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STATE OF WASHINGTON

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NO. 82101-1

BY RONALD R. CARPENTER

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**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

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*Personal Restraint Petition of:*

**ROBERT YATES, JR.,**

Petitioner.

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**OPENING BRIEF IN SUPPORT OF  
PERSONAL RESTRAINT PETITION**

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PIERCE COUNTY SUPERIOR COURT NO. 00-1-03253-8

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**ORIGINAL**

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**A. STATUS OF PETITIONER**

Petitioner Robert Yates, Jr., is currently under a sentence of death for two counts of first degree aggravated murder under Pierce County Superior Court cause number 00-1-03253-8. Yates is also serving a sentence of 4,900 months confinement (approximately 408 years) after pleading guilty to 13 counts of first degree murder and one count of attempted first degree murder under Spokane County Superior Court cause number 00-1-01153-0. Mr. Yates does not attack his Spokane judgment in this petition.

On mandatory direct review, this Court affirmed the Pierce County convictions and death sentence. *State v. Yates*, 161 Wash.2d 714, 168 P.3d 359 (2007), *cert. denied*, 128 S.Ct. 2694 (2008). The United States Supreme Court denied *certiorari* on June 23, 2008. This Court issued its mandate on August 1, 2008.

Along with his request for a stay of execution, on September 8, 2008, Mr. Yates filed a preliminary statement of grounds for relief. On April 29, 2009, this Court found that this pleading constituted a “properly filed” post-conviction petition. This Court then set June 8, 2009, as the due date for this pleading.

Mr. Yates will seek additional time to supplement and leave to amend this petition by separate motion.

## **B. STATEMENT OF THE CASE**

Robert Yates is, by definition, a serial killer. In total, he has killed sixteen people.

Robert Yates is also mentally ill. He suffers from a psychiatric, sexual disorder. He also suffers from neuropsychological deficits. His mental disorders compelled him to act and interfered with his ability to conform his conduct to the law. However, his jury heard nothing from the defense about this critical mitigating factor—the one fact jurors most likely needed to hear in order to vote for life. Instead, the only information Mr. Yates’s jurors heard about his mental condition came from the State’s “linkage” expert, who improperly opined about Mr. Yates’s psychological makeup. Thus, Mr. Yates’s jury was left with the negative and misleading impression that no explanation existed for Mr. Yates’s many murders.

Mr. Yates does not present a significant risk of committing future acts of violence if sentenced to life in prison—the only option other than death. Once again, however, Mr. Yates’s jury was left with the opposite impression. This was the result of trial counsel’s failure to investigate and the State’s distortion of both the relevant inquiry and the answer.

Finally, Mr. Yates is a man whose family loves him—as he loves them. However, once again, due to counsel’s failure to investigate and

present evidence, Mr. Yates's jury was not given the opportunity to balance the elusive, but life-affirming qualities that flow from the bonds of family and friends against the tremendous loss that he inflicted on others.

In sum, defense counsel failed to give Mr. Yates's jury reasons to vote for life when, in fact, numerous compelling reasons existed. This failure was not the result of a tactical choice. It was the direct result of a failure to conduct a competent capital mitigation investigation.

The jury that sentenced Mr. Yates to death had an accurate picture of his crimes. However, they had nothing resembling an accurate picture of the man.

For that reason, the vast majority of the claims raised herein, focus on penalty phase error, although a few constitute errors arising from the conduct or structure of the trial.

On direct review, this Court summarized the facts of the case as follows:

*The Pierce County Murders.* Melinda Mercer turned to prostitution in November 1997 to support her heroin addiction. She was last seen alive on the night of December 6, 1997, leaving a Seattle tavern. According to the testimony of a friend, Mercer left the tavern to go to Aurora Avenue to make money for a heroin buy. On the following morning, Mercer's nude body was found in some blackberry bushes in a vacant lot in Tacoma, a lot used as a dump site for garbage. Some of her clothing had been thrown on top of her, but other items were never recovered. An autopsy revealed that she had been shot three times in the back left side of the head. Only one of the three bullets penetrated

her brain, but it did so without affecting the areas that control consciousness and motor response. Found nearby was a .25 caliber shell casing. Bloodstains on her blouse indicated that she had been clothed and upright when shot in the head. After shooting her, the killer encased her head in four plastic grocery bags. The two outer bags contained very little blood, but blood had pooled inside the two inner bags. Mercer's nostrils and upper lip were visible through small tears in the two inner bags, which had been partially drawn into Mercer's mouth; the holes suggested that Mercer was alive when the bags were tied over her head and that she had used her teeth to create the holes. Although Mercer could have died solely from the gunshot wounds, the oxygen deprivation would have hastened her death.

Connie Ellis likewise worked as a prostitute to support a heroin addiction. Ellis had reentered a methadone treatment program on September 8, 1998, and she was last seen alive on September 17, 1998, when she received a dose of methadone at the clinic (a urinalysis taken at that time revealed that she was again using heroin). On October 13, 1998, approximately 11 months after the discovery of Mercer's body, a search and rescue dog that was engaged in an unrelated search in Pierce County discovered Ellis's decomposed body 10 feet down an embankment in a greenbelt used as a dump site. The degree of decomposition suggested that Ellis had been killed a month prior, not long after her September 17 visit to the methadone clinic. Ellis's body was clothed in jeans, a blouse, and socks, but lacked any undergarments. Ellis died of a single gunshot wound to the left side of her head. The wound was consistent with a .25 caliber bullet. Her head was encased in three plastic grocery bags.

*The Spokane County Murders.* On the day Ellis's body was discovered, the Spokane County Sheriff's Department learned of the Pierce County case. In a phone call to one of the Tacoma detectives investigating the Ellis murder, a Spokane detective asked, "Will you just tell me one thing? Does she have plastic bags on her head?" Detectives from Tacoma and Spokane shared information gathered on the 2 Pierce County murders and 10 unsolved murders committed in Spokane County between 1996 and 1998. As did Mercer and Ellis, the 10 Spokane victims had a history of drug abuse and worked in prostitution (all were last seen in the East Sprague Street corridor in Spokane, an area known for prostitution). Again like Mercer and Ellis,

the Spokane victims had been shot in the head with a small caliber handgun. Moreover, just as Mercer's and Ellis's heads had been encased in plastic bags, two or three plastic bags had been tied over the heads of five of the Spokane victims. Similarly, plastic bags were found in the grave with one victim and near the body of another, and a towel was found on or near the first two victims.

On April 18, 2000, a year and a half after the discovery of Ellis's body, the Spokane police arrested Yates. The police first contacted him in July 1998, after the body of Michelyn Dering was discovered on July 7, 1998, a block north of Pantrol, a manufacturing company where Yates had worked since moving to Spokane in April 1996 after being released from the army. Yates gave the officer his name, date of birth, and address. A second contact occurred on November 9, 1998, when a police officer saw Yates pick up Jennifer Robinson in the East Sprague Street area. Yates told Robinson to say that he was one of her father's friends, and Robinson complied. When asked for identification, Yates gave the officer his driver's license. The officer ultimately let them move on, and Yates dropped Robinson off a few blocks away. Following the Pantrol interview and the Robinson incident, the police learned that Yates had once owned a white Corvette, a type of car that witnesses had reported seeing in relation to the disappearance of two of the earliest victims, Jennifer Joseph and Heather Hernandez. Late in 1999, a Spokane detective interviewed Yates, who claimed he never patronized Spokane prostitutes and owned no handguns. He admitted that he had previously owned a white Corvette and had sold it to a friend, Rita Jones. The police located Yates' white Corvette in January 2000 and discovered under the front passenger seat the white mother-of-pearl button missing from Joseph's blouse. Bloodstains found in the Corvette matched Joseph's deoxyribonucleic acid (DNA).

Following Yates's arrest, the police developed additional evidence. On the day after the arrest, Christine Smith, a former prostitute, contacted the police to identify Yates as the person who had picked her up in Spokane in August 1998 and shot and robbed her in the back of his van. In May 2000, officers searched Yates's black Ford van, in the back of which Yates had installed a homemade wooden platform bed covered with carpet. The carpet, padding, and underlying wood tested positive for blood (later identified as that of Ellis and Murfin),

and three bullet holes were found, as well as a spent bullet and bullet debris (containing Smith's DNA). From Yates' house, the police took records indicating that he had owned at least three guns, one .22 caliber and two .25 caliber handguns. Forensic analysis later showed that Mercer was killed with the same .25 caliber handgun used in the murders of Spokane victims Johnson, Oster, Wason, and Maybin and that Ellis was killed with a different .25 caliber gun, the same one used to murder Murfin and wound Smith. Other evidence taken from Yates' house established that, at the time Mercer and Ellis were last seen alive, Yates had been in the Tacoma area, fulfilling National Guard duties at nearby Fort Lewis. From Yates' closet, the police took a jacket identified as the one Smith had been wearing on the night Yates assaulted and robbed her, and from Yates' laundry room, they took a canvas coat that bore a stain later identified by DNA analysis as Mercer's blood. Using Yates' hand-drawn map, police excavated an area on the east side of Yates' house, beneath his bedroom window, and recovered Murfin's body. The semen collected by oral, vaginal, and/or anal swabs from Mercer and six Spokane victims (Scott, Johnson, Wason, Oster, Maybin, and Dering) was linked by DNA analysis to Yates, as were hairs found on Mercer and Maybin.

Yates was ultimately charged in Spokane County Superior Court with 10 counts of first degree murder and 1 count of attempted first degree murder. On October 13, 2000, in exchange for the Spokane County Prosecuting Attorney's agreement not to seek the death penalty, Yates pleaded guilty to the Spokane County crimes, as well as to two counts of first degree murder in Walla Walla County and one in Skagit County. His statement on plea of guilty did no more than acknowledge that he had committed with premeditated intent the murders listed in the amended information, which had provided nothing more than the names and dates of the murders. Yates was sentenced to 408 years in prison.

*State v. Yates*, 161 Wash.2d at 728-33 (footnotes omitted).

Additional facts relevant to a particular claim are set forth in greater detail in their respective section(s).

## C. GROUNDS FOR RELIEF

Yates organizes his claims as follows:

- ◆ Right to effective assistance of counsel (and related) claims;
- ◆ Infringement on the right to a jury trial claims;
- ◆ Penalty phase instructional claims;
- ◆ Cumulative trial error;
- ◆ Claims related to arbitrariness of death penalty.

**CLAIM NO. 1:**     Yates was Denied his Sixth Amendment Right to Effective Assistance of Counsel when Counsel Failed to Conduct a Competent Mitigation Investigation.

This claim is comprised of a number of component “sub-claims,” as follows:

- (a) Failure to Competently Investigate Whether Yates Suffers from a Mental Disease or Defect.
- (b) Failure to Competently Investigate Yates’ Neuropsychological Deficits.
- (c) Failure to Investigate and Present Evidence that at Least One of the Spokane Victims’ Survivors was Willing to Testify that Mr. Yates’ Cooperation With the Police and His Decision to Plead Guilty Provided a Measure of Comfort and Relief.
- (d) Failure to Present Evidence of Yates’ Cooperation and Decision to Plead Guilty to the “Spokane Murders.”
- (e) Failure to Competently Investigate and Present Evidence to Humanize Yates.
- (f) Failure to Competently Investigate and Present Evidence of Yates’ Minimal Risk of Committing Future Acts of Violence If Sentenced to Life in Prison.

## Facts Relevant to Claims

### *Evidence of Mental Disease or Defect*

Robert Yates's crimes cry out for explanation. Yet Yates's defense counsel made no attempt to explain how Yates became a serial killer, and called no mental health experts to testify during penalty phase. Indeed, in penalty phase opening statement defense counsel told the jury that "We are not going to try to explain to you why Mr. Yates killed these women." RP 7762. This rather stunning admission opened the door for the State to argue to the jury that Yates should be sentenced to death because he is a monster who killed for pleasure:

The key question or one of the key questions that I am sure has entered your mind over time is, why did he do it? From the evidence that's been presented, which is all that you can consider, it points to only one conclusion: that he murdered these women, all of his victims, because he liked doing it. It was, simply put, recreational murder. There is nothing else to show you that there is a different reason why. It was his hobby.

It is no wonder at all why Mr. Hunko told you during the opening statement for the defense in the penalty phase of this trial that they would not offer any evidence about why the defendant murdered. There is no reason for it, other than it seemed to satisfy his desires and his needs.

RP 8212-13.

In fact, Yates's acts of murder were not "recreational" or a "hobby."

They were the product of a severe psychiatric sexual disorder which

substantially impaired Yates' ability to conform his conduct to the requirements of the law. Trial counsel failed to discover and present evidence of Yates' psychiatric sexual disorder because they did not investigate this critical issue. *Declaration of Roger Hunko*, ¶ 19.

Recently, Frederick S. Berlin, M.D., Ph.D., evaluated Yates. Dr. Berlin is a nationally recognized expert on the interplay between psychiatric disorders, sexual deviancy and sexual violence. *See Curriculum Vitae of Frederick S. Berlin, M.D., Ph.D.; Report of Dr. Berlin*, at 3. Dr. Berlin concluded that Yates's crimes were:

reflective of serious psychiatric disturbance; a disturbance involving a sometimes seemingly desperate need to respond to intense, recurrent (albeit sometimes intermittently present) pathological cravings. However, [Yates'] sentencing jury was never afforded an opportunity to properly consider such a possibility by means of the introduction of expert testimony.

*Report of Dr. Berlin*, at 5. Dr. Berlin noted that paraphilic disorders may involve volitional and/or cognitive impairment. Although Dr. Berlin did not find a clinically significant degree of cognitive impairment in Yates' paraphilia, he did conclude that Yates' psychiatric disorder significantly impaired his volitional control:

[T]he intense effects, or cravings, associated with a number of psychiatric conditions (e.g., cravings for heroin, alcohol or cravings for paraphilic sexual behaviors) can also, in the absence of proper psychiatric treatment, compromise full volitional capabilities. Although there would likely have been disagreements about the extent

to which Mr. Yates's ability to fully control his paraphilic cravings had been compromised at the times of his killings, in my professional opinion, it is important to note that his sentencing jury never had the opportunity to debate any such considerations. . .

[P]ersons such as Mr. Yates can sometimes defer acting on their urges, and he has done so many times. He can also remain in control in a structured environment, such as a prison for example, which in a sense, by its very nature, can help to control him. A more crucial question would be whether in the past in the absence of appropriate psychiatric treatment for his disorder, he had been fully capable of completely and permanently stopping his actions on his own. Arguably, the answer to that question may have been "no," (and, in my professional opinion was "no") but once again, his sentencing jury had not been afforded the opportunity to decide whether the existence of a severe paraphilic disorder; a disorder that had afflicted him through no fault of his own, along with its associated impairments, had constituted a sufficient mitigating circumstance to merit leniency.

*Report of Dr. Berlin*, at 5-6. Dr. Berlin ultimately opined that "but for the presence of [Yates's] psychiatric disorder, a disorder that had predisposed his violence, many of his victims might still be alive today."

#### ***Evidence of Neuropsychological Deficits***

Yates's trial counsel did retain a neuropsychologist, but engaged in no meaningful dialog with that person regarding what types of tests would be performed and what areas of the brain those tests would target. Specifically, trial counsel did not request that the neuropsychologist administer any tests sensitive to deficiencies in temporal lobe functioning. There was no tactical reason for this failure. *Declaration of Roger Hunko*, ¶¶ 21-22.

Dale G. Watson, Ph.D. conducted a thorough neuropsychological evaluation of Yates. Dr. Watson is a nationally recognized expert in neuropsychological testing who has conducted evaluations and testified in numerous capital cases. *See Curriculum Vitae of Dale G. Watson, Ph.D.; Declaration of Dr. Watson, ¶¶ 1-6.*

Dr. Watson's comprehensive testing revealed subtle yet significant signs of subcortical temporal lobe dysfunction in the left hemisphere. *Declaration of Dr. Watson, ¶¶ 9-19.* Current research suggests that dysfunction in the areas of the brain in which Yates manifested deficits may "disrupt a regulatory control mechanism and provoke paraphilic tendencies." *Id.*, ¶ 23. In other words, Dr. Watson's comprehensive neuropsychological testing of Robert Yates revealed deficits consistent with Dr. Berlin's conclusion that Yates suffers from a serious psychiatric sexual disorder.

***Evidence of Yates' Cooperation with Law Enforcement and Evidence from Survivors of the Spokane Victims***

Yates pled guilty in October 2000 to 13 counts of first degree murder in Spokane County Superior Court. As part of that plea, Yates took responsibility for 11 murders which he committed in Spokane County in 1996-98. But he also admitted killing three additional people: Patrick Oliver and Susan Savage in Walla Walla County in 1975, and Stacy Hahn in Skagit County in 1988. At a minimum, the Oliver and Savage murders would

certainly have remained unsolved had Yates not confessed and pled guilty to those crimes in 2000.

In addition, Yates revealed the location of the remains of Melody Murfin as part of the Spokane County plea deal. Murfin had been missing and presumed dead for some time. Her remains were ultimately found buried in Yates' yard, and that discovery came as a direct result of Yates' cooperation with the State. Indeed, in explaining his reasons for not seeking a death sentence in Spokane County, the Spokane County Prosecutor specifically cited Yates' cooperation and the closure it provided to victims' families as the primary mitigating factor on which he based his decision.

Yates's trial counsel in Pierce County did not attempt to contact any family members or friends of the victims of the 14 murders for which Yates had already accepted responsibility.

Post-conviction counsel spoke with Audrey McClenahan, the mother of Spokane victim Shawn McClenahan.<sup>1</sup> Ms. McClenahan had spoken at Yates's sentencing hearing in Spokane County. *Declaration of Audrey McClenahan*, ¶¶ 1-2. Ms. McClenahan supported the Spokane plea deal,

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<sup>1</sup> Although Yates had admitted to Shawn McClenahan's murder, the charge involving her had been dropped as part of the Spokane plea, with the understanding that the charge could be reinstated at a later time if Yates' pleas were ever invalidated.

and stated that “it provided me with some solace to know that he admitted to and accepted responsibility for [Shawn’s] murder.” *Id.*, ¶ 4. Ms.

McClenahan continued:

I know that as part of the plea bargain, Yates admitted committing two murders in the 1970s in Walla Walla, and that he revealed the location of Melody Murfin’s body here in Spokane. I was able to take comfort in the fact that Yates provided this information as part of the plea bargain in Spokane. I remain convinced that the plea bargain was the right thing to do because of the measure of comfort and relief it provided to me, and that I hope it provided to the families and loved ones of Yates’s other victims.

*Id.*, ¶ 5. Although Ms. McClenahan would have been willing to testify to these feelings at Yates’s Pierce County trial, she never had the opportunity to do so because no one from Yates’s trial team ever contacted her. *Id.*, ¶ 6-7.

Yates ultimately faced the worst of all possible scenarios at his Pierce County trial: his sentencing jury heard all of the horrible details of his other crimes, but heard nothing of the ameliorative effects his acceptance of responsibility and cooperation with the State had for the victims’ survivors.

#### ***Evidence Humanizing Robert Yates***

Yates’s trial counsel called two members of Yates’s family to testify at trial—Robert Yates, Sr. (Yates’ father) and Janis Rustad (one of Yates’s sisters). Both testified almost exclusively about Yates’s childhood, and how

it was happy and normal. See RP 7799-7847 (Mr. Yates, Sr.'s testimony); RP 7852-7873 (Ms. Rustad's testimony).

There were many other family members who were close to Yates. Yates had a wife, five children, two half-sisters, and numerous extended family members. Trial counsel was aware of these witnesses, and spoke with many—but not all—of them, ultimately electing not to call any family members other than Mr. Yates, Sr., and Ms. Rustad. *Declaration of Roger Hunko*, ¶¶ 28-30.

Had counsel called some of Yates's other family members to testify in penalty phase, here is some of the humanizing evidence the jury would have heard:

- ◆ Yates helped his daughter Sonja with her homework. He helped her and her sisters with their Girl Scout badges. He taught all of the children how to ride a bike. He paid for Sonja's college tuition and helped her to buy a car. *Declaration of Sonja Yates*.
- ◆ Yates and his daughter Sasha used to love making doughnuts together. He played baseball, volleyball and badminton with her. He taught her and her sisters how to be independent. He was affectionate, caring and interested as a father. *Declaration of Sasha Yates*.
- ◆ Yates was a great source of comfort to his step-mother, Carrie Yates, when her first husband died. Yates taught Carrie's son Terry how to fix cars. Yates treated Terry like a brother. *Declaration of Carrie Yates*.
- ◆ Yates and his half-sister Linda were very close growing up. They played tetherball and read books together. Linda and her sister

Shirley did not have a good relationship with their mother, and having their little brother around helped alleviate that pain.

*Declaration of Linda Yates Welsh.*

- ◆ Yates's brother-in-law Don Hess developed a friendship with Yates. He liked that Yates's children were raised to have manners and to be respectful. He has fond memories of picking huckleberries with Yates and his children. *Declaration of Don Hess.*
- ◆ Yates's aunt Juanita Youderian remembers him as a sweet and obedient child who was close with his sisters. He went out of his way to help Ms. Youderian's family with the hay each year. As an adult, he was a loving and caring father. *Declaration of Juanita Youderian.*
- ◆ Yates's uncle Ernie Youderian remembers Yates as always being willing to help others. Yates would help his family put up the hay in the summer and cut wood in the fall. *Declaration of Ernie Youderian.*
- ◆ Yates's cousin Debra Meek recalls that when her father died Yates came to her home to provide comfort and support for her family. She also considered Yates to be a loving, caring and attentive father. *Declaration of Debra Meek.*
- ◆ Yates's cousin Curt Youderian used to haul hay and cut wood with Yates. When they were kids Yates would go out of his way to make sure all the children were included in activities and that no one felt left out. *Declaration of Curt Yoderian.*

*See also Declarations of Shirley Yates Hess, John Clinton Yates, Gary Berner, and Patricia Fisher.*

### *Evidence of Lack of Future Dangerousness in Prison*

In Yates's penalty phase trial the jury was specifically instructed that it was to consider whether Yates would "pose a danger to others in the future." CP 4446 (Jury Instruction No. 5). Yates's counsel called a number of county correctional officers from Spokane and Pierce County to testify that Yates' behavior in jail since his arrest had been good. However, trial counsel never sought to have an expert on risk assessment review Yates' school or military records, review records from his incarceration following his arrest, administer any risk assessment tests to Yates, or apply any actuarial risk assessment instruments to Yates. Consequently, the defense presented no expert testimony during penalty phase on the issue of future dangerousness. This was not the result of a tactical decision by trial counsel. Rather, counsel simply failed to consider hiring an expert on future dangerousness. *Declaration of Roger Hunko*, ¶ 24.

The defense team's failure to meaningfully address the issue of future dangerousness allowed the State to run wild during its closing and rebuttal arguments in penalty phase. Here is a sampling of some of the arguments regarding future dangerousness made to the jury by the State:

- ◆ "With this sort of track record [of murder], do you think [Yates] might be dangerous in the future?" RP 8215.

- ◆ “[T]he defense would have you believe that because the defendant is now a Christian, that he is peaceful, law abiding and won’t be dangerous in the future. . . How can you have any confidence that he is not just as dangerous now as he was in 1975, 1988, 1996, 1997 and 1998?” RP 8228.
- ◆ “What is the best predictor of future behavior? The past. He murdered 15 people in cold blood and nearly a 16<sup>th</sup>. Now, one of his victims was a man, so it can’t be said that only women would be in danger from Robert Yates. He is a proficient, smart, skillful murderer. He is skillful and strong and as resourceful as ever. And ladies and gentlemen, this man is exceedingly dangerous.” RP 8229.
- ◆ “So let us focus on whether he really would be safe in any event. Will he be isolated from others for the rest of his life? . . . [As time goes on he] gets an increasing amount of time out of his cell. He might have only one inmate per cell, by himself if he is in the intensive management unit, or he might have roommates. He’s certainly going to be in contact with people if he is in general population as contrasted with intensive management.” RP 8238.
- ◆ “Clearly, crime occurs in prison. . . Do you think that acquiring street drugs in prison might be a circumstance that would result in some conflict that could cause assaults, that could cause further crimes to occur? Absolutely. In addition to that, you know, there hasn’t been any expert to come in here and tell [you] that the defendant will [sic] commit an infraction or violation on this date seven years down the road because the science of psychology or the study of humans does not permit that. But we do know and your good common sense will so inform you that the best predictor of future behavior is past behavior.” RP 8293.
- ◆ “People do commit crimes in prison, as there is every reason to believe that a man who has a history of murder for three decades, in the ’70s, the ’80s and the ’90s—we are nearly into the oughts—is going to continue down that path.” RP 8294.

- ◆ “Counsel has suggested that the defendant will do well in prison because when he is in a highly structured setting, like the military, he doesn’t seem to commit crime. I think the evidence proves otherwise, ladies and gentlemen. The defendant was in the military in 1988 when he murdered Stacy Hahn. He was here on leave, but he was on active duty. In addition to that, when the defendant came to Pierce County and murdered Melinda Mercer and Connie LaFontaine Ellis, he was coming here to serve his country. He was coming here for National Guard duty. That was the only reason he was in our jurisdiction. So when he was coming here to partake in the structured activity that was supposedly so good for him and in which he performed so very, very well, he committed two aggravated murders. The amount of structure in his environment is simply not a reliable predictor of the defendant’s behavior.” RP 8294-95.

Recently, Ronald Roesch, Ph.D. conducted a violence risk assessment of Yates. Dr. Roesch is a recognized expert in violence, future dangerousness and risk assessment. See *Curriculum Vitae of Ronald Roesch, Ph.D.*; *Report of Dr. Roesch*, at 10-11. After conducting his evaluation, Dr. Roesch concluded that Yates—both at the time of trial and today—presents a low risk for violence in prison. *Report of Dr. Roesch*, at 1, 10. Dr. Roesch identified multiple factors which, based on the research, would have led to this conclusion at the time of Yates’ penalty phase trial:

1. Yates’s lack of disciplinary infractions in jail;
2. Yates’s age;
3. Yates’s level of education;
4. Yates’s stable employment history;
5. Yates’s continued support from members of his family and the community;
6. The low rates of violence among capital inmates generally.

*Report of Dr. Roesch*, at 8-9.

#### Need for an Evidentiary Hearing

Yates relies on extra-record facts to support his claim that trial counsel failed to conduct a competent mitigation investigation. If the State does not dispute Yates' extra-record evidence, then no evidentiary hearing is necessary. Otherwise, an evidentiary will be necessary to resolve any factual disputes.

#### Argument on the Merits

Effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984). To establish that trial counsel's representation was constitutionally inadequate, Yates must show that counsel's performance was deficient—*i.e.*, that it fell below an objective standard of reasonableness—and that the deficient performance was prejudicial. *Strickland*, 466 U.S. at 687-88. The proper measure of attorney performance is reasonableness under prevailing professional norms. *Id.* at 688. In order to demonstrate prejudice arising from counsel's deficient performance, Yates must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694.

A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* The "reasonable probability" standard is not stringent, and requires a showing by less than a preponderance of the evidence that the outcome of the proceeding would have been different had the claimant's rights not been violated. *See, e.g., Pirtle v. Morgan*, 313 F.3d 1160, 1172 (9<sup>th</sup> Cir. 2002), *cert. denied*, 539 U.S. 916 (2003), quoting *Strickland*, 466 U.S. at 694:

A "reasonable probability" is less than a preponderance: "the result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome."

In recent years, trial counsel's duty to thoroughly investigate potential mitigating evidence in a capital case has been clearly defined. *See, e.g., Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000). These three cases applied the *Strickland* rule—that counsel must conduct a competent investigation before making tactical choices—to capital mitigation investigations.

In *Williams*, trial counsel conducted only a minimal mitigation investigation, arguing that they decided to focus on the fact that Williams turned himself into the police, was cooperative, and remorseful. In state

post-conviction proceedings, new counsel conducted an investigation revealing that Williams endured an abusive childhood (and that he had been committed to juvenile institutions on several occasions), that he suffered from mental impairments, and developed an expert opinion that he would likely not pose a danger to others in prison. The Supreme Court concluded that counsel's failure to discover and present this and other significant mitigating evidence fell "below the range expected of reasonable, professional competent assistance of counsel," and that Williams was prejudiced. In reaching this conclusion, the Court compared the totality of the available mitigation evidence with the evidence actually adduced at trial, and then re-weighed it against the evidence in aggravation. *Williams*, 529 U.S. at 397.

While *Williams*' explanation of penalty phase ineffectiveness is interrupted by lengthy discussions of various procedural habeas issues, the *Wiggins* decision focuses more closely on the scope of competent capital counsel's investigative responsibilities: "In this case, as in *Strickland*, petitioner's claim stems from counsel's decision to limit the scope of their investigation into potential mitigating evidence." *Wiggins*, 539 U.S. at 521. "Here, as in *Strickland*, counsel attempt to justify their limited investigation as reflecting a tactical judgment not to present mitigating evidence at

sentencing and to pursue an alternative strategy instead.” The Court then indicated that the question “is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background *was itself reasonable*.” *Id.* at 523 (emphasis in original). In concluding the state court decision (which assumed that because counsel had unearthed *some* information regarding petitioner's background they were in a position to make a tactical choice not to present a mitigation defense) was objectively unreasonable, the Supreme Court held that trial counsel “abandon[ed] their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible.” *Id.* at 527-28. “Counsel's investigation into Wiggins' background did not reflect reasonable professional judgment.” *Id.* at 534.

Finally, in *Rompilla* the Supreme Court rejected the argument that because defense counsel conducted an investigation into certain aspects of their client's life (interviewing Rompilla and some members of his family, and having him examined by three mental health experts), and because Rompilla's own contributions to any mitigation case were minimal, counsel's failure to examine a court file detailing a previous offense and revealing potential mitigation was not deficient. The Court characterized the

state's position at argument as: "defense counsel's efforts to find mitigating evidence by other means excused them from looking at the prior conviction file." *Rompilla*, 545 U.S. at 388. Counsel's failure was prejudicial, notwithstanding the defense investigation, because "(i)f the defense lawyers had looked in the file on Rompilla's prior conviction, it is uncontested they would have found a range of mitigation leads that no other source had opened up." *Id.* at 390. "This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury." *Id.* at 393.

In sum, these cases provide context to the rule that strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on investigation. In a capital context, counsel has a duty to conduct a wide ranging investigation into the past, present, and future.

In addition to framing the question as a failure to investigate, not as a failure to present evidence, these three cases also acknowledge that the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003) [hereinafter *Guidelines*] serve as "guides to determining what is reasonable." *Wiggins*, 539 U.S. at 534. In other words,

the *Guidelines* are the starting place for determining the reasonableness of a questioned investigation.

The *Guidelines* state that “(b)ecause the sentencer in a capital case must consider in mitigation, anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant, penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history.” *See Commentary to Guideline 10.7* (internal quotation marks removed). Consistent with this directive, federal courts have consistently held that “it is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase.” *Wallace v. Stewart*, 184 F.3d 1112, 1117 (9th Cir. 1999). In order to perform effectively counsel must conduct sufficient investigation and engage in sufficient preparation to be able to present and explain the significance of *all* the available mitigating evidence. *Allen v. Woodford*, 395 F.3d 979, 1000 (9th Cir. 2005); *Mayfield v. Woodford*, 270 F.3d 915, 927 (9th Cir. 2001). Counsel may not “sit idly by, thinking that investigation would be futile.” *Austin v. Bell*, 126 F.3d 843, 849 (6th Cir. 1997) (counsel’s failure to investigate and present mitigating evidence at the penalty phase of the trial “because he did not think that it would do any good” constituted ineffective assistance).

Only after capital trial counsel conducts a competent investigation can he accurately weigh the options of what evidence to present and what to hold back. In other words, the decision not to present a particular defense or not to offer particular mitigating evidence is unreasonable unless counsel has explored the issue sufficiently to discover the facts relevant to his making an informed decision. *Wiggins*, 539 U.S. at 522-23; *Stankewitz v. Woodford*, 365 F.3d 706, 719 (9th Cir. 2004).

When “tantalizing indications in the record” suggest that certain mitigating evidence may be available, those leads *must* be pursued. *Stankewitz*, 365 F.3d at 719-20. Furthermore, “counsel has an affirmative duty to provide mental health experts with information needed to develop an accurate profile of the defendant’s mental health.” *Caro v. Woodford*, 280 F.3d 1247, 1254 (9<sup>th</sup> Cir. 2002). This duty to provide the appropriate experts with pertinent information about the defendant is key to developing an effective penalty phase presentation. *Bean v. Calderon*, 163 F.3d 1073, 1079-80 (9th Cir. 1998) (“However, the ineffectiveness at issue in this case did not arise from failure to employ novel or neoteric tactics. Rather, it resulted from inadequacies in rudimentary trial preparation and presentation: providing experts with requested information, performing recommended

testing, conducting an adequate investigation, and preparing witnesses for trial testimony.”).

In sum, an ineffectiveness claim aimed at a failure to investigate focuses on the scope of counsel’s trial preparation, not his strategic trial decisions. *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003).

#### *Yates’ Severe Psychiatric Disorder*

[M]ental health experts are essential to defending capital cases. Neurological and psychiatric impairment, combined with a history of physical and sexual abuse, are common among persons convicted of violent offenses.

*Commentary to Guideline 4.1.* Robert Yates was a serial killer who had sex with his victims *after* he killed them. Indeed, the circumstances surrounding the crimes suggest that for Yates the killing was incidental to the necrophilia—in other words, he did not kill for the sake of killing, he killed in order to satisfy his necrophilic compulsions. An expert examination of Yates to determine whether he suffers from a psychiatric sexual disorder was mandated by the facts of the case. Yet trial counsel did not investigate this critical issue. *Declaration of Roger Hunko*, ¶ 19. As a result of this failure to investigate, Yates’s jury was provided with no explanation of why Yates

would engage in such horrific acts, no explanation save the State's argument that Yates killed for "recreation" because it was his "hobby."

Post-conviction counsel has now conducted the investigation which trial counsel failed to do, and the results are crucial to understanding how a seemingly normal man could engage in such monstrous crimes. Dr. Berlin concluded that Robert Yates not only suffers—through no fault of his own—from a "serious psychiatric disturbance," but that this severe disorder significantly impairs Yates' volitional control. In other words, Yates' capacity "to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect"—a statutory mitigating factor in Washington. RCW 10.95.070(6).

#### *Yates' Neuropsychological Impairment*

Trial counsel did not request administration of the types of neuropsychological tests which would reveal deficiencies in temporal lobe functioning. There was no tactical reason for the failure to request complete and comprehensive testing. *Declaration of Roger Hunko*, ¶¶ 21-22.

Comprehensive neuropsychological testing of Robert Yates has now been conducted for the first time as part of this post-conviction proceeding, and that testing has yielded results consistent with Dr. Berlin's conclusion that Yates suffers from a serious psychiatric sexual disorder.

Yates' jury was thus deprived of powerful psychiatric and neuropsychological evidence which was not simply mitigating, but which would have helped to reduce Yates' moral culpability in the eyes of his jury. For a juror charged with deciding whether to vote for a death sentence, there is an enormous difference between a defendant who kills for sport (the Robert Yates portrayed by the State), and a defendant who kills because he is driven by overwhelming compulsions arising from an undiagnosed and untreated psychiatric disorder.

*Yates' Cooperation with Spokane Authorities and Pleas of Guilty*

Thorough investigation of a capital case includes victim outreach:

[C]ounsel should consider making overtures to members of the victim's family – possibly through an intermediary, such as a clergy person, defense-victim liaison, or representative of an organization such as Murder Victim's Families for Reconciliation – to ascertain their feelings about the death penalty and/or the possibility of a plea.

*Commentary to Guideline 10.7. See also Commentary to Guideline 10.9.1*

(recognizing the importance of victim outreach in negotiations); Russell Stetler, *Working with the Victim's Survivors in Death Penalty Cases*, THE CHAMPION (June 1999).

For the trial team in this case, once Yates pled guilty in Spokane County there was no getting around the number and enormity of Yates's crimes. It was thus imperative for trial counsel to investigate the potentially

powerful mitigation to be derived from those guilty pleas and the acceptance of responsibility they represented. Yet trial counsel made no effort to reach out to the victims's survivors in the plea cases. As a result, Yates's jury was allowed to consider all of the horrible details of Yates' other murders—details which undoubtedly weighed in favor of a death sentence—without being presented with any of the mitigating aspects of Yates' acceptance of responsibility, cooperation with the State, or guilty pleas to mitigate those horrors.

In fact, at least one person—the mother of one of Yates' victims—would have been willing to testify that Yates' cooperation and guilty pleas in Spokane had provided her with some measure of solace, comfort and relief in the wake of her loss. This mitigating evidence was never uncovered by trial counsel because trial counsel conducted *no* investigation in this critical area.

### *Evidence Humanizing Yates*

In addition to uncovering evidence about the difficulties a capital defendant has encountered in his life, a competent investigation must also develop “positive aspects of the client's life.” *Guideline* 10.11(F)(1). *See also* Commentary to *Guideline* 10.11(F)(1) (“None of this evidence should be offered as counterweight to the gravity of the crime, but rather to show

that the person who committed the crime is a flawed but real individual rather than a generic evildoer, someone for whom one could reasonably see a constricted but worthwhile future.”). The presentation of mitigating evidence affords an opportunity to humanize and explain—to individualize—a defendant outside the constraints of the normal rules of evidence. *Mayes v. Gibson*, 210 F.3d 1284, 1288 (10<sup>th</sup> Cir. 2000). *See also Mak v. Blodgett*, 970 F.2d 614, 619 (9<sup>th</sup> Cir. 1992):

Mak’s defense counsel never placed Mak in the community nor portrayed Mak as a human being who was a devoted son with family members who loved him. Mak was depicted by the prosecution as a killing machine, and the defense presented no humanizing evidence whatsoever to offset that picture. Absent tactical purpose or risk, such performance is deficient within the meaning of *Strickland*.

Quoting from the district court, the Ninth Circuit noted:

The sentencing hearing is defense counsel's chance to show the jury that the defendant, despite the crime, is worth saving as a human being.... To fail to present important mitigating evidence in the penalty phase—if there is no risk in doing so—can be as devastating as a failure to present proof of innocence in the guilt phase.

*Id.*

Here trial counsel made a half-hearted effort to humanize Yates by calling his father and sister to testify in penalty phase. But there was a wealth of information available to trial counsel demonstrating that Robert Yates was loved by many people, and that he had often helped others under circumstances in which he did not stand to gain anything by doing so.

### *Yates's Lack of Future Dangerousness in Prison*

One of the statutory factors to be considered under Washington's capital sentencing scheme is "[w]hether there is a likelihood that the defendant will pose a danger to others in the future." RCW 10.95.070(8). Indeed, "[s]tudies show that future dangerousness is on the minds of most capital jurors, and is thus 'at issue' in virtually all capital trials, whether or not it is argued by the prosecution or is a statutorily mandated sentencing consideration." *Commentary to Guideline 10.11*, quoting John H. Blume, *et al.*, *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 CORNELL L. REV. 397, 398-99 (2001).

The development of "*Skipper*" evidence is a critical component of competent capital counsel's mitigation investigation. *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986) (noting that jury would "quite naturally" give great weight to "[t]he testimony of ... disinterested witnesses" such as "jailers who would have had no particular reason to be favorably predisposed toward one of their charges"); *Guideline 10.11(F)(2)* (explaining the need to consult with experts "to give a favorable opinion as to the client's capacity for rehabilitation, or adaptation to prison").

Trial counsel did not consult with an expert to determine whether Yates would pose a future danger to others in prison. Indeed, counsel never

even considered doing so. *Declaration of Roger Hunko*, ¶ 24. Post-conviction counsel did conduct the necessary investigation, which has revealed that—contrary to the State’s arguments to the jury in penalty phase—Robert Yates presents a low risk of committing violent acts in a prison setting.

Had trial counsel conducted an adequate investigation, they would have discovered compelling evidence of Yates’ low risk of future dangerousness in a prison setting, and they would have been able to counteract and defuse the State’s repeated arguments that Yates’ future dangerousness could be inferred from his crimes alone.

The failures of trial counsel detailed in these sections, taken together or individually, fall below an objective standard of reasonableness for competent capital counsel. As a result, the jury was deprived of compelling mitigating evidence. There is at least a reasonable likelihood that, had counsel conducted an adequate mitigation investigation, the result of the proceedings would have been different. This Court should grant Yates’ petition.

CLAIMS NO. 2-6: Portions of the Testimony of Mark Safarick Should Not Have Been Admitted Because The Opinions Were Not Based on Sound or Accepted Science.

Mr. Yates's Sixth Amendment Right to Effective Assistance of Counsel was Violated When Counsel Failed to Demand a *Frye* Hearing for the Portion of Mark Safarick's Opinion Testimony Discussing the Psychological Attributes of the Victims's Killer.

The Admission of Mr. Safarick's Scientifically Unsound Opinions about Mr. Yates's Personality Violated the Eighth Amendment Guarantee of Reliability in the Imposition of a Death Sentence.

Mr. Yates's Sixth Amendment Right to Effective Assistance of Counsel was Violated when Counsel Failed to Object to Safarick's Opinions Regarding the Psychology of the Killer. In addition, Counsel's Failure to Object Resulted in an Eighth Amendment Violation.

Mr. Yates's Sixth Amendment Right to Effective Assistance of Counsel on Appeal was Violated When Counsel Failed to Raise this Issue on Direct Review.

### Introduction

Mark Safarick, an FBI agent, testified to his opinion that the fifteen homicides discussed in this case were "linked;" *i.e.*, that numerous similarities existed strongly suggesting that they were all committed by one person.

On direct appeal, this Court upheld the admission of Safarick's "linkage" testimony finding that it "was relevant to showing the identity of Mercer's and Ellis's murderer and to establishing the 'aggravating

circumstance' of 'common scheme or plan.'" 161 Wn.2d at 762. Assuming an error, this Court concluded that any error was harmless because "the State presented overwhelming evidence of Yates' guilt," independent of Safarik's testimony. *Id.*

Yates does not complain about Safarik's "linkage" opinion in this PRP. Instead, his complaint is focused on Safarik's opinions about the psychopathology of the victims' killer—Mr. Yates. Yates concedes that this error is harmless on the issue of Yates's guilt. However, Yates urges this Court to consider the harm as it contributed to the jurors' penalty phase weighing.

#### Facts Relevant to Claims

While most of Special Agent Safarik's testimony dealt with facts related to similarities in the crime scenes and his opinion that the murders were committed by the same person, Safarik's testimony went further—delving into opinions about the psychological makeup and motives of the killer.

While Safarik is not a psychologist and affirmatively disclaimed that he was not offering any psychological opinions (RP 6847), that is exactly what he did.

Thus, by his own admission, Safarik was not competent to offer an

opinion about the psychology of the killer. Further, none of these opinions offered by Safarick was tested at a *Frye* hearing.

For example, when asked to describe his specialized knowledge, in addition to crime scheme analysis, Safarick included “areas of aggression and criminal behavior, psychopathology;” what he later termed a “multi-disciplinary area to look at and assess the dynamics of behavior that’s occurring at a crime scene.” RP 6845-46.

While offering his opinion about Mr. Yates’s *modus operandi*, Safarick opined that, “people who commit crimes, any types of crimes, want to be successful. They don’t want to get caught. So what they will do is they try to engage in behaviors that will make them successful in committing this crime.” RP 6859. Adding to that, Safarick then told Yates’s jury “typically MO behaviors are goal driven. They’re conscious behaviors engaged in by the offender to be a successful criminal.” RP 6860. Safarick continued this “pop psychology of the offender” testimony when he noted that ritualized behavior is “need driven, its emotionally psychologically driven, and so it shows up over and over again.” RP 6863.

Safarick later explained that he worked as a “profiler,” which he defined as commenting on “the particular *personality characteristics* or behavioral characteristics of a particular type of offender who may have

committed this.” RP 6949. He then referenced the September 11<sup>th</sup> terrorist attacks on the United States, noting that, like in this case, he and his colleagues were developing a personality profile of the actors. RP 6948-49.

Most of Safarick’s testimony that went beyond the proffered “linkage” (described above) was not objected to by defense counsel. However, the defense did object to when Safarick opined:

Typically in all violent crimes, or in the signature violent crimes that we are working in our unit, homicides and sexual assaults, and this is well documented in the literature as well, that there typically is an event that occurs in the offender’s life; we call it a precursing event...

RP 6868-69. However, when defense counsel did object, the objection was overruled. Safarick was then permitted to further opine that he was trained to look for an event immediately preceding the homicide in order to discern the “triggering” event. RP 6870. Making matters worse, Safarick then testified that he was not provided with the information or materials to enable him to make an assessment of the triggering event in this case. *Id.*

In sum, Special Agent Safarick’s testimony went beyond the “linkage” assessment. In addition to that opinion, Safarick was permitted to testify that the murderer, who was obviously Yates, consciously sought to be a successful, undetected murderer; that committing murders was his “goal;” and that either something happened to him to set him off or, if there was no precursor event, that Yates was simply worse than the other serial killers that

Safarick and others had studied.

Argument

None of this testimony was admissible—not under ER 702 or any other evidentiary rule; not under *Frye*; not for the guilt phase; and certainly not for the penalty phase. All of the above testimony should have drawn an objection. There was no tactical reason for counsel to fail to object. Indeed, that point is best made by counsel’s one objection. Because this claim is based entirely on the trial record, it could have been raised on direct appeal. Once again, there was no reason to fail to raise it at that juncture—where the standard of review is more favorable to Yates.

Yates has discussed the relevant ineffectiveness standards in pervious sections. He relies on that discussion of the law and does not repeat it, here. Instead, Yates focuses on the inadmissibility of the opinion evidence and its harm to the delicate and imprecise “life vs. death” calculation.

In *State v. Cauthron*, 120 Wash.2d 879, 886, 846 P.2d 502 (1993), this Court renewed its adherence to the *Frye* standard: “[E]vidence deriving from a scientific theory or principle is admissible only if that theory or principle has achieved general acceptance in the relevant scientific community.” 120 Wn.2d at 886 (quoting *Frye v. United States*, 293 F. 1013, 1014, 34 A.L.R. 145 (D.C.Cir.1923)).

In Washington, there are two prongs to the *Frye* test: (1) whether the scientific theory upon which the evidence is based is generally accepted in the relevant scientific community, and (2) whether the technique used to implement that theory is also generally accepted by that scientific community. If there is a significant dispute between qualified experts as to the validity of the scientific evidence, either as to the theory or the implementing technique, it may not be admitted. A third prong, which asks whether a generally accepted technique was performed correctly on a given occasion, is included in some states as part of the *Frye* test, but in Washington, prong three inquiries go to weight, not to admissibility. 120 Wash.2d at 887-89.

In this case, there was no *Frye* hearing on Safarick's "psychological profile" testimony. Thus, while Safarick's "linkage" testimony may have satisfied the relevant standard, this testimony did not. Although this testimony may have gone beyond the expected limits of Safarick's "linkage" testimony, that should have provided all the more reason for defense counsel to object and demand a *Frye* hearing, if the State persisted in offering this portion of Safarick's testimony. Counsel's failure is especially egregious given that Safarick admitted his lack of expertise with regard to psychology.

In sum, the evidence should have been excluded on several theories. The failure of prior trial and appellate counsel to advance any of those theories constituted deficient performance.

Mr. Safarick's testimony was particularly harmful in the penalty phase. As this Court noted in *State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984), since the death penalty is the ultimate punishment, due process under this state's constitution requires stringent procedural safeguards so that a fundamentally fair proceeding is provided. Where the trial which results in imposition of the death penalty lacks fundamental fairness, the punishment violates article 1, section 14 of the state constitution.

This Court deemed "particularly offensive" to the concept of fairness a proceeding in which evidence is allowed which lacks reliability. *Id.* The rules of this court concerning admissibility of evidence are premised on allowing evidence which is trustworthy, reliable, and not unreasonably prejudicial. *See* ER 403. The purpose of the Rules of Evidence is to afford any litigant a fair proceeding. *See* ER 102.

It makes no sense to afford these protections to one charged with a lesser crime but then suspend them in a capital case. "We will not do so, for this would place a defendant facing the death penalty in the perilous position

of having to rebut potentially unreliable or unreasonably prejudicial evidence before a jury that has already convicted him of aggravated murder. To suspend these protections which are afforded all other criminally charged defendants at such a critical phase of a capital case is contrary to the reliability of evidence standard embodied in the due process clause of our state constitution” *Id.* at 641.

Special Agent Safarick’s testimony was devastating on the issue of Mr. Yates’s mental state during and between the commission of these murders. It was mental “aggravation” only slightly disguised as “crime scene analysis.” In sum, Safarick was able to tell jurors that Yates’s state of mind was especially egregious—perhaps even more egregious than other serial killers.

Yates was harmed not only from defense counsel’s failure to object, but when this error is considered in connection with counsel’s failure to present any mitigating evidence regarding Mr. Yates’s mental condition. Thus, this claim should be considered cumulatively with the other ineffectiveness claims arising from the failure to conduct a competent mitigation investigation.

In sum, the State was permitted to introduce unscientific psychological testimony through an unqualified witness—testimony that was

especially damning on the issue of Yates's culpability for these crimes.

Admission of this evidence certainly undermines confidence in the verdict, especially when considered under the lens of cumulative error review.

**CLAIMS NO. 7-9:** Yates's Right to Due Process Guaranteed By the Fourteenth Amendment Was Violated When the Prosecutor Improperly Argued the Issue of Future Dangerousness to the Jury When There Was No Evidence in the Record to Support the Prosecutor's Arguments.

Yates's Sixth Amendment Right to Effective Assistance of Counsel Was Violated When Counsel Failed to Object to the Prosecutors' Improper Arguments Regarding Future Dangerousness.

Yates's Sixth and Fourteenth Amendment Right to Effective Assistance of Appellate Counsel Was Violated When Appellate Counsel Failed to Assign Error to Prosecutorial Misconduct in Closing Argument Regarding the Issue of Future Dangerousness.

#### Facts Relevant to Claims

As detailed above, the State in closing and rebuttal argued on seven separate occasions that the jury could infer solely from Yates's crimes that he would pose a risk of violence in prison. The prosecutor twice explicitly argued that the best predictor of future behavior is past behavior. Of the seven times the prosecutor advanced these arguments, trial counsel only objected twice. *See* RP 8293, 8294. One of the objections was sustained.

RP 8293. In the five instances where trial counsel failed to object, there was no tactical reason for the failure. *Declaration of Roger Hunko*, ¶ 26.

The prosecutor's repeated claims that past behavior is the best predictor of future behavior, and that a prison setting would have no impact on Yates's dangerousness, were not derived from any evidence adduced at trial.

Yates's counsel on direct appeal did not raise a claim of prosecutorial misconduct based on the State's arguments regarding future dangerousness.

#### Need for an Evidentiary Hearing

The only extra-record fact which Yates has produced in support of these claims is trial counsel's admission that there was no tactical reason for any failure to object to the State's arguments regarding future dangerousness. If the State disputes this fact, or seeks to introduce its own extra-record facts, then an evidentiary hearing is necessary.

#### Argument on the Merits

##### ***Prosecutorial Misconduct***

"It is a serious error for [the prosecutor] to make statements in closing argument unsupported by evidence, to misstate admitted evidence, or to misquote a witness' testimony." *United States v. Earle*, 375 F.3d 1159, 1163 (D.C. Cir. 2004) (quotations omitted). *See also United States v. Blueford*,

312 F.3d 962, 968 (9th Cir. 2002) (misconduct for prosecution to “propound inferences that it knows to be false, or has very strong reason to doubt”).

In Yates’s penalty phase, the State’s arguments regarding future dangerousness were not derived from any evidence introduced at trial. They were simply invented from whole cloth. Indeed, had defense counsel competently investigated the issue of future dangerousness, the prosecutor’s statements could have been demonstrated to be contradicted by numerous reliable sources. *See Report of Dr. Roesch* (past violence is not a reliable predictor of violence in prison). But in the absence of expert testimony, the prosecutor’s arguments—which were really testimony in the guise of argument—went unrebutted. And given that the issue of future dangerousness is a factor which the jury is required to consider, and which the jury was in fact instructed to consider in this case, it can hardly be said that the prosecutor’s improper arguments were harmless.

Accordingly, the prosecutor’s misconduct in arguing future dangerousness forms a separate basis for Yates to obtain relief from the death sentence imposed in this case.

#### ***Ineffective Assistance of Trial Counsel***

Trial counsel failed to object to five of the seven instances of prosecutorial misconduct at issue in these claims. Counsel had no tactical

reason for failing to object. Failing to object to the prosecutor's improper arguments on an issue as important as future dangerousness falls below an objective standard of reasonableness for competent capital counsel. There is at least a reasonable probability that one jury would have voted for life had the prosecutor been prohibited from "testifying" in closing that Yates would be dangerous in prison.

Yates should be granted a new penalty phase trial.

#### *Ineffective Assistance of Appellate Counsel*

Effective assistance of trial counsel is guaranteed by the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The right to effective assistance of appellate counsel, on the other hand, is rooted in the due process clause. *United States v. Skurdal*, 341 F.3d 921, 926 (9<sup>th</sup> Cir. 2003). Nevertheless, the standard adopted in *Strickland* does not only protect criminal defendants at the trial level; it also applies to claims of ineffective assistance of appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000).

To establish that his appellate attorney's representation was constitutionally inadequate, Yates must show that counsel's performance was deficient, and that the deficient performance was prejudicial to his

defense. *Strickland*, 466 U.S. at 687. In the appellate context, counsel's failure to discover and raise non-frivolous issues on appeal constitutes deficient performance under *Strickland*. *Delgado v. Lewis*, 223 F.3d 976, 980 (9<sup>th</sup> Cir. 2000), citing *Smith v. Robbins*, 528 U.S. at 285.

The second prong of the *Strickland* inquiry is prejudice. If there is a reasonable probability that, but for appellate counsel's unreasonable errors or omissions, the outcome of the proceeding would have been different, Yates is entitled to relief. *See Strickland*, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Here, the State engaged in misconduct by asking the jury to infer that Yates would be violent in prison when there was no evidence in the record to support this inference. This was misconduct. Appellate counsel failed to assign error to the misconduct. Had this issue been litigated on direct appeal, there is a reasonable likelihood that Yates would have been granted penalty phase relief.

**CLAIM NO. 10:** Yates was Denied his Sixth Amendment Right to Effective Assistance of Counsel When He Was Given Unreasonable Advice to Plead Guilty to Multiple Murders in Spokane County Prior to His Trial in Pierce County.

Facts Relevant to Claim

Mr. Yates was arrested on April 18, 2000, in Spokane, and the Spokane County Public Defender was appointed to represent him. Richard Fasy was lead counsel in Spokane; Scott Mason and Jay Ames were also assigned to represent Yates. *Declaration of Richard Fasy*, ¶ 1. Shortly after he was arrested, Yates communicated to his lawyers a willingness to take responsibility for and to plead guilty to all of his crimes, including those that had taken place in other counties and that had not yet been charged. *Id.*, ¶ 2.

By early July 2000, Yates' Spokane lawyers believed that they had negotiated a "global resolution" of Yates' crimes. The proposed plea deal involved Yates' pleading guilty to all of his Spokane crimes, as well as two murders in Walla Walla county, one murder in Skagit county, and the two murders in Pierce County which are now the subject of this PRP. As part of the agreement Mr. Yates also agreed to disclose the location of the body of Melody Murfin, who had been missing and presumed dead for some time. The guilty plea and sentencing were to take place in Spokane County Superior Court, and as part of the deal Mr. Yates would avoid the possibility

of the death penalty and be sentenced to life in prison without the possibility of parole. *Id.*, ¶ 3.

The global resolution never took place. Instead, on July 17, 2000, the Pierce County Prosecutor charged Mr. Yates with two counts of aggravated first degree murder in Pierce County. Roger Hunko was appointed to represent Yates on the Pierce County charges. *Id.*, ¶ 4-5; *Declaration of Roger Hunko*, ¶ 3. Between the time of his appointment in July 2000 and late October 2000, Hunko met in person with Yates and with the Spokane lawyers on multiple occasions to discuss Yates' cases. Hunko also spoke on the phone multiple times with both Yates and with the Spokane lawyers. One of the major issues Hunko discussed with the Spokane lawyers was how to proceed with the cases in Spokane County now that Pierce County had filed charges. *Declaration of Richard Fasy*, ¶ 5; *Declaration of Roger Hunko*, ¶ 9; *Declaration of Robert Yates*, ¶ 4.

Meanwhile, the Spokane County plea deal remained on the table—minus the two Pierce County aggravated murders. Because it appeared very likely that the Pierce County Prosecutor would seek death for the two murders there, Yates' Spokane lawyers deferred to Hunko's judgment in deciding how to proceed with the Spokane cases. They did not want to do anything with the cases in Spokane which would compromise Yates' ability

to avoid a death sentence in Pierce County. *Declaration of Richard Fasy*, ¶ 6.

Ultimately, Hunko advised Yates, Fasy, Mason and Ames to go through with the guilty pleas in Spokane County. *Declaration of Richard Fasy*, ¶ 7; *Declaration of Robert Yates*, ¶ 5. Hunko never discussed with Yates or with his Spokane lawyers the possibility of delaying or staying the Spokane proceedings until after the Pierce County charges were resolved. Nor did Hunko ever discuss with them the possibility of Yates' pleading guilty in Pierce County in an effort to avoid the admission of evidence of Mr. Yates' other murders in a Pierce County trial. *Declaration of Richard Fasy*, ¶ 7; *Declaration of Roger Hunko*, ¶ 12; *Declaration of Robert Yates*, ¶ 5.

Had Yates been advised by his lawyers that he should not plead guilty in Spokane, he would have followed that advice. Similarly, had he been advised that he should plead guilty to two counts of aggravated murder in Pierce County, he would have followed that advice as well. *Declaration of Robert Yates*, ¶ 5. Yates was an easy client to work with, and he was very willing to follow the advice of his lawyers. *Declaration of Richard Fasy*, ¶ 8; *Declaration of Roger Hunko*, ¶ 14.

At the urging of Hunko and his Spokane lawyers, Yates pled guilty in Spokane in October 2000 to 13 counts of first degree murder and one count of attempted first degree murder. When Yates proceeded to trial in Pierce County in 2002, the details of the Spokane murders were admitted during the guilt phase to prove the “common scheme or plan” aggravator alleged in the Pierce County cases. Additionally, Yates’s convictions arising from the Spokane pleas—including the 1975 murders of Patrick Oliver and Susan Savage in Walla Walla, and the 1988 murder of Stacy Hahn in Skagit County—were admitted during penalty phase.

#### Need for an Evidentiary Hearing

Yates relies in part on extra-record facts to support this claim. If the State does not dispute Yates’ extra-record evidence, then no evidentiary hearing is necessary. Otherwise, an evidentiary will be necessary to resolve any factual disputes.

#### Argument on the Merits

Effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984). To establish that trial counsel’s representation was constitutionally inadequate, Yates must show that counsel’s performance was deficient—*i.e.*, that it fell below an objective standard of

reasonableness—and that the deficient performance was prejudicial.

*Strickland*, 466 U.S. at 687-88.

The constitutional guarantee of effective assistance of counsel extends to all stages of a criminal proceeding, including advice about the decision whether to plead guilty. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Effective assistance of counsel includes counsel’s informed opinion about what plea should be entered. *Boria v. Keane*, 99 F.3d 492, 497 (2d Cir. 1996), *cert. denied*, 521 U.S. 1118 (1997).

There is no question that in many potential capital cases, negotiating a guilty plea in return for a life sentence is the best available outcome. In fact, the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003) (hereinafter *Guidelines*—discussed at greater length in the claims related to penalty phase ineffectiveness) specifically provide that competent capital counsel should attempt to seek an agreed upon resolution at every stage of a capital case. *See Guideline 10.9.1*. “A competent client is ultimately entitled to make his own choice. Counsel’s role is to ensure that the choice is as well considered as possible.” *See Commentary to Guideline 10.9.2*. The *Guidelines*, often cited by the United States Supreme Court as reflecting the standards of practice in

capital cases, clearly mandate that counsel explain to his client the numerous negative implications of pleading guilty:

If no written guarantee can be obtained that death will not be imposed following a plea of guilty, counsel should be extremely reluctant to participate in a waiver of the client's trial rights.

*Id.*

Trial counsel's advice to Yates to proceed with his guilty pleas in Spokane County, while at the same time challenging guilt in Pierce County, created a disastrous scenario which insured the wholesale and monumentally prejudicial admission of the Spokane crimes during both the guilt and penalty phases of the trial in Pierce County.

There were avenues which counsel failed to explore which could have averted this scenario. For example, counsel could have advised Yates and his Spokane attorneys to seek a continuance or a stay in Spokane until the Pierce County charges were resolved. Yates could then have entered guilty pleas to the two aggravated murder charges in Pierce County and proceeded directly to penalty phase. Because the "common scheme or plan" aggravator would no longer have been at issue, evidence of the details of the Spokane murders would not have been admissible in penalty phase. Only those "facts and circumstances" of the Pierce County murders would have been admissible. *See* RCW 10.95.060(3) (describing evidence a

penalty phase jury may hear when it has not already heard evidence of the aggravated murder itself). Similarly, the Spokane murders would not be admissible as criminal history because they would not yet have resulted in convictions. *See* RCW 10.95.070(1); *State v. Bartholomew*, 101 Wash.2d 631, 642, 683 P.2d 1079 (1984) (limiting admission in penalty phase of prior criminal activity to actual convictions).

Trial counsel failed to properly advise Yates regarding the overwhelming risks associated with pleading guilty to over a dozen murders in Spokane County, and failed to explore other options which did not involve Yates' pleading guilty in Spokane at that time. This failure fell below an objective standard of reasonableness for competent capital counsel. And given the enormity of the evidence which was admitted at the Pierce County trial as a result of counsel's deficient advice, it is abundantly clear that there is at least a reasonable likelihood of a different outcome—*i.e.*, a life verdict—had Yates' sentencing jury not been subjected to the overwhelming evidence regarding the Spokane murders.

This Court should grant Yates' petition.

**CLAIMS NO. 11-13:** Yates' Sixth Amendment Right to a Jury Trial, His Fourteenth Amendment Right to Due Process, and His Eighth Amendment Right to a Reliable Sentencing Determination Were Violated When Pierce County Superior Court Utilized a Jury Summons Process Which Fails to Produce a Venire Drawn From a Fair Cross-Section of the Community.

Yates' Sixth Amendment Right to a Jury Trial, His Fourteenth Amendment Right to Due Process, and His Eight Amendment Right to a Reliable Sentencing Determination Were Violated When Court Personnel Excused Prospective Jurors Without Judicial Involvement.

Yates' Sixth Amendment Right to a Jury Trial, His Fourteenth Amendment Right to Due Process, and His Eight Amendment Right to a Reliable Sentencing Determination Were Violated When Low Juror Pay and Pierce County's Failure to Enforce Jury Summonses Resulted in a Venire Which Was Not Representative of a Fair Cross-Section of the Community.

#### Facts Relevant to Claims

According to the Deputy Court Administrator, Pierce County's jury summons procedures are as follows:

1. Prospective jurors are summoned from a master source list compiled by the State Administrative Office of the Courts, from voter registrations, Washington State Drivers License's and Washington State identification cards.
2. Pierce County sends out an average of fifteen hundred (1,500) summons weekly by a computerized random draw from the Pierce County master jury source list.

3. From the fifteen hundred (1,500) summons sent out weekly Pierce County averages about two hundred and fifty (250) persons who actually show up and serve for that selected time period.
4. If a potential juror does not respond to the initial summons, Pierce County sends a card to them reminding them of their legal obligation to respond and cites the RCW that makes it a misdemeanor to knowingly and willingly fail to do so. Pierce County does not pursue prosecutions of persons who fail to respond, nor do they take any additional steps to ensure the presence of the prospective juror.

Jurors receive \$10 per day for jury service.

According to U.S. Census Bureau statistics, in Pierce County 64 percent of the population is between the ages of 18-65; only 10 percent is over 65; and the median income is \$55,000. *United States Census Bureau, 2008 Statistics, <http://quickfacts.census.gov/qfd/states/53/53053.html>.*

For those jurors who respond to their summons, juror administration staff is authorized to excuse potential jurors for a variety of reasons. "Pre-approved" reasons for excusing a potential juror include the following:

- Not a U.S. citizen;
- Cannot communicate in the English language;
- Does not reside in Pierce County;
- Convicted felons whose rights have not been restored;
- Under eighteen years of age;
- Physical illness or disability which will not permit service (requires written verification from attending physician);
- Responsible for health care of another who cannot care for themselves (requiring verification);
- Parent with no child care available;
- Full-time student (approved educational program);
- Active military service including abroad;

- Job related issues (requiring verification such as a letter from the employer).

It is unknown how many potential jurors in this case were excused by administrative staff. Further, there is no record of the reasons administrative staff found sufficient to justify excusal. Likewise, there is no demographic information regarding the jurors excused by staff. Neither Mr. Yates nor counsel were present when staff “excused” these jurors.

In contrast, excusals requiring judicial review and authorization include:

- ▶ Financial hardship;
- ▶ Extreme inconvenience;
- ▶ Public necessity; and
- ▶ Unfit person.

*See Declaration of Ronald Ness.*

#### Need for an Evidentiary Hearing

Yates relies on extra-record facts to support these claims. If the State does not dispute Yates’s extra-record evidence, then no evidentiary hearing is necessary. Otherwise, an evidentiary will be necessary to resolve any factual disputes. Given the nature of the claims, it may be prudent for the Court to order an evidentiary in any event so that the record may be fully developed.

### Argument on the Merits

Mr. Yates was entitled to a panel of “impartial, indifferent jurors.” Wash. Const. Art. 1, §22 (amend. 10) (“the accused shall have a right to ... a speedy public trial by an impartial jury”); *State v. Latham*, 100 Wash.2d 59, 62-63, 667 P.2d 56 (1983) (defendant constitutionally guaranteed fair and impartial jury). Mr. Yates’ Sixth Amendment right to a jury trial, his Fifth Amendment right to be present, his Fourteenth Amendment right to due process, and his Eighth Amendment right to a reliable sentencing determination were violated when Pierce County’s jury summons process, low juror pay, failure to enforce jury summons, and exclusion of prospective jurors without judicial involvement, failed to produce a venire drawn from a cross-section of the community.

The Sixth Amendment to the United States Constitution entitles a defendant to a jury drawn from a fair cross-section of the community. The United States Supreme Court stated in *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975), “we accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power -- to make available the common sense judgment of the community as a hedge against the overzealous or mistaken

prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968).

The Sixth Amendment's guarantee of a fair cross-section requirement is made binding on states by virtue of the Fourteenth Amendment. The presence of a fair cross-section of the community on venires, panels, or lists from which petit juries are drawn is essential to the fulfillment of the Sixth Amendment's guarantee of an impartial jury trial in criminal prosecutions. *Taylor* 419 U.S. at 538; *citing Duncan*, 391 U.S. 145 (1968). The jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof. *Id.* A criminal defendant has standing to challenge exclusion resulting in a violation of the fair cross-section requirement, whether or not he is a member of the excluded class. *Duren v. Missouri*, 439 U.S. 357 (1979).

"In order to establish a prima facie violation of the fair cross-section requirement of the Sixth Amendment, the defendant must show the following: (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number

of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process."

*Duren*, 439 U.S. at 364.

The Eighth Amendment provides a defendant the right to a reliable sentencing determination in that it entitles a defendant to a jury capable of a reasoned moral judgment about whether death, rather than some lesser sentence, ought to be imposed, and imposes a heightened standard for reliability in the determination that death is the appropriate punishment in a specific case. *Woodson v. North Carolina*, 428 U.S. 280 (1976). Thus, the Eighth Amendment can invalidate "procedural rules that tend to diminish the reliability of the sentencing determination." *See Simmons v. South Carolina*, 512 U.S. 154, 172 (1994) (Souter, J., concurring), citing *Beck v. Alabama*, 447 U.S. 625 (1980). A violation of a defendant's Eighth Amendment right to a reliable sentencing determination cannot be harmless error. "None of the seminal Supreme Court Eighth Amendment cases requiring the narrowing of the class of defendants eligible for the death penalty permit the offender to be executed because the error was deemed harmless." *Esparza v. Mitchell*, 310 F.3d 414, 421 (6<sup>th</sup> Cir. 2002).

As a result of the Pierce County policies outlined above, it is overwhelmingly likely that numerous jurors were excused "for cause" by

administrative staff as a result of a “hearing” where neither Mr. Yates, nor his counsel were permitted to be present. Just as importantly, no record was kept of this process, making review virtually impossible.

The listed reasons supporting administrative excusal are numerous. Just as importantly, the reasons go beyond statutory disqualifying factors, requiring the exercise of discretion. For example, all parents “without child care,” are excused without judicial intervention. In addition, Pierce County policy permits the exclusion, by jury administration, of any full-time students, as well as individuals who have “job related issues.”

This policy of non-judicial exclusion, employed in this and every case in Pierce County, violates several important Constitutional protections. First, a defendant is denied the right to be present—in person or through counsel. Next, the public is excluded from the process—a violation of the right to an open and public trial (discussed more extensively in a separate section).

Although the lack of note-keeping makes the process essentially unreviewable, the reasons supporting exclusion for cause overwhelmingly lead to the conclusion that administrative staff excluded jurors who would not have been excluded for cause in a judicial proceeding. Indeed, it is very likely that the most significant decisions about whether a juror should be

excluded for cause were made by administrative staff applying an improper legal standard at a “private” “hearing” from which the defendant was denied access.

Perhaps additional information can be ascertained through an evidentiary hearing and the discovery devices that are available to Mr. Yates only if such a hearing is authorized. RAP 16.11. He has certainly made a *prima facie* showing of error necessitating a hearing.

However, administrative excusals for cause are not the only problem in this case. The disgraceful rate of pay for jury duty existing in Pierce County and in this State results in the systematic *de facto* exclusion of the working class from jury duty. This is especially true where the case will take weeks to try—as in this case. Further exacerbating the problem is the authority granted to the jury administrator to exclude for job related issues. Financial concerns undoubtedly play a role in a large percentage of the citizens who seek excusal or who fail to respond at all.

The result is a jury venire consisting mainly of individuals who are retired, or who earn a salary which is guaranteed during jury service. Exclusion of wage earners distorts the process. Yates’ death sentence is not the reasoned moral response of the community—only a part of that community.

Finally, there is the problem of non-enforcement. There are, of course, a number of potential reasons why only 250 people out of 1,500 (approximately 17%) summoned actually respond. Some of those reasons may support excusal for cause. Most likely do not. No one from the Pierce County Superior Court attempts to require people to appear other than by mailing a reminder to the people who do not originally respond.

The Eighth Amendment's mandate of heightened reliability prohibits upholding the death sentence rendered by the jury selected in this case. Because the penalty of death is qualitatively different from any other punishment, the Supreme Court "has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring). One of the most important and consistent themes of the Supreme Court's death penalty jurisprudence is the "emphasis on procedural protections that are intended to ensure that the death penalty will be imposed in a consistent, rational manner." *Barclay v. Florida*, 463 U.S. 939, 960 (1983) (Stevens, J., concurring); see *Beck v. Alabama*, 447 U.S. 625, 638 (1980) (noting that, because death is different, "we have invalidated procedural rules that tended

to diminish the reliability of the sentencing determination"). Accordingly, the severity of the sentence that Yates faces demands that this Court apply "careful scrutiny in the review of any colorable claim of error." *Stephens v. Zant*, 462 U.S. 862, 885 (1982).

Pierce County's jury summons process, administrative exclusion process, and low juror pay are all procedures that produced a venire in Mr. Yates' case that was not representative of the community and therefore calls into question the reliability of the death sentence that was returned in his case.

**CLAIM NO. 14:** Yates' Constitutional Right to an Open and Public Trial Were Violated When the Trial Court Closed the Courtroom and Conducted "Private" Voir Dire Without Conducting a Pre-closure Hearing.

#### Facts Relevant to Claim

Extra-record evidence that supports the conclusion that the trial court closed the courtroom during a portion of jury selection. Because there is no closure order on the record, it follows that prior to closing the courtroom the trial court did not conduct a hearing. Instead, it appears that the trial court simply directed the press and public to remain outside the courtroom until the completion of individual *voir dire*. The declarations of Barbara Corey (one of the prosecuting attorneys on this case), and Karen Sanderson (describing statements made to her by a juror) lend factual support to the

conclusion that the press and public were not permitted in the courtroom during portions of jury selection.

#### Need for an Evidentiary Hearing

Mr. Yates' seeks an evidentiary hearing where he can engage in discovery, call witnesses, and develop the record on this issue.

#### Argument on the Merits

##### ***The Constitutional Right to an Open and Public Trial***

The right to a public trial is protected by both the federal and the Washington state constitutions. *See* U.S. CONST. AMEND. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."); WASH. CONST., ART. 1, § 22 ("In criminal prosecutions the accused shall have the right. . . to have a speedy public trial."); WASH. CONST., ART. 1, § 10 ("Justice in all cases shall be administered openly."). This right includes the right to open jury selection. *In re Orange*, 152 Wash.2d 795, 804, 100 P.3d 291 (2005), citing *Press-Enter Co. v. Superior Court*, 464 U.S. 501, 505 (1984).

Washington Courts have scrupulously protected the accused's and the public's right to open public criminal proceedings. *State v. Easterling*, 157 Wn.2d 167, 181, 137 P.3d 825 (2006) (state constitution requires open and public trials); *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005)

(closing courtroom during *voir dire* without first conducting full hearing violated defendant's public trial rights); *In re Restraint of Orange*, 152 Wn.2d 795, 812, 100 P.3d 291 (2004) (reversing a conviction where the court was closed during *voir dire* and holding that the process of juror selection is a matter of importance, not simply to the adversaries but to the criminal justice system); *State v. Bone-Club*, 128 Wn.2d 254, 256, 906 P.2d 325 (1995) (reversible error to close the courtroom during a suppression motion); *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982) (setting forth guidelines that must be followed prior to closing a courtroom or sealing documents). “[P]rotection of this basic constitutional right clearly calls for a trial court to *resist* a closure motion *except under the most unusual circumstances.*” *Orange*, 152 Wn.2d at 805, *citing State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995) (emphasis in original).

### ***The Hearing that Must Precede Any Contemplated Closure***

This Court has developed a test which must be applied in every case where a closure is contemplated. The *Bone-Club* requirements are:

1. The proponent of closure. . . must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a “serious and imminent threat” to that right;

2. Anyone present when the closure motion is made must be given an opportunity to object to the closure;
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests;
4. The court must weigh the competing interests of the proponent of the closure and the public;
5. The order must be no broader in its application or duration than necessary to serve its purpose.

*Easterling*, 157 Wash.2d at 175, n.5; *Bone-Club*, 128 Wash.2d at 258-259.

As the test itself demonstrates, it must be conducted *before* closing the courtroom. For example, it is impossible to weigh the reasons given by a member of the press or public opposed to closure, if the trial court fails to expressly invite comment on the matter. After conducting a full hearing, the trial court must then make findings. The constitutional presumption of openness may be overcome only by “an overriding interest *based on findings* that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.” *Orange*, 152 Wash.2d at 806 (emphasis added), quoting *Waller v. Georgia*, 467 U.S. 39, 45 (1984). These requirements are necessary to protect both the accused’s right to a public trial *and* the public’s right to opening proceedings. *Easterling*, 157 Wash.2d at 175.

***The Right to an Open and Public Trial and the Requirement of a Hearing Apply to the Closure of a Portion of Jury Selection***

The process of jury selection is included, not excepted, from this rule.

*Brightman, supra; Orange, supra.* As the United States Supreme Court stated in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505: “(t)he process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system.”

This Court has specifically noted that a closed jury selection process harms the defendant by preventing his or her family from contributing their knowledge or insight to jury selection and by preventing the venire from seeing the interested individuals. *Brightman*, 155 Wash.2d at 515; *Orange*, 152 Wash.2d at 812.

***The Trial Court Closed the Courtroom Without Conducting a Bone-Club Hearing***

While juror privacy may be one appropriate consideration in weighing a decision to close, it is not a factor that justifies the failure to conduct a *Bone-Club* hearing. *State v. Duckett*, 141 Wash. App. 797, 808, 173 P.2d 948 (2007) (“In this case only a limited portion of voir dire was held outside the courtroom, but this does not excuse the failure to engage in a *Bone-Club* analysis.”). As this Court recognized in *Orange* and confirmed in *Easterling*, the guaranty of a public trial under our constitution has never

been subject to a *de minimis* exception. *Orange*, 152 Wash.2d at 812-14; *Easterling*, 157 Wash.2d at 180-81. The closure here was deliberate, and the questioning of the prospective jurors concerned their ability to serve; this cannot be characterized as ministerial in nature or trivial in result. *See Easterling*, 157 Wash.2d at 181.

Moreover, the trial court did not “resist” closure, apparently ordering it *sua sponte*. While Yates concedes there may be instances where a juror’s privacy concerns are significant enough to warrant closure (*after* a hearing and *after* weighing the other interests), the trial court’s actions run completely contrary to the approach required under the law. Where a juror expresses a concern about his/her privacy, a trial court’s role is to determine whether there are available “less restrictive” alternatives to closure that will still ensure juror candor and protect against unnecessary juror embarrassment. Here, the trial court did not invite an opportunity for objections to closure to be expressed, and did not question any jurors to learn if they were willing to answer any “sensitive” questions in open court apart from other potential jurors. In short, the trial court failed to apply the law.

*Defense Counsel's Failure to Object Does Not Waive the Issue*

The State may argue that defense counsel's failure to object and subsequent participation in closed courtroom proceeding means that the issue has been waived. This Court has answered this question in the negative, holding that is "the request to close itself, and not the party who made the request, that triggered the trial court's duty to apply the five-part *Bone-Club* requirements. The trial court's failure to apply that test constitutes reversible error." *Easterling*, 157 Wash.2d at 180.

Specifically, the *Easterling* Court held that this outcome was compelled by "our prior decisions relating to article 1, section 22 of our state constitution, which require trial courts to strictly adhere to the well-established guidelines for closing a courtroom, and . . .[by] public policy as made manifest by the federal and state constitutions which favors keeping criminal judicial proceedings open to the public unless there is a compelling interest warranting closure." *Easterling*, 157 Wash.2d at 177.

Because the trial court must act to protect the rights of both a defendant and the public to open proceedings, "the defendant's failure to lodge a contemporaneous objection at trial [does] not effect a waiver of the public trial right." *Brightman*, 155 Wash.2d at 517.

### *A New Trial is Required*

“Prejudice is necessarily presumed where a violation of the public trial right occurs.” *Easterling*, 157 Wash.2d at 181. “The denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis.” *Id.* The remedy is reversal and a new trial. *Id.* at 174.

Yates has stated admissible facts that make out a *prima facie* claim. If the State disputes these facts with its own competent, extra-record declarations, then a hearing is mandated. If Yates establishes at that hearing that a portion of his trial was closed without the trial court’s first conducting a *Bone-Club* hearing, then Yates is entitled to a new trial.

**CLAIM NO. 15:** Yates’ Sixth Amendment Right to a Jury Trial, His Fourteenth Amendment Right to Due Process, and His Eight Amendment Right to a Reliable Sentencing Determination Were Violated When a Sitting Juror Committed Misconduct During Trial.

#### Facts Relevant to Claim

One of Yates’ jurors told at least one other juror during the trial that she was intending to write a book about the case after the trial was over.

*Declaration of Karen Sanderson*, ¶ 3. During lunch recesses in the trial the

juror would go to her car and attempt to reproduce the notes she had just taken in court during the testimony of trial witnesses. *Id.*<sup>2</sup>

#### Need for an Evidentiary Hearing

Yates seeks an evidentiary hearing regarding this claim where he can engage in discovery, call witnesses, and develop the record on this issue.

#### Argument on the Merits

The Sixth Amendment right to jury trial “guarantees to the criminally accused a fair trial by a panel of impartial, ‘indifferent’ jurors.” *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). “A fair trial in a fair tribunal is a basic requirement of due process.” *Id.* The jury must be “capable and willing to decide the case solely on the evidence before it.” *Smith v. Phillips*, 455 U.S. 209, 217 (1982). If even a single juror is unduly biased or prejudiced, the defendant is denied his constitutional right to an impartial jury. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992); *Tinsley v. Borg*, 895 F.2d 520, 523-24 (9th Cir. 1990).

Actual bias against a defendant on a juror's part is sufficient to taint an entire trial. *See United States v. Allsup*, 566 F.2d 68, 71 (9th Cir. 1977).

Indeed, “[t]he presence of a biased juror cannot be harmless; the error

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<sup>2</sup> Jurors were allowed to take notes during the trial but were required to leave their notebooks with the bailiff when court was not in session.

requires a new trial without a showing of actual prejudice.” *United States v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir. 2000).

There are two types of bias: actual and implied. Actual bias arises from the juror’s prior experiences. Implied bias arises from a juror’s failure to answer questions truthfully during the voir dire process. Either may support a challenge for cause. *Gonzalez*, 214 F.3d at 1111. Focusing for the moment on implied bias, courts may presume bias based on the circumstances. *Dyer v. Calderon*, 151 F.3d 970, 982 (9<sup>th</sup> Cir. 1998) (“[t]he individual who lies in order to improve his chances of serving has too much of a stake in the matter to be considered indifferent.”). Nevertheless, it is an open question whether dishonesty is required before implied bias may be found. *Fields v. Woodford*, 309 F.3d 1095, 1105 (9<sup>th</sup> Cir. 2002).

Courts have implied bias in those situations where the relationship between a prospective juror and some aspect of the litigation makes it unlikely that the average person could remain impartial in his deliberations under the circumstances, or where repeated lies in voir dire imply that the juror concealed material facts in order to secure a spot on the particular jury. *Dyer*, 151 F.3d at 982. The standard is “essentially an objective one,” under which a juror may be presumed biased even though the juror himself believes or states that he can be impartial. *Id.*

While a juror's misconduct has always concerned the courts, it takes on added significance in a death penalty case. Because the penalty of death is qualitatively different from any other punishment, the Supreme Court "has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring). One of the most important and consistent themes of the Supreme Court's death penalty jurisprudence is the "emphasis on procedural protections that are intended to ensure that the death penalty will be imposed in a consistent, rational manner." *Barclay v. Florida*, 463 U.S. 939, 960 (1983) (Stevens, J., concurring). Accordingly, the severity of Yates' sentence demands that this Court apply "careful scrutiny in the review of any colorable claim of error." *Stephens v. Zant*, 462 U.S. 862, 885 (1982). This admonition is especially true when the claim of error involves the right to a fair trial, one of the primary means of ensuring that a jury renders its verdict "based only on the evidence subjected to the crucible of the adversarial process." *Woods v. Dugger*, 923 F.2d 1454, 1460 (11<sup>th</sup> Cir.), *cert. denied*, 502 U.S. 953 (1991).

According to *Williams v. Taylor*, 529 U.S. 420 (2000), an evidentiary hearing to determine partiality is required where even a single response to a voir dire query was not forthcoming or factually misleading. In *Williams*, a habeas petitioner claimed he was entitled to an evidentiary hearing regarding juror bias because a juror failed to respond to the following question posed during voir dire: “Are any of you related to the following people who may be called as witnesses?” The juror's ex-husband was among the witnesses named. The government insisted that the juror was honest because the questions were phrased in the present tense. But a unanimous Supreme Court rejected this argument, stating that “[e]ven if the juror had been correct in her technical or literal interpretation of the question relating to [her ex-husband], her silence ... could suggest to the finder of fact an unwillingness to be forthcoming ...” *Id.* The Court held that the petitioner was entitled to an evidentiary hearing on whether the juror was biased. *Id.* at 442. See also *Fields v. Woodford*, 309 F.3d 1095, 1106 (9<sup>th</sup> Cir. 2002), *amended in part*, 315 F.2d 1062 (“Here, there is no credibility determination to which we owe deference, and in the absence of one it is difficult for us to say that Hilliard was not intentionally misleading or to accept his statement of impartiality at face value. Under the circumstances, we conclude that an evidentiary hearing is appropriate.”).

Yates' juror, by planning to write a book about the case while testimony was ongoing, adopted a financial incentive in the outcome of the case. Certainly a book about Yates' trial would arguably carry more cachet if it were written by a juror who participated in sentencing Yates to death. Moreover, the juror at issue did not disclose her plan—or her lunchtime reproduction of her trial notes—to the court and the parties. Accordingly, the parties were precluded from questioning the juror about the circumstances surrounding her alleged misconduct, and about its potential interference with her ability to be fair and impartial.

The conduct of this juror—if true as alleged—compromised Yates' right to have his sentence determined by a fair and impartial jury. This Court should order an evidentiary hearing on this claim.

**CLAIM NO. 16:**     The Process of “Death Qualification” Violates the State Constitutional Guarantee that the Right to a Jury Trial Shall Remain “Inviolate.”

Facts Relevant to Claim

During voir dire at Yates' trial, a number of jurors were excused for cause when they expressed doubts about their ability to vote for a death sentence.

### Need for an Evidentiary Hearing

This claim does not rely upon extra-record evidence, and can be resolved without an evidentiary hearing.

### Argument on the Merits

#### ***Introduction***

This Court should overrule *State v. Brown*, 132 Wash.2d 529, 940 P.2d 946 (1997), in which the Court held that the state constitutional right to a jury permits death qualification.

Historically, this state has employed a jury in capital sentencing because a death sentence must reflect a community-based judgment that the sentence constitutes proper retribution. And a jury is significantly more likely than a judge to “express the conscience of the community on the ultimate question of life or death.” *See e.g., Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968). As Justice Stevens pointed out: “Juries—comprised as they are of a fair cross-section of the community—are more representative institutions than is the judiciary; they reflect more accurately the composition and experiences of the community as a whole, and inevitably make decisions based on community values more reliably, than can that segment of the community that is selected for service on the bench.” *Spaziano v. Florida*, 468 U.S. 447, 486-87, (1984).

A jury must be drawn from a fair cross-section of the community. The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. “Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case .... [The] broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.” *Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975), citing *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968).

The process of death qualification—*i.e.*, removing potential jurors who

are willing to follow the law, but who may be substantially impaired in their ability to impose a death sentence—results in a jury whose composition reflects only a portion of the community from which it is drawn.

***The Right to a Jury Trial Shall Remain Inviolable***

Our state constitution guarantees that the right to a jury trial shall remain “inviolable.” Excluding citizens from serving as jurors in a capital case based on scruples against imposing a death sentence violates that guarantee, especially where those scruples would not interfere with the prospective juror’s ability to fairly decide whether the defendant is “guilty” or “not guilty.”

This Court upheld the process of death qualification under our state constitution in *Brown, supra*. This Court did so almost entirely on the reasoning that at the time Const. art. I, §§ 21 and 22 were adopted, Code of 1881 § 1083, p. 202, provided: “No person whose opinions are such as to preclude him from finding any defendant guilty of an offense punishable with death, shall be compelled or allowed to serve as a juror on the trial of any indictment for such an offense.” The *Brown* Court then concluded: “As that passage indicates, preexisting law supports the process of death qualification. And, as the State points out, no preexisting body of state law supports a broader interpretation of Const. art. I, § 21 and § 22 in this

context.” *Id.* at 597.

To the contrary, preexisting law only supported the exclusion of a juror who could not fairly determine guilt based on opposition to the death penalty. In other words, preexisting law only supported the exclusion of a “nullifying” juror. The current practice of death qualifying removes jurors from the guilt phase who would not be impaired in any manner during that trial.

### ***Death Qualification and Bifurcation***

Death-qualification is a practice of recent origin in the long history of capital punishment. It was not used in the courts of Britain's American colonies, or in the courts of England. No precedents are cited from British courts upholding an exclusion for cause of a death-scrupled juror. Prospective jurors in Britain were not asked their views on this subject or any subject. Instead, under British law, a prospective juror could be challenged for cause on one of four grounds: *propter honoris respectum* (where the juror was a peer), *propter defectum* (for want of qualification in respect of age), *propter affectum* (partiality based on a relationship with a party or from a stated partiality), and *propter delictum* (crime committed previously by the prospective juror). The category *propter affectum* comes closest to death-qualification since it relates to partiality. However, it was

not used to determine whether potential jurors had reservations about capital punishment, or to exclude them.

Death-qualification was devised in the United States in the early nineteenth century, where it appeared initially in scattered statutes and court decisions. The earliest reported case in which the prosecution raised the matter by moving to exclude a juror for cause was *Commonwealth v. Leshner*, which involved a capital murder prosecution in a state court of Pennsylvania. At the time in Pennsylvania, in conformity with British practice, there was no procedure to ask jurors their beliefs about capital punishment. Nonetheless, a prospective juror told the judge, apparently spontaneously, “[t]hat he had conscientious scruples on the subject of capital punishment, and that he would not, because he conscientiously could not, consent or agree to a verdict of murder in the first degree, death being the punishment, though the evidence required such a verdict.” Upon hearing this statement, the prosecutor challenged for cause and the trial judge excused the man from jury service. *Commonwealth v. Leshner*, 17 Serg. & Rawle 155 (Pa. 1828).

By the late nineteenth century, exclusion for cause of death-scrupled prospective jurors became accepted practice in the United States. See Annotation, *Prejudice Against Capital Punishment as Disqualifying Juror in*

*Criminal Case*, 1912A Am. Ann. Cas. 786 (1912); Francis Wharton, *A Treatise on Criminal Pleading and Practice* § 664 (9th ed. 1889). Death-qualification was practiced, reported the U.S. Supreme Court in 1892, “by the courts of every State in which the question has arisen, and by express statute in many States.” *Logan v. United States*, 144 U.S. 263, 298 (1892).

This was, of course, prior to the “modern” concept of bifurcation. In other words, jurors were excluded only where they would not vote to convict.

Today, jurors excused based on “death qualification” rarely, if ever, indicate that their anti-death penalty feelings would prevent them from fairly deciding whether the State has proved the elements of the crime beyond a reasonable doubt. Certainly, that is true in this case. None of the jurors who were excused for cause because they had scruples against imposing death indicated they could not fairly decide the guilt/innocence question. Thus, the process of death qualification removes jurors from sitting in a case where those jurors would not have been challengeable for cause at the time the constitution was adopted. The solution mandated by the constitutional protection is to either abolish death qualification or impanel two juries—one for each of the two bifurcated stages of a capital case.

### *Gunwall Analysis*

Whether the Washington Constitution should be independently analyzed as granting more protection than the federal constitution is determined by examining six nonexclusive factors set forth in *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986). Those factors are: (1) the textual language of the state constitutional provision at issue; (2) differences in the parallel texts of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) structural differences between the federal and state constitutions; and (6) matters of particular state or local concern.

The first *Gunwall* factor requires this Court to examine the text of the state constitutional provisions at issue. Const. art. I, § 21 provides that “[t]he right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record....” Const. art. I, § 22 (amend. X) provides that “[i]n criminal prosecutions the accused shall have the right to ... a speedy public trial by an impartial jury....” Const. art. I, § 21 emphasizes the importance of the right to trial by jury, by declaring the right “shall remain inviolate.” Nothing in the state constitutional provisions suggests that death qualifying a jury is prohibited. However, nothing suggests it is permitted.

The second *Gunwall* factor requires this Court to consider significant differences between the texts of parallel provisions of the federal and state constitutions. The Sixth Amendment and Const. art. I § 22 are similar in that both grant the “right to ... an impartial jury.” But Const. art. I, § 21, which declares “[t]he right of trial by jury shall remain inviolate ....” has no federal counterpart. This Court in *Pasco v. Mace*, 98 Wash.2d 87, 653 P.2d 618 (1982), found that difference between the state and federal constitutions significant enough to hold that the right to a jury trial under the state constitution, unlike the federal constitution, extended to the case of any adult criminal offense, including petty offenses.

Under the third *Gunwall* factor this Court must look to common law and constitutional history. Under the fourth *Gunwall* factor we look for guidance to preexisting law, or law existing prior to adoption of the Washington Constitution. *Gunwall*, 106 Wash.2d at 61-62. Mr. Yates has already discussed the constitutional and common law history.

This Court has previously held that the state constitutional jury trial protection ensures that an inviolate right “must not diminish over time and must be protected from all assaults to its essential guarantees.” *Wilson v. Horsley*, 137 Wash.2d 500, 509, 974 P.2d 316 (1999). Under this analysis, the process of death qualification diminishes the right to a jury trial by

diminishing the scope of the community permitted to sit in guilt phase.

The fifth *Gunwall* factor requires this Court to examine the structural differences between the federal constitution and the state constitution. That factor always favors independent state constitutional analysis “because the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the State's power.” *State v. Gocken*, 127 Wash.2d 95, 105, 896 P.2d 1267 (1995), citing *State v. Young*, 123 Wash.2d 173, 180, 867 P.2d 593 (1994).

Under the sixth *Gunwall* factor this Court examines whether the matter at issue is of particular state interest or local concern. In *Taylor v. Louisiana*, the United States Supreme Court stated: The States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may be fairly said that the jury lists or panels are representative of the community. *Taylor v. Louisiana*, 419 U.S. 522, 538, (1975).

In addition, the United States Supreme Court has emphasized there is not “any one right way for a State to set up its capital sentencing scheme.” *Morgan v. Illinois*, 504 U.S. 719 (1992), quoting *Spaziano v. Florida*, 468 U.S. 447, 464, 104 S.Ct. 3154, 3164, 82 L.Ed.2d 340 (1984)). Those statements suggest the death qualification process is a matter of purely local

state concern.

An individual defendant convicted of capital murder by a jury from which some jurors were excluded as death-scrupled can never prove that a non-death-qualified jury would have decided the case to his advantage. Yet, the procedure may violate the state constitution even without a showing that the outcome of the trial would have been different. Indeed, the erroneous exclusion of a juror for cause constitutes a structural error.

Because the process of death qualification undoubtedly removes jurors from sitting in guilt phase who would not have been removable based on the law at the time the state constitution was adopted, the process violates the constitutional protection. Thus, we must next ask if there is a solution that complies with the constitutional guarantee. One option is that the states can impanel two separate juries, one for the guilt phase and one for the trial. Petitioner admits there are some serious problems with this option. It entails enough cost and complexity. On the other hand, it makes little sense for the State to argue that it must have a unified jury because of cost and convenience when it is arguably much cheaper and more convenient to dispense with the death penalty and its lengthy appeals process altogether.

The more acceptable solution is for the State to carry on (if they must carry on with the death penalty) with unified, non-death-qualified juries.

This will certainly lead to some situations when the death penalty cannot be applied. However, the State must face this “luck of the draw” issue, and it is improper to argue that the defendant’s constitutional right must yield to the State’s interest in improving its chances in the luck of the draw. The prosecution must simply accept that as long as significant numbers of people are opposed to death sentences, there will be some cases when they cannot get the death penalty.

### ***Conclusion***

“I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty.” These are the words of Justice Blackmun, dissenting in *Furman v. Georgia*, and voting to *uphold* the death penalty. *Furman v. Georgia*, 408 U.S. 238, 405 (1972) (Blackmun, J., dissenting). A common reaction to a proposal to end death qualification is to say that the end of the death qualification process would mean the end of the death penalty altogether, but this is not necessarily true. There will always be some communities where it will be easier to empanel a pro-death jury. Prosecutors could still rely on their peremptory challenges to exclude those whom they thought would not give the result they want.

This Court should overrule that portion of *Brown* holding that the state constitution permits “death qualification.”

**CLAIM NO. 17:** Trial Counsel's Failed to Conduct a Competent Voir Dire. If Counsel Had Done So, There is a Reasonable Likelihood of a Different Outcome.

A review of the trial record reveals that defense counsel failed to conduct an adequate voir dire. Counsel failed to ask effective questions designed to ferret out potential jurors' true feelings on capital punishment and potential biases relative to Yates' case. In response to the questions counsel did ask, jury venire members often gave ambiguous and conflicting answers. Despite these ambiguous responses, counsel failed again by not conducting adequate follow up questions to determine which jurors were unqualified to serve on a capital jury. There were also instances when jurors gave responses which would have prompted an effective attorney to challenge the juror for cause. Trial counsel, however, failed to challenge any of these particular jurors. *See Declaration of Matthew Rubenstein.*

The Sixth and Fourteenth Amendments of the United States Constitution guarantee a capital defendant the right to a fair trial before a panel of impartial and indifferent jurors. *Morgan v. Illinois*, 504 U.S. 719, 728 (1992); *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988); *Duncan v. Louisiana*, 391 U.S. 145, 147-158 (1968); *Turner v. Louisiana*, 379 U.S. 466, 471-473 (1965); *Irwin v. Dowd*, 366 U.S. 717, 722-723 (1961).

Death qualification, which “[limits] the State’s power to exclude” jurors for cause based upon their conscientious scruples against the death penalty, *Wainwright v. Witt*, 469 U.S. 412, 423 (1985), is governed by the same standard. *See Morgan*, 504 U.S. at 728, 734-35 (“jurors with views preventing or substantially impairing their duties in accordance with their instructions and oath...whether they be unalterably *in favor of or opposed to* the death penalty in every case...by definition are ones who cannot perform their duties in accordance with the law”) (emphasis added).

In *Morgan v. Illinois*, the Supreme Court confirmed, as it had previously suggested in *Ross v. Oklahoma*, that, in order to protect a capital defendant’s right to a fair trial, a juror is properly removed for cause (life qualified) if it becomes clear that the juror’s views in favor of the death penalty would “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” *Id.* at 728-729 (quoting *Wainwright v. Witt*, 469 U.S. 412, 424 (1985); *Adams v. Texas*, 448 U.S. 38, 45 (1980)). In *Morgan*, the Court “reiterate[d]” that a juror, for example, who would “automatically” impose a death sentence following conviction for murder is properly excluded under this standard. *Morgan*, 504 U.S. at 729, 736. Such “automatic death penalty” (ADP) jurors are properly excused because they “obviously deem mitigating evidence to be irrelevant

to their decision to impose the death penalty; they not only refuse to give such evidence any weight but are also plainly saying that mitigating evidence is not worth their consideration and that they will not consider it.”  
*Id.* at 736.

The *Morgan* mandate of life qualification teaches that any juror whose ability to follow the trial court’s instruction to consider the defendant’s mitigating evidence is substantially impaired must be excused for cause. *Id.* In other words, if a juror is “mitigation impaired” – meaning he or she cannot or will not meaningfully consider and give effect to any mitigation evidence relevant to the defendant’s case, that juror is not qualified.

In sum, a capital defendant’s constitutional right to a fair trial is protected -- and the constitutional mandate satisfied -- only where each individual juror actively considers all relevant mitigating evidence as a meaningful part of his or her life or death decision.

Trial counsel failed to protect his right to a fair trial through a series of unreasonable and prejudicial errors and omissions.

Furthermore, counsel’s behavior sunk below the ABA Guidelines, 10.10.2(b), which provides that counsel should be familiar with the precedents relating to questioning and challenging of potential jurors, including the procedures surrounding “death qualification” concerning any

potential juror's beliefs about the death penalty. Counsel should be familiar with techniques: (1) for exposing those prospective jurors who would automatically impose the death penalty following a murder conviction or finding that the defendant is death-eligible, regardless of the individual circumstances of the case; (2) for uncovering those prospective jurors who are unable to give meaningful consideration to mitigating evidence; and (3) for rehabilitating potential jurors whose initial indications of opposition to the death penalty a number of cases as "guides to determining what is reasonable." *Williams v. Taylor*, 529 U.S. 362, 396 (2000); *Wiggins v. Smith*, 539 U.S. 510, 522 (2003); *Rompilla v. Beard*, 125 S.Ct. 2456, 2466 (2005).

Trial counsel's ineffective questioning of ADP, "mitigation impaired," and biased jurors was both unreasonable and prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1984). One of counsel's "most essential responsibilities" was to protect Mr. Yates' "constitutional right to a fair and impartial jury by using voir dire to identify and ferret out jurors who are biased against the defense." *Miller v. Francis*, 269 F.3d 609, 615 (6th Cir. 2001). There was no legitimate strategic reason for counsels' repeated failure to question and completely follow up with each individual juror. Indeed, "[t]he primary purpose of the voir dire of jurors is to make possible

the empaneling of an impartial jury through questions that permit the intelligent exercise of challenges by counsel.” *United States v. Glount*, 479 F.2d 650, 651 (6th Cir. 1973); *see also Mu’Min v. Virginia*, 500 U.S. 415, 431 (1991) (stating that voir dire “serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges”). There was no way to determine which jurors were unqualified to serve on Yates’ jury apart from complete and effective questioning. *See Hughes v. United States*, 258 F.3d 453, 459 (6th Cir. 2001) (stating that potential jurors’ biased attitudes must often be discovered through “circumstantial evidence” because jurors are reluctant to expressly admit them). As a result of counsel’s failures, there is a reasonable probability sufficient to undermine confidence in the outcome that unqualified jurors – those who would automatically impose a death sentence in any case of murder, those who were unable to consider and give effect to mitigating evidence, and those who were prejudiced against Yates because of bias – served on Mr. Yates’ jury and determined his punishment. *See Miller v. Webb*, 385 F.3d 666 (5th Cir. 2005) (finding ineffective assistance of counsel where neither trial counsel nor court asked follow up questions when juror suggested bias, and counsel never attempted to remove the juror for cause or by peremptory strike); *Knese v. State*, 85 S.W.3d 628, 633 (Mo.

2002) (finding ineffective assistance where counsel failed to question, object to, or strike two jurors whose questionnaires “suggest – although not conclusively establishing – that they would automatically vote to impose death after a murder conviction. . . . At a minimum, counsel should have . . . voir dired to determine whether they could serve as jurors”).

This Court should remand this claim for an evidentiary hearing.

**CLAIMS NO. 18-21:**     The Statutory Question Posed to Yates’ Sentencing Jury Required a Nexus Between the Crime and the Mitigating Evidence Presented, Thereby Preventing the Jury From Considering and Giving Meaningful Effect to the Mitigating Evidence Presented at Trial in Violation of the Eighth and Fourteenth Amendments.

Yates’ Fourteenth Amendment Right to Due Process and His Eighth Amendment Right to a Reliable Sentencing Determination Were Violated When the Prosecutor Improperly Argued That the Jury Need Not Give Effect to Yates’ Mitigating Evidence Because It Did Not Relate to His Crimes.

Yates’ Sixth Amendment Right to Effective Assistance of Counsel Was Violated When Trial Counsel Failed to Object to Prosecutorial Misconduct in Closing Argument Regarding How the Jury Should Consider Mitigating Evidence.

Yates’ Sixth Amendment Right to Effective Assistance of Appellate Counsel Was Violated When Appellate Counsel Failed to Assign Error to Prosecutorial Misconduct in Closing Argument Regarding How the Jury Should Consider Mitigating Evidence.

### Facts Relevant to Claims

At the conclusion of Yates' penalty phase trial, the court instructed the jury on Washington's mandatory statutory question regarding the imposition of a death sentence:

*Having in mind the crime* of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?

CP 4445 (Jury Instruction No. 4) (emphasis supplied); *see* RCW

10.95.060(4) (jury *shall* deliberate upon this question at the conclusion of penalty phase trial). The only other jury instruction which guided the jury in its consideration of mitigation evidence stated:

A mitigating circumstance is a fact about either the offense or about the defendant which in fairness or in mercy may be considered as extenuating or reducing the degree of moral culpability or which justifies a sentence of less than death, although it does not justify or excuse the offense.

The appropriateness of the exercise of mercy is itself a mitigating factor you may consider in determining whether the State has proved beyond a reasonable doubt that the death penalty is warranted.

You are also to consider as mitigating circumstances any other factors concerning the offense or the defendant that you find to be relevant, including, but not limited to, the following:

Whether there is a likelihood that the defendant will pose a danger to others in the future.

CP 4446 (Jury Instruction No. 5); *see also* WPIC 31.07 (on which the instruction was based).

In rebuttal closing argument the prosecutor utilized the court's instructions—and Washington's statutory scheme on which those instructions were based—to argue that the jury must impose a death sentence *unless* Yates could show a nexus between his mitigating evidence and his crimes:

Instruction No. 5 [CP 4446] is extremely important because the definition of “mitigating circumstances” is not as broad as [defense] counsel would lead you to believe. It says that it is a fact about the crime, the offense, or a fact about the defendant which in fairness or in mercy extenuates or reduces the degree of moral culpability or justifies a sentence of less than death.

When you are thinking about what counsel has argued to you as mitigating evidence, you need to put it in this instruction. You need to see, *what is there about the fact that the defendant served in the military that in fairness or mercy somehow extenuates or reduces his moral culpability for the death of Melinda Mercer or the death of Connie Ellis. What is it about that that justifies a sentence less than death for these murders? How does the fact that he was a pilot relate logically to the defendant's moral culpability for killing these two women?*

RP 8290-91 (emphasis supplied). A few moments later the prosecutor returned to this theme:

Counsel has suggested to you that the fact that the defendant has a family should be a mitigating circumstance. And I would urge you to carefully read the instructions. *It is not a fact about the offense or the defendant that reduces his moral culpability. If that were the law, then any time a defendant had procreated, we would not be able to punish him. That is illogical.*

RP 8305 (emphasis supplied).

Trial counsel did not object to these arguments by the prosecutor, and there was no tactical reason for counsel's failure to do so. *Declaration of Roger Hunko*, ¶ 32. Similarly, Yates' counsel on direct appeal did not assign error to the prosecutor's arguments urging the jury to disregard Yates' mitigating evidence if it did not lessen his "moral culpability" for the charged crimes.

#### Need for an Evidentiary Hearing

The jury instructions and the prosecutor's improper arguments are part of the trial record. However, to the extent the State claims that trial counsel's failure to object to the prosecutor's arguments was tactical, an evidentiary will be necessary to resolve that issue. Conversely, if the State does not challenge Mr. Hunko's declaration on this point, then no evidentiary hearing is necessary.

#### Argument on the Merits

[I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer. ***The sentencer must also be able to consider and give effect to that evidence in imposing sentence.*** Only then can we be sure that the sentencer has treated the defendant as a uniquely individual human being and has made a reliable determination that death is the appropriate sentence.

*Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S.Ct. 2934, 106 L.Ed.2d 256

(1989) (emphasis supplied) (citation and quotations omitted) [hereinafter

*Penry I*]; see also *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 250 n.12, 127

S.Ct. 1654, 167 L.Ed.2d 585 (2007) (“the mere ability to present [mitigating] evidence is not sufficient”; jury must be able to give “meaningful effect to mitigating evidence”). The harm standard applied in capital cases involving jury instructions challenged under *Penry I* is “whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.” *Boyde v. California*, 494 U.S. 370, 380, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990). The “reasonable likelihood” standard is less stringent than a preponderance of the evidence standard. *Boyde*, 494 U.S. at 380 (“defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction”).

In *Penry I*, the defendant offered evidence of his mental retardation and childhood abuse during the penalty phase of his capital murder trial. The jury was instructed to answer three “special issues” during its deliberations: whether Penry acted deliberately, whether he posed a future danger, and whether he acted unreasonably in response to provocation. Under then-existing Texas law, an affirmative answer to each of the three questions resulted in a sentence of death. *Penry I*, 492 U.S. at 310. Penry’s jury was not instructed whether and how it could consider and give mitigating effect to the evidence offered by Penry. *Id.* at 320. In reversing

Penry's death sentence and remanding for a new penalty phase trial, the

Court held:

[I]n the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response" to that evidence in rendering its sentencing decision. Our reasoning in *Lockett* and *Eddings* thus compels a remand for resentencing so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty."

*Id.* at 328, quoting *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); and *Eddings v. Oklahoma*, 455 U.S. 104, 119, 102 S.Ct. 869, 71 L.Ed.2d 1 (O'Connor, J., concurring).

Subsequent Supreme Court cases have reaffirmed the holding in *Penry I*. For example, after the Court's decision in *Penry I*, Penry was retried and again sentenced to death. At his second penalty phase trial the jury was again asked to answer the same three "special issues" as at the first trial, but was given the following "supplemental instruction":

You are instructed that when you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's

personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

*Penry v. Johnson*, 532 U.S. 782, 789-90, 121 S.Ct. 1910, 150 L.Ed.2d 9

(2001) [hereinafter *Penry II*]. The Supreme Court again reversed Penry's death sentence, noting that simply giving a "supplemental instruction" regarding "mitigating circumstances" is inadequate to satisfy the constitutional concerns addressed in *Penry I*:

*Penry I* did not hold that the mere mention of "mitigating circumstances" to a capital sentencing jury satisfies the Eighth Amendment. Nor does it stand for the proposition that it is constitutionally sufficient to inform the jury that it may "consider" mitigating circumstances in deciding the appropriate sentence. Rather, the key under *Penry I* is that the jury be able to consider and *give effect to* a defendant's mitigating evidence in imposing sentence.

*Penry II*, 532 U.S. at 797 (italics in original). The Court reasoned that the supplemental instruction conflicted with the "special issues" instructions—the jury could give effect to Penry's mitigating evidence only by answering "no" to one of the "special issues," even if the jury were in fact convinced beyond a reasonable doubt that the answer should be "yes." *Id.* at 797-800. The inconsistencies within the instructions "inserted an element of capriciousness into the sentencing decision, making the jurors' power to avoid the death penalty dependent on their willingness to elevate the

supplemental instruction over the verdict form instructions.” *Id.* at 800 (quotations omitted).

More recently, the Supreme Court emphatically rejected the Fifth Circuit’s practice of screening *Penry* claims for “constitutional relevance,” an approach which resulted in summary rejection of *Penry* claims unless the habeas petitioner could establish a “nexus” between the mitigating evidence and the crime. *Tennard v. Dretke*, 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004). The Court noted that there is an exceedingly low relevance threshold for the admission of mitigating evidence in a capital case, and that “virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances.” *Tennard*, 542 U.S. at 285 (quotations omitted).

The Fifth Circuit’s test [requiring a nexus between mitigation and the crime] has no foundation in the decisions of this Court. Neither *Penry I* nor its progeny screened mitigating evidence for “constitutional relevance” before considering whether the jury instructions comported with the Eighth Amendment.

*Id.* at 284 *see also Abdul-Kabir, supra* (reaffirming *Penry I* and the requirement that a capital sentencing jury be instructed so that it is able to give meaningful effect to mitigating evidence); *Brewer v. Quarterman*, 550 U.S. 286, 127 S.Ct. 1706, 167 L.Ed.2d 622 (2007) (same).

Yates' mitigating evidence during penalty phase focused on four general themes, none of them related to the crimes themselves: (1) Yates came from a good family and had excelled as an athlete in high school; (2) Yates had served his country honorably in the military; (3) Yates had exhibited good behavior in jail since his arrest; and (4) Yates was a Christian whose faith had been of benefit to other jail inmates. Indeed, in penalty phase opening statement defense counsel began by frankly telling the jury that the defense's mitigating evidence would be wholly unrelated to Yates' crimes:

We are not going to try to explain to you why Mr. Yates killed these women. It was wrong. He knows it's wrong. What we are going to try to do is tell you a little bit about Mr. Yates.

RP 7762.

Against this backdrop of mitigating evidence divorced from the crimes themselves, the jury deciding Yates' fate was instructed that in determining whether there were "sufficient mitigating circumstances to merit leniency," it must "[have] in mind the crime[s]" which Yates committed. CP 4445 (Jury Instruction No. 4). This connection between "the crime" and "mitigating circumstances"—a connection drawn in the sole question the jury was asked to answer—created a very real danger that the jury would conclude that it needed to find a nexus between any "mitigating

circumstances” and “the crime” in order to give weight to those mitigating circumstances.

While Jury Instruction No. 5 (CP 4446) provided the jury with an arguably broader definition of what could constitute a “mitigating circumstance,” any benefit that Jury Instruction No. 5 may have provided to Yates was negated in two ways. First, the phrase “Having in mind the crime. . .” in Jury Instruction No. 4 both qualified and narrowed the jury’s use of mitigating circumstances in reaching its penalty decision. And second, the State exploited the apparent nexus requirement of Instruction No. 4 by arguing to the jury—in brazen contradiction of federal constitutional law—that “the definition of “mitigating circumstances” is not as broad as [defense] counsel would lead you to believe,” and that the instructions directed that the jury could only give effect to mitigating evidence that “relate[d] logically” to Yates’ “moral culpability” for his crimes. RP 8290-92, 8305.

The United States Supreme Court has repeatedly looked to the prosecutor’s closing arguments to the jury during penalty phase to assist in determining whether the jury was prevented from giving meaningful effect to mitigating evidence. *See Penry I*, 492 U.S. at 325-26; *Tennard*, 542 U.S. at 288-89; *Abdul-Kabir*, 550 U.S. at 242; *Brewer*, 550 U.S. at 291; *cf. Ayers*

*v. Belmontes*, 549 U.S. 7, 17-18, 127 S.Ct. 469, 166 L.Ed.2d 334 (2006) (upholding California court's denial of *Penry* claim based in part on the fact that trial prosecutor's arguments assumed the relevance of defendant's mitigation evidence).

Given the combined effect of the language of Jury Instruction No. 4 and the prosecutor's closing argument, there is at least "a reasonable likelihood" that the jury applied the instruction in a way that limited its consideration of Yates' non-crime-related mitigating evidence. *See Boyde*, 494 U.S. at 380. Accordingly, this Court should grant the petition.

#### ***Prosecutorial Misconduct***

It is misconduct for the prosecutor to misstate the law during argument in a manner that infringes on a defendant's constitutional rights. *See, e.g., State v. Fleming*, 83 Wash. App. 209, 216, 920 P.2d 1235 (1996), *rev. denied*, 131 Wn.2d 1018 (1997) (reversible misconduct for prosecutor to misstate nature of reasonable doubt by arguing that in order to acquit defendant jury would have to believe that alleged victim was lying).

As discussed above, the State argued to Yates's sentencing jury that it could disregard any mitigating evidence which did not logically relate to Yates's moral culpability for the murders. Given that the defense explicitly eschewed the notion of trying to explain Yates's crimes, the State's

argument was tantamount to telling the jury it could ignore all of Yates's evidence. While the jury was certainly entitled to give whatever effect (or not) to Yates's mitigation as it saw fit, it was flatly contrary to the law for the prosecutor to argue that the jury could refuse to consider that evidence altogether.

### *Ineffective Assistance of Trial Counsel*

Trial counsel did not object to the prosecutor's improper arguments, and had no tactical reason for failing to do so. Failing to object to the prosecutor's improper arguments regarding an issue as fundamental as the jury's consideration of mitigating evidence falls bellow an objective standard of reasonableness for competent capital counsel. There is at least a reasonable probability that one juror would have voted for life had the prosecutor improper arguments been prevented or stricken from the record.

Yates should be granted a new penalty phase trial.

### *Ineffective Assistance of Appellate Counsel*

Effective assistance of trial counsel is guaranteed by the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The right to effective assistance of appellate counsel, on the other hand, is rooted in the due process clause. *United States v. Skurdal*, 341 F.3d 921, 926 (9<sup>th</sup> Cir. 2003).

Nevertheless, the standard adopted in *Strickland* does not only protect criminal defendants at the trial level; it also applies to claims of ineffective assistance of appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000).

To establish that his appellate attorney's representation was constitutionally inadequate, Yates must show that counsel's performance was deficient, and that the deficient performance was prejudicial to his defense. *Strickland*, 466 U.S. at 687. In the appellate context, counsel's failure to discover and raise non-frivolous issues on appeal constitutes deficient performance under *Strickland*. *Delgado v. Lewis*, 223 F.3d 976, 980 (9<sup>th</sup> Cir. 2000), citing *Smith v. Robbins*, 528 U.S. at 285.

The second prong of the *Strickland* inquiry is prejudice. If there is a reasonable probability that, but for appellate counsel's unreasonable errors or omissions, the outcome of the proceeding would have been different, Yates is entitled to relief. *See Strickland*, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

As with the issue of future dangerousness, appellate counsel failed to assign error to the prosecutor's misconduct in arguing that a nexus is required between the crime and any mitigating evidence. Had this issue

been litigated on direct appeal, there is a reasonable likelihood that Yates would have been granted penalty phase relief.

**CLAIM NO. 22:** Cumulative Penalty Phase Error Resulted in a Fundamental Denial of Due Process

Introduction

Mr. Yates next raises a claim of cumulative error. He urges this Court to review his claims of error, especially his claims of penalty phase ineffectiveness, cumulatively.

However, in addition Mr. Yates raises a separate claim of error based on the doctrine of cumulative error premised on the Due Process Clauses of the Fifth and Fourteenth Amendments. Not only should the Court consider the claims raised in this PRP cumulatively, it should weight the PRP errors, along with the errors from the direct appeal.

Argument

Where the cumulative effect of multiple errors so infected the proceedings with unfairness a resulting conviction or death sentence is invalid. *See Kyles v. Whitley*, 514 U.S. 419, 434-35, 115 S. Ct. 1555, 131 L. Ed.2d 490 (1995). As the Ninth Circuit pointed out in *Thomas v. Hubbard*, 273 F.3d 1164 (9th Cir.2001), “[i]n analyzing prejudice in a case in which it is questionable whether any single trial error examined in isolation is sufficiently prejudicial to warrant reversal, this court has recognized the

importance of considering the cumulative effect of multiple errors and not simply conducting a balkanized, issue-by-issue harmless error review.” *Id.* at 1178 (internal quotations omitted) (citing *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir.1996)); see also *Matlock v. Rose*, 731 F.2d 1236, 1244 (6th Cir.1984) (“Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair.”).

Mr. Yates’s penalty phase was infected by numerous errors— ineffective assistance of counsel for failing to investigate and present evidence multiple avenues of mitigating evidence, along with the improper admission of evidence and argument. In at least two instances the harm was most pronounced.

First, counsel’s investigation on the issue of future dangerousness stopped far short of competence. Nevertheless, defense counsel put on this “minimalist” case. Not surprisingly, the State was able to turn the defense failures into their advantage. In some cases, the State’s actions were proper. In other cases, the tactics were improper. However, the jury was left with an incredibly distorted view on the issue of future dangerousness, when these errors are considered cumulatively. In fact, Ms. Corey, one of the trial prosecutors summarizes the cumulative effect of the “future dangerousness”

errors neatly:

The defense case did not prove that Mr. Yates would not present a significant risk

of committing future acts of violence if sentenced to life in prison. Thus, it was very easy to cross-examine the defense witnesses by simply pointing out the limits of their testimony.

However, at the time of trial the State did not possess any affirmative evidence that Mr. Yates would pose a significant risk of committing future acts of violence in prison.

*See Declaration of Corey*, ¶ 12-13.

Thus, it is readily apparent that Mr. Yates' jury sentenced him to death based a severely distorted view of his true risk of dangerousness in prison.

Perhaps more profound are the errors regarding what caused Mr. Yates to kill so many women. Mr. Yates' crimes called out for an explanation. How could a man, seemingly so normal, commit so many murders? The State certainly firmly renewed this question in jurors's minds when they presented improper and inadmissible testimony regarding Mr. Yates's personality profile from a non-psychologist. The upshot of that testimony was not only that Mr. Yates was a serial killer, but that, even in that rare sub-group, he stood out. This was testimony both devastating and improper.

However, not only did the defense attorneys fail to answer the renewed question “why?” they also failed to put the remainder of Mr. Yates’s life in the “normal” category: a man with a family who loves and is loved. Just as importantly, a mitigating explanation was available: Mr. Yates is afflicted with an illness served to compel him to commit these crimes.

In short, an answer to Mr. Safarick’s improper psychological opinion existed and it was very mitigating. However, considered cumulatively, the jury was left with an overwhelmingly negative and overwhelmingly false impression of the facts.

### Conclusion

In short, considering the errors cumulatively, this Court should have no confidence in the “correctness” of Mr. Yates’s death sentence.

**CLAIMS NO. 23-24:**      This Court’s Conduct of the Mandatory Proportionality Review on Direct Appeal Violated Federal Due Process Where the Court Conducted Its Review Utilizing a Deficient and Incomplete Database.

This Court’s Failure to Consider and Compare Similar “Life” Cases as an Integral Part of Proportionality Review Results in an Eighth Amendment Violation Because it Dispenses With a Critical Safeguard Designed to Protect Against Arbitrariness.

## Introduction

This Court's proportionality review on direct appeal failed to consider any similar "life" cases. In addition, this Court's proportionality review failed to adequately consider the mitigation present in this case and then compare it to mitigation in other "life" case. In fact, such a comparison was and is impossible given this Court's failure to enforce the requirement that the aggravated murder reports contain meaningful information about the reasons supporting a life sentence.

In short, this Court's proportionality review on direct appeal utterly failed to comply with the dictates of the statute. As a result, Mr. Yates was denied his federal constitutional right to Due Process of law. In addition, this Court's deficient proportionality review process results in a separate Eighth Amendment violation, either considered in isolation or with the other failed safeguards discussed in this PRP designed to protect against arbitrariness discussed in this PRP.

## Facts Relevant to Claims

On direct review, this Court concluded that the "aggravated murder report" database complied with the statute enabling proportionality review. While noting previous deficiencies in the database, this Court described database as "now overwhelmingly complete." *State v. Cross*, 156 Wn.2d

580, 638, 132 P.3d 80 (2006). This Court continued: “There is an ample amount of detail we can use to compare this case with the others collected, and we have no reason to think that the omitted reports would not be consistent with the completed ones.” 156 Wn.2d at 638.

While it is true that previously missing reports have since been included, it is a gross overstatement that the reports have an “ample amount of detail,” especially with regard to relevant mitigating facts.

Overwhelmingly the aggravated murder reports fail to include any meaningful information about the mitigating factors that justified a life sentence in a particular case. While reports have now been filed for almost every case resulting in an aggravated murder conviction, almost every filed report fails to include mitigation information. Indeed, only when a capital case has been tried to a penalty phase jury is there anything more than cursory information listed describing the mitigation. What that means, practically speaking, is that in *every* case where death was not sought there is *little to no* information about the mitigating facts that a prosecutor found sufficient to justify a decision not to seek a death sentence. Given that prosecutors decide not to seek death in the vast majority of eligible cases, the vast majority of aggravated murder reports are deficient. Thus, while the database may permit a litigant or the Court to compare aggravating facts,

any comparison of mitigation is essentially impossible.

This Court has not sought to shore up this obvious deficiency.

To be clear, Yates relies on the aggravated murder reports that were filed in this Court at the time of the direct appeal decision. He does not, however, append those documents to this petition both because they are voluminous, but more importantly because the documents are already part of the record of this or any other capital case. If the State disputes this factual claim, Yates will painstakingly detail in his reply the minimal “mitigation” information contained in the reports.

#### Argument

Yates makes two arguments. First, he claims that the aggravated murder database remains substantially deficient. The problem is no longer one of quantity. The problem is quality. Petitioner seeks to have this Court conduct proportionality review again, but only after the information missing from so many of the reports is obtained and new reports filed.

Secondly, Mr. Yates argues that this Court, constitutionally speaking, must examine similar cases that have resulted in life sentences when it conducts proportionality review. This Court’s proportionality review on direct appeal included only a comparison to cases where death was imposed. The Court’s failure to consider “life” cases as part of the

mandatory death sentence review violates the Eighth Amendment and results in the application of an unconstitutional capital punishment scheme. Petitioner urges the Court to consider life cases when it conducts proportionality review again.

In short, Yates claims that this Court has failed to (1) conduct meaningful proportionality review, and (2) enforce reporting requirements under Washington's capital sentencing scheme, as is required to ensure that only the most culpable offenders are put to death.

If this Court is unwilling to revisit this issue, then Yates claims that this Court's previous failure to conduct proportionality review utilizing a database that substantially complies with the statutory directives, results in a federal due process violation. *Hicks v. Oklahoma*, 447 U.S. 343, 346, (1980) (a state may create a liberty interest protected by the Due Process Clause of the Fourteenth Amendment if it provides a criminal defendant with a "substantial and legitimate expectation" of certain procedural protections). *See also Campbell v. Blodgett*, 997 F.2d 512, 522 (9th Cir.1992), *cert. denied*, 510 U.S. 1215, 114 S.Ct. 1337, 127 L.Ed.2d 685 (1992) (noting same and finding that state statute created a liberty interest in having the Washington Supreme Court review and make certain findings whether or not the defendant raised particular issues).

### *The Database Remains Deficient*

Recently, this Court acknowledged “that our database of comparable cases has not been timely and faithfully updated by trial courts as required by the statute, and contains many omissions. Many reports were filed years late and are missing data on everything from ethnicity to the mental health of the defendant.” *State v. Cross*, 156 Wn.2d 580, 637, 132 P.3d 80 (2006) (also noting that missing reports had since been added to the database).

However, when the Court conducted its review in this case, it concluded that the database was sufficiently complete. To the contrary, the filed reports are severely deficient when it comes to providing information about the defendant’s history and any proffered mitigation (either to the prosecutor in the filing decision or to the jury).

The basic principle underlying comparative proportionality review is that it is unjust to impose a death sentence upon one defendant when other defendants, convicted of similar crimes with similar facts, receive sentences of life without parole. *State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997). Thus, proportionality review serves as a judicial safeguard against arbitrary and capricious sentences. *State v. Brown*, 132 Wn.2d 529, 555, 940 P.2d 546 (1997).

Proportionality implies consistency and balance in sentences for similar crimes. That is why the statute mandates the collection of data in all aggravated murder cases, not just those where a death sentence is imposed. Thus, to the extent that the missing reports consist of similar cases resulting in a life sentence, they must be factored into the proportionality equation.

In addition, the failure of many trial judges to answer some or many of the questions on the report leads to unreliable results. The aggravated murder “Information Report” is divided into seven parts. The first section seeks information about the defendant, including his general mental health and his state of mind at the time of the crime. RCW 10.95.120(1)(a)-(j).<sup>3</sup> These questions demonstrate that proportionality review in Washington is not only “offense” review, but also “offender” review. In other words, the overriding question is not just whether the punishment fits the crime, *see, e.g., Coker v. Georgia*, 433 U.S. 584, 97 S. Ct. 2861, 53 L.Ed.2d 982 (1977) (death sentence disproportionate for crime of rape), but whether it also fits the criminal. The failure of the reports to contain the information requested in question 1 (a)-(g) makes comparing defendants’ personal history

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<sup>3</sup> The “Information about the Defendant” section is consistently the most incomplete section in the filed reports.

difficult, if not impossible.<sup>4</sup> If proportionality review is to assure consistency, it must not be blind to relevant and comparable cases.

Comparing the crimes on completes half of the legislatively required proportionality review. Comparing the person and the mitigation is the necessary other half. In fact, it is the more critical component of the equation given how seldom death is sought and imposed in this state. In order to conduct proportionality review that complies with the dictates of the statute and the mandates of the Constitution, this Court must discover and compare the reasons that have led to life sentences.

The “mitigation” that is considered and compared as part of the proportionality review must be commensurate with the Constitutional individualization requirement. *See e.g., Tennard v. Dretke*, 542 U.S. 27, 124 S. Ct. 2562, 159 L.Ed.2d 384 (2004) (defining mitigating evidence in the most expansive of terms—as evidence which tends logically to prove or disprove some fact or circumstance which a decision-maker could reasonably deem to have mitigating value).

Only when that information is in hand, can the extent of its mitigating or persuasive value be accurately assessed. Over the last several years, the United States Supreme Court has found that the quality of certain types of

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<sup>4</sup> This problem was exacerbated in this case due to trial counsel’s ineffectiveness by failing to investigate and present the available mitigating evidence.

mitigating factors is so compelling that the Supreme Court concluded the Eighth Amendment proportionality guarantee categorically prohibits death sentences. *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L.Ed.2d 1 (2005); *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L.Ed.2d 335 (2002). The Supreme Court could not have come to this conclusion without objective data. *Id.*

The state legislature instructed this Court to collect and consider that same type of objective information in administering our death penalty. If, for example, prosecutors and juries overwhelmingly reject death sentences for individuals who are willing to confess and plead guilty no matter how “aggravated” the crime, then Yates’s death sentence is disproportionate. If prosecutors and juries overwhelmingly reject death sentences for individuals who suffer from a psychiatric sexual disorder which compels behavior, the Yates’s death sentence may not be disproportionate (since trial counsel failed to investigate and present such evidence), but that information could inform this Court’s prejudice analysis. In other words, this Court needs to determine what mitigating factors lead to life, just as it analyzes those aggravating factors that lead to death.

Certainly, it is clear from sources other than the aggravated murder reports that confessing and offering to plead guilty are among the most

mitigating of any available facts. Gary Ridgway was permitted to plead guilty to 48 counts of aggravated murder and receive 48 life sentences, despite the lack of any other claimed mitigation. *See* [http://en.wikipedia.org/wiki/Gary\\_Ridgway](http://en.wikipedia.org/wiki/Gary_Ridgway) last visited on June 8, 2009. As a result, one of the former prosecutors who sought and obtained a death sentence *on this case* now believes the death sentence is disproportionate. *See Declaration of Barbara Corey.*

Indeed, the Spokane Prosecutor felt that Mr. Yates's willingness to confess and plead guilty was sufficient mitigation to justify a life sentence for thirteen aggravated murders. Mr. Yates's was undeniably willing to do the same for the Pierce County cases. Thus, the only explanation for the different decisions by different prosecutors is a difference in weighing the same mitigation—the very definition of arbitrariness.

As enticing as it seems, Yates does not endeavor to set forth his own proportionality calculations in this PRP for one simple reason: he cannot do so as long as the database is incomplete. Likewise, he cannot replicate what the database should include on his own.

Only the trial judge can file an aggravated murder report. RCW 10.95.120. Although counsel for Mr. Yates could presumably gather information about the facts arguably relevant to a defendant's aggravated

murder conviction, and could even submit that information in the form specified by statute, such information would certainly not be viewed as an acceptable substitute for what the statute makes mandatory. Second, the statute makes it clear that the duty to file an aggravated murder report falls on the trial court. The reports are sent to this Court. The reports are not sent to defense counsel, other than counsel on the case, and even that requirement is often neglected. Even if current counsel have the means of adequately researching the sufficiency of the database, which Mr. Yates does not concede, this Court has the obligation to ensure that trial judges obey the law. Defense counsel have no authority to enforce the clear requirements of the statute. This Court does.

In this case, Mr. Yates was prejudiced because a necessary component of his death sentence review, mandated by the people of the state through the Legislature, has not been performed. Mr. Yates could not waive proportionality review even if he tried. *Dodd, supra; Sagestegui, supra.* This Court should not *de facto* waive proportionality review for him.

***Proportionality Review Must Involve a Comparison of Similar  
“Life” Cases***

Justice Stewart was the principal architect of our Nation’s death penalty jurisprudence during his tenure on the Court. In his separate opinion in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)

(*per curiam*), he observed that death sentences imposed pursuant to Georgia's capital sentencing scheme were "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Id.*, at 309 (concurring opinion).

The Georgia Legislature amended its capital sentencing scheme after *Furman*, and a challenge to the new scheme reached the Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). The decision in that case to uphold the later enacted statute was founded on an understanding that the new procedures the statute prescribed would protect against the imposition of death sentences influenced by arbitrary or impermissible factors (such as race). Among the new procedures was a requirement that the Georgia Supreme Court "compar[e] each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate." *Id.*, at 198 (joint opinion of Stewart, Powell, and Stevens, JJ.). It seemed plain that the state court consideration of "similarly situated defendants" included those who had *not* been put to death because that inquiry is an essential part of any meaningful proportionality review.

That assumption was confirmed a few years later in *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). The question in that

case was whether a death sentence was valid notwithstanding the jury's reliance on an invalid aggravating circumstance. As in *Gregg*, the decision to uphold the sentence “depend[ed] in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality.” 462 U.S. at 890. In response to the certified question regarding the operation of the State's capital sentencing scheme, the Georgia Supreme Court expressly stated that its proportionality review “uses for comparison purposes not only similar cases in which death was imposed, but similar cases in which death was not imposed.” *Id.*, at 880, n. 19. That approach seemed logical and judicious because, quite obviously, a significant number of similar cases in which death was not imposed might well provide the most relevant evidence of arbitrariness in the sentence before the court. “When a defendant's life is at stake, th[is] Court has been particularly sensitive to insure that every safeguard is observed.” *Gregg*, 428 U.S., at 187 (joint opinion of Stewart, Powell, and Stevens, JJ.).

The salient aspects of Georgia's capital sentencing scheme have changed little since evaluated in *Gregg* and *Zant*. Although Washington's sentencing scheme is unique, it is largely modeled on the Georgia scheme. In Georgia, the State must prove at least one of an enumerated list of

aggravating circumstances for an offense to be death eligible. Ga.Code Ann. § 17-10-30(b) (2008). The jury then has complete discretion to weigh all aggravating and mitigating factors in determining the sentence. Georgia law requires the State Supreme Court to review each death sentence to determine whether it “was imposed under the influence of passion, prejudice, or any other arbitrary factor” and whether it “is excessive or disproportionate to the penalty imposed in similar cases.” § 17-10-35(c). The trial court must in each case transmit the entire record and transcript, along with a special report prepared by the trial judge, to facilitate appellate review. § 17-10-35(a).

Admittedly, it is difficult to state with any precision how this Court conducts proportionality review since the test seems to change from case to case. The only constant is that the Court has never found a death sentence it concluded was disproportionate.

Even prior to direct review in this case, this Court has significantly narrowed the universe of cases from which it culls comparators. It now appears to be the court's practice *never* to consider cases in which the jury sentenced the defendant to life imprisonment.

Certainly, that is exactly what happened in this case on direct review.

On direct appeal, this Court's comparison to other cases in the database was largely confined to a small sample of cases where death was sought and imposed. This Court started by noting "while Cross murdered three women (his wife and two of her daughters), Yates murdered two, and as the *Cross* court pointed out, death sentences have previously been handed down in cases with fewer than three victims. 156 Wn.2d at 632 (citing *State v. Woods*, 143 Wn.2d 561, 616, 23 P.3d 1046 (2001); *State v. Stenson*, 132 Wn.2d 668, 759, 940 P.2d 1239 (1997); *State v. Elledge*, 144 Wn.2d 62, 66, 26 P.3d 271 (2001)). Second, the *Cross* court recognized that "[t]here was a marked level of cruelty" in the murders: "At least one of Cross's victims was conscious and pleaded with him to either spare her life or kill her more quickly." *Id.* Yates' crimes were similarly cruel. For example, the evidence indicated that, after Yates shot Mercer three times with a .25 caliber weapon and tied four plastic grocery bags over her head, she survived long enough to chew through the two innermost bags and partially suck one bag into her mouth. 56 VRP at 5538-39; 57 VRP at 5626-28. This Court concluded, "Yates' crimes, in fact, reflected a more calculated cruelty than did Cross's crimes. The degree of planning in Yates' crimes was similar to that seen in the murders committed in *Pirtle*, 127 Wn.2d 628, 904 P.2d 245, and *Brett*, 126 Wn.2d 136, 892 P.2d 29, and Yates selected his victims from a

particularly vulnerable class. *Dodd*, 120 Wn.2d 1, 838 P.2d 86. “In sum, although Cross's and Yates’ death sentences arose from crimes involving a similar number of victims and a similar degree of cruelty, the nature and number of the aggravating factors in the present case mark Yates’ crimes as surpassingly reprehensible.”

Thus, it appears that the Court actively sought to discover and compare the aggravating facts in this case with the aggravating facts in other cases where death was imposed. However, the Court failed to compare the aggravating facts in this case with the aggravating facts in even a single case where life was imposed. The Court’s failure to conduct the full, statutorily mandated proportionality review is more profound when one examines the mitigation side of the equation. To begin, this Court narrowed its focus to “personal history,” which it neatly characterized as a “stable, happy childhood.” Then, it chose to view this mitigation as aggravation. Most importantly, this Court did not undertake any analysis of how often, if ever, a “stable, happy childhood” is a factor that results in a life sentence. In other words, this Court failed to conduct comparative review.

Of course, Yates’s childhood is not the only and not the primary mitigating factor in this case. Instead, the most compelling mitigation in this case is Mr. Yates’s willingness to confess and plead guilty. That factor,

completely unmentioned in this Court's proportionality review, was sufficient to support the Spokane Prosecutor's decision not to seek a death sentence for thirteen murders committed by Yates. It was sufficient to justify a life sentence in the Gary Ridgway case. Thus, it appears that the willingness to confess and plead guilty is extraordinarily mitigating in the judgment of prosecutors. This Court must then enforce proportionality. However, it cannot do so when it does not have the relevant information and, in any event, refuses to analyze that information.

### Conclusion

Rather than perform a thorough proportionality review to mitigate the heightened risks of arbitrariness and discrimination in this case, the Washington Supreme Court carried out an utterly perfunctory review. The result of such this Court's truncated review—particularly in conjunction with the remainder of the Washington scheme, which does not cabin the jury's discretion in weighing aggravating and mitigating factors—is the arbitrary or discriminatory imposition of death sentences in contravention of the Eighth Amendment.

Mr. Yates is entitled to death sentence review that comports with the statute and the constitution.

**CLAIM NO. 24:** Washington Death Penalty is Hopelessly Arbitrary in Application. As a Result, It Violates the Protection Against Cruel and Unusual Punishment.

Over three and half decades ago, in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 333 L.Ed.2d 346 (1972), the United States Supreme Court concluded that existing death penalty statutes across the United States violated the Eighth Amendment's prohibition against cruel and unusual punishment because they failed to protect against arbitrary, discriminatory, and random application of capital punishment.

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders . . . many just as reprehensible as these, the petitioners are among a *capriciously selected random handful* upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so *wantonly and so freakishly imposed*.

*Furman*, 408 U.S. at 309-10 (Stewart, J., concurring; citations and footnotes omitted; emphasis added).

Writing for the majority, Justice Stewart concluded that executing only 15-20% of the convicted rapists and murders in those jurisdictions where the

death penalty was an available punishment offended the Eighth Amendment.<sup>5</sup>

In 1981, Washington State, in response to *Furman*, enacted RCW 10.95.<sup>6</sup> A year later, in *State v. Bartholomew*, 98 Wn.2d 173, 654 P.2d 1170 (1982), *reversed on other grounds*, 363 U.S. 1203, 103 S.Ct. 3530, 77 L.Ed.2d 1383 (1983), this Court was asked whether RCW 10.95 protected against the dangers of arbitrary death verdicts. This Court rejected the challenge and took solace in the statute's prophylactic features that were considered safeguards against the concerns outlined in *Furman*. *Id.* at 192. Only one justice dissented on this issue.

It is important to emphasize that Eighth Amendment cruel and unusual punishment jurisprudence is not primarily concerned with the theoretical construction of death penalty statutes, but with how those statutes actually operate in practice. “The high service rendered by the ‘cruel and unusual’ punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and

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<sup>5</sup> Justice White added that, “[T]he death penalty is exacted with great infrequency even for the most atrocious crimes, and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.” *Id.* at 313. The infrequency of death sentences was noted by all five concurring Justices in the *Furman* majority. *See Furman*, 408 U.S. at 248 n. 11 (Douglas, J., concurring); *id.* at 291-95 (Brennan, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 312 (White, J., concurring); and, *id.* at 354 n.124 and 362-63 (Marshall, J., concurring).

<sup>6</sup> The statute requires trial court judges to file with the Washington State Supreme Court a “trial report” which contains certain information about every aggravated murder conviction. RCW 10.95.120.

nonarbitrary, and to require judges to see to it that general laws are *not applied* sparsely, selectively, and spottily to unpopular groups.” 408 U.S. at 256 (emphasis added). As Justice Brennan eloquently wrote in his concurring opinion:

In determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the Clause—that the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it *inflicts* upon some people a severe punishment that it *does not inflict* upon others. Indeed, the very words ‘cruel and unusual punishments’ imply condemnation of the arbitrary *infliction* of severe punishments.

408 U.S. at 274 (Brennan, J., concurring) (emphasis added).

Only three years ago, in *State v. Cross*, 156 Wn.2d 580, 132 P.3d 80, *cert. denied*, 549 U.S. 1022, 127 S.Ct. 559, 166 L.Ed.2d 415 (2006), a bare majority of this Court, found the procedures set forth in RCW 10.95 were sufficient to protect against arbitrary and unfair death sentences. The four justice dissent, however, concluded that twenty-four years of the Washington’s death penalty statute had demonstrated the prophylactic measures did not protect against the concerns expressed in *Furman*.

In the years since this Court decided *Cross*, the validity of this conclusion has become even more apparent. It has become even more clear that there is no reasoned basis to distinguish those cases in which the death penalty is sought and those in which it is not, and in the subset of cases

where the death penalty is sought, there is no way to distinguish those cases where the jury imposes a death penalty from those in which juries impose only a life sentence. Indeed, this case may provide the example *par excellence*. Mr. Yates received life sentences for thirteen murders and a death sentence for two. All of the other factors were identical. The only way to distinguish the outcomes is point to the unguided and arbitrary exercise of prosecutorial discretion.

To the extent that “statutory protections” against the arbitrary and capricious imposition of the death penalty exist in RCW 10.95, they have failed.

A death sentence is imposed in Washington *in less than 1%* of the cases for which the punishment is available, a full 19% *less* than the 20% figure found unconstitutional in *Furman*. In the last 45 years, Washington State has, on average, executed less than one person every ten years. Since 1975, there have been four executions. Three of the condemned were “volunteers” who requested and/or did not challenge the death sentence. Only Charles Campbell was executed involuntarily. Arbitrariness and caprice are the inevitable side effects of such a rarely-imposed punishment of death.

Since the enactment of RCW 10.95 there have been in excess of 7,000 homicide cases filed in Washington State. Of those, there have been nearly 300 convictions for aggravated first-degree murder.<sup>7</sup> Of these aggravated murder convictions, the punishment of death was sought in 80 cases and imposed in only 31 cases.<sup>8</sup> However, the majority of death sentences in Washington have been reversed and never reinstated. *Washington State Bar Association, Final Report of the Death Penalty Subcommittee of the Committee of Public Defense*, pg. 6-10 (December 2006, Adopted by the Washington State Bar Association Board of Governors April 13, 2007) [hereinafter WSBA Report]. The number of death sentences sought and imposed has diminished dramatically even though the number of aggravating circumstances that qualifies a crime for a possible death sentence has expanded. *See* Laws of 2003, Ch. 53, § 96; Laws of 1995, Ch. 129, § 17 (Initiative Measure No. 159); Laws of 1994, Ch. 121, § 3.

The Legislative response to *Furman* has failed in Washington. Nothing prevents this Court from finding that, despite the best intentions of the Legislature, it did not create a capital sentencing scheme that is fair and just. It created a scheme even more arbitrary than those considered in

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<sup>7</sup> Information from reported cases and trial judge reports submitted pursuant to RCW 10.95.120.

<sup>8</sup> While it is true that most of these have been overturned on appeal, that in itself demonstrates, that not only is the death penalty sought arbitrarily, it is generally imposed only after an illegal or unfair trial.

*Furman*. For whatever reason – be it “the evolving standards of decency that mark the progress of a maturing society,” *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), or the fact that Washington’s capital sentencing scheme is implemented by fallible human beings – a death sentence in Washington is truly akin to being struck by lightning. No meaningful basis can be discerned to distinguish the cases – even among the most extreme – where death is imposed from those in which it is not. *See*, D. McCord, “Lightning Still Strikes: Evidence From the Popular Press that Death Sentencing Continues to be Unconstitutionally Arbitrary More Than Three Decades After *Furman*,” 71 BROOKLYN L.REV. 797 (2005). *See also*, *State v. Cross*, *supra* (J. Johnson, C., dissenting with three justices joining).

Since 1981, nearly 300 people convicted of aggravated first degree murder in Washington. Trial reports have been filed with this Court in 291 of those cases.<sup>9</sup> Of these aggravated murder convictions, the punishment of death was sought in eighty cases and imposed in thirty-one. All thirty-one

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<sup>9</sup> It is known that trial reports have not been filed in four cases: Daniel Tavares, Jr.; Mario Mendez; Jose Luis Sanchez; and Brandon Backstrom.

death sentenced imposed were men, no woman has ever been sentenced to death.<sup>10</sup>

Eighteen of the death sentences imposed have been reversed and only one has resulted in subsequent death sentences. None of those persons released from death row have committed later murders or escaped.

In addition, since 1981, three men who did not challenge their sentences on appeal were executed: Westley Dodd, Jeremy Sagastegui, and James Elledge. None were convicted of a single-victim murder. *State v. Dodd*, 120 Wn.2d 1, 838 P.3d 86 (1992); *State v. Sagastegui*, 135 Wn.2d 67, 954 P.2d 1211 (1998); *State v. Elledge*, 144 Wn.2d 62, 26 P.3d 271 (2001).

Since 1981, only one person, Charles Campbell, has been executed in Washington against his will. Mr. Campbell was executed on May 1994. He was sentenced to death for the murder of two women and a child who he killed after absconding from a work furlough program. He had been placed in the program after he was convicted of assaulting and raping one of the women he later murdered.

The purposes of capital punishment are retribution and deterrence. *Gregg v. Georgia*, 428 U.S. 153 (1976). Neither principle is advanced by

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<sup>10</sup> *Washington State Bar Association, Final Report of the Death Penalty Subcommittee of the Committee of Public Defense*, pg. 6 - 10 (December 2006, Adopted by the Washington State Bar Association Board of Governors April 13, 2007)[hereinafter *WSBA Report*]. The full *WSBA Report* can also be found on the Washington State Bar Association's web page: <http://www.wsba.org/lawyers/groups/committeonpublicdefense.htm>

having one involuntary execution every forty-five years and executing a single-victim crime when the “worst of the worst” are given life sentences. In *State v. Cross*, 156 Wn.2d 580, 132 P.3d 80 (2006)(C. Johnson, J., dissenting)(Where the death penalty is not imposed on Gary Ridgway, Ben Ng, and Kwan Fai Mak, who represent the worst mass murders in Washington’s history, on what basis do we determine on whom it is imposed?).<sup>11</sup>

Jurists who have historically upheld the death penalty have begun to question its validity. Justice Stevens recently concluded that “the death penalty represents ‘the pointless and needless extinction of life with only marginal contributions to any discernible social or public purpose.’” *Baze v. Rees*, -- U.S. --, 128 S.Ct. 1520, 1551, 170 L.Ed.2d 420 (2008) (Stevens, J., concurring) (quoting *Furman*, 408 U.S. at 312). Oregon Supreme Court Justice Walters urged her colleagues to “consider our state’s experience in imposing the death penalty and to examine its constitutionality anew,” in light of the fact that in 2008, “jurists who had voted many times to affirm

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<sup>11</sup> As for deterrence, hard data demonstrate that this goal is not only equally served by sentences of life without possibility of parole, but *better* served by the less severe punishment. Every year for at least 18 years, the murder rate in death-penalty states has been higher than that in states without the death penalty. Death Penalty Information Center. Even more significantly, the difference in the murder rate between the two groups is now 10 times greater than it was in 1990. *The Death Penalty in 2008: Year End Report* (Death Penalty Information Center), Dec. 2008. States that impose capital punishment suffer a murder rate that is over 40% higher than states without the death penalty. *Id.* And although the annual number of death sentences has declined by 60% nationally since the 1990’s, the murder rate has remained close to constant. *Id.*

sentences of death have reassessed the constitutionality of the death penalty in light of their experiences with its administration and objective evidence of the evolving standards of decency.” *State v. Davis*, 345 Or. 551, -- P.3d -- , 2008 WL 5412451 at \*25 (filed 12/31/08) (Walters, J., concurring).

Mississippi’s Supreme Court Presiding Justice Diaz echoed the previous opinions and also encouraged other members of the bench to reconsider the validity of capital punishment:

The death penalty is, therefore, reduced to “the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment.” *Furman v. Georgia*, 408 U.S. 238, 312, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (White, J., concurring and casting decisive vote). In these 36 years since the high court ruled in *Furman*, American and Mississippian experience have served only to underscore this constitutional truism, and history proffers no reason to believe that the next 36 will not follow accordingly. I cast no illusions for myself that my conclusion will persuade a majority of this Court’s members, whose sober judgments in capital cases I deeply respect, even as I disagree just as deeply. Neither do I doubt that, for the time being, Justice Stevens’ decision to “no longer ... tinker with the machinery of death,” *Callins v. Collins*, 510 U.S. 1141, 1145, 114 S.Ct. 1127, 127 L.Ed.2d 435 (1994) (Blackmun, J., dissenting from denial of certiorari), will fall upon unconvinced colleagues at the high court. But I am convinced that the progress of our maturing society is pointed toward a day when our nation and state recognize that, even as murderers commit the most cruel and unusual crime, so too do executioners render cruel and unusual punishment.

But because I would make today that day, I dissent.

*Doss v. State*, -- So.2d -- , 2008 WL 5174209, \*19 (Miss. 2008).

Other arbitrary factors, such as geographic location, have played an increasing part in Washington's death penalty history. Recent studies demonstrate that, in Washington, whether one is likely to face capital punishment depends upon which county is charged with prosecuting the case. In *State v. Cross*, 156 Wn.2d at 639, the court withheld judgment on this issue because insufficient evidence was presented. Additionally, the court took solace that state funds were available to reimburse counties prosecuting capital cases under RCW 43.330.190, 43.330.200 (Extraordinary Criminal Justice Act [ECJA]) to neutralize the application of the death penalty by county. *Id.*

Since *Cross*, however, the WSBA issued a report that shows just how unequal that application is due to the extraordinary expense of capital litigation. The WSBA concluded that:

At the trial level, death penalty cases are estimated to generate roughly \$470,000 in additional costs to the prosecution and defense over the costs of trying the same case as an aggravated murder without the death penalty and costs of \$47,000 to \$70,000 for court personnel.

Appendix 7 at pg. 32. The report found that these huge increases can and do affect prosecutorial discretion despite the state funds available to smaller counties under the ECJA and concluded:

The high costs of death penalty cases and the lack of state assistance could cause a prosecutor in a county with financial constraints to elect not to pursue the death penalty. Such financial pressures could result in the uneven application of the death penalty across the state.

*Id.* at pg. 33.

Comments from elected prosecutors further support this conclusion:

Prosecutors face a varying degree of pressure to plea-bargain capital cases rather than endure costly trials followed by a decade or more of appeals. A few flatly concede they couldn't afford to go to trial. John R. Henry, prosecutor since 1989 in tiny Garfield County, has never had a death penalty case – and vows he never will. “We’re so small, I could never afford a death-penalty case.”<sup>12</sup>

Franklin County Prosecutor Steve Lowe also echoed this “financial decision standard”, while disputing the defense’s claim that Franklin County had a substantial financial incentive to pursue the death penalty due to budget shortages, he stated:

Death penalty cases aren’t moneymakers for small counties. If there is any financial reason behind filing a death penalty case, it would be not to do so. Substantially more is spent by the county than is ever reimbursed.<sup>13</sup>

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<sup>12</sup> *One Killer, Two Standards*, Seattle Post-Intelligencer (August 7, 2001), Lise Olson. [www.seattlepi.nwsource.com](http://www.seattlepi.nwsource.com).

<sup>13</sup> *Vasquez Attorneys’ Claims Disputed*, Tri-City Herald (July 11, 2001), Janine Jobe. [www.tri-cityherald.com](http://www.tri-cityherald.com).

Pierce County Prosecutor Gerry Horne has indicated that financial costs associated with capital punishment will play a factor in his decision whether to file death notices.<sup>14</sup>

Because counties are liable for the costs associated with capital cases, smaller and less affluent counties are unlikely to seek, and thus, impose a death sentence. The report concluded that most death penalty cases occur in a smaller number of counties, with the majority being initiated in the two largest counties – King and Pierce – with smaller counties rarely, if ever, seeking the same punishment.

The trial reports filed with this Court confirm the *WSBA Report's* findings. From 1981 to 2008, twenty-one counties (53%) had never filed a death notice and jurors in twenty-nine counties (74%) have never imposed it. Over the last ten years (1997 – 2008), the trend has increased to thirty-three counties (85%) have not filed a death notice and jurors in thirty-five of the thirty-nine counties (90%) have not imposed the death penalty. Death has been imposed in only four counties since 1997. Over the last ten years, Washington State has seen a dramatic decline in the imposition of death sentences.

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<sup>14</sup> *High costs force prosecutor to be selective in capital cases. Expensive process rarely results in execution*, Karen Hucks, The News Tribune (South Sound Edition) Tacoma, Wash.: July 4, 2003 at pg. A.01.

It is high time to revisit the question posed in *Furman*. Washington's death penalty can be examined from numerous perspectives. However, from each perspective observed one truth is clear: unconstitutional arbitrariness continues to infect our death penalty.

Frankly, it is also high time we acknowledge that the Court in *McGautha* was correct:

To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.

402 U.S. at 205.

This Court should reverse and dismiss the death penalty in this case. While statutory creation, regulation, and abolition of the death penalty is a legislative matter, enforcement of the Constitution is this Court's mandate.

#### **D. CONCLUSION**

Based on the above, this Court should:

1. Permit Mr. Yates' to either supplement or amend his petition no later than August 1, 2009 (1 year from the mandate). A separate motion addressing this request will follow within the next few days;

2. Once that date has passed, require the State to file a response and set a schedule for Mr. Yates's reply;
3. Direct the trial court to conduct an evidentiary hearing on any claim supported by disputed, extra-record evidence;
4. Permit oral argument;
5. Grant the petition, either providing for a new trial; dismissal of the death penalty; or remanding for a new special sentencing proceeding.

DATED this 8<sup>th</sup> day of June, 2009.

/s/ Jeffrey E. Ellis

Jeffrey Ellis #17139  
Steven Witchley # 20106  
Law Offices of Ellis,  
Holmes & Witchley, PLLC  
705 Second Avenue, Suite 401  
Seattle, WA 98104  
(206) 262-0300  
(206) 262-0335 (fax)  
jeff@ehwlawyers.com

/s/ Ronald Ness

Ronald Ness #5299  
Tricia D. Hahn #36668  
420 Cline Avenue  
Port Orchard, WA 98366  
(360) 895-2042  
(360) 895-3602 (fax)  
info@nesslaw.com

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STATE OF WASHINGTON  
2009 JUN 15 A 8:02  
BY RONALD R. CARPENTER

## OFFICE RECEPTIONIST, CLERK

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**To:** Steven Witchley  
**Subject:** RE: In Re PRP of Robert Yates

Rec. 6-15-09

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**From:** Steven Witchley [mailto:switchley@hotmail.com]  
**Sent:** Sunday, June 14, 2009 8:09 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Subject:** In Re PRP of Robert Yates

Attached is another copy of the PRP which was originally filed on June 8th. This version includes the table of contents and the table of authorities.

Steven Witchley  
Law Offices of Ellis, Holmes & Witchley, PLLC  
705 Second Avenue, Suite 401  
Seattle WA 98104  
(206) 262-0300 office  
(206) 218-8250 cell  
(206) 262-0335 fax

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Lauren found her dream laptop. [Find the PC that's right for you.](#)

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**LIST OF EXHIBITS—PART ONE**

*Verification by Petitioner*

*Declaration of Barbara Corey*

~~*Declaration of Ronald Ness*~~

*Declaration of Matthew Rubenstein*

*Declaration of Roger Hunko*

*Declaration of Richard Fasy*

*Declaration of Robert Yates, Jr.*

*Declaration of Mary Kay High*

*Report of Dr. Berlin*

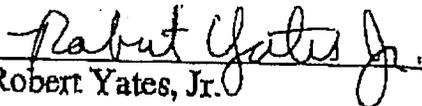
*Curriculum Vita of Frederick S. Berlin, M.D., Ph.D.*

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**VERIFICATION BY PETITIONER**

I, Robert Yates, declare that I have received a copy of the personal  
restraint petition prepared by my attorney and that I consent to the petition  
being filed on my behalf.

Dated this 8<sup>th</sup> day of June, 2009.

  
Robert Yates, Jr.

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DECLARATION OF BARBARA COREY

I, Barbara Corey, declare as follows:

1. I am over 18 and am competent to give this declaration.

*Background and Experience*

2. I was admitted to the practice of law in Washington in 1981. During that time, I have practiced criminal law (trials and appeals) exclusively. I worked for the King County Prosecutor's Office from 1981-1989. I worked for the Pierce County Prosecutor's Office from 1984-2004. Since 2004, I have practiced as a criminal defense attorney.

*Prosecution of Robert Yates*

3. I was one of the prosecutors representing Pierce County in the capital prosecution of Robert Yates for the murders of Melinda Mercer and Connie LaFontaine Ellis.

*Jury Selection*

4. During selection and after individual voir dire, the court room was locked until the venire was seated. I do not recall when the courtroom was reopened

5. During individual voir dire, I do not recall members of the public being present in the courtroom.

6. During the time that Mr. Yates' case was tried, it was not unusual in Pierce County Superior Court for the public to be excluded from the courtroom during voir dire on sensitive topics.

*Penalty Phase Mitigation Presentation*

7. Obviously, I do not know the extent of the defense team's mitigation investigation. Thus, my comments are limited to the defense presentation.

8. I was surprised by the limited information presented by the defense team in the penalty phase. Given the magnitude of Mr. Yates' crimes, I expected the defense to present more mitigating evidence—both quantitatively and qualitatively speaking.

1 9. For example, I was surprised that the defense did not call anyone who was close  
2 to Mr. Yates at the time of the crimes. Although Mr. Yates' father and sister testified briefly, I  
3 was also surprised that the defense did not call additional witnesses who had personal  
4 relationships with Mr. Yates, such as immediate family members.

5 10. Instead, the trial team called witnesses who either knew Mr. Yates before or after  
6 the murders took place, and who had only a brief and/or professional relationship with him.

7 11. Many of Mr. Yates' family members, including his children, were present during  
8 the closing arguments, the penalty phase and possibly during the closing argument in the guilt  
9 phase. Mr. Yates' children were present when the graphic details of their father's crimes were  
10 discussed. The presence of the children, including Mr. Yates' 9 year old son, was startling as the  
11 very graphic details of the murders were discussed at length. Conversely, the defense team  
12 failed to call these witnesses—whose love and affection for their father would have been  
13 virtually impossible to cross-examine.

14 12. The defense case did not prove that Mr. Yates would not present a significant risk  
15 of committing future acts of violence if sentenced to life in prison. Thus, it was very easy to  
16 cross-examine the defense witnesses by simply pointing out the limits of their testimony.

17 13. However, at the time of trial the State did not possess any affirmative evidence  
18 that Mr. Yates would pose a significant risk of committing future acts of violence in prison.

19 14. Thus, our strategy on this point was to demonstrate the defense failure to prove  
20 lack of dangerousness.

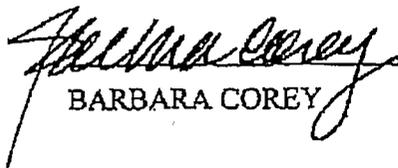
21 15. Finally, I was surprised that the defense did not offer any psychological  
22 explanation for Mr. Yates' crimes. It seems to me that the crucial fact that the defense needed to  
23 explain in this case is how a seemingly normal man with a normal family and a normal job  
24 became a serial killer. Instead, the defense simply opted out of answering that question. Of  
25 course, I do not know what evidence, if any, might have been available to the defense on this  
26 issue.

27 16. Although I sought and obtained a death sentence for Mr. Yates, it is now my  
28 opinion that Mr. Yates' death sentence is disproportionate. I hold this opinion due to the State's  
29 decision to offer a life sentence to Gary Ridgway in exchange for his plea of guilty to 48  
30 murders. Like Ridgway, Mr. Yates was willing to confess and plead guilty to all of his murders.  
31 He also had disclosed the whereabouts of one of his murder victims.

1 17. Prior to the time that the Spokane County prosecutor made a life deal in exchange  
 2 for Mr. Yates' guilty pleas, I was involved in a lengthy conference <sup>call</sup> where the former King  
 3 County Prosecutor, the late Norm Maleng, and others discussed the possibility of Spokane  
 4 Prosecutor Steven Tucker making a life deal in exchange for guilty pleas. During this  
 5 conversation, Mr. Maleng adamantly expressed his strong viewpoint that making such a plea  
 6 deal would result in the end of the death penalty in this state given the proportionality issues that  
 7 would arise. Obviously, Mr. Tucker nevertheless chose to make a plea bargain with Mr. Yates.  
 8 In addition, Mr. Maleng himself made a similar plea bargain with Mr. Ridgway only a year or so  
 9 later.

10 18. I believe that the late Mr. Maleng's concerns were entirely valid. In my opinion,  
 11 it is disproportionate to sentence a defendant to death for two murders, no matter how heinous,  
 12 where another defendant is permitted to plead guilty to 48 murders and yet escape the death  
 13 penalty.

14 I declare under the penalty of perjury of the laws of the State of Washington that the  
 15 above is true and correct.

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 18 BARBARA COREY  
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4 IN THE SUPREME COURT  
5 OF THE STATE OF WASHINGTON

6 )  
7 ) NO. 82101-1  
8 IN RE PERSONAL RESTRAINT )  
9 PETITION OF: )

DECLARATION OF  
RONALD D. NESS

10 ROBERT LEE YATES, )  
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Petitioner.

STATE OF WASHINGTON )

: ss.

COUNTY OF KITSAP )

I, RONALD D. NESS, being first duly sworn upon oath, depose and say:

That I am the attorney for the Petitioner, ROBERT LEE YATES.

I have been in communication with Bruce S. Moran, Deputy Court Administrator of Pierce County Superior Court, and he has given me the following information regarding Pierce County's jury summons process, juror exclusion process and juror compensation:

**Jury Summons Process**

1) Prospective jurors are summonsed from a master source list compiled, by the State Administrative Office of the Courts, from Voter Registrations, Washington State Drivers Licenses and Washington State Identification Cards.

2) Pierce County sends out an average of 1,500 summons weekly by a computerized random draw from our county master jury source list.

3) From the 1,500 summons sent out weekly, Pierce County average about 250 persons who actually show up and serve for that selected time period.

**Exclusion of Jurors**

Pierce County's excusal process for jurors includes two levels, one level requires judicial review and authorization and the other can be done automatically by the staff in Jury Administration in accordance with a list of reasons that is "pre-approved" by our court. The levels and excusals are:

DECLARATION - 1

Law Offices of  
RONALD D. NESS & ASSOCIATES  
420 Cline Avenue  
Port Orchard, WA 98366  
(360) 895-2042

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4 **(1) Pre-approved - permitted by Jury Administration**

5 Not a U.S. Citizen.

6 Cannot communicate in the English Language.

7 Does not reside in Pierce County.

8 Convicted Felon and rights have not been restored.

9 Under 18 years of age.

10 Physical Illness or Disability will not permit service (requires written verification from the attending physician).

11 Responsible for the healthcare of another who cannot care for themselves (verification required).

12 Parent with no child care available.

13 Full time student (approved educational program).

14 Active Military Service with duty abroad.

15 Job related issues(verification required - usually a letter from the employer).

16 **(2) Requires Judicial Review and Authorization**

17 Financial Hardship. (e.g. juror not compensated by employer for jury duty and person cannot afford to serve)

18 Extreme Inconvenience. (e.g. lacks transportation, homecare provider)

19 Public Necessity. (e.g. certain " critical" occupations - Physician, Nurse, Firefighter, Police, EMS)

20 Unfit Person. (e.g. mentally defective, openly biased or prejudiced)

21 As far as enforcement of the jury summons process, Pierce County sends out an additional reminder card to any prospective juror who does not respond to the initial summons. The cards remind them of their legal obligation to respond and cites the RCW that makes it a Misdemeanor to knowingly and willfully fail to do so.

22 **However, Pierce County does not pursue prosecution of persons who fail to respond.**

23 **Juror Compensation**

24 Pierce County pays jurors at the rate of \$10.00 per day.

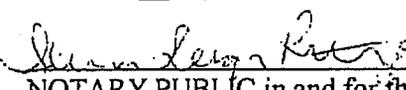
25  
26 DATED this \_\_\_\_ day of June, 2009.

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28   
29 RONALD D. NESS WSBA #5299  
30 Attorney for Petitioner

31  
32 DECLARATION - 2

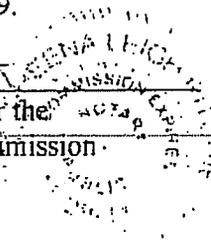
Law Offices of  
RONALD D. NESS & ASSOCIATES  
420 Cline Avenue  
Port Orchard, WA 98366  
(360) 895-2042

SUBSCRIBED AND SWORN to before this 3 day of June, 2009.

  
NOTARY PUBLIC in and for the

State of Washington. My commission

Expires: 11/29/11



DECLARATION - 3

Law Offices of  
RONALD D. NESS & ASSOCIATES  
420 Cline Avenue  
Port Orchard, WA 98366  
(360) 895-2042



I am licensed to practice law in Oregon, Washington, New York, Louisiana (inactive status), Georgia, and Texas, and have met the qualifications to represent clients in death penalty trials in Washington, Oregon, Georgia, Texas, and Louisiana.

I have given presentations on a variety of capital defense topics at capital defense conferences, including the Bryan R. Shechmeister Death Penalty College at Santa Clara University School of Law in California, the NACDL Capital Voir Dire program, the CACJ/CPDA Death Penalty Seminar in Monterey, California, and other capital defense training seminars on such topics as Developing an Integrated Theory of the Case, Future Dangerousness, Discovery Issues in Capital Litigation, Working with Neuropsychologists and Mental Health Experts, Lethal Injection Challenges, Capital Sentencing Issues and Legal Updates, Planning and Conducting the Defense Mitigation Investigation, Making the Record and Preserving Error, Litigating Capital Jury Project Data and a *Furman* Motion, Motions Practice and Capital Litigation, Review and Update of Relevant Supreme Court Cases and Capital Sentencing Law, The Defense Function and Resolving Counsel Issues, and Recusal of Prosecutors and Judges.

I conduct capital voir dire and assist defense teams in theme and theory development as counsel of record or associate counsel in capital cases. I have conducted voir dire in ten capital cases in jurisdictions including Louisiana, Georgia, Texas, and Oregon, and have provided assistance and consultation to dozens of other capital defense teams in state and federal jurisdictions across the United States.

I have lectured and provided practice-based skills training on "Colorado Method" capital voir dire at training programs sponsored by the National Association of Criminal Defense Lawyers Association and state capital defense groups in Georgia, Texas, Ohio, Illinois, Pennsylvania, Colorado, Kentucky, California, Washington, and Oregon. Beginning in 2004 I have taught these methods at approximately eight national capital defense training programs under the leadership and guidance of David Wymore, retired chief deputy of the Colorado Public Defender and the person primarily responsible for developing the "Colorado Method" of life-qualification voir dire.

### **The Colorado-Method of Capital Jury Selection**

David Wymore, chief deputy public defender of the Colorado Public Defender (now retired) and his capital appellate and trial attorneys at the public defender developed and refined what has become known as the "Colorado Method" of capital jury selection in the 1980s and 1990s. Beginning in the mid 1990s David Wymore and his colleagues in Colorado began to teach and train attorneys from other jurisdictions in the jury selection methods developed in Colorado. State criminal defense lawyers associations, capital defender offices and other capital defense organizations began holding training sessions with Mr. Wymore and attorneys from his office on the "Colorado Method" of voir dire.

The "Colorado Method" of capital jury selection requires the defense team to utilize the juror questionnaire and voir dire to identify the prospective juror's views about the death penalty, question the juror in a manner to establish a record to create a legal basis with which to advance cause challenges to state-favored pro-death jurors and to defend state cause challenges to defense-favored pro-life jurors, and then question the juror in a manner to determine and confirm the juror's capacity and commitment to making the penalty phase sentencing determinations in a constitutionally legitimate and appropriate manner.

The "Colorado Method" of life-qualification capital voir dire has been adopted by the national capital defense community as a critical skill for trial counsel since the late 1990s. Trial counsel must be trained in and master the strategy, methods, and techniques of Colorado-method life-qualification to meet the constitutional standard for effective assistance.

#### **Capital Jury Project Research Highlights the Inadequacies of Capital Defense Voir Dire Efforts Prior to "Colorado Method" Life-Qualification Voir Dire**

The Capital Jury Project [hereafter "CJP"] was created in 1990, with funding from the Law and Social Sciences Program of the National Science Foundation (grant NSF SES-9013252). The CJP researched the decision-making of actual capital jurors. The CJP's interviews chronicle the jurors' experiences and decision making over the course of the trial, identify points at which various influences come into play, and reveal the ways in which jurors reach their final sentencing decisions.

The CJP began in eight states and has grown to a total of fourteen states. Although Washington is not one of those states the principles and conclusions drawn from the CJP are universal in that they show how a juror thinks and makes decisions. The fact that the juror may have sat in a court's deliberation room in Texas, or Alabama or Florida as opposed to say, Washington, is of no moment to whether capital jurors understand or fail to understand the fundamental principles of capital jurisprudence that are set out above. States were chosen for the CJP research to reflect the principal variations in guided discretion capital statutes. Within each state, 20 to 30 capital trials were picked to represent both life and death sentencing outcomes. From each trial, a target sample of four jurors was systematically selected for in-depth three-to-four-hour personal interviews. Interviewing began in the summer of 1991. The present CJP working sample includes 1,201 jurors from 354 capital trials in 14 states. These 14 states are responsible for 76.1% of the 3,718 persons on death row as of June 1, 2002, and for 79.0% of the 795 persons who were executed between 1977 and September 1, 2002.

The CJP data reveal profound discrepancies between what the federal and state constitutions require and how actual capital jurors actually make their decisions. Moreover, this data reveals that these discrepancies exist on every measure which the federal and Washington constitutions imposes, both in terms of what jurors are

required to do, and in terms of what jurors are prohibited from doing. The data establishes the following:

- 1) Rampant premature decision-making which renders the penalty phase meaningless;
- 2) The failure of jury selection to remove large numbers of death-biased jurors, and the overall biasing effect of the selection process, itself;
- 3) The pervasive failure of death qualified jurors in actual cases to comprehend and/or follow penalty instructions;
- 4) The wide-spread belief amongst jurors that sat on capital trials that death is required;
- 5) Wholesale evasion of responsibility for the punishment decision;
- 6) The continuing influence of race discrimination on juror decision-making; and
- 7) Significant underestimation of the alternative to death;

As applied in the real world of capital trials, actual capital jurors are not making sentencing decisions consistent with state and federal constitutional mandates, and defense counsel's questioning of prospective jurors in voir dire is a critical stage for defense counsel to identify and remove jurors who are constitutionally impaired, to identify jurors the state seeks to remove for cause who are constitutionally qualified, and to confirm that the jurors are capable and committed to making the sentencing phase decisions in a constitutionally legitimate and appropriate manner.

#### **Trial Counsel Performance in the Robert Lee Yates Case**

I reviewed the voir dire transcript and juror questionnaires in the *State v. Robert Lee Yates, Jr.* (Pierce County Case No. 00-1-03253-8) aggravated murder trial held in 2002. In my professional opinion, Defense Counsel Roger Hunko and Mary Kay High in many instances failed to effectively utilize the strategy, methods, and techniques of Colorado-method life-qualification jury selection in four critical areas:

1. During the critical questioning of the prospective jurors about their views about punishment for murder (so called "death qualification" or "life qualification" voir dire), defense counsel failed to consistently and effectively strip away extraneous circumstances and defenses from the juror's consideration before and during questioning prospective jurors about their life and death views;
2. During the questioning of prospective jurors whose views about imposing a death sentence favored the state, defense counsel failed to consistently and

effectively ask questions to create a factual basis supporting defense-raised cause challenges;

3. During the questioning of prospective jurors whose views about imposing a death sentence favored the defense, defense counsel failed to consistently and effectively ask questions to create a factual basis supporting defense efforts to rebut state-raised cause challenges; and
4. During questioning of prospective jurors, failed to determine and confirm that each juror was capable and committed to making the penalty phase sentencing determinations in a constitutionally legitimate and appropriate manner, including,
  - a. Each juror decides for him or herself if the evidence presented by the state was of sufficient quantity and quality to prove the aggravating circumstance (RCW 10.95.020) beyond a reasonable doubt necessary for the state to convict a defendant of aggravated first degree murder;
  - b. The jurors' decision-making process in a penalty phase encompasses an individual, personal, moral judgment, in contrast to the factual decisions that are rendered in the culpability (and most other) trial deliberative process;
  - c. The law never requires a juror vote for death and the Court has no interest in obtaining any particular sentencing result in the proceedings;
  - d. Mitigation is any evidence that supports a sentence less than death for any one juror;
  - e. Mitigation is evaluated, considered, and found by each individual juror and there is no requirement that it be found by other jurors for one juror to give it weight and significance;
  - f. Mitigation is given weight, significance, and relevance by a juror based on the juror's individual, personal, moral decision, and there is no burden of proof required to be met before a juror can give it effect;
  - g. Any juror may give the "weight of life" to any one piece of mitigating evidence (i.e. give one mitigating fact sufficient significance to merit leniency pursuant to RCW 10.95.060(4).);
  - h. One juror's vote for life results in the defendant receiving a life sentence and such result – regardless of the number of life votes – is a lawful, appropriate, valid result; and
  - i. Each juror is to be treated with respect and dignity and a juror never has to justify or explain the basis for the juror's individual, personal moral decision.

The performance of defense counsel in voir dire resulted in the state removing life-favoring, yet constitutionally qualified jurors and keeping death-favoring, yet

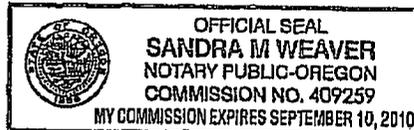
constitutionally impaired jurors in the pool, permitted the state to reserve peremptory challenges that they otherwise would have had to use, required the defense to utilize peremptory challenges that they otherwise would not have had to use, and resulted in a seated jury more favoring death than would have otherwise occurred. In my professional opinion, had defense counsel consistently and effectively utilized the strategy, methods, and techniques of Colorado-method life-qualification jury selection, the jurors ultimately seated in the case would have been more inclined to return a life verdict.

  
MATTHEW M. RUBENSTEIN  
WSBA No. 22884

STATE OF OREGON            )  
  ) ss.  
County of Multnomah        )

This instrument was acknowledged before me on JUNE 8, 2009, by  
MATTHEW M. RUBENSTEIN.

Sandra M Weaver  
Notary Public for Oregon



DECLARATION OF ROGER HUNKO

I, Roger A. Hunko, declare as follows:

1. I am over 18 and am competent to give this declaration.

*Background and Experience*

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2. I have been practicing law in the State of Washington, since 1979 when I was admitted to the bar. I graduated from Rutgers's Camden Law School that year as well. I have been partner with David Wecker, since 1981. I presently limit my practice to criminal defense. I have done a number of aggravated murder cases, and have been forced to the penalty phase of such cases on four occasions. I have been approved by the panel appointed by the Supreme Court to be lead counsel in cases where the death penalty may be sought. I have also attended and taught at many seminars regarding defending capital cases.

*Representation of Robert Yates~ Composition of Trial Team*

3. I was appointed in July 2000 to represent Robert Yates on two charges of aggravated murder in Pierce County.
4. I was lead counsel. Mary Kay High was co-counsel.
5. Pam Rogers was appointed as our mitigation specialist, and David Rogers was our fact investigator.
6. As lead counsel, I had the ultimate responsibility of deciding matters of case strategy. Obviously, our team consulted on many issues related to the case. However, I bore the duty of making any final calls where there was no clear consensus.
7. Although both Ms. High and I worked on both "guilt" and "penalty" phase aspects of the case, Ms. High's primary focus was on the "guilt" phase issues. My focus was on "penalty" phase issues.

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*Plea Bargaining and the "Spokane County" Murders*

8. I was appointed to represent Mr. Yates while the murder charges that were ultimately resolved in Spokane County were still pending.
9. I met with Mr. Yates and the lawyers appointed to represent him in Spokane County on multiple occasions between July 2000 and the entry of his

guilty pleas in Spokane in October 2000. I also spoke on the phone with Mr. Yates and with his Spokane lawyers numerous times during that period.

10. Before Mr. Yates pled guilty in Spokane County, I was aware that Pierce County was unwilling to give Spokane County the authority to accept a plea of guilty in return for a life sentence for the two Pierce County murders.

11. Thus, prior to Mr. Yates' guilty pleas in Spokane County it was clear to me that Pierce County intended to seek a death sentence.

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12. I did not consider the possibility of seeking a continuance or stay of the consolidated Spokane County cases, so that the Pierce County cases would be tried first. Further, it did not occur to me that we could attempt to keep the Pierce County jury from hearing substantive evidence regarding the Spokane murders if Mr. Yates pled guilty to aggravated murder in Pierce County, so that he faced only a penalty phase trial there.

13. To the contrary, I agreed with Mr. Yates and his Spokane attorneys that I thought it was best for him to plead guilty to the Spokane County murders.

14. In my opinion, had Mr. Yates been advised to continue the Spokane case and to plead guilty to the Pierce County murders in order to exclude evidence of the Spokane murders from the sentencing trial in Pierce County, it is highly likely that Mr. Yates would have been willing to follow such advice. Indeed, Mr. Yates had always expressed the willingness to plead guilty to all of his murders and to cooperate with his attorneys.

#### *Jury Selection*

15. During jury selection, our goal was simple: attempt to pick the jurors who most likely would vote for life and to excuse, for cause if possible, those jurors who would most likely vote for death. In addition, because we knew that only one juror is necessary in order to return a life sentence, our goal was to find a juror who would be willing to hold out for life.

#### *Overview of Penalty Phase Mitigation Investigation*

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16. I know that capital trial counsel has a non-delegable duty to ensure that a complete and thorough mitigation investigation is conducted. I further know that capital trial counsel must thoroughly investigate an avenue of mitigation before he can make a decision whether or not to present that category of mitigating evidence at trial.

17. We knew it was important to try to explain to the jury why or how Mr. Yates became a serial killer. We theorized that one key factor was trauma. Thus, we spent a good deal of time and effort investigating Mr. Yates' history of trauma, as well as the effects of trauma.

18. However, we were unable to discover any significant traumatic events in Mr. Yates' life. Having worked on capital cases previously, I was aware that in many cases family members are reluctant to reveal family secrets like trauma, so we continued to investigate this avenue.

---

#### *Psychiatric Disease/Disorder Related to Sexuality*

19. We were aware that Mr. Yates engaged in multiple acts of necrophilia after he killed his victims. We were also aware that Mr. Yates' victims were engaged in acts of prostitution with him at the time he killed them. However, we did not retain an expert to opine whether Mr. Yates suffers from a sexual deviancy disorder. Further, because we did not retain an expert to evaluate and form an opinion about whether Mr. Yates' suffers from a sexual disorder, no expert evaluated whether there was any connection between any sexual disease or disorder and the multiple homicides. Thus, our failure to call an expert to explain whether Mr. Yates suffers from a sexual disorder and, if so, whether that disorder was a contributing factor in the murders was the result of our failure to investigate.

#### *Temporal Lobe Dysfunction*

20. During our trial preparation, we were interested in determining whether Mr. Yates suffers from any neuropsychological condition(s) that may have contributed to these crimes. I recognized that neuropsychological dysfunction often plays a role in homicides and can be a powerful mitigating factor.

21. For that reason we retained a neuropsychologist who tested Mr. Yates. I did not direct that expert regarding which tests to perform. More specifically, I did not request that he administer tests designed to evaluate whether Mr. Yates suffers from neuropsychological deficits in the temporal lobe region of the brain.

22. There was no tactical reason for our team not to conduct a neuropsychological evaluation focusing on temporal lobe dysfunction.

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#### *Future Dangerousness*

23. During pre-trial confinement, Mr. Yates was a model prisoner. For that reason, we called a number of the jail staff who had contact with him. We also called a witness regarding prison conditions. Our intent was to attempt to show

jurors that Mr. Yates presented a low risk of committing future acts of violence if sentenced to life in prison.

24. However, I did not retain an expert to evaluate Mr. Yates' risk of committing future acts of violence. There was no tactical reason for this failure; I simply did not consider it.

25. I also did not consider and thus, did not investigate and obtain information from Washington Department of Corrections about rates of violence in prison; the system of classifying prisoners; and escape rates.

26. Further, if we did not object, there was no tactical reason for any failure to object to any improper evidence or arguments advanced by the State in support of its claim that Mr. Yates was a future danger.

#### *Victim Outreach*

27. I did not investigate, nor cause an investigation to be conducted into whether any of the survivors of the victims of the Spokane County murders would be willing to testify in Pierce County that the information regarding the homicides provided by Mr. Yates, or his acceptance of responsibility through his guilty pleas, provided some degree of closure and/or measure of comfort for the victims' survivors.

#### *Humanizing Evidence*

28. As part of the mitigation investigation, we spoke with many of Mr. Yates' family members and friends. We were obviously interested in the prospect of presenting the testimony of family members given how powerful that type of testimony can be.

29. Most of Mr. Yates' family members were understandably conflicted given that they had not known that Mr. Yates was a murderer. This revelation obviously caused the family enormous emotional turmoil and shame.

30. As a result, it was my opinion that we should not call these family members during the penalty phase.

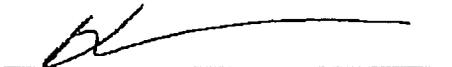
#### *Nexus Between Mitigation and the Charged Crimes*

31. I am aware that there need not be any nexus between mitigating evidence presented in penalty phase and the murder(s) committed by the capital defendant who is on trial.

32. If I failed to object, there was no tactical reason for my failure to object to any improper arguments made by the State asserting that Mr. Yates' mitigating evidence could be disregarded by the jury because it did not diminish Yates' culpability for the charged murders.

I declare under the penalty of perjury of the laws of the State of Washington that the above is true and correct.

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\_\_\_\_\_  
ROGER A. HUNKO

6-8-09 at Port Orchard, WA  
DATE AND PLACE SIGNED

DECLARATION OF RICHARD C. FASY

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3       1.     My name is Richard Fasy. I was one of three lawyers who represented  
4 Robert Yates in Spokane County Superior Court case number 00-1-01153-0. The other  
5 lawyers were Scott Mason and Jay Ames. I was lead counsel.  
6

7       2.     Mr. Yates was arrested in April 2000. Very early on in our representation  
8 of Mr. Yates, it became clear that he was willing to take responsibility for and to plead  
9 guilty to all of his crimes, including those that had taken place in other counties and that  
10 had not yet been charged.  
11

12       3.     By early July 2000, we believed that we had successfully negotiated a plea  
13 deal which would involve Mr. Yates's pleading guilty to all of his Spokane crimes, as  
14 well as two murders in Walla Walla county, one murder in Skagit county, and two  
15 murders in Pierce County. As part of the agreement Mr. Yates also agreed to disclose the  
16 location of the body of Melody Murfin. The guilty plea and sentencing were to take  
17 place in Spokane County Superior Court, and as part of the deal Mr. Yates would avoid  
18 the possibility of the death penalty and be sentenced to life in prison without the  
19 possibility of parole.  
20  
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23

24       4.     In mid-July 2000, the deal we had negotiated with the Spokane County  
25 Prosecutor fell apart at the eleventh hour when the Pierce County Prosecutor backed out  
26 of the deal, refused to allow the Spokane County Prosecutor to handle the Pierce County  
27  
28  
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1 cases, and instead charged Mr. Yates with two counts of aggravated first degree murder  
2 in Pierce County.  
3

4 5. Once Mr. Yates was charged in Pierce County, Roger Hunko began  
5 representing him on those charges, while Mr. Mason, Mr. Ames and I continued to  
6  
7 represent Mr. Yates in Spokane. Between mid-July 2000 and late October 2000, Mr.  
8 Hunko met with us in person on multiple occasions to discuss Mr. Yates's cases. We  
9 also had a number of conference calls with Mr. Hunko. One of the major issues we  
10 discussed with Mr. Hunko was how to proceed with the cases in Spokane County.  
11

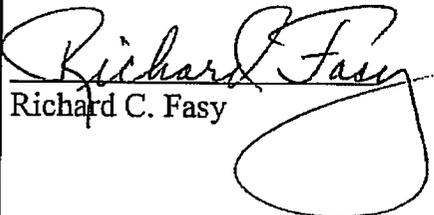
12 6. The deal we had negotiated in Spokane County remained on the table—  
13 minus the two Pierce County aggravated murders. Because the deal remained open, and  
14 because it seemed very likely that the Pierce County Prosecutor would seek death for the  
15 two murders there (otherwise he would not have pulled out of the deal in the first place),  
16 we deferred to Mr. Hunko's judgment in deciding how to proceed with our cases. We did  
17 not want to do anything with our cases which would compromise Mr. Yates's ability to  
18 avoid a death sentence in Pierce County.  
19

20 7. Ultimately, Mr. Hunko advised us and Mr. Yates to go through with the  
21 guilty pleas in Spokane County. Mr. Hunko never discussed with us the possibility of  
22 delaying or staying the Spokane proceedings until after the Pierce County charges were  
23 resolved. Nor did Mr. Hunko ever discuss with us the possibility of Mr. Yates's pleading  
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1 guilty in Pierce County in an effort to avoid the admission of evidence of Mr. Yates's  
2 other murders in a Pierce County trial.  
3

4 8. Mr. Yates was a very easy client to work with. He was appreciative of our  
5 work and very willing to follow our advice. I believe that he would have followed any  
6  
7 advice we gave him regarding the best way to proceed with the Spokane cases.

8 I declare under penalty of perjury under the laws of the State of Washington that  
9  
10 the foregoing is true and correct.

11  
12   
13 Richard C. Fasy

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6-4-09, Bellingham, Wa.  
Date and Place Signed

DECLARATION OF ROBERT YATES, JR.

1. My name is Robert Yates, Jr. I am the petitioner in this case.

2. Since I was arrested in April 2000, it has always been my intention to admit responsibility for all of my crimes and to accept a sentence of life in prison without the possibility of parole (LWOP).

3. In July 2000, I believed that my Spokane lawyers had negotiated a plea deal which would involve my pleading guilty to all of my Spokane crimes, two murders in Walla Walla county, one murder in Skagit county, and two murders in Pierce County, and that as part of this deal I would be sentenced to LWOP. I was ready to go through with this plea right up until the day that the Pierce County Prosecutor backed out of the deal and filed two aggravated murder charges against me in Pierce County Superior Court.

4. I met Roger Hunko, the lead lawyer on my Pierce County cases, very shortly after I was charged in Pierce County. I estimate that I met with Mr. Hunko about a half dozen times between the filing of charges in Pierce County in July 2000 and the time I pled guilty in Spokane County in October 2000. I also spoke with him on the phone multiple times during that three month period.

5. I ended up pleading guilty in Spokane because Mr. Hunko, along with my Spokane lawyers, advised me to do so despite the pending aggravated murder charges in Pierce County. None of my lawyers ever talked to me about the possibility of delaying the Spokane proceedings until after the Pierce County charges were resolved. None of

1 my lawyers ever talked to me about the possibility of pleading guilty in Pierce County to  
 2 try to avoid the admission of evidence of my Spokane crimes in a Pierce County trial.  
 3

4 6. I would have followed any advice from my lawyers that would have  
 5 increased my chances of getting an LWOP sentence instead of the death penalty, even if  
 6 that advice included pleading guilty to two aggravated murders in Pierce County.  
 7

8 I declare under penalty of perjury under the laws of the State of Washington that  
 9 the foregoing is true and correct.  
 10

11  
 12 Robert Yates, Jr.  
 13 Robert Yates, Jr.

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 Date and Place Signed 6/3/09 Walla Walla,  
 LWA

DECLARATION OF MARY KAY HIGH

I, Mary Kay High, declare as follows:

1. I am over 18 and am competent to give this declaration.

*Background and Experience*

2. I graduated from the University of Washington Law School, Class of 1990 with honors. I obtained a B.A. undergraduate degree from the University of New Mexico in Anthropology in 1984 and completed post graduate degree work in social anthropology from the University of Washington PhD program. Professionally, since June 2006 to present, I have been employed by the Pierce County Department of Assigned Counsel Public Defender. I am a senior attorney whose practice emphasizes serious violent Class A felony criminal defense at both the trial and appellate level. I am death penalty qualified and currently have one pending potential death case. Prior to my employment with DAC, I was in private practice. My private practice emphasized state and federal felony criminal defense at both the trial and appellate level. While in private practice I was lead counsel on two capital cases in Pierce County and one capital case in Yakima County. I accepted appointed cases from Pierce County, the Washington State Office of Public Defense and the Federal Criminal Justice Administration.

*Representation of Robert Yates~ Composition of Trial Team*

3. I was appointed as co-counsel to represent Robert Yates on the charges of aggravated murder in Pierce County.
4. I was co-counsel with Roger Hunko, who was lead counsel.
5. Pam Rogers was appointed as our mitigation specialist.
6. Although both Mr. Hunko and I worked on both "guilt" and "penalty" phase aspects of the case, my primary focus was on the "guilt" phase issues. Mr. Hunko's focus was on "penalty" phase issues.

*Jury Selection*

7. During jury selection, we sought to identify the jurors who we hoped would vote for life. Likewise, we sought to identify and excuse, for cause if possible, jurors who would most likely vote for death.

8. I do not recall if the courtroom was closed during jury selection. I do recall that the press was seated outside of the courtroom during this portion of trial. However, I do not recall whether this was because they were excluded; or for some other reason. There was room in the courtroom for them to be seated if they had been allowed in the courtroom.

*Penalty Phase Mitigation Investigation*

8. As indicated earlier, Mr. Hunko was lead counsel in the case and was thus the final decision-maker. In addition, he was the attorney in charge of the mitigation investigation. Thus, he is better able to discuss the scope of our investigation. I have read his declaration and it is consistent with my recollection of events.

9. However, I wish to add my thoughts about one aspect of the mitigation case. I think that we should have called at least some of Mr. Yates' family members to "humanize" Mr. Yates for his jury.

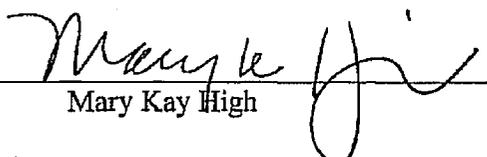
10. During our investigation, we met with many of Mr. Yates' family members. They were uniformly cooperative and helpful. They were kind people who were understandably confused and hurt as a result of learning of the events that led to Mr. Yates' arrest and prosecution.

11. Despite the stresses they were under, it was clear that they loved Robert and he loved them.

12. I regret that we did not consider presenting limited testimony from at least some of the family members so that Mr. Yates' jurors would be able to see and hear from them.

I declare under the penalty of perjury of the laws of the State of Washington that the above is true and correct.

DATED June 8, 2009 at TACOMA, WA

  
Mary Kay High

**National  
Institute  
for the Study,  
Prevention and  
Treatment of  
Sexual Trauma**

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Phone: (410) 539-1661

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fredsberlinmd@comcast.net

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**Therapists:**

Lyndy Bais, LCSW-C  
Phyllis Burke, MA, LGPC  
Richard Feldman, LCSW-C  
Joseph Fuhrmaneck, MA, NCC, LPCS, PFA  
Shana Grant, LCSW-C  
Daniel Marshall, JD, MA  
Mutas Mulazim, BS, MS, PFA  
Bobbette Smith, MSW

**Clinical Affiliates:**

Shelly Lurie, MS, RN, CS-P  
H. Martin Mallin, PhD, FADCS

**Chief Administrator:**

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Robert L. Saitler, MD  
Gary Ticknor, Esq.  
Frank L. Valcor, MD  
Henry H. Wagner, Jr., MD  
Phyllis Ward, BA, MAT

May 29, 2009 - Page 1 of 7

Steven Witchley, Esquire  
Attorney at Law  
Law Offices of Ellis, Holmes, and Witchley  
705 Second Avenue, Suite 401  
Seattle, Washington 98104



**RE: Robert Lee Yates, Jr. (DOB: 05/27/1952)**

Dear Mr. Witchley:

Per your request, I am providing this written report regarding your above-noted client. It is my understanding that you are representing Mr. Yates in appealing the death sentences that have been imposed upon him for the murders of two women in the Tacoma area of Washington State. The first woman, Melinda Mercer, was killed more than 11 years ago in December 1997; and the second, Connie LaFontaine Ellis, in September 1998. It is my understanding that in order for the death penalty to have been imposed upon Mr. Yates, that the state had been required to prove, beyond a reasonable doubt, that there had not been sufficient mitigating circumstances to merit leniency.

Of note, during the penalty phase of his trial (page 7762 of the penalty phase transcript), even though he was a serial killer, Mr. Yates' defense attorneys had informed the jury that they would not try to explain why he had killed. That had been so even though at that time it had been believed that he had engaged in sexual acts with the deceased bodies of most, if not all, of his female victims. Clearly, in my judgment, that should have raised the question of whether Mr. Yates was sexually disordered; most specifically whether he could have been diagnosed with the psychiatric disorder of necrophilia. Necrophilia will be discussed in greater detail below. Certainly by today's standards, he would almost certainly be classified as a "sexually violent predator." Admittedly, that term was not in widespread use at that time. However, the concept that some men, rather than being of sound mind, can be psychiatrically disordered in such a fashion that they are predisposed to repeatedly commit sexual offenses, was well appreciated by the psychiatric profession at the time of his sentencing. Thus, if Mr. Yates was a psychiatrically-disordered individual (as I believe him to have been), in my professional opinion, the jury should have been presented with that information when making a decision as important as life or death.

**Mr. Yates' Criminal History:**

Mr. Yates has acknowledged the murders of 14 other persons (13 women and one man), besides the two women for whom he had been given the death penalty.

Steven Witchley, Esquire  
RE: Robert Lee Yates, Jr.  
May 29, 2009 -- Page 2

Although not sentenced to death for any of those killings, in my professional opinion, knowledge about them is nevertheless still relevant to an appreciation of the psychological forces within him that had driven his acts. More than 34 years ago, in 1975, at the age of 23, Mr. Yates had killed for the first time, taking the lives of a couple; Susan Savage and Patrick Oliver. Mr. Oliver was his only male victim. He did not kill again until 13 years later when, at the age of 36, in 1988, he took the life of a woman named Stacy Hahn.

Eight years after that, at the age of 44, in 1996, he took the life of Shannon Zielinski. Then, over a year later, within a period of approximately four to five months, between August and December 1997, during which time, in my judgment, he had appeared to be under exceptionally poor self-control, he had taken the lives of eight additional women; women to whose murders he has pled guilty. Those women had been: (1) Jennifer Joseph, (2) Heather Hernandez, (3) Darla Scott, (4) Shawn Johnson, (5) Laurie Wason, (6) Sunny Oster, (7) Linda Maybin, and (8) Melinda Mercer. He has also acknowledged having taken the life of an additional woman (Shawn McClenahan); a murder for which he has not been charged criminally.

Finally, in 1998, over a four-month period extending from May through September (during which time Mr. Yates had been 46 years of age), he had then taken the lives of his last three victims. One, his final victim, Connie LaFontaine Ellis, has already been mentioned above. The other two women were Melody Murfin and Michelyn Dering. During that same time period, in August 1998, he had also shot an additional woman in the head (Christine Smith), who miraculously not only did not die, but did not even realize at the time that she had been shot by him. Following that shooting, Mr. Yates had then allowed her to run off, without once again trying to kill her. Her description of the events surrounding that shooting will be further detailed below.

#### **Informants:**

In evaluating Mr. Yates psychiatrically, not only have I interviewed him clinically (by telephone) for a period of approximately 3-1/2 hours (from 2:00 PM until 5:30 PM Eastern standard time) on May 19, 2009, but in addition, I have also reviewed the following relevant background materials: (1) transcripts from the penalty phase of his trial (619 pages), (2) transcripts from the guilt phase of his trial (2817 pages), (3) neuropsychological testing of Mr. Yates (which had included copies of some of his school records), by Rich Kolbell that had been performed in 2002 (87 pages of materials), (4) a draft report regarding a psychological evaluation of Mr. Yates that had been performed by Dorothy Lewis in 2001 (11 pages), and (5) various military records regarding Mr. Yates (80 pages). In addition, for background knowledge with respect to serial sex offenders such as Mr. Yates, I have also reviewed (6) a copy of the revised code of Washington State, Chapter 71.09 regarding sexually violent predators (41 pages).

Steven Witchley, Esquire  
RE: Robert Lee Yates, Jr.  
May 29, 2009 – Page 3

**Dr. Berlin's Professional Background:**

Before further summarizing my psychiatric opinions and conclusions about Mr. Yates, I thought that I might first briefly summarize my own professional background. In terms of training and education, I have both a Ph.D. degree in Psychology as well as a Medical degree (M.D. degree). Presently, I am an attending physician at The Johns Hopkins Hospital, and an Associate Professor of Psychiatry at The Johns Hopkins University School of Medicine. Certified as a specialist in psychiatry by the American Board of Psychiatry and Neurology, my particular area of expertise within the field of psychiatry is related to the paraphilic disorders (in layman's terms, the Sexual Deviancy Disorders).

As a consequence of my expertise, I had been an invited member of the Subcommittee on the Paraphilias for the third revision of The Diagnostic and Statistical Manual of Mental Disorders (the so-called DSM). I have also been invited to participate in a variety of other activities as well that are relevant to the area of sexual abuse and sexual offenders. These have included: (1) a White House conference, (2) sessions held by various Subcommittees of the United States Senate, (3) Conferences of Judges in several states, and (4) various educational symposium sponsored by both the Federal Bureau of Investigation and by the United States Department of Justice. I have also provided consultation to the European Parliament, the Maryland Division of Corrections, the Subcommittee on Sexual Abuse of the National Conference of Catholic Bishops, and to the Cardinals Commission for the Protection of Children in Boston, Massachusetts. One of the treatment programs that I currently direct has been designated by the United States Department of Justice as a "National Resource Site." In the event that it may prove to be of some use to you, I am enclosing a copy of my professional vitae along with this report.

**Was Mr. Yates Psychiatrically Disordered at the Time of the Crimes for Which He Has Been Sentenced to Death?**

By his own admission, over the course of many years, even though married, Mr. Yates had been involved sexually with a variety of prostitutes. Clearly, by virtue of their profession, these had been women who had been willing to engage in sexual interactions with him in exchange for cash. In that sense, in order to have sex, there had been no need for him to become forceful with any of them, let alone killing them. Beyond that, even if he had wanted to rob them, by forcibly taking his money back, given the nature of their own illegal activities, few if any, would likely have been predisposed to complain to the police about him. Yet the two women for whom he has been sentenced to death had reportedly both been known prostitutes, as had been the remainder (with the exception of the first two killings in 1975) of his other victims. As noted above, the evidence suggests that after killing, Mr. Yates had often had sex with the bodies of most, if not all, of the prostitutes whose lives he had taken. Certainly any murder is an immoral act. However, in Mr. Yates' case, in my professional opinion, his actions in killing, and then having sex with the dead bodies of his victims, would also seem to have additionally been both

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disturbed and irrational. Yet no psychiatric testimony had been presented to his sentencing jury regarding the likelihood that he was mentally disturbed (as I believe he had been); the prosecutor's contentions that his actions had instead been reflective of some sort of a "hobby," essentially having remained unchallenged.

#### The Nature of Mr. Yates' Psychiatric Disorder:

In my judgment, common sense alone should have suggested that evidence of a repeated pattern of being sexual with dead bodies was very likely an indicator of psychiatric disturbance. The paraphilias (or in layman's terms, the Sexual Deviancy Disorders) constitute a category of psychiatric disturbance that is included within The Diagnostic and Statistical Manual of Mental Disorders (the latest version being DSM-IV-TR). The essential mental feature of any paraphilic disorder is that the afflicted individual experiences "recurrent, intense sexually-arousing fantasies" and/or "sexual urges" of an abnormal nature. In the case of necrophilia, which is one of the subcategories of a paraphilic disorder (classified in the DSM under the subcategory of a Paraphilia Not Otherwise Specified), these intense, fantasies, sexual urges, or behaviors are related to the act of being sexually intimate with a corpse.

Arguably, the average man may be capable of interacting sexually with a dead human body (although that point is indeed arguable). A more likely reaction would be one of disgust and revulsion rather than eroticism. Beyond that, it would clearly be ludicrous to argue that the average man experiences "recurrent, intense, sexually arousing fantasies, sexual urges, or behaviors" (the cardinal feature of any paraphilia according to the DSM) related to being intimate with corpses. Unlike many sexually disordered individuals who have necrophilia, the average man certainly does not have to repeatedly fight off the urge to have sex with corpses in order to prevent himself from acting. Nor does he have to fight off the possibly associated urge to kill so as to create a corpse.

According to the hand written notes accompanying the neuropsychological materials from Rich Kolbell's testing of Mr. Yates in 2002 (materials not presented to his sentencing jury), in my professional opinion, when describing his first murder in 1975, Mr. Yates had seemed to have characterized himself as having been both driven and conflicted. Reportedly, when talking about wanting sex with his first victim (Susan Savage), Mr. Yates had said "don't want them to leave." The notes had gone on to state "gun can prevent leaving...conflicted...wrong, but if I don't do, they'll leave. Their leaving and missed opportunity was overwhelming control of urges – gun only way to control...made decision – surrendered to need/urge. Could not fight off urge to have sex with her." In my professional opinion, these comments and observations are reflective of both the internal struggle, and of the intense, possibly overpowering urges, that constituted the disturbed core of Mr. Yates' criminal acts.

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In discussing with me the murder of Melody Murfin, which had taken place in May 1998, Mr. Yates described how, after killing her, because he had been running late in getting back home, he had hurriedly brought her body back onto the property of his own home with him. He had done so in his own vehicle not wanting to abandon her body before having had sex with it. He had then subsequently been trying to have sex with her body while it had still been in his own vehicle, when interrupted by the nearby presence of one of his children. Later on, he had finally had sex with her body before burying it (the only body that he had actually buried) next to his home. Somewhat paradoxically, according to his self-report, he would ordinarily still conceive of her, and of his other dead victims, in his mind's eye, as if they were still alive. Such actions, though clearly reprehensible, in my professional opinion, were at the same time also reflective of serious psychiatric disturbance; a disturbance involving a sometimes seemingly desperate need to respond to intense, recurrent (albeit sometimes intermittently present) pathological cravings. However, his sentencing jury was never afforded an opportunity to properly consider such a possibility by means of the introduction of expert testimony.

#### **Paraphilias and Mental Impairment:**

Paraphilic disorders can be associated with two types of impairment; (1) volitional and (2) cognitive. Cognitive impairment can be present to the extent that the existence of strong cravings can color perceptions – thereby interfering with an objective appreciation of the true ramifications of one's own actions. Thus, as with alcoholism and drug addiction for example, there can be self-deceptive thought processes such as denial, minimization, and rationalization. However, in Mr. Yates' case, in my professional opinion, any cognitive impairment that may have been present was not so severe as to prevent him from appreciating the wrongfulness of his actions.

Volitional impairment refers to the compromising of one's ability to exercise full self-control through the application of will-power. Ordinarily, there is no impairment of volitional control when making a routine every day decision, such as whether to put on a blue or grey tie. However, when a gunman proclaims "your money or your life," while pointing a weapon at a victim's head, there is only the illusion of volitional choice. That is so because the intense fear generated will invariably compromise the amount of freedom that an individual can exercise under such circumstances. Similarly, the intense affects, or cravings, associated with a number of psychiatric conditions (e.g., cravings for heroin, alcohol or cravings for paraphilic sexual behaviors) can also, in the absence of proper psychiatric treatment, compromise full volitional capabilities. Although there would likely have been disagreements about the extent to which Mr. Yates' ability to fully control his paraphilic cravings had been compromised at the times of his killings, in my professional opinion, it is important to note that his sentencing jury never had the opportunity to debate any such considerations. Parenthetically, it might be noted that no lesser an authority than the United State Supreme Court has acknowledged that repeat sexual offenders such as Mr. Yates can indeed experience difficulties in controlling their actions. The court did so

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when ruling that at least some degree of difficulty in being able to control oneself must be present in order to justify the civil commitment of "sexually violent predators." [Kansas v Crane, (00-957) U.S. 269 KAN 578, 7P3d 285, Vacated and remanded (2002)]. In my professional opinion, few would likely now argue that Mr. Yates would not qualify for inclusion within that category.

For the sake of completion, I would also want to note that persons such as Mr. Yates can sometimes defer acting on their urges, and he has done so many times. He can also remain in control in a structured environment, such as a prison for example, which in a sense, by its very nature, can help to control him. A more crucial question would be whether in the past in the absence of appropriate psychiatric treatment for his disorder, he had been fully capable of completely and permanently stopping his actions on his own. Arguably, the answer to that question may have been "no," (and, in my professional opinion was "no") but once again, his sentencing jury had not been afforded the opportunity to decide whether the existence of a severe paraphilic disorder; a disorder that had afflicted him through no fault of his own, along with its associated impairments, had constituted a sufficient mitigating circumstance to merit leniency.

Finally, in closing, I would like to document the fact that some experts on the paraphilias have described the presence of an associated "dissociative state." In layman's language, the term "dissociative state" refers to a state of mind in which an individual's attention has become so focused that he has, at least for the moment, lost track of his true circumstances, situation, and surroundings. Most of us are, in a sense, in a "dissociative state" while absorbed in a movie to the point where the characters lives can almost seem real. However, if someone in the theater were to yell out the word "fire," our attention would likely very quickly return to our real life circumstances.

Even though Mr. Yates had shot a woman named Christine Smith in the head in August 1998, the bullet had deflected from her skull and she had not died. Thus, she was the only living witness capable of describing his state of mind at the time of one of his shootings. According to her, immediately after the shooting he had seemed to be dazed, asking her name. He had also asked what they were doing in his van. Then, rather remarkably, perhaps now no longer in any kind of a "dissociative state," at least for the time being, and, therefore, in a sense back in touch with the truly horrific nature of his own actions, he had made no further attempt to kill. Thus, he had refrained from killing the one woman who would now be able to identify the serial killer who had already killed many others. Once again, the exact meaning of his actions in allowing Ms. Smith to remain alive at that time would likely have been vigorously debated by his sentencing jury. However, they had had no opportunity to engage in such a debate. That had been so because they had been presented with no information whatsoever regarding the possibility that when in a more lucid state of mind, temporarily distracted from the "dissociative state" associated with his paraphilic fantasies and cravings, that Mr. Yates had been unable to bring himself to kill again.

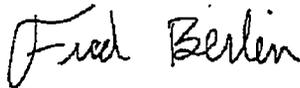
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In allocuting to the court at the time of his penalty phase hearing (page 8195 of the relevant court transcript), Mr. Yates had said "within myself I had no power to defeat this full-blown sinful nature. There were times, long periods, when in between my horrific crimes there were periods of relative calm; nothing evil happened. But that sinful nature which wrought so much recent violence never really left." Although, at times, Mr. Yates had himself also used the word "disease," neither his sentencing jury, nor the loved ones of his victims, had been afforded the opportunity to hear professional testimony about the possibility that his actions may have been more the product of mental disorder, and of recurrent, intense pathological cravings, than of a "sinful nature." In my professional opinion, but for the presence of his psychiatric disorder, a disorder that had predisposed his violence, many of his victims might still be alive today.

I trust that this information may prove useful. Should you require any additional information from me at this time, please do not hesitate to let me know. Thank you very much.

I declare, under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct to the best of my knowledge.

Sincerely,



Fred S. Berlin, M.D., Ph.D.  
Associate Professor, The Johns Hopkins University  
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Founder, The Johns Hopkins Sexual Disorders Clinic  
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Treatment of Sexual Trauma

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Enclosure: Dr. Berlin's professional vitae

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*Research Assistant, 1965 - 1966, Fordham University, Department of Psychology.*

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*Clinical Clerkship, 1973 - 1974, Victoria General Hospital, Halifax.*

*Medical Intern, 1974 - 1975, McGill University School of Medicine, Jewish General Hospital, Children's Hospital, Montreal, Canada.*

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Attending Physician, 1978 – Present, The Johns Hopkins Hospital.

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**RESEARCH ACTIVITIES:**

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Berlin FS, Shaerf FW: Laboratory Assessment of the Paraphilias and Their Treatment with Antiandrogenic Medication. In (Hall RCW, Beresford TP, Eds.), A Handbook of Psychiatric Diagnostic Procedures. New York, Spectrum Publications, pp. 273-305, 1985.

Berlin FS: (1) Behavior Modification, (2) Biological Therapies. Two sections in (Meyer J, Schmidt CW, Wise TN, Eds.), Clinical Management of Sexual Disorders. Williams and Wilkins, Baltimore, Maryland, 1983.

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Berlin FS. *Sex Offenders: A Biomedical Perspective and a Status Report on Biomedical Treatment*. In (Greer JB, Stuart IR, Eds.), *The Sexual Aggressor: Current Perspectives on Treatment*. Van Nostrand Reinhold Co., New York, pp. 83-123, 1983.

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### **INVITED REVIEWS AND EDITORIALS:**

Lehne G, Thomas K, Berlin FS. *Treatment of sexual paraphilias: a review of the 1999-2000 literature*, *Current Opinion in Psychiatry*, 13, 569-573, 2000 (invited review requested of Dr. Berlin).

Berlin FS, *Pornography and politics: A case for sane civility*. *The Baltimore Sun*, p. 13F, 2/7/99 (invited editorial).

Berlin FS, *If the Starr Report Were a Psychiatric Case Study, What Kind of Footprint Would It Leave?* *The Baltimore Sun, Arts & Society*, p. 11G, 9/27/98 (invited editorial).

Berlin FS, *Criminal or Patient?* *Culturefront*, 5, 2, pp. 71-75, Summer 1998 (invited article).

Berlin FS. *The Case for Castration, Part 2*. *The Washington Monthly*, 5, pp. 28-29, May 1994 (invited editorial).

Berlin FS, Malin HM, Dean S. *Involuntary Intervention: Does the Benefit Exceed the Cost?* *American Journal of Psychiatry*, 149, 3, 1992 (invited editorial response - letter).

Berlin FS, Malin HM. *Laws on Reporting Sexual Abuse of Children, Dr. Berlin and associates reply*. *American Journal of Psychiatry*, 148, 11, p. 1619, 1991. (invited editorial response - letter).

Berlin FS. *Response to KJ Masters Commentary "Dahmer Case Trivialized by Forensic Psychiatrists"*. *Clinical Psychiatry News*, p. 4, February 1993 (invited editorial).

Berlin FS, Malin HM. *Rape: A Presumption of Guilt? A Presumption of Severe Punishment if Guilty*. *A Journal for the Expert Witness, The Trial Attorney and the Trial Judge*, 5, pp. 7-9, 1990 (invited article).

Berlin FS. *Commentary on "Sexual Addiction and Compulsive Sexual Behaviors" by Eric Griffin-Shelley*. *Medical-Moral Newsletter*, 26, pp. 8-9, 1989 (invited article).

Berlin FS. *Ethical Use of Psychiatric Diagnoses*. *Psychiatric Annals*, 13, pp. 321-331, 1983 (invited article).

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Berlin FS. *Ethical Use of Antiandrogenic Medications*. *American Journal of Psychiatry*, 138, 11, p 1516, 1981 (invited editorial response - letter).

Berlin FS. *In Defense of the Disease Model in Psychiatry*. *Psychiatric Annals*, 11, p. 5 - 12, 1981 (invited article).

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Berlin FS. *Psychological Therapies for Anxiety*. Psychiatric Annals, 9, pp. 41-55, 1974 (invited article).

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### **BOOK REVIEWS:**

*Sexual Deviation, Third Edition (Rosen I, Ed.)*, The Journal of Nervous and Mental Disease, 186, No. 4, pp 255-256, 4/98.

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*Text Book of Homosexuality and Mental Health (Cabaj RP and Stein TS, Eds.)*, Journal of Nervous and Mental Disease, 185, No. 11, 11/97. .

*Handbook of Sexual Assault: Issues, Theories and Treatment of the Offender*. (Marshall WL, Laws DR, Barbaree HE, Eds.), Archives of Sexual Behavior, 21, p. 4, 1992.

*Treating Perpetrators of Sexual Abuse*. (Ingersol SL, Patton S). The Bulletin of the American Academy of Psychiatry and the Law, 18, 4, pp. 429-430, 1990.

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### **OTHER PUBLISHED MATERIALS:**

Berlin FS. *An Interview by the Editor*. The Maryland Psychiatrist, 17, pp. 5-7, 1990.

Berlin FS, *National Conference of Catholic Bishops Interview*, National Conference of Catholic Bishops' Ad Hoc Committee on Sexual Abuse, Published online at [uscbb.org](http://uscbb.org), Baltimore, Maryland, 09/08/97

Berlin FS *Diagnosis and Treatment of Paraphilias*. Audio Digest Psychiatry, 17, p. 17, September 5, 1988.

Berlin FS. *Treating Sexual Disorders with Medroxyprogesterone Acetate: An Interview with Fred S. Berlin*. Currents in Affective Illness, 6, 7, pp. 5-15, 1987.

Berlin FS. *Psychiatry Meets the Sex Offender*. Audio-Digest Psychiatry, 16, p. 13, July 13, 1987.

Berlin FS, Meinecke CF. *Treatment of Sex Offenders with Antiandrogenic Medications*. Audio Digest Psychiatry, December 1981. (Audio Cassette).

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### **EXTRAMURAL SPONSORSHIP:**

#### **GRANTS AND CONTRACTS:**

The Harry Frank Guggenheim Foundation: *The Assessment of Compulsive Rapists and Pedophiles for Hormonal, Chromosomal and Neurobiological Pathologies*. Grant awarded on July 15, 1985.

## FREDERICK S. BERLIN, M.D., Ph.D. - CURRICULUM VITAE

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Berlin FS, Conner E, Rider M: Annotated Bibliographic Review of Literature on Etiology and Treatment of Sex Offenses and Sex Offenders. Contracted and published by The National Institute of Mental Health, 1982.

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### **EDUCATIONAL ACTIVITIES:**

#### **TEACHING:**

Classroom Instruction – Yearly lecture, 2nd year medical students, The Johns Hopkins University School of Medicine.

Clinical Instruction – Bedside and didactic teaching, psychiatric residents and students, Meyer-5 ward (currently attending physician 3 months of the academic year), The Johns Hopkins Hospital.

(See also below – “Primary Service Responsibilities”)

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#### **CME INSTRUCTION:**

Invited Participant, When Sex Offenders are Adolescents, Ministry of the Sick, The Johns Hopkins University School of Medicine Continuing Medical Education Course, Baltimore, Maryland, 4/29/96.

Invited Participant, Positron Emission Tomography and the Chemistry of Mental Illness: Changes in Brain Chemistry During Sexual Arousal, Nuclear Medicine Seminar, The Johns Hopkins University School of Medicine Continuing Medical Education Course, Baltimore, Maryland, 3/13/97.

Course Director, Pedophilia and Rape, 143rd Annual Meeting, American Psychiatric Association, New York, New York, 5/12/90 - 5/17/90.

Course Director, Diagnosis and Treatment of Pedophiles and Rapists, 142nd Annual Meeting, American Psychiatric Association, San Francisco, California, 5/6/89 - 5/11/89.

Course Director, Assessment and Treatment of Adult and Adolescent Sex Offenders, 141st Annual Meeting, American Psychiatric Association, Montreal, Canada, 5/9/88.

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Course Director, Diagnosing and Treating Rapists and Pedophiles, 140th Annual Meeting, American Psychiatric Association, Chicago, Illinois, 5/13/87.

Invited Participant, Positron Emission Tomography: Changes in Opiate Receptor Activity on PET Scanning During Sexual Arousal, The Johns Hopkins University School of Medicine Continuing Education Course, Baltimore, Maryland, 4/19/86.

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**FREDERICK S. BERLIN, M.D., Ph.D. - CURRICULUM VITAE**

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(See also below – “Conferences Organized”)

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**MENTORING:**

Member, Board of Student Advisors, The Johns Hopkins University School of Medicine, 1980-1983.

Member, Ph.D. Thesis Committee, for Dr. Kate Thomas and Dr. Kathy Pilero.

Clinical Supervisor for a Variety of Psychiatric Residents.

Supervisor of Elective Training to a Variety of Pre- and Post-doctoral Students.

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**EDITORIAL BOARD APPOINTMENTS:**

Member, Editorial Board, Family Violence and Sexual Assault Institute, 2003 – present

Member, Editorial Board, Journal of Sexual Addiction and Compulsivity, 2001 - present

Associate Editor, International Journal of Offender Therapy and Comparative Criminology, January 1997 – December 2002

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**PEER REVIEW PERFORMED FOR THE FOLLOWING JOURNALS:**

The American Journal of Psychiatry

Behavioral Sciences and the Law

Journal of the American Medical Association (JAMA)

Journal of Child Sexual Abuse

The Journal of Nervous & Mental Disease

The Journal of Pediatrics

The Journal of the American Academy of Psychiatry and the Law

The American Journal of Clinical Hypnosis

The Archives of General Psychiatry

Archives of Sexual Behavior

Child Abuse and Neglect: The International Journal

The Journal of Consulting and Clinical Psychology

The Journal of Neuropsychiatry and Clinical Neurosciences

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Psychosomatics

Social Psychiatry and Psychiatric Epidemiology

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**CLINICAL ACTIVITIES:**

**LICENSURES:**

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**FREDERICK S. BERLIN, M.D., Ph.D. - CURRICULUM VITAE**

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*Licensed Physician, State of Maryland, 1975 – Present, ID #D18703.*

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**CERTIFICATIONS AND FELLOWSHIPS:**

*Diplomat, National Board of Medical Examiners, ID #141770, 1975.*

*Board Certified in Psychiatry, American Board of Psychiatry and Neurology, ID #21208, 1980.*

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*Distinguished Fellow, American Psychiatric Association, 1991.*

*Diplomat, The American Board of Forensic Examiners, ID #660, 1994.*

*Diplomat, The American Board of Sexology, ID #1760, 1995.*

*(have also provided questions for board certification examinations)*

*Board Certified in Forensic Psychiatry, American Board of Psychiatry and Neurology, ID #504, 1998.*

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**PRIMARY SERVICE RESPONSIBILITIES:**

*Attending Physician, Psychiatry, Meyer-5 Inpatient Service, Currently 3 months per year (previously as much as 12 months per year) – includes periodic weekends on-call.*

*Affiliate Staff Member, Sexual Behaviors Consultation Unit, involves teaching and supervision of Johns Hopkins psychiatric residents during their outpatient training.*

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**ORGANIZATIONAL ACTIVITIES:**

**THE JOHNS HOPKINS MEDICAL INSTITUTIONS:**

*Member, Medical School Counsel, The Johns Hopkins University, 1982 – 1984.*

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*Member, Gender Identity Committee, The Johns Hopkins Hospital, 1980 – 1981.*

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*Member, Utilization Review Committee, The Johns Hopkins Hospital, 1977 – 1978.*

*Member, Advisory Committee, House Staff Council, The Johns Hopkins Hospital, 1977 – 1978.*

*Member, House Staff Council, The Johns Hopkins Hospital, 1976 – 1978.*

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**PROFESSIONAL SOCIETIES:**

**ELECTED POSITIONS:**

President, Chesapeake Bay Chapter, American Academy of Psychiatry and the Law, 4/95 - 4/98.

Treasurer, Chesapeake Bay Chapter, American Academy of Psychiatry and the Law, 1993-1995.

Elected Member of Council, Maryland Psychiatric Society, 1993-1996.

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**APPOINTED POSITIONS:**

Appointed Member, Technical Advisory Committee, The Spurwink Institute, 1996 - Present.

Appointed Member, Board of Directors, Maryland Foundation for Psychiatry, 1995 - Present.

Appointed Member, Task Force on Examinations, Section on Sexological Research, The American Board of Sexology, 8/31/92 - Present.

Appointed Member, Legislative Committee, Maryland Psychiatric Society, 1989 - Present.

Appointed Member, Legislative Network, Mental Health Association of Metropolitan Baltimore, 1985 - Present.

Appointed Member (by the Governor of Maryland), The Board of Patuxent Institution, 1984 - 1989.

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**MEMBERSHIPS:**

American Academy of Psychiatry and the Law  
American Association for the Advancement of Science  
American Board of Forensic Examiners  
American College of Forensic Psychiatry  
American Medical Association  
American Professional Society on the Abuse of Children  
American Psychiatric Association  
Association for the Treatment of Sexual Abusers  
Eastern Psychological Association  
Greater Baltimore Task Force on Sexual Offenders  
Maryland Psychiatric Society  
Mental Health Association of Maryland  
National Adolescent Perpetrator Network  
Society for Scientific Study of Sex  
Society of Biological Psychiatry

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*Southern Medical Association*

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**CONFERENCES ORGANIZED:**

*Course Director, The Cycle of Sexual Trauma: Treating the Victim and Treating the Offender, The Johns Hopkins University School of Medicine Continuing Medical Education Course, Baltimore, Maryland, 2/10/94 - 2/12/94.*

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*Course Director, Sex Offenders: Focus on Treatment, The Johns Hopkins University School of Medicine Continuing Medical Education Course, Baltimore, Maryland, 1/19/88.*

*Course Director, Sex Offenders: Criminals or Patients? The Johns Hopkins University School of Medicine Continuing Medical Education Course, Baltimore, Maryland, 1/19/87 - 2/21/87.*

*Course Director, The Sex Offender: Medical and Legal Issues, The Johns Hopkins University School of Medicine Continuing Medical Education Course, Baltimore, Maryland, 2/20/86 - 2/22/86.*

*Course Director, Diagnosis and Treatment of Sex Offenders, The Johns Hopkins University School of Medicine Continuing Medical Education Course, Baltimore, Maryland 2/21/85 - 2/22/85.*

*Course Director, Medical Assessment and Treatment of Sex Offenders, The Johns Hopkins University School of Medicine Continuing Medical Education Course, Baltimore, Maryland, 2/20/84.*

*Course Director, Medical Assessment and Treatment of Sex Offenders, The Johns Hopkins University School of Medicine Continuing Medical Education Course, Baltimore, Maryland, 2/16/83.*

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**PEER REVIEW GROUPS:**

*Member, National Institute of Mental Health Special Emphasis Panel, ZMH1 ERB - 1(01), Adult and Adolescent Interventions, 10/29/04.*

*National Institute of Mental Health Grant Review Panel, Bethesda, Maryland, 03/04/00.*

*Ad Hoc Member, National Institute of Mental Health Review Group, Violence and Traumatic Stress Research Review Committee, 1997.*

*External Peer Reviewer of the Psychiatry Program at Shodair Hospital, Helena, Montana, 1996.*

*Grant Reviews performed for the Mental Health Foundation, Ottawa, Canada, 1984-85, 1996.*

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**CONSULTANTSHIPS:**

Consultation provided to Gerry Sutcliffe, MP, Under Secretary of State for Criminal Justice and Offender Management, United Kingdom, July 21, 2006.

Consultant, Prison Service Division, Correction Bureau, Ministry of Justice, Japan, September 15, 2005.

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First Draft Technical Advisory Research Person, Entertainment Industries Council, 2002

Member, Cardinal's Commission for the Protection of Children, Archdiocese of Boston, 2002

Standing Ethics Committee Member, Association for the Treatment of Sexual Abusers (ATSA), Beaverton, Oregon, 7/2001 – Present.

Standing Advisory Member, Advisory Board, Association for the Treatment of Sexual Abusers (ATSA), Beaverton, Oregon, 12/00 – Present.

Standing Advisory Member, Ad Hoc Committee on Sexual Abuse, National Conference of Catholic Bishops, Washington, D.C., 11/13/93 – Present.

Ad Hoc Commentator, The Forensic Psychiatry Echo, New York, NY, 1996 – Present.

Consultant, Wisconsin Department of Corrections regarding the use of antiandrogens. July 2001.

Psychiatric Consultant, State of Maryland Division of Corrections, 1980 – 1994.

Psychiatric Consultant, The Maryland Training School for Boys, 1980 – 1988.

Consultation provided to several state agencies regarding establishment of treatment programs for sex offenders (e.g., Pennsylvania, Tennessee, Virginia, Oregon) 1984 – 1994.

Consultation provided to European Parliament regarding rehabilitation of sex offenders, 1984.

Numerous court appearances as an expert witness on the diagnosis and treatment of paraphilic disorders ( and on the insanity defense), 1980 – Present.

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**RECOGNITION:**

**AWARDS, HONORS:**

Distinguished Fellow, The American Psychiatric Association May 2003

National Institute for the Study, Prevention and Treatment of Sexual Trauma designated as a National "Resource Site" by the United States Department of Justice 1997 - Present

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**FREDERICK S. BERLIN, M.D., Ph.D. - CURRICULUM VITAE**

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<i>Listed in "The Best 2000 Doctors"</i>	<i>1996 - Present</i>
<i>Listed in "Who's Who in Medicine and Healthcare"</i>	<i>1996 - Present</i>
<i>Presidential Citation, City of Baltimore</i>	<i>December 1996</i>
<i>Citation of Meritorious Achievement, Dictionary of International Biography, Cambridge, England</i>	<i>May 1995</i>
<i>Listed in "The Best Doctors in America"</i>	<i>1994 - Present</i>
<i>Listed in "Who's Who in America"</i>	<i>1990 - Present</i>

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**INVITED TALKS:**

**GRAND ROUNDS (VISITING SPEAKER):**

*Invited Speaker, Sex Offenders: Criminals or Patients, Psychiatry Grand Rounds, Georgetown University Hospital, Washington, DC, 03/27/08.*

*Invited Speaker, Men Who Rape. Psychiatry Grand Rounds, The Johns Hopkins University School of Medicine, Baltimore, Maryland, 12/12/05.*

*Invited Speaker, Sex Offenders: Criminals or Patients?, Psychiatry Grand Rounds, University of Massachusetts, School of Medicine, Worcester, Massachusetts, 12/16/04.*

*Invited Presenter, The Paraphilias: Moral or Medical Problem?, Psychiatry Grand Rounds, Quillen College of Medicine, Johnson City, Tennessee, 08/27/04.*

*Invited Presenter, Clergy Sexual Abuse: The Crisis in the Catholic Church, Grand Rounds, St. Luke Institute, Silver Spring, Maryland, 11/21/02.*

*Invited Presenter, Evidence-based Treatment of Sex Offenders, Park Ridge Hospital, Rochester, New York, 10/2/03.*

*Invited Presenter, Psychiatry and the Law, Charles E. Steinberg Grand Rounds Lecture, University of Rochester Medical Center, Rochester, New York, 10/01/03.*

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*Invited Presenter, Sex Offenders: Criminals or Patients? Grand Rounds, Springfield Hospital Center, Sykesville, Maryland, 8/22/03.*

*Invited Presenter, The Crisis in the Catholic Church, Mendelsohn Lecture Series, The New England Medical Center, Boston, Massachusetts, 09/30/02.*

*Invited Presenter, Diagnosis and Treatment of Paraphilias, Correctional Mental Health Grand Round Series, Baltimore, Maryland, 11/17/00.*

## FREDERICK S. BERLIN, M.D., Ph.D. - CURRICULUM VITAE

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Invited Speaker, The Paraphilias, Grand Rounds, Columbia University College of Physicians and Surgeons, The Psychiatric Institute, New York, New York, 10/27/00.

Invited Speaker, Ethical Issues in the Care and Treatment of Sexual Predators, Grand Rounds, Bronx Psychiatric Center, Albert Einstein College of Medicine, Bronx, New York, 5/7/98.

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Invited Speaker, Diagnosis and Treatment of Sexual Offenders, Grand Rounds, St. Luke Institute, Silver Spring, Maryland, 4/9/98.

Fifth Annual Speaker, Diagnosing and Treating Paraphilias, Paul Mendelsohn Memorial Grand Rounds on Psychiatry and the Law, New England Medical Center, Tufts University School of Medicine, Boston, Massachusetts, 4/28/95.

Invited Speaker, Psychiatric and Other Issues in Paraphilias, Grand Rounds, Springfield Hospital Center, Sykesville, Maryland, 8/22/03, 2/18/94, 7/24/92, 4/26/91, 3/30/90.

Invited Speaker, The Insanity Plea and the Paraphilias, Grand Rounds, Sheppard Pratt Hospital, Baltimore, Maryland, 5/1/93.

Invited Speaker, The Paraphilias, Adolescent Psychiatry Grand Rounds, University of Maryland, Baltimore, Maryland, 2/23/93.

Invited Speaker, Treating Sexual Disorders, Grand Rounds, Crownsville Hospital Center, Baltimore, Maryland, 1/22/93.

Invited Speaker, Differential Diagnosis and Treatment Strategies in Sexual Perversions, Psychiatric Grand Rounds, West Virginia University School of Medicine, Morgantown, West Virginia, 4/1/92.

Invited Speaker, Interventions for the Paraphilic Patient, Psychiatric Grand Rounds, University of Maryland, Baltimore, Maryland, 3/26/92, 3/19/85.

Invited Speaker, The Paraphilias, Psychiatric Grand Rounds, Bethesda Naval Hospital, Bethesda, Maryland, 1/27/88, 5/20/87.

Invited Speaker, Treating the Paraphilias, Psychiatric Grand Rounds, University of Texas School of Medicine, Dallas, Texas, 10/27/87, 1/17/86.

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Invited Speaker, Treating Sex Offenders, Psychiatric Grand Rounds, University of Virginia School of Medicine, Charlottesville, Virginia, 9/12/85.

Invited Speaker, Management of the Paraphilias, Psychiatric Grand Rounds, St. Elizabeth's Hospital, Washington, D.C., 5/23/84.

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### **INVITED TALKS AND MEMBERSHIP**

**FREDERICK S. BERLIN, M.D., Ph.D. - CURRICULUM VITAE**

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**AT GOVERNMENT SPONSORED ACTIVITIES:**

**(FEDERAL GOVERNMENT):**

*Invited Participant, Judicial Hearing Regarding Sex Offender Legislation, Subcommittee on Crime, Terrorism, and Homeland Security, United States Congress, Washington, DC, 6/9/05.*

*Invited Speaker, Sexual Addiction and the Fantasy Defense, International Online Child Sexual Victimization Symposium, United States Department of Justice, Federal Bureau of Investigation, Leesburg, Virginia, 06/06/04 – 06/11/04.*

*Invited Participant, Online Sexual Victimization of Children Working Group, Federal Bureau of Investigation, Quantico, Virginia, 02/04/04 – 02/05/04.*

*Invited Speaker, Understanding Sex Offenders, Annual In-service Training, Crimes Against Children Unit, Headquarters Federal Bureau of Investigation, Washington, DC, 03/20/2002.*

*Invited Participant, Second National Summit, Center for Sex Offender Management (CSOM), Office of Justice Programs, U. S. Department of Justice, Washington, D.C., 12/17/00 – 12/19/00.*

*Member, Office of Justice Programs Planning Group Regarding Safe Management of Sex Offenders in the Community, Center for Effective Public Policy, Center for Sex Offender Management (CSOM), U. S. Department of Justice, Washington, D.C., 9/9/96 - Present.*

*Invited Participant, National Resource Group Meeting, Center for Sex Offender Management (CSOM), Office of Justice Programs, U. S. Department of Justice, Washington, DC, 10/2/00 – 10/3/00.*

*Invited Participant, Third Meeting of the Center for Sex Offender Management's National Resource Sites, Boston, Massachusetts, 7/26/99 – 7/31/99.*

*Invited Participant, Mental Health and the Criminal Justice System Forum, U.S. Department of Justice, Office of Justice Programs and the Center for Mental Health Services, Washington, DC, 7/22/99 – 7/23/99.*

*Invited Speaker, Safe Management of Sex Offenders in the Community. Center for Effective Public Policy, Office of Justice Programs Symposium, U. S. Department of Justice, Washington, D.C., 11/24/96 - 11/26/96.*

*Invited Speaker, Treatment of Sex Offenders, United States Parole Commission (Northeastern Region), Baltimore, Maryland, 6/27/89.*

*Invited Testimony, presented to members of The Meese Commission on Pornography, Baltimore, Maryland, 5/16/85.*

**FREDERICK S. BERLIN, M.D., Ph.D. - CURRICULUM VITAE**

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*Invited Participant, NIMH Sponsored Conference, Allocation of Grant Funding to Support Training on Research Related to Sex Offenses and Sexual Disorders, St. Louis, Missouri, 3/2/85 - 3/8/85.*

*Invited Speaker, Subcommittee on Juvenile Justice Hearings, United States Senate, Washington, D.C., 9/18/84.*

*Invited Participant, White House Conference on Child Sexual Abuse, Washington, D.C., 4/1/83.*

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**INVITED PRESENTATIONS:**

**(STATE GOVERNMENT and  
STATE BAR ASSOCIATIONS):**

*Keynote Speaker, Sex Offenders: Criminals or Patients? Clinical Evaluation of Sex Offenders, Treatment of Sex Offenders, Legislative Issues, Civil Commitments and "Cyber-Sex," Massachusetts District Attorneys Association, Boston, Massachusetts, October 25, 2007.*

*Invited Speaker, Watching and Restricting Dangerous Offenders, Annual Meeting, National Conference of State Legislatures, Nashville, Tennessee, 08/16/06.*

*Invited Speaker, Treatment of Sexual Offenders, State House Judiciary Committee, Annapolis, Maryland, 10/18/04.*

*Invited Speaker, Treatment of Sexual Offenders, Specialized Treatment Committee, New Jersey Study Commission on Parole, Trenton, New Jersey, 4/22/96; 10/23/96.*

*Invited Speaker, Megan's Law: Community Notification. Justice Committee, New Jersey State Legislature, Trenton, New Jersey, 2/22/95.*

*Invited Participant, Assessing Dangerousness and Treatment Potential, Conference of the Superior Court of California, San Diego, California, 1/15/95 - 1/17/95.*

*Invited Speaker, Designing a Model Sex Offender Treatment Program for the State of Texas, 2nd Round House Conference, Child Abuse and Texas Families, Austin, Texas, 9/24/93.*

*Invited Speaker, Cause and Elements of Pedophilic Behavior, Child Abuse Seminar, The New Jersey Institute for Continuing Legal Education, The New Jersey State Bar Association, Fairfield, New Jersey, 4/25/92.*

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*Invited Speaker, Sentencing Alternatives and the Developmentally Handicapped Sex Offender, Wisconsin State Public Defender Service, Milwaukee, Wisconsin, 11/14/91.*

*Invited Speaker, Treatment of Sex Offenders with Depo-Provera, Seminar for South Carolina Judges and Penal Officers, Columbia, South Carolina, 4/17/90.*

**FREDERICK S. BERLIN, M.D., Ph.D. - CURRICULUM VITAE**

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*Invited Speaker, Rapist and Sex Offender Rehabilitation, Subcommittee on Crime and Corrections, New York State Senate, Albany, New York, 6/15/89.*

*Invited Speaker, Men Who Rape: Profiles of Rapists, Criminal Law and Sentencing Institute Conference, Supreme Court of Wisconsin, Oshkosh, Wisconsin, 5/17/89.*

*Invited Speaker, The Sex Offender and the Criminal Justice System, Cook County Circuit Court Judges Seminar, Chicago, Illinois, 9/24/88.*

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*Invited Speaker, Sentencing Alternatives, Judicial Education Conference, District Court of Maryland, Baltimore, Maryland, 10/5/88.*

*Invited Speaker, Sex Offender Treatment, Annual Meeting, Pennsylvania State College of Judges, Hershey, Pennsylvania, 7/25/87.*

*Invited Speaker, Treating the Incarcerated Sex Offender, Special Conference, State of Maryland Division of Correction, Baltimore, Maryland, 11/16/87*

*Invited Speaker, Paraphilic Disorders and the Criminal Justice System, Annual Conference, Kansas State College of Judges, 10/14/86 - 10/16/86.*

*Invited Speaker, Treatment of Sex Offenders, Annual Conference, State of Utah Department of Corrections, Salt Lake City, Utah, 9/28/86 - 9/30/86.*

*Invited Speaker, Sex Offenders: Treatment and Sentencing Alternatives, Annual Meeting, Vermont Judicial College, Burlington, Vermont, 6/4/86 - 6/6/86.*

*Invited Speaker, Medical Assessment and Treatment of Sex Offenders, Annual Meeting, Maryland States Attorneys Association, Ocean City, Maryland 6/4/85.*

*Invited Speaker, Community Setting Programs for the Treatment of Sex Offenders, South Carolina Department of Parole and Community Corrections, Columbia, South Carolina, 5/10/85.*

*Invited Speaker, Issues in the Rehabilitation of Sex Offenders, Maryland State Parole Board, Baltimore, Maryland, 3/9/84.*

*Invited Speaker, Rape and Sexual Assault, Governor of Maryland's Task Force on Rape and Sexual Violence, Baltimore, Maryland, 10/4/83.*

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*Invited Speaker, Rehabilitation of Sex Offenders, Somers Treatment Program, State of Connecticut Department of Corrections, Somers, Connecticut, 7/8/83.*

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**INVITED PRESENTATIONS:**

**(LOCAL GOVERNMENTS and  
LOCAL BAR ASSOCIATIONS)**

**FREDERICK S. BERLIN, M.D., Ph.D. - CURRICULUM VITAE**

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*Invited Speaker, Mandatory Reporting of Child Sexual Abuse, Forum on Child Abuse and Confidentiality: Privacy Protection and Accountability, Association of the Bar of the City of New York, Committees on Family Court and Family Law and Children and the Law, New York, New York, 10/13/92.*

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**INVITED PRESENTATIONS TO NATIONAL CONFERENCES OF JUDGES:**

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*Invited Speaker, Sexual Offenders and the Criminal Justice System, National Conference of Juvenile Court Judges, Burlington, Vermont, 8/20/85 - 8/21/85.*

*Invited Speaker (as a National Leader in Law and Health), National Symposium on the Child Victim of Sexual Abuse, National Counsel of Juvenile and Family Court Judges, Burlington, Vermont, 2/24/85 - 2/27/85.*

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**INVITED PRESENTATIONS TO LAW ENFORCEMENT AGENCIES:**

*Invited Speaker, Evaluation and Treatment of Sex Offenders, Annual Child Sexual Exploitation Seminar, Baltimore County Police Academy, Baltimore County, Maryland, 10/14/98; 10/15/97; 8/30/96; 7/20/95; 7/16/93; 6/14/91; 8/23/90; 9/15/89; 7/15/88; 6/15/87, 10/6/99, 10/13/00, 10/10/01, 10/11/02, 10/15/04, 10/25/05, 10/27/06. 10/23/07.*

*Invited Speaker, Profiling the Rapist, Violent Crimes Task Force, Baltimore City Police Department, Baltimore, Maryland, 9/22/97*

*Invited Speaker, The Mind of the Sex Offender, Violent Crimes Task Force, Baltimore City Police Department, Baltimore, Maryland, 12/6/96.*

*Invited Speaker, Clinical Perspectives and Profiles of Sexual Offenders, Colorado Association of Sex Crimes Investigators, Lakewood, Colorado, 9/8/94 - 9/10/94.*

*Production of a Training Film, Psychosexual Disorders as They Relate to Law Enforcement, Maryland State Police, Baltimore, Maryland, 3/25/86.*

*Invited Speaker, Sex Offenders and the Law, Educational Seminar, Baltimore City Police Department, Baltimore, Maryland, 12/17/85.*

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**PRESENTATIONS AT NATIONAL TREATMENT CONFERENCES:**

*Keynote Speaker, 2008 National Conference of The Society for the Advancement of Sexual Health (SASH), Cambridge, Massachusetts, 09/19/08.*

**FREDERICK S. BERLIN, M.D., Ph.D. - CURRICULUM VITAE**

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*Invited Participant, Child Pornography Roundtable: Toward a Shared Understanding of the Problem & Prevention Strategies, National Center for Missing and Exploited Children, Alexandria, Virginia, 02/07/08.*

*Invited Speaker, The Assessment and Etiology of Paraphillias & The Rationale for Treatment, and Treating Paraphillias, ValueOptions Postgraduate Institute for Medicine, Behavioral Health Update 2006, Phoenix Arizona, 03/04/06.*

*Invited Speaker, Sex and the Nursing Home Resident: Pharmacological Enhancement of Sexual Control, American Association for Geriatric Psychiatry, 17<sup>th</sup> Annual Meeting, Baltimore, Maryland, 02/21/04 – 02/24/04.*

*Invited Speaker, Sex Offenders: Criminals or Patients? National Defense Investigators Association, Federal Public Defenders Office, National Training Conference, Ft. Lauderdale, Florida, 4/23/03 – 4/25/03.*

*Keynote Speaker, Sex Offenders: Criminals or Patients? Annual Meeting of the Minnesota Association for the Treatment of Sexual Abusers, Minneapolis, Minnesota, 3/21/03.*

*Invited Participant, Law and Disorder: SVP, Mock Trial, American Academy of Psychiatry and the Law Annual Meeting, Newport Beach, California, 10/24/02 – 10/27/02.*

*Keynote Speaker, Sex Offenders: Criminals or Patients? National Council on Sexual Addiction and Compulsivity (NCSAC) Conference, Nashville, Tennessee, 10/6/02 – 10/8/02.*

*Invited Speaker, The Diagnosis and Treatment of Sex Offenders, SAPEN Conference, Pittsburgh, Pennsylvania, 9/6/01.*

*Invited Keynote Speaker, Sex Offenders: Criminals or Patients (and also The Use of Actuarials at Civil Commitment Hearings), Association for the Treatment of Sexual Abusers (ATSA), San Diego, California, 11/1/00 – 11/4/00.*

*Invited Speaker, Diagnosis and Treatment of Sexual Disorders, Sexual Abuse Prevention and Education Network (S.A.P.E.N.) Annual Conference, Harrisburg, Pennsylvania, 10/10/00.*

*Invited Speaker, Diagnosis and Treatment of Sex Offenders, American Academy of Psychiatry and the Law (AAPL) Annual Meeting, Baltimore, Maryland, 10/15/99.*

*Invited Participant, Diagnosing and Treating Sexual Offenders From a Medical Perspective, Association for the Treatment of Sexual Abusers (ATSA) 18th Annual Research and Treatment Conference, Lake Buena Vista, Florida, 9/22/99 – 9/25/99.*

*Invited Speaker, Diagnosis and Treatment of Sex Offenders, Specialized Training Services – Assessing and Treating Sex Offenders, Chicago, Illinois, July 8, 1999.*

*Keynote Speaker, Sex Offenders: Criminal or Patient? The National Council on Sex Addiction and Compulsivity 1999 National Conference, St. Louis, Missouri, 4/9/99.*

## FREDERICK S. BERLIN, M.D., Ph.D. - CURRICULUM VITAE

Invited Panelist, Toward a Whole Systems Approach to Sex Abuse, 22<sup>nd</sup> Annual Family Therapy Network Symposium, Washington, D.C., 3/20/99.

Invited Panelist, The Missing Face in Sex Abuse Prevention, The International Society for Traumatic Stress Studies and The Dartmouth-Hitchcock Medical Center XIV Annual Meeting, Washington, D.C., 11/22/98.

Invited Panelist, A Serial Murderer: From Competency to Sentencing, American Academy of Psychiatry and the Law, New Orleans, Louisiana, October 23, 1998.

Invited Speaker, Sex Offenders: Criminals or Patients? National Council on Sexual Addiction and Compulsivity, Louisville, Kentucky, 3/26/98 - 3/28/98.

Invited Panelist, Sex Offenders: Criminals or Patients? 150th Annual Meeting, American Psychiatric Association, San Diego, California, 5/20/97.

Invited Speaker, Forensic Evaluation of the Accused Sexual Offender: Can He Be Treated? 12th Annual Symposium, American College of Forensic Psychiatry, Montreal, Canada 5/8/94 - 5/15/94.

Invited Speaker, Jeffrey Dahmer: Was He Ill? Was He Impaired? 11th Annual Symposium, American College of Forensic Psychiatry, Santa Fe, New Mexico, 4/23/93.

Invited Panelist, Jeffrey Dahmer: A Case Study, Annual Meeting, American Academy of Psychiatry and the Law, San Antonio, Texas, 10/15/92 - 10/18/92.

Invited Panelist, Diagnosis and Treatment of Sex Offenders, Annual Meeting, American Academy of Psychiatry and the Law, Washington, D.C., 10/19/89 - 10/20/89.

Invited Speaker, Evaluating and Treating Sex Offenders, 3rd Annual Meeting, American College of Forensic Psychiatry, Newport Beach, California, 4/18/85 - 4/21/85.

Invited Speaker, Behavioral Medicine Seminar, Medical Evaluation and Treatment of the Paraphilias, 136th Annual Meeting, American Psychiatric Association, 5/18/83.

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### **ADDITIONAL SIGNIFICANT LECTURES:**

Invited Participant, Mentally Ill/Problematic Sexual Behavior Summit Conference, University of Massachusetts-Medical-School, Beechwood-Hotel, Worcester, Massachusetts, November 17, 2006

Invited Speaker, Sexual Offense and Sexual Offenders: An Overview, Reading Specialists Offender Treatment Services, The Delaware County Association of Criminal Defense Lawyers, and The Criminal Legal Education Committee of the Delaware County Bar Association, Sexual Offenders & the Law: Issues and Process in Treatment, Defense & Prosecution of Sexual Offenders, Reading, Pennsylvania, October 4, 2006

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Invited Speaker, Sexually Violent Predators: Medical Issues and Trends, National Association of State Mental Health Program Directors, Alexandria, Virginia, 08/07/06.

Invited Presenter, Understanding Paraphilias: The Place for Research Findings, Topics in Psychiatry, Sixth Annual Course, Johns Hopkins Continuing Medical Education, Department of Psychiatry and Behavioral Sciences, Baltimore, Maryland, November 18, 2005.

Invited Speaker, Sex Offender Treatment, Massachusetts Psychiatric Society, Third Annual Genetics Update and Fall Seminar, Newton, Massachusetts, October 29, 2005.

Invited Speaker, Sexually Dangerous Persons: Issues and Controversies, Forensic Health Services, Boston, Massachusetts, June 24, 2005.

Invited Speaker, Sex Offenders: Criminals or Patients?, Massachusetts Psychiatric Society, Worcester, Massachusetts, 12/16/04.

Panel Member, The Need for a New Sexual Disorders Diagnosis in DSM-V, Annual Conference, The Society for the Advancement of Sexual Health (NCSAC / SASH), Washington, DC, 10/07/04.

Invited Speaker, Sex: Victims and Victimizers, Tristate American Academy of Psychiatry and the Law, Annual Meeting, New York University School of Medicine, New York, New York, 01/24/04.

Invited Speaker, Rehabilitation of Sex Offenders, Maryland Mensa, Baltimore, Maryland, 10/17/03.

Invited Speaker, Evaluating and Treating Sexual Disorders, Judicial Process Commission, Rochester, New York, 02/17/03.

Invited Speaker, Sexual Disorders and The Catholic Church Crisis, Diocese of Rochester, Rochester, New York, 2/17/03.

Invited Speaker, Sex Offenders: Criminals or Patients, Criminal Justice Seminar, Rochester Institute of Technology, Rochester, New York, 2/17/03.

Invited Speaker (full day), Diagnosing and Treating Sexual Offenders, Colorado Association for the Treatment of Sexual Abusers, Denver, Colorado, 2/23/01.

Invited Presenter, Diagnosis and Treatment of Sex Offenders, Association of Paroling Authorities International, 15<sup>th</sup> Annual Training Conference, Biloxi, Mississippi, 4/19/99.

Invited Speaker, Diagnosis and Treatment of "Sexually Violent Predators", Atascadero State Hospital, Atascadero, California, 2/26/99.

Invited Speaker, Sex Offenders: Criminals or Patients?, Tristate AAPL Annual Conference, New York, NY, 1/23/99.

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Invited Speaker, Treatment of Sex Offenders, Center for Sex Offender Management Conference, Washington, D.C., 12/8/98

Invited Speaker, The Diagnosis and Treatment of Sex Offenders, Arizona State Hospital, Arizona Community Protection and Treatment Center, Phoenix, Arizona, 11/17/98.

Invited Speaker, Understanding Deviant Sexual Behavior, Effective Sex Offender Management Conference, Sponsored by the Arizona Supreme Court and the Center for Sex Offender Management, Phoenix, Arizona, 11/16/98.

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Invited Speaker, Assessing and Treating Sex Offenders, Specialized Training Services and The National Association for the Development of Work With Sex Offenders (NOTA), London, England, 7/3/98.

Invited Speaker, Sexual Aggression: Treatment or Punishment, 2nd Biennial Meeting, American Psychiatric Association - French Federation of Psychiatry, Carre' des Sciences, Paris, France, 6/10/98.

Invited Speaker, Diagnosis and Treatment of Sex Offenders, First Annual Conference on Violence and Aggression, Centre de Recherche Phillippe Pinel de Montreal, Montreal, Canada, 11/1/96.

Distinguished Lecturer, The Evaluation and Treatment of Sex Offenders, Distinguished Lecturer Series, Poplar Springs Hospital, Petersburg, Virginia, 9/27/96.

Distinguished Lecturer, Differential Diagnosis and Treatment of Sexual Offenders, The Spurwink Foundation Distinguished Lecture Series, Nashua, New Hampshire, Portland, Maine, 3/15/95; 3/17/95.

Invited Panelist, Understanding Paraphilias and Sexual Offenders, 29th American Society of Hospital Pharmacists Annual Mid-year Meeting, Miami, Florida, 10/5/94.

Invited Lecturer, Understanding and Treating Sexual Trauma in Children and Adolescents, Devereux Glenholme Professional Resource Center, Windsor Locks, Connecticut, 10/31/94 - 11/2/94.

Visiting Professor, A Forensic Perspective on the Jeffrey Dahmer Case and Overview of the Paraphilias, Visiting Professor Seminar, Pennsylvania Hospital, Philadelphia, Pennsylvania, 7/29/93.

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Invited Speaker, Reassignment of Priest Pedophiles, Cardinal's Commission on Sex Abuse, Archdiocese of Chicago, Chicago, Illinois, 4/30/93.

Invited Speaker, Theories on the Physical Causality of Homosexuality, Annual Meeting, Bishops of North America, Central America and the Caribbean, Dallas, Texas, 2/5/93.

Invited Speaker, Sexual Addiction, Research Seminar, National Institute on Alcohol and Drug Abuse, Rockville, Maryland 1/12/93.

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*Invited Lecturer, Treatment of the Paraphilias, 4th Annual Forensic Psychiatry Symposium on Sexual Misconduct in the Military, Walter Reed Army Hospital, Washington, D.C., 11/23/92.*

*Distinguished Lecturer, Jeffrey Dahmer and Other Sexual Offenders: Diagnosis and Treatment, Distinguished Lecturer Series, Poplar Springs Hospital, Petersburg, Virginia, 7/15/92.*

*~~Invited Speaker, Rehabilitation and Reassignment for the Errant in the Clergy, Annual Meeting, National Conference of Catholic Bishops, University of Notre Dame, West Bend, Indiana, 6/20/92.~~*

*Invited Speaker, How to Deal With Priest Pedophiles, Cardinal Bernardin's Commission on Sexual Misconduct, Archdiocese of Chicago, Chicago, Illinois, 3/19/92.*

*Invited Lecturer, Diagnosis and Treatment of the Paraphilias, Tenth Annual Columbia Hospital Psychiatry Conference, Medical College of Wisconsin, Milwaukee, Wisconsin, 3/10/92.*

*Invited Speaker, Paraphilia, Personality and Sex Offending Behavior, Annual Meeting, Society for Sex Therapy and Research, Baltimore, Maryland, 3/17/90.*

*Invited Panelist, Sexual Abuse: Research and Solutions, Child Help U.S.A. Forum, Capital Hill, Washington, D.C., 11/9/89.*

*Invited Panelist, Human Sexual Aggression and Dominance: Biological Clues, Differential Diagnosis and Pharmacological Treatment of Sex Offenders, Annual Meeting, American Association for the Advancement of Science, San Francisco, California, 1/14/89 - 1/19/89.*

*Invited Speaker, Diagnosis and Treatment of the Paraphilias, Northeast Ohio Psychiatric Association, Columbus, Ohio, 1/11/89.*

*Invited Lecturer, Diagnosis and Treatment of Paraphilic Disorders, Continuing Medical Education Program, Eastern State Hospital, Williamsburg, Virginia, 11/14/88.*

*Invited Speaker, Diagnosis and Treatment of Sex Offenders, Midwest Conference on Child Sexual Abuse and Incest, Madison, Wisconsin, 9/26/88 - 9/27/88.*

*Invited Lecturer, Diagnosing and Treating Sex Offenders, Education Program in Psychiatry, The Institute of Living, University of Connecticut Health Center Consortium, Hartford, Connecticut, 11/12/87 - 11/13/87.*

*Invited Panelist, Etiology and Treatment of Sexual Disorders, Conference on the Management of Sex Offenders, University of Illinois College of Medicine, Peoria, Illinois, 10/30/87.*

*Keynote Speaker, The Paraphilias, Annual Meeting, Scientific Society for the Study of Sex, Philadelphia, Pennsylvania, 4/3/87 - 4/5/87.*

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Invited Panelist, Evaluation and Treatment of Paraphilic Disorders, Annual Conference, National Association of Forensic Social Workers, Charleston, South Carolina, 3/26/87.

Invited Panelist, Issues in the Exploration of Biological Factors Contributing to the Etiology of the Sex Offender, Plus Some Ethical Considerations, Human Sexual Aggression Conference, New York Academy of Sciences, 1/7/87 - 1/9/87.

Invited Speaker, Coordinating Treatment for Sex Offenders With Parole and Probation, Annual Conference, National Association of Parole and Probation, Baltimore, Maryland, 8/5/86.

Invited Speaker, Paraphilic Coercive Disorder, Board of Trustees, American Psychiatric Association, Washington, D.C., 6/24/86.

Invited Speaker, The Paraphillias: Forensic Issues, The Ohio Forensic Society, 6/7/86.

Invited Speaker, Inclusion of Paraphilic Coercive Disorder as a DSM-III-R Diagnosis, Hearing on Rapism, American Psychiatric Association, Washington, D.C., 10/4/85.

Invited NIMH Panelist, Rehabilitating Sex Offenders, 37th Annual Meeting, American Society of Criminology, San Diego, California, 11/13/85 - 11/17/85.

Invited Speaker, Assessment and Treatment of Incarcerated Sex Offenders, Annual Meeting, National Association of Prison Administrators, Philadelphia, Pennsylvania, 11/14/85.

Invited Speaker, The Paraphilic Disorders, Annual Meeting, Kansas Mental Health Association, Kansas City, Kansas, 8/17/85.

Invited Speaker, Changes to be Made in DSM-III-R Related to the Paraphilic Disorders, Educational Seminar, New York Division, American Academy of Psychiatry and the Law, New York, New York, 1/19/85.

Invited Speaker, Sex Offenders: Differential Diagnoses and Treatment, Centrocare Symposium, Sex Offender Treatment in Canada, St. John, New Brunswick, 10/17/84 - 10/18/84.

Invited Speaker, Treating Sex Offenders in the Community, Annual Meeting, National Association of Parole and Probation, Boston, Massachusetts, 8/24/84 - 8/27/84.

Invited Speaker, Treating Rapists, District of Columbia Conference on Rape and Sexual Violence, Washington, D.C., 5/8/84.

Invited Speaker, Diagnosing and Treating Incest, Third National Conference, Sexual Victimization of Children, Arlington, Virginia, 4/26/84.

Invited NIMH Panelist, Biological Factors Related to Rape, 35th Annual Meeting, American Society of Criminology, Denver, Colorado, 11/9/83 - 11/13/83.

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*Invited Speaker, Medical-Legal Issues in the Treatment of Sex Offenders, Georgetown University Law School Symposium, Washington, D.C., 1/20/83.*

*Invited Speaker, Pharmacological Treatment of Sexual Deviation, Psychiatric Symposia Series, Taylor Manor Hospital, Ellicott City, Maryland, 3/25/92, 3/21/86, 5/19/82.*

*Invited Speaker, Antiandrogenic Medication in the Treatment of Sex Offenders, Third National Conference, Evaluation and Treatment of Sexual Aggressives, Avila Beach, California, 3/15/81 - 3/18/81.*

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*Invited Speaker, Victims Turned Victimizers, First World Congress of Victimology, Washington, D.C., 8/20/80 - 8/24/80.*

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### **OTHER TALKS AND PRESENTATIONS:**

*Invited Speaker, Provided Full-Day Statewide Training Session on Chronic Mentally Ill Patients with Comorbid Problematic Sexual Behaviors, University of Massachusetts Medical School, Worcester, Massachusetts, 06/20/08.*

*Invited Panelist, Contemporary Perspectives on Sexual Paraphilias, American Association of Sexuality Educators, Counselors and Therapists (AASECT), Baltimore, Maryland, 05/18/08.*

*Invited Speaker, Sex Offenders: Criminals or Patient? University of Maryland Baltimore, Department of Psychiatry, Series on Forensic Psychiatry, Baltimore, Maryland, 02/14/08.*

*Invited Speaker, Sex Offenders: Criminals or Patients? University of Maryland Baltimore, Department of Psychiatry, Series on Forensic Psychiatry, Baltimore, Maryland, 04/19/07.*

*Invited Speaker, Sex Offenders: Criminals or Patients? Roland Park Place Men's Club, Baltimore, Maryland, 01/08/07.*

*Invited Speaker, Using Actuarial Tables, New Perspectives on Youth Sexual Behavior, Sponsored by the Maryland Association of Resources for Families and Youth, Linthicum Heights, Maryland, 05/05/06.*

*Invited Speaker, Evaluating and Treating Paraphilic Disorders, Baltimore/DC Cluster of the Fielding Graduate University, Baltimore, Maryland, 01/07/06.*

*Invited Speaker, Evaluating and Treating Paraphilic Disorders, Baltimore County Department of Social Services, Towson, Maryland, 06/07/05.*

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*Invited Speaker, Diagnosis and Treatment of Sexual Disorders, Topics in Psychiatry, The Johns Hopkins University, Department of Psychiatry and Behavioral Sciences, Baltimore, Maryland 11/05/04 - 11/06/04.*

*Invited Speaker, Sexuality Facts vs. Religious Responses, United Religious Initiative, Episcopal Cathedral, Baltimore, Maryland, 02/17/04.*

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Invited Speaker, Sexual Relations Between Adults and Children, Social and Community Psychiatry Seminar, The Johns Hopkins Hospital, Baltimore, Maryland 09/24/03.

Invited Speaker, Evaluating and Treating Paraphilic Disorders, Baltimore County Department of Social Services, Baltimore, Maryland, 04/15/03.

Invited Speaker, Sex Offenders: Criminals or Patients, Third Annual Henry L. Hartman Forensic Psychiatry Conference, Medical College of Ohio, Toledo, Ohio, 11/8/02.

Invited Speaker, The Crisis in the Catholic Church, Adult Night at St. John the Evangelist Catholic Church, Phoenix, Maryland, June 2, 2002.

Invited Chair, Vanderbilt Symposium on "Sexual Addiction," American Foundation for Addiction Research, Vanderbilt University, Nashville, Tennessee, 3/22/01 – 3/23/01.

Invited Speaker, Treatment of Adolescent Sex Offenders, Reading Specialists, Reading, Pennsylvania, 05/05/00.

Invited Lecturer, Sexuality Issues/Disorders Training, Maryland Department of Health and Mental Hygiene – Sponsored by DDA Central Regional Office, The Community College of Baltimore County – Catonsville Campus, Catonsville, Maryland, 03/24/00.

Invited Participant, The Neurobiology of Compulsive Sexual Behavior and Sexual Addiction – A Planning Meeting, Sponsored by Vanderbilt Addiction Center and The American Foundation for Addiction Research, Vanderbilt University Medical Center, Nashville, Tennessee, 2/3/00 – 2/4/00

Invited Speaker, Diagnosis and Treatment of Sexual Disorders, Regional Training Seminar Worcester County Department of Social Services, Salisbury State College, Salisbury, Maryland, 1/28/00

Invited Lecturer, Sex Offenders and the Law, course on Law and Psychiatry, University of Baltimore School of Law, Baltimore, Maryland, 11/1/99, 10/23/00.

Guest Lecturer, Diagnosis and Treatment of Sexual Disorders, Villa Julie College, Baltimore, Maryland, 7/14/99.

Invited Speaker, Evaluations and Etiology of Sex Offenders, Charter Psychosexual Rehabilitation and Education Program, Understanding, Assessing and Treating Male Adolescent Sex Offenders, Pittsburgh, Pennsylvania, 7/9/99.

Invited Speaker, Sex Offenders: Criminals or Patients, Chesapeake Bay Chapter of AAPL, Bethesda, Maryland, 6/30/99.

Invited Speaker, Diagnosis and Treatment of Sex Offenders, Allegany County Health Department, Cumberland, Maryland, 6/1/99.

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*Invited Lecturer, Sex Offenders: Criminals or Patients, Course on Psychiatry and the Law, University of Baltimore School of Law, Baltimore, Maryland, 3/17/99.*

*Invited Participant, The Use of Triptorelin in Paraphilia Management, DebioPharm S.A. Developpements Biologiques et Pharmaceutiques, Lausanne, Switzerland, 2/8/99.*

*Invited Speaker, Sexual Compulsivity, The National Catholic Bioethics Center, Dallas, Texas, 2/4/99.*

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*Invited Participant, Mixing of Sex Offenders in Custodial Drug Treatment Therapeutic Community Units: Problems and Potential Solutions, A Gathering of Leading Experts, University of California, San Diego, School of Medicine, San Diego, California, 1/19/99 - 1/20/99.*

*Invited Presenter, Sexual Misconduct by Clergy, Case Conference at St. Luke Institute, Silver Spring, Maryland, 11/5/98.*

*Invited Speaker, Rape and Child Sexual Abuse, University of Baltimore, Baltimore, Maryland, 9/17/98.*

*Invited Speaker, Sexual Offenders: Criminal or Patients?, Loudon County Mental Health Center, Loudon County, Virginia, 9/15/98.*

*Invited Speaker, Sexual Offenders - Registration Statutes and Treatment Alternatives, Maryland Criminal Defense Attorney's Association Annual Meeting, Baltimore, Maryland, 6/6/98.*

*Invited Speaker, Treating the Paraphilias with Depo-Lupron, Maryland Health Administration, State-wide Pharmacy and Therapeutics Committee, Spring Grove Hospital, Baltimore, Maryland 5/29/98.*

*Invited Speaker, Diagnosis and Treatment of Sex Offenders, Utah Correctional Association Conference, St. George, Utah, 3/30/98 - 4/2/98.*

*Invited Speaker, Paraphilias in the Developmentally Disabled, The Kennedy-Krieger School, Baltimore, Maryland 12/10/97.*

*Invited Speaker, The Paraphilias, Sexual Offender Assessment, Risk Management and Treatment, Continuing Education Seminar, Psychiatry Department, The University of California School of Medicine, San Diego, California, 8/20/97 - 8/22/97.*

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*Invited Speaker, Diagnosis and Treatment of Sex Offenders, Conference, Sexual Abuse Prevention and Education Network, New Cumberland, Pennsylvania, 8/6/97 - 8/8/97.*

*Invited Speaker, Evaluation, Etiology and Treatment of the Sex Offender, Educational Seminar, Forensic Hospital, Trenton, New Jersey, 6/23/95.*

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Invited Speaker, Reporting Sexual Abuse of Adult Survivors, Educational Seminar, Central Maryland Sexual Abuse Treatment Task Force, Baltimore, Maryland, 11/18/94.

Invited Speaker, The Etiology of Sexual Disorders: The Damaged Child Grows Up, Clinical Seminar Series on Infancy, University of Maryland School of Medicine, Baltimore, Maryland, 11/16/94.

"Guest Professor", Rape and Pedophilia, Course on Psychology of Criminal Behavior, Georgetown University, 11/14/94, 10/25/93, 2/2/93, 11/12/90, 4/2/90, 4/24/89, 4/9/87, 3/24/87.

Invited Speaker, Child Sexual Abuse, Conference on Domestic Violence: Sexual Trauma, Elder Abuse, Child Abuse, Doyelstown, Pennsylvania, 10/14/94.

Invited Speaker, Rape and Pedophilia, Forensic Mental Health Associates, Salt Lake City, Utah, 8/24/94; St. Petersburg, Florida, 7/1/94; Denver, Colorado, 8/31/88 - 9/1/88; Chicago, Illinois, 5/11/88 - 5/12/88; Boston, Massachusetts, 10/1/87 - 10/2/87; Denver, Colorado, 8/31/87 - 9/1/87; Fargo, South Dakota, 7/16/87 - 7/17/87; Chicago, Illinois, 5/11/87 - 5/12/87; Orange County, California, 1/21/87 - 1/23/87; Phoenix, Arizona, 10/30/86 - 10/31/86; Detroit, Michigan, 9/11/86 - 9/12/86; Cleveland, Ohio, 7/31/86 - 8/1/86; Dallas, Texas, 3/27/86 - 3/28/86; Lake Buena Vista, Florida, 8/29/85 - 8/30/85; San Francisco, California, 3/21/85 - 3/22/85; Dallas, Texas, 10/11/84 - 10/12/84.

Invited Speaker, Sentencing Sex Offenders, Annual Meeting, National Association of Sentencing Advocates, Baltimore, Maryland, 6/9/94 - 6/11/94.

Invited Lecturer, The Paraphilias, Criminal Justice Class, The American University, The Johns Hopkins Center, Baltimore, Maryland, 4/22/94.

Invited Speaker, Paraphilic Development and Treatment, Educational Seminar, National Center on Institutions and Alternatives, Alexandria, Virginia, 10/15/93.

Invited Speaker, Treatment of Sexual Disorders and Sexual Trauma, Annual Symposium, Virginia Correctional Counseling Association, Charlottesville, Virginia, 6/2/93.

Invited Speaker, Rehabilitation and Reassignment for the Errant in the Clergy, Catholic Bishops of Indiana, Fort Wayne, Indiana, 9/3/92.

Invited Speaker, Treatment of Sex Offenders, Maryland Association of Private Practice Psychiatrists, Baltimore, Maryland, 4/23/92.

Invited Speaker, Issues of Pedophilia in the Developmentally Handicapped, Rosewood Hospital Center, Baltimore, Maryland, 12/18/91, 05/09/97.

Invited Speaker, Pharmacological Treatment of Juvenile Sex Offenders, Mathom House Residential Facility for Adolescents, Philadelphia, Pennsylvania, 9/20/91.

Invited Speaker, Diagnosis and Treatment of Sex Offenders, Community Mental Health Conference, Howard County Health Department, Columbia, Maryland, 9/17/91.

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Invited Speaker, Paraphilias: Evaluation and Treatment, Psychiatric Staff Meeting, St. Joseph's Hospital, Towson, Maryland, 5/21/91.

Invited Speaker, Sexual Psychopath Laws, Medical Service, Circuit Court for Baltimore City, Baltimore, Maryland, 12/19/90.

Invited Speaker, Aspects of the Diagnosis and Treatment of Sexual Disorders, Educational Seminar, University of Maryland, College Park, Maryland, 11/16/90.

Invited Speaker, Diagnosis and Treatment of Paraphilias, Educational Meeting, Suburban Maryland Psychiatric Society, Greenbelt, Maryland, 10/11/90.

Invited Speaker, Working with Paraphilic Individuals, Educational Seminar, Counseling Associates, Hollywood, Florida, 10/5/90.

Invited Speaker, Forensic Issues of the Sex Offender, University of Maryland Forensic Fellowship Program, Baltimore, Maryland, 12/13/89.

Invited Speaker, Adolescent Sex Offenders, Conference on the Treatment of Adolescent Sex Offenders, Regional Institute for Children and Adolescents (RICA), Rockville, Maryland, 12/6/89.

Invited Speaker, Managing the Sex Offender on Probation, Annual Conference, Middle Atlantic States Correctional Association, Atlantic City, New Jersey, 5/22/88 - 5/25/88.

Invited Speaker, Treatment of the Sex Offender, Child Sexual Abuse - Adult Substance Abuse Connection Conference, St. Elizabeth's Hospital, Washington, D.C., (Rape Crises Center and Drug Abuse Center), 2/17/88.

Invited Speaker, Treating the Adolescent Sex Offender, State-wide Clinicians Network of Services for Adolescent Sex Offenders, Ellicott City, Maryland, 1/29/88.

Invited Speaker, Mandated Reporting of Child Sexual Abuse, People Against Child Abuse (PACA) Conference, Anne Arundel Community College, Anne Arundel, Maryland, 11/7/87.

Invited Speaker, Treating Sex Offenders in the Community, Annual Meeting, Allegheny County Health Department, Hagerstown, Maryland, 10/2/86.

Invited Speaker, Treating Incarcerated and Paroled Sex Offenders, Special Symposium, South Carolina Association for the Treatment of Sexual Aggressives, Columbia, South Carolina, 4/24/86 - 4/25/86.

Invited Speaker, The Paraphilias, Maryland Association of Private Practice Psychiatrists, Baltimore, Maryland, 1/23/86.

Invited Speaker, Victims and Victimizers, Maryland Conference on Child Victimization, Baltimore, Maryland, 1/6/86.

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*Invited Speaker, Sexual Offenders: Treatment Issues for the Social Worker, University of Maryland School of Social Work, Baltimore, Maryland, 9/17/85, 9/10/85.*

*Invited Speaker, Paraphilic Disorders and the Clergy, St. Luke's Institute, Suitland, Maryland, 8/23/85.*

*Invited Speaker, Protecting Children from Sexual Abuse, Annual Meeting, Montessori Society of Central Maryland, Baltimore, Maryland, 5/13/85.*

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*Invited Speaker, Forensic Issues in Evaluation Sex Offenders, Clifton T. Perkins Hospital, Baltimore, Maryland, 1/14/85.*

*Invited Speaker, Differential Diagnosis of Sex Offenders, Annual Conference, Psychiatric Associates, Virginia Beach, Virginia, 11/9/84.*

*Invited Speaker, Use of Antiandrogenic Medications, Patuxent Institution, Baltimore, Maryland, 10/25/84, 5/29/84, 1/20/83.*

*Invited Speaker, Treating the Abuser, Community Seminar on Child Sexual Abuse, Carroll County, Maryland, 10/23/84.*

*Invited Speaker, Treatment of Sex Offenders, Symposium, Howard County General Hospital, Howard County, Maryland, 5/15/84.*

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**OTHER PROFESSIONAL ACCOMPLISHMENTS:**

*Appointed Member, Subcommittee on the Paraphilias, American Psychiatric Association Committee to Review the 3rd Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R), 1984-1989.*

*President, Board of Directors, National Institute for the Study, Prevention and Treatment of Sexual Trauma*

*Chairman, Board of Directors, Foundation for the Study, Prevention and Treatment of Sexual Trauma (a nonprofit foundation supporting clinical care, teaching and research)*

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**MAJOR NATIONAL MEDIA INTERVIEWS (PARTIAL LIST):**

*Face the Nation*

*Sixty Minutes*

*Nightline*

*Larry King Show*

*Dianne Rehm Show (National Public Radio)*

*Emmy Winning Group W Documentary (Child Molesters: Please Make Them Stop)*

*Good Morning America*

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*Today Show*

*20/20*

*48 Hours*

*NBC Dateline*

*Forensic Psychiatric Commentator for Court TV (based upon a recommendation  
from the American Psychiatric Association)*

*Johnnie Cochran Show (Court TV)*

*Alan Dershowitz Show (Court TV)*

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**LIST OF EXHIBITS—PART TWO**

*Declaration of Dr. Watson*

*Curriculum Vita of Dale G. Watson, Ph.D.*

*Report of Dr. Roesch*

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*Curriculum Vita of Ronald Roesch, Ph.D.*

*Declaration of Audrey McClenahan*

*Declaration of Sonja Yates*

*Declaration of Sasha Yates*

*Declaration of Carrie Yates*

*Declaration of Linda Yates Welsh*

*Declaration of Juanita Youderian*

*Declaration of Don Hess*

*Declaration of Ernie Youderian*

*Declaration of Debra Meek*

*Declaration of Curt Youderian*

*Declaration of Shirley Yates Hess*

*Declaration of John Clinton Yates*

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*Declaration of Gary Berner*

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*Declaration of Patricia Fisher*

*Declaration of Karen Sanderson*

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**DECLARATION OF DALE G. WATSON, PH. D.**

I, Dale G. Watson, Ph.D., declare as follows:

1. I am a clinical and forensic psychologist with a specialty in neuropsychological assessment. I am licensed to practice in the State of California. I am a member in good standing of the American Psychological Association (APA), and its subspecialty divisions 40 and 41 (Clinical Neuropsychology and the American Psychology-Law Society), the National Academy of Neuropsychology, the International Neuropsychological Society and the American Association on Intellectual and Developmental Disabilities (AAIDD).

2. I received my Bachelor of Arts degree, with a major in psychology, from California State College, Sonoma in 1975. I received my Masters degree in Clinical Psychology from John F. Kennedy University in Orinda, California in 1980. In 1988, I earned a Ph.D. in Clinical Psychology from the California School of Professional Psychology (CSPP) in Berkeley/Alameda, California. CSPP is accredited by the American Psychological Association (APA) and is now a school within Alliant International University with a campus in San Francisco.

3. I have been in private practice in Pinole, California since 1990. In addition, I serve as the Consulting Neuropsychologist to Neurobehavioral Cognitive Services (NCS) of Dixon, California, a residential brain-injury rehabilitation program. In that role, I am regularly involved in the evaluation of individuals with moderate to severe brain injuries resulting from trauma, stroke, and other neuropathological processes. I also serve on the adjunct faculty of the Wright Institute, an APA accredited doctoral training program. At the Wright Institute, I taught a 3-trimester course in psychological

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assessment from 1994 until 2000 and resumed these duties beginning in 2007. This course covers the broad array of psychological assessment instruments utilized within the field of assessment and includes modules on intellectual assessment, effort testing and personality assessment. Until 2003, I was on the panel of forensic examiners for the Superior Court in Contra Costa County, California. In that role I regularly examined criminal defendants referred by the court for the evaluation of competency to stand trial and insanity. I have been qualified as an expert and testified in the Superior Courts of Contra Costa, Alameda, Fresno, Los Angeles, Marin, Monterey, Sacramento, San Mateo, Santa Clara, San Francisco, and Shasta Counties in California, as well as Custer County, Montana, King County in Washington, Harris County in Texas and the York County – Poquoson Circuit Court in Virginia. In addition, I have testified in United States District Courts in California, Oklahoma, and Montana. I have frequently completed “Atkins” evaluations in my role as a forensic neuropsychologist.

4. I have made numerous professional presentations regarding: the neuropsychological impairments found in forensic populations; mental retardation and adaptive functioning, head injuries; brain functions; substance abuse and traumatic brain injury; as well as the neurobehavioral differentiation of depression and cognitive impairment.

5. From 1989 through 1992, I was a clinical neuropsychologist with NeuroCare in Concord, California. In that capacity, I conducted neuropsychological evaluations, served as a psychology team leader, supervised interns, planned treatment, conducted cognitive rehabilitation and crisis intervention and performed consultation and project management.

6. From 1986 through 1989, I was on the staff of Specialized Rehabilitation Services (SRS) of Fremont, California, in the Chronic Pain Management Program. Between 1986 and 1987, my duties included coordinating the treatment team in the Brain Injury Rehabilitation Program at SRS. My role at SRS also included conducting neuropsychological evaluations, performing cognitive rehabilitation, and psychotherapy. In addition, I previously worked as a consultant to a substance abuse treatment program.

7. Counsel for Robert Lee Yates, Jr. requested that I complete a comprehensive neuropsychological evaluation of Mr. Yates in order to determine if any brain-related neurocognitive deficiencies, impairments, limitations, or dysfunction were present.

8. I evaluated Mr. Yates on April 25, 26, and May 5, 2009 at the Washington State Penitentiary at Walla Walla, Washington. The evaluation procedures included a clinical/forensic interview and administration of a battery of instruments including: *Test of Memory Malingering (TOMM)*, the *Victoria Symptom Validity Test (VSVT)*, *North American Adult Reading Test (NAART)*, *Wechsler Test of Adult Reading (WTAR)*, *Wechsler Test of Adult Intelligence – IV (WAIS-IV)*, *Woodcock-Johnson Tests of Cognitive Abilities (WJ III Cog)*, *Wide Range Achievement Test – Fourth Edition (WRAT4)(Reading and Sentence Comprehension Subtests)*, *Conners' Continuous Performance Test (CPT II V.5)*, *Wechsler Memory Scale – Fourth Edition (WMS-IV)*, *California Verbal Learning Test (CVLT)*, *Figure Memory Test*, *Ruff-Light Trail Learning Test (RULIT)*, *Speech Sounds Perception Test*, *Seashore Rhythm Test*, *Dichotic Word Listening Test*, *Boston Naming Test*, *Aphasia Screening Test*, *Sensory Perceptual Exam*, *Tactile Form Recognition Test*, *Facial Recognition Test*, *Rey Complex Figure Test*, *Quick Smell Identification Test*, *Smell Identification Test*, *Lateral Dominance Exam*, *Dynamometer (Grip Strength)*, *Grooved Pegboard Test*, *Finger Tapping Test*, *Tactual Performance Test*, *Digit*

*Vigilance Test, Trailmaking A & B, Wisconsin Card Sorting Test (WCST), Booklet Category Test, Delis-Kaplan Executive Function System (D-KEFS) (Verbal Fluency, Design Fluency, Color-Word Interference Test, Twenty Questions Test, Tower Test), Iowa Gambling Test (Computer Version), Emotional Perception Test and the Comprehensive Affect Testing System.*

9. Mr. Yates' performance on measures of effort, including the *Test of Memory Malingering (TOMM)*, the *Victoria Symptom Validity Test (VSVT)*, and the Verbal subtest of the *Validity Indicator Profile (VIP)*, all suggested good effort and that he was attempting to perform at his best. These results, as well as the pattern of test findings and this examiner's clinical impression, would suggest that the results of the neuropsychological evaluation are valid and accurately reflect Mr. Yates' current neurocognitive functioning.

10. A number of summary indices for the *HRNB* have been developed in order to facilitate decisions regarding the presence and severity of brain dysfunction. The most comprehensive of these summary indices include the *General Neuropsychological Deficit Scale (GNDS)* (Reitan and Wolfson, 1993), the *Global Deficit Score (GDS)* (Heaton et al., 2004) and the *Overall Test Battery Mean (OTBM)* (Rohling, Williamson, Miler and Adams, 2003). The latter two indices provide normative corrections for age, education, gender, and race.<sup>1</sup>

11. In Mr. Yates' case, there was a lack of consistency between these indices, which necessitates a careful analysis of both the summary indices and the underlying test findings.

12. Mr. Yates' raw score on the *General Neuropsychological Deficit Scale*, a summary measure incorporating 42 measures from the *HRNB*, was 29 – falling within the Mildly

<sup>1</sup> Corrections for scores to compensate for differences between age, education, and race have been developed to minimize the influence of non-neuropsychological factors in the interpretation of results. However, there is disagreement in the literature as to whether such adjustments are necessary and these adjustments may actually tend to minimize actual deficits.

Impaired (26-40) range of neuropsychological functioning. His *Left Neuropsychological Deficit Scale (GNDS)*, associated with the functioning of the left hemisphere, was a raw score of 8 that is suggestive of potential dysfunction within the left hemisphere. His *Right Neuropsychological Deficit Scale (RNDS)*, modified to a minor extent because of the use of the newer *Wechsler Adult Intelligence Scale – IV*, was only 3 – not suggesting significant right hemisphere dysfunction.

13. The *Global Deficit Score (GDS)*, developed by Heaton et al. (2004), summarizes the results of 21 measures from an Expanded Halstead-Reitan Battery.<sup>2</sup> The *GDS* uses a T-Score system for standardized comparison purposes. Mr. Yates' performance on the *GDS*, in contrast to the *GNDS*, fell at a T-score of 51 placing him in the Average range for individuals of similar age, gender, and education.

14. Finally, using procedures developed by Rohling et al (2003), Mr. Yates' *Overall Test Battery Mean (OTBM)* t-score, incorporating 70 different scores, was 53 and fell within the Average range. However, this score was statistically significantly poorer ( $p < .005$ ) than the t-score of 57 predicted by measures of premorbid functioning, which fell in the High Average range. In other words, in spite of Mr. Yates' apparently average level of functioning, there would nonetheless appear to be deficits present in his test profile. In particular, statistically significant deficits with at least medium effect sizes, were seen in the domains of processing speed, verbal and visual memory, as well as dominant and non-dominant motor and sensory functions. That is, Mr. Yates' performance on measures within these domains were significantly poorer than would be predicted based upon estimates of his pre-morbid (or baseline) functioning.

These findings necessitate further inquiry into the pattern of deficits seen in individual measures.

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<sup>2</sup> Research has suggested that the *GDS* is somewhat less sensitive than the *General Neuropsychological Deficit Scale (GNDS)* (see below), and thus prone to somewhat greater "false negative" findings but that it may have somewhat greater specificity and thus fewer "false positives."

15. Perhaps the most striking evidence of dysfunction occurred on the *Dichotic Word Listening Test (DWLT)*. A study by Richardson et al (1994) suggested that the *DWLT* is effective in "...the identification of clinically defective auditory channels in neurologic and neuropsychiatric patients." In addition, "The dichotic paradigm is a useful tool for the detection of cerebral dysfunction in those patients for whom gross structural lesions may not be present but for whom disruption of critical subcortical pathways is likely. [Further] dichotic listening can be a useful diagnostic tool with populations who are at risk for disruption of subcortical white matter pathways either by transient electrical discharges (i.e., seizure disorders) or structural changes at the subcortical level"<sup>3</sup>

16. The *DWLT* requires an individual to identify different words presented to each ear simultaneously to each ear via stereo headphones. Single channel hearing was intact and Mr. Yates was able to identify 30 out of 30 words in the right ear, a superior performance, and one that placed him at the 94<sup>th</sup> percentile rank. In contrast, he could only identify 20 out of 30 in the left ear – a defective performance and one that fell below the cutoff for impairment. This pattern of performance suggests a lateralized disturbance of the auditory pathways likely within the subcortical regions of the brain.

17. A similarly intriguing pattern of performance, requiring the integration of information across hemispheres and dependent upon subcortical structures was seen on the *Tactual Performance Test (TPT)*. The *TPT* is a complex motor-sensory problem-solving task that taps the "mapping capacity" of the posterior hemispheres. The task requires an individual to place puzzle pieces in a form-board while blindfolded – first with the dominant hand, then the

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<sup>3</sup> Richardson, Emily D., Springer, J.A., Varney, N.R., Struchen, M.A., and Roberts, R.J. (1994). Dichotic listening in the clinic: New neuropsychological applications. The Clinical Neuropsychologist, 8(4), 416-428.

non-dominant and finally using both hands together. The final trial assesses the degree to which information can be integrated across hemispheres. On the first trial, using his right hand he was able to place ten blocks in the board in 7'15" – an average length of time and falling at the 37<sup>th</sup> percentile rank. With his left hand, he cut his time to 4'31" – consistent with the expectation of a 33% degree of improvement due to learning – and a performance equivalent to the 53<sup>rd</sup> percentile rank. Finally, with both hands together, having now practiced for over eleven minutes, he required 7'19" to complete the task. He was thus slower using two hands than he was using either hand alone. It would seem that the right hand interfered with the left to a significant degree – resulting in a performance falling at the 8<sup>th</sup> percentile rank. Thus, the integration of spatial and tactual information across hemispheres appears deficient in some fashion.

18. Further examination of sensory and motor capacities revealed that Mr. Yates performance on the *Sensory Perceptual Exam* was impaired using the right hand (29-t) but unimpaired on the left (40-t). This pattern is suggestive of lateralized dysfunction impacting the left hemisphere.

19. Finally, an examination of Mr. Yates' performance on the *Wechsler Memory Scale – Fourth Edition (WMS-IV)* revealed relative weaknesses in auditory but not visual memory. On the *WMS-IV* Mr. Yates obtained a standard score of 102 on the Auditory Memory Index score. This score is certainly average – falling at the 55th percentile rank. However, based upon his Full Scale IQ from the *WAIS-IV*, it is lower than expected. His predicted Auditory Memory score was 113 and his obtained score of 102 is 11 points below expectation.

Differences of this magnitude occurred with a frequency of 20 percent in the normative sample so, though of interest, it may not be an abnormality. Still, such differences were not found on measures of visual memory where he was predicted to score 115 and instead scored 112 – a

difference below that required for statistical significance. Notably, there is an association between auditory memory and left temporal lobe processes.

20. Joyal, Black and Dassylva (2007) have noted:

Both cortical and subcortical structures are important for normal sexual functioning, especially in the anterior parts of the brain. While the frontal and temporal cortices are believed to be involved in the modulation of drive, initiation, and sexual activation, subcortical structures including the hippocampus, the amygdala, the septal complex and the hypothalamus are implicated in the modulation of sexual behaviors and genital responses (e.g. Zasler 1994). Neuroimaging studies confirmed the involvement of frontal, temporal, cingulate and subcortical structures in the regulation of sexual arousal (e.g. Redouté et al. 2000; Arnow et al. 2002). Damage or anomalies to one of these neural nodes are hypothesized to be involved in sexual deviance, including hypersexuality.<sup>4</sup>

21. It has long been hypothesized that deficits within the frontal and temporal lobes, particularly within the left hemisphere, may be associated with sexual deviance.

Joyal et al. (2007) reviewed this literature, reporting:

22. After reviewing six cases, Miller et al. (1986) suggested that basal frontal and/or diencephalic lesions are more likely to provoke hypersexuality whereas temporo-limbic damages are more closely associated with true modification of sexual preferences. Stein et al. (2000b) further concluded that frontal lesions would provoke general disinhibition, including impulsive hypersexual symptoms, with temporo-limbic damages possibly leading to disturbances in sexual appetite itself, including change in the direction of sexual drive, and striatal lesions increasing the triggering of sexual response in a compulsive pattern. Thus, heightened sexual activity might be more closely associated with frontal damage (especially basal; e.g. Lesniak et al. 1972), while modifications of sexual preference would more likely result from temporal lobe lesions (e.g. Cummings 1985; Langevin et al. 1985; Miller et al. 1986). The opposite pattern has been observed, however (i.e. hypersexuality in conjunction with temporal lobe anomalies, e.g. Blumer 1970, and modification of sexual preference after basal frontal damage, e.g. Burns and Swerdlow 2003), so that future paradigms should distinguish between genuine changes of sexual

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<sup>4</sup> Joyal, C.C., Black, D.N., & Dassylva, B. (2007). The neuropsychology and neurology of sexual deviance: A review and pilot study. *Sex Abuse*, 19:155-173.

orientation and mere deficits of global behavioral inhibition that include sexually oriented impulsivity.

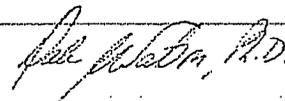
23. Joyal et al. noted that though the neuropsychological and neuroimaging data examining sexual offenders is limited the most frequent findings are left frontotemporal anomalies that perhaps "disrupt a regulatory control mechanism and provoke paraphillic tendencies."

24. In conclusion, Robert Yates' neuropsychological profile, while demonstrating significant strengths also demonstrated relative or ipsitive weaknesses. Summary measures of neuropsychological function differed in the conclusions suggested. However, there were indications of mild neuropsychological dysfunction and in particular, statistically significant deficits with at least medium effect sizes, in the domains of processing speed, verbal and visual memory, as well as dominant and non-dominant motor and sensory functions. There were also striking implications of subcortical dysfunction as well as signs of lateralized left hemisphere dysfunction. The available literature, while limited, does suggest a role for subcortical structures, particularly those within the left temporal and frontal lobes, in shaping sexual drives and aggressive behaviors.

The foregoing is true and correct and executed under penalty of perjury under the laws of the United States and the States of California and Washington on June 8, 2009.

6/8/2009

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Dale G. Watson, Ph.D.

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**Curriculum Vitae**

**January 29, 2009**

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**Education:**

- 1988 Ph.D. California School of Professional Psychology-Berkeley/Alameda  
Clinical Psychology (APA accredited)
- 1980 M.A. John F. Kennedy University, Orinda, CA.  
Clinical Psychology
- 1975 B.A. California State College, Sonoma, Rohnert Park, CA.  
Psychology

**Professional Experience:**

- 1990- **Private Practice**  
Pinole, CA.
- Forensic Evaluation/Consultation.
  - Comprehensive Neuropsychological/Psychodiagnostic Assessment services.
  - Mental Retardation "Atkins" evaluations.
  - Trial Competency, Competency to be Executed, Insanity, Mitigation and Future Dangerousness.
  - Trial testimony in Superior and Federal District Courts.
  - Individual Psychotherapy.
- 2000- **Clinical Neuropsychologist**  
Neurobehavioral Cognitive Services, Dixon, CA.
- Neurocognitive rehabilitation services including consultation and treatment planning.
  - Individual and Group Psychotherapy with neurologically impaired patients.
  - Neuropsychological and Psychodiagnostic Assessment.
- 2007- **Adjunct Faculty**  
1994-2000 The Wright Institute, Berkeley, CA. (APA accredited)
- Teaching 3-trimester courses in Graduate Level Psychodiagnostic Assessment including intellectual and psychological evaluation and neuropsychological screening.
  - Dissertation supervision.
- 1989-1992 **Clinical Neuropsychologist**  
NeuroCare, Concord, CA.
- Acting program director (July 1991).
  - Psychology team leader.
  - Supervision of interns and the behavioral technician.
  - Post-acute rehabilitation of the brain-injured.
  - Neuropsychological evaluation.
  - Treatment planning.
  - Individual/Couples/Group Psychotherapy.
  - Substance Abuse treatment/Cognitive Rehabilitation/Crisis Intervention.

**Licensed Psychologist PSY11899**

**Professional Experience (Continued):**

1988-1990 **Psychological Assistant**  
Supervisor: Virginia Wulf, Ph.D., Pinole, CA.  
• Individual/Couples Psychotherapy.

1988-1989 **Psychological Assistant**  
Supervisor: Norbert Ralph, Ph.D.  
Comprehensive Assessment Services/Sausalito Professional Clinic Sausalito, CA.  
• Psychodiagnostic evaluations of hospitalized, adolescent substance abusers.  
• Hospital Consultation (New Beginnings - Modesto).

1986-1989 **Staff Psychologist**  
Supervisors: Michael Shore, Ph.D./Harry Noda, Jr., Ph.D.  
Specialized Rehabilitation Services  
An affiliate of Transitions / Bay Area Recovery Centers, Fremont, CA.

Brain Injury Rehabilitation Program (1986-1987)  
• Coordinating the Treatment Team.  
• Neuropsychological and Psychodiagnostic Evaluation.  
• Cognitive Rehabilitation.  
• Individual Psychotherapy/Case Management.

Chronic Pain Management Program  
• Individual/Group Psychotherapy.  
• Case Management.  
• Biofeedback Training.  
• Patient education.

1981-1986 **Clinical Coordinator/ Psychological Assistant**  
Supervisors: Sheila Bastien, Ph.D./Ann Hoff, Ph.D.  
Spectrum Psychology Associates, Berkeley, CA.  
• Clinical Coordination.  
• Neuropsychological, Psychodiagnostic and Vocational Evaluation.  
• Evaluation of the Developmentally Disabled  
• Individual Psychotherapy.  
• Forensic psychology.

1984-1985 **Clinical Psychology Intern (Academic Year)**  
Supervisor: Neil Young, Ph.D.  
Community Education and Counseling Center, Fremont, CA.  
• Individual Psychotherapy within a Control Mastery framework.  
• Group and Couples Psychotherapy.  
• ~~Community-Needs-Assessment-(Program-Evaluation)~~

1983-1984 **Clinical Psychology Intern (Academic Year)**  
Supervisor: Joan Roth, Ph.D.  
Northern California Reception Center.  
California Medical Facility, Vacaville, CA.  
• Psychodiagnostic Evaluation of court referred criminal offenders.  
• Group Psychotherapy with Category "B" inmates (Pre-operational Transsexuals).  
• Individual Psychotherapy.

**Professional Experience (Continued):**

- 1983 **Teaching Assistant**  
Neuropsychological Measurement Laboratory  
California Graduate School of Marital and Family Therapy, San Rafael, CA.
- Taught the laboratory section of Neuropsychological Assessment using the Halstead-Reitan Battery.
- 
- 1983 **Clinical Psychology Intern**  
East Bay Activities Center, Oakland, CA.
- Milieu therapy in classroom setting with emotionally disturbed children.
- 1983 **Co-Leader: Neuropsychological Assessment - An In-service Training Workshop.** Sonoma County Office of Education.
- 1-day in-service training workshop with psychologists and nurses.
- 1982 **Teaching Assistant**  
Neuropsychological Measurement Laboratory  
California School of Professional Psychology, Berkeley, CA.
- Taught the laboratory section of Neuropsychological Assessment using the Halstead-Reitan Battery.
- 1982 **Teaching Assistant**  
Neuropsychological Measurement Laboratory  
California Graduate School of Marital and Family Therapy  
San Rafael, CA.
- Taught the laboratory section of Neuropsychological Assessment using the Halstead-Reitan Battery.
- 1979-1980 **Counselor Intern**  
Contra Costa County Alcoholism Information and Rehabilitation Service (AIRS), Antioch, CA.
- Conducted Alcoholism Education Orientations.
  - Individual, Marital and Group Psychotherapy.
- 1978-1979 **Counselor Intern**  
John F. Kennedy University Community Counseling Center, Concord, CA.
- Individual, Marital and Family Psychotherapy.
  - Peer Supervision.
- 1975 **Staff Counselor**  
New Horizons Center, Pittsburg, CA.
- Milieu treatment of developmentally disabled and psychotic adolescents and young adults.
  - Liaison to Consulting Psychiatrist.

**Recent Professional Training:**

- 2008 "Law and Ethics." Daniel O. Taube, J.D., Ph.D. John F. Kennedy University, March 10, 2006. Pleasant Hill, CA. (6 APA CE units).
- 
- 2007 "Useful Clinical Ratings of CT and MRI in the Clinical Practice of Neuropsychology." Erin Bigler, Ph.D. 27<sup>th</sup> Annual Conference of the National Academy of Neuropsychology, November 14-17, 2007. Scottsdale, AZ (3 CE Credits).
- 2007 "The Amazing Halstead Finger Oscillation Test." George Prigatano, Ph.D. 27<sup>th</sup> Annual Conference of the National Academy of Neuropsychology, November 14-17, 2007. Scottsdale, AZ (3 CE Credits).
- 2007 "Introducing the MMPI-2-RF (Restructured Form)." Yossef Ben-Porath, Ph.D. 27<sup>th</sup> Annual Conference of the National Academy of Neuropsychology, November 14-17, 2007. Scottsdale, AZ (3 CE Credits).
- 2007 "Behavioral Teratology: Neuropsychological Effects of Prenatal Exposures." Sarah N. Mattson, Ph.D. 27<sup>th</sup> Annual

Conference of the National Academy of Neuropsychology, November 14-17, 2007. Scottsdale, AZ (1.5 CE Credits).

**Recent Professional Training (Continued):**

- 2007 "Releasing Raw Data and Psychological Test Materials: Ethical Dilemmas, Legal Requirements, and Simple Solutions to Discovery Demands." Paul Kaulmann, J.D., Ph.D. 27<sup>th</sup> Annual Conference of the National Academy of Neuropsychology, November 14-17, 2007. Scottsdale, AZ (1.5 CE Credits).
- 
- 2007 "The Neurobiology of Antisocial, Violent, and Psychopathic Behavior." Adrian Raine, Ph.D. 27<sup>th</sup> Annual Conference of the National Academy of Neuropsychology, November 14-17, 2007. Scottsdale, AZ (3 CE Credits).
- 2007 "Forensic Evaluation." Institute of Law, Psychiatry and Public Policy, School of Medicine & School of Law, University of Virginia under contract for the Virginia Department of Mental Health, Mental Retardation and Substance Abuse Services and the Office of the Attorney General, April 30 - May 4, 2007, Charlottesville, VA (30 APA CE Units).
- 2006 "Deepening Legal and Ethical Understanding in Clinical Practice." Daniel O. Taube, J.D., Ph.D. John F. Kennedy University, March 10, 2006. Pleasant Hill, CA. (6 APA CE units).
- 2004 "Assessment of Response Bias: Beyond Malingering Tests." Scott R. Millis, 24<sup>th</sup> Annual Conference of the National Academy of Neuropsychology, November 17-20, 2004. Seattle, WA. (3 APA CE units).
- 2004 "Neurochemistry and Medication Management of Aggression in Children, Adolescents, and Adults." Daniel Matthews, M.D. 24<sup>th</sup> Annual Conference of the National Academy of Neuropsychology, November 17-20, 2004. Seattle, WA. (3 APA CE Units).
- 2004 "Constitutional/Judicial Foundations for Criminal Forensic Neuropsychology: Competency to Stand Trial and Confess." Robert L. Denny, Psy.D. & James Sullivan, Ph.D., 24<sup>th</sup> Annual Conference of the National Academy of Neuropsychology, November 17-20, 2004. Seattle, WA. (3 APA CE Units).
- 2004 "Professional Issues." Antonio Puente, Leslie Rosenstein, & Patricia Pimental, 24<sup>th</sup> Annual Conference of the National Academy of Neuropsychology, November 17-20, 2004. Seattle, WA. (1.0 APA CE Units).
- 2004 "Pediatric Brain Injury: Neuroimaging, Clinical Presentation, and Neuropsychological Status, Dr. Paul C. Leiby, 24<sup>th</sup> Annual Conference of the National Academy of Neuropsychology, November 17-20, 2004. Seattle, WA. (3 APA CE Units).
- 2004 "What neuropathology can teach us about the neurobiology of the self." Todd Feinberg, 24<sup>th</sup> Annual Conference of the National Academy of Neuropsychology, November 17-20, 2004. Seattle, WA. (1.5 APA CE Units).
- 2004 "Imaging brain circuitry in the clinical neuropsychology of memory: fMRI, morphometry & DTI. Andrew J. Saykin, 24<sup>th</sup> Annual Conference of the National Academy of Neuropsychology, November 17-20, 2004. Seattle, WA. (3 APA CE Units).
- 2004 "Workshop in Clinical Neuropsychology: Significant Developments and Advanced Clinical Issues." Ralph Reitan, Deborah Wolfson, Jim Hom et al. Reitan Neuropsychology Laboratories, October 1-3, 2004. Phoenix, AZ (17 APA CE Units).
- 
- 2004 "Spousal/Partner Abuse Assessment and Treatment: Domestic Violence Training." John F. Kennedy University, February 20, 2004. Pleasant Hill, CA. (7 APA CE units).
- 2004 "6-Hour Ethics and the Law." Daniel O. Taube, J.D., Ph.D. John F. Kennedy University, February 6, 2004. Pleasant Hill, CA. (6 APA CE units).
- 2003 "A New Anatomical Framework for Neuropsychiatric Disorders: Systems Analysis and Hands-On Dissection of the Human Brain." Lennart Heimer, M.D. Saint Louis University School of Medicine Practical Anatomy Workshop, October 31 - November 2, 2003. St. Louis, MO. (17 APA CE units).

- 2003 "Practical Issues and Clinical Methods of Practice with the Wechsler Scales." David Tulskey, Gordon Chelune & Josette Harris, 23rd Annual Conference of the National Academy of Neuropsychology, October 15-18, 2003. Dallas, TX. (3 APA CE units).

### Recent Professional Training (Continued):

- 2003 "New Scores and Methods of Practice with the Wechsler Scales." Gordon Chelune, David Tulskey & Josette Harris, 23rd Annual Conference of the National Academy of Neuropsychology, October 15-18, 2003. Dallas, TX. (3 APA CE units).
- 2003 "Race and Education in Neuropsychological Testing." Jennifer Manly, 23rd Annual Conference of the National Academy of Neuropsychology, October 15-18, 2003. Dallas, TX. (3 APA CE units).
- 2003 "Neuropsychological Impairment and Environmental Risk Factors in Capital Murder Offenders." Robert A. Goffner, Elizabeth Lim, Barbara Hart & Robert Owen, 23rd Annual Conference of the National Academy of Neuropsychology, October 15-18, 2003. Dallas, TX.
- 2003 "Functional Neuroanatomy Primer: Clinical Presentation of Patients with Neuropsychological Conditions." Paul Lebby, Ph.D., 23rd Annual Conference of the National Academy of Neuropsychology, October 15-18, 2003. Dallas, TX.
- 2003 "The Atkins Decision and the Forensic Evaluation of Mental Retardation: Roles for the Neuropsychologist and Special Educator." J. Randall Price & Kay Stevens, 23rd Annual Conference of the National Academy of Neuropsychology, October 15-18, 2003. Dallas, TX. (3 APA CE units).
- 2003 "Increasing Diagnostic and Predictive Accuracy in Neuropsychology." David Faust, Ph.D., 2003 23rd Annual Conference of the National Academy of Neuropsychology. October 15-18, 2003. Dallas, TX. (3 APA CE units).

### Publications:

- Abueg, F., Woods, G.W., & Watson, D.G. (2000). Disaster Trauma. In Frank M. Dattillio & Arthur Freeman (Eds.) Cognitive Behavioral Strategies in Crisis Intervention, Second Edition. New York, N.Y.: Guilford Press.
- Bastien, S., Peterson, D. & Watson, D.G. (1996). IQ abnormalities associated with chronic fatigue syndrome in repeated WAIS-R testing (abstract). Journal of Chronic Fatigue Syndrome, 2(2/3).

### Recent Presentations:

- 2008 "Intellectual Disabilities: IQ and Adaptive Functioning Evaluation. Life in the Balance 2008: Defending Death Penalty Cases. The National Legal Aid & Defender Association. March 8, 2008. Atlanta, GA
- 2008 "Neuropsychological Evaluation." Life in the Balance 2008: Defending Death Penalty Cases. The National Legal Aid & Defender Association. March 8, 2008. Atlanta, GA
- 2007 "The Roles of Psychology and Neuropsychology in Forensic Evaluations." Second Annual Solano County Public Defender Felony Transition Seminar. Office of the Solano County Public Defender. September 28, 2007. Fairfield, CA.
- 2007 "Attacks on Neuropsychological Norms." National Seminar on the Development and Integration of Mitigation Evidence in Capital Cases. Administrative Office of the US Courts. March 30, 2007. Washington, D.C.
- 2007 "Intelligence Testing." National Seminar on the Development and Integration of Mitigation Evidence in Capital Cases. Administrative Office of the US Courts. March 30, 2007. Washington, D.C.
- 2007 "Neuropsychological Evaluation: The Impact of Norms." 2007 CACJ/CPDA Capital Case Defense Seminar. February 18, 2007. Monterey, CA.
- 2007 "Frontal and Temporal Brain Systems and Functions." Co-presented with Karen Froming, Ph.D. 2007 CACJ/CPDA

Capital Case Defense Seminar. February 18, 2007. Monterey, CA.

2006 "Neuropsychological Assessment." Making the Case for Life IX: Mitigation and Jury Selection in Capital Cases. National Association of Criminal Defense Lawyers and the Southern Center for Human Rights. September 30, 2006. Las Vegas, NV.

### Recent Presentations (Continued):

- 2006 "Foundations of Neuropsychology." First Annual Felony Transition College. Solano County Public Defender's Office. June 23, 2006. Fairfield, CA.
- 2006 "Psychological and Neuropsychological Testing." Motions, Evidence & Expert Witnesses. The Center for American and International Law. May 21, 2006. Plano, TX.
- 2006 "Brain, Behavior, and Cognition." Co-Presented with James R. Merikangas, M.D. National Seminar on the Development and Integration of Mitigation Evidence. Administrative Offices of the U.S. Courts. April 28, 2006. Washington, DC.
- 2005 "Executive Functions." Second National Seminar on Development and Integration of Mitigation Evidence. Administrative Office of the U.S. Courts. April 22, 2005. Salt Lake City, UT.
- 2005 "Law and the Brain – The Neurobiology of Violence." Washington State Appellate Courts Spring Judicial Conference. April 6, 2005. Walla Walla, WA.
- 2005 "Mental Retardation." Texas Criminal Defense Lawyers Association. February 23 & 24, 2005. Dallas, TX.
- 2005 "Neuropsychological Evaluation." 2005 CACJ/CPDA Capital Case Defense Seminar. February 21, 2005. Monterey, CA.
- 2005 "Mental Retardation." CACJ/CPDA Capital Case Defense Seminar. February 21, 2005. Monterey, CA.
- 2004 "Developmental Aspects of Executive Functions." 2004 CACJ/CPDA Capital Case Defense Seminar. February 15, 2004. Monterey, CA.
- 2004 "Advanced Determination of Competency – A Case Study (Workshop)." Co-presented with John Philipsborn and Judge Michael Ryan. 2004 CACJ/CPDA Capital Case Defense Seminar. February 15, 2004. Monterey, CA.
- 2003 "Update on IQ Testing: Neuropsychology for the 21<sup>st</sup> Century." Paper presented with George W. Woods, M.D. at the 2003 Annual Meeting of the American Academy of Psychiatry and the Law (AAPL). October 19, 2003. San Antonio, TX.
- 2003 "The Subtlety of IQ Testing." 8<sup>th</sup> Annual National Federal Habeas Corpus Seminar. Administrative Office of the United States Courts and Habeas Assistance and Training Counsel. Chicago, IL.
- 2003 "Mental Retardation." Investigating Capital Cases Seminar. Virginia Capital Representation Resource Center. Charlottesville, VA.
- ~~2003 "Intelligence Testing in Mental Retardation." Litigation Training: Investigating and Proving Mental Retardation. Federal Defender Program of Atlanta and the Habeas Assistance and Training Counsel. Atlanta, GA.~~

### Licenses, Qualifications and Certificates:

- 1990-Present State of California Licensed Psychologist (PSY11899)
- 2007 Virginia qualified Forensic Evaluator
- 2006 & 2007 State of Texas Psychology Temporary License No. TLP-07-0009; TLP-07-0014
- 2005- State of Oregon Psychology Permit
- 2003-2004 State of Washington Psychology Permit (030503)
- 2002-2004 State of Oregon Psychology Permit (LP 077)

Dale G. Watson, Ph.D.

March 10, 2008

**Curriculum Vitae**

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2001-2002 State of Washington Psychology Permit (010903)  
1999-2000 State of Washington Psychology Permit (990903)  
1992-1994 Qualified Medical Examiner / Psychology (State of California Industrial Medical Council # 009321)

**Dissertation:**

"Screening for Neurotoxicity: A Comparison of the Neurobehavioral Evaluation System and the California Neuropsychological Screening Battery"

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**Research Activities:**

1989-1992 Neuropharmacological treatment of brain injuries: Neuropsychological monitoring. Sponsored by NeuroCare.  
1990 Ampligen Clinical Trial (HEM Research): Neuropsychological monitoring of Chronic Fatigue Syndrome patients.

**Hospital Privileges:**

2000-2003 Doctors Medical Center – San Pablo Campus  
1991-2003 Doctors Medical Center – Pinole Campus  
1992-1997 East Bay Hospital, Richmond, C.A.  
1993-1995 First Hospital of Vallejo

**Professional Affiliations:**

International: Member, International Neuropsychological Society (2004- )  
National: Member, American Psychological Association (1988-present),  
Member, Division 33 (Intellectual and Developmental Disabilities)  
Member, Division 40 (Clinical Neuropsychology)  
Member, Division 41 (American Psychology - Law Society)  
Member, National Academy of Neuropsychology (1995-present)  
Associate Member /1983-1994  
Member, The Reitan Society (1998-2006)  
Member, American Association of Intellectual and Developmental Disabilities (2007)

References on request

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June 3, 2009

Steven Witchley  
Law Offices of Ellis, Holmes & Witchley, PLLC  
705 Second Avenue, Suite 401  
Seattle, WA 98104

Dear Mr. Witchley,

This is a report of my evaluation of Mr. Robert Yates, Jr. I interviewed Mr. Yates at the Washington State Penitentiary in Walla, Walla, Washington on April 28 and April 29 for a total of 11 hours. I also interviewed by telephone his father, Robert Yates, Sr., two of his sisters, Shirley Cleveland-Hess and Linda Welsh, and his daughter, Sonya Anderson. I also interviewed by telephone Mr. Russ Ward, Mr. Yates's counselor in prison.

The focus of this evaluation is Mr. Yates's risk for violence at the time of his capital sentencing trial. This is a specific form of risk assessment, given that the sentencing options are either the death penalty or life without parole. Either sentence results in imprisonment for life, until death occurs either by execution or natural causes. These offenders will never return to the community, so the appropriate context for assessing violence risk is on risk for violence in prison. My opinion, which I will explain in detail in this report, is that at the time of his capital sentencing proceeding Mr. Yates presented—and he still presents today—a low risk for violence in prison. If I had been retained at the time of his capital sentencing trial, my testimony would have been consistent with the opinion expressed in this report.

The materials reviewed as part of this evaluation include the following: *State of Washington v. Robert Lee Yates, Jr.*, Pierce County Penalty Phase Trial Transcripts, September 24 – October 2, 2002; Spokane Police-Sheriff Additional Reports dated April 22, April 24, May 30, May 31, June 7 (all in 2000); United States Army records, various dates; psychological testing report by Dr. Richard Kobell, dated April 10, 2002; Oak Harbor school transcripts; Walla Walla College transcripts; Skagit Valley College transcripts. If other information becomes available to me, I will update this report.

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#### Assessing Risk in Capital Sentencing Cases

Before turning to my assessment of Mr. Yates, it may be useful to provide an overview of the differences between assessing risk for violence in the community versus risk for violence in prison.

In capital sentencing cases, risk for future violence can be raised as a mitigating or aggravating factor.<sup>1</sup> Since capital offenders will either be sentenced to death or life without parole, future risk must be considered in the context of risk for violence in prison and not violence risk if the individual were in the community at some point. Most assessments of violence risk focus on an individual's risk for violence in the community. The instruments developed to assess risk, such as the Violence Risk Assessment Guide or the HCR-20, provide a valid and reliable method for assessing behavior post-release, but they have limited utility in assessing violence while in prison.<sup>2</sup> This is because prison violence occurs with much less frequency than violence in the community. This is the case even for offenders who have been extremely violent in the community. An individual could be considered a high risk for offending in the community but could also be considered a low risk for prison violence.

**Over-prediction of prison violence.** A study by John Edens and his colleagues<sup>3</sup> showed that mental health experts vastly overpredicted future violence in 155 capital sentencing cases in Texas. Sorensen and Pilgrim<sup>4</sup> note that prison violence is also overpredicted by jurors. A study of 145 federal capital inmates found that prosecutors' assertions of future dangerousness were not predictive of prison misconduct.<sup>5</sup> This is largely because the base rate of prison violence, particularly among capital offenders, is low. This is true for capital offenders sentenced to death, in the general prison population after obtaining relief from a death sentence, or sentenced to a life term at trial.<sup>6</sup> One study found that inmates sentenced to life without parole, as well as mainstreamed death-sentenced inmates, were half as likely to be cited for violent misconduct when compared to parole-eligible inmates.<sup>7</sup>

**Predictors of prison violence.** There is a small body of research that has examined predictors of prison violence. It is often assumed that the best predictor of future behavior is past behavior. Thus, if an individual has been violent in the past, it is assumed that this person would be more likely to be violent in the future. In fact, research on prison violence finds quite the opposite, namely that the vast majority of inmates with prior violence are **not**

<sup>1</sup> *Jurek v. Texas*, 428 U.S. 153 (1976); *Skipper v. South Carolina*, 476 U.S. 1 (1986).

<sup>2</sup> Cunningham, M. D. (2008). Institutional misconduct among capital murderers. In M. DeLisi & P. J. Conis (Eds.), *Violent offenders: Theory, research, public policy, and practice* (pp. 237-253). Boston: Jones & Bartlett; Edens, J., Buffington-Vollum, J., Keilin, A., Roskamp, P., & Anthony, C. (2005). Predictions of future dangerousness in capital murder trials: Is it time to "disinvent the wheel?" *Law & Human Behavior*, 26, 59-87.

<sup>3</sup> See Edens et al., Footnote 2.

<sup>4</sup> Sorensen, J. R. & Pilgrim, R. L. (2000). An actuarial risk assessment of violence posed by capital murder defendants. *Journal of Criminal Law & Criminology*, 90, 1251-1270.

<sup>5</sup> Cunningham, M. D., Reidy, T. J., & Sorensen, J. R. (2008). Assertions of "future dangerousness" at federal capital sentencing: Rates and correlates of subsequent prison misconduct and violence. *Law and Human Behavior*, 32, 46-63.

<sup>6</sup> Cunningham, M. D. (2008). Institutional misconduct among capital murderers. In M. DeLisi & P. J. Conis (Eds.), *Violent offenders: Theory, research, public policy, and practice* (pp. 237-253). Boston: Jones & Bartlett; Edens, J., Buffington-Vollum, J., Keilin, A., Roskamp, P., & Anthony, C. (2005). Predictions of future dangerousness in capital murder trials: Is it time to "disinvent the wheel?" *Law & Human Behavior*, 26, 59-87.

<sup>7</sup> Cunningham, M. D., & Sorensen, J. R. (2006). Actuarial models for assessment of prison violence risk: Revisions and extensions of the Risk Assessment Scale for Prison (RASP). *Assessment*, 13, 253-265.

violent in prison. Sorenson and Pilgrim<sup>8</sup> examined the prison disciplinary records of over 6000 inmates in Texas. They projected that during a 40-year term in prison, only about 16% of these inmates would be involved in any form of institutional violence.

Research has identified factors that are predictive of prison violence.<sup>9</sup> Cunningham and Sorensen<sup>10</sup> summarized a number of studies that examined the factors available at sentencing that are associated with prison violence. Research indicates that there is an inverse relationship between inmate age and prison disciplinary infractions (including aggression), meaning that infractions are more likely to be committed by younger inmates. As in the community, violent behavior declines with age. There is also an inverse relationship between level of education and prison misconduct, as inmates with more education are less likely to be involved in disciplinary infractions. One study found that prior prison confinement was a risk enhancing factor for serious prison violence among nearly 6,400 convicted murderers in the Texas Department of Criminal Justice.

Other research has found that factors that many assume would serve as good predictors of future violence, such as antisocial personality disorder or psychopathy, are not reliable predictors of prison violence.<sup>11</sup> Another factor that has not been found to be a predictor of prison violence is a conviction for murder, with one study finding that the 40-year projected likelihood of an aggravated assault on a correctional officer was 1% and the risk of violence against another inmate was .2%.<sup>12</sup> In a study of 145 federally sentenced capital offenders, just over half of the capital LWOP inmates had killed multiple victims, and two-thirds had committed murder in the course of organized criminal activity.<sup>13</sup> Yet, these offenders had a low rate of institutional violence, indicating that violent behavior in the community is not a good predictor of prison violence.

With this research as a context, I will now turn to my evaluation of Mr. Yates.

## Background

Mr. Yates was born on May 27, 1952. He lived with both parents throughout his childhood. He lived in Oak Harbor, Washington through high school. His father, Robert Yates, Sr., married Anna Mae, who had two children from a previous marriage (Shirley and Linda). Robert Jr. was the first son and he has a sister, Janis, who is three years younger. His mother died in 1976, and his father is living in Arizona.

Mr. Yates did not show any evidence of early childhood problems. He was an average student and there are no reports of any difficulties in school. He self-reports sexual experiences when he was about eight years old with a neighbor boy who was three or four years older. They engaged in oral sex. He acknowledges sexual contact with his younger

<sup>8</sup> See Sorensen & Pilgrim (2000), Footnote 4.

<sup>9</sup> Although some of the research summarized in this section were published after the 2002 sentencing trial of Mr. Yates, the more recent research consistently supports the key findings presented in the Sorenson and Pilgrim (2000) study. Thus, at the time of the sentencing trial, research on the key predictors of prison violence was available in the published literature.

<sup>10</sup> See Cunningham & Sorensen (2006), Footnote 7.

<sup>11</sup> See Cunningham et al. (2008), Footnote 5; Edens et al., Footnote 2.

<sup>12</sup> See Sorensen & Pilgrim (2000), Footnote 4.

<sup>13</sup> Cunningham et al., Footnote 5.

sister when he was about 9 or 10 (they slept in the same bed and he admits to fondling her genitalia on several occasions). He also reports interest in pornography beginning in his early teens, and this continued throughout his adulthood (at the time of his arrest on the current charges, police found a large amount of pornographic video and magazines in his home).

Mr. Yates married Shirley Nylander at age 20. This marriage lasted less than two years, as he began an affair with Linda Brewer while married to Shirley. He separated from Shirley and married Linda when he was 22, but his divorce from Shirley had not been finalized. Mr. Yates and Linda remarried two years later in a legal ceremony in Oak Harbor. They have five children, four girls and a boy. Mrs. Yates obtained a divorce in 2008.

There is a history of mental illness in his family. His paternal grandmother murdered her husband with an axe and was found not guilty by reason of insanity and spent about seven years in a mental hospital. Mr. Yates reports that a number of his children have experienced mental health problems.

Mr. Yates graduated from high school and received an Associate of Arts degree from Skagit Community College. Intelligence testing conducted by Dr. Kolbell in 2002 indicates that Mr. Yates scores in the high average range of intellectual functioning. He worked a number of jobs after college, including 3-4 months as a correctional officer at the Washington State Penitentiary in Walla Walla, Washington. He resigned from this job and enlisted in the Army when he was 25 years old. He remained in the army for the next 18 years, rising to the level of Warrant Officer. He was a helicopter pilot and later a flight instructor during his years in the army. Army records indicate an outstanding record. In a performance evaluation dated February 16, 1984, it was noted that he is "One of the most knowledgeable and technically proficient aviators in the company. Highly flexible in planning and works best under stress. Displays exceptional instructor qualities. His dedication is total; His loyalty unquestionable. Highly disciplined officer." In a report dated June 30, 1995, it was noted that he is "Dedicated, dependable, and unselfish, he has proven to be a great leader and mentor." He received a number of medals during his service, including a Meritorious Service Medal and a Humanitarian Service Medal. Following his discharge, he worked in a variety of jobs. At the time of his arrest, he was employed at the Kaiser Aluminum Plant.

### **Offense History**

There is no history of arrests as a juvenile, and no self-reported delinquent behavior. His first arrest was in 1998 when his daughter called police after Mr. Yates spanked her for disobeying him. The charge was reduced to misdemeanor assault and he was placed on probation for one year. He completed probation without incident.

Although not arrested until age 47, his involvement in criminal behavior began soon after high school. At age 18 or 19, he admits to stealing explosives and setting them off in various locations, and describes how he set a trap on a deer run in which a trip wire triggered an explosion. He set the trap and returned two days later and found a dead doe. He told me that he was surprised at the reaction of others when he told them about this incident, in that they raised concerns that a person could have walked by and tripped the explosive. He dismissed this possibility, stating that it was a remote area not accessed by adults. He failed

to recognize that given that he accessed the area, perhaps others might as well. His first violent crime occurred at age 23, when he shot and murdered Susan Savage and Patrick Oliver near Walla Walla during the time period when he was working as a correctional officer. Mr. Yates reports that he did not commit another murder until some 14 years later, when he began a series of murders that took place over the next ten years. He was arrested on April 18, 2000, and later entered a guilty plea to 13 counts of murder. He was sentenced to 408 years in prison. Subsequently, he was charged with two counts of murder in Pierce County, with prosecutors seeking the death penalty. He was convicted and sentenced to death. He was sent to Washington State Penitentiary, where he is currently on death row.

### Current Evaluation

This assessment is based on my interviews with Mr. Yates, interviews with family members and prison staff, and a review of records listed in the beginning of this report. I will first describe the results of personality testing and then turn to my assessment of his risk of violence in the prison setting.

**Personality testing.** I administered the Personality Assessment Inventory (PAI). The PAI is a self-administered, objective inventory of adult personality and psychopathology that has been widely used in forensic settings.<sup>14</sup> The PAI contains 344 items comprising 22 non-overlapping scales: validity scales, clinical scales, 5 treatment scales and 2 interpersonal scales. Clinical scales are clustered in Neurotic, Psychotic, Personality Disorders and Behavioral Disorders. In addition to measurement of clinical constructs, interpretation of results also provides measures for detecting Malingering; evaluating potential for Aggression and Suicide; and motivation for Treatment.

Mr. Yates was also administered the PAI while in custody in 2002. His current PAI provides a similar profile. His current PAI scores suggest that he attended appropriately to item content and responded in a consistent fashion to similar items. He responded to questions in a forthright manner and did not attempt to present an unrealistic or inaccurate impression that was either more negative or more positive than the clinical picture would warrant. Thus, the PAI is considered to represent a valid picture of his current clinical functioning.

The PAI clinical profile shows elevations on a number of different scales. His profile is consistent with a history of both drug and alcohol abuse, which has served as a disinhibitor for engaging in acting-out behaviors. This is consistent with information Yates provided in our interview, in which he stated that he would drink a few beers before engaging prostitutes, and later would use crack cocaine.

His PAI profile also suggests an individual who experiences rapid mood changes, and can easily shift into moments of extreme anger. Coupled with his impulsivity, this has resulted in violent responses. Mr. Yates acknowledges his impulsivity, noting that most of his murders were not planned but rather were in response to his perception that he was

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<sup>14</sup> Morey, L.C. (1991). *Personality Assessment Inventory - Professional Manual*. Florida, USA: Psychological Assessment Resources; Edens, J. F., Cruise, K. R., & Buffington-Vollum, J. K. (2001). Forensic and correctional applications of the Personality Assessment Inventory. *Behavioral Sciences and the Law*, 19, 519-543.

provoked. In our interview, he stated there were times when his temper exploded and he would lose control, and this would usually result in violence. For example, he describes some of the murders in which the victims commented during oral sex that he needed to get an erection more quickly. His impulsivity and poorly controlled anger resulted in his shooting the victims and then having sex with them after they died. He stated that he viewed this as a means of regaining control over the victims.

His personality style is consistent with a number of antisocial character features, although he does not meet the diagnostic criteria for Antisocial Personality Disorder because he does not have a history of conduct disorder as an adolescent. Prior to his current imprisonment, his adult life was characterized by a pervasive pattern of disregard for and violation of the rights of others, including his lengthy period of engaging in criminal acts, his deceitfulness, impulsivity, irritability, and aggressiveness.

Interpersonally, his PAI profile suggests he is likely seen by others as cold and aloof, and he lacks the ability to establish close relationships. He is easily dissatisfied with relationships. Although he remained married to his second wife for many years, he stated that his wife was often upset with him because he spent little time with her or the children. He and his wife separated a number of times during their marriage.

**Psychopathy Checklist-Revised.** The Psychopathy Checklist-Revised (PCL-R) is a 20-item scale for the assessment of psychopathy.<sup>15</sup> Scoring is based on an interview and review of file and collateral information. Psychopathy has been shown to be a robust predictor of recidivism in the community, particularly violent recidivism, and the PCL-R is the most widely-used method for assessing this construct.<sup>16</sup> The maximum score is 40, and a score of 30 or more is indicative of psychopathy. Mr. Yates received a score of 17 on the PCL-R. This score is in the nonpsychopath range, indicating that Mr. Yates would not be considered a psychopath based on his scores on the PCL-R.

### Risk Assessment

As I reviewed earlier in this report, standard risk assessment models typically assess risk for violence in the community. The base rates for community violence are considerably higher than the base rates for prison violence. Assessments based on predictions of community risk will likely overestimate the risk the individual poses in a prison setting. Thus, standard risk assessment instruments such as the Violence Risk Assessment Guide (VRAG)<sup>17</sup> or the Historical Clinical Risk-20 instrument (HCR-20)<sup>18</sup> are not useful in

<sup>15</sup> Hare, R. D. (2003). *Manual for the Revised Psychopathy Checklist (2<sup>nd</sup> ed.)*. Toronto, ON: Multi-Health Systems.

<sup>16</sup> Items are scored on a 3-point scale, with 0 indicating that the item does not apply to the individual, 1 indicating that the item applies to a certain extent but not to the degree required for a score of 2, and 2 indicates that the item applies to the individual. Examples of items on the PCL-R are Grandiose sense of self worth, Pathological lying, Lack of remorse or guilt, Poor behavioral controls, Early behavioral problems, Impulsivity, and Juvenile delinquency.

<sup>17</sup> Webster, C. D., Harris, G. T., Rice, M. E., Cormier, C., & Quinsey, V. L. (1994). *The Violence Prediction Scheme: Assessing dangerousness in high risk men*. Toronto: Centre of Criminology, University of Toronto.

<sup>18</sup> Webster, C. D., Douglas, K. S., Eaves, D., & Hart, S. D. (1997). *The HCR-20 scheme (version 2): The assessment of risk for violence*. Burnaby, BC: Mental Health, Law, and Policy Institute, Simon Fraser University.

assessing risk for violence in prison. I scored Mr. Yates on both of these instruments and received a score of medium to high risk of violence in the community. While it is my opinion that Mr. Yates would pose a high risk for violence if he were in the community, it is also my opinion that this assessment would substantially overestimate his risk for violence in a prison setting, as I will discuss in the next section.

**Assessing violence risk in prison.** In my opinion, for the purpose of evaluating future risk for Mr. Yates, standard risk instruments and assessments of psychopathy do not provide an accurate portrayal of his risk for prison violence. As noted earlier in this report, Mr. Yates does not have a history of child behavior problems or juvenile delinquency. He was considered an average student with no difficulties in the classroom, and he excelled in sports in high school. His involvement in criminal behavior took place after high school. As an adult, he led a double life. He worked regularly and maintained a large family, but at the same time he was engaged in violent criminal behavior that was unknown to those around him, including his wife and children. His deviant and criminal behavior was confined to his involvement with prostitutes and later with illegal drugs.

Mr. Yates has substantial problems dealing with his anger. Personality testing indicates he is capable of rapid mood changes and explosive anger. The murders were committed during periods when he was angry, either at his wife for perceived slights or neglect, or directed toward the women he killed. While in prison, Mr. Yates can still get angry if he feels slighted or mistreated, but he has been able to control his responses in both jail and prison. He described a number of incidents to me that took place in prison in which a correctional officer or an inmate had made him angry. He said he accepted the fact that he might lose the few privileges he had if he reacted, so he has chosen to ignore the perceived slights or provocations. According to Mr. Russ Ward, his counselor in prison, Mr. Yates has one infraction during the 6-plus years he has been in prison. The infraction was for refusing a UA (urinalysis), and it occurred on May 8, 2006. According to Mr. Ward, Mr. Yates has no other infractions so he has not been involved in any violent or aggressive incident in prison. Thus, while he has clearly demonstrated angry and violent behavior when he was in the community, this behavior has not been manifested either in the Spokane Jail or in prison.

Spokane Police-Sheriff Additional Reports were reviewed to assess his behavior while in jail. There were some notes regarding sullen or tearful behavior and possible suicidal comments, but no incidents of aggressive behavior were noted while he was in the Spokane jail. Pierce County jail reports were not available at the time of this report. I will update this report should they become available.

Risk assessment also involves an assessment of how a given level of risk can be managed. While it is my opinion that Mr. Yates' level of risk would be high if he were in the community, I do not believe that his risk in a prison setting would be at the same level. Given his offense history and death sentence, Mr. Yates is currently placed in a maximum security prison on death row. If his sentence had been life without parole, it is my understanding that he would also have been placed, at least initially, in a maximum security prison, and that due to the nature and notoriety of his offenses he would likely remain isolated from the main prison population, possibly for the rest of his life.

As part of this evaluation, I contacted family members to discuss the nature of their relationship with Mr. Yates at the time of his arrest and subsequent sentencing, as well as the present time. This is an important aspect of assessing risk for prison violence given the research reviewed in this report indicating that inmates who maintain strong ties to the community are less likely to engage in prison violence.

His father, Mr. Robert Yates, Sr., corresponds with his son two to three times a month and talks to him on the phone. He visited him in jail in Spokane and Tacoma and also attended his trial. He lives in Arizona but visits him in prison periodically, with his most recent visit in April, 2009. He describes his relationship with his son as good. Sonya Anderson, one of his daughters, stated that she corresponds regularly with her father, and talks to him on the phone when she visits her mother in Walla Walla. She visited him in jail in Spokane and Tacoma and has maintained communication with him since that time. She describes their relationship as good, and says she talks to him about many issues in her life. She added that she seeks advice from him and that their continuing relationship is important to her. Shirley Cleveland Hess, one of his sisters, saw him frequently in the Spokane and Tacoma jails and was also present at his trial. She continues to speak with Mr. Yates regularly on the telephone and visits him in prison occasionally. She commented that she does not condone his criminal behavior but nevertheless has unconditional love for her brother, and will continue to have contact with him in prison. Linda Welsh, a sister, lives in Montana. She saw him frequently in the Spokane and Tacoma jails and was also present at his trial. At present, she doesn't talk to him often because of the cost, but they correspond regularly, and she describes their relationship as supportive.

**Opinion about Mr. Yates's Risk for Prison Violence.** Based on the research on prison violence risk factors referenced in this report, it is my opinion that at the time of his capital sentencing, Mr. Yates would have been considered a low risk for violent offending in prison. This is based on the following:

- He was incarcerated in jails in Spokane and Tacoma for over two years. Records for Tacoma were not available at the time of this report, but there were no reported incidents of aggressive behavior in the Spokane jail. Research has shown that inmates with prior incarcerations with no disciplinary infractions are less likely to have infractions in prison.
- He was 50 years old at the time of his capital sentencing. Research has shown that older inmates are less likely to engage in violent or other problematic behavior in prison.
- He has above average education for an inmate population (high school and an Associate of Arts degree). Inmates with higher levels of education are less likely to have violations in prison.
- He has a stable employment history. Inmates who had been regularly employed are less likely to have violations in prison. Mr. Yates was in the military for 18 years and was employed at the time of his arrest.
- He has continuing ties with family and community members. Research indicates that inmates with family and community ties have lower levels of problem

behavior in prison. As noted in this report, Mr. Yates was visited regularly when he was in jail in Spokane and Tacoma by his father, two sisters, and some of his children, and they also attended his trial. They remain in close communication with him, visit him regularly in prison, correspond with him, and receive telephone calls from him. Mr. Yates reports that he communicates regularly with his ex-wife Linda Yates and his other children.

- Capital inmates have lower rates of violent behavior in prison, compared to prisoners in the general population.

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**Actuarial Assessment of Risk.** Another method for assessing likelihood of risk for violence in prison is called an actuarial method. The items on an actuarial instrument are empirically based, in that they have been shown to be associated with some specified form of recidivism. The rules for scoring and weighting each factor are explicit, and a single total score is typically used to determine an offender's overall level of risk. The factors are usually historical, or static, in nature (such as age at first offence, prior criminal history). Mark Cunningham and his colleagues have developed an actuarial scale, the *Risk Assessment Scale for Prison (RASP)*, for the assessment of risk of violent misconduct in a maximum security prison setting.<sup>19</sup> Versions of this scale have been developed using data from thousands of prisoners in Florida, Texas, and Missouri. The researchers examined predictive variables that are available at conviction and admission to prison, including age, length of sentence, education, prior prison terms, prior probated sentences, conviction for a property offense, and years served. The level of risk posed by Mr. Yates when he was sentenced in 2002 is estimated from the version of the scale derived from the sample of 13,341 inmates in Florida. This version, termed the *RASP-RB*, scores individuals on variables that were shown to predict prison violence: age, education, prior prison commitment, property conviction offense, drug conviction offense, sentence length, and type of sentence (life without parole, death sentence). Each variable is given a weighted score. For example, the age of the inmate at admission to prison could receive a score ranging from +3 to -1, with younger inmates receiving a higher score. This reflects research showing that younger individuals are more likely to engage in violent behavior, both in and out of prison. A sentence to either life without parole or a death sentence would receive a score of -1, based on research showing that persons with either of these sentences are less likely to be involved in disciplinary infractions in prison. The total score on the *RASP-RB* could range from -4 to +6.

Mr. Yates received a score of -4 on the *RASP-RB* (age = -2 as he was over 40; education = -1 as he has some college; and a score of -1 if sentenced to either life without parole or the death sentence). The following table<sup>20</sup> shows the prevalence of violence in the Florida-prison sample for each score on the *RASP-RB*.

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<sup>19</sup> Cunningham, M. D., Sorensen, J. R., & Reidy, T. J. (2005). An actuarial model for assessment of prison violence risk among maximum security inmates. *Assessment, 12*, 40-49.

<sup>20</sup> See Cunningham et al. (2005), Footnote 19, at page 262.

RASP-PB Score	Prevalence of Violent Misconduct
-4	0/26 = 0.0%
-3	10/205 = 4.9%
-2	31/817 = 3.8%
-1	76/1,681 = 4.5%
0	142/2,099 = 6.8%
1	170/2410 = 7.1%
2	250/2,423 = 10.3%
3	316/2,027 = 15.6%
4	330/1,215 = 27.2%
5	188/420 = 28.1%
6	6/18 = 33.3%
Total	1,450/13,341 = 10.9%

Mr. Yates's score of -4 places him with a group of offenders who had no infractions during the first year of incarceration. The above table shows that as the RASP-RB increases, inmates are more likely to be involved in infractions. Mr. Yates's score is consistent with the research summarized earlier in this report indicating that older inmates, with more education, and serving either a death sentence or life without parole, are less likely to be involved in prison violence or other disciplinary infractions.

### Opinion

It is my clinical opinion that Mr. Yates, at the time of his capital sentencing in 2002, would have been assessed as a low risk for prison violence. As noted in this report, the incidence of prison violence is generally quite low, and Mr. Yates's background (age, level of education, and sentence to either life without parole or death) would make him a lower risk than most inmates entering prison. If I had been retained at the time of his capital sentencing, my testimony would have been consistent with the opinion expressed in this report.

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I believe you have a copy of my curriculum vita. To summarize, I am a Professor of Psychology and Director of the Mental Health, Law, and Policy Institute at Simon Fraser University in British Columbia, Canada. I received a Ph.D. in clinical psychology from the University of Illinois. I am past-president of the American Psychology-Law Society and president-elect of the International Association of Forensic Mental Health. I am currently editor of the journal, *Psychology, Public Policy, and Law*. In addition to research, I consult on forensic cases related to competency to stand trial, criminal responsibility, juvenile capacity, juvenile waiver to adult court, risk assessment, and other forensic assessment

issues. I am licensed to practice as a psychologist in Washington, Alaska, and British Columbia.

I, Ronald Roesch, PhD, swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

Sincerely,

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Ronald Roesch, PhD

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## Professor Ronald Roesch

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**Citizenship:** United States and Canada

**Education**

PhD: University of Illinois, 1977 (Clinical Psychology)  
BS: Arizona State University, 1971 (Psychology)

**Major Interests**

Law and psychology; Clinical and community psychology

**CURRENT POSITIONS**

1984 – present Professor of Psychology, Simon Fraser University (SFU)  
1991 – present Director, Mental Health, Law, and Policy Institute, SFU

**PREVIOUS POSITIONS**

2001 – 2002 Director, Law and Forensic Psychology Graduate Program (SFU)  
1981 – 1997 Director, Clinical Psychology Doctoral Program (SFU). Accredited by the American Psychological Association (since 1984) and the Canadian Psychological Association (since 1986)  
1984 – 1985 Visiting Professor, Arizona State University, Department of Psychology  
1980 – 1984 Associate Professor of Psychology and Criminology, SFU  
1978 – 1986 Director, Criminology Research Centre, SFU  
1977 – 1980 Assistant Professor of Psychology and Criminology, SFU

**PROFESSIONAL LICENSES**

Registered Psychologist, British Columbia College of Psychologists (#906)  
Licensed Psychologist, State of Alaska (#540)  
Temporary Psychologist Permit, State of Washington (#TY3229)  
State of Nevada Board of Psychological Examiners, Non-resident Consultant

**PROFESSIONAL ACTIVITIES**

Forensic evaluations of competency to stand trial, Miranda warnings, juvenile transfer to adult court, and risk assessment.

Member, Scientific Council, International Victimology Institute, Tilburg University, The Netherlands (2006–present).

Member, Board of Directors, International Association of Forensic Mental Health Services (2001–present).

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Member, International Advisory Board, The Master's Course on Forensic Psychiatry, School of Medicine, National University of La Plata, Argentina (2001–present).

Member, Executive Committee, European Association of Psychology and Law (1999–present)

Member, Surrey Pretrial Services Centre Mental Health Program Management Committee (1991–2002)

Member, Executive Committee, American Psychology-Law Society (1988–present; served as president in 1993-94)

Senior Research Consultant, British Columbia Forensic Services Commission (1985–2003)

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Founding Chair, Board of Directors, Family Violence Institute of British Columbia (1988–1993);  
Member, Board of Directors (1993–2002)

Member, Subcommittee on the Mental Disorder Project of the Criminal Code Review, Canadian Psychological Association Section on Criminal Justice Systems (1983–1985)

Consultant, M.A.D.D. (Mothers Against Drunk Drivers, Vancouver) (1982–1985)

Member, Board of Directors, Elizabeth Fry Society (1978–1980)

Member, Citizen's Advisory Board to Corrections in British Columbia (1978–1980)

Member, Subcommittee on Psychologists and the Law of the Professional Affairs Committee, Canadian Psychological Association (1978–1980)

#### HONORS and AWARDS

2009 American Psychology-Law Society Award for Outstanding Teaching and Mentoring in the Field of Psychology and Law

President-elect, International Association of Forensic Mental Health Services (2007-09)

Honorary President, Curso en Psicopatología Criminal of the Centro Internacional de Formación e Investigación en Psicopatología Criminal, Madrid Spain. Participants include forensic psychologists in Spain who will be trained as specialists to work in forensic psychology (2006- present)

President, American Psychology-Law Society (Division 41 of the American Psychological Association), 1993-94

Simon Fraser University Research Professorship, 1988-89

Fellow, Canadian Psychological Association, since 1986

Fellow, American Psychological Association, since 1984

Leave Fellowship, Social Sciences and Humanities Research Council, 1984-1985

Certificate of Merit, 1982 American Bar Association Gavel Awards Competition, for the book, *Competency to Stand Trial* (with S. L. Golding)

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~~Social-Issues Dissertation Award (Society for the Psychological Studies of Social Issues), 1977. Award was for "the best psychological dissertation concerned with social issues."~~

Consulting Psychology Research Award (American Psychological Association, Division 13), 1977. Award was for "the most fruitful research of the year related to consultation."

U.S. Public Health Service Traineeship in Clinical Psychology (1972-73; 1974-75)

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**EDITORIAL RESPONSIBILITIES**

Editor, *Psychology, Public Policy, and Law*, a quarterly journal published by the American Psychological Association (2008-2012).

Series Editor, *American Psychology-Law Society Series*, a book series sponsored by the American Psychology-Law Society (Division 41 of the American Psychological Association) and published by Oxford University Press. I have been series editor since 2005. The following books have been published or are in preparation:

Bornstein, B., & Miller, M. (in press). *God in the courtroom: Religion's role at trial*. NY: Oxford University Press.

Cutler, B. L. (in press). *Expert testimony on the psychology of eyewitness identification*. NY: Oxford University Press.

Arrigo, B. (in preparation). *Ethics, culture, and mental health*. NY: Oxford University Press.

Dvoskin, J., Skeem, J., Novaco, R., & Douglas, K. S. (in preparation). *Applying social science to reduce violent offending*. NY: Oxford University Press.

Klein, D., & Mitchell, G. (Eds.). (in preparation). *The psychology of judicial decision making*. NY: Oxford University Press.

Mechanic, M. B. (in preparation). *Criminal cases involving battered women defendants and witnesses: Expert evidence on intimate partner battering and its effects*. NY: Oxford University Press.

Perlin, M. L. (in preparation). *"The chimes of freedom flashing": Exploring the intersection between international human rights and mental disability law*. NY: Oxford University Press.

Wrightsmann, L. S. (in preparation). *What's the matter with Miranda? How America's best-known right went wrong*. NY: Oxford University Press.

Wrightsmann, L. S. (2008). *Oral arguments before the Supreme Court: An empirical approach*. NY: Oxford University Press.

Levesque, R. J. R. (2007). *Adolescents, media and the law: What developmental science reveals and free speech requires*. NY: Oxford University Press.

This book received the 2007 American Psychology-Law Society Book Award.

Slobogin, C. (2006). *Proving the unprovable: The role of law, science, and speculation in adjudicating culpability and dangerousness*. NY: Oxford University Press.

Stefan, S. (2006). *Emergency department treatment of the psychiatric patient: Policy issues and legal requirements*. NY: Oxford University Press.

Wrightsmann, L. S. (2006). *The psychology of the Supreme Court*. NY: Oxford University Press.

Haney, C. (2005). *Death by design: Capital punishment as a social psychological system*. NY: Oxford University Press. (Received the Herbert Jacob Book Prize from the Law and Society Association for the "most outstanding book written on law and society in 2005")

Koch, W. J., Douglas, K. S., Nicholls, T. L., & O'Neill, M. (2005). *Psychological injuries: Forensic assessment, treatment and law*. NY: Oxford University Press.

Posey, A. J., & Wrightsmann, L. S. (2005). *Trial consulting*. NY: Oxford University Press.

Series Co-editor, *International Perspectives on Forensic Mental Health*. This books series is sponsored by the International Association of Forensic Mental Health Services and published by Routledge. The following books have been published or are in preparation:

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- Otto, R. K., & Douglas, K. (Eds.). (in preparation). *Handbook of violent risk assessment*. NY: Routledge.
- Jackson, R. (Ed.). (2007). *Learning forensic assessment*. NY: Routledge.
- Series Editor, *Perspectives in Law and Psychology*. This book series was sponsored by the American Psychology-Law Society (Division 41 of the American Psychological Association) and published by Kluwer Academic/Plenum. I was series editor from 1999 to 2004, when the series ended with Kluwer. The following 11 books were published during my editorship:
- 
- Lassiter, G. D. (Ed.). (2004). *Interrogations, confessions, and entrapment*. (Volume 20). NY: Kluwer Academic/Plenum.
- Moretti, M. M., Odgers, C. L., & Jackson, M. A. (Eds.). (2004). *Girls and aggression: Contributing factors and intervention principles*. (Volume 19). NY: Kluwer Academic/Plenum.
- Condie, L. O. (2003). *Parenting evaluations for the court: Care and protection matters*. (Volume 18). NY: Kluwer Academic/Plenum.
- van Koppen, P. J., & Penrod, S. D. (Eds.). (2003). *Adversarial versus inquisitorial justice: Psychological perspectives on criminal justice systems*. (Volume 17). NY: Kluwer Academic/Plenum.
- Grisso, T. (2003). *Evaluating competencies: Forensic assessments and instruments* (2<sup>nd</sup> ed.). (Volume 16). NY: Kluwer Academic/Plenum.
- Poythress, N. G., Bonnie, R. J., Monahan, J., Otto, R. K., & Hoge, S. K. (2002). *Adjudicative competence: The MacArthur studies*. (Volume 15). NY: Kluwer Academic/Plenum.
- Ogloff, J. R. P. (Ed.). (2002). *Taking psychology and law into the twenty-first century*. (Volume 14). NY: Kluwer Academic/Plenum.
- Levesque, R. (2002). *Dangerous adolescents, model adolescents: Shaping the role and promise of education*. (Volume 13). NY: Kluwer Academic/Plenum.
- Heilbrun, K. (2001). *Principals of forensic mental health assessment*. (Volume 12). NY: Plenum.
- Wrightsmann, L. (1999). *Judicial decision making: Is psychology relevant?* (Volume 11). NY: Plenum.
- Roesch, R., Hart, S. D., & Ogloff, J. R. P. (Eds.). (1999). *Psychology and law: The state of the discipline*. (Volume 10). NY: Plenum.
- Editorial Advisory Board, *The Encyclopedia of Psychology and Law* (edited by Brian Cutler). Thousand Oaks, CA: Sage.
- Editor, *International Journal of Forensic Mental Health*, a semi-annual journal of the International Association of Forensic Mental Health Services (2002–2006).
- Editor, *Law and Human Behavior*, a bi-monthly journal of the American Psychology-Law Society (1988–1996).
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- Current or past Editorial Board member of the following journals:
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- Law and Human Behavior* (1996– present)
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- Legal and Criminological Psychology* (1996– present)
- Criminal Behaviour and Mental Health* (1991– present)
- European Journal of Psychology Applied to Legal Context* (2008– present)
- Empirical and Applied Criminal Justice Research* (1999–2004)
- Behavioral Sciences & the Law* (1992–2001)

*International Journal of Law and Psychiatry* (1988–1992)  
*Canadian Journal of Community Mental Health* (1983–1992)  
*Social Action and the Law* (1982–1990)  
*American Journal of Community Psychology* (1981–1984)

## PUBLICATIONS

### A. Books

- Roesch, R., Zapf, P. A., & Hart, S. D. (in preparation). *Forensic psychology and the law*. Hoboken, NJ: Wiley.
- Zapf, P. A., & Roesch, R. (2009). *Best practices in forensic mental health assessments: Evaluation of competence to stand trial*. NY: Oxford University Press.
- Roesch, R., & Gagnon, N. (Eds.) (2007). *Psychology and law: Criminal and civil perspectives*. Hampshire, UK: Ashgate.
- Roesch, R., & McLachlan, K. (Eds.) (2007). *Clinical forensic psychology and law*. Hampshire, UK: Ashgate.
- Roesch, R., Zapf, P. A., & Eaves, D. (2006). *Fitness Interview Test—Revised: A structured interview for assessing competency to stand trial*. Sarasota, FL: Professional Resource Press.
- Czerederecka, A., Jaskiewicz, T., Roesch, R., & Wojcikiewicz, J. (Eds.). (2005). *Psychology and law: Facing the challenges of a changing world*. Krakow, Poland: Institute of Forensic Research Publishers.
- Nicholls, T. L., Roesch, R., Olley, M. C., Ogloff, J. R. P., & Hemphill, J. F. (2005). *Jail Screening Assessment Tool (JSAT): Guidelines for mental health screening in jails*. Burnaby, BC: Mental Health, Law, and Policy Institute, Simon Fraser University.
- Corrado, R. R., Roesch, R., Hart, S. D., & Gierowski, J. K. (Eds.). (2002). *Multi-problem violent youth: A foundation for comparative research on needs, interventions, and outcomes*. NATO Science Series. Amsterdam: IOS Press.
- Roesch, R., Corrado, R. R., & Dempster, R. (Eds.). (2001). *Psychology in the courts: International advances in knowledge*. London: Routledge.
- Eaves, D., Ogloff, J. R. P., & Roesch, R. (Eds.). (2000). *Mental disorders and the Criminal Code: Legal background and contemporary perspectives*. Burnaby, BC: Mental Health, Law, and Policy Institute, Simon Fraser University.
- Roesch, R., Hart, S. D., & Ogloff, J. R. P. (Eds.). (1999). *Psychology and law: The state of the discipline*. NY: Kluwer Academic/Plenum.
- Roesch, R., Zapf, P. A., Eaves, D., & Webster, C. D. (1998). *The Fitness Interview Test* (revised edition). Burnaby, BC: Mental Health, Law, and Policy Institute, Simon Fraser University.
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- Translated into French by Anne Crocker, University of Montreal.
- Spanish version published as: Folino, J. O., Castillo, J. L., & Roesch, R. (2003). *Escala de evaluacion de capacidad para actuar en proceso penal eecapapp*. La Plata, Argentina: Editorial Interfase Forense.
- Roesch, R., Dutton, D., & Sacco, V. F. (Eds.). (1990). *Family violence: Perspectives on treatment, research, and policy*. Burnaby, B.C.: British Columbia Family Violence Institute.

- Roesch, R., Webster, C. D., & Eaves, D. (1984). *The Fitness Interview Test: A method for assessing fitness to stand trial*. Toronto: University of Toronto Centre of Criminology.
- Roesch, R., & Corrado, R. R. (Eds.). (1981). *Evaluation and criminal justice policy*. Beverly Hills: Sage.
- Roesch, R., & Golding, S. L. (1980). *Competency to stand trial*. Urbana: University of Illinois Press.
- Roesch, R., & Golding, S. L. (1977). *A systems analysis of competency to stand trial procedures: Implications for forensic services in North Carolina*. Urbana, IL: National Clearinghouse for Criminal Justice Planning and Architecture, University of Illinois.

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### B. Edited Journal Special Issues

- Eaves, D., Roesch, R., & Ogloff, J. R. P. (Eds.). (2000). International perspectives on forensic mental health systems. A special double issue of *International Journal of Law and Psychiatry*, 23 (Numbers 5-6, pp. 429-663).
- Ogloff, J. R. P., Roesch, R., & Eaves, D. (Eds.). (1995). International perspectives on mental health research in the criminal justice system. A special issue of *International Journal of Law and Psychiatry*, 18 (Whole issue No. 1).
- Roesch, R., & Freeman, R. J. (Eds.). (1989). Mental disorder and the criminal justice system. A special double issue of *International Journal of Law and Psychiatry*, 12 (Numbers 2 and 3).
- Roesch, R. (Ed.). (1988). Community psychology and the law. A special issue of the *American Journal of Community Psychology*, 16, (No. 4).

### C. Articles and Chapters

- Hart, S. D., & Roesch, R. (in press). Mental disorder and the law. In D. J. A. Dozois & P. Firestone (Eds.), *Abnormal psychology: Perspectives*. Toronto: Pearson.
- Roesch, R., & McLachlan, K. (in press). Competency to stand trial. In P. Rossi (Ed.), *Encyclopedia of psychology*. Hoboken, NJ: Wiley.
- Mordell, S., McLachlan, K., Gagnon, N., & Roesch, R. (2008). Questões éticas em psicologia forense (Ethical issues in psychology and the law). In A. C. Fonseca (Ed.), *Psicologia e justiça (Psychology and justice)* (pp. 475-505). Coimbra, Portugal: Nova Almedina.
- Roesch, R., & McLachlan, K. (2008). The Fitness Interview Test-Revised. In B. Cutler (Ed.), *Encyclopedia of psychology and law* (pp. 322-324). Thousand Oaks, CA: Sage.
- Roesch, R., & McLachlan, K. (2008). Capacity to waive *Miranda* rights. In B. Cutler (Ed.), *Encyclopedia of psychology and law* (pp. 56-59). Thousand Oaks, CA: Sage.
- Zapf, P. A., Gagnon, N., Cox, D. N., & Roesch, R. (2008). Psychological perspectives on criminality. In R. Linden (Ed.), *Criminology: A Canadian perspective* (6<sup>th</sup> ed., pp. 247-281). Toronto: Holt, Rinehart and Winston.
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- ~~Roesch, R., McLachlan, K., & Viljoen, J. L. (2007). The capacity of juveniles to understand and waive arrest rights. In R. Jackson (Ed.), *Learning forensic assessment* (pp. 265-289). NY: Routledge.~~
- Viljoen, J. L., & Roesch, R. (2007). Assessing adolescents' adjudicative competence. In R. Jackson (Ed.), *Learning forensic assessment* (pp. 291-312). NY: Taylor & Francis.
- Roesch, R., & McLachlan, K. (2007). Introduction. In R. Roesch & K. McLachlan (Eds.), *Clinical forensic psychology and law* (pp. xiii-xxv). Hampshire, UK: Ashgate.
- Roesch, R., & Gagnon, N. (2007). Introduction. In R. Roesch & N. Gagnon (Eds.), *Psychology and law: Criminal and civil perspectives* (pp. xiii-xxv). Hampshire, UK: Ashgate.

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- Blatier, C., Roesch, R., & Corrado, R. (2007). Les dynamiques de la justice restaurative pour les mineurs. *L'Observatoire, Revue d'Action Sociale et Médico-sociale*, 53, 7-10.
- Roesch, R. (2007). Delincuencia juvenil: Riesgos y prevención (Juvenile delinquency: Risk and prevention). In J. M. Sabucedo & J. Sanmartín (Eds.), *Los escenarios de la violencia* (pp. 215-232). Barcelona: Ariel.
- Viljoen, J. L., Zapf, P. A., & Roesch, R. (2007). Adjudicative competence and comprehension of *Miranda* rights in adolescent defendants: A comparison of legal standards. *Behavioral Sciences and the Law*, 25, 1-19.
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- Hart, S. D., & Roesch, R. (2006). Mental health law and professional ethics. In P. Firestone & D. J. A. Dozois (Eds.), *Abnormal psychology: Perspectives* (Chapter 19, pp. 453-472). Toronto: Pearson.
- Lavoie, J. A. A., Connolly, D. A., & Roesch, R. (2006). Correctional officers' views of mentally disordered offenders: The role of training and burnout syndrome in reported perceptions. *International Journal of Forensic Mental Health*, 5, 151-166.
- Roesch, R. (2006). Responsabilidade criminal e competência para participar no próprio julgamento (Criminal responsibility and competency to stand trial). In A. C. Fonseca (Ed.), *Psicologia forense* (pp. 173-201). Coimbra, Portugal: Nova Almedina.
- Viljoen, J. L., Vincent, G. M., & Roesch, R. (2006). Assessing adolescent defendants' adjudicative competence: Interrater reliability and factor structure of the Fitness Interview Test-Revised. *Criminal Justice and Behavior*, 33, 449-466.
- Roesch, R., & Blatier, C. (2005). Psychologie légale: Une analyse Canadienne & Européenne. *Revue d'action Sociale et Médico-sociale*, 48, 6-14.
- Roesch, R., & van der Woerd, K. A. (2005). Avaliação psicológica de jovens em contexto forense: Risco e saúde mental (Psychological assessment of youth in a forensic context: Risk and mental health). In C. M. C. Vieira and colleagues (Eds.), *Ensaio sobre o comportamento humano: Do diagnóstico à intervenção contributos nacionais e internacionais (Essays about human behavior from diagnosis to intervention: National and international contributions)* (pp. 369-386). Coimbra: Livraria Almedina.
- Viljoen, J. L., Klaver, J., & Roesch, R. (2005). Legal decisions of preadolescent and adolescent defendants: Predictors of confessions, pleas, communication with attorneys, and appeals. *Law and Human Behavior*, 29, 253-257.
- Viljoen, J. L., & Roesch, R. (2005). Competency to waive interrogation rights and adjudicative competence in adolescent defendants: Cognitive development, attorney contact, and psychological symptoms. *Law and Human Behavior*, 29, 723-742.
- Zapf, P. A., & Roesch, R. (2005). An investigation of the construct of competence: A comparison of the FIT, the MacCAT-CA, and the MacCAT-T. *Law and Human Behavior*, 29, 229-252.
- Reprinted in R. Roesch & K. McLachlan (Eds.). (2007). *Clinical forensic psychology and law*. Hampshire, UK: Ashgate.
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- Zapf, P. A., & Roesch, R. (2005). Competency to stand trial: A guide for evaluators. In I. B. Weiner & A. K. Hess (Eds.), *Handbook of forensic psychology* (3<sup>rd</sup> ed., pp. 305-331). NY: Wiley.
- Zapf, P. A., Golding, S. L., & Roesch, R. (2005). Criminal responsibility and the insanity defense. In I. B. Weiner & A. K. Hess (Eds.), *Handbook of forensic psychology* (3<sup>rd</sup> ed., pp. 332-363). NY: Wiley.
- Roesch, R., & Viljoen, J. L. (2004). Competency to stand trial. In W. E. Craighead & C. B. Nemeroff (Eds.), *The concise Corsini encyclopedia of psychology and behavioral science* (pp. 200-201). NY: Wiley.

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- Roesch, R., & Zapf, P. A. (2004). Psychology and the law. In W. E. Craighead & C. B. Nemeroff (Eds.), *The concise Corsini encyclopedia of psychology and behavioral science* (pp. 751-753). NY: Wiley.
- Roesch, R., Viljoen, J. L., & Hui, I. (2004). Assessing intent and criminal responsibility. In W. O'Donohue & E. Levensky (Eds.), *Handbook of forensic psychology: Resource for mental health and legal professionals* (pp. 157-174). NY: Academic Press.
- Zapf, P. A., Cox, D. N., & Roesch, R. (2004). Psychological perspectives on criminality. In R. Linden (Ed.), *Criminology: A Canadian perspective* (5<sup>th</sup> ed., pp. 260-291). Toronto: Holt, Rinehart and Winston.
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- Roesch, R. (2003). Risk assessment: Communicating risk information to lawyers. In G. Vervaeke, L. Kools, M. Vanderhallen, & J. Goethals (Eds.), *Relationship of psychology and law* (pp. 23-49). Brussels, Belgium: Die Keure.
- Viljoen, J. L., Roesch, R., Ogloff, J. R. P., & Zapf, P. A. (2003). The role of Canadian psychologists in conducting fitness and criminal responsibility evaluations. *Canadian Psychology, 44*, 369-381.
- Viljoen, J. L., Zapf, P. A., & Roesch, R. (2003). Diagnosis, current symptomatology, and the ability to stand trial. *Journal of Forensic Psychology Practice, 3*, 23-37.
- Viljoen, J. L., Roesch, R., & Eaves, D. (2002). Canadian mentally disordered offender legislation: Obstacles and advances. In E. Blaauw, M. Hoeve, H. van Maarle, & L. Sheridan (Eds.), *Mentally disordered offenders: International perspectives on assessment and treatment* (pp. 39-72). Den Haag: Elsevier.
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- Viljoen, J. L., Roesch, R., & Zapf, P. A. (2002). Interrater reliability of the Fitness Interview Test across four professional groups. *Canadian Journal of Psychiatry, 47*, 945-952.
- Zapf, P. A., Viljoen, J. L., Whittemore, K. E., Poythress, N. G., & Roesch, R. (2002). Competency: Past, present, and future. In J. R. P. Ogloff (Ed.), *Taking psychology and law into the twenty-first century* (pp. 171-198). NY: Kluwer Academic/Plenum.
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- Samra, J., & Roesch, R. (2001). Conditional release attitudes: Laypersons' perceptions of the purposes, effectiveness, and acceptability of early release by offense type. In R. Roesch, R. R. Corrado, & R. J. Dempster (Eds.), *Psychology in the courts: International advances in knowledge* (pp. 181-194). London: Routledge.
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- Blaauw E., Roesch, R., & Kerkhof, A. (2000). Mental health in European prison systems: What arrangements have countries made to deal with mental disorders in jails and prisons? *International Journal of Law and Psychiatry, 23*, 649-663.
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#### D. Book Reviews and Miscellaneous Publications

- Roesch, R., & McLachlan, K. (2008). Review of R. D. Schneider, H. Bloom, and M. Heerema, *Mental health courts: Decriminalizing the mentally ill*. *Windsor Review of Legal and Social Issues*, 25, 113-116.
- Roesch, R., & Hart, S. D. (2006). Our final editorial. *International Journal of Forensic Mental Health*, 5, 105-106.
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- Roesch, R., & Goodman-Delahunty, J. (1998). Debate on forensic psychology as a specialization: Position against. *American Psychology-Law Society News*, 18 (No. 2), 37-38.
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- Roesch, R. (1993). A guide for mental health experts. Review of R. Rogers & C. Mitchell, *Mental health experts and the criminal courts: A handbook for lawyers and clinicians*. *Contemporary Psychology*, 38, 502-503.
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- Roesch, R. (1987). Review of V. P. Hans & N. Vidmar, *Judging the jury*. *Canadian Journal of Behavioural Science*, 19, 497-498.
- Roesch, R. (1987). Perspectives on crime. Review of D. P. Farrington & J. Gunn (Eds.), *Reactions to crime*. *Contemporary Psychology*, 32, 332-333.
- Roesch, R. (1986). Review of D.N. Weisstub (Ed.), *Law and mental health: International perspectives*. *Canadian Journal of Behavioural Science*, 18, 197-199.
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#### E. Invited and Keynote Addresses; Selected Conference Papers

- Roesch, R. (2008, October). *Larry Wrightsman's perspectives on the United States Supreme Court*. Invited address, Lawrence S. Wrightsman Festschrift, Lawrence, Kansas.
- Roesch, R., & Gagnon, N. (2008, July). *Mental health screening in pretrial jails*. Paper presented at the International Association of Forensic Mental Health Services 8th Annual Conference, Vienna, Austria.

- Roesch, R. (2007, December). *Mental health screening and intervention*. Invited address, Conference on Delinquency, Victims, and Social Responsibility, Madrid, Spain.
- Roesch, R. (2007, October). *Assessing competence of adults and youth in conflict with the law*. Centre for Applied Research in Mental Health & Addiction (CARMHA) Rounds, SFU Faculty of Health Sciences.
- Roesch, R., & Viljoen, J. (2007, October). *Managing the mentally ill juvenile offender*. Presented at the 2<sup>nd</sup> Biennial Forensic Mental Health Conference, SFU Harbour Centre.
- Roesch, R. (2006, November). *Forensic assessment of risk in child and adolescent populations: Implications for prevention and intervention*. Invited address, Madrid, Spain.
- Roesch, R. (2006, September). *Effective intervention programs*. Invited address, Muovendo "INSUD" Conference, Naples, Italy.
- Roesch, R. (2005, April). *Violence risk assessment*. Invited address, Conference on Family Violence, University of Napoli at Caserta, Italy.
- Roesch, R. (2005, April). *Juvenile delinquency*. Invited address, International Congress on Violence, Santiago de Compostelo, Spain.
- Roesch, R., & Viljoen, J. (2004, May). *Assessment of legal abilities of adolescent defendants*. Paper presented at the IX Conference of the European Association for Research on Adolescence, Porto, Portugal.
- Roesch, R. (2004, May). *Psychological assessment of youth in a forensic context: Mental health, competence, and risk*. Keynote address, Congress on Education, Psychology and Crime, Coimbra, Portugal.
- Roesch, R., & van der Woerd, K. A. (2004, May). *The assessment of mental health, competency and risk in youth: Program evaluation*. Workshop conducted at Educação, Psicologia E Justiça, Universidade de Coimbra, Portugal.
- Roesch, R. (2004, March). *Multiproblematic youth and programs of intervention*. Invited address, Conference of the Associazione Centro Studi Opera Don Calabria di Verona, Caltanissetta, Sicily.
- Roesch, R. (2004, March). *Interventions with youth*. Invited address, Conference of the Consorzio Nazionale della Cooperazione Sociale Gino Mattarelli, Florence, Italy.
- Roesch, R. (2003, November). *Risk assessment*. Invited talk, National Legal Aid & Defender Association Conference, Seattle.
- Roesch, R. (2003, June). *Assessing risk: Use and misuse of juvenile risk instruments*. Society for Community Research and Action Conference, Las Vegas, NM.
- Roesch, R. (2002, July). *Transfer of juveniles to adult court: Clinical and research issues in expert evidence*. International Institute of Forensic Studies Conference, Prato, Italy.
- Roesch, R. (2002, September). *Risk assessment geared to lawyers' use of risk for violence information*. Invited address, Flemish Bar Association conference, Leuven, Belgium.
- Roesch, R. (2002, April). *Forensic assessment of juvenile offenders*. Public Defender Conference, Ocean Shores, Washington.
- Roesch, R. (2001, October). *Prevention strategies and treatment of juvenile delinquency*. Keynote address, ICARO Conference, Palermo, Sicily.
- Roesch, R. (2001, June). *Youth violence: Models for risk assessment and prevention*. Keynote address, 11<sup>th</sup> European Association of Psychology and Law Conference, Lisbon, Portugal.

Roesch, R. (2000, November). *Forensic evaluations in the juvenile justice system*. Invited address, Young Adults in Conflict with the Law: Evaluation and Treatment Conference, University of Belgrano, Buenos Aires, Argentina.

Roesch, R. (2000, July). Chair of symposium, *Fitness to stand trial: Legal and clinical perspectives*. International Association of Law and Mental Health conference, Siena, Italy.

Roesch, R., & Boddy, J. L. (2000, April). *Fitness to stand trial: A comparison of remanded and non-remanded criminal defendants*. Paper read at the 10<sup>th</sup> European Association of Psychology and Law Conference, Limassol, Cyprus.

Roesch, R. (1999, June). *Current controversies in the delivery of forensic mental health care in Canada*. International Congress on Law and Mental Health, Toronto.

Roesch, R., & Zapf, P. A. (1998, September). *Competency issues in civil and criminal law: A comparison of competency measures*. Presented at the 8<sup>th</sup> European Conference on Psychology and Law, Krakow, Poland.

Roesch, R. (1998, February). *Psychological expertise in the criminal justice system*. Invited address, NISCALE, Leiden, The Netherlands.

Roesch, R. (1997, September). *Psychology and law: Prospects for international collaboration*. Keynote address, 7<sup>th</sup> European Association of Psychology and Law, Stockholm, Sweden.

Roesch, R. (1996, August). *Mental health and the law: Reflections on twenty years of research*. Keynote address, 6<sup>th</sup> European Conference on Psychology and Law, Siena, Italy.

Roesch, R. (1996, August). Forensic training in graduate programs. Presented at the symposium on *Training in law and psychology: Outcomes of the Villanova conference* (D. Bersoff, chair). Toronto: American Psychological Association Convention.

Roesch, R. (1996, November). *Assessment of competency to stand trial*. Keynote address, Phillippe Pinel Institute Second Annual International Colloquium, Montreal.

Roesch, R. (1996, November). *Mental health law research*. Invited address, Therapeutic Jurisprudence Conference, University of Nebraska.

Roesch, R. (1994, August). *Creating change in the legal system: Contributions from community psychology*. American Psychology-Law Society Presidential address, presented at the American Psychological Association Convention, Los Angeles, CA.

Roesch, R. (1992, September). *Mental health interventions in jails*. Keynote address, 3<sup>rd</sup> European Conference on Psychology and Law, Oxford University, England.

#### RESEARCH GRANTS AND CONTRACTS

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| 2007 – 2009 | International Education and Youth Division (PRE) of the Canadian Department of Foreign Affairs and International Trade, International Research Linkage program award for "Strengthening Academic Ties Between Argentina and Canada: The Assessment of Young Offenders within a Rights-based Policy Context" (\$10,000; with Margaret Jackson and Liliana Alvarez). |
| 2007 – 2009 | Burnaby Youth Custody Services, for program evaluation (\$85,000; with J. Viljoen).  |
| 2007 – 2009 | BC Corrections, Grant for a study of pretrial mental health screening (\$18,000).  |
| 2007        | Correctional Service of Canada, for the Second Biennial Forensic Mental Health Conference, held in Vancouver, October 25-26, 2007 (\$26,500).  |
| 2006 – 2009 | British Columbia Forensic Services for post-doctoral and internship training (\$109,000).  |

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- 2003 – 2008 British Columbia Forensic Services Commission, for research and training projects with forensic services (\$300,000, with S. D. Hart).
- 2006 BC Institute Against Family Violence, for a review of Violence and the Social Determinants of Health (\$7,000).
- 2005 Correctional Service of Canada, for the First Biennial Forensic Mental Health Conference, held in Vancouver, October 17-18, 2005 (\$24,500).
- 2001 – 2003 Correctional Service of Canada, for research and training consultation (\$68,000).
- 1999 – 2003 Burnaby Correctional Centre for Women, for the provision of mental health screening services (\$98,000).
- 1998 – 2003 Vancouver Pretrial Services Center, for the provision of mental health screening services (\$270,987).
- 1999 – 2000 North Atlantic Treaty Organization (NATO) to organize an Advanced Research Workshop (ARW) on "Multi-Problem Violent Youth: A Foundation for Comparative Research on Needs, Interventions and Outcomes" (\$62,000; with R. R. Corrado).
- 1999 – 2000 SFU Conference Grant, for a conference held in Vancouver, April, 2000, on violent youth (\$5,000).
- 1998 – 1999 Canadian Foundation for Innovation. Forensic Mental Health Research and Training Network (\$175,000, with S. D. Hart, J. R. P. Ogloff, and W. Krane).
- 1996 – 1999 Social Sciences and Humanities Research Council. "Assessing Fitness to Stand Trial: Studies on the Reliability and Validity of the Fitness Interview Test-Revised" (\$67,000, with P. Zapf).
- 1998 – 2001 British Columbia Forensic Psychiatric Services Commission, for research and training projects with forensic services (\$329,000).
- 1996 – 1997 British Columbia Forensic Psychiatric Services Commission, for research and training projects with forensic services (\$158,000; with M. M. Moretti, C. D. Webster).
- 1997 Social Sciences and Humanities Research Council (Small Grant Program). "A Comparative Study of Forensic Assessments in Canada and Italy" (\$4993).
- 1995 Department of Justice, for a study of remands for pretrial evaluations in British Columbia (\$5200; with S. D. Hart and J. R. P. Ogloff).
- 1994 – 2002 Surrey Pretrial Services Center, for the provision of mental health screening services for the Surrey Mental Health Project (\$450,000).
- 1994 British Columbia Forensic Psychiatric Services Commission, for a follow-up study of Surrey Pretrial Mental Health Project participants (\$13,000; with J. R. P. Ogloff).
- 1993 – 1994 John Howard Society, for a study of the feasibility of a residential facility for a forensic population (\$14,941).
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- 1992 – 1995 Social Sciences and Humanities Research Council. "The Impact of Mental Disorder on Legal Competencies and Pretrial Release Decisions: Implications for Public Policy" (\$126,788).
- 1993 Department of Justice, for a study of the impact of Bill C-30 on remands and assessments of fitness to stand trial and criminal responsibility (\$9969; with J. R. P. Ogloff).
- 1992 – 1993 British Columbia Corrections Branch, for an evaluation of the Vancouver Metro Region Disordered Offender Project (\$35,000).

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- 1992 Forensic Psychiatric Services Commission, for the development of a training program for correctional officers and nurses (\$46,600).
- 1991 – 1994 Department of Justice, for a study of the impact of proposed changes in release procedures for defendants found not guilty by reason of insanity (\$75,000; with J.R.P. Ogloff and M. Moretti).
- 1991 – 1992 BC Ministry of Solicitor General, for a survey of domestic violence (\$29,500; with J. R. P. Ogloff).
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- ~~1991 – 1992 President's Research Grant, for the establishment of a research team for the Mental Health, Law, and Policy Institute (\$10,730).~~
- 1991 – 1992 Steel Fund, for a study of co-occurring disorders in a pretrial population (\$8300).
- 1991 – 1992 British Columbia Forensic Psychiatric Services Commission, for the development of the Mental Health, Law, and Policy Institute to provide research and training in the area of law and mental health (\$60,000).
- 1989 – 1991 British Columbia Health Research Foundation, for a study of the prevalence and detection of mental disorder in a pretrial jail (\$61,000; with R. Corrado and D. Cox).
- 1989 – 1990 Health and Welfare Canada, for the preparation of an edited book based on papers presented at a conference on family violence (\$15,000; with D. Dutton and V. F. Sacco).
- 1988 – 1991 SFU Special Research Fund, for a study of the impact of child sexual abuse on a rural community (\$18,000).
- 1986 – 1987 President's Research Grant, for a study of the impact of child sexual abuse on psychological functioning (\$2,500).
- 1984 – 1985 Social Sciences and Humanities Research Council Leave Fellowship (\$15,500).
- 1982 – 1984 Solicitor General, for an evaluation of a robbery prevention program (\$48,000; with J. Winterdyk).
- 1980 – 1982 Ministry of Justice, for a collaborative project with Dr. Chris Webster of the Metropolitan Toronto Forensic Services, for a study of fitness assessment models (\$27,000).
- 1980 – 1982 National Institute of Mental Health, Center for Crime and Delinquency, for a study of methods for the assessment of competency to stand trial (\$213,000; with S. L. Golding and J. Schreiber).
- 1979 – 1986 Solicitor General, for the development and operation of the Criminology Research Centre (\$450,000).
- 1979 – 1981 Solicitor General, for an analysis of the Vancouver Victimization Survey (\$43,000; with R. R. Corrado and W. Glackman).
- 1979 – 1981 North Fraser Regional Corrections Dept. for an evaluation of two specialized correctional programs for young offenders. (\$30,000; with M. Shea).
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- 1979 – 1981 British Columbia Forensic Psychiatric Services Commission, for a study of the reliability and validity of legal/mental health decision making (\$47,000; with D. Eaves).
- 1979 – 1980 Dept. of Health, Promotion and Prevention Directorate. "Family Violence." (\$10,000; with W. Glackman).
- 1978 – 1979 President's Research Grant, Simon Fraser University. "An Analysis of Competency to Stand Trial Procedures." (\$4,500).

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1977 – 1979 Solicitor General. "An Evaluation of the House of Concord, a Program for Juvenile Offenders." (\$10,000; with S. Ksionzky).

### **COURSES INSTRUCTED**

**Undergraduate:** Introduction to Clinical Psychology; Psychopathology; Community Psychology; Psychology and Law

**Graduate:** Research Design in Clinical Psychology; Program Evaluation; Community Psychology; Law and Mental Health; Forensic Psychology; Forensic Assessment; Law and Psychology

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### **PROFESSIONAL ASSOCIATIONS**

Fellow, American Psychological Association

Fellow, Division 9 (Society for the Psychological Study of Social Issues)

Fellow, Division 12 (Clinical Psychology)

Fellow, Division 27 (Society for Community Research and Action)

Fellow, Division 41 (American Psychology-Law Society; served as President in 1994-95)

Fellow, Canadian Psychological Association

Member, International Association of Forensic Mental Health Services (also serve as member of the Executive Committee; President-Elect, 2007-08)

Member, European Association of Psychology and Law (also serve as member of the Executive Committee)

Board of Directors, Canadian Council of Clinical Psychology Program Directors (1983-87; Chair of Board, 1986-87)

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1           5.     I know that as part of the plea bargain, Yates admitted committing two  
2 murders in the 1970s in Walla Walla, and that he revealed the location of Melody  
3  
4 Murfin's body here in Spokane. I was able to take comfort in the fact that Yates provided  
5 this information as part of the plea bargain in Spokane. I remain convinced that the plea  
6  
7 bargain was the right thing to do because of the measure of comfort and relief it provided  
8 to me, and that I hope it provided to the families and loved ones of Yates's other victims.

9           6.     None of Yates's lawyers from Spokane or from Pierce County ever  
10 contacted me, and no one working with those lawyers ever contacted me. No one  
11  
12 connected with Robert Yates contacted me until I met with Steven Witchley and Karen  
13 Sanderson on April 4, 2009.

14           7.     If I had been contacted back in 2000-2002, during the period between the  
15  
16 Spokane sentencing and Yates's Pierce County trial, I would have voiced the same  
17  
18 feelings and opinions that I have expressed in this declaration. Had I been asked, I would  
19 have testified to these feelings and opinions at the Pierce County trial.

20           I declare under penalty of perjury under the laws of the State of Washington that  
21  
22 the foregoing is true and correct.

23  
24   
25 Audrey McClenahan

5/14/09 Spokane, WA  
Date and Place Signed

**DECLARATION OF SONJA YATES**

I, SONJA YATES, declare:

1. I am the second born child of Robert Yates and Linda Brewer. I was born on 7/2/78. I am 30 years of age.
2. I miss my dad. I miss traveling as we did when we were younger. I miss him working on our cars. I still love him and I always have.
3. I know that my father loves me. I have felt this all of my life. He showed me that he loved me by showing us the world. He provided well for our family as best as he could.
4. My dad helped me with my homework. When I had a hard time paying for my college tuition, he paid for it. He would help me when I needed help. Sometimes I could talk with him about things that bothered me. Since he was arrested I could talk with him even more about important things in my life.
5. I have a boy and a girl child. My son is 7.5 years old and my daughter is 1.5 years old. I was pregnant during the time when my dad was on trial. My dad is proud of my children and I think he was excited for me when I was pregnant with my son, Connor.
6. My husband and I came to Tacoma and did not attend the trial because he watched my son at the hotel while I attended the trial.
7. When we lived in Germany my dad took us to see the different castles there. We drove everywhere. I miss living there. My dad made it special. He took us on the Volksmarche, which is a hike. He once took us to Washington, D.C. to see historical things. He wanted us to see Washington, D.C. because it was interesting and we could learn from it. He would tell us the history of each town. It was so much fun to get away and see things with him that were different. He knew a lot about the places we went. He would research the places we went before we left.

8. My dad wanted us to be happy in what we did in our lives and be able to support ourselves. He wanted us to be able to take care of ourselves.
  9. When we were little we played with our dad. We played baseball with him and basketball. We had a hoop in the yard in Spokane and he played basketball with my brother.
- 
10. My father was always generous with gifts at Christmas. He liked to get us gifts besides us getting things with my mom. He helped me get a car. It was my favorite thing. It was a Honda Prelude. He and I went together to find the car. He wanted me to look and check out all the cars and make sure they ran correctly. He knew enough about cars to help me.
  9. Dad would help us get our badges when we were in Girl Scouts. My mother also helped us. He helped us make a tent in the forest. We went on a camping trip to the Great Smokey Mountains and it was very pretty there. We would cook our food outside and we told stories. We tried to scare each other as kids do. He would joke around and tell us about Casper the Ghost and the Sasquatch story.
  10. My dad taught me how to ride a bike. He taught us all how. He taught me how to change a tire and how to change the oil in my car. He taught me how to take care of myself in a situation where my car broke down on the road.
  11. We got to go to the air shows with my dad. I was proud of my dad's military career. It makes me feel great to think of his accomplishments and the things he was good at.
  12. I kept in contact with my dad before he went to trial. I write him and he writes me. We have talked on the phone but not as much because my dad didn't want to run up my bill. I went to visit him when he was in jail in Tacoma and Spokane. They were a good visit. I cried. He comforted me. It made me feel better about the situation.
  13. I am aware of the terrible things my father was convicted of doing. My dad said I should read my Bible, go to church and try to live my life the best I can.

- 14. I feel very sorry for the families. I have had nightmares about this, wondering how a person could survive as some of them did.
- 12. I don't recall if I was asked to testify at my father's trial. I would have been more than willing to do so but not in front of a lot of people. I know that my father has done some terrible things, but I still love him.

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

06-06-09  
Date and Place

Sonja Anderson  
Sonia Yates (Yates)

**DECLARATION OF SASHA YATES**

I, SASHA YATES, declare:

1. I am the firstborn child of Robert Yates and Linda Brewer. I was born on 12/16/74; I am 34 years of age.

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2. ~~I love my father.~~
3. He loves me.
4. Growing up, most of the time I felt accepted and loved by my Father.
5. Over the years, my father and I did many things together. When I was younger I liked to help him out with stuff. I would watch him for hours work on his remote control airplanes, and cars. I loved to learn from him about how they worked. He would tell me that girls should know how to work on their own cars. He wanted us girls to be independent.
6. For example, my Dad and I used to make doughnuts together. It was one of our favorite things to do. We would make the dough together and then roll it into a circle. Then, we'd drop the dough into the oil. We had just as much fun making the doughnuts as eating them.
7. My father and I often played ball together. We stand out in a field for hours throwing the ball to each other. We always played volleyball, and badminton. We often went to the park and played Frisbee and had a picnic.
8. My father was always generous with gifts to me. When you are young, you want to feel special on your birthday. My Dad always tried real hard to make sure my birthdays were special days for me.

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9. When I was young, we would go camping and hiking together and as a family. We also went fishing. My dad wanted us to know how to survive in nature and we learned a lot about this from him. My dad always organized our vacations and we saw many different places in Europe and the United States. My dad wanted us to see that other

cultures in life have many things to offer. He wanted us to continue to learn things about the world as we continued to grow older.

- 10. Growing up, my father did many things that showed me he cared about me. He would hug and kiss me and my other siblings. He'd ask me about how things were going; try to cheer me up when I was down; and was interested in the things that I cared about.
- 11. I am aware of the terrible things my father was convicted of doing. I feel very sorry for the families.
- 12. I was not asked to testify at my fathers' trial, but would have been more than willing to do so. I know that my father has done some terrible things, but I still love him.

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

6-4-09 Walla Walla, WA  
Date and Place      99362

Sasha Yates  
Sasha Yates

Jun. 6. 2009 2:41PM

No. 2923 P. 2

**DECLARATION OF CARRIE YATES**

I, CARRIE YATES, declare that:

1. I am the step-mother of Robert Lee Yates, Jr.
2. I have known Bobby from the time when he was still in high school because our families went to the same church together. I have probably known him for 34 years. I knew his mother and the family. I was widowed the same year that Anna Mae Yates died. I later married Bob Yates, Sr. in April of 1977. When we were still married to our former spouses our families were close.
3. One of my memories of my Bobby is that he was a loving and kind person. Even as an adult, he was kind to us and made sure we were comfortable whenever we visited. I always was impressed with how he went out of his way to do things to make us feel welcome in his home.
4. To me, Bobby was a very smart guy. He could do anything he set his mind to. I saw him as a good person. My daughters, especially, felt the same way.
5. Bobby told something special to me in church one day after my husband's death. We were standing in the foyer one Sunday and I could not help myself from crying. I had been devastated for a couple of months. Bobby comforted me and said, "When one door closes another opens." I have never forgotten those words of comfort. He wasn't very old at the time to have such wisdom.
6. As a young man, I knew that he and his dad were happy, and always laughing together. He was so much like his father. They really got along. There were times when they were fixing cars and he would tell his dad, "I really have to do this my way." His dad would let him and things worked out.
7. Bobby had good goals in life. My kids all loved him. I have three children, Lisa, Beth and Terry. My son, Terry is deceased now.

Jun. 6. 2009 2:41PM

No. 2923 P. 3

8. Terry worshipped Bobby because Bobby would spent time with him. He taught Terry how to fix things and they worked on cars together.

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9. Once we went to see Bobby and his family. He had a wife, Linda, and a small daughter and they were so poor they had to get toilet paper from a gas station bathroom. I felt that was pretty bad. I sat down with them around the table and talked with him about the service and what a wonderful life he could have. He went and enlisted the next day. He always said, "Thank you, Mom, I am so grateful to you for doing this for me." He loved the Army. He did very well. I was very proud of him.
10. I am still proud of Bobby. We have written letters since he was arrested, and over the years and I am always impressed with the fact that he appreciates us so much. Every time I read his letters I cry because he speaks positively to me.
11. I remember Bobby as being a person who loved to talk with us. He would joke and laugh.
12. When he would come to visit we would go to the beach and just visit.
13. We went to Alabama to visit Bobby and his family when he was in the service. Each time we visited him he made sure we had cinnamon rolls in the morning. He always went and got a pie and baked it. He wanted to make sure that we were comfortable. Usually it's the wife that does this, but he did it. He always made sure that the room we stayed in was clean and comfortable. We would sit around the table and laugh about the funny things he did in the Army.

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14. One time Linda left him and he was so downhearted. He called me and asked, "Carrie, how can I get her back?" We sat down together and talked about this problem. He looked to me for help for this. I called her and talked with her and she went back to him.

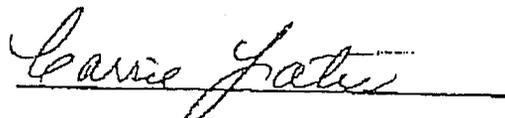
Jun. 6. 2009 2:41PM

No. 2923 P. 4

15. Before he went overseas he would always come and spend two or three days. We would go for a drive and talk.
16. He always told my children to do the right things.
17. I remember that Bob and Terry once tried to make a cake, and cookies, which were a big time failure. They even tried to make Flubber. It was a terrible mess.
18. My son, Terry, received a letter from Bobby once written "to my brother." Terry could hardly read it he was so moved. Terry had gotten a divorce and became addicted to drugs. He became a heroin addict. Bobby wrote him such a beautiful letter about going straight. Terry broke down and cried. It was heartbreaking it was so beautifully written.
19. My daughter Lisa writes to Bobby.
20. I was never interviewed by anyone when they prepared for his trial. I wish they had because I have a lot of stories and history with this man. I know Bobby was a blessing to me. Even now when he is in prison we stay in touch.
21. I feel a great deal of sorrow for the victim's in this case.
22. I was not asked to testify at my stepson's trial, but would have been more than willing to do so. I have many stories of our life together and relationship, which are very precious to me and I would have liked to have the opportunity to explain this to the jury. I know that my stepson has done some terrible things, but I still love him.

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

Date and Place:

  
Carrie Yates

**DECLARATION OF LINDA YATES WELSH**

COMES NOW, LINDA YATES WELSH, who does hereby declare that:

1. I am the half sister of Robert Lee Yates, Jr.;
2. I am older than Robert by 3 years. I have a sister, Shirley. We are the children of Anna Mae Youderian and Gerald Cleveland. We were adopted by Robert Yates, Sr. after he married our mother. Robert Yates, Sr. and my mother had two children, Robert and Janis. We loved our little brother, and called him "Bobby." We called Robert Yates, Sr. "Dad." I recall that my little brother couldn't sleep as a baby and so the family took him for rides in the car to get him to sleep;
3. Our parents worked and my sister Shirley was like a little mother to us. All of the kids in the family, including Bobby, had chores to do and there were never hard feelings between us about who had to do what. As Bobby got older and busier with his schooling he felt he shouldn't have to do the evening dishes. I remember the night he was told that he would have to take a turn at doing the dishes. It was fun to see him humbled;
4. Our dad spent time with us, as kids. He taught us to fish and my brother to hunt. He took us on camping trips. I have fond memories of my brother and sisters while on these outings;
5. My brother Bobby was always one to want to understand how things worked. He took many things apart in our household. I remember our neighbor, Nellie Rounds. She was an elderly woman who lived alone. She had a lot of junk at her house. He once took apart a clock of hers. He was a very curious child;
6. My brother earned money as a youth by picking strawberries, and we played tetherball quite a bit together;

7. He was just so much fun as a child. My sister and I didn't feel very loved by our mother and we weren't very happy in our home. So have to have such a fun child around made it worthwhile;
8. A whale once washed up on the beach and I recall that our mother took Bobby and I to see it. We climbed all over that whale;
9. Bobby and I would sit down and read books together;

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10. I remember that Bobby was very taken with the movie "Flubber" and he decided that he would try and make flubber. He melted pieces of an old tire on the stove and put the rubber on the bottom of his shoes and tried to jump. My parents were very clean, and when they saw what he had done to the kitchen floor they were horrified. He really believed he could jump higher if he did this;
11. I left home when Bobby was 15 years old. I do not have a good recollection of his adolescence. However, I do recall that as a child and a young boy that Bobby was a very truthful and honest person. He was good to us and to his friends. He was never a bully or violent;
12. Our mother died of cancer in October of 1976. She had been very ill for a number of years. She had very radical surgery first removing both of her breasts, and later her ovaries and other organs. We were all deeply affected by her death. Bobby was very very close to our mother. He didn't show much emotion after her death, but we knew he was in turmoil;
13. I believe that my brother got his love of flying from our uncle, Ernie Youderian, who worked extensively in auto mechanics, had his own plane and airstrip. They spent many hours together on his farm. I remember that Bobby helped Uncle Ernie build a hoist in his garage;

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14. Our mother was a very hard worker. She taught Bobby and the rest of us to cook, sew, and how to clean. She didn't teach us about life, or socialization, though. She was a very shy, closed person;

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15. I was not asked to testify at my brother's trial, but would have been more than willing to do so. I know that my brother has

done some terrible things, but I have supported him through his prosecutions and continued to write and visit him, as well as talk with him on the telephone without fail. I have many stories of our childhood and relationship, which are very precious to me and I would have liked to have the opportunity to explain this to the jury. I would have wanted them to know that Bobby is my brother forever and I am moving forward in my life with him in it.

---

I declare under the penalty of perjury of the laws of the State of Washington that the following is true and correct.

Date and Place:

Linda Welsh      June 2, 2009

Linda Welsh<sup>h.w.</sup>

4. N. Evans  
Basin, mt. 59631

## DECLARATION OF JUANITA YOUNDERIAN

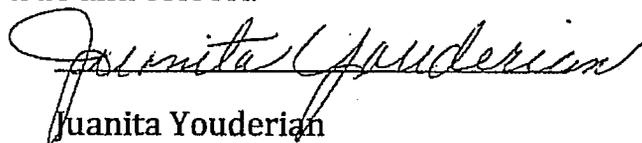
COMES NOW, Juanita Youderian, who does hereby declare that:

1. I am the maternal aunt of Robert Lee Yates, Jr.
2. I have known Bobby for his entire life.
3. Bobby was a sweet and obedient child.
4. I remember Bobby and sisters were close and got along well.
5. When the 7<sup>th</sup> Day Adventist Church burned down Bobby helped rebuild it.
6. Bobby went out of his way to help us with our hay each year.
7. I have fond memories of Bobby at our holiday family functions.
8. Bobby would come with us to picnics near Mr. Rainier when he was younger.
9. I still cherish a beer stein that Bobby brought me from Germany.
10. I saw Bobby as a loving and caring father to his daughter, Sasha.
11. I was never asked to testify at Bobby's trial, but would have been more than willing to do so.
12. I loved Bobby so much and still do.

I declare under the penalty of perjury of the laws of the State of Washington that the following is true and correct.

Date and Place:

6/14/09

  
Juanita Youderian

Prosser, wa

**DECLARATION OF DON HESS**

COMES NOW, DON HESS, who does hereby declare that:

1. I am the brother-in-law of Robert Lee Yates, Jr., being married for many years to his sister, Shirley Hess;
2. We moved to Spokane in 1985. Bobby was in the service then and he would come and see us when he could. We always had good visits. We talked about the Army because I also served in the army. We also talked about fishing, and working on cars. We always had a good conversation about things guys talk about;
3. Bobby wanted his children to be respectful of adults and others. He reared his children to have manners and be respectful. I liked this quality in him;
4. We were very happy when Bobby and Linda decided to move to Spokane. My wife was very proud of her little brother. It was good for our family that he would be so close;
5. I remember an outing where both families went huckleberry picking. Bobby brought his two youngest children along. We picked berries, visited and picnicked. It was a real good time;
6. Bobby always thought of others first. This was the way he was;
7. I was not asked to testify at my brother in law's trial, but would have been more than willing to do so. I know that my Bobby has done some terrible things, but I still care about him. He is not only a brother in law, but also a friend. I still think a lot of Bobby.

I declare under the penalty of perjury of the laws of the State of Washington that the following is true and correct.

Date and Place:

*Don Hess*

Don Hess

## DECLARATION OF ERNIE YOUNDERIAN

COMES NOW, Ernie Youderian, who does hereby state and declare that:

1. I am the maternal uncle of Robert Lee Yates, Jr.
2. I have known Bobby his entire life.
3. As a youngster Bobby was bright, polite, and respectful.
4. Bobby has always been very friendly in my interactions with him.
5. Our families would all get together for holidays and picnics.
6. Bobby and the other children always played well together and did normal child activities.
7. Bobby helped my parents put up their hay in the summer and then cut wood in the fall.
8. Bobby and the other boys would put the bales of hay on the truck or loose hay on the wagon, and then unload it in the barn.
9. I remember Bobby always being willing to help others. Bobby was never one to shirk his duty.
10. I helped Bobby work on his car when he was in high school.
11. I remember Bobby and his parents coming down to visit us in California when we lived down there.
12. I was never asked to testify at Bobby's trial, but would have been willing to do so.
13. I still think a lot of Bobby.

I declare under the penalty of perjury of the laws of the State of Washington that the following is true and correct.

Date and Place:

*June 4-2009*

*Ernie Youderian*

Ernie Youderian

**DECLARATION OF DEBRA MEEK**

COMES NOW, Debra Meek, who does hereby declare that:

1. I am the maternal cousin of Robert Lee Yates, Jr.
2. I have known Bobby for our entire life.
3. Bobby was always polite and respectful.
4. I remember playing with Bobby at our grandmother's house. We would play in tree forts and do normal child activities.
5. I remember Bobby went out of his way to help my family with our hay each year.
6. I remember our family having picnics and those are fond memories.
7. I remember Bobby coming to our home when our father passed away to show his support for my family and I.
8. Bobby is a loving, caring, and attentive father.
9. If I ever needed anything Bobby would have helped me.
10. I was not asked to testify at Bobby's trial, but would have been more than willing to do so.
11. I still love Bobby.

I declare under the penalty of perjury of the laws of the State of Washington that the following is true and correct.

Date and Place:

6/04/09  
Coupeville WA

Debra Meek

Debra Meek

**DECLARATION OF CURT YOUNDERIAN**

COMES NOW, CURT YOUNDERIAN, who does hereby declare that:

1. I am a maternal cousin of Robert Lee Yates, Jr.
2. I grew up with Bob.
3. Bob and I would spend time together at family functions such as Thanksgiving and Christmas and picnics.
4. Bob and I spent a lot of time hauling hay and cutting wood at our grandparent's house each summer and fall.
5. We would follow the hay truck or wagon and load the hay from the field and take it to the barn.
6. Bob was always polite and respectful.
7. As kids we did normal kid things like build forts, play on the hay bales, and climb trees.
8. I remember Bob going out of his way to include everyone in our activities as children. Bob treated all the kids with the same respect. The thing I remember the most about Bob was that he made sure nobody got left out of whatever games we were playing.
9. Bob was not only my cousin but he was my friend.
10. I was never asked to testify at Bob's trial, but would have been willing to do so.

I declare under the penalty of perjury of the laws of the State of Washington that the following is true and correct.

Date and Place:



Curt Youderian

6/4, 2009  
Coupeville WA.

## DECLARATION OF SHIRLEY YATES HESS

I, SHIRLEY YATES HESS, declare that:

1. I am the half sister of Robert Lee Yates, Jr.

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2. I am older than Robert by 6 years. I have a sister, Linda. We are the children of Anna Mae Youderian and Gerald Cleveland. We were adopted by Robert Yates, Sr. after he married our mother. Robert Yates, Sr. and my mother had two children, Robert and Janis. We loved our little brother, and called him "Bobby."

3. One of my earliest memories of my brother is that he couldn't sleep as a baby and so the family took him for rides in the car to get him to sleep;

4. When my brother was young, he was very active. My mother finally got him a little white plastic harness and he was on a leash when they went somewhere.

5. Bobby was just so much fun as a child. One time, my mother made him a Superman suit and he ran all over the house and neighborhood with it. I can remember him getting up on the porch roof. He never jumped off but ran around up there pretending he was flying.

6. Our parents worked hard—especially, my mother. She was a very hard worker and task master. As a result, Bobby, and all the rest of us, had chores to do.

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7. In later years I recall Bobby's wife, Linda, saying that he was the

very best house cleaner and cook.

8. Growing up, we were a close family. We went on camping trips, and did a large number of activities together.

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9. We also have a very big family. Thus, there were many times when our house was filled with many uncles, aunts and cousins. Bobby was always a cherished member of our family. We loved him and he showed his love for all of us.

10. I left home when Bobby was about 13 years old. Thus, I do not have a good recollection of his adolescence.

11. Our mother died of cancer in October of 1976. She had been very ill for a number of years. Bobby was very close to our mother. He was heartbroken when she finally passed away. She had a special place in her heart for Bobby. It was obvious ;

12. I was not asked to testify at my brother's trial, but would have been more than willing to do so. I have many stories of our childhood and relationship, which are very precious to me and I would have liked to have the opportunity to explain this to the jury. I would have wanted them to know that Bobby is my brother and I have unconditional love for him. I know that my brother has done some terrible things, but I still love him.

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

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Date:

4 June 2009 Shirley Hess

**DECLARATION OF JOHN CLINTON YATES**

COMES NOW, John Clinton Yates, who does hereby declare that:

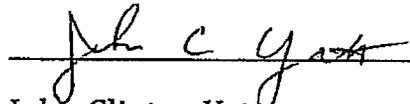
1. I am a paternal cousin of Robert Lee Yates, Jr.
2. I have known Bobby since we were born.
3. Bobby's family and mine were very close when we were growing up.
4. Bobby and I played catch and went fishing all the time when we were young.
5. Bobby and I would spend many hours at the end of the dock fishing. We would go under the dock and find worms for fishing.
6. We used to read comic books.
7. Bobby was friendly and considerate to everyone we knew.
8. I remember going to church with Bobby even though I was not a member.
9. I remember reading about how Bobby helped rebuild the 7<sup>th</sup> Day Adventist Church.
10. I was never asked to testify at Bobby's trial, but I would have been more than willing to do so.
11. I love Bobby more than you will ever know.

I declare under the penalty of perjury of the laws of the State of Washington that the following is true and correct.

Date and Place:

6/4/09

Skykomish, WA,  
98288

  
\_\_\_\_\_  
John Clinton Yates

## DECLARATION OF GARY BERNER

COMES NOW, Gary Berner, who does hereby declare that:

1. I am a former junior high and high school classmate of Robert Lee Yates, Jr.
2. Bob and I played on the same youth baseball team that Bob's father coached.
3. Bob and I played high school football together.
4. Bob was always a polite and respectful young man.
5. Bob and I worked together during summers doing pea vining for the Stokely Van Camp Company.
6. We would drive a tractor over these rows of peas and a combine would crack the shell and push the peas out of this net. We worked 7 days a week 12 hours and I remember Bob was a good co-worker.
7. Bob took his summer jobs seriously and always showed up.
8. Bob was competitive and took athletics seriously.
9. I remember Bob enjoyed playing silly jokes while we worked in the field during the summer. We had a good time doing our summer work.
10. I remember Bob loved the outdoors.
11. I was never asked to testify at Bob's trial, but would have been more than willing to do so. I know that Bob has done some terrible things, but I never saw any of that behavior in him.

I declare under the penalty of perjury of the laws of the State of Washington that the following is true and correct.

Date and Place:

6/4/09

Ozki Harbor, Wa

Gary Berner  
Gary Berner

## DECLARATION OF PATRICIA FISHER

COMES NOW, Patricia Fisher, who does hereby declare that:

1. I am the sister of Robert Lee Yates Jr's., aunt, Barbara Youderian.
2. I am a friend of the Yates family.
3. I have known Bobby since 1968.
4. Bobby and his family attended the same 7<sup>th</sup> Day Adventist Church as we did in Oak Harbor, WA.
5. I remember Bobby was in the youth group at the church.
6. Bobby always had a smile on his face.
7. Bobby was polite and respectful.
8. I remember Bobby being one of the nicest kids I ever met.
9. I remember Bobby helped rebuild our church when it burned down.
10. Bobby wore his uniform to his grandmother's funeral and we were so proud of him.
11. I was never asked to testify at Bobby's trial, but I am happy to help Bobby.
12. I pray for Bobby.
13. I really do care a lot about Bobby.

I declare under the penalty of perjury of the laws of the State of Washington that the following is true and correct.

Date and Place:

6-4-09

Coupeville, WA

*Patricia M Fisher*

Patricia Fisher



## OFFICE RECEPTIONIST, CLERK

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**To:** Jeff Ellis  
**Subject:** RE: In re PRP of Rbt Yates

Rec. 6-9-09

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**From:** Jeff Ellis [mailto:jeffreyerwinellis@gmail.com]  
**Sent:** Monday, June 08, 2009 5:28 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Subject:** Re: In re PRP of Rbt Yates

I have attached the appendix, including the verification, and the cert of service, which were too large to include with the original email.

--Jeff Ellis

On Mon, Jun 8, 2009 at 4:59 PM, OFFICE RECEPTIONIST, CLERK <[SUPREME@courts.wa.gov](mailto:SUPREME@courts.wa.gov)> wrote:

Rec. 6-8-09

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**From:** Jeff Ellis [mailto:jeffreyerwinellis@gmail.com]  
**Sent:** Monday, June 08, 2009 4:58 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Subject:** Re: In re PRP of Rbt Yates

Attached please find Mr. Yates' PRP for filing. Because of the size of the attachments, they will follow by separate email, along with a cert of service and a verification. We will also mail an original and a copy of the petition and its attachments to the Court.

--Jeff Ellis, Attorney at Law

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Jeff Ellis  
Law Offices of Ellis, Holmes  
& Witchley, PLLC  
705 Second Ave., Ste 401  
Seattle, WA 98104  
206/262-0300 (o)  
206/262-0335 (f)  
206/218-7076 (c)