

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

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

IN RE THE PERSONAL RESTRAINT
PETITION OF:

NO. 35773-9

JIMMEE CHEA,

STATE'S RESPONSE TO PERSONAL
RESTRAINT PETITION

Petitioner.

A. ISSUES PERTAINING TO DEFENDANT'S PERSONAL RESTRAINT
PETITION:

1. Should this court dismiss this petition when petitioner has failed to show either prejudicial constitutional error or a fundamental defect resulting in a complete miscarriage of justice?
2. Should this court dismiss claims that were raised and rejected on direct review when petition has failed to show that the interests of justice require their relitigation?
3. Has petitioner failed to demonstrate ineffective assistance of counsel as his evidence does not show both deficient performance and resulting prejudice necessary to succeed on this claim?

CERTIFICATE OF SERVICE
 I certify that I mailed
 copies of State's Response
 to Court Appointed
 @ ASST
 Date 5/11/07 Signed CA

- 1 4. Has petitioner failed to provide any evidence to support his claims that
2 there was juror and prosecutorial misconduct?
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4 5. Has petitioner failed to show that his convictions for five counts of
5 aggravated murder in the first degree violate constitutional principles
6 against multiple punishments when each count pertained to a separate
7 homicide victim?

8 B. STATUS OF PETITIONER:

9 Petitioner, Jimmee Chea, is restrained pursuant to a Judgment and Sentence
10 entered in Pierce County Cause No. 98-1-03157-5. Appendix A. He was sentenced on
11 five counts of aggravated murder in the first degree and five counts of assault in the first
12 degree. Id. Petitioner appealed from entry of this judgment and sentence. Appendix B.
13 His convictions were affirmed by Division II of the Court of Appeals in an unpublished
14 opinion. Id. The mandate issued on January 18, 2006. Id.

15 On January 9, 2007, petitioner filed a timely personal restraint petition alleging
16 that his convictions or sentence should be vacated because: 1) he received ineffective
17 assistance of counsel; 2) juror/prosecutorial misconduct; 3) there was insufficient
18 evidence that he committed the murders; 4) he received improper multiple punishments;
19 and, 5) a person cannot be convicted of aggravated murder on the basis of accomplice
20 liability. The State has no information to dispute petitioner's claim of indigency.
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2 C. ARGUMENT:

- 3 1. THE PETITION SHOULD BE DISMISSED BECAUSE
4 PETITIONER HAS NOT SHOWN PREJUDICIAL
5 CONSTITUTIONAL ERROR OR A FUNDAMENTAL DEFECT
6 RESULTING IN A COMPLETE MISCARRIAGE OF JUSTICE
7 NECESSARY TO OBTAIN RELIEF BY PERSONAL
8 RESTRAINT PETITION.

9 Personal restraint procedure has its origins in the State's habeas corpus remedy,
10 guaranteed by article 4, section 4, of the State Constitution. Fundamental to the nature of
11 habeas corpus relief is the principle that the writ will not serve as a substitute for appeal.
12 A personal restraint petition, like a petition for a writ of habeas corpus, is not a substitute
13 for an appeal. In re Hagler, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982). Collateral
14 relief undermines the principles of finality of litigation, degrades the prominence of the
15 trial, and sometimes costs society the right to punish admitted offenders. These are
16 significant costs, and they require that collateral relief be limited in state as well as federal
17 courts. Hagler, Id.

18 In this collateral action, the petitioner has the duty of showing constitutional error
19 and that such error was actually prejudicial. The rule that constitutional errors must be
20 shown to be harmless beyond a reasonable doubt has no application in the context of
21 personal restraint petitions. In re Mercer, 108 Wn.2d 714, 718-21, 741 P.2d 559 (1987);
22 Hagler, 97 Wn.2d at 825. Mere assertions are insufficient in a collateral action to
23 demonstrate actual prejudice. Inferences, if any, must be drawn in favor of the validity of
24 the judgment and sentence and not against it. In re Hagler, 97 Wn.2d at 825-26. To
25 obtain collateral relief from an alleged nonconstitutional error, a petitioner must show "a
fundamental defect which inherently results in a complete miscarriage of justice." In re

1 Cook, 114 Wn.2d 802, 812, 792 P.2d 506 (1990). This is a higher standard than the
2 constitutional standard of actual prejudice. Id. at 810.

3 Reviewing courts have three options in evaluating personal restraint petitions:

- 4 1. If a petitioner fails to meet the threshold burden of showing actual
5 prejudice arising from constitutional error or a fundamental defect
6 resulting in a miscarriage of justice, the petition must be
 dismissed;
- 7 2. If a petitioner makes at least a prima facie showing of actual
8 prejudice, but the merits of the contentions cannot be determined
9 solely on the record, the court should remand the petition for a full
 hearing on the merits or for a reference hearing pursuant to RAP
10 16.11(a) and RAP 16.12;
- 11 3. If the court is convinced a petitioner has proven actual prejudicial
 error, the court should grant the personal restraint petition without
 remanding the cause for further hearing.

12 In re Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

13 In a personal restraint petition, “naked castings into the constitutional sea are not
14 sufficient to command judicial consideration and discussion.” In re Williams, 111 Wn.2d
15 353, 365, 759 P.2d 436 (1988) (citing In re Rozier, 105 Wn.2d 606, 616, 717 P.2d 1353
16 (1986), which quoted United States v. Phillips, 433 F.2d 1364, 1366 (8th Cir. 1970)).

17 That phrase means “more is required than that the petitioner merely claim in broad
18 general terms that the prior convictions were unconstitutional.” Williams, 111 Wn.2d at
19 364. The petition must also include the facts and “the evidence reasonably available to
20 support the factual allegations.” Id.

21 The evidence that is presented to an appellate court to support a claim in a
22 personal restraint petition must also be in proper form. On this subject, the Washington
23 Supreme Court has stated:
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1 It is beyond question that all parties appearing before the courts of this
2 State are required to follow the statutes and rules relating to authentication
of documents. This court will, in future cases, accept no less.

3 In re Connick, 144 Wn.2d 442, 458, 28 P.3d 729 (2001). That rule applies to pro se
4 defendants as well:

5 Although functioning pro se through most of these proceedings, Petitioner
6 – not a member of the bar – is nevertheless held to the same responsibility
as a lawyer and is required to follow applicable statutes and rules.

7 Connick, 144 Wn.2d at 455. The petition must include a statement of the facts upon
8 which the claim of unlawful restraint is based and the evidence available to support the
9 factual allegations. RAP 16.7(a)(2); Petition of Williams, 111 Wn.2d 353, 365, 759 P.2d
10 436 (1988). Personal restraint petition claims must be supported by affidavits stating
11 particular facts, certified documents, certified transcripts, and the like. Williams, 111
12 Wn.2d at 364. If the petitioner fails to provide sufficient evidence to support his
13 challenge, the petition must be dismissed. Williams at 364. The purpose of a reference
14 hearing “is to resolve genuine factual disputes, not to determine whether the petitioner
15 actually has evidence to support his allegations.” In re Rice, 118 Wn.2d 876, 886, 828
16 P.2d 1086 (1992). It is not enough for a petitioner to give a statement about evidence that
17 he believes will prove his factual allegations. Id. The court has been specific on how
18 petition must support his claims:

19 If the petitioner's allegations are based on matters outside the existing
20 record, the petitioner must demonstrate that he has competent, admissible
21 evidence to establish the facts that entitle him to relief. If the petitioner's
22 evidence is based on knowledge in the possession of others, he may not
23 simply state what he thinks those others would say, but must present their
24 affidavits or other corroborative evidence. The affidavits, in turn, must
25 contain matters to which the affiants may competently testify. In short, the
petitioner must present evidence showing that his factual allegations are
based on more than speculation, conjecture, or inadmissible hearsay.

1 In re Rice, 118 Wn.2d at 886. Generally, a motion or petition that is supported by
2 unsworn statements or hearsay affidavits, rather than proper testimonial affidavits, should
3 be dismissed. See, State v. Crumpton, 90 Wn. App. 297, 952 P.2d 1100 (1998). In
4 Crumpton, 90 Wn. App.297, 952 P.2d 1100 (1998), a motion for relief from judgment
5 alleging newly discovered evidence, which was transferred to the Court of Appeals to be
6 handled as a personal restraint petition, was dismissed because the affidavits from an
7 attorney and an investigator that supported this claim were not testimonial, and therefore
8 insufficient. Crumpton later filed another motion for relief of judgment alleging the same
9 newly discovered evidence, but this time supported it with testimonial affidavits. The
10 court dismissed it as an improper second or subsequent attack under RCW 10.73.140.
11 The court noted that there was no showing of good cause for the delay in filing the
12 testimonial affidavits, expressly rejecting a claim of incarceration as providing such
13 cause. Crumpton, 90 Wn. App, at 302-303.

14 As will be more fully set forth below, petitioner has failed to meet his burden of
15 showing that he is entitled to relief.

16 2. PETITIONER'S CLAIMS THAT ARE REFORMULATIONS OF
17 CLAIMS THAT WERE REJECTED IN HIS DIRECT APPEAL
18 SHOULD BE DISMISSED AS HE HAS MADE NO SHOWING
19 WHY THE INTERESTS OF JUSTICE REQUIRES THEIR RE-
EXAMINATION.

20 A petitioner may not raise in a personal restraint petition an issue which "was
21 raised and rejected on direct appeal unless the interests of justice require re-litigation of
22 that issue." In re Personal Restraint of Lord, 123 Wn.2d 296, 303, 868 P.2d 835 (1994).
23 "Simply 'revising' a previously rejected legal argument . . . neither creates a 'new' claim
24 nor constitutes good cause to reconsider the original claim". In re Jeffries, 114 Wn.2d
25 485, 488, 789 P.2d 731 (1990).

1 [I]dential grounds may often be proved by different factual allegations.
2 So also, identical grounds may be supported by different legal arguments,
3 . . . or be couched in different language, . . . or vary in immaterial respects.
4 Thus, for example, “a claim of involuntary confession predicated on
alleged psychological coercion does not raise a different 'ground' than
does one predicated on physical coercion.”

5 Jeffries, 114 Wn.2d at 488 (citations omitted). A petitioner may not create a different
6 ground for relief merely by alleging different facts, asserting different legal theories, or
7 couching his argument in different language. Lord, 123 Wn.2d at 329.

8 Petitioner alleges that there was insufficient evidence¹ to convict him of five
9 counts of premeditated murder. However, petitioner raised a challenge to the sufficiency
10 of the evidence in his direct appeal and the court rejected it. Although he focused on a
11 different aspect of proof in the direct appeal than he does now, this does not matter under
12 Jeffries. The Court of Appeals found the evidence was sufficient to support the verdicts.
13 Appendix B at p. 28. Petitioner’s claim that he cannot, as an accomplice, be convicted of
14 aggravated murder is a reworking of issues that were raised and rejected in his direct
15 appeal as well. See Appendix B, at pp 26-28². Petitioner must demonstrate that the
16 interests of justice require re-litigation of these issues. As petitioner makes no argument
17 regarding the “interest of justice” standard, these claims should be summarily dismissed.

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23 ¹ Petitioner asserts this claim in two ways - in one argument section he claims that his double jeopardy
24 rights were violated when he was convicted of five counts when the evidence showed that he only knew
25 about one murder, and in the next section he claims that the State failed to prove every element beyond a
reasonable doubt. Both of these claims challenge the State’s proof to support the verdicts and are,
therefore, claims regarding the sufficiency of the evidence.

² The relevant portions of the opinion begins toward the end of the subsection entitled “Major Participant in
the Crime” and continues through the next subsection entitled “Aggravating Factors Applying Specifically
to Chea.”

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2 3. PETITIONER HAS FAILED TO PRESENT EVIDENCE TO SHOW
3 BOTH DEFICIENT PERFORMANCE AND RESULTING PREJUDICE
4 NECESSARY TO SUCCEED ON THIS CLAIM; THE STATE
5 DISPUTES THAT PETITIONER RECEIVED INEFFECTIVE
6 ASSISTANCE OF COUNSEL.

7 The right to effective assistance of counsel is the right "to require the prosecution's
8 case to survive the crucible of meaningful adversarial testing." United States v. Cronin,
9 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L.Ed.2d 657 (1984). When such a true adversarial
10 proceeding has been conducted, even if defense counsel made demonstrable errors in
11 judgment or tactics, the testing envisioned by the Sixth Amendment of the United States
12 Constitution has occurred. Id. "The essence of an ineffective-assistance claim is that
13 counsel's unprofessional errors so upset the adversarial balance between defense and
14 prosecution that the trial was rendered unfair and the verdict rendered suspect."
15 Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L.Ed.2d 305
16 (1986).

17 To demonstrate ineffective assistance of counsel, a defendant must satisfy the
18 two-prong test laid out in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052,
19 80 L.Ed.2d 674 (1984); see also State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987).
20 First, a defendant must demonstrate that his attorney's representation fell below an
21 objective standard of reasonableness. Second, a defendant must show that he or she was
22 prejudiced by the deficient representation. Prejudice exists if "there is a reasonable
23 probability that, except for counsel's unprofessional errors, the result of the proceeding
24 would have been different." State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251
25 (1995); see also Strickland, 466 U.S. at 695 ("When a defendant challenges a conviction,
the question is whether there is a reasonable probability that, absent the errors, the fact

1 finder would have had a reasonable doubt respecting guilt."). There is a strong
2 presumption that a defendant received effective representation. State v. Brett, 126 Wn.2d
3 136, 198, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L.Ed.2d
4 858 (1996); Thomas, 109 Wn.2d at 226. A defendant carries the burden of demonstrating
5 that there was no legitimate strategic or tactical rationale for the challenged attorney
6 conduct. McFarland, 127 Wn. 2d at 336.

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8 The standard of review for effective assistance of counsel is whether, after
9 examining the whole record, the court can conclude that defendant received effective
10 representation and a fair trial. State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988). An
11 appellate court is unlikely to find ineffective assistance on the basis of one alleged
12 mistake. State v. Carpenter, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

13 Judicial scrutiny of a defense attorney's performance must be "highly deferential
14 in order to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689. The
15 reviewing court must judge the reasonableness of counsel's actions "on the facts of the
16 particular case, viewed as of the time of counsel's conduct." Id. at 690; State v. Benn, 120
17 Wn.2d 631, 633, 845 P.2d 289 (1993).

18 What decision [defense counsel] may have made if he had more
19 information at the time is exactly the sort of Monday-morning
20 quarterbacking the contemporary assessment rule forbids. It is
21 meaningless...for [defense counsel] now to claim that he would have done
22 things differently if only he had more information. With more
23 information, Benjamin Franklin might have invented television.

24 Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995).

25 Post-conviction admissions of ineffectiveness by trial counsel have been viewed
with skepticism by the appellate courts. Ineffectiveness is a question which the courts

1 must decide and "so admissions of deficient performance by attorneys are not decisive."

2 Harris v. Dugger, 874 F.2d 756, 761 n.4 (11th Cir. 1989).

3 In addition to proving his attorney's deficient performance, the defendant must
4 affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the
5 result would have been different." Strickland, 466 U.S. at 694.

6 The presumption of counsel's competence can be overcome by a showing, among
7 other things, that counsel failed to conduct appropriate investigations. State v. Thomas,
8 109 Wn. 2d 222, 230, 743 P.2d 816 (1987). The adequacy of a pretrial investigation turns
9 on the complexity of the case and trial strategy. Washington v. Strickland, 693 F.2d
10 1243, 1251 (11th Cir.1982) (en banc), rev'd on other grounds, 466 U.S. 668, 104 S. Ct.
11 2052, 80 L.Ed.2d 674 (1984). The decision to either call or not call a witness is generally
12 a matter of legitimate trial tactics and will not support a claim of ineffective assistance.
13 Thomas, 109 Wn. 2d at 230.

14 The reviewing court will defer to counsel's strategic decision to present, or to
15 forego, a particular defense theory when the decision falls within the wide range of
16 professionally competent assistance. Strickland, 466 U.S. at 489; United States v.
17 Layton, 855 F.2d 1388, 1419-20 (9th Cir. 1988), cert. denied, 489 U.S. 1046 (1989);
18 Campbell v. Knicheloe, 829 F.2d 1453, 1462 (9th Cir. 1987), cert. denied, 488 U.S. 948
19 (1988). When the ineffectiveness allegation is premised upon counsel's failure to litigate
20 a motion or objection, defendant must demonstrate not only that the legal grounds for
21 such a motion or objection was meritorious, but also that the verdict would have been
22 different if the motion or objections had been granted. Kimmelman, 477 U.S. at 375;
23 United States v. Molina, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not
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1 required to argue a meritless claim. Cuffle v. Goldsmith, 906 F.2d 385, 388 (9th Cir.
2 1990).

3 A defendant must demonstrate both prongs of the Strickland test, but a reviewing
4 court is not required to address both prongs of the test if the defendant makes an
5 insufficient showing on either prong. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d
6 816 (1987).

7 Petitioner claims that he received ineffective assistance of counsel because he told
8 each and every one of his attorneys that he “was at home and was not involved with the
9 shooting deaths and assaults” at the Trang Dai Café and that he “provided information to
10 each and every one of my attorneys and their defense investigators about my family
11 members informing me that they had witnessed me being asleep at their residence during
12 the hours of 1:00 A.M. and 2:00 A.M. on July 5th, 1998,” and yet his attorneys did
13 nothing to investigate this information or present these witnesses. See Affidavit of
14 Jimmee Chea at pp1-2, attached to petition. Petitioner also presents affidavits from his
15 mother, father, sister and brother wherein each states that he or she saw petitioner at home
16 asleep in the relevant time frame. See Affidavits of Felisa Kamtansy, Bouaphan Tansy,
17 Seak Heang Chea and Jesse Chea, attached to petition. However, the claims petitioner
18 makes in his affidavit are inconsistent with his sworn testimony at trial.
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20 During cross-examination petitioner was asked about the statement he had given
21 to detectives regarding his whereabouts the night of the shooting.³ At trial, defendant
22

23 _____
24 ³ Detective Davidson testified that petitioner’s statement to him about his arrival home was that :

25 “ He said he then went home, and he arrived there approximately 12:00 or 12:30 A.M.
He said there was nobody up when he got home and so he didn’t actually see anybody
and nobody actually saw him at his residence.” RP 3470, Appendix C.

1 testified that only he and his little sister were at home that night, and that he did not see
2 his sister when he got home. Appendix D. Petitioner affirmatively testified that his
3 parents were out of town and that he was at the house to take care of the dogs and feed the
4 fish. Appendix D, RP 6441-6442.

5 Petitioner's more recent claims that his parents and brother were home and that he
6 wanted them to testify that they saw him that night cannot be reconciled with his trial
7 testimony. If petitioner knew at the time of trial that his brother and parents were home
8 and had conveyed this information to his attorneys, then he lied under oath in his trial
9 testimony about who was home. If his trial testimony is true, then the claims in his
10 affidavit that he informed his attorneys about his parents and brother's willingness to
11 testify must be either of recent invention or reflective of a past attempt to present perjured
12 testimony to support his alibi. In either case, petitioner's inconsistency in two sworn
13 statements must cast doubt on the veracity of his claims.

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15 Petitioner's claims are also refuted by the declaration of one of his trial attorneys.
16 See Appendix E, Declaration of Kristi Weeks (formerly Minchau). Ms. Weeks states that
17 she does "not recall any member of the Chea family being willing to provide an alibi
18 defense for Mr. Chea. Had that opportunity presented itself, I would have vigorously
19 pursued it." Id. She also indicates that Jesse Chea was interviewed by her co-counsel and
20 the defense investigator. She reflects that there was extensive preparation and
21 investigation into the defense case and that the defense team "pursued every avenue of
22 defense that appeared even remotely feasible." Id. These representations are
23 corroborated by the motion and declaration filed by counsel on June 17, 2002, asking the
24 court to authorize an additional funding for 100 hours of time for the defense investigator
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1 as there was considerable investigation left to be done in preparing the defense case.

2 Appendix F. The motion reflects that hundreds of hours had already been spent on the
3 investigation, and that the investigator was virtually working on the case full-time.

4 Appendix F. It should be noted that petitioner's lead trial counsel, Ms. Stenberg, changed
5 her mind regarding whether she would provide an affidavit addressing petitioner's claims.

6 See Appendix G, Declaration of Ann Stenberg, and Appendix H, Affidavit of Kathleen
7 Proctor.

8
9 Finally, even if this court were to accept the claims made in the affidavits by
10 petitioner, and his parents, brother and sister as true, this evidence does not support a
11 basis for finding ineffective assistance of counsel for failure to investigate. Each of the
12 affiants indicates that he or she informed one of petitioner's attorneys about his or her
13 ability to provide an alibi for defendant based on what he or she saw that night. Each
14 states that he or she was not further interviewed. No one explains or articulates what
15 information, beyond that already conveyed to the attorneys, could have been learned from
16 a second interview. None of the information conveyed in the affidavits suggests avenues
17 for additional investigation or corroboration based upon the content of the statements.

18 Without a showing that there was more information to be discovered by further
19 investigation, petitioner has failed to show that he has been prejudiced by the lack of
20 further investigation. As noted above, petitioner must show deficient performance and
21 resulting prejudice to succeed on his claim of ineffective assistance of counsel. The
22 evidence he provides shows that his attorneys were aware of the information to which his
23 family members were willing to testify. It does not show that there was alibi information
24 that they failed to discover.
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1 If you accept the affidavits as true, the defense attorneys had the information from
2 petitioner's parents, brother and sister, about the potential alibi testimony and chose not to
3 use it at trial. As noted above, the decision to either call or not call a witness is generally a
4 matter of legitimate trial tactics and will not support a claim of ineffective assistance.
5 Thomas, 109 Wn. 2d at 230. The attorneys could have had a variety of reasons for not
6 calling the family members, which is why this decision falls within the scope of
7 legitimate trial tactics. Counsel could have known that testimony from the parents and
8 brother would have contradicted the petitioner's testimony about who was home that
9 night. The attorneys might have been concerned that putting petitioner's sister on the
10 stand might backfire when her journals, that were being held in the evidence room,
11 showed that she did not think favorably of petitioner. See, Appendix I, Affidavit of Tom
12 Davidson. The attorneys could have considered that the totality of the evidence looked
13 contrived as four members of petitioner's family would testify that each just happened to
14 be up in the middle of the night to see petitioner sleeping on the couch without
15 encountering other occupants.⁴ The attorneys could have believed that evidence just from
16 the petitioner as to his whereabouts posed less risk of being rejected by the jury than
17 evidence from four family members whose testimony seemed, as a whole, contrived. The
18 statement in petitioner's affidavit stating that his attorney told him that such testimony
19 would make him look more involved in the crime and that the jury would not believe his
20 family members is evidence that the attorneys were not putting these witnesses on as a
21 matter of trial strategy. Decisions involving trial strategy will not support a claim of
22 ineffective assistance of counsel. The evidence supporting the petition is insufficient to
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⁴ The parents encountered each other but not Felisa or Jesse.

1 show any prejudice stemming from a failure to investigate, but does support a conclusion
2 that his attorneys did not call his family members as a matter of trial strategy. This is
3 insufficient to show ineffective assistance of counsel.

4
5 4. PETITIONER HAS FAILED TO SHOW ANY JUROR OR
6 PROSECUTORIAL MISCONDUCT OR ANY FAILURE BY THE
7 COURT TO INVESTIGATE A CLAIM OF IMPROPER JUROR
8 CONDUCT.

9 The party who asserts juror misconduct bears the burden of showing that the
10 alleged misconduct occurred. State v. Hawkins, 72 Wn.2d 565, 566, 434 P.2d 584
11 (1967). The determination of whether misconduct has occurred lies within the discretion
12 of the trial court. State v. Havens, 70 Wn. App. 251, 255-56, 852 P.2d 1120, review
13 denied, 122 Wn.2d 1023 (1993). Not all instances of juror misconduct merit a new trial;
14 there must be prejudice. State v. Barnes, 85 Wn. App. 638, 668-669, 932 P.2d 669
15 (1997); State v. Tigano, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991).

16 It is well-settled that hearsay affidavits are not sufficient to establish juror
17 misconduct. State v. Hawkins, 72 Wn.2d at 566-567, citing State v. Murphy, 13 Wash.
18 229, 43 P. 44 (1895); State v. Wilson, 42 Wash. 56, 84 P. 409 (1906); State v. Simmons,
19 52 Wash. 132, 100 P. 269 (1909); Haggard v. Seattle, 61 Wash. 499, 112 P. 503 (1911);
20 State v. Pepoon, 62 Wash. 635, 114 P. 449 (1911); Maryland Cas. Co. v. Seattle Elec.
21 Co., 75 Wash. 430, 134 P. 1097 (1913); State v. Prince, 154 Wash. 409, 282 P. 907
22 (1929); State v. Patterson, 183 Wash. 239, 48 P.2d 193 (1935).

23
24 In Maryland Cas. Co. v. Seattle Elec. Co., 75 Wash. at 436-437, the Supreme
25 Court reversed an order of the trial court granting a new trial that was based upon juror

1 misconduct where the only proof offered was the reporter's stenographic report,
2 containing a hearsay statement of what the foreman of the jury told the bailiff about a
3 juror's misconduct. The court held this was insufficient proof of the misconduct.

4 Here defendant claims there was improper communication between a prosecutor
5 and a juror, and that this same juror later admitted that she did not keep an open mind
6 throughout the trial. Petitioner presents no competent evidence of these claims as
7 required by In re Rice, supra. Petitioner claims that he was told by "one of my attorneys"
8 that "she had witnessed one of the prosecutors giving juror number 11 a hug in the
9 hallway during one of the trial breaks." See Affidavit of Jimmee Chea at p. 3 (attached to
10 petition). Similarly, petitioner claims that after the verdict, Juror 11 told his attorneys and
11 a defense investigator that "she wanted to convict us the day she came in the courtroom."
12 See Affidavit of Jimmee Chea at pp.4-5. Petitioner has no personal knowledge of a hug
13 between a prosecutor and Juror 11 or of any post trial statements by Juror 11. His
14 affidavit on these points is based on hearsay. This is insufficient to support his claims.
15 The State disputes that any such action occurred either in the hallway or in the post
16 verdict discussion. See, Appendices I, J, and K, Declarations of Tom Davidson, Edmund
17 Murphy, and Phil Sorenson. These claims should be dismissed.

19 Petitioner has personal knowledge, and therefore presented competent evidence, to
20 support his claim that Juror 11 demonstrated inappropriate favoritism to the prosecution
21 by her actions and facial expressions. The record shows that petitioner's attorneys
22 brought their concerns regarding Juror 11's conduct to the attention of the court on more
23 than one occasion, ultimately asking the court to remove her as a juror. Appendix L,
24 (containing excerpts from the verbatim report of proceedings at RP 2965-2968, 5122-
25

1 5133, 5731-5732, 6724-6725). At the close of the case, the court indicated that it had
2 been paying close attention to this juror over the course of the trial and “did not see
3 anything that would support this court excusing her as a juror on this case.” Appendix L,
4 RP 6724. The court denied the motion to excuse. Id. This record shows that the court
5 was aware of the concerns expressed by defense counsel regarding Juror 11, took careful
6 observation of her over the course of the trial and saw nothing in Juror 11’s behavior to
7 cause concern. This record does not demonstrate that the court failed to conduct an
8 inquiry into the matter or failed to protect petitioner’s right to a fair and impartial trial.
9 This claim is without merit and should be dismissed.
10

11 5. PETITIONER’S FIVE CONVICTIONS FOR AGGRAVATED MURDER
12 IN THE FIRST DEGREE DO NOT VIOLATE DOUBLE JEOPARDY.

13 The double jeopardy clause of the Fifth Amendment to the United States
14 Constitution and article I, section 9 of the Washington State Constitution prohibit the
15 imposition of multiple punishments for the same offense. Whalen v. United States, 445
16 U.S. 684, 688, 100 S. Ct. 1432, 63 L.Ed.2d 715 (1980); State v. Westling, 145 Wn.2d
17 607, 610, 40 P.3d 669 (2002); State v. Calle, 125 Wn.2d 769, 772, 888 P.2d 155 (1995).
18 The federal and state double jeopardy clauses provide identical protections. State v.
19 Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Although the protection itself is
20 constitutional, it is for the Legislature to decide what conduct is criminal and to determine
21 the appropriate punishment. Calle, 125 Wn.2d at 776. The court's role is limited to
22 determining whether the Legislature intended to authorize multiple punishments. Id.
23 When the trial court has imposed cumulative punishment without legislative
24
25

1 authorization, it has also violated the separation of powers doctrine. See State v. Frohs,
2 83 Wn. App. 803, 810, 924 P.2d 384 (1996).

3 “[W]hen a defendant is convicted of multiple violations of the same statute, the
4 double jeopardy question focuses on what ‘unit of prosecution’ the Legislature intends as
5 the punishable act under the statute.” Westling, 145 Wn.2d at 610. The “unit of
6 prosecution” is the legislatively defined scope of the criminal act. State v. Adel, 136
7 Wn.2d 629, 634-35, 965 P.2d 1072 (1998). This inquiry is resolved by examining the
8 relevant statute in order to ascertain what the Legislature intended. Id.; In re Davis, 142
9 Wn.2d 165, 172, 12 P.3d 603 (2000). If the statute is ambiguous as to the unit of
10 prosecution, “the ambiguity should be construed in favor of lenity.” State v. Adel, 136
11 Wn.2d 629, 634-35, 965 P.2d 1072 (1998). Absent a threshold showing of ambiguity, a
12 court derives a statute’s meaning from the wording of the statute itself, and does not
13 engage in statutory construction or consider the rule of lenity. State v. Tili, 139 Wn.2d
14 107, 115, 985 P.2d 365 (1999).

15
16 The first step in determining legislative authorization for punishment is to review
17 the statutes proscribing the offenses. Petitioner contends that he was improperly
18 convicted of five counts of aggravated first degree murder claiming that the wording of
19 the aggravating factor applicable to his crimes – that “[t]here was more than one victim
20 and the murders were part of a common scheme or plan or the result of a single act of the
21 person” – authorizes only one punishment no matter how many murders were committed.
22 See, RCW 10.95.020. Petitioner is mistaken as to which statute is relevant to a
23 determination of the “unit of prosecution” for murder.
24
25

1 Although commonly referred to as “aggravated first degree murder” or
2 “aggravated murder”, Washington’s criminal code does not contain such a crime in and of
3 itself; the crime is premeditated murder in the first degree, RCW 9A.32.030(1)(a),
4 accompanied by the presence of one or more of the statutory aggravating circumstances
5 listed in RCW 10.95.020. State v. Roberts, 142 Wn.2d at 50; State v. Irizarry, 111 Wn.2d
6 591, 593-94, 763 P.2d 432 (1988); State v. Kincaid, 103 Wn.2d 304, 312, 692 P.2d 823
7 (1985). The aggravating circumstances operate as “aggravation of penalty” provisions
8 which provide for an increased penalty⁵ where the circumstances of the crime aggravate
9 the gravity of the offense.” Kincaid, 103 Wn.2d at 312. The substantive offense is
10 premeditated murder in the first degree, which is proscribed in RCW 9A.32.030(1)(a).
11

12 The premeditated murder statute provides: “A person is guilty of murder in the
13 first degree when ...[w]ith a premeditated intent to cause the death of another person, he
14 or she causes the death of such person or of a third person.” RCW 9A.32.030(1)(a). The
15 statutes proscribing homicides are found in Title 9A.32. With one exception, the various
16 statutes proscribing homicide require that a criminal defendant’s acts must cause the
17 death of a person. See, RCW 9A.32.030 (all three methods of committing first degree
18 murder require the defendant to cause the death of a person); RCW 9A.32.050 (both
19 alternative methods of committing second degree murder require the defendant to cause
20 the death of a person); RCW 9A.32.055 (homicide by abuse requires defendant cause the
21 death of a child or person under 16 years of age or a dependant adult); RCW
22 9A.32.060(1)(a) (one means of committing manslaughter in the first degree requires the
23
24
25

⁵ A person convicted of “aggravated murder” will either receive a death sentence or be sentenced to life without the possibility of parole. RCW 10.95.080.

1 defendant to cause the death of a person); RCW 9A.32.070 (manslaughter in the second
2 degree requires the defendant to cause the death of a person). The only exception is
3 found in an alternative means of committing manslaughter in the first degree where a
4 defendant may be held liable for intentionally and unlawfully killing “an unborn quick
5 child by inflicting any injury upon the mother of such child.” RCW 9A.32.060. While
6 this does not require the death of a “person”, it penalizes the unlawful termination of the
7 life of an inchoate person. These statutes show a clear legislative intent that “causing the
8 death of a person” is the aspect of criminal conduct to be punished in any form of
9 homicide prosecution.
10

11 In State v. Graham, 153 Wn.2d 400, 405, 103 P.3d 1238 (2005), the Supreme
12 Court examined the reckless endangerment statute to determine its unit of prosecution.
13 The statute proscribed conduct “not amounting to drive-by shooting but that creates a
14 substantial risk of death or serious physical injury to another person.” RCW
15 9A.36.050(1). The court in Graham noted that when a statute refers to damage to “any”
16 property or person, the intent is to convict only once when a criminal act damages
17 multiple items or people. Id. at 405-06, 103 P.3d 1238. Consequently, a second degree
18 arson that criminalizes the setting of a fire that damages “any” property results in a single
19 unit of prosecution regardless of how many buildings are damaged or how many different
20 victims suffer loss. See, Westling, 145 Wn.2d at 610-11 (citing RCW 9A.48.030(1)). In
21 contrast, the reckless endangerment statute charged in Graham criminalized conduct that
22 places “another” person at risk. Graham, 153 Wn.2d at 406, 103 P.3d 1238. Under
23 Graham, a statute that “proscribes conduct that places at risk not simply any person but
24 ‘another person’ ” plainly intends one unit of prosecution per victim. Id.
25

1 Applying the principle set forth in Graham, this court should hold that the “unit of
2 prosecution” for any homicide offense found in Title 9A.32 is one count for each
3 deceased person.

4 In this case, petitioner was found guilty of five counts of premeditated murder for
5 causing the death of five separate victims. Appendices B and M. This is an appropriate
6 number of convictions based upon the unit of prosecution for homicides.

7 Petitioner mistakenly focuses on the enhancement or aggravation of penalty
8 provision found in RCW 10.95.020. A prosecutor cannot file charges under the
9 provisions of RCW 10.95.020 alone. Enhancement statutes do not themselves create
10 criminal offenses. State v. Claborn, 95 Wn.2d 629, 636-38, 628 P.2d 467 (1981); see also,
11 State v. Jones 102 Wn. App. 89, 98, 6 P.3d 58 (2000), review denied, 142 Wn.2d 1018,
12 16 P.3d 1267 (2001) (double jeopardy does not protect a criminal defendant against being
13 retried on non-capital sentencing enhancement as it would on a substantive offense). By
14 its express wording, the enhancement provisions of RCW 10.95.020 must pertain to the
15 substantive offense of premeditated murder in the first degree. Washington courts have
16 repeatedly rejected claims that enhancement provisions violate double jeopardy when a
17 defendant receives multiple enhancements for multiple crimes arising from the same
18 event. See State v. Husted, 118 Wn. App. 92, 96, 74 P.3d 672 (2003), review denied,
19 151 Wn.2d 1014 (2004)(deadly weapon enhancements for first degree rape and first
20 degree burglary based on a single knife did not violate double jeopardy); State v. Claborn,
21 supra, (separate weapons enhancements for burglary and theft convictions arising from
22 the same event did not create multiple punishments for the same offense). These cases
23 make it clear that when assessing a multiple punishment claim, the focus is on the
24 underlying substantive charge and not the enhancement provisions.
25

1 Here the jury found defendant guilty of five counts of premeditated murder, and
2 then found by special verdict that an aggravating circumstance applied to each count.
3 Appendix M. Because each count of murder pertained to a different victim, defendant did
4 not receive unauthorized multiple punishments. This claim is without merit

5 Should this court reject the state procedural arguments regarding the challenge to
6 the sufficiency of the evidence, or petitioner's claims regarding whether an accomplice
7 can be convicted of aggravated murder, the State reserves the right to respond to the
8 merits of these claims. The State disputes that: 1) petitioner received ineffective
9 assistance of counsel; 2) there was improper contact between Juror 11 and the
10 prosecutors; 3) that Juror 11 engaged in misconduct; 4) there was insufficient evidence
11 adduced at trial to support his five convictions for aggravated murder in the first degree.
12

13
14 D. CONCLUSION:

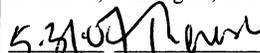
15 The State respectfully requests that this court dismiss this personal restraint
16 petition.

17 DATED: May 31, 2007.

18 GERALD A. HORNE
19 Pierce County Prosecuting Attorney

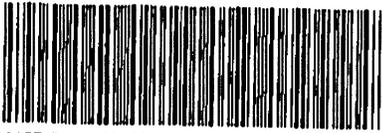
20 
21 KATHLEEN PROCTOR
22 Deputy Prosecuting Attorney
23 WSB # 14811

23 Certificate of Service:
24 The undersigned certifies that on this day she delivered by U.S. mail
25 to the petitioner a true and correct copy of the document to which this
certificate is attached. This statement is certified to be true and correct
under penalty of perjury of the laws of the State of Washington. Signed
at Tacoma, Washington, on the date below.

5.31.07 
Date Signature

APPENDIX “A”

Judgment and Sentence



98-1-03157-5 18912895 JDSWCD 07-01-02



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,
Plaintiff,
vs.
JIMMEE CHEA,
Defendant.

CAUSE NO. 98-1-03157-5
WARRANT OF COMMITMENT

- 1) [] County Jail
- 2) [] Dept. of Corrections
- 3) [] Other - Custody

JUN 28 2002

THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto.

- [] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).
- [] 2. YOU, THE DIRECTOR, 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. (Sentence of confinement in Department of Corrections custody).

WARRANT OF COMMITMENT - 1

[] 3. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement or placement not covered by Sections 1 and 2 above).

Dated: June 28, 2002

By direction of the Honorable
Robert L. Thompson
JUDGE

BOB SAN SOUCIE
INTERIM CLERK

By: Hollie Kinne
DEPUTY CLERK

CERTIFIED COPY DELIVERED TO SHERIFF
JUN 28 2002
Date By Hollie Kinne Deputy

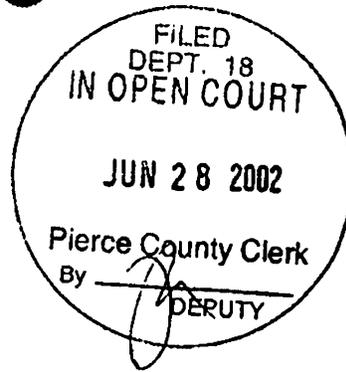
STATE OF WASHINGTON,)
County of Pierce) ss:

I, Bob San Soucie, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.

IN WITNESS WHEREOF, I hereunto set my hand and the Seal of Said Court.
DATED: _____

BOB SAN SOUCIE, Clerk
By: _____ Deputy





IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

JUN 28 2002

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO.98-1-03157-5

JUDGMENT AND SENTENCE (JS)

vs.

JIMMEE CHEA,

Defendant.

- Prison
- Jail One year or less
- First Time Offender
- Special Sexual Offender Sentencing Alternative
- Special Drug Offender Sentencing Alternative
- Breaking The Cycle (BTC)

DOB: 11/4/1979
SID NO.: WA16548934

I. HEARING

1.1 A sentencing hearing in this case was held on June 28, 2002 and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on the 27th day of June, 2002 by

plea jury-verdict bench trial of:

JUDGMENT AND SENTENCE (JS)
(Felony)(6/2000)

1 of 15

ENTERED
JUDGMENT # 02-9-07589-5

1
2
3 Count No.: I
4 Crime: AGGRAVATED MURDER IN THE FIRST DEGREE, Charge Code: (D21)
5 RCW: 9A.32.030(1)(a), 10.95.020(10), 9A.08.020, 9.41.010,
6 9.94A.310, and 9.94A.370
7 Date of Crime: 07/05/1998
8 Incident No.: TPD 98-186-0260

9
10 Count No.: II
11 Crime: AGGRAVATED MURDER IN THE FIRST DEGREE, Charge Code: (D21)
12 RCW: 9A.32.030(1)(a), 10.95.020(10), 9A.08.020, 9.41.010,
13 9.94A.310, and 9.94A.370
14 Date of Crime: 07/05/1998
15 Incident No.: TPD 98-186-0260

16
17 Count No.: III
18 Crime: AGGRAVATED MURDER IN THE FIRST DEGREE, Charge Code: (D21)
19 RCW: 9A.32.030(1)(a), 10.95.020(10), 9A.08.020, 9.41.010,
20 9.94A.310, and 9.94A.370
21 Date of Crime: 07/05/1998
22 Incident No.: TPD 98-186-0260

23
24 Count No.: IV
25 Crime: AGGRAVATED MURDER IN THE FIRST DEGREE, Charge Code: (D21)
26 RCW: 9A.32.030(1)(a), 10.95.020(10), 9A.08.020, 9.41.010,
27 9.94A.310, and 9.94A.370
28 Date of Crime: 07/05/1998
Incident No.: TPD 98-186-0260

Count No.: V
Crime: AGGRAVATED MURDER IN THE FIRST DEGREE, Charge Code: (D21)
RCW: 9A.32.030(1)(a), 10.95.020(10), 9A.08.020, 9.41.010,
9.94A.310, and 9.94A.370
Date of Crime: 07/05/1998
Incident No.: TPD 98-186-0260

Count No.: VI
Crime: ASSAULT IN THE FIRST DEGREE, Charge Code: (E23)
RCW: 9A.36.011(1)(a), 9A.08.020, 9.41.010, 9.94A.310, and
9.94A.370
Date of Crime: 07/05/1998
Incident No.: TPD 98-186-0260

Count No.: VII
Crime: ASSAULT IN THE FIRST DEGREE, Charge Code: (E23)
RCW: 9A.36.011(1)(a), 9A.08.020, 9.41.010, 9.94A.310, and
9.94A.370
Date of Crime: 07/05/1998
Incident No.: TPD 98-186-0260

JUDGMENT AND SENTENCE (JS)
(Felony)(6/2000)

Count No.: VIII
 Crime: ASSAULT IN THE FIRST DEGREE, Charge Code: (E23)
 RCW: 9A.36.011(1)(a), 9A.08.020, 9.41.010, 9.94A.310, and 9.94A.370
 Date of Crime: 07/05/1998
 Incident No.: TPD 98-186-0260

Count No.: IX
 Crime: ASSAULT IN THE FIRST DEGREE, Charge Code: (E23)
 RCW: 9A.36.011(1)(a), 9A.08.020, 9.41.010, 9.94A.310, and 9.94A.370
 Date of Crime: 07/05/1998
 Incident No.: TPD 98-186-0260

Count No.: X
 Crime: ASSAULT IN THE FIRST DEGREE, Charge Code: (E23)
 RCW: 9A.36.011(1)(a), 9A.08.020, 9.41.010, 9.94A.310, and 9.94A.370
 Date of Crime: 07/05/1998
 Incident No.: TPD 98-186-0260

as charged in the Amended Information.

- A special verdict/finding for use of a firearm was returned on Count(s) V-X. RCW 9.94A.125, .310.
- A special verdict/finding for use of deadly weapon other than a firearm was returned on Count(s) _____. RCW 9.94A.125, .310.
- A special verdict/finding of sexual motivation was returned on Count(s) _____. RCW 9.94A.127.
- A special verdict/finding for violation of the Uniform Controlled Substances Act was returned on Count(s) _____, RCW 69.50.401 and RCW 69.50.435, taking place in a school, school bus, or 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 government authority as a drug-free zone.
- A special verdict/finding that the defendant committed a crime involving the manufacture of methamphetamine when a juvenile was present in or upon the premises of manufacture was returned on Count(s) _____. RCW 9.94A, RCW 69.50.401(a), RCW 69.50.440.
- The defendant was convicted of vehicular homicide which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and is therefore a violent offense. RCW 9.94A.030.
- This case involves kidnapping in the first degree, kidnapping in

JUDGMENT AND SENTENCE (JS)
 (Felony)(6/2000)

the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.

[] The court finds that the offender has a chemical dependency that has contributed to the offense(s). RCW 9.94A.129.

[] The crime charged in Count(s) _____ involve(s) domestic violence.

[] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.400):

[] Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.360):

| <u>Crime</u> | <u>Date of Sentence</u> | <u>Sentencing Court (County & State)</u> | <u>Date of Crime</u> | <u>Adult or Juv</u> | <u>Crime Type</u> |
|----------------|-------------------------|----------------------------------------------|----------------------|---------------------|-------------------|
| TMVWOP | 10/26/95 | PIERCE/WA | 09/10/95 | JUV | NV |
| ESCAPE 1* | 02/13/96 | PIERCE/WA | 12/01/95 | JUV | NV |
| TMVWOP/ELUDING | 02/29/96 | PIERCE/WA | 01/16/96 | JUV | NV |

[] The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.360

[] the court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.360):

[] The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

2.3 SENTENCING DATA:

| <u>Count</u> | <u>Offender Score</u> | <u>Serious Level</u> | <u>Standard Range (w/o enhancement)</u> | <u>Plus Enhancement*</u> | <u>Total Standard Range</u> | <u>Maximum Term</u> |
|--------------|-----------------------|----------------------|-----------------------------------------|--------------------------|-----------------------------|---------------------|
| I | 1 | XVI | LIFE W/O PAROLE | FASE 60 MOS | LIFE+60 MOS | LIFE W/O |
| II | 0 | XVI | LIFE W/O PAROLE | FASE 60 MOS | LIFE+60 MOS | LIFE W/O |
| III | 0 | XVI | LIFE W/O PAROLE | FASE 60 MOS | LIFE+60 MOS | LIFE W/O |
| IV | 0 | XVI | LIFE W/O PAROLE | FASE 60 MOS | LIFE+60 MOS | LIFE W/O |
| V | 0 | XVI | LIFE W/O PAROLE | FASE 60 MOS | LIFE+60 MOS | LIFE W/O |
| VI | 0 | XII | 93-123 MOS | FASE 60 MOS | 153-183 MOS | LIFE |

JUDGMENT AND SENTENCE (JS)
(Felony)(6/2000)

| | | | | | | |
|------|---|-----|------------|-------------|-------------|------|
| VII | 0 | XII | 93-123 MOS | FASE 60 MOS | 153-183 MOS | LIFE |
| VIII | 0 | XII | 93-123 MOS | FASE 60 MOS | 153-183 MOS | LIFE |
| IX | 0 | XII | 93-123 MOS | FASE 60 MOS | 153-183 MOS | LIFE |
| X | 0 | XII | 93-123 MOS | FASE 60 MOS | 153-183 MOS | LIFE |

*(F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Vehicular Homicide, See RCW 46.61.520, (JP) Juvenile Present.

2.4 [] EXCEPTIONAL SENTENCE: Substantial and compelling reasons exist which justify an exceptional sentence [] above [] below the standard range for Count(s) _____. Findings of fact and conclusions of law are attached in Appendix 2.4. 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.142.

[] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.142):

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are [] attached [X] as follows:

LIFE WITHOUT PAROLE

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1.

3.2 []The Court DISMISSES Count(s)_____. [] The defendant is found NOT GUILTY of Count(s)_____.

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma, WA 98402):

JUDGMENT AND SENTENCE (JS)
(Felony)(6/2000)

1
2
3 \$ _____

Restitution to: Set by Separate order

4 \$ _____

Restitution to: _____

5 \$ _____

Restitution to: _____

(Name and Address-address may be withheld and provided confidentially to Clerk's Office).

6 \$ 500

Victim assessment RCW 7.6B.035

7 \$ 110

Court costs, including RCW 9.94A.030, 9.94A.120, 10.01.160, 10.46.190

9 Criminal filing fee \$ _____

10 Witness costs \$ _____

11 Sheriff service fees \$ _____

Jury demand fee \$ _____

Other \$ _____

12 \$ _____

Fees for court appointed attorney RCW 9.94A.030

13 \$ _____

Court appointed defense expert and other defense costs RCW 9.94A.030

14 \$ _____

Fine RCW 9A.20.021 [] VUCSA additional fine waived due to indigency RCW 69.50.430

15 \$ _____

16 Drug enforcement fund of _____ RCW 9.94A.030

17 \$ _____

18 Crime Lab fee [] deferred due to indigency RCW 43.43.690

19 \$ _____

Extradition costs RCW 9.94A.120

20 \$ _____

21 Emergency response costs (Vehicular Assault, Vehicular Homicide only, \$1000 maximum) RCW 38.52.430

22 \$ _____

Other costs for: _____

23 \$ 610

TOTAL RCW 9.94A.145

24 [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 order may be entered. RCW 9.94A.142. A restitution hearing:

25 [] shall be set by the prosecutor
26 [X] is scheduled for 8/9/02

27
28 JUDGMENT AND SENTENCE (JS)
(Felony)(6/2000)

[] RESTITUTION. See attached order.
 [X] Restitution ordered above shall be paid jointly and severally with:

JOHN PHET 98-1-03162-1; MARVIN LEO 98-1-031601-3 and
Sarun Ageth 98-1-03160-5; Kusma Sok 98-1-03163-0; John Chak #01-1-01577-1

| <u>NAME OF OTHER DEFENDANT</u> | <u>CAUSE NUMBER</u> | <u>VICTIM NAME</u> | <u>AMOUNT-\$</u> |
|--------------------------------|---------------------|--------------------|------------------|
| | | | |
| | | | |

[] The Department of Corrections (DOC) may immediately issue a Notice of Payroll Deduction. RCW 9.94A.200010.

[X] All payments shall be made in accordance with the policies of the clerk and on a schedule established by DOC, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ _____ per month commencing _____.
 RCW 9.94A.145.

[] In addition to the other costs imposed herein, the Court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the statutory rate.
 RCW 9.94A.145.

[] The defendant shall pay the costs of services to collect unpaid legal financial obligations. RCW 36.18.190.

[X] 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.

4.2 [] HIV TESTING. The health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing.
 RCW 70.24.340.

[X] DNA TESTING. The defendant shall have a blood sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement.
 RCW 43.43.754.

4.3 The defendant shall not have contact with Kusma Sok, John Chak or their families or the named victims and their families (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for LIFE years (not to exceed the maximum statutory sentence).

[] Domestic Violence Protection Order or Antiharassment Order is filed with this Judgment and Sentence.

JUDGMENT AND SENTENCE (JS)
 (Felony)(6/2000)

4.4 OTHER: _____

4.4(a) Bond is hereby exonerated.

4.5 CONFINEMENT OVER ONE YEAR: The defendant is sentenced as follows:

(a) CONFINEMENT: RCW 9.94A.400. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

| | | |
|--------------------------|-----------|-----------------|
| LIFE WITHOUT PAROLE | Count No. | <u> 1 </u> |
| LIFE WITHOUT PAROLE | Count No. | <u> II </u> |
| LIFE WITHOUT PAROLE | Count No. | <u> III </u> |
| LIFE WITHOUT PAROLE | Count No. | <u> IV </u> |
| LIFE WITHOUT PAROLE | Count No. | <u> V </u> |
| <u> 100 </u> months on | Count No. | <u> VI </u> |
| <u> 100 </u> months on | Count No. | <u> VII </u> |
| <u> 100 </u> months on | Count No. | <u> VIII </u> |
| <u> 100 </u> months on | Count No. | <u> IX </u> |
| <u> 100 </u> months on | Count No. | <u> X </u> |

(a)(i) CONFINEMENT (Sentence Enhancement): A special finding/verdict having been entered as indicated in Section 2.1, the defendant is sentenced to the following additional term of total confinement in the custody of the Department of Corrections:

| | | | | | |
|-------------------------|-----------|----------------|-------------------------|-----------|-----------------|
| <u> 60 </u> months on | Count No. | <u> 1 </u> | <u> 60 </u> months on | Count No. | <u> VI </u> |
| <u> 60 </u> months on | Count No. | <u> II </u> | <u> 60 </u> months on | Count No. | <u> VII </u> |
| <u> 60 </u> months on | Count No. | <u> III </u> | <u> 60 </u> months on | Count No. | <u> VIII </u> |
| <u> 60 </u> months on | Count No. | <u> IV </u> | <u> 60 </u> months on | Count No. | <u> IX </u> |
| <u> 60 </u> months on | Count No. | <u> V </u> | <u> 60 </u> months on | Count No. | <u> X </u> |

Sentence enhancements in Counts 1-X shall run
[] concurrent [] consecutive to each other.
Sentence enhancements in Counts 1-X shall be served
[] flat time [] subject to earned good time credit.

Actual number of months of total confinement ordered is Life plus 1,100.
(Add mandatory firearm and deadly weapons enhancement time to run consecutively to other counts, see Section 2.3 above).

(b) CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A.400. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively:

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All Counts are Class A Serious Violent Felonies and therefore run consecutively to each other.

The sentence herein shall run consecutively to all felony sentences in other cause numbers that were imposed prior to the commission of the crime(s) being sentenced.

The sentence herein shall run concurrently with felony sentences in other cause numbers that were imposed subsequent to the commission of the crime(s) being sentenced unless otherwise set forth here. [] The sentence herein shall run consecutively to the felony sentence in cause number(s)

The sentence herein shall run consecutively to all previously imposed misdemeanor sentences unless otherwise set forth here:

Confinement shall commence immediately unless otherwise set forth here:

(c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.120. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court:

1441 days July 18, 1998 thru June 28, 2002

4.6 [X] COMMUNITY PLACEMENT (pre 7/1/00 offenses) is ordered as follows:

Count I for 24 months; Count VI for 24 months;
Count II for 24 months; Count VII for 24 months;
Count III for 24 months; Count VIII for 24 months;
Count IV for 24 months; Count IX for 24 months;
Count V for 24 months; Count X for 24 months;

or for the period of earned release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A.120 for community placement/custody offenses-- serious violent offense, second degree assault, any crime against a person with a deadly weapon finding, Chapter 69.50 or 69.52 RCW offense. Community custody follows a term for a sex offense. Use paragraph 4.7 to impose community custody following work ethic camp.]

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While on community placement or 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 service; (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by DOC; and (6) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

[] The defendant shall not consume any alcohol.

[] Defendant shall have no contact with: _____

[] Defendant shall remain [] within [] outside of a specified geographical boundary, to-wit: _____

[] The defendant shall participate in the following crime-related treatment or counseling services: _____

[] The defendant shall undergo an evaluation for treatment for [] domestic violence [] substance abuse [] mental health [] anger management and fully comply with all recommended treatment.

[] The defendant shall comply with the following crime-related prohibitions: _____

Other conditions may be imposed by the court or DOC during community custody, or are set forth here: _____

4.7 [] WORK ETHIC CAMP. RCW 9.94A.137, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. 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 total

JUDGMENT AND SENTENCE (JS)
(Felony)(6/2000)

1
2
3 confinement. The conditions of community custody are stated in Section
4 4.6.

5 4.8 OFF LIMITS ORDER (known drug trafficker) RCW 10.66.020. The
6 following areas are off limits to the defendant while under the
7 supervision of the County Jail or Department of Corrections:

8 **V. NOTICES AND SIGNATURES**

9 5.1. COLLATERAL ATTACK ON JUDGMENT. Any petition or motion for
10 collateral attack on this judgment and sentence, including but not
11 limited to any personal restraint petition, state habeas corpus
12 petition, motion to vacate judgment, motion to withdraw guilty plea,
13 motion for new trial or motion to arrest judgment, must be filed within
14 one year of the final judgment in this matter, except as provided for
15 in RCW 10.73.100. RCW 10.73.090.

16 5.2 LENGTH OF SUPERVISION. For an offense committed prior to July 1,
17 2000, the defendant shall remain under the court's jurisdiction and the
18 supervision of the Department of Corrections for a period up to 10
19 years from the date of sentence or release from confinement, whichever
20 is longer, to assure payment of all legal financial obligations unless
21 the court extends the criminal judgment an additional 10 years. For an
22 offense committed on or after July 1, 2000, the court shall retain
23 jurisdiction over the offender, for the purposes of the offender's
24 compliance with payment of the legal financial obligations, until the
25 obligation is completely satisfied, regardless of the statutory maximum
26 for the crime. RCW 9.94A.145 and RCW 9.94A.120(13).

27 5.3 NOTICE OF INCOME-WITHHOLDING ACTION. If the court has not ordered
28 an immediate notice of payroll deduction in Section 4.1, you are
29 notified that the Department of Corrections may issue a notice of
30 payroll deduction without notice to you if you are more than 30 days
31 past due in monthly payments in an amount equal to or greater than the
32 amount payable for one month. RCW 9.94A.200010. Other income-
33 withholding action under RCW 9.94A may be taken without further notice.
34 RCW 9.94A.200030.

35 5.4. RESTITUTION HEARING.

36 [] Defendant waives any right to be present at any restitution hearing
37 (defendant's initials):

38 5.5 Any violation of this Judgment and Sentence is punishable by up to
39 60 days of confinement per violation. RCW 9.94A.200.

40 JUDGMENT AND SENTENCE (JS)
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5.6 FIREARMS. You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk 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.

Cross off if not applicable:

5.7 SEX AND KIDNAPPING OFFENDER REGISTRATION. RCW 9A.44.130, 10.01.200. Because this crime involves a sex offense or kidnapping offense (e.g., kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW where the victim is a minor and you are not the minor's parent), you are required to register with the sheriff of the county of the State of Washington where you reside. If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.

If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within 30 days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry out a vocation in Washington, or attend school in Washington, you must register within 30 days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of the Department of Corrections.

If you change your residence within a county, you must send written notice of your change of residence to the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving, register with that sheriff within 24 hours of moving and you must give written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move out of Washington State, you must also send written notice within 10 days of moving to the county sheriff with whom you last registered in Washington State.

If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the

JUDGMENT AND SENTENCE (JS)
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institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier.

Even if you lack a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody or within 14 days after ceasing to have a fixed residence. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report in person to the sheriff of the county where you are registered on a weekly basis if you have been classified as a risk level II or III, or on a monthly basis if you have been classified as a risk level I. The lack of a fixed residence is a factor that may be considered in determining a sex offender's risk level.

If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within 10 days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

5.8 OTHER: _____

DONE in Open Court and in the presence of the defendant this date:

June 28, 2002

Karen L. Strombon
JUDGE Print Name:

M. K. [Signature]
Deputy Prosecuting Attorney
Print Name:
WSB# 16441

Kristi Minchae
Attorney for Defendant
Print name: Kristi Minchae
WSB# 22299

refused km
Defendant
Print name:



JUDGMENT AND SENTENCE (JS)
(Felony)(6/2000)

CERTIFICATE OF INTERPRETER

Interpreter signature/Print name: _____
I am a certified interpreter of, or the court has found me otherwise
qualified to interpret, the _____ language, which
the defendant understands. I translated this Judgment and Sentence for
the defendant into that language.

CERTIFICATE OF CLERK

CAUSE NUMBER of this case: 01-1-05626-5

I, Bob San Soucie, Clerk of this Court, certify that the foregoing is a
full, true and correct copy of the judgment and sentence in the above-
entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed on this
date: _____

Clerk of said County and State, by: _____, Deputy
Clerk

IDENTIFICATION OF DEFENDANT

SID No.: WA18629069 Date of Birth: 09/15/1981
(If no SID take fingerprint card for WSP)

FBI No. UNKNOWN Local ID No. _____

PCN No. _____ Other _____

Alias name, SSN, DOB: _____

| | | |
|------------------------------------------------------------|---------------------------------------|------------------------------------------|
| Race: | Ethnicity: | Sex: |
| <input checked="" type="checkbox"/> Asian/Pacific Islander | <input type="checkbox"/> Hispanic | <input checked="" type="checkbox"/> Male |
| <input type="checkbox"/> Black/African-American | <input type="checkbox"/> Non-Hispanic | <input type="checkbox"/> Female |
| <input type="checkbox"/> Caucasian | | |
| <input type="checkbox"/> Native American | | |
| <input type="checkbox"/> Other: _____ | | |

trp

JUDGMENT AND SENTENCE (JS)
(Felony)(6/2000)

FILED
DEPT. 18
IN OPEN COURT
JUN 28 2002
Pierce County Clerk
By [Signature] DEPUTY

98-1-03157-5

FINGERPRINTS

Right four fingers taken simultaneously

Right thumb

Left four fingers taken simultaneously

Left thumb

I attest that I saw the same defendant who appeared in Court on this Document affix his or her fingerprints and signature thereto. Clerk of the Court, BOB SAN SOUCIE:

[Signature], Deputy Clerk.

Dated: 6-28-02

DEFENDANT'S SIGNATURE: refused

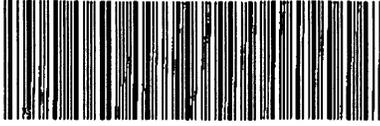
DEFENDANT'S ADDRESS: DOC

DEFENDANT'S PHONE#: _____

FINGERPRINTS

APPENDIX “B”

Opinion and Mandate (COA No. 29027-8 Consolidated with 29087-1)



98-1-03157-5 24410788 MND 01-19-06

FILED
IN COUNTY CLERK'S OFFICE
A.M. JAN 19 2006 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY *[Signature]* DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,

No. 29027-8-II (cons w/29087-1-II)

v.

MANDATE

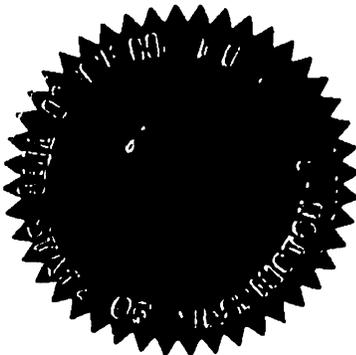
JOHN PHET and JIMMIE CHEA,
Appellants.

Pierce County Cause Nos.
98-1-03162-1 and 98-1-03157-5

The State of Washington to: The Superior Court of the State of Washington
in and for Pierce County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on May 3, 2005 became the decision terminating review of this court of the above entitled case on January 10, 2006. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion. Costs and attorney fees have been awarded in the following amount:

- Judgment Creditor Respondent State: \$67.78
- Judgment Creditor A.I.D.F.: 81,076.29
- Judgment Debtor Appellant Phet: \$37,119.96
- Judgment Debtor Appellant Chea: \$43,956.33



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma, this 18th day of January, 2006.

[Signature]
Clerk of the Court of Appeals,
State of Washington, Div. II

MANDATE
29027-8-II (cons w/29087-1-II)
Page Two

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Pierce Co Superior Court Judge
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Tacoma, WA 98402

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Pierce County Prosecuting Atty Ofc
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Indeterminate Sentence Review Board

FILED
COURT OF APPEALS
DIVISION II

05 MAY -3 AM 9:26

STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JOHN PHET and JIMMIE CHEA,

Appellants.

No. 29027-8-II
(consolidated with)

No. 29087-1-II

UNPUBLISHED OPINION

HOUGHTON, J. -- Jimmee Chea and John Phet appeal from their convictions of five counts of first degree aggravated murder and five counts of first degree assault, arguing numerous grounds.¹ We affirm.

¹ Four judges presided over this case. First, Judge Grant Anderson entered CrR 3.5 findings of fact and conclusions of law. When our Supreme Court removed Judge Anderson from the bench, for reasons unrelated to this matter, Judge Rudy Tollefson made preliminary rulings. When the Supreme Court suspended Judge Tollefson from the bench, for reasons unrelated to this matter, the case was re-assigned to Judge Vicki Hogan. Judge Hogan made preliminary rulings, but then recused herself on the defendants' request. Judge Karen Strombom then presided over all further matters, including the trial.

No. 29027-8-II / No. 29087-1-II

FACTS²

On July 5, 1998, at approximately 1:45 A.M., several gunmen burst into Tacoma's Trang Dai Café and opened fire on the patrons, killing five people and wounding five others.³ Later, forensic officers collected 52 shell casings in and around the café.⁴

Tacoma Police Department (TPD) officers retrieved a neighboring business videotape recording of the alley behind the café. It revealed two vehicles backing into the alley minutes before gunfire erupted. Based on prior armed assault reports, TPD detectives recognized Chea's silver or gray vehicle. They knew Chea as a member of the LOC's Out Crips (LOC's), a local gang. The detectives then began watching Chea's residence, where they observed that a silver Honda parked there closely matched the Honda in the videotape.

The headlights of a white car displayed in the video illuminated the ground in an unusual pattern. The day after the shootings, a detective who had watched the video observed a car with similar headlights. A records check revealed that the car belonged to Veasna Sok.

The detectives interviewed some of the surviving café patrons. They learned that, in March 1998, one of the people injured in the shootings, Son Kim, fought with Ri Le at the café. Kim told the detectives that he suspected Le's involvement in the shootings and that he, Kim, was the intended target. The detectives focused their investigation on Le, Chea, and their associates. Later investigation revealed Phet's participation in the crimes.

² We derive the facts from pretrial proceedings and trial testimony.

³ The verbatim reports of proceedings are not numbered consecutively. Therefore, the standard abbreviation, "RP" followed by a page number, represents only the trial records before Judge Strombom. The trial record is the most extensive and it is consecutively numbered. "RP" followed by a date and a page number identifies all other proceedings before various judges.

⁴ These casings came from five different guns: a 7.62 rifle, three different 9 millimeter semiautomatic handguns, and a .380 semiautomatic handgun.

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At 6:00 A.M. on July 18, the detectives served search warrants at nine different locations⁵ and took approximately 20 people, including Sok, Sarun Ngeth, and Thanna John Chak, to the police station for questioning.⁶ On July 19, Marvin Leo was taken from his residence to the police station for questioning. At the police station, these individuals gave statements implicating themselves and others.⁷

Authorities also contacted Phet and Chea while executing the warrants and transported them to the TPD for interviews. The TPD kept Chea and Phet at the station from approximately 6:00 A.M. until late afternoon, when they were interviewed.

A guard held Chea in a captain's office awaiting his interview. No one asked Chea questions. The guard attended to Chea's personal needs.

⁵ During the searches, the detectives found several photographs of gang members. The trial judge later stated:

I believe some photos are admissible to show the relationship that all of the gang members had with each other, and I think it's particularly significant that these photos were found at the various homes in which the search warrants were executed, in particular Ri Le's and Khanh Trinh's home as well, because that's part of the theory of the case as to why other members of the gang would do what Ri Le wanted them to do.

Report of Proceedings (RP) at 2317. The court admitted into evidence four photographs of gang members, including the one showing gang members holding guns.

⁶ In November 2000, Chea and Phet moved to suppress evidence obtained in executing these search warrants, arguing lack of probable cause. In March 2001, Judge Hogan denied the motion. She found compelling ballistics comparisons between casings recovered at the Trang Dai Café crime scene and shell casings recovered at a prior shooting scene where the assailants' and the car's descriptions matched those from the café shooting. Additionally, Judge Hogan considered prior police contacts with Chea and Phet and their residences or vehicles, and the security videotape from behind the Trang Dai Café. From these facts, Judge Hogan found a nexus between the places to be searched and the criminal activity prompting the search.

⁷ Sok and Leo stated that Phet rode in the car driven by Chea. During the shooting, Phet was stationed at the rear entrance of the café while armed with a 9 millimeter handgun. These co-defendants also claimed that they observed Phet discharging the firearm. Ngeth stated that he did not actually observe Phet discharge a firearm, but that Phet exited the vehicle driven by Chea and headed toward the café while armed. Sok and Ngeth claimed that they remained inside the parked vehicles in the alley behind the café and that they did not participate in the shooting.

No. 29027-8-II / No. 29087-1-II

On July 18, at 4:05 P.M., a detective advised Chea of his *Miranda*⁸ rights and began interviewing him. Chea stated that he understood those rights and he wished to waive them. He then signed the advisement of rights form in the presence of Detectives Davidson and Ringer. During the interview, Chea denied any involvement in the shootings.

The TPD also held 16-year-old Phet, without interviewing him, from approximately 6:00 A.M. until 5:05 P.M., when he received his *Miranda* warnings. Phet orally acknowledged that he understood his rights and that he wished to waive them and speak to the police. Phet also signed the standard advisement of rights form.⁹ Phet did not acknowledge involvement in the shootings.

The State charged Chea and Phet with five counts of first degree aggravated murder and five counts of first degree assault. The State alleged a firearm enhancement on each count.¹⁰

The State sought a pretrial ruling on the admissibility of Chea's and Phet's involvement with the LOC's gang. Judge Tollefson ruled the evidence inadmissible because the State failed to show a nexus between the café shooting and advancement of any gang-related activity. Judge Tollefson reasoned that the shooting at the Trang Dai Café was not a gang-related crime because

⁸ *Miranda v. Arizona*, 384 U.S. 436, 483-85, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

⁹ Phet later moved to suppress his statements, arguing they were involuntary because he had limited education and understanding. Reasoning that Phet made his statements freely and voluntarily after he had been properly advised of his constitutional rights and having chosen to waive them, Judge Anderson declined to suppress the statements. Judge Anderson also stated that "[t]he delay between the time of the defendant's arrest and the time he was interviewed and advised of his rights is understandable given the need for the same detectives to do all of the suspect interviews, and was not prejudicial to the defendant." Clerk's Papers (CP) Phet 165-66.

¹⁰ The State also charged several other defendants not subject to this appeal: Ri Le, Samath Mom, Khanh Trinh, Sarun Ngeth, Marvin Leo, Veasna Sok, and John Chak. Samath Mom, defendant Phet's brother, committed suicide. Le shot his brother Khanh Trinh and then killed himself when authorities sought to arrest them. Marvin Leo pleaded guilty as charged. Veasna Sok, Sarun Ngeth, and John Chak entered into plea agreements with the State.

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there was no basis to believe that the LOC's gang or one of its members would benefit from the shooting.

Instead, Judge Tollefson found that the shooting was motivated by Le's desire for revenge against Kim. Because Le was not a member of LOC's gang, the judge believed that the shooting was not gang-related. Therefore, Judge Tollefson ruled that the State failed to show that a nexus existed between the shooting at the café and the advancement of some gang purpose.

Later, Judge Hogan agreed to reconsider Judge Tollefson's ruling regarding the gang affiliation evidence. Judge Hogan ruled that the State could raise the issue through an offer of proof. The State presented its offer of proof through Davidson's declaration dated June 11, 2001.¹¹ Ultimately, Judge Strombom admitted the evidence of gang affiliation.

On August 3, 1999, while in custody, Chea and Phet assaulted Sok, who agreed to testify against Chea and Phet under his plea agreement.¹² The State moved to admit the evidence of this assault through the testimony of escorting officers. Judge Tollefson granted the State's motion; he stated that the evidence indicated that Chea and Phet knew that Sok had agreed to testify and that was the reason for the assault.¹³

¹¹ Later, when Judge Strombom took over the case, the defense argued that the trial court must hold a preponderance hearing regarding gang planning. Judge Strombom declined to do so.

¹² On that day, officers transported Phet, Chea, and Sok to court for a hearing. Once the officers removed Phet's and Chea's handcuffs, they began hitting Sok, who was still handcuffed. The officers heard Chea and Phet call Sok a "snitch" and yell, "snitches die." RP (03/24/00) at 38.

¹³ Judge Tollefson noted: "This evidence and the statements that were made not only shows consciousness of guilt, but it also links the parties to the crime itself. For that reason, its probative value certainly outweighs the prejudicial effect because it directly links the parties to the crime." RP (03/24/00) at 39.

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Before trial, the State moved to exclude any evidence of alleged gambling or narcotics activity at the Trang Dai Café on the grounds that such evidence constituted irrelevant hearsay. Judge Tollefson granted the State's motion.¹⁴

At trial, Sok, who had been a member of the LOC's gang for a couple of years before the shooting, testified. He said that on the evening of the shooting, he left home with his 9 millimeter handgun, which he carried to protect himself against other gangs' members.

Sok went to Ngeth's house, where he picked up Ngeth and Leo; Ngeth was armed with his .380 and Leo took Sok's 9 millimeter. While they drove around, Khanh Trinh called them to find out whether Sok wanted to "put in work" that night. Report of Proceedings (RP) at 4388. Sok understood the term "put in work" meant a drive-by shooting. RP at 4388.

Sok, Ngeth, and Leo waited about 10 minutes before Chea showed up in his car; Chea wore red clothes. Le, Samath Mom, Trinh, and Phet were in Chea's car. Chea asked if they wanted to "put in work"; Le mentioned that he wanted to "get" Kim at the Trang Dai Café. RP at 4396. Sok understood this to mean to shoot Kim.

Next, Chak testified that he belonged to the LOC's gang. On July 4, 1998, Chea called Chak and invited him over to Le's house. Chea wore red clothes. He drove his gray/silver Honda Civic and picked up Chak for the ride to Le's house. Phet and Mom were already there. Chea and Le talked about Kim "mean mugging" Chea, a sign of disrespect that could trigger

¹⁴ On September 5, 2001, Judge Hogan denied Chea and Phet's motion to reconsider Judge Tollefson's earlier ruling on this issue. Judge Hogan stated that she did not find the connection between the shooting and the guns and unlawful gambling, or narcotics activities at the café. When Judge Hogan recused herself from the case, Judge Stromborn also denied the renewed motion to admit evidence of unlawful activities at the café. Judge Stromborn found no evidence establishing a nexus between these acts and the crimes at issue.

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violent retaliation.¹⁵ At one point, Le and Khanh left the house for awhile and returned with red clothing. Eventually everybody got into cars and met other LOC's members.

Chak further testified that Sok and his carload and Chea and his carload drove to the market. Chea told Chak to call the café to learn whether Kim remained there. When Kim answered, Chak hung up. Both cars then drove into the alley behind the café. The cars went down the alley twice, the second time backing into it so that they could leave without driving the wrong way on a one-way street.

Chak also testified that Chea stayed in his car, and Sok and Ngeth stayed in Sok's car; everyone else got out and took guns from Chea's car trunk. Le told Khanh and Phet to guard the back door and to shoot if anyone came out.

Leo, Le, Mom, and Chak headed for the front door; Chak opened the door and everyone rushed in and opened fire. After a short time, the three backed out of the door while Le continued to fire through the wall as they retreated to their cars. By the time Chak and others returned to their cars, Phet and Khanh were already in their car. After the shooting, they all returned to Le's house.

Davidson testified as an expert on gang culture. He opined that gang crimes may include all kinds of assaults, threats, intimidation, physical beatings, nonfatal shootings, stabbings, and homicides. He also stated that gangs were generally formed to make profits, to protect individual members, and to "gang bang" or commit violence; that "OG's"¹⁶ exerted influence

¹⁵ Later, Davidson testified that, in gang culture, the term "mean mugging" is a "hard stare" meant to challenge or intimidate. RP at 3487. Davidson opined that "mean mugging" could be a prelude to violence and such violence "doesn't have to be immediate." RP at 3488.

¹⁶ Davidson stated that the founding members of a gang were called "OG's," or "original gangsters." RP at 3405.

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over younger gang members; and that gang members would dress in another gang's color when carrying out a drive-by shooting in order to level blame on members of a rival gang.¹⁷

The detective identified Chea as one of the LOC's "OG's." RP at 3408. Davidson and other witnesses explained gang hand signals, signs, and tattoos, and provided LOC's members' names. Jurors reviewed one photograph of some LOC's gang members, including Chea and Phet.¹⁸

The jury found Chea and Phet guilty as charged, including the firearm enhancements. Chea and Phet appeal.

ANALYSIS

I. CHARGING DOCUMENT

For the first time on appeal, Phet and Chea contend that the information charging them with first degree aggravated murders did not contain all the essential elements of the crime. They assert that the State did not identify the intended victim of the charged premeditated murder.

An information must contain all essential elements of a crime, statutory or otherwise, in order to give notice to the accused of the nature and cause of the action against him. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). Where the challenge to the sufficiency of the charging document is raised for the first time after the verdict, we construe the document liberally in favor of its validity. *Kjorsvik*, 117 Wn.2d at 105.

¹⁷ Davidson testified that the "Crips" adopted blue as their color and the "Bloods," a rival gang, adopted red. RP at 3406. Davidson opined that a Crip, such as one of the LOC's, would not dress in red and go out with other Crips unless intending to commit a crime in an attempt to frame a rival gang.

¹⁸ See footnote 5.

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The State charged as follows:

That JIMMEE CHEA and JOHN PHET, acting as accomplices of each other and of Ri Ngoc Le, Samath Mom, Khanh Van Trinh, Sarun Truck Ngeth, Marvin Lofi Leo, Veasna Sok, and Thanna John Chak as defined in RCW 9A.08.020, in Pierce County, on or about the 5th day of July, 1998, did unlawfully and feloniously with premeditated intent to cause the death of *another person*, shoot [a name of each homicide victim], thereby causing the death of [victim's name], a human being, who died on or about the 5th day of July, 1998 . . . contrary to RCW 9A.32.030(1)(a) and RCW 10.95.020(10).

Clerk's Papers (CP) (Chea) at 757-63; CP (Phet) at 1255 (emphasis added).

RCW 9A.32.030(1)(a) provides: "A person is guilty of murder in the first degree when[] [w]ith a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person." RCW 10.95.020 provides: "A person is guilty of aggravated first degree murder. . . if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a). . . and one or more of the following aggravating circumstances exist: . . . (10) There was more than one victim and the murders were part of a common scheme or plan."

Nothing in these statutes specifies that the victim's name is an element of the crime. Nor do Chea and Phet cite any case law establishing that the victim must be named. To the contrary, in *State v. Plano*, 67 Wn. App. 674, 679-80, 838 P.2d 1145 (1992), Division One held that the victim's name is not an element of the crime charged. We agree. The argument fails.

II. CHEA'S AND PHET'S CUSTODIAL STATEMENTS

Chea and Phet further contend that the trial court erred in admitting their statements made to the police because the officers failed to advise them of their *Miranda* rights and their right to counsel "as soon as feasible" as required by CrR 3.1.¹⁹

¹⁹ CrR 3.1 states:

(b)(1) The right to a lawyer shall accrue as soon as feasible after the defendant is taken into custody, appears before a committing magistrate, or is formally charged, whichever occurs earliest.

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Miranda, 384 U.S. at 444-45, requires that prior to a custodial interrogation, a defendant must be informed of his or her constitutional rights. CrR 3.1 goes beyond the requirements of *Miranda* and requires that a defendant be advised of his right to counsel immediately upon being taken into custody. *State v. Dunn*, 108 Wn. App. 490, 494, 28 P.3d 789 (2001), *aff'd*, 148 Wn.2d 193 (2002).

Chea and Phet failed to raise a CrR 3.1 argument below and, thus, did not preserve it on appeal. RAP 2.5(a).²⁰ We do not address this argument further.²¹

III. EVIDENCE RULINGS

A. Changing Another Judge's Ruling

Chea and Phet next contend that Judge Hogan had no authority to reconsider Judge Tollefson's earlier ruling excluding evidence of gang affiliation and Judge Strombom erred in later admitting it.

The orderly administration of justice requires that the trial court, after having full opportunity to hear, consider, and decide all material questions of the case, enters formal judgment resolving those questions. *Snyder v. State*, 19 Wn. App. 631, 635-36, 577 P.2d 160

(c)(1) When a person is taken into custody that person shall immediately be advised of the right to a lawyer. Such advice shall be made in words easily understood, and it shall be stated expressly that a person who is unable to pay a lawyer is entitled to have one provided without charge.

²⁰ A defendant's rights under CrR 3.1 are procedural, not constitutional. An alleged statutory error, such as this one, is harmless, unless, "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *State v. Hancock*, 46 Wn. App. 672, 678, 731 P.2d 1133 (1987) (citation omitted), *aff'd*, 109 Wn.2d 760 (1988).

²¹ Moreover, Chea and Phet gave alibi statements or did not acknowledge any involvement in the shootings.

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(1978). In managing litigation, the trial court must have wide discretion and authority, including the power to issue interlocutory orders. *Snyder*, 19 Wn. App. at 636. These orders or rulings may be changed, modified, revised, or eliminated as the case progresses. *Snyder*, 19 Wn. App. at 636.

Here, Judge Tollefson initially denied the admission of evidence of gang affiliation: “Unless the State can provide a nexus . . . where there was a relationship to the crime and the crime relates to true gang activities, such as securing your turf or enhancing your reputation with the gang, . . . I don’t think that the State has shown a nexus I am going to rule that [this evidence is not] admissible at this time.” RP (02/14/00) at 77-78. Later, Judge Hogan reconsidered and granted the State’s motion to admit evidence of gang affiliation, finding it relevant to the relationship of the participants in the crime.²²

The record discloses that Judge Tollefson entered a preliminary ruling on the admissibility of gang-related evidence based on the State’s lack of evidence. Later, after the State more fully developed its evidence and argument and submitted an offer of proof, Judge

²² Judge Hogan noted:

[I]t’s clear Judge Tollefson did leave the door open, and didn’t feel that in February of 2000 . . . the State had satisfied what he thought was the proper inquiry.

I will require an offer of proof, but I am not closing the door on this issue. I think under Evidence Rule 404(b) the gang involvement does go to the theory of the State’s case. The absence of mistake or accident, the evidence of premeditation or with a plan of preparation, as well as intent which are relevant to prove an essential ingredient of the crime charged It is probative evidence of interrelationships of the participants. There was bad blood between Ri Le and Son Kim. Whatever that basis was, . . . that is not the motive to improve an individual status within the gang, the gang’s benefit, but the gang . . . adopted Ri Le’s crime, and the gang affiliation is relevant to the relationship of the participants. . . .

I feel that the evidence of the gang involvement and how a gang operates is critical to the showing of how each participant in the gang acted. RP (5-24-01) at 612-13.

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Hogan modified the ruling, and during trial Judge Strombom admitted it. Under these facts, they did not err in doing so.

B. Gang Association Evidence

1. Expert Qualifications

Chea and Phet also argue that the detective lacked expert qualifications to testify about gangs.²³ We review a trial court decision as to expert qualification for abuse of discretion. *State v. Zunker*, 112 Wn. App. 130, 140, 48 P.3d 344 (2002), *review denied*, 148 Wn.2d. 1012 (2003).

Davidson detailed his training and experience involving gang crimes and gang-related activities. He had 16 hours of training on gangs. He attended the National Law Enforcement Institute Advanced Gang Conference. He had experience with gang activities as a patrol officer since 1987 and as a detective since 1994. He had investigated hundreds of gang-related crimes and had hundreds of gang-related interactions.

Although the detective's classroom training may have been minimal, an expert may be qualified to express opinions based on experience. ER 702.²⁴ The trial court did not abuse its discretion in allowing the detective to testify about gangs and gang-related activities.

²³ Defense counsel raised a question about Davidson's qualifications earlier in the proceedings and questioned whether he had attended lengthy classes. Counsel did not repeat the objection later when Davidson testified and, although we could decline to review it, we review it in the interests of justice.

²⁴ ER 702 allows an expert to testify if "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." An expert testifying as to gang culture need not acquire his knowledge through personal gang membership experience. ER 702.

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2. Nexus between Crime Charged and Gang Association

Chea and Phet further contend that the trial court erred in admitting gang-related evidence. They assert an insufficient nexus existed between gang association and the crimes.²⁵ They also argue that the trial court erred in allowing Davidson to testify as a gang expert because nothing in his testimony assisted the jury in understanding the evidence presented or determining a fact in issue.

The trial court allowed Davidson to testify as an expert on gang culture. He stated that gang crimes may include all kinds of assaults, threats, intimidation, physical beatings, nonfatal shootings, stabbings, and homicides. He explained the meaning of gang terminology and symbols, including "mean mugging" and "putting in work," gang criminal activities, gang codes of conduct and discipline, gang interactions with other gangs and prospective gang members, and gang organizational structure and history.

Davidson identified Chea as one of the LOC's "OG's." RP at 3408. He provided the names of the LOC's members. And jurors also saw pictures of some LOC's gang members, including Chea and Phet, making gang signs.

²⁵ Judge Stromborn allowed Davidson to testify as to the gang culture and rules. Judge Stromborn noted that Davidson's testimony explains to the jury various aspects of a gang and the relationships that develop within a gang. This is not common knowledge, but rather is knowledge gained through experience.

Further, the testimony is not based on Detective Davidson's personal observations of any individual defendant, but rather is used to explain a world which is not understood by people who have no gang experience.

For these reasons, I believe that the testimony is relevant as to motive, intent, identity, plan, preparation and knowledge. I do not believe that the purpose for which the testimony is being presented is unduly prejudicial, as it provides an explanation to the jury regarding gangs and gang life.

RP at 2212-13.

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Co-defendants Sok and Chak testified that Phet and Chea participated in the shooting in retaliation for Kim's "mean mugging" Chea, and for Kim's fight with Le. Chea was a gang member and Le was gang affiliate. Both witnesses stated that, in gang culture, an act of disrespect provides grounds for retaliation and murder. They noted that the assailants, including Chea and Phet, purposefully donned red clothing before the shooting to distract from their gang's involvement.

We review trial court evidentiary decisions for abuse of discretion. *State v. Brown*, 132 Wn.2d 529, 578, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). To preserve an evidentiary issue, a party objecting to the admission of the evidence must have made a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986).

Evidence of other crimes or bad acts may be admitted under ER 404(b)²⁶ as proof of premeditation, intent, motive, and opportunity. Evidence of prior misconduct and previous quarrels may be admissible to show motive. *State v. Powell*, 126 Wn.2d 244, 260, 893 P.2d 615 (1995).

²⁶ "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). In applying ER 404(b), a trial court must engage in a three-step analysis: (1) determine the purpose for which the evidence is offered, (2) determine the relevance of the evidence, and (3) balance on the record the probative value of the evidence against its prejudicial effect. *State v. Campbell*, 78 Wn. App. 813, 821, 901 P.2d 1050, *review denied*, 128 Wn.2d 1004 (1995).

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Evidence of a defendant's gang membership may be relevant to show motive where the trial court finds a sufficient nexus between gang affiliation and motive for committing the crime. *State v. Boot*, 89 Wn. App. 780, 789, 950 P.2d 964, *review denied*, 135 Wn.2d 1015 (1998). But evidence of gang membership lacks probative value "when it proves nothing more than a defendant's abstract beliefs."²⁷ *State v. Campbell*, 78 Wn. App. 813, 822, 901 P.2d 1050, *review denied*, 128 Wn.2d 1004 (1995).²⁸ It has probative value, however, when it proves premeditation, intent, motive, or the bias of a witness. *United States v. Abel*, 469 U.S. 45, 48, 54, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984) (bias and motive of witness);²⁹ *State v. Johnson*, 124 Wn.2d 57, 69, 873 P.2d 514 (1994) (motive); *Boot*, 89 Wn. App. at 789 (premeditation).³⁰

²⁷ Chea and Phet also argue that the gang testimony infringed on their First Amendment right of association. Gang membership is not admissible to prove abstract beliefs and associations in part because it is protected by the constitutional rights of freedom of speech and freedom of association. *Dawson v. Delaware*, 503 U.S. 159, 165, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992). But association evidence is inadmissible only when it proves nothing more than a defendant's abstract beliefs. *Dawson*, 503 U.S. at 164-67. The constitutional right to free association does not bar the admission of associational evidence when such evidence is relevant to a material issue at trial. *Campbell*, 78 Wn. App. at 822; *United States v. Robinson*, 978 F.2d 1554, 1565 (10th Cir. 1992), *cert. denied*, 507 U.S. 1034 (1993). As we discuss below, evidence of Chea's and Phet's gang affiliation was relevant to show premeditation and motive. Thus, its admission did not violate their First Amendment rights.

²⁸ In *Campbell*, the State charged a gang member with killing two rival gang members. The State theorized that the defendant had been motivated to kill the victims because they invaded his "turf" and challenged his authority. It properly showed that the defendant was a gang member; that the victims were rival members who "disrespected" the defendant and sold drugs on his "turf"; and that, in gang culture, these resulted in violent retaliation. *Campbell*, 78 Wn. App. at 822.

²⁹ The *Abel* court allowed the State to show that a defense witness and the defendant belonged to the same gang, that each member of the gang took an oath to lie on behalf of other members; and, thus, that the defense witness was arguably biased. 469 U.S. at 47.

³⁰ In *Boot*, the gang evidence showed motive and premeditation where killing someone enhanced a gang member's status. *Boot*, 89 Wn. App. at 789-90. The appellate court affirmed. *Boot*, 89 Wn. App. at 794.

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Here, the challenged evidence tended to prove the State's theory--that Chea and Phet were gang members who responded with violence to any challenges from others. As in *Campbell, Boot*, and *Abel*, the evidence here showed that both Chea and Phet were gang members; that one of the gang's tenets was to retaliate for "disrespect"; and that Kim exhibited disrespect when he "mean mugged" Chea and fought with Le, a gang affiliate. The evidence of gang affiliation also showed that another tenet was intra-group loyalty and, inferentially, that the other gang members would retaliate if their fellow member had been treated disrespectfully.

The evidence also shows that Chea and Phet considered their actions and took deliberate steps to accomplish their goal. Although gang affiliation evidence may be suggestive of violent activity, and thus prejudicial, the evidence placed the relationship of the intended victim, Kim, and Chea and Phet in context and revealed the implications of a person "mean mugging" a gang member.

The trial court properly admitted this evidence as probative of Chea's and Phet's premeditation, motive, and intent. The evidence had probative value that outweighed its prejudicial effect.³¹

³¹ This conclusion disposes of Chea's and Phet's argument that there was an "insufficient nexus" between the offered evidence of gang activity and the shooting at the café. Under ER 401 and 403, the required nexus is that the evidence has a "tendency" to prove or disprove a fact of consequence to the action and that the evidence have probative value that was not substantially outweighed by unfair prejudice. That nexus existed here.

Chea and Phet also argue that the gang evidence was mere profile testimony and that the prejudicial effect of admitting the gang members' photos outweighed their probative value. We disagree. After carefully evaluating and weighing the evidence, the trial court admitted these photographs to show the relationship of the gang members. The trial court did not abuse its discretion.

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C. August 3, 1999 Assault on Veasna Sok

Chea and Phet further contend that the trial court erred in admitting evidence of their assault on Veasna Sok. They assert that it was irrelevant and unfairly prejudicial. Phet also argues that the trial court erred in not holding a preliminary hearing about the assault.

Generally, a court may admit evidence that a defendant threatened a witness as implication of guilt. *State v. Bourgeois*, 133 Wn.2d 389, 400, 945 P.2d 1120 (1997). Where relevant, such evidence may be admitted after a proper ER 404(b) balancing. *State v. McGhee*, 57 Wn. App. 457, 460, 788 P.2d 603, *review denied*, 115 Wn.2d 1013 (1990). Evidence of threats may be relevant if it connects the defendant to the crime and shows guilty knowledge. *McGhee*, 57 Wn. App. at 460-61.

Here, the State introduced evidence of the assault through the testimony of four officers and the victim, Sok. The trial court ruled that the State could introduce evidence of this incident because Chea and Phet knew that Sok was going to testify for the State. The trial judge ruled:

It is my conclusion that the probative value outweighs the prejudicial effect of this testimony. The actions of these two defendants against a co-defendant who has made a deal with the State speaks volumes as to guilty knowledge and identity.

... The assault occurred after the announcement by the State that Sok had reached a deal with the State and would testify on behalf of the State.

RP at 2356. The trial court also noted that “[c]alling someone a snitch further supports the conclusion they knew Veasna Sok was going to testify against them. There is no need for an ER 404(b) preponderance hearing regarding the assault of August 3, 1999.” RP at 2355-56.

Before the evidence was introduced, the trial court gave the jury the following limiting instruction:

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You are about to hear evidence on the subject of the August 3, 1999 assault on Veasna Sok alleged to have been committed by Jimmee Chea and John Phet.

Before this evidence is allowed the court advises you that you may consider the evidence only for the limited purpose of establishing the defendants' consciousness of guilt of the crimes charged in this case.

You must not consider the evidence for any other purpose unless instructed otherwise. It is up to you to determine how much weight, if any, is to be given this evidence.

You are further instructed that statements attributable to one of the defendants are not attributable to the other defendant and can not [sic] be used as evidence against the nonspeaking defendant.

RP at 3827. Thus, the trial court properly limited the evidence to show Chea's and Phet's guilty knowledge. It did not abuse its discretion in doing so.

Phet further contends that the trial court erred in not holding a preliminary hearing to determine, by a preponderance of the evidence, whether he ever called Sok a "snitch" during the assault.

When the trial court fails to conduct the on-the-record balancing process required by ER 404(b), we may decide issues of admissibility. *McGhee*, 57 Wn. App. at 460. In affirming this court's holding in *State v. Kilgore*, 147 Wn.2d 288, 294-95, 53 P.3d 974 (2002), our Supreme Court noted:

Requiring an evidentiary hearing in any case where the defendant contests a prior bad act would serve no useful purpose and would undoubtedly cause unnecessary delay in the trial process. In our view, these hearings would most likely degenerate into a court-supervised discovery process for defendants. As the Court of Appeals observed, the defendant will always have the right to confront the witnesses who testify against him at trial. We should be slow, therefore, to allow defendants to confront the witnesses twice, particularly where testifying just once can be a difficult experience for any witness. We believe, in the final analysis, that the trial court is in the best position to determine whether it can fairly decide, based upon the offer of proof, that a prior bad act or acts probably occurred. We recognize, as did the Court of Appeals, that there may be instances where the trial court cannot make the decision it must make based simply on an offer of proof. In such cases, it would be entirely proper for the court to conduct an evidentiary hearing outside the presence of the jury. The decision whether or not to conduct

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such a hearing, though, should be left to the sound discretion of the trial court. We conclude, finally, that there was no error here on the part of the trial court in allowing the evidence of prior bad acts to come in following the State's offer of proof.

Here, the record shows that the trial judge considered the issue of holding an evidentiary hearing and properly exercised its discretion by not doing so.

D. Unlawful Activities at Trang Dai Café

Chea and Phet contend that the trial court improperly excluded evidence of unlawful drug and gambling activities at the Trang Dai Café.³² Chea and Phet argue that their theory of the case--owing Phat Nguyen, the café's owner, thousands of dollars in gambling debts--provided the motive for the shooting. They assert that the evidence of unlawful drug activity at the café was probative of their theory of the case.³³

A defendant has a constitutional right to present a defense consisting of admissible relevant evidence. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, *cert. denied*, 508 U.S., 953 (1993). Under ER 401, evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of

³² Three judges considered this argument below. First, Judge Tollefson granted the State's motion to exclude evidence of unlawful activity at the café on the grounds that the evidence was irrelevant or based on hearsay, but he allowed Chea and Phet to ask for review of that ruling if they could present a better offer of proof.

Second, Judge Hogan denied Chea and Phet's motion for reconsideration of Judge Tollefson's ruling. Judge Hogan ruled that she found no automatic connection of the crimes at issue with the unlawful activities at the café. Judge Hogan also found that the facts that Chea and Phet wanted to admit were "remote speculations." RP (08/23/01) at 57.

Finally, Chea and Phet moved for reconsideration before Judge Strombom, who denied their motion.

³³ Without properly citing authority or setting forth argument, Chea and Phet also argue that the trial court improperly excluded a photograph of another car taken from the surveillance tape, a letter from Chak to Chea, and evidence that Chea's brother had been threatened. We decline to further address this contention. RAP 10.3(a)(5); *State v. Jacobs*, 121 Wn. App. 669, 681 n.2, 89 P.3d 232, *review granted on other grounds*, 152 Wn.2d 1036 (2004).

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the action more probable or less probable than it would be without that evidence. Relevant evidence may still be excluded if its probative value is outweighed by its prejudicial effect, or its tendency to confuse the issues, mislead the jury, or cause an undue delay, waste of time, or needless presentation of cumulative evidence.³⁴ ER 403.

Nevertheless, a criminal defendant “does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.” *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 653, 98 L. Ed. 2d 798 (1988). The proffered evidence is not relevant to rebut the evidence presented against defendants if it was offered solely to encourage the jury to speculate as to possible other assailants. *State v. Drummer*, 54 Wn. App. 751, 755, 775 P.2d 981 (1989).

In this case, Chea and Phet argue that the evidence of unlawful drug activity at the café was relevant because it established that Le owed money to the café owner and that the motive for the shooting at the café was that debt, not Chea being “mean mugged” by Kim. In order to present evidence of this debt, it was necessary to admit evidence of other people’s unrelated unlawful activities. But Chea and Phet never offered evidence of this debt at trial. The trial court did not abuse its discretion in excluding evidence of unlawful activities at the café.

³⁴ Although evidence tending to show that another party may have committed the crime may be admissible, before it can be admitted, there must be such proof of connection with it, such facts or circumstances tending clearly to point out someone other than the one charged as the guilty party. *State v. Kwan*, 174 Wash. 528, 532-33, 25 P.2d 104 (1933). “Remote acts, disconnected and outside of the crime itself, cannot be separately proved for such a purpose.” *Kwan*, 174 Wash. at 533 (citing *State v. Downs*, 168 Wash. 664, 13 P.2d 1 (1932)). “Mere evidence of motive in another party, or motive coupled with threats of such other person, is inadmissible, unless coupled with other evidence tending to connect such other person with the actual commission of the crime charged.” *Kwan*, 174 Wash. at 533 (citing *People v. Mendez*, 193 Cal. 39, 223 P.65 (1924)).

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E. Assault on Veasna Sok's Brother

Chea and Phet next contend that the trial court improperly permitted Sok to testify that he backed out of his first plea agreement with the State because someone had shot at his younger brother, Rathana Sok. The trial court admitted this evidence because defense counsel opened the door to it.³⁵

Generally, when a subject has been opened during examination, the opponent may develop and explore the various phases of that subject. *State v. Hayes*, 73 Wn.2d 568, 571, 439 P.2d 978 (1968) (citing *Wilson v. Miller Flour Mills*, 144 Wash. 60, 66, 256 P. 777 (1927)); *State v. West*, 70 Wn.2d 725, 424 P.2d 1014 (1967)). In *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969), our Supreme Court noted:

It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

In the present case, during Davidson's cross-examination, Chea's counsel asked why the State offered Sok a new plea agreement in February 2001.³⁶ Before starting redirect, the State

³⁵ The trial court ruled that the State could ask about the State's thought processes in offering a new deal, but not as to Sok's reasons for taking it because he would have to testify as to his reasons.

³⁶ The relevant dialog follows:

Q: Veasna was offered his new deal back in February?

A: Yes.

Q: Based on what?

A: You'll have to ask the prosecutors.

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asked for a hearing outside the presence of the jury indicating that, in response to Chea's line of questioning, the State intended to demonstrate the reason behind Sok's new and more favorable plea agreement.

The State explained to the trial judge that Sok backed out of his original plea agreement after his brother had been shot at by someone other than Chea and Phet. The trial court ruled that, by inquiring into Sok's reasons for backing out of his plea agreement, Chea's counsel had opened the door in this area of inquiry. The court also gave a limiting instruction:

You will hear testimony regarding Veasna Sok's brother being shot at in the year 2000. Before this evidence is allowed, the court advises you that you may consider the evidence only for the limited purpose of showing Veasna Sok's state of mind when he decided to withdraw his plea agreement with the Pierce County Prosecutor's Office in 2000.

Neither defendant in this case has been charged or implicated in that shooting. You must not consider the evidence for any other purpose.

RP at 4455. The trial court acted within its discretion in allowing the State to explore why the State offered Sok a new deal.

F. Chea's and Phet's Custodial Status

Chea and Phet further contend that the prosecutor improperly elicited testimony from several officers about Chea's and Phet's custodial status. Specifically, several officers testified that they worked in the jail and escorted Chea and Phet to and from the courtroom. Also, an officer testified that he was responsible for transporting people to and from jail and he referred to Chea and Phet as "inmates." RP at 3851

Q: There were no new developments between his first deal and February of 2001 which would generate a new plea offer?

A: There were developments, but not in reference --

....

A. -- to the other suspect.

RP at 3610.

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The fundamental right to a fair trial is secured by the United States and Washington Constitutions. U.S. Const. amends. VI and XIV, and Wash. Const. art. I, § 22. Central to the right to a fair trial is the principle that a defendant is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, not official suspicion, indictment, continued custody, or other circumstances short of proof. *Holbrook v. Flynn*, 475 U.S. 560, 567, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986).

In light of the fundamental right to the presumption of innocence, courtroom security measures such as shackling, gagging, or handcuffing can unnecessarily mark the defendant as guilty or dangerous. *Holbrook*, 475 U.S. at 567-68. But unlike physical restraints, uniformed security guards in a courtroom do not inherently prejudice a defendant's right to a fair trial. *Holbrook*, 475 U.S. at 569.

Here, the State called the corrections officers to testify about Chea's and Phet's assault on Sok. Before the officers described the assault they had witnessed, the State inquired as to their occupation, place of employment, and their relationship with Chea and Phet.

Chea and Phet concede that the jurors were likely aware that both of them were in custody. Moreover, they did not seek a limiting instruction. The officers' testimony regarding their place of employment and their role in escorting Chea and Phet to and from jail were not unfairly prejudicial to Chea and Phet. The trial court did not err in allowing this line of questioning.

G. Right to Remain Silent

Chea contends that Davidson impermissibly commented on Chea's exercise of his right to remain silent.

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The Fifth Amendment to the United States Constitution states, in part, that no person “shall . . . be compelled in any criminal case to be a witness against himself.” Washington Constitution article I, section 9 states in part: “No person shall be compelled in any criminal case to give evidence against himself.” The State may not elicit comments from witnesses or make closing arguments relating to a defendant’s silence for the jury to infer guilt from such silence. *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996). “[A] mere reference to silence which is not a ‘comment’ on the silence is not reversible error absent a showing of prejudice” that is an error that actually affects the defendant’s rights. *State v. Lewis*, 130 Wn.2d 700, 706-07, 927 P.2d 235 (1996).

Here, during direct examination, the prosecutor asked Davidson to relate the events and content of his interview with Chea. The following exchange occurred:

[Detective:] [I] [s]howed him one of the surveillance photos with his vehicle clearly in the picture.
 [Prosecutor:] Did he respond to that?
 [Detective:] Yes, he did.
 [Prosecutor:] What did he say?
 [Detective:] He said, “I’m not the only one that drives that car.”
 [Prosecutor:] Did he say anything further in the interview?
 [Detective:] No, he didn’t. He clammed up. He never said another word.

RP at 3471.

The record reflects that the State inquired no further about Chea’s silence. Nor did it refer to the comment during further testimony or in closing argument. Even assuming error, it is harmless as it did not materially affect Chea’s rights, given the otherwise overwhelming evidence against him.

No. 29027-8-II / No. 29087-1-II

H. Opinion of Guilt

Chea and Phet further contend that Davidson impermissibly commented on their guilt. They assert that his statement, that in the course of his investigation he arrested and booked them into jail, implied guilt. We disagree. Although a witness may not comment on another's guilt,³⁷ Davidson did not do so here. Rather, he testified about his actions as lead detective and based on his personal knowledge.

IV. JURY INSTRUCTIONS

A. Essential Elements of the Crime

Chea and Phet further contend that the jury instructions relieved the State of its burden to prove all of the essential elements of the crime. They assert that the State failed to identify the intended victim of the charged premeditated murder.

The court instructed the jury: "A person commits the crime of Murder in the First Degree when, with a premeditated intent to cause the death of another person, he or an accomplice causes the death of such person or of a third person." CP (Phet) at 1379.

This argument repeats Chea's and Phet's earlier essential element argument that the intended victim must be named in the charging document. As already noted, we disagree.³⁸ This argument likewise fails.

B. Major Participant in the Crime

Citing *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000), Chea and Phet also argue that the jury instructions and special verdict forms were deficient because they did not require

³⁷ *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (allowing a witness to opine to the guilt of the defendant invades the exclusive province of the jury).

³⁸ See preceding section I, CHARGING DOCUMENT.

No. 29027-8-II / No. 29087-1-II

the jury to find that they were major participants in the crimes. In *Roberts*, our Supreme Court held that

major participation by a defendant in the acts giving rise to the homicide is required in order to execute a defendant convicted solely as an accomplice to premeditated first degree murder. Merely satisfying the minimal requirements of the accomplice liability statute is insufficient to impose the death penalty under RCW 10.95.020, the Eighth and Fourteenth Amendments, and the cruel punishment clause of the Washington State Constitution.

142 Wn.2d at 505-06.

Here, the State did not seek the death penalty against Chea and Phet; thus, *Roberts* does not apply. Also, Chea and Phet contend that the aggravating factors of the crimes must apply personally to each of them and that the jury instructions and the verdict forms failed to instruct the jury accordingly. We disagree.

To convict a person of aggravated first degree murder, the State must prove all elements of first degree murder *and* that there was more than one victim and the murders were a part of a common scheme or plan. In other words, to find an aggravating factor, it is not necessary that a particular defendant commit more than one murder; it is sufficient that his or her accomplices murder more than one person as a part of a plan. Thus, Chea's and Phet's argument fails.

C. Aggravating Factors Applying Specifically to Chea

Chea further argues that when the jury was asked to decide whether "[t]here was more than one person murdered³⁹ and the murders were part of a common scheme or plan or the result of a single act of the person," CP (Chea) at 867, it allowed the jury to find the aggravating factor applicable to him based on an accomplice's acts. He cites *In re the Personal Restraint Petition of Howerton*, 109 Wn. App. 494, 36 P.3d 565 (2001) in support.

³⁹ No one disputes that more than one person was murdered.

No. 29027-8-II / No. 29087-1-II

In *Howerton*, Division One held that “a defendant’s culpability for an aggravating factor cannot be premised solely upon accomplice liability for the underlying substantive crime absent explicit evidence of the Legislature’s intent to create strict liability. Instead, any such sentence enhancement must depend on the defendant’s own misconduct.” 109 Wn. App. at 501.

The instruction here comports with *Howerton*. It focuses on a specific act (i.e., murder of more than one person and a common scheme or plan). Thus, to determine whether this aggravating factor was properly applied to Chea, the key inquiry is whether the evidence sufficiently implicated him in the murders that were part of a common scheme or plan.

Sufficient evidence supports a conviction if, when viewed in the light most favorable to the prosecution, it permits any rational fact finder to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201. We leave credibility determinations, issues of conflicting testimony, and persuasiveness of the evidence to the fact finder. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Before the shooting, Chea wore red clothes. He asked other assailants whether they wanted to “put in work” that night--the phrase that the testifying witnesses understood to mean to shoot Kim. Chea also talked to Le about Kim “mean mugging” him. Before driving to the café, Chea stopped at a payphone and told Chak to call to ascertain whether Kim remained there. And after learning that Kim was at the café, Chea went there. Finally, the guns were stored in Chea’s

No. 29027-8-II / No. 29087-1-II

car. This evidence sufficiently established Chea's culpability in the murder of multiple persons as part of a common scheme or plan.⁴⁰

V. INSUFFICIENCY OF THE EVIDENCE

Chea also contends that insufficient evidence supported finding that he had a premeditated intent to murder specific named persons. This assertion flows from Chea's arguments that the charging document was defective and the jury instructions incorrect because they failed to name specific individuals. Because we hold that the State need not identify the victim of the premeditated murder, Chea's argument fails.

VI. CUMULATIVE ERROR

Chea and Phet contend that the doctrine of cumulative error compels reversal and a new trial because the trial errors had a serious impact on their ability to receive a fair trial.

Under the cumulative error doctrine, a defendant may be entitled to a new trial when errors cumulatively produced a trial that was fundamentally unfair. *In re the Personal Restraint Petition of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). Because we find no error, this argument fails.

VII. STATEMENT OF ADDITIONAL GROUNDS

Phet raises additional arguments in his Statement of Additional Grounds (RAP 10.10), none of which has merit.

⁴⁰ We decline the State's invitation to revisit *Howerton* because the facts here fit within it.

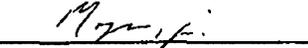
No. 29027-8-II / No. 29087-1-II

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.


Houghton, J.

We concur:


Morgan, P.J.


Hunt, J.

APPENDIX “C”

Testimony Transcripts of Detective Davidson

1 Q What did you do at that point?

2 A Well, I advised my lieutenant that he was considered
3 under arrest, and that Detective Ringer and I would
4 interview him later.

5 Q After you did that, what did you do next that day?

6 A The next person we interviewed was Sarun Ngeth.

7 Q What time did you begin that interview?

8 A That was at 2:05 P.M.

9 Q Did you take an initial statement from Mr. Ngeth?

10 A Yes.

11 Q Did you take a tape recorded statement from Mr. Ngeth?

12 A Yes.

13 Q When did that begin?

14 A 3:15.

15 Q When did that end?

16 A 3:43. P.M.

17 Q What did you do after you concluded the interview with
18 Mr. Ngeth?

19 A He was then booked into the Pierce County Jail for the
20 murders.

21 Q What did you do next?

22 A Next person we interviewed was Mr. Chea.

23 Q How did that interview begin?

24 A Well, we sat down with him and advised him of his
25 rights.

- 1 Q What time did you do that?
- 2 A 4:05.
- 3 Q Did Mr. Chea indicate to you that he understood those
- 4 rights?
- 5 A Yes.
- 6 Q Did he tell you that he was willing to answer your
- 7 questions?
- 8 A Yes, he did.
- 9 Q How did you begin the interview with him?
- 10 A We asked him about his involvement in the LOC gang.
- 11 Q What did he tell you about that?
- 12 A He stated that he had been in the LOCs since it
- 13 started. He wasn't sure exactly when it had started,
- 14 but that he had been 11 or 12 years old.
- 15 He stated that the gang had been started by some
- 16 people from Cali, as he called it, California, but he
- 17 wouldn't give us any details as to who those people
- 18 were.
- 19 Q Did you ask him whether there was any leader of the
- 20 LOCs?
- 21 A Yes.
- 22 Q What did he say?
- 23 A He said there wasn't.
- 24 Q Did you ask Defendant Chea about the 1983 Honda Civic?
- 25 A I did.

1 Q What did he tell you about that?

2 A He said he was the only one that drove that car.

3 Q Did you ask him about his whereabouts on the evening of
4 July 4th, 1998?

5 A Yes, I did.

6 Q What did he say?

7 A He said that he had been in Seattle between the hours
8 of 8:00 and 10:00 P.M. driving in his Honda Civic
9 alone.

10 He stated that he returned to Tacoma at about the
11 time -- and went down to the waterfront at just about
12 the time that the traffic was being released after the
13 fireworks show.

14 He said he then went home, and he arrived there at
15 approximately 12:00 or 12:30 A.M. He said there was
16 nobody up when he got home, and so he didn't actually
17 see anybody and nobody actually saw him at his
18 residence.

19 He likewise said that he hadn't seen anybody he
20 had known in Seattle and nobody had seen him. He
21 stated that he stayed home that night -- the rest of
22 that night. He said he got up in the morning and left
23 I think at around noon, and he thought he just drove
24 around.

25 Q What happened next in the interview?

- 1 A I told him that his vehicle had been captured on video
2 at the time of the murders at the Trang Dai.
- 3 Q Did he respond to that?
- 4 A Yes.
- 5 Q What did he say?
- 6 A He didn't believe us.
- 7 Q What did you do then?
- 8 A Showed him one of the surveillance photos with his
9 vehicle clearly in the picture.
- 10 Q Did he respond to that?
- 11 A Yes, he did.
- 12 Q What did he say?
- 13 A He said, "I'm not the only one that drives that car."
- 14 Q Did he say anything further in the interview?
- 15 A No, he didn't. He clammed up. He never said another
16 word.
- 17 Q What was done with him then?
- 18 A He was taken into the county jail and booked for the
19 murders.
- 20 Q What was Defendant Chea's demeanor during your contact
21 with him that day?
- 22 A He was cawky and defiant.
- 23 Q What did you do next?
- 24 A We next interviewed John Phet.
- 25 Q Is he present in the courtroom today?

- 1 A Yes, he is.
- 2 Q For the record, would you please indicate where he is
3 located and describe what he is wearing today?
- 4 A Well, he's seated to the right of Mr. Staurset there,
5 at the end of counsel table, and it looks like he has a
6 light green or -- looks like a light green shirt on.
- 7 MR. MURPHY: The record should reflect that
8 the witness has identified the defendant, John Phet.
- 9 Q Was Mr. Phet in the LOCs?
- 10 A Yes.
- 11 Q What was his gang name?
- 12 A His gang name was Lil Clumz.
- 13 Q Who was Clumz?
- 14 A Sam Mom. Samath Mom.
- 15 Q Was there any relationship between the Defendant Phet
16 and Sam Mom?
- 17 A Yes. They are brothers.
- 18 Q How did the interview begin with Mr. Phet?
- 19 A Well, again, we sat down, advised him of his rights.
- 20 Q What time did that occur?
- 21 A That was at 5:05 P.M.
- 22 Q Did Defendant Phet indicate to you that he understood
23 those rights?
- 24 A Yes.
- 25 Q How did he do that?

APPENDIX “D”

Testimony Transcripts of Jimmie Chea

1 BY MR. MURPHY:

2 Q So after the detectives talked to you about your gang
3 involvement, then they started asking you about what
4 you did on the night of July 4th; isn't that true?

5 A Yes.

6 Q Still at that time you didn't know this had anything to
7 do with the Trang Dai shootings?

8 A No.

9 Q You told them about going to Seattle in your Honda
10 Civic; isn't that true?

11 A Yes.

12 Q You didn't tell them about buying marijuana, though,
13 did you?

14 A No.

15 Q You told them about coming back to Tacoma and driving
16 down to the waterfront; right?

17 A Yes.

18 Q You told them about going home between 12:00, 12:30 in
19 the morning and that everybody was asleep in your house
20 at that time.

21 Do you remember that?

22 A I don't think -- nobody was there except my little
23 sister.

24 Q Your parents weren't there?

25 A No.

- 1 Q Where were they?
- 2 A Out of town.
- 3 Q How long had they been out of town?
- 4 A They go out of town every month.
- 5 Q So it was just you and your little sister?
- 6 A Yeah. I had to watch the house because I had two dogs
- 7 that needed to be fed, three fish tanks. I had to feed
- 8 the fishes.
- 9 Q You didn't see your little sister when you got home,
- 10 did you?
- 11 A When I came home?
- 12 Q Yes.
- 13 A No.
- 14 Q You told the detectives that you didn't see anybody
- 15 that you knew in Seattle either; isn't that correct?
- 16 A No.
- 17 Q That's not correct?
- 18 A I mean, I didn't tell them that I went to buy marijuana
- 19 from this guy named CG, no. I didn't tell them.
- 20 Q You told them you didn't see anybody that you knew up
- 21 in Seattle; right?
- 22 A They asked me what I did in Seattle and I told them
- 23 what I did in Seattle.
- 24 Q What did you tell them?
- 25 A I was in Seattle.

APPENDIX “E”

Declaration of Kristi L. Weeks

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SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF PIERCE

STATE OF WASHINGTON,
Plaintiff,
vs.
JIMMEE CHEA,
Defendant.

Case No.: No. 98-1-03157-5
DECLARATION OF KRISTI L. WEEKS

COMES NOW KRISTI L. WEEKS (fka MINCHAU) and declares as follows:

- 1) I am over the age of twenty-one (21) and competent to testify herein.
- 2) Ann Stenberg and I represented Jimmee Chea on the above referenced case between approximately mid-2000 and sentencing on June 28, 2002.
- 3) During this same time period, Sverre O. Staurset represented the only other co-defendant proceeding to trial, John Phet.
- 4) Mitchell Anderson initially served as Mr. Chea's defense investigator. Sometime during the pre-trial period, Mr. Anderson was also appointed as Mr. Phet's defense investigator.
- 5) I am no longer employed by Stenberg Law Office and have not had the opportunity to review the trial transcripts and/or the boxes of trial materials, including notes kept during the trial and pre-trial periods. Due to the passage of time, my memories of specific dates and conversations may have diminished. However, this trial was a benchmark in my career and remains largely memorable.

ORIGINAL

1 6) Mr. Anderson, Mr. Staurset, Ms. Stenberg and myself worked together as a
2 cohesive defense team. Our trial preparation was extensive and included
3 regular Friday meetings that often lasted all day and sometimes into the
4 weekend. We thoroughly pursued every avenue of defense that appeared
5 even remotely feasible.

6 7) I do not recall ever being personally approached by any member of Mr.
7 Chea's family, either before, during or after the trial. I recall Jesse Chea
8 coming to our office to speak with Ms. Stenberg and Mr. Anderson on one
9 occasion when I was not present. I recall that it was difficult to persuade
10 Jesse to appear for the meeting and nothing of value resulted from the
11 meeting.

12 8) I do not recall any member of the Chea family being willing to provide an alibi
13 defense for Mr. Chea. Had that opportunity presented itself, I would have
14 vigorously pursued it.

15
16 I declare under penalty of perjury under the laws of the state of Washington that
17 the foregoing is true and correct to the best of my knowledge.

18
19 Dated this 29th day of May, 2007 at Tumwater, Washington.

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23 KRISTI L. WEEKS
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APPENDIX “F”

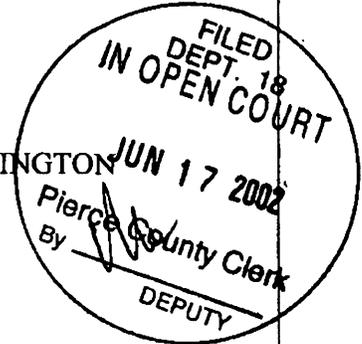
*Ex Parte Motion for Order Authorizing Additional Funds for Private Investigator and
Declaration of Counsel in Support*



98-1-03157-5 18913080 MT 07-01-02

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE



STATE OF WASHINGTON,

Plaintiff,

vs.

JIMMEE CHEA,

Defendant.

)
) NO. 98-1-03157-5
)
) EX PARTE MOTION FOR ORDER
) AUTHORIZING ADDITIONAL FUNDS
) FOR PRIVATE INVESTIGATOR AND
) DECLARATION OF COUNSEL IN
) SUPPORT
)
)
)

COMES NOW the Defendant JIMMEE CHEA, by and through his attorney of record, Kristi Minchau, and moves this court for an order authorizing the expenditure of public funds for the services of Private Investigator Mitchell Anderson of Anderson Investigative Agency, to assist appointed counsel in preparing for the trial in the above-captioned matter.

THIS MOTION is made pursuant to Criminal Rule 3.1(f) and is supported by the attached Declaration of Counsel.

EX PARTE MOTION FOR ORDER
AUTHORIZING ADDITIONAL FUNDS
FOR PRIVATE INVESTIGATOR AND
DECLARATION OF COUNSEL
PAGE 1

STENBERG LAW OFFICE
707 Pacific Avenue
Tacoma, WA 98402
(253) 779-8124
FAX: (253) 779-8126

ORIGINAL

1 DATED this 17th day of June, 2002.

2 Kristi Minchau
3 Kristi Minchau, WSBA#22299
4 Of Attorneys for Jimmie Chea

5 DECLARATION

6 Kristi Minchau declares as follows:

7 I am one of the appointed attorney for Jimmie Chea.

8 Mitchell Anderson of Anderson Investigations has been assisting counsel continuously in
9 this matter since December of 2000, when the Department of Assigned Counsel first authorized
10 funds.

11 Following the initial authorization, Jack Hill of DAC, advised counsel that all further
12 requests for funds should be authorized by the court. On April 16, 2001, Judge Vicki Hogan
13 ordered an additional 600 hours for Mr. Anderson, contingent upon those hours also being used
14 for co-defendant John Phet's defense. The order allowed for amendment to authorize additional
15 time. 500 additional hours were authorized by this Court via orders dated March 4, 2002, and
16 April 22, 2002. Mr. Anderson has, in fact, used his hours to perform work on this case and has
17 now expended nearly all of those hours.

18 The Defense is requesting this court approve and authorize the expenses of public funds
19 for Mitchell Anderson to perform an additional 100 hours of work at \$35.00 an hour in this
20

21
22 EX PARTE MOTION FOR ORDER
23 AUTHORIZING ADDITIONAL FUNDS
24 FOR PRIVATE INVESTIGATOR AND
25 DECLARATION OF COUNSEL
26 PAGE 2

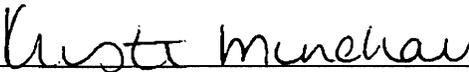
STENBERG LAW OFFICE
707 Pacific Avenue
Tacoma, WA 98402
(253) 779-8124
FAX: (253) 779-8126

1 matter plus expenses which may be incurred. It is counsel's experience that such time and fees
2 are reasonable given the number of witnesses and the tasks that have been performed and are to
3 be performed. Mr. Anderson has been an integral member of the defense team and much work
4 remains to be done in during trial while the attorneys are required to be in court. As the Court is
5 aware, numerous defense witnesses have yet to be located and/or interviewed and several factual
6 leads are still being investigated. Although this case is rapidly reaching its end, the defense team
7 is working at greater speed than ever in preparing and presenting its case in chief. Mr. Anderson
8 is working also virtually full-time on this case and expended hours quickly. In addition, it has
9 become apparent that Mr. Anderson may be called to testify as a witness to events that have
10 unfolded during the course of this trial.
11

12 Without the continued assistance of Mitchell Anderson, the Defense will be at a significant
13 disadvantage in defending the rights of Mr. Chea.
14

15 THE UNDERSIGNED HEREBY CERTIFIES UNDER PENALTY OF PERJURY
16 UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING
17 STATEMENT IS TRUE AND CORRECT, BASED ON MY OWN PERSONAL
18 KNOWLEDGE AND BELIEF.

19 DATED this 17th day of June, 2002, at Tacoma, Washington.

20 

21 Kristi Minchau, WSBA#22299
22 Of Attorneys for Jimmee Chea

23 EX PARTE MOTION FOR ORDER
24 AUTHORIZING ADDITIONAL FUNDS
25 FOR PRIVATE INVESTIGATOR AND
26 DECLARATION OF COUNSEL
PAGE 3

STENBERG LAW OFFICE
707 Pacific Avenue
Tacoma, WA 98402
(253) 779-8124
FAX: (253) 779-8126

APPENDIX “G”

Declaration of Ann Stenberg

**STENBERG LAW OFFICE
ANN STENBERG
ATTORNEY AT LAW**

**P.O. BOX 23729
Federal Way, WA 98093-0729
Office Telephone (253) 952-2912
Facsimile (253) 952-2609**

Facsimile

TO: Kit Proctor

FAX# 253-798-6636

ATTENTION: Pierce County Pros. Office

DATE: Wednesday, May 30, 2007

FROM: Ann Stenberg

OF PAGES INCLUDING COVER: 3

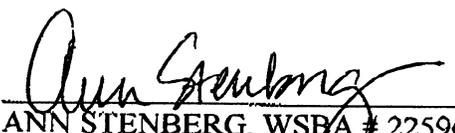
CONFIDENTIAL FACSIMILE

THE INFORMATION CONTAINED IN THIS FACSIMILE IS INTENDED FOR THE RECIPIENT ONLY. IF YOU HAVE RECEIVED THE FACSIMILE IN ERROR, PLEASE CALL OUR OFFICE TO REPORT THE ERROR AT (253) 952-2912

- 5.) After some additional reflection, I believe I can not file a declaration at this time which addresses the substantive issues raised in Mr. Chea's petition. I consulted the Rules of Professional Conduct, sought out other colleagues and spoke to the Washington State Bar Association for guidance. Ms. Proctor was informed of my decision on today's date and had no part in my deliberations. I apologize to the Court and the parties for the postponement.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE ABOVE IS TRUE AND CORRECT.

DATED THIS 30th of May, 2007.


ANN STENBERG, WSBA # 22596

DECLARATION OF COUNSEL
ANN STENBERG - Page 2

APPENDIX “H”

Affidavit of Kathleen Proctor

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

IN RE PERSONAL RESTRAINT
PETITION OF:

NO. 35773-9

JIMMEE CHEA,

AFFIDAVIT OF KATHLEEN PROCTOR

Petitioner.

STATE OF WASHINGTON)

: ss.

COUNTY OF PIERCE)

The undersigned, being first duly sworn upon oath, deposes and says:

1. I am an attorney licensed to practice in the State of Washington and currently employed by the Pierce County Prosecutor's Office.

2. I was the prosecutor assigned to handle the direct appeal in State v. Jimmee Chea, Pierce County Cause No. 98-1-03157-5, COA # 29087-1-II and am the attorney assigned to handle the response to the personal restraint petition captioned above.

3. Appendices C, D and L attached to the State's response contain excerpts from the verbatim report of proceedings filed in petitioner's direct appeal. I made these

1 copies from the appellate records kept within the prosecutor's office. I am filing a motion
2 for the court to temporarily transfer the entire report of proceedings from the direct appeal
3 case file to the personal restraint petition case file, but have included these excerpts as
4 appendices for the convenience of the court and parties. The court should note the contents
5 of Appendix L contain excerpts from several different portions of the record as the
6 pagination numbers will reflect.

7
8 4. Appendix G contains a declaration from Ann Stenberg. Ms. Stenberg
9 initially indicated that she would provide me a substantive affidavit regarding the
10 substance of petitioner's claims. Based upon her statements to me, I asked the court to
11 grant a ten day continuance of the due date and the imposition of sanction in which to file
12 my response, so that she could have additional time to prepare her affidavit and perhaps
13 obtain additional affidavits from other members of the defense team. I asked for that
14 continuance in good faith based upon her representations. The court granted the requested
15 continuance from May 21st until May 31, 2007. On May 30, 2007, I learned in a phone
16 call that Ms Stenberg had changed her mind about providing an affidavit regarding
17 petitioner's claims. She was willing to provide an affidavit setting forth her change of
18 position. As my response was due the next day, I asked her to send my the affidavit by
19 facsimile. There was not time to receive the original by mail. Once I received her fax, I
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1 copied it and included the copy as Appendix G to my response. This is why Appendix G is
2 not an original copy.

3 Further your affiant sayeth naught.

4 
5 KATHLEEN PROCTOR

6 SUBSCRIBED AND SWORN to before me this 31st day of May, 2007.



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NOTARY PUBLIC, in and for the
State of Washington, residing
at Federal Way, wa.
My Commission Expires: 10-15-09

APPENDIX “I”

Affidavit of Tom Davidson

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

IN RE PERSONAL RESTRAINT
PETITION OF:

NO. 35773-9

JIMMEE CHEA,

AFFIDAVIT OF TOM DAVIDSON

Petitioner.

STATE OF WASHINGTON)

: ss.

COUNTY OF PIERCE)

The undersigned, being first duly sworn upon oath, deposes and says:

1. I am a Detective with the Tacoma Police Department and was the lead investigator for the Trang Dai homicides. I sat through the entire trial proceedings of State v. Jimmee Chea, Pierce County Cause No. 98-1-03157-5, sitting at the prosecution table.

2. I reviewed the evidence seized pursuant to a search warrant at petitioner's parent's house. Included in the items seized were several journals belonging to petitioner's sister, Felisa Kamtansy. I recall several journal entries where she was talking about her

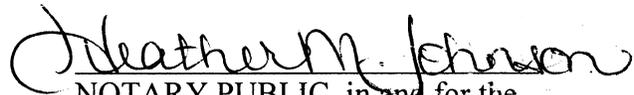
1 brother, the petitioner, and casting him in an unfavorable light. These items were in the
2 property room and available for review by the defense team.

3 3. After the jury returned its verdicts, there was a discussion about the case
4 held amongst the jurors, defense counsel, and prosecutors. I was present for this
5 discussion. I did not hear any juror making a statement to the effect that he or she had
6 made his or her mind up before all the evidence was out. Such a comment would have
7 registered with me because I would have thought that it would mean a new trial.

8 Further your affiant sayeth naught.

9
10 
11 NAME
12 Tom Davidson

13 SUBSCRIBED AND SWORN to before me this DAY day of MONTH, 20YEAR.

14 
15 NOTARY PUBLIC, in and for the
16 State of Washington, residing
17 at Shungo.
My Commission Expires: 5/20/08

18 Certificate of Service:
19 The undersigned certifies that on this day she delivered by U.S. mail or
20 ABC-LMI delivery to the attorney of record for the appellanta and appellant
21 c/o his or her attorney or to the attorney of record for the respondent and
22 respondent c/o his or her attorney true and correct copies of the document to
23 which this certificate is attached. This statement is certified to be true and
24 correct under penalty of perjury of the laws of the State of Washington. Signed
25 at Tacoma, Washington, on the date below.

Date Signature

APPENDIX “J”

Affidavit of Edmund Murphy

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6 IN THE COURT OF APPEALS
7 OF THE STATE OF WASHINGTON
8 DIVISION II

9 IN RE PERSONAL RESTRAINT
10 PETITION OF:

11 NO. 35773-9

12
13 JIMMEE CHEA,

AFFIDAVIT OF EDMUND MURPHY

14 Petitioner.

15 STATE OF WASHINGTON)

16) : ss.
17 COUNTY OF PIERCE)

18 The undersigned, being first duly sworn upon oath, deposes and says:

19 1. I am an attorney licensed to practice in the State of Washington and
20 currently employed by the Pierce County Prosecutor's Office.

21 2. I was one of the two trial prosecutors assigned to handle State v. Jimmee
22 Chea, Pierce County Cause No. 98-1-03157-5.

23 3. I had no improper contact with any juror member during the course of this
24 trial either in or out of the courtroom. I did not hug Juror 11 or any other jury member.
25

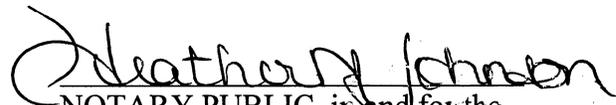
1 4. At no time did I observe Juror 11 wave, wink, or make greeting gestures to
2 anyone at the prosecution table. She did smile on occasion when she came into the
3 courtroom, but it did not appear to be directed towards any particular person or persons in
4 the courtroom. I did not observe Juror 11 scowl or make faces of disapproval at the
5 defendants or their attorneys.

6 5. I was not present in court at the time that the verdicts were taken and was
7 not present at the post-verdict discussion with the jury.

8 Further your affiant sayeth naught.

9
10 
11 EDMUND MURPHY

12 SUBSCRIBED AND SWORN to before me this 25TH day of May, 2007.

13
14 
15 NOTARY PUBLIC, in and for the
16 State of Washington, residing
17 at Chungo
My Commission Expires: 5/20/08

18 Certificate of Service:
19 The undersigned certifies that on this day she delivered by U.S. mail or
20 ABC-LMI delivery to the attorney of record for the appellanta and appellant
21 c/o his or her attorney or to the attorney of record for the respondent and
22 respondent c/o his or her attorney true and correct copies of the document to
23 which this certificate is attached. This statement is certified to be true and
24 correct under penalty of perjury of the laws of the State of Washington. Signed
25 at Tacoma, Washington, on the date below.

Date Signature

APPENDIX “K”

Phil Sorensen

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6 IN THE COURT OF APPEALS
7 OF THE STATE OF WASHINGTON
8 DIVISION II

9 IN RE PERSONAL RESTRAINT
10 PETITION OF:

11 NO. 35773-9

12
13 JIMMEE CHEA,

AFFIDAVIT OF PHIL SORENSEN

14 Petitioner.

15 STATE OF WASHINGTON)

16) : ss.
17 COUNTY OF PIERCE)

18 The undersigned, being first duly sworn upon oath, deposes and says:

19 1. I am an attorney licensed to practice in the State of Washington and
20 currently employed by the Pierce County Prosecutor's Office.

21 2. I was one of the two trial prosecutors assigned to handle State v. Jimmee
22 Chea, Pierce County Cause No. 98-1-03157-5.

23 3. For trial several video monitors were set up in the courtroom. The judge
24 had a monitor her bench. Both defendants had individual monitors on counsel tables. The
25 prosecutors' table had a monitor. A large screen monitor and at least two smaller monitors

1 were set up for the jury. The smaller jury monitors were in fairly fixed positions near the
2 ends of the jury box. The larger monitor was on a cart and was utilized more or less
3 centrally for all jurors to see. In addition, a large film screen was utilized for video and
4 photographs shown through a projector. During the course of the trial, I adjusted these
5 monitors a number of times at the request of one juror or another so that each juror was
6 able to see what was being displayed on the monitor screen. Adjustments consisted of
7 moving monitors for better viewing and repairing or replacing wiring in the event of
8 malfunction. I have no specific recollection of adjusting a monitor in response to a request
9 from Juror 11 or any other particular juror. Any such request from a juror would have
10 been made in open court in the presence of the judge and opposing counsel.
11

12 4. I had no improper contact with any juror member during the course of this
13 trial either in or out of the courtroom. I did not hug Juror 11 or any other jury member.

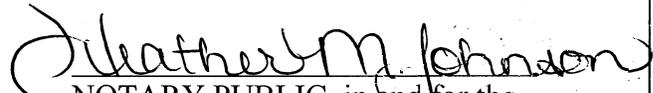
14 5. After the jury returned its verdicts, there was a discussion about the case
15 held amongst the jurors, defense counsel, and myself. The discussion took place in the
16 jury deliberation room shortly after the verdicts were read in court. Counsel for Chea, both
17 counsel for Phet, a defense investigator (Mitch) and Detective Davidson were present. I
18 was present as well. Jurors were given the opportunity to ask questions. Those questions
19 were answered. The attorneys also asked questions of the jurors. Those questions were
20 answered. I was present during the entirety of this discussion. I recall that at some point
21 during the discussion Juror 11 became aware that the defense perceived her as scowling or
22 “mean mugging” them. Juror 11 indicated that any facial expressions or head turns should
23 be attributed to her efforts to continually adjust her head so that she could reduce the glare
24 in the courtroom. Juror number 11 did not express that she wanted to convict the
25

1 defendants the day she came in the courtroom or after she heard the prosecutors opening
2 statements, as Chea asserts on page 5 of his affidavit. There was no such statement or
3 implication made by any juror.

4 Further your affiant sayeth naught.

5
6 
7 PHILIP K. SORENSEN
8 WSPA #16441

9 SUBSCRIBED AND SWORN to before me this 31st day of May, 2007.

10
11 
12 NOTARY PUBLIC, in and for the
13 State of Washington, residing
14 at hugo.
15 My Commission Expires: 5/20/08

16 Certificate of Service:

17 The undersigned certifies that on this day she delivered by U.S. mail or
18 ABC-LMI delivery to the attorney of record for the appellanta and appellant
19 c/o his or her attorney or to the attorney of record for the respondent and
20 respondent c/o his or her attorney true and correct copies of the document to
21 which this certificate is attached. This statement is certified to be true and
22 correct under penalty of perjury of the laws of the State of Washington. Signed
23 at Tacoma, Washington, on the date below.

24 _____
25 Date Signature

APPENDIX “L”

Excerpts from the Verbatim Report of Proceedings

1 morning. Is that --

2 MR. SORENSEN: That's correct.

3 THE COURT: We will be at recess until
4 tomorrow morning. I want to read this instruction to
5 you again, please.

6 Do not discuss this case among yourselves or with
7 anyone else during any recess. Do not permit anyone to
8 discuss the case with you or in your presence.

9 Do not read, view or listen to any report in a
10 newspaper or on radio, television or the Internet on
11 the subject of this trial.

12 Continue to keep your minds open and free of
13 outside influences so that you will decide this case on
14 the evidence and under the court's instructions on the
15 law.

16 With that, have a nice evening. We'll see you
17 tomorrow morning. Court is at recess.

18 (JURY NOT PRESENT.)

19 THE COURT: Ms. Stenberg?

20 MS. STENBERG: I should have prearranged for
21 Your Honor to remain on the bench, but the defense has
22 a big concern here, Your Honor, with regard to Juror
23 No. 11.

24 It's become quite obvious to us over the course of
25 time that she is displaying physically a bias in this

1 case and that she has essentially made up her mind.

2 We're bringing it to the court's attention so that
3 if the court doesn't excuse her, the court at least
4 watches what she does.

5 THE COURT: Can you tell me what you think is
6 resulting in a physical display?

7 MS. STENBERG: Well, her big beams to the
8 police officers --

9 THE COURT: Her what?

10 MS. STENBERG: Her beaming smile to the police
11 officer. In fact, I pointed it out to Detective
12 Margeson this morning, and he said, "I know. I've
13 noticed her." Then he almost had a giggle fit because
14 she came out and looked at him and smiled, and she
15 seeks Detective Davidson out to smile obviously at him
16 and the prosecutors, and then when she was looking our
17 direction, Your Honor, it's a completely different
18 face. The eyebrows are coming in and she's frowning.

19 She is mean mugging us, Your Honor, and I really
20 need for the court to pay attention to Juror No. 11, if
21 the court is not prepared to take action today.

22 THE COURT: I haven't observed any of the
23 things you have just described so I'm clearly not in a
24 position to take any action, but you have made a record
25 and I'll observe and I'll ask counsel to observe as

1 well and see where we are at.

2 MR. STAURSET: Your Honor, I would like to
3 supplement this as well. It's rather interesting that
4 Ann mentioned this to me, because I had actually
5 intended to bring this to your attention as well.

6 It really started almost immediately after the
7 case started, and when she comes in the door from the
8 juror room into the aisle, she clutches her notebook,
9 and then she pointedly looks for people at the
10 prosecution's table to get their eye contact, and she
11 lights up like a Christmas tree. She smiles
12 beautifully.

13 Then she pans to the left, and then she scowls,
14 and I guess I would never have used the words mean
15 mugging either until now that I've become familiar with
16 the term, and that's truly -- actually, it's worse than
17 mean mugging. I think it's mad dogging, they call it.

18 THE COURT: I think I would just like to keep
19 the English phrases here going. We are talking about a
20 juror.

21 MR. STAURSET: I don't know what else to --

22 THE COURT: How about scowling.

23 MR. STAURSET: She is scowling in a very
24 noticeable way, and I don't know what to attribute this
25 to, but it's become a pattern now day after day.

1 THE COURT: All right. Has the prosecution
2 noticed anything in this regard?

3 MR. MURPHY: I've noticed her smile, Your
4 Honor. I have not been watching to see if she's
5 scowling at anyone. She does appear to smile when she
6 comes into the courtroom.

7 THE COURT: Anything further?

8 MR. STAURSET: No.

9 THE COURT: I'll try and keep an eye out.
10 Thank you for making a record. Court is at recess.

11 (Proceedings adjourned.)

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1 Mr. Staurset, I'm not sure how much he has left.
2 He was making assurances earlier, after 3:00, that he
3 would be done this afternoon. I don't know what his
4 situation is.

5 THE COURT: Mr. Staurset, how long do you
6 think your cross will take?

7 MR. STAURSET: Well, a half hour, 45 minutes.

8 THE COURT: He's going to have to come back
9 on Monday or whatever other time we can make
10 arrangements for.

11 MR. SORENSEN: We'll have to make
12 arrangements.

13 THE COURT: Any objection to sending the jury
14 home through my judicial assistant?

15 MS. MINCHAU: No objection.

16 THE COURT: There's a couple things I want to
17 put on the record, so let me just have my judicial
18 assistant send them home and Mr. Fredericks you may
19 step down.

20 (Witness excused.)

21 THE COURT: My judicial assistant indicated
22 there was something someone wanted to put on the
23 record, and I wanted to get going with the testimony.
24 So I want to take an opportunity to do that at this
25 time.

1 MS. STENBERG: Thank you, Your Honor. That
2 was me. I wanted to make -- for the record, regarding
3 Juror No. 11, I meant to put this on the record
4 yesterday when what was really disconcerting occurred,
5 but it left my mind before I could put it on the
6 record, and then today mention was made -- Juror No. 11
7 was once again making facial expressions towards the
8 witness, much like she had done with Detective
9 Margeson, really expressing her interest and approval
10 via facial expressions. So I thought it was really
11 time to bring this to the court's attention again.

12 What happened yesterday, Your Honor, is that when
13 she came out, at some point yesterday or the day before
14 she had notified Mr. Sorensen, I believe, that she was
15 having trouble with that monitor and he adjusted it for
16 her, and then as she got into her place here in the
17 jury box yesterday, I believe it was in the morning,
18 she began speaking with Mr. Murphy, who made absolutely
19 no remark to her, and I think he even tried to turn
20 away from her to put off the conversation, but she
21 started to engage in a conversation.

22 "Thank you so much for adjusting the monitor. I
23 wanted you to know that it really helped and thank
24 you," and she -- it's completely inappropriate the way
25 this juror is behaving.

1 We have not lost a juror thus far. We still have
2 16. I think excusing her at this point does not put
3 the trial's completion in jeopardy. We should not have
4 to continue to feel the need to observe this rouge
5 juror. I think the prosecutors -- I won't speak for
6 them -- but they seem to appreciate this issue and are
7 watching her as well.

8 I'm not -- I do want the court to know that
9 Mr. Murphy acted completely appropriately, but this
10 woman does not know what the boundaries need to be
11 here, and we ask for her dismissal.

12 THE COURT: I just want to make sure I
13 understand the instances that you are concerned with.
14 I understand the one as to -- you referenced something
15 to Detective Margeson. I don't know what that was.

16 MS. STENBERG: That's when we first brought up
17 this issue with No. 11.

18 THE COURT: All right.

19 MS. STENBERG: She had been expressing
20 herself, giving us dirty looks, smiling happily and
21 often at the prosecutors.

22 THE COURT: I've been trying to watch every
23 time I'm on the bench, which has been a lot lately when
24 she comes in, and I haven't noticed that. I do think I
25 remember her getting someone's attention that there was

1 some problem with the monitor.

2 I don't specifically recall her attempting to talk
3 to Mr. Murphy. That's not something that stands out.

4 MS. STENBERG: That occurred at a different
5 time. She asked Mr. Sorensen to adjust the monitor.
6 He did that for her. The next time -- or it might have
7 been the next day, she was taking her seat, she made it
8 a point to engage Mr. Murphy in this, you know,
9 gratuitous, "Thank you so much. You know, it really
10 helped me. I appreciate your attention." I don't
11 think it lasted for too long because he wasn't talking
12 back to her.

13 THE COURT: That was yesterday?

14 MS. STENBERG: Yes. That was yesterday.

15 THE COURT: I just want to make sure I
16 understand. Is there another instance as well that you
17 wanted to call to my attention?

18 MS. STENBERG: The observation for today was
19 she was beginning to take the same affect towards
20 Mr. Fredericks that she has done with previous -- it
21 seems to be male State witnesses. She flutters her
22 eyelashes, and so that's what was happening today.
23 That reminded me I needed to put yesterday's events on
24 the record.

25 THE COURT: Mr. Murphy, are you able to --

1 Mr. Staurset, did you have something to add?

2 MR. STAURSET: Your Honor, since we brought it
3 up the first time there was a period -- I don't know
4 whether it was brought to her attention or not -- where
5 she purposely walked in, you know, like this,
6 (Indicating), but then she -- she has done it again
7 numerous times.

8 I've talked even to the guards. They have seen
9 it. They have looked at her when she comes in and then
10 they look back at us and just acknowledge that this
11 issue is still ongoing, and I just think that she has
12 behaved in a way that doesn't give us the feeling that
13 she could be a fair, impartial juror.

14 Given that we have gone now for this length of
15 time without losing anybody, we don't need to be
16 saddled with her when the behavior is that kind of
17 overt interest in someone else.

18 THE COURT: Mr. Murphy?

19 MR. MURPHY: I think it's hard for anybody to
20 read anything into body language. I've done closing
21 arguments where I've had jurors that look absolutely
22 disgusted with everything I'm saying, and you mention
23 something to them after the verdict comes back about
24 how uncomfortable you were about what they were doing
25 and they weren't aware of it. Didn't mean to convey

1 it.

2 What happened yesterday or the day before was that
3 she had brought it to everyone's attention that this
4 monitor on the counsel table was not working.

5 Mr. Sorensen -- I brought it to Mr. Sorensen's
6 attention. He went and fixed it, and I believe it was
7 the next time she came in and said, "Thank you." I did
8 not respond to her in any way.

9 THE COURT: Do you recall what -- was her
10 thank you more than two words?

11 MR. MURPHY: What I heard was, "Thank you."

12 MS. STENBERG: Your Honor, I was watching. It
13 was more than that. I think Mr. Murphy averted his
14 head. He wanted to put the kabosh on this, but she
15 started to say, "Thank you. That really helped me."
16 She was prepared to encourage a conversation with him,
17 and had he not turned his head and given her an off
18 signal, it could have gone on. He essentially cut her
19 off. It was more than just, "Thank you." Then he
20 looked at me and he saw that I was watching.

21 THE COURT: Are you able to add anything to
22 that based on your recollection?

23 MR. MURPHY: She began saying, "Thank you." I
24 turned away. Whether she was prepared to say something
25 else, I don't know. I've had other jurors point out

1 that the monitor wasn't working as well. The gentleman
2 sitting next to her this afternoon indicated it wasn't
3 working.

4 MS. STENBERG: The monitor issue is completely
5 separate and distinct from her attempting to start up a
6 conversation with the prosecutors, apropos of no
7 technical issue. This was after the monitor had been
8 adjusted by Mr. Sorensen, everything was up and
9 running. There was no reason to speak with them and
10 she comes out here, basically tripping over herself
11 with love and admiration for these guys.

12 THE COURT: Just a minute. You really
13 exaggerate. Basically tripping over herself with love
14 and admiration is slightly different from saying,
15 "Thank you," and I'm -- we need to really be careful
16 about the words used to describe. Because if you are
17 suggesting that, I'm not seeing that kind of action.
18 I'm not seeing someone tripping over herself with love
19 and admiration.

20 I've been watching when she comes in to see what
21 kind of eye contact is being made, because I have been
22 sitting here quite a bit when they come in. I have not
23 seen that. Obviously Mr. Fredericks is going to be
24 back, and I will watch to see if I see something that
25 suggests there is that kind of connection.

1 She did attempt to make some contact with
2 Mr. Murphy. That's inappropriate, other than asking to
3 have something changed or fixed. I will just keep an
4 eye out and be aware of your concerns.

5 MS. STENBERG: Your Honor, if --

6 THE COURT: But I think I need to see some of
7 this as well. I'm seeing the defense team seeing it in
8 a different light than I'm hearing from the State, and
9 I need to have some -- I need to be able to observe
10 some of that myself because I'm hearing two different
11 versions here.

12 MS. STENBERG: I think Mr. Murphy has
13 confirmed that she did in fact attempt to speak with
14 him.

15 THE COURT: Certainly.

16 MS. STENBERG: If that had been a situation
17 that happened outside the courtroom -- this has
18 happened to me in other cases where there is some
19 attempt between juror and lawyer, they have
20 communication -- it doesn't matter whether it is a long
21 conversation, short conversation, that's enough to
22 excuse the juror, and you know, I think that keeping
23 her on, in light of her attempts to communicate with
24 him, albeit in open court -- but it's completely
25 inappropriate for jurors and lawyers to speak

1 whatsoever to one another during the proceedings in a
2 trial. The jurors are told this.

3 She is not following the court's instructions by
4 attempting to speak with him. I think that in and of
5 itself is a basis for her excusal.

6 THE COURT: Mr. Staurset?

7 MR. STAURSET: Your Honor, maybe I'm sensitive
8 about this, but this was something that came up that we
9 didn't expect. We are reacting to her for what she has
10 done since this trial has begun, and you know, when she
11 comes in, Your Honor, and she heads down this row, you
12 can't see the front of her face, but we see it.

13 All we can do is bring it to your attention, but I
14 find -- I guess I'm concerned that whenever we bring
15 something that -- the defense, it is then deferred to
16 the State, and whatever the State says becomes the
17 truth, and that we somehow are not officers of the
18 court. We are not concerned with a fair trial. We are
19 not concerned with justice. It is only the State, and
20 whether you intend to convey that or not, Your Honor,
21 or whether or not that's overt or covert or whatever, I
22 don't know. But I want --

23 THE COURT: Mr. Staurset --

24 MR. STAURSET: -- you to understand that you
25 make us feel this way.

1 THE COURT: Mr. Staurset, as I indicated, I'm
2 hearing different versions from both sides. That's
3 what I said. Mr. Murphy agreed and acknowledged that
4 the juror attempted to speak to him. He turned away.
5 That confirms exactly what Ms. Stenberg said.

6 What I have indicated here in this instance is
7 that since I'm hearing different versions, I believe I
8 need to see something in that regard. I don't
9 believe -- although you are interpreting it in that
10 fashion -- that my statement somehow sides with one
11 side or the other. I do not believe I am siding.

12 I have indicated I need to see something because
13 I'm hearing different versions. That's where I am
14 going. I will also take it under consideration with
15 regard to the attempted contact that has not been
16 disputed, and I will consider that. But there's also
17 suggestions that she's making facial contact and things
18 that I believe I need to see.

19 Your perception of me is your perception, and you
20 have made it clear several times that you seem to think
21 I am always siding on one side as opposed to the other.
22 I disagree with that being the case, and I will make
23 that clear on the record.

24 I don't feel that it's appropriate for me to
25 always have to try and defend myself from statements

1 that you make on the record as to how you perceive me.
2 The record will have to reflect that, and the Court of
3 Appeals will have to make a determination as to whether
4 or not my rulings were or were not appropriate and
5 fair. That's all I can say at this point. But I think
6 I've made it clear that I have been trying to observe
7 things since it's been called to my attention.

8 I have not observed when I've been on the bench
9 these facial contortions that were first brought to my
10 attention. I see her make faces. She is a very
11 expressive person.

12 I think the more stronger issue right now is the
13 attempted contact, which is not disputed, and I want to
14 take that under consideration. It's been suggested
15 that she's been fluttering her eyelashes at this
16 witness. I did not observe that. This witness is
17 going to be back. I will also look at that. But I
18 wanted to take under consideration the motion to have
19 her excused based on the contact with Mr. Murphy.
20 That's where we are at.

21 MS. STENBERG: Thank you, Your Honor.

22 Just to clear up the record, I would like to
23 retract my exaggerations of skipping down the jury box.
24 Essentially the best -- and I think more honest way to
25 couch her behavior is that she behaves flirtatiously

1 with the male members of the State's team, both the
2 prosecutors and their male witnesses. I think that is
3 a fair perception of what I'm perceiving.

4 THE COURT: Thank you.

5 I have a matter pending that related to an issue
6 that I heard out of the presence of anybody else when I
7 had a closed hearing, and I have a ruling I need to
8 make in that regard. Unless there is anything else
9 that I need to make -- or take up on the record before
10 I get there, I want to do that. It looks like
11 Mr. Sorensen is nodding there is.

12 MR. SORENSEN: Your Honor, we mentioned at
13 the end of last week we were asking for a witness list
14 and summary for the defense case.

15 We have been provided yesterday -- yesterday
16 morning, which was agreeable, the witness list which
17 includes 18 names. It includes nothing or very little
18 in most cases about what the testimony is expected to
19 be, other than people to testify as to their
20 involvement in the events of July 5, 1998 or to testify
21 against penal interests by Veasna Sok.

22 We have been taken to task for discovery
23 violations, and you know, I think that we're entitled
24 to know what the defense witnesses actually are going
25 to testify about, and right now we don't -- we don't

1 regard to impeachment convictions. As the court knows,
2 he pled straight up guilty to five counts of first
3 degree aggravated murder and the assaults in the
4 underlying case here.

5 We don't plan to ask him any questions on July
6 5th, 1998, but rather about the assault in the jail
7 only. The court during its hearing on what was
8 admissible for criminal history ruled --

9 THE COURT: Again, I just wanted to identify
10 that. So we have that issue.

11 MS. STENBERG: There is that issue. The other
12 issue that I guess in my estimation is still
13 outstanding is the issue of Juror No. 11. The court
14 was going to take that under advisement.

15 THE COURT: Anything else? I'm assuming the
16 State wishes to take care of its motions in limine
17 before the defense starts presenting testimony. Is
18 that an accurate or fair --

19 MR. MURPHY: Certainly before there is any
20 reference to those particular witnesses, whether there
21 be an opening or before they testify -- I don't know
22 what counsel intends to do with opening.

23 THE COURT: Ms. Stenberg has reserved her
24 opening. Ms. Stenberg, do you agree I should be
25 dealing with the motion in limine before you start your

1 case?

2 MS. STENBERG: Yes, Your Honor.

3 MR. STAURSET: Your Honor, maybe as a help for
4 the court, what might be a good idea today would be to
5 call the jury back in, let the State rest and send them
6 home for the rest of the day.

7 We have gone and talked about this again today,
8 and we are absolutely sure that we will be finished
9 this week. So then maybe we could come back in after
10 the jury leaves and finish all of these motions, take
11 care of Mr. Leo and Mr. Ngeth or whatever, and then --
12 and then we will be ready to go tomorrow if we don't
13 have any interruptions of any sort.

14 THE COURT: Does everyone agree with that
15 option?

16 MR. MURPHY: That's fine with the State.

17 THE COURT: That's what we'll do. Let's
18 bring in the jury. Detective, if you would resume the
19 stand, please.

20 (JURY PRESENT.)

21 THE COURT: Mr. Murphy.

22 MR. MURPHY: Your Honor, the State has no
23 further questions for the witness.

24 THE COURT: Detective, you may step down.

25 (Witness excused.)

1 going over the exhibits, and she advises me that she
2 believes she just skipped Exhibit Nos. 423 and 424, and
3 also that counsel agree that those numbers were just
4 skipped. So I wanted to make a record in that regard.

5 Does the State believe that's the case as well?

6 MR. SORENSEN: Yes, Your Honor.

7 THE COURT: The defense?

8 MS. STENBERG: Yes, Your Honor.

9 MR. STAURSET: Correct.

10 THE COURT: I have pending before me a motion
11 to excuse Juror No. 11, Jacqueline Fleming, a juror in
12 this case. This request has been made to the court
13 several times before, and I have been observing her
14 more than anybody else. I watched her when other
15 experts testified. I watched her when Grant Fredericks
16 came back on the stand and testified.

17 I did not see anything that would support this
18 court excusing her as a juror on this case, so I'm
19 going to be denying the request to have her excused. I
20 wanted to take care of that now.

21 With that being the case, I believe that everyone
22 agreed that the last four jurors seated would then
23 become the alternate jurors. So I wanted to reaffirm
24 that, and that means that Jurors 13, 14, 15 and 16,
25 which would be from my right, going over four, those

1 would be the ones that would be excused as alternates,
2 and I wanted to make sure that still reflected
3 everyone's agreement and understanding.

4 Is that the State's understanding?

5 MR. MURPHY: It is, Your Honor.

6 THE COURT: Defense?

7 MS. STENBERG: Yes.

8 MR. STAURSET: Yes.

9 THE COURT: We have some certificates that
10 have been prepared, and they will be handed out to
11 those four jurors once we excuse them after Mr. Murphy
12 does his rebuttal.

13 MR. STAURSET: Your Honor, I have one request.

14 THE COURT: I can take that up later. I'm
15 going to tell the jury that we are not going to be
16 sending all the exhibits back in today and that they
17 will have them tomorrow, because I need to have counsel
18 go through all the exhibits that have been admitted and
19 sign off that they agree everything is there.

20 So once rebuttal is concluded, then I will hear
21 your motion with regard to the illustrative matters.
22 Let's bring in the jury.

23 (JURY PRESENT.)

24 THE COURT: Please be seated. At this time
25 I'm going to ask that you please give your attention to

APPENDIX “M”

Verdict Forms



98-1-03157-5 16912258 VRD 07-01-02

ERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

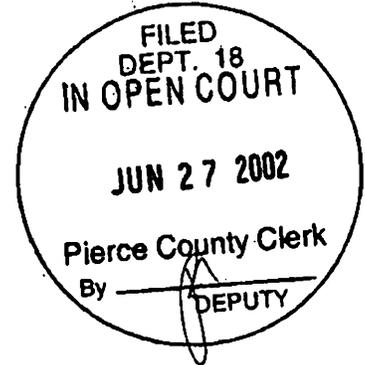
JIMMEE CHEA,

Defendant.

NO. 98-1-03157-5

VERDICT FORM A

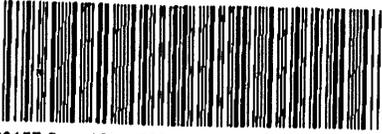
COUNT I



ORIGINAL

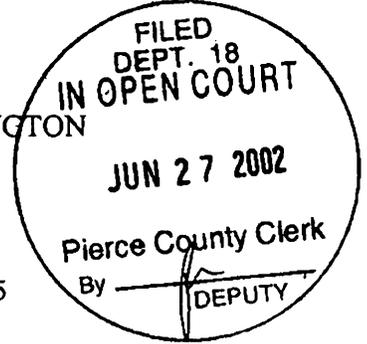
We, the jury, find defendant JIMMEE CHEA GUILTY (Not Guilty or Guilty) of the crime of MURDER IN THE FIRST DEGREE as charged in COUNT I, the count involving victim Duy Quang Le.

[Signature]
PRESIDING JUROR



98-1-03157-5 18912263 VRD 07-01-02

ERIOR COURT OF THE STATE OF WASHINGTON
N AND FOR THE COUNTY OF PIERCE



STATE OF WASHINGTON,

Plaintiff,

vs.

JIMMEE CHEA,

Defendant.

CAUSE NO. 98-1-03157-5

**SPECIAL VERDICT FORM
AGGRAVATING CIRCUMSTANCES**

COUNT I

ORIGINAL

We, the jury, having found defendant **JIMMEE CHEA** guilty of Murder in the First Degree as charged in COUNT I (Instruction 12), answer the following question submitted by the court:

QUESTION: Has the State proven the existence of the following aggravating circumstance beyond a reasonable doubt ?

There was more than one person murdered and the murders were part of a common scheme or plan or the result of a single act of the defendant.

ANSWER: YES
(Yes or No)

PRESIDING JUROR



98-1-03157-5 18912279 VRD 07-01-02

RIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

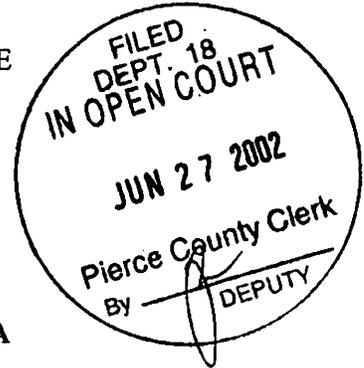
JIMMEE CHEA,

Defendant.

NO. 98-1-03157-5

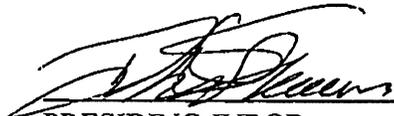
VERDICT FORM A

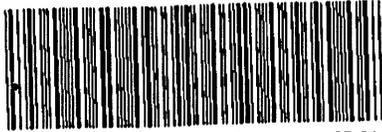
COUNT II



ORIGINAL

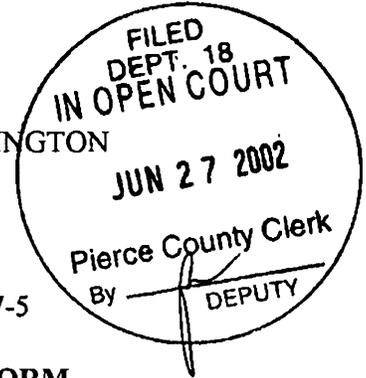
We, the jury, find defendant JIMMEE CHEA GUILTY (Not Guilty or Guilty) of the crime of MURDER IN THE FIRST DEGREE as charged in COUNT II, the count involving victim Hai Quang Le.


PRESIDING JUROR



98-1-03157-5 18912281 VRD 07-01-02

JUR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE



STATE OF WASHINGTON,
Plaintiff,

vs.

JIMMEE CHEA,
Defendant.

CAUSE NO. 98-1-03157-5

SPECIAL VERDICT FORM
AGGRAVATING CIRCUMSTANCES

COUNT II

ORIGINAL

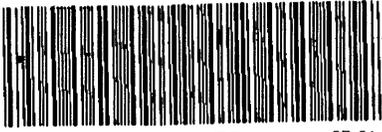
We, the jury, having found defendant **JIMMEE CHEA** guilty of Murder in the First Degree as charged in COUNT II (Instruction 14), answer the following question submitted by the court:

QUESTION: Has the State proven the existence of the following aggravating circumstance beyond a reasonable doubt ?

There was more than one person murdered and the murders were part of a common scheme or plan or the result of a single act of the defendant.

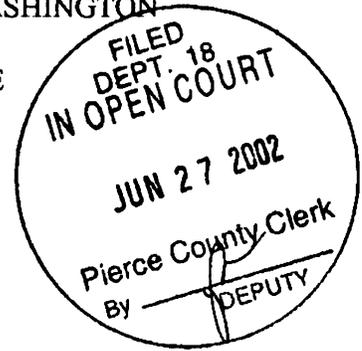
ANSWER: YES
(Yes or No)

[Signature]
PRESIDING JUROR



98-1-03157-5 16912312 VRD 07-01-02

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE



STATE OF WASHINGTON,

Plaintiff,

vs.

JIMMEE CHEA,

Defendant.

NO. 98-1-03157-5

VERDICT FORM A

COUNT III

ORIGINAL

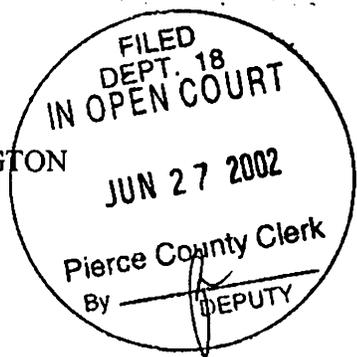
We, the jury, find defendant **JIMMEE CHEA** GUILTY (Not Guilty or Guilty) of the crime of **MURDER IN THE FIRST DEGREE** as charged in **COUNT III**, the count involving victim Nhan Ai Nguyen.

PRESIDING JUROR



98-1-03157-5 16912318 VRD 07-01-02

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE



STATE OF WASHINGTON,
Plaintiff,

vs.

JIMMEE CHEA,
Defendant.

CAUSE NO. 98-1-03157-5

**SPECIAL VERDICT FORM
AGGRAVATING CIRCUMSTANCES**

COUNT III

ORIGINAL

We, the jury, having found defendant **JIMMEE CHEA** guilty of Murder in the First Degree as charged in COUNT III (Instruction 16), answer the following question submitted by the court:

QUESTION: Has the State proven the existence of the following aggravating circumstance beyond a reasonable doubt ?

There was more than one person murdered and the murders were part of a common scheme or plan or the result of a single act of the defendant.

ANSWER: YES
(Yes or No)

[Signature]
PRESIDING JUROR



98-1-03157-5 16912330 VRD 07-01-02

RIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE



STATE OF WASHINGTON,

Plaintiff,

vs.

JIMMEE CHEA,

Defendant.

NO. 98-1-03157-5

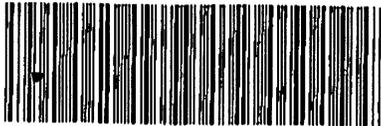
VERDICT FORM A

COUNT IV

ORIGINAL

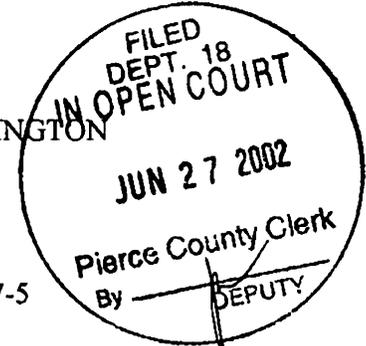
We, the jury, find defendant JIMMEE CHEA GUILTY (Not Guilty or Guilty) of the crime of MURDER IN THE FIRST DEGREE as charged in COUNT IV, the count involving victim Tuong Hung Dang Do.

[Signature]
PRESIDING JUROR



98-1-03157-5 16912335 VRD 07-01-02

ERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE



STATE OF WASHINGTON,

Plaintiff,

vs.

JIMMEE CHEA,

Defendant.

CAUSE NO. 98-1-03157-5

**SPECIAL VERDICT FORM
AGGRAVATING CIRCUMSTANCES**

COUNT IV

ORIGINAL

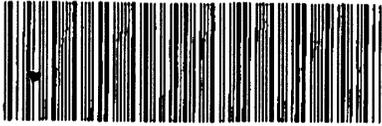
We, the jury, having found defendant **JIMMEE CHEA** guilty of Murder in the First Degree as charged in COUNT IV (Instruction 18), answer the following question submitted by the court:

QUESTION: Has the State proven the existence of the following aggravating circumstance beyond a reasonable doubt ?

There was more than one person murdered and the murders were part of a common scheme or plan or the result of a single act of the defendant.

ANSWER: YES
(Yes or No)

PRESIDING JUROR



98-1-03157-5 18912345 VRD 07-01-02

ERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

JIMMEE CHEA,

Defendant.

NO. 98-1-03157-5

VERDICT FORM A

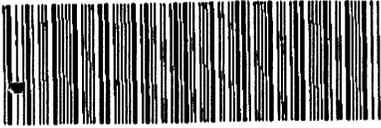
COUNT V



ORIGINAL

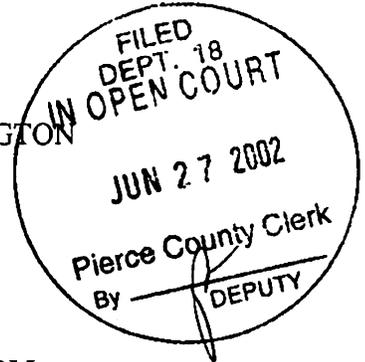
We, the jury, find defendant JIMMEE CHEA GUILTY (Not Guilty or Guilty) of the crime of MURDER IN THE FIRST DEGREE as charged in COUNT V, the count involving victim Ngoc Tuyen Thi Vo.


PRESIDING JUROR



98-1-03157-5 16912348 VRD 07-01-02

RIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE



STATE OF WASHINGTON,

Plaintiff,

vs.

JIMMEE CHEA,

Defendant.

CAUSE NO. 98-1-03157-5

**SPECIAL VERDICT FORM
AGGRAVATING CIRCUMSTANCES**

COUNT V

ORIGINAL

We, the jury, having found defendant **JIMMEE CHEA** guilty of Murder in the First Degree as charged in COUNT V (Instruction 20), answer the following question submitted by the court:

QUESTION: Has the State proven the existence of the following aggravating circumstance beyond a reasonable doubt ?

There was more than one person murdered and the murders were part of a common scheme or plan or the result of a single act of the defendant.

ANSWER: YES
(Yes or No)

[Signature]
PRESIDING JUROR