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

IN RE THE PERSONAL RESTRAINT  
PETITION OF:

JAMES MITCHELL,

Petitioner.

NO. 52642-5

STATE'S RESPONSE TO PERSONAL  
RESTRAINT PETITION

I. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION:

1. Must the petition be dismissed where the petitioner cannot show actual  
prejudice to a constitutional right?

2. Must the petition be dismissed because it does not establish a fundamental  
defect which inherently results in a complete miscarriage of justice?

II. STATUS OF PETITIONER:

Petitioner, James Mitchell, is restrained pursuant to a Judgment and Sentence  
(Appendix "A") entered in Pierce County Cause No. 14-1-02979-1.

On March 25, 2016, petitioner was found guilty of Murder in the First Degree.

III. FACTS

On February 6, 1993, Shawonika Elliott was a seven year old girl spending the  
night with her cousins at her aunt's apartment. 1/26/2016 RP 314. Elliot's aunt, Linda

1 Robinson, often provided childcare for her sisters' children. 1/25/2015 RP 250. The cousins  
2 were sleeping in the living room of the small one-bedroom apartment. 1/26/2016 RP 315.  
3 Elliott was awakened by the smoke-alarm going off. 1/26/2016 RP 316. She remembered  
4 that Robinson had started to make Top-Ramen. 1/26/2016 RP 319. Elliott smelled  
5 something burning in the kitchen and wondered why her aunt was burning the Top-Ramen.  
6 1/26/2016 RP 320. Elliott went to the kitchen to find out what was going on. *Id.*

7  
8 Elliott found Robinson laying on the kitchen floor in a pool of blood. 1/26/2016 RP  
9 321. Elliott turned off the stove. 1/26/2016 RP 320. She then went across the landing to  
10 ask the neighbor to call 911. 1/26/2016 RP 322.

11 Police and medical aid arrived and discovered that Robinson was dead. 1/27 2016  
12 RP 445. Detectives arrived to investigate. They observed that Robinson had been stabbed  
13 multiple times in the back. 1/27/2016 RP 461. They found the phone nearby. It had been  
14 removed from the wall; the cord disconnected or cut. 1/27/2016 RP 462, 2/8/2016 RP 810.  
15 Detectives noted blood smears on the refrigerator. 2/8/2016 RP 807. There was blood  
16 spatter in the hall and on the front of the nightstand in the bedroom. 2/8/2016 RP 814, 816.  
17 Blood samples were collected from the bathroom floor, the hallway, the bedroom, the  
18 bedroom vanity and dresser, a child's coat, and the kitchen wall. 2/3/2016 RP 525.

19 An autopsy confirmed that Robinson had been stabbed several times in the back;  
20 actually 10 times. 2/9/2016 RP 974. Robinson had numerous defensive cutting or stab  
21 wounds on her hands and arms. 2/9/2016 RP 969, 970, 973. She had numerous superficial  
22 cut or stab wounds on her chest and torso. 2/9/2016 RP 968, 969. Two of the stab wounds  
23 to her back were very deep. One penetrated the chest cavity and lung. 2/9/2016 RP 977.  
24  
25

1 Another punctured her liver. *Id.* The cause of death was from blood loss or a punctured  
2 lung, caused by the knife wounds. 2/9/2016 RP 978.

3 In 2013, Det. Kobel of the Pierce County Sheriff's Dept. began to reexamine the  
4 case. 1/25/2016 RP 182. He reviewed the photographs and evidence that had been  
5 collected. 1/25/2016 RP 184-185. He sent the blood sample swabs to the crime laboratory  
6 for DNA analysis. 1/25/2016 RP 208. At least five of the samples, including those taken  
7 from the locations in the kitchen and the bedroom were positive as the DNA of the  
8 defendant. 2/10/2016 RP 65.

9  
10 Police located the defendant, who was living in Florida. 2/10/2016  
11 RP 103. The defendant was arrested and returned to Washington. 2/10/2016 RP 104.

12 IV. ARGUMENT:

13 A. THE TRIAL COURT ISSUED A TENTATIVE IN LIMINE RULING—IT  
14 DID NOT EXCLUDE PETITIONER'S OTHER SUSPECT EVIDENCE.

15 The trial court's order granting the state's motion to exclude other suspect evidence  
16 was tentative. CP 187. The trial court unambiguously expressed the tentative nature of its  
17 ruling in a written pretrial order:

18 The defendant has the burden to produce the necessary evidence of  
19 connection between the crime and the other suspects. Here, the defendant  
20 has failed to produce such evidence. Defendant may re-litigate the issue of  
21 other suspect evidence based on evidence produced or proffered at trial.

22 *Id.* The consequences of a tentative in limine ruling are well settled.

23 If the trial court has made a definite, final ruling, on the record, the parties  
24 should be entitled to rely on that ruling without again raising objections  
25 during trial. When the trial court refuses to rule, or makes only a tentative  
ruling subject to evidence developed at trial, the parties are under a duty to  
raise the issue at the appropriate time with proper objections at trial.

When a ruling on a motion in limine is tentative, any error in admitting or  
excluding evidence is waived unless the trial court is given an opportunity to  
reconsider its ruling.

1 (internal quotation marks, braces, and citations omitted) *State v. Powell*, 126 Wn.2d 244,  
2 256, 893 P.2d 615, 623 (1995). “A defendant who does not seek a final ruling on a motion  
3 in limine after a court issues a tentative ruling waives any objection to the exclusion of the  
4 evidence.” *State v. Riker*, 123 Wn.2d 351, 369, 869 P.2d 43, 53 (1994) (citing *State v.*  
5 *Carlson*, 61 Wn. App. 865, 875, 812 P.2d 536 (1991)).

6 Petitioner’s claim that the trial court excluded “other suspect” evidence from his  
7 trial is false and should be rejected. Petitioner retained a full and fair opportunity to  
8 present such evidence in the course of his trial.

9  
10 B. PETITIONER HAS FAILED TO IDENTIFY ANY ADMISSIBLE OTHER  
11 SUSPECT EVIDENCE THAT SHOULD HAVE BEEN ADMITTED AT  
12 TRIAL.

13 Petitioner presents the following items as other suspect evidence that his trial  
14 counsel should have had admitted at trial: Attachments D, E, F, and G. Petition at 23-26.  
15 Petitioner does not tell this court what that evidence is.<sup>1</sup> Petitioner has the burden of  
16 demonstrating the admissibility of his proffered other suspect evidence. *State v.*  
17 *Pacheco*, 107 Wn.2d 59, 67, 726 P.2d 981 (1986). Petitioner leaves it for this Court to sort  
18 through his attachments and make evidentiary decisions and evidentiary arguments on his  
19 behalf. The petition completely avoids the issue of evidentiary admissibility and should be  
20 denied for that reason. Alternatively, even if this Court does sort through petitioner’s  
21 attachments D, E, F, and G, there is no substance to petitioner’s claim that his trial counsel  
22 deficiently failed to present other suspect evidence.

23 Defendant’s “other suspect” evidence argument collapses without the testimony of  
24 Mark McGruder. Petitioner argues that Mark McGruder is the witness who established  
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<sup>1</sup> The documents themselves are layered hearsay.

1 that Lee Chandler (the “other suspect”) had the opportunity to kill Ms. Robinson and “had  
2 a history of acting out violently over drugs and money, and acting ‘scary’ and paranoid  
3 when smoking crack-cocaine, which he did on a regular basis.” Petition at 24. Without  
4 Mr. McGruder’s statements all that remains of petitioner’s purported “other suspect”  
5 evidence are claims that Mr. Chandler “had a relationship with Ms. Robinson involving  
6 sex, drugs and money.” *Id.* This assertion of “other suspect” evidence is insufficient  
7 because it fails to even promise evidence demonstrating “an adequate nexus between the  
8 alleged other suspect and the crime.” *State v. Franklin*, 180 Wn.2d 371, 373, 325 P.3d  
9 159, 160 (2014).

10  
11 Petitioner has failed to establish that his trial lawyer deficiently failed to call Mr.  
12 McGruder as a witness. Specifically, petitioner has failed to demonstrate that Mr.  
13 McGruder was available as a witness that his trial counsel could have called. Mark  
14 McGruder died on February 23, 2010, about six years before petitioner’s trial commenced.  
15 Appendix B. Petitioner points to statements made by Mr. McGruder, but those statements  
16 are hearsay.<sup>2</sup>

17 Sylvia Patrick told Detective O’Hern that Lee Chandler and Ms. Robinson were  
18 smoking buddies, and that Ms. Robinson told her that “Lee would call and have Linda go  
19 and get the stuff and bring. [sic]” Petition, Attachment D at 000724. Ms. Patrick also said  
20 “I heard two days before from Linda that he, parenthesis, Lee, owed her some money and  
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25 <sup>2</sup> Although Retired Detective O’Hern’s statements made in his notes were admissible as past recollection  
recorded statements pursuant to ER 803(a)(5), Mr. McGruder’s statements to Retired Detective O’Hern are  
merely inadmissible hearsay.

1 that he was coming to pay her back. I was there.” *Id.* Petitioner has failed to demonstrate  
2 how these hearsay relations of Ms. Robinson to Ms. Patrick were admissible evidence  
3 available to petitioner’s trial counsel. Alternatively, petitioner has failed to demonstrate  
4 that Ms. Patrick was, herself, available to petitioner’s trial counsel as a witness.

5         Petitioner presents Lee Chandler as the “other suspect” petitioner’s trial counsel  
6 should have presented at trial. Petition at 23-25. Attachment D contains Lee Chandler’s  
7 statement that he had known Linda Robinson, that they were friends, and that Ms.  
8 Robinson would come over to the house and sometimes smoke crack, sometimes drink  
9 wine, and sometimes have sex. Petition, Attachment D at 000722. Mr. Chandler told  
10 Detective O’Hern that the last time that he saw Ms. Robinson was January 7. *Id.* Mr.  
11 Chandler also made similar statements as related in Petition, Attachment E. This is the  
12 report following Mr. Chandler’s polygraph examination. None of those statements provide  
13 any kind of nexus between Mr. Chandler and the crime. *Franklin, supra.* Furthermore,  
14 petitioner has failed to demonstrate that Mr. Chandler was a witness available to his trial  
15 counsel who would have voluntarily come forward and testified to his own self-  
16 incrimination in the course of petitioner’s trial.

17  
18         Petitioner argues that Mr. Chandler “was the investigating officer’s main suspect.”  
19 Petition at 23. This statement is not admissible evidence and petitioner’s trial counsel  
20 cannot be faulted for any failure to present it.

21  
22         Petition, Attachment F relates Retired Detective O’Hern’s recollection that Lee  
23 Chandler took a polygraph and failed (Petition, Attachment F at 000943). Petition,  
24  
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1 Attachment E is the report following that polygraph. Petitioner’s trial counsel would have  
2 obviously recognized that the polygraph was inadmissible as evidence.<sup>3</sup>

3 Petitioner has failed to demonstrate that his trial counsel had viable “other suspect”  
4 evidence that she could have presented at trial. To admit evidence suggesting that another  
5 person committed the crime, the defendant must lay a foundation establishing a “train of  
6 facts or circumstances” that provides a clear nexus between the other person and the  
7 crime. *State v. Strizheus*, 163 Wn. App. 820, 830, 262 P.3d 100 (2011).

8 The offered evidence must demonstrate a “step taken by the third party that  
9 indicates an intention to act” on the motive or opportunity. *State v.*  
10 *Rehak*, 67 Wn.App. 157, 163, 834 P.2d 651 (1992). The defendant has the  
11 burden of showing that the other suspect evidence is admissible. *State v.*  
*Pacheco*, 107 Wash.2d 59, 67, 726 P.2d 981 (1986).

12 *Id.*, 163 Wn. App. at 830. Petitioner has failed to demonstrate that his trial counsel could  
13 have presented admissible other suspect evidence at trial. The claim of ineffective  
14 assistance of counsel should fail because petitioner has failed to demonstrate deficient  
15 performance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80  
16 L.Ed.2d 674 (1984).

17 Alternatively, petitioner has failed to satisfy the actual prejudice prong of  
18 *Strickland* because he has not demonstrated how the failure of his trial counsel to secure  
19 admission of any item or items of evidence resulted in “a reasonable probability that, but  
20 for counsel’s deficient performance, the outcome of the proceedings would have been  
21 different.” *State v. Lopez*, 190 Wn.2d 104, 125, 410 P.3d 1117, 1127 (2018) (citing  
22

23 <sup>3</sup> See *In re Hawkins*, 169 Wn.2d 796, 802, 238 P.3d 1175, 1177 (2010) where the Supreme Court stated that  
24 the courts have consistently recognized as polygraph examinations as unreliable and, unless stipulated to by  
25 all parties, inadmissible. Petitioner makes an argument that the inadmissible polygraph evidence would have  
been admissible in an ER 104(a) hearing. Petition at 24. This is wrong. One of the crucial points in  
evaluating the admissibility of other suspect evidence is that the strength of the “other suspect” evidence is  
not to be considered by the trial court. *State v. Franklin*, 180 Wn.2d 371, 372-73, 325 P.3d 159, 160 (2014).

1 multiple cases). Petitioner’s “other suspect evidence” argument is devoid of any  
2 evidentiary discussion. It is impossible for petitioner to prove prejudice resulting from the  
3 non-admission of evidence when petitioner fails to identify the evidence that should have  
4 been admitted.

5 C. THE PROSECUTOR FAIRLY ARGUED THE BLOOD EVIDENCE IN  
6 THIS CASE.

7 The prosecutor presented the following statement in his closing argument:

8 He was there -- he was there that night, and he bled that night; and he didn't  
9 just bleed a little bit, and he didn't just bleed in one place. He bled far and  
10 wide in that apartment, and his blood was mixed with hers which means they  
11 bled at the same time.

12 2/22/16 VRP 1081. Petitioner does not challenge the prosecutor’s argument regarding the  
13 volume of his blood deposited in Ms. Robinson’s apartment. Petition at 28-31. Nor does  
14 petitioner challenge the prosecutor’s argument that his blood was mixed with Ms.  
15 Robinson’s blood.<sup>4</sup> *Id.* Petitioner only challenges the inference that the prosecutor asked  
16 the jury to draw from the evidence “. . . which means they bled at the same time.” Defense  
17 counsel did not object to this argument during the trial because it was fair argument. The  
18 prosecutor in this case argued an inference from the available facts. This argument is not  
19 misconduct.

20 The prosecutor later presented a related, but different argument:

21 But more importantly than that is, actually, the blood that's on the jacket.  
22 Now, you heard a lot of different blood evidence, and you took notes, and  
23 maybe you made a chart, maybe you haven't; but if you did make a chart,  
24 what you're going to see is that the blood that was on Linda's jeans was Mr.  
25 Mitchell's, and the blood that was on the dresser was Mr. Mitchell's and the  
blood on the envelope. The blood on the jacket was Mr. Mitchell's and then  
a second donor consistent with Linda Robinson which only makes sense  
because it was transfer blood; remember that? Detective Kobel told you the

<sup>4</sup> Testimony as to mixed samples of Ms. Robinson’s and Petitioner’s blood is found at 2/10/16 VRP 59, 63.  
Testimony relating to a mixed sample of Petitioner’s blood and a sample which could neither include nor  
exclude Ms. Robinson’s blood is found at 2/10/16 VRP 48-50.

1 blood on the dresser and on the papers, that was drops; but the blood on the  
2 jacket was transfer blood from touching. If you're cut and you drip blood, it's  
3 your blood. If you've just murdered somebody with, what, twelve, fourteen  
4 stab wounds, your hands are going to be bloody with your blood and her  
5 blood; so it's significant that the blood on the jacket is both transfer blood and  
6 mixed blood because it shows not only did Mr. Mitchell bleed there that night,  
7 he bled at the same time as Linda; and the reason that he bled at the same  
8 time as Linda is that he murdered Linda with a knife.

6 2/22/16 VRP 1087-88. The argument that Petitioner's blood is found on the jeans Ms.  
7 Robinson was wearing when she was stabbed to death is relevant evidence which really  
8 does tend to show that petitioner was the person who stabbed Ms. Robinson to death.

9 The prosecutor reiterated the argument near the conclusion of his closing argument:

10 We know that Mr. Mitchell attacked her in her own home, that he came at her  
11 from the front, and she defended herself. That means there was a struggle.  
12 We know that he got cut because he bled, and he bled at the exact same time  
13 that she did, and we know when she bled. She bled when she was murdered.  
14 He bled at the same time because he was the murderer, and he left his blood  
15 in the bedroom and on the phone cord and on the back of Linda Robinson's  
16 pants.

17 This argument summarizes the arguments already presented.

18 The prosecutor presented the argument from another angle during rebuttal:

19 You know, time passes, memories fade, people make up stories; but the one  
20 thing that doesn't fade and doesn't make up stories, that has no interest or bias  
21 in the outcome is the DNA, the DNA of the killer; and we know it's the killer  
22 because of where it was deposited away from the body, on the back of the  
23 body, in the bedroom, how it was deposited, drips, not spatter from the fight,  
24 drips from a cut; and when it was deposited, the same time that Linda  
25 Robinson bled, mixed with her blood. She bled that night when she was  
murdered, and Mr. Mitchell's blood mixed with hers because he's the one who  
murdered her.

22 2/22/16 VRP 1143-44.

23 A petitioner alleging prosecutorial misconduct where there was no  
24 contemporaneous objection "must show the prosecutor's misconduct was  
25 so flagrant and ill intentioned that (1) no curative instruction would have obviated any

1 prejudicial effect on the jury and (2) the resulting prejudice had a substantial likelihood of  
2 affecting the jury verdict.” (internal quotation omitted) *State v. Scherf*, 192 Wn.2d 350,  
3 394, 429 P.3d 776, 800 (2018). There is nothing “flagrant and ill-intentioned” about this  
4 argument.

5         The prosecutor in this case did not just rely upon petitioner’s blood mixed with Ms.  
6 Robinson’s to prove that defendant stabbed Ms. Robinson to death. He also relied upon  
7 the distribution of petitioner’s dripped blood throughout Ms. Robinson’s apartment,  
8 petitioner’s blood (both mixed and transferred) upon Ms. Robinson’s clothes, petitioner’s  
9 blood on the severed telephone cord. This was fair argument based upon the evidence  
10 presented. It was not prosecutorial misconduct. It was certainly not flagrant and ill-  
11 intentioned.  
12

13         Petitioner’s Confrontation Clause argument is frivolous, because the prosecution in  
14 this case did not imply that defendant tailored his testimony and the State introduced no  
15 new evidence in its closing and rebuttal arguments. *See State v. Martin*, 171 Wn.2d 521,  
16 536, 252 P.3d 872 (2011).

17             D.         THE PROSECUTOR FAIRLY ARGUED DEFENDANT’S  
18                         CREDIBILITY IN CLOSING ARGUMENT.

19         Petitioner argues that the prosecutor “spent a considerable portion of his closing  
20 argument telling the jury that he believed Mr. Mitchell’s testimony was a lie.” Petition at  
21 31. That is false. The prosecutor’s credibility argument carefully related the facts of the  
22 case to the issue of petitioner’s credibility.

23         Petitioner presents only two particular instances of claimed misconduct. Petition at  
24 33. When these examples are viewed in context, it is immediately apparent that the  
25 prosecutor presented credibility arguments related to the facts of the case.

1 For his first claimed example, petitioner presents a mere sentence fragment.  
2 Petition at 32-33. The entire sentence reads: “So, Mr. Mitchell's testimony isn't consistent  
3 with itself. It's shifted around. It isn't consistent with what other witnesses told you, and it  
4 simply isn't believable, and you shouldn't believe it, and the reason you shouldn't believe it  
5 is because it's not true.” 2/22/16 VRP 1096.

6 Petitioner's second claimed example is a sentence taken out of context. Petition at  
7 33. The entire paragraph fairly expresses the prosecutor's argument:

8 Counsel said the idea of this attack, this violent attack, doesn't make sense if  
9 it's just a friendly visit, and she's exactly right; but you know it was that kind  
10 of an attack. You saw the crime scene photographs. You saw the autopsy  
11 photographs. You know exactly what kind of an attack it was. It was not a  
12 friendly visit. What Mr. Mitchell told you was not what actually happened.  
13 This was a premeditated attack. Think about where she ended up. Think  
14 about the handprint on the wall. There's a knock at the door; and, remember,  
15 she talked to people on the phone. She talked to George Caldwell. She talked  
16 to the other men that you heard from, what are you doing tonight? Just  
17 watching the kids; nobody else here with me. She didn't tell any story about  
18 James Mitchell and some other guy coming over and there being this big ole  
19 fight, and there's blood here and this and that, and I'm calling the police. No.  
20 And she would have told somebody. She's on the phone all the time, talking  
21 to everybody about everything.

22 2/22/16 VRP 1143. This is an argument relating the facts to the evidence. This is not an  
23 expression of personal opinion.

24 Petitioner's trial counsel did not object to this argument because it was proper  
25 argument. There is nothing “flagrant or ill-intentioned” about it. *State v. Scherf, supra*.  
Petitioner has not demonstrated prosecutorial misconduct.

1 E. PETITIONER'S CONFRONTATION CLAUSE CLAIMS ARE  
2 FRIVOLOUS.

3 Hilding Johnson, a forensic investigator,<sup>5</sup> testified on February 3, 2016<sup>6</sup> about his  
4 participation in a homicide investigation that took place in 1993. 2/3/16 VRP 519-623.  
5 Mr. Johnson had no independent recollection of the crime scene in this case when he  
6 testified at trial, so many years later.<sup>7</sup> 2/3/16 VRP 519. Ted Schlosser, another forensic  
7 investigator,<sup>8</sup> testified on February, 8, 2016<sup>9</sup> about his participation in the same 1993  
8 homicide investigation. 2/8/16 VRP 736-765. Mr. Johnson had no independent  
9 recollection of the crime scene in this case when he testified at trial.<sup>10</sup>

10 Pretrial, petitioner objected to the testimony of Mr. Johnson and Mr. Schlosser on  
11 hearsay and confrontation clause grounds.<sup>11</sup> That motion was denied.<sup>12</sup> The trial court  
12 held that the police reports and property sheets drafted by Mr. Johnson and Mr. Schlosser  
13 were "admissible under ER 803(a)(5) as prior recollections recorded, assuming proper  
14 foundation is laid." CP 186. This ruling implicitly rejected petitioner's Confrontation  
15 Clause claim relating to Mr. Johnson and Mr. Schlosser, which was preserved as a  
16 continuing objection. 2/3/16 VRP 493; 2/8/16 VRP 34. Petitioner does not present the  
17 hearsay objection to this court for review.

18 Petitioner argues that "Because the reports are testimonial, allowing the forensic  
19 investigators to read directly from their reports, without any independent recollection,  
20 deprived Mr. Mitchell of the right to confront the witnesses against him." Petition at 39-

22 \_\_\_\_\_  
23 <sup>5</sup> 2/3/16 VRP 503.

24 <sup>6</sup> 2/3/16 VRP 489.

25 <sup>7</sup> "I have a collage vision of a part of the scene, and that's it." 2/3/16 VRP 519-20.

<sup>8</sup> 2/8/16 VRP 736.

<sup>9</sup> 2/8/16 VRP 734.

<sup>10</sup> 2/8/16 VRP 737.

<sup>11</sup> The State's motion to admit is found at CP 78-88, petitioner's response is found at CP 159-175,

<sup>12</sup> CP 186-88.

1 40. This argument was “squarely presented” and squarely rejected by the United States  
2 Supreme Court in *United States v. Owens*, 484 U.S. 554, 559, 108 S. Ct. 838, 98 L. Ed. 2d  
3 951 (1988).<sup>13</sup> *Owens* involved a crucial forgotten eyewitness identification admitted  
4 through the testifying declarant eyewitness pursuant to FRE 801(d)(1)(C) (statement of  
5 identification hearsay exclusion). *Owens*, 484 U.S. at 555-56. The Court’s conclusion  
6 was unambiguous: “We do not think that a constitutional line drawn by the Confrontation  
7 Clause falls between a forgetful witness' live testimony that he once believed this  
8 defendant to be the perpetrator of the crime, and the introduction of the witness' earlier  
9 statement to that effect.” *United States v. Owens*, 484 U.S. 554, 560, 108 S. Ct. 838, 843,  
10 98 L. Ed. 2d 951 (1988).

11  
12 *Crawford v. Washington*, 541 U.S. 36, 61, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)  
13 did not overrule *United States v. Owens*. Justice Scalia authored both opinions and  
14 included the following language in *Crawford*: “Where testimonial evidence is at issue,  
15 however, the Sixth Amendment demands what the common law required: unavailability  
16 and a prior opportunity for cross-examination.” *Crawford v. Washington*, 541 U.S. at 68.  
17 Justice Scalia underlined that precise point: “Finally, we reiterate that, when the declarant  
18 appears for cross-examination at trial, the Confrontation Clause places no constraints at all  
19 on the use of his prior testimonial statements.”<sup>14</sup> *Crawford v. Washington*, 541 U.S. at 59  
20 (fn. 9). The continued vitality of *Owens* is recognized in the Courts of Appeal. *See United*  
21 *States v. Mallory*, 902 F.3d 584, 591 (6th Cir. 2018); *United States v. Ghilarducci*, 480  
22

23  
24 <sup>13</sup> *California v. Green*, 399 U.S. 149, 157, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), and *Delaware v.*  
25 *Fensterer*, 474 U.S. 15, 18, 106 S. Ct. 292, 294, 88 L. Ed. 2d 15 (1985) were the cases which led up to  
*Owens*.

<sup>14</sup> The personal restraint petition hammers home the point that Mr. Johnson’s and Mr. Schlosser’s respective testimonies were “testimonial.” Petition at 37-39.

1 F.3d 542, 548-550 (7th Cir. 2007); *Yanez v. Minnesota*, 562 F.3d 958, 964-65 (8th Cir.  
2 2009); *United States v. Romo-Chavez*, 681 F.3d 955, 961 (9th Cir. 2012); *Childers v.*  
3 *Floyd*, 642 F.3d 953, 972-73 (11th Cir. 2011), *cert. granted, judgment vacated on other*  
4 *grounds*, 568 U.S. 1190, 133 S. Ct. 1452, 185 L. Ed. 2d 358 (2013), and *opinion*  
5 *reinstated*, 736 F.3d 1331 (11th Cir. 2013). The Washington Supreme Court has spoken  
6 conclusively on the issue: “Significantly, *Crawford* neither overruled nor called into  
7 question either *Fensterer*<sup>15</sup> or *Owens*. *State v. Price*, 158 Wn.2d 630, 647, 146 P.3d 1183,  
8 1191 (2006).

9  
10 Petitioner does not claim that the trial court imposed any improper limitation upon  
11 his cross examination of either Mr. Johnson or Mr. Schlosser. Petitioner’s entire  
12 Confrontation Clause claim is founded upon the witnesses’ quite understandable (after 22  
13 years) forgetfulness. That claim is foreclosed by *Owens* and *State v. Price*:

14 In sum, all of the purposes of the confrontation clause are satisfied even when  
15 a witness answers that he or she is unable to recall. Thus, we hold that when  
16 a witness is asked questions about the events at issue and about his or her  
17 prior statements, but answers that he or she is unable to remember the charged  
18 events or the prior statements, this provides the defendant sufficient  
opportunity for cross-examination to satisfy the confrontation clause. We  
conclude that a witness's inability to remember does not implicate *Crawford*  
nor foreclose admission of pretrial statements.

19 *State v. Price*, 158 Wn.2d at 650 (citing cases).

20 Petitioner’s misleading Confrontation Clause claim should be denied because it is  
21 foreclosed by controlling United States Supreme Court and Washington Supreme Court  
22 precedent.

23  
24  
25 <sup>15</sup> “[T]he confrontation clause offers no guaranty that every witness called by the prosecution will refrain  
from giving testimony that is “marred by forgetfulness”. *State v. Price*, 158 Wn.2d 630, 649, 146 P.3d 1183,  
1192 (2006) quoting *Delaware v. Fensterer*, 474 U.S. at 22.

1 F. DEFENSE COUNSEL NEVER HAD A SPOILIATION CLAIM TO  
2 MAKE, OR THAT PETITIONER WAS PREJUDICED BY THE  
FAILURE TO MAKE SPOILIATION CLAIM.

3 1. Petitioner has failed to demonstrate that the bloody knife was  
4 evidence.

5 Petitioner asserts that his defense counsel deficiently failed to request a spoliation  
6 instruction in this case. Petition at 45-46. Spoliation is “[t]he intentional destruction of  
7 evidence.” *Henderson v. Tyrrell*, 80 Wn.App. 592, 605, 910 P.2d 522 (1996). There can  
8 be no finding of spoliation absent a finding of bad faith. *Id.* 80 Wn.App. at 609. Petitioner  
9 has failed to demonstrate his lawyer’s deficient performance because he has failed to  
10 demonstrate (1) that “evidence” was destroyed, (2) that any destruction was intentional,  
11 and (3) that any the evidence was destroyed in bad faith.

12 Petitioner makes the following assertion:

13 Det. O’Hern discovered the likely weapon, a bloody knife, which was  
14 discovered on or immediately following the night of Ms. Robinson’s death.  
2.18.16 RP 834-35.

15 Petition at 45. That assertion is false. Nothing in the cited VRP supports the conclusion  
16 that Det. O’Hern himself discovered the weapon.<sup>16</sup> *Id.* Nothing in the cited VRP supports  
17 the conclusion that the bloody knife was ‘the likely weapon.’ *Id.*

18 Retired Detective O’Hern’s notes included the following notation: “Bloody knife  
19 from sawed off shotgun, Case No. 930380408, found by apartment manager between 02/06  
20 and 02/07. 2/8/16 VRP 832. Retired Detective O’Hern stated: “I have no actual  
21 recollection of why I even wrote that down.” 2/8/16 VRP 833. Retired Detective O’Hern  
22 did not think that the knife and the shotgun related to this case: “No, It’s obvious that it  
23  
24  
25

---

<sup>16</sup> The fact that another police officer responded to get the sawed-off shotgun is addressed at 2/8/16 VRP 864.

1 was something else relating to another case. I had about three different homicides going at  
2 the same time. . .”<sup>17</sup> Petition, Attachment F at 000960.

3 Retired Detective O’Hern was asked to review Exhibit 84, a property report for that  
4 case number which stated where the knife and sawed off shotgun were found. 2/18/16  
5 VRP 834. He read from the document:

6 Yeah, I'm looking at an address. There's -- okay. There's an address up here  
7 of 8814 -- I think it's Wadsworth Southwest. That's where the property was  
8 obtained from between 6 and 7, which I'm assuming is the date of that month;  
so I'm assuming that's where it was found.

9 *Id.* Retired Detective O’Hern testified that location is not near the murder in this case. *Id.*  
10 The apartment manager apparently found the knife with possibly dried blood on it and a  
11 sawed off shotgun in a little room with a door that could be opened with a credit card.  
12 2/8/16 VRP 866. The report included a request that the knife be processed for fingerprints  
13 and the possible blood on the knife blade. 2/8/16 VRP 867. Retired Detective O’Hern had  
14 no recollection of what was done with that request. *Id.* The record contains no suggestion  
15 how long the knife had been in the “little room” before it was discovered by the apartment  
16 manager. 2/8/16 VRP, 2/9/16 VRP.

17  
18 2. Petitioner’s trial counsel recognized that the missing knife was not  
evidence, but exploited it nevertheless.

19 A bloody knife, along with a shotgun, was found in a place that was not near the  
20 scene of the murder. 2/18/16 VRP 834. In her closing argument, petitioner’s trial counsel  
21 argued that this case was poorly investigated. 2/22/16 VRP 1107-1117. The failure to  
22 analyze, fingerprint, or preserve that knife was presented as evidence of poor investigation.  
23 2/22/16 VRP 1108-09. Arguing that the knife actually was evidence would have undercut  
24  
25

---

<sup>17</sup> That this material applied to another case is further elaborated on in Petitioner’s Attachment F at 00961-63.

1 defense counsel's credibility with the jury, because nothing linked the "knife obtained  
2 from between 6 and 7" February 1993 in a location not near the February 6, 2016 murder  
3 scene in this case to that murder scene. 2/18/16 VRP 834. It was entirely possible that the  
4 knife was found in that storage room at 8814 Wadsworth on February 6 before the murder  
5 occurred. Trial Exhibit 84. "Strategic choices made after thorough investigation of law  
6 and facts relevant to plausible options are virtually unchallengeable." (braces and internal  
7 quotation omitted) *State v. Coristine*, 177 Wn.2d 370, 379, 300 P.3d 400, 404 (2013).  
8 (quoting *In re Hubert*, 138 Wn.App. 924, 928-29, 158 P.3d 1282 (2007) and *Strickland v.*  
9 *Washington*, 466 U.S. 668, 690-91, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). In this case,  
10 counsel realized that the knife was not evidence, and that the better argument was that the  
11 absence of that knife was better exploited as an example of an assertedly insufficient  
12 investigation. Petitioner has not demonstrated deficient performance by petitioner's trial  
13 counsel.  
14

15 3. Alternatively, petitioner has demonstrated neither intentional  
16 destruction of the knife nor bad faith on the part of the State.

17 All this Court knows, from the record presented by petitioner, is that a knife that an  
18 apartment manager found, not near the scene of the murder, was not admitted at trial.<sup>18</sup>  
19 2/18/16 VRP 834. Petitioner presents no evidence whatsoever that his trial counsel could  
20 have established either intentional destruction of the knife or bad faith destruction of the  
21

22 \_\_\_\_\_  
23 <sup>18</sup> Defense counsel asked Retired Detective O'Hern: "But nonetheless, it [the knife found by the Apartment  
24 Manager at 8814 Wadsworth SW] wasn't ever tested or, to your knowledge, located in the course of this  
25 case?" 2/8/16 VRP 871. Again, Retired Detective O'Hern professed no memory. In the personal restraint  
petition, petitioner argues that the knife and the sawed off shotgun were "not preserved and were not  
available at the time of trial." Petition at 11. Petitioner presents Retired Detective O'Hern's testimony as  
support for this proposition, but all Retired Detective O'Hern provides is a lack of recall on the issue. 2/8/16  
VRP 867. Retired Detective O'Hern did testify that there was "nothing showing that there was some follow  
up in his notes, but the record does not establish that follow up for testing was something that Retired  
Detective O'Hern would have included in his notes.

1 knife. The only link of that knife to this case is a notation in Retired Detective O’Hern’s  
2 notes—a note that Retired Detective O’Hern believes did not relate to this case. Petition,  
3 Attachment F at 000960.

4 Linda Robinson was murdered in 1993. 1/26/16 VRP 316-322; 1/27/16 VRP 445.  
5 This case was unsolved and without suspects when Detective Kobel began to re-examine  
6 the case in 2013, 20 years later. 1/25/16 VRP 182. DNA was not available as something  
7 that could be used to identify people when this case was investigated in 1993. 2/9/16 VRP  
8 889-91. The reasoning behind the “bad faith” requirement expressed in *Henderson* is that  
9 bad faith provides the basis for “the inference of consciousness of a weak cause.”  
10 *Henderson*, 80 Wn.App. at 609 (citing McCormick § 265, at 191). In this case, until the  
11 DNA results came back from the Crime Lab, the State had no “weak cause”—it had no  
12 cause whatsoever. The suggestion that the State would purposefully destroy evidence in  
13 furtherance of a non-existent criminal case is frivolous on its face. Petitioner presents no  
14 evidence whatsoever that the knife in question was destroyed or hidden after Detective  
15 Kobel commenced his investigation in 2013.  
16

17 Petitioner has failed to demonstrate deficient attorney performance because an  
18 intentional and bad faith destruction of evidence argument was never available.

19 *Henderson, supra.*  
20  
21  
22  
23  
24  
25

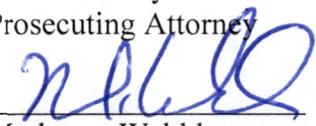
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V. CONCLUSIONS:

Petitioner's claims are meritless. The personal restraint petitions should be dismissed.

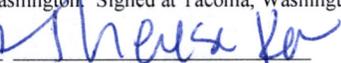
DATED: March 28, 2019.

MARY E. ROBNETT  
Pierce County  
Prosecuting Attorney

  
Mark von Wahlde  
Deputy Prosecuting Attorney  
WSB #18373

Certificate of Service:

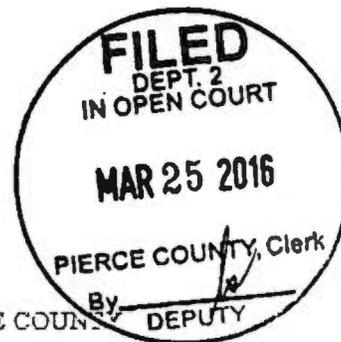
The undersigned certifies that on this day she delivered by U.S. mail and/or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his or her attorney or to the attorney of record for the respondent and respondent c/o of his or her attorney true and correct copies of the document 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.

   
Date Signature

## **APPENDIX “A”**



14-1-02979-1 46612808 JDSWCD 03-28-16



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO: 14-1-02979-1

vs.

JAMES EDWARD MITCHELL,

Defendant.

WARRANT OF COMMITMENT

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

MAR 28 2016

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).

[X] 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).

[ ] 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: 03/25/16

By direction of the Honorable  
*Katherine M. Stolz*  
KATHERINE M. STOLZ  
CLERK

*Melissa Jones*  
DEPUTY CLERK



CERTIFIED COPY DELIVERED TO SHERIFF  
MAR 28 2016 *Melissa Jones* Deputy



STATE OF WASHINGTON ss:  
County of Pierce  
I, Kevin Stock, 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 herunto set my hand and the Seal of Said Court this \_\_\_\_\_ day of \_\_\_\_\_

KEVIN STOCK, Clerk  
By: \_\_\_\_\_ Deputy

PC



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 14-1-02979-1

MAR 28 2016

vs.

JUDGMENT AND SENTENCE (FJS)

JAMES EDWARD MITCHELL

Defendant.

- Prison
- RCW 9.94A.712/9.94A.507 Prison Confinement
- Jail One Year or Less
- First-Time Offender
- Special Sexual Offender Sentencing Alternative
- Special Drug Offender Sentencing Alternative
- Alternative to Confinement (ATC)
- Clerk's Action Required, para 4.5 (SDOSA), 4.7 and 4.8 (SSOSA) 4.15.2, 5.3, 5.6 and 5.8
- Juvenile Decline  Mandatory  Discretionary

SID: 15497498  
DOB: 08-06-1963

I. HEARING

1.1 A sentencing hearing was held 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 02-24-2016 by  plea  jury-verdict  bench trial of:

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
1	MURDER 1 (D1)	9A.32.030	None (N/A)	02-06-1993	930371041 PCSD

\* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Ham, See RCW 46.61.520, (JP) Juvenile present, (SM) Sexual Motivation, (SCF) Sexual Conduct with a Child for a Fee. See RCW 9.94A.533(8). (If the crime is a drug offense, include the type of drug in the second column.)

as charged in the Amended Information

Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.529):

JUDGMENT AND SENTENCE (JS)  
(Felony) (7/2007) Page 1 of 11

16-9-02589-8

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

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

	CRIME	DATE OF SENTENCE	SENTENCING COURT	DATE OF CRIME	A or J ADULT JUV	TYPE OF CRIME
1	ARMED ROBBERY	07-02-84	ORANGE CO, FL	10-06-82	A	V
2	ATTEMPT UPCS	01-13-95	PIERCE CO, WA	05-16-94	A	NV
3	UPCS	12-12-96	PIERCE CO, WA	10-24-96	A	NV
4	CONSP UDCS	03-25-99	PIERCE CO, WA	01-05-99	A	NV
5	CONSP UDCS	07-09-99	PIERCE CO, WA	04-20-99	A	NV
6	COSNP UDCS	08-09-00	PIERCE CO, WA	06-12-00	A	NV
7	UDCS	11-14-02	PIERCE CO, WA	05-21-02	A	NV

The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	8	XIV	370 - 493 mos	(none)	370 - 493 mos	Life

2.4  EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence:

within  below the standard range for Count(s) \_\_\_\_\_.

above the standard range for Count(s) \_\_\_\_\_.

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

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

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

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

The following extraordinary circumstances exist that make payment of nonmandatory legal financial obligations inappropriate:

2.6  **FELONY FIREARM OFFENDER REGISTRATION.** The defendant committed a felony firearm offense as defined in RCW 9A.010.

The court considered the following factors:

the defendant's criminal history.

whether the defendant has previously been found not guilty by reason of insanity of any offense in this state or elsewhere.

evidence of the defendant's propensity for violence that would likely endanger persons.

other: \_\_\_\_\_

The court decided the defendant  should  should not register as a felony firearm offender.

**III. JUDGMENT**

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

3.2  The court DISMISSES Counts \_\_\_\_\_  The defendant is found NOT GUILTY of Counts \_\_\_\_\_

**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)

JASS CODE

RTNRJN \$ TBD Restitution to: LOC/TBD

\$ \_\_\_\_\_ Restitution to: \_\_\_\_\_  
(Name and Address--address may be withheld and provided confidentially to Clerk's Office).

PCV \$ 500.00 Crime Victim assessment

DNA \$ 100.00 DNA Database Fee

PUB \$ \_\_\_\_\_ Court-Appointed Attorney Fees and Defense Costs

FRC \$ 200.00 Criminal Filing Fee

FCM \$ \_\_\_\_\_ Fine

**OTHER LEGAL FINANCIAL OBLIGATIONS (specify below)**

\$ \_\_\_\_\_ Other Costs for: \_\_\_\_\_

\$ \_\_\_\_\_ Other Costs for: \_\_\_\_\_

\$ 800.00 TOTAL

The above total does not include all restitution which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

shall be set by the prosecutor.

is scheduled for \_\_\_\_\_

RESTITUTION. Order Attached

JUDGMENT AND SENTENCE (JS)

(Felony) (7/2007) Page 3 of 11

1  
2 [ ] The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

3 [X] All payments shall be made in accordance with the policies of the clerk, commencing immediately,  
4 unless the court specifically sets forth the rate herein: Not less than \$\_\_\_\_\_ per month  
5 commencing \_\_\_\_\_. RCW 9.94.760. If the court does not set the rate herein, the  
6 defendant shall report to the clerk's office within 24 hours of the entry of the judgment and sentence to  
7 set up a payment plan.

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

10 [ ] COSTS OF INCARCERATION. In addition to other costs imposed herein, the court finds that the  
11 defendant has or is likely to have the means to pay the costs of incarceration, and the defendant is  
12 ordered to pay such costs at the statutory rate. RCW 10.01.160.

13 COLLECTION COSTS The defendant shall pay the costs of services to collect unpaid legal financial  
14 obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.16.500.

15 INTEREST The financial obligations imposed in this judgment shall bear interest from the date of the  
16 judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090

17 COSTS ON APPEAL An award of costs on appeal against the defendant may be added to the total legal  
18 financial obligations. RCW. 10.73.160.

19 4.1b ELECTRONIC MONITORING REIMBURSEMENT. The defendant is ordered to reimburse  
20 \_\_\_\_\_ (name of electronic monitoring agency) at \_\_\_\_\_  
21 for the cost of pretrial electronic monitoring in the amount of \$\_\_\_\_\_.

22 4.2 [X] DNA TESTING. The defendant shall have a blood/biological sample drawn for purposes of DNA  
23 identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the  
24 county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from  
25 confinement. RCW 43.43.754.

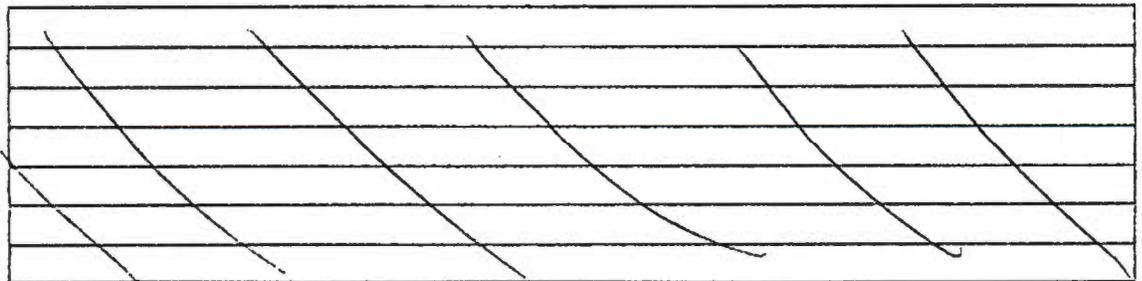
26 [ ] HIV TESTING. The Health Department or designee shall test and counsel the defendant for HIV as  
27 soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

28 4.3 NO CONTACT

The defendant shall not have contact with family of Linda Robinson including, but not limited to, personal,  
verbal, telephonic, written or contact through a third party for life (not to exceed the maximum statutory  
sentence).

[ ] Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection  
Order is filed with this Judgment and Sentence.

4.4 OTHER: Property may have been taken into custody in conjunction with this case. Property may be  
returned to the rightful owner. Any claim for return of such property must be made within 90 days. After  
90 days, if you do not make a claim, property may be disposed of according to law.



4.4a Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days unless forfeited by agreement in which case no claim may be made. After 90 days, if you do not make a claim, property may be disposed of according to law.

4.4b BOND IS HEREBY EXONERATED

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

(a) CONFINEMENT. RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

450 months on Count I

Actual number of months of total confinement ordered is: 450 MONTHS

(Add mandatory firearm, deadly weapons, and sexual motivation enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

[ ] The confinement time on Count(s) \_\_\_\_\_ contain(s) a mandatory minimum term of \_\_\_\_\_.

CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A.589. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm, other deadly weapon, sexual motivation, VUCSA in a protected zone, or manufacture of methamphetamine with juvenile present as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: \_\_\_\_\_

The sentence herein shall run consecutively to all felony sentences in other cause numbers imposed prior to the commission of the crime(s) being sentenced. The sentence herein shall run concurrently with felony sentences in other cause numbers imposed after the commission of the crime(s) being sentenced except for the following cause numbers. RCW 9.94A.589: \_\_\_\_\_

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.505. 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: 530 DAYS

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

Count I for 24 months;

Count \_\_\_\_\_ for \_\_\_\_\_ months;

Count \_\_\_\_\_ for \_\_\_\_\_ months;

**COMMUNITY CUSTODY** (To determine which offenses are eligible for or required for community custody see RCW 9.94A.701)

The defendant shall be on community custody for:

Count(s) \_\_\_\_\_ 36 months for Serious Violent Offenses

Count(s) \_\_\_\_\_ 18 months for Violent Offenses

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

Note: combined term of confinement and community custody for any particular offense cannot exceed the statutory maximum. RCW 9.94A.701.

(B) 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 restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while in community custody; (6) not own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; (9) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706 and (10) for sex offenses, submit to electronic monitoring if imposed by DOC. The defendant's 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 not sentenced under RCW 9.94A.712 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 court orders that during the period of supervision the defendant shall:

consume no alcohol.

have no contact with: \_\_\_\_\_

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

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

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

undergo an evaluation for treatment for  domestic violence  substance abuse

mental health  anger management and fully comply with all recommended treatment

comply with the following crime-related prohibitions: \_\_\_\_\_

Other conditions: \_\_\_\_\_

[ ] For sentences imposed under RCW 9.94A.702, other conditions, including electronic monitoring, may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than seven working days.

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

PROVIDED: That under no circumstances shall the total term of confinement plus the term of community custody actually served exceed the statutory maximum for each offense

4.7 [ ] **WORK ETHIC CAMP.** RCW 9.94A.690, 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 confinement. The conditions of community custody are stated above in Section 4.6.

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

## V. NOTICES AND SIGNATURES

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

5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505. The clerk of the court is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW

9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 RESTITUTION HEARING.

Defendant waives any right to be present at any restitution hearing (sign initials): SM

5.5 CRIMINAL ENFORCEMENT AND CIVIL COLLECTION. Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. Per section 2.5 of this document, legal financial obligations are collectible by civil means. RCW 9.94A.634.

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, identicaid, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.7 SEX AND KIDNAPPING OFFENDER REGISTRATION. RCW 9A.44.130, 10.01.200.

N/A

5.8 [ ] The court finds that Count \_\_\_\_\_ is a felony in the commission of which a motor vehicle was used. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.

5.9 If the defendant is or becomes subject to court-ordered mental health or chemical dependency treatment, the defendant must notify DOC and the defendant's treatment information must be shared with DOC for the duration of the defendant's incarceration and supervision. RCW 9.94A.562.

5.10 OTHER: \_\_\_\_\_

DONE in Open Court and in the presence of the defendant this date 3-25-2016

JUDGE: [Signature]  
Print name: KATHERINE M. STOLZ

[Signature]  
Deputy Prosecuting Attorney  
Print name: \_\_\_\_\_  
WSB # 25470

[Signature]  
Attorney for Defendant  
Print name: MARLYN HUGH  
WSB # 20123

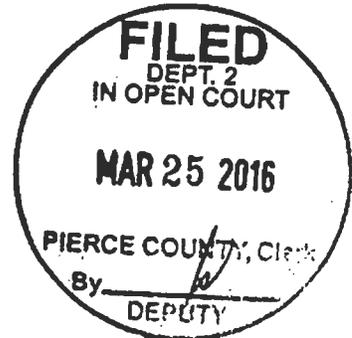
[Signature]  
Defendant  
Print name: James Mitchell

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

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

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

Defendant's signature: [Signature]



**CERTIFICATE OF CLERK**

CAUSE NUMBER of this case: 14-1-02979-1

I, KEVIN STOCK 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 this date:

Clerk of said County and State, by: \_\_\_\_\_, Deputy Clerk

**IDENTIFICATION OF COURT REPORTER**

**KIMBERLY A. O'NEILL**

Court Reporter

APPENDIX "F"

The defendant having been sentenced to the Department of Corrections for a:

- sex offense
- serious violent offense
- assault in the second degree
- any crime where the defendant or an accomplice was armed with a deadly weapon
- any felony under 69.50 and 69.52

The offender shall report to and be available for contact with the assigned community corrections officer as directed:

The offender shall work at Department of Corrections approved education, employment, and/or community service;

The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions;

An offender in community custody shall not unlawfully possess controlled substances;

The offender shall pay community placement fees as determined by DOC;

The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement.

The offender shall submit to affirmative acts necessary to monitor compliance with court orders as required by DOC.

The Court may also order any of the following special conditions:

\_\_\_\_\_ (I) The offender shall remain within, or outside of, a specified geographical boundary: \_\_\_\_\_

\_\_\_\_\_ (II) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals: \_\_\_\_\_

\_\_\_\_\_ (III) The offender shall participate in crime-related treatment or counseling services;

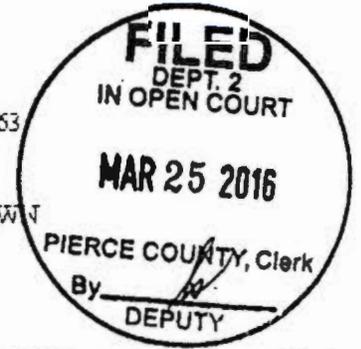
\_\_\_\_\_ (IV) The offender shall not consume alcohol; \_\_\_\_\_

\_\_\_\_\_ (V) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections; or

\_\_\_\_\_ (VI) The offender shall comply with any crime-related prohibitions.

\_\_\_\_\_ (VII) Other: \_\_\_\_\_

IDENTIFICATION OF DEFENDANT



SID No. 15497498 Date of Birth 08-06-1963  
(If no SID take fingerprint card for State Patrol)

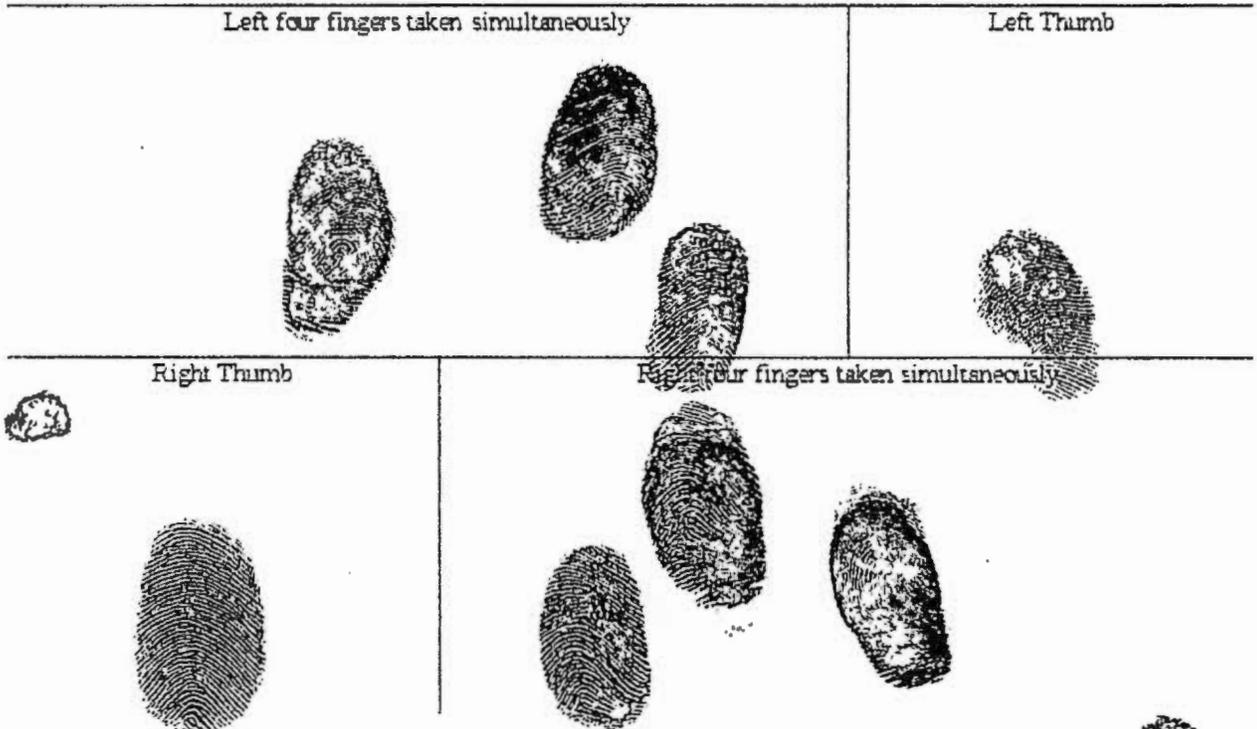
FBI No. UNKNOWN Local ID No. UNKNOWN

PCN No. UNKNOWN Other

Alias name, SSN, DOB: \_\_\_\_\_

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

FINGERPRINTS



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, Deputy Clerk, J. Shipman

Dated: 3/25/2016

DEFENDANT'S SIGNATURE:

[Signature]

DEFENDANT'S ADDRESS:

1/c Dept. of Corrections

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the  
aforementioned 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 herunto set my hand and the Seal of said  
Court this 28 day of March, 2019



Kevin Stock, Pierce County Clerk

By /S/Linda Fowler, Deputy.

Dated: March 28, 2019 11:40 AM



**Instructions to recipient:** If you wish to verify the authenticity of the certified document that was transmitted by the Court, sign on to:

<https://linxonline.co.pierce.wa.us/linxweb/Case/CaseFiling/certifiedDocumentView.cfm>,  
enter **SerialID: 6C2750D2-8B78-4941-9F030726F4E0C8DF**.

This document contains 14 pages plus this sheet, and is a true and correct copy of the original that is of record in the Pierce County Clerk's Office. The copy associated with this number will be displayed by the Court.

## **APPENDIX "B"**

# STATE OF CALIFORNIA

## CERTIFICATION OF VITAL RECORD

# SACRAMENTO COUNTY

SACRAMENTO, CALIFORNIA

3052010009476

CERTIFICATE OF DEATH

3201034001523

STATE FILE NUMBER		STATE OF CALIFORNIA USE BLACK INK ONLY / NO ERASURES, WHITEOUTS OR ALTERATIONS VS-1 (REV 3/08)				LOCAL REGISTRATION NUMBER	
DECEDENT'S PERSONAL DATA	1. NAME OF DECEDENT—FIRST (Given) <b>MARK</b>		2. MIDDLE <b>ANTHONY</b>		3. LAST (Family) <b>MCGRUDER</b>		
	AKA, ALSO KNOWN AS — Include full AKA (FIRST, MIDDLE, LAST)			4. DATE OF BIRTH mm/dd/yyyy <b>10/12/1954</b>	5. AGE Yrs. <b>55</b>	IF UNDER ONE YEAR Months Days	IF UNDER 24 HOURS Hour Minutes
	6. BIRTH STATE/FOREIGN COUNTRY <b>CO</b>	10. SOCIAL SECURITY NUMBER <b>548-02-9593</b>	11. EVER IN U.S. ARMED FORCES? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> UNK	12. MARITAL STATUS/SRDP* at Time of Death <b>NEVER MARRIED</b>		7. DATE OF DEATH mm/dd/yyyy <b>02/23/2010</b>	8. HOUR (24 Hour) <b>1511</b>
	13. EDUCATION — Highest Level/Degree (See worksheet on back) <b>SOME COLLEGE</b> <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		14/15. WAS DECEDENT HISPANIC/LATINO/SPANISH? (If yes, see worksheet on back) <input checked="" type="checkbox"/> NO		16. DECEDENT'S RACE — Up to 3 races may be listed (see worksheet on back) <b>BLACK</b>		
17. USUAL OCCUPATION — Type of work for most of life. DO NOT USE RETIRED <b>MORTGAGE TITLE</b>			18. KIND OF BUSINESS OR INDUSTRY (e.g., grocery store, road construction, employment agency, etc.) <b>HOME MORTGAGES</b>			19. YEARS IN OCCUPATION <b>20</b>	
20. DECEDENT'S RESIDENCE (Street and number, or location) <b>8501 SUTTER CREEK WAY</b>							
USUAL RESIDENCE	21. CITY <b>ANTELOPE</b>		22. COUNTY/PROVINCE <b>SACRAMENTO</b>		23. ZIP CODE <b>95843</b>	24. YEARS IN COUNTY <b>17</b>	
	25. STATE/FOREIGN COUNTRY <b>CA</b>						
SPOUSE(S) AND PARENT INFORMATION	26. INFORMANT'S NAME, RELATIONSHIP <b>DARMON MCGRUDER, FATHER</b>			27. INFORMANT'S MAILING ADDRESS (Street and number, or rural route number, city or town, state and zip) <b>8501 SUTTER CREEK WAY, ANTELOPE, CA 95843</b>			
	28. NAME OF SURVIVING SPOUSE/SRDP—FIRST		29. MIDDLE	30. LAST (BIRTH NAME)			
	31. NAME OF FATHER/PARENT—FIRST <b>DARMON</b>		32. MIDDLE <b>CLARENCE</b>	33. LAST <b>MCGRUDER</b>		34. BIRTH STATE <b>CA</b>	
	35. NAME OF MOTHER/PARENT—FIRST <b>HARRIETT</b>		36. MIDDLE <b>ELAINE</b>	37. LAST (BIRTH NAME) <b>ROBINSON</b>		38. BIRTH STATE <b>CO</b>	
FUNERAL DIRECTORY LOCAL REGISTRATION	39. DISPOSITION DATE mm/dd/yyyy <b>03/03/2010</b>		40. PLACE OF FINAL DISPOSITION <b>SACRAMENTO VALLEY NATIONAL CEMETERY 5810 MIDWAY RD., DIXON, CA 95620</b>				
	41. TYPE OF DISPOSITION(S) <b>BU</b>		42. SIGNATURE OF EMBALMER <b>NOT EMBALMED</b>			43. LICENSE NUMBER	
	44. NAME OF FUNERAL ESTABLISHMENT <b>PRICE FUNERAL CHAPEL, INC.</b>		45. LICENSE NUMBER <b>FD-1062</b>	46. SIGNATURE OF LOCAL REGISTRAR <b>GLENNAH I TROCHET, MD</b>		47. DATE mm/dd/yyyy <b>02/25/2010</b>	
PLACE OF DEATH	101. PLACE OF DEATH <b>MANOR CARE</b>			102. IF HOSPITAL, SPECIFY ONE <input type="checkbox"/> IP <input type="checkbox"/> EVOP <input type="checkbox"/> DCA		103. IF OTHER THAN HOSPITAL, SPECIFY ONE <input checked="" type="checkbox"/> Nursing Home/LTD <input type="checkbox"/> Decedent's Home <input type="checkbox"/> Other	
	104. COUNTY <b>SACRAMENTO</b>	105. FACILITY ADDRESS OR LOCATION WHERE FOUND (Street and number, or location) <b>7807 UPLANDS WAY</b>			106. CITY <b>CITRUS HEIGHTS</b>		
	107. CAUSE OF DEATH Enter the chain of events — diseases, injuries, or complications — that directly caused death. DO NOT enter terminal events such as cardiac arrest, respiratory arrest, or ventricular fibrillation without showing the etiology. DO NOT ABBREVIATE. <b>IMMEDIATE CAUSE (Final disease or condition resulting in death) A) CARDIAC ARREST</b> <b>Sequentially, list conditions, if any, leading to cause on Line A. Enter UNDERLYING CAUSE (disease or injury that initiated the events resulting in death) LAST B) METHICILLIN-RESISTANT STAPHYLOCOCCUS AUREUS SEPTICEMIA</b> <b>C) ENDSTAGE RENAL FAILURE</b>			108. TIME INTERVAL BETWEEN ONSET AND DEATH (MINS.) <b>WKS.</b>	109. DEATH REPORTED TO CORONER? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		
	110. OTHER SIGNIFICANT CONDITIONS CONTRIBUTING TO DEATH BUT NOT RESULTING IN THE UNDERLYING CAUSE (GIVEN IN 107) <b>INFECTED DIALYSIS PORTS</b>			111. WAS OPERATION PERFORMED FOR ANY CONDITION IN ITEM 107 OR 112? (If yes, list type of operation and date.) <b>REMOVAL DIALYSIS PORTS 02/08/2010</b>		113A. IF FEMALE, PREGNANT IN LAST YEAR? <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> UNK	
PHYSICIAN'S CERTIFICATION	114. I CERTIFY THAT TO THE BEST OF MY KNOWLEDGE DEATH OCCURRED AT THE HOUR, DATE, AND PLACE STATED FROM THE CAUSES STATED. Decedent Attended Since: mm/dd/yyyy (A) <b>02/18/2010</b> Decedent Last Seen Alive: mm/dd/yyyy (B) <b>02/20/2010</b>		115. SIGNATURE AND TITLE OF CERTIFIER <b>DONALD RAYMOND PETERSON II M.D.</b>		116. LICENSE NUMBER <b>G22928</b>	117. DATE mm/dd/yyyy <b>02/25/2010</b>	
	118. TYPE ATTENDING PHYSICIAN'S NAME, MAILING ADDRESS, ZIP CODE <b>DONALD RAYMOND PETERSON II M.D. PO BOX 408, FAIR OAKS, CA 95628</b>						
CORONER'S USE ONLY	119. I CERTIFY THAT IN MY OPINION DEATH OCCURRED AT THE HOUR, DATE, AND PLACE STATED FROM THE CAUSES STATED. MANNER OF DEATH <input type="checkbox"/> Natural <input type="checkbox"/> Accident <input type="checkbox"/> Homicide <input type="checkbox"/> Suicide <input type="checkbox"/> Pending Investigation <input type="checkbox"/> Could not be determined			120. INJURED AT WORK? <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> UNK		121. INJURY DATE mm/dd/yyyy	
	122. HOUR (24 Hour)						
	123. PLACE OF INJURY (e.g., home, construction site, wooded area, etc.)						
	124. DESCRIBE HOW INJURY OCCURRED (Events which resulted in injury)						
	125. LOCATION OF INJURY (Street and number, or location, and city, and zip)						
126. SIGNATURE OF CORONER / DEPUTY CORONER			127. DATE mm/dd/yyyy	128. TYPE NAME, TITLE OF CORONER / DEPUTY CORONER			
STATE REGISTRAR		A	B	C	D	E	
				FAX AUTH.#		CENSUS TRACT	

CERTIFIED COPY OF VITAL RECORD  
STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

This is a true and exact reproduction of the document officially registered and placed on file in the office of the Sacramento County Clerk/Recorder.

DATE ISSUED:

MAR 07 2010

This copy is not valid unless prepared on an engraved border displaying the date, seal and signature of the County Clerk/Recorder.



001801367

*Donna Allred*  
DONNA ALLRED, COUNTY CLERK/RECORDER  
SACRAMENTO COUNTY, CALIFORNIA



**PIERCE COUNTY PROSECUTING ATTORNEY**

**March 28, 2019 - 12:09 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 52642-5  
**Appellate Court Case Title:** Personal Restraint Petition of James Edward Mitchell  
**Superior Court Case Number:** 14-1-02979-1

**The following documents have been uploaded:**

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*The Original File Name was supp designation mitchell.pdf*
- 526425\_Personal\_Restraint\_Petition\_20190328120654D2274186\_3529.pdf  
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Personal Restraint Petition - Response to PRP/PSP  
*The Original File Name was prp Mitchell.pdf*

**A copy of the uploaded files will be sent to:**

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Tacoma, WA, 98402  
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