

Even if the Court were to conclude that only one or two of the aggravating elements were proven beyond a reasonable doubt, reversal of Mr. Yates's sentences is required. RCW 10.95.060(4) requires a jury in a special sentencing proceeding to answer the question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" See CP 4445. "The jury is not instructed to consider the crime and separately consider the aggravating factors. Rather, the aggravators describe the circumstances of the 'crime' for which [the defendant] was found guilty." *Brett*, 126 Wn.2d at 170. Thus, if any of the aggravating elements are dismissed for lack of proof, the sentences themselves must be reversed as well.

8. MR. YATES'S CONVICTIONS MUST BE REVERSED AS THE SECOND AMENDED INFORMATION FAILED TO ALLEGE ALL OF THE ELEMENTS OF THE OFFENSE OF AGGRAVATED FIRST DEGREE MURDER

a. All elements of the offense are constitutionally required to be charged in the information. The Sixth Amendment to the United States Constitution and Article I, § 22 of the Washington Constitution require a charging document include all essential elements of a crime--statutory and nonstatutory--so as to inform a defendant of the charges against him or her and to allow preparation for the defense. *Hamling v.*

United States, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41 L.Ed.2d 590 (1974); *State v. Kjorsvik*, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991); *Leonard v. Territory*, 2 Wash.Terr. 381, 392, 7 P. 872 (1885). “Therefore an accused has a right to be informed of the criminal charge against him so he will be able to prepare and mount a defense at trial.” *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). If a charging document does not on its face state an offense, the document is unconstitutional and must be dismissed without prejudice to the State's right to recharge. *State v. Vangerpen*, 125 Wn.2d 782, 791, 888 P.2d 1177 (1995).

We have repeatedly and recently insisted that a charging document is constitutionally adequate only if all essential elements of a crime, statutory and non-statutory, are included in the document so as to apprise the accused of the charges against him or her and to allow the defendant to prepare a defense. This “essential elements rule” has long been settled law in Washington and is based on the federal and state constitutions and on court rule. Merely citing to the proper statute and naming the offense is insufficient to charge a crime unless the name of the offense apprises the defendant of all of the essential elements of the crime.

(Internal citations omitted.) *Vangerpen*, 125 Wn.2d at 787-788.

The standard of review for charging documents turns on when the information is challenged. *State v. Grant*, 104 Wn.App. 715, 720, 17 P.3d 674 (2001). When an accused challenges the sufficiency of the information prior to verdict, the charging document is strictly construed to determine whether all the elements of the crime are included. *Vangerpen*,

125 Wn.2d at 788. Where the defendant challenges the sufficiency of the information on appeal, the information is more liberally construed in favor of validity than if raised before the verdict is rendered. *Kjorsvik*, 117 Wn.2d at 103. In that circumstance, the test is: (1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice. *State v. Tandecki*, 153 Wn.2d 842, 109 P.3d 398 (2005); *Kjorsvik*, 117 Wn.2d at 105-06. The first prong of the test looks to the face of the charging document itself. There must be some language in the document giving at least some indication of the missing element. *Id.*

b. The aggravating factors for the offense of aggravated first degree murder are elements of the offense and must be pleaded in the information. In *Apprendi*, the Court held: "Other than the fact of a prior conviction, any fact which increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490; accord *Blakely*, 124 S.Ct. at 2536. These "facts" extending the sentence beyond the maximum authorized by the jury's verdict are elements of an aggravated version of the crime. *Harris*, 536 U.S. at 557.

Those facts, *Apprendi* held, were what the Framers had in mind when they spoke of “crimes” and “criminal prosecutions” in the Fifth and Sixth Amendments: A crime was not alleged and a criminal prosecution not complete, unless the indictment and the jury verdict included all the facts to which the legislature had attached the maximum punishment. Any “fact that . . . exposes the criminal defendant to a penalty exceeding maximum he would receive if punished according to the facts reflected in the jury verdict alone,” the Court concluded, would have been, under the prevailing historical practice, an element of an aggravated offense.

(Emphasis and internal citation omitted.) *Harris*, 536 U.S. at 563.

In aggravated murder cases, the aggravating circumstances are elements of the offense. *See e.g., Ring*, 536 U.S. at 609 (aggravating circumstances that make a defendant eligible for increased punishment “operates as the functional equivalent of an element of a greater offense”), *accord Sattazahn v. Pennsylvania*, 537 U.S. 101, 111, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003); and *Mills*, 109 P.3d at 419 (holding the elements of aggravated first degree murder are first degree murder and at least one of the elements listed in RCW 10.95.020. As Justice Scalia so eloquently stated in his concurring opinion in *Ring*:

I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt.

Ring, 536 U.S. at 610 (Scalia, J., concurring).

Without the jury finding at least one of the alleged aggravating factors, Mr. Yates's offense would have been punishable as first degree murder with a maximum term of life imprisonment *with* the possibility of parole. RCW 9A.20.021(1); RCW 9A.32.030(2). However, with the jury finding at least one of the aggravating factors, the offense became aggravated first degree murder, which is punishable by life imprisonment *without* the possibility of parole or death. RCW 10.95.030(1), (2). Thus, the aggravating factors are "elements" of the offense of aggravated first degree murder. *Harris*, 536 U.S. at 567; *Apprendi*, 530 U.S. at 479-81; *Accord Thomas*, 150 Wn.2d at 848 (a sentence of life imprisonment without the possibility of parole "is an increased sentence as compared to life with the possibility of parole" in aggravated murder cases).

i. The information failed to allege the absence of mitigating factors as required by RCW 10.95.060. The presumptive sentence in Washington for a conviction for aggravated first degree murder is life imprisonment without the possibility of parole. RCW 10.95.030(1). Only where there is a special sentencing hearing held and the jury finds there are "not sufficient mitigating circumstances to merit leniency" shall the defendant be sentenced to death. RCW 10.95.030(2). If the jury cannot make the finding that, having in mind the facts about the

defendant and the crime charged, there are not sufficient mitigating circumstances to merit leniency, a death sentence cannot be imposed.

As argued *supra*, any fact which increases the maximum punishment from life imprisonment with the possibility of parole to life without or death is an element of the offense and must be pleaded and proved to the jury. *Apprendi*, 530 U.S. at 490. Here, absent a jury finding that there are not sufficient mitigating circumstances, Mr. Yates would be guilty of aggravated first degree murder but would not be eligible for the death penalty. Only with a jury finding that there were not sufficient mitigating circumstances to merit leniency was Mr. Yates exposed to both a conviction for *aggravated* first degree murder and a sentence of death. As a consequence, the finding that there were not sufficient mitigating circumstances to merit leniency was an element of the crime of *aggravated unmitigated* first degree murder, and as such, was required to be pleaded in the amended information. *Apprendi*, 530 U.S. at 489 n.15 (“The indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted.”) (quoting *United States v. Reese*, 92 U.S. 214, 232-33, 23 L.Ed. 563 (1875) (Clifford, J., concurring)); *accord*, *State v. Campbell*, 103 Wn.2d 1, 25, 691 P.2d 929 (1984) (“a sentence of death requires consideration of an additional factor

beyond that for a sentence for life imprisonment – namely, an absence of mitigating circumstances.”¹⁰

It is undisputed that the information charging Mr. Yates with aggravated first degree murder does not set forth the allegation that there was not sufficient evidence to merit leniency. Therefore, the information charging Mr. Yates with aggravated first degree murder was insufficient to support the imposition of any sentence beyond life imprisonment without the possibility of parole.

ii. The information failed to allege the underlying elements of the aggravating factors of first or second degree robbery. In order to be convicted of aggravated first degree murder, the State must prove that the murder was premeditated and prove at least one aggravating circumstance. RCW 10.95.020. Here, Mr. Yates was charged with having committed the murders with three aggravating circumstances: “[that] the murder was committed in the course of, in furtherance of, or in immediate flight from robbery in the first or second Degree and/or defendant committed the murder to conceal the commission of a crime; and/or defendant killed more than one victim and the murders were part of a common scheme or plan during the period of May 1996 through October

¹⁰ The State in *Campbell* argued that the absence of mitigating circumstances to merit leniency was an *element* of the offense. 103 Wn.2d at 24.

1998.” CP 1003-04. While the information contained the aggravating factors, it did not include the elements of first or second degree robbery.

Instructive on this issue is this Court’s decision in *State v. Goodman*, 150 Wn.2d 774, 83 P.3d 410 (2004). In *Goodman*, a prosecution for possession of methamphetamine with intent to distribute, the State filed an amended information which identified the controlled substance only as “meth.” *Id* at 779. Although no objection was raised in the trial court, on appeal Mr. Goodman challenged the amended information, arguing it failed to allege all of the essential elements of the offense of possession of methamphetamine with intent to distribute. *Id* at 785. The Court of Appeals ruled the specific controlled substance need not be named in the information. *State v. Goodman*, 114 Wn.App. 602, 608, 59 P.3d 696 (2002). This Court began its analysis by determining whether the identity of the controlled substance was an element of the offense. *Id*. Noting that possession of a controlled substance with the intent to distribute carried a maximum sentence of 5 years, but a conviction for possession of methamphetamine with the intent to distribute carried a maximum sentence of 10 years, this Court concluded that the identity of the specific controlled substance was an element of the offense under a strict application of *Apprendi*. *Goodman*, 150 Wn.2d at 785-86. As such, the State was required to allege in the information and prove the

specific substance possessed by Mr. Goodman was methamphetamine. *Id.* Nevertheless, since the information was challenged for the first time on appeal, the Supreme Court found the use of the term “meth” in the amended information provided sufficient notice to the defendant under the more liberal standard of the *Kjorsvik* test. *Goodman*, 150 Wn.2d at 787-90.

Under *Apprendi* and *Goodman*, the aggravating factors are thus elements which must be included in the information. *Goodman*, 150 Wn.2d at 785-86 (citing *Apprendi*, 530 U.S. at 490).¹¹ Further, since the aggravating factor that the murders were committed during a first or second degree robbery were elements and required to be included in the information, the underlying elements of those offenses were also required to be included in the information. *Id.*

iii. The information failed to define the term “common scheme or plan. While the information did allege that the murders were committed as a common scheme or plan, the information did not define what a common scheme or plan was, did not define what was the common scheme or plan, and did not provide any facts setting forth the common scheme or plan.

¹¹ See also *State v. Fortin*, 178 N.J. 540, 641-46, 843 A.2d 974 (2004) (New Jersey Supreme Court ruling aggravating factors for capital murder are elements and under state constitution must be presented to grand jury and included in the indictment).

As argued at length *supra*, for there to be sufficient evidence of the common scheme or plan aggravator, the was a required to prove a nexus between the killings other than Mr. Yates. *Pirtle*, 127 Wn.2d at 661-62 (citing *Dictado*, 102 Wn.2d at 501; and *Grisby*, 97 Wn.2d at 501); *Guloy*, 104 Wn.2d at 416. The information failed to allege such a nexus.

Further, in attempting to determine whether or not a nexus had been alleged, the information was silent as to whether the nexus was between the Pierce County victims, Ms. Mercer and Ms. Ellis, or whether the nexus was between either Ms. Mercer and the Spokane victims or Ms. Ellis and the Spokane victims, or both.

The defense sought some definition for the common scheme or plan in this case by requesting a bill of particulars defining the common scheme or plan. CP 691-700. The State merely averred that evidence of the Spokane murders would be introduced to establish a common scheme or plan, without more.

The second amended information failed to allege all of the essential elements of the offense as it failed to plead sufficient facts to provide the defense sufficient notice of the common scheme or plan.

c. To the extent *Thomas* and *Kincaid* held the aggravating factors are *not* elements of aggravated first degree murder they have been disapproved. In *Kincaid*, this Court determined that the aggravating factors are “aggravation of penalty” factors and not elements of the crime of aggravated first degree murder. 103 Wn.2d at 307-13, *accord Irizarry*, 111 Wn.2d at 594. Subsequently, in *Thomas*, this Court reaffirmed the *Kincaid* and *Irizarry* ruling that the aggravating factors were not elements of the offense. *Thomas*, 150 Wn.2d at 847.

As argued in §6a supra, this Court’s ruling in *Thomas*, *Irizarry*, and *Kincaid* are no longer controlling in light of the rulings of the United States Supreme Court in *Apprendi*, *Ring*, and *Harris* and this Court in *Mills*.

d. Reversal of the conviction is required. The remedy for an insufficient charging document is reversal and dismissal of the charges without prejudice. *Vangerpen*, 125 Wn.2d at 792-93.

The defense challenged the sufficiency of the information prior to the trial court instructing the jury. CP 4071-76. Since the sufficiency of the information was challenged prior to the verdict, the charging document must be strictly construed to determine whether all the elements of the crime are included. *Vangerpen*, 125 Wn.2d at 788.

The amended information failed to allege all of the elements of the aggravating factors. Since the aggravating factors are elements of the charge of aggravated first degree murder, the amended information was constitutionally defective.

Even assuming the lesser standard under *Kjorsvik* applies, Mr. Yates has met his burden under that standard. The information stated that the murders of Ms. Mercer and Ms. Ellis were part of a common scheme or plan. CP 1003-04. Yet, as argued, the State convinced the court to adopt the position that the two murders were not required to be connected with each other as well as the common scheme or plan, which was patently wrong. In addition, given the State's subsequent claim that the common scheme or plan did not have to be connected to both Ms. Mercer and Ms. Ellis the "notice" given to the defense was deficient.

Defense counsel argued persuasively that Ms. Ellis and Ms. Mercer were not a part of the common scheme or plan charged in the information and the evidence regarding the Spokane cases was admitted by the State merely to show what constituted the single common scheme or plan. RP 7373. The State argued it did not have to prove Ms. Mercer and Ms. Ellis's murders were connected with each other, only that they were tied to a common scheme or plan. RP 7350.

This lack of specificity in the information prejudiced Mr. Yates. Defense counsel again argued persuasively that its entire defense was premised on the fact the Pierce County murders were not connected with each other as well as the common scheme or plan. RP 7370-75. Counsel noted that if they had known the two murders were not connected with each other, but nonetheless connected to a common scheme or plan, they would have requested a unanimity instruction pursuant to *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984), since there was now evidence of multiple schemes or plans requiring the jury unanimously agree as to which plan formed the basis for conviction. RP 7373-74. In addition, defense counsel noted they conducted their *voir dire* of potential jurors based upon the assumption gleaned from the charges that the two Pierce County murders were connected to each other. RP 7374. As a consequence, even if the defense had not challenged the information prior to the verdict, Mr. Yates has offered sufficient evidence of prejudice to reverse the convictions.

9. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF FIRST DEGREE MURDER

a. The trial court refused to give Mr. Yates's proposed

instruction informing the jury they could convict him of the lesser offense

of first degree murder. Mr. Yates proposed an instruction which provided:

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, the defendant may be found guilty of any lesser crime, the commission of which is necessarily included in the crime charged, if the evidence is sufficient to establish the defendant's guilt of such lesser crime beyond a reasonable doubt.

The crime of first degree premeditated murder with aggravating circumstances necessarily includes the lesser crime of premeditated first degree murder.

When a crime has been proven against a person and there exists a reasonable doubt as to which of two or more crimes that person is guilty, he or she shall be convicted only of the lowest crime.

CP 4030. The State opposed given the instruction, arguing it misstated the law by suggesting first degree murder and aggravated first degree murder are separate offenses. RP 7280-81. The trial court agreed with the State's argument and did not give the jury Mr. Yates's proposed instruction. RP 7282.

b. Mr. Yates was constitutionally entitled to an instruction informing the jury they could convict him of the lesser offense of first degree murder. Pursuant to the Sixth Amendment of the United State Constitution and Article 1, § 22 of the Washington Constitution a criminal defendant may only be convicted of those offenses charged in the information, or those offenses which are either lesser included offenses, or inferior degrees of the charged offense. *Schmuck v. United States*, 489 U.S. 705, 717-18, 109 S.Ct. 2091, 103 L.Ed. 734 (1989); *State v. Tamalini*, 134 Wn.2d 725, 731, 953 P.2d 450 (1998) (citing *Irizarry*, 111 Wn.2d at 592). However, RCW 10.61.003 and RCW 10.61.006 permit a conviction for an offense which is an inferior degrees or lesser included offense of the offense charged. The failure to instruct the jury on a lesser noncapital offense, where the evidence might allow the jury to convict the defendant of only the lesser offense violates the Eighth and Fourteenth Amendments. *Beck v. Alabama*, 447 U.S. 625, 636-38, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980).

An instruction on a lesser offense is warranted where: (1) each element of the lesser offense must necessarily be proved to establish the greater offense as charged (legal prong); and (2) the evidence in the case supports an inference that the lesser offense was committed (factual prong). *State v. Berlin*, 133 Wn.2d 541, 548, 947 P.2d 700 (1997); *State v.*

Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). An instruction for an inferior degree is proper only where:

(1) the statutes for both the charged offense and the proposed inferior degree offense “proscribe but one offense;” (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only inferior offense.

(Citations omitted.) *Tamalini*, 134 Wn.2d at 732.

c. Aggravated first degree murder and first degree murder are different degrees of the same crime. As set forth previously, aggravated first degree murder is a separate offense from first degree murder. In *Ring*, the Court concluded the finding necessary to increase a capital defendant’s punishment from life in prison to death fell within the rule of *Apprendi* and was the equivalent of an element of a greater offense. 536 U.S. at 609. The Court has made clear *Apprendi* concerned whether “facts labeled sentencing factors were nevertheless ‘traditional elements’” *Harris*, 536 U.S. at 557-58. Finally, this Court has held “[u]nder *Ring* and *Apprendi* the *elements* of aggravated first degree murder are premeditated first degree murder under RCW 9A.32.030(1)(a) and at least one of the aggravating circumstances from RCW 10.95.020.” (Italics in original). *Mills*, 109 P.3d at 419.

Thus, aggravated first degree murder and first degree murder are different degrees of the same offense

d. Mr. Yates was constitutionally entitled to his proposed jury instruction. The factual inference required for both lesser included and inferior degree offenses is the same. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). In applying the factual prong a court must view the supporting evidence in the light most favorable to the party requesting the instruction. *Id.*, 141 Wn.2d at 455-56. The instruction should be given “[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.” *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997) (citing *Beck*, 447 U.S. at 635).

In the light most favorable to Mr. Yates, a reasonable juror could have reasonable doubts as to the existence of the three aggravating factors. As discussed previously the State did not offer any direct evidence that Mr. Yates had the specific intent to rob any of his victims. In the light most favorable to Mr. Yates, a reasonable juror could conclude the absence of money at the time the remains were discovered did not provide sufficient proof that Mr. Yates killed Ms. Mercer and Ms. Ellis specifically to facilitate his intent to rob them. Such a conclusion is even

more reasonable in light of the evidence that neither woman had any money when they were last seen.

Similarly, in the light most favorable to Mr. Yates, a reasonable juror could conclude Mr. Yates did not commit the murders with the specific intent to conceal the commission of the crime of patronizing a prostitute. A reasonable juror could conclude it was preposterous to think that Mr. Yates was concerned that visiting prostitutes would adversely affect his military career but was not concerned that killing prostitutes would have a similar drag on his advancement. It is even more likely that a reasonable juror could reach these conclusions in light of the testimony of four women who had worked as prostitutes and "dated" Mr. Yates on several occasions and yet had not been killed.

In the light most favorable to Mr. Yates a reasonable juror could have concluded that the State failed to establish a nexus between the murders of Ms. Ellis and Ms. Mercer. Thus, in the light most favorable to Mr. Yates the requested lesser offense instruction satisfied the factual prong of the *Workman* test. The trial court's failure to give the instruction violated the Eighth and Fourteenth Amendments. *Beck*, 447 U.S. at 636-38.

10. THE TRIAL COURT ERRED IN ADMITTING
THE TESTIMONY OF AGENT SAFARIK
REGARDING LINKAGE ASSESSMENT

a. The evidentiary rulings of the trial court violated Mr.

Yates's right to due process. Erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. U.S. Const. Amend. XIV; *Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Pulley v. Harris*, 465 U.S. 37, 41, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). The trial court's ruling allowing FBI Agent Mark Safarik to testify regarding linkage assessment was erroneous and as such, violated Mr. Yates's right to due process.

b. Expert testimony is admissible only where it will assist the trier of fact and not where the purpose of the admission is to prejudice the defense. "Expert testimony on scientific, technical, or specialized knowledge is admissible under ER 702 if it will assist the trier of fact to understand the evidence or a fact in issue." *State v. Farr-Lenzini*, 93 Wn.App. 453, 460, 970 P.2d 313 (1999) (Internal quotation omitted).

ER 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Thus, under ER 702 expert testimony is admissible where two criteria are met: “(i) does the proffered witness qualify as an expert; and (ii) would the proposed testimony be helpful to the trier of fact.” *Farr-Lenzini*, 93 Wn.App. at 469 (quoting *State v. Greene*, 92 Wn.App. 80, 96, 960 P.2d 980 (1998)). Even if these two criteria are met, if such testimony would be unduly prejudicial to the party against whom it is offered, the testimony is inadmissible. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

c. Mr. Safarik’s testimony was not relevant to identity.

The trial court admitted Mr. Safarik’s testimony regarding linkage assessment on the basis that it was relevant under ER 404(b), as well as proof of the aggravating element of common scheme or plan. CP 3244-45. In its oral ruling, the court also appeared to find Mr. Safarik’s testimony was admissible to establish *modus operandi* under ER 404(b). RP 1311-12 (citing *Thang*, 145 Wn.2d 630).

The admissibility of evidence is generally determined by ER 401 and 402. ER 401 defines relevant evidence as “evidence having any tendency to make the existence of facts that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 402 states that relevant evidence is admissible and irrelevant evidence is inadmissible.

The admission of relevant evidence is within the sound discretion of the trial court and will be reversed only for an abuse of discretion. *Mak*, 105 Wn.2d at 702.

Even if relevant, the evidence may nevertheless still be inadmissible. ER 403 requires exclusion of relevant evidence when “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” *See State v. Oughton*, 26 Wn.App. 74, 83-84, 612 P.2d 812 (1980) (trial court’s admission of knife unrelated to murder of highly questionable relevance; reversed and remanded on other grounds). In a close case, the scale must tip in favor of the defendant and the evidence excluded. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986) (citing *State v. Bennett*, 36 Wn.App. 176, 180, 672 P.2d 772 (1983)).

Evidence of a unique *modus operandi* is *only* relevant and admissible where the focus of the inquiry is on the *identity* of the perpetrator and not whether the charged offense occurred. *State v. DeVincentis*, 150 Wn.2d 11, 21, 74 P.3d 119 (2003). Where identity is at issue, “the degree of similarity [between the offenses] must be at the highest level and the commonalities must be unique because the crimes

must have been committed in a manner to serve as an identifiable signature.” *Id.* (citing *Thang*, 145 Wn.2d at 643).

In the present case - the State’s argument notwithstanding - identity was simply not at issue. Mr. Yates pleaded guilty to the Spokane crimes and admitted committing the murders in Pierce County. He would have pleaded guilty to the Pierce County offenses had the State not reneged on its plea deal with Spokane County. At trial, Mr. Yates never placed his identity as the killer at issue, and thus the evidence of the Spokane cases was not relevant regarding identity. *See State v. Bowen*, 48 Wn.App. 187, 193, 738 P.2d 316 (1987) (in a prosecution of physician for taking indecent liberties with a patient, two previous incidents involving other patients not admissible on the issue because the defendant never claimed mistaken identity but merely denied doing the act), *overruled on other grounds, Lough*, 125 Wn.2d 847.

Further, the Spokane and Pierce County murders were not so unique and were not committed in a similar matter that served as an identifiable signature by Mr. Yates, and thus were not *modus operandi* evidence. Mr. Safarik even admitted, not all of the victims looked alike, not all were the same age, not all were killed with the same caliber of weapon, not all were found with bags over their heads, and not all of the

bodies were found in a rural area. There was nothing so unique about either the women or their deaths that came close to being a signature.

Finally, the testimony was nothing more than the needless presentation of cumulative evidence. Mr. Safarik's testimony relied upon crime scene photographs, which had already been admitted into evidence, autopsy reports and photographs, which were entered into evidence through Dr. Howard, maps and diagrams and police reports, which were entered into evidence through the investigating police officers, and witness interviews which also had already been admitted through the testimony of the individual witnesses. Mr. Safarik's testimony was simply a presentation of cumulative and prejudicial evidence and should have been excluded.

d. The testimony was unduly prejudicial to Mr. Yates.

i. The testimony consisted of inadmissible propensity evidence. Although this Court has previously found evidence of prior acts that constituted a common scheme or plan admissible under ER 404(b), *DeVincentis*, 150 Wn.2d at 21, Mr. Safarik's testimony went far beyond the permissible bounds under ER 404(b) and instead was inadmissible propensity evidence.

Under ER 404(a), evidence of "a person's character or trait of character is not admissible for the purpose of proving action in conformity

therewith on a particular occasion, . . .” See *DeVincentis*, 150 Wn.2d at 17 (“ER 404(b) prohibits admission of evidence to prove a defendant has a criminal propensity.”); *Saltarelli*, 98 Wn.2d at 362 (evidence is not relevant merely because it shows the defendant's propensity to engage in criminal conduct).

The court allowed State to admit evidence of the Spokane offenses through Mr. Safarik to prove Mr. Yates had a criminal propensity to murder prostitutes. When he began his linkage assessment analysis, Mr. Safarik knew Mr. Yates had admitted responsibility for the Spokane and Pierce County murders based upon Mr. Yates’s conviction in Spokane and his admission in that forum to the Pierce County murders. Based upon the first two exhibits proffered by the State at trial, Mr. Yates’s guilty plea form and the information from Spokane County, the jury was also aware without Mr. Safarik’s testimony that Mr. Yates was responsible for the Spokane murders. Mr. Safarik was then allowed to selectively testify about the “similarities” between the Spokane murders and the Pierce County murders, even though the only real similarity was that the women were all prostitutes. The only purpose of Mr. Safarik’s testimony was to point out to the jury that the same person who committed the Spokane murders committed the Pierce County murders, i.e., Mr. Yates based on his convictions in Spokane. Mr. Safarik proffered improper propensity

evidence: Mr. Yates committed the murders in Spokane County, ergo he committed the Pierce County murders. ER 404 bars precisely this kind of evidence. The trial court erred in admitting this evidence.

ii. The testimony constituted an impermissible opinion regarding Mr. Yates's guilt. "No witness, lay or expert may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." (Emphasis added.) *Black*, 109 Wn.2d at 348.

The goal in prohibiting a witness from expressing an opinion about the defendant's guilt or innocence is to avoid having the witness tell the jury what result to reach.

State v. Baird, 83 Wn.App. 477, 485, 922 P.2d 157 (1996), *review denied*, 131 Wn.2d 1012 (1997).

In its written order, the trial court stated that Mr. Safarik "may testify to his opinion that the Pierce County murders and the Spokane County murders were committed by the same individual." CP 3244. At the same time, the court ordered that "[n]o witness shall be allowed to express an opinion as to the defendant's guilt in the Pierce County murders." CP 3245. These two statements in this case were completely at odds. The first two pieces of evidence admitted by the State, the Spokane County amended information and the Spokane County guilty plea form completed by Mr. Yates, told the jury that Mr. Yates had committed the Spokane County murders. RP 5217. And, as expected, Mr. Safarik

testified that the same person who committed the Spokane County murders committed the Pierce County murders. RP 6923-24.

Given the conclusive evidence that Mr. Yates committed the Spokane County murders, it did not take a rocket scientist to figure out that when Mr. Safarik stated the same person committed the murders in the two counties he was expressing an opinion about Mr. Yates's guilt in the Pierce County cases.

Obviously, a witness's statement that a particular defendant is guilty goes beyond the pale. *In addition, inferential testimony that leaves no other conclusion but that a defendant is guilty cannot be condoned, no matter how artfully worded.*

(Emphasis added.) *State v. Cruz*, 77 Wn.App. 811, 815, 894 P.2d 573 (1995). Yet this is what the trial court authorized Mr. Safarik to do: infer there was *no other conclusion* but that Mr. Yates was guilty of the Pierce County murders. While not stating explicitly that Mr. Yates was guilty of the Pierce County murders, the *only* inference to be drawn from his opinion that the same person who committed the Spokane County murders committed the Pierce County murders, was that Mr. Yates committed all of the murders. As a result, Mr. Safarik rendered an opinion regarding Mr. Yates's guilt which was simply impermissible no matter the incorrect court order "authorizing" Mr. Safarik to render the opinion.

d. Mr. Safarik's testimony was not helpful to the jury.

Expert testimony is helpful if it concerns matters beyond the common knowledge of the average layperson and does not mislead the jury. *Farr-Lenzini*, 93 Wn.App. at 461. Such evidence is not considered helpful if its prejudicial nature is great. *Black*, 109 Wn.2d at 348.

As argued *supra*, Mr. Safarik's testimony consisted of a mere restatement or reiteration of evidence already presented. Mr. Safarik selectively reemphasized this evidence, and told the jury what result they should reach. There was nothing in Mr. Safarik's testimony that was outside the common understanding of the jury. The jury was able to understand and compare photographs, diagrams, testimony, autopsy results, and all evidence that was admitted and all evidence Mr. Safarik reemphasized in his testimony. Mr. Safarik merely gave the evidence the imprimatur of the FBI thereby improperly raising its importance in the eyes of the jury. The testimony was not helpful to the jury.

f. The error in allowing Mr. Safarik's testimony was not harmless. Since the admission of Mr. Safarik's testimony infringed Mr. Yates's right to due process, the error is harmless only if the State proves beyond a reasonable doubt the error did not "contribute to the verdict obtained." *Chapman*, 386 U.S. at 23-24. Once again, the State cannot meet this standard by speculating that a hypothetical reasonable juror

relying on the properly admitted evidence could have reached the same verdict, but rather must prove this specific jury would have reached the same verdict. *Anderson*, 112 Wn.App. at 837.

As argued, Mr. Safarik's testimony consisted of a simple recitation of the *similarities* between, Ms. Mercer's and Ms. Ellis's murders and the murders to which Mr. Yates pleaded guilty in Spokane County. In light of the court's erroneous ruling that proof of the common scheme or plan element of aggravated first degree murder required only a similarity between the crimes as opposed to the required overarching plan, Mr. Safarik's testimony was a linchpin of the State's proof of the common scheme or plan element. In discussing the evidence that provided the proof of the common scheme or plan element, the State argued in closing argument:

And we had supervisory Special Agent Safarik from the FBI who came in and talked to us about features that individuals who study criminal and their methods recognized. He talked about modus operandi. He talked about signature. He talked about features of the crimes that change.

RP 7487.

Given the importance of Mr. Safarik's testimony in the State's theory of the case, the error in admitting the linkage assessment testimony can not be deemed harmless and the convictions must be reversed.

11. THE TRIAL COURT VIOLATED MR. YATES'S
RIGHT TO DUE PROCESS WHEN IT
ALLOWED LYNN EVERSON TO TESTIFY
ABOUT THE HABITS OF PROSTITUTES
WITHOUT A FOUNDATION

Lynn Everson was an outreach worker who befriended many of the prostitutes who worked the "Sprague Corridor" in Spokane, including several of the Spokane County victims. RP 4416. Ms. Everson had never been a prostitute and only learned about prostitution through her conversations with prostitutes. RP 4418-21. The State sought to have her testify about prostitution practices in general and the practices and habits of, as well as statements made to her by the Spokane County victims. RP 4398. The defense objected, noting Ms. Everson was not an expert, but did not object to her testifying about statements of the victims regarding drugs and prostitution provided she did not testify about the impact it had their lives. RP 4399. The court ruled that should the State lay the proper foundation, Ms. Everson could testify as an expert and render an opinion. RP 4408-09. In addition, the court ruled Ms. Everson could testify generally about prostitutes and contacts she had with the Spokane County victims, but could not testify prostitutes always or usually accepted money in advance or always or usually used condoms. RP 4409. The court also ruled habit or routine practice testimony was not admissible. RP 4412.

Ms. Everson subsequently was allowed over repeated defense objections to testify about the habits and routine practice of prostitutes in general and the Spokane County victims in particular in contravention of the court's order.

a. Habit and routine practice evidence must be nonvolitional and instinctive behavior to be admissible. ER 406 provides:

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

A "habit" is a person's "regular response to a repeated specific situation so that doing the habitual act becomes semi-automatic." *Heigis v. Cepeda*, 71 Wn.App. 626, 632, 862 P.2d 129 (1993) (quoting Comment to ER 406).

Rule 406 allows certain evidence which would otherwise be inadmissible if it rises to the level of habit. In this context, habit refers to the type of nonvolitional activity that occurs with invariable regularity. It is the nonvolitional character of habit evidence that makes it probative. *See, e.g., Levin v. United States*, 338 F.2d 265, 272 (D.C.Cir.1964) (testimony concerning religious practices not admissible because "the very volitional basis of the activity raises serious questions as to its invariable nature, and hence its probative value"), *cert. denied*, 379 U.S. 999, 85 S.Ct. 719, 13 L.Ed.2d 701 (1965).

Weil v. Seltzer, 873 F.2d 1453, 1460 (D.C. Cir.,1989). “Thus, before a court may admit evidence of habit, the offering party must establish the degree of specificity and frequency of uniform response that ensures more than a mere ‘tendency’ to act in a given manner, but rather, conduct that is ‘semi-automatic’ in nature.” *Simplex, Inc. v. Diversified Energy Systems, Inc.*, 847 F.2d 1290, 1293 (7th Cir.,1988) (citing Fed.R.Evid. 406 (Notes of Advisory Committee)). “Thus habit is a *consistent* method or manner of responding to particular stimulus. Habits have a reflexive, almost instinctive quality.” (Emphasis in original) *Weil*, 873 F.2d at 1460.

In deciding whether certain conduct constitutes habit, courts consider three factors: (1) the degree to which the conduct is reflexive or semi-automatic as opposed to volitional; (2) the specificity or particularity of the conduct; and (3) the regularity or numerosity of the examples of the conduct.

United States v. Angwin, 271 F.3d 786, 799 (9th Cir., 2001), *cert. denied*, 535 U.S. 966 (2002).

Ms. Everson’s testimony regarding prostitutes’ behavior “in general” did not rise to the level of nonvolitional behavior and was thus not admissible.

b. Ms. Everson lacked the personal knowledge sufficient to testify to the habits of prostitutes. Habit evidence is admissible when offered by a competent witness. *Frankel v. Styer*, 386 F.2d 151, 152 (3rd

Cir. 1967). But, before testimony can be properly admitted as habit evidence, the witness “must have some knowledge of the practice and must demonstrate this knowledge prior to giving testimony concerning the routine practice. Where a witness cannot demonstrate such knowledge, he cannot testify as to the routine nature of the practice.” *Weil*, 873 F.2d at 1461 (quoting *Laszko v. Cooper Laboratories, Inc.*, 114 Mich.App. 253, 318 N.W.2d 639, 641 (1982)).

Instructive on this issue is the decision in *Weil, supra*. In a wrongful death action, the plaintiff sought to introduce evidence from five former patients of the defendant physician’s treatment of them to the physician’s habit. *Weil*, 873 F.2d at 1460-61. The appellate court upheld the lower court’s refusal to admit the evidence finding the witnesses lacked the foundation necessary to prove habit evidence. *Id* at 1461. Most notably, the court ruled the patients were not able to testify about the physician’s treatment of other patients, only themselves. *Id*.

The same holds true with Ms. Everson. Ms. Everson did not have any personal knowledge since she had not been a prostitute and had not accompanied any of the prostitutes on any of their “tricks” to determine if they responded the same way with each individual they met. She could only base her testimony on the conversations she had with individual

prostitutes. Without this knowledge, Ms. Everson lacked the proper foundation to testify that prostitutes act in the same way with each date.

c. Ms. Everson's testimony regarding the habits and routine practices of prostitutes was not admissible under ER 406. While the trial court ordered that Ms. Everson could not testify that a particular victim always engaged in specific conduct, over defense objection, the court did allow her to testify about prostitutes' practices in general "based upon her experience." RP 4408-09. Ms. Everson was allowed to testify:

- 99% of prostitutes asked for money up front;
- Many prostitutes used drugs and/or alcohol;
- Prostitutes usually dictated where the sex act would occur;
- Oral and vaginal sex were common;
- Prostitutes did not engage in anal intercourse because it made them vulnerable.

RP 4426-34.

This evidence was not evidence of the nonvolitional and habitual type necessary for proving a habit under ER 406. *Weil*, 873 F.2d at 1461.

Initially, as argued *supra*, Ms. Everson lacked intimate knowledge of the prostitutes' behavior during their dates, relying instead on self-reporting by the women. More importantly, the testimony was not of nonvolitional behavior that was instinctive almost reflexive method of

responding to a particular situation as required under ER 406. *Weil*, 873 F.2d at 1461.

Ms. Everson's testimony that anal sex by prostitutes was virtually "non-existent" was belied by the testimony of Aloha Ingram, who testified she engaged in anal sex with Mr. Yates. RP 7182. Ms. Everson also contradicted her own testimony regarding the "habits" of prostitutes when she testified that prostitutes were "desperate" because of their addiction to drugs and alcohol and as a result would be willing to "bend the rules" and engage in behavior outside the norm. RP 4475-76. This type of behavior as testified to by Ms. Everson suggests the behavior by prostitutes was not a nonvolitional habit as required by ER 406 but a conscious choice. Ms. Everson's testimony failed to meet the preliminary requirements for admissibility as habit evidence under ER 406 and should have been excluded.

d. The error in admitting Ms. Everson's testimony as habit evidence under ER 406 was not harmless error. Since the admission of the habit testimony impacted Mr. Yates's right to due process, the State bore the burden of proving, beyond a reasonable doubt, the error in admitting Ms. Everson's testimony regarding the habits of prostitutes was harmless error. *Chapman*, 386 U.S. at 23-24.

Ms. Everson's testimony was used as the primary evidence of the robbery aggravator alleged by the State. The State's theory was Ms. Mercer's and Ms. Ellis's murders were committed by Mr. Yates during the course of, in furtherance of, in the commission of, or in flight therefrom a first or second degree robbery. CP 1003-04. The crux of the argument was the women must have had money prior to their killing since, according to Ms. Everson, prostitutes always get their money before engaging in sexual endeavors. Thus, without Ms. Everson's claim that the women always get their money first, the State's evidence would have been insufficient to prove the robbery aggravator. Thus the court's error in admitting Ms. Everson's habit testimony was not harmless and must result in the reversal of Mr. Yates's convictions.

12. IN LIGHT OF THE ADMISSION OF MS. EVERSON'S HABIT TESTIMONY REGARDING PROSTITUTES, THE TRIAL COURT VIOLATED MR. YATES'S RIGHT TO DUE PROCESS AND HIS RIGHT TO PRESENT A DEFENSE BY REFUSING TO PROVIDE FUNDING FOR A DEFENSE EXPERT ON PROSTITUTION

Well before trial, the defense moved *ex parte* for an order from the trial court authorizing public funds for an expert in prostitution from the Lola Greene Baldwin Foundation for Recovery in Portland. RP 851-52. This expert was the counterpart to Lynn Everson and would have offered

testimony about women engaged in prostitution and their behavior on the street and specifically whether or not they carry money or purses. RP 852. This evidence was particularly relevant to the rebut the State's evidence regarding robbery aggravator. *Id.* The court denied the request. RP 854-55.

a. Mr. Yates had the constitutionally protected right to present a defense which encompassed the right to have experts testify on his behalf. It is axiomatic that an accused person has the constitutional rights to present a defense. U.S. Const. Amend. VI, XIV; Const. Art. I § 22; *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *State v. Roberts*, 80 Wn.App. 342, 350-51, 908 P.2d 892 (1996) (reversing conviction where defendant was unable to present relevant testimony.)

In order to be effective as demanded by the Sixth Amendment, counsel often must obtain experts to aid in the defense. *See, e.g., In re Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001) (finding counsel ineffective for, *inter alia*, failing to retain a single mental health expert until one month prior to trial, despite being on notice of client's mental health issues); *State v. Maurice*, 79 Wn.App. 544, 903 P.2d 514 (1995) (finding counsel deficient for failing to call a mechanic or accident reconstructionist as an expert witness, where such an expert's testimony

could have attributed loss of control of the vehicle to mechanical failure---
and not negligence).

The right to offer the testimony of witnesses ... is in plain terms the right to present a defense, the right to present the defendant's version of the facts.... [The accused] has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.”

Washington, 388 U.S. at 19.

While there is no absolute right to the services of any expert the defendant chooses, the Constitution nonetheless safeguards his right to the appointment of a competent expert for the purpose of evaluating his potential defenses. *Ake v. Oklahoma*, 470 U.S. 68, 83, 104 S.Ct 1087, 84 L.Ed.2d 53 (1985): A court’s denial of experts necessary to the defense and limitation on access to expert services based solely on financial considerations therefore violates both the defendant’s constitutional rights to a present a defense and to compulsory process. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (reversing murder conviction where defendant was barred from presenting witnesses in his defense).

[M]ere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and... a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense. Thus, while the [Supreme] Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy, it has often reaffirmed that fundamental fairness

entitles indigent defendants to “an adequate opportunity to present their claims fairly within the adversary system”

Ake, 470 U.S. at 77.

Finally, the due process and equal protection clauses of the United States Constitution “assure a poor defendant the same essential tools of an adequate defense as are available” to non-indigent defendants. U.S. Const. Amend. VI, XIV; *Griffin v. Illinois*, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585 (1956), *Ake, supra*; *State v. Woodard*, 26 Wn.App. 735, 736-37, 617 P.2d 103 (1980) (reversing a conviction where defendant was denied the right to a transcript at public expense of an earlier mistrial of same case which was necessary for impeachment of state’s expert).

b. The court’s denial of the requested expert on prostitution violated Mr. Yates’s rights to present a defense, equal protection, and due process. Initially, in denying the defense request for funding, the court was unsure whether Ms. Everson would testify as an expert. Once the court found Ms. Everson to be an expert on the subject of the habits and practices of prostitutes and allowed her to testify to such, the need for a defense expert to present a counter opinion became critical. RP 4412, 4426. Ms. Everson was allowed by the court to testify the women hid the money in their shoes, underwear, or brassieres. RP 4433.

This testimony became the sum total of the evidence the State used to prove the robbery aggravator. RP 7477-80. In closing, the State argued

In this case, the evidence shows that the defendant gave – that the women were picked up when they were working in prostitution. *In the course of the protocols or parley, as we have come to know them so well, money is exchanged up front.* The women would have had money.

(Emphasis added.) RP 7477.

By denying the defense request, the trial court's ruling effectively denied Mr. Yates any opportunity to challenge Ms. Everson's testimony. The court's ruling that the defense could present their theory through Ms. Everson was simply nonsensical. Mr. Yates had the right to present his own witness's perspective on prostitutes' behavior and habits and was not required to rely on the State's expert. *Washington*, 388 U.S. at 19.

Further, this was no minor error given the State's closing argument. Ms. Everson's testimony became the linchpin for the State's argument regarding the robbery aggravator and the testimony went to the jury virtually unchallenged by the defense. Given the minor amount of money involved, a maximum of \$1000, the error was devastating to the defense. CP 2511. The court's denial of funding for a defense expert on prostitution violated Mr. Yates's rights to due process, equal protection, and to present a defense.

13. THE TRIAL COURT ERRED IN ADMITTING PHOTOGRAPHIC EVIDENCE THAT WAS EITHER IRRELEVANT OR UNDULY GRUESOME AND PREJUDICIAL

a. Gruesome photographs must be suppressed if their prejudice outweighs their probative value and they would deny a defendant due process. Erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. U.S. Const. Amend. XIV; *McGuire*, 502 U.S. 62; *Pulley*, 465 U.S. at 41. The error in admitting gruesome and prejudicial photographs violates the Due Process Clause of the Fourteenth Amendment as it deprives the defendant of a fair trial. *Cf. Ferrier v. Duckworth*, 902 F.2d 545, 548-49 (7th Cir.) (erroneous admission of “lurid and disgusting” photographs harmless error due to inexplicable failure of defense counsel to object), *cert. denied*, 498 U.S. 988 (1990).

The admission of photographs is generally within the sound discretion of the trial judge. *State v. Crenshaw*, 98 Wn.2d 789, 806, 659 P.2d 488 (1983). Judicial discretion to admit photographs is, as with any evidence, limited by the Rules of Evidence. Only relevant evidence is admissible. ER 402. The relevance of evidence will necessarily depend upon the circumstances of each case. *State v. Rice*, 48 Wn.App. 7, 12, 737 P.2d 726 (1987).

However, even relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice . . ."

ER 403. Unfair prejudice refers to "evidence that is likely to arouse an emotional response rather than a rational decision among the jurors." *Id.* at 13; K. Tegland, 5 *Washington Practice, Evidence*, 106 (3rd ed. 1989).

Thus, accurate photographic representations are admissible only if their probative value outweighs their prejudicial effect. *State v. Rice*, 110 Wn.2d 577, 599, 757 P.2d 889 (1988), *cert. denied*, 491 U.S. 910 (1989); *State v. Griffith*, 52 Wn.2d 721, 328 P.2d 897 (1958). This Court has addressed the admissibility of gruesome photographs, stating:

"[p]hotographs have probative value where they are used to illustrate or explain the testimony of the pathologist performing the autopsy." *State v. Lord*, 117 Wn.2d 829, 870, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992); *see also Gentry*, 125 Wn.2d at 608-09. However, courts have held photographs should not be admitted when the same information could be revealed in a nonprejudicial manner. *State v. Sargent*, 40 Wn.App. 340, 349, 698 P.2d 598 (1985), *reversed on other grounds*, 49 Wn.App. 64, 741 P.2d 1017 (1987).¹² Under such circumstances, their "marginal"

¹²Mr. Sargent's conviction was reversed on several bases, including the use of prejudicially gruesome photographs when other nonprejudicial means of establishing the same information was available. *Sargent*, 40 Wn.App. at 349. Following a new trial in which the photographs were not used, Mr. Sargent was again convicted and appealed. This conviction was affirmed. *Sargent*, 49 Wn.App. at 64. Mr. Sargent sought review in

probative value is outweighed by the danger of unfair prejudice. *Sargent*, 40 Wn.App. at 349 (holding that, because testimony from witnesses revealed the same information as gleaned from the photographs, "the prejudicial effect of the photographs outweighed any probative value.").

Furthermore, Washington courts have recognized the problem of prosecutors constantly pushing the limits of acceptable photographic evidence. In *State v. Adams*, Justice Rosselini described the problem:

The majority seems to feel that, because we have never found that the introduction of photographs constituted prejudicial error, we are committed to the philosophy that the trial court's exercise of discretion on such matters is not subject to review. The trouble is, I fear, that every time we refuse to reverse in a doubtful case, the impression is created that the prosecutor is free to go a little further the next time. I also fear that, if the trend is allowed to continue, pictorial appeals to the emotions of the jury may be an accepted substitute for proof the defendant committed the crime.

State v. Adams, 76 Wn.2d 651, 681, 458 P.2d 558 (1969) (Rosselini, J. dissenting), *reversed on other grounds*, 430 U.S. 947 (1971).

Justice Rosselini's concerns have been reiterated by this Court. For example in *State v. Crenshaw*, this Court stated:

[W]e take this opportunity to warn prosecutors that we look unfavorably on the admission of repetitious, inflammatory photographs. Prosecutors as well as trial courts must

the Supreme Court, which reversed the second conviction, again, on grounds other than the gruesome photographs. *State v. Sargent*, 111 Wn.2d 641, 762 P.2d 1127 (1988). Thus, the decision of the Court of Appeals in *Sargent* is still good law.

exercise their discretion in the use of gruesome photographs. *The statement that "the State had the right to prove its case up to the hilt in whatever manner it chose," must be read to mean only that the State may present ample evidence to prove every element of the crime. Prosecutors are not given carte blanche to introduce every piece of admissible evidence if the cumulative effect of such evidence is inflammatory and unnecessary.* In other words, in such situations where proof of the criminal act may be amply proven through testimony and noninflammatory evidence, we caution prosecutors to use restraint in their reliance on gruesome and repetitive photographs.

(Emphasis added, citations omitted.) *Crenshaw*, 98 Wn.2d at 807.

b. The court erred in admitting post-mortem photographs of Darla Scott and Connie Ellis that were particularly gruesome. The court allowed the State to admit, over defense objection, numerous photographs of Darla Scott's body during the autopsy. Exhibits 321-25. Of particular concern to the defense was Exhibit 325, a photograph of Ms. Scott's arm, showing a post-mortem incision by the medical examiner revealing the underlying tissue and needle injection sites. RP 1428. The court accepted the State's argument that this provided support for its common scheme or plan theory that all of the women killed were drug users.

The court allowed a similar photograph, Exhibit 444, of Connie Ellis's leg. RP 1483. The majority of Ms. Ellis's body had been skeletonized except for her legs which still contained some tissue. RP

1483. Exhibit 444 showed a post mortem incision of the leg where samples of Ms. Ellis's blood and muscle were taken for DNA analysis. *Id.*

Neither picture was necessary for the State to prove its case and the photographs were particularly gruesome. The photographs showed incisions that were not inflicted by Mr. Yates but were post-mortem, undertaken as part of the autopsy process. The photographs were particularly gruesome in light of the fact there were far less prejudicial means of providing the same information.

Regarding Darla Scott, there was the testimony of both Lynn Everson and Michael Mitchell who knew Ms. Scott and were aware she was a crack addict. RP 4450-52, 4863-68. Since there was sufficient alternative evidence already in the record regarding Ms. Scott's addiction, the gruesome photograph was simply unnecessary.

Regarding Ms. Ellis, Dr. Howard, the medical examiner who conducted the autopsy, testified he was unable to obtain a blood sample due to the skeletonized nature of the body. This testimony alone was sufficient and the gruesome photograph was similarly unnecessary and prejudicial.

c. The court erred in admitting the photograph of Ms. Mercer's mouth containing part of a plastic bag. The trial court conducted an extensive all day pretrial hearing on June 12, 2002, to determine which of the State's proposed photographs would be admitted into evidence. RP 1395-1491. The defense objected to a number of the photographs. The court heard testimony from Dr. Howard, the medical examiner who conducted the autopsies of Ms. Mercer and Ms. Ellis and testified regarding the autopsies of the Spokane County victims after reviewing the photographs, x-rays, and reports from the Spokane County medical examiner. CP 2618-23.

In the middle of trial, the State sought to admit a photograph not originally discussed during the pretrial hearing. RP 5450. The photograph showed part of plastic bag inside Melinda Mercer's mouth and, according to the State, provided evidence Ms. Mercer was alive when the bags were placed over her head. RP 5450. The defense vehemently objected, noting the medical examiner's report of the autopsy of Ms. Mercer did not contain an opinion she was alive when the bags were placed over her head. RP 5452-53. The defense requested additional time to interview the medical examiner about the photograph and his opinion. RP 5453. The trial court allowed the defense additional time to interview the medical examiner. RP 5458.

After interviewing the medical examiner, the defense indicated they needed to speak with their pathologist, a move seconded by the medical examiner. RP 5516. The court agreed to allow the defense additional time to confer with their pathologist prior to the State seeking an opinion from the medical examiner. RP 5518. But, the court nevertheless allowed the State to admit the photograph, Exhibit 604. RP 5518-20, 5540. Ultimately, the medical examiner testified that he could not say with any medical certainty that suffocation due to the bags being placed over Ms. Mercer's head was the cause of death or contributing cause and assuming the gunshots were delivered in quick succession rendered her unconscious. RP 5634.

Given the equivocal nature of the medical examiner's opinion regarding the plastic bags and their contribution or lack thereof to Ms. Mercer's death, the admission of photograph was an inflammatory exhibit that was unnecessary to the proof of the State's case. Further, the tardy motion by the State to admit the exhibit with no excuse as to why the supposedly important photograph was not discussed at the pretrial hearing threw the defense off-guard and further prejudiced Mr. Yates. This Court cannot condone the sort of "gamesmanship" evidenced by the State's introducing this prejudicial photograph so late in the proceedings.

d. The “in life” photographs of the Spokane County victims were irrelevant as there were only two victims for which Mr. Yates was on trial and the admission of these photographs was unduly prejudicial. Mr. Yates was charged with the murders of only two victims in Pierce County: Melinda Mercer and Connie Ellis. The State sought to admit photographs of the two victims in Pierce County as well as the Spokane County victims for which Mr. Yates had already pleaded guilty. CP 1676. The State’s theory was that all the victims had suffered gunshot wounds to the head and this evidence supported the State’s common scheme or plan hypothesis. *Id.* Ultimately the trial court admitted the in life photographs of the Spokane and Pierce County victims.¹³

The State was also allowed to introduce autopsy photographs of the Spokane victims to show that each was shot in the head with a small caliber firearm. There was no correlation, however, between the State’s common scheme theory and the in-life photographs of the Spokane victims. Mr. Yates offered to stipulate to the identity of these women, an offer rejected by the State. The in-life photographs were simply irrelevant to proving the State’s case in the Pierce County murders and were admitted for the sole purpose of prejudicing Mr. Yates. The trial court

¹³ The in-life photographs of the Spokane victims were entered as Exhibits 281 (Zielinski), 292 (Joseph), 308 (Hernandez), 316 (Scott), 326 (Johnson), 340 (Wason), 354 (Oster), 368 (Maybin) 405 (Murphin), and 422 (Derning).

erred in admitting the in-life photographs of the Spokane County victims as they were irrelevant to any issue sought to be proven by the State.

e. The photographs of Shawn Johnson's automobile and Christine Smith's jacket were irrelevant. The trial court allowed the State to introduce Exhibit 339, a photograph of Spokane County victim Shawn Johnson's automobile. RP 1438. The court admitted the photograph even though the automobile was no longer at the location where the police found it when the photograph was taken. RP 1432-33, 1438. The court accepted the State's argument, over defense objection, that the photograph showed what the vehicle looked like at or near the time Ms. Johnson came into contact with Mr. Yates. RP 1433, 1438.

The court similarly allowed the State to admit photographs of a Mickey Mouse jacket found in Mr. Yates's residence that belonged to Spokane County victim Christine Smith. Exhibits 509, 510, 511; RP 1502. Again the court duped by the State's argument that the fact the jacket was in Mr. Yates's possession of supported the robbery aggravator. RP 1500-02.

The photographs were irrelevant to the Pierce County prosecution as the items belonged to Spokane County victims and related to crimes to which Mr. Yates had already pleaded guilty. The State conceded neither

Ms. Ellis nor Ms. Mercer had any connection with Ms. Johnson's car. RP 1433.

Similarly, Ms. Smith's jacket was not relevant to the Pierce County prosecutions. In addition, the State's assertion that Mr. Yates's possession of the jacket supported the robbery aggravator was belied by Ms. Smith's testimony at trial. Ms. Smith testified when she fled Mr. Yates's van after being shot she left all of her possessions behind. RP 4510. This contradicted the State's argument that Mr. Yates attempted to kill Ms. Smith with the intent of taking her jacket, which is what the State was required to prove to support the robbery aggravator. RCW 10.95.030(11).

These photographs were not relevant to the Pierce County prosecution and it was error to admit them.

f. The admission of the photographs was not harmless.

The error in admitting the gruesome and inflammatory photographs infringed Mr. Yates's right to due process and a fundamentally fair trial. As a consequence, the error cannot be harmless unless the State can prove, beyond a reasonable doubt, the error was harmless. *Chapman*, 386 U.S. at 23-24. The State cannot make that showing.

The photographs were incredibly gruesome or irrelevant and there were available alternatives that were far less gruesome. Admission of the photographs interfered with the jury's ability to determine Mr. Yates's guilt

free from unfair prejudice, and thus deprived him of a fair trial. *See Sargent*, 40 Wn.App. at 349. Here, although the medical examiner voiced a preference for the photographs to embellish his testimony, he also testified during the State's offer of proof that diagrams, models and sketches were credible and less inflammatory alternatives. These photographs materially affected the outcome of Mr. Yates's trial and the State cannot show the error was harmless beyond a reasonable doubt. As a consequence, Mr. Yates is entitled to a new trial free from this prejudicial evidence.

14. THE TRIAL COURT VIOLATED MR. YATES'S RIGHT TO DUE PROCESS IN ALLOWING THE DISPLAY OF A LARGE, IMPOSING, INACCURATE, AND MISLEADING CHART BEFORE THE JURY THROUGHOUT THE GUILT PHASE

a. Summary charts which are inaccurate and misleading violate due process. Prior to trial, the State moved for admission of summary charts it anticipated using during trial. CP 1678. Specifically, the State sought to use a summary chart to illustrate its theory the murders were part of a common scheme or plan. Exhibit 544; RP 4354. Upon its first unveiling before the jury, the defense objected, arguing the imposing, color-coded chart was misleading, inaccurate, and that allowing it to be displayed to the jury throughout the trial put undue emphasis on the

information included on the chart. RP 4712-21. The trial court overruled the defense objections, made the State alter the chart somewhat, and allowed the chart to remain throughout the trial. RP 4721-23. The summary chart was not entered into evidence but was present covering the wall directly across from the jurors throughout the trial.

Although summary charts may be admissible as illustrative evidence, their use may deny a defendant his or her right to due process where the chart is inaccurate. *Lord*, 117 Wn.2d at 855. But, *Lord* acknowledged concern:

Because a summary chart submitted by the prosecution can be a very persuasive and powerful tool, the court must make certain that the summary is based upon, and fairly represents, competent evidence already before the jury. *United States v. Conlin*, 551 F.2d 534, 538 (2d Cir.), cert. denied, 434 U.S. 831, 98 S.Ct. 114, 54 L.Ed.2d 91 (1977). This does not mean, however, that there can be no controversy as to the evidence presented. Rather, the chart must be a substantially accurate summary of evidence properly admitted. The jury is then free to judge the worth and weight of the evidence summarized in the chart. *Epstein v. United States*, 246 F.2d 563, 570 (6th Cir.), cert. denied, 355 U.S. 868, 78 S.Ct. 116, 2 L.Ed.2d 74 (1957).

The fact that summary charts can be a very persuasive tool also gives rise to concerns associated with their use. The jury might rely upon the alleged facts in the summary as if these facts had already been proved or as a substitute for assessing the credibility of witnesses. *United States v. Scales*, 594 F.2d 558, 564 (6th Cir.), cert. denied, 441 U.S. 946, 99 S.Ct. 2168, 60 L.Ed.2d 1049 (1979). There is also the possibility that the jury will treat the summary as additional evidence or that the summary will provide extra

summation for the government. *Lemire*, 720 F.2d at 1348. These reservations have led to the requirement of “guarding instructions” to the effect that the chart is not itself evidence, but is only an aid in evaluating the evidence. *Scales*, 594 F.2d at 564; *Lemire*, 594 F.2d at 1347.

Such instructions are not the only protection against the concerns sometimes associated with summary charts. The trial court has a duty to ensure that such charts are substantially accurate. The court fulfills this duty, in part, by allowing the defense full opportunity to object to any portions of the summary chart before it is seen by the jury. Moreover, the concern that the jury might rely upon the alleged facts in the summary as if they had already been proved is minimized by allowing complete cross examination of any witnesses testifying in connection with the summary. *Lemire*, 594 F.2d at 1348.

Lord, 117 Wn.2d at 855-856.

b. Exhibit 544 was inaccurate and misleading. The State’s chart, Exhibit 544, contained a section labeled “Cause of Death.” The chart then listed each of the Spokane County and Pierce County victims. This was extremely misleading as it listed Spokane County victim Christine Smith, who survived her encounter with Mr. Yates and testified at trial. In order to circumvent this obvious inaccuracy, the State labeled this part of the chart: “Gunshot wound to head (survived).” Exhibit 544. This attempt by the State to cure the inaccuracy created a misleading chart. This extremely large chart took up one whole wall opposite the jury. The jury saw that each victim suffered a gunshot wound the head and that was the cause of death all the way across the chart. Only by

focusing specifically on Ms. Smith's line on the chart would the jury remember she survived.

Another inaccurate and misleading portion of the chart was the category listed as "Clothing Removed/Missing." Exhibit 544. As argued by the defense at trial, this statement was inaccurate regarding Spokane County victim Shannon Zielinski and Pierce County victim Melinda Mercer.

Ms. Zielinski's body was discovered wearing a shift dress. RP 4578. Nearby, the police found pair of pantyhose, socks, and a boot. RP 4718. No brassiere or panties were found on or near Ms. Zielinski's body. RP 4567. As defense counsel argued to the trial court, many women wear pantyhose in place of panties yet the chart indicated her panties were missing. RP 4718. In addition, there was no evidence presented about what Ms. Zielinski was wearing prior to her disappearance, which was also the case for the majority of the victims. Yet the State's chart told the jury otherwise. Further, although panties were found near Ms. Mercer's body, the chart made no mention of that fact, instead claiming that the clothing was "missing." Exhibit 544. The chart was the State's theory of the case, not a summary of the evidence as required by *Lord*. 117 Wn.2d at 855.

c. The error in allowing the State to use Exhibit 544 as an illustrative exhibit was not harmless. Where the State violates a defendant's right to due process, the error cannot be deemed harmless unless the State can prove, beyond a reasonable doubt, the error *was* harmless. *Chapman*, 386 U.S. at 23-24. Here, the error in allowing the State to place the inaccurate and misleading Exhibit 544 before the jury during the entire trial was not harmless. The chart mischaracterized the evidence, emphasizing the State's version of the events and misleading the jury. In essence, the chart allowed the jury to rely on the facts on the chart as if they were proven and provided an extra summation for the State. Further, the evidence regarding Ms. Ellis's death was extremely thin, based solely on the fact she was killed by a .25 caliber bullet, there were plastic bags covering her head when she was found, and Mr. Yates was in the Tacoma area in the time period the medical examiner opined she was killed. Finally, the chart tracked the State's argument that the jury could convict Mr. Yates of aggravated murder based upon a common scheme or plan based upon the mere "similarity" of Ms. Mercer and Ms. Ellis's murders with the Spokane County cases rather than their proper constitutional burden of proving an overarching plan. The chart was a critical part of the State's closing argument to the jury:

And we have the board that was presented all through the trial that lists the elements of common scheme or plan. Maybe Detective Devault would light them as we go, and we will talk about them in turn. But obviously, the defendant chose his victims. He chose female victims. He chose victims who had a history of involving prostitution, many of whom were also significantly involved in drugs.

RP 7487-88.

Later, in the rebuttal portion of the State's argument, the prosecutor told the jury:

[The defense] nitpick about certain items and the way things are phrased in this chart, and that is unreasonable.

...

We submit to you that when you study this chart, as we would imagine that have over the course of time that everything on here is very reasonable; that it is a fair and accurate summary of the common scheme or plan that [Mr. Yates] undertook.

RP 7573.

Given the critical part the chart played in the State's presentation of the evidence, especially in light of the fact the chart stayed in front of the jury, confronting them during the entire trial, the error in allowing the State to display this inaccurate and misleading chart was not harmless.

15. MR. YATES'S DUE PROCESS RIGHT TO A
FAIR TRIAL WAS INFRINGED DUE TO
PROSECUTORIAL MISCONDUCT DURING
TRIAL AND IN CLOSING ARGUMENT

Trial Misconduct

Scott Carlson purchased Mr. Yates's 1979 Ford 150 Econoline Van through a newspaper advertisement in 1999. RP 5875-76. Mr. Carlson was not on the State's witness list provided to the defense prior to trial. RP 5792. The defense offered no objection to the State calling Mr. Carlson provided his testimony was limited to the information that was included in the police reports. RP 5792. The State confirmed on the record that Mr. Carlson's testimony would be limited to that information. RP 5792-93.

After discussing the purchase of the van from Mr. Yates, the prosecutor began a discussion of Mr. Carlson's conversation with Mr.

Yates:

Q: Did you and [Mr. Yates] discuss a mutual hobby of target shooting?

A: Yes.

RP 5882. The defense immediately objected, noting this testimony was outside the materials they had been provided. RP 5882. The State explained that the follow-up question would be about a comment Mr. Yates made about a particular gun he owned. RP 5882. The court

excused the jury and offered the State the opportunity to ask its follow-up questions. RP 5884. The State queried:

Q: Did you discuss a mutual hobby of target shooting?

A: Yes.

Q: Did [Mr. Yates] at any point reference a specific gun that he owned?

A: He said that him and his daughters went out and he taught them how to shoot a .22 because that's a quite easy gun for young people.

RP 5884-85.

The defense objected to this further line of questions arguing 1) the witness was not originally on the witness list and the scope of the questioning went beyond the information they were given, 2) the testimony went beyond the parameters outlined by the deputy prosecutor immediately before Mr. Carlson's testimony, based upon which the defense agreed to permit the State to call Mr. Carlson, and 3) the topic was an impermissible comment on Mr. Yates's exercise of his constitutionally protected right to possess firearms as set forth in *Rupe*, 101 Wn.2d at 705-07. RP 5885-86. The court, clearly troubled by the State's conduct, ruled:

The issue to me is not one of relevance. The issue to me, I just don't like surprises in the middle of trial. And defense needs to know in advance what type of testimony you are going to elicit now. And we talked about the fact that you were going to call this witness and confine yourself to what is in the police report. Now, I am hearing that's not there. That's a discovery issue, and that's the one thing that concerns me, as opposed to relevance.

RP 5888. The court allowed the defense to again interview the witness, then allowed the State to proceed with the questioning the State proffered during the offer of proof. RP 5888-89.

After the defense conferred with Mr. Carlson, the State then sought the opportunity to broaden its offer of proof. The State asked:

Q: Did you talk about any other information regarding guns or bullets?

A: Just what I had already told the police about a shell, a spent casing that I found.

Q: A spent .25 caliber casing?

A: Yes.

Q: That you found in the van?

A: Yes.

Q: And you did this sometime, what, between 8:30, 9:00 o'clock this morning?

A: Around 9:00 o'clock.

RP 5889-90. The defense immediately moved for sanctions against the deputy prosecutor based upon his active misrepresentation to the court regarding the scope of Mr. Carlson's testimony. RP 5890. The prosecutor immediately apologized to the court but admitted he and the witness had talked the morning prior to his testimony and the prosecutor claimed he had simply "forgotten" that he was going to ask Mr. Carlson about the .22 caliber firearm. RP 5890-91. The court accepted the prosecutor's apology and allowed the State to elicit the testimony about the .22 caliber firearm. RP 5891-93.

A woman who was working as a prostitute in Spokane and whom Mr. Yates frequented, Danielle Gorder, was called to testify by the defense on Mr. Yates's behalf. RP 7066. She testified she and Mr. Yates had sex approximately four to seven times between the spring of 1999 and November 1999. RP 7067. Ms. Gorder described Mr. Yates as a "good date" who paid well. RP 7071. On cross-examination the prosecutor probed Ms. Gorder's claim that Mr. Yates was a good date and concluded by asking:

Q: And your gut feeling was that that man over there, Robert Yates, was good guy to go with?

A: Yeah.

Q: And you went with him?

A: Yes, ma'am, I did.

Q: *You are lucky to be alive, aren't you?*

(Emphasis added) RP 7093.

The defense immediately objected and moved to strike the question, which the court instructed the jury to disregard the State's inappropriate statement. RP 7093. The defense also moved for a mistrial based upon the prosecutor's comment. RP 7094. The court admonished the prosecutor:

You said, "You are lucky to be alive, aren't you?" That's a totally inappropriate comment and question. You are experienced. You knew you shouldn't make that comment or that question to that witness. I'm going to take your motion under advisement.

RP 7095-96.

Ultimately the court denied the motion for a mistrial, ruling, despite its earlier admonishment of the prosecutor, that the prosecutor's conduct was not "of such a flagrant nature that a mistrial should be granted." RP 7303.

Closing Argument Misconduct

During the rebuttal portion of the State's closing argument, the prosecutor made several remarks that were improper and were immediately objected to:

So, too, you can rob someone you just murdered. *You prevented their knowledge of it by killing them, and it's still robbery.*

Please don't be troubled by the fact that the money that he gave to them was for an illegal purpose

(Emphasis added) RP 7576-77. The defense immediately objected, arguing the comment that you can rob from the dead was not the law. RP 7577. The court overruled the objection. RP 7577.

Most egregious, in completing the rebuttal argument, the prosecutor stated:

The lawyers had their say, and now you'll have your say. We thank you for your patience during this lengthy trial. *On behalf of all of the decent and law-abiding citizens of the state whom we are honored to represent –*

RP 7587. Again the defense objected, but the court allowed the prosecutor to finish his statement. RP 7588. Once the jury had retired to deliberate, the defense moved for a mistrial based upon the prosecutor's prejudicial and improper remarks. RP 7592. The defense noted the "clear inference [of the prosecutor's remark] was that the defense counsel in this case don't represent people who are law-abiding citizens in this state." RP 7592.

The court denied the motion for a mistrial, finding the prosecutor's remark harmless:

I didn't get, from the comment, any inference about defense attorneys or the defendant, and I don't find it to be an egregious comment which would necessitate a mistrial or a curative instruction. So I am going to deny the motion for a mistrial.

RP 7597.

a. Mr. Yates had a constitutionally protected right to counsel and a right to a fair trial. The United States Supreme Court has stated that a prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

Prosecutorial misconduct may deprive a defendant of a fair trial, and only a fair trial is a constitutional trial. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Prosecutorial misconduct which deprives an individual of a fair trial violates the individual's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution. "The touchstone of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause?" *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). Therefore, the ultimate inquiry is not whether the error was harmless or not harmless, but rather whether the impropriety violated the defendant's due process rights to a fair trial. *Davenport*, 100 Wn.2d at 762.

In addition, because defendants have a Sixth Amendment right to the effective assistance of counsel, personally attacking defense counsel may rise to the level of constitutional error. *Bruno v. Rushen*, 721 F.2d 1193 (9th Cir.1983)(*per curiam*), *cert. denied sub nom, McCarthy v. Bruno*, 469 U.S. 920 (1984).

Comments made by a deputy prosecutor constitute misconduct and require reversal where they were improper and substantially likely to

affect the verdict. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). To prevail on a claim of prosecutorial misconduct, the defendant must show both improper conduct and resulting prejudice. *Pirtle*, 127 Wn.2d at 672. "Prejudice is established by demonstrating a substantial likelihood that the misconduct affected the jury's verdict." *Id.* A mistrial should be granted by a trial court when a defendant has been so prejudiced that nothing short of a new trial will ensure the defendant a fair trial. *Mak*, 105 Wn.2d at 701.

b. The prosecutor's questions and argument constituted egregious misconduct.

i. The prosecutor's question on cross-examination appealed to the jury's passions and prejudices. A prosecutor's "deliberate appeal to the jury's passion and prejudice" constitutes prosecutorial misconduct. *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). In *Belgarde*, unobjected-to remarks made by prosecutor in closing argument that the defendant was "strong in" the American Indian Movement and its members were "a deadly group of madmen" and "butchers that kill indiscriminately," were highly prejudicial, introduced facts not in evidence, and had a substantial likelihood of affecting the verdict, mandating a retrial. *Belgarde*, 110 Wn.2d at 507.

Here, as the trial court recognized, the prosecutor's question that the witness was "lucky to be alive" was egregious misconduct. The State's theory was that Mr. Yates hunted and killed prostitutes. The defense proffered a theory that although Mr. Yates may have killed prostitutes, he did not kill every prostitute he came in contact with. The defense called Ms. Gorder to support that theory. Rather than fairly confront the defense theory, the prosecutor's final question suggested it was mere happenstance that Mr. Yates had not killed Ms. Gorder as well. The prosecutor's final question was coldly calculated to appeal squarely to the passions and prejudices of the jury. The court's ruling that a curative instruction or admonition would not have sufficiently addressed the misconduct was particularly prescient since there was no way to clear the taint of the comment. The court erred in not granting a mistrial.

ii. The prosecutor's final remark in rebuttal argument disparaged the role of defense counsel. In *State v. Gonzales*, the Court of Appeals reversed a conviction where the prosecutor's argument was very similar to the argument here. 111 Wn.App. 276, 283-84, 45 P.3d 205 (2002). In *Gonzales*, the prosecutor told the jury

I have a very different job than the defense attorney . . . I have an oath and an obligation to see that justice is served . . . Justice, that's my responsibility and justice is holding him responsible for the crime he committed.

Id. at 283.

Although the trial court overruled the objection as “not well taken,” the Court of Appeals reversed the conviction, finding the prosecutor’s argument to be misconduct. *Id.* at 284. Relying on the Fifth Circuit’s decision in *United States v. Frascone*, 747 F.2d 953 (5th Cir. 1984),¹⁴ the court reasoned the prosecutor’s argument established in the jurors’ minds “the false notion that unlike defense attorneys, prosecutor’s take an oath ‘to see that justice is served.’” *Gonzales*, 111 Wn.App. at 283-84. The Court found that “[s]uch an argument clearly has the potential to affect the verdict, which would necessitate reversal.” *Id.*

Here, the prosecutor’s argument was remarkably similar. By claiming he represented the “decent and law-abiding citizens,” the deputy prosecutor falsely divided the state into two groups: the decent and law-abiding citizens and law breaking non-decent citizens. The argument implied this latter group were represented by defense counsel. This argument impugned defense counsel and violated the presumption of innocence the jury was obliged to apply to Mr. Yates during the trial. The argument was clearly misconduct. *Gonzales*, 111 Wn.App. at 284.

¹⁴ In *Frascone*, the prosecutor argued “I take an oath to see that justice is done. [The defense] take an oath to represent their client zealously.” *Frascone*, 747 F.2d at 957. The district court immediately sustained the defense objection to the argument and directed the jury to disregard the argument, a fact critical to the appellate court’s refusal to reverse the conviction. *Id.* at 957-58.

iii. The prosecutor's argument that the dead could be robbed was a misstatement of the law. "Statements by the prosecution or defense to the jury upon the law, must be confined to the law as set forth in the instructions given by the court." *Davenport*, 100 Wn.2d at 760.

The State charged Mr. Yates with committing premeditated murder in the course of, in furtherance of, or in flight from robbery in the first or second degree. CP 1003-4. The court instructed the jury using the standard WPICs on robbery, that unlawfully and with intent to commit theft, the defendant took personal property from the person of or in the presence of another against the person's will and with force, threatened use of force, or fear of injury. CP 4101.

The State then argued during rebuttal that one can rob someone he murdered and that even though the person did not have knowledge of the robbery because they were dead, it was still robbery. RP 7576-77. This comment was an incorrect statement of the law.

iv. The prosecutor's questioning of witness Carlson violated Mr. Yates's right to bear arms. Prior to trial, the defense moved *in limine* to bar any testimony regarding gun ownership by Mr. Yates or that he possessed a gun collection. RP 1016. The court did not rule on this motion but allowed the State to admit photographs of Mr. Yates in

possession of a .25 caliber firearm. RP 1510. During trial Mr. Carlson testified to Mr. Yates's interest in target shooting.

“Due process prohibits the State from drawing adverse inferences from a defendant's exercise of a constitutional right.” *State v. Hancock*, 109 Wn.2d 760, 767, 748 P.2d 611 (1988) (citing *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)). Mr. Yates had a constitutionally guaranteed right to possess legal weapons. U.S. Const. Amend II (“[T]he right of the people to keep and bear arms, shall not be abridged.”); Const. Art. 1, § 24 (“The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired . . .”). As a consequence, Mr. Yates was “entitled under our constitution to possess weapons, without incurring the risk that the State would subsequently use the mere fact of possession against him in a criminal trial unrelated to their use.” *Rupe*, 101 Wn.2d at 707.

The State's questioning of Mr. Carlson regarding his and Mr. Yates's mutual enjoyment of target shooting was not just a discovery violation, as found by the trial court, but a direct comment on Mr. Yates's right to possess legal firearms. A .22 caliber firearm is not a banned weapon and as such was legal for Mr. Yates to possess.

c. The prosecutor's misconduct was not harmless.

Typically, appellate courts examine whether prosecutorial misconduct

denied the defendant a fair trial and reverse if there is a substantial likelihood that the comments affected the verdict. *State v. Contreras*, 57 Wn.App. 471, 473, 788 P.2d 1114, *review denied*, 115 Wn.2d 1014 (1990)(quoting *State v. Traweek*, 43 Wn.App. 99, 107-08, 715 P.2d 1148, *review denied*, 106 Wn.2d 1007 (1986)). When a prosecutor's comments also affect a separate constitutional right, they are subject to the stricter standard of constitutional harmless error. *Id.* This Court must reverse Mr. Yates's conviction and remand for a new trial unless this Court concludes the error was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24. "The State's burden to prove harmless error is heavier the more egregious the conduct is." *State v. Rivers*, 96 Wn.App. 672, 676, 981 P.2d 6 (1999).

Given the extensiveness of the prosecutor's misconduct, the errors cannot be deemed harmless. The prosecutor impugned defense counsel, commented on Mr. Yates's exercise of a constitutional right, misstated the law during argument, and appealed to the passions and prejudices of the jury. Impugning defense counsel alone is sufficient to require a reversal. *Gonzales*, 100 Wn.App. at 284. As a consequence, the misconduct by the prosecutor cannot be deemed harmless.

d. Cumulatively, the prosecutor's misconduct must result in reversal. "The cumulative effect of repetitive [prosecutorial] error may

be so flagrant that no instruction can erase the error.” *State v. Henderson*, 100 Wn.App. 794, 805, 998 P.2d 907 (2000) (citing *State v. Case*, 49 Wn.2d 66, 73, 298 P.2d 500 (1956)); *State v. Torres*, 16 Wn.App. 254, 263, 554 P.2d 1069 (1976).

‘Fair trial’ certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office, information from its records, and the expression of his own belief of guilt into the scales against the accused.

(citation omitted.) *Case*, 49 Wn.2d at 71. *See also, Gonzales*, 111 Wn.App. at 283-84 (improper argument by prosecutor not corrected by jury instruction).

Here, if this Court concludes the multiple instances of prosecutorial misconduct alone do not require reversal the combined instances cumulatively mandate reversal. *Henderson*, 100 Wn.App. at 805.

We hold that, when viewed against the evidence, the cumulative effect of the incidents of prosecutorial misconduct were so ill-intentioned and flagrant as to have materially affected the outcome of the trial. No instruction could have erased the error.

Id.

The same conclusion applies equally here. This Court must reverse Mr. Yates’s conviction for prosecutorial misconduct.

16. THE PROSECUTION COMMITTED
MISCONDUCT IN ITS CLOSING ARGUMENT
OF THE PENALTY PHASE OF THE TRIAL

a. Prosecutorial misconduct during the penalty phase

closing argument violates a defendant's right to due process. Under the Eighth and Fourteenth Amendments to the United States Constitution, a capital defendant has the right to a penalty phase in which the closing arguments are free from prejudicial prosecutorial misconduct.

DeChristoforo, 416 U.S. at 643. If the prosecutor's statement was inappropriate "[t]he relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (quoting *DeChristoforo*, 416 U.S. at 643).

Prosecution arguments which incite feelings of fear, anger, and a desire for revenge "or arguments that are irrelevant, irrational, inflammatory . . . [and] prevent calm and dispassionate appraisal of the evidence" are improper. *State v. Elledge*, 144 Wn.2d 62, 85, 26 P.3d 271 (2001). Prosecution arguments that evoke an emotional response are appropriate only if they are restricted to the circumstances of the crime. *Brett*, 126 Wn.2d at 214.

The prosecutors in Mr. Yates' penalty phase repeatedly made improper comments and arguments during their closing and rebuttal arguments during the penalty phase. Many defense objections to the prosecutors' arguments were sustained. The defense then moved for a mistrial at the conclusion of Deputy Prosecutor Costello's argument and renewed it following Deputy Prosecutor Corey-Boulet's rebuttal argument. RP 8245, 8309-10.

b. The prosecutor impermissibly commented on Mr. Yates' right to counsel. Very early in closing argument, Mr. Costello directly commented on Mr. Yates' constitutionally protected right to counsel:

Now you've heard from the defendant's, one of his pastors that he might have revealed this information to his lawyers. The defendant said as much to you. That does not absolve him of the despicable decision . . . to hold onto that information until such time as it might work to his advantage.

RP 8223.

The purpose of this comment was to suggest to the jury that Mr. Yates was not remorseful because he did not tell the police the location of Ms. Murfin's body until the October 2000 plea. Mr. Costello knew this was patently false because the prosecutors knew Mr. Yates was prepared to reveal this information as early as July 2000, but did not because Pierce County's withdrawal from the plea deal caused the attorneys to delay

disclosure. This deliberate misrepresentation follows a clear pattern by this prosecutors' office to engage in violations of defendants' rights under the federal and state constitutions. *See Benn v. Lambert*, 283 F.3d 1040 (9th Cir. 2002) (Pierce County prosecutor's act of knowingly presenting false testimony in capital case ruled reprehensible and resulted in a deprivation of the defendant's right to a fair trial).

c. The prosecutor repeatedly commented on Mr. Yates's right not to testify or incriminate himself. It is well-settled that a comment by the prosecuting attorney on the defendant's decision not to testify is prohibited by the Fifth Amendment to the United States Constitution. *Griffin v. California*, 380 U.S. 609, 615, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). *Griffin* applies equally at the penalty phase as it does the guilt phase. *Lesko v. Lehman*, 925 F.2d 1257, 1541-42 (3rd Cir.), *cert. denied*, 502 U.S. 898 (1991).

Over repeated defense objections, Mr. Costello commented multiple time on Mr. Yates's failure to give any of the details about the killings.

Again, when was his remorse? What about the details, the details of what he has done? He has never revealed them. He has talked with many people, pastors, police before his arrest.

...

I am talking about the evidence before you. He talked with police before his arrest. He has talked with his pastors. He

has written many, many letters. He addressed the Spokane County Court when he entered his plea. Isn't confession supposed to be good for the soul? Ladies and gentlemen, it's the State of Washington that carefully laid out for you what he did. He has never done so. When he stood before you this morning, did he ever offer a single detail?

...

Now, Mr. Hunko told you in opening statement of the guilt phase of this trial that the defendant was waiting two years for his lawyer to tell you what he - - that he did it. That he did what? When has the defendant, according to the evidence that you've heard in this case, when has the defendant ever tell - - did he tell his new-found friends after his arrest what he did? If he is remorseful, ladies and gentlemen, would he not offer up details of what he did?

RP 8223-24.

Such comments by a prosecutor have been found by the Connecticut Supreme Court to constitute an impermissible comment on the defendant's failure to testify, necessitating reversal of the defendant's conviction and remand for a new trial. *State v. Rizzo*, 266 Conn. 171, 269-70, 833 A.2d 363 (2003). In *Rizzo*, the prosecutor repeatedly referenced the defendant's failure to take responsibility for the murder. *Id.* The Court concluded "that it is more likely that the jury heard the statement in its more literal sense - - the defendant did not tell you that he took responsibility for his crime." *Id.* From this conclusion, the Court necessarily found the jury's interpretation of this was "that *neither* the defendant *nor* any of his witnesses testified he took responsibility." *Id.*

The Court ruled this amounted to an impermissible comment on the defendant's Fifth Amendment right to remain silent. *Id.*

Similarly, in *Lesko, supra*, the prosecutor talked about Mr. Lesko's "arrogance" in presenting mitigating evidence about his background, without having "the decency to say I'm sorry for what I did." *Lesko*, 925 F.2d at 1544. The Third Circuit ruled:

To the jury, the natural and necessary interpretation of these comments would be that Lesko had a moral or legal obligation to address the charges against him - - indeed, to apologize for his crimes - - during his penalty phase testimony, and that the jury should punish him for his failure.

Thus, we conclude that the prosecutor's criticism of Lesko's failure to express remorse penalized the assertion of his fifth amendment privilege against self-incrimination, in violation of the rule in *Griffin v. California*.

Id. at 1544-45.

This Court should similarly find Mr. Costello's argument an improper comment on Mr. Yates' constitutionally protected right to remain silent.

d. The prosecution denigrated defense counsel. Again over repeated defense objections, Mr. Costello made comments which denigrated defense counsel:

Members of the jury, this is an unspoken. One of the arguments, the issues that have been presented to you is an unspoken reason the defense wants you to believe Mr.

Yates is a Christian person. It's unspoken. The defense is trying to pander to those among you who are Christians.

...
Ladies and gentlemen, every one of you, every single one of you told us in jury selection that if the State proves what it must, you could return a death verdict. And we suggest that it is shameful, frankly, that the defense would attempt to play upon spiritual beliefs.

RP 8230-31.

It is improper for a prosecutor to denigrate the function of defense counsel. *See, e.g., State v. Williams*, 81 Conn.App. 1, 16, 838 A.2d 214, *cert. denied*, 268 Conn. 904, 845 A.2d 409 (2004) (“[T]he prosecutor is expected to refrain from impugning, directly or through implication, the integrity or institutional role of defense counsel.” (Internal quotation omitted.)). Further, a prosecutor may not personally attack defense counsel, *People v. Kennebrew*, 220 Mich.App 601, 607; 560 NW 2d 354 (1996), or suggest that defense counsel is intentionally attempting to mislead the jury, *People v. Watson*, 245 Mich.App 572, 592, 629 N.W.2d 411 (2001).

Mr. Costello did both these things. In arguing the defense was purposely targeting Christians on the jury panel and allegedly attempting to gain sympathy for Mr. Yates based solely upon that fact, Mr. Costello suggested counsel was “shamefully” and intentionally attempting to mislead the jury.

e. The prosecutors' closing and rebuttal arguments

improperly relied on factors other than the circumstances of the crime. In his parting comments in the closing argument, Mr. Costello stated over defense objection:

Members of the jury, the topic of deterrence is significant.
Does the death penalty have a deterrent value?

RP 8236. The court sustained the defense objection.

Later, in the rebuttal argument, Ms. Corey-Boulet repeatedly argued circumstances other than the crimes for which Mr. Yates was convicted. Defense objections to this argument were repeatedly sustained as beyond the scope of argument:

Counsel has invited you to speculate that what happened in Spokane was somehow a determination on the merits; that nothing more happened. You should not speculate. You don't have any evidence about how the case - - you know, the machinations that resulted in that disposition in Spokane. All you have is whatever you can make a reasonable inference from the sequence of events there, and you know the sequence of events. *You know the date that Ms. Mercer - - or Ms. Murphin's body was disclosed to the prosecutor.*

(Emphasis added.) RP 8287.

Later, Ms. Corey-Boulet stated:

But we do know and your common sense will so inform you that the best predictor of future behavior is past behavior.

...

Well, with regard to the aloneness, I would suggest that you consider the circumstances of the death of each of the victims, and that you particularly consider the experience of Ms. Mercer. *I am going to show you that horrifying picture again of Ms. Mercer trying to chew her way out of the plastic bag.*

(Emphasis added.) RP 8293, 8297.

The State presented no evidence regarding the deterrent effect of the death penalty. In addition, this last comment was a patent misrepresentation of the record given Dr. Howard's testimony that he did not find any plastic between Ms. Mercer's teeth but rather draped over her bottom lip. RP 5633. Dr. Howard stated the holes found in the bags were consistent with Ms. Mercer using her teeth, but also consistent with the bags being torn when they were placed over her head. RP 5627-28. The prosecutor distorted the record and relied on factors other than the circumstances of Ms. Ellis's and Ms. Mercer's murders in seeking the death penalty.

f. The prosecutor improperly appealed to passion and prejudice in engaging in a balancing test. During rebuttal, Ms. Corey-Boulet talked about the sentence imposed upon Mr. Yates by the Spokane Superior Court:

He was sentenced for the Spokane murders two years ago, 1998. Assume that he lives to be - - he was 48 - - 2000. He was 48 then. Assume he lives 50 years beyond the time he was sentenced in 2000, so he lives to be 98 years old. In

Spokane, he was sentenced for 13 murders and one attempted murder. Divide that number 14 into 50. That's a little over three years for each murder. Is human life that cheap?

RP 8300. A defense objection to this argument was sustained by the court on the ground it was improper argument. *Id.*

Weighing the victims' lives with the defendant's life is patently misconduct. *Rizzo, supra*. In *Rizzo*, the prosecutor urged the jury to "[b]alance [the defendant] against what he did, *his life against [the victim]*. *That's the balancing test.*" (Emphasis in original) *Rizzo*, 266 Conn. at 258. The Connecticut Supreme Court concluded "that it is more likely that the jurors heard this entire final passage as an appeal to weigh one life against another - - the life of the defendant, who had committed a horrendous murder, against the life of an innocent thirteen year old victim." *Id.* The Court found "[t]his was an improper appeal to the jurors' emotions of anger and revenge - - to persuade the jury to avenge the defendant's taking of the life of an innocent victim by mandating the death of the guilty defendant." *Id.*

Ms. Corey-Boulet's argument was just such a balancing of the defendant's life against the victims in Spokane. The prosecutor's remarks did indeed appeal to the jurors' emotions and sought to avenge what the prosecutor considered a lenient sentence in Spokane. Ms. Corey-Boulet

improperly urged the jurors to right the wrong she perceived had occurred in Spokane by voting for the death of Mr. Yates.

Further, Ms. Corey-Boulet's discussion of the Spokane murders and exhortation that the jury remedy the unfair sentence meted out to Mr. Yates in Spokane necessarily violated the Double Jeopardy Clause of the Fifth Amendment since Mr. Yates had already been sentenced for the Spokane murders. *See Lesko*, 925 F.2d at 1545-46 (prosecutor's urging the jury to sentence for current murder by considering another murder for which defendant was to be sentenced separately was improper and would have violated double jeopardy).

Ms. Corey-Boulet's arguments plainly were designed to appeal to the passion and prejudice of the jury and urged the jury to avenge the deaths of the victims. The arguments were improper and violated Mr. Yates' constitutionally protected right to due process and right to a fair trial.

17. THE TRIAL COURT ERRED IN ORDERING MR. YATES'S SENTENCE IN THIS CASE BE SERVED CONCURRENTLY WITH HIS SENTENCE FOR THE SPOKANE CASES

At sentencing, Mr. Yates argued his sentences in this matter must be served consecutively to his sentences for his Spokane convictions pursuant to RCW 9.94A.589(1)(b). CP 4503-12; RP 8353. Mr. Yates also contended concurrent sentences violated his right to due process of law under the Fourteenth Amendment. The trial court, however, concluded RCW 9.94A.589(3) required the imposition of concurrent sentences. CP 4543; RP 8356.

Mr. Yates contends on appeal, as he did below, that the provisions of RCW 9.94A.589(1)(b) required the imposition of consecutive sentences.

a. The sentence for a serious violent offense must be served consecutively to a previously imposed sentence. This Court has repeatedly held that all sentencing authority is statutory and a court cannot act in excess of that authority. *In re the Personal Restraint of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980); *see also, In re the Personal Restraint of Goodwin*, 146 Wn.2d 861, 874-76, 50 P.3d 618 (2002) (holding defendant could not agree to incorrect offender score); *State v. Hughes*, __ Wn.2d __, 110 P.3d 192, 208-09 (2005) (concluding that upon

vacation of exceptional sentence courts lacked inherent authority to convene jury to consider aggravating factors). In addition, the due process clause of the Fourteenth Amendment protects an individual from a deprivation of liberty in excess of the sentencing court's authority. *Hicks v. Oklahoma*, 447 U.S. 343, 346, 65 L.Ed.2d 175, 100 S.Ct. 2227, 2229 (1980).

The provisions of the Sentencing Reform Act govern all felony sentencing. RCW 9.94A.505(1) provides "whenever a person is convicted of a felony, the court shall impose punishment as provided in this chapter." RCW 9.94A.515 establishes the seriousness level of aggravated first degree murder as "XVI." RCW 9.94A.510 establishes the standard range for such an offense as "Life Sentence without Parole/Death Penalty."

RCW 9.94A.589 provides in relevant part:

(1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. . . .

(b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

(c) [concerning consecutive sentences for multiple current convictions of unlawful possession of and/or theft of a firearm].

(2)(a) Except as provided in (b) of this subsection, whenever a person while under sentence for conviction of a felony commits another felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms.

....

(3) Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

....

Where serious violent offenses do not meet the definition of “same criminal conduct” the offenses are necessarily “separate and distinct” for purposes of RCW 9.94A.589. *State v. Brown*, 100 Wn.App. 104, 113, 995 P.2d 1278 (2000), *overturned on other grounds*, 147 Wn.2d 330, 58 P.3d 889 (2002). The definition of “same criminal conduct” requires the offenses involve the same victim. RCW 9.94.589(1)(a). As such, if two or more serious violent offenses involve separate victims, the offenses are separate and distinct.

Unquestionably, the 13 counts of first degree murder and one count of attempt first degree murder in Spokane County and 2 counts of aggravated first degree murder in Pierce County involved separate victims. Further, all the counts involved serious violent offenses. RCW 9.94A.030(37)(a).¹⁵ Thus, because Mr. Yates was being sentenced for serious violent offenses, RCW 9.94A.589(1)(b) required the court to impose sentences in this case which were consecutive to the sentences for the serious violent offenses for which Mr. Yates was previously convicted and sentenced in Spokane County.

¹⁵ RCW 9.94A.030(37)(a) lists only “first degree murder,” and not “aggravated first degree murder.” This Court has long held “aggravated first degree murder” is not a separate offense but merely an aggravated version of first degree murder. *See State v. Kincaid*, 103 Wn.2d 304, 312-13, 692 P.2d 823 (1985); and *Irizarry*, 111 Wn.2d. at 594-9. While the conclusion of these cases is contrary to recent United States Supreme Court jurisprudence, as argued at various points in this brief, the Legislature’s failure to list “aggravated first degree murder” separately can be viewed only as a legislative recognition of the state of this court’s jurisprudence at the time the statute was drafted.

b. The trial court wrongly imposed concurrent sentences.

The State argued below, and the trial court concluded, RCW 9.94A.589(1)(b) only applies to current offenses and does not apply to a scenario where the person is currently serving sentences for previous serious violent offenses. RP 8360-63. The State convinced the court the provisions of RCW 9.94A.589(3) govern in this case. CP 4553.

While RCW 9.94A.589(1)(a) expressly limits its application by the phrase “whenever a person is to be sentenced for two or more current offenses,” RCW 9.94A.589(1)(b) contains no such limitation and applies “[w]henver a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct.”

The meaning of an unambiguous statute must be derived from the language of the statute alone. *State v. Chester*, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997) (citing *Cherry v. Municipality of Metro. Seattle*, 116 Wn.2d 794, 799, 808 P.2d 746 (1991)). Because the plain language of RCW 9.94A.589(1)(b) does not limit the subsection’s application to current offenses as does the language of the preceding subsection, the trial court incorrectly concluded that only current serious violent offenses are subject to consecutive sentences.

The trial court’s conclusion that RCW 9.94A.589(3) required concurrent sentences is similarly incorrect. That subsection provides:

Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

(Emphasis added.) RCW 9.94A.589(3). As the underlined portion indicates, the subsection expressly incorporates the provisions of the preceding two subsections, including, of course, the consecutive sentence provisions of RCW 9.94A.589(1)(b).

The interpretation advanced by the State and accepted by the trial court was that anytime a person commits a current felony while he is not under conviction or sentence but prior to conviction of the current offense is convicted of another felony, the sentences must always be served concurrently, unless the second sentencing court specifically orders otherwise. RP 8360. The State's interpretation simply eliminates the introductory clause "subject to subsections (1) and (2) of this section." But this violates a central principle of statutory construction that "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (quoting *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d

1303 (1996)). Thus, in interpreting a statute a court may neither add or delete terms. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

RCW 9.94A.589(3) expressly makes its provisions subject to the limitations and requirements of the preceding subsections. Among these is the requirement of RCW 9.94A.589(1)(b) that sentences for serious violent offenses be served consecutively. Again, the plain language of RCW 9.94A.589(1)(b) does not limit its application to current offenses as does RCW 9.94A.589(1)(a). Because the plain language of RCW 9.94A.589(3) expressly incorporates the limitations of the preceding two subsections, including the requirement of consecutive sentences for serious violent offenses, the trial court was required to give effect to that language.

If a statute is plain and unambiguous, courts must derive its meaning from the statutory language. *Dep't of Transp. V. State Employees' Ins. Bd.*, 97 Wn.2d 454, 458, 645 P.2d 1076 (1982). The language "[s]ubject to subsections (1) and (2) of this section" plainly requires consecutive sentences in this case. However, even assuming the statute is ambiguous, the rule of lenity requires a court adopt the interpretation most favorable to a defendant. *In re Post Sentencing Review of Charles*, 135 Wn.2d 239, 240-50, 955 P.2d 798 (1998). "A statute is ambiguous if it can be reasonably interpreted in more than one way."

McFreeze Corp. v. Dep't of Revenue, 102 Wn.App. 196, 200, 6 P.3d 1187 (2000) (citing *Vashon Island Comm'n for Self-Gov't v. Washington State Boundary Review Bd.*, 127 Wn.2d 759, 771, 903 P.2d 953 (1995)). If the language “[s]ubject to subsections (1) and (2) of this section” can be interpreted as the trial court did to require concurrent sentences the statute is at best ambiguous. Thus, the interpretation offered by Mr. Yates must control.

c. The Court should reverse Mr. Yates’s sentence.

Because the trial court imposed a sentence in excess of its statutory authority, and in doing so violated Mr. Yates’s right to due process under the Fourteenth Amendment, the sentence must be reversed.

F. MANDATORY REVIEW ISSUES

18. THE DEATH SENTENCE WAS THE PRODUCT OF PASSION AND PREJUDICE

This Court is required to determine “whether the sentence of death was brought about through passion or prejudice.” RCW 10.95.130(2)(b). As argued above, the prosecutors engaged in repeated acts of misconduct during the closing arguments of the penalty phase, impugned defense counsel, commented on Mr. Yates’ right to silence, and argued factors other than the circumstances of the Ellis and Mercer murders. Under RCW 10.95.130(2)(c), this provides an independent basis to invalidate the

death sentence since the prosecutor's actions were designed to inflame the jury and lead them to render a verdict based upon passion and prejudice against Mr. Yates.

19. UNDER THE REASONING OF *FURMAN V. GEORGIA*, THE WASHINGTON CAPITAL PUNISHMENT STATUTE IS UNCONSTITUTIONAL AND VIOLATES THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS.¹⁶

a. Introduction. In *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) the Supreme Court held that discretionary death sentencing statutes in Georgia and Texas resulted in an arbitrary imposition of the death penalty, and therefore authorized cruel and unusual punishment contrary to the Eighth Amendment. *State v. Baker*, 81 Wn.2d 281, 282, 501 P. 2d 284 (1972). In *Baker, State v. Vidal*, 82 Wn.2d 74, 508 P. 2d 158 (1973), and *State v. Braun*, 82 Wn.2d 157, 509 P. 2d 742 (1973), this Court concluded that *Furman* invalidated Washington's death penalty statute, "there being no significant difference between the result of the law challenged in *Furman* and our own." *Braun*, 82 Wn.2d at 166.

The arbitrariness that was constitutionally unacceptable in *Furman* had several facets identified in the majority opinions:

¹⁶ This issue is currently pending before this Court in *State v. Allen Gregory*, # 71155-1 in which oral argument was held on March 22, 2005.

Each member of the Court [in *Furman*] wrote an opinion. Two Justices, Brennan and Marshall, considered the death penalty violated the Eighth Amendment proscription of cruel and unusual punishment, no matter what the circumstances of its imposition. Three Justices, Douglas, Stewart, and White, voted to strike down the death penalty statutes before them because of the manner in which the penalty was imposed...

...Justice Douglas was concerned with the selective application of the penalty to the poor and to unpopular minorities . . . *Furman*, 408 U.S. at 256-57. Justice Stewart voiced similar concerns and concluded that the Eighth Amendment prohibited the imposition of the death penalty “wantonly” and “freakishly” on a capriciously selected random handful of defendants. *Furman*, 408 U.S. at 310. Justice White argued that the infrequency of the imposition of the death penalty nullified any deterrent or retributive value it might have, and that moreover “there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.” *Furman*, 408 U.S. at 313.

State v. Bartholomew, 98 Wn.2d 173, 181-82, 654 P. 2d 1170 (1982),
vacated on other grounds, 463 U.S. 1203 (1983). Put somewhat more succinctly:

In *Furman*, the court found existing death penalty statutes gave juries so little guidance that the death penalty was being imposed discriminatorily. *Furman*, 408 U.S. at 240 (Douglas, J., concurring). The large numbers of crimes that were death-eligible coupled with unfettered jury discretion had resulted in the death penalty being imposed so infrequently that there was no principled way to distinguish those cases in which death was imposed. *Furman*, 408 U.S. At 312 (White, J., concurring). The fact a “random handful” of rapists and murderers were selected for execution from among equally culpable individuals caused one Justice to conclude the death penalty was being

imposed “wantonly” and “freakishly.” *Furman*, 408 U.S. at 310. (Stewart, J., concurring).

Pirtle, 127 Wn.2d. at 684.

Washington’s death penalty statute has produced results that are worse on all these criteria than the law struck down in *Furman*. Mr. Yates has been “arbitrarily” sentenced to death under a statute that is arbitrary, purposeless and racially disparate.¹⁷ Under RCW 10.95, death sentencing has been even more racially disparate, and apparently discriminatory. There is no principled way to distinguish the few cases in which death has been imposed, such as this case, and upheld, from the cases similar to Mr. Yates’s in which it was not. Under Washington’s statute, the death penalty has been so delayed and “so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice,” so that carrying out executions constitutes “the pointless and needless extinction of life.” *Furman*, 408 U.S. at 312 (White, J., concurring).

The highest courts of allied nations, including Canada, have concluded that the imposition of capital punishment under our system violates the right to life and to be free from cruel, inhuman and degrading

¹⁷ See Department of Corrections Web site, www.wa.gov/doc/deathpnlty.htm, (hereafter “DOC Death Penalty Summary”); Status Report on the Death Penalty in Washington State, www.courts.wa.gov/reports_deathpen/home.cfm.

punishment.¹⁸ Two decades of hard reality have shown that Washington's death penalty statute produces results that are indistinguishable from those produced by the law struck down in *Furman*.

b. The Washington death penalty statute is arbitrary. The arbitrariness that concerned the majority of the justices in *Furman* is best defined by Justice Stewart's often quoted metaphor: the death penalty was "cruel and unusual in the same way that being struck by lightning is cruel and unusual." 408 U.S. at 309. Arbitrary or capricious has also been defined as "having no rational basis." See *Bicknell v. United States*, 422 F. 2d 1055, 1057 (5th Cir. 1970). Washington's present pattern of death sentencing is as lacking in a rational basis as its predecessor. Under this statute, the death sentence is not imposed and carried out on the worst homicide offenders. Men who were convicted of murders involving the largest number of victims, such as Gary Ridgeway, Benjamin Ng, David Rice, and Lawrence Sullens, and even Mr. Yates in the Spokane matters, have avoided execution. See Trial Judge Report Nos. 14, 43, and 69, 265.

¹⁸ See *U.S. v. Burns & Rafay*, [2001] 1 S.C.R. 283, 2001 S.C.C. 7 (Supreme Court of Canada held that its Constitution forbade extradition to the State of Washington in capital cases); see also *State v. Pang*, 132 Wn.2d 852, 940 P. 2d 1293 (1997) (Supreme Court of Brazil prohibited extradition to face capital charges in Washington State); cf. *Soering v. United Kingdom*, 11 EUR. HUM. RTS. REP. 439 (1989) (European Court of Human Rights forbade extradition to the U.S., principally because of anticipated time that he would have to spend on death row if sentenced to death).

So did all of the men who were convicted of killing police officers under this law.¹⁹

In stark contrast, six of the ten men now under death sentence in this state were convicted of single victim homicides; none killed police officers or prison guards. *See* Trial Judge Report Nos. 194 (Thomas), 216 (Gregory), 180 (Davis), 119 (Gentry), 177 (Woods), and 165 (Elmore). The vast majority of the 253 cases represented by Trial Judge Reports involved single victims. These six men have been selected from those people convicted of single victim aggravated first degree murders under this statute. *See* Trial Judge Report Nos. 1-253. As noted above, four of those six are African American. Other than that, there is little apparent basis for distinguishing those few from the many apparently similar defendants who escaped death.

Another form of arbitrariness is the geographical disparity in the frequency with which the death penalty is sought and imposed in different counties. Pierce County, where Mr. Yates was prosecuted, seeks and imposes death far more than any other of Washington's 39 counties. *See Seattle Post Intelligencer*, August 6-8, 2001. In fact, the geographical disparities are highlighted in Mr. Yates' matter. Spokane County

¹⁹ *See* Kenneth Scradler (No. 95); Nedley Norman (No. 17); Robert Hughes (No. 24); Lonnie Link (No. 27); Darron Hutchinson (No. 68); Patrick Hoffman (No. 71); Elmer McGuiness (No. 72); Ray Lewis (No. 88); Charles Finch (No. 154); Sap Kray (No. 212).

Prosecutor Steven Tucker considered the death penalty for Mr. Yates in the death of thirteen victims and chose to charge Mr. Yates only with first degree murder and recommended a sentence of 408 years. Pierce County Prosecutor John Ladenburg faced with just two victims killed in the same manner as the Spokane victims, chose to seek the death penalty.

Arbitrariness is apparent from a review of the cases in which death has actually been imposed. Although the four men who were executed under this law all committed serious crimes, three of those four “volunteered” for execution. See *State v. Dodd*, 120 Wn.2d 1, 838 P.2d 86 (1992); *State v. Sagastegui*, 135 Wn.2d 67, 954 P.2d 1311 (1998), and *State v. Elledge*, *supra*. Death sentences have been reversed on appeal largely due to two types of systemic breakdowns which exacerbate the unfairness, contribute to the arbitrariness, and undermine the reliability of the death sentencing decision: ineffectiveness of court appointed defense counsel, and concealment of exculpatory evidence by prosecutors. See *Seattle Post Intelligencer*, August 6-8, 2001; Liebman, “*A Broken System, Error Rates in Capital Cases, 1973-75.*”²⁰

Those systemic problems also contribute to another form of arbitrariness: “Execution of an innocent person...the ultimate ‘arbitrary imposition.’” *Herrera v. Collins*, 506 U.S. 390, 437, 113 S. Ct. 853, 122

²⁰ Available at <http://justice.policy.net/jpreport/index.html>.

L. Ed. 2d 203 (1993) (Blackmun, Stevens and Souter, J. dissenting). Executing the innocent has been magnified in recent years with the repeated spectacle of death row exonerations. See Report of the Governor's Commission on Capital Punishment (April 2002) (hereinafter "Ryan Report").²¹ The risk of executing an innocent defendant has directly impacted this state; the risk of error and our failure to address it weighed heavily in the decision of the Canadian Supreme Court to preclude extradition to this state for capital prosecution. See *U.S. v. Burns & Rafay, supra*. The death penalty in Washington is thus as arbitrary as the statutes at issue in *Furman*, and should be invalidated.

c. The death penalty is infrequently imposed and purposeless. Justice White premised his decision in *Furman* on the infrequency of imposition of the penalty in relation to the number of crimes for which it was legally authorized, which "Justice White argued . . . nullified any deterrent or retributive value it might have"²² and thus eliminated the constitutional justification for its imposition. Justice White wrote:

Most important, a major goal of the criminal law – to deter others by punishing the convicted criminal – would not be substantially served where the penalty is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others...

²¹ www.idoc.state.il.us/ccp/reports/commission_report.

²² *Bartholomew*, 98 Wn.2d at 182.

Furman, 408 U.S. at 311-13.

In 1972, a total of nine men were under death sentence in Washington, and another eight had been executed over the preceding two decades. See DOC Death Penalty Summary. During the same period in which those seventeen death sentences were imposed, approximately 1440 murders and non-negligent homicides were committed in this state. Thus, in the decades prior to *Furman*, just over one death sentence was imposed for every 100 non-negligent homicides committed in this state.

Under the present law, the death penalty has been imposed even less frequently than that. Thirteen people have been executed or stand condemned to death under the present statute. Between the enactment of the statute and the end of 2000 (the most recent year for which data are available), 4629 murders and non-negligent homicides have occurred in Washington. Thus, this statute has produced less than one death sentence for every 350 non-negligent homicides committed in this state during its regime. In other words, measured against homicide data (the only data available for both periods), the death penalty has been imposed more than three and one-half times as infrequently under this law as under the law struck down in *Furman*.

While 14 men have been executed or condemned, another 239 or more have been convicted of aggravated first-degree murder and

sentenced to life. That means, even looking at this most narrowly defined group of cases (for which there are no comparable data pre-*Furman*), some 94% of persons prosecuted for and convicted of this most serious offense have escaped execution.

The weight of the scientific evidence and opinion indicates that capital punishment is not a better deterrent than life imprisonment, even in jurisdictions that carry it out regularly.²³ Executions in Washington cannot deter, when three of the four cases in which there have been actual executions involved persons who volunteered for execution.

The administration of the death penalty has stripped it of its purported justifications, leaving it as “nothing more than the pointless infliction of suffering[.]” *Furman*, 408 U.S. at 279 (Brennan, J., concurring). Much as at the time of *Furman*, the current statute has become a meaningless and cruel anomaly in our system of justice.

d. The arbitrary, capricious, and purposeless imposition of the death sentence under the 1981 statute violates the state and federal constitutions and the ICCPR. *Furman v. Georgia* remains the state of the

²³ See, e.g., Harries and Cheatwood, *The Geography of Execution: The Capital Punishment Quagmire in America* (1997); Sorenson, et al., *Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas*, 45 *Crime and Delinquency* 481-93 (1999); Bailey, *Deterrence, Brutalization, and the Death Penalty: Another Examination of Oklahoma's Return to Capital Punishment*, 36 *Criminology* 711-33 (1998); Thompson, *Effects of an Execution on Homicides in California*, 3 *Homicide Studies* 129-50 (1999).

law. *Cooper v. Leatherman Tool Co.*, 532 U.S. 424, 433-34, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001). If the death penalty had been imposed under the present statute in a manner indistinguishable from the manner in which it was imposed at the time of *Furman*, it necessarily violated the Eighth Amendment. Moreover, it is well-settled that Article I, § 14 of the Washington Constitution prohibits arbitrariness in death sentencing and excessiveness in punishment, even more strongly than the Eighth Amendment. *State v. Bartholomew* (II), 101 Wn.2d 631, 640, 683 P.2d 1079 (1984); *State v. Fain*, 94 Wn.2d 387, 392, 617 P.2d 720 (1980); *State v. Gimarelli*, 105 Wn.App. 370, 20 P.3d 430, *review denied*, 144 Wn.2d 1014 (2001).

In addition, the United States has ratified the International Covenant on Civil and Political Rights (ICCPR), which expressly states that “No one shall be arbitrarily deprived of his life” and “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” *See* Article 6(1), and Article 7 of ICCPR, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, art. 6 (entered into force March 23, 1976.) The United States became a party to the ICCPR on September 8, 1992. 138 Cong. Rec. S4781-84 (daily ed. April 2, 1992). Under the U.S. Constitution, treaties are the supreme law of the land. U.S. Const. Art. VI, § 2, cl. 2.

The manner in which the death penalty has been carried out under the present Washington law, in general and in Mr. Yates' case, simply cannot be squared with the principles embodied in these provisions. Thus, this Court must strike down Washington's death penalty provisions:

20. THIS COURT CANNOT ENGAGE IN A
MEANINGFUL PROPORTIONALITY REVIEW
IN LIGHT OF THE INCOMPLETE AND
INACCURATE TRIAL COURT REPORTS

a. Introduction

Under RCW 10.95.130(2)(b), this Court is required to examine a set of "similar cases" to determine whether a death sentence is excessive or disproportionate. If this Court finds the sentence to be excessive or disproportionate, it must invalidate the sentence and remand the case for the imposition of a sentence of life without parole. RCW 10.95.140 (2)(b). By statute, "similar cases" include all reported cases since 1965 in which a trier of fact considered the imposition of a death sentence and Trial Judge Reports filed in every aggravated murder case since the passage of the current statute in 1981. RCW 10.95.130(2)(b).

This Court's set of "similar cases," however, is defective because it is incomplete and inaccurate, rendering proportionality review impossible. For this reason, once this Court has compiled a complete and accurate set

of Trial Judge Reports, this Court should then set a briefing schedule for the parties.

b. The proportionality test mandated by RCW 10.95.130(2)(b) requires a complete set of Trial Judge Reports. This Court has struggled with the concept of a meaningful proportionality review under RCW 10.95.130. *See e.g., State v. Harris*, 106 Wn.2d 784, 798-99, 725 P.2d 975 (1986), *cert. denied*, 480 U.S. 940 (1987); *Jeffries*, 105 Wn.2d at 431; *Campbell*, 103 Wn.2d at 42 (Utter, J., dissenting). The lack of statutory guidance has been exacerbated by the Court's wavering interpretation of "similar cases." *Pirtle*, 127 Wn.2d at 690.

In 1995, a federal court in the Western District of Washington held that this Court's inconsistency in performing proportionality reviews constituted a due process violation. *See Harris v. Blodgett*, 853 F.Supp. 1239 (W.D. WA 1994), *aff'd*, 64 F.3d 1432 (9th Cir. 1995). Specifically, the court noted that the lack of clear definition of "similar cases" had created a situation where "there is no procedure for the parties to be notified of which cases, or types of cases, the court may consider similar, until the parties receive the court's ultimate determination." *Id.*

In addition to the defective definition of similar cases, the federal court also noted that the statute itself failed to provide a standard for reviewing the cases ultimately selected for comparison. *Harris*, 853 F.

Supp. at 1289. This criticism has been echoed by members of this Court. One former Supreme Court justice expressed concerns that the various approaches adopted by this Court over the years lacked systemic consistency. *Brett*, 126 Wn.2d at 227 (Utter, J., dissenting).

In *Brett* and *Pirtle*, this Court responded to the systemic problem identified by the *Harris* court and held that when comparing a case to “similar cases,” it would in fact review all reported cases in which the judge or jury considered the imposition of a death penalty and all cases described in the Trial Judges Report on file with the Court. *Brett*, 126 Wn.2d at 211.

In addition, this Court has held that the purpose of the proportionality review provision of RCW Ch. 10.95 was not to guarantee proportionality, but was instead to search out the “aberrant” or “freakish” case. *Brett*, 126 Wn.2d at 211; *Pirtle*, 127 Wn.2d at 683. This Court adopted a four-factor test to examine (1) the nature of the crime; (2) the number of aggravating circumstances; (3) the defendant’s criminal history; and (4) the defendant’s personal history. *Pirtle*, 127 Wn.2d at 127. Since the *Brett* and *Pirtle* decisions, this Court has sought to apply this test in each of the death penalty cases it has reviewed on direct appeal. *State v. Stenson*, 132 Wn.2d 668, 758-759, 940 P.2d 1239 (1997); *Brown*, 132 Wn.2d at 557; *Sagastegui*, 135 Wn.2d at 94; *State v. Elmore*, 139 Wn.2d

250, 308, 985 P.2d 289 (1999), *cert. denied*, 531 U.S. 831 (2000); *State v. Davis*, 141 Wn.2d 798, 10 P.3d 977 (2000); *State v. Woods*, 143 Wn.2d 561, 613, 23 P.3d 1046 (2001), *cert. denied*, 122 S. Ct. 374 (2001); *Elledge*, 144 Wn.2d at 80.²⁴

This Court, however, did not have a complete set of Trial Judge Reports with which to perform the proportionality analysis in any of these cases.

A recent study of the trial reports filed between 1981 and March 2003, revealed serious problems. Kaufman-Osborn, *Capital Punishment, Proportionality Review, and Claims of Fairness (With Lessons From Washington State)*, 79 Wash.L.Rev. 775 (2004).

The study revealed (1) there are missing reports, reports filed late or not revised after death sentences were invalidated; (2) there are reports which fail to provide either accurate or adequate information regarding defendants and victims; (3) there are reports which fail to provide either accurate or adequate information regarding aggravating and mitigating factors; and (4) there are reports which fail to provide accurate or adequate information about the racial and ethnic identities of the participants in capital trials. Kaufman-Osborn at 816. At the time of his study, Professor

²⁴ In two other cases the Court did not apply the test as the Court reversed the sentence on other grounds. *Thomas*, 150 Wn.2d 821; *State v. Marshall*, 144 Wn.2d 266, 27 P.3d 192 (2001).

Kaufman-Osborn noted there were missing reports in 12 first degree aggravated murder convictions. *Id.* at 817 n.219. Absent these reports, any attempt to identify the full range of “similar cases” to Mr. Yates’ case is less than credible. Given that all of the defendants in these 13 cases were sentenced to life imprisonment without the possibility of parole, a proportionality review conducted without these reports will skew the calculation in favor of death. *See Elledge*, 144 Wn.2d at 90-91 (Sanders, J., dissenting).

In addition, the study noted that there are 15 trial judge reports that have not been updated where defendants initially sentenced to death have had their sentences reversed and have been re-sentenced to life without parole or had the convictions set aside. *Id.* at 818-19 n.224. This failure to update the trial reports introduces inaccuracy into the database because these cases appear on their face to reflect facts warranting a death sentence where those sentences have been found legally invalid. While this Court has rejected a claim that the trial reports need to be updated after a death sentence has been overturned, the failure to update the reports allows this Court to continue to cite, in future cases, death sentences that it has upheld but have been subsequently rejected. Kaufman-Osborn at 820 n.226 (citing *Woods*, 142 Wn.2d at 612-14). These cases should remain in the

database and they should be treated as if the death sentence had not been imposed.

Further, Professor Kaufman-Osborn's study found that the majority of the trial reports were not submitted within 30 days of the entry of the judgment and sentence as required by RCW 10.95.120. Kaufman-Osborn at 821. Of the 259 trial judge reports, 161 or 62% were filed late, with the range of tardiness being from two days to eight years. *Id.* at 821 n. 231, 232. The study also found 79, or 31% of all reports, were received over a year late, 58 over two years, 40 over three years, and 26 over four years. *Id.* at 821. Finally, the trial judge reports failed to include crucial information regarding the defendant, with 41 of the 259 reports, or 15.8%, providing no answer regarding the highest grade completed by the defendant, 63 reports, or 24.3%, failing to provide the defendant's intelligence level, and 149 reports, or 57.5%, failing to provide any information regarding the defendant's IQ score. *Id.* at 825. Very rarely do the reports indicate with any detail what mitigating evidence was presented and 12 reports fail to indicate any aggravating circumstances alleged or found by the jury. *Id.* at 827-28.

As a result of these deficiencies in the trial reports, this Court's ability to conduct a meaningful proportionality review is compromised. This Court should either remedy the deficiencies or reverse Mr. Yates'

death sentence in light of its inability to conduct a meaningful proportionality review to which Mr. Yates is constitutionally entitled.

c. Conducting a proportionality review without a complete set of Trial Judge Reports would violate Mr. Yates's constitutional rights under the United States Constitution. This Court cannot constitutionally conduct a proportionality review using the existing set of Trial Judge Reports. Such an incomplete review violates the Fourteenth Amendment as the Due Process Clause requires this court conduct a proportionality review as statutorily mandated. In *Hicks v. Oklahoma*, the U.S. Supreme Court held that when a state enacts a criminal statute which sets out a procedure for the imposition of a particular penalty, a defendant has a "substantial and legitimate expectation" that he will be deprived of his liberty only if the state complies with the procedural requirements of that state statute. 447 U.S. at 346.

Under *Hicks*, Mr. Yates has a due process right to appellate proportionality review in conformity with RCW 10.95.120-140. See *Kilgore v. Bowersox*, 124 F. 3d 985, 996 (8th Cir. 1997) (once state establishes statutory proportionality review, it must be conducted consistently with the Due Process Clause), *cert. denied*, 524 U.S. 942 (1998); *Leisure v. Bowersox*, 990 F. Supp. 769, 783 (E.D. Mo. 1998) (same); *State v. Benn*, 120 Wn.2d 631, 698, 845 P.2d 289 (1993) (failure

to adhere to Washington's statutorily mandated duty to conduct a proportionality review would violate due process) (Utter, J., dissenting), *cert. denied*, 510 U.S. 944 (1993).

Trial judges have failed to comply with RCW 10.95.120 and this Court does not have reports from trial judges in all aggravated first-degree murder convictions since 1981. This violates RCW 10.95.130.

In light of the defects in the reports, there is little likelihood that these problems can be remedied. As noted, many of the Trial Judge Reports that have been filed were sent to this Court years after the judgments and sentences were entered, in violation of the requirement that these reports be submitted to this Court within 30 days of the entry of the judgment and sentence. RCW 10.95.120. As a result, trial judges (some of whom have retired) have submitted reports in cases years after the fact, admitting that they could no longer remember the case in sufficient detail to complete the form. See for example, Trial Judge Reports 108 and 110.

The Legislature has tailored post-trial procedures to govern the mandatory appellate review of all death sentences. Filing a completed Trial Judge Report within 30 days of the entry of a judgment and sentence is mandatory. Review of these Trial Judge Reports to determine proportionality is mandatory. If the Trial Judge Reports are incomplete or

not filed, as required by statute, the due process problems presented here may not be curable.

The U.S. Supreme Court held in *Pulley v. Harris* that the federal constitution does not require a comparative proportionality analysis in every death sentence review, as long as there were some set of checks to ensure that the penalty was not arbitrarily imposed. 465 U.S. at 45. *Pulley*, however, did not modify the Supreme Court's prior ruling in *Hicks*. Because the Washington statute sets up the procedural protection of a proportionality review, this Court is obligated under the Fourteenth Amendment's Due Process Clause to ensure that this analysis complies with the state statute and is performed in a meaningful way. See *Harris*, 853 F. Supp. at 1286.

In addition, due process must be "meaningful." *Armstrong v. Manzo*, 380 U.S. 545, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965). What process is constitutionally due may depend on the particular situation, but when the state seeks to deliberately extinguish human life, the United States Supreme Court has required a heightened degree of scrutiny of procedural due process. *Harris*, 853 F. Supp. at 1286. United States Supreme Court cases make it clear that two fundamental aspects of due process are appropriate notice of the proceedings to be held against a defendant and a meaningful opportunity to argue the strengths of the

defendant's position and to attack the state's position. *Harris*, 853 F. Supp. at 1286.

As argued *supra*, Washington's proportionality review was found by a federal court to violate due process because the statute did not give defendants notice of the cases on which this Court intended to rely on in finding a sentence proportionate. *Harris, supra*. *Brett and Pirtle* held that this due process problem was rectified by the Court's pronouncement that it would consider and rely on every case defined as a "similar case" in the statute. While this Court felt that this ruling eliminated the due process problems outlined by the *Harris* court, it is obvious now that it did not. The problem is that neither this Court nor defendants under sentence of death can say that they have a complete set of these "similar cases."

Moreover, even the "information" that has been provided by way of Trial Judge Reports is of questionable reliability given the passage of time between entry of judgment and completion of the reports and the sparse responses provided. It is fundamentally unfair to ask a defendant to compare his case, his background, and his sentence to those of others identified in the Trial Judge Reports when these reports are so incomplete and unreliable.

Conducting a proportionality review using inaccurate and incomplete data of “similar cases,” in contravention of RCW 10.95.120 and RCW 10.95.130, violates Mr. Yates’ constitutional due process rights.

d. There is an independent state ground for a comparative proportionality review. Although *Pulley v. Harris* held that a comparative proportionality review is not required under the Eighth Amendment, a meaningful comparative proportionality review is required by the Washington State constitution’s prohibition of cruel punishment. Const. Art. I, § 14.²⁵

The United States Supreme Court’s interpretation of the Eighth Amendment does not control the Washington Supreme Court’s interpretation of Article I, §14. *Fain*, 94 Wn.2d at 392-93 (state constitutional prohibition against cruel punishment is broader than Eighth Amendment prohibition of cruel and unusual punishment); *State v. Roberts*, 142 Wn.2d 471, 506, 14 P.3d 717 (2000) (same). Because this Court has already found that the Washington Constitution provides broader protection, this Court need only examine factors four and six of the *Gunwall* analysis.²⁶

²⁵ Although *Brown*, 132 Wn.2d at 554 rejected a state constitutional challenge to RCW 10.95.130, that challenge was based solely upon the “void for vagueness” holding of *Harris*, 853 F.Supp. at 1288. This Court has not previously decided whether the state constitution requires that death sentences be proportionate.

²⁶ *Gunwall*, 106 Wn.2d at 61-62.

An evaluation of Washington constitutional and common law history and pre-existing state law also points to a broader application of Article I, § 14 than the Eighth Amendment (*Gunwall* factors (3) and (4)). In both *Fain* and *Roberts*, this Court acknowledged that it has not limited state cruel punishment jurisprudence to the limits set by federal case law. *Roberts*, 142 Wn.2d at 501; *Fain*, 94 Wn.2d at 397.

And death sentences, and in particular comparatively proportionate death sentences, are a matter of particular local concern (*Gunwall* factor 6). The United States Supreme Court has noted that considerations of “federalism and comity counsel respect for the ability of state courts to carry out their role as primary protectors of rights of criminal defendants.” *Cabana v. Bullock*, 474 U.S. 376, 391, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986). In capital cases, states have always been “free to provide greater protections in criminal justice system than the Federal Constitution requires.” *California v. Ramos*, 463 U.S. 992, 1013-14, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983).

For the foregoing reasons, this Court should use independent state constitutional grounds to hold that a comparative proportionality review, based on complete and accurate comparative data, is required by the Washington constitution. See *Washington’s Comparative Proportionality Review: Toward Effective Appellate Review of Death Penalty Cases*

Under the Washington State Constitution, 64 Wash.L.Rev. 111, 132 (1989) (“The Washington Supreme Court has not examined its comparative proportionality review for actual effectiveness. The Washington Constitution’s prohibition against cruel punishment requires that it do so.”); *Vernon Kills on Top v. State*, 279 Mont. 384, 928 P. 2d 182, 205 (1996) (Montana state constitution requires proportionality review of death sentences).

In *Fain*, this Court recognized that historically the Court has examined death penalty cases to ensure that a punishment was not unconstitutionally disproportionate. *Fain*, 94 Wn.2d at 396. In *Roberts*, the Court reaffirmed the holding that the imposition of a capital sentence is cruel punishment if it is imposed without an individualized determination that the punishment is appropriate. 142 Wn.2d at 501 (citing *Enmund v. Florida*, 458 U.S. 782, 798, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982)). Furthermore, a death penalty statute must “limit the imposition of the penalty to what is assumed to be the small group for which it is appropriate.” *Furman*, 408 U.S. at 310 (White, J., concurring). Procedural safeguards are required to ensure that juries imposing death sentences are not swayed by impermissible discrimination. See *McClesky v. Kemp*, 481 U.S. 279, 309, 107 S.Ct. 1756, 95 L. Ed. 2d 262 (1987) (court has engaged in “unceasing efforts” to eradicate racial prejudice

from criminal justice system). A comparative proportionality review in death penalty cases is the only mechanism that permits system-wide evaluation of prosecutorial and jury decision-making to determine if there has been racial or other impermissible discrimination. *State v. Loftin*, 157 N.J. 253, 724 A.2d 129, 142 (1999) (rejecting holding of *McClesky* and holding that state constitution prohibits racial disparity in capital sentencing).

In order to ensure that the sentence is appropriate for this defendant, still properly limited to the appropriate group of defendants, and imposed without impermissible discrimination, this Court must compare one aggravated murder conviction against all others. In *Woods*, this Court noted that 79 percent of the Trial Judge Reports involved crimes with one or two aggravating factors. *Woods*, 143 Wn.2d at 617. Because Woods' case involved three aggravators, the Court seemed to conclude that his crime fell within the top 21 percent of the most heinous crimes in this state. Yet the Court did not have before it all of the aggravated murder convictions that had preceded Woods' appeal. Any additions to the database will change these statistics and could change the Court's conclusions on proportionality.

Without a complete set of Trial Judge Reports, prepared in a timely manner and pursuant to a process that ensures the accuracy and usefulness

of the data contained in them, this Court simply cannot say that death sentences have been imposed across the state in an evenhanded, non-discriminatory and non-arbitrary manner.

21. MR. YATES' DEATH SENTENCE IS
DISPROPORTIONATE, WANTON, AND
FREAKISH, AND ARBITRARY

This Court has a mandatory duty to determine whether Mr. Yates' sentence was excessive or disproportionate "to the penalty imposed in similar cases, considering both the crime and the defendant." RCW 10.95.130(2)(b). If this Court finds in the affirmative, it must invalidate the sentence and remand for imposition of a life sentence without the possibility of parole. RCW 10.95.140(1)(b). "Similar cases" are defined by statute as:

cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965, in which the judge or jury considered the imposition of capital punishment regardless of whether it was imposed or executed, and cases in which reports have been filed with the supreme court under RCW 10.95.120;

RCW 10.95.130(2)(b).

Because of the incomplete and inaccurate Trial Judge Reports, this Court cannot perform the required proportionality review. Because the question posed in RCW 10.95.130(2)(b) cannot be resolved in the State's favor, Mr. Yates cannot be executed. As discussed above, the deficiencies

in the Trial Judge Reports can never be corrected because the information no longer exists. Therefore, the Court must invalidate the death sentence under RCW 10.95.140.

In the alternative, if the Court believes the deficiencies can be corrected, the Court should defer its proportionality analysis until that has been accomplished. Mr. Yates cannot properly present his full argument at this time and asks the Court to set a briefing schedule for this issue only after the reports are complete and accurate.

There is a good-faith basis for making these requests. Based on the information available, it appears that Mr. Yates's sentence could not survive proportionality review. The principle concern of such review is "avoiding two systemic problems associated with imposition of capital punishment: random arbitrariness and imposition of the death sentence in a racially discriminatory manner." *Woods*, 143 Wn.2d at 615. As for arbitrariness, Mr. Yates will address the factors used by this Court in recent cases.

a. Mr. Yates's Pierce County convictions and death sentences are disproportionate to his Spokane County convictions and sentences. Although not part of the universe of "similar cases" as defined by RCW 10.95.130(2)(b), Mr. Yates's matter presents a rare case where the death sentence was disproportionate since he was sentenced to death

for the same type of conduct to which he pleaded guilty in Spokane, which was used extensively by the State to show a common scheme or plan, and which resulted in first degree murder convictions and a standard range sentences totaling 408 years in Spokane. Ex. 1-2, 700-01. A comparison of the two matters leads to the inescapable conclusion the death sentence is disproportionate and arbitrary, and must be reversed.

In Spokane County, Mr. Yates was charged with, and pleaded guilty to, 13 counts of first degree murder. CP 2, 701. The evidence underlying ten of those counts was introduced at this trial under the theory that those acts were part of a common scheme or plan to murder prostitutes, which included the two victims which resulted in his death sentences. The Spokane murders were the linchpin of the entire State's case which included the testimony of Agent Safarik, an FBI profiler, that the Pierce County and Spokane County murders demonstrated a unique signature which resulted in the conclusion that one killer committed all of the murders. RP 6922-23. The Pierce County murders occurred during the same period as the Spokane County murders.

Even though the State's theory in this case was that Mr. Yates committed the two Pierce County murders in the exact same manner as the Spokane County murders, the result was completely disproportionate and evidences the arbitrary manner in which the sentence of death is imposed

in the State of Washington. The Spokane County prosecutor, faced with 13 murders, evaluated the circumstances of the victims and Mr. Yates and concluded the crimes were properly charged as first degree murder and agreed that a sentence of 408 years was appropriate. Based upon only two victims killed in the same manner as the Spokane County victims and the exact same defendant, the Pierce County prosecutor charged Mr. Yates with *aggravated* first murder and sought and obtained a death sentence. The arbitrariness of the death penalty is even more pronounced because Mr. Yates's Spokane convictions and the Pierce County convictions, which the jury apparently found constituted a common scheme or plan, are by definition not "similar cases" for purposes of determining proportionality. There can be no greater evidence of the disproportionality of Mr. Yates's death sentence and the fact that the sentence was wanton and freakish. Based solely on the disproportionality between the Spokane County and Pierce County sentences, Mr. Yates's death sentences violated his Eighth Amendment right against cruel and unusual punishment. This Court must reverse the death sentences and remand for resentencing to life sentences.

b. Mr. Yates's convictions and sentences are disproportionate to Gary Ridgeway's conviction and sentence. In

conducting a proportionality review under RCW 10.95.130, this Court looks

at the nature of the crime compared to other aggravated murders, at the number of aggravators compared to the others, and at the defendant's criminal and personal history compared to other aggravated murderers'.

Pirtle, 127 Wn.2d at 689.

The case most similar to Mr. Yates's case in the nature of the crime and the defendants' criminal and personal histories is that of Gary Ridgeway. Mr. Ridgeway and Mr. Yates's matters were remarkably similar, as were the two men. Mr. Ridgeway is a white male, born in 1952, and served in the United States Navy from 1969 to 1971. Trial Report 265 at 2; Summary of Evidence at 4.²⁷ From 1971 until his arrest in 2001, Mr. Ridgeway worked as a painter at the Kenworth Motor Truck Company. Summary at 4. Mr. Ridgeway was married three times, his first two marriages ending in divorce. Summary at 4-6. Mr. Ridgeway had a minor criminal history, suffering two misdemeanor convictions involving his association with prostitutes. Trial Report at 3.

Mr. Yates is a white male and was born in 1952. Trial Report 251 at 2. Mr. Yates also had a period of stable employment, serving in the United States Army as a Chief Warrant Officer for 19 years. Trial Report

²⁷ Appended to the Trial Report was the Prosecutor's Summary of Evidence detailing the investigation leading to Mr. Ridgeway's conviction.

at 2-3. Mr. Yates was married twice, his first marriage ending in divorce as well. Trial Report at 2. Other than the Spokane County murder convictions, which were the centerpiece of Pierce County prosecution, Mr. Yates had no criminal history. Trial Report at 3.

Both men were convicted of soliciting and killing prostitutes and dumping their bodies in secluded locations where discovery was delayed for, in some cases, years. Both men committed numerous murders, but Mr. Ridgeway far and away exceeded the number of murders by Mr. Yates by a factor three. In addition, Mr. Ridgeway's span of killing covered decades where Mr. Yates committed his murders in a matter of less than 10 years.

The common scheme or plan aggravator was alleged in both matters. Trial Report 265 at 4, Trial Report 251 at 5. Mr. Yates had the additional aggravating factors that the murders occurred during the commission of a robbery and the murders were committed to conceal the commission of the crime of soliciting a prostitute. Trial Report 251 at 5. Facts contained in the summary of evidence in Mr. Ridgeway's case suggest these two potential aggravators were present as well but were not charged by the King County Prosecutor's Office.

After Ridgeway, it must be assumed that the low end threshold is 49 victims. Any defendant who has committed less than 49 murders

cannot be sentenced to death in light of Ridgeway or the sentence is necessarily disproportionate. Should this Court decide to narrow the impact of Ridgeway to serial killers that target prostitutes, then anyone matching that profile, such as Mr. Yates, cannot be sentenced to death unless the number of victims exceeds 49. As a consequence, death can only be imposed where the defendant has necessarily committed more than 49 murders. Under the *Pirtle* analysis, in light of the vast similarities between Mr. Ridgeway's crimes and Mr. Yates' crimes, Mr. Yates' death sentence is disproportionate to Mr. Ridgeway's sentence of life imprisonment without the possibility of parole, given the sheer number of victims in Mr. Ridgeway's case as opposed to Mr. Yates.

c. Other aggravated murder cases where there were two victims and the defendant was not sentenced to death. It is important to note that Mr. Yates' was convicted and sentenced to death for *two* murders. He received a separate sentence for the additional victims in Spokane County, which should not, and cannot, be considered in this proportionality analysis.

The Trial Reports contain numerous cases where there were more than one victim and a death sentence was not imposed. *See, e.g.*, Trial Report No. 10 (Steven Carey, burned his wife and child to death); Trial Reports Nos. 13 and 14 (Kwan Mak and Benjamin Ng shot and killed 13

patrons and employees of a restaurant);²⁸ Trial Report No. 59 (Thomas Baja, broke into residence and shot and killed wife and friend); Trial Report No. 69 (Lawrence Sullens, shot three victims, two of whom died, then set fire to residence); Trial Report No. 81 (Martin Sanders, raped and killed two 14 year-old victims); Trial Report No. 86 (Rick Peerson, assaulted two men, killed two others, and engaged in a shoot-out with police); Trial Report No. 95 (Kenneth Schrader, murdered his wife then killed police officer); Trial Report 101 (Minviluz Macas, set fire to home killing husband and son); Trial Reports Nos. 107, 108 (David Simmons and Henry Dailey, killed husband and wife); Trial Report No. 120 (George Russell, sexually assaulted and bludgeoned three people to death); Trial Report No. 128 (Tommy Metcalf, held couple hostage before killing them); Trial Report No. 130 (Cherno Camara, killed his two children with hatchet); Trial Report 157 (Vincent Sherrill, killed three young victims); Trial Report No. 161 (Nga Ngoeung, shot four high school students, two of whom died); Trial Report No. 167 (Jack Spillman, III, killed then eviscerated and sexually mutilated two women); Trial Report No. 168 (Scott Pierce, stabbed and choked two young victims in racially motivated act); Trial Report No. 172 (James Thomas, raped and murdered woman

²⁸ The State sought the death penalty in both cases. Ng escaped the death penalty but Mak was sentenced to death. Mak's conviction was subsequently overturned and on remand he received a life sentence.

then strangled her thirteen year-old daughter); Trial Report No. 174 (Timothy Blackwell, shot and killed his wife and two other bystanders in courthouse); Trial Report No. 182 (Joey Ellis, bludgeoned two victims to death); Trial Report No. 185 (Robert Parker, sexually assaulted then strangled two women); Trial Report No. 186 (Gerald Davis, raped and murdered two elderly women); Trial Report No. 203 (Marvin Francisco, shot four young victims, two who died); Trial Report No. 228 (Rosendo Delgado, Jr., shot four victims including two young children); Trial Report No. 238 (Michael Thornton, killed two young men, one with a hammer the other with a gun); and Trial Report No. 256 (Kevin Cruz, shot and killed employer and two co-workers).

In stark contrast, there have been only a handful of cases where there were multiple victims and the defendant was sentenced to death.²⁹ *See e.g.*, Trial Report No. 76 (Wesley Allen Dodd, raped and killed three young boys); Trial Report No. 144 (Darold Stenson, shot and killed his wife and his business partner); Trial Report No. 160 (Jeremy Sagastegui, raped and stabbed to death three year-old boy, and shot and killed his mother and another woman); Trial Report No. 177 (Dwayne Woods, raped

²⁹ There were other cases where death was sought and imposed where there were multiple murders but either the conviction or sentence or both were subsequently overturned. *See* Trial Report 14 (Benjamin Ng); Trial Report 15 (Patrick Jeffries) Trial Report 31 (Mitchell Rupe); 43 (David Rice); Trial Report 75 (Gary Benn); Trial Report 132 (Blake Pirtle); Trial Report No. 154 (Charles Finch).

and beat to death two women); and Trial Report 220 (Davya Cross, stabbed to death his wife and two step-daughters).³⁰

The review of other cases reveals that Mr. Yates' two murders were no worse than others who received life sentences, and certainly no worse than that of Mr. Spillman, who eviscerated and sexually mutilated his two female victims.

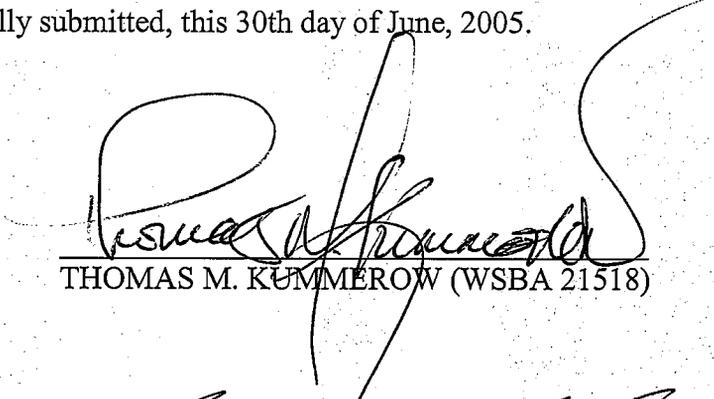
Because Mr. Yates's death sentence is disproportionate and was imposed in a wanton and freakish manner, it must be reversed.

³⁰ Both Dodd and Sagastegui withdrew their right to appeal their convictions and death sentences and were subsequently executed.

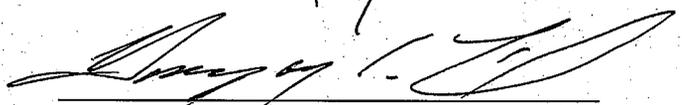
G. CONCLUSION

For the reasons stated, Robert Yates submits this Court must reverse his convictions and remand for a new trial or remand for resentencing to a sentence consistent with the sentence he received in Spokane County, life imprisonment.

Respectfully submitted, this 30th day of June, 2005.



THOMAS M. KUMMEROW (WSBA 21518)



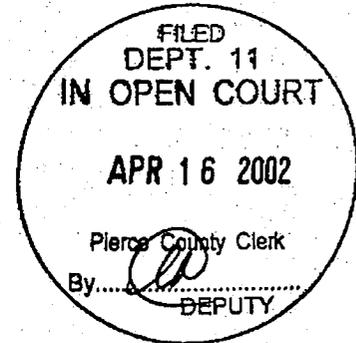
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APPENDIX A



00-1-03253-8 16493888 FNFLC 04-17-02

ORIGINAL



**SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY**

STATE OF WASHINGTON
Plaintiff

vs.

ROBERT LEE YATES, JR.
Defendant

No. 00-1-03253-8

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
RE: MOTION FOR EQUITABLE
ESTOPPEL

On March 7, 2002 defendant Robert Lee Yates, Jr. through his attorneys Mary Kay High and Roger Hunko, appeared before visiting Superior Court Judge Gordon L. Godfrey for the motion for equitable estoppel and preclusion of the death penalty. The State was represented by Pierce County Prosecuting Attorney Gerald A. Horne through his deputies Gerald Costello and Barbara Corey-Boulet. The defendant, being present, was represented by Attorneys Mary Kay High and Roger Hunko. The court having heard testimony and considered the written and oral arguments of counsel, now makes and enters these:

FINDINGS OF FACT

1. On or about April 19, 2000 the defendant Mr. Robert Lee Yates Jr. was arrested and charged with one count of the murder of Jennifer Joseph. He was immediately appointed counsel through the offices of the Spokane County Public Defense. Attorney Richard Fasy undertook the representation of the defendant on behalf of that office.
1. On May 18, 2000, defendant was charged in Spokane County Superior Court with eight counts of aggravated murder for the deaths of Ms. Joseph, Scott, Johnson, Wasson,

McClenahan, Oster, Maybin, and Durning. Additionally he was charged with one count of attempted first degree murder and one count of attempted first degree robbery of Ms. Smith.

2. On behalf of defendant, Mr. Fasy began to pursue the possibility of "global resolution" discussions with the Spokane County Prosecuting Attorneys Office. It began as a "what if" approach. Towards the end of June it became more "concrete". The purpose was to bring about a resolution short of the death penalty. He would not provide information without assurances as to the detriment of his client. The window of time for these discussions was June 28 to July 17, 2000.
3. At the Washington State Prosecuting Attorneys Summer Conference in Chelan Washington between June 13-16, 2000 Mr. Tucker and other state prosecuting attorneys, including former Pierce County Prosecuting Attorney John W. Ladenburg, had an informal conversation about this defendants case. Based on the conversations at that meeting with the prosecuting attorneys, including John W. Ladenburg, and based on the prosecutorial protocol of handling multi-venue prosecutions in one venue, Mr. Tucker believed and had reason to believe that he had the authority to prosecute the Pierce County murders of Melinda Mercer and Connie LaFontaine Ellis that are the subject matter of this hearing. Mr. Tucker subsequently conveyed that understanding to defense counsel, Mr. Fasy.
4. When it became apparent to the Pierce County Prosecutors Office that Mr Tucker⁶⁶ was anticipating plea negotiations which included the possible elimination of the death penalty a phone conference was arranged between Mr Tucker, Mr. Ladenburg, and other death penalty familiar prosecutors including but not limited to King County Prosecutor Norm Maleng and Yakima Prosecuting Attorney Jeff Sullivan. Discussions included the problems posed with the prosecution, that DNA results were not back, philosophical positions of plea bargaining the death penalty at this stage of a proceeding, and other unstated issues. During that call, Mr. Ladenburg expressed his disapproval of Mr. Tucker's suggestion that he might plea bargain the death penalty in this case at this juncture. Mr. Ladenburg also told Mr. Tucker that if he was considering plea bargaining the death penalty Mr. Ladenburg would not allow Mr. Tucker to handle the Pierce County cases. During this phone call Mr. Ladenburg revoked any and all authority implied or otherwise that he had⁶⁷ given to Mr. Tucker to prosecute or plea bargain the Pierce County murder cases that are the subject of this matter.
5. During the course of plea negotiations in Spokane during May and June, 2000, defendant through his attorney Mr. Fasy offered to plead guilty to the two Walla Walla murders and the Skagit County murder as well as to disclose the location of the remains of Melody Murfin of Spokane.

- a. Defendant never provided any written statements or other substantive evidence relevant to the Walla Walla and Skagit County murders. Mr. Tucker and police investigators who are familiar with those cases agree that those cases were weak in evidence and would not have been prosecutable.
 - b. Defendant took a polygraph which was arranged by Mr. Fasy. The polygraph test evaluated defendant's truthfulness regarding the content of a handwritten statement that defendant wrote and provided to the polygrapher regarding his crimes. That handwritten statement has never been provided to police or prosecutors who remain unaware of its content.
6. On July 1, 2000 Mr. Tucker made the decision to proceed with a plea agreement with the defendant and started the process of putting together a plea agreement. Prior to July 13, 2000, Mr. Tucker and Mr. Fasy drafted a proposed plea bargain agreement which attempted to resolve all murder cases from Spokane, Skagit, Walla Walla, and Pierce counties. On July 13, 2000 Mr. Tucker sent by fax a copy of that "draft" plea bargain to prosecutors from those specific counties including Mr. Ladenburg of Pierce County.
- a. The proposed plea bargain required defendant to disclose the location of the remains of Melody Murfin and also to assist police with the location of a .25 caliber handgun that had been used in some of the murders.
 - b. Defendant did not disclose to the State the location of the remains of Melody Murfin until October 2000, and defendant never provided any assistance in the location of the .25 caliber handgun, which to date has not yet been recovered.
7. On Sunday, July 16, 2000, Mr. Tucker sent via fax a letter to Mr. Ladenburg requesting written authorization to file the Pierce County cases in Spokane County.
8. On Monday, July 17, 2000, Mr. Ladenburg sent a letter to Mr. Tucker stating that Pierce County would file its own cases in Pierce County. Mr. Ladenburg also left a voice message to that effect. Mr. Ladenburg's office on or about that date filed the Pierce County charges with the murders of Melinda Mercer and Connie LaFontaine Ellis.
9. Following the filing of the Pierce County charge Mr. Fasy and Mr. Tucker continued to negotiate a plea agreement exclusive of the Pierce county charges.

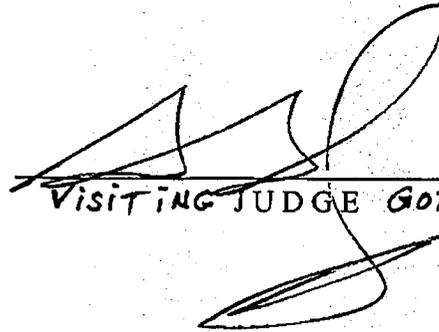
10. On October 13, 2000, defendant entered into a plea agreement with the Spokane County Prosecuting Attorney. In exchange for the State's decision in those specific cases filed in Spokane county not to seek the death penalty, defendant agreed to plea guilty to those relevant first degree murders and one attempted first degree murder in Spokane County, two first degree murders from Walla Walla County, and one first degree murder from Skagit County.
11. On October 16, 2000, the Spokane County Superior Court accepted defendant's guilty plea to the specific cases filed on behalf of Spokane, Walla Walla, and Skagit counties. The record is absent of any actions by the defendant at that proceeding alleging any violations of a plea agreement and/or that plea agreement, any detrimental reliance in plea negotiations, voluntariness of his plea, prosecutorial misconduct, or any other matters relevant to this proceeding. The record is further absent of any actions taken by the prosecution in the Spokane plea to appraise the Spokane Superior Court of any objections to or comments by the victims of the Pierce county slaying as required pursuant to RCW 9.94A.030 (37), 9.94A.080, and 9.94A.090.
12. Defendant to date has not pursued any post-conviction motion in Spokane County Superior Court challenging his guilty plea or challenging the application of his plea agreement.

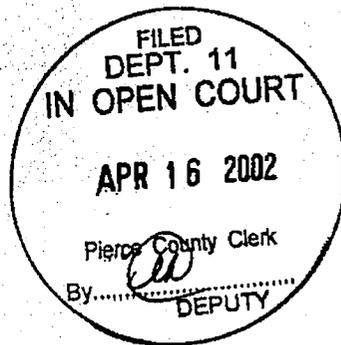
CONCLUSIONS OF LAW

1. The defendant has failed to prove by clear, cogent, and convincing evidence that the doctrine of equitable estoppel should apply to the plea bargaining in this case.
2. Defendant has failed to establish that a manifest injustice has occurred and that the application of the doctrine would not hinder or impair a governmental purpose or function. Similarly, defendant has failed to prove that he was injured in any way by representations made during the course of plea bargaining in Spokane County.
3. Acceptance of a plea bargain is within the specific purview of the trial court. The Superior Court of Spokane County accepted the plea agreement in that specific litigation. Any motion challenging the circumstances of plea bargaining germane to, related to, or relevant to this litigation must have been timely brought in Spokane County Superior Court pursuant to CR 4.2 (e), RCW 9.94A.090, and/or any other applicable statute or case law.

4. Application of the doctrine of equitable estoppel to the plea bargaining process as plead and argued by the defense in this matter would severely impair an important government function.
5. Defendant's motion to apply equitable estoppel to preclude the death penalty in the Pierce County aggravated murder trials is denied.

DATED: April 16, 2002


VISITING JUDGE GORDON GODFREY



APPENDIX B

INSTRUCTION NO. 20

A "common scheme or plan" means there is a connection between the crimes in that one crime is done in preparation for the other.

A "common scheme or plan" also occurs when a person devises an overarching criminal plan and uses it to perpetrate separate but very similar crimes.

APPENDIX C

No. 7

In order to prove "common scheme or plan" there must be a nexus between the killings that goes beyond the mere firing of the fatal shots. The term "common scheme or plan" refers to a larger criminal design of which the charged crime is only a part. To prove the existence of this aggravating circumstance the state bears the burden of proving beyond a reasonable doubt that the killings must be connected by a larger criminal plan.

Washington v. Finch 975 P.2d 967, 944 (1994)
Benn v. Lambert, No. 00-99014 (9th Cir, 2002)

APPENDIX D

No. 6

If you find the defendant guilty of premeditated murder in the first degree as defined in instruction _____, you must then determine whether any of the following aggravating circumstances exist.

The defendant committed the murder to conceal the commission of a crime, or

There were more than one person murdered and the murders of Melinda Mercer and Connie L. Ellis were part of a common scheme or plan, or

The murder was committed in the course of, in furtherance of, or in immediate flight from robbery in the first or second degree.

The State has the burden of proving the existence of an aggravating circumstance beyond a reasonable doubt. In order for you to find that there is an aggravating circumstance in this case, you must unanimously agree that the aggravating circumstance has been proved beyond a reasonable doubt.

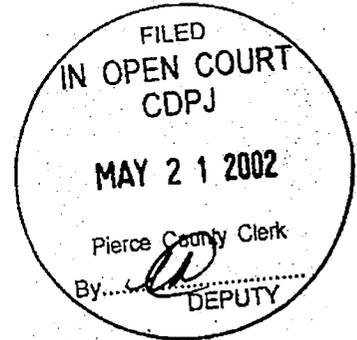
You should consider each of the aggravating circumstances above separately. If you unanimously agree that a specific aggravating circumstance has been proved beyond a reasonable doubt, you should answer the special verdict "yes" as to that circumstance. If you unanimously agree that a specific aggravating circumstance has not been proved beyond a reasonable doubt or you cannot unanimously agree, you should answer the special verdict "no" as to that circumstance.

WPIC 30.03 Modified

APPENDIX E



00-1-03253-8 16885496 FNFCL 05-23-02



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

STATE OF WASHINGTON,)
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 Plaintiff,)
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 v.)
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 ROBERT LEE YATES, JR.)
)
 Defendant.)

NO. 00 1 03253 8
FINDINGS OF FACT
AND CONCLUSIONS OF LAW
ON EVIDENCE OF COMMON
SCHEME OR PLAN

On April 19, 2001, the parties appeared before the court for the State's motion to admit as proof of common scheme or plan evidence of the Spokane homicides for which defendant was convicted. The defendant ROBERT LEE YATES, JR. was represented by his attorneys Roger Hunko and Mary Kay High and the STATE OF WASHINGTON was represented by PIERCE COUNTY PROSECUTING ATTORNEY GERALD A. HORNE through his deputies Gerald Costello and Barbara Corey-Boulet.

The court, having considered the written materials and oral arguments, now enters the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW
RE: EVIDENCE OF SPOKANE MURDERS - I

ORIGINAL
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Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

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FINDINGS OF FACT

I

The State has proved by a preponderance of the evidence that the defendant committed the Spokane murders, to which defendant previously entered guilty pleas.

II.

The evidence which the State seeks to offer will establish that both the Spokane and Pierce County murders and murder victims shared certain characteristics, that is, that all of the murder victims were women working in prostitution, that the women engaged in drug activity, that all of the women were shot in the head with small caliber weapons, that most of the women's heads were wrapped in plastic bags, that all of the women were discarded in locations not readily apparent to passersby, that all of the women were transported by vehicle before the murders, that those victims who were not substantially decomposed exhibited seminal fluid in their mouths, vaginas, and anuses, and that all of the women were missing items, including cash, which they would be expected to have.

III.

The evidence which the State seeks to offer also will establish that the perpetrator of these murders had a motive to cruise for women working in prostitution, then picked them up and took them to isolated areas where he shot them in the head, performed various sexual acts, and then discarded their bodies.

IV.

The evidence which the State seeks to offer also will establish that the perpetrator of the Spokane County murders planned the murders in advance by obtaining guns, ammunition, plastic bags, and selecting locations at which to discard the women's bodies.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
RE: EVIDENCE OF SPOKANE MURDERS - 2

V.

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3 The evidence which the State seeks to offer also will establish that there are common features between
4 the charged crimes and the prior misconduct such that the charged crime and the misconduct are part of a
5 general plan and also will establish that the perpetrator of the murders acted with an over-arching plan which
6 he used repeatedly to perpetrate separate but very similar crimes. Exclusion of the evidence of the Spokane
7 murders would unfairly limit the State's ability to prove the aggravator of common scheme or plan.
8

VI.

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10 Evidence of the Spokane murders is relevant and will be of consequence to the outcome to be determined
11 by the trier of fact. The similarities between the Spokane murders and the Pierce County murders are
12 compelling evidence which could lead a trier of fact to conclude that the perpetrator of the Spokane murders
13 was also the perpetrator of the Pierce County murders.
14

VII.

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16 Evidence of the Spokane murders possesses probative value which exceeds any unfair prejudicial effect.
17 This is so even if the evidence is admitted for only one of the stated purposes. Further, the only potential
18 unfair prejudicial effect of the admission of this evidence is that the jury might incorrectly consider the
19 evidence as proof of defendant's propensity to commit the Pierce County murders. This issue is cured by
20 giving a limiting instruction.
21

VIII.

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23 Whether the Spokane murders were committed as part of a common scheme or plan has not been
24 previously litigated in Spokane County Superior Court.
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28 FINDINGS OF FACT AND CONCLUSIONS OF LAW
RE: EVIDENCE OF SPOKANE MURDERS - 3

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CONCLUSIONS OF LAW

I.

Evidence of the Spokane murders is relevant to prove identity of the murderer of Ms. Mercer and Ms. Ellis.

II.

Evidence of the Spokane murders is relevant to prove motive of the murderer of Ms. Mercer and Ms. Ellis.

III.

Evidence of the Spokane murders is relevant to prove that the murderer of Ms. Mercer and Ms. Ellis acted with premeditation.

IV.

Evidence of the Spokane murders is relevant to prove the aggravator of "common scheme or plan" as defined by RCW 10.95.020(10).

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FINDINGS OF FACT AND CONCLUSIONS OF LAW
RE: EVIDENCE OF SPOKANE MURDERS - 4

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V.

Any potential unfair prejudice to the defendant will be cured by a limiting instruction to the trier of fact.

DONE IN OPEN COURT this 21 day of May, 2002.

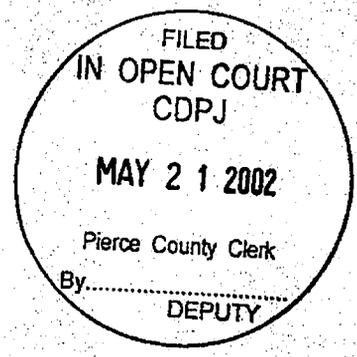
John A. McCarthy
JUDGE

Presented by:

Barbara Corey-Boulet
Barbara Corey-Boulet
Deputy Prosecuting Attorney
WSB# 11778

Approved as to Form:

Mary Kay High
Mary Kay High
Attorney for Defendant



FINDINGS OF FACT AND CONCLUSIONS OF LAW
RE: EVIDENCE OF SPOKANE MURDERS - 5

APPENDIX F

No. 2

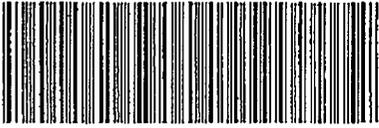
The existence of a fact cannot rest in guess, speculation or conjecture.

State v. Golladay, 78 Wn. 2d 111, 470 P.2d 191 (1970) (Overruled on other grounds.

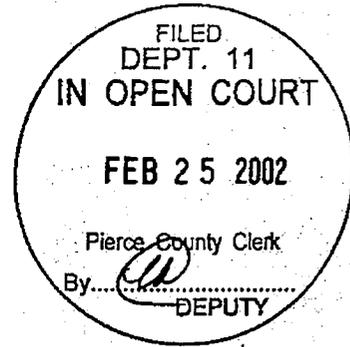
State v. Carter, 5 Wn. App. 802, 490 P.2d 1346 (Div. I, 1971)

State v. Summers, 107 Wn. App. 373, 28 P.3d 780 (Div.2, 2001)

APPENDIX G



00-1-03253-8 16249998 AMINF 02-28-02



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

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 00-1-03253-8

vs.

SECOND AMENDED INFORMATION

ROBERT LEE YATES, JR.,

Defendant.

FEB 28 2002

DOB: 05-27-52
SS#: 532-56-2311

SEX: MALE
SID#: UNKNOWN

RACE: WHITE
DOL#: UNKNOWN

COUNT I

I, JOHN W. LADENBURG, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse ROBERT LEE YATES, JR., of the crime of MURDER IN THE FIRST DEGREE WITH AGGRAVATING CIRCUMSTANCES, committed as follows:

That ROBERT LEE YATES, JR., in Pierce County, on or about 6-7 December 1997, with premeditated intent to cause the death of another person, did shoot Melinda L. Mercer, thereby causing the death of Melinda L. Mercer, a human being, who died on or about 6-7 December 1997, and

That further aggravated circumstances exist, to-wit: the murder was committed in the course of, in furtherance of, or in immediate flight from the crime of robbery in the first or second Degree and/or defendant committed the murder to conceal the commission of a crime; and/or defendant killed more than one victim and the murders were part of a common scheme or plan during the period of May 1996 through October 1998, and

That further, during said conduct the defendant was armed with a firearm as defined in RCW 9.41.010, invoking the provisions of RCW 9.94A.310, and adding time to the presumptive sentence, as provided in RCW

SECOND AMENDED INFORMATION - 1

ORIGINAL
1003

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

00-1-03253-8

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2 9.94A.370; contrary to RCW 9A.32.030(1)(a) and RCW 10.95.020(9)(10) (11), and against the peace and
3 dignity of the State of Washington.
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COUNT II

And I, JOHN W. LADENBURG, Prosecuting Attorney aforesaid, do accuse ROBERT LEE YATES, JR., of the crime of MURDER IN THE FIRST DEGREE WITH AGGRAVATING CIRCUMSTANCES, a crime of the same or similar character, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That ROBERT LEE YATES, JR., in Pierce County, on or about a period between 11 - 19 September 1998, did shoot Connie L. Ellis, thereby causing the death of Connie L. Ellis, a human being, who died sometime between about 11 - 19 September 1998, and

That further aggravated circumstances exist, to-wit: the murder was committed in the course of, in furtherance of, or in immediate flight from the crime of robbery in the first or second degree and or defendant committed the murder to conceal the commission of a crime; and/or the defendant killed more than one victim, and the murders were part of a common scheme or plan during the period of May 1996 through October 1998,

That further, during said conduct the defendant was armed with a firearm as defined in RCW 9.41.010, invoking the provisions RCW 9.94A.310, and adding time to the presumptive sentence, as provided in RCW 9.94A.370, contrary to RCW 9A.32.030(1)(a) and RCW 10.95.020(9)(10)(11), and against the peace and dignity of the State of Washington.

DATED this 25th day of February, 2002.

TACOMA POLICE DEPT CASE
WA02703 and
PIERCE COUNTY SHERIFF CASE
WA 02700

JOHN W. LADENBURG
Prosecuting Attorney in and for said County and
State.

By: *Gerald Costello*
GERALD T. COSTELLO
Deputy Prosecuting Attorney
WSB#: 15738

SECOND AMENDED INFORMATION - 2

1004

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

APPENDIX H

No. 2

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, the defendant may be found guilty of any lesser crime, the commission of which is necessarily included in the crime charged, if the evidence is sufficient to establish the defendant's guilt of such lesser crime beyond a reasonable doubt.

The crime of premeditated first degree murder with aggravating circumstances necessarily includes the lesser crime of premeditated first degree murder.

When a crime has been proven against a person and there exists a reasonable doubt as to which of two or more crimes that person is guilty, he or she shall be convicted only of the lowest crime.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	SUPREME CT. NO. 73155-1
)	
ROBERT LEE YATES, JR.,)	
)	
APPELLANT.)	

DECLARATION OF SERVICE

I, MARIA ARRANZA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 30TH DAY OF JUNE, 2005, A COPY OF THE **BRIEF OF APPELLANT** WAS SERVED ON THE PARTY/PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL:

KATHLEEN PROCTOR
PIERCE COUNTY PROSECUTOR'S OFFICE
930 TACOMA AVE S, RM 946
TACOMA WA 98402-2102

ROBERT LEE YATES, JR.
DOC# 817529
WASHINGTON STATE PENITENTIARY
1313 N 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF JUNE, 2005.

x _____
grj

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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