

NO. 38015-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS HACHENEY,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 01-1-01311-2

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
DATED March 30, 2009, Port Orchard, WA   
Original **AND ONE COPY** filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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## I. COUNTERSTATEMENT OF THE ISSUES

Whether Hacheny fails to show that the trial court failed to follow any mandatory statutory or constitutional provision, such that his standard-range sentence is appealable where the trial court declined to consider evidence of the course of pretrial plea negotiations?

## II. STATEMENT OF THE CASE

Nicholas Hacheny was charged with first-degree murder with aggravating circumstances for killing his wife, Dawn Hacheny. *State v. Hacheny*, 160 Wn.2d 503, ¶ 1, 158 P.3d 1152 (2007); CP 4. The State's theory at trial was that after Hacheny suffocated Dawn, he left on a hunting trip, but before leaving, he set fire to the family home to conceal the evidence. *Hacheny*, 160 Wn.2d at ¶ 1, 4, 7-8, 17; CP 4, 6-8, 11-12. The jury found Hacheny guilty of first-degree premeditated murder, and also found the aggravating circumstance that the murder was committed in the course of an arson. *Hacheny*, 160 Wn.2d at ¶ 12; CP 9-10. The trial court accordingly sentenced Hacheny to life without the possibility of parole. *Hacheny*, 160 Wn.2d at ¶ 1; CP 4.

On appeal, the Supreme Court found that this course of events did not support the aggravating circumstance because the arson was committed after the murder was complete. *Hacheny*, 160 Wn.2d at ¶ 27, 30; CP 20, 21-22.

The Court affirmed Hachenev's conviction, but struck the aggravating circumstance and remanded the case for resentencing. *Hachenev*, 160 Wn.2d at ¶ 39; CP 27.

At the resentencing hearing, it was determined that the standard range was 240 to 320 months. RP 3.

The State recommended that the trial court impose a sentence at the top of the standard range. RP 4. The State first argued that this sentence was appropriate because of the horrific nature of the crime:

Dawn knew that it was Nick Hachenev that was smothering her. The testimony reflected that he smothered her with a plastic bag and she was aware that it was him that was killing her ... this must have been just a horrible moment of horror for Dawn to know that the husband that she loved and trusted was killing her.

RP 4-5. The State emphasized the premeditated nature of the crime:

Mr. Hachenev set fire to cover his tracks and to present sort of an alibi for himself when he left after setting the fire and going hunting. This presented a danger to neighbors. This presented a danger to fireman and it was more evidence that this was a completely premeditated and just a cold-blooded murder.

This was premeditated. He had a plan. He had to devise a plan. He had to plan for an alibi. He set up a time to go hunting, killed her, set fire and left so that he might have an alibi. And he had to plan so much to know when was the right time to kill her and when was the right time to set the fire and then leave the home; absolutely premeditated and cold-blooded.

RP 5. The State then mentioned Hachenev's motive for killing his wife. RP

5. It also reminded the court how Hacheney used his standing in the community to avoid detection for many years. RP 6. The State concluded that the quality of the premeditation deserved a top-of-the-range sentence:

This kind of crime, this cold-blooded premeditated crime, demands the top of the range, and I would respectfully request Your Honor to impose the top of the range, and that would be 320 months.

RP 6.

Upon defense objection, the trial court declined to permit family friend Annette Anderson to speak at the hearing. RP 7-13. The trial court did permit Dawn Hacheney's brother, Dennis Tienhaara, to present a statement. RP 13.

Tienhaara asked that the court impose the maximum sentence, and urged the court to consider an exceptional sentence. RP 14. Over defense objection, he also asked the court to consider the effect the sentence would have on other criminals. RP 14. He also referred to an editorial that questioned the wisdom of the Supreme Court's decision in the case. RP 15-16. Tienhaara then asked the court to consider the domestic violence nature of the crime. RP 16. Like the State, he also asked the court to recall the horror his sister must have experienced in her final moments. RP 16. Tienhaara closed with a brief reference to the loss Dawn's friends and family had felt since her murder. RP 17. He compared her goodness to Hacheney,

whom he characterized as “an evil cold-hearted emotionless killer who takes no responsibility for his actions and shows no remorse for his crimes.” RP 17. Tienhaara then again asked that the court impose the maximum sentence. RP 17.

At the conclusion of Tienhaara’s statement, Hacheney objected that his statement violated the real facts doctrine. RP 18. He therefore asked that the court strike the statement and not consider the documents.<sup>1</sup> The court noted that some parts of the statement were “inflammatory,” but that it could disregard those aspects of the statement. RP 18-19. Hacheney appeared satisfied with that resolution. RP 19.

Hacheney then submitted that the State’s argument that Dawn knew who her perpetrator was was contrary to trial evidence that she was unconscious at the time. RP 19. He further argued that the court should not consider premeditation in weighing the sentence because it was a necessary element of the offense. RP 19. Hacheney also contended that his motive was irrelevant to the sentence. RP 20.

Hacheney then suggested that the situation was unusual because he had been offered a plea with a sentence of seven years, and if he had accepted

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<sup>1</sup> Tienhaara’s oral presentation consisted of his reading a written statement. The written document appears at CP 45.

the offer, he would probably have been out of prison by the time of the resentencing. RP 20. The State objected that prior plea negotiations were not part of the real facts and evidence of them was not admissible. RP 20. Hacheny responded that it showed “his belief in his position that he did not commit this crime.” RP 20.

The court responded that that position had been made clear. RP 20. The court was “hesitant,” however, to consider any plea negotiations. RP 21. It therefore ruled that unless Hacheny was seeking an exceptional sentence of seven years, it would not consider it. RP 21.

Counsel then proceeded to relate conversations he had had with his client:

Your Honor, six years ago Nick Hacheny told me he really didn't understand why he was going through this but that there had to be a plan. And given Mr. Hacheny's beliefs and his position in the universe, I guess that was how he looked at it. And he basically told me that: “I have been convicted of this, and I will do the best I can in this regard.”

RP 21. Hacheny went on to argue that he had been a positive influence in the prison and had continued his ministry in the prison through a non-denominational program there, and had engaged in other constructive activities in prison. RP 22-23. Hacheny therefore asked the court to impose a sentence at the bottom of the range, of 240 months. RP 23-24.

The trial court informed Hacheny that it had read the letter he had

prepared for the court. RP 24. Hacheny declined an opportunity for further allocution. RP 24.

In the letter Hacheny reiterated his innocence, and averred that nothing at sentencing could “undo the terrible injustice that has occurred.” CP 48. He then presented a long description of the unpleasantness of prison life. CP 48-49. The remainder of the letter purported not to be a plea for his own case, but a request for the court to consider the effects of prison on the young men it sentenced. CP 50-52.

Before pronouncing sentence, the trial court observed that both the State and the defense had presented eloquent arguments for imposing sentences at the top and bottom of the range. RP 25. The court specifically disavowed that Tienhaara’s comments had any influence on its decision. RP 25.

The court observed that the jury had found Hacheny guilty of killing his wife. For the court, this was the only factor that it found dispositive:

That is the most intimate relationship that any of us on earth can imagine, and implicit in that finding by the jury is a violation of the most intimate trust and love.

Base on that violation, and that violation alone, I am sentencing Mr. Hacheny to 320 months in prison.

RP 26; CP 54.

### III. ARGUMENT

**HACHENEY FAILS TO SHOW THAT THE TRIAL COURT FAILED TO FOLLOW ANY MANDATORY STATUTORY OR CONSTITUTIONAL PROVISION IN FINDING THAT THE COURSE OF PRETRIAL PLEA NEGOTIATIONS WAS NOT RELEVANT TO ITS SENTENCING DECISION, AND AS SUCH, HIS STANDARD-RANGE SENTENCE IS NOT APPEALABLE.**

Hachenev argues at length that he was entitled to have relevant evidence considered at his resentencing hearing. What he fails to show, however, is any authority holding that the trial court's decision is even reviewable. It was not. As such, Hachenev's sentence should be affirmed.

1. *Hachenev's claim does not fall within the two exceptions to the general rule that a standard-range sentence may not be appealed.*

A trial court's decision regarding the length of a sentence within the standard range is not appealable because "as a matter of law there can be no abuse of discretion." *State v. Kinneman*, 155 Wn.2d 272, ¶ 21, 119 P.3d 350 (2005) (quoting *State v. Mail*, 121 Wn.2d 707, 710, 854 P.2d 1042 (1993) and *State v. Ammons*, 105 Wn.2d 175, 183, 713 P.2d 719, 718 P.2d 796 (1986)). That said, a defendant nevertheless "is not precluded from challenging on appeal the procedure by which a sentence within the standard range was imposed." *Ammons*, 105 Wn.2d at 183.

In *Mail*, the Court rejected the defense argument that the *Ammons*

“dicta” should be read broadly. *Mail*, 121 Wn.2d at 711. Instead, it explained that review was circumscribed by the terms of the Sentencing Reform Act. *Mail*, 121 Wn.2d at 711. It found that RCW 9.94A.110 (recodified as RCW 9.94A.500(1)) was the “baseline.” *Mail*, 121 Wn.2d at 711. That provision sets forth the minimum factors that the court *must* consider at sentencing:

[T]he presentence reports, if any, including any victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed.

The Court went on to explain that RCW 9.94A.370(2) (recodified as 9.94A.530(2)) identifies the information that the court “may rely on.” *Mail*, 121 Wn.2d at 711.

In this context, the Court concluded that in order for a “in order for a ‘procedural’ appeal to be allowed under *Ammons*, it must be shown that the sentencing court had a duty to follow some specific procedure required by the SRA, and that the court failed to do so.” *Mail*, 121 Wn.2d at 712. Unless there is a “clear showing” that the trial court failed to follow a mandated procedure, RCW 9.94A.210(1) (recodified as 9.94A.585(1)) applies, and no appeal should be permitted. *Mail*, 121 Wn.2d at 712. The Court summarized its holding thus:

Since the only applicable procedures mandated by the SRA in this case are those dictated by RCW 9.94A.[500(1)] and RCW 9.94A.[530](2), these are the only statutory bases for an appeal under *Ammons*. In order to bypass the prohibition on appeals found at RCW 9.94A.[585](1), this petitioner must show either that the trial court refused to consider information mandated by RCW 9.94A.[500(1)], or that the petitioner timely and specifically objected to the consideration of certain information and that no evidentiary hearing was held.

*Mail*, 121 Wn.2d at 713. The Court observed that this rule would prevent the *Ammons* exception from swallowing the appeal prohibition of RCW 9.94A.585(1) in its entirety. *Mail*, 121 Wn.2d at 713-14.

Here, the trial court considered all the information mandated by RCW 9.94A.500(1). It likewise did not consider any factual information to which Hacheney interposed a timely and valid objection. As such, Hacheney fails to show he has any statutory basis for appeal.

Hacheney's reliance on *United States v. Mylor*, 971 F.2d 706 (11<sup>th</sup> Cir. 1992), is misplaced. There, the trial court refused to hear defense argument at all. The trial court's action was thus contrary to a federal sentencing procedure that required that "the court *shall* afford the counsel for the defendant ... an opportunity to comment upon the probation officer's determination." *Mylor*, 971 F.2d at 708 (emphasis and ellipsis the Court's). The trial court's default was thus the same as the circumstances that would justify an appeal under the first grounds for appeal set forth in *Mail*: failure

to comply with RCW 9.94A.500(1). Since, as discussed above, the trial court did not violate this provision, *Mylor* provides no comfort to Hacheny.

**2. *Death-penalty specific jurisprudence does provide a basis for appealing a standard-range prison sentence.***

The *Mail* Court did acknowledge that in certain circumstances, there might be a constitutional basis to appeal from a standard-range sentence. *Mail*, 121 Wn.2d at 712 (citing *State v. Herzog*, 112 Wn.2d 419, 771 P.2d 739 (1989)). Hacheny, fails, however, to show that the sentencing procedure below was constitutionally deficient. He relies on death-penalty jurisprudence that has no applicability to the imposition of a determinate prison sentence. Moreover, even if the precedent he cites were to apply in the present context, the evidence he sought to admit would not be constitutionally required.

Hacheny cites to cases such as *State v. Bartholomew*, 101 Wn.2d 631, 648, 683 P.2d 1079 (1984), and *Tennard v. Dretke*, 542 U.S. 274, 124 S. Ct. 2562, 159 L. Ed. 2d 384 (2004). However, both these cases were addressing the application of the Eighth Amendment to specific statutory death-penalty schemes, and cannot be read out of that context. The United States Supreme Court has repeatedly asserted that “because there is a qualitative difference between death and any other permissible form of punishment, ‘there is a corresponding difference in the need for reliability in

the determination that death is the appropriate punishment in a specific case” *Zant v. Stephens*, 462 U.S. 862, 884-85, 103 S. Ct. 2733, 2747, 77 L. Ed. 2d 235 (1983) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, 96S. Ct. 2978, 2991, 49 L. Ed. 2d 944 (1976)); see also *Ring v. Arizona*, 536 U.S. 584, 605-06, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) (observing that “death is different”). The procedures mandated by cases such as *Betholomew and Tennard* are the product of these considerations, and to the State’s knowledge, are not applied outside of the capital punishment arena. Hacheny offers no authority or explanation for why they should be.

Hacheny’s right to appeal his standard-range is quite limited, as discussed above. He fails to show that any constitutionally mandated procedure that applies to non-capital cases was not followed below. His appeal should be denied.

**3. “Lingering doubt” as to the defendant’s guilt is not a valid sentencing consideration.**

Moreover, the purpose for which Hacheny sought to introduce the evidence of his plea negotiations with the State was to support the argument that he was maintaining his innocence.<sup>2</sup> Even in capital cases, however,

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<sup>2</sup> “MR YELISH: Your Honor, I think it shows Mr. Hacheny’s position, and it shows his belief in his position that he did not commit this crime.” RP 20. To the extent that Hacheny would argue that the evidence was admissible for any other purpose, he fails to meet the requirements of RAP 2.5. *State v. Davis*, 141 Wn.2d 798, 850, 10 P.3d 977 (2000).

“lingering” or “residual” doubt is not a factor of which the constitution requires consideration. To the contrary, the Supreme Court has unanimously rejected such a notion. *Franklin v. Lynaugh*, 487 U.S. 164, 174-175, 108 S. Ct. 2320, 101 L. Ed. 2d 155 (1988) (plurality); 487 U.S. at 187 (Connor, J. concurring); 487 U.S. at 189 (Stevens, J., dissenting).

In *Franklin*, Justice White, writing for the plurality, explained why such evidence is not constitutionally required:

Our edict that, in a capital case, “the sentencer ... [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense,” *Eddings v. Oklahoma*, 455 U.S. 104, 110, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982) (quoting *Lockett*, 438 U.S., at 604), in no way mandates reconsideration by capital juries, in the sentencing phase, of their “residual doubts” over a defendant’s guilt. Such lingering doubts are not over any aspect of petitioner’s “character,” “record,” or a “circumstance of the offense.” This Court’s prior decisions, as we understand them, fail to recognize a constitutional right to have such doubts considered as a mitigating factor.

*Franklin*, 487 U.S. at 174 (alterations the Court’s). Thus, even if the strictures of death-penalty jurisprudence did apply to Hacheney’s sentencing, he was not entitled to have the court consider his continued protestations of innocence.

**4. Evidence of the course of the pretrial plea negotiations was not relevant.**

Further, even assuming that residual doubt were a valid consideration,

Hachenev fails to show that the proffered evidence would be relevant to that factor. Even in death penalty sentencing, although the rules of evidence don't fully apply, mitigation evidence must still be relevant. *State v. Lord*, 117 Wn.2d 829, 914, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992); *accord Tennard*, 542 U.S. at 284 (cited by Hachenev).

Evidence of plea negotiations is excluded under the evidence rules for two reasons: first to avoid chilling the negotiation process, and secondly, because such evidence is usually lacking in probative value, *i.e.*, it is irrelevant:

The rule is based upon a belief that (1) the evidence has little probative value because an offer to settle may be motivated solely by a desire to buy peace, and (2) it is sound public policy to encourage the settlement of disputes by creating at least a limited privilege for settlement negotiations.

Karl B. Tegland, *Courtroom Handbook on Wash. Evid.*, ER 408 (2008-09) (discussing the civil version of the rule).

The evidence in question here fully illustrates the point of relevance. While Hachenev argued that it was evidence of his abiding belief in his innocence, his refusal to accept a plea could be just as probative of his utter refusal to accept the consequences of his actions, *i.e.* the very lack of remorse he would now introduce the evidence to rebut. He could also have refused the plea offer because he did not wish to spend even seven years in prison, and/or perhaps because he believed that the State's evidence would be

insufficient to sway a jury into convicting him. In short the evidence's probative value was virtually nil.

Hachenev's claim of relevance based on the argument that if he had remained silent, it could have been construed as a lack of remorse lacks logical force. First, Hachenev did not remain silent. His counsel countered the presentation of both the state and Dawn Hachenev's brother directly and forcefully. RP 18-24. Further the trial court considered his written statement to the court, in which he continued to protest his innocence. Finally, the very authority to which Hachenev cites itself cites to authority that "when [the] defendant continues to maintain his innocence, [the] court *may not* draw [a] negative inference of lack of remorse from [the] defendant's silence at sentencing." *State v. Blunt*, 118 Wn. App. 1, 10 n.13, 71 P.3d 657 (2003) (citing *State v. Shreves*, 313 Mont. 252, 60 P.3d 991, 997 (2002)) (emphasis supplied).

More importantly, however, that silence could be held against the defendant does not somehow make irrelevant evidence relevant. It remains lacking in probative value.

**5. *Exclusion of the evidence of plea negotiations would be harmless if error at all.***

Finally, even assuming error at all, Hachenev also fails to show that admission of the history of the plea negotiations would have affected the

outcome of the case. If this Court is certain the sentence would have been the same absent the error, it will find the trial court's error harmless. *State v. Strauss*, 93 Wn. App. 691, 701, 969 P.2d 529 (1999) .

The trial court, in excluding the evidence, acknowledged that it was already well aware of Hacheny's belief: "That position has been made clear." RP 20. As such the evidence would have at best been cumulative.

More importantly, it is plain that the trial court accepted the jury's verdict. A trial court is not required to give reasons for its imposition of sentence within the standard range. *Mail*, 121 Wn.2d at 714. The trial judge here nevertheless was quite explicit in her reasoning. She believed that Hacheny's crime was a gross violation of the trust and love that inheres in the marital relationship. For that reason "alone" the court determined that a top-of-the-range sentence was called for. RP 26. The court specifically disavowed being swayed by Tienhaara, who was the primary source of the claim that Hacheny lacked remorse. It also gave short shrift to "the litany of factors" that the State had cited, and acknowledged Hacheny's continued maintenance of his innocence. But the court returned to the jury's finding that Hacheny was guilty, and based its sentence on that fact. RP 25. In view of this quite clear record, it would be extraordinarily unlikely that admission of evidence of which the trial court was already aware, and in support of a position of which the court was well-apprised, would have affected the

outcome.

Hachenev's argument that the alleged error here constituted "structural error" again takes a death-penalty case completely out of its context. He relies on the concurring opinion<sup>3</sup> in *Nelson v. Quarterman*, 472 F.3d 287 (5<sup>th</sup> Cir. 2006), in support of his nearly throw-away contention that the failure to consider the evidence obviates the necessity that he show prejudice. Since Hachenev has given such short shrift to his theory, the State will confine itself to pointing out that there is a significant difference between the present situation and that of a capital penalty phase proceeding under Texas law.

In the instant case, the trial court had virtually unfettered discretion (subject to the limitations discussed above with regard to the *Mail* opinion) in what it could and or could not consider in imposing a standard-range sentence. Under the jurisprudence discussed at length in *Nelson*, in order for Texas's unique "three question" death penalty scheme to meet constitutional muster, the jury must be instructed in such a way that it is given a "vehicle for expressing its 'reasoned moral response to the defendant's background, character, and crime.'" *Nelson*, 472 F.3d at 314 (citation omitted). Where the jury was not, the error could not be harmless. Clearly the requirement in

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<sup>3</sup> The case was decided en banc by the Court of Appeals, and six judges dissented.

*Nelson* was central to the process, and constitutionally mandated.

Here, on the other hand, Hachenev fails to point to any statute or constitutional provision that required the court to consider the evidence in question. Moreover, as noted, the court considered the argument presented, but found other considerations far more compelling. Hachenev fails to explain or justify his “structural error” claim, and it should be disregarded.

The trial court did not abuse its discretion in conducting the resentencing, or in sentencing Hachenev to a standard-range sentence. Hachenev’s sentence should be affirmed.

#### IV. CONCLUSION

For the foregoing reasons, Hachenev’s conviction and sentence should be affirmed.

DATED March 30, 2009.

Respectfully submitted,

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