

NO. 77507-9

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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KIM MASON,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. **ISSUES PRESENTED**

1. The doctrine of forfeiture by wrongdoing dictates that a defendant who wrongfully procures the unavailability of a witness forfeits the right to confront that witness and any hearsay objections regarding the witness's out-of-court statements. Such statements are admissible in lieu of testimony if the evidence proves by a preponderance of the evidence that the defendant's misconduct caused the witness's unavailability. In murder cases, the victim's statements are admissible to prove the murder itself. In this case, overwhelming evidence proves that the defendant caused the witness's unavailability by stabbing him to death. Are the victim's statements admissible under the doctrine of forfeiture by wrongdoing?

2. The United States Supreme Court's decisions in Crawford v. Washington and Davis v. Washington hold that testimonial hearsay should not be admitted at trial without subjecting the declarant to cross examination. However, testimonial statements offered for non-hearsay purposes and nontestimonial statements do not implicate the Confrontation Clause. Pleas for help made during an ongoing emergency are categorically nontestimonial. In this case, some of the murder victim's out-of-court statements were

offered for non-hearsay purposes, and other statements were pleas for help made during an ongoing emergency. Were these statements properly admitted at trial?

3. This Court held in State v. Townsend that trial courts should not instruct prospective jurors *sua sponte* that a murder case does not involve a request for the death penalty. However, Townsend does not preclude trial courts from responding appropriately when prospective jurors indicate that they would not follow the law if the death penalty were at issue. In this case, after thoughtful consideration, the trial court decided to instruct the venire that the death penalty was not at issue *only* if prospective jurors raised the issue themselves. During voir dire, a prospective juror stated that she could not follow the law in a death penalty case, and the court gave a brief and accurate instruction. Did the trial court respond appropriately by issuing an instruction in these circumstances?

B. STATEMENT OF THE CASE

The defendant, Kim Mason, was a professional kickboxer who competed under the name "The Sensation." RP (4/15/03) 156. The victim, Hartanto Santoso, was a young man from Indonesia. RP (4/21/03) 135. The two men were friends. RP (4/15/03) 207.

Mason's life began unraveling in late 2000 and early 2001 due to suspected drug use, severe financial problems, and the loss of his job as a kickboxing instructor. RP (4/15/03) 102-07; RP (4/22/03) 165-66; RP (5/7/03) 120-35; RP (5/19/03) 56-58; RP (5/28/03) 188-89. On January 23, 2001, Mason invited Santoso to his Redmond condominium on a pretext. RP (4/18/03) 119. Mason strangled Santoso into unconsciousness, bound him with duct tape, threatened him with a gun and a syringe of drain cleaner, and forced Santoso to write a check for \$700. He also made Santoso write a letter to his roommate stating that he was moving to Portland. RP (4/8/03) 119-23; RP (4/9/03) 70; RP (4/10/03) 167; RP (4/14/03) 73-74; RP (4/16/03) 58-69. Eventually, Santoso talked Mason into letting him go, but Mason threatened to kill him if he went to the police. RP (4/8/03) 123; RP (4/10/03) 168.

The next day, one of Santoso's friends talked him into reporting the attack. Santoso reported the incident to the Kirkland police, who then referred him to the Redmond police. RP (4/8/03) 113-24, 158-60; RP (4/14/03) 16. Mason was arrested and charged with first-degree kidnapping and attempted first-degree robbery; nonetheless, he was released from jail on January 31 pending trial. RP (4/9/03) 89; RP (5/29/03) 14.

On February 19, 2001 at about 10:30 p.m., Mason called his girlfriend, Marina Madrid, and instructed her to meet him at SeaTac airport with a change of clothes. RP (4/29/03) 92. At 10:45 p.m., Santoso's neighbors heard a crash and sounds of a struggle. RP (4/17/03) 97, 99, 102, 111, 168-75. About ten minutes later, they saw Santoso's car leaving the parking lot. RP (4/17/03) 108, 182-87. Approximately one hour later, Madrid picked up Mason at the airport; his hands were covered in blood and he said that "Santoso won't be a problem anymore." RP (4/29/03) 96-98.

Mason told Madrid he had thrown a brick through Santoso's window, entered the apartment, and stabbed Santoso repeatedly until he was dead. RP (4/29/03) 129-30. Mason drove the body away in Santoso's car, hid the body, and left the car at the airport. RP (4/23/03) 109, 113; RP (4/29/03) 131. Santoso was never heard from again, and his body has never been found. RP (4/10/03) 109; RP (4/21/03) 34, 145; RP (5/1/03) 184-89; RP (5/27/03) 147, 157, 159-61.

Santoso's bedroom and car were saturated with enormous amounts of blood consistent with Santoso's DNA profile. RP (4/22/03) 47; RP (4/23/03) 4-24; RP (5/19/03) 76-77, 88, 90-105, 126, 138, 151-56; RP (5/29/03) 25-27; Ex. 14-16, 99, 100, 113-14.

In addition, blood recovered from the driver's seat of Santoso's car and from the passenger's seat of Madrid's car was consistent with a mixture of Santoso's and Mason's DNA profiles. RP (5/19/03) 119-25; RP (5/20/03) 32-33, 43-44. Mason had cut himself on the thigh while stabbing Santoso to death. RP (4/29/03) 99-100, 114, 117.

Mason was tried to a jury and convicted of murder in the first degree with aggravating circumstances.¹ CP 565; RP (6/11/03) 3. The trial court imposed the mandatory penalty of life in prison without the possibility of parole. CP 572-78; RP (7/25/03) 3. In an opinion published in part, the Court of Appeals rejected all of Mason's appellate claims. State v. Mason, 127 Wn. App. 554, 126 P.3d 34 (2005); State v. Mason (No. 52824-6-I), slip op.

For a far more detailed account of the facts of this complex case, see Brief of Respondent, at 4-17, and Mason, 127 Wn. App. at 558-60.

¹ The jury was unanimous that two aggravating circumstances had been proved beyond a reasonable doubt: 1) that the murder was committed in the course of a burglary; and 2) that an order prohibiting contact with the victim was in place when the murder was committed. The jury could not agree on the third aggravating factor, i.e., that the murder was committed against a witness in a pending trial. CP 566-67; RP (6/11/03) 3-4.

C. **ARGUMENT**

Mason petitioned this Court for review of every issue that was raised in the Court of Appeals. In granting Mason's petition, this Court did not limit the scope of its review. In the interests of brevity and clarity, however, this supplemental brief focuses primarily upon the main issue in this case: the trial court's admission of Hartanto Santoso's statements to Corporal Haslip, Detectives Berberich, Malins and Roze, and victim advocate Linda Webb, and whether the admission of any of these statements provides grounds to reverse Mason's conviction.

First, this brief discusses the well-established doctrine of forfeiture by wrongdoing, and asks this Court to adopt this doctrine in Washington and hold that all of Santoso's statements are admissible under the doctrine. Next, this brief discusses the current landscape of the law regarding the Confrontation Clause as set forth in Crawford v. Washington and Davis v. Washington, and explains why most of Santoso's statements are still admissible, even under the Davis analysis. This brief then addresses harmless error. In sum, there is no basis to grant Mason a new trial due to the admission of Santoso's statements.

This brief also addresses the other published portion of the Court of Appeals' decision, holding that this Court's ruling in State v. Townsend² does not apply to circumstances where, as here, prospective jurors themselves raise concerns about the prospect of the death penalty during voir dire. Lastly, this brief discusses the remaining issues raised in Mason's petition only to the extent necessary to cite any recent decisions bearing on those issues, or to explain how Mason has misstated those issues. The State will rely on its previous briefing in the Court of Appeals for the remainder of its arguments.

1. **THERE IS NO BASIS TO REVERSE MASON'S CONVICTION BASED ON THE ADMISSION OF THE MURDER VICTIM'S STATEMENTS AT TRIAL.**
 - a. ALL OF THE VICTIM'S STATEMENTS ARE ADMISSIBLE UNDER THE DOCTRINE OF FORFEITURE BY WRONGDOING.

Mason argued in the Court of Appeals that the doctrine of forfeiture by wrongdoing should not apply in this case. The Court of Appeals ultimately did not reach the issue because it held that Santoso's statements were admissible on other grounds, and that admitting the challenged statements was harmless beyond a reasonable doubt. Mason, 127 Wn. App. at 570.

² State v. Townsend, 142 Wn.2d 838, 15 P.3d 145 (2001).

But now that the contours of Confrontation Clause jurisprudence have fundamentally changed, this Court should join with every jurisdiction that has considered the issue, and hold that forfeiture by wrongdoing applies in this case. Accordingly, this Court should hold that Mason forfeited his right to confront Hartanto Santoso by causing his unavailability, and that all of Santoso's statements were thus properly admitted at trial.

i. Introduction: General Principles and Overview

Forfeiture by wrongdoing is an exception to the requirement of confrontation that was recognized in American case law over a century ago. Reynolds v. United States, 98 U.S. 145, 25 L. Ed. 244 (1878). The doctrine has its roots in equity, and stems from the principle that a defendant who has wrongfully procured the unavailability of a witness cannot profit from that wrongdoing by asserting the right to confront the witness:

The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the

witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.

Reynolds, 98 U.S. at 158.

The policy behind this doctrine is as simple as it is just: no one will be rewarded for subverting the justice system by depriving the prosecution, the court, and the jury of evidence through bribery, intimidation, collusion, coercion, or murder:

The law simply cannot countenance a defendant deriving benefits from murdering the chief witness against him. To permit such subversion of a criminal prosecution would be contrary to public policy, common sense, and the underlying purpose of the confrontation clause, and make a mockery of the system of justice that the right was designed to protect.

United States v. Thevis, 665 F.2d 616, 630 (5th Cir. Unit B 1982) (citations and internal quotations omitted), *superseded by rule on other grounds as stated in* United States v. Zlatogur, 271 F.3d 1025, 1028 (11th Cir. 2001). Or, as one court has more bluntly stated, "Though justice may be blind, it is not stupid." State v. Henry, 76 Conn. App. 515, 533, 820 A.2d 1076 (2003) (quoting State v. Altrui, 188 Conn. 161, 173, 448 A.2d 837 (1982)). Thus, forfeiture by wrongdoing serves "to ensure that a wrongdoer does not profit in a court of law by reason of his miscreancy." United

States v. Houlihan, 92 F.3d 1271, 1282-83 (1st Cir. 1996).

Forfeiture by wrongdoing, distilled to its essence, dictates that a defendant who has wrongfully procured a witness's unavailability has forfeited the right of confrontation and any hearsay objections, and the witness's out-of-court statements are admissible at trial in lieu of testimony. See Houlihan, 92 F.3d at 1282. Courts applying the forfeiture doctrine acknowledge that confrontation is a bedrock constitutional right; nonetheless, the "Sixth Amendment does not stand as a shield to protect the accused from his own misconduct or chicanery." Commonwealth v. Edwards, 444 Mass. 526, 535, 830 N.E.2d 158 (2005) (quoting Houlihan, 92 F.3d at 1282-83). Furthermore, "[t]he same equity and policy considerations apply with even more force to a rule of evidence without constitutional weight," and thus any hearsay objections are forfeited as well. United States v. White, 116 F.3d 903, 913 (D.C. Cir. 1997).

In 1997, forfeiture by wrongdoing was codified in the Federal Rules of Evidence as a hearsay exception. Fed. R. Evid. 804(b)(6). The rule provides that out-of-court statements are admissible if "offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability

of the declarant as a witness." Id. The rule also eliminated a prior circuit split as to the preliminary standard of proof,³ and all federal courts now apply a preponderance of the evidence standard to the question of admissibility under Fed. R. Evid. 104. Zlatogur, 271 F.3d at 1028.

The United States Supreme Court has encouraged courts to apply forfeiture by wrongdoing in the wake of its recent reformulation of the Confrontation Clause. See Crawford v. Washington, 541 U.S. 36, 62, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) ("[T]he rule of forfeiture by wrongdoing (which we accept extinguishes confrontation claims on essentially equitable grounds"); Davis v. Washington, ___ U.S. ___, 126 S. Ct. 2266, 2280, 165 L. Ed. 2d 224 (2006) (reiterating approval of forfeiture by wrongdoing). Six states have adopted evidence rules identical or

³ Before the rule was adopted, the Fifth Circuit applied a clear and convincing standard of proof to the preliminary question of whether forfeiture had occurred, opining that the forfeiture question was similar to the question of whether an in-court identification was admissible in spite of a prior, tainted out-of-court identification. See Thevis, 665 F.2d at 631. All other circuits applied a preponderance standard, concluding that proving forfeiture was "functionally identical" to proving "the conditions precedent to the applicability of the coconspirator exception" for coconspirator statements. Houlihan, 92 F.3d at 1280 (and cases cited therein). As will be discussed further below, the preponderance standard is now the rule in every jurisdiction but New York. See Edwards, 444 Mass. at 542-44 (and cases cited therein).

substantially similar to the federal rule.⁴ At least fifteen⁵ more states and the District of Columbia have adopted forfeiture by wrongdoing through their decisional law.⁶

In sum, every jurisdiction that has had the opportunity to make forfeiture by wrongdoing a part of its jurisprudence has done so. This Court has the opportunity to do so now in Washington. Furthermore, particularly in cases decided post-Crawford, no appellate court has declined to address the issue of forfeiture by wrongdoing in any case with a sufficient trial record, even if the trial court made its evidentiary rulings on different grounds. To the contrary, courts have held that the question of "[w]hether to adopt

⁴ See Del. R. Evid. 804(b)(6); Haw. R. Evid. 804(b)(7); Mich. R. Evid. 804(b)(6); Ohio R. Evid. 804(b)(6); Pa. R. Evid. 804(b)(6); Tenn. R. Evid. 804(b)(6).

⁵ California's lower appellate courts have adopted forfeiture by wrongdoing, but the lower court opinions were unpublished pending review by the California Supreme Court. See People v. Giles, 123 Cal. App. 4th 475, 19 Cal. Rptr. 3d 843, rev. granted, 22 Cal. Rptr. 3d 548, 102 P.3d 930 (2004); People v. Jiles, 122 Cal. App. 4th 504, 18 Cal. Rptr. 3d 790, rev. granted, 22 Cal. Rptr. 3d 869, 103 P.3d 270 (2004).

⁶ See State v. Valencia, 186 Ariz. 493, 924 P.2d 497 (1996); People v. Moore, 117 P.3d 1 (Colo. App. 2004); Henry, 76 Conn. App. 515; Devonshire v. United States, 691 A.2d 165 (D.C. 1997); People v. Melchor, 362 Ill. App. 355, 299 Ill. Dec. 8, 841 N.E.2d 436 (2005); State v. Hallum, 606 N.W.2d 351 (Iowa 2000); State v. Meeks, 277 Kan. 609, 88 P.3d 789 (2004); State v. Magourik, 561 So.2d 801 (La. 1990); Edwards, 444 Mass. 526; State v. Fields, 679 N.W.2d 341 (Minn. 2004); State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330 (1994); State v. Alvarez-Lopez, 136 N.M. 309, 98 P.3d 699 (2004); People v. Cotto, 92 N.Y.2d 68, 677 N.Y.S.2d 35, 699 N.E.2d 394 (1998); Gonzalez v. State, 195 S.W.3d 114 (Tex. Crim. App. 2006); State v. Mechling, ___ S.E.2d ___, 2006 WL 1805697 (W. Va.); State v. Frambs, 157 Wis.2d 700, 460 N.W.2d 811 (1990).

the 'forfeiture by wrongdoing' doctrine is a question of law, which we review de novo." Edwards, 444 Mass. at 532; see also Gonzalez, 195 S.W.3d at 125-26; Hallum, 606 N.W.2d at 354. Washington law also holds that the trial court may be affirmed on appeal on any basis supported by the record and the law. Lamon v. Butler, 112 Wn.2d 193, 201, 770 P.2d 1027 (1989).

The record in this case provides more than a sufficient basis for this Court to adopt and apply forfeiture by wrongdoing, even though the trial court made its rulings on different grounds. Accordingly, this Court should hold that all of Hartanto Santoso's statements were properly admitted at trial.

ii. Practical Considerations: Procedures and Application

Although forfeiture by wrongdoing has been adopted by every jurisdiction that has considered it, some debate has occurred with respect to its procedures and application. Specifically, minor conflicts have arisen as to three discrete issues: 1) whether a pretrial hearing is mandatory; 2) which standard of proof should apply to a trial court's preliminary ruling that forfeiture has occurred; and 3) whether a murdered witness's statements are admissible to prove the murder itself. Clear majority rules have emerged,

however, and the State asks this Court to adopt those rules.

First, as to whether a pretrial hearing is required, the majority view is that a pretrial hearing outside the presence of the jury, while not necessarily mandatory, is the preferred method for establishing predicate facts for the trial court's ruling that the elements of forfeiture have been satisfied. See, e.g., United States v. Dhinsa, 243 F.3d 635, 653-54 (2nd Cir. 2001); Henry, 76 Conn. App. at 534-35; State v. Ivy, 188 S.W.3d 132, 147 (Tenn. 2006). At such a hearing, as with any pretrial hearing regarding the admissibility of evidence, the rules of evidence do not apply and the trial court may consider a wide array of information, including hearsay, in making its determination. See ER 104; Fed. R. Evid. 104; Edwards, 444 Mass. 545 (preliminary ruling may rely on hearsay, and should not be a "mini-trial"); Davis, 126 S. Ct. 2280 (citing Edwards).

On the other hand, courts have held that a pretrial hearing is not necessary if the defense does not request one,⁷ if the prosecution makes a sufficient offer of proof,⁸ or if the trial court decides to admit the out-of-court statements "contingent upon proof

⁷ See United States v. Johnson, 219 F.3d 349, 356 (4th Cir. 2000).

⁸ See Devonshire v. United States, 691 A.2d 165, 169 (D.C. 1997).

of the underlying [misconduct] by a preponderance of the evidence."⁹ Washington case law is in accord with these principles. See State v. Kilgore, 147 Wn.2d 188, 53 P.3d 974 (2002) (holding in the context of ER 404(b) that it should be left to a trial court's discretion whether a full pretrial hearing is required or whether an offer of proof will suffice for the preliminary ruling); see *also* ER 104(b) (evidence may be conditionally admitted).

This Court should rule consistently with its prior precedent and with the majority rule that although an evidentiary hearing will be the preferred method for establishing a basis for the trial court's preliminary ruling on forfeiture by wrongdoing, it is within a trial court's discretion not to hold a hearing in appropriate cases.

The second practical issue about which there has been some debate is the appropriate standard of proof for a trial court's pretrial ruling that forfeiture has occurred. As mentioned above, there used to be a minor circuit split as to this burden of proof, with all circuits but the Fifth applying a preponderance of the evidence standard. Compare Houlihan, 92 F.3d at 1280 (and cases cited therein), *with* Thevis, 665 F.2d at 631. This conflict was resolved with the adoption of Fed. R. Evid. 804(b)(6), and all federal courts

⁹ United States v. Emery, 186 F.3d 921, 926 (8th Cir. 1999).

now apply the preponderance standard. Zlatogur, 271 F.3d at 1028. In addition, of the states that have expressly adopted a standard of proof for forfeiture by wrongdoing, every state but one (New York) has rejected the clear and convincing standard in favor of the preponderance standard. See Edwards, 444 Mass. at 542-44 (noting overwhelming support for the preponderance standard, citing numerous cases).

The reasons for applying the preponderance standard are multifold. First, many courts agree that a trial court's preliminary ruling as to whether a witness's statements are admissible due to forfeiture by wrongdoing is functionally identical to a ruling that a co-conspirator's statements are admissible because they were made in furtherance of the conspiracy. See, e.g., People v. Jones, 270 Mich. App. 208, 215-16, 714 N.W.2d 362 (2006); Edwards, 444 Mass. at 543; Devonshire, 691 A.2d at 169. Second, many jurisdictions have rules identical to ER 104, and hold consistently that the preponderance standard applies to nearly all preliminary rulings. See, e.g., Steele v. Taylor, 684 F.2d 1193, 1202-03 (6th Cir. 1982) (preponderance standard governs preliminary rulings); Devonshire, 691 A.2d at 169 (preponderance "is the accepted standard" and is "traditionally used in deciding preliminary fact

questions"); Jones, 270 Mich. App. at 216 (Mich. R. Evid. 104 is identical to Fed. R. Evid. 104).

But most importantly, courts recognize that the policies underlying forfeiture by wrongdoing would be undermined by requiring proof by clear and convincing evidence. See Zlatogur, 271 F.3d at 1028 (preponderance standard adopted "in light of the behavior [forfeiture] seeks to discourage"); Edwards, 444 Mass. at 544 (rejecting clear and convincing standard on policy grounds). As one court has observed, a higher standard of proof would undermine the forfeiture doctrine's equitable purposes without any resulting benefit to the truth-seeking function of the trial:

As a higher standard of proof under the forfeiture doctrine would not actually separate out the more from the less reliable hearsay and admit only the former (it would simply reduce the scope of the doctrine's application), and as the public interest in deterring this sort of mischief is great, we think it correct to use the same standard as is used for coconspirators' statements.

White, 115 F.3d at 912; see *also* United States v. Mastrangelo, 693 F.2d 269, 273 (2nd Cir. 1982) (a higher burden of proof "might encourage behavior that strikes at the heart of the system of justice itself").

This Court should hold, as has every jurisdiction but one,

that the preponderance standard applies to a trial court's preliminary determination as to whether forfeiture by wrongdoing has occurred. This standard is consistent with ER 104 and with this Court's holdings in analogous circumstances. See State v. Guloy, 104 Wn.2d 412, 420, 705 P.2d 1182 (1985) (preponderance standard applies to preliminary finding that defendant participated in conspiracy for purposes of admitting co-conspirator statements); State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995) (preponderance standard applies to preliminary finding that other bad acts occurred under ER 404(b)). This standard also serves the compelling public policy underlying the forfeiture doctrine itself, ensuring that a defendant does not profit in a court of law from his or her wrongdoing.¹⁰

The final issue about which there has been some debate is

¹⁰ Mason may argue for a higher standard of proof based on the premise that confrontation rights are broader under the state constitution. See Wash. Const. art. 1, § 22. Such an argument should be rejected for two reasons. First, Mason has yet to perform the analysis required under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), and this Court generally will not consider novel state constitutional claims made for the first time in a petition for review or supplemental brief. See State v. Pulfrey, 154 Wn.2d 517, 528, 111 P.3d 1162 (2005); State v. Reding, 119 Wn.2d 685, 696, 835 P.2d 1019 (1992). Second, no other state with constitutional language similar to Washington's (i.e., "face to face") has rejected or restricted forfeiture by wrongdoing on this basis. See Ariz. Const. art. 2, § 24; Colo. Const. art. 2, § 16; Del. Const. art. 1, § 7; Kan. Const. Bill of Rights, § 10; Mass. Const. pt. 1, art. 12; Ohio Const. art. I, § 10; Tenn. Const. art. 1, § 9; Wis. Const. art. 1, § 7. In fact, the one court that has considered an independent state constitutional claim in the context of forfeiture by wrongdoing has soundly rejected that claim. See Edwards, 444 Mass. at 536.

whether a murdered witness's statements are admissible only to prove past crimes about which the witness could have testified, or whether they are admissible to prove the murder as well. Stated another way, the question was whether forfeiture by wrongdoing contains a "subject matter limitation." United States v. Dhinsa, 243 F.3d 635, 652 (2d Cir. 2001). Overwhelmingly, courts have either expressly held that no such limitation exists,¹¹ or have simply applied forfeiture in murder and conspiracy-to-murder cases and held that the murder victim's statements were admissible.¹² Thus, there is no longer any meaningful debate as to whether a murdered witness's statements are admissible when the defendant is on trial for that murder.¹³

The rationale here is a sound and simple one. The very purpose of forfeiture by wrongdoing is to ensure "that a defendant

¹¹ See, e.g., Emery, 186 F.3d at 926; Johnson, 219 F.3d at 356; Dhinsa, 243 F.3d at 652-53; Valencia, 186 Ariz. at 500; United States v. Garcia-Meza, 403 F.3d 364 (6th Cir. 2005); Ivy, 188 S.W.3d at 146-47; Gonzalez, 195 S.W.3d at 125.

¹² See, e.g., Thevis, 665 F.2d at 630-33; Houlihan, 92 F.3d at 1280-81; Moore, 117 P.3d at 5; State v. Hand, 107 Ohio St.3d 378, 391-93, 840 N.E.2d 151 (2006); see also Edwards, 444 Mass. at 537 n.17.

¹³ The only case holding that a murder victim's statements are not admissible in the murder trial appears to be United States v. Lentz, 282 F. Supp. 2d 399 (E.D. Va. 2002). However, Lentz cites two cases for support – Dhinsa and Emery – that hold that there is no subject matter limitation on forfeiture by wrongdoing. Thus, Lentz's holding is untenable.

may not benefit from his or her wrongful prevention of future testimony from a witness or potential witness." Emery, 186 F.3d at 926. Moreover, "[i]t is hard to imagine a form of misconduct more extreme than the murder of a potential witness." White, 116 F.3d at 911. But if courts were to impose a subject matter limitation on forfeiture by wrongdoing, defendants would benefit from the ultimate wrongdoing (murder) by demanding confrontation while on trial for that ultimate wrongdoing. In other words, a subject matter limitation would cause "the very result that the waiver-by-misconduct doctrine seeks to remedy." Dhinsa, 243 F.3d at 653.

Despite the great weight of authority to the contrary, Mason may argue that forfeiture should not apply when the murdered witness's statements are offered in the murder trial itself because trial courts should not make preliminary rulings on whether a murder was committed when this is also the ultimate question for the jury. This Court should reject any such argument, just as other courts have rejected it. See Valencia, 186 Ariz. at 500 (trial court's preliminary rulings under Ariz. R. Evid. 104 are not made known to the jury and do not usurp its function, and thus a subject matter limitation serves no purpose). Indeed, as Professor Richard D.

Friedman¹⁴ has observed, there is no compelling justification for a subject matter limitation on forfeiture by wrongdoing:

If the case is being tried to a jury, the predicate evidentiary question and the substantive question are determined by different factfinders, and the jury (unless knowledgeable in the law of evidence) will not be aware that the judge has made a finding on the evidentiary predicate. And, whether the case is being tried to a jury or not, the two questions are tried on different factual bases and under different standards of proof. It is not a charade, therefore, to say that, although the two questions may be identical, they are tried separately for separate purposes. It is perfectly plausible that the judge would answer the predicate evidentiary question in favor of the prosecution, but that the jury, applying a more stringent standard of proof to a more limited set of information, would refuse to conclude that the same proposition is proven beyond a reasonable doubt.

R. D. Friedman, *Confrontation and the Definition of Chutzpah*, 31 Israel L. Rev. 506, 522-23 (1997); see also Bourjaily v. United States, 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987) (defendant on trial for conspiracy, yet trial court properly finds

¹⁴ Prof. Friedman is a proponent of the reformulated Confrontation Clause, and was lead counsel for the defendant in the Indiana companion case to Davis v. Washington. Interestingly, Friedman is also one of the strongest proponents of a robust and expansive forfeiture doctrine. In fact, he and several other law professors wrote an amicus brief in Crawford, arguing for a broad application of forfeiture by wrongdoing. See Crawford v. Washington, Brief Amicus Curiae of Law Professors Sherman J. Clark, James J. Duane, Richard D. Friedman, Norman Garland, Gary M. Maveal, Bridget McCormack, David A. Moran, Christopher B. Mueller, and Roger C. Park, in Support of Petitioner, No. 02-9410, 2002 U.S. Briefs 9410 (July 24, 2003).

existence of same conspiracy by a preponderance of the evidence in determining admissibility of co-conspirator statements).

This Court should also hold that forfeiture by wrongdoing applies without a subject matter limitation. Such a holding is consistent with ER 104, with sound precedent, and with the very purpose of forfeiture by wrongdoing itself.

iii. Post-Crawford Cases: The New Debate

As noted above, the Supreme Court approved of forfeiture by wrongdoing as a counterbalance to its reformulation of the Confrontation Clause. Crawford, 541 U.S. at 62; Davis, 126 S. Ct. at 2280. Accordingly, a substantial number of cases regarding forfeiture have been decided post-Crawford, and a new debate has emerged in these recent decisions. This new debate concerns the scope of forfeiture itself as applied in murder cases: specifically, whether the prosecution must prove that the defendant intended to kill the victim for the purpose of preventing his or her future testimony in order for forfeiture to apply.

The seminal case on forfeiture by wrongdoing did not expressly hold that the defendant's intent to prevent a witness's testimony was a necessary factual predicate for the doctrine's application. See Reynolds, 98 U.S. at 158-61. However, when a

flurry of mob-related RICO prosecutions in the 1970s caused a resurgence of the forfeiture doctrine in the federal courts, most circuit courts began requiring proof that the motive in causing a victim's death was, at least in part, to secure the victim's unavailability as a witness for the prosecution. See Thevis, 665 F.2d at 630; Houlihan, 92 F.3d at 1279. Thus, when the federal evidence rule was adopted in 1997, it incorporated a motive element. Fed. R. Evid. 804(b)(6).

Post-Crawford, however, the motive element has become the subject of intense and thoughtful debate. Thus far in the federal courts, the Sixth Circuit and at least one district court have concluded that the motive element is not constitutionally mandated, and that it simply should not apply in murder cases. United States v. Garcia-Meza, 403 F.3d 364, 370-71 (6th Cir. 2006); United States v. Mayhew, 380 F. Supp. 2d 961, 966-68 (S.D. Ohio 2005). To the contrary, as the Sixth Circuit held, to impose such constraints on forfeiture in murder cases leads to absurd results and thwarts public policy:

Since he did not kill her with the specific intent to prevent her from testifying, the Defendant argues, he should not be found to have forfeited his right to confront her. . . . Though the Federal Rules of Evidence may contain such a requirement, see Fed.

R. Evid. 804(b)(6), the right secured by the Sixth Amendment does not depend on, in the recent words of the Supreme Court, "the vagaries of the Rules of Evidence." *Crawford*, 124 S. Ct. at 1370. The Supreme Court's recent affirmation of the "essentially equitable grounds" for the rule of forfeiture strongly suggests that the rule's applicability does not hinge on the wrongdoer's motive. The Defendant, regardless of whether he intended to prevent the witness from testifying against him or not, would benefit through his own wrongdoing if such a witness's statements could not be used against him, which the rule of forfeiture, based on principles of equity, does not permit.

Garcia-Meza, 403 F. 3d at 370-71.

In state courts thus far, Colorado and Kansas have applied forfeiture in murder cases without regard to the defendant's motive for the killing. People v. Moore, 117 P.3d 1 (Colo. Ct. App. 2004); State v. Meeks, 277 Kan. 609, 88 P.3d 789 (2004). Moreover, the New Mexico Court of Appeals has performed a thoughtful analysis of the issue and urged its state's highest court to abrogate the motive element in murder cases on public policy grounds. The New Mexico Supreme Court has indeed granted review. State v. Romero, 139 N.M. 386, 133 P.3d 842, 849-56 (N.M. Ct. App.), cert. granted, 139 N.M. 429, 134 P.3d 120 (2006). The same situation exists in California. People v. Giles, 123 Cal. App. 4th 475, 19 Cal. Rptr. 3d 843, 848-50, rev. granted, 22 Cal. Rptr. 3d 548, 102 P.3d 930 (2004). Texas's highest court also has done an exhaustive

analysis, but ultimately left the issue for another day because the facts of the case before it were sufficient to prove the motive element. Gonzalez v. State, 195 S.W.3d 114, 120-26 (Tex. Crim. App. 2006).

Tennessee and Ohio have expressly required proof of motive in murder cases post-Crawford; however, they have done so because their state evidence rules modeled upon Fed. R. Evid. 804(b)(6) contain a motive element. State v. Ivy, 188 S.W.3d 132, 147 (Tenn. 2006); State v. Hand, 107 Ohio St. 378, 391, 840 N.E.2d 151 (2006). In sum, the majority of murder cases decided post-Crawford have either abrogated or strongly questioned the motive element, at least in the absence of an evidence rule containing that element.

The emerging trend in homicide cases post-Crawford is that the motive element is of dubious value and not constitutionally required. Further, as one court has well explained, the motive element appears to have stemmed from a flawed analysis of the doctrine itself as *waiver* of confrontation rights rather than forfeiture:

We glean that the intent-to-silence element arises from the erroneous use of a "waiver-by-misconduct" label. Because a "waiver" is an intelligent relinquishment of a known right, the intent-to-silence element was added in order to establish that the

defendant was on notice that the declarant was a potential witness and therefore knowingly relinquished the right to cross-examine that witness. But the rule in question is characterized by the Supreme Court as a "forfeiture" that "extinguishes confrontation claims on essentially equitable grounds," not a waiver. As a forfeiture, there is no need to prove an intelligent relinquishment of a known right.

Romero, 133 P.3d at 852 (citations omitted). As Professor

Friedman has more simply stated, forfeiture in homicide cases should not depend upon the existence or nonexistence of motive evidence, but upon evidence of the killing itself:

The witness is unavailable for cross-examination, and the reason is that the accused has killed her wrongfully; it is fundamentally unacceptable to allow him to complain about a situation created by his wrongful conduct, and that her unavailability as a witness is not what motivated him should not matter.¹⁵

This Court should strongly consider adopting the emerging rule that the motive element is not required in murder cases. The emerging rule most strongly advances the public policy behind forfeiture by wrongdoing, and ensures that defendants do not profit in court from homicide, the most extreme form of wrongdoing. However, ample evidence of Mason's motive exists in this case,

¹⁵ R. D. Friedman, The Confrontation Blog, *Forfeiture and Dying Declarations* (Dec. 14, 2004), <http://confrontationright.blogspot.com/2004/12/forfeiture-and-dying-declarations.html>.

and this Court may also decide to leave the issue for a future case.

iv. Forfeiture As Applied

A more paradigmatic case for forfeiture by wrongdoing than this one is difficult to imagine. Based on the record, this Court should conclude by a preponderance of the evidence that Mason caused Santoso's absence by the wrongful act of murder.

Mason told Marina Madrid that Santoso was "making his life a living hell," and "that Santoso couldn't testify" about the January 23 attack. RP (4/29/03) 91. When Madrid picked up Mason at the airport and saw that his hands were covered with blood, he said, "Let's just say that Santoso won't be a problem anymore." He smirked and appeared relieved. RP (4/29/03) 98. Mason told Madrid that he had thrown a brick through Santoso's window, went into his apartment, and stabbed him repeatedly until he was dead. He admitted that he drove the body away in Santoso's car, and that he hid the body where it would not be found. RP (4/29/03) 129-31. These statements were all consistent with the physical evidence. RP (5/29/03) 25-27; Ex. 14, 15, 16, 99, 100, 113, 114.

Mason's statements to Madrid alone are enough to establish forfeiture by wrongdoing. However, Mason's responsibility for Santoso's murder was established by other, overwhelming

evidence including DNA. See Brief of Respondent, at 12-17.

Accordingly, this Court should hold that all of Santoso's statements were properly admitted at trial. Moreover, if this Court holds that the doctrine applies, Mason's confrontation claims are rendered moot because the right of confrontation has been forfeited.

b. MOST OF THE VICTIM'S STATEMENTS ARE ADMISSIBLE UNDER CRAWFORD AND DAVIS.

Should this Court decide to address Mason's confrontation claims despite the existence of forfeiture by wrongdoing, most of Mason's claims still fail under a Crawford and Davis analysis. Santoso's statements to Detectives Berberich and Malins were admitted for non-hearsay purposes with appropriate limiting instructions to the jury, and thus the Confrontation Clause is not implicated. Moreover, Santoso's statements to Detective Roze and victim advocate Linda Webb are nontestimonial, even under Davis, and these statements were thus properly admitted as well.

i. Crawford and Davis: Introduction and Overview

In Crawford v. Washington, the Supreme Court rejected the reliability analysis of Ohio v. Roberts,¹⁶ and held that the

¹⁶ Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980).

Confrontation Clause requires that "testimonial" hearsay statements made by an absent declarant cannot be admitted at trial unless the defendant had a prior opportunity for cross examination. Crawford, 541 U.S. at 53-54. "Testimony" in this context means "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." Id. at 51 (citation omitted). Although the Court did not provide a comprehensive definition of what constitutes a "testimonial" statement, the Court noted that affidavits, depositions, ex parte pretrial testimony, police interrogations, and other formal statements "that declarants would reasonably expect to be used prosecutorially" are obvious examples. Id. at 51-52.

On the other hand, "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law[.]" Id. at 68. In other words, nontestimonial statements do not implicate the Confrontation Clause. Moreover, because the very definition of "testimony" for confrontation purposes is a "solemn declaration or affirmation *made for the purpose of establishing or proving some*

fact,"¹⁷ the Confrontation Clause is not implicated by any statements offered for legitimate non-hearsay purposes. As the Court observed, the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Crawford, 541 U.S. at 59 n.9 (citing Tennessee v. Street, 471 U.S. 409, 414, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985)).

Confusion has ensued in the wake of Crawford as to the meaning of the term "testimonial." See State v. Davis, 154 Wn.2d 291, 111 P.3d 844 (2005). Accordingly, the Supreme Court provided some further guidance in this respect with its decision in Davis v. Washington. Although the ruling in Davis is very narrow, and is limited only to police interrogations, the Court held that statements made during an emergency are not testimonial:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

¹⁷ Crawford, 541 U.S. at 51 (emphasis supplied).

Davis, 126 S. Ct. at 2273-74. Accordingly, the Supreme Court affirmed this Court's ruling that the victim's emergency 911 call was properly admitted at trial. Id. at 2280.

Crawford and Davis, while still leaving much to debate, have established four general principles regarding the reformulated Confrontation Clause. First, testimonial statements offered to prove the truth of the matters asserted cannot be admitted at trial unless the declarant is or has been subject to cross examination. Second, nontestimonial statements fall outside the scope of the Confrontation Clause, and are admissible subject to the hearsay rules. Third, all statements, even if testimonial, are outside the scope of the Confrontation Clause if offered for non-hearsay purposes. And fourth, statements made in response to police interrogation for the purpose of responding to an ongoing emergency are categorically nontestimonial.

ii. Crawford and Davis as Applied: Non-hearsay Does Not Implicate the Confrontation Clause

In this case, the Court of Appeals correctly concluded that Hartanto Santoso's statements to Detectives Berberich and Malins, while arguably testimonial, were properly admitted at trial because they were offered for legitimate, non-hearsay purposes.

Detective Berberich met with Santoso on January 24, 2001, and Santoso described the attack that had occurred the day before. RP (4/8/03) 157. The trial court allowed limited testimony from Berberich regarding Santoso's statements, but only for the purpose of explaining why Berberich collected particular items of evidence at Mason's condominium in order to investigate the attack. Accordingly, the trial court repeatedly gave limiting instructions to the jury during these portions of Berberich's testimony. RP (4/9/03 a.m.) 71-72, 78. The court instructed the jury that this limited testimony could be considered only for the express purpose of explaining why certain items were seized, and "may not be considered by you for the truth of the matters asserted." RP (4/9/03 a.m.) 71. In fact, after the court had given this instruction twice, defense counsel told the court that further instructions "would not be necessary" because the court had made it "abundantly clear" that Santoso's statements would not be considered for hearsay purposes. RP (4/9/03 p.m.) 15-16.

Detective Malins's testimony was the same. She testified about Santoso's statements describing the attack in a limited manner only to explain why Santoso's checkbook was seized during the investigation. The court gave a limiting instruction during

Malins's testimony as well. RP (4/14/03) 155-56.

As noted in Crawford, even testimonial statements do not implicate the Confrontation Clause if they are not offered to prove the matters asserted. Crawford, 541 U.S. at 59 n.9. Indeed, the very definition of "testimony" requires that statements be "made for the purpose of establishing or proving some fact." Id. at 51. Here, Berberich and Malins's testimony regarding Santoso's statements was admitted for non-hearsay purposes -- purposes which were made "abundantly clear" to the jury. RP (4/9/03 p.m.) 15-16. Therefore, the Court of Appeals correctly concluded that this testimony did not violate Mason's confrontation rights. Mason, 127 Wn. App. at 566-67.

iii. Crawford and Davis as Applied:
Statements Made in an Emergency are
Nontestimonial

The Court of Appeals also correctly concluded that Santoso's statements to Detective Roze and Linda Webb were properly admitted because they were nontestimonial. Santoso's statements to these witnesses were pleas for help, not testimony about past facts, and are thus admissible under Davis.

Even when police interrogation is at issue, a declarant's resulting statements are nontestimonial, and thus outside the scope

of the Confrontation Clause, if they were made "to enable police assistance to meet an ongoing emergency." Davis, 126 S. Ct. at 2273-74. Accordingly, the Court soundly rejected Davis's arguments that a victim's cries for help could be characterized as "testimony" from a "witness" for confrontation purposes:

Davis seeks to cast [the victim calling 911] in the unlikely role of a witness by pointing to English cases. None of them involves statements made during an ongoing emergency. In *King V. Brazier*, 1 Leach 199, 168 Eng. Rep. 202 (1779), for example, a young rape victim, "immediately on her coming home, told all the circumstances of her injury" to her mother. *Id.*, at 200, 168 Eng. Rep., at 202. The case would be helpful to Davis if the relevant statement had been the girl's screams for aid as she was being chased by her assailant. But by the time the victim got home, her story was an account of past events.

Davis, 126 S. Ct. at 2277.

In this case, Santoso's statements to Detective Roze and Linda Webb are nontestimonial under Davis. Roze testified that Santoso was scared, and he asked her if he could sleep under a desk at the police station or in a jail cell. RP (4/14/03) 126-27. Webb testified that she helped Santoso with safety planning and helped him obtain a protective order. RP (4/15/03) 22-28, 30-36. When Santoso found out, to his horror, that Mason had been released from jail pending trial, he called Webb in a panic, "close to

hysteria." RP (4/15/03) 37. Santoso said he knew he was going to die, and he begged Webb to put him in jail or to let him sleep in her office so that he would be safe. RP (4/15/03) 39. Less than three weeks later, Santoso was dead. RP (4/29/03) 129-31.

As a preliminary matter, it is dubious at best whether Santoso's statements to Roze and Webb were the product of "police interrogation" given their spontaneity. It is also a dubious proposition that Webb qualifies as a police agent. See Brief of Respondent, at 30-32. In any event, Santoso's statements – expressions of fear and pleas for help – clearly fall within Davis's definition of statements in the course of an ongoing emergency. Santoso was not relating past facts about a crime when he said he was afraid and begged to sleep in a jail cell. Rather, these statements were obvious pleas for help made while he was in very real danger. These are not statements made with the "[i]nvolvement of government officers in the production of testimony with an eye toward trial[.]" Crawford, 541 U.S. at 56 n.7. To the contrary, statements such as "I am afraid" and "please let me sleep under your desk" simply cannot be shoehorned into the definition of "testimony."

Although the Court of Appeals decided this case before Davis, its holding was prescient indeed:

If a declarant makes a statement while seeking protection, it is unlikely that he or she intends to make a formal statement, is aware that he or she is bearing witness, or is aware that his or her utterances might ultimately be used in a prosecution. The witness's focus is on getting help, not establishing or proving a fact to further a prosecution. Therefore, *statements seeking help made by someone in immediate peril are not testimonial.*

Mason, 127 Wn. App. at 564 (emphasis supplied). This holding is correct, and should be affirmed.

iv. Harmless Error

While this Court should hold that Santoso's statements to Berberich, Malins, Roze and Webb were properly admitted, the State agrees that Santoso's statements to Corporal Haslip do not survive the analysis in Davis v. Washington. Nonetheless, there is no basis to reverse because the admission of Santoso's statements was harmless.

Even if statements are admitted in violation of the Confrontation Clause, a conviction should be affirmed if the error was harmless beyond a reasonable doubt. Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986); State v. Smith, 148 Wn.2d 122, 138-39, 59 P.3d 74 (2002).

An error is harmless beyond a reasonable doubt if the untainted evidence overwhelmingly proves the defendant's guilt. Smith, 148 Wn.2d at 139. Stated another way, an error is harmless if there is no "reasonable probability that the outcome of the trial would have been different had the error not occurred." State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995).

In this case, the Court of Appeals correctly concluded that the admission of Santoso's statements was harmless beyond a reasonable doubt. Mason, 127 Wn. App. at 565. Mason's guilt was established by overwhelming evidence, including Mason's own statements and DNA. Moreover, the out-of-court statements that Mason challenges on appeal were cumulative of testimony that Mason does not challenge on appeal. Specifically, Santoso's statements regarding the January 23 attack were also introduced through his roommate, Dean Anderson, his supervisor, Lisa Schulke, his treating physician, Dr. Gregory Gross, and his sister, Nina Kandiani. RP (4/10/03) 98-99, 128, 143, 164-68; RP ((4/14/03) 73-75, 79; RP (4/21/03) 171-72. Mason's claims should be rejected, and his conviction should be affirmed.

2. THE TRIAL COURT RESPONDED APPROPRIATELY TO PROSPECTIVE JURORS' CONCERNS REGARDING THE DEATH PENALTY.

In the other published portion of the Court of Appeals' decision,¹⁸ the court held that the trial court responded appropriately when potential jurors raised concerns about the death penalty during voir dire. This Court should affirm.

Mason's argument rests upon State v. Townsend, wherein this Court held that trial courts should not instruct prospective jurors in noncapital cases that the death penalty is not at issue, and that a defense attorney's failure to object to such an instruction constitutes deficient representation.¹⁹ Townsend, 142 Wn.2d at 847. But a critical difference exists between this case and Townsend: in Townsend, the trial court instructed the venire *sua sponte* that the death penalty was not at issue, and not in response to any questions from the prospective jurors themselves. Id. at 842-43. In this case, by contrast, serious concerns regarding the death penalty were raised by the venire, to which the trial court had little choice

¹⁸ This portion of the opinion was originally unpublished; however, the Court of Appeals later granted a motion to publish made by the Honorable Ronald Kessler, King County Superior Court.

¹⁹ Ultimately, however, the Court found the error to be harmless because there was no discernible effect on the outcome of the trial. Townsend, 142 Wn.2d at 848-49.

but to respond. RP (4/1/03) 31-32, 84.

Unlike Townsend, the trial court in this case explored this issue thoroughly and sought input from Mason's counsel before deciding to instruct the venire *only* if the issue were raised by prospective jurors themselves. RP (2/27/03) 15; RP (3/31/03) 104-05; RP ((4/1/03) 6-7, 10-12. Furthermore, although Mason's counsel objected "for the record," counsel agreed that he could not articulate "a particularly compelling reason" to object. RP (4/1/03) 7-8.

The trial court's concerns came to fruition at the outset of voir dire, when a prospective juror indicated that she could not follow the law in a death penalty case. RP (4/1/03) 31. In response, the court stated briefly that "this case does not involve a request for the death penalty," that the jurors should not concern themselves with punishment, and that the jury would not be involved in imposing punishment in the event of a guilty verdict. The court then confirmed that the venire would follow the law. RP (4/1/03) 32. The record demonstrates that the jury was extraordinarily diligent and attentive throughout the trial. See Brief of Respondent, at 98 (footnote 29).

As the Court of Appeals observed, the trial court's actions in

this case should be commended, not reversed:

The trial court did not err by responding to the potential juror's statement as it did. This case is distinguishable from *Townsend* because the judge in this case had no intention of discussing the death penalty with the jury unless a juror made it clear that he needed to do so. The court's discussion of the death penalty was short and succinct, and did not emphasize sentencing considerations. The court instructed the jury, both during voir dire and at the close of the case, that the jury was not to consider sentencing in making its decision. The judge was extraordinarily thoughtful about the issue and specifically consulted with defense counsel about it ahead of time. And finally, after he informed the jury that the death penalty was not involved, the judge again asked the jurors if they could apply the law as instructed. When he received no response, he proceeded with the voir dire. The trial court did not violate the *Townsend* rule, and even if it did, the error was clearly harmless[.]

Mason, 127 Wn. App. at 573-74.

The trial court did not violate Townsend by responding honestly and succinctly to the concerns of the venire to ensure that jurors opposed to the death penalty would not excuse themselves, and the court's instruction had no conceivable impact on the outcome of the trial. This Court should affirm the Court of Appeals.

3. MASON'S REMAINING CLAIMS ARE WITHOUT MERIT.

Mason raises many other issues, including numerous claims of evidentiary error, insufficiency of the evidence for the burglary

aggravating factor, and instructional error, all of which were rejected in the unpublished portion of the Court of Appeals' decision. See Petition for Review, at 15-27; State v. Mason (No. 52824-6-1), slip op. at 16-40. Two of those issues warrant brief discussion here.

First, as to Mason's claim that the aggravating factors for aggravated murder are essential elements of the crime that must be included in the "to convict" instruction, this Court has already rejected identical claims in State v. Kincaid, 103 Wn.2d 304, 692 P.2d 823 (1985), State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004), and again most recently in State v. Mills, 154 Wn.2d 1, 109 P.3d 415 (2005). The Court should reject Mason's claim as well.

Second, as to Mason's claim that the trial court erred in excluding proposed testimony from the DNA expert he endorsed, Mason's petition mischaracterizes the trial court's ruling. Specifically, Mason asserts that the trial court suppressed Dr. Randell Libby's testimony regarding mixed DNA samples on the basis that "Dr. Libby's *statistical approach* was not generally accepted in the relevant scientific community[.]" Petition for Review, at 18 (emphasis supplied).

The trial court did not suppress Libby's statistical approach. Rather, the trial court suppressed only Libby's unsupported assertion that "30 to 80 percent" of the general population could not be excluded as contributors to a mixed DNA sample.²⁰ RP (6/4/03) 68-69. As the Court of Appeals held, this ruling was correct:

The court did not refuse to admit Libby's opinion that mixed DNA samples are difficult to interpret, nor did it take issue with Libby's preferred statistical calculation method. It simply wanted scientific confirmation of Libby's "30% to 80%" statistic, and the defense presented none.

Mason, slip op. at 18-19; see *also* Brief of Respondent, at 47-58.

This Court also should reject Mason's claim, and affirm.

The State rests on its briefing in the Court of Appeals for the remainder of Mason's claims. See Brief of Respondent, at 58-85, 90-93; Supplemental Brief of Respondent; see *also* Mason, slip op. at 19-35, 37-40.

²⁰ As the trial court observed, if Libby's assertion were true, a minimum of more than half a million people in King County alone could be contributors, and mixed DNA samples would be "worthless" as forensic evidence. RP (6/4/03) 97.

D. CONCLUSION

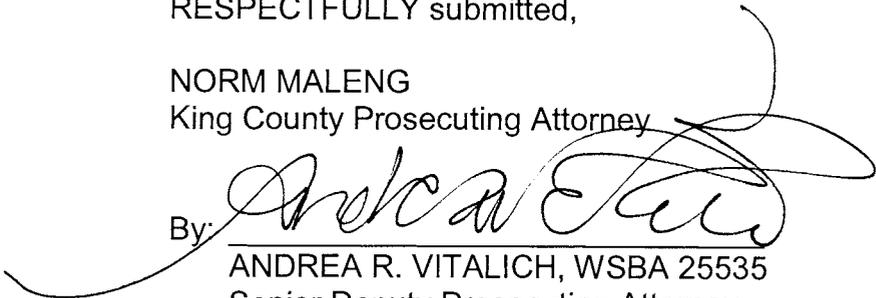
For all of the foregoing reasons, for the reasons stated in the Brief of Respondent and Supplemental Brief of Respondent submitted to the Court of Appeals, and for the reasons stated in the opinion of the Court of Appeals, Division I, the defendant's conviction for murder in the first degree with aggravating circumstances should be affirmed.

DATED this 21st day of August, 2006.

RESPECTFULLY submitted,

NORM MALENG
King County Prosecuting Attorney

By:

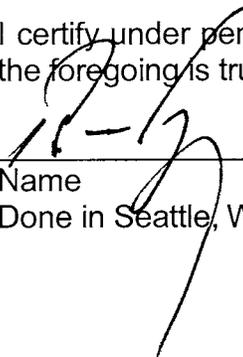


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Attorneys for the Respondent

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy P. Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Supplemental Brief of Respondent, in STATE V. KIM MASON, Cause No. 77507-9, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

08/21/06

Date

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