

No. 43056-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRIAN BRUSH,

Appellant.

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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Pacific County Superior Court Cause No. 09-1-00143-8
The Honorable Judge Michael J. Sullivan

STATE'S REPLY BRIEF

DAVID BURKE
PACIFIC COUNTY PROSECUTOR'S OFFICE
P.O. BOX 45
SOUTH BEND, WASHINGTON 98586
(360) 875-9361

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**STATE'S RESPONSE TO APPELLANT'S
ASSIGNMENTS OF ERROR**

1. The trial court did not err in admitting recorded statements of Mr. Brian Brush. The Defense chose to admit Mr. Brush's statements for tactical reasons. Any error pertaining to the admission of these statements was harmless.
2. Interviews of Mr. Brush by Deputy Chief Heath Layman of the Cosmopolis Police Department did not strictly comply with the requirements of the Privacy Act. However, the decision to admit the recordings was a tactical choice by the Defense. Any error pertaining to the admission of the recordings was harmless.
3. Mr. Brush's counsel was not ineffective in making a tactical decision to admit the recorded interviews.
4. Mr. Brush's counsel was not ineffective for failing to object to admitted evidence. This decision was tactical and harmless.
5. Mr. Brush's counsel was not ineffective for declining to seek suppression of evidence which would have excluded the recordings, but not the statements, of Mr. Brush.
6. Mr. Brush's privilege against self-incrimination was not violated.
7. Mr. Brush's right to remain silent was not violated.
8. Mr. Brush's statements to police were properly admitted.
9. Mr. Brush's custodial statements were properly admitted; the police did not compromise Mr. Brush's right to remain silent.
10. Mr. Brush re-initiated contact with law enforcement officers, was re-advised on his right to remain silent, and again waived his right to remain silent. As a result, he was not denied counsel.
11. Trial court Finding of Fact No. I-7 (CrR 3.5 hearing) was proper.
12. Trial court Finding of Fact No. I-14 (CrR 3.5 hearing) was proper.

13. Trial court Finding of Fact No. I-15 (CrR 3.5 hearing) was proper.
14. Trial court Finding of Fact No. III-1 (CrR 3.5 hearing) was proper.
15. Trial court Finding of Fact No. III-4 (CrR 3.5 hearing) was proper.
16. Trial court Finding of Fact No. III-7 (CrR 3.5 hearing) was proper.
17. Trial court Conclusion of Law No. 2 (CrR 3.5 hearing) was proper.
18. Trial Court Conclusion of Law No. 3 (CrR 3.5 hearing) was proper.
19. Trial Court Conclusion of Law No. 4 (CrR 3.5 hearing) was proper.
20. Mr. Brush's right to a jury trial was not denied.
21. Mr. Brush received the jury he selected.
22. The trial court did not error when it removed juror no. 1.
23. The trial court followed the requirements of RCW 2.36.110 and CrR 6.5.
24. The trial court did not err by denying Mr. Brush's motion for a new trial.
25. The trial court did not err in adopting Finding of Fact No. 2 (Motion for New Trial).
26. The trial court did not err in adopting Finding of Fact No. 3 (Motion for New Trial).
27. The trial court did not err in adopting Finding of Fact No. 4 (Motion for New Trial).
28. The trial court did not err in adopting Conclusion of Law No. 2 (Motion for a New Trial)

29. The trial court did not err in adopting Conclusion of Law No. 3 (Motion for a New Trial).
30. The trial court did not err in adopting Conclusion of Law No. 4 (Motion for a New Trial).
31. The trial court did not err in admitting hearsay statements.
32. There was sufficient evidence to support the three aggravating factors cited by the trial court.
33. The three aggravating factors cited by the trial court support an exceptional sentence above the standard range.
34. The trial court did not comment on the evidence.
35. The trial court's instruction no. 26 which defined the phrase "prolonged period of time" did not relieve the State of its burden to prove an aggravating factor.
36. The trial court properly instructed the jury pertaining to the domestic violence pattern of abuse aggravating factor.
37. The trial court did not error in giving supplemental instruction no. 26.
38. Mr. Brush's sentence was not clearly excessive.

**STATE'S RESPONSE TO APPELLANT'S ISSUES PERTAINING
TO ASSIGNMENTS OF ERROR**

1. Defense counsel was not ineffective in failing to move to suppress two recorded interviews for want of notification that the interview was being recorded. The confessions would have been admitted in spite of any Privacy Act violation, and the decision to admit Mr. Brush's actual statements was tactical and harmless.

1. Mr. Brush was not denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
2. Mr. Brush's custodial statements were neither coerced nor tainted, and the trial court properly found that Mr. Brush was provided *Miranda* warnings, which he waived. Mr. Brush's Fifth Amendment privilege against self-incrimination was not violated.
3. Mr. Brush's desire to remain silent was scrupulously honored. When Mr. Brush requested a second law enforcement interview, he was again advised of his right to counsel and his right to silence, which he waived. The trial court did not err in refusing to suppress statements made by Mr. Brush.
4. The trial court did not err in refusing to suppress statements by Mr. Brush after he invoked his constitutional rights. Mr. Brush initiated contact with the police and subsequently waived his rights. Mr. Brush's waiver of his rights was knowing, intelligent and voluntary.
5. Removal of a juror for undue hardship was proper and did not deny Mr. Brush a trial by the jury he selected. No constitutional violation occurred under the Washington State Constitution or the Federal Constitution.
6. The trial court properly admitted hearsay statements from the victim's daughter regarding several prior incidents of domestic violence perpetrated by Mr. Brush. The statements constituted exceptions to the hearsay rule. The trial court did not abuse its discretion by admitting hearsay in violation of ER 802.
7. Sufficient evidence exists to uphold the three aggravating factors that were found by the jury. The trial court properly

found that there were substantial and compelling reasons to impose an exceptional sentence upward based on these three aggravating factors. The sentence imposed was not clearly excessive.

8. The trial court did not comment on the evidence when it used language from a WPIC pattern instruction to define a “prolonged period of time” as “more than a few weeks.” Mr. Brush’s rights were not violated under Article IV, Section 16 of the Washington State Constitution.
9. The trial court did not relieve the prosecution of its burden of proof when the jury was instructed that the phrase “prolonged period of time” meant “more than a few weeks.” This instruction did not violate Mr. Brush’s Fourteenth Amendment right to due process.
10. The trial court imposed an exceptional sentence of 1060 months. The trial court concluded that any one of three aggravating factors found by the jury was sufficient to justify this sentence. Therefore, even if any of these aggravating factors are vacated on appeal, the sentence handed down by the trial court should not be overturned. The exceptional sentence imposed by the trial court is not clearly excessive.

STATEMENT OF THE CASE

On September 11, 2009, at approximately 4:40 p.m., three police officers were on foot patrol in the City of Long Beach, Washington, when they heard gun fire. As they looked up they observed Brian Brush fire a shotgun four times, thereby murdering his girlfriend, Lisa Bonney. RP (11/28/11) 76-83, 89-91, 98-103, 107-113. The officers saw Mr. Brush on

the Bolstad beach approach. They heard one shot, followed a pause, and then several other shots. RP (11/28/11) 98. They saw Mr. Brush slide back the shotgun slide to reload the shotgun in an angry manner. RP (11/28/11) 83, 98. Mr. Brush was observed “violently chambering the next round” like he “was just trying to tear the shotgun apart to get another round chambered.” RP (11/28/11) 116. Mr. Brush first shot Ms. Bonney in the abdomen at less than three feet with a shotgun, and the remaining shots were within three to nine feet. RP (11/28/11) 114; (11/29/11) 71. Inside of Mr. Brush’s pickup truck, officers found a set of handcuffs looped and fastened through a seatbelt in the front seat; the handcuff key and handcuff case were located at Mr. Brush’s home. RP (11/28/11) 175-177, 183-185.

A number of other individuals observed the shooting. In particular, two tourists were having lunch with their family when they saw Mr. Brush and Ms. Bonney having a discussion. Ms. Bonney was not acting aggressively towards Mr. Brush. RP (11/28/11) 127, 133. Ms. Bonney attempted to leave, and pulled out of Mr. Brush’s grasp; Mr. Brush then went to the back passenger compartment of his pickup truck, retrieved his shotgun, and shot Ms. Bonney. RP (11/28/11) 121-123, 134-136. Both of these individuals observed Mr. Brush being taken into custody. RP (11/28/11) 124, 138.

When Mr. Brush, a former police officer, observed the approaching officers, he tossed his shotgun into the air, walked towards the officers, and followed their instructions—being one step ahead of them—as they effected a “high risk arrest position.” RP (11/28/11) 87, 192-93, 201. When Mr. Brush was being handcuffed by the police, Raymond Police Officer, Arlie Boggs, asked Mr. Brush if he was shooting at a human being. Mr. Brush responded by saying “yes.” RP (10/12/11) 8. Mr. Brush was read *Miranda* warnings by Officer Boggs. Mr. Brush chose to remain silent. RP (10/12/11) 11-14.

Once the scene of the shooting was secure, Mr. Brush was placed in a patrol vehicle. Deputy Chief Heath Layman of the Cosmopolis Police Department took control of Mr. Brush. In an abundance of caution, Deputy Chief Layman read *Miranda* rights to Mr. Brush from a preprinted form. Mr. Brush indicated that he would talk to the police but not until he was removed from the crime scene. Based on Mr. Brush’s response, Deputy Chief Layman did not interrogate Mr. Brush immediately. RP (10/12/11) 50-55. Less than 10 minutes elapsed between the time of the incident and the time that Mr. Brush was read *Miranda* rights by Deputy Chief Layman. RP (10/12/11) 5, 28, 78.

Mr. Brush was transported to the Pacific County Sheriff’s Office which is several miles away from the crime scene. RP (10/12/11) 32. Mr.

Brush was interviewed at the Sheriff's Office by Deputy Chief Layman and Ron Clark, the Pacific County Undersheriff. This interview began at approximately 5:52 p.m. RP (10/12/11) 59. Mr. Brush was once again re-advised of his constitutional rights. RP (10/12/11) 66. This first interview concluded immediately when Mr. Brush asked for an attorney. RP (10/12/11) 67.

Deputy Chief Layman subsequently received a telephone call from Chief Flint Wright of the Long Beach Police Department. Chief Wright told Deputy Chief Layman that Mr. Brush had changed his mind and wanted to continue to talk. Deputy Chief Layman was informed that Mr. Brush only wanted to talk to him. RP (10/12/11) 67-68. Deputy Chief Layman conducted a second interview of Mr. Brush at 7:27 p.m. RP (10/12/11) 12. The second interview concluded at 7:39 p.m. RP (10/12/11) 77. Mr. Brush was once again apprised of his *Miranda* rights, and he waived them. RP (10/12/11) 69-70. Shortly after Mr. Brush was incarcerated in the Pacific County Jail, he made a telephone call to his ex-wife. During this recorded conversation, Mr. Brush admitted to killing Ms. Bonney. RP (11/29/11) 21-24.

Ultimately, the trial judge ruled under CrR 3.5 that only one statement by Mr. Brush would be suppressed, viz., the State was not allowed to introduce Mr. Brush's answer to the question posed by Officer

Boggs [Was it a human being you were shooting at?]. RP (10/12/11) 9, 104-120; *see* Appendix A.

Dr. Clifford Nelson conducted the post-mortem examination of Ms. Bonney. RP (11/30/11) 14-16. Dr. Nelson has been a forensic pathologist since 1992. He began his career in Atlanta, Georgia in 1993 and is presently a Deputy State Medical Examiner for Oregon and a forensic pathologist for Pacific, Wahkiakum, Cowlitz, Skamania, Klickitat and Clark counties. He also serves as a crime scene analyst in criminal death investigations. RP (11/30/11) 11-14.

At trial, Dr. Nelson testified that Ms. Bonney was shot four times. According to Dr. Nelson, the first shotgun wound, across the abdomen, would not have killed Ms. Bonney, but it would have been extremely painful. This shot occurred at a range of four to five feet. RP (11/30/11) 21-24, 44. The second shot hit Ms. Bonney's back; the shotgun was held from the waist. This wound penetrated the muscles in the back and broke the lower lumbar and upper cervical vertebral bodies, basically blowing apart the lower part of her spine, lacerating the mesentery, and shredding her aorta and small and large bowel. This shot also shredded the inferior vena cava and perforated the duodenum. According to Dr. Nelson, this shot was fired within three and a half feet from Ms. Bonney, was fatal, and occurred at such a close range as to imbed the shot cup (wadding which

separates the pellets from the gun powder in a shotgun shell) inside of Ms. Bonney. RP (11/30/11) 26-27, 32, 34.

The next shot that Mr. Brush fired entered Ms. Bonney's buttocks and, by itself, would have been sufficient to cause Ms. Bonney's death. RP (11/30/11) 37. Mr. Brush's final shot destroyed Ms. Bonney's head. The shot was fired at close range (within three and one-half feet); the bursting-rupture wound created a fracture and exploded the bones of the skull. This final shot was so intense that the brain and other tissue was ejected out of Ms. Bonney's head. RP (11/30/11) 39- 42.

Dr. Nelson has investigated hundreds of homicide matters over his 19 years as a forensic and crime scene analyst, and he described this homicide as one of the two worst he has observed in terms of being gratuitously violent and causing damage far in excess of the level of violence necessary to kill someone. RP (11/30/11) 46-50.

The events which transpired on September 11, 2009, were part of an ongoing pattern of domestic violence. Mr. Brush and Ms. Bonney had a dating relationship for almost two years. They had lived together for much of this time. RP (11/29/11) 126, (11/30/11) 47-59, (12/6/11) 176. The first cautionary event occurred in July 2008. During an argument with Ms. Bonney, Mr. Brush kicked Ms. Bonney out of his home and threatened to have the locks changed. RP (12/6/11) 192. In July 2009,

Ms. Bonney and Mr. Brush had an argument. Mr. Brush became violent and bashed a chair over a couch and broke a bottle of wine on a counter before going into the garage where Ms. Bonney locked the door behind him. As a result, Mr. Brush took a hammer and struck Ms. Bonney's BMW several times with the hammer. PR (12/5/11) 52-53, 134-35.

Following this event, Mr. Brush and Ms. Bonney agreed to a self-imposed no-contact agreement, but Mr. Brush repeatedly violated the agreement. During a counseling appointment, Mr. Brush threatened Ms. Bonney with financial ruin. RP (12/5/11) 140-141.

Over the course of the next two months, Mr. Brush pursued the relationship with Ms. Bonney in an obsessive way. According to the expert who testified for the Defense, Mr. Brush was pathological about the relationship. He sent a Ms. Bonney threatening email and repeatedly harassed her. RP (12/5/11) 55, 138, 159.

Mr. Brush also stalked Ms. Bonney at a concert, and then followed Ms. Bonney to a friend's house. Mr. Brush confronted Ms. Bonney and her companion by banging on the windows and doors until Ms. Bonney eventually came out to talk with Mr. Brush. RP (12/5/11) 138-139. Ms. Bonney called her daughter, Elizabeth¹, immediately after Mr. Brush had

¹ The State refers to Elisabeth Bonney by her first name in order to avoid confusion.

confronted Ms. Bonney at her companion's home. Ms. Bonney was crying as she described the events. RP (12/5/11) 187.

On the following day, Ms. Bonney further described the event from the previous evening; she was bawling and physically shaking. Elizabeth indicated that she had never seen her mother so scared. RP (12/6/11) 178-187. As Elizabeth and her mother left her home, they observed Mr. Brush in his truck. Mr. Brush accelerated towards Elizabeth and her mother, and Ms. Bonney, fearing they would be struck, yelled, "He's not stopping. Run." RP (12/6/11) 179. The pair ran two blocks and hid. RP (12/6/11) 189. Ms. Bonney was shaking, crying, and throwing up as a result of the fear that she experienced. RP (12/6/11) 190.

While the pair ran from Mr. Brush, he left a message on Ms. Bonney's phone threatening to post naked photographs of Ms. Bonney on her office door. RP (12/6/11) 191. Mr. Brush then sent a text message to Ms. Bonney threatening to turn Ms. Bonney into the Oregon tax authority for receiving unemployment insurance. RP (12/6/11) 191.

The trial began in November 2011. After the jury was selected, but before opening statements, the trial judge was informed by the bailiff that juror no. 1 had been contacted by his employer and informed that he was required to travel out of state. RP (11/28/11) 17. The juror apprised the court that his employer had purchased airline tickets for him to travel

to Alaska and that he was told “You’re going to leave Wednesday.” RP (11/28/11) 17. The juror was unaware that his employer had purchased tickets for him while he was sitting as a potential juror. RP (11/28/11) 17. Missing the trip to Alaska would have created an undue hardship on the juror and on others he was obligated to support, since he was the sole provider for his family. RP (11/28/11) 18. The juror would have lost the opportunity to earn income if he were unable to leave until after the trial. The juror would have lost more than \$4,000.00 for the trip. RP (11/28/11) 19 - 20. The court was concerned that the juror might not return given the financial importance and impact on the juror’s family. RP (11/28/11) 22 - 23, 44. The court found that continued service also constituted an undue financial hardship for the juror. RP (11/28/11) 23, 44. The court further provided a curative instruction for the remaining jurors which indicated that they were not to consider the removal of the juror in any way. RP (11/28/11) 46.

During the trial the State asked the court for clarification regarding how the audio recordings would be presented to the jury. The State wanted to make sure that there was a knowing, intelligent, and voluntary waiver of any appeal issue with regard to playing the recordings. The State made certain that the record reflected the tactical purpose for the parties’ use of the recordings. RP (11/28/11) 147-48. The Defense raised

no objection to playing the recordings (other than wanting to redact the reference to prior domestic violence aspects on the recordings, and wanting to remove the recitation of constitutional warnings). The Defense indicated that they wanted the redacted recordings played before the jury. RP (11/28/11) 37-40, 149, 203, 247. The redacted recordings, which omitted prior domestic violence and Mr. Brush's advisement of rights, were played in the presence of the jury. The Defense relied upon the recordings to amplify their diminished capacity defense. RP (12/5/11) 66-73.

The Defense raised a general objection to the exceptional sentence instructions, but did not otherwise oppose the State's proposed instructions. RP (12/5/11) 231-298, RP (12/6/11) 2-52, 104-106, 198-209.

The jury found Mr. Brush guilty of First Degree Murder. RP (12/6/11) 119. The jury also found via special verdicts that (1) Mr. Brush and Ms. Bonney were members of the same household or family; (2) Mr. Brush was armed with a firearm when the crime was committed; (3) Mr. Brush's conduct during the commission of the crime manifested deliberate cruelty to the victim; (4) the victim's injuries exceeded the level of bodily harm necessary to satisfy the elements of the offense; and (5) the crime was an aggravated domestic violence offense. RP (12/6/11) 119-122. Subsequently, after a second phase of the trial, the jury found that Mr.

Brush committed an aggravated domestic violence offense based on an ongoing pattern of psychological abuse over a prolonged period of time. RP (12/6/11) 229.

Mr. Brush moved for a new trial based on the fact that a juror was excused after the jury had been impaneled. The trial judge denied Mr. Brush's motion. RP (2/9/12) 3-4. The trial judge found that based on the jury's special verdicts there was sufficient evidence to support an exceptional sentence. Mr. Brush was given an exceptional sentence of 1060 months. *See* Appendix B.

Mr. Brush timely appealed.

ARGUMENT

I. MR. BRUSH'S CONVICTION SHOULD NOT BE REVERSED BASED ON A PRIVACY ACT VIOLATION.

A. Standard of review.

Admission of evidence in violation of the privacy act is a statutory, rather a constitutional, violation. *State v. Courtney*, 137 Wash.App. 376, 383, 153 P.3d 238 (2007). Failure to object on the basis that tape recordings were made without consent constitutes a waiver on appeal. *State v. Sengxay*, 80 Wash.App. 11, 15, 906 P.2d 368 (1995). In general, RAP 2.5(a) does not permit a party to raise a claim of error for the first time on appeal. However, an appellant can raise a claimed error if (1) the

error is manifest, and (2) the error is truly of constitutional dimension. *State v. Kirkman*, 159 Wash.2d 918, 926, 155 P.3d 125 (2007). A showing of actual prejudice is required. *State v. Walsh*, 143 Wash.2d 1, 8, 17 P.3d 591(2001); *State v. McFarland*, 127 Wash.2d 322, 333–34, 899 P.2d 1251 (1995). If a court determines that a claim raises a manifest constitutional error, it may still be subject to harmless error analysis. *Kirkman*, 159 Wash.2d at 927.

B. Mr. Brush agreed to have the audio tapes of his conversations with police played to the jury; he, therefore, waived any objection on appeal.

Mr. Brush raised no objection to the admission and playing of both law enforcement interviews. RP (11/28/11) 37-41, 147-149, 247. It is evident from the record, and Mr. Brush's asserted defense, that the decision to play the recordings was tactical. Hence, Mr. Brush cannot choose a trial strategy and thereafter use Chapter 9.73 RCW to complain about the efficacy of his decision to allow the audio recordings to be played to the jury. Mr. Brush's Defense counsel effectively waived any right he is now asserting.

C. Any error in admitting the audio recordings of Mr. Brush was harmless since the substance of the communications would have been placed before the jury.

There is no reasonable expectation of privacy for persons in custody undergoing custodial interrogations. The remedy for a violation of the Privacy Act is not exclusion of the evidence, but rather exclusion of the recording. *Lewis v. Dep't of Licensing*, 157 Wash.2d 446, 467, 139 P.3d 1078 (2006). As a result, Mr. Brush's confession would have been properly admitted. Moreover, the third recording admitted in Mr. Brush's trial— his call from jail to his ex-wife where he admits to killing Ms. Bonney— would not have been excluded. The jury therefore would have been apprised about Mr. Brush's confession at the Sheriff's office. The jury would have listened to the recorded confession from the jail, and the jury would have heard the testimony of several eye-witnesses who observed the murder. As a result, any error alleged by the Appellant is harmless.

II. MR. BRUSH WAS NOT SUBJECT TO INEFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of review.

A claim of ineffective assistance of counsel presents a mixed question of fact and law which is reviewed *de novo*. *State v. Sutherby*, 165 Wash.2d 870, 883, 204 P.3d 916 (2009).

B. Defense counsel was not ineffective by deciding to admit the recorded interviews.

“To prevail on an ineffective assistance of counsel claim, the defendant must show that (1) defense counsel's representation was deficient, in that it fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defendant.” *Sutherby*, 165 Wash.2d at 883, citing *State v. McFarland*, 127 Wash.2d 322, 334–35, 899 P.2d 1251 (1995) (applying the two-prong test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Counsel is presumed to be effective, “and the defendant must show there was no legitimate strategic or tactical reason for counsel's action.” *Sutherby*, 165 Wash.2d at 883. The Appellant also must demonstrate that but for the error, the result of the trial would have been different. *State v. Courtney*, 137 Wash.App. 376, 383-384, 153 P.3d 238 (2007) (an ineffective assistance argument is without merit where trial counsel did not move to suppress a video confession that did not strictly comply with RCW 9.73.090--the Privacy Act).

Here, Defense counsel agreed to the admission of the audio tape recordings as a tactical measure, and the State made certain that their decision was part of the record. RP (11/28/11) 37-41, 147-49, 247. The recordings were the only way for Mr. Brush's confession to have any context, convey any emotion, or demonstrate his mental state at the time

of the murder, all of which were placed at issue by Defense counsel in their diminished capacity defense. Tactically, this was the best evidence of Mr. Brush's state of mind at the time of the events. Therefore, the Appellant has failed to demonstrate the absence of a tactical decision.

Further, this error was invited by Mr. Brush. *State v. Jones*, 144 Wash.App. 284, 298, 183 P.3d 307 (2008) (under the invited error doctrine, an appellate court "may decline to review a claimed trial court error if the appealing party induced the court to make the error").

Finally, Mr. Brush must demonstrate that the result of the proceeding would have been different "but for" Defense counsel's deficient representation. *McFarland*, 127 Wash. 2d at 337. Even if the recordings were suppressed, the evidence contained on the recordings and any evidence derived therefrom nevertheless would have been admissible at trial. *Courtney*, 137 Wash.App. at 383 ("a violation of section .090 of the privacy act does not require suppression of derivative evidence"). Thus, it is only the recordings themselves that would have been inadmissible. *Lewis*, 157 Wash.2d at 472.

Even if Mr. Brush's recorded confessions on the day of the murder were excluded, no less than five witnesses observed Mr. Brush shoot Ms. Bonney. Additionally, Mr. Brush talked to his ex-wife on a recorded telephone line the day after his arrest and stated four times, "I killed Lisa,"

referring to Ms. Bonney. Consequently, it cannot be said that excluding the audio tapes that were recorded on the day of the murder would have changed the outcome of the trial. RP (11/29/11) 21, 24.

The Appellant has failed to demonstrate ineffective assistance of counsel.

III. MR. BRUSH'S SELF-INCRIMINATING STATEMENTS WERE PROPERLY ADMITTED.

A. Standard of review.

A trial court's CrR 3.5 findings of fact are not disturbed if substantial evidence supports them. *State v. Broadaway*, 133 Wash.2d 118, 131, 942 P.2d 363 (1997).

B. Mr. Brush's statements to the police were not coerced; nothing in the record indicates that the police violated Mr. Brush's constitutional rights.

The statements at issue here occurred while three police officers observed a shooting incident. They initially were unaware that Mr. Brush was shooting at a person. One officer asked Mr. Brush whether he was shooting at a human being in order to determine whether an ambulance was needed. In response to this question, Mr. Brush answered "yes". RP 10/12/11) 8-9. No other questions were asked by any of the three officers, but instead they searched the area to determine if there was a victim and what aid might be needed. The question posed did not constitute an

interrogation in the classic sense, but instead can be best categorized as a question in the heat of the moment by an officer who wanted to determine what action needed to be taken. RP (10/12/11) 18-21.

Mr. Brush, a former police officer,² was obviously aware of his rights. Within 30 seconds of being placed in handcuffs, Mr. Brush was read his *Miranda* warnings, and he indicated that he understood them. RP (10/12/11) 11-12, 23, 25, 50-51, 54. Mr. Brush was again read his *Miranda* warnings a second time before being placed in the patrol vehicle at the scene, and, when asked if he would talk with police, he said, “Yes, I’ll talk to you but not here... not where I can see this.” RP (10/12/11) 54, 82. Mr. Brush complained of chest pains and aid was called. After being medically cleared, he was transported to the Pacific County Sheriff’s Office where he was again re-advised of his *Miranda* warnings.³ RP (10/12/11) 58, 66. Mr. Brush was interviewed by two police officers who both questioned Mr. Brush about the events of the day. The interview was concluded when Mr. Brush indicated that he wanted an attorney, and no

² *Miller v. Fenton*, 796 F.2d 598, 606 (3d Cir.1986) (familiarity of rights is also relevant).

³ Mr. Brush was advised of his *Miranda* rights before the recorded interview commenced. The *Miranda* warnings were redacted for the jury.

further questions were asked; Mr. Brush was released to Pacific County Corrections Officers. RP (10/12/11) 67.

Mr. Brush re-initiated contact and asked for a second interview. RP (10/12/11) 67-68, 71-72. Mr. Brush was again advised of his *Miranda* warnings and signed a form waiving those rights. RP (10/12/11) 71, 80-81. Deputy Chief Layman testified that no one talked to Mr. Brush to convince him to be re-interviewed. RP (10/21/11) 71-72.

The trial judge found Mr. Brush's waivers and confession were knowingly, intelligently and voluntarily made, without threat or coercion, and were not tainted by any initial questioning. RP (10/12/11) 104-118; *see* Appendix A. To rebut these findings, the Appellant relies on *Missouri v. Seibert*, 542 U.S. 600, 124 S.Ct. 260 159 L.Ed 2d 643 (2004). Brief of Appellant at 26. The present case is entirely unlike *Seibert* which involved police questioning of a defendant for 30 to 40 minutes before *Miranda* warnings were given. The present case is more closely aligned with *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed. 2d 222 (1985), where the Supreme Court held that a prior remark made by a defendant in response to questioning without the benefit of *Miranda* warnings did not render inadmissible a subsequent voluntary confession.

Thus, even if the pre-*Miranda* statement was not admissible, the post-*Miranda* statements were insulated from any taint and properly

admitted. Unless a prior unwarned statement was actually coerced, subsequent *Miranda* warnings provide the accused a choice as to whether to exercise the privilege to remain silent. *State v. Ustimenko*, 137 Wash.App. 109, 116, 151 P.3d 256 (2007). Whether Mr. Brush may have confessed to criminal activity in his responses to Officer Boggs is irrelevant to the admissibility of his post-*Miranda* statements. *State v. Allenby*, 68 Wash.App. 657, 660-662, 847 P.2d 1 (1992).

When a prior unwarned statement is voluntary, a break in time is not required to make a second warned confession can be rendered admissible; a proper administration of *Miranda* warnings “conveys the relevant information and thereafter the suspect's choice whether to exercise his privilege to remain silent should ordinarily be viewed as an ‘act of free will.’” *Allenby*, 68 Wash.App. at 660, (quoting *Elstad*, 470 U.S. at 311. “[A] *Miranda* violation without actual coercion will not taint evidence derived from a confession, no matter what form such evidence takes.” *State v. Wethered*, 110 Wash.2d 466, 474, 755 P.2d 797 (1985).

Based on the totality of the circumstances, there was substantial evidence supporting the trial judge’s determination that Mr. Brush knowingly, voluntarily, and intelligently waived his right to silence, which rendered his statements admissible at trial. *See* Appendix A. Mr. Brush’s first recorded interview was insulated from any statement made at the time

of arrest by more than an hour and his second interview started about an hour after the first interview ended. RP (10/12/11) 4-13, 33-34, 59, 68. There is no evidence to suggest that any interview was the product of a two-part *Missouri v. Seibert*⁴ interrogation.

C. Mr. Brush's initial statement to Officer Boggs did not taint subsequent statements made by Mr. Brush to the police.

Mr. Brush argues that his initial statement to Officer Boggs tainted any subsequent statements that Mr. Brush made to the police. Brief of Appellant at 27-30. The Appellant asserts that the two recorded interviews should have been suppressed. Brief of Appellant at 30. The Appellant rests his argument on the assertion that his custodial statement to Officer Boggs with regard to the shooting of a human being was coerced.

The State concedes that Mr. Brush was in custody when he made the statement about shooting a human being, because he was being handcuffed and was not free to leave. The relevant question, however, is not whether Mr. Brush was in custody but whether the "confession" was

⁴ It is important to emphasize that in *Seibert* the interrogating officers deliberately questioned a suspect without providing *Miranda* warnings until the suspect confessed. At this point, the officers advised the suspect of her *Miranda* rights, acquired a waiver from her, and then resumed interrogation. The officers then referred to the suspect's earlier pre-*Miranda* admissions to elicit a post-*Miranda* confession.

coerced. The defendant's volition in providing pre-*Miranda* statements, absent deliberately coercive or improper tactics in obtaining the inculpatory statements, renders subsequent statements an "act of free will." *Elstad*, 470 U.S. at 311. The relevant question, therefore, turns on whether a confession is coerced. The presence of coercion is judged "under the totality of the circumstances." *State v. Broadaway*, 133 Wash.2d 118, 132, 942 P.2d 363 (1997). To answer the question, courts have looked at whether the statements were "extracted by any sorts of threats, violence, or direct or implied promises, however slight." *State v. Riley*, 17 Wash.App. 732, 735, 565 P.2d 105 (1977). Other factors include "the condition of the defendant, the defendant's mental abilities, and the conduct of the police." *Broadaway*, 133 Wash.2d at 132. One also must consider "any promises or misrepresentations made by the interrogating officers." *Id.*

In large measure, the Appellant relies on the "cat out of the bag" doctrine to justify the suppression of subsequent recorded statements. Brief of Appellant at 27-30. However, the Appellant does not acknowledge that the "cat out of the bag" doctrine has been severely limited. *See Elstad*, 470 U.S. at 310-314. Moreover, the Appellant asserts, with little or no analysis, that his statement to Officer Boggs was involuntary. Brief of Appellant at 28-29. In short, the Appellant fails to

apply the “totality of the circumstances” test. The application of this test shows that Officer Boggs did not make any threats or imply any promises. The record also does not indicate that Mr. Brush suffered any mental infirmities that would cause him to not understand the question posed by Officer Boggs. Similarly, actions of Mr. Brush at the time he was arrested by the police demonstrate that he understood what was happening. The evidence shows that law enforcement officers were trying to restrain Mr. Brush so that they could examine the scene to determine exactly what had happened and to render any necessary aid. Officer Boggs testified that he asked Mr. Brush about shooting at a human being in order to determine whether medical personnel needed to be summoned. Officer Boggs also testified that Mr. Brush was handcuffed in order to protect the police officers and to enable them to secure the scene. RP (10/12/11) 18-21. Under such circumstances, there is ample evidence to support the conclusion that Mr. Brush’s statement to Officer Boggs was not coerced and therefore was voluntary. Under *Elstad*, the subsequent recorded statements are therefore admissible.

In a similar vein, the testimony of Officer Boggs brings into play the “public safety” exception to the requirement of *Miranda* warnings. See *New York v. Quarles*, 467 U.S. 649, 656, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984) (“the doctrinal underpinnings of *Miranda* [do not] require that

it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety”). Officer Boggs was quite clear in testifying that he asked Mr. Brush the one question about shooting at a human being in order to get a better handle on what the police needed to do next. Consequently, Officer Boggs’ single question to Mr. Brush falls under the ambit of the public safety exception to the *Miranda* rule.

Of equal significance is the fact that Officer Boggs’ question was not coercive. The lack of coercion obviates any argument attacking the admissibility of Mr. Brush’s subsequent statements. In this regard, it also needs to be pointed out that an appellate court must apply a substantial evidence standard in analyzing the question of voluntariness. As stated in *State v. L.U.*:

If there is substantial evidence in the record from which the trial court could have found by a preponderance of the evidence that the confession was voluntary, we will not disturb the trial court’s determination of voluntariness on appeal.

137 Wash.App. 410, 414, 153 P.3d 894 (2007).

Based on the totality of the record, and the deferential “substantial evidence” standard of review, the Court of Appeals should not disturb Findings of Fact I-7 and III-1. These findings indicate that Officer Boggs did not coerce Mr. Brush or use improper tactics in asking him the one

question about shooting at a human being. Given the holding in *Elstad*, the absence of coercion renders Mr. Brush's subsequent admissions at the Sheriff's Office admissible.⁵

D. After Mr. Brush was advised of his *Miranda* rights, the police did not interrogate Mr. Brush without his consent.

The Appellant contends that the police did not honor Mr. Brush's invocation of his right to remain silent when *Miranda* warnings were read to Mr. Brush by Officer Boggs. Brief of Appellant at 30-32. It is true that Deputy Chief Layman read Mr. Brush *Miranda* warnings from a preprinted form approximately eight minutes after the shooting took place. See Appendix A, Findings of Fact I-2 and I-10. From the Appellant's perspective, the police were trying to get "a second bite at the apple" after Mr. Brush declined to talk to Officer Boggs. However, the record does not contain any information which indicates that Deputy Chief Layman knew that Mr. Brush already had been *Mirandized* by Officer Boggs. Deputy Chief Layman was not on the scene when the shooting occurred.

⁵ Parenthetically, the Appellant may attempt to argue that the trial court's decision to exclude Mr. Brush's statement to Officer Boggs in the State's case-in-chief rendered the subsequent statements that Mr. Brush made at the Sheriff's Office inadmissible. The Appellant may try to point out that the State did not object to this ruling of the trial judge. The State proleptically notes that it did not "push" this issue because it desired a "clean" trial and did not want to muddy a clear-cut case by giving Mr. Brush another issue to raise on appeal. *Cf. State v. Lane*, 77 Wash.2d 860, 864, 467 P.2d 304 (1970).

Although Deputy Chief Layman arrived shortly thereafter, he simply took physical custody of Mr. Brush in the confused scene. As such, in an abundance of caution Deputy Chief Layman read *Miranda* warnings to Mr. Brush again. Nothing in the record indicates that Deputy Chief Layman attempted to extract additional statements from Mr. Brush. In fact, it was Mr. Brush who interjected that he would talk to the police when he was removed from the scene. RP (10/11/11) 54. See Appendix A, Finding of Fact I-10.

Moreover, the Appellant minimizes the fact Deputy Chief Layman went over Mr. Brush's advisement of rights a second time before the first interview occurred at the Sheriff's Office. RP (10/12/11) 66. When Mr. Brush asked for a lawyer after being interviewed for about half an hour, the interview was immediately terminated. RP (10/12/11) 34, 37, 67. A second interview was conducted only because Mr. Brush subsequently indicated that he wanted to continue to talk with Deputy Chief Layman. Further, before the second interview began, Mr. Brush was once again advised of his *Miranda* rights to make sure that he wanted to continue to converse with Deputy Chief Layman. RP (10/12/11) 67-72. Given these facts, it cannot be said that the police were trying to undermine Mr. Brush's right to remain silent. The admission of Mr. Brush's statements was proper.

E. The trial judge possessed sufficient evidence to find that Mr. Brush initiated contact with law enforcement after the first interview at the Sheriff's Office and that he subsequently voluntarily waived his *Miranda* rights.

If an accused invokes the right to counsel, the police may not re-question the accused until counsel has been provided, unless the accused himself initiates further communications with the police. *Edwards v. Arizona*, 451 U.S. 477, 484, 101 S.Ct. 1880, 1884, 68 L.Ed.2d 378 (1981). Likewise, the question of whether a defendant validly waives his previously asserted right to remain silent depends on: (1) whether the police scrupulously honored the defendant's right to cut off questioning, (2) whether the police continued interrogating the defendant before obtaining a waiver, (3) whether the police coerced the defendant to change his mind, and (4) whether the subsequent waiver was knowing and voluntary. *State v. Wheeler*, 108 Wash.2d 230, 238, 737 P.2d 1005 (1987). "An express written ... statement of waiver of the right to remain silent ... is usually strong proof of the validity of that waiver." *State v. Brown*, 158 Wash.App. 49, 61, 240 P.3d 1175 (2010), quoting *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979); see also *State v. Radcliffe*, 139 Wash.App. 214, 159 P.3d 486 (2007), which announced that Washington follows the holding in *Davis v. United States*, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994)

(after a knowing and voluntary waiver of the *Miranda* rights, an officer may continue questioning unless and until a suspect unequivocally requests an attorney).

Here, police officers stopped questioning Mr. Brush when he asked for an attorney during his first interview at the Sheriff's Office. The officers began completing their reports, and they had no intention of re-interviewing Mr. Brush. It was Mr. Brush who initiated contact and asked for a second interview with law enforcement. RP (10/12/11) 67-68. Mr. Brush was again advised of his *Miranda* warnings and signed a form waiving those rights. RP (10/12/11) 69-72. Deputy Chief Layman testified that no one talked to Mr. Brush to convince him to be re-interviewed. RP (10/12/11) 67-68, 71. The trial judge found that Mr. Brush's waivers and confession were knowingly, intelligently and voluntarily made, without threat or coercion, and were not tainted by any initial questioning. RP (10/12/11) 104-118; *see* Appendix A.

The Appellant argues that he was improperly interrogated a second time at the Sheriff's Office. Brief of Appellant at 32-35. The Appellant contends that there was insufficient evidence to show that he initiated further communication with law enforcement. The Appellant cites *State v. Armenta*, 134 Wash.2d 1, 14, 948 P.2d 1280 (1997) and *State v. Bryd*, 110 Wash.App. 259, 265, 39 P.3d 1010 (2002) for the proposition that the

State failed to carry its burden of proof, because there is an absence of a finding on a factual issue. Brief of Appellant at 34. The Appellant contends that the trial judge needed to make specific findings with regard to how Deputy Chief Layman found out that Mr. Brush wanted to continue to talk to Deputy Chief Layman after the first interview at the Sheriff's Office was terminated.

Although the record could have been more robust with regard to how Deputy Chief Layman was apprised of the fact that Mr. Brush wanted to talk to Deputy Chief Layman again, there are sufficient facts to justify the findings and conclusions of the trial judge. Deputy Chief Layman received a telephone call from Chief Flint Wright of the Long Beach Police Department, wherein Deputy Chief Layman was told that Mr. Brush had changed his mind and wanted to speak *specifically* with Deputy Chief Layman. RP (10/12/11) 67-68. While the Appellant tries "to make hay" out of the fact that we do know exactly what transpired between Chief Wright and Mr. Brush, it cannot be said that there is an absence of factual findings on the issue of whether Mr. Brush initiated further contact with the police. The record is clear on this point. After terminating the first interview at the Sheriff's Office, Mr. Brush subsequently indicated that he wanted to speak *specifically* with Deputy Chief Layman. The fact that the trial judge could have added more factual details to his decision

does not mean that there are insufficient facts to conclude that Mr. Brush voluntarily initiated further contact with the police. Hence, the holding in *Armenta* and *Byrd* is not applicable to Mr. Brush's case because there are factual predicates that pertain to Mr. Brush initiating further contact with the police.

The Appellant's contention that the second interview at the Sheriff's Office should have been suppressed is without merit.

IV. Mr. Brush selected each juror, and there was no error in excusing a juror.

A. Standard of review

Removal of a juror is reviewed for abuse of discretion. *State v. Jordan*, 103 Wash. App. 221, 226, 11 P.3d 866 (2000); *see also State v. Hughes*, 106 Wash.2d 176, 204, 721 P.2d 902 (1986). Removal of a juror is not subject to heightened scrutiny until a jury begins deliberation. *State v. Elmore*, 155 Wash.2d 758, 123 P.3d 72 (2005).

B. Mr. Brush's trial was decided by a properly constituted jury, and the removal of a juror was proper.

RCW 2.36.110 and CrR 6.5 place a continuous obligation on the trial judge to excuse any juror who is unfit and unable to perform the duties of a juror and enable the court to seat alternate jurors when the jury is selected: ". . . at any time before submission of the case to the jury a

juror is found unable to perform the duties *the court shall order* the juror discharged.” *Jorden*, 103 Wash. App. at 227. Factual determinations are left to the trial judge. *State v. Noltie*, 116 Wash.2d 831, 839-40, 809 P.2d 190 (1991).

Here, the trial judge considered a number of factors in reaching his conclusion: there were three alternative jurors; no evidence had been presented; the juror in question was unaware of his employment obligation before being empaneled; the airline tickets had been purchased by his employer without the juror’s involvement; the juror would suffer an undue economic hardship; and the juror may not have returned despite the court’s order. RP (11/28/11) 16-24, 44. The trial judge further provided a curative instruction for the remaining jurors which said that they were not to concern themselves with the removal of juror no. 1 in any way. RP (11/28/11) 46.

Mr. Brush selected each juror, including the alternate jurors. Mr. Brush’s empaneled jury was the panel he selected. The trial judge did not err in dismissing juror no.1.

V. MR. BRUSH’S EXCEPTIONAL SENTENCE WAS APPROPRIATE AND JUSTIFIED; IT SHOULD NOT BE REVERSED.

A. Standard of review

An exceptional sentence is reviewed with a three-part analysis. An appellate court (1) must make a factual inquiry to determine whether the record supports the jury's special verdict on the aggravating circumstance; (2) must conduct a *de novo* review to determine whether the trial court's reasons for imposing an exceptional sentence are substantial and compelling; and (3) must make a determination as to whether the trial court abused its discretion by imposing a sentence that is clearly excessive. *State v. Hyder*, 159 Wash.App. 234, 258, 244 P.3d 454 (2011); *see also State v. Sao*, 156 Wash.App. 67, 80, 230 P.3d 277 (2010); *State v. Law*, 154 Wash.2d 85, 93, 110 P.3d 717 (2005); *State v. Branch*, 129 Wash.2d 635; 919 P.2d 1228 (1996); and *State v. Pappas*, 176 Wash.2d 188, 289 P.3d 634 (2012).

Under the factual inquiry prong, the jury's findings will be upheld unless they are clearly erroneous. *State v. Hale*, 146 Wash.App. 299, 189 P.3d 829 (2008). The trial judge's findings with regard to the presence of aggravating factor, also must be upheld unless they are clearly erroneous. *State v. Scott*, 72 Wash. App 207, 866 P.2d 1258 (1993).

B. Hearsay statements were properly admitted during the second phase of the trial.⁶

⁶ This subsection appears at this point in the State's Brief in order to track the argument of the Appellant. Strictly speaking, the hearsay issue

A trial court's decision to admit hearsay statements is reviewed for abuse of discretion. *State v. Young*, 160 Wn.2d 799, 806, 161 P.3d 967 (2007).

In this case the Appellant's argument pertaining to hearsay primarily involves testimony of Elizabeth Bonney, the daughter of the victim Lisa Bonney. Elizabeth was allowed to testify as to statements made by Lisa concerning Lisa's relationship with Mr. Brush. The trial judge ruled that these statements were admissible. Some of the statements pertained to present sense impressions under ER 803 (a)(1), but the gravamen of this issue pertains to excited utterances.

An out-of-court statement offered to prove the truth of the matter asserted is admissible at trial if the statement relates to "a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." ER 803(a)(2). Three requirements must be satisfied in order for a hearsay statement to qualify as an excited utterance. First, a startling event or condition must have occurred. Second, the statement must have been made while the declarant was under the stress or excitement caused by the startling event or condition. Third, the statement must relate to the startling event or condition. *State v. Wood*,

raised by the Appellant does not directly pertain to the imposition of an exceptional sentence.

143 Wash.2d 561, 597, 23 P.3d 1046 (2001); *State v. Hardy*, 133 Wash.2d 701, 714, 946 P.2d 1175 (1997).

Here, the startling events which occurred are undisputed and were admitted through the Defendant's expert and Elizabeth Bonney. RP (12/5/11) 49-56, 134-143, 159. Elizabeth established that her mother was under the stress of the startling events as they occurred and that the statements related to the startling events. RP (12/6/11) 175-192. As a result, the hearsay statements were properly admitted. The Appellant argues that the excited utterances did not relate to the startling event or condition. Brief of Appellant at 39. This argument, *inter alia*, lacks merit because the Appellant has not demonstrated that the trial judge abused his discretion.

Furthermore, to the extent that Appellant is asserting any confrontation rights pertaining to the hearsay statements, this contention is blocked by the forfeiture by wrongdoing doctrine. *State v. Mason*, 160 Wash.2d 910, 162 P.3d 396 (2007) (the accused forfeits their confrontation rights when a witness is unavailable as a natural and foreseeable consequence of the Defendant's actions).

C. The exceptional sentence is supported by the record, and the aggravating factors justified an exceptional sentence; the sentence is not clearly excessive

A jury's finding by special interrogatory is reviewed under the sufficiency of the evidence standard and will be upheld unless clearly erroneous. *State v. Hale*, 146 Wash. App. 299, 307, 189 P.3d 829 (2008); *State v. Stubbs*, 170 Wash.2d 117, 123, 240 P.3d 143 (2010). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the aggravating factor beyond a reasonable doubt. *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992). *See also State v. Webb*, 162 Wash.App. 195, 205-206, 252 P.3d 424 (2011). The truth of the evidence, and all reasonable inferences therefrom, must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, 119 Wash.2d at 201.

1. The State presented sufficient evidence to allow the jury and the trial judge to find that Mr. Brush's actions were deliberately cruel, thereby justifying an exceptional sentence.

Deliberate cruelty requires gratuitous violence or other conduct, which inflicts physical, psychological or emotional pain as an end in itself and which goes beyond what is inherent in the elements of the crime or is normally associated with the commission of the crime. WPIC 300.10; *State v. Russell*, 69 Wash.App. at 237, 253, 848 P.2d 743 (1993) (upholding an exception sentence where a defendant used brass knuckles

on a child striking him several times causing his death); *State v. Delarosa-Flores*, 59 Wash.App. 514, 518, 799 P.2d 736 (1990).

The trier of fact's factual findings which justify an exception sentence are reversed only upon a showing of no substantial evidence supporting the findings. *Russell*, 69 Wash.App. at 250. Once the sentencing court finds substantial and compelling reasons for imposing an exceptional sentence, the court is permitted to use its discretion to determine the precise length of the sentence. The length of an exceptional sentence is reviewed under the abuse of discretion standard. *State v. Scott*, 72 Wash. App 207, 219, 866 P.2d 1258 (1993).

While a statute may proscribe behavior that could be described as deliberately cruel, it remains possible for a defendant to engage in gratuitous violence more egregious than typical. *Russell*, 69 Wash.App. at 253; *State v. Armstrong*, 106 Wash. 2d 547, 723 P.2d 1111 (1986) (upholding an exception sentence where a defendant threw boiling coffee on the infant and plunged the baby's foot in the hot coffee); *State v. Holyoak*, 49 Wash.App. 691, 696, 745 P.2d 515 (1987) (upholding an exceptional sentence for repeatedly striking the victim in the head with a rock); *State v. Tili*, 148 Wash.2d 350, 60 P.3d 1192 (2003) (upholding a 417-month exceptional sentence for rape where the defendant brutalized his victim when he held her down, hit her with fists and bit her back); and

State v. Gordon, 172 Wash.2d 671, 260 P.3d 884 (2011) (upholding a sentence where the defendants put the victim in a chokehold and continued hitting him, stomping on his head, and kicking him repeatedly, although their punches had already caused his death). In all of these cases, deliberate cruelty was used to justify an exceptional sentence.

Here, Mr. Brush's shotgun blasts were deliberate and cruel. In particular, the last shot to Ms. Bonney's head was designed to blow apart her head, leaving her lifeless body disfigured. This shot occurred after three previous shots, two of which were fatal. Ms. Bonney, whose body was already battered from a shot across her midsection and one to her back, suffered a third degrading shot to her buttock. Then Mr. Brush finished his shooting spree with a *coupe de grace*. Mr. Brush was so filled with rage that he blew Ms. Bonney's brain out of her skull and mangled her face and head. Dr. Nelson, with his 19 years of experience as a forensic medical examiner and crime scene analyst, described this homicide as one of the two worst he has observed in terms of being gratuitously violent and causing damage far in excess of the level of violence necessary to kill someone. RP (11/30/11) 46-50. This testimony

is substantial and compelling and thereby justifies an exceptional sentence upward.⁷

- 2. The injuries sustained by the victim, Lisa Bonney, substantially exceeded the level of bodily harm necessary to satisfy the elements of Murder in the First Degree; therefore, this aggravating factor justifies an exceptional sentence upward.**

Under RCW 9.94A.535(3)(y), an aggravating factor exists if “the victim’s injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense.” The Appellant cites *State v. Stubbs*, 170 Wash.2d 117, 240 P.3d 143 (2010) for the proposition that no injury can exceed the level of bodily harm necessary to cause death. Appellant’s Brief at 43. *Stubbs* on its face only applies to Assault in the First Degree.

More importantly, Dr. Nelson testified that he rarely has seen the level of violence that is associated with this case. Clearly, this case embodies a level of bodily harm that goes far beyond what is typically

⁷ The Appellant cites to *State v. Serrano*, 95 Wash.App. 700, 977 P.2d 47 (1999) to bolster his claim that the present case does not involve deliberate cruelty. Brief of Appellant at 42. The Appellant notes that shooting someone five times does not necessarily constitute gratuitous violence. While this piece of “dicta” may be true, connecting the holding of *Serrano* to Mr. Brush’s case is tendentious. Mr. Brush did not merely shoot Ms. Bonney four times. Mr. Brush’s actions in essence dismembered Ms. Bonney’s torso and brain. Thus, the number of shots that Mr. Brush fired at Ms. Bonney is not dispositive in determining whether Mr. Brush acted with deliberate cruelty.

associated with a case involving Murder in the First Degree. The Appellant seems to be arguing that all Murder in the First Degree cases are essentially the same because the end result is death. Nonetheless, it is important to emphasize that manner of death can fluctuate widely depending on the specific facts of a particular case. Thus, the level of bodily harm can vary substantially from case to case. For example, being killed by *one* bullet from a pistol is not qualitatively the same thing as being blasted four times at close range with a shotgun and having one's brain eviscerated.

In this case, the level of bodily injury is truly extraordinary. The bodily injuries that Ms. Bonney sustained substantially exceeded the injuries typically associated with a Murder in the First Degree. Hence, this aggravating factor justifies an exceptional sentence.

3. There was sufficient evidence for the jury and the trial judge to find that Mr. Brush's conduct constituted an "aggravated domestic violence offense."

Mr. Brush's pattern of psychological abuse began in July 2008 when he excluded Ms. Bonney from his home and had the locks changed. RP (12/6/11) 192. The abuse continued, and in July 2009, Mr. Brush became violent during an argument. He bashed a chair over a couch, broke a bottle of wine on a counter, and smashed Ms. Bonney's BMW

several times with a hammer. PR (12/5/11) 52-53, 134-35. The pattern of abuse continued when Mr. Brush began a stalking campaign after Ms. Bonney moved into a separate home. Mr. Brush followed Ms. Bonney to a friend's home to confront her about who she was seeing, and he repeatedly "stalked her" at her own home. Mr. Brush sent a threatening email, made harassing telephone calls, threatened Lisa Bonney with financial ruin, and sought to subject Ms. Bonney to public ridicule by threatening to post nude photos of her at her work place. Mr. Brush left a message which said that he would turn Ms. Bonney in for tax evasion and fraud. RP (12/5/11) 55, 138-141, 159; (12/6/11) 179, 189, 191. And, after more than a year of psychological abuse, on September 11, 2009, Mr. Brush murdered Ms. Bonney.

The State disagrees with the Appellant's contention that the jury should not have considered the fact that Mr. Brush kicked Ms. Bonney out of his home. Brief of Appellant at 45, RP (12/6/11) 192. Ownership of the home is irrelevant. What matters is that Mr. Brush took actions to psychologically terrorize Ms. Bonney. Mr. Brush changed the locks to psychologically abuse and control Ms. Bonney. As such, this example bolsters the claim of aggravated domestic violence.

On balance, Mr. Brush's murder of Ms. Bonney was a part of an on-going pattern of physiological abuse which occurred over a prolonged

period of time. There was sufficient evidence for the jury reach that conclusion, and the trial judge did not abuse his discretion in imposing an exceptional sentence upward.

D. The trial court’s instruction pertaining to the phrase “a prolonged period of time” utilized the approved WPIC language; this instruction does not constitute a comment on the evidence..

The Appellant asserts that the trial court commented on the evidence when the jury was given instruction no. 26. See Appendix C. Brief of Appellant at 47-48. A challenged jury instruction is reviewed *de novo*, in the context of the instructions as a whole. *State v. Brett*, 126 Wash.2d 136, 171, 892 P.2d 29 (1995). As long as the instructions properly inform the jury of the elements of the charged crime, any error in further defining terms used in the elements is not of constitutional magnitude. *State v. Gordon*, 172 Wash.2d 671, 677, 260 P.3d 884 (2011).

The trial judge used the language in WPIC 300.17 to define “a prolonged period of time” as “more than a few weeks.” The Appellant believes that this definition constitutes a judicial comment on the evidence and relieves the State of its burden to prove an aggravating factor beyond a reasonable doubt. Brief of Appellant at 48.

The Appellant’s contention misses the mark for two reasons. First, under the Appellant’s logic, any attempt to define a term or phrase would

constitute a comment on the evidence. This surely cannot be the case since appellate courts have approved numerous definitions that are contained in the WPIC pattern forms. Secondly, the issue of what constitutes a “prolonged period of time” is a question of law. *State v. Epefanio*, 156 Wash.App. 378, 391, 234 P.3d 253 (2010). Although the *Epefanio* Court did not approve a specific definition for what constitutes a “prolonged period of time,” a trial judge is not out of line in defining this phrase since the question is a matter of law. The definition of a “prolonged period of time” which is contained in WPIC 300.17 is consistent with the holding in *State v. Barnett*, 104 Wash.App. 191, 203, 16 P.3d 74 (2001), where the Court found that two weeks is not a prolonged period of time. Consequently, the Court of Appeals should see through the Appellant’s facile reasoning and hold that the trial judge did not err in giving instruction no. 26.

The trial judge correctly defined the state of the law, did not comment on the evidence, and did not relieve the State of its burden of proof.

E. Any aggravating factor can warrant a sentence above the standard range; the sentence imposed in this case is not clearly excessive.

The trial court found that the following aggravating factors justified the imposition of an exceptional sentence:

- (a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.
- (b) The current offense involved domestic violence, and the following was present: (1) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time; and (2) the offender's conduct during the commission of the current crime manifested deliberate cruelty.
- (c) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense.

See Appendix B.

The trial judge further found that the aggravating circumstances when taken together or considered individually constituted sufficient cause to impose the exceptional sentence. The trial judge stated that he would have imposed a sentence of 1060 months even if only one of the exceptional factors were found. *See Appendix B.*

The trial judge adopted the State's sentencing memorandum in justifying the imposition of an exceptional sentence. RP (2/9/12) 58. The relevant part of the State's sentencing memorandum reads as follows:

Each of the three aggravating factors found by the jury is sufficient, standing alone, to justify an exceptional sentence. The first aggravating factor (deliberate cruelty) is amply demonstrated by Dr. Nelson's testimony. Mr. Brush fired four shotgun blasts at close range into Ms. Bonney's body. Three of the four shots were lethal blows by themselves. The fourth shot, in particular, delivered Mr. Brush's final message: Ms. Bonney deserved to be totally vanquished. Dr. Nelson testified that in his decades of

practice as a forensic pathologist he had only observed one similar shooting. To be sure, this homicide was not a typical murder via a gunshot wound. Mr. Brush cruelly desecrated Ms. Bonney's body in order to make the ultimate statement that he was in control. Mr. Brush's deliberately cruel actions caused Ms. Bonney to suffer intense pain, if only for a short period of time. The deliberately cruel behavior of Mr. Brush justifies an exceptional sentence.

The second aggravating factor (an ongoing pattern of psychological abuse) also justifies an exceptional sentence. This appalling domestic violence crime did not occur in a vacuum. Mr. Brush and Ms. Bonney were involved in a long-term relationship that can only be described as toxic. Mr. Brush used psychological manipulation and placed Ms. Bonney in fear on multiple occasions. The sordid event which occurred on September 11, 2009, was the culmination of Mr. Brush's inability to keep his anger under control. Without a doubt, this incident constitutes a domestic violence crime that is horrific beyond description. It is difficult to imagine a parade of imaginary horrors involving a victim of domestic violence that would be worse than what occurred in this case. Consequently, the Court should exercise its discretion and impose an exceptional sentence based on this aggravating factor.

Finally, an exceptional sentence is justified because Ms. Bonney's injuries substantially exceeded the level of bodily harm that was necessary to kill her. The excessive injuries that Ms. Bonney sustained were carefully documented by Dr. Nelson. More importantly, Dr. Nelson emphasized that throughout his lengthy career he had only seen this level of violence in one other case. The number of shotgun blasts, in combination with the severity of the resultant injuries, produced a level of bodily harm far beyond what is "typical" in a first degree murder case. Thus, this aggravating factor supports the imposition of an exceptional sentence.

Each of these three aggravating factors should convince the Court that a standard range sentence is not appropriate and that an exceptional sentence upward is

justified given the severity of the aggravating factors. The sentence imposed in this case should reflect the fact that Mr. Brush's actions were "off the Richter scale." Of course, any murder by definition is very serious. But this case is "beyond the beyond." The State is hard pressed to imagine any scenario that would be worse than what happened to Ms. Bonney. But for Mr. Brush's egregiously callous and deleterious decision to extinguish Ms. Bonney's life, Lisa Bonney would still be enjoying the richness of living on the Long Beach Peninsula. No sentence imposed by the Court can possibly make up for the evil perpetrated by Mr. Brush. The State asks the Court to give Mr. Brush no quarter and to impose a long exceptional sentence that in some small measure will help to heal the misery that Mr. Brush unleashed on that fateful afternoon of September 11, 2009.

See Appendix D.

The amount of time that a trial judge imposes when giving an exceptional sentence upward can be overturned if the sentence is clearly excessive. RCW 9.94A.585(4). The standard of review for "clearly excessive" determinations is an abuse of discretion. *State v. Knutz*, 161 Wash.App. 395, 410, 253 P.3d 437 (2011). An abuse of discretion occurs when a judge bases his or her decision on untenable grounds or on untenable reasons, or takes an action that no reasonable person would have taken. *Id.* When a trial judge bases an exceptional sentence on appropriate reasons, a sentence is excessive only if it "shocks the conscience." *Id.* at 410-411.

In this instance, a “so-called” reasonable person could have imposed the sentence handed down by the trial judge. Under a substantial evidence standard, there is ample evidence which shows that the imposed sentence of 1060 months was not clearly excessive. The trial judge, *inter alia*, noted that the exceptional sentence was warranted because of the terror and horror inflicted by Mr. Brush in committing the offense. The trial judge also pointed to the shot selection, the number of shots, and the decision to continue well beyond what was necessary to cause Ms. Bonney’s death. RP (2/9/12) 60-68. The trial judge further referenced the extreme psychological abuse which turned this matter into an aggravated domestic violence case. Finally, the trial judge announced that the sentence was not based on emotion, but instead was based on a thorough review of the facts presented at trial. RP (2/9/12) 58-61.

In sum, there were sufficient grounds to justify an exceptional sentence upward. The trial judge did not abuse his discretion in finding substantial and compelling reasons to impose an exceptional sentence. The sentence is not clearly excessive.

CONCLUSION

For the foregoing reasons discussed above, Mr. Brush’s conviction should be upheld. The exceptional sentence of 1060 months also should

be sustained based on the fact that the jury found the presence of aggravating factors beyond a reasonable doubt. Further, the trial judge determined that based on these aggravating factors there were substantial and compelling reasons to impose an exceptional sentence. Consequently, Mr. Brush's arguments should be rejected and his request for relief should be denied.

Respectfully submitted this 25th day of March, 2013.

DAVID J. BURKE
PACIFIC COUNTY PROSEGTOR

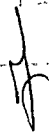
By. David J. Burke

DAVID J. BURKE, WSBA#16163
Pacific County Prosecuting Attorney

FILED

2011 NOV 30 PM 12: 24

PROSECUTOR
PACIFIC COUNTY, WA



APPENDIX "A"

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PACIFIC COUNTY

STATE OF WASHINGTON,)
)
Plaintiff,)
)
vs.)
)
BRIAN K. BRUSH,)
Defendant.)
_____)

NO. **09-1-00143-8**

**CrR 3.5 HEARING
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND DECISION**

I. UNDISPUTED FACTS

1. On September 11, 2009, Officer Arlie Boggs, Officer Brad Page and Officer Nicholas Fosse were in Long Beach, Washington. Officer Boggs and Officer Page worked for the Raymond Police Department. Officer Fosse worked for the Montesano Police Department. These police officers were in Long Beach for the "Rod Run" antique automobile festival which was occurring over the weekend. The "Rod Run" event attracts a large number of people to the Long Beach Peninsula. Hence, these three officers were in the City of Long Beach to provide additional police presence.

CrR 3.5 Hearing
Findings of Fact, Conclusions
Of Law and Decision - 1

204

Pacific County Prosecuting Attorney
P.O. Box 45
Courthouse
South Bend, WA 98586
Phone: (360) 875-9361
Fax: (360) 875-9362



- 1
2 2. At approximately 4:40 p.m. on September 11, 2009, Officers Boggs, Page,
3 and Fosse were in uniform and were walking west on the Bolstad beach
4 approach. Officer Boggs heard a loud noise which sounded like a
5 firecracker. Officer Boggs and the other two officers moved forward in a
6 westerly direction toward the beach.
7
- 8
9 3. The police observed a person crouching down shooting a rifle/shotgun.
10 Officer Boggs heard multiple shots.
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- 12
13 4. Upon moving forward, the police saw a male throw the firearm into the air
14 and throw his baseball cap onto the ground.
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- 16
17 5. The male moved toward the three police officers and put his hands into
18 the air. When told to get on the ground by the police, the male complied.
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- 20
21 6. The police noticed that there appeared to be a person laying on the
22 ground.
23
- 24
25 7. While this male was being handcuffed, Officer Boggs asked this person if
26 he was shooting at a human being. The male responded "yes". Officer
27 Boggs did not ask this male any other questions. Neither Officer Boggs
28 nor the other police officers threatened this male when Officer Bogs asked
29 this question.
30
- 31
32 8. The police quickly determined that a female who was laying on the ground
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1 had received massive trauma from shotgun blasts and was deceased.

2 This individual was later determined to be Lisa Bonney.

3
4
5 9. The male who was taken into custody complained that he was
6 experiencing chest pains. This male was later identified as Brian Brush.

7
8 Mr. Brush told Pacific County Undersheriff Ron Clark that he suffered from
9 high blood pressure. An emergency aid crew responded to the scene.

10
11
12 10. Mr. Brush was read his constitutional rights by Officer Heath Layman of
13 the Cosmopolis Police Department. Officer Layman read Mr. Brush his
14 rights verbatim from a preprinted form at 4:48 p.m. See Exhibit A. Mr.
15 Brush told Officer Layman that he understood each of his rights but that
16 he did not want to talk to the police at the scene where he could see the
17 body of the victim. Mr. Brush indicated that he would talk to the police
18 when he was removed from the scene.

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23 11. A medical aide crew determined that Mr. Brush did not have any
24 significant injuries and "cleared" Mr. Brush so that he could be transported
25 by the police.

26
27
28 12. Mr. Brush was transported to the Pacific County Sheriff's Office for
29 questioning.

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31
32 13. Officer Layman and Undersheriff Clark conducted an interview with Mr.
33

1 Brush. Mr. Brush was asked again if he understood his constitutional
2 rights. Mr. Brush indicated once again that he understood his rights and
3 that he did not want an attorney. The interview began at 5:52 p.m.
4

5
6 Eventually Mr. Brush indicated that he wanted to talk to a lawyer. The
7 interview was ended immediately at 6:24 p.m.
8

9
10 14. Subsequently, Mr. Brush indicated that he wanted to speak to the police.

11 A second interview was conducted with Officer Layman only. At the
12 beginning of this second interview Officer Layman read Mr. Brush his
13 constitutional rights from a preprinted form. See Exhibit B. This form is
14 different from Exhibit A because Officer Layman used a form that was
15 readily available which was created by another police agency. Mr. Brush
16 indicated that he understood each of his constitutional rights and that he
17 wanted to talk to Officer Layman. Mr. Brush signed Exhibit B and
18 acknowledged that he had waived his Constitutional Rights. Mr. Brush
19 indicated that it was his idea to participate in this second interview and
20 that the police had done nothing to get him to continue to talk. At the
21 beginning of this second interview, Mr. Brush also indicated that he did
22 not want an attorney. This second interview began at 7:27 p.m. and
23 concluded at 7:39 p.m.
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2 15. Mr. Brush never gave any indication that he did not understand the
3 constitutional rights that were read to him on two separate occasions. Mr.
4 Brush's responses indicate that he cognizant of what he was doing each
5 time he waived his constitutional rights. The police did not put any
6 "pressure" on Mr. Brush to get him to talk.
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10 **II. DISPUTED FACTS**

- 11
12 1. Did Officer Boggs intentionally coerce Mr. Brush into making an
13 incriminating statement?
14
15 2. Do the answers contained on written form that Officer Layman used to
16 read Mr. Brush his constitutional rights for the first time at 4:48 p.m. on
17 September 11, 2009, demonstrate that Mr. Brush did not waive his
18 constitutional rights?
19
20 3. Does Mr. Brush's failure to sign the written form that Officer Layman used
21 to read Mr. Brush his constitutional rights of 4:48 p.m. on September 11,
22 2009 constitute a refusal by Mr. Brush to waive his constitutional rights?
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27 **III. RESOLUTION OF DISPUTED FACTS**

- 28
29 1. Officer Boggs blurted out a question to Mr. Brush on the spur of the
30 moment. Officer Boggs was trying to process what he had just observed,
31 viz., the apparent shooting of a human being. Officer Boggs was not
32
33

1 intentionally trying to elicit an incriminating response from Mr. Brush. The
2 question that Officer Boggs posed to Mr. Brush does not constitute police
3 coercion or the use of improper tactics.
4

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7 2. Officer Layman testified that the written form he used to advise Mr. Brush
8 of his constitutional rights for the first time at 4:48 p.m. on September 11,
9 2009, contained two questions that required a dichotomous choice.
10

11 Specifically, the form contains the following language:
12

13 1. Do you understand these rights explained to you?

14 YES NO Initials: _____
15

16 2. Having these rights in mind, do you wish to talk to us now?
17

18 YES NO Initials: _____
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23 See Exhibit A.

24 3. With regard to question no. 2, Officer Layman testified that he checked
25 the "no" box because Mr. Brush did not affirmatively say that he was
26 immediately willing to talk to the police. Officer Layman testified that he
27 would have written in the reason why Mr. Brush did not want to talk to
28 the police immediately, viz., Mr. Brush did not want to participate in an
29 interview at the scene because he could see the decedent's body.
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2 However, the written form used by Officer Layman did not contain an
3 option for explaining that the arrestee was willing to talk to the police,
4 albeit at a later time. Consequently, Officer Layman checked the "no" box
5 for question no. 2, because he thought that checking the "no" box was a
6 better approximation for what Mr. Brush said rather than checking the
7 "yes" box.
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11 4. The Court finds that Officer Layman's explanation is credible. The Court
12 was carefully able to observe Officer Layman's testimony. While
13 testifying, Officer Layman was seated at a very close distance to the Court
14 (approximately 4.5 feet). Officer Layman looked directly at the Court
15 while testifying and explained his reasoning in a manner that was
16 overwhelmingly believable. In addition, Officer Layman's testimony was
17 not contradicted by any other witnesses. Therefore, the Court finds that
18 Mr. Brush did not refuse to talk to the police after being read his
19 constitutional rights for the first time at the scene of the incident.
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22 Although Mr. Brush decided to delay talking to the police, he nevertheless
23 voluntarily chose to talk to the police.
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27 5. Although Mr. Brush did not sign the written form that Officer Layman used
28 when he first read Mr. Brush his constitutional rights at 4:48 p.m. on
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1 September 11, 2009, Officer Layman testified that he did not have Mr.
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3 Brush sign the form due to officer safety issues. Mr. Brush was
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5 handcuffed at the time, and Officer Layman thought it would be unwise
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7 from a security standpoint to release Mr. Brush from handcuffs so that he
8
9 could sign the form.

10 6. The Court finds that Officer Layman's reasoning is both credible and
11
12 justified. Because it would have been an unnecessary and deleterious risk
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14 to release Mr. Brush from handcuffs, there is a logical and rational
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16 explanation for why Mr. Brush did not sign the written form that Officer
17
18 Layman used. See Appendix A. Therefore, the absence of Mr. Brush's
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20 signature on the written form that Officer Layman first used to apprise Mr.
21
22 Brush of his constitutional rights has no bearing on whether Mr. Brush
23
24 knowingly, intelligently, and voluntarily waived his constitutional rights.

25 7. The police read Mr. Brush his constitutional rights on two separate
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27 occasions in a clear and understandable manner. Mr. Brush appears to be
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29 of a normal or higher intelligence. The police were able to communicate
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31 effectively with Mr. Brush. Also, nothing pertaining to the incident
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33 indicates that Mr. Brush had any difficulty understanding Officer Layman's
statements on each occasion when Officer Layman read Mr. Brush his

1 constitutional rights. As a former police officer, Mr. Brush was familiar
2 with the substance of his constitutional rights. Therefore, the Court finds
3 that Mr. Brush knowingly, intelligently, and voluntarily waived his
4 constitutional rights at approximately 4:48 p.m. and at approximately 7:27
5 p.m.
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- 10 8. Any conclusion of law deemed to be a finding of fact is adopted as such.

11 **IV. CONCLUSIONS OF LAW**

- 12
13 1. The Pacific County Superior Court has jurisdiction to hear this matter.
14
15 2. Mr. Brush's statement to Officer Arlie Boggs which acknowledged that Mr.
16 Brush shot at a human being is inadmissible during the State's case-in-
17 chief. This statement was made before Mr. Brush's constitutional rights
18 were read to Mr. Brush. When the statement was made, Mr. Brush, was
19 being handcuffed which indicates that he was not free to leave.
20 Therefore, Mr. Brush in essence was in custody. Given the totality of the
21 circumstances, the question posed by Officer Boggs to Mr. Brush
22 constitutes interrogation, even though Officer Boggs was not trying to
23 elicit an incriminating response. Since this question reasonably could
24 produce an incriminating statement by Mr. Brush, this pre-Miranda
25 statement must be suppressed. However, since the asking of this one
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1 question does not constitute coercion or the use of improper tactics, it
2 does not taint any subsequent admissions/statements by Mr. Brush. This
3 conclusion of law is consistent with the U.S. Supreme Court holding in
4 Oregon v. Elstad, 490 U.S. 298 (1985). The behavior of the police in this
5 case does not rise to the level of proscribed conduct delineated in Elstad
6 or discussed in Missouri v. Seibert, 542 U.S. 600 (2004).
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11 3. The statements made by Mr. Brush after he was first read his
12 constitutional rights at approximately 4:48 p.m. on September 11, 2009,
13 are admissible during the State's case-in-chief with one exception. Any
14 statements Mr. Brush made concerning his constitutional rights are not
15 admissible, e.g., his request for a lawyer at approximately 6:24 p.m. The
16 statements that Mr. Brush made after he waived his constitutional rights
17 are admissible during the State's case-in-chief because his waiver was
18 knowing, intelligent, and voluntary.
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25 4. Mr. Brush waived his constitutional rights for a second time at
26 approximately 7:27 p.m. on September 11, 2009. This second waiver was
27 also knowing, intelligent, and voluntary. This second waiver has the effect
28 of vitiating Mr. Brush's request for a lawyer at approximately 6:24 p.m.
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32 Therefore, the substantive statements made to Officer Layman during the
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second interview are also admissible during the State's case-in-chief.

5. Any finding of fact deemed to be a conclusion of law is adopted as such.

V. DECISION

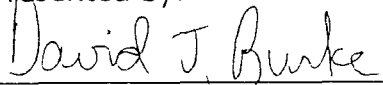
Pursuant to CrR 3.5, all of the defendant's responses to questions and all of the statements made by Mr. Brush to the police are admissible during the State's case-in-chief with two exceptions. First, the statement made by Mr. Brush in response to Officer Bogg's question is not admissible during the State's case-in-chief. Secondly, any statements which Mr. Brush made concerning his constitutional rights are also inadmissible during the State's case-in-chief.

Dated this 30th day of November, 2011.



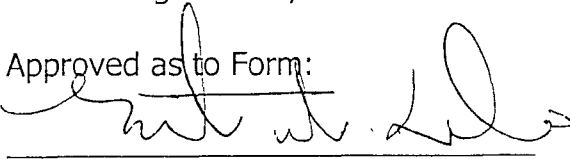
JUDGE

Presented by:




DAVID J. BURKE, WSBA#16163
Prosecuting Attorney

Approved as to Form:



ERIK KUPKA, WSBA# 28835
Attorney for Defendant



David Mistak in #34063
As to Form only.



CONSTITUTIONAL RIGHTS
COSMOPOLIS POLICE DEPARTMENT

1312 First Street / PO Box 478 Cosmopolis, WA. 98537
Emergency Dial 911 · Office (360) 532-9237 · Fax (360) 532-9273 · E-Mail cpdrecords@comcast.net

Date 9-11-09	Time 16:48	Officer Completing Form K. LAYMAN	Law Incident #
Location Where Rights Advised BOLSTAD APPROACH		Witnesses 221 NW 19TH, LONG BEACH, WA	

Last Name BRUSH	First Name BRIAN	Middle KEITH	Date of Birth 06-16-1962
--------------------	---------------------	-----------------	-----------------------------

You are hereby advised you are being investigated for: A SHOOTING, ASSAULT,
HOMICIDE

1. You have the right to remain silent; ✓
2. Anything you say can and will be used against you in a court of law; ✓
3. You have the right at this time to talk to a lawyer and have him present with you while you are being questioned; ✓
4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish; ✓
5. You can decide at any time to exercise these rights and not answer any questions or make any statements. ✓

Additional Warning for Juveniles:

If you are under the age of 18, anything you say can be used against you in a juvenile court prosecution for a juvenile offense and can also be used against you in an adult court criminal prosecution if the juvenile court decides that you are to be tried as an adult.

After reading and/ or having the above rights read to you:

1. Do you understand each of these rights explained to you? YES NO Initials: _____
2. Having these rights in mind, do you wish to talk to us now? YES NO Initials: _____

nature: Y Date: 09-11-09 Time: 16:48

Signature of Witness: [Signature] Signature of Witness: _____

VOLUNTARY STATEMENT

DATE 09-11-09 PLACE Pacific Co. S.O. Longbeach TIME STARTED 19:27 .M

I, Brian Brewster am 47 years old. My date of birth is 06-16-1962

I live at 221 NW 19th Longbeach 98631

The person to whom I give the following voluntary statement, HEATH LAYMAN

having identified and made himself known as a DEPUTY CHIEF OF POLICE, COMPOUS

Statement of Miranda Rights

- 1. You have the right to remain silent.
- 2. Anything you say can and will be used against you in a court of law.
- 3. You have right to talk to a lawyer and have him present with you while you are being questioned.
- 4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish.
- 5. You can decide at any time to exercise these rights and not answer any questions or make any statements.

Waiver of Rights

I have read the above statement of my rights and I understand each of those rights, and having these rights in mind I waive them and willingly make a statement.

[Signature]
Signature of Person Giving Statement

I have read each page of his statement consisting of _____ pages, each page of which bears my signature, and corrections, if any, bear my initials, and I certify that the facts contained herein are true and correct.

[Signature]
Signature of Person Giving Statement

WITNESSED BY:

[Signature]
Officer's Name

Officer's Department

DATE: 09-11-2009, 19:27 TIME 19:27 .M

FILED

2012 FEB -9 PM 4:55

CLERK OF SUPERIOR COURT
WA 50.03A

[Handwritten signature]

APPENDIX "B"

Superior Court of Washington
County of PACIFIC

12 9 00051 1

State of Washington, Plaintiff.

No. 09-1-00143-8

vs.

Felony Judgment and Sentence --
Prison
(FJS)

BRIAN K. BRUSH, 06/16/1962
Defendant. DOB
PCN:
SID: WA25307137

- Clerk's Action Required, para 2.1, 4.1, 4.3, 5.2, 5.3, 5.5 and 5.7
- Defendant Used Motor Vehicle
- Juvenile Decline Mandatory Discretionary

I. Hearing

1.1 The court conducted a sentencing hearing this date; the defendant, the defendant's lawyer, and the (deputy) prosecuting attorney were present.

II. Findings

2.1 **Current Offenses:** The defendant is guilty of the following offenses, based upon
 guilty plea (date) ___ jury-verdict (date) 12/9/11 bench trial (date) _____:

Count	Crime	RCW (w/subsection)	Class	Date of Crime
1	MURDER IN THE FIRST DEGREE	9A.32.030(1)(a)	A	9/11/09

Class: FA (Felony-A), FB (Felony-B), FC (Felony-C)

(If the crime is a drug offense, include the type of drug in the second column.)

Additional current offenses are attached in Appendix 2.1a.

The jury returned a special verdict or the court made a special finding with regard to the following:

The defendant used a **firearm** in the commission of the offense in Count 1. RCW 9.94A.825, 9.94A.533.

The defendant used a **deadly weapon other than a firearm** in committing the offense in Count _____
RCW 9.94A.602, 9.94A.533.

Count _____, **Violation of the Uniform Controlled Substances Act (VUCSA)**, RCW 69.50.401 and RCW 69.50.435, took place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.

250

- The defendant committed a crime involving the manufacture of methamphetamine including its salts, isomers, and salts of isomers, **when a juvenile was present in or upon the premises of manufacture** in Count _____, RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.
- Count _____ is a **criminal street gang**-related felony offense in which the defendant compensated, threatened, or solicited a **minor** in order to involve that minor in the commission of the offense. RCW 9.94A.833.
- Count _____ is the crime of **unlawful possession of a firearm** and the defendant was a **criminal street gang** member or associate when the defendant committed the crime. RCW 9.94A.702, 9.94A._____.
- The defendant committed **vehicular homicide** or **vehicular assault** proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030.
- Count _____ involves **attempting to elude** a police vehicle and during the commission of the crime the *defendant endangered* one or more persons other than the defendant or the pursuing law enforcement officer. RCW 9.94A.834.
- Count _____ is a felony in the commission of which the defendant used **amotor vehicle**. RCW 46.20.285.
- The defendant has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.
- The crime(s) charged in Count 1 _____ involve(s) **domestic violence**. RCW 10.99.020.
- Counts _____ encompass the same criminal conduct and count as one crime in determining the offender score. RCW 9.94A.589.
- Other current convictions listed under different cause numbers used in calculating the offender score are** (list offense and cause number):

	<i>Crime</i>	<i>Cause Number</i>	<i>Court (county & state)</i>
1.			
2.			

- Additional current convictions listed under different cause numbers used in calculating the offender score are attached in Appendix 2.1b.

2.2 Criminal History (RCW 9.94A.525):

	<i>Crime</i>	<i>Date of Crime</i>	<i>Date of Sentence</i>	<i>Sentencing Court (County & State)</i>	<i>A or J Adult, Juv.</i>	<i>Type of Crime</i>	<i>DV* Yes</i>
1	NONE						

* DV: Domestic Violence was pled and proved.

- Additional criminal history is attached in Appendix 2.2.
- The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.
- The prior convictions listed as number(s) _____, above, or in appendix 2.2, are one offense for purposes of determining the offender score (RCW 9.94A.525)
- The prior convictions listed as number(s) _____, above, or in appendix 2.2, are not counted as points but as enhancements pursuant to RCW 46.61.520.

2.3 Sentencing Data:

Count No.	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus Enhancements*	Total Standard Range (including enhancements)	Maximum Term
1	0	XV	240-320 months	60 months	300-380 months	LIFE \$50,000

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present, (CSG) criminal street gang involving minor, (AE) endangerment while attempting to elude.
 Additional current offense sentencing data is attached in Appendix 2.3.

For violent offenses, most serious offenses, or armed offenders, recommended sentencing agreements or plea agreements are attached as follows: _____

2.4 [X] Exceptional Sentence. The court finds substantial and compelling reasons that justify an exceptional sentence:

below the standard range for Count(s) _____.

above the standard range for Count(s) **I** _____.

The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

Aggravating factors were stipulated by the defendant, found by the court after the defendant waived jury trial, found by jury, by special interrogatory.

within the standard range for Count(s) _____, but served consecutively to Count(s) _____.

Findings of fact and conclusions of law are attached in Appendix 2.4. Jury's special interrogatory is attached as Appendix 2.5. The Prosecuting Attorney did did not recommend a similar sentence.

2.5 Ability to Pay Legal Financial Obligations. The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds

That the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.755):

 The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

III. Judgment

3.1 The defendant is **guilty** of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 The court **dismisses** Counts _____ in the charging document.

IV. Sentence and Order

It is ordered:

4.1 C onfinement. The court sentences the defendant to total confinement as follows:

(a) **Confinement.** RCW 9.94A.589. A term of total confinement in the custody of the Department of Corrections (DOC):

1000 months on Count 1 (exceptional sentence upward) months on Count _____
_____ months on Count _____ months on Count _____
_____ months on Count _____ months on Count _____

The confinement time on Count(s) _____ contain(s) a mandatory minimum term of _____.

The confinement time on Count 1 includes 60 months as enhancement for firearm deadly weapon VUCSA in a protected zone

manufacture of methamphetamine with juvenile present.

Actual number of months of total confinement ordered is: 1,060 months

All counts shall be served concurrently, except for the portion of those counts for which there is an enhancement as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

The sentence herein shall run consecutively with the sentence in cause number(s) _____

but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589.

Confinement shall commence immediately unless otherwise set forth here: _____

(b) **Credit for Time Served.** The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The jail shall compute time served.

(c) **Work Ethic Program.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic program. The court recommends that the defendant serve the sentence at a work ethic program. Upon completion of work ethic program, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions in Section 4.2. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of confinement.

4.2 Community Custody. (To determine which offenses are eligible for or required for community custody see RCW 9.94A.701)

(A) The defendant shall be on community custody for the longer of:

- (1) the period of early release. RCW 9.94A.728(1)(2); or
- (2) the period imposed by the court, as follows:

Count(s) 1 36 months for Serious Violent Offenses

Count(s) _____ 18 months for Violent Offenses

Count(s) _____ 12 months (for crimes against a person, drug offenses, or offenses involving the unlawful possession of a firearm by a street gang member or associate)

(B) While on community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while on community custody; (6) not own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; and (9) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706. The defendant's residence location and living arrangements are subject to the prior approval of DOC while on community custody.

The court orders that during the period of supervision the defendant shall:

consume no alcohol.

have no contact with: _____

remain within outside of a specified geographical boundary, to wit: _____

not serve in any paid or volunteer capacity where he or she has control or supervision of minors under 13 years of age.

participate in the following crime-related treatment or counseling services: _____

undergo an evaluation for treatment for domestic violence substance abuse

mental health anger management, and fully comply with all recommended treatment. _____

comply with the following crime-related prohibitions: _____

Other conditions:

SEE ATTACHED APPENDIX H

Court Ordered Treatment: If any court orders mental health or chemical dependency treatment the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

4.3 Legal Financial Obligations: The defendant shall pay to the clerk of this court:

JASS CODE

PCV \$ 500 Victim assessment RCW 7.68.035

PDV \$ 100 Domestic Violence assessment RCW 10.99.080

CRC \$ 200 Court

costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190

Criminal filing fee \$200 _____ FRC
 Witness costs \$ _____ WFR
 Sheriff service fees \$ _____ SFR/SFS/SFW/WRF
 Jury demand fee \$ _____ JFR
 Extradition costs \$ _____ EXT
 Other \$ _____

PUB \$ 250 Fees for court appointed attorney RCW 9.94A.760

WFR \$ _____ Court appointed defense expert and other defense costs RCW 9.94A.760

FCM/MTH \$ _____ Fine RCW 9A.20.021; [] VUCSA chapter 69.50 RCW, [] VUCSA additional fine deferred due to indigency RCW 69.50.430

CDF/LDI/FCD \$ _____ Drug enforcement fund of _____ RCW 9.94A.760
 NTF/SAD/SDI \$ _____ DUI fines, fees and assessments

CLF \$ _____ Crime lab fee [] suspended due to indigency RCW 43.43.690
 \$ 100 DNA collection fee RCW 43.43.7541

FPV \$ _____ Specialized forest products RCW 76.48.140
 \$ _____ Other fines or costs for: _____

RTN/RJN \$ _____ Emergency response costs (Vehicular Assault, Vehicular Homicide, Felony DUI only, \$1000 maximum) RCW 38.52.430

RTN/RJN \$ _____ Restitution to: _____
 \$ _____ Restitution to: _____
 \$ _____ Restitution to: _____
 (Name and Address--address may be withheld and provided confidentially to Clerk of the Court's office.)

\$ 1,150⁰⁰ Total RCW 9.94A.760

[X] The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

[] shall be set by the prosecutor.

[X] is scheduled for May 11, 2012 at 1:30pm (date).

* [X] The defendant waives any right to be present at any restitution hearing (sign initials): BB *

[] Restitution Schedule attached.

[] Restitution ordered above shall be paid jointly and severally with:

Name of other defendant Cause Number (Victim's name) (Amount-\$)

RJN

[] The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

[] All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ _____ per month commencing _____ RCW 9.94A.760.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b).

[] The court orders the defendant to pay costs of incarceration at the rate of \$ _____ per day, (actual costs not to exceed \$100 per day). (JLR) RCW 9.94A.760.

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.4 DNA Testing. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

HIV Testing. The defendant shall submit to HIV testing. RCW 70.24.340.

4.5 No Contact:

The defendant shall not have contact with ELIZABETH BONNEY, OLIVIA BONNEY, KIM KLINGER AND GENE AND ANNA KLINGER (name) including, but not limited to, personal, verbal, telephonic, written or contact through a third party until FOR LIFE (which does not exceed the maximum statutory sentence).

Scott Klingler
Raymond Bonney

The defendant is excluded or prohibited from coming within 300 FEET (distance) of: ELIZABETH BONNEY, OLIVIA BONNEY, KIM KLINGER, GENE AND ANNA KLINGER's home/ residence work place school (other location(s))

Scott

Raymond Bonney
Klinger and

_____, or
 other location: _____, until _____ (which does not exceed the maximum statutory sentence).

A separate Domestic Violence No-Contact Order or Antiharassment No-Contact Order is filed concurrent with this Judgment and Sentence.

4.6 Other: _____

4.7 Off -Limits Order. (Known drug trafficker). RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections: _____

V. Notices and Signatures

5.1 Collateral Attack on Judgment. If you wish to petition or move for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, you must do so within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 Length of Supervision. If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 Notice of Income-Withholding Action. If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections (DOC) or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 Community Custody Violation.

(a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.633.

(b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.714.

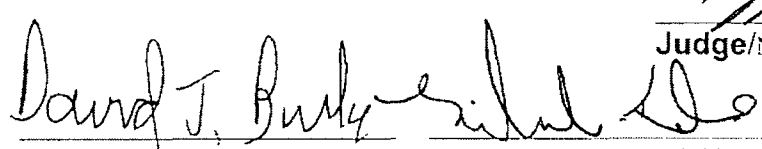
5.5 Firearms. You may not own, use or possess any firearm unless your right to do so is restored by a superior court in Washington State, and by a federal court if required. You must immediately surrender any concealed pistol license. (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.6 Reserved

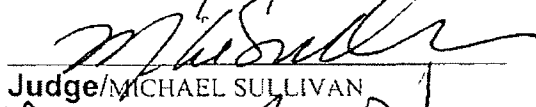
5.7 Motor Vehicle: If the court found that you used a motor vehicle in the commission of the offense, then the Department of Licensing will revoke your driver's license. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke your driver's license. RCW 46.20.285

5.8 Other: This offense is a most serious offense under RCW 9.94A.030(31) and constitutes a "strike" under Washington's "three strikes" law.

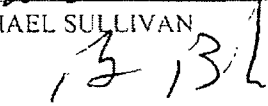
Done in Open Court and in the presence of the defendant this date: 2/9/2012



DAVID J. BURKE, WSBA#16163
Prosecuting Attorney


Judge/MICHAEL SULLIVAN

ERIK KUPKA, WSBA#28835
Attorney for Defendant

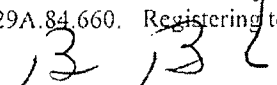


BRIAN K. BRUSH
Defendant

Voting Rights Statement: I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

My right to vote is provisionally restored as long as I am not under the authority of DOC (not serving a sentence of confinement in the custody of DOC and not subject to community custody as defined in RCW 9.94A.030). I must register before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal financial obligations or an agreement for the payment of legal financial obligations

My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

Defendant's signature: 

I am a certified or registered interpreter, or the court has found me otherwise qualified to interpret, in the _____ language, which the defendant understands. I interpreted this Judgment and Sentence for the defendant into that language.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at (city) _____, (state) _____, on (date) _____.

Interpreter _____

Print Name _____

VI. Identification of the Defendant

SID No. WA25307137

Date of Birth 06/16/1962

(If no SID complete a separate Applicant card
(form FD-258) for State Patrol)

FBI No. 832184ED2

Local ID No. _____

PCN No. _____

Other _____

Alias name, DOB: _____

Race:

Asian/Pacific Islander Black/African-American Caucasian
 Native American Other: _____

Ethnicity:

Hispanic Male
 Non-Hispanic Female

Sex:

Fingerprints: I attest that I saw the defendant who appeared in court affix his or her fingerprints and signature on this document.

Clerk of the Court, Deputy Clerk, _____

[Handwritten signature]
[Handwritten signature]

Dated: 2-9-2012

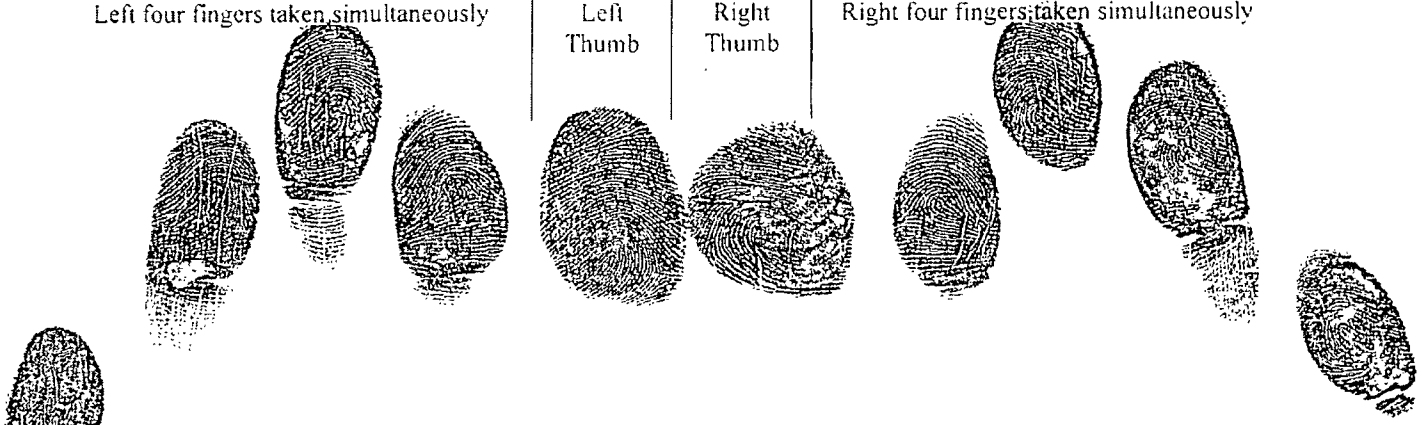
The defendant's signature: _____

Left four fingers taken simultaneously

Left Thumb

Right Thumb

Right four fingers taken simultaneously



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PACIFIC COUNTY

STATE OF WASHINGTON)	NO. 09-1-00143-8
Plaintiff)	
vs.	)	JUDGMENT AND SENTENCE
	)	(FELONY) APPENDIX 2.4,
	)	FINDINGS OF FACT AND
BRIAN K. BRUSH,	)	CONCLUSIONS OF LAW
Defendant	)	JUSTIFYING AN UPWARD
_____	)	EXCEPTIONAL SENTENCE

2.4 An exceptional sentence above the standard range should be imposed based upon the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Court hereby ratifies the special verdicts that were found by the jury beyond a reasonable doubt. See Appendix 2.5
2. The exceptional sentence is justified by the following aggravating circumstances.
 - (a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.
 - (b) The current offense involved domestic violence, and the following was present: (1) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time; and (2) the offender's conduct during the commission of the current offense manifested deliberate cruelty.
 - (c) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense.
3. The aggravating circumstances listed in Findings of Fact No. 2, taken together or considered individually constitutes sufficient cause to impose the exceptional sentence. This Court would impose the same sentence if only one of the grounds listed in Findings of Fact No. 2 is valid.

Based upon the aforementioned Findings of Fact the Court makes the following Conclusions of Law.

II. CONCLUSIONS OF LAW


1. The Court has jurisdiction over the parties and subject matter of this action.

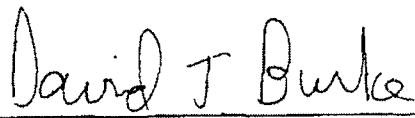
Pacific County Prosecuting Attorney
P.O. Box 45
Courthouse
South Bend, WA 98586
Phone: (360) 875-9361
Fax: (360) 875-9362

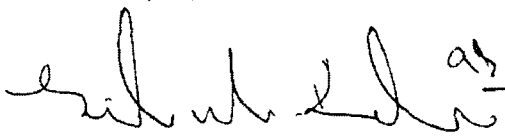
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- 2. There are substantial and compelling reasons to impose a sentence outside the standard range pursuant to RCW 9.94A.535(3) and RCW 9.94A.537.
- 3. Finding of Fact No. 2(a) constitutes a sufficient basis for an exceptional sentence upward pursuant to RCW 9.94A.535(3)(a).
- 4. Finding of Fact No. 2(b) constitutes a sufficient basis for an exceptional sentence upward pursuant to RCW 10.99.020 and RCW 9.94A.535(3)(h).
- 5. Finding of Fact No. 2(c) constitutes a sufficient basis for an exceptional sentence upward pursuant to RCW 9.94A.535(3)(y).
- 6. A sentence above the standard range is in the interest of justice and is consistent with the purposes of the Sentencing Reform Act.
- 7. A sentence of 1060 months is appropriate to ensure that punishment is proportionate to the seriousness of the offense.
- 8. Each of the aggravating circumstances delineated in Conclusions of Law Nos. 3, 4, and 5, taken together or standing alone, constitutes a sufficient basis to impose the exceptional sentence of 1060 months.

Dated this 9th day of February, 2012.


JUDGE


DAVID J. BURKE, WSBA#16163
Senior Deputy Prosecuting Attorney

 as to some other
ERIK KUPKA, WSBA#28835
Attorney for Defendant.



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CLERK OF SUPERIOR COURT
PACIFIC COUNTY

BY AK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PACIFIC COUNTY

STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 vs.)
)
 BRIAN K. BRUSH,)
 Defendant.)
 _____)

NO. 09-1-00143-8
SPECIAL VERDICT FORM NO. 1

We the jury, having found the defendant guilty of Murder in the First Degree or the lesser offense of Murder in the Second Degree or the lesser offense of Manslaughter in the First Degree as defined in instruction(s) 8, 10-16, 19, return a special verdict by answering as follows:

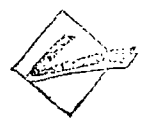
QUESTION: Were Brian K. Brush and Lisa G. Bonney members of the same family or household?

ANSWER: Yes (Write "yes" or "no")

DATED this 6 day of December, 2011.

Jim Olson
Presiding Juror

ORIGINAL



213

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BY [Signature]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PACIFIC COUNTY

STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 vs.)
)
 BRIAN K. BRUSH,)
 Defendant.)
 _____)

NO. **09-1-00143-8**
SPECIAL VERDICT FORM NO. 2

We the jury, having found the defendant guilty of Murder in the First Degree or the lesser offense of Murder in the Second Degree or the lesser offense of Manslaughter in the First Degree as defined in instruction(s) 8, 10-16, 20, return a special verdict by answering as follows:

QUESTION: Was the defendant, Brian K. Brush, armed with a firearm at the time of the commission of the crime.

ANSWER: Yes (Write "yes" or "no")

DATED this 6 day of December, 2011.

[Signature]
Presiding Juror

ORIGINAL

214



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2011 DEC -5 PM 2:05

CLERK OF SUPERIOR COURT
PACIFIC COUNTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PACIFIC COUNTY

STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 vs.)
)
 BRIAN K. BRUSH,)
 Defendant.)
 _____)

NO. **09-1-00143-8**
SPECIAL VERDICT FORM NO. 3

We the jury, having found the defendant guilty of Murder in the First Degree or the lesser offense of Murder in the Second Degree or the lesser offense of Manslaughter in the First Degree as defined in instruction(s) 8,10-16, 23, return a special verdict by answering as follows:

QUESTION: Did the defendant's conduct during the commission of the crime manifest deliberate cruelty to the victim?

ANSWER: Yes (Write "yes" or "no")

DATED this 6 day of December, 2011.

Jim Olson
Presiding Juror

ORIGINAL
215



FILED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PACIFIC COUNTY

DEC 5 PM 2:05
VICTIM IDENTIFICATION
SECTION

STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 vs.)
)
 BRIAN K. BRUSH,)
 Defendant.)
 _____)

NO. 09-1-00143-8

SPECIAL VERDICT FORM NO. 4

We the jury, having found the defendant guilty of Murder in the First Degree or the lesser offense of Murder in the Second Degree or the lesser offense of Manslaughter in the First Degree as defined in instruction(s) 8, 10-16, return a special verdict by answering as follows:

QUESTION: Did the victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense?

ANSWER: Yes (Write "yes" or "no")

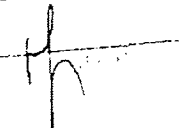
DATED this 6 day of December, 2011.

Jim Olson
Presiding Juror

ORIGINAL



FILED
2011 DEC -6 PM 2:05

CLERK OF COURT
COURT HOUSE
601 4TH AVENUE
SEASIDE, WA 98138
BY: 

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PACIFIC COUNTY

STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 vs.)
)
 BRIAN K. BRUSH,)
 Defendant.)
 _____)

NO. 09-1-00143-8

SPECIAL VERDICT FORM NO. 5

We the jury, having found the defendant guilty of Murder in the First Degree or the lesser offense of Murder in the Second Degree or the lesser offense of Manslaughter in the First Degree as defined in instruction(s) 8, 10-16, 19, 23, return a special verdict by answering as follows:

QUESTION 1: Was the crime an aggravated domestic violence offense?

ANSWER: Yes (Write "yes" or "no").

If your answer to the above question is "yes," answer the following two questions. If your answer to QUESTION 1 is "no," do not answer QUESTIONS 2 and 3.

ORIGINAL

217




QUESTION 2: Did the defendant's conduct during the commission of the crime manifest deliberate cruelty to the victim:

ANSWER: Yes (Write "yes" or "no")

QUESTION 3: Did the victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense?

ANSWER: Yes (Write "yes" or "no")

DATED this 6 day of December, 2011.



Presiding Juror

ORIGINAL

FILED

2011 DEC -6 PM 4:47

WASCO COUNTY CLERK
PACIFIC COUNTY

[Handwritten signature]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PACIFIC COUNTY

STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 vs.)
)
 BRIAN K. BRUSH,)
 Defendant.)
 _____)

NO. 09-1-00143-8

SPECIAL VERDICT FORM NO. 6

We the jury, having found the defendant guilty of Murder in the First Degree as defined in instruction(s) 7, 8, 10, 11, 19, return a special verdict by answering as follows:

QUESTION: Was the crime an aggravated domestic violence offense?

ANSWER: yes (Write "yes" or "no")

DATED this 6 day of December, 2011.

[Handwritten signature]

Presiding Juror

ORIGINAL

222



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PACIFIC COUNTY

STATE OF WASHINGTON)	
	)	NO. 09-1-00143-8
Plaintiff,	)	APPENDIX H
	)	JUDGMENT AND SENTENCE
vs.	)	ADDITIONAL CONDITIONS
BRIAN K. BRUSH,	)	OF SENTENCE
)	
Defendant)	
_____)	

4.3 Continued: Additional conditions of sentence are:

[X] Defendant shall serve **36 months** in community custody under the Department of Corrections. Defendant shall report to the Department of Corrections, by telephone (360)942-4817 or toll free at 1(888)895-2527, within **72 hours** of being released from custody or from date of sentencing whichever is soonest and the defendant shall comply with all rules, regulations and requirements of the Department of Corrections, and any other conditions of community custody stated in his/her Judgment and Sentence;

[X] Defendant shall obey all local, county, state, and federal laws;

[X] Must consent to DOC home visits to monitor compliance with supervision. Home visits include access for the purposes of visual inspection of all areas of residence, in which the offender lives or has exclusive/joint control/access;

[X] Defendant shall pay supervision fees as determined by the department.

[X] The residence location and living arrangements shall be subject to the prior approval of the department during the period of community custody.

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[X] Defendant shall not initiate or permit contact with known felons or persons on probation or supervision.

[X] Defendant shall not possess any firearm or deadly weapons.

[[X] The offender shall work at department-approved education, employment, or community restitution, or any combination thereof.

[X] Defendant shall not consume, possess, or have under his/her control any alcoholic beverages.


[X] Defendant shall not consume, possess, or have under his/her control any controlled substances unless otherwise prescribed by a certified physician.

[X] Defendant shall submit to urinalysis/breathalyzer at the request of his/her CCO.

[X] Defendant must obtain an anger management evaluation and follow any recommended treatment.

[X] Defendant must obtain a domestic violence evaluation and follow any recommended treatment.

[X] Defendant shall have no direct or indirect contact with ELIZABETH BONNEY, OLIVIA BONNEY, KIM KLINGLER AND GENE AND ANNA KLINGLER. SCOTT KLINGLER

Date: 2/9/2012 
JUDGE

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PACIFIC COUNTY.

STATE OF WASHINGTON,)
) NO. 09-1-00143-8
)
Plaintiff,)
) WARRANT OF COMMITMENT
vs.)
)
BRIAN K. BRUSH,)
Defendant.)
_____)

STATE OF WASHINGTON

TO: The Sheriff of Pacific County.

The defendant **BRIAN K. BRUSH** pled guilty in the Pacific County Superior Court of the State of Washington of the crime of **MURDER IN THE FIRST DEGREE WITH FIREARM SENTENCE ENHANCEMENT AND AGGRAVATING FACTORS** and the Court has ordered that the defendant be punished by serving the determined sentence of:

Count I 1060 months; **Count II** _____ months, and **Count** _____ months; **Count III** _____ (month(s)); **Count IV** _____ months, **Count V** _____ months, and **Count VI** _____ months

_____ (day(s) (month(s)) of partial confinement in the County jail.

_____ (month(s)) of total confinement in the Pacific County jail.

Defendant shall receive credit for time served to this date.

YOU, THE SHERIFF, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence in the Pacific County Jail.

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[X] YOU, THE SHERIFF, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence.

[] The defendant is committed for up to thirty (30) days evaluation at Western State Hospital or Eastern State Hospital to determine amenability to sexual offender treatment.

YOU THE SHERIFF ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections pending delivery of the proper officers of the Secretary of the Department of Social and Health Services.

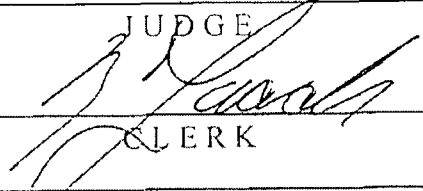
YOU, THE PROPER OFFICERS OF THE SECRETARY OF THE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, ARE COMMANDED, to receive the defendant for evaluation as ordered in the Judgment and Sentence.

DATED this 9th day of February, 2012.

By Direction of the Honorable

MICHAEL SULLIVAN

JUDGE



CLERK

BY:

DEPUTY CLERK



cc: Prosecuting Attorney
Defendant's Lawyer
Defendant
Jail
Institutions (3)

APPENDIX "C"

INSTRUCTION NO. 26

To find that this crime is an aggravated domestic violence offense, each of the following two elements must be proved beyond a reasonable doubt:

- (1) That the victim and the defendant were family or household members;
and
- (2) That the offense was part of an ongoing pattern of psychological abuse of the victim manifested by multiple incidents over a prolonged period of time.

An "ongoing pattern of abuse" means multiple incidents of abuse over a prolonged period of time. The term "prolonged period of time" means more than a few weeks.


If you find from the evidence that element (1) and element (2) have been proved beyond a reasonable doubt, then it will be your duty to answer "yes" on the Special Verdict Form No. 6.

On the other hand, if after weighing all the evidence, any one of you has a reasonable doubt as to element (1) or element (2), then it will be your duty to answer "no" on the Special Verdict Form No. 6.

FILED

2012 FEB -8 PH 3:15

VIRGINIA LEACH CLERK
PACIFIC CO. WA

BY 

APPENDIX "D"

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PACIFIC COUNTY

STATE OF WASHINGTON,)	
	)	NO. 09-1-00143-8
Plaintiff,)	
	)	STATE'S SENTENCING
vs.	)	MEMORANDUM
)	
BRIAN K. BRUSH,)	
Defendant.)	
_____)	

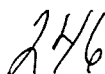
STATEMENT OF THE CASE

Officer Nicholas Fosse (Montesano Police Department) was on foot patrol on the Bolstad Beach Approach in Long Beach on the afternoon of September 11, 2009, with Officer Brad Page (Raymond Police Department) and Officer Arlie Boggs (Raymond Police Department), when he heard a muffled sound that sounded like "a large fire cracker". Officer Fosse observed a male (later identified as Brian Brush) holding what appeared to be a shotgun about 100 yards away.

Officer Fosse observed Mr. Brush hold the gun to his right shoulder, with one of his feet forward, as if to brace the recoil of the weapon. Officer Fosse

STATE'S SENTENCING
MEMORANDUM 1

Pacific County Prosecuting Attorney
P.O. Box 45
Courthouse
South Bend, WA 98586
Phone: (360) 875-9361
Fax: (360) 875-9362





1 saw Mr. Brush fire one shot, reload the weapon, and fire again.
2

3 Mr. Brush fired his weapon in rapid succession. When Mr. Brush saw the
4 officers approaching, he threw the gun over his shoulder and started walking
5 towards the officers. Officers Page and Boggs indicated that Mr. Brush appeared
6 to be very agitated. Mr. Brush threw up his hands and the officers ordered him
7 to the ground. Mr. Brush lay down on the roadway, and was handcuffed.
8
9

10 The officers approached the victim, a female later identified as Lisa
11 Bonney, lying face down just off the sidewalk. The center of her back was red
12 with what appeared to be blood. The shots had struck the female in the torso
13 and head, causing fatal injuries.
14
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18 The officers located spent 12-gauge shotgun shells on the ground near
19 the victim. The shotgun was identified as a Winchester 12-gauge pump shotgun.
20
21

22 The officers noted that the victim had been struck in the left side of her
23 abdomen, the back, the back of the head and the buttocks area. Autopsy results
24 indicated that Ms. Bonney had been shot four times. According to Dr. Clifford
25 Nelson, the forensic pathologist, three of the four shots individually would have
26 killed Ms. Bonney. Dr. Nelson testified that the fourth shot ripped Ms. Bonney's
27 brain apart.
28
29
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31

32 Deputy Heath Layman (Cosmopolis Police Department) first talked to Mr.
33 Brush at the scene of the shooting. Deputy Layman and Undersheriff Ron Clark

STATE'S SENTENCING
MEMORANDUM 2

Pacific County Prosecuting Attorney
P.O. Box 45
Courthouse
South Bend, WA 98586
Phone: (360) 875-9361
Fax: (360) 875-9362

1 (Pacific County Sheriff's Office) interviewed Mr. Brush later on September 11 in
2
3 an interview room at the Pacific County Sheriff's Office. Mr. Brush indicated that
4
5 he and the victim had first met in April 2008, via the internet. They became
6
7 "engaged" in March 2009, according to Mr. Brush. He described their
8
9 relationship as "volatile," stating that he was often the victim of domestic
10
11 violence perpetrated by Ms. Bonney.

12 Mr. Brush asserted that Ms. Bonney had called him on his cell phone
13
14 about 10 to 15 minutes before they met that fateful day, and that she had asked
15
16 him to meet her on the Bolstad Beach Approach. In a response to a question as
17
18 to why he had his shotgun with him that day, Mr. Brush stated that he had been
19
20 training his dog for hunting. He stated that he left the gun and ammunition on
21
22 the back seat of his truck. He also related to officers that he had the gun
23
24 because he had been thinking about suicide.

25 Mr. Brush stated that he had been trying to decide if he wanted "to save"
26
27 or end the relationship with Ms. Bonney. They met on the Bolstad Beach
28
29 Approach, and he indicated that she was angry. He stated they sat on a bench
30
31 and had a nice discussion for about ten minutes, until she went ballistic. He
32
33 stated that she had gone ballistic because he had decided to end the relationship
with the victim. He stated that she then began assaulting him.

1 According to Mr. Brush, Ms. Bonney was angry with him because he would
2
3 not stand up for himself and be a man. Mr. Brush indicated that Ms. Bonney
4
5 used profanity. The upshot of Mr. Brush's comments to the police was that Mr.
6
7 Brush was a victim. During this interview and subsequent interviews with
8
9 psychological professionals, Mr. Brush tried to point the finger at anyone but
10
11 himself. His modus operandi was to blame his behavior on his unfortunate
12
13 circumstances. The fact remains, however, that Mr. Brush with premeditation
14
15 intentionally murdered Ms. Bonney.

16 The jury rejected Mr. Brush's diminished capacity defense and found Mr.
17
18 Brush guilty of domestic violence murder in the first degree with a firearm
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20 enhancement and with three aggravating factors: (1) Mr. Brush's conduct during
21
22 the commission of the offense manifested deliberate cruelty to the victim; (2) the
23
24 current offense involved domestic violence and the offense was part of an
25
26 ongoing pattern of psychological abuse of the victim manifested by multiple
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28 incidents over a prolonged period of time; and (3) the victim's injuries
29
30 substantially exceeded the level of bodily harm necessary to satisfy the elements
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32 of the crime.

33 **SENTENCING GRID**

Domestic violence murder in the first degree is a Level XV offense under
RCW 9.94A.510 of the Sentencing Reform Act. Since Mr. Brush has no prior

STATE'S SENTENCING
MEMORANDUM 4

Pacific County Prosecuting Attorney
P.O. Box 45
Courthouse
South Bend, WA 98586
Phone: (360) 875-9361
Fax: (360) 875-9362

1 felonies, his basic standard sentence range is 240-320 months. In addition,
2
3 pursuant to RCW 9.94A.533(3)(a), five years must be added to the standard
4
5 sentence range, because Mr. Brush was armed with a firearm when he killed Ms.
6
7 Bonney. Hence, the actual standard sentence range of 300-380 months. While
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9 Mr. Brush is theoretically eligible to receive an exceptional sentence below the
10
11 standard range pursuant to RCW 9.94A.535(1), Mr. Brush must be sentenced to
12
13 at least 20 years under RCW 9.94A.540(1)(a).

14 **A SENTENCE ABOVE THE STANDARD RANGE SHOULD BE IMPOSED**

15
16 RCW 9.94A.537 delineates the process that must be followed when the
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18 State seeks an exceptional sentence above the standard range. This process
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20 was followed in this case. Because the jury found three aggravating factors
21
22 under RCW 9.94A.535, the Court has the discretion to sentence Mr. Brush up to
23
24 the maximum term allowable for a Class A felony, which is life imprisonment.

25 Each of the three aggravating factors found by the jury is sufficient,
26
27 standing alone, to justify an exceptional sentence. The first aggravating factor
28
29 (deliberate cruelty) is amply demonstrated by Dr. Nelson's testimony. Mr. Brush
30
31 fired four shotgun blasts at close range into Ms. Bonney's body. Three of the
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33 four shots were lethal blows by themselves. The fourth shot, in particular,
delivered Mr. Brush's final message: Ms. Bonney deserved to be totally

1
2 vanquished. Dr. Nelson testified that in his decades of practice as a forensic
3 pathologist he had only observed one similar shooting. To be sure, this homicide
4 was not a typical murder via a gunshot wound. Mr. Brush cruelly desecrated Ms.
5 Bonney's body in order to make the ultimate statement that he was in control.
6
7 Mr. Brush's deliberately cruel actions caused Ms. Bonney to suffer intense pain, if
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9 only for a short period of time. The deliberately cruel behavior of Mr. Brush
10
11 justifies an exceptional sentence.
12

13 The second aggravating factor (an ongoing pattern of psychological
14 abuse) also justifies an exceptional sentence. This appalling domestic violence
15 crime did not occur in a vacuum. Mr. Brush and Ms. Bonney were involved in a
16 long-term relationship that can only be described as toxic. Mr. Brush used
17 psychological manipulation and placed Ms. Bonney in fear on multiple occasions.
18
19

20 The sordid event which occurred on September 11, 2009, was the culmination
21
22 of Mr. Brush's inability to keep his anger under control. Without a doubt, this
23 incident constitutes a domestic violence crime that is horrific beyond description.
24
25

26 It is difficult to imagine a parade of imaginary horrors involving a victim of
27 domestic violence that would be worse than what occurred in this case.
28
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30 Consequently, the Court should exercise its discretion and impose an exceptional
31 sentence based on this aggravating factor.
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2 Finally, an exceptional sentence is justified because Ms. Bonney's injuries
3 substantially exceeded the level of bodily harm that was necessary to kill her.
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5 The excessive injuries that Ms. Bonney sustained were carefully documented by
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7 Dr. Nelson. More importantly, Dr. Nelson emphasized that throughout his
8
9 lengthy career he had only seen this level of violence in one other case. The
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11 number of shotgun blasts, in combination with the severity of the resultant
12
13 injuries, produced a level of bodily harm far beyond what is "typical" in a first
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15 degree murder case. Thus, this aggravating factor supports the imposition of an
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17 exceptional sentence.

18 Each of these three aggravating factors should convince the Court that a
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20 standard range sentence is not appropriate and that an exceptional sentence
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22 upward is justified given the severity of the aggravating factors. The sentence
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24 imposed in this case should reflect the fact that Mr. Brush's actions were "off the
25
26 Richter scale." Of course, any murder by definition is very serious. But this case
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28 is "beyond the beyond." The State is hard pressed to imagine any scenario that
29
30 would be worse than what happened to Ms. Bonney. But for Mr. Brush's
31
32 egregiously callous and deleterious decision to extinguish Ms. Bonney's life, Lisa
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Bonney would still be enjoying the richness of living on the Long Beach
Peninsula. No sentence imposed by the Court can possibly make up for the evil
perpetrated by Mr. Brush. The State asks the Court to give Mr. Brush no quarter

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and to impose a long exceptional sentence that in some small measure will help
to heal the misery that Mr. Brush unleashed on that fateful afternoon of
September 11, 2009.

Dated this 8th day of February, 2012.

David J. Burke
DAVID J. BURKE, WSBA#16163
Prosecuting Attorney

FILED
 COURT OF APPEALS
 DIVISION II
 2013 MAR 26 AM 11:49
 STATE OF WASHINGTON
 BY Ca
 DEPUTY

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

STATE OF WASHINGTON,)	
	)	NO 43056-8-II
Respondent)	
	)	AFFIDAVIT OF MAILING
BRIAN BRUSH,)	
)	
Appellant)	
<hr/>		
STATE OF WASHINGTON)	
	)	ss.
COUNTY OF PACIFIC)	

BRANDI HUBER, being first duly sworn on oath, deposes and says:

I am the Office Administrator for the Prosecuting Attorney's Office for Pacific County, Washington.

On March 25, 2013, I mailed one original and one copy of the State's Reply Brief and Affidavit of Mailing, via the U.S. mail, postage prepaid to the Court of Appeals, Division II, and two copies to the Jodi R. Backlund, Attorney for Appellant, at the following addresses:

DAVID PONZOHA, CLERK
 COURT OF APPEALS, DIVISION II
 950 BROADWAY, SUITE 300
 TACOMA WA 98402-4454

JODI R. BACKLUND
 BACKLUND & MISTRY
 PO BOX 6490
 OLYMPIA WA 98507

Brandi Huber
 BRANDI HUBER

SUBSCRIBED and SWORN to before me this 25th day of March, 2013.

Zorah E Sowa

NOTARY PUBLIC in and for the State
of Washington, residing at Raymond.