecutor's license to make otherwise improper arguments, but whether the prosecutor's "invited response," taken in context, unfairly prejudiced the defendant.

In order to make an appropriate assessment, the reviewing court must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo. Thus the import of the evaluation has been that if the prosecutor's remarks were "invited," and did no more than respond substantially in order to "right the scale," such comments would not warrant reversing a conviction.

Courts have not intended by any means to encourage the practice of zealous counsel's going "out of bounds" in the manner of defense counsel here, or to encourage prosecutors to respond to the "invitation." Reviewing courts ought not to be put in the position of weighing which of two inappropriate arguments was the lesser. "Invited responses" can be effectively discouraged by prompt action from the bench in the form of corrective instructions to the jury and, when necessary, an admonition to the errant advocate.

Plainly, the better remedy in this case, at least with the accurate vision of hindsight, would have been for the District Judge to deal with the improper argument of the defense counsel promptly and thus blunt the need for the prosecutor to respond. Arguably defense counsel's misconduct could have warranted the judge to interrupt the argument and admonish him, *see Viereck v. United States,* 318 U.S. 236, 248, 63 S.Ct. 561, 566, 87 L.Ed. 734 (1943), thereby rendering the prosecutor's response unnecessary. Similarly, the prosecutor at the close of defense summation should have objected to the defense counsel's improper statements with a request that the court give a timely warning and curative instruction to the jury. Defense counsel, even though obviously vulnerable, could well have done likewise if he thought that the prosecutor's remarks were harmful to his client. Here neither counsel made a timely objection to preserve the issue for review. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 644, 94 S.Ct. 1868, 1872, 40 L.Ed.2d 431 (1974). However, interruptions of arguments, either by an opposing counsel or the presiding judge, are matters to be approached cautiously. At the very least, a bench conference might have been convened out of the hearing of the jury once defense counsel closed, and an appropriate instruction given.

Here the Court of Appeals was not unaware of our holdings and those of other Circuits, but seemingly did not undertake to weigh the prosecutor's comments in context. The court acknowledged defense counsel's obvious misconduct, but it does not appear that this was given appropriate weight in evaluating the situation.

We share the Court of Appeals' desire to minimize "invited responses"; and we agree that the prosecutor's response constituted error. In addition to departing from the Tenth Circuit's "rule" prohibiting such remarks, the prosecutor's comments crossed the line of permissible conduct established by the ethical rules of the legal profession, as did defense counsel's argument, see supra, at 1042 - 1044, and went beyond what was necessary to "right the scale" in the wake of defense counsel's misconduct. Indeed the prosecutor's first error was in failing to ask the District Judge to deal with defense counsel's misconduct.

(Footnotes omitted.)

State v. Sargent, 40 Wn.App. 340, 344-45, 698 P.2d 598 (Div. 1 1985) ((1) prosecutor's remarks directly placing integrity of prosecution on side of witness' credibility were prejudicial so as to deprive defendant of fair trial; (2) error in prosecutor's calling attention to defendant's failure to testify was not harmless; (3) prejudicial effect of photographs of victim outweighed probative value; (4) it was error to permit detective to state his impression that defendant's response to learning of his wife's death was contrived; (5)

trial court erred in admitting testimony concerning argument during which defendant hit his wife eight months prior to her death; Held: conviction reversed and remanded for new trial)

The State contends that defense counsel's argument to the jury opened up the issue of the prosecutor's personal beliefs, and thus the response is proper rebuttal. In *State v. Wright*, 97 Wash. 304, 307, 166 P. 645 (1917), the defendant insinuated that the prosecutor did not have the courage to dismiss the action, and the court held it was not error for the prosecutor to state his belief that the defendant was guilty in rebuttal.

The general rule is that remarks of the prosecutor, that would otherwise be improper, are not grounds for reversal where they are invited or provoked by defense counsel, or in reply to defense counsel's statements, unless the remarks are so prejudicial that an instruction would not cure them. *State v. Davenport,* 100 Wn.2d 757, 761, 675 P.2d 1213 (1984).

In *United States v. Young,* ___ U.S. ___, ___, 105 S.Ct. 1038, 1045, 84 L.Ed.2d 1 (1985), the Supreme Court reevaluated the rule, stating:

> "In order to make an appropriate assessment, the reviewing court must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo. Thus the import of the evaluation has been that if the prosecutor's remarks were "invited," and did no more than respond substantially in order to "right the scale," such comments would not warrant reversing a conviction."

The Court criticized the practice of responding in kind to improper argument by defense counsel, and made it clear that the State's appropriate response is to request a curative instruction at trial. The Court held that the test is not whether the prosecutor's remarks were invited, but whether, taken in context, the remarks unfairly prejudiced the defendant.

State v. Swan, 114 Wn.2d 613, 662-63, 790 P.2d 610 (1990), *cert. denied,* 498 U.S. 1046, 112 L.Ed.2d 772, 111 S.Ct. 752 (1991) (Counsel must be accorded a reasonable latitude in argument to draw and express inferences and deductions from the evidence. Moreover, remarks of the deputy prosecuting attorney that would otherwise be improper are not grounds for reversal where they are in reply to defense counsel s statements unless the remarks are so prejudicial that an instruction would not cure them. (Footnotes omitted.)).

State v. Gentry, 125 Wn.2d 570, 643-44, 888 P.2d 1105 (1995), *cert. denied,* 516 U.S. 843, 116 S.Ct. 131, 133 L.Ed.2d 79 (1995) (not error for prosecutor to discuss Biblical story of David and Goliath in response to extensive use of Biblical stories by defense counsel)

> A prosecuting attorney s remarks, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.

(citing with approval *State v. Russell,* 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), *cert. denied,* 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995) (prosecutor entitled to make fair response to defense counsel s arguments); *State v. Dennison,* 72 Wn.2d 842, 849, 435 P.2d 526 (1967); *State v. La Porte,* 58 Wn.2d 816, 822, 365 P.2d 24 (1961) (remarks of a prosecuting attorney, including remarks that would otherwise be improper, are not grounds for reversal where they are invited, provoked, or occasioned by defense counsel s statements)).

State v. Hardy, 83 Wn.App. 167, 178, 920 P.2d 626 (Div. 1 1996), *reversed on other grounds,* 133 Wn.2d 701, 946 P.2d 1175 (1997) (prosecutor argued that defense presented no reason why [victim] would lie ; Held: invited)

> Here, the prosecutor was responding to defense counsel's remarks during closing implying that Wilkins was fabricating her story out of spite. Thus, even if improper, the remarks were invited and are not particularly prejudicial such that a curative instruction would not alleviate any prejudice.

Case Law Defense Counsel Disparaging Arguments Prohibited

State v. Reed, 102 Wn.2d 140, 143-44, 146, 684 P.2d 699 (1984) (prosecutor said defendant was a liar four times, stated defense had no case, implied defense counsel believed defendant was guilty, said the defendant was a "murder two", and implied defense diminished capacity witnesses should not be believed because they were from out of town and drove fancy cars; Held: reversible error)

> &*If I irritated him, it is probably because I had all the goods. It must be very difficult to represent somebody like Gordon Reed when you don't have anything....*
>
> &Are you going to let a bunch of city lawyers come down here and make your decision? A bunch of city doctors who drive down here in their Mercedes Benz?

These statements suggest not the dispassionate proceedings of an American jury trial, but the impassioned arguments of a character from Camus' "The Stranger".

> [Footnote] In "The Stranger", the hero is convicted of murder and sentenced to death, in part, because the prosecutor accused him of immorality because he did not cry at his mother's funeral. Although the dramatics of

the prosecutor here were more relevant to the facts of the case, they were hardly less prejudicial.

Case Law Defense Theory Not Supported by Evidence Argument Permitted

State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994), *cert. denied,* 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995) (it is not misconduct for prosecutor to argue that evidence does not support defense theory).

Case Law Defense Theory Jury Violates Oath if it Accepts Defense Theory Arguments Prohibited

State v. Coleman, 74 Wn.App. 835, 838-39, 876 P.2d 458 (Div. 1 1994), *review denied*, 125 Wn.2d 1017 (1995) (misconduct, but harmless)

The prosecutor presented a short rebuttal argument, which ended with the following comments:

> It is your job to apply the facts to the law, and we cannot second guess you, and will not second guess you, and if you determine that the only thing that happened here was a theft then that is your judgment. And you are entitled to make it, but I would suggest to you that to do so you have to do two things. And one is to ignore the actual evidence in front of you, and the second is thereby to violate your [oa]th as jurors.

A prosecutor does not commit misconduct by arguing that the jury would have to disregard the evidence in order to reach a certain result or that to disregard evidence would be in violation of their oath. While the argument here could be construed as conveying the above, it could also be construed as telling the jury that it would violate its oath if it disagreed with the State's theory of the evidence. Under this construction, the argument would be improper. Because a substantial risk exists that the prosecutor's comments could be so construed, we treat the comments as improper.

Case Law Experiments Inviting Jury to Conduct

State v. Strandy, 49 Wn.App. 537, 544-45, 745 P.2d 43 (Div. 2 1987), *review denied*, 109 Wn.2d 1027 (1988) (prosecutor invited jury to conduct memory experiments to try to remember what they did on particular day to explain why state s witnesses had memory lapses; Held: improper, but not reversible error).

State v. Balisok, 123 Wn.2d 114, 117-19, 866 P.2d 631 (1994) (Held: jury s reenactment of evidence not improper)

> As a general rule, appellate courts are reluctant to inquire into how a jury arrives at its verdict. A strong, affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury.
>
> [Nonetheless, the consideration of novel or extrinsic evidence by a jury is misconduct and can be grounds for a new trial. "Novel or extrinsic evidence is defined as information that is outside all the evidence admitted at trial, either orally or by document." (Italics ours) Such evidence is improper because it is not subject to objection, cross examination, explanation or rebuttal.
>
> The reenactments engaged in by the jury here did not constitute such extrinsic evidence. Primarily, it must be noted that the jury foreperson's affidavit does not show that the jury considered any evidence which was outside of, or extrinsic to, the evidence already presented at trial. *See, e.g., People v. Kurena,* 87 Ill.App.3d 771, 776, 43 Ill.Dec. 277, 282, 410 N.E.2d 277, 282 (1980) (jury experiment with a facsimile of the murder weapon not extrinsic evidence); *United States v. Hephner,* 410 F.2d 930, 936 (7th Cir. 1969) (jury experiment of having one juror cover his head and wear sunglasses not extrinsic evidence). Rather, the reenactments were entirely permissible simulations of the testimony at trial. "[W]here the jurors attempt to re-enact the crime during their deliberations in accordance with their own recollection of the testimony, their conduct constitutes nothing more than an 'application of everyday perceptions and common sense to the issues presented in the trial.' " *People v. Harris,* 84 A.D.2d 63, 105, 445 N.Y.S.2d 520, 546, 31 A.L.R.4th 525 (1981) (quoting *People v. Brown,* 48 N.Y.2d 388, 393, 399 N.E.2d 51, 423 N.Y.S.2d 461 (1979)*), aff'd,* 57 N.Y.2d 335, 456 N.Y.S.2d 694, 442 N.E.2d 1205 (1982), *cert. denied,* 460 U.S. 1047, 103 S.Ct. 1448, 75 L.Ed.2d 803 (1983).

(Citations omitted.)

Query Is it misconduct for prosecutor to ask jury to reenact incident based on admissible evidence?

Case Law Inferences from Evidence Arguments Permitted

State v. Mak, 105 Wn.2d 692, 698, 718 P.2d 407, *cert. denied,* 479 U.S. 995, 93 L.Ed.2d 599, 107 S.Ct. 599 (1986) (In closing argument, a prosecutor has wide latitude to draw and express reasonable inferences from the evidence. (Footnote omitted.)).

State v. Copeland, 130 Wn.2d 244, 290-91, 922 P.2d 1304 (1996)

> "However, prejudicial error does not occur until it is clear that the prosecutor is not arguing an inference from the evidence, but is expressing a personal opinion." Thus, prosecutors may argue inferences from the evidence, including inferences as to why the jury would want to believe one witness over another. *State v. Brett,* 126 Wn.2d 136, 175, 892

P.2d 29 (1995), *cert. denied,* ___ U.S. ___, 116 S.Ct. 931, 133 L.Ed.2d 858 (1996).

(Citation omitted.)

Case Law Inferences from Evidence Liar Arguments Permitted

State v. Smith, 104 Wn.2d 497, 510-11, 707 P.2d 1306 (1985) (counsel may comment on witness s veracity as long as comment is not an expression of personal opinion and counsel does not argue facts beyond the record).

State v. Carter, 74 Wn.App. 320, 330-32, 875 P.2d 1 (Div. 1 1994), *affirmed,* 127 Wn.2d 836, 904 P.2d 290 (1995) (prosecutor suggested defense was characterizing the officers as liars and conspirators even though nothing in defendant s testimony or counsel s argument suggested that defendant believed she was being framed or that there was a conspiracy against her; Held: misconduct, but harmless).

State v. Copeland, 130 Wn.2d 244, 291-92, 922 P.2d 1304 (1996)

In *State v. Adams,* 76 Wn.2d 650, 660, 458 P.2d 558, *rev'd on other grounds by,* 403 U.S. 947, 91 S.Ct. 2273, 29 L.Ed.2d 855 (1971), the prosecutor called the defendant a liar several times during closing argument. Each time, the prosecutor referred to specific evidence, including the defendant's own testimony, which "clearly demonstrated that in fact [the] defendant had lied." The court held that the argument fell within the rule allowing counsel to draw and express reasonable inferences from the evidence. *Adams,* 76 Wn.2d at 660, 458 P.2d 558. *See also State v. Luoma,* 88 Wn.2d 28, 40, 558 P.2d 756 (1977) (defendant argued that prosecutor's comments in closing argument to effect that defendant was a liar and he knew the jury would have the "guts" to do what they had to do were improper; court found support for statement in the evidence); *State v. Jefferson,* 11 Wn.App. 566, 524 P.2d 248 (1974) (court said prosecutor's use of word "liar" as a comment on defendant's credibility not improper where evidence showed defendant was not truthful).

Significantly, the prosecutor did not simply call Copeland a liar. Instead, his comments were related to the evidence and drew inferences that Copeland lied because his testimony conflicted with that of other witnesses. Like the cases cited above, there is evidence which supports the prosecutor's inferences that Copeland was not credible.

But, Not Guilty Verdict Means Witnesses Lied or Mistaken Arguments Prohibited

State v. Barrow, 60 Wn.App. 869, 874-76, 809 P.2d 209, *review denied* 118 Wn.2d 1007 (Div. 1 1991) (Held: comments by prosecutor in closing and rebuttal arguments that defendant called police officers liars and that jury was required to completely disbelieve officers' testimony in order to find defendant not guilty constituted misconduct, but not reversible error)

Barrow contends that the prosecutor's closing argument was inflammatory and deprived him of a fair trial. In closing, the prosecutor asserted that by giving testimony contradictory to the officers' testimony, Barrow effectively called the officers liars. The prosecutor continued this line of argument even after the trial judge sustained Barrow's initial objection.

Barrow also assigns error to the part of the prosecutor's rebuttal argument in which she told the jury that "in order for you to find the defendant not guilty on either of these charges, you have to believe his testimony and you have to completely disbelieve the officers' testimony. You have to believe that the officers are lying." Barrow's objection to this statement was overruled.

It has not been decided in this state whether it is misconduct for a prosecutor to argue that a defendant in essence called the police witnesses liars. It has been said, however, that cross examination in which the prosecutor attempts to get the defendant to call the State's witnesses liars is "argumentative, impertinent and uncalled for". *State v. Green,* 71 Wn.2d 372, 380-81, 428 P.2d 540 (1967) (the error was not so deliberate, flagrant, persistent, or genuinely inflammatory as to warrant a new trial). It was also "incorrect" under the particular facts of another case for a prosecutor to argue that a verdict for defendant means that the jury said the police officers are liars and perjurers. *State v. Brown,* 35 Wn.2d 379, 387, 213 P.2d 305 (1949) (statement although incorrect did not constitute prejudicial error).

Other courts, moreover, consistently have found liar arguments similar to those at issue here to be improper. They reason that arguments about a defendant's opinion of the government's witnesses' credibility are irrelevant and interfere with the jury's duty to make credibility determinations. *See, e.g., United States v. Richter,* 826 F.2d 206, 208-09 (2d Cir. 1987); *United States v. Davis,* 328 F.2d 864, 867 (2d Cir. 1964); *United States v. Hestie,* 439 F.2d 131 (2d Cir. 1971); *People v. Ochoa,* 86 A.D.2d 637, 446 N.Y.S.2d 339, 340 (1982). Based upon this authority and the related Washington cases of Green and Brown, we hold the arguments at issue here to be misconduct. It was a mischaracterization to say that the defendant was calling the officers liars. The officers simply could have been mistaken about the seller's identity. Furthermore, the jurors did not need to "completely disbelieve" the officers' testimony in order to acquit Barrow; all that

they needed was to entertain a reasonable doubt that it was Barrow who made the sale to Officer O'Neal.

(Footnote omitted.)

State v. Fleming, 83 Wn.App. 209, 213-14, 921 P.2d 1076 (Div. 1 1996), *review denied,* 131 Wn.2d 1018 (1997) (Held: reversed and remanded for new trial even through defense failed to object)

> This court has repeatedly held that it is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken. *State v. Casteneda-Perez,* 61 Wn.App. 354, 362-63, 810 P.2d 74 ("it is misleading and unfair to make it appear that an acquittal requires the conclusion that the police officers are lying"), *review denied*, 118 Wn.2d 1007 (1991); *State v. Wright,* 76 Wn.App. 811, 826, 888 P.2d 1214, *review denied* 127 Wn.2d 1010 (1995); *State v. Barrow,* 60 Wn.App. 869, 874-75, 809 P.2d 209, *review denied* 118 Wn.2d 1007 (1991). The prosecutor's argument misstated the law and misrepresented both the role of the jury and the burden of proof. The jury would not have had to find that D.S. was mistaken or lying in order to acquit; instead, it was required to acquit unless it had an abiding conviction in the truth of her testimony. Thus, if the jury were unsure whether D.S. was telling the truth, or unsure of her ability to accurately recall and recount what happened in light of her level of intoxication on the night in question, it was required to acquit. In neither of these instances would the jury also have to find that D.S. was lying or mistaken, in order to acquit.
>
> We note that this improper argument was made over two years after the opinion in *Casteneda-Perez, supra.* We therefore deem it to be a flagrant and ill-intentioned violation of the rules governing a prosecutor's conduct at trial. We summarily reject the contention by the State raised during oral argument for this appeal that the comments were not misconduct, in that the defendants did not testify at trial. As illustrated by the prosecutor's next point raised during closing argument, the "lying or mistaken" argument can be even more egregious when the defendant does not testify than when he or she does. Misstating the bases upon which a jury can acquit may insidiously lead, as it did here, to burden-shifting and to an invasion of the right to remain silent. First, the prosecutor erred by telling the jury that it could only acquit if it found that the complaining witness lied or was confused. Next, the prosecutor argued that there was no reasonable doubt because there was no evidence that the witness was lying or confused, and if there had been any such evidence, the defendants would have presented it.

Case Law Law Not Given to Jury Arguments Prohibited

State v. Davenport, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984) (prosecutor unilaterally argued that defendant guilty as accomplice despite lack of accomplice instructions; Held: misconduct, conviction reversed and remanded for new trial)

> Statements by the prosecution or defense to the jury upon the law, must be confined to the law as set forth in the instructions given by the court. The State neither charged the petitioner as an accomplice under RCW 9A.08.020, nor sought an instruction on accomplice liability at the close of the case. Nevertheless, the prosecutor stated in rebuttal closing argument that it did not matter who entered the building as the petitioner was an accomplice. "Accomplice" is a legal theory of criminal liability. Consequently, the comment is clearly a statement of law that was not contained in the instructions given to the jury and was, therefore, improper.

(Citations omitted.)

State v. Ager, 75 Wn.App. 843, 863-64, 880 P.2d 1017 (Div. 1 1994) (prosecutor abandoned theft theory when it failed to submit the theory in the to convict instructions; Held: misconduct to argue theft theory of case to jury, and conviction reversed), *affirmed on this ground but reversed on other grounds,* 128 Wn.2d 85, 87 fn. 1, 904 P.2d 715 (1995).

Case Law Literary Allusions Arguments Permitted

[But Be Careful]

State v. Claflin, 38 Wn.App. 847, 852-52, 690 P.2d 1186 (Div. 2 1984), *review denied*, 103 Wn.2d 1014 (1985) (conviction reversed in rape case due to prosecutor s reading of poem describing rape's emotional effect on its victims)

> With respect to the bounds of proper argument and the use of literary allusions, we can say it no better than it was said in *State v. Stacy,* 355 S.W.2d at 380-81, quoting in turn from *Evans v. Town of Trenton,* 112 Mo. 390, 20 S.W. 614, 616 (1892):
>
> > "... The largest and most liberal freedom of speech is allowed an attorney in the conduct of his client's cause. 'The range of discussion is wide. &In his address to the jury it is his privilege to descant upon the facts proved or admitted in the pleadings; &His illustrations may be as various as the resources of his genius; his argumentation as full and profound as learning can make it; and he may, if he will, give play to his wit, or wings to his imagination. To this freedom of speech, however, there are some limitations. & So, too, what a counsel says or does in the argument of a case must be pertinent to the matter on trial before the jury, and he takes the hazard of its not being so. Now, statements of facts not proved, and comments thereon, are outside of

> the case. They stand legally irrelevant to the matter in question, and are therefore not pertinent. If not pertinent, they are not within the privilege of counsel.' & Attorneys sometimes, with a persistency worthy of a better cause, press, during the trial, into the record, much that is objectionable; and, as soon as they get verdicts, they seem to awake to a realization of the fact that they have performed works of supererogation, and have done more to win their causes than was required of them, or more than was necessary, and, as an excuse for this excess of energy, insist that it had no prejudicial effect, and no harm resulted from it...."

State v. Gentry, 125 Wn.2d 570, 643-44, 888 P.2d 1105 (1995), *cert. denied,* 516 U.S. 843, 116 S.Ct. 131, 133 L.Ed.2d 79 (1995) (Bible; not error for prosecutor to discuss Biblical story of David and Goliath in response to extensive use of Biblical stories by defense counsel).

Note on The Bible

Washington case law has not directly addressed the propriety of usage of the Bible during closing argument. *Gentry, supra,* implies that the prosecutor's use of David and Goliath was improper, but not reversible error due to the extensive use of Biblical stories by the defense. Other courts which have addressed the issue, though, clearly frown on the practice

Commonwealth v. Chambers, 528 Pa. 558, 599 A.2d 630 (Pa. 1991), *cert. denied,* 504 U.S. 946, 112 S.Ct. 2290, 119 L.Ed.2d 214 (1992) (courts are not ecclesiastical courts, and therefore, there is no reason to refer to religious rules or commandments to support the imposition of the death penalty.).

Commonwealth v. Daniels, 537 Pa. 464, 644 A.2d 1175, 1182 (Pa. 1994) (defense counsel, like prosecutors, must refrain from references to the Bible in opposition to imposition of the death penalty).

People v. Wrest, 3 Cal.4th 1088, 839 P.2d 1020, 13 Cal.Repr.2d 511, 520, *cert. denied,* 510 U.S. 848, 114 S.Ct. 144, 126 L.Ed.2d 106 (1993) (rationale for limitation on use of the Bible is that arguments, from either side, regarding what the Bible requires tend to diminish the jury's sense of responsibility for its verdict and to imply that another, higher law should be applied in capital cases, thereby displacing the law in the court's instructions; i.e. arguing law not provided to jury).

Case Law Marital Privilege Arguments Prohibited

State v. Charlton, 90 Wn.2d 657, 660, 585 P.2d 142 (1978) (improper prosecutorial comment concerning defendant's exercise of statutory marital privilege was mindful, flagrant, and ill-intentioned conduct, and thus defendant did not waive his right to object to such conduct on appeal by failing to request curative instruction following the comment; Held, conviction reversed)

> In rebuttal, the prosecutor, among other things, stated: "I'll go one better. Who was there that was another witness to the arrest, the defendant could have called? Where is Mrs. Charlton?"

Case Law Matters Outside Record Arguments Prohibited

State v. Huson, 73 Wn.2d 660, 662, 440 P.2d 192 (1968), *cert. denied,* 393 U.S. 1096, 21 L.Ed.2d 787, 89 S.Ct. 886 (1969) (personal self-promotion improper)

> I believe in the laws of the State of Washington. I believe in the Constitution of the State of Washington, have sworn to uphold it. I believe in the Constitution of the United States. I am a church member. I have a family in this community, lost a son in the war in Saigon, or son-in-law in the war in Saigon.

State v. Dennison, 115 Wn.2d 609, 622-23, 801 P.2d 193 (1990) (prosecutor's comment apologizing to decedent's mother for mispronouncing decedent's name ill advised, but reversal not required).

State v. Stith, 71 Wn.App. 14, 21-22, 856 P.2d 415 (Div. 1 1993) (prosecutor's comments that defendant just out of jail and returned to criminal ways by dealing drugs again and that incredible safeguards exist to prevent police officer perjury and court found probable cause; Held: conviction reversed)

> Of far greater concern are the prosecutor's comment in closing argument that the appellant "was just coming back and he was dealing again", and his later comment, in rebuttal, to the effect that our system has incredible safeguards to prevent police officer perjury and that probable cause had already been determined.
>
> The first comment indicated to the jury that the prior crime for which appellant was convicted was drug related (a fact which had not previously been entered into evidence) and is also impermissible opinion "testimony" that the appellant was selling drugs again and thus was guilty, not only of the previous charge, but also of the current charge. Moreover, the remark was made in spite of a direct court order on a motion in limine to exclude any evidence of prior drug convictions.
>
> The second comment concerning "incredible safeguards" and the court's prior determination of probable cause not only constituted "testimony" as to facts not in evidence but also indicated to the jury that, if there were any question of the defendant's guilt, the defendant would not even be in court. This was tantamount to arguing that guilt had already been determined. Clearly, both comments were flagrantly improper.

State v. Russell, 125 Wn.2d 24, 88, 882 P.2d 747 (1994), *cert. denied,* 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995) (prosecutor improperly suggested that evidence not presented at trial provided additional grounds for finding defendant guilty; Held:

curative instruction avoided reversal)

> Despite this admonition, the deputy prosecutor could not resist commenting further on the possibility of withheld evidence. During rebuttal, she referred to defense counsel s notions that evidence is being held back , and to the large amount of discovery information made available to the defense. The deputy prosecutor then added, You know they have had access to their own experts to look at & this evidence, very few of whom you heard from . The defense objected, and the court reminded the jury that it was to consider the evidence before it, the exhibits and the instructions.

(Citation omitted.)

Case Law Minimizing Jury Responsibility Arguments Prohibited

State v. Torres, 16 Wn.App. 254, 262, 554 P.2d 1069 (Div. 1 1976)

> Prosecutorial argument that an accused may receive probation is generally considered to be improper, and the issue then arises whether the impropriety has been prejudicial. *See Lovely v. United States,* 169 F.2d 386 (4th Cir. 1948); *Fryson v. State,* 17 Md.App. 320, 301 A.2d 211 (1973); Annot., 16 A.L.R.3d 1137, 1140 (1967). Such comment may distract the jury from its function of determining whether the defendant was guilty or innocent beyond a reasonable doubt by informing them, in substance, that it does not matter if their verdict is wrong because the judge may correct its effect. In Washington, the cases that have discussed the problem have been primarily concerned with the issue of the death penalty and have not faced the current problem squarely. *See State v. Talbott,* 199 Wash. 431, 91 P.2d 1020 (1939); *State v. Buttry,* 199 Wash. 228, 90 P.2d 1026 (1939); *State v. Knapp,* 194 Wash. 286, 77 P.2d 985 (1938); *State v. Stratton,* 170 Wash. 666, 17 P.2d 621 (1932).
>
> We hold that continuing to underscore the irrelevant argument in the face of the consistent sustaining of objections to the argument by the trial judge constituted yet another error that added to the unfairness that permeated the trial because of the overreaching of the deputy prosecutor.

Case Law Name-calling Arguments Prohibited

State v. Rose, 62 Wn.2d 309, 313-14, 382 P.2d 513 (1963) (Held: that deputy prosecuting attorney's characterization of defendant in closing argument as drunken homosexual was prejudicial where state's witnesses testified that defendant had not been drunk and there were no allegations or proof of any homosexual behavior other than the alleged activity for which defendant was being prosecuted)

> However, it should be borne in mind that the term homosexual was not used in summing up the evidence, but was delivered as a degrading description of the appellant, coupled with the adjective 'drunken' (discussed above). There were no allegations nor proof of any homosexual behavior other than the alleged activity for which he was being prosecuted. We do not now decide that the term 'homosexual' as used here would constitute reversible error if used alone; however, used in the phrase 'a drunken homosexual' in the posture of this case, it constituted prejudicial misconduct because it tended to degrade appellant in the minds of the jury in a case where the evidence did not warrant such a characterization.

(Emphasis in original.)

State v. Music, 79 Wn.2d 699, 717, 489 P.2d 159 (1971), *judgment vacated on other grounds,* 408 U.S. 940, 33 L.Ed.2d 764, 92 S.Ct. 2877 (1972) (prosecutor referred to defendant as a mad dog and to defendant and friends as four punks in a car ; Held: improper, but not reversible error)

> That the foregoing statements of the prosecutor constituted reprehensible conduct is without dissent.

State v. Belgarde, 110 Wn.2d 504, 508-9, 755 P.2d 174 (1988) (conviction reversed due to misconduct)

> Not only did the prosecutor say the defendant belonged to a group of butchers and madmen who killed indiscriminately, but in so doing he also testified as to facts outside the record. He told the jury that AIM [American Indian Movement] was a "deadly group of madmen", "the people are frightened of AIM", and that AIM is "something to be frightened of when you are an Indian and you live on the reservation". The defendant described AIM as a group organized to protect Indian rights. The prosecution's statements that AIM is a group of terrorists (which he based on his own memory of the events at Wounded Knee) constituted not argument, but testimony refuting the defendant's description.

Case Law Officers of the Court Arguments Permitted

State v. Benn, 120 Wn.2d 631, 676, 845 P.2d 289 (1993), *cert. denied,* 510 U.S. 944, 125 L.Ed.2d 331, 114 S.Ct. 382 (1993) ([T]he prosecutor s reference to all jurors and attorneys as officers of the court merely charged the jurors not to be guided by emotion. This was proper.).

Case Law Personal Beliefs Arguments Prohibited

RPC 3.4 (e) and (f)

A lawyer shall not:

(e) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, or assert personal knowledge of facts in issue except when testifying as a witness; or

(f) In trial, state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused, but the lawyer may argue, on his or her analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

State v. Case, 49 Wn.2d 66, 68, 298 P.2d 500 (1956) (cumulative effect of prosecutor's repeated improprieties in argument including statement that defendant had raped his own daughter, together with his branding of defendant's character witnesses as "his entire herd", constituted such flagrant misconduct that no instruction or series of instructions could have cured the error; Held: conviction reversed)

'I doubt in my mind that anyone at this point has any question in their mind about the guilt or innocence of this man. I doubt that you haven't already made up your mind. Now, you must have, as human beings. But if you haven't, don't hold it against me, I mean, that is my opinion about what this evidence shows and how clearly this evidence indicates that this girl has been violated. This girl has been sexually attacked by a person; by a man by her father. It is called statutory rape. Carnal knowledge is just a nice name for statutory rape. This girl has been raped by her own father. It is not a nice thing.' (Italics ours.)

If presented as a summation of the evidence, such language, prefaced with at least an implied 'The evidence establishes that,' would be excused if not approved. But that is not the situation here. We cannot interpret the quoted statement, taken in context, as anything other than an attempt to impress upon the jury the deputy prosecuting attorney's personal belief in the defendant's guilt. As such, it was not only unethical but extremely prejudicial.

(Citations omitted.)

State v. Reed, 102 Wn.2d 140, 144, 684 P.2d 699 (1984) (prosecutor said defendant was a liar four times, stated defense had no case, said the defendant was a "murder two", and implied the defense witnesses should not be believed because they were from out of town and drove fancy cars; Held: reversible error).

... Then, the final the final insult to Anola Reed came from the eloquence of Don Taylor. The final insult to that poor woman, because Gordon Reed doesn't have her around any more, it should be manslaughter. Whew! That is like out of Captain Marvel.... The kids told you he hit her with the chair, and then he stabbed her. He knowingly assaulted her with a weapon or instrument likely to cause harm. He's a cold murder two. It's cold. There is no question about murder two.

Case Law Provoking Mistrial Prohibited

State v. Cochran, 51 Wn.App. 116, 118-20, 751 P.2d 1194, *review denied,* 110 Wn.2d 1017 (Div. 1 1988)

Where a conviction is reversed on appeal, reprosecution is generally permissible. *United States v. Tateo,* 377 U.S. 463, 84 S.Ct. 1587, 12 L.Ed.2d 448 (1964); *State v. Anderson,* 96 Wn.2d 739, 638 P.2d 1205, *cert. denied,* 459 U.S. 842, 103 S.Ct. 93, 74 L.Ed.2d 85 (1982). A bar against retrial is appropriate, however, where prosecutorial misconduct is intended to provoke a request for mistrial. *Oregon v. Kennedy,* 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982). Although this rule generally applies to mistrials, this exception should apply with equal weight to appellate reversals resulting from prosecutorial misconduct. *See United States v. Singer,* 785 F.2d 228, 239 (8th Cir. 1986), *cert. denied,* ___ U.S. ___, 107 S.Ct. 273, 93 L.Ed.2d 249 (1986); *United States v. Opager,* 616 F.2d 231, 236 (5th Cir. 1980). "The right of a criminal defendant not to be twice placed in jeopardy should not hang on which court correctly determines that misconduct infected the trial." *Singer,* at 239. *See Robinson v. Wade,* 686 F.2d 298, 307 (5th Cir. 1982); *United States v. Curtis,* 683 F.2d 769, 774 (3rd Cir. 1982), *cert. denied,* 459 U.S. 1018, 703 S.Ct. 379, 74 L.Ed. 2d 512 (1982).

The reprosecution exception for prosecutorial misconduct is well established. *See United States v. Jorn,* 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971). The definition of prosecutorial misconduct, however, has been the source of much confusion. In *United States v. Dinitz,* 424 U.S. 600, 611, 96 S.Ct. 1075, 1081, 47 L.Ed.2d 267 (1976), the Supreme Court articulated the reprosecution exception under double jeopardy in terms of government actions which tend to provoke mistrial requests. The Court then articulated a more lenient exception

> where "bad faith conduct by [the] judge or prosecutor," threatens the "[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict" the defendant.

(Citation omitted). *Dinitz,* at 611, 96 S.Ct. at 1081.

Six years later, the Supreme Court clarified the standard in *Oregon v. Kennedy, supra.* "Only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the

bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." *Kennedy,* 456 U.S. at 676, 102 S.Ct. at 2089. This standard merely calls for the court to make a finding of fact by inferring the existence or nonexistence of intent from objective facts and circumstances. *Kennedy,* at 675, 102 S.Ct. at 2089. By contrast, the Supreme Court stated that the broader "bad faith conduct" or "harassment" standard offers little criteria for its application because "[e]very act on the part of a rational prosecutor during a trial is designed to 'prejudice' the defendant by placing before the judge or jury evidence leading to a finding of his guilt." *Kennedy,* at 674, 102 S.Ct. at 2089. The Court, in explaining why the broader standard should be rejected, stated:

> Knowing that the granting of the defendant's motion for mistrial would all but inevitably bring with it an attempt to bar a second trial on grounds of double jeopardy, the judge presiding over the first trial might well be more loath to grant a defendant's motion for mistrial.
>
> *Kennedy,* at 676, 102 S.Ct. at 2090.

Although onerous, the standard for determining prosecutorial misconduct in light of Kennedy is clear. In order to invoke the protections of the double jeopardy clause, Cochran must show that prosecutorial misconduct was committed with the intent to provoke or goad a mistrial request. *Kennedy,* at 676, 102 S.Ct. at 2089. A determination of whether certain actions constitute intentional misconduct is a finding of fact which will not be disturbed unless it is clearly erroneous. *Robinson*, at 309.

State v. Lewis, 78 Wn.App. 739, 744-45, 898 P.2d 874 (Div. 1 1995), *review denied,* 128 Wn.2d 1012 (1996) (prosecutor attempted over objection to elicit testimony that defense investigator attempted to obtain favorable and untruthful information from witness, resulting in trial court declaring mistrial; Held: trial court's finding that prosecutor's actions did not intentionally provoke mistrial affirmed, so retrial allowed)

> We agree with the trial court that the misconduct was serious. The prosecutor's questions were prejudicial for the reason noted by the court--the insinuation that the so-called investigator was an agent of defense counsel Connick. Further, the questions lacked a foundation to show that the person who approached the store owner actually was sent by Lewis. Without such a foundation, which the prosecutor never produced, the evidence had no relevance. The prosecutor continued his questioning after the court had sustained *three* objections.
>
> **When adrenaline overcomes judgment and trial court rulings are ignored, the trial may lose its civilized attributes and be reduced to the level of a dog chasing a cat. A mistrial will often be the result, as it was here.** But we cannot say the trial court erred in characterizing the State's conduct as insufficient to bar a retrial. Even under the Oregon "indifference" test, the State is held "only to the consequence of what its official knew to be prejudicial misconduct.... Incompetence, thoughtlessness, or excitability of the state's officers may lead to a mistrial, but it does not reflect a willingness to risk placing the defendant repeatedly in jeopardy for the same offense." The trial court here did not find the prosecutor knowingly engaged in prejudicial misconduct. The record does not demand that finding.

(Footnote omitted.) (Bold emphasis added.)

Case Law Race, Etc. References Strictly Prohibited

State v. Torres, 16 Wn.App. 254, 257, 554 P.2d 1069 (Div. 1 1976) (Race. Held: that cumulative effect of instances of prosecutorial misconduct in opening statement, interrogation of witnesses, and closing argument prejudiced defendants and effectively deprived them of constitutional right to fair trial)

> In opening, the defendants were referred to as Mexicans or Mexican-Americans a number of times, a racial reference that the trial judge considered 'fairly close to misconduct.' We do not condone any reference to a person's race which is intended to slur or to disparage either the person or the race. Each citizen could be categorized and described by his or her ethnic background as one type or another American. We have put aside such references in the knowledge and hope that there should be no hyphenated Americans, but only 'Americans.' The remarks of the prosecutor were such that we could not tell from the record whether the remarks were meant to slight the defendants in the eyes of the jury or not. What we can say is that the trial court was concerned about the impact of the statements. He observed that he was bothered by the prosecutor repeatedly referring to the defendants as Mexican-Americans while referring to the complaining witness as 'Ms.' and 'Mrs.' The statements of the prosecutor were unfortunate at best. The record reveals that the references may have been inadvertent, but that, in any event, their effect may have been to impugn the standing of the defendants before the jury and intimate that the defendants would be more likely than those of other races to commit the crime charged. Such an inference is improper and prejudicial.

State v. Avendano-Lopez, 79 Wn.App. 706, 722-23, 904 P.2d 324 (Div. 2 1995), *review denied*, 129 Wn.2d 1007 (1996) (prosecutor improperly asked defendant if he was illegal immigrant; Held: prosecutorial misconduct, but harmless error)

&The prosecutor s question was grossly improper. It is well-established that appeals to nationality or other prejudices are highly improper in a court of justice, and evidence as to the race, color, or nationality of a person whose act is in question is generally irrelevant and inadmissible if introduced for such a purpose. &

The true test of our criminal justice system lies in how we treat the foreigner, the poor, and the disadvantaged, both in how we treat those born in this country, the wealthy or the respectable established citizenry. The dark shadow of arrogant chauvinism would eclipse our ideal of justice for all if we allowed juries to infer that immigrants, legal or illegal, were more likely to have committed crimes.

(Emphasis added.) (Footnote omitted.)

Case Law Results in Other Cases Arguments Prohibited

State v. Russell, 33 Wn.App. 579, 592 fn. 8, 657 P.2d 338 (Div. 1 1983), *reversed in part on other grounds,* 101 Wn.2d 349, 678 P.2d 332 (1984), *cert. denied,* 501 U.S. 1260, 111 S.Ct. 2915, 115 L.Ed.2d 1078 (1991)

[Footnote 8] We observe, however, that argument based on what juries in other cases have done when confronted with similar facts or comparable instructions tends to needlessly inject collateral matters into a case. Such argument is subject to abuse and should be discouraged.

Case Law Send a Message Arguments Prohibited

State v. Powell, 62 Wn.App. 914, 919, 816 P.2d 86 (Div. 3 1991), *review denied*, 118 Wn.2d 1013 (1992) (the prosecutor in effect told the jury that a not guilty verdict would send a message that children who reported sexual abuse would not be believed, thereby "declaring open season on children"; Held: misconduct, and reversed and dismissed on other grounds)

The remarks were made at the completion of the final closing argument, immediately prior to the jury beginning their deliberations. This is one of those cases of prosecutorial misconduct in which "[t]he bell once rung cannot be unrung." *State v. Trickel,* 16 Wn.App. 18, 30, 553 P.2d 139 (1976). It denied Mr. Powell a fair trial.

State v. Gaff, 90 Wn.App. 834, 954 P.2d 943 (Div. 1 1998) (Sexual predator commitment. Prosecutor s emotional appeal to society s general fear of crime (equating uneasy sleep and noises in the night to the fear of someone like respondent) and use of civil commitment as a tool to impose further punishment (send a message argument) was misconduct; Held: judgment affirmed since no objection by defense counsel and comment).

Case Law Standard of Review

State v. Brett, 126 Wn.2d 136, 174-75, 892 P.2d 29 (1995), *cert. denied,* 516 U.S. 1121, 133 L.Ed.2d 858, 116 S.Ct. 931 (1996)

Allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard. *State v. Hughes,* 106 Wn.2d 176, 195, 721 P.2d 902 (1986). The defendant bears the burden of "establishing both the impropriety of the prosecutor's conduct and its prejudicial effect." (Footnote omitted.) *State v. Furman,* 122 Wn.2d 440, 455, 858 P.2d 1092 (1993). Prosecutorial misconduct does not constitute prejudicial error unless the appellate court determines there is a substantial likelihood the instances of misconduct affected the jury's verdict. *State v. Evans,* 96 Wn.2d 1, 5, 633 P.2d 83 (1981).

State v. Avendano-Lopez, 79 Wn.App. 706, 722, 904 P.2d 324 (Div. 2 1995), *review denied*, 129 Wn.2d 1007 (1996) (prosecutor improperly asked defendant if he was illegal immigrant. prosecutorial misconduct found, harmless error)

We emphasize, however, that the concept of harmless error is not a license to inject naked prejudice into any case. A public prosecutor is a quasi-judicial officer charged with the duty to seek a verdict free of prejudice and based upon reason. Prosecutors must act impartially and "with the object in mind that all admissible evidence and all proper argument be made, but that inadmissible evidence and improper argument be avoided."

(Footnotes omitted.) (Bold emphasis added.)

Case Law Standard of Review Failure of Defense to Object

State v. Copeland, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996)

Copeland did not object to the allegedly improper argument or request a curative instruction. "[U]nless prosecutorial conduct is flagrant and ill-intentioned, and the prejudice resulting therefrom so marked and enduring that corrective instructions or admonitions could not neutralize its effect, any objection to such conduct is waived by failure to make an adequate timely objection and request a curative instruction."

(Citations omitted.)

Case Law Statistics to Prove Guilt Arguments Prohibited

State v. Copeland, 130 Wn.2d 244, 293-94, 922 P.2d 1304 (1996) (error harmless)

While the prosecutor did not assign probabilities to the events, his argument on the whole invited the jury to consider the possible rarity of each of the "circumstances" and then multiply them together, like the "circumstances" involving the hypothetical of the little girl on the plane to reach a conclusion that the odds of all the circumstances occurring together were extremely rare. Where the product rule is used, however, the events must be shown to be independent, and this record is devoid of foundation evidence establishing independence of these events. Further, the argument assumes, for example, that Connie Taff did in fact see a mulatto man, when she may have been mistaken in her identification. The product rule suggests an infallibility which is inappropriate where eye witness testimony is concerned and independence of events is not established. The argument on the whole invited the jury to calculate that mistaken identification was an unlikely event.

We are aware that some courts have upheld use of the product rule in closing argument. However, a defendant is presumed innocent and the State has the burden of proving guilt beyond a reasonable doubt. We do not countenance use of a mathematical approach to the determination of guilt, and especially do not do so where, as in this case, there is no basis in the record for assuming independence of the events described by the prosecutor. See 1 McCormick on Evidence § 210, at 953-54 n. 13 (John W. Strong ed., 4th ed. 1992) (closing argument involving multiplication of hypothetical probabilities likely to mislead the jury in the absence of careful explanation of the probability of a coincidental misidentification and the distinct probability the defendant left the incriminating traces).

However, while the prosecutor's argument in this case was improper, a curative instruction would have neutralized any prejudice. Accordingly, Copeland waived any error by failing to object and request a curative instruction.

(Citations omitted.)

Case Law Victims Asking Jury to Place Itself in Role of Victim

State v. Rice, 110 Wn.2d 577, 607, 757 P.2d 889 (1988), *cert. denied,* 491 U.S. 910, 105 L.Ed.2d 707, 109 S.Ct. 3200 (1989) (Held: proper in penalty phase of death penalty case if based on evidence)

Appellate courts in this state have not decided the propriety of a prosecutor's argument asking jurors to place themselves in the role of the victims. Some courts elsewhere have concluded that such argument is improper, although not necessarily of such a degree as to require reversal, in trials other than the sentencing phase of a death penalty case. *See United States v. Gaspard,* 744 F.2d 438, 441 n. 5 (5th Cir. 1984), *cert. denied,* 469 U.S. 1217, 105 S.Ct. 1197, 84 L.Ed.2d 341 (1985); *State v. Sowards,* 147 Ariz. 185, 709 P.2d 542 (Ct.App. 1984), *remanded on other grounds,* 147 Ariz. 156, 709 P.2d 513 (1985); *People v. Fields,* 35 Cal.3d 329, 197 Cal.Rptr. 803, 673 P.2d 680 (1983), *cert. denied,* 469 U.S. 892, 105 S.Ct. 267, 83 L.Ed.2d 204 (1984) (guilt phase of death penalty case). However, due to the unique nature of the sentencing phase of a death penalty case, we need not address the propriety of this argument in other types of criminal cases.

Case Law Vouching for Credibility of Witness Arguments Prohibited

State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied,* 516 U.S. 1121, 133 L.Ed.2d 858, 116 S.Ct. 931 (1996)

It is improper for a prosecutor personally to vouch for the credibility of a witness. *State v. Sargent,* 40 Wn.App. 340, 344, 698 P.2d 598 (1985). Prosecutors may, however, argue an inference from the evidence, and prejudicial error will not be found unless it is "clear and unmistakable" that counsel is expressing a personal opinion. *Sargent,* 40 Wn.App. at 344.

U.S. v. Edwards, 154 F.3d 915, 921-23 (9th Cir. 1998) (Defendant convicted in federal district court of poss/cocaine with intent to distribute. The key evidence was cocaine found in a black bag. After defense opening statement where defense said no evidence tying defendant to the bag, assistant AG who was trying the case notified defendant that he had found a bail receipt (with officers present) in the bag under a cardboard liner with defendant's name on it. The bag had been in police custody for two years with this evidence not found. Held: conviction reversed).

It is well settled that a prosecutor in a criminal case has a special obligation to avoid improper suggesstions, insinuations and especially assertions of personal knowledge. A prosecutor may not impart to the jury his belief that a government witness is credible. Such improper vouching may occur in at least two ways. The prosecutor may either place the prestige of the government behind the witness or ... indicate that information not presented to the jury supports the witness's testimony. When the credibility of witnesses is crucial, improper vouching is particularly likely to jeopardize the fundamental fairness of the trial.

Akin to the rule against vouching is the advocate-witness rule, under which attorneys are generally prohibited from taking the witness stand to testify in a case they are litigating. As with vouching, the policies underlying the application of

the advocate-witness rule in a criminal case are related to the concern that jurors will be unduly influenced by the prestige and prominence of the prosecutor s office and will base their credibility determinations on improper factors. Moreover,

> the rule reflects a broader concern for public confidence in the administration of justice, and implements the maxim that justice must satisfy the appearance of justice. This concern is especially significant where the testifying attorney represents the prosecuting arm of the federal government.

...From the cases on vouching and the advocate-witness problem, it is clear that both of these rules were designed to prevent prosecutors from taking advantage of the natural tendency of jury members to believe in the honesty of lawyers in general, and government attorneys in particular, and to preclude the blurring of the fundamental distinctions between advocates and witnesses. Although the circumstances of this case do not fit neatly under either rule, there can be no question that the policies underlying both rules were directly contravened by the prosecutor s continued representation of the government in Edwards s criminal prosecution. Once the members of the jury learned that the prosecutor found the evidence, it is almost certain that they attributed the authority of the prosecutor s office to the receipt s discovery....

The vouching in this case was far more serious than in the ordinary circumstances. The prosecutor did not simply make one or two isolated statements regarding the credibility of a particular witness. Instead, he repeatedly vouched for the reliability of a key piece of evidence, both by presenting witnesses to verify that the receipt was not planted and by arguing that it was a bona fide piece of evidence. In effect, the prosecutor functioned throughout the second half of trial as a silent witness for the prosecution. Unlike other witnesses, however, he was not subject to cross-examination and the jury members never had the opportunity to evaluate for themselves whether his story was to be believed.

(Citations omitted.)

5.9 Facts outside the record

unprofessional conduct to intentionally refer to or argue facts outside the record whether at trial or on appeal, unless such facts are of common public knowledge based on ordinary human experience or are matters of which the court may take judicial notice

Excerpt from Commentary to ABA Standard

&The broad discretion a trial court has in such matters enables it to deal with them [matters outside record] as they arise by allowing a party to reopen the case or to take other appropriate steps to enlarge the record so as to provide an evidentiary basis for the matter the party wishes to argue but for some reason failed to establish. &

5.10 Comments by prosecutor after verdict

prosecutor should not make public comments critical of verdict, whether rendered by judge or jury

Excerpt from Commentary to ABA Standard

&[B]ecause of the prosecutor s influence as the representative of the people, the prosecutor should refrain from making public statements critical of a &verdict. &

PART VI. SENTENCING

6.1 Role in sentencing

(a) prosecutor should not make the severity of sentences the index of his or her effectiveness; prosecutor should seek to assure a fair and informed judgment is made, and to avoid unfair sentence disparities

(b) prosecutor should be afforded opportunity to address court at sentencing and to offer a sentencing recommendation

(c) where sentence fixed by jury, prosecutor should present evidence within limits permitted in jurisdiction, but should avoid introducing sentence evidence with will prejudice jury s determination of guilt

Excerpt from Commentary to ABA Standard

Severity of Sentence. &[T]he prosecutor s overriding obligation is to see that justice is fairly done and can most effectively be achieved by seeking to make the sentencing process operate in a fair, equitable manner with the best available information. Public pressure on prosecutors to seek severe sentences is often present. However, once guilt is determined it is important that prosecutors, like judges, maintain an attitude of fairness and objectivity. &

Recommendations in Sentencing by the Court. &[T]he prosecutor must be permitted in all cases, at his or her discretion, access to information pertaining to the appropriate sentence and to make a sentencing recommendations. &

Sentencing by the Jury. &[E]ven where the evidence rules permit some evidence at trial to be introduced as bearing on the sentence issue, the prosecutor should avoid unnecessarily presenting evidence of an inflammatory nature that may prejudice the jury s decision on the issue of guilt.

See also 4.2 Fulfillment of Plea Discussions, *supra*.

6.2 Information relevant to sentencing

(a) prosecutor should assist court in basing its sentence on complete and accurate information; if incompleteness or inaccuratenss comes to the prosecutor s attention, the prosecutor should take steps to present the complete and correct information to the court and defense counsel

(b) prosecutor should disclose to defense and court at or prior to sentencing hearing all information in the prosecutor s files which is relevant to the sentencing issue

Excerpt from Commentary to ABA Standard

One of the most important contributions the prosecutor can make in the sentencing process is to see that the information that the prosecutor has gathered for use at trial is brought to bear on the issue of sentence to the extent relevant, whether that information is favorable or unfavorable to the convicted defendant. &

SRA Charging and Plea Disposition Standards

RCW 9.94A.460 Sentence Recommendations

The prosecutor may reach an agreement regarding sentence recommendations.

The prosecutor shall not agree to withhold relevant information from the court concerning the plea agreement.

Case Law Criminal History Validity

State v. Burton, 92 Wn.App. 114, 960 P.2d 480 (Div. 3 1998) (Constitutionality of prior convictions challenged in life without parole case; Held: conviction affirmed).

A defendant generally may not contest the constitutional validity of a prior conviction during current sentencing proceedings. *State v. Ammons,* 105 Wn.2d 175, 188, 713 P.2d 719, 718 P.2d 796, *cert. denied,* 479 U.S. 930, 107 S.Ct. 398, 93 L.Ed.2d 351 (1985); *State v. Aronson,* 82 Wn.App. 762, 764, 919 P.2d 133 (1996). As explained in *Ammons*, trial courts should not be burdened with the sort of appellate review of prior convictions that was undertaken at Mr. Burton s sentencing.

Once the State establishes the existence of the two prior convictions by a preponderance of the evidence, it must prove the constitutional validity of only those convictions previously declared constitutionally invalid on their face. A conviction is constitutionally invalid on its face if, without further elaboration, it manifests infirmities of a constitutional magnitude. Not only must the plea forms be deficient, an affirmative showing must be made that constitutional safeguards were not provided....

So absent an affirmative showing at sentencing that his prior guilty pleas were entered in violation of his constitutional rights, Mr. Burton s sole remedy is to pursue post-conviction relief in the form of either a collateral challenge in the court in which the judgment was entered or a personal restraint petition under RAP 16.3....

Here, the court was aware of Mr. Burton s prior written statements on plea of guilty. They were entered on a standard form in accord with CrR 4.2(g). And although they did not include an express waiver of the right to testify in his own defense, the court nevertheless concluded the pleas were not facially invalid. That finding is amply supported by the record.

(Citations omitted.)