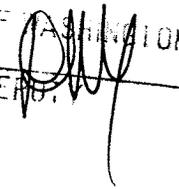


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NO. 38782-4-II

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

STATE OF WASHINGTON,

Respondent,

vs.

PETER JACOB INOUYE,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
The Honorable Gary R. Tabor, Judge
Cause Number 07-1-00376-6

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing the testimony of Dr. Staub in place of the actual analysts who performed the DNA testing at Orchid Cellmark Lab, in violation of the Defendant's constitutional right to confront witnesses.
2. The trial court erred in denying the defense motion to dismiss the aggravating factor of "deliberate cruelty" at the close of all of the evidence.
3. The trial court erred in denying the defense motion to dismiss or, in the alternative, for a new trial as to counts III, IV, and V, where the Verdict Forms convicted the Defendant of an uncharged crime.
4. The trial court erred in failing to find that counts III, IV, and V constituted same criminal conduct for sentencing purposes.
5. The trial court erred in ruling that the deadly weapon sentence enhancements at to Counts III, IV, and V should run consecutively to each other.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was the Defendant denied his constitutional right to confront witnesses when the court allowed Dr. Rick Staub, who performed none of the DNA testing in this case, to testify as to the DNA testing and results thereof at Orchid Cellmark Lab? (Assignment of Error No. 1)
2. Was there sufficient evidence from which a rational trier of fact, viewing the evidence in the light most favorable to the State, could have found that the Defendant exhibited deliberate cruelty in the commission of the crimes alleged in counts III, IV, and V? (Assignment of Error No. 2)
3. Should the Court have dismissed counts III, IV, and V, or, alternatively, have ordered a new trial as to those counts, where the Verdict Forms convicted the Defendant of the uncharged crimes of Rape of a Child in the First Degree? (Assignment of Error No. 3)
4. Should counts III, IV, and V been found to have constituted same criminal conduct for purposes of sentencing? (Assignments of Error Nos. 4 and 5).

C. STATEMENT OF THE CASE

By Third Amended Information, filed on November 14, 2008, the Defendant, PETER JACOB INOUYE, was charged with one count of Burglary in the First Degree (with Sexual Motivation) with a Deadly Weapon allegation; one count of Assault of a Child in the Second Degree (with Sexual Motivation) with a Deadly Weapon allegation; and three counts of Rape in the First Degree with a deadly Weapon allegation, and with a special allegation that the victim was under fifteen years of age. CP 25-27.

Prior to trial, on September 29, 2008, a hearing was held pursuant to the State's motion to allow Dr. Rick Staub, the Laboratory Director of Orchid Cellmark Lab in Dalas, Texas, to provide testimony concerning the DNA testing and results done by Orchid Cellmark Lab. RP 9/29/08, pp. 1-63.

Dr. Staub testified that Orchid Cellmark is a DNA identity testing company, and that he was the Senior Forensic Manager and Laboratory Director of the Orchid Cellmark forensic casework lab in Dallas, Texas. RP 9/29/08, p. 9. Dr. Staub's curriculum vitae was admitted without objection as Exhibit 1 for this hearing. RP 9/29/08, p. 11. He stated that the majority of the lab's work is done for police departments, district attorney's offices, and other crime labs. RP 9/29/08, p. 14.

Staub then described the process used by the lab in testing DNA samples submitted for analysis. RP 9/29/08, pp. 16-22. Exhibit 2, which was the entire case package from Orchid Cellmark Lab for the present case, was admitted without objection as Exhibit 2. RP 9.92.08, p. 24. Staub then described the quality control mechanisms which have been implemented at Orchid Cellmark. RP 9/29/08, pp. 25-29. When Staub

began to testify concerning the specific testing done by Orchid Cellmark in the present case, defense counsel objected on the grounds that Staub was testifying from lab notes and other documents contained in Exhibit 2, rather than from his own personal knowledge. RP 9/29/08, pp. 30-31. To clarify, the State asked Staub whether he had done “any of the actual hands-on testing of the genetic material submitted in this case”, and Staub responded that he had not done any of the testing himself. RP 9/29/08, p. 31. Staub then proceeded, based upon the reports and other documents contained in Exhibit 2, to describe the testing process and test results involving the evidence which was submitted in the instant case. RP 9/29/08, pp. 32-45.

On cross examination, Stab stated that when Orchid Cellmark received the materials for evaluation involving the Defendant, the Lab was informed that Inouye was a suspect in the case. RP 9/29/08, p. 48. He stated that he did not do any of the actual testing and analysis in the Inouye case himself, nor did he personally observe the work of the lab analysts and technicians who did the work in the Inouye case. RP 9/29/08, p. 50. He stated that there were a total of thirteen analysts who had some role and/or participation in the testing of the DNA evidence in the Inouye case. RP 9/29/08, p. 51. He also stated that other individuals at the Lab are charged with maintaining the robotic machinery which aid in the analysis, and that some of that maintenance is “hands-on” maintenance. RP 9/29/08, p. 52-53.

Staub stated that in the 217 pages of the Orchid Cellmark case file (Exhibit 2), there were many places where an individual analyst had initialed a document indicating that a certain observation was made, that a certain procedure had been done and done properly, etc. RP 9/29/08, p. 55-56. He admitted that he had performed none of those tests

himself, and that the validity of the results are based on the assumption that each of the analysts did what they stated they did, and did those things correctly. RP 9/29/08, p. 56. He stated that his confidence in the Orchid Cellmark results was based, in part, on his confidence in his analysts to do the testing correctly and to say that they did the testing correctly. RP 9/29/08, p. 56. He stated that the data generated by Orchid Cellmark in the Inouye was, as far as he was concerned, going to be used in a litigation setting, unless there was some sort of resolution prior to the start of actual litigation. RP 9/29/08, p. 57. He stated the purpose of Orchid Cellmark being asked to do the testing was “the criminal case more than anything else.” RP 9/29/08, p. 57. He concluded his direct testimony by admitting that dealing with problems in the testing procedures would be dependent upon each individual analyst making any such problems known to the other lab personnel. RP 9/29/08, pp. 58-59.

The hearing resumed on November 6, 2008. RP 11/6/08, pp. 1-34. After hearing the arguments of counsel, the Court, over defense objection, granted the State’s motion to allow Dr. Staub to testify, in lieu of the testimony of the analysts who actually performed the DNA testing in this case, as to the Orchid Cellmark Lab’s DNA test results in this case. RP 11/6/08, p. 33. The Court’s ruling was based on a finding that such scientific testing is not to be considered “testimonial”, and thus not subject to the Sixth Amendment’s right to confront witnesses. RP 11/6/08, p. 33.

Trial commenced on November 17, 2008, in Thurston County Superior Court, the Honorable Judge Gary R. Tabor presiding. RP 1-792 **(NOTE: The trial is contained in four volumes of the Report of Proceedings, denominated “Jury Trial - Volume ___.** **These four volumes consisting of consecutively numbered pages from 1 through 792,**

will be referred to herein simply a “RP”.)

After some preliminary matters and Opening Statement of Counsel, the State called Diana Stamos as its first witness. RP 21 et seq. Stamos stated that just after midnight on February 5, 2007, her daughter, Grace, awakened her and informed her that she had been molested. RP 24. She stated Grace’s face was completely red and purple, and her eyes were bloodshot. RP 24. Grace described the incident to her mother, and indicated that her attacker had a knife. RP 28-30. At the time of the incident, Grace was 11 years old, with a birthday of October 29, 1995. RP 36. Stamos testified that Grace had drawn a sketch of her assailant, and that sketch was ultimately turned over to the police. RP 39-40.

Grace Stamos was then called to testify by the State. RP 47 et seq. She stated that after she went to sleep on the night of February 4, 2007, she was awakened by someone strangling her. RP 51. She turned on her lamp and saw a stranger standing there with a knife. RP 53. She then described being sexually assaulted by this person, and described acts of vaginal and anal penetration, as well as oral contact and penetration with her vagina. RP 53-61. She stated the entire incident lasted 15-20 minutes. RP 60.

Laurie Davis, a clinician at the St. Peter Hospital Sexual Assault Clinic, then testified concerning her contact with Grace Stamos and her involvement in the case. RP 95-129.

Ken Swanson, a criminal investigator with the Pierce County Prosecutor’s Office, described his contact with Grace Stamos, and the preparation of a forensic sketch of Grace’s assailant. RP 138-164.

Kim Seig, an officer with the Olympia police Department, testified concerning her

responding to the Stamos residence on the morning of February 5, 2007, and to her contacts with Grace and Diana Stamos at that time. RP 165-183.

Over continuing defense objection, Dr. Rick Staub of Orchid Cellmark Laboratory, then testified concerning the DNA testing done by Orchid Cellmark in this case, and to the Lab's conclusion that the DNA obtained from the vaginal swabs of Grace Stamos matched the DNA of the Defendant. RP 183-236. Again, as at the preliminary hearing, Dr. Staub testified that he had not personally performed or observed any of the lab procedures which were done by the various DNA analysts at Orchid Cellmark. RP 239. He also admitted that if the standard operating procedures, with regard to DNA testing, are not followed by the various analysts, there could be problems with the ultimate result of that testing. RP 248.

There followed a number of law enforcement witnesses, each of whom testified as to their role in the investigation of this case. These witnesses were:

Detective Jeff Herbig of the Olympia Police Department (RP 261-274);

Chester Mackaben, Evidence Technician for the Olympia police Department (RP 274-329);

Det. Sam Costello of the Olympia Police Department (RP 330-339);

Det. Brenda Anderson of the Olympia Police Department (RP 347-352);

Det. Amy King of the Olympia Police Department (RP 353-434); and

Det. Paul Lower of the Olympia police Department (RP 436-443).

Will Dean, a forensic scientist with the Washington State Patrol Crime Lab in Tacoma, testified as to his DNA testing in this case in April, 2008, and his conclusion that the DNA matched that of the Defendant. RP 446-465. On cross examination, Dean

stated that the testing procedures are “hands on” and involve microscopic materials. RP 465-66. He stated that it would be important for him to be aware of and be able to examine the reports or notes of anyone else who had handled the samples, and that contamination of any of the materials being tested could invalidate the test results. RP 467. The State then rested its case. RP 470.

The defense then called a number of witnesses. They were:

Eric Inouye, the Defendant’s father (RP 485-517);

Kathryn Inouye, the mother of the Defendant (RP 518-555);

Melanie Castellano, fiancée of the Defendant (RP 556-608);

James Inouye, the Defendant’s brother (RP 611-633); and

Peter Inouye, the Defendant (RP 634-665). After the testimony of the Defendant, the defense rested its case.

Det. King was recalled by the State for brief rebuttal testimony. (RP 666-671).

After the conclusion of testimony, there was brief discussion between the court and counsel regarding jury instructions, and neither the State nor the defense took any exceptions to jury instructions either given or not given. RP 673-675.

When court convened the next day, defense counsel moved to dismiss the aggravating factor of deliberate cruelty” as alleged in Counts III, IV, and V. RP 676-679. After arguments of counsel, the court denied the motion to dismiss. RP 684.

After the giving of jury instructions (RP 688-708) and closing arguments of counsel (RP 708-777), the jury returned verdicts of guilty and affirmative findings as to the special interrogatories and special allegations. RP 782-787.

On December 4, 2008, the defense filed a Motion to Dismiss with Prejudice or, in

the Alternative, for a New Trial as to counts III, IV, and V. CP 103-104. The motion concerned the fact that Verdict Forms III, IV, and V had indicated guilty verdicts as to the uncharged crimes of Rape of a Child in the First Degree, rather than the charged crimes of Rape in the First Degree. CP 136-138.

The matter came before the court for sentencing on January 6, 2009. RP 1/6/09, pp. 4-52. After arguments of counsel, the Court denied the defense motion to dismiss and/or for a new trial based on the incorrect Verdict Forms. RP 1/6/09, pp. 4-10. After hearing impact statements and the arguments of counsel as to several sentencing issues, the Court ruled as follows:

1. Counts III, IV, and V should not be considered same criminal conduct for sentencing purposes (RP 37).

2. Counts I and II run concurrently with each other and with counts III, IV, and V. Counts III, IV, and V run consecutively to each other (RP 39).

3. All deadly weapon enhancements and sexual motivation enhancements run consecutively to each other (RP 39).

4. Based upon the jury finding of the aggravating factor of deliberate cruelty, an additional 108 months is added to the standard range sentence. (RP 44). The total sentence imposed was 720 months in the Department of Corrections. CP 105-118.

Timely Notice of Appeal was filed on January 23, 2009. CP 119-134

D. ARGUMENT

I

By the Court allowing the Lab Director of Orchid Cellmark, who performed no actual testing himself, to testify in lieu of the thirteen analysts who actually Performed the DNA testing in this case, the Defendant was denied his constitutional right to confront witnesses against him.

“In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him...” U.S. Const. amend. VI. This right to confrontation is fundamental and essential to a fair trial in a criminal prosecution. *Pointer v. Texas*, 380 U.S. 400, 403-4, 85 S. Ct. 1065 (1965). “[A] major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him.” *Id.*, at 406-7. As a result, “[I]t cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. *Id.*, at 404. In fact:

There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country’s constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment’s guarantee of due process of law.

Pointer, 380 U.S. at 405.

Under this provision, “witnesses” refers to all who “bear testimony”. *Crawford v. Washington*, 541 U.S. 36, 51, 124 S. Ct. 1354 (2004). “‘Testimony.’ in turn, is typically

‘[a] solemn declaration or affirmation made for the purposes of establishing or proving some fact.’” *Id.* (citations omitted). It applies both to “in-court testimony” and “out of court statements introduced at trial.” *Id.* at 50-1. “The constitutional text...reflects an especially acute concern with a specific type of out-of-court statement.” *Id.* at 51. “[T]his core class of ‘testimonial’ statements” includes:

ex parte in-court testimony or its functional equivalent -- that is, **material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pre-trial statements that declarants would reasonably expect to be used prosecutorially...extrajudicial statements...contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions...statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial...**

Crawford, 541 U.S. at 51-2. (Emphasis added and citations omitted).

Each of these out-of-court “testimonial statements” are subject to the accuser’s right to confrontation. *Crawford*, 541 U.S. at 68-9. This requires that they be subject to “testing in the crucible of cross-examination.” *Id.*, at 61. Accordingly, the Sixth Amendment places an absolute prohibition against the introduction of out-of-court “testimonial statements” made by any witness UNLESS: (1) the witness is unavailable; AND (2) the defendant had a prior opportunity to cross-examine the witness. *Id.*, at 68. Further, “a witness is not ‘unavailable’...unless the prosecutorial authorities have made a good faith effort to obtain his presence at trial.” *Barber v. Page*, 390 U.S. 719, 724-5, 88 S. Ct. 1318 (1968).

That such “testimonial statements” may have been produced by a “neutral”

government official or other individual does nothing to remove them from these constitutional constraints. *Crawford*, 541 U.S. at 66. To the contrary, “[I]nvolvement of government officers in the prosecution of testimony with an eye towards trial presents unique potential for prosecutorial abuse...a fact borne out time and again...” *Id.*, at 56. Such circumstances “implicate the core concerns of the old *ex parte* affidavit practice.” *Lilly v. Virginia*, 527 U.S. 116, 137, 119 S. Ct. 1887 (1999). When a court admits such a statement against a defendant where he has had no opportunity to cross-examine the maker, it is a clear violation of the Sixth Amendment. *Crawford*, 541 U.S. at 68-9.

These principles strictly limit judicial discretion. *Crawford*, 541 U.S. at 67-8. “Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence, much less to amorphous notions of ‘reliability.’” *Id.* At 61. “Admitting [such] statements [on the basis that they have been] deemed reliable by a judge is fundamentally at odds with the right of confrontation.” *Id.* Further, the very wisdom underlying the various exceptions which have been crafted to the hearsay rule are undetermined in such cases. *Id.*, at 56, n. 7. As a result, all such exceptions are completely superseded by the right to confrontation where out-of-court testimonial statements are involved. *Crawford*, 541 U.S. at 68.

The rule we are left with is clear and unequivocal: “Where testimonial evidence is at issue...the Sixth Amendment demands...unavailability and a prior opportunity for cross-examination” before such out-of-court statements may be introduced.” *Id.*

With respect to the evidence admitted by the Court in the instant case, it is admitted, in Dr. Staub’s testimony itself, that upwards of thirteen different scientists

participated in the processing and testing of the DNA evidence in this matter. Each of these scientists performed various functions in the testing process and made notes and reports based upon whatever aspect they were involved in. Dr. Staub, by his own admission, performed no “hands on” testing himself, nor was he actually present during any of the actual work done by any of the 13 scientists. There was no showing that the State has made a good faith effort to obtain the presence of these witnesses (i.e. the 13 scientists) for trial. Indeed, there was no indication whatsoever that these witnesses were in any way unavailable. Rather, it is clear that the State simply did not want to go to the expense and trouble of having to produce these witnesses for trial in this matter. Further, there is no argument being made that Mr. Inouye had ever received a prior opportunity to cross-examine any of these witnesses. Thus, neither of the requirements enunciated in *Crawford* were met in this case. As a result, if the lab testing, reports, etc., constitute “testimonial statements”, they are inadmissible.

Turning to the question of whether the contents of the lab report are testimonial in nature, we must first consider the elements constituting the crimes themselves. An essential element of each of the crimes charged in this case was the identity of the Defendant as the perpetrator of the crime. With this in mind, we have the following facts for consideration:

The testing and test results were done and created at the request of the prosecuting authorities under an existing contract between Orchid Cellmark and the Washington Association of Sheriffs and Police Chiefs to do such testing. Without this request, and without this contract, the testing and test results would not exist. Further, the testing was requested for the **sole** purpose of establishing the identity of the Defendant as the

perpetrator of these crimes. The request was made after the Defendant was a suspect in the case, and the testing was focused on him alone, as stated by Dr. Staub in his testimony. The primary focus of the Orchid Cellmark Lab in Dallas is, according to the testimony of Dr. Staub, “forensic casework”, and the work of the lab is done with an obvious eye towards litigation (unless, as Dr. Staub stated, the case settles by way of a guilty plea before trial).

Subjecting these facts to the fundamental principles enunciated in *Crawford*, the lab testing evidence and lab results are clearly testimonial in nature. They were done and produced “with an eye towards trial” “under circumstances which would lead an objective witness reasonably to believe that the testing and results would be available for use at trial.” Looking at the matter realistically and objectively, there is simply no other reason for the testing to have been done, and for the results to have been generated **other than** for their use in the trial of Mr. Inouye to attempt to establish him as the perpetrator of the crimes in question. In every way, the lab testing and the lab results satisfy the definition of “testimonial statements” under the *Crawford* analysis.

The State argued that the testimony of Dr. Staub, and the admission, through his testimony, of the lab testing procedures and lab results, were admissible under either ER 703 or ER 803(a)(6) or (7). However, where testimonial statements are involved, the Sixth Amendment’s protection is not subject “to the vagaries of the rules of evidence, much less to amorphous notions of ‘reliability.’” *Crawford*, 541 U.S. at 61. “Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.” *Id.*, at 62. While there may be no doubt that most courts will act in utmost good faith when they find reliability, the Framers “would

not have been content to indulge this assumption.” *Id.*, at 67. The “unpardonable vice” of reliability as a test is “its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.” *Id.*, at 63. “[T]he Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by “neutral” government officers.” *Crawford*, 541 U.S. at 66. The same holds true for “neutral” government agents, such as the 13 Orchid Cellmark scientists who performed the DNA testing in this case. The Framers were keenly aware of the hazards presented by such practices, hazards that do “not evaporate when testimony happens to fall within some broad, modern hearsay exception.” *Id.*, at 56, n. 7.

The rule enunciated by the *Crawford* court is clear, strict and unambiguous. “Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: “confrontation.” *Crawford*, 541 U.S. at 68-9. This requires that “testimonial statements” be assessed “by testing in the crucible of cross-examination” *Id.*, at 61. Where out-of-court testimonial “evidence is at issue...the Sixth Amendment demands...unavailability and a prior opportunity for cross-examination” before it may be introduced. *Id.*, at 68-9. These conditions are “necessary” and “dispositive” in determining the admissibility of any “testimonial statements.” *Id.*, at 55-6. Since neither condition was satisfied in the instant case, the lab testing procedures and the lab testing results in this matter should not have been admissible absent the in-court testimony of the scientists who actually performed the testing. Holding otherwise violated Mr. Inouye’s constitutional rights to confrontation and due process.

Logistical difficulties are in no way a valid reason to circumvent the Sixth

Amendment. *Crawford* did not dispense with the right of confrontation for witnesses who might create “logistical challenges” for the State or for witnesses whose presence may be unreasonable to require at every level or every proceeding. “The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts.” *Crawford* 541 U.S. at 54.

The fact the logistical difficulties should play no part in the right to confrontation was addressed in the 2005 case of *People v. Orpin*, 8 Misc. 3d 768 (2005), a New York case which held that written certifications of calibrations and simulator solutions in a DWI case were not admissible under the *Crawford* analysis, and that the actual testimony of the technicians was required under the Confrontation Clause. In addressing the logistical difficulties inherent in its ruling, the court stated as follows:

The court is mindful of the practical concerns entailed in having the personnel who performed the calibration and simulator solution analyses testify at each DWI trial in New York. But as the recent sentencing guideline cases show, see *United States v. Booker*, ___ U.S. ___, 125 S. Ct. 738 (2005); *Blakely v. Washington*, 542 U.S. ___, 124 S. Ct. 2531 (2004), the current Court’s formalistic approach to interpreting the guarantees of the Sixth Amendment provides little room for accommodation of the pragmatic issues its decisions might raise in the day-to-day administration of criminal justice. Certainly *Crawford*, a decision in which seven of nine judges joined, shows no departure from this trend.

Further, the truth-seeking value of cross examination in this context is not merely theoretical. Substantial problems with DWI testing in this state were uncovered in the 1990s, and there have also been recent problems even with the reliability of the FBI’s laboratory analyses. Subjecting the persons who conduct these calibrations tests to the “crucible of cross examination” will help ensure the reliability of their work and protect the

integrity of the judicial system by avoiding convictions based on faulty breath test results.

Clearly, the 13 scientists who performed the testing of the DNA evidence in this case were available for testimony at trial. The fact that producing them for such testimony may have been expensive, inconvenient, or cumbersome is in no way a valid excuse to have dispensed with the constitutional requirement of confrontation guaranteed to the Defendant in this case.

The recent United States Supreme Court case of *Melendez-Diaz v. Massachusetts*, 557 U.S. _____, decided on June 25, 2009, seem to put the matter to rest, and clearly indicates that the Defendant's constitutional right to confront witnesses was violated by the court allowing the testimony of Dr. Staub in lieu of the analysts who actually did the DNAS testing in this case. In *Melendez-Diaz, supra.*, the State of Massachusetts, in lieu of actual testimony from the testing personnel, introduced certificates from the state laboratory analysts stating that the material seized by the police and connected to the defendant was cocaine of a certain quantity. Melendez-Diaz objected to the introduction of those certificates, arguing that the Confrontation Clause and the *Crawford* case required that the analysts be called to testify in person.

In holding that the Confrontation Clause had indeed been violated, the Supreme Court described the challenged documents as follows:

...three 'certificates of analysis' showing the results of the forensic analysis performed on the seized substances. The certificates reported the weight of the seized bags and stated that the bags '[h]a[ve] been examined with the following results: The substance was found to contain: Cocaine.' The certificates were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health, as re-

quired under Massachusetts law. (Citations to record omitted).

The Supreme Court in *Melendez-Diaz* specifically discussed the applicability of the *Crawford* case and the Confrontation Clause to the “certificates” at issue in that case:

Our opinion [in *Crawford*] described the class of testimonial statements covered by the Confrontation clause as follows:

‘Various formulations of this core class of testimonial statements exist: *ex parte* in-court testimony or its functional equivalent - that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements...contained in formalized materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial.’

There is little doubt that the documents at issue in this case fall within the ‘core class of testimonial statements’ thus described. Our description of that category mentions affidavits twice...The documents at issue here, while denominated by Massachusetts law ‘certificates,’ are quite plainly affidavits: ‘declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths.’ They are incontrovertibly a ‘solemn declaration or affirmation made for the purpose of establishing or proving some fact. The fact in question is that the substance found in the possession of Melendez-Diaz and his codefendants was, as the prosecution claimed, cocaine - the precise testimony the analysts would be expected to provide if called at trial. The ‘certificates’ are functionally identical to live, in-court testimony, doing ‘precisely what a witness does on direct examination.

...

In short, under our decision in *Crawford* the analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to 'be confronted with' the analysts at trial. (Citations omitted).

The application of the holding in *Melendez-Diaz* to the facts of the instant case is clear and subject to no need for interpretation. In fact, the evidence at issue here (i.e. the testimony of Dr. Staub) was simply that, and was not even as compelling as the "affidavits" submitted in *Melendez-Diaz*. Dr. Staub did no testing whatsoever, whereas it could be assumed that, at the very least, the affidavits in *Melendez-Diaz* were prepared by those who actually did the testing. Here, Dr. Staub was simply referring to and reciting unsworn documents in support of one of the ultimate conclusions in the case. Clearly, this falls within the "core class of testimonial statements" which invoke the Confrontation Clause. It was clear constitutional error for the Court to allow the testimony of Dr. Staub in lieu of the live testimony of the analysts who performed the actual analyses.

II

There was not sufficient evidence from which a rational trier of fact, viewing the evidence in the light most favorable to the State, could have found beyond a reasonable doubt that the Defendant acted with deliberate cruelty in the commission of the crimes charged in counts III, IV, and V.

In deciding whether the finding of "deliberate cruelty" was based upon sufficient **evidence**, a reviewing court must view the **evidence** in the light most favorable to the State. The issue becomes whether any rational trier of fact could have found the essential elements of that aggravating factor beyond a reasonable doubt. *State v. Salinas*, 119 Wn. 2d 192, 201, 829 P. 2d 1068 (1992). All reasonable inferences from the **evidence** must be

drawn in favor of the State and interpreted most strongly against the Defendant. *Salinas, supra.*, at 201; *State v. Craven*, 67 Wn. App. 921, 928, 841 P. 2d 774 (1992).

Circumstantial **evidence** is no less reliable than direct **evidence**, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” *State v. Delmarter*, 94 Wn. 2d 634, 638, 618 P. 2d 99 (1980). A claim of insufficiency admits the truth of the State’s **evidence** and all inferences that reasonably can be drawn therefrom. *Salinas, supra.*, at 201; *Craven, supra.*, at 928.

The jury was instructed, consistent with well-established case law, as to the definition of “deliberate cruelty” in jury instruction no 27 (CP 100) as follows:

Deliberate Cruelty consists of gratuitous violence or other conduct which inflicts physical, psychological or emotional pain as an end in itself. The cruelty must go beyond that normally associated with the commission of the charged offense.

Given the manner in which the Defendant was charged in this case, there is no conduct in which the Defendant allegedly engaged which could justify a finding of deliberate cruelty. The choking of the victim was part and parcel of the charge of Assault of a Child in the Second Degree and, as such, cannot form the basis for a finding of deliberate cruelty as to the three counts of rape. Similarly, there was nothing in the testimony concerning the three counts of rape which, as a matter of law, manifested “deliberate cruelty” to the victim, as that term has been defined by case law. While the acts of rape described by the victim in the case were horrifying (as any act of rape necessarily is), there was no evidence that the actions of her assailant were intended to inflict “physical, psychological or emotional pain as an end in itself”. Rather, any and all actions were actions done to accomplish the act of rape, and nothing more. In no way

does the testimony establish, beyond a reasonable doubt, that the assailant acted with deliberate cruelty, for purposes of the imposition of an exceptional sentence.

Additionally, even taking into consideration the jury's finding, the Court must had to determine whether that aggravating factor (i.e. deliberate cruelty) was a substantial and compelling reason to impose an exceptional sentence. Given the other charges for which the Defendant was convicted, and given the length of the sentence being faced by the Defendant even under standard range sentencing options, it is respectfully submitted that these was no basis for the imposition of an exceptional sentence in this case.

III

Where the Defendant was convicted by the jury of crimes for which he was not charged, he is entitled to dismissal of the original charges with prejudice or, in the alternative, a new trial as to those counts.

Article I, Section 22 of the Washington State Constitution provides, in relevant part, as follows:

In criminal prosecutions the accused shall have the right... to demand the nature and cause of the accusation against him.

It follows, as a matter of logical reasoning, that an accused cannot be legally and constitutionally convicted of a crime with which he was not charged. Indeed, as stated by our Supreme Court over 100 years ago in *State v. Ackles*, 8 Wash. 462, 464-65, 36 P. 597 (1894):

While it is true that the jury may find a defendant not guilty of the crime charged, but guilty of an offense of lesser degree, or of an offense necessarily included within that charged, it is also true that **'accusation must precede conviction,' and that no one can legally be convicted of an offense not**

properly alleged... This doctrine is elementary and of universal application, and is founded on the plainest principle of justice.

In the instant case, the crime of which the Defendant was convicted by the jury, i.e. Rape of a Child in the First Degree, was neither a lesser degree or a lesser included offense of the crime of Rape in the First Degree. The elements are different, and proof of one crime does not necessarily include, as a matter of law, proof of the other. As such, the Defendant was convicted of a crime with which he had never been charged, in clear violation of Washington constitutional provisions.

Having excused the jury in the instant case, the court was unable to remedy this situation, even if it had been deemed that the jury simply made an error. As stated in *State v. Zwiefelhofer*, 75 Wn. App. 440, 444, 880 P. 2d 58 (1994):

Only under limited circumstances may a trial court, upon determining that the verdict form is inaccurate, correct the verdict to conform to the actual finding of the jury. The jury must not have passed from the trial court's control, jurors must not have had an opportunity to mingle with nonjurors, and the jurors must not have renewed their deliberations or discussed the merits of the case. The law presumes that the jury is contaminated when jurors 'pass from the sterility of the court's control and...separate or disperse and mingle with outsiders.' A jury simply can no longer function as a jury after the court has received and recorded the verdict and discharged the jury. (Citations omitted).

The same argument would have applied to any attempt to re-convene the jury in the instant case to correct its verdicts. Such would be patently unconstitutional. Thus, the Defendant's convictions as to Counts III, IV, and V must be vacated and the charges dismissed or, at the very least, a new trial ordered as to those counts.

IV

The three convictions of Rape in the First Degree should be considered “same criminal conduct” for purposes of sentencing, and sentence should be imposed pursuant to RCW 9.94A.589(1)(a).

At the sentencing hearing in this matter, the State relied on the case of *State v. Grantham*, 84 Wn. App. 854, 932 P. 2d 657 (1997), in arguing that the three rape convictions arise from “separate and distinct criminal conduct”, and thus should be sentenced pursuant to the provisions of RCW 9.94A.589 (1)(b).

However, it is submitted that the case of *State v. Tili*, 139 Wn. 2d 107, 985 P. 2d 365 (1999), a case decided subsequent to *Grantham*, and which discusses and distinguishes *Grantham*, is far more on point in the instant case. In this regard, it is critical to note the description of the assault and rape, as described by the victim in her court testimony. By all accounts, given (1) the observation of the victim as to the time of her clock at the very inception of the incident and (2) the time of the initial call to 911, the entire duration of the incident was in the neighborhood of 15 minutes, **at most**. Given other factors, such as (1) the time one would assume would be required to gather one’s self together after such an incident, (2) the time it took the victim to ultimately make it to her mother’s room, with stops on the way, and (3) the time it took for the victim’s mother to realize something was wrong with her child (as testified to by the victim’s mother), there is every reason to conclude that the actual incident itself took far less than 15 minutes. Additionally, there is nothing in the victim’s testimony which gives any indication as to how long the choking (i.e. the assault) lasted before the sexual assault began, or addressing in any way the time involved in dealing with removing the family

pet from the room, which apparently occurred after the choking assault but before the commencement of the sexual assault.. Similarly, there is nothing in the victim's testimony which indicates the actual duration of the sexual assault itself, nor is there any indication in the victim's testimony of anything but an ongoing and continuous sexual assault, once that sexual assault started. All of these factors operate to bring the instant case within the ambit of *Tili*, as set forth below.

In the *Tili* case, *supra.*, the Defendant was convicted of three counts of First Degree Rape, one count of First Degree Burglary, and one count of Second Degree Assault. In that case, Tili had entered the victim's apartment, and attacked the victim with a heavy metal frying pan. After beating the victim into submission, Tili used his fingers to penetrate the victim's anus and vagina. These acts were done "separately, not at the same time". Tili told the victim to say that she liked it, and the victim complied with that order. Tili then attempted to penetrate the victim's anus with his penis, but stopped, and instead inserted his penis into the victim's vagina. Tili was charged and convicted of three counts of First Degree Rape, one for each independent penetration of a different bodily orifice or the same orifice with a different object. He was sentenced to consecutive sentences for the three rape convictions, under the analysis set forth in RCW 9.94A.400(1)(b), which is the predecessor to the current statute, viz. RCW 9.94A.589(1).

The issue addressed in the *Tili* case was whether the three rape convictions should have been deemed to have constituted "same criminal conduct", thus triggering the concurrent sentence provisions of RCW 9.94A.400 (1)(a), rather than the consecutive sentence provisions of RCW 9.94A.400(1)(b). In framing the issue, the Supreme Court stated as follows:

For multiple crimes to be treated as the ‘same criminal conduct’ at sentencing, the crimes must have (1) been committed at the same time and place; (2) involved the same victim; and (3) involved the same objective criminal intent. In the instant case, Tili’s offenses involved the same victim, occurred at the same place, and were nearly simultaneous in time. The only issue remaining, therefore, is whether the three acts of rape involved the same objective criminal intent. The relevant inquiry for the intent prong is to what extent did the criminal intent, when viewed objectively, change from one crime to the next.

The State in *Tili* relied upon *State v. Grantham, supra.*, in support of its argument that Tili’s rapes should not be considered “same criminal conduct”. In holding that Tili’s acts should be considered “same criminal conduct”, and in distinguishing the facts in *Grantham*, the Supreme Court stated as follows:

The evidence in *Grantham* supported a conclusion that the criminal episode had ended with the first rape: ‘*Grantham*, upon completing the act of forced anal intercourse, had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act.’ *Grantham*, 84 Wn. App. At 859. After raping his victim, *Grantham* stood over her and threatened her not to tell. He then began to argue with and physically assault his victim in order to force her to perform oral sex. Thus, *Grantham* was able to form a new criminal intent before his second criminal act because his ‘crimes were sequential, not simultaneous or continuous.’ *Grantham* 84 Wn. App. at 856-57, 859. In contrast to the facts in *Grantham*, Tili’s three penetrations of I.M. were continuous, uninterrupted, and committed within a much closer time frame - approximately two minutes. This extremely short time frame, coupled with Tili’s unchanging pattern of conduct, objectively viewed, renders it unlikely that Tili formed an independent criminal intent between each separate penetration. *Grantham*, therefore, is factually distinct. The present case, on the other hand, is more factually similar to *State v. Walden*, 69 Wn. App. 183.

The case of *State v. Walden*, 69 Wn. App. 183, 847 P. 2d 956 (1993), specifically

relied upon by the *Tili* court, is also instructive to the instant analysis. In that case, the Defendant Walden dragged the victim up a hill and forced the victim to masturbate and then perform fellatio upon Walden. Walden then unsuccessfully attempted to perform anal intercourse on the victim. He was ultimately convicted of Second Degree Rape and Attempted Second Degree Rape. Walden argued on appeal that the two convictions should constitute “same criminal conduct”. In agreeing with Walden’s position, and holding that the two offenses do constitute the “same criminal conduct”, the Court of Appeals stated as follows at page 188:

Walden argues that the conduct charged in counts 1 and 2 constituted the same criminal conduct because the acts occurred at the same place and nearly at the same time, the same victim was involved, and each count involved the same criminal objective. We agree. When viewed objectively, the criminal intent of the conduct comprising the two charges is the same: ‘sexual intercourse’. Accordingly, the two crimes of rape in the second degree and attempted rape in the second degree furthered a single criminal purpose. In addition, one victim was involved and the time and place of the crimes remained the same. Therefore, under RCW 9.94A.400(1)(a), the trial court abused its discretion in failing to count the offenses as one crime.

Aside from the clear parallels to the facts of the instant case, one of the more significant factors of the *Walden* case is the absence, anywhere in the opinion, of any reference to the actual time frames involved or the actual duration of the sexual assault. Rather, the case was decided upon an objective view of the facts, and the critical fact that the sexual assault was continuous and uninterrupted, contrary to the facts in the *Grantham* case, relied upon by the State in its argument. The same can be said of the facts in the instant case.

Under the clear rationale of *Tili* and *Walden*, the three rapes in the instant case should be considered “same criminal conduct” for purposes of sentencing. They involved the same victim, the same location, and a compacted time frame. There was, according to the testimony, no interruption at all once the sexual assault commenced and, hence, according to the clear holdings of the cited cases, no reason to conclude that the criminal intent changed in any way from one act to the next. The three counts of Rape in the First Degree should have been sentenced, as should have all of the charged crimes, under the provisions of RCW 9.94A.589(1)(a), with presumptively concurrent sentences.

V

Assuming that Counts III, IV, and V are found to constitute “same criminal conduct”, the deadly weapon enhancements imposed therein should run concurrently, not consecutively.

This specific issue is currently pending before the Washington Supreme Court in the case of *State v. Mandanas*, 139 Wn. App. 1017 (2007), *review granted*, 163 Wn. 2d 1021 (2008). The case was argued before the Supreme court on October 14, 2008, and a decision from the Court will be forthcoming, and should control this issue in this case.

E. CONCLUSION

For the reasons stated herein, this court should (a) reverse the Defendant’s convictions and remand for a new trial, (b) dismiss counts III, IV, and V with prejudice,

and/or (c) remand to the trial court for a new sentencing hearing.

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Respectfully submitted,



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CERTIFICATE

I certify that I mailed a copy of the Brief of Appellant by depositing same in the United States Mail, first class postage prepaid, to the following people at the addresses indicated:

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