

No. 73155-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT LEE YATES, JR.,

Appellant.

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STATE OF WASHINGTON

ON DIRECT APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable John A. McCarthy

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. IMPROPERLY ENTICING MR. YATES INTO ADMITTING GUILT BASED ON A FALSE PROMISE OF AVOIDING THE DEATH PENALTY VIOLATES MR. YATES' RIGHT TO DUE PROCESS OF LAW AND PRINCIPLES OF FAIRNESS

As Mr. Yates argued in trial court, he can only be killed one time.

RP 701. Mr. Yates engaged in plea bargain negotiations for the sole purpose of avoiding the death penalty and after being expressly promised that the prosecution had the authority to ensure he would not face the death penalty in Spokane or Pierce County. By obtaining Mr. Yates's admissions of guilt to numerous charged and uncharged homicides in the course of this ultimately illusory and deceitful plea negotiation process, the State's tactics deprived Mr. Yates of his right to due process of law and violated principles of fundamental fairness.

a. The prosecution ignores the deprivation of Mr. Yates's right to due process of law. Plea bargaining is not merely a matter of contractual law or an exercise of discretionary prosecutorial authority, but is regulated by the demands of the constitution. *Santobello v. New York*, 404 U.S. 257, 261, 92 S.Ct. 495, 30 L.Ed.2d 427 (1972) (procedures used in plea bargaining "presuppose fairness in securing agreement"); *United States v. Randolph*, 230 F.3d 243, 249 (6th Cir. 2000) (plea bargaining "is

constitutional, and therefore implicates concerns in addition to those pertaining to the formation and interpretation of commercial contracts between private parties.”); *State v. Moen*, 151 Wn.2d 221, 228, 76 P.3d 721 (2003) (prosecutor’s plea bargain discretion “may not be exercised in a manner that constitutes a violation of due process rights.”). When a plea rests on the prosecution’s fulfillment of an agreement or promise, “such promise must be fulfilled.” *Santobello*, 404 U.S. at 262.

ABA Standards of Professional Conduct, frequently used to define the constitutionally adequate performance of counsel, require that a prosecutor “should not imply a greater power to influence the disposition of a case than actually possessed.” *ABA Standards for Criminal Justice, Prosecution Function and Defense Function*, 3rd Ed., 3-4.2(b) (1993); *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 2466, 162 L.Ed.2d 360 (2005) (explaining frequent reliance on ABA Standards in assessing whether counsel’s performance meets bare constitutional requirements). Additionally, “a prosecutor should not knowingly make false statements or representations as to fact or law in the course of plea discussions with defense counsel or the accused.” Standards, 3-4.1(c).

The prosecution asserts that no case law supports Mr. Yates’ appeal of his Pierce County conviction based on fundamentally unfair

practices by the Washington prosecutors. *Randolph* exemplifies the fallacy of the prosecution's position. 230 F.3d at 249-51.

In *Randolph*, the court overturned a Tennessee conviction based on prosecutorial misconduct by Texas prosecutors in another prosecution in which Randolph had pleaded guilty due to the unfairness of the prosecution's tactics. *Id.* at 249. The defendant agreed to plead guilty to federal charges in Texas and cooperate with the prosecution in exchange for no further prosecution by the Texas prosecutors on any charges known to the prosecutors at the time of the plea. *Id.* at 247. Then federal prosecutors in Tennessee charged Randolph with the same crime, which involved a conspiracy to deliver drugs from Texas to Tennessee. *Id.* at 245. The prosecution contended the plea agreement permitted this prosecution since it expressly said the agreement did not bar other prosecutions. *Id.* at 247.

The *Randolph* Court found that even though the plea agreement permitted additional prosecution, it was "simply unfair" to extract useful information from Randolph and induce him to plead guilty based on a promise not to prosecute and then prosecute him anyway. *Id.* at 249. The plea agreement was essentially illusory, as it offered a benefit to the State and none to Randolph. *Id.* This fundamentally unfair procedure violated due process. *Id.*

In the case at bar, the prosecution claims Mr. Yates did not show detrimental reliance since the Spokane prosecutor did not demand inculpatory information from Mr. Yates. Brief of Respondent (BOR) at 57. This assertion is absurd, since Mr. Tucker rested his plea bargaining on Mr. Yates's agreement that he committed and would plead guilty to certain charged and uncharged homicides and Mr. Tucker relied upon the results of Mr. Yates' polygraph test in his assurance of Mr. Yates's complicity. RP 640-41, 656-57. Additionally, the State's claim that it would be bad policy to permit a defendant to voluntarily admit committing certain crimes and then claim it is unfair not to offer a plea bargain has no bearing to the facts of this case. BOR at 58. Mr. Tucker expressly told both defense counsel and the lead police detective that he had authority to handle the Pierce County cases and was willing to offer a plea that would enable Mr. Yates to avoid the death penalty. RP 676, 753. Mr. Yates engaged in plea bargaining based on this express promise of authority. When a prosecutor misrepresents his authority in the course of plea bargaining, or offers a plea bargain that cannot be fulfilled while extracting inculpatory information that makes a fair trial impossible, the State violates the defendant's right to due process. *Santobello*, 404 U.S. at 265; *Randolph*, 230 F.3d at 250-51.

In the case at bar, the State contends Spokane prosecutor Tucker knew he lacked authority to plea bargain the Pierce County homicides yet he continued to offer Mr. Yates a plea bargain including those offenses as a way to avoid the death penalty. BOR at 46-50, 53. The trial court found Mr. Tucker misrepresented his authority to induce a plea bargain, promising Mr. Yates he could avoid the death penalty upon providing the State with certain information about his involvement in charged and uncharged homicides. CP 2745. If Mr. Tucker knew or should have known that he could not plea bargain the Pierce County cases, his misrepresentation that he had this authority as a mechanism for inducing a guilty plea was unreasonable and improper.

The prosecution's contention that Mr. Yates suffered no detriment from his numerous admissions of guilt to a large number of homicides at a time when the State was trying to determine whether it would seek the death penalty and had not gathered evidence tying Mr. Yates to six unsolved homicides is simply unreasonable. RP 744 (police lacked evidence connecting Mr. Yates to six Spokane homicides at time of plea negotiations).

Death penalty negotiations are different from other plea negotiations in that Mr. Yates had only one goal – to avoid punishment by death. He desired no other result and it made no difference if he received

the death penalty for one conviction or for 13 convictions. Had Mr. Yates been aware that Mr. Tucker lacked authority over Pierce County cases, and the Pierce County prosecutor refused any plea negotiation targeted toward avoiding the death penalty, he would not have had any incentive to offer information in exchange for a guilty plea. Not only did Mr. Yates lack any benefit from providing information and admitting guilt if he still faced the death penalty, his plea bargaining made it all the more likely that the State would seek and receive a death penalty sentence based on his admissions. Simply put, having learned that Mr. Yates admitted he killed 16 women, had passed a polygraph test establishing the truthfulness of these representations, and knew of the location of additional evidence that would establish his guilt for these offenses, he provided ample grounds for the State to pursue the death penalty.

The prosecution reaped the benefits of the Spokane admissions to obtain the death penalty and even to defend its death penalty prosecution on appeal. While Mr. Yates had no criminal convictions prior to his Spokane guilty pleas, the State distinguishes Mr. Yates from other death penalty recipients:

Defendant's criminal history consisted of fourteen felony convictions comprised of thirteen convictions for murder in the first degree and one count of attempted murder in the first degree. . . . The State can find no similar case where the defendant had so many prior convictions for murder.

BOR at 228. The State repeats several sentences later, in case its point was insufficiently clear, “Defendant’s criminal history is *the most extensive of any within the pool of similar cases*. . . . This factor must weigh very heavily with the court in finding that defendant’[s] death sentence was not disproportionately imposed.” *Id.* at 228-29 (emphasis in original).

The advantage the State gained from inducing Mr. Yates to admit guilt in hopes of saving himself from the death penalty and then renegeing on that promise renders the proceedings fundamentally unfair, as Mr. Yates’s reasonably believed that his extensive admissions in Spokane required him to seek any non-death penalty plea he could, as had he not pleaded guilty in Spokane he could easily have faced the death penalty there too, as well as providing substantial incentive for additional prosecutions in Walla Walla, Skagit, and Spokane. The State itself ensured Mr. Yates had this “extensive” criminal history by the time he arrived in Pierce County, and now uses this unfairly gained advantage as grounds for the death penalty, demonstrating the violation of due process.

b. The “protocol” of written authorization to prosecute a case in another county has no bearing on the case at bar. The State repeatedly asserts that a formal protocol requiring written authorization

before prosecuting a case in another jurisdiction barred Mr. Tucker from negotiating the Pierce County homicides. BOR at 45. This argument has little relevance to the case at bar since the question is not what authority Mr. Tucker had, but rather what authority Mr. Tucker told Mr. Yates he had and how this claimed authority influenced plea negotiations.

Moreover, even Pierce County prosecutor John Ladenburg denied that any such protocol exists. While it is “common courtesy” to obtain written permission from another prosecutor when prosecuting a case from his or her county, written authorization is not required. RP 719. RCW 36.27.040, cited by the prosecution as purported authority for its claim of required written authorization, merely describes the mechanism for appointing special deputies in any prosecution and make no reference to prosecutions in jurisdictions other than where the offense occurred. Accordingly, Mr. Tucker’s lack of written authorization to prosecute the Pierce County cases has no bearing on whether the State acted in a fundamentally unfair manner in prosecuting the case at bar.

c. The court’s factual findings are unsupported by the record and must be disregarded on appeal. Despite the many pages Mr. Yates spent in his opening brief discussing the factual deficiencies in the trial court’s written findings, the prosecution asserts he did not support his assignments of error with citations to the record and to authority. BOR at

52. In the event a more simplistic explanation of the court's deficient fact-finding is required, Mr. Yates will further explain the court's failings herein.

In finding of fact 4, the court found that in a telephone conference call among various prosecutors,

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 had given to Mr. Tucker to prosecute or plea bargain the Pierce County murder cases that are the subject of this matter.

CP 2745. While the court's finding correctly reflects Mr. Ladenburg's testimony at the hearing, it contains no reference to credible contradictory evidence that undermines the accuracy of Mr. Ladenburg's testimony. Both Mr. Tucker and Mr. Ladenburg agreed that the conference call focused on the procedures a prosecutor should follow when deciding whether to seek the death penalty. RP 638, 560, 654-55, 711-13.

Mr. Tucker insisted that Mr. Ladenburg mentioned nothing about whether Mr. Tucker could or should handle the Pierce County cases during the conference call. RP 650 (Ladenburg "did not say I could not handle" Pierce County cases in conference call), 654 (did not discuss Pierce County cases "either way" in conference call), 664 (Ladenburg "did

not revoke authority” in the conference call). Mr. Tucker believed he had Mr. Ladenburg’s authorization to handle the Pierce County matters, subject to his final written approval. RP 650, 655. Mr. Tucker represented to others, including defense counsel Richard Fasy and the Spokane County detective supervising the case that he had authority to negotiate on behalf of the Pierce County cases. RP 675-76, 678, 753.

Operating under the belief that he had Mr. Ladenburg’s authorization, he negotiated a plea agreement including the Pierce County cases and faxed several copies of the proposed agreement to Mr. Ladenburg for his approval and written authorization. RP 656. The trial court never explained or apparently considered why Mr. Tucker would have continued negotiating the Pierce County cases and telling law enforcement and defense counsel that he had the authority to negotiate these cases if Mr. Ladenburg had unambiguously withdrawn all consent to Mr. Tucker’s role in the prosecution of those cases. The findings also do not explain why Mr. Ladenburg registered no surprise when he heard Mr. Tucker was negotiating a plea bargain that included the Pierce County cases.

The court’s written finding not only ignores Mr. Tucker’s testimony, but it ignores the only logical inference possible from both prosecuting attorneys’ testimony. Based on the actions of the parties

involved, the only possible conclusion is that Mr. Tucker believed he retained authority to prosecute the cases until he learned Mr. Ladenburg filed a Pierce County Information on July 17, 2000.

In finding of fact 5, the court noted that Mr. Yates offered to plead guilty to two Walla Walla murders and one Skagit County murder in the course of plea bargain negotiations, as well as offered evidence of a polygraph test by Mr. Yates. The court entered the following findings regarding this information:

Mr. Tucker and police investigators who were familiar with those [Walla Walla and Skagit County] cases agree that those cases were weak in evidence and would not have been prosecutable. . . . The polygraph test [of Mr. Yates] 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.

CP 2745-46.

The court's finding misleadingly minimizes the Walla Walla and Skagit cases. The only evidence offered was that Captain Cal Walker from Spokane "reviewed some information" from Walla Walla. RP 749. Captain Walker knew that Walla Walla considered Mr. Yates a suspect in a double homicide. RP 754. He did not testify or indicate he had any basis for evaluating the strength of the evidence against Mr. Yates in

Walla Walla or Skagit County. Mr. Tucker said he did not have probable cause to charge Mr. Yates with the Skagit or Walla Walla homicides or receive detailed information from Mr. Yates about them. RP 659-60. Yet Mr. Tucker's testimony does not show that the prosecution could not have investigated and prosecuted a case against Mr. Yates, but only that there was a decomposed body in Skagit County. RP 660. Despite a decomposed body, the State gathered substantial evidence linking Mr. Yates to Shannon Zielinski. RP 4551, 4635-37, 6776-77. Mr. Yates' confessions could well have lead to renewed testing, interviews, and other investigation had the prosecution wished to proceed against Mr. Yates. Mr. Yates certainly could not have known or been secure in the fact that there was no risk of prosecution for these offenses.

Additionally, the court's finding that the handwritten statement regarding the polygraph test "has never been provided to police or prosecutors who remain unaware of its content" is substantially misleading. While the prosecution did not obtain a copy of Mr. Yates's written statement, defense counsel explained its content to Mr. Tucker. RP 689. Captain Walker said he received a copy of the polygrapher's test as well as copies of questions asked so that an expert could verify the validity of the examination. RP 748-49.

As explained the Brief of Appellant as well as herein, these findings of fact are not supported by common sense or substantial evidence in the record.

d. The trial court erroneously based its ruling on the notion that the proper remedy was a motion to dismiss filed in Spokane.

Nonsensically, the trial court ruled Mr. Yates needed to object to Pierce County's jurisdiction over the Pierce County cases in Spokane when he entered his guilty plea. It entered factual findings 11 and 12, noting that Mr. Yates did not challenge his Spokane guilty plea based on his inability to also plead guilty to the Pierce County charges at that time.

The court did not explain what authority would exist for the Spokane Court to require a guilty plea in cases filed in another county when the alleged incidents occurred in that county. Although a court certainly has authority to reject a plea, this authority has no bearing on the due process violation by the State in its procedures used in the plea bargaining process. *Santobello*, 404 U.S. at 261; *Randolph*, 230 F.3d at 249. The harm occurred not because Mr. Yates pleaded guilty in Spokane, but because he was also prosecuted in Pierce County. Thus, there would be no remedy, and no unfairness, in Spokane when the Pierce County prosecution had not been resolved at the time of the Spokane guilty plea.

2. THE STATE MISREPRESENTS THE DOCTRINE OF EQUITABLE ESTOPPEL AND ITS APPLICATION TO THE CASE AT BAR

Mr. Yates set forth the requirements of equitable estoppel in the Brief of Appellant and will not repeat the substantial evidence fulfilling those requirements in the case at bar. *See* Brief of Appellant, p. 42-48. However, the State misrepresents this doctrine and its application to the instant case.

Equitable estoppel in a criminal prosecution is intertwined with the rights to due process in the Fourteenth Amendment. *See e.g., United States v. Miranda-Ramirez*, 309 F.3d 1255, 1262 n.4 (10th Cir. 2002). The doctrine of equitable estoppel is a “fundamental principle that applies “to government agencies, as well as private parties.” *ATC Petroleum Inc. v. Sanders*, 860 F.2d 1104, 1111 (D.C. Cir. 1988). Equitable estoppel “generally requires that government agents engage -- by commission or omission -- in conduct that can be characterized as misrepresentation or concealment, or, at least, behave in ways that have or will cause an egregiously unfair result.” *Grumman Ohio Corp. v. Dole*, 776 F.2d 338, 347 (D.C. Cir. 1985); *see also Akbarin v. Immigration and Naturalization Service*, 669 F.2d 839, 842 (1st Cir. 1982) (equitable estoppel applies against government if party relied on government’s conduct and government engaged in affirmative misconduct).

The prosecution incorrectly asserts that equitable estoppel is unavailable in criminal prosecutions. BOR at 62. Neither case cited by the prosecution supports this proposition. The portion of the opinion the prosecution relies upon in *United States v. Alexander*, 736 F.Supp. 968 (D. Minn. 1990), *overruled on other grounds*, 529 U.S. 544 (1993), is an appendix containing a magistrate's opinion that the federal district court adopted in part without analysis. *Id.* at 970. In *Alexander*, the defendant argued that because he had been openly selling pornography without prosecution for 17 years, the government should be estopped from prosecuting him. Since there was no evidence the government ever affirmatively suggested Alexander would not be prosecuted for his conduct, the magistrate rejected the estoppel claim on its merits, while questioning the availability of estoppel as a matter of general principle. *Id.* at 993. Mr. Yates presents a far different scenario than *Alexander*, since the government affirmatively assured him it had the authority to enter into a plea bargain in which he would admit his guilt for numerous Spokane, Skagit, Walla Walla and Pierce County homicides in exchange for not receiving the death penalty.

In the other case cited by the prosecution, *United State v. Anderson*, 637 F.Supp. 1106 (D. Conn. 1986), the court also disposed of the equitable estoppel claim on its merits while noting that this doctrine

applied against the government with the “utmost caution and restraint.” The *Anderson* Court found it unreasonable to assert the government actually misrepresented income tax law in an IRS informational booklet that could only be reasonably understood as a cursory summary of complicated tax laws. *Id.* at 1109. Certainly, when its forces are marshaled to impose the death penalty, the government must exercise its power with “the utmost caution and restraint.” *See State v. Cross*, 156 Wn.2d 580, 594, 623, 132 P.2d 80 (2006) (applying “heightened scrutiny” to claim prosecutor arbitrarily or capriciously sought death penalty).

While there are indeed cases in which courts have rejected estoppel arguments, they generally involve a defendant who claims he thought his actions were not criminal, or did not carry the criminal penalty they did, based on some governmental representation, as in *Alexander* or *Anderson*. Courts reject such claims as unreasonable, since a person is not free to disregard the criminal law. The same reasoning does not apply in the case at bar, as Mr. Yates does not claim the government lured him into committing the crimes. Instead, the government induced him into admitting he committed numerous homicides based on its representation that it had the authority to ensure he would not face the death penalty for these offenses when in fact, it had no such authority. The actual misrepresentation and resulting injustice, such that Mr. Yates indeed faces

the death penalty based in large part on his convictions for the homicides at issue in the plea negotiation, distinguishes this case from others. Since Mr. Yates justifiably relied upon representations made by the State, admitted he committed 16 murders, including two in Pierce County, based on his understanding he would not face the death penalty, and he indeed is now sentenced to death due to his convictions for these same offenses, the doctrine of equitable estoppel should bar the prosecution from the manifestly unjust result of imposing the death penalty.

3. THE DEATH PENALTY STATUTE LACKS
STANDARDS NECESSARY TO ENSURE
EQUAL PROTECTION AND IS
UNCONSTITUTIONALLY VAGUE

The disparate treatment of individuals accused of the same crime must be rationally based, or the State violates the right to equal protection of the laws. U.S. Const. Amend. XIV; Const. Art. I, § 12; *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 P.ed.2d 786 (1982); *In re Personal Restraint of Mota*, 114 Wn.2d 465, 473, 788 P.2d 538 (1990).

Additionally, a statute violates the vagueness requirement of due process of law where it lacks ascertainable or fixed standards of application or invites “unfettered latitude” in its application. *See e.g., Godfrey v. Georgia*, 446 U.S. 420, 428, 10 S.Ct. 1759, 64 L.Ed.2d 398 (1980)

(capital sentencing requires “clear and objective standards” and “specific and detailed guidance”).

This Court is required to ensure the death penalty is applied uniformly. *Bush v. Gore*, 531 U.S. 98, 109, 121 S.Ct. 525, 148 L.Ed.2d 388 (2001); *State v. Cross*, 156 Wn.2d 580 (2006). The importance of regularity in the procedures used by prosecutors in seeking the death penalty has not been fully explored by this Court in its previous decisions in death penalty cases. *Cross*, 156 Wn.2d at 625-26 (“When this court decided previous cases [before *Bush v. Gore*, 531 U.S. 98], this principle had not been so clearly pronounced. *E.g. Rupe I*, 101 Wn.2d at 700.”). In *Cross*, this Court underscored the importance of regularity in death penalty procedures but declined to apply those principles to that case absent evidence of irregular treatment. *Id.* at 626.

The case at bar presents a far more compelling need to address the irregularity of the death penalty procedures than in *Cross*, or indeed in other cases decided before *Bush v. Gore*. The differences in procedures applied by local prosecutors is not a matter of speculation. Numerous prosecutors declined to seek the death penalty against Mr. Yates, even for far more egregious multiple homicides. Walla Walla County declined to prosecute and seek the death penalty for two homicides, Skagit County for one homicide, and Spokane County eleven homicides over the course of

many years. In the middle years of these Spokane cases, two women were killed in Pierce County and for these two homicides, Pierce County refused any plea bargaining and insisted on pursuing the death penalty.

Moreover, while *Bush v. Gore* was a case involving elections procedures, this Court rightfully recognized that the underlying principles of equal protection discussed in that case apply with far greater urgency in a death penalty case. *Cross*, 156 Wn.2d at 625. Arbitrary and disparate treatment simply cannot be countenanced by this Court. *Bush v. Gore*, 531 U.S. at 109. The “rudimentary requirements of equal treatment and fundamental fairness” require this Court ensure uniformity. *Id.*

The State defends the obvious disparity of treatment and unfettered prosecutorial discretion by claiming that by the time Pierce County prosecuted Mr. Yates, he had a far different criminal history than in Spokane County, and thus he deserved different treatment. This justification is nonsensical, since Mr. Yates’ connection to all of these offenses arose at a similar time and the only reason the Pierce County cases were prosecuted later was because Spokane filed its charges first and Spokane, along with the other counties, promptly decided plea negotiation was a proper course of action. Pierce County, on the other hand, reneged on its initial willingness to have its cases joined with the others and singlemindedly pursued the death penalty.

The prosecution claims this Court has already addressed the equal protection argument raised in the Brief of Appellant, p. 53-56, in other cases. Yet as this Court's recent analysis in *Cross* demonstrates, this Court did not previously accord the regularity underlying the right to equal protection of the laws its full importance as outlined in *Bush v. Gore*. While the *Cross* Court declined to extend *Bush v. Gore* to that case, the disparities in the case at bar require such attention.

This Court has the power to assure uniformity and has been entrusted with that role. RCW 10.95.130. As this Court recognized in *Cross*, it is clear that various prosecutors use different standards for when they seek the death penalty. 156 Wn.2d at 625. While in other cases it may be fair to assume that prosecutors evenhandedly evaluate the strength of the evidence and similarly decide whether it merits the death penalty, the starkly different approaches of different counties in this case demonstrates the complete arbitrariness of the death penalty and the vagueness of the statutes making the death penalty available.

The governing statutes do not set forth objective guidelines that effectively guard against unfettered prosecutorial discretion. Accordingly, the statutes violate the right to equal protection and the due process of law.

4. MR. YATES'S DEATH SENTENCE MUST BE
VACATED BECAUSE OF THE COURT'S
IMPROPER EXCLUSION OF JURORS 39, 52, 74

In response to Mr. Yates's challenge to the exclusion of jurors 39, 52, 74 based upon the State's cause challenge, the State cites the time worn law regarding deference to the trial court's factual finding regarding the apparent inability of these prospective jurors to serve. Glaringly omitted from the State's discussion of the issue is any reference to the Ninth Circuit's recent decision in *Brown v. Lambert*, 431 F.3d 661 (9th Cir. 2005), *as amended*, 2006 U.S.App. LEXIS 14933 (June 19, 2006), where the Court overturned yet another death sentence imposed in Washington.

In *Brown*, the trial court excluded juror Z, who had stated his belief in the death penalty during *voir dire*, but expressed some reservations about imposing the death penalty in certain circumstances. *Brown*, 2006 U.S.App 14933 at 8-10. But, juror Z stated unequivocally that he would follow the court's instructions and could consider the death penalty if told to do so. *Id.* Nevertheless, the prosecutor challenged the juror for cause, a challenge sustained by the trial court. *Id.* Circuit Judge Alex Kozinski noted that the United States Supreme Court's decision in *Gray v. Mississippi*, 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987), barred exclusion of prospective jurors for cause "unless they are unable to follow

the court's instructions." *Id* at 10. In finding the exclusion of juror Z to be unconstitutional, the Court noted that the juror had stated he could follow the trial court's instructions and consider the death penalty in the appropriate case. *Id* at 11-12.

The undisputable fact is there is nothing whatsoever in juror Z's voir dire that lends the least support for the finding – explicit or implicit – that he would not follow his oath. This is a juror who listed himself as pro-death penalty in his juror questionnaire and stated repeatedly under oath that he believes in the death penalty. He did not perhaps show the bloodthirsty eagerness for its imposition as the prosecutor may have preferred – juror Z did say he “would have to give [the matter] some thought and reserved the right to impose the death penalty only when he “was convinced [it] was the appropriate measure” – but there is nothing in his testimony that could remotely support the view that he would not faithfully follow the court's instructions.

Brown, 2006 U.S.App LEXIS at 14933 at 17.

a. The exclusion of Juror 39. This juror initially admitted she was opposed to the death penalty but agreed to consider the death penalty, agreed to listen to all of the evidence follow the court's instructions, and agreed she could vote for death penalty if the evidence pointed to it. RP 2276-82. The court excluded Juror 39, finding her beliefs conflicted.

In response, the State merely parrots the trial court's view of the conflicting responses of Juror 39, but ignores her repeated statements that

she would consider the evidence, and vote for the death penalty if the evidence warranted it. The State even cites a question posed by the trial court of the juror which undercuts its entire argument. The court asked the juror if she could ever vote for the death penalty and she responded by noting that her personal beliefs were contrary but after viewing all of the evidence she could indeed vote for death. RP 2282-83. Although she did not “show the kind of bloodthirsty eagerness the prosecutor may have preferred,” there was nothing in Juror 39’s *voir dire* that would support a finding she would not follow her oath as a juror. *Brown*, 2006 U.S.App. LEXIS 14933 at 17.

Under *Gray* and *Brown*, the exclusion of a juror who expresses an ability to consider the evidence and follow the court’s instructions is unconstitutional. *Gray*, 481 U.S. at 653; *Brown*, 2006 U.S.App. LEXIS 14933 at 12. The trial court exclusion of juror Z was improper.

b. The exclusion of Juror 52. Juror 52 candidly admitted she was a deeply religious person whose church opposed the taking of a human life. Nevertheless, she stated she could set aside her beliefs, agreed to listen to all of the evidence, and follow the law as provided in the court’s jury instructions. The trial court focused solely on the juror’s religious beliefs in granting the State’s cause challenge.

In response to Mr. Yates's argument that the exclusion of this juror was unconstitutional, the State contends that the juror did not do anything more than answer "yes" to structured and leading questions posed by the defense. BOR at 74. The State argues the trial court evaluated the juror's answers and the court's subsequent factual findings regarding the juror's religious beliefs are entitled to deference. BOR at 74-75.

The case relied upon by the State, *Patton v. Yount*, 467 U.S.1025, 104 S.Ct. 2885, 81 L.Ed.2d 847 (2004), is of no assistance in this matter. The *Yount* decision was not a death penalty case and was not a direct appeal. The matter was a federal habeas corpus matter where the sole issue was whether the "presumption of correctness" under 28 U.S.C. § 2254 applied to the trial court's findings. *Yount*, 467 U.S. at 1038. This is a far different and far more deferential standard of review of than applicable here.

In addition, following the State's argument would render review meaningless since the trial court's factual finding would be unreviewable as a matter of law. As soon as a juror expressed some reservation about imposing the death penalty, according to the State, the trial court would be within its discretion to exclude that juror even if the juror subsequently promised to consider all of the evidence, follow the court's instructions, and vote for death if the evidence supports a death verdict. This is wholly

inconsistent with the Supreme Court's decision in *Gray* and the Ninth Circuit's pronouncement in *Brown*.

The decision in *Brown* points out the absurdity of the State's position. Reviewing a state conviction under the federal habeas standard, the court reviewed the factual findings of the trial court under the deferential standard noted in *Yount*, and still found the trial court's findings without support. *Brown*, 2006 U.S.App. LEXIS 14399 at 17 (“No degree of deference, nor allowance for facial expressions and demeanor, can possibly fill in what isn't there: the least indication that [the juror] could not or would not follow the law.”).

Here Juror 52 expressed her reservations but then clearly stated she would consider all of the evidence, and if the evidence supported it, vote for death. The trial court's exclusion of this juror violated Mr. Yates's right to an impartial jury.

c. The exclusion of Juror 74. Juror 74 presents a clearly erroneous exclusion of a juror for cause by the trial court. The juror expressed philosophical and religious reservations about the death penalty, but noted that she had been able to set aside her personal feelings during prior juror service and followed the court's instructions. The juror noted she could do the same in this case. Once again the trial court excluded the juror based solely upon her religious and philosophical reservations.

The State's argument concentrates solely on the juror's reservations about the imposition of the death penalty, but like the court's ruling excluding the juror, conveniently ignores the juror's quite candid statement that she had been able to put aside her personal feelings while serving as a juror in the previous matter. Here, the juror's prior jury service provides evidence which supported her promise that she could set aside her beliefs and follow the court's instructions. The trial court's myopic view regarding the juror's personal beliefs clearly ignored the juror's prior jury service. The court's exclusion of this juror was improper.

5. THE TRIAL COURT RELIEVED THE STATE OF ITS BURDEN OF PROVING THE ELEMENTS OF THE CRIME OF AGGRAVATED FIRST DEGREE MURDER

The Fourteenth Amendment's Due Process Clause and the similar provisions of Article I, § 3 of the Washington Constitution require the State prove each element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). This requirement is violated where a jury instruction relieves the State of its burden of proving each element of the crime. *Sandstrom v. Montana*, 442 U.S. 510, 523-24, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). Here, the trial court erroneously defined the common scheme or plan aggravating factor

and thereby relieved the State of its burden of proof, depriving Mr. Yates of due process.

a. The aggravating elements set forth in RCW 10.95.020 are elements of the offense of aggravated first degree murder. This Court has recently said “[u]nder [*Ring v. Arizona*, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)] and [*Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)] 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) *State v. Mills*, 154 Wn.2d 1, 109 P.3d 415, 419 (2005). The United States Supreme Court too has clarified its holding in *Apprendi*

Apprendi and [*McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986)] mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are **the elements** of the crime for purposes of the constitutional analysis.

Harris v. United States. 536 U.S. 545, 557-58, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2003) (emphasis added).

In its response, the State steadfastly ignores these straightforward statements of law and maintains the aggravating elements of first degree

aggravated murder are not elements of a greater offense. BOR at 91-95.¹

In fact the State's brief does not cite to either *Harris* or *Mills*.

In *State v. Thomas*, this Court recognized the aggravating elements of RCW 10.95.020 set the maximum punishment for the offense of aggravated murder, i.e. death. *State v. Thomas*, 150 Wn.2d 821, 848, 83 P.3d 970 (2004). As such, they are “the elements of the crime for purposes of the constitutional analysis.” *Harris*, 536 U.S. at 557-58.

b. Proof of the common scheme or plan element of aggravated murder requires proof of a nexus between the murders. RCW 10.95.020 provides in relevant part:

A person is guilty of aggravated first degree murder, a class A felony, if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist:

...

(10) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person.

....

¹ The State does concede at one point in its brief that “the absence of mitigating circumstances” is an essential element of aggravated first degree murder because without such a finding the death penalty is unavailable. See BOR at 196. Of course in a separate portion of its brief the State offers the directly contrary argument that the “the absence of mitigating circumstances” is not an essential element of aggravated first degree murder in this case. See BOR at 117-19. At best, what can be distilled from the State's contradictory arguments is that facts will or will not be elements of the crime when their inclusion or exclusion is necessary to affirm the verdict obtained.

To prove multiple killings were committed as part of a common scheme or plan, the State must prove a “nexus between the killings.” *State v. Pirtle*, 127 Wn.2d 628, 661-62, 904 P.2d 245 , *cert. denied*, 518 U.S. 1026 (1996)(citing *State v. Dictado*, 102 Wn.2d 493, 501, 687 P.2d 172 (1984); and *State v. Grisby*, 97 Wn.2d 493, 501, 647 P.2d 6 (1982), *cert. denied*, 459 U.S. 1211 (1983)). The factor requires proof of “an overarching plan that connects [the] murders.” *State v. Finch*, 137 Wn.2d 792, 835, 975 P.2d 967, *cert. denied*, 528 U.S. 922, (1999). Stated differently, the State must prove a “nexus between the killings and not the killers.” *State v. Guloy*, 104 Wn.2d 412, 416, 705 P.2d 1182 (1985), *cert denied*, 475 U.S. 1020 (1986) (citing *Grisby*, 97 Wn.2d 493). Most recently, this Court reaffirmed this long-held definition of common scheme or plan; “a common scheme or plan exists when there are multiple murders with a nexus connecting them, such as an overarching purpose.” *State v. Cross*, 156 Wn.2d at 628 (citing *Finch*, 137 Wn.2d 792). The Court further explained “the State must . . . prove an ‘overarching’ plan with a criminal purpose that connects the murders.” *Cross*, 156 Wn.2d at 628 (citing *Pirtle*, 127 Wn.2d at 663; *Finch*, 137 Wn.2d ay 835).

This Court has never wavered from the view that proof of the common scheme element requires proof of a nexus between the murders. Nonetheless, the State baldly claims “Over the years, this court has

described what is required by the common scheme or plan aggravating circumstance in various ways.” BOR at 97. The above authorities demonstrate that beginning with *Grisby* in 1983 and continuing to this day, every case in which the factor has been employed has required proof of a nexus.

At the base of the State’s fallacious argument is this Court’s citation to and brief discussion of *State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995), in *Finch* and *Pirtle*. See BOR at 98-99. The discussion of *Lough* in *Pirtle* was as follows:

The use of common scheme or plan in *Dictado* and *Grisby* is consistent with the traditional understanding of common scheme or plan within the rules of evidence. This understanding, in turn, sheds light on the nature of the connection needed between the murders. Under the rules of evidence, common scheme or plan may refer to the situation where “several crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan.” [*Lough*, 125 Wn.2d at 855.] The term refers to a larger criminal design, of which the charged crime is only part. *State v. Bowen*, 48 Wn.App. 187, 192, 738 P.2d 316 (1987). Thus, the common scheme or plan aggravator requires the killings be connected by a larger criminal plan.

Pirtle, 127 Wn.2d at 662.

As discussed in Mr. Yates’s initial brief, *Lough* identified two situations in which evidence may be admitted as evidence of a common scheme or plan under ER 404(b). The first involves a scenario in which “several crimes constitute constituent parts of a plan in which each crime

is but a piece of the larger plan.” *Lough*, 125 Wn.2d at 855. The second scenario arises where there is “such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.” *Id.* at 856. *Finch* and *Pirtle* cite only to the first of these two definitions. See *Finch*, 137 Wn.2d at 835-36; *Pirtle*, 127 Wn.2d at 264. *Pirtle* explained this first definition is precisely the scenario presented in *Dictado* and *Grisby*. *Pirtle*, 127 Wn.2d at 662 (citing *Dictado*, 102 Wn.2d at 281; and *Grisby*, 97 Wn.2d at 469). Thus, that portion of *Lough* relied upon by *Pirtle* and *Finch* is wholly consistent with this Court’s prior cases defining the common scheme element of RCW 10.95.020(10).

As it did below, the State contends that by their mere citation to *Lough*, *Pirtle* and *Finch* implicitly altered the definition of the common scheme element, thereby eliminating the requirement that the murders be connected. The State claims “There is nothing in the *Pirtle* decision to suggest that the court was adopting only one meaning of that phrase as set forth in *Lough*.” BOR at 101. The State’s novel “adoption by silence” theory presents an interesting approach to precedent, but the fact remains, *Pirtle*, and *Finch* after it, discussed *Lough* only with respect to the

traditional understanding of commons scheme or plan.² Moreover, the State has not cited a single case that has gone beyond *Pirtle* and *Finch*, to broaden the common scheme aggravating element of RCW 10. 95.020(10) to include “separate but very similar crimes” Yet this is precisely what Instruction 20 permitted. CP 4106. In doing so, Instruction 20 relieved the State of its burden of proving an element of the offense of aggravated first degree murder.

c. Because Instruction 20 relieved the State of its burden of proof on an element of the offense reversal is required. The State has not offered any argument that the error in Instruction 20 was harmless. Perhaps that is a recognition that such a claim would fly in the face of its arguments below, that Instruction 20 was required to ensure the State was not required to meet the higher standard of proving the murders were connected. CP 1688, RP 7369, 7386. Or perhaps it is a recognition that a claim of harmless error is contrary to the State’s arguments to the jury that they need not find the murders were connected or even that they were a part of the same plan, and its concession that the State had not proven an overarching plan. RP 7574, 7477.

² After setting forth its “adoption by silence” view of precedent, the State goes on to accuse Mr. Yates of “ignore[ing] the language of *Pirtle*.” But if as the State contends *Pirtle* means more than it says, the State cannot accuse anyone of ignoring its language, as the language of the decision is apparently not the limit of the court’s holding.

The error in this case requires reversal of Mr. Yates's sentences and convictions

6. IN THE ABSENCE OF PROOF BEYOND A REASONABLE DOUBT OF THE THREE AGGRAVATING ELEMENTS, MR. YATES'S CONVICTIONS DEPRIVED HIM OF DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT

a The State did not establish the murders of Connie Ellis and Melinda Mercer were a part of a common scheme or plan. A person commits aggravated first degree murder where he commits premeditated murder, there is more than one victim and the killings are a part of a common scheme or plan. RCW 10.95.020(10). Two or more murders may be a part of a common scheme or plan if there is a nexus between them other than the killer. *Pirtle*, 127 Wn.2d at 661-62; *Finch*, 137 Wn.2d 792; *Cross*, 156 Wn.2d at 628. This is and always has been the sole definition.

Despite the unbroken string of precedent defining the element in this manner, the State maintains the element may also be established where the State proves only that a person uses a common scheme or plan to commit unrelated though similar murders. BOR at 107 (Citing *State v. DeVincintis*, 150 Wn.2d 11, 19, 74 P.3d 119 (2003) and *Lough*, 125 Wn.2d at 860). Neither *DeVincintis* nor *Lough* altered the definition of the

common scheme element of RCW 10.95.020(10), and neither case addressed the sufficiency of proof to sustain a conviction, but rather whether a trial court had abused its discretion in concluding the state had met the foundation for admitting evidence under ER 404(b). That this Court has never applied this lesser standard is aptly demonstrated by the fact that every case which has addressed this aggravating element beginning with *Grisby* and *Dictado*, continuing to *Cross*, and including *Pirtle* and *Finch*, have required the State to prove a nexus between the murders. See *Pirtle*, 127 Wn.2d at 661-62; *Finch*, 137 Wn.2d 792; *Cross*, 156 Wn.2d at 628.

Nonetheless the State faults Mr. Yates for failing to challenge the sufficiency of the State's evidence supporting this supposed second alternative. BOR at 107. Mr. Yates "failing" in this respect is easily explained by the fact that he has confined his challenges to the State's proof of the actual elements of the crime, as defined by this Court, and not the imaginary elements which the State has posited.

Having refused to accept this Court's precedent requiring proof of a nexus between the murders, the State makes no effort in its brief to argue that its evidence met this standard. While the State's evidence did establish Mr. Yates killed "more than one" person, Ms. Ellis and Ms. Mercer, the State offered no evidence to establish a nexus between these

two killings other than Mr. Yates. In fact, the State argued to the jury it need not even prove both murders were a part of the **same** common scheme or plan. RP 7262, 7322, 7325-26, 7486. The State conceded the jury might have a reasonable doubt as to whether Connie Ellis's murder was a part of the same common scheme as Melinda Mercer's death and thus would be required to answer no to that aggravating factor with respect to Melinda Mercer as well. The State argued that requiring that the murders of both Connie Ellis and Melinda Mercer to be a part of the same common scheme would raise the State's burden of proof beyond that which was required. RP 7369, 7386. Finally, the State told the jury "there is no contention" that Melinda Mercer and Connie Ellis were killed as part of an overarching plan. RP 7477.

In its best light the evidence established Melinda Mercer and Connie Ellis were killed by Mr. Yates. However, this is not sufficient to establish the nexus required to prove the common scheme or plan aggravator as this Court said the State must prove a "nexus between the killings and not the killers." *Guloy*, 104 Wn.2d at 416. The State did not meet its burden of proof with respect to the common scheme element.

b. The State did not establish the murders of Connie Ellis and Melinda Mercer were committed in furtherance of a robbery. RCW 10.95.020 provides in relevant part:

A person is guilty of aggravated first degree murder, a class A felony, if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist:

...

(11) The murder was committed in the course of, in furtherance of, or in the immediate flight there from one of the following crimes:

(a) Robbery in the first or second degree

....

Proof of this element requires proof of an intimate connection between the murder and felony. *State v. Brown*, 132 Wn.2d 529, 607-08, 940 P.2d 546 (1997) (citing *State v. Golloday*, 78 Wn.2d 121, 132, 470 P.2d 191 (1970), *overruled on other grounds*, *State v. Arndt*, 87 Wn.2d 374, 553 P.2d 1328 (1976)), *overruled on other grounds sub nom*, *Brown v. Lambert*, 2006 U.S. App. LEXIS 14933.

The killing must be a part of “*res gestae*” of the felony, that is in close proximity in terms of time and distance. A “causal connection” must be clearly established between the two. In other words, ‘more than a mere coincidence of time and place is necessary.’ (Citations omitted.) *Brown*, 132 Wn.2d at 608.

The State’s response focuses entirely on this first sentence from *Brown* ignoring in its entirety the cautionary limitation which follows in the second. *See*, BOR at 111-12.

To prove this element of the offense, the State was required to prove that Mr. Yates intentionally killed Ms. Ellis and Ms. Mercer with

the intent and for the purpose of robbing them. It is not enough that the State prove that Mr. Yates intentionally killed the victims and also committed a robbery, as “more than a mere coincidence of time and place is necessary.” *Brown*, 132 Wn.2d at 608. As it did at trial, the State does nothing more than point to evidence that no money was recovered from either Ms. Mercer or Ms. Ellis. Missing from the State’s analysis is any evidence which remotely suggests that the murders were committed with the intent to rob the victims.

In response to Mr. Yates’ argument that the State prove such an intimate connection beyond the mere coincidence of time and place, the State claims Mr. Yates has failed to view the evidence in the light most favorable to the State. BOR at 113. While this is indeed the standard for reviewing the facts proven at trial, it does not lessen the State constitutional burden of ensuring the facts establish the legal elements of the crime.

In its best case, the State’s evidence arguably established a robbery, or more likely a theft, which was incidental to the murders, but it fell far short of establishing that the murders were committed for the purpose of robbing the victims. Indeed, the State’s principal argument to the jury was that the driving purpose of the killings was Mr. Yates’s desire to engage in sexual activity with the bodies. If this is so, again at best the State has

proven an incidental taking of property, not that the murders were committed for the purpose of committing a robbery.

7. ALL ESSENTIAL ELEMENTS OF THE
OFFENSE MUST BE CONTAINED IN THE
INFORMATION

In response to Mr. Yates's argument that the aggravating factors and the absence of mitigating factors are elements of the offense of aggravated first degree murder and thus must be included in the information, the State puts its head further in the sand and continues to cite cases from this Court that predated the decisions in *Ring v. Arizona*, 536 U.S. 584, and *Apprendi v. New Jersey*, 530 U.S. 466. This Court should reject the State's argument and analyze the issue under the latest pronouncements from the United States Supreme Court.

But more telling is the State's inability to state a consistent position regarding whether the lack of mitigating factors is an element of the offense. Initially, in arguing the lack of mitigating factors is not an element of the offense so that it need not be included in the information, the State argued: "Although the 'mitigating circumstances' standard is not an element of the crime under [*State v. Clark*, 129 Wn.2d 805, 920 P.2d 187 (1996)], defendants are in fact given timely notice of this standard through the death penalty notice procedures." BOR at 118-19. Later, in

addressing Mr. Yates’s argument that he was denied equal protection due to the charging of aggravated murder in Pierce County, the State argued:

Equal protection is denied when a prosecutor is permitted to seek varying degrees of punishment when proving *identical elements*; however, there is no constitutional defect when the crimes which the prosecutor has discretion to charge have *different elements*. [Citation omitted].

In *Campbell*, this Court held that there is no equal protection violation because a sentence of death requires consideration of an additional factor beyond that for a sentence for life imprisonment – “namely, an absence of [or insufficiency of] mitigating circumstances.” [Citation omitted].

BOR at 196 (emphasis added).

Thus in two different parts of its brief, the State manages to argue two diametrically opposed positions: the lack of mitigating circumstances is, and is not, an element of the offense of aggravated first degree murder.

Since the State has admitted the absence of mitigating circumstances is an element of the offense, under *State v. Vangerpen*, 125 Wn.2d 782, 888 P.2d 1177 (1995), this element was required to be included in the information. The failure rendered the amended information constitutionally infirm requiring reversal of Mr. Yates’s conviction.

9. MR. YATES’S DEATH SENTENCE IS
DISPROPORTIONATE, FREAKISH, WANTON,
AND RANDOM

The goal of the proportionality review “is to ensure that the sentence, in a particular case, is proportional to sentences given in similar cases, is not freakish, wanton, or random, and is not based on race or other suspect classifications.” *State v. Cross*, 156 Wn.2d 580 (citing *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)). The State’s response to Mr. Yates’s argument that his sentence is disproportionate, freakish, wanton, and random, is amazingly brief, superficial, and completely fails to respond to any of the arguments made by Mr. Yates.

a. Mr. Yates’s sentence is arbitrary, wanton, random, freakish, and random in light of his Spokane County sentence. Telling in the State’s response is a total failure to address Mr. Yates’s argument that his Pierce County death sentence is disproportionate and arbitrary in light of his Spokane County sentence on what the Pierce County prosecutors described as identical crimes. The most likely reason is that there is no response to that argument; the death sentence *is* disproportionate and arbitrary.

Mr. Yates conceded in his opening brief that his Spokane County matter does not fall within the statutory definition of “similar cases” under

RCW 10.95.130(2)(b). But this Court cannot ignore the Spokane County sentence because it was made part and parcel of the instant matter by the Pierce County prosecutors. As argued in the opening brief, the State argued the Spokane County cases were part of Mr. Yates's common scheme or plan in killing prostitutes that included the two Pierce County cases. Nothing proves Mr. Yates's Pierce County sentence is disproportionate and arbitrary better than the Spokane County sentence. Identical cases received two different sentences.

Justice Charles Johnson's dissent in *Cross*, points out the absurdity of ignoring Mr. Yates's Spokane County sentence:

With Ridgeway, Ng, Yates, Rice and others in our pool of similar cases, our proportionality review reveals the staggering flaw in the system of administration of the death penalty . . . [T]he dual objectives of our proportionality review are to proscribe random arbitrariness in the imposition of the death penalty and to ensure that the sentence of death is not imposed because of a defendant's race. We accomplish this object through conducting a proportionality review to guarantee that "no sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed *generally* and 'not wantonly and freakishly.'" [Citations omitted].

Cross, 156 Wn.2d at 652 (C. Johnson, dissenting).

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.

b. Mr. Yates's death sentence is disproportionate to Gary Ridgeway's life sentence. Again a very telling fact regarding the State's response is its utter failure to address Mr. Yates's argument his death sentence is disproportionate to Gary Ridgeway's sentence of life imprisonment without the possibility of parole. The State appears to want to ignore the Ridgeway case, or as *Cross* did, create an exception for Ridgeway. The Ridgeway case cannot be ignored in Mr. Yates's case; his crimes and personal history are almost identical to Ridgeway's.

Cross attempted to skirt the impact of Ridgeway by claiming it was a unique case:

We recognize that Ridgeway brutally murdered at least 48 women (and possibly many more), over decades, often returning to rape their corpses, and yet was spared the death penalty under a plea bargain. It resolved the tragedy of many unsolved deaths and disappearances that probably would have otherwise remained unsolved forever. Families were spared the agony of unknowing and the rigors of testimony. [Citations omitted].

Gary Ridgeway is but a single case, an instance of what we hope are unique and horrible crimes. Each death sentence is a product of unique circumstances. The issue before us is whether the sentence of death for Cross is disproportionate to the penalty imposed in similar cases. Ridgeway, standing alone, is not sufficient reason to find capital sentences always disproportionate.

Cross, 156 Wn.2d at 634.

Mr. Yates is certainly not claiming the Ridgeway case compels the conclusion that Washington's death penalty is unconstitutional, rather, he submits the Ridgeway case is so similar to his that his death sentence is disproportionate in light of Ridgeway's sentence. There is very little difference between the Ridgeway case and Mr. Yates's case other than the sheer number of victims. While this Court could find Ridgeway inapplicable to the *Cross* case, it cannot do so in Mr. Yates's case. Mr. Yates's death sentence is so disproportionate to Ridgeway that Mr. Yates's sentence violates the Eighth Amendment.

c. The State's analysis of "similar cases" replicates the same flaws of this Court's analysis in relying on cases in which only a death sentence was imposed. The State's analysis of "similar cases" ignores the statutory mandate under RCW 10.95.130(2)(b) and focuses solely on those cases in which a death sentence was imposed as opposed to all cases where the jury considered death, regardless of whether or not it was imposed or executed.

Of particular concern is the State's analysis of Mr. Yates's criminal history. The State notes that Mr. Yates's criminal history consisted of fourteen felony convictions; thirteen first degree murder convictions and one attempted murder conviction. BOR at 228. The State argues that it could "find no other similar case where the defendant had so

many prior convictions for murder.” *Id.* This is simply disingenuous. Mr. Yates’s had no criminal history before he entered his guilty plea in Spokane County. The only reasons he had a criminal history in Pierce County was because of the prosecutor’s refusal to follow through in the global plea agreement that Spokane, Walla Walla, and Skagit counties did and proceed in its own quixotic quest to seek a death sentence for Mr. Yates.

But, the State’s analysis of “similar cases” as required by RCW 10.95.130(2)(b) also suffers the same flaws as this Court’s analysis in recent death cases. As the *Cross* dissent noted, this Court’s recent analysis has “embodied many forms.” *Cross*, 156 Wn.2d at 642 (C. Johnson dissenting). But, the four dissenters concluded this Court’s proportionality analysis has become so flawed it is no longer viable:

As the above discussion of our proportionality jurisprudence indicates, our appellate review as required by RCW 10.95.130(2)(b) has not only evolved but has continued to limit the focus of comparison to other death penalty cases. This approach ignores the statutory mandate to include all cases in which the defendant was convicted of first degree aggravated murder as “similar cases” for comparison. When we factor in all the cases required by statute and review the outcome of our previous cases, no rational basis exists to explain or conclude that the sentence of death in any given case is imposed generally in similar cases. Not only have we not generally included all cases where the defendant has been convicted of first degree aggravated murder in our review, the majority of the death penalty cases we have declared to be “similar” for

comparison in proportionality review are no longer death penalty cases. Where, in previous cases our analysis has focused on “similar” cases where the death penalty was imposed, when those “similar” cases are no longer death penalty cases, our prior comparability analysis is undermined. This outcome renders it impossible to find that the death penalty is imposed generally in similar cases and leads to the conclusion that our historical approach to proportionality review is no longer viable.

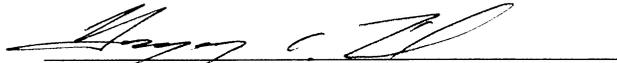
Cross, 156 Wn.2d at 651 (C. Johnson, dissenting).

Since as the statutory proportionality review performed by this Court is no longer viable, there can be no assurance from this Court that Mr. Yates’s death sentence was not arbitrarily and freakishly imposed. In fact, as has been argued, the sentence is arbitrary, wanton, and freakish and violates the Eighth Amendment. This Court must reverse Mr. Yates’s death sentence.

B. CONCLUSION

For the reasons stated above, and in Mr. Yates's prior brief, this Court should 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, 2006.



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Attorneys for Robert Yates

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 73155-1
)	
ROBERT YATES,)	
)	
APPELLANT.)	

DECLARATION OF SERVICE

I, MARIA 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, 2006, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S REPLY BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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STATE OF WASHINGTON
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SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF JUNE, 2006.

x _____ 