

No. 84614-6
King County Superior Court No. 06-1-06563-4 SEA

IN THE WASHINGTON STATE SUPREME COURT

STATE OF WASHINGTON,
Plaintiff-Appellee,
v.

CONNER MICHAEL SCHIERMAN,
Defendant-Appellant.

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COUNTY OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

The Honorable Gregory Canova, Judge

APPELLANT'S OPENING BRIEF

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Rice, Harris and Lang, <i>Validation of and Revision to the VRAG and SORAG: The Violence Risk Appraisal Guide – Revised (VRAG-R)</i> , Vol. 25, <i>Journal of Psychological Assessment</i> , No. 3, p. 953 (2013)	111
Robert D. Hare, <i>Comparison of Procedures for the Assessment of Psychopathy</i> , Vol. 53, <i>Journal of Consulting and Clinical Psychology</i> , No. 1, p. 7 (1985)	111
THE MINNESOTA SEX OFFENDER SCREENING TOOL-3.1 (MNSOST-3.1): AN UPDATE TO THE MnSOST-3, Minnesota Department of Corrections, November 2012, available at http://www.doc.state.mn.us/publications/documents/MnSOST3-1DOCReport.pdf	111
The Oxford American Dictionary (New York: Oxford University Press, 2001).....	89
Vitacco, Erickson, Kurus and Apple, <i>The Role of the Violence Risk Appraisal Guide and Historical, Clinical, Risk-20 in U.S. Courts: A Case Law Survey</i> , Vol. 18, <i>Psychology, Public Policy, and Law</i> , No. 3, 361-91 (2012).....	112
Webster’s 3rd New International Dictionary (Springfield, Mass: Merriam-Webster, Inc., 1961)	89
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I.
ASSIGNMENTS OF ERROR

1. The trial court violated Schierman's right to be present under the Sixth Amendment (right to counsel and right to public trial) and the Fourteenth Amendment¹ to the U.S. Constitution, and Article I, §§ 3 and 22 to the Washington State Constitution, when he permitted the dismissal of jurors for hardship, and a hearing on six challenges for cause, to be conducted outside the presence of the defendant.

2. The trial court violated the public's right to be present under the First Amendment (freedom of the press) and the Sixth Amendment (right to public trial) to the U.S. Constitution and Article I, §§ 10 and 22 to the Washington Constitution, when it permitted the dismissal of jurors for hardship in the jury coordinator's office, and the dismissal of six jurors for cause during an in-chambers hearing.

3. Schierman was denied his constitutional right to representation pursuant to the Sixth Amendment to the U.S. Constitution and Article I, § 22 to the Washington Constitution, when some jurors were excused without the presence of, or consultation with, his counsel.

¹ All references in this brief to the Fourteenth Amendment refer to the federal due process clause.

4. The statutorily required notice of death penalty proceeding was defective and should have been stricken because Schierman was not properly charged with premeditated murder with an aggravating factor.
5. Schierman was denied due process of law under the Fourteenth Amendment, and the right to an impartial jury under the Sixth Amendment, because the trial court applied an incorrect standard regarding defense challenges for cause, and improperly granted State challenges.
6. The cumulative improprieties in the summoning and selecting of the jury violated Schierman's right to a fair and impartial jury under the Sixth and Fourteenth Amendments.
7. The trial judge violated Schierman's right to due process under the Fourteenth Amendment when he permitted the State to present a theory of sexual motivation after the prosecutor and judge promised that this would not be at issue at trial, and when the State was permitted to argue inferences not supported by the evidence.
8. The presence of numerous soldiers in uniform, coupled with testimony that Leonid Milkin, husband of one victim and father of two others, was deployed in a combat zone at the time of the murders violated Schierman's rights under the Sixth Amendment (right to confrontation and to impartial jury) and the Fourteenth Amendment.

9. The trial court erred in giving guilt phase instruction 10 (definition of premeditation).²

10. The trial court erred in refusing defendant's unnumbered proposed instruction regarding premeditation at CP 7652.

11. The trial court erred in refusing defendant's alternative unnumbered proposed instruction regarding premeditation at CP 7814.

12. The trial court erred in refusing defendant's second unnumbered alternative proposed instruction regarding premeditation at CP 7815.

13. In the alternative, the prosecutor misstated the law in closing argument by conflating intent and premeditation, in violation of the Fourteenth Amendment.

14. The trial court erred in giving guilt phase instruction 25 regarding voluntary intoxication.

15. The trial court erred in refusing defendant's unnumbered proposed instruction regarding voluntary intoxication at CP 7654.

16. The trial court erred in refusing defendant's proposed standard WPIC instructions regarding lesser included offenses of manslaughter in the first and second degree at CP 7641-51.

² As to all the jury instruction errors, Schierman maintains that his Fourteenth Amendment right to due process was violated.

17. The trial court violated Schierman's rights under the Eighth and Fourteenth Amendments to the U.S. Constitution and Article I, §§ 3 and 14 to the Washington Constitution, and his statutory right to present relevant mitigating evidence in the penalty phase.

18. The trial court violated Schierman's rights under the Fourteenth Amendment and Article I, §§ 3 and 14, by permitting the State to introduce inflammatory "victim impact" testimony which encouraged the jury to apply the death penalty in an arbitrary manner.

19. The trial court violated RCW 10.95.070, as interpreted by this Court in the *Bartholomew II*³ decision, when it permitted the prosecutor to use Schierman's "treatment journal" in cross-examining Schierman's stepfather.

20. The trial court violated Schierman's Fourteenth Amendment right to rebut the State's penalty phase evidence, and Schierman's right to present mitigating evidence under the Eighth and Fourteenth Amendments, Article I, §§ 3 and 14, and Washington's Rules of Evidence, when it prevented Schierman from rehabilitating his stepfather's testimony with favorable entries from the treatment journal.

³ *State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984) (*Bartholomew II*).

21. The trial court erred in permitting the State to introduce unreliable hearsay statements attributed to Schierman regarding a “bucketful of knives” and a “hot chick” in violation of Schierman’s rights under the Sixth Amendment (confrontation clause), Fourteenth Amendment, Article I, §§ 3 and 14, and the Washington Rules of Evidence.

22. The prosecutor committed misconduct in his penalty phase closing argument and deprived Schierman of his Sixth Amendment (impartial jury) and Fourteenth Amendment rights by comparing Schierman’s crime to the Holocaust and by personally attacking defense counsel.

23. The cumulative errors at the guilt and penalty phases deprived Schierman of his right to a fair trial under the Sixth Amendment (impartial jury) and Fourteenth Amendment and Article I, § 3, and rendered the verdict arbitrary and capricious in violation of the Eighth Amendment and Article I, § 14. Because the jury considered at the penalty phase all evidence introduced at the guilt phase, errors at the guilt phase must be cumulated with those at the penalty phase.

24. Washington’s mandatory appellate review of death sentences pursuant to RCW 10.95.130(b) inevitably fails to ensure proportionality. The death penalty must be abolished in Washington because it has been imposed randomly and freakishly in violation of the Eighth Amendment and Article I, §§ 3 and 14.

25. The Court should reverse Schierman's death sentence because it was the result of passion and prejudice.

**II.
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Was Schierman's right to presence violated when he was excluded from the decisions regarding hardship requests? Assignment of Error 1.

2. Was the public's right to be present violated when decisions regarding hardship requests were not conducted in open court? Assignment of Error 2.

3. Was Schierman's right to counsel violated when jurors were excused by the Juror Services Manager for hardship based solely on consultation with a defense paralegal? Assignment of Error 3.

4. Where the State filed an Information that the trial judge found did not properly charge Schierman with aggravated murder, did the trial court err in failing to strike the statutorily required notice to seek the death penalty? Assignment of Error 4.

5. Did the trial court erroneously apply an "asymmetric" standard regarding death qualification of potential jurors? Assignment of Error 5.

6. Should the trial court have excused jurors who were substantially impaired because their voir dire examination revealed that they could not

fairly consider a sentence of life without the possibility of parole?

Assignment of Error 5.

7. Did the trial judge improperly excuse a juror who was not substantially impaired because her answers in voir dire revealed that she could properly consider the death penalty? Assignment of Error 5.

8. In light of the cumulative errors in jury selection, can this Court conclude that Schierman had a fair trial by an impartial jury? Assignment of Error 6.

9. Was Schierman denied due process when the State's stipulation and the trial judge's promises led the defense to believe that sexual motivation would not be an issue at trial? Assignment of Error 7.

10. Did the State argue a theory of sexual motivation which was not supported by the evidence? Assignment of Error 7.

11. Should the trial court have prohibited supporters of Leonid Milkin from wearing military uniforms when attending trial? Assignment of Error 8.

12. Should the trial court have granted a mistrial after the State violated the trial court's order prohibiting testimony that at the time of the murders Leonid Milkin was deployed in a combat zone? Assignment of Error 8.

13. Did the trial court err in failing to give the proper guilt phase instructions regarding premeditation, voluntarily intoxication and the necessary lesser included offenses? Assignments of Error 9-16.
14. In the alternative, did the prosecutor commit misconduct by conflating intent and premeditation in closing argument? Assignment of Error 13.
15. Are actuarial risk assessments admissible only when they rely solely on studies from Washington's prison population? Assignment of Error 17.
16. Was Dr. Cunningham's proposed testimony regarding Schierman's diminished control admissible to support the statutory mitigating factor of "mental disease or defect?" Assignment of Error 17.
17. Was Dr. Mark McClung's testimony regarding Schierman's head injury admissible mitigating evidence? Assignment of Error 17.
18. Did the trial court unfairly limit the defense mitigation presentation in other significant ways? Assignment of Error 17.
19. Did the State's presentation of emotionally evocative victim impact evidence exceed constitutional limits? Assignment of Error 18.
20. Should the trial court have permitted the prosecutor to cross-examine Schierman's stepfather with entries from a "treatment journal?" Assignment of Error 19.

21. Did the trial court compound the error by then prohibiting the defense from using other portions of the journal to rehabilitate Schierman's stepfather? Assignment of Error 20.
22. Did the trial court violate the restrictions on aggravating evidence when it permitted the State to introduce unreliable hearsay to impeach a defense penalty phase witness? Assignment of Error 21.
23. Should the trial court have granted a mistrial in the penalty phase after the State drew comparisons between Schierman's crime and the Holocaust? Assignment of Error 22.
24. Did the prosecutor commit misconduct when he made the unfounded claim that defense counsel had compared him to Satan in the defense closing argument? Assignment of Error 22.
25. Does cumulative error in the guilt and penalty phases require reversal of the death sentence? Assignment of Error 23.
26. Should the death penalty be abolished because it is impossible to administer it fairly? Assignment of Error 24.
27. Was the death sentence in this case the result of passion and prejudice? Assignment of Error 25.

III. STATEMENT OF THE CASE

Conner Schierman was charged with and convicted of four counts of premeditated murder and one count of first degree arson. As to each murder count, the jury found that more than one person was murdered and that the murders were committed by a single act or were part of a common scheme or plan. CP 1-3; 4/12/10 RP 4-7. At the close of a 6-month trial (26 days of jury selection and 40 days of trial testimony), the jury found Schierman guilty on all counts. CP 7857-7865. The jury also found the State proved the aggravating factor in all four murders. CP 7866-7869.

The State filed a notice of intent to seek the death penalty. CP 1220, 6769. Thus, a 12-day penalty phase hearing followed. At the close of that hearing the jury found there were not sufficient circumstances to merit leniency. CP 8322. On May 27, 2010, the trial judge sentenced Schierman to death. CP 8441-48.⁴ A timely notice of appeal followed. CP 8452.

Given the length of the record, the intricate details supporting Schierman's assignments of error will be discussed in depth in the relevant argument sections. What follows is an overview of the trial in order to

⁴ Schierman was sentenced to 27 months on Count V, Arson in the First Degree. That sentence was ordered to be served consecutive to his death sentence. CP 8442.

provide the proper framework for the Court's examination of the issues and assignments of error.

Schierman lived across the street from the Milkin family in Kirkland, Washington. In the summer of 2006, the Milkin family consisted of Leonid, who was a member of the military and deployed overseas, his wife Olga, and their two young sons, Andrew and Justin. 1/20/10 RP 100-104. Olga's sister, Alla Botvina, also lived with them. *Id.* On the night of July 16-17, Alla was not in the home, but Olga's other sister, Lyuba, spent the night. 1/21/10 RP 33-45. Lyuba and Olga both spoke to their mother about 9:15 p.m. on the evening of July 16, 2006. *Id.* at 46-47.

On the morning of July 17, 2006, neighbors discovered a fire at the Milkin residence. By the time the Kirkland Fire Battalion Chief arrived, the first and second floors of the house were fully engulfed in flames. 1/25/10 RP 211-216. The Chief did not believe that anyone could still be alive on those floors but considered it possible that someone could be alive in the basement. *Id.* at 216-217. By the time the flames were extinguished, however, the firefighters found the bodies of Olga, Andrew, Justin and Lyuba in the home.

An investigation into the cause of the fire began. Eventually, the arson investigators concluded the fire had been set with the use of

accelerants. 2/2/10 RP 3-34. The medical examiner performed autopsies and determined that each victim had been stabbed to death before the fire was started. 1/28/10 RP 148; 2/1/10 RP 17-18, 36, 49.

Suspicion soon focused on Schierman because on the morning of the 17th, two witnesses had observed a man who looked like him walking in front of the Milkin house carrying a gas can. 1/21/10 RP 86-93, 126-141. The police contacted Schierman and observed scratches and cuts on his face, head and neck. 2/11/10 RP 97, 103. Schierman was arrested and gave several statements to the police.⁵

Based upon his statements, the police discovered that Schierman was videotaped on the morning of July 17, 2006, at a nearby AM/PM gas station buying gas and putting it into a gas can. 2/25/10 RP 134-147. Further investigation revealed Schierman's DNA in several places at the crime scene. *See, e.g.*, 2/18/10 RP 39-42.

It was clear from Schierman's statements and from other witnesses, primarily Isaac Way, who had been in treatment with Schierman, that Schierman was a substance abuser. 2/10/10 RP 144-163. After his arrest the police found three empty vodka bottles in his backpack. 2/25/10 RP 54-55.

⁵ One of the statements was initially suppressed, but it came into evidence after the testimony of Dr. Saxon, discussed below.

Dr. Andrew Saxon, an addiction specialist at the VA Medical Center in Seattle, testified that he had reviewed Schierman's statements to the police, his medical records, other records in the case and Schierman's treatment records from Lakeside-Milam Recovery Center (Lakeside-Milam). 4/1/10 RP 6-13. He also reviewed the medical literature regarding alcohol intoxication and blackouts. He stated that Schierman's records indicated a family history of alcoholism and a personal history of numerous blackouts. *Id.* at 13-14. Saxon interviewed Schierman on July 16 and 17, 2007. *Id.* at 28-30.

Schierman told Saxon that on the evening before the fire he drank three or four bottles of vodka and perhaps some champagne. 4/1/10 RP 31-32. He went into an alcoholic blackout. He awoke in the Milkin house and found the dead bodies. He actually moved one of the bodies and became covered in blood. He realized that it would be hard for him to explain what had happened since he had no memory. He then found a gas can, went to the minimart, bought gas and returned to the Milkin house. He spread gasoline everywhere and ignited the home. *Id.* at 36-51.

Saxon concluded that Schierman was suffering from an alcoholic blackout on the night of July 16. *Id.* at 38-39. His conclusion was based partly on Schierman's description, and partly on the alcohol consumed. He refers to this as the "perfect storm to create an alcohol blackout."

4/1/10 RP 39. Saxon opined that blackouts are much more common in people who have a history of them and in people who have a strong biological family history of alcoholism. *Id.* at 39-40. There is also a strong genetic basis for blackouts. *Id.* at 40. They are more likely in young people and more likely in men than in women. *Id.* at 40. Blackouts are also much more likely when the blood alcohol level is above 0.25. In this case, Saxon was made aware of a blood alcohol concentration of 0.35. *Id.* at 41.⁶

In guilt-phase closing argument, the defense conceded that Schierman was in the Milkin house on the night of the murders. 4/8/10 RP 133. Because he was in an alcoholic blackout, there was significant doubt that he was the murderer. The defense conceded that when Schierman came to on the morning of July 17, he panicked and set the fire to avoid being accused of murders he did not commit.

At the penalty phase, the defendant's theory of mitigation was that Schierman was a warm, loving individual who was burdened by an abusive birth father and a genetic predisposition to alcoholism. On the night of the crime he drank so much that he was in an alcoholic blackout

⁶ That estimation was made by Dr. Barry Logan based on the three empty bottles of vodka, Schierman's weight, and the period of time over which he consumed the alcohol. 4/1/10 RP 41.

and in such a state of diminished control that he could not comprehend or remember his actions. Moreover, because he had no criminal history and substantial community support, despite his crime, he would not present a future danger if sentenced to life in prison without the possibility of parole. His efforts to present this evidence were significantly truncated by the judge's evidentiary rulings.

The State concentrated on the facts of the murders and presented exceedingly inflammatory evidence and argument regarding the impact to the remaining family members.

IV. ARGUMENT

A. STANDARD OF REVIEW

Because the death penalty qualitatively differs from all other punishments, there must be reliability in the determination that death is the appropriate punishment. *Johnson v. Mississippi*, 486 U.S. 578, 584, 108 S.Ct. 1981, 1986, 100 L.Ed.2d 575 (1988); *Bartholomew II*, 101 Wn.2d at 638 (*Bartholomew II*) (citing *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977)). Thus, claimed sentencing errors in a capital case are subjected to a correspondingly higher degree of scrutiny than in noncapital cases. *Caldwell v. Mississippi*, 472 U.S. 320, 329, 105 S.Ct. 2633, 2639-40, 86 L.Ed.2d 231 (1985); *State v. Gregory*, 158 Wn.2d 759,

849, 147 P.3d 1201 (2006). Procedural rules, including rules regarding arguments raised for the first time on appeal, are also construed more liberally in the sentencing phase. *Gregory*, 158 Wn.2d at 849; *State v. Lord*, 117 Wn.2d 829, 849, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992). Further, even in non-capital cases, a party may raise a manifest error affecting a constitutional right for the first time in the appellate court. RAP 2.5(a).

B. THE DISMISSAL OF JURORS FOR REASONS RELATED TO HARDSHIP, AND THE LATER IN-CHAMBERS HEARING ON SIX CHALLENGES FOR CAUSE, VIOLATED SCHIERMAN'S RIGHT TO BE PRESENT UNDER THE STATE AND FEDERAL CONSTITUTIONS

1. Relevant Facts and Procedural History

This factual discussion pertains to this jury selection issue and the other jury selection issues at sections C and D, below.

Jury summonses for the trial were issued during the week of September 28, 2009, to 3,000 people randomly chosen from the master jury list. CP 23710. The summons indicated that potential jurors were to appear at the King County Superior Court on November 13, 2009. It stated: "The Court will not consider requests for postponement of this summons, you have been summoned for a specific trial." CP 23715. King County Juror policy adopted pursuant to RCW 2.36.100, and in place at the time of Schierman's trial, stated "Jury staff shall not excuse jurors

summoned to special panels absent approval from the assigned judge.” CP 21350. King County Superior Court policy permitted “jury staff” to excuse jurors summoned in regular cases under a written policy that included guidelines for financial burdens, illness, employment issues, full-time student status, child care issues and prior service in the preceding year. *Id.*

Using a program called E-Response, potential jurors were permitted to confirm that they would appear or indicate they were statutorily disqualified to serve or to request excusal. The electronic response system told jurors that their responses were made under oath. CP 21347. Potential jurors who did not use the E-response system could respond using U.S. mail and were instructed to submit their responses under penalty of perjury. CP 21348.

Prior to trial, Judge Canova directed King County Jury Services Manager Greg Wheeler to review all of the requests for excusal based on a potential juror’s claim that he was statutorily disqualified. As to hardship claims, the trial judge directed that the prosecutor and defense counsel to review them in the jury assembly room office on the first floor of the King County Courthouse. *Id.*; 10/14/09 RP 39-42. If both parties and Wheeler agreed that a juror should be excused per official court policy, the juror was excused without further action by the court. CP 21347-21348. The

judge made it clear that he would not review the individual hardship requests if the parties were in agreement. 10/28/09 RP 25. This policy was employed during the period between October 19, 2009 and November 6, 2009. CP 23711. Schierman was never present when the attorneys dealt with these hardship requests. *Id.*

On one occasion, during the week of October 19, 2009, a young woman from defense counsel Peter Connick's office came to the jury room to review a set of hardship declarations. She identified herself as Connick's legal assistant. CP 21348. Neither Connick nor James Conroy, the other defense counsel, were present. She identified about 100 jurors she felt should be excused and Wheeler excused them. *Id.*; 10/28/09 RP 6.

The trial judge held an in-chambers hearing on this issue on October 20, 2009. Apparently, no clerk or court reporter was present and there are no clerk's minutes regarding this hearing. The court memorialized the substance of the in-chambers conference at a later hearing. 10/28/09 RP 6-8. The court noted that Connick emailed the court 30 minutes after his paralegal returned to the office and stated that there had been a miscommunication. *Id.* at 6. He told the court that "he didn't approve of the – the defense was not agreeing to excuse any jurors who were requesting hardship at that time." But by the time Connick learned of the incident, the jurors had already been excused. 10/28/09 RP at 7.

Despite the court's order that the clerk's office could excuse jurors only if they were statutorily disqualified, Jury Coordinator Pat Rials notified Wheeler that she had excused two jurors for "Age Related Reasons." CP 24703. She stated: "This was done via telephone . . . no back-up information." *Id.*

The jury summons told jurors that the compensation for jury duty was \$10 per day. CP 5735. Prior to trial, the defense asked the court to provide fair compensation for jurors and for reimbursement to jurors who needed to purchase daycare in order to serve. *Id.* The defense argued that:

At prevailing rates of payment, it is practically impossible for wage laborers and persons caring for young children to serve on the jury. Those potential jurors at the lowest end of the economic spectrum cannot afford to forego their wages for a few days or abandon their offspring to serve on a jury.

CP 5736. Defense counsel pointed out the King County Superior Court knew that the low rate of pay was a barrier to service for some citizens. Thus, the County adopted a "Two Day, One Trial" system for jury service. That is, jurors were required to appear for only two days and if not selected for a jury, were excused. If they were picked for a jury they served only through that trial. CP 5700-5705. The primary reason for adopting this policy was "to make it easier for jurors of lower economic means to serve as jurors in our county." CP 5701. Defense counsel

argued that the prevailing rate of pay made it virtually impossible for minimum or low wage laborers to serve on a capital jury.

The trial judge denied the motion for fair compensation and for the provision on daycare. 10/1/09 RP 19-20. He stated that there was no “legal or practical basis for doing what the defense suggests.” *Id.* at 19.

At a hearing on October 28, 2009, defense counsel, having reviewed the large number of requests for excusal due to hardship, renewed their motion to increase compensation for jurors and to compensate for childcare, which would enable more people to serve. 10/28/09 RP 12. The court reiterated that increasing the compensation “is not legally available as an option for this court.” *Id.* at 18.

On November 5, just 8 days before jurors were to appear at the courthouse, Judge Canova said:

...the latest information available from jury staff was that we had something in the neighborhood of 1,900 jurors from whom we had heard nothing on a request for hardship, not a request for exemption because of disqualification under the statute, not because the mail wasn't delivered to the right address or the person has moved and left no forwarding address, but simply no response at all.

11/5/09 RP 33.

On November 13, 2009, 604 people reported for jury duty. 2,396 persons summoned did not report. Many were excused by agreement of the parties based upon a claim of hardship under the County policy.

Others did not meet the statutory requirements. As to the balance, that is, those persons summoned but who simply did not respond or appear, there was no attempt to enforce the subpoenas. CP 23712.

On January 12, 2010, the very last day of jury selection, the judge announced to the panel that he and the lawyers were going into chambers with the court reporter. He said:

I'm going to rule on a number of requests for hardship that have been received by the court, I'm also going to rule on a number of challenges for cause that are before the court, that is, requests to excuse jurors for different reasons from counsel.

1/12/10 RP 16. In chambers, outside the presence of Schierman and the public, the judge excused Juror 28 and 58 on the State's motion for cause. *Id.* at 18. He denied the defense challenge for cause as to Jurors 76, 171, 104 and 64. *Id.* at 22. After a lengthy discussion the court granted hardship requests to Jurors 49, 130, 172, 265, 365, 424, 79, 104, 168 and 218. He denied hardship request to Jurors 267 and 285. *Id.* at 20-41.

2. Argument

Due Process guarantees any person accused of a crime the right to be present for all critical stages of the prosecution. U.S. Const. amends. 6, 14; Const. art. 1, §§ 3, 22; *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987); *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486, *reh'g denied*, 471 U.S. 1112,

105 S.Ct. 2350, 85 L.Ed.2d 865 (1985); *Illinois v. Allen*, 397 U.S. 337, 338, 90 S.Ct. 1057, 25 L.Ed.2d 353, *reh'g denied*, 398 U.S. 915, 90 S.Ct. 1684, 26 L.Ed.2d 80 (1970). In *Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934), *overruled on other grounds by Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964), the Court explained that a defendant has a due process right to be present at a proceeding

whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.... [T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.

Id. at 105-06, 108. The defendant's presence is not constitutionally required when his "presence would be useless, or the benefit but a shadow[.]" *Stincer*, 482 U.S. at 745. The Washington Constitution specifically provides for the right to "appear and defend in person." Const. art. 1, § 22.

It is clear that this due process right includes the right to be present for the selection of one's jury. *See Lewis v. United States*, 146 U.S. 370, 373-374, 13 S.Ct. 136, 36 L.Ed. 1011 (1892); *Gomez v. United States*, 490 U.S. 858, 873, 109 S.Ct. 2237, 104 L.Ed.2d 923, *judgment vacated*, 491

U.S. 902, 109 S.Ct. 3181, 105 L.Ed.2d 690 (1989); *State v. Wilson*, 141 Wn. App. 597, 604, 171 P.3d 501 (2007).⁷

Far from being “useless” or its benefit “but a shadow,” “[j]ury selection is the primary means by which [to] enforce a defendant’s right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant’s culpability[.]” *Gomez*, 490 U.S. at 873 (citations omitted). The defendant’s presence “is substantially related to the defense and allows the defendant ‘to give advice or suggestion or even to supersede his lawyers.’” *Wilson*, 141 Wn. App. at 604 (quoting *Snyder*, 291 U.S. at 106); *see also United States v. Gordon*, 829 F.2d 119, 124 (D.C. Cir. 1987) (Fifth Amendment requires opportunity to give advice or suggestions to lawyer when assessing potential jurors).

This Court has held that the right to be present at jury selection includes the right to be present when hardship requests are considered. *State v. Irby*, 170 Wn.2d 874, 246 P.3d 796 (2011). The error here is indistinguishable from the error in that case. In *Irby*, jurors were summoned, took an oath and were given a questionnaire. After the judge

⁷ Consistent with this constitutional guarantee, CrR 3.4(a) explicitly requires the defendant’s presence “*at every stage of the trial including the empanelling of the jury...* [F]or purposes of CrR 3.4 the beginning of trial occurs, at the latest, when the jury panel is sworn for voir dire and before any questioning begins.” *State v. Thomson*, 70 Wn. App. 200, 211, 852 P.2d 1104 (emphasis in original), *rev. granted*, 122 Wn.2d 1022, 866 P.2d 39 (1993), *aff’d*, 123 Wn.2d 877, 872 P.2d 1097 (1994).

reviewed the questionnaires, he then emailed defense counsel and the prosecutor and suggested that ten jurors be removed from the panel, including two that claimed hardship. *Id.* at 878. Counsel then stipulated to the release of seven of the jurors, including two who claimed hardship. *Id.* Irby was not present for these email discussions. The Court found that this violated Irby's state and federal constitutional rights to be present at all critical stages of his trial.

In this case, on January 12, 2010, the trial court heard six challenges for cause in chambers and outside the presence of the defendant. On that basis alone, this case is on all fours with *Irby* and reversal is required.

But the violation was worse in this case because the work of empanelling Schierman's jury began on the day the jurors' hardship responses were reviewed. The jurors were supposed to answer the questions regarding their hardships under oath. In many cases there were initial denials, further communication with jurors and then reconsideration of the request, many of which were not transmitted to defense counsel. *See, e.g.*, 24932, 24935, 24940, 24945. And, King County Superior Court policy did not permit the jury coordinator to independently excuse jurors without judicial supervision in this case, even though he had the power to do so in other cases. The judge had directed defense counsel and the

prosecutor to review the requests. If the parties agreed that the request should be granted, it was to be submitted to the judge for review. Thus, at least under these facts, the hardship determinations were clearly a critical phase of Schierman's trial and affected his substantial rights.

As discussed below, Schierman was entitled to know that the hardship determinations being made out of his view were eliminating many women and low income wage earners. Schierman had no input into these determinations and did not see the final panel that resulted until November 13, 2009, when the reduced panel was finally brought into court.

C. THE DISMISSAL OF JURORS FOR REASONS RELATED TO HARDSHIP IN THE JURY COORDINATOR'S OFFICE AND THE DISMISSAL OF SIX JURORS FOR CAUSE AFTER AN IN-CHAMBERS HEARING VIOLATED SCHIERMAN'S AND THE PUBLIC'S RIGHT TO A PUBLIC TRIAL

The Sixth Amendment to the United States Constitution and Article I, Section 22 of the Washington Constitution guarantee the right to a public trial. The state constitution also requires that "[j]ustice in all cases shall be administered openly." Const. art. I, § 10. A defendant does not waive his public trial right by failing to object to a closure during trial. *State v. Wise*, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012). "Whether a criminal accused's constitutional public trial right has been violated is a question of law, subject to de novo review on direct appeal." *Wise*, 176

Wn.2d at 9 (quoting *State v. Easterling*, 157 Wn.2d 167, 173-74, 137 P.3d 825 (2006)).

Under this Court's recent guidance, the Court must first determine whether a closure triggered the public trial right by asking if, under considerations of experience and logic, "the core values of the public trial right are implicated." *State v. Sublett*, 176 Wn.2d 58, 73, 292 P.3d 715 (2012). If there is such a closure, the Court looks to whether the trial court properly conducted a *State v. Bone-Club*⁸ analysis before closing the courtroom. *State v. Paumier*, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012); *Wise*, 176 Wn.2d at 12. If the trial court failed to do so, then a "per se prejudicial" public trial violation has occurred "even where the defendant failed to object at trial." *Id.* at 18. The remedy is typically a new trial. *Id.*

⁸ *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). A *Bone-Club* analysis requires a trial court to consider the following factors before closing part of a trial:

1. The proponent of closure or sealing must make some showing of a compelling state 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. The court must weigh the competing interests of the proponent of closure and the public.
4. The order must be no broader in its application or duration than necessary to serve its purpose.

at 19. *See also, United States v. Marcus*, 560 U.S. 258, 130 S.Ct. 2159, 2164, 176 L.Ed.2d 1012 (2010).

In *Sublett*, this Court explained that the experience and logic test was taken from *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-10, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) (*Press II*). The experience prong, asks “whether the place and process have historically been open to the press and general public.” *Sublett*, 176 Wn.2d 73, citing *Press II*, 478 U.S. at 8. The logic prong asks “whether public access plays a significant positive role in the functioning of the particular process in question.” *Id.* If the answer to both is yes, the public trial right attaches. *Id.*

There was no *Bone-Club* hearing prior to the trial court’s order for the parties to consider the hardship requests with the jury administrator in the jury room outside the presence of the public and the defendant. And there was no *Bone-Club* hearing on January 12, 2010, before the trial judge retired to chambers with counsel to consider six challenges for cause and additional hardship requests. Thus, if there was a closure that triggered the public trial right, reversal of the conviction and sentence is required.

Historically, all phases of jury selection have been open to the public. Washington has a long history of ensuring that jury selection takes place in open court in order to ensure the fairness of the proceedings.

Most recently, in *State v. Jones*, 175 Wn. App. 87, 303 P.3d 1084 (2013), Division II found that holding the alternate juror drawing off the record and outside of the trial proceedings violated the experience and logic test.

Public access plays a significant positive role in the functioning of jury selection. Certainly, there is no precedent for considering challenges for cause in chambers and outside of the public view. This is particularly true in a capital case where jury selection focuses on death qualification. Six jurors in this case were challenged for cause in chambers and the trial judge made his rulings in that closed room.

Moreover, considering hardship questions and permitting jurors to be excused based upon a written response, reviewed in private by counsel for the parties without requiring those summoned to appear, implicates the core values of the public trial right. One of the primary functions of random jury selection from a master list prepared in accordance with RCW 2.36.054 is to assure the selection of a representative group of citizens. 14A Wash. Prac., Civil Procedure § 29:2 (2d ed.).

No citizen may be excluded from jury service in this State on account of race, color, religion, sex, national origin, or economic status. RCW 2.36.080. In order to make a claim of systematic exclusion of members of these protected classes under the federal constitution, a criminal defendant must show

(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 v. Missouri, 439 U.S. 357, 364, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979). And, under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), discriminatory challenges against a member of a protected class are prohibited by the equal protection clause of the Fourteenth Amendment. *See also, State v. Saintcalle*, 178 Wn.2d 34, 309 P.3d 326 (2013), *cert. petition filed* Oct. 25, 2013; *State v. Evans*, 100 Wn. App. 757, 759, 998 P.2d 373 (2000). It is the court’s duty to protect the right of jurors to participate in the civic process and to ensure that our justice system is free from any taint of bias. *Id.* at 762.

Experience, logic and the actual facts of this case demonstrate that these core values of the criminal justice system – the right of every citizen to sit on a jury and the right of the defendant to a jury drawn from a cross-section of the community – cannot be protected when judges do not hear challenges for cause in an open courtroom and do not actively supervise hardship determinations in open court, but rather delegate that duty to the parties and a clerk acting under a vague written policy.

The possibility that a small cadre making the hardship determinations out of public view, as occurred in this case, could make race or gender assumptions based solely upon the jurors' written hardship requests is very problematic. Then, by agreement, the parties could exclude entire juror populations. This would be accomplished with very little judicial oversight (none in this case) and completely out of sight of the public. In looking at the hardship requests in this case, the varying decisions to excuse one juror and not another are hard to explain. For example, Juror #377252 asked to be excused because he had served on a jury within the last year and his request was denied. CP 23763. But, the very next entry is a request by Juror #655648 – a person with a decidedly ethnic name – for the very same reason and his request was approved. *Id.* Juror #297203 asked to be excused because he was going to be in “Europe working.” CP 23757. His request was denied. But Juror #228062 asked to be excused because he had tickets to go out of town for a Bears football game and his request was granted. CP 23758.

The public is also entitled to consider whether the decisions made are arbitrary. For example, in this case, a small business owner, Juror #487427, asked to be excused “in order to keep my business alive” and her request was approved. CP 23766. . But Juror #581240, a psychotherapist who was concerned for his patients and was the “primary support for his

family,” had his request denied. CP 23768. Then there were the potential jurors who work for large employers (Juror #513823, CP 24228; Juror #176, CP 24293; Juror #545432, CP 24301; Juror #1535301, CP 24307; and Juror #1419959, CP 24314), who supported requests for release from jury duty because their employees were too valuable to let serve or who did not pay for their employees to serve on juries, about which the court made varied rulings.

Finally, the public should be aware of the innumerable requests for release from working citizens who simply cannot afford to sit on a jury because the rate of pay – \$10 a day for a capital trial that lasted four months – would ruin them financially. Numerous jurors asked to be excused because of financial hardship and just a few are listed here. *See, e.g.,* #847490, CP 23765; #788471, CP 23766; #390769, CP 23770; #204480, CP 23773; #1098637, CP 23775; #972887, CP 23778; #975959, CP 23778; #1403279, CP 23782. As an example, one potential juror wrote:

I am very upset to hear that I will not be excused from Jury Duty. Attached is a letter from employer claiming hardship. In addition to this letter I am claiming hardship because I cannot afford to miss any work. My financial situation is very dependent on the money I make and the jury duty compensation will not suffice while I am on such strict budget. I strongly hope you will reconsider.

CP 24732. Even though his request was denied, it appears that this juror did not appear for voir dire on November 13, 2009.

The impact of the extremely low pay and high cost of child care also appear to result in a troubling exclusion of women. In this case, the following jurors asked to be excused because they had children to care for and did not have access to daycare: #547788, CP 23743; #598033, CP 23743; #1508501, CP 23747; #759433, CP 23764; #406355, CP 23793; #196087, CP 23798; #924793, CP 23802; #1552310, CP 23808; #997363, CP 23819. All of these jurors appear to be women. CP 23805 to 23828 lists 26 additional jurors who were excused because they need to stay home to take care of their children. Out of a total of 35 jurors who were excused because they were a stay-at-home parent, only 2, Jurors #1429847 and #1441579, appear to be men.

These are not the sort of judicial inquiries that can or should be conducted out of the public view. The public is entitled to know that only the rich or those who have employment protection and regular pay during their service will be able to serve on capital juries. The public is entitled to know which employers value their economic pursuits more highly than ensuring their employees' right to serve as jurors. The public needs to know that the rate of pay is so low that hundreds of those actually summoned were excused and that hundreds more simply did not appear.

The public cannot address the shortcomings in the current system of jury service and selection if these issues are not considered in open courtrooms.

Critically, the public needs to know that capital jury pools are only nominally “random.” It is true that in this case the King County Superior Court randomly drew 3,000 names from the jury source lists. But at least 1,900 of those summoned simply decided not to appear. The King County Superior Court does not utilize any mechanism to force potential jurors to comply with the court’s summons. Thus, capital juries are, at a very significant level, “self-selected.” That is, they are comprised only of the potential jurors who choose to comply with the court’s summons. There is no way to know if under this “self-selecting” system, the persons who actually appear on the first day of service represent a cross-section of the community.

Absent discussion of these issues in open court, there is no way for the public to address these failures either by supporting an increase in juror pay, insisting on court enforcement of the jury summons or creating some other solution to the problem.

In short, there is no way for this Court or the trial courts of this state to discharge the duty to protect the right of jurors to participate in the civic process and to ensure that our justice system is free from any taint of

bias if more than 900 of those summoned are excused in closed proceedings.

Finally, it is true that in *State v. Beskurt*, 176 Wn.2d 441, 447, 293 P.3d 1159, 1162 (2013), this Court held that there was no closure implicating the right to a public trial when the trial court sealed pretrial juror questionnaires. But this Court carefully pointed out that the questionnaires in that case were utilized by the attorneys as a “screening tool” and that all of the jurors were actually in the courtroom and questioned by the trial judge and the parties in the presence of the defendant and the public. “At most, the questionnaires provided the attorneys and court with a framework for that questioning.” *Id.* at 447. In this case, however, the jurors’ hardship requests were done entirely in private with no judicial oversight. While the jurors’ initial written requests for excusal have been properly sealed pursuant to a post-trial *Bone-Club* analysis, the consideration, evaluation and questioning of the jurors was required to occur in an open courtroom in the presence of the defendant and the public. *See also, In re Yates*, 177 Wn.2d , 1, 29, 296 P.3d 872 (2013).

Here, however, all of the excusals for hardship were completely hidden from the public. This Court should therefore find a violation of

Sixth Amendment and Article I, sections 10 and 22 and remand for a new trial.⁹

D. SCHIERMAN WAS DENIED HIS CONSTITUTIONAL RIGHT TO REPRESENTATION PURSUANT TO THE SIXTH AMENDMENT AND ARTICLE 1, § 22 WHEN SOME JURORS WERE EXCUSED WITHOUT THE PRESENCE OF, OR CONSULTATION WITH, HIS COUNSEL

On two occasions jurors were dismissed without any consultation with Schierman's lawyers. First, two jurors were dismissed for hardship by the jury room clerk. Second, about 100 jurors were dismissed after consultation with a defense paralegal who was not authorized to approve any dismissals.

It is firmly established that an accused has a constitutional right to counsel during all critical stages of a criminal proceeding:

. . . in addition no counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or

⁹ The State may argue that because the trial court can delegate its power to consider hardship requests to a court clerk, it necessarily follows that such requests may be considered behind closed doors. *See, e.g., State v. Wilson*, 174 Wn. App. 328, 298 P.3d 148 (2013), *petition for review pending*, No. 88818-3. But until the statute was amended in 1992, to give authority for a judge to delegate the consideration of hardship requests to a court clerk or administrator. Laws 1992, Ch. 93, Sec. 5. This Court later approved of the practice under the previous version of the statute in *State v. Rice*, 120 Wn.2d 549, 561, 844 P.2d 416, 422 (1993). But as Division II pointed out in *Wilson* at 344, this Court, has not expressly addressed whether a defendant has a public trial right to have juror excusals under RCW 2.36.100(1) conducted in the public courtroom. *See also State v. Njonge*, No. 86072-6, argument scheduled for October 17, 2013.

out, where counsel's absence might derogate from the accused's right to a fair trial.

Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

Jury selection is a critical stage in a criminal trial. *See Gomez*, 490 U.S. at 873; *Com. v. Barnette*, 445 Pa. 288, 290, 285 A.2d 141, 142 (1971). This is particularly true in a capital case. Here, the trial judge recognized that by requiring counsel to be involved with all aspects of jury selection. But on two occasions, Schierman was denied the right to counsel's assistance.

In *United States v. Cronin*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), the Supreme Court held there are circumstances "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified" and prejudice is presumed. *Id.* at 658. Where the defendant "is denied counsel at a critical stage of his trial," courts are required "to conclude that a trial is unfair," and an independent showing of prejudice is not required. *Id.*

E. THE STATUTORILY REQUIRED NOTICE OF DEATH PENALTY PROCEEDING WAS DEFECTIVE BECAUSE SCHIERMAN WAS NOT PROPERLY CHARGED WITH AGGRAVATED MURDER

1. Summary

The State may file a notice that it will seek the death penalty only if the defendant is "charged with aggravated first degree murder as defined by RCW 10.95.020." *See* RCW 10.95.040(1). When the State filed its

notice in this case, the Information did not contain an adequate description of any aggravating factor. Although the State much later caught the error and amended the Information, the deadline had long since passed for filing a death penalty notice. Schierman's death sentence must therefore be reversed.

2. Relevant Procedural History

On July 24, 2006, the State filed an Information accusing Schierman of four counts of premeditated murder. As to each count, the State further alleged that "aggravating circumstances exist, to-wit: there was more than one victim." CP 1-3. On October 26, 2006, the court extended the deadline to January 31, 2007, for filing a Notice of Special Sentencing Proceeding to Determine Whether Death Penalty Should be Imposed. 10/20/06 RP 45. The State filed the notice on January 30, 2007. CP 1220. At that time, there had been no amendment to the Information. The notice itself does not specify any aggravating factor.

On October 23, 2009, at the omnibus hearing, less than one month before jury selection began, the State notified the court and the defense that it wished to amend the Information to include the full statutory

language of the aggravating factor set out in RCW 10.95.020(10).¹⁰ 10/23/09 RP 126. The prosecutor frankly admitted his error, but maintained that he should be permitted to correct it under CrR 2.1 because the defense was not prejudiced. 11/3/09 RP 99-105. He believed the remedy was “to amend the information, to arraign the defendant, *to file a new notice of sentencing proceeding*, and then prepare for trial.” *Id.* at 105 (emphasis added). The defense strenuously objected. 11/3/09 RP 105-110. *See also* CP 6479.

The trial court found that the State made “an error in drafting and an error in proofreading.” *Id.* at 112. It further found that the proposed amendment “adds substantially to the burden on the State.” *Id.* at 113.

It adds an element, either, the element that the murders of more than one victim were part of a common scheme or that they were part of a common plan, those words are used interchangeably . . . , or that the multiple murders were the result of a single act of the person charged.

Id. (emphasis added). The court permitted the amendment because it found no prejudice to the defense. *Id.* at 114-15.

Schierman was arraigned on the Amended Information. *Id.* at 115-20. *See also* CP 6764-6765 (motion and order permitting Amended Information). The Amended Information properly described the

¹⁰ The correct language is as follows: “There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person.”

aggravating factor: “There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person.” CP 6766-68. The State also filed a new death penalty notice on November 3, 2009. CP 6769.

On the same day, the defense filed a motion to strike the death penalty notice because the State had not properly pled aggravated murder in the original Information. CP 6742-44. As the defense noted, the State may file a death notice only if “a person is charged with aggravated first degree murder *as defined by RCW 10.95.020.*” See RCW 10.95.040 (emphasis added). That “there was more than one victim” does not in itself state an aggravating factor under RCW 10.95.020. Rather, RCW 10.95.020(10) requires that “[t]here was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person.” Therefore, the defense argued that the death penalty notice filed in 2007 was invalid. Further, the defense pointed out that it was far too late for the State to file a new death notice. CP 6743. RCW 10.95.040(2) restricts the time for filing to 30 days from arraignment “unless the court, for good cause shown, extends or reopens the period for filing and service of the notice.” The last extension of time prior to the filing of the notice was only until January 31, 2007.

On November 5, 2009, the court held a hearing on this issue. The prosecutor's main argument was that the reference to multiple victims in the original Information was sufficient to inform the defense which aggravator was at issue. 11/5/09 RP 23. The court ruled that the original death penalty notice was valid, reasoning that the defense had actual notice of the aggravating factor even though it was not properly described in the Information. 11/5/09 RP 24-25.

3. Argument

RCW 10.95.040 reads in pertinent part:

(1) If a person is charged with aggravated first degree murder as defined by RCW 10.95.020, the prosecuting attorney shall file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.

(2) The notice of special sentencing proceeding shall be filed and served on the defendant or the defendant's attorney within thirty days after the defendant's arraignment upon the charge of aggravated first degree murder unless the court, for good cause shown, extends or reopens the period for filing and service of the notice. . . .

(3) If a notice of special sentencing proceeding is not filed and served as provided in this section, the prosecuting attorney may not request the death penalty

When interpreting this statute, “[t]wo observations are important.”

First, a specific statute in Chapter 10.95, not a rule of criminal procedure, requires the prosecuting attorney to

serve notice. Given the unique qualities of the death penalty, the Legislature has tailored pretrial procedures to govern the use of a special sentencing proceeding. Second, filing and service of notice is mandatory-no notice, no death penalty.

State v. Dearbone, 125 Wn.2d 173, 177, 883 P.2d 303 (1994). In *Dearbone*, the prosecutor timely filed the death penalty notice and verbally notified defense counsel, but failed to formally serve a copy on the defense. *Id.* at 176. After time expired, defendant moved to preclude the State from requesting the death penalty. The State then served the defendant and moved to reopen the time for serving the notice. *Id.* The trial court granted the motion and this Court took review. *Id.* at 176-77.

The Court first determined that review of the notice's validity is de novo. *Id.* at 178-79. *See also, State v. Luvene*, 127 Wn.2d 690, 718, 903 P.2d 960 (1995), *denial of habeas corpus aff'd*, 203 F.3d 831(9th Cir. 1999). Next, the Court found that neither the defendant's actual notice, the lack of prejudice, nor the State's substantial compliance, could excuse the State's failure to strictly comply with the statute. *Luvene*, 127 Wn.2d at 179. Because no factor external to the prosecutor precluded him from timely complying with the service requirement, the trial court erred in finding "good cause" to reopen the time for filing and serving the notice. *Id.* The Court stressed that "it is impossible to substantially comply with a statutory time limit. . . . It is either complied with or it is not." *Id.* at 182,

quoting *City of Seattle v. Public Employment Relations Com'n*, 116 Wn.2d 923, 928-29, 809 P.2d 1377 (1991).

This Court again required strict compliance with the notice statute in *State v. Luvene, supra*. In that case, the parties verbally agreed, on the record, to an extension of time for the death penalty notice. *Luvene*, 125 Wn.2d at 714. The prosecutor obtained an agreed order signed by the defense, but did not present it to a judge until after time expired. *Id.* at 714-15. The parties nevertheless acted on the assumption that the order was valid, and agreed to two more extensions of time. *Id.* at 715. Despite the lack of prejudice and the defendant's failure to raise the issue in the trial court, this Court found that the notice was invalid and reversed the death penalty. *Id.* at 718-20. The prosecutor's "inadvertence" was not sufficient cause for the trial court to, in effect, reopen the time for filing the notice. *Id.* at 718.

Under the reasoning of *Dearbone* and *Luvene*, this Court should find the death penalty notice invalid in Schierman's case. First, under RCW 10.95.040(1), the prosecutor is authorized to file a notice only if "a person is charged with aggravated first degree murder as defined by RCW 10.95.020." The statute unambiguously requires more than a mere mention of aggravated murder in the charging document. Here, the charging document stated only that "there is more than one victim" which

does not in itself set out any aggravating factor in RCW 10.95.020. The State may have intended to set out the aggravating factor defined by RCW 10.95.020(10), but it did not do so. It is undisputed that the original Information was defective. The prosecutor conceded as much, and the trial court specifically found that the Information omitted an element. When, as here, the Information is challenged prior to verdict, “the language of the charging document is strictly construed to determine whether all elements are included, and the defendant need not show he was prejudiced by the defect.” *State v. Tinker*, 155 Wn.2d 219, 221, 118 P.3d 885 (2005). “All essential elements of a crime . . . must be included in the charging document.” *Id.* quoting *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991).¹¹

Just as prejudice need not be shown to challenge a defective Information, no prejudice should be required to challenge a defective death penalty notice prior to verdict. *Dearbone* and *Luvane* both reject any notion that prejudice need be shown when challenging the timeliness of a death penalty notice even when the challenge is made for the first time on appeal. The same should apply to other defects in a death penalty

¹¹ It is true that the original Information included a citation to RCW 10.95.020(10). However, “[t]he mere recitation of a ‘numerical code section’ . . . does not satisfy the essential elements rule.” *State v. Zillyette*, 178 Wn.2d 153, 162, 307 P.3d 712 (2013), quoting *City of Auburn v. Brooke*, 119 Wn.2d 623, 627, 836 P.2d 212 (1992).

notice. Certainly, it would make little sense to treat the requirements of a death penalty notice more liberally than the requirements of a charging document in any criminal case. The State's position in the trial court appeared to be that it had substantially complied with the notice requirements. But as this Court stressed in *Dearbone*, the notice statute is either complied with or it is not.

The issue presented here is separate from whether the trial court properly permitted the State to amend the Information after the prosecutor noticed the deficiency. CrR 2.1(d) permits amendment of an Information at any time before verdict as long as there is no prejudice to the defense. There is no corresponding provision regarding RCW 10.95.040. As noted above, the *Dearbone* Court explained that this death penalty notice statute is separate from the rules of criminal procedure.

Certainly, the State could not save the original death penalty notice by re-filing it after filing the Amended Information. By that time, the deadline for filing the notice had long since expired. The State did not move to reopen the time for filing the notice, and if it had, it could not have shown good cause. As in *Dearbone* and *Luvane*, the prosecutor's error in regard to the original Information was a matter of mere inadvertence. Nothing prevented the prosecutor from filing a correct Information prior to filing the original notice.

Thus, this Court should find that the death penalty notice was invalid. If the Court remands for a new trial on other grounds, the State may not seek the death penalty at the new trial. If the Court does not reverse the guilt phase, the remedy is to remand for resentencing to life without parole.

F. SCHIERMAN WAS DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT, AND THE RIGHT TO AN IMPARTIAL JURY UNDER THE SIXTH AMENDMENT, BECAUSE THE TRIAL COURT APPLIED AN INCORRECT STANDARD REGARDING DEFENSE CHALLENGES FOR CAUSE, AND IMPROPERLY GRANTED STATE CHALLENGES

1. Summary

Under clearly established U.S. Supreme Court authority, either side may challenge jurors for cause if their strong views for or against the death penalty would substantially impair their ability to follow the law. Here, based on a misreading of one case, the trial court applied an admittedly “asymmetric” standard: the prosecutor need only show that a juror with concerns about the death penalty was substantially impaired, while the defense must show that a juror who strongly supported the death penalty would “automatically” vote for death under any circumstances. The defense attempted to remove all the biased jurors through peremptory challenges, but after those challenges were used up, two biased jurors remained.

The court ostensibly cited the correct standard as to prosecution challenges for cause, but it erred in applying that standard to Juror 280.

2. Relevant Facts and Procedural History

Beginning in November, 2009, voir dire was divided into phases: The first phase concerned the jurors' exposure to media accounts of the crime and their attitudes regarding the death penalty. This included individual voir dire of some jurors, based in part upon their answers to the pretrial jury questionnaire.

In several pleadings, the State repeatedly took the position that the standard for challenging a pro-death juror for cause was not the same as the standard for challenging a pro-life juror for cause. CP 6974-6981; CP 7006-7021. The State acknowledged that in *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the United States Supreme Court ruled that a juror's views regarding the death penalty could justify dismissal for cause if they would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *See Witt* at 424. The State maintained, however, that this standard applied only when the State challenged a "pro-life" juror. CP 6974-76. The State argued that the standard was different for jurors who favor the death penalty. CP 6976. Citing *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992), the State said that those

jurors could be excused only when they would “automatically vote for the death penalty in every case.” *Id.* at 6976.

It is clear to Judge Scalia, and from reading *Morgan*, that a capital defendant is *not* entitled to the “substantially impaired” standard of *Witt*. For jurors who *oppose* the death penalty, the standard for a challenge for cause is whether their views substantially impair them from performing their duties; for those who *favor* the death penalty, the question is whether the juror would automatically impose the death penalty.

CP 6977 (emphasis by prosecutor). The State called this an “asymmetrical standard.” CP 6976. The defense repeatedly argued that the test for either pro-life or pro-death jurors was the same. CP 6968-6973, 6982-6989, 6990-6990, 6996-7005.

The trial judge accepted the State’s position.

The standard for disqualification of a juror for cause because of their favoring the death penalty is, as *Morgan vs. Illinois* very clearly lays out, a very strict standard. It is – and I reread the case last night – interesting to the court that the standards really are different between deciding whether a person is to be excused for cause because of their views in favor of the death penalty vs. whether they should be excused for cause because of their views in opposition to the death penalty.

12/1/09 RP 56. In his view, the defense could challenge a juror for cause only if he or she

really has an automatic reaction, that is that they will impose the death penalty if a person is convicted of a particular crime regardless of any of the details, regardless of mitigating circumstances, which may be present, that

they, in essence, will not consider any mitigating circumstances.

12/1/09 RP 56-57. “*Morgan v. Illinois* very clearly lays out, a very strict standard.” *Id.* at 56.

On the third day of jury selection, after reviewing the briefing on this issue, the judge made a lengthy oral ruling.

The *Morgan* decision in the majority reflects this contradictory, as urged by the defense, positions, that, in fact, there are two different standards for pro-death and anti-death penalty jurors based upon the State’s interest in having a fair and impartial jury, able to uphold the law, for the reasons that are noted in and laid out, in part, in the *Morgan* decision, but more in the analysis of the issue in the dissent by Justice Scalia.

.....

The subsequent decisions by the courts of appeal, and even the opinion by the U.S. Supreme Court in *Uttecht vs. Brown*, do not support the defense position that there should be one standard, the *Witt* standard, applied to, both, pro- and anti-death penalty jurors.

.....

For those reasons the court is ruling that the *Morgan vs. Illinois* standard is the appropriate standard to apply on such challenges, since the U.S. Supreme Court has not adopted the *Wainwright vs. Witt* standard, which is applied to anti-death penalty prospective jurors. For that reason I’m going to deny the motion to dismiss the two remaining jurors of the three, numbers 20 and 21, for cause.

12/08/09 RP 224-31. *See also* 12/22/09 RP 82-87.

3. Argument

(a) *The Court Erroneously Applied an Asymmetric Standard*

The prosecutor led the trial court astray; there is no support whatsoever for an “asymmetric” standard for challenges for cause. Neither the U.S. Supreme Court, nor apparently any lower court, has ever espoused such an unfair approach. The trial court seems to have focused on the specific facts of the leading cases rather than on their holdings.

It is true that *Witt* dealt with a prosecution challenge to a “pro-life” juror. But the Supreme Court phrased the legal standard in terms neutral to the defense and prosecution.

That standard is whether the juror’s views would “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.”

Witt, 469 U.S. at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d. 581 (1980)). Again using neutral language, the *Witt* Court specifically rejected a standard it arguably established in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776, *reh’g denied*, 393 U.S. 898, 89 S.Ct. 67, 21 L.Ed.2d 186 (1968), that is, that jurors could be challenged only if their decision-making was “automatic.” *Id.*

Morgan v. Illinois did not change that standard; in fact, it overturned a related asymmetric approach used by the trial court in that

case. In *Morgan*, at the prosecutor's request, the trial court asked all jurors whether they would "automatically" reject the death penalty (*id.* at 722-23) but denied the defense request to ask all jurors whether they would automatically vote for death. *Id.* at 722-23. The U.S. Supreme Court reversed, holding that the defense was entitled to the same inquiry as the prosecutor. *Id.* at 736.

In *Morgan*, both sides phrased their requests in terms of an "automatic" vote for either death or life. That is because they relied on "the inquiry permitted by *Witherspoon*." *Morgan* at 722. It does not appear that the *Witt* decision had issued by the time of *Morgan*'s trial. For that reason, much of the discussion in *Morgan* focuses on "automatic" decision-making. The *Morgan* Court, however, reaffirmed the *Witt* standard without differentiating between the prosecution and the defense.

Witt held that the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment ... is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

Morgan at 728 (citations and internal quotation marks omitted). The *Morgan* Court also noted that in *Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80, *reh'g denied*, 487 U.S. 1250, 109 S.Ct. 11, 101 L.Ed.2d 962 (1988), it applied the "standard enunciated in *Witt*" to a

defense challenge regarding a juror biased in favor of death. *Morgan* at 728-29.¹² It did not suggest that it was modifying or overruling *Ross*. See also, *People v. Whalen*, 56 Cal.4th 1, 25, 294 P.3d 915, 939 (2013), *cert. denied*, 2013 WL 3093921 (Oct. 07, 2013) (“The analysis is the same whether the claim is the failure to exclude prospective jurors who exhibited a pro-death bias, or wrongful exclusion of prospective jurors who exhibited an anti-death bias.”)

The prosecutor’s and trial court’s reliance on Justice Scalia’s dissent in *Morgan* is puzzling. Justice Scalia’s position was that a jury deciding punishment in a capital case need not be impartial, and therefore there was no need for the trial court to probe the juror’s bias in any way. *Morgan*, 504 U.S. at 740. That extreme position does not shed any light on the majority’s ruling.

(b) *The Court Applied its Asymmetric Standard throughout Jury Selection*

Throughout jury selection, the trial court applied the “automatic death” standard to defense challenges and the *Witt* standard to prosecution challenges. 12/09/09 RP 48; 12/21/09 RP 139.

¹² In *Ross*, the juror at issue stated that he would automatically vote for death. But the ruling in *Ross* is based on the *Witt* standard, which of course applies with greater force when a juror’s bias does not merely substantially impair his judgment but makes him an automatic vote for death. *Ross*, at 85

The court's treatment of Juror 291 demonstrates how the defense was unfairly required to use up all its peremptory challenges on jurors who should have been dismissed for cause. Juror 291 circled 7 on his questionnaire indicating the strongest support for the death penalty. CP 15709.¹³ He stated: "My opinion is that if one is convicted of premeditated murder, then I am in favor of the death penalty." *Id.* He repeated that answer: "My opinion is that if someone murders a person, they should get the death penalty." *Id.* He had never held any other view on the issue. And when evaluating life in prison without the possibility of parole and the death penalty he stated: "Life imprisonment a person is still living while someone is murder is not fair. [sic]" *Id.* The questionnaire asked:

What would you want to consider as a juror in deciding between the death penalty or the penalty of life in prison without the possibility of release or parole for a person who is convicted of the premeditated and intentional killing of two women and two children?

CP 15710. He answered: "I would like to consider the death penalty for premeditated murder." *Id.*

Juror 291 readily affirmed those answers during voir dire. 12/21/09

RP 169-171. He reiterated his belief that if someone premeditated a

¹³ Number 1 represented "strongly opposed" and number 7 represented "strongly in favor."

murder, “then they should have the death penalty.” 12/21/09 RP 173-74. He agreed, however, that he would first put the State to its burden of proving premeditated murder before voting for death. *Id.* at 174. He reiterated that once the evidence proved a defendant guilty of murder, “that they should have the death penalty.” 12/21/09 RP 175. He seemed to concede, however, that if the prosecutor or judge told the jury that life was the appropriate sentence, he would be okay with that. *Id.* at 178-79, 181. “For me personally, I think the case warrant the death penalty but the Judge come at me with life in prison. I would agree on. [sic]” *Id.* at 182.

The defense challenged Juror 291 for cause. *Id.* at 182-188. The court denied the challenge stating that “in the court’s view this juror is not someone who will automatically vote to impose the death penalty . . . For those reasons I am going to deny the challenge under *Morgan v. Illinois.*” 12/22/09 RP 188.

The defense filed a written motion for reconsideration. CP 7146-7151. The defense again argued that the court was applying the wrong standard but even so, Juror 291’s answers did indicate that he would automatically impose the death penalty, would shift the burden of proof to the defense and did not understand mitigation. *Id.* The trial court denied the motion. 12/30/09 RP 140. The defense therefore was forced to use a peremptory challenge. 1/12/09 RP 80.

The trial court gave each side 17 peremptory challenges. 1/4/10 RP 157. At the conclusion of the voir dire the peremptory challenges were done “in writing alternating the exercise of these challenges.” *Id.* Although the record does not explicitly state which party exercised each challenge, it is obvious which 17 jurors the defense excluded because *every one of them* had previously been challenged for cause by the defense. 1/12/10 RP 80-81. The judge read the challenges off as follows at 1/12/10 RP 80-81 with the jurors the defense had previously challenged for cause noted in bold: **Juror 21 (challenged for cause, 11/30/09 RP 197-98)**; Juror 213; Juror 227; **Juror 243 (challenged for cause 12/17/09 RP 33-35)**; Juror 40; **Juror 224 (challenged for cause 12/16/09 RP 34-37)**; Juror 256; **Juror 195 (challenged for cause 12/14/09 RP 147-151)**; Juror 267, Juror 33, Juror 281; **Juror 291 (challenged for cause 12/21/09 RP 182-84)**; Juror 316; **Juror 295 (challenged for cause 12/22/09 RP 53-56)**; **Juror 313 (challenged for cause 12/30/09 RP 105-106)**; **Juror 321 (challenged for cause 12/28/09 RP 75-77)**; Juror 105; **Juror 70 (challenged for cause 12/3/09 RP 34)**; Juror 131; Juror 133 (**challenged for cause 12/8/09 RP 142-145**); **Juror 58 (challenged for cause 12/2/09 RP 166-6)**; **Juror 116 (challenged for cause 12/7/09 RP 138-139)**, Juror 143; Juror 84; **Juror 20 (challenged for cause 11/30/09 RP 172-176)**; **Juror 144 (challenged for cause 12/09/09 RP 94-96)**; Juror 109; **Juror 44 (challenged for cause**

1/11/10 RP 265-67); Juror 179; **Juror 68 (challenged for cause 12/02/09 RP 199)**; Juror 191; **Juror 171 (challenged for cause 1/11/10 RP 263-65)**. Thus, the defense used all its peremptory challenges on jurors who it had previously argued were not qualified to serve. Clearly, had the State wanted to remove these jurors, the prosecutor would have simply agreed to defendant's challenges for cause rather than using its peremptory challenges.

But the defense was not able to exclude all the jurors it had challenged for cause because the trial judge's application of *Morgan* left so many death penalty supporters on the jury. Because the defense had to exhaust its peremptory challenges on jurors who had not been removed for cause, two jurors who clearly were substantially impaired were seated.

(c) *Juror 59 (Seated Juror 12)*

Juror 59 was seated on the jury as Juror 12 and sat until a day or so before closing argument. On April 5, 2010, he was excused because he was 40 minutes late for court. 4/5/10 RP 5-7. The trial court's lack of concern about seating him as a juror in this case is important because it demonstrates how prejudicial the court's misreading of the law was to Schierman's right to a fair trial. His placement on the panel also demonstrates how the defense did not have enough peremptory challenges to remove all of the jurors that the trial judge failed to remove for cause.

Juror 59 was a 24-year-old man. In the pretrial questionnaire he stated that the biggest problem with the criminal justice system was untruthful statements, deciding whether a possible mental condition constitutes a different charge and evidence intentionally altered, removed, or created to influence an outcome.

CP 21396. He stated that he believed that “many attorneys will intentionally lie under oath in order to win a case.” CP 21394. Juror 59 was asked: “In general, what is your opinion on the death penalty as punishment for intentional, premeditated murder?” CP 21399. Juror 59 first circled 7 but then scratched that out and circled 6. CP 21400. He also stated that he believed that the death penalty was the “fair and punishment and/or solution.” *Id.*

During voir dire, Juror 59 confirmed that he thought death appropriate if the defendant were convicted as charged. 12/8/09 RP 93. *See also* RP 95. He agreed that he could consider “mental disorders” when deciding whether or not to impose the death penalty, 12/8/09 RP 89, but only if they were “actually medically recognized.” *Id.* at 94.

On questioning from the prosecutor Juror 59 confirmed that he was “very for the death penalty” but maintained he would not be “absolutely bullheaded in that direction.” He made it clear, however, that his consideration of mitigating factors would be very limited.

MR. O'TOOLE: . . . if the circumstances – you mentioned circumstances, such as mental disorders and other possible factors. Would you be open to considering the possibility that those might be present?

JUROR 59: I would be open to the possibility.

MR. O'TOOLE: You sound like you're hesitating a bit.

12/8/09 RP 98.

Juror 59 then said he might consider mental illness mitigating “[i]f there’s, you know, psychiatric, doctors, you know, present in the courtroom . . . for example, psychosis, anything like that, it could possibly . . .” *Id.*

After the prosecutor explained the burden of proof at the penalty phase he asked: “Is there any chance that you’ll require the defendant to establish that to make – that you’re going to impose some burden on the defendant rather than on the prosecutor in the penalty phase?” Juror 59 responded: “As of right now I would.” *Id.* at 100.

If we’re speaking of mitigating circumstances, I would expect that the defendant would have to be able to protect and back up the reason to support it is not a lie, or a very convincing story, I would expect it would have to be hard facts to prove that.

Id.

Juror 59 reiterated that he believed that lawyers lie because of “what they do.” *Id.* at 91. He felt that was a “great possibility” when it

came to defense attorneys. *Id.* “Because anybody could claim a lie or a false testimony . . . so I would need to see hard fact evidence.” *Id.* at 101.

The defense challenged Juror 59 for cause, noting that his ability to accept the burden of proof and to consider mitigating evidence was significantly impaired. 12/8/09 RP 104. The State objected because Juror 59 had not stated that he would “automatically vote for the death penalty.” *Id.* at 105. The trial judge found that under “the *Morgan* standard” Juror 59 was qualified to serve because he did not say he would “automatically vote for the death penalty.” *Id.* at 106. The court acknowledged that Juror 59 did state that if he found a premeditated and intentional killing and none of the self-defense or other issues were present, the death penalty would be an appropriate verdict. *Id.* at 106.

The fact that for this juror there are potentially limited circumstances that would constitute mitigating circumstances, as he currently understands the statutory scheme, again, does not disqualify him under the *Morgan* standard.

Id. at 107. The court also acknowledged that the juror was “opinionated,” in particular,

in responding to defense counsel’s question about his view of attorneys and that they will lie to get what they want and then expanding that to say that people in general, in his opinion would do that as long as they didn’t think they’d get caught...

Id.

The court concluded, echoing the juror's own words, that Juror 59 "was not going to be absolutely bullheaded about imposing the death penalty." 12/8/09 RP 108.

After discussing this juror under the "automatic" standard at length, the trial judge turned to a brief discussion of the *Witt* standard "assuming for the sake of discussion that is the appropriate standard for this juror." *Id.* at 108. He concluded that Juror 59 was not substantially impaired because he stated that he could follow the law as set forth in the court's instructions. *Id.* at 108-09.

The trial court's decision could arguably be upheld if the standard was truly "automatic death." This juror was bullheaded, but perhaps not *completely* bullheaded. He grudgingly left some room for the possibility of mitigation so long as it was limited to severe mental disorders and it was proved to him beyond any doubt by "hard fact."

But there can be no question that this juror's ability to consider a life sentence was substantially impaired. Even after the prosecutor's best efforts to rehabilitate him, Juror 59 stuck to his position that the death penalty was appropriate in all but the most limited circumstances, and that the defense faced a grim burden in convincing him that any legitimate mitigation might exist. That he believed the defendant and defense lawyer would likely lie about mitigation made it even more unlikely that he could

follow the presumption of leniency. Further, he had prejudged that only disorders “medically recognized” by a psychiatrist could be mitigating, although the law imposes no such requirement. The trial court’s brief, conclusory statement that the *Witt* standard was satisfied “for the sake of argument” was clearly an abuse of discretion.

It is generally true that the trial court’s ruling is accorded deference because he can assess the juror’s demeanor and body language. *See Witt*, 469 U.S. at 428. That principal should not apply here, however, because the judge made it so clear throughout jury selection that he was not focusing on such subtleties, but rather on whether the juror would automatically vote for death. *Cf. Gray v. Mississippi*, 481 U.S. 648, 661 n. 10, 107 S.Ct. 2045, 2057, 95 L.Ed.2d 622 (1987) (declining to defer to trial court’s excusal for cause of a juror in a capital case because the court’s reasoning was based in part on the misapplication of federal law); *United States v. Collins*, 551 F.3d 914 (9th Cir. 2009) (reviewing trial court’s denial of a *Batson* challenge de novo where judge initially relied on an incorrect legal standard, even though judge later briefly recited correct standard and re-affirmed his ruling).¹⁴

¹⁴ *See also, Johnson v. Finn*, 665 F.3d 1063, 1068-69 (9th Cir. 2011) (evaluating purposeful discrimination de novo where the California court applied the wrong legal standard to a *Batson* challenge);

In any event, the State can hardly argue that the juror's manner of speaking showed him to be friendlier to the defense than would appear on a cold record. The trial prosecutor himself noted that the juror hesitated before agreeing that he could even consider mitigating factors.

(d) *Juror 140 (Seated Juror 5)*

Juror 140 became seated Juror 5 and served throughout the entire trial. She circled "6" to indicate that she was strongly in favor of the death penalty. CP 21508. In response to her views on the death penalty, if someone were convicted of the same crime Schierman was alleged to have committed, she said "I think that they should get it if convicted." *Id.* In her opinion, the death penalty was imposed "too seldom" and that "if they did it they should pay the price." *Id.* She did also express some willingness to accept a life sentence if the defendant could better himself in prison. *Id.*

Juror 140 affirmed these answers in voir dire. 12/09/09 RP 28, 31, 32. She stated that the defendant's life circumstances should not make a difference when considering the penalty. 12/09/09 RP 32. She agreed that mitigating factors did not really play a part in her decision. *Id.* at 32. Under rehabilitation by the prosecutor, she affirmed that she could follow the court's instructions. *Id.* at 36. She understood that she could not just "go with what my heart tells me," but rather had to listen to the facts. *Id.* at 40.

The court stated that Juror 140 would not automatically vote for death and, and thus, denied defense counsel's challenge for cause on that basis. 12/9/09 RP 44-45. Whether the trial court actually considered the question of "substantial impairment" is not entirely clear from the record.

The court remarked on both the *Witt* and the *Morgan* standard but stated:

The juror was not asked in the court's view "follow the law" questions. The court was listening carefully to the questions posed by the State and those questions were designed to elicit, in the court's view, her views, and whether she would be disqualified based on *Morgan*, even, arguably, whether she would be disqualified under *Witt v. Wainwright*.

In the court's view, this juror is not disqualified under either standard and as the Court is clearly applying the standard from *Morgan v. Illinois*, I'm going to deny the challenge for cause on both grounds, both under *Witt* and under *Morgan*.

Id. at 47-48.

To the extent the court could be said to have considered the *Witt* standard, the court abused its discretion in finding that it did not require excusal here. The juror was absolutely unwilling to consider any mitigation other than possibly some proof that the defendant would better himself in prison. She never disavowed her stated position that if the defendant planned the murders, she would impose the death penalty. Thus, she was substantially impaired. Again, the trial court's improper standard was decisive because this juror was perhaps not an "automatic" vote for

death; it was conceivable that under certain narrow circumstances she might vote for life.

In *Morgan*, at 739, the Court said: “Because the ‘inadequacy of voir dire’ leads us to doubt that petitioner was sentenced to death by a jury empaneled in compliance with the Fourteenth Amendment, his sentence cannot stand.” Similarly here, there is substantial doubt that the jury was empaneled in compliance with the Fourteenth Amendment and the sentence cannot stand.

(e) *The Trial Court Improperly Granted One
Prosecution Challenge for Cause*

As noted above, a prospective juror may be excluded for cause because of her views on capital punishment when “the juror’s views would ‘prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath.’” *Witt*, 469 U.S. at 424 (quoting *Adams*, 448 U.S. at 45).

Juror 280 circled “2” regarding her views on the death penalty. She believed it should be “reserved for severe society cases [sic].” CP 15528. When asked her views on life imprisonment, she said it “seems appropriate,” but she did not believe the defendant “should get out on good behavior.” *Id.* She stated that she could consider the death penalty under the facts of this case “[i]f this was an incident or more of a serial

killer with multiple victims that would kill again if let out.” CP 15529. She said her opinions were not influenced by religious, spiritual, political or philosophical beliefs. *Id.* She confirmed she would follow the judge’s orders. *Id.*

In voir dire she reiterated that she could impose the death penalty for killers who would “kill again.” 12/21/09 RP 23. She repeated, “If they are going to be killing again” she could impose the death penalty. *Id.* at 24. She stated that she did not know what the standards of proof were in this case “so my bar may be different than what the court instructs. I think I’ve already stated what my bar is.” *Id.* at 29. She stated that she could give the State a fair trial. *Id.* at 32.

The State did not question the juror but challenged her for cause. *Id.* at 32-33. The prosecutor argued that because “there is not a suggestion here that the defendant is a serial killer,” Juror 280 was substantially impaired. *Id.* at 34. Defense counsel objected to the challenge; the juror might set a “high bar” before she would vote for the death penalty, but that was consistent with Washington’s burden of proof. *Id.* at 35. Counsel also noted the juror was focused in part on future dangerousness, a factor that might be at issue in the penalty phase. *Id.* at 36-37.

Judge Canova granted the State’s challenge because:

the only situation where . . . she could ever vote for the death penalty, would be in a case involving a serial killer, that is defined by her as someone who, if they got out, would kill again . . .

12/21/09 RP 38. The judge found that she “has added to the State’s burden of proof.” *Id.* at 39. He concluded that because Juror 280:

has it narrowed down [her consideration] to one very, very limited set of facts, and that set of facts clearly, in the court’s view, would substantially impair her ability to follow the court’s instructions as to the law to be applied in this case.

Id. at 39.

The trial court erred in granting the State’s challenge because none of Juror 280’s answers on the questionnaire or in voir dire suggested views that would substantially impair her ability to perform her duties by voting to impose the death penalty in an appropriate case. And, under the facts of this case, she was more than able to consider the death penalty. The State’s position in closing argument was that Schierman was a mass murderer and that he would pose a danger even in prison. *See* Section O(3), *infra*. She might well have found that argument compelling. The trial judge did not discuss her demeanor, body language or any other factor other than her answers to the questions. The sum total of the examination then did not support the challenge for cause.

Certainly, Juror 280 was no more prone to vote for life than juror 140 was to vote for death. Juror 140 had her own limitations on what could possibly justify a life sentence. Further, Juror 280 was not nearly as “bullheaded” as Juror 59. Juror 280 offered the State a far more fair hearing than Juror 59 offered the defense.

In short, the court’s unequal handling of jury selection violated Schierman’s right to an impartial jury and requires reversal.

G. THE CUMULATIVE IMPROPRIETIES IN THE SUMMONING AND SELECTING OF THE JURY VIOLATED SCHIERMAN’S RIGHT TO A FAIR AND IMPARTIAL JURY

This Court is now confronted with a capital trial in which the vast majority of the jurors summoned did not appear for trial, challenges for cause and hardship were heard outside the presence of the defendant and the public, some jurors were dismissed without consultation with defense counsel and the trial judge misapplied federal constitutional case law when considering challenges for cause by both parties. The purpose of all these constitutional provisions is to provide a fair and impartial jury. Here, there were material departures from the constitutional requirements at every turn. In the end, Schierman was tried by a jury of only those persons who voluntarily appeared and were uncommonly inclined to impose the death penalty. Schierman could not eliminate all of the impaired jurors for

cause and one clearly impaired juror served throughout both the guilt and penalty verdicts.

Under these cumulative circumstances, this Court cannot conclude that Schierman had a fair trial by an impartial jury under the Sixth and Fourteenth amendments to the U.S. Constitution and Article I, sections three and 22 of the Washington Constitution. These errors also led to an arbitrary and capricious death penalty in violation of the Eighth Amendment.

H. THE STATE PRESENTED A THEORY OF SEXUAL MOTIVATION AFTER THE PROSECUTOR AND JUDGE PROMISED THAT WOULD NOT BE AT ISSUE, AND THE PROSECUTOR ARGUED INFERENCES NOT SUPPORTED BY THE EVIDENCE

1. Procedural History

Early in the proceedings, the State conceded that it had no evidence of a sexual assault. In response to a defense motion for independent DNA testing of the vaginal swabs, the State responded as follows:

[T]he defendant's claim that he "seeks to obtain DNA testing of the vaginal swabs showing he did not rape the victims" ignores the reality of what he actually is charged with. The defendant is not accused of raping the victims in this case. There is no physical evidence of sexual assault of any of the victims. In other words, the defendant ostensibly seeks to prove – or disprove – a contention that is not at issue. *Indeed, the State will stipulate that there is no physical evidence of sexual assault of any of the victims.*

CP 4449 (emphasis by prosecutor). The State had good reason to make that stipulation. One of their DNA experts, Dr. Blake, found no sperm cells on the vaginal or anal swabs from the victims. It was not likely that the fire destroyed such evidence because skin cells *were* present on the swabs and sperm is hardier than skin. *See* 2/16/10 RP 136-43. James Curry of the Washington State Patrol Crime Laboratory (WSPCL) reached the same conclusions from the swabs. 2/23/10 RP 86. Curry found no sperm cells on the victims' clothing. *Id.* at 26-29, 37-38.

The conclusions of medical examiner, Dr. Harruff, were also initially consistent with the prosecutor's stipulation. He stated in a defense interview in 2007 that the female victims' legs were found apart due to the effect of the heat and not because they were placed that way. *See* CP 7203-04.

On December 29, 2009, however, the State served the defense with a memorandum in support of the admissibility of crime scene and autopsy photographs. CP 7226.¹⁵ The State indicated that Dr. Harruff would use a certain photograph to show that "the victims' legs are spread apart, in all likelihood not a result of the fire but probably reflects positioning prior to the fire." CP 7232. The State also sought to admit photos showing that no

¹⁵ The defense received the State's brief on December 30, 2009 (*See* CP 7200) but it was not filed by the clerk until January 11, 2010.

clothing was found on Olga Milkin and that Lyuba Botvina was found with her tank top pulled over her breasts. CP 7240, 7246.

On January 4, 2010, Schierman filed a motion for various sanctions under CrR 8.3 in view of this and other late-disclosed expert opinions. In particular, the defense requested “that the court strike the jury pool and continue the trial since the State is now asserting some type of sexual motivation.” Counsel noted that in jury selection prospective jurors repeatedly stated that the defendant’s motivation would be a factor at the penalty phase. CP 7203-7204. Neither the juror questionnaire nor the voir dire probed the jurors’ thoughts regarding sexual motivation. The defense therefore needed to conduct voir dire anew. CP 7209.

On January 11, with jury selection still ongoing, defense counsel noted that the court should rule promptly on their motion. 1/11/10 RP 3. “No one has been asked about anything related to the subject matter contained within this new discovery. The entire process is flawed.” *Id.* at 4. The court denied the defense request to hear its motion prior to empaneling a jury, but also gave them a promise:

I will advise the parties, there will be no evidence presented *of sexual motivation or sexual assault*, consistent with this Court’s prior rulings and the prior representations of counsel for the State that that was not an issue in the case.

Id. at 7 (emphasis added).

In its response to the defense motion filed on January 15, however, the prosecutor for the first time revealed that he did intend to argue a sexual motive to the jury. CP 7347- 49. The prosecutor acknowledged that he had worded his prior stipulation very carefully:

The record should be very clear here: the State has *never* stipulated or conceded that there is no evidence of a sexual *motive*. To the contrary the State has been very careful to acknowledge only that, in the context of the defendant's request for supplemental DNA testing of the victims' vaginal swabs, there is no *physical* DNA evidence of sexual *assault*.

CP 7347 (emphasis in original).

The court addressed the CrR 8.3 motion January 19, 2010, after jury selection concluded. 1/19/10 RP 126. Defense counsel noted that the State had never before asserted a sexual motive for the murders. In particular, during a hearing on October 28, 2009 regarding the admissibility of evidence under ER 404(b), the State did not suggest that any evidence should come in for the purpose of proving motive under that rule. *Id.* at 128. Now, it was too late to question the jurors about that issue.

I don't know one attorney, defense attorney, who would not say, what are your views, what are your beliefs on sex offenses, and that sort of thing, as we did in the questionnaire with respect to drugs, alcohol impairment, that sort of thing.

Id. at 130. Counsel noted that if the court permitted the State to argue sexual motivation, it would be necessary to reinterview witnesses whose testimony would be the basis for such argument. 1/19/10 RP 132. Counsel therefore asked the court to prohibit any argument regarding sexual motivation. *Id.* at 133. Counsel also pointed out that in its statutory proportionality review, the Supreme Court has relied on the defendant's motive. *Id.* at 142.

Despite its earlier promise that no testimony regarding sexual motivation would be presented, the court ruled that the State would be free to argue sexual motivation. *Id.* at 149.

In opening statement the prosecutor noted that Schierman made a sexual comment about one of the women in the Milkin home, using an Eastern European accent. 1/20/10 RP 29. He also pointed out that Olga was found naked and Lyuba was wearing only a tank top which had been pushed up over her breasts. *Id.* at 41. After the opening statement, with the jury out, defense counsel explained that they had not made a strategic choice to refrain from discussing sexual assaults or sexual motivation during jury selection, but rather were relying on what they understood to be a promise from the State that such matters would not be raised during the trial. *Id.* at 78.

As it turned out, Dr. Harruff did *not* suggest in his trial testimony that the victim's legs were positioned apart. 1/28/10 RP 77-168; 2/1/10 RP 1-103. But various testimony regarding sexual motivation came in through several witnesses.

Sean Winter was permitted to testify that Schierman mentioned that the blonde woman across the street from his house was attractive. 2/9/10 RP 85. Winter also said that Schierman engaged in "locker room talk" on July 16, 2006, and that the night before the murders Schierman made some sort of sexual comment in a Russian accent while referring to the Milkin house. *Id.* at 90, 105. Further, he claimed Schierman had a porn video and that he made a joke about giving Isaac Way a "blowup doll." 2/10/10 RP 52-54, 66.

Todd Taylor, a computer forensic technician for WSPCL testified over objection that Schierman had a Myspace chat with someone on July 16, 2006, which includes him saying: "Are you allowed to have sexy parties at work?" 3/3/10 RP 36.

In guilt-phase closing argument, the prosecutor noted the alleged comment Schierman made about the women across the street. 4/8/10 RP 40. He suggested, contrary to the testimony of the State's experts, that Schierman had destroyed sexual evidence. "Why pour gasoline on the victims' bodies? What does he know about those bodies that he doesn't

want discovered?" 4/8/10 RP 75. The prosecutor then pointed out that he had no obligation to prove a motive, "[b]ut here we know." *Id.* at 77.

Well, we know what was going on Sunday evening. I talked about the comment he knew about the women across the street, he knew about the locker room talk, the joke about the blow-up doll, the defendant bringing out the pornographic movie, Jenna Jamison movie, the e-mail at 9:37 at night, 10:00, a sex party, there's nothing wrong with that, people talk, that's not a condemnation, but taken together, what does it tell us?

We know what's on the floor of Alla's bedroom, we know where the bodies were found and how they were found inside that room at the top of the stairs. Olga completely naked, leaving Lyuba only with her tank-top on.

We know what the evidence tells us. We know there was trace evidence found on the pajamas that were taken from the microwave, Lyuba's DNA and the defendant's DNA, and there was trace evidence recovered from underneath Lyuba's body.

Id. at 77-78.

The prosecutor also came up with a theory, not endorsed by any expert witness, that Schierman must have been prone over the body of Olga Milkin.

What else was on his body? There's a ligature mark around his neck. Remember Detective Goguen talked about that? That's the mark that goes across – it's the mark that goes from one side, like a half-moon, below his hairline, to the other.

It is not a scratch, and if you look at this ligature mark, you'll have these photographs with you, it begins on the lower right part of his neck, goes into his hairline, and it comes out at the other side.

If you'll look at it, it looks an awful lot like those figure eights in that necklace, doesn't it? Why is that important? Look how high up on the defendant's neck this ligature mark is, and look where the necklace is. This is not a heavy chain, it's not a heavy chain that's going to move a lot. Look how fragile and delicate that necklace is.

For this necklace to have been that far up on his head means he may have been prone on top of somebody else, and who might that person have been? Whose DNA is on this necklace? Conner Schierman and Olga Milkin.

4/8/10 RP 78-79.

At the penalty phase, the prosecutor brought out hearsay testimony that Schierman made a reference to a "hot chick" across the street washing her car while wearing a bikini. See Section N, below.

2. Argument

"Although prosecuting attorneys have some latitude to argue facts and inferences from the evidence, they are not permitted to make prejudicial statements unsupported by the record." *State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008), citing *State v. Weber*, 159 Wn.2d 252, 276, 149 P.3d 646 (2006), *cert. denied*, 551 U.S. 1137, 127 S.Ct. 2986, 168 L.Ed.2d 714 (2007). See also, *State v. Rose*, 62 Wn.2d 309, 382 P.2d 513 (1963) (improper for prosecutor to refer to defendant as a "drunken homosexual" where the only homosexual act in evidence was the alleged offense and, despite defendant's admission to having seven or eight drinks, no witness described him as drunk); *State v. Boehning*, 127 Wn. App. 511, 111 P.3d 899 (2005) (prosecutor improperly suggested in

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closing that the reason child victim did not confirm all charges originally alleged was that she felt uncomfortable relating such facts in front of the jury).

Here, the prosecutor was reaching to draw sexual conclusions from testimony that simply did not support it. No expert supported his theories. For example, the notion that Schierman was prone over the body of one of the victims was pure speculation. Similarly, that a bunch of 20-something men would engage in some “locker room talk” is hardly unusual; it cannot justify an inference that any of them were plotting a sexual crime.

The United States Supreme Court discussed the prejudice resulting from similar evidence and argument in *House v. Bell*, 547 U.S. 518, 540-541, 126 S.Ct. 2064, 2079, 165 L.Ed.2d 1 (2006). At trial, the prosecution maintained that the semen stains found on the murder victim’s underpants came from the defendant, House. Years later, DNA testing proved that the semen belonged to the victim’s husband. The State maintained that this was “immaterial” because “neither sexual contact nor motive were elements of the offense.” The Supreme Court disagreed:

When identity is in question, motive is key. The point, indeed, was not lost on the prosecution, for it introduced the evidence and relied on it in the final guilt-phase closing argument. Referring to “evidence at the scene,” the prosecutor suggested that House committed, or attempted to commit, some “indignity” on Mrs. Muncey. . . . Law and society, as they ought to do, demand accountability when a sexual offense has been committed, so not only did this evidence link House to the crime; it likely was a factor in persuading the jury not to let him go free.

Id. at 240-41.

Of course, whether the defendant's crime was sexually motivated would also have a significant impact on the penalty phase. It is true that no formal sexual aggravating factor was alleged here. But crimes committed with sexual motivation are almost universally seen as more heinous. *See, e.g.*, RCW 9.94A.535(2)(f) (sexual motivation is a ground for an exceptional sentence).

Thus, the prosecutor's unjustified efforts to convince the jury that this case involved a sexual crime violated Schierman's right to due process under the state and federal constitutions and rendered the death sentence arbitrary and capricious in violation of the Eighth Amendment and Article I, Section 14.

Further, even if the prosecutor's approach was otherwise proper, Schierman was denied due process under the state and federal constitutions because the prosecutor and trial judge misled the defense regarding the nature of the State's case. *See Gray v. Netherland*, 518 U.S. 152, 116 S.Ct. 2074, 135 L.Ed.2d 457, *reh'g denied*, 518 U.S. 1047, 117 S.Ct. 22, 135 L.Ed.2d 1116 (1996). The prosecutor's cleverly worded stipulation may not have technically prohibited all evidence and argument regarding sexual motivation, but he must have known the defense interpreted it that way. Worse, the trial court expressly promised the defense, while jury selection was still ongoing, that there would be no evidence regarding sexual motivation. When the judge reneged on that promise, it was too late to question the jurors on that issue.

I. THE PRESENCE OF NUMEROUS SOLDIERS IN UNIFORM, COUPLED WITH TESTIMONY THAT LEONID MILKIN WAS DEPLOYED IN A COMBAT ZONE AT THE TIME OF THE MURDERS, RENDERED THE TRIAL UNFAIR

1. Relevant Facts and Procedural History

Leonid Milkin, the husband of Olga Milkin and father of Andrew and Justin Milkin, was a U.S. soldier stationed in Iraq at the time of the murders. In a motion filed prior to trial, the defense noted that soldiers in uniform had routinely attended pretrial hearings, typically sitting directly behind the prosecutor. CP 6444. The defense requested the court to prohibit that practice during the jury trial to protect Schierman's rights to due process and an impartial jury under the Sixth and Fourteenth Amendments to the U.S. Constitution, and the corresponding provisions of the Washington Constitution. *Id.* Defendant pointed out that soldiers have a special aura of respect during wartime, and that it would appear unpatriotic to side against them during the trial. CP 6448-49.

The defense also requested that if the court were to deny the motion, it permit videotaping of the courtroom in order to make a record of the military presence during trial. CP 6449.

At a hearing on the motion, the defense specifically noted that Leonid Milkin, as well as his supporters, had been appearing in uniform. In addition to objecting to the uniforms, the defense further moved to exclude any testimony that Milkin was fighting for his country in Iraq

when the murders took place. 11/5/09 RP 8-9. Counsel noted that such testimony would be irrelevant and could only inflame the passions of the jury. Instead, counsel suggested that Milkin could simply indicate that he was “out of the country.” *Id.*

The trial court denied the motion regarding uniforms. In its view, they did not tend to signify that the defendant was guilty. *Id.* at 21-22. The court also denied the request to videotape the courtroom so as to make a record. *Id.* at 21. The court ultimately agreed, however, to limit testimony concerning Milkin’s military role as follows: “That he was in the military, on active duty at that time, and stationed outside of the United States at the time of these crimes.” 1/20/10 RP 14.

Leonid Milkin was the State’s first witness. *Id.* at 99. He took the stand in his uniform and explained that he was currently serving at Fort Lewis. *Id.* at 100. In the course of direct examination, the prosecutor asked a series of questions about Milkin’s ability to communicate with his wife, Olga, while he was overseas. This led up to the following:

Q. When you say it was the nature of the communications, what do you mean, why was there a difficulty?

A. Sometime my base would get mortared, and that was the knock out communications.

MR. CONNICK: Objection, relevance.

THE COURT: Overruled

A. Knock out communications, also, whenever soldiers would get killed, a complete communication black out would be imposed on our base.

1/20/10 RP 167.

After Milkin completed his testimony for the day, the court heard argument about the improper testimony. As the defense pointed out, it was obvious that the prosecutor used his line of questioning to “back-door” testimony that Milkin was in a combat zone; whether he had consistent communication with his wife had no relevance to the trial. *Id.* at 170.

The court chastised the prosecutor and Milkin for violating the motion in limine. *Id.* at 172-74. The defense moved for a mistrial. *Id.* at 174. In the alternative, it requested a limiting instruction. *Id.* The court agreed to the latter option. *Id.* at 175. The court rejected Schierman’s proposed instruction (CP 7395-96). Instead, the court instructed the jury as follows:

Testimony yesterday from Mr. Milkin regarding his being stationed in a combat zone in July 2006 is directed to be stricken and should be disregarded by the jury, as it is not relevant to any of the issues presented in this case.

1/21/10 RP 12. The court noted that there were now three individuals in the audience dressed in camouflage fatigues. *Id.* at 8.

A month into the trial, the defense noted that soldiers in uniforms had been attending trial every day. Further, they would sit each day on a bench just outside the door to the courtroom before court began, which meant that the jurors would necessarily file past them. 2/18/10 RP 10. The judge said he had seen the soldiers in front of the doors on only “one or two occasions.” He was not aware of any improper contact between the soldiers and the jurors. *Id.* at 10-11. He declined to change his prior ruling. *Id.*

2. Argument

The presence of spectators or other influences “sending a message” during a trial implicates several constitutional rights. First, it may violate the right to due process under the Fourteenth Amendment. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 1692, 48 L.Ed.2d 126, *reh’g denied*, 426 U.S. 954, 96 S.Ct. 3182, 49 L.Ed.2d (1976) (requiring defendant to appear in jail garb violated due process). This right includes the presumption of innocence. *Id.* at 503. “To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process.” *Id.* One factor which may send an implicit message that the defendant is guilty is the apparent presence of extra security, such as shackling the defendant or maintaining an abnormally large number of security officers. *Holbrook v. Flynn*, 475 U.S. 560, 572, 106 S.Ct. 1340,

1347-48, 89 L.Ed.2d 525 (1986); *State v. Jaime*, 168 Wn.2d 857, 233 P.3d 554 (2010) (holding trial in jail courtroom eroded presumption of innocence). The implicit message promoted by spectators may also violate the Sixth Amendment right of confrontation. *Norris v. Risely*, 918 F.2d 828, 833 (9th Cir. 1990) (in rape trial, presence of spectators wearing “women against rape” buttons “constituted a statement, not subject to cross-examination” that defendant was guilty).

Here, because Leonid Milkin’s entire family was killed, the jurors would naturally feel that he was the true party at interest, rather than the amorphous “State.” They would surely feel some pressure to present him with a conviction and with the strongest penalty. This, in itself, might not overcome the court’s instructions regarding the juror’s duty at the guilt and penalty phases. But here, the jurors had the added pressure of a military presence at trial. With the United States at war in Iraq, most citizens, including the jurors, would consider it their duty to support and respect our troops. The presentation in the courtroom and on the witness stand played to those sentiments.

At the very beginning of the trial, the prosecutor presented Milkin in full uniform. Further, contrary to the court’s ruling in limine, Milkin testified that he was stationed in a war zone where he was the target of enemy mortars. This portrayed him as something of a war hero, risking

his life in Iraq only to face a tragedy at home. Certainly, Milkin deserves honor and respect for his service to our country, but that information was irrelevant and prejudicial in Schierman's trial. The continuous presence of uniformed soldiers in the courtroom reinforced the notion that our armed forces supported Milkin's efforts to achieve justice, and that the jury should support him as well.

It is true that the court ultimately told the jurors not to consider the improper testimony concerning Milkin's presence in a war zone. The U.S. Supreme Court, however, has noted that jurors will not always follow such instructions.

Our faith in the adversary system and in jurors' capacity to adhere to the trial judge's instructions has never been absolute, however. We have recognized that certain practices pose such a threat to the "fairness of the factfinding process" that they must be subjected to "close judicial scrutiny." *Estelle v. Williams*, 425 U.S. 501, 503-504, 96 S.Ct. 1691, 1692-1693, 48 L.Ed.2d 126 (1976).

Holbrook, 475 U.S. at 568. That concern was amplified here by the continuous presence of uniformed soldiers throughout the trial, which made it impossible to put Milkin's comments about warfare out of the jurors' minds.

It is also possible that some of the jurors may have interpreted the presence of the soldiers as part of the court's security for the trial. In *Holbrook*, the Supreme Court found that the presence of an additional four

security officers would not create any undue inferences in a trial involving six defendants. The use of military in a single defendant case, however, would be seen as an unusual security presence.

Several courts have found a due process violation where the offense was against a police officer or prison guard and uniformed colleagues of the victim made their presence known at trial. *See Woods v. Dugger*, 923 F.2d 1454 (11th Cir.), *reh'g denied*, 933 F.2d 1023 (11th Cir.), *cert. denied*, 502 U.S. 953, 112 S.Ct. 407, 116 L.Ed.2d 355 (1991) (defendant accused of killing a prison guard; presence of prison guards in uniform violated due process); *Shootes v. Florida*, 20 So.3d 434 (2009) (capital defendant accused of assaulting police officer; presence of police officers in uniform violated due process); *United States v. Johnson*, 713 F.Supp.2d 595, 616-17, 643-44 (E.D. La. 2010) (capital defendant accused of killing a police officer; trial court finds it erred in permitting multiple officers in uniform to attend trial; error harmless at guilt phase but prejudicial at penalty phase). The same concerns are present when a soldier's family has been killed and the jurors see a continuous presence of uniformed soldiers, obviously expressing solidarity with their comrade's quest for justice.

The trial court focused on the relatively small number of soldiers present at any one time in the courtroom. The U.S. district court in *Norris*

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took a similar approach, finding that the number of women wearing “women against rape” buttons was not large enough to create an unfair trial. *See Norris*, 918 F.2d at 830. The Ninth Circuit, however, focused on the message sent to the jurors rather than on the sheer numbers of spectators wearing buttons. *Id.* at 830-34. Similarly, in this case, the number of uniformed soldiers in the courtroom at any one time may not have been large, but their continuous presence throughout a lengthy trial surely caught the jurors’ attention.

Thus, Schierman’s Fourteenth Amendment right to due process and Sixth Amendment right to confrontation and to an impartial jury were violated here. Further, in part because all testimony at the guilt phase is considered at the penalty phase, the error rendered the death sentence arbitrary and capricious in violation of the Eighth Amendment and Article I, § 14.

J. THE GUILT PHASE JURY INSTRUCTIONS REGARDING PREMEDITATION, VOLUNTARY INTOXICATION, AND LESSER INCLUDED OFFENSES VIOLATED SCHIERMAN’S RIGHT TO DUE PROCESS

1. Procedural History

The trial court rejected three related defense requests for jury instructions. First, the defense objected to WPIC 26.01.01 for the definition of premeditation. CP 7653. The pattern instruction states:

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

CP 7653.

The defense pointed out that WPIC 10.01, defining intent, is essentially the same: “A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.” The defense discussed this problem in their proposed jury instructions.

The two definitions cannot be differentiated. Any intent must involve more than “a moment in time” and WPICs 26.01.01 and 10.01 have no discernible difference. Murder 1° requiring premeditation and Murder 2° requiring intent (i.e., acting with “objective or purpose”) have no difference – both Murder 1° and 2° require a “thinking it over beforehand” to accomplish “a result that constitutes a crime.” Accordingly, the defense requests the United States Supreme Court’s definition in *Fisher* with the emphasis on prior deliberation.

CP 7653.

The defense therefore proposed the following alternative:

Deliberation is consideration and reflection upon the preconceived design to kill; turning it over in the mind; giving it second thought.

Although formulation of a design to kill may be instantaneous, as quick as thought itself, the mental process

of deliberating upon such a design does require that an appreciable time elapse between formation of the design and the fatal act within which there is, in fact deliberation.

The law prescribes no particular period of time. It necessarily varies according to the peculiar circumstances of each case. Consideration of a matter may continue over a prolonged period – hours, days or even longer. Then again, it may cover but a brief span of minutes. If one forming an intent to kill does not act instantly, but pauses and actually give second thought and consideration to the intended act, [he] [she] has, in fact, deliberated. It is the fact of deliberation that is important, rather than the length of time it may have continued.

CP 7652.

This definition of premeditation was held to be “clear, definite, understandable and applicable to the facts developed by the testimony” in *Fisher v. U.S.*, 328 US 463, 467 fn 3, and 470, 90 L.Ed 1382, 66 S.Ct 1318 (1945); *see also* Perkins, *Criminal Law*, 3d ed., Ch. 2, § 1 p. 132, [“the intent to kill must be turned over in the mind and given a ‘second thought.’ [Fn omitted].”

CP 7652. The defense maintained that the failure to adequately instruct the jury on the burden of proof would violate Schierman’s federal constitutional right to due process. *Id.*

The defense alternatively proposed an instruction which it argued would add some clarification to the WPIC:

. . . It is not enough that a person intended to kill or had the opportunity to deliberate; premeditation requires that the person actually engage in the process of reflection and meditation.

Premeditation may be proved by circumstantial evidence only where the circumstantial evidence is substantial.

CP 7814. The defense noted that this language was supported by *State v. Bingham*, 105 Wn.2d 820, 827, 719 P.2d 109 (1986); *State v. Finch*, 137 Wn.2d 792, 975 P.2d 967, *cert. denied*, 528 U.S. 922, 120 S.Ct. 285, 145 L.Ed.2d 239 (1999); and *Austin v. United States*, 382 F.2d 129, 136 (D.C. Cir. 1967).

The defense also suggested a third alternative:

Premeditation must involve more than a moment in point of time; but, mere opportunity to deliberate is not sufficient to support a finding of premeditation.

Rather, premeditation is the deliberate formation of and reflection upon the intent to take a human life and involves the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.

CP 7815.

The trial court refused all of these the instructions and gave the standard WPIC 26.01.01. CP 7834 (instruction 10). The defense noted its exception. 4/7/10 RP 13-17.

The second issue involved the instruction on voluntary intoxication. The trial court gave WPIC 18.10 over defense objection. 4/7/10 RP 17-18. The WPIC states:

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent or premeditation.

CP 7849 (instruction 25). The pattern instruction is taken from RCW

9A.16.090, which states:

No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his or her intoxication may be taken into consideration in determining such mental state.

The defense pointed out that the first clause (that the act committed while intoxicated is no less criminal) “seems to contradict and vitiate” the second clause telling the jury that intoxication may raise a reasonable doubt about the required mental state. 4/7/10 RP 17-18.

Defendant’s proposed instruction clearly explained the legal effect of voluntary intoxication.

The prosecution must prove that the defendant committed Aggravated First Degree Murder with premeditation and/or Murder in the Second Degree with intent. The defendant contends that he did not have the required intent and mental state due in whole or part to his intoxication. However, the defendant does not need to prove that he did not have the required intent and mental state.

CP 7654.

Third, the defense requested lesser included instructions on manslaughter in the first and second degree. CP 7641-51. The court rejected the request, finding no “legal or factual basis.” 4/7/10 RP 11-12.

2. Under the Pattern Jury Instructions There is No Meaningful Distinction Between Intent and Premeditation

Schierman acknowledges that this Court has upheld WPIC 26.01.01 in several cases. *See, e.g., State v. Clark*, 143 Wn.2d 731, 770-71, 24 P.3d 1006 (citing earlier cases), *cert. denied*, 534 U.S. 1000, 122 S.Ct. 475, 151 L.Ed.2d 389 (2001). It is not clear from the opinions, however, that the issue raised in the other cases is exactly the same as that raised here.

Regardless, Schierman asks this Court to reconsider the pattern instructions because they do not differentiate between intent and premeditation in any meaningful way. Forming the intent to kill necessarily involves some thought. Otherwise, the killing would be a mere reflexive action.

It is true that the instruction requires “deliberation,” but it uses that word in a different way from standard definitions. *See, e.g.,* The Oxford American Dictionary (New York: Oxford University Press, 2001) (“Long and careful consideration or discussion.”); Webster’s 3rd New International Dictionary (Springfield, Mass: Merriam-Webster, Inc., 1961) (“The act of weighing and examining the reasons for and against a choice or measure; careful consideration; mature reflection”).

The WPIC, on the other hand, says that the killing may follow “immediately” after intent is formed, and that the thought process has essentially no time requirement. It may be “however long or short.” That it must go on for “more than a moment in point of time” adds nothing of substance.¹⁶ A “moment” or “point” can be arbitrarily small.

The prosecutor’s closing argument in this case demonstrates how the pattern instructions do not differentiate between premeditation and intent. He first told the jurors that it would be wrong to think that premeditation requires the defendant to “meditate” on his plan. 4/8/10 RP 68. “That’s not what the law says.” *Id.* He maintained that not even “five seconds” of thought was required. *Id.*

The prosecutor used baseball examples to illustrate his point. If the pitcher receives the sign from the catcher to throw a fastball and then immediately does so, that would be a premeditated act because the pitcher knew what he was going to do before throwing the pitch. *Id.* at 68-69. On the other hand, if an errant fastball is coming to the batter’s head and he bails out of the batter’s box, that would be an intentional act without deliberation. *Id.* at 70.

¹⁶ The grammar of the phrase is also peculiar. One might speak of a “moment in time” or of a “point in time.” But “a moment in point of time” seems contrary to Standard English usage and has no clear meaning.

In fact, the prosecutor's second example is *not* an intentional act; it is mere reflex. A batter who took the time to form a purposeful intent to avoid the pitch would surely end up lying in the dirt. But the prosecutor was forced to give a faulty example of intent because every truly intentional act fits the WPIC definition of premeditation. By any reasonable definition, it is the prosecutor's *first* example that amounts to intent (the pitcher sees the signal for a fastball and promptly throws one.) There is no true deliberation in that example. A meaningful example of premeditation would involve the pitcher shaking off the signal, the catcher calling time, and the two of them having a discussion on the mound before the next pitch was thrown.

The WPIC is inconsistent with at least some of this Court's precedent. In *State v. Arata*, 56 Wn. 185, 189, 105 P. 227 (1909), the Court overturned an instruction on premeditation because it did not require sufficient contemplation of the act. In that case, the trial court appropriately noted that the jury must find not only that there was time for deliberation, but that it took place. Unfortunately, the trial court then said that "[t]here need be no appreciable space of time between the formation of the intention to kill and the killing." This Court disagreed.

By these few last words the court destroyed at once all that was good in the entire statement, and gave the jury a rule which this court has frequently held was erroneous.

Id.

This portion of *Arata* was cited with approval in *State v. Bingham*, 40 Wn. App. 553, 556-57, 699 P.2d 262 (1985).

Unless evidence of both time for and fact of deliberation are required, premeditation could be inferred in any case where the means of effecting death requires more than a moment in time. For all practical purposes, it would merge with intent; proof of intent would become proof of premeditation.

Id. at 557. This Court affirmed the Court of Appeals in *State v. Bingham*, 105 Wn.2d 820, 719 P.2d 109 (1986). It noted that “[w]e recently approved an instruction which defined premeditation as “the deliberate formation of and reflection upon the intent to take a human life.”” *Id.* at 823, quoting *State v. Robtoy*, 98 Wn.2d 30, 43, 653 P.2d 284 (1982).¹⁷

The instructions offered by the defense in this case made a meaningful distinction between intent and premeditation, but the pattern instruction did not.

In the alternative, if the Court finds that the jury instruction did properly differentiate between intent and premeditation, then the prosecutor’s argument was improper. As noted above, his baseball

¹⁷Overruled on other grounds by *State v. Radcliffe*, 164 Wn.2d 900, 902, 194 P.3d 250, 251 (2008).

analogy clearly did *not* accurately portray either intent or premeditation.

This violated Schierman's Fourteenth Amendment right to due process.

3. The Instruction Regarding Voluntary Intoxication was Contradictory and Ambiguous

As noted above, the pattern instruction regarding voluntary intoxication, like the statute on which it is based, appears to be internally inconsistent. It begins by stating that voluntary intoxication cannot make an act "less criminal." That would seem to rule out the possibility that the intoxication could reduce the level of the crime in any way. But the next sentence says that "evidence of intoxication may be considered in determining whether the defendant acted with intent or premeditation." At best, these apparently contradictory statements would have left the jurors completely confused. Perhaps they might conclude that the second sentence referred to *involuntary* intoxication, since the use of voluntary intoxication had been ruled out. Or perhaps they would just be left with a vague sense that considering intoxication was disfavored. Jurors, after all, do not generally think like lawyers.

This problem could have been avoided. Although the statute is poorly worded, jury instructions based on it need not be. This Court definitively interpreted the statute in *State v. Coates*, 107 Wn.2d 882, 735 P.2d 64 (1987). It explained that the prohibition on making an act "less

criminal” meant that evidence of intoxication “cannot form the basis of an affirmative defense that essentially admits the crime but attempts to excuse or mitigate the actor’s criminality.” Rather, “evidence of voluntary intoxication is relevant to the trier of fact in determining in the first instance whether the defendant acted with a particular degree of mental culpability.” *Id.* at 889. The Court further explained that “[t]he State always has the burden of proving the defendant acted with the necessary culpable mental state.” *Id.* at 890.

This is a sensible interpretation of the statute, but it is not one that would likely occur to jurors based on the instructions given. On the other hand, *Coates* makes it easy to provide a clear instruction. Under the *Coates* analysis, there is no reason to quote the first clause of the statute to the jury. Its only purpose is to explain *to the courts* that voluntary intoxication is not an affirmative defense. With that established, the jurors need only be told that they may consider voluntary intoxication in assessing the defendant’s mental state, and that the State always bears the burden of proving the relevant mental state. That is precisely what the defense proposed instruction says. There is no need to tell the jurors that voluntary intoxication cannot make conduct “less criminal.”

Another problem with the voluntary intoxication instruction is that it did not apply to the aggravating factor of common scheme or plan.

Forming a scheme or plan is a mental state, just like premeditation or intent. The jurors should have considered whether, due to intoxication, Schierman was not acting under any plan at the time of the murders.

4. The Trial Court Erred in Denying Jury Instructions on Manslaughter

Under RCW 10.61.006, a defendant can be found guilty of a crime that is a lesser-included offense of the crime charged, without being separately charged. *State v. Fernandez-Medina*, 141 Wn.2d 448, 453, 6 P.3d 1150 (2000). An instruction on a lesser-included offense is warranted when two conditions are met: 1) each of the elements of the lesser offense must be a necessary element of the offense charged; and 2) the evidence must support an inference that the lesser crime was committed to the exclusion of the greater crime. *Id.* at 454-55.

When determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction.

Id. at 455-56. The court must consider all evidence presented by either side, not merely by the side requesting the instruction. *Id.* at 456.

Here, the trial court was clearly wrong in suggesting that manslaughter in the first and second degree were not necessary elements of the crime charged. First degree manslaughter is committed when a

person recklessly causes the death of another person. RCW

9A.32.060(1)(a).

A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation.

RCW 9A.08.010(c). Second degree manslaughter is committed when a person, with criminal negligence, causes the death of another person.

RCW 9A.32.070.

A person is criminally negligent or acts with criminal negligence when he fails to be aware of a substantial risk that a wrongful act may occur and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable man would exercise in the same situation.

RCW 9A.08.010(d).

The first condition for defendant's proposed lesser-included instruction was met here because all elements of manslaughter in the first and second degree are necessary elements of intentional murder. *See State v. Schaffer*, 135 Wn.2d 355, 356, 957 P.2d 214 (1998), *citing*, *State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997), and *State v. Warden*, 133 Wn.2d 559, 947 P.2d 708 (1997).

When a statute provides that criminal negligence suffices to establish an element of an offense, such element also is established if a person acts intentionally, knowingly, or recklessly. When recklessness suffices to establish an

element, such element also is established if a person acts intentionally or knowingly.

Berlin, 133 Wn.2d at 551.

The second condition was also satisfied. The jury could have found that Schierman disregarded a significant risk when he drank heavily, knowing full well that he had a history of blackouts. Further, the defense presented evidence that Schierman was severely intoxicated at the time of the offense. The jury could have found that this reckless intoxication diminished Schierman's ability to act intentionally, or even to knowingly disregard a risk of harm. *See Berlin* at 552-53 (defendant's intoxication supported lesser-included instructions on manslaughter in the first and second degree); *cf. Warden*, 133 Wn.2d at 563-65 (defendant's diminished capacity due to abuse supported lesser-included instructions on manslaughter in the first and second degree).

It is a violation of the federal due process clause to deny a lesser-included instruction in a capital case when the jury could rationally find that only the lesser offense was committed. *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980).

The State may argue that any error in this regard was harmless since, if the jury rejected second-degree murder, it would have also rejected manslaughter. But as discussed above, the jury never properly

considered Schierman's voluntary intoxication defense due to the confusing jury instructions.

5. The Errors Regarding these Three Jury Instructions Denied Schierman Due Process of Law

In *Middleton v. McNeil*, 541 U.S. 433, 124 S.Ct. 1830, 158 L.Ed.2d 701, *reh'g denied*, 542 U.S. 946, 124 S.Ct. 2930, 159 L.Ed.2d 829 (2004), the Supreme Court addressed a state-court trial in which the judge gave a partially incorrect statement regarding self-defense in one of the instructions. *Id.* at 435. The Court noted that “[i]n a criminal trial, the State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement.” *Id.* at 437, citing *Sandstrom v. Montana*, 442 U.S. 510, 520-521, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. If the charge as a whole is ambiguous, the question is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution.

Id. at 437 (citations and internal quotation marks omitted).

In *Middleton*, the Court rejected the defendant's claim largely because it was raised in a habeas petition, requiring the federal courts to give great deference to the state-court ruling. *Id.* at 437-38. The state court found the four-word error did not likely mislead the jury in view of

the overall charge and the prosecutor's argument, which set out and relied on the correct standard. *Id.* at 435-36. The Supreme Court found that result to be reasonable. *Id.* at 438-49.

Here, however, the errors permeated the guilt phase of the trial, particularly when the three faulty instructions are considered together. The jurors had no meaningful way to distinguish premeditation from intent, they were given an incomprehensible instruction on voluntary intoxication, and they were not permitted to consider manslaughter. Whether the errors are considered singly or together, this Court should find that Schierman's right to due process was violated.

K. THE TRIAL COURT VIOLATED SCHIERMAN'S
CONSTITUTIONAL AND STATUTORY RIGHTS TO
PRESENT RELEVANT MITIGATING EVIDENCE IN THE
PENALTY PHASE

1. Legal Standards

The Eighth and Fourteenth Amendments to the United States Constitution, and Article 1, §§ 3 and 14 of the Washington Constitution, require admission of any relevant mitigating evidence in the sentencing phase of a capital case. *State v. Bartholomew*, 98 Wn.2d 173, 194, 654 P.2d 1170 (1982) (*Bartholomew I*) (citing *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and *Eddings v. Oklahoma*, 455 U.S.

104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)). *See also McKoy v. North Carolina*, 494 U.S. 433, 441-42, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990).

Mitigating evidence includes any facts that do not constitute a legal excuse for the offense but which, in fairness and mercy, may justify a less severe punishment or serve as a basis for a sentence less than death. *Lockett*, 438 U.S. at 604; *State v. Pirtle*, 127 Wn.2d 628, 671, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996). The State cannot bar the defense from presenting relevant mitigating evidence during the penalty phase of a capital trial, and the jury may not be limited in its consideration of such evidence. *Lockett*, 438 U.S. at 604; *Eddings*, 455 U.S. at 113-15. *See also, Buchanan v. Angelone*, 522 U.S. 269, 118 S.Ct. 757, 761, 139 L.Ed.2d 702 (1998). If the jury is precluded from giving effect to a single mitigating factor, the proceeding is constitutionally flawed. *Pirtle*, 127 Wn.2d at 679. “[I]t is not relevant whether the barrier to the sentencer’s consideration of all mitigating evidence is interposed by statute; by the sentencing court; or by an evidentiary ruling.” *Mills v. Maryland*, 486 U.S. 367, 375, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) (citations omitted).

The defendant is entitled to present mitigation evidence so that the jury may “give a ‘reasoned moral response to the defendant’s background, character, and crime’” and prevent it from reacting out of an “unguided

emotional response.” *Penry v. Lynaugh*, 492 U.S. 302, 328, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 184, 108 S.Ct. 2320, 101 L.Ed.2d 155, *reh’g denied*, 487 U.S. 1263, 109 S.Ct. 25, 101 L.Ed.2d 976 (1988) (O’Connor, J., concurring)).¹⁸ Mitigating evidence can be excluded only if it is irrelevant or so unreliable that it has no probative value at all. *Rupe v. Wood*, 93 F.3d 1434, 1440 (9th Cir. 1996), *cert. denied*, 519 U.S. 1142, 117 S.Ct. 1017, 136 L.Ed.2d 894 (1997).

RCW 10.95.070 codifies these requirements. At the sentencing phase the jury may consider “any relevant factors.” Further, the defendant is not restricted to the Rules of Evidence. RCW 10.95.060(3). The jury in this case was properly instructed that as mitigation, it could consider “any fact” about the defendant which in mercy . . . may be considered extenuating” or which “justifies a sentence of less than death.” CP 8318.

In Washington, a defendant may also introduce at the special sentencing proceeding evidence “concerning the facts and circumstances of the murder.” *Pirtle*, 127 Wn.2d at 671.

¹⁸*Abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

2. The Trial Court Erred in Excluding Dr. Cunningham's Actuarial Testimony that Schierman Was Unlikely to Pose a Danger to Others in The Future

(a) *Lack of Future Dangerousness is a Valid Mitigating Factor*

The United States Supreme Court has held that evidence of probable future conduct in prison as a well-behaved, well-adjusted prisoner is relevant mitigating evidence which is appropriately considered by a jury in deciding on a sentence less than death. *Skipper v. South Carolina*, 476 U.S. 1, 4-5, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). Thus,

[i]n the penalty phase of a capital trial, the jury knows the defendant is a convicted felon. But the extent to which he continues to be dangerous is a central issue the jury must decide in determining his sentence.

Duckett v. Godinez, 67 F.3d 734, 748 (9th Cir. 1995), *cert. denied*, 517 U.S. 1158, 116 S.Ct. 1549, 134 L.Ed.2d 651 (1996). This is true even where the alternative to a death sentence is that the defendant would be incarcerated for the rest of his or her life. *Skipper*, 476 U.S. at 5 (“[E]vidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. Under *Eddings*, such evidence may not be excluded from the sentencer’s consideration.” (Footnote omitted)). *See also Finch*, 137 Wn.2d at 863-64.

Further, when the prosecution has argued that future dangerousness is a reason for imposing the death penalty, exclusion of

evidence on this point violates “the elemental due process requirement that a defendant not be sentenced to death ‘on the basis of information which he had no opportunity to deny or explain.’” *Skipper*, 476 U.S. at 5 n.1. *See also, Simmons v. South Carolina*, 512 U.S. 154, 156, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994).

In Washington, the Legislature has expressly provided that the sentencing jury may consider, among other things, “[w]hether there is a likelihood that the defendant will pose a danger to others in the future.” RCW 10.95.070(8).

(b) Relevant Facts

The trial judge in this case instructed the jury that it could consider that “[t]he defendant is unlikely to pose a danger to others in the future” as a mitigating factor if it was supported by the evidence. CP 8318. He also permitted the defense to present the testimony of Eldon Vail, the former head of the Washington Department of Corrections (DOC), to testify about Schierman’s likely conditions of confinement if he were to receive a sentence of life without parole. Vail explained that Schierman would very likely be placed in a maximum security unit where he would have little opportunity to harm others. 4/21/10 RP 47. He acknowledged, however, that Schierman might someday achieve medium custody and have more contact with other inmates, staff and visitors. *Id.* at 155-57.

The defense also sought to present testimony from Dr. Mark Cunningham regarding the specific risk of Schierman committing a violent act while in prison based on an individualized, actuarial analysis. The trial court, however, eviscerated Dr. Cunningham's proposed testimony by requiring him to rely only on studies conducted within the Washington DOC. Because little of the research was done in Washington, the ruling effectively ruled out the actuarial approach, requiring the defense to forego that line of testimony.

Schierman's offer of proof on this issue is contained primarily in a declaration of Dr. Cunningham filed on April 30, 2010 (CP 8261-69) and a proposed PowerPoint presentation (CP 8302-08). The trial court reviewed both documents. 4/29/13 RP 24; 4/30/13 RP 2-3.

Dr. Cunningham is a board certified forensic psychologist. CP 8262. He and his colleagues have conducted extensive research regarding the risk of violence and other misconduct in prison by convicted murderers. CP 8263. He has published approximately 25 peer-reviewed articles on the subject. CP 8263-65.

Dr. Cunningham was prepared to present an individualized risk assessment regarding Schierman, based on "his prior behavior while in incarceration, his age, his level of educational attainment, and other features and characteristics regarding him." CP 8266.

The meaning and relevance to future prison conduct of specific features of Mr. Schierman, including his capital murder conviction and life sentence, will be interpreted in light of group statistical data regarding *similarly situated* inmates.

Id. (emphasis added). The assessment would also take into account such individualized factors as Schierman's "demographic features, adjustment to prior incarceration, [and] offense and sentence characteristics. Dr. Cunningham explained that *all* individual psychological assessments depend in part on some sort of group data.

Violence risk assessment, a particular area of research and knowledge within psychology, also fundamentally relies on the accumulation of group data that are then applied to a given individual.

CP 8267. He noted that actuarial risk assessments are far more scientific than other methods of judging risk such as clinical evaluation. CP 8302 (slide 5).

Dr. Cunningham also pointed out that the scientific research on this issue would not be obvious to the average juror and could in fact be counterintuitive. For example, lay persons commonly believe that a pattern of behavior in the community will be continued in prison although research shows otherwise. Further, studies show that the severity of the offense is not a good predictor of prison adjustment. For example, prisoners serving life without parole are only half as likely to commit

violent misconduct in prison as the parole-eligible prisoners they are incarcerated with.

Because these findings are both counter-intuitive and outside of a capital jury's expected experience and knowledge, and because research has demonstrated that capital juries are concerned with the future violence potential of a capital inmate whether or not it is overtly asserted at trial, it is essential that in any jury consideration of future violence risk in prison be informed by the fundamentally important underlying group statistical data that form the essential foundation for any reliable risk assessment.

CP 8269.

The trial court acknowledged that lack of future dangerousness is a valid mitigating factor and was relevant in this case. 4/29/10 RP 22. Relying on *Morva v. Virginia*, 278 Va. 329, 683 S.E.2d 553 (2009), *cert. denied*, 131 S.Ct. 97, 178 L.Ed.2d 61 (2010), however, the court maintained that any testimony regarding Schierman's dangerousness must be tailored to his personal background. *Id.* at 24. In the court's view, this meant that Dr. Cunningham could not rely in any way "upon his analysis of offenders from other jurisdictions." *Id.* at 25. The court therefore excluded the "vast majority" of Dr. Cunningham's slides, finding them to be "generic." *Id.* at 24. Specifically, of the 42 PowerPoint slides, numbers 6-11, 16-25, 32-34, and 36-39 (CP 8302-08) were completely excluded. Slides 30 and 36-38 could be used only if Dr. Cunningham removed all references to offenders from other jurisdictions. Slides 40-42

(CP 8308), which deal with Washington DOC practices were excluded as cumulative of Eldon Vail's testimony. *Id.* at 26.¹⁹

This left little of any use to the defense. Dr. Cunningham could presumably state his opinion that Schierman would make a positive adjustment to prison based on certain aspects of his background (slide 2). But he could not explain the basis of his opinion because the studies on which he relied were performed outside of Washington.

The defense correctly pointed out that on this and other issues, “[t]he court has decided to substitute its judgment for the judgment of the experts.” 4/29/10 RP 26. The defense noted that it would have to decide whether to call the witnesses in view of the court's rulings. *Id.* at 26-27. The judge directed the defense to advise him of their decision soon. *Id.* at 28.

On the next day, April 30, the defense presented the declaration of Dr. Cunningham and asked the court to reconsider. 4/30/13 RP 2-3. The judge reviewed it and noted that it did not change his ruling. He reiterated that any group statistics must be limited to “the Department of Corrections in the State of Washington.” *Id.* at 3.

¹⁹ The court apparently neglected to make a ruling regarding slide 39 (CP 8308), which lists some measures used to control disruptive or violent inmates.

After making this ruling, and another one discussed below regarding Dr. McClung, the judge asked defense counsel to notify the court and the State “by 4 o’clock tomorrow whether or not you will be calling either Dr. McClung or Dr. Cunningham.” *Id.* at 12. The next day the court said:

The Court received an e-mail as earlier directed by the Court, shortly before 4 o’clock on Saturday, advising the Court and opposing counsel that the defense would not be calling Dr. McClung and Dr. Cunningham . . .

5/3/10 RP 2.

(c) *The Trial Court Erred in Excluding Actuarial Evidence Simply Because the Research was done in Washington*

The trial court’s ruling excluding actuarial risks assessments because they were not specifically validated in the State of Washington appears to be unprecedented. Such tools are routinely used in this State and around the world without separate studies in each jurisdiction.

This Court has explained that actuarial instruments are generally admissible when a prisoner’s future dangerousness is at issue. For example, they are often used in Sexually Violent Predator (SVP) trials to aid in the prediction of an offender’s future dangerousness. *See, e.g., In re Det. of Thorell*, 149 Wn.2d 724, 753, 72 P.3d 708 (2003), *cert. denied*, 541 U.S. 990, 124 S.Ct. 2015, 158 L.Ed.2d 496 (2004); *In re Det. of*

Robinson, 135 Wn. App. 772, 786, 146 P.3d 451 (2006), *rev. denied*, 161 Wn.2d 1028, 172 P.3d 360 (2007). As this Court explained in *Thorell*,

[t]he actuarial approach evaluates a limited set of predictors and then combines these variables using a predetermined, numerical weighting system to determine future risk of reoffense which may be adjusted (or not) by expert evaluators considering potentially important factors not included in the actuarial measure.

Thorell, 149 Wn.2d at 753.

Actuarial instruments are not novel scientific evidence requiring a *Frye*²⁰ hearing and de novo review. *Thorell*, 149 Wn.2d at 755. Rather, they are an aid to expert testimony under ER 702 and ER 703. *Thorell*, 149 Wn.2d at 755-56. Actuarial tools used in such cases include the Minnesota Sex Offender Screening Tool–Revised (MnSOST–R), the Static–99, the Sex Offender Risk Appraisal Guide (SORAG) and the Violence Risk Assessment Guide (VRAG). *In re Audett*, 158 Wn.2d 712, 717, 147 P.3d 982, 984 (2006); *In re Det. of Reyes*, 309 P.3d 745, 759 (Wash. Ct. App. 2013); *In re Det. of Taylor*, 132 Wn. App. 827, 833, 134 P.3d 254, 257 (2006), *rev. denied*, 159 Wn.2d 1006, 153 P.3d 196 (2007); *In re Det. of Strauss*, 106 Wn. App. 1, 4, 20 P.3d 1022, 1024 (2001), *aff'd*

²⁰ See *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) (standard for admitting novel scientific theory or principle is whether it has achieved general acceptance in the relevant scientific community).

sub nom., In re Det. of Thorell, 149 Wn.2d 724, 72 P.3d 708 (2003)
(VRAG).

Washington’s Indeterminate Sentence Review Board (ISRB) routinely relies on actuarial risk assessments when deciding whether to release a prisoner on parole. *See, e.g., In re Dyer*, 157 Wn.2d 358, 372, 139 P.3d 320, 327 (2006) (discussing Dyer’s scores on the MnSOST–R, the Rapid Risk Assessment for Sexual Offense Recidivism (RRASOR), and the Hare Psychopathy Checklist—Revised (Hare PCL–R)).

This Court has also endorsed the use of risk assessments in the family law context, to determine whether a parent is likely to abduct a child to another country. *Katare v. Katare*, 175 Wn.2d 23, 40, 283 P.3d 546, 554 (2012), *cert. denied*, 133 S.Ct. 889, 184 L.Ed.2d 661 (2013) (“Similarly, the risk factor evidence at issue here was ‘directly relevant to whether visitation restrictions were necessary—a determination that unavoidably involved prediction’). That the expert had not personally interviewed the subject did not render his testimony inadmissible. “That an expert’s testimony is not based on a personal evaluation of the subject goes to the testimony’s weight, not its admissibility.” *Id.*

The widely-used actuarial risk instruments are not generally based on Washington data. For example, the Static-99 is based primarily on

subjects from the United Kingdom and Canada.²¹ The RRASOR is based on “populations outside the United States.”²² The MnSOST-R was developed on a sample of 256 sex offenders released from Minnesota prisons during the late 1980s and early 1990s.²³ The VRAG was developed using data from prisoners in Ontario, Canada.²⁴ The SORAG is “closely related” to the VRAG so it presumably relies on similar data.²⁵ The Hare PCL was based on prisoners from the Mission Medium Security Institution in British Columbia, Canada.²⁶

Nevertheless, aside from this case, it does not appear that any Washington judge has found risk assessment tools to be invalid simply because they were based on research outside of Washington. Obviously forensic psychologists do not believe it is essential to validate the tools

²¹ *Taylor*, 132 Wn. App. at 839.

²² See *United States v. Shields*, 649 F.3d 78, 89 (1st Cir. 2011), 132 S.Ct. 1586, 182 L.Ed.2d 200 (2012).

²³ THE MINNESOTA SEX OFFENDER SCREENING TOOL-3.1 (MNSOST-3.1): AN UPDATE TO THE MnSOST-3, Minnesota Department of Corrections, November 2012, available at <http://www.doc.state.mn.us/publications/documents/MnSOST3-1DOCReport.pdf>

²⁴ See Rice, Harris and Lang, *Validation of and Revision to the VRAG and SORAG: The Violence Risk Appraisal Guide – Revised (VRAG-R)*, Vol. 25, *Journal of Psychological Assessment*, No. 3, p. 953 (2013).

²⁵ *Id.* at 952.

²⁶ See Robert D. Hare, *Comparison of Procedures for the Assessment of Psychopathy*, Vol. 53, *Journal of Consulting and Clinical Psychology*, No. 1, p. 7 (1985). See also (for exact location of prison), web site of Correctional Services of Canada, <http://www.csc-scc.gc.ca/institutions/001002-5006-eng.shtml>

separately in each jurisdiction because they rely on these tools throughout the United States.²⁷ If this Court, however, were to uphold Judge Canova's reasoning in Schierman's case, the Court would necessarily invalidate nearly all use of forensic risk assessment tools in Washington. After all, the standards for admissibility of evidence are greatly relaxed for the defense at the penalty phase. If risk assessments are inadmissible in this setting unless specifically validated in Washington, it would follow with greater force that they must be inadmissible in any settings in which the Rules of Evidence apply.

Certainly there is no reason to single out Dr. Cunningham's risk assessment tools. Other courts have found similar testimony from Dr. Cunningham admissible even though his studies were not specific to their jurisdictions. For example, in *Rojem v. State*, 207 P.3d 385, 392, 2009 OK CR 15 (Ok. 2009), *cert. denied*, 558 U.S. 1120, 130 S.Ct. 1065, 175 L.Ed.2d 897 (2010), the trial court prohibited Dr. Cunningham from discussing a study by the U.S. Department of Justice. The Oklahoma Supreme Court found this to be error. *Id.* at 391-92.

²⁷ See, e.g., Vitacco, Erickson, Kurus and Apple, *The Role of the Violence Risk Appraisal Guide and Historical, Clinical, Risk-20 in U.S. Courts: A Case Law Survey*, Vol. 18, Psychology, Public Policy, and Law, No. 3, 361-91 (2012).

Dr. Cunningham's testimony has also been accepted in federal court capital cases, even when it was not as particularized to the defendant as the proposed testimony would have been in Schierman's case.

[T]he defense called expert witness Dr. Mark Cunningham, a board-certified forensic psychologist, who testified as a "teaching witness" rather than a witness specifically evaluating Robinson as an individual, regarding risk assessment of future dangerousness. (R22/22, 26-30.) . . . He testified that, based on a study of 533 inmates commuted from death sentences that had been imposed before the decision in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), there were low rates of serious violence. (R22/50-52, 56-57.) . . .

Cunningham also reviewed other studies demonstrating low rates of violent behavior by those with death sentences commuted to life in prison and by those who had been convicted of capital sentences but not sentenced to death.

Robinson v. United States, 2008 WL 4906272, *6 (N.D. Tex. Nov. 7, 2008) (NO. 4:00-CR-260-Y-2, 4:05-CV-756-Y). *See also*, *United States v. Barnette*, 211 F.3d 803, 810 (4th Cir. 2000) ("Dr. Mark Cunningham presented the most detailed testimony on future dangerousness, providing a risk assessment of Barnette and concluding that there was little likelihood Barnette would commit future violent acts in prison.")

The trial court's reliance on *Morva v. Commonwealth of Virginia*, *supra*, was misplaced. The *Morva* Court did not exclude Dr. Cunningham's testimony on the ground that his actuarial evidence was not specific to Virginia. Rather, the Court held that his proposed testimony

about security measures within the Virginia prisons was irrelevant because it applied to all high-security prisoners and therefore was not specific to the defendant. *Morva*, 278 Va. at 351. This peculiar reasoning has never been accepted in Washington. In fact, the judge in this case agreed that such testimony *was* relevant and therefore permitted the testimony of Eldon Vail.

The proper procedure in this case was to permit Dr. Cunningham to testify about the studies he found relevant, subject to cross-examination and rebuttal. The weight to give the testimony was up to the jury. *See, e.g. Barefoot v. Estelle*, 463 U.S. 880, 898, 103 S.Ct. 3383, 3397, 77 L.Ed.2d 1090, *reh'g denied*, 464 U.S. 874, 104 S.Ct. 209, 78 L.Ed.2d 185 (1983) (psychiatric testimony regarding future dangerousness should generally be admissible, with the weight left to the fact finder); *Thorell*, 149 Wn.2d at 756 (Strauss's arguments challenging the validity of actuarial risk assessments went "to the weight of the evidence rather than its admissibility.") The ruling in *Thorell* was based on the Rules of Evidence. Again, it follows with greater force that such evidence is admissible by the defense at the penalty phase, where the rules for admissibility are relaxed.

In closing argument, the State took advantage of the exclusion of Dr. Cunningham's testimony. The prosecutor noted that lack of future danger was a mitigating factor. "I think that may be why Eldon Vail . .

.was called as a witness.” 5/3/10 RP 52. But he argued, largely based on Vail’s testimony, that Schierman would likely pose a danger in prison.

We know that the defendant has a problem with authority figures, because his stepfather testified to that. Dean Dubinsky said that he [had] a problem with the authority figures.

We know that the defendant will, eventually, have cell mates. We know that he will be in a common area with other inmates. We know that he will have access to a library and gymnasium and to school, and other educational opportunities and to movies and the things like that. We know that he will be in contact with other[s].

5/3/10 RP 52-53. This was precisely the type of argument that Dr. Cunningham could have addressed. He should have been permitted to testify that actuarial evidence showed that Schierman was not likely to be a danger in prison, even if he had contact with other people.

In *Simmons*, 512 U.S. at 156, the defendant’s right to due process was violated when the State argued he posed a danger to others in the future, but the defendant was not permitted to show that he was ineligible for parole. The error here is similar. The State was allowed to argue that Schierman would be dangerous in prison, while Schierman was not permitted to rebut that with the best evidence available.

3. The Trial Court Erred in Excluding Dr. Cunningham's Testimony Regarding Schierman's "Mental Disease or Defect"

The defense also proposed to present testimony through Dr. Cunningham regarding Schierman's "diminished control" due to his traumatic childhood and his addiction to alcohol and drugs. CP 8270-84 (PowerPoint slides). The State objected on the basis that Schierman had not presented a diminished capacity defense at the guilt phase. CP 8140-41.

The court correctly understood the nature of the testimony.

I assume he will produce testimony related to the – concept of diminished capacity as a legal concept, either because of alcohol use, alcohol and drug use, alcohol, drug use and the trauma of all of the physical and emotional abuse...reflected in the records as it was visited upon the defendant by his father...

4/30/10 RP 7-8.

The court excluded the proposed testimony on the ground that it was an attempt to relitigate the guilt-phase issues of intent and premeditation. *Id.* at 9. The court relied on *Oregon v. Guzek*, 546 U.S. 517, 126 S.Ct. 1226, 163 L.Ed.2d 1112 (2006), which held that the defendant had no right to present additional evidence of his alibi defense at the penalty phase of his capital trial. *Id.* at 8-10.

The court's reasoning was faulty. Under RCW 10.95.070(6) the jury may consider:

[w]hether, at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental disease or defect.

The court instructed the jury on this statutory mitigating factor. CP 8318. Nevertheless, the court prohibited Dr. Cunningham from testifying on this very issue.

The court's reliance on *Guzek* was misplaced. In *Guzek*, the United States Supreme Court stated the issue as follows:

Do the Eighth and Fourteenth Amendments grant Guzek a constitutional right to present evidence of the kind he seeks to introduce, namely, new evidence that shows he was not present at the scene of the crime?

Id. at 523. Guzek's death sentence had been reversed and he sought to present new evidence of his alibi defense at the remand sentencing. The Court held that Oregon was not required to admit the evidence at issue because it went to *whether* Guzek committed the crime, rather than *how* he committed it. *Id.* at 524.

The evidence Schierman proposed to introduce regarding his "diminished control," however, was not inconsistent with the jury's finding of guilt. A defendant may be capable of intent and premeditation although his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law is substantially impaired. The legislature obviously recognized that fact because otherwise there

would be no reason for the statutory mitigating factor. Mitigating factors are considered *only* after the jury has found intent and premeditation.

The court therefore erred in excluding this important mitigating evidence.

4. The Trial Court Erred in Excluding The Testimony of Dr. Mark McClung Simply Because The Judge did not Believe that Schierman Suffered Sufficiently Serious Head Injuries

The defense also proposed calling Dr. Mark McClung, a forensic psychiatrist, to testify that organic brain damage diminished Schierman's capacity. An MRI indicated Schierman had suffered a brain injury in the medial right parietal lobe. CP 8259. Dr. McClung's report relied upon findings by Dr. Wendy Cohen,²⁸ M.D, Chief of Service, Neuroradiology, U.W. Medical Center, neuropsychologist Paul O'Connor, Ph.D., and Dr. Richard Adler. CP 8241-8260. Dr. McClung proposed to testify that

the presence of old hemorrhage, along with the pattern of neuropsychological test findings that correlate with the location of the brain injury, are suggestive of ongoing brain function changes as a result of a brain injury.

CP 8260.

Mr. Schierman's brain injury may have had no impact on his subsequent emotions or behavior. However, it is possible that it had an impact on subsequent mood problems and intensity of substance abuse. When Mr.

²⁸ The transcript incorrectly gives the name as "Cowen."

Schierman was intoxicated, the brain injury may have contributed to worsening any problems with loss of inhibitions, interpreting his surroundings, and controlling anger/aggression. Violent offending is correlated with increased incidence of brain injury in offenders; however, specific cause-and-effect has not been established in all but a few specific cases.

CP 8260. This testimony would have provided an additional reason to believe that Schierman had diminished capacity due to a mental disease or defect. *See* RCW 10.95.070(6).

The State objected to Dr. McClung's testimony arguing that the disclosure from the defense came too late, that the opinion "does not meet the *Frye* standard" and that it would be "confusing and unhelpful to the trier of fact." 4/28/10 RP 44, 46.

The trial court received Dr. McClung's written report and the reports he relied on. CP 8241-8260. Dr. Cohen noted that the brain MRI revealed the presence of a "prior hemorrhage, specifically due to prior trauma." CP 8243. *See also* 4/29/10 RP 8. Consistent with that finding, the report from Dr. Adler included family reports of Schierman's previous head injuries from high school football and from abuse by his biological father. CP 8244-46. Dr. Connor specifically confirmed that the original medical records from the football injury were consistent with the MRI; Schierman's headaches after the accident were in the same location as the hemorrhage detected by the MRI. CP 8257. Schierman's symptoms at the

time of the concussion included nausea, vomiting, and disorientation, all of which are consistent with “post-concussive syndrome.” *Id.*

Dr. Adler noted that, regardless of the level of brain injury, an athlete should never return to play before all symptoms have resolved. Yet “[i]t appears that Conner did return to play even though the symptoms of this post-concussive syndrome had not resolved.” CP 8245. Dr. Adler opined that “the effect(s) of the September 1997 trauma was/were more likely made more serious by precedent head trauma.” *Id.* “It is well-accepted that repeat head trauma, particularly in young persons, often has a cumulative effect.” *Id.* He noted “evidence that the defendant was noticeably impacted by the September 1997 concussion.” He listed several specific examples including: inability to wake up after a deep sleep; frequent headaches from the moment he woke in the morning; social withdrawal; a depressive episode leading to a suicide attempt; and marked decrease in classroom performance. *Id.* The temporal connection between the concussion and these effects was confirmed by his mother and one of his high school teachers. CP 8257.

Dr. Connor noted that his neuropsychological testing was “entirely consistent with the evidence of old, hemorrhagic damage in the right hemisphere of [Schierman’s] brain.” CP 8257. Among other things, it explained why Schierman’s non-verbal cognitive functioning was so much

poorer than his verbal functioning. *Id. See also*, CP 8254-56 (regarding the results of the testing). Under normal circumstances the brain injury's impact "is fairly subtle and may be somewhat 'hidden' by [Schierman's] quite good verbal skills." CP 8257. On the other hand,

[I]n situations where his functioning is in some way compromised, for example, when under the influence of alcohol or drugs, the neuropsychological deficits would likely be significantly magnified and could lead to difficulties with impulsivity, poor inhibition, and troubles with problem solving.

CP 8257-59.

As the trial court noted, the family history regarding head injuries was based on Dr. Cunningham's interviews with Schierman and his mother, sister and stepfather. 4/29/10 RP 9.²⁹ This included Kinsey Schierman's recollection that David Schierman, Kinsey and Conner's biological father, threw Conner face first into a brick hearth. *Id.* at 11. *See also*, CP 26879, 26906 (Dr. Cunningham's notes of interviews). Kinsey, Conner and Wendy Dubinsky all discuss another incident in which David slapped Conner in the face so hard that it left marks that could not be covered up and resulted in CPS action. *Id.* at 9-13. Kinsey and Conner both recall Conner being subject to frequent "physical violence" by their father (*id.* at 11), including being "roughed up routinely" and being

²⁹ Dr. Cunningham's notes on the interviews are at CP 26862-26968.

“wrestled and thrown around.” *Id.* at 13. The interviews also include a reference to Schierman receiving a concussion in a football game in 1997. 4/29/10 RP 16.³⁰

Conner Schierman provided the most detailed information about his head trauma. When he was young, David would often shake him by the shoulders with his head flopping down. David would also frequently throw him against a wall or to the ground, and would sometimes kick him down the stairs. David would often slap him hard to the face. CP 26935. One time when Conner was nine or ten, David held Conner over his head and slammed him to the floor. Conner struck his head on a stone hearth. He was disoriented and stunned and had trouble walking. CP 26938. By late high school (which would have been after the football concussion) Conner often woke up with crushing headaches, which were worst on the right side and back of the neck. This was accompanied by nausea and light sensitivity. The symptoms were sometimes so severe that he could not go to work. CP 26926.

Despite all this evidence, the court concluded that all of Dr. McClung’s testimony should be excluded because, in the court’s view,

³⁰ During the penalty phase Schierman’s mother, Wendy Dubinsky, testified that Schierman suffered a concussion in high school. 4/27/10 RP 89-92. This testimony was not challenged by the State.

there was no evidence Schierman ever suffered sufficiently serious head injuries to cause lasting problems. 4/29/10 RP 16-19. Thus, the proposed expert testimony was “based upon a faulty foundation.” *Id.* at 20.

As noted above in section K(2)(b), the defense found it fruitless to present Dr. McClung in view of this ruling.

As with Dr. Cunningham’s testimony, the trial judge essentially substituted his opinion for those of the experts. Throughout the hearing on April 29, 2010, he expressed a skeptical and sarcastic view of the expert’s reports. *Id.* at 5-20. In particular, he maintained that the experts had no basis to believe that Schierman suffered more than one head injury. *Id.* In fact, as discussed above, the history included not only the well-documented football concussion, but also a long-term history of severe, physical abuse by David Schierman, which included head injuries. Whether Schierman’s history of head injuries was sufficient to diminish his capacity was a matter for the experts – not the trial court – to decide. It appears that the trial judge was skeptical of the history provided by Schierman and his family members. But it is improper for the court to make such credibility determinations. *See, State v. Eaton*, 30 Wn. App. 288, 291-93, 633 P.2d 921 (1981) (expert medical testimony may be based on symptoms reported to the expert by a non-testifying defendant). *Accord, State v. Lucas*, 167 Wn. App. 100, 110, 271 P.3d 394, 398 (2012).

The trial judge further erred in excluding the evidence because, in his view, it was not based on a “reasonable medical certainty.” That standard might apply at the guilt phase of the trial, which is held under the Rules of Evidence. But even then, the standard for expert testimony on diminished capacity is not high. In *State v. Ellis*, 136 Wn.2d 498, 963 P.2d 843 (1998), the trial court excluded evidence at the guilt phase of a capital trial because, in its view, the testimony did not satisfy the “*Edmon*”³¹ factors. One of those factors was that the expert’s opinion must be given to a “reasonable medical certainty.” This Court reversed the trial court, noting that the *Edmon* factors were unduly restrictive. *Id.* at 855-56. It did not specifically address whether the “medical certainty” standard was improper.

It is clear, however, that that standard is improper when the defense presents mitigating evidence at the penalty phase. The standard for admissibility is simply “relevance.” *See* section K(1), above.

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

ER 401. Thus, the testimony of Dr. McClung was relevant as long as it made it “more probable” that Schierman suffered from a mental disease or

³¹*State v. Edmon*, 28 Wn. App. 98, 621 P.2d 1310, *rev. denied*, 95 Wn.2d 1019 (1981).

defect which impaired his capacity to understand the wrongfulness of his actions or to behave lawfully. *See* RCW 10.95.070(6).

Clearly, that standard was satisfied here. While it was not certain that Schierman's head injuries were serious enough to diminish his capacity, all the experts agreed there was good reason to believe that was the case (particularly when Schierman's alcohol and drug abuse was taken into account). As discussed in section K(2)(c), above, any weaknesses in this expert testimony went to weight and not admissibility. The prosecutor would, of course, have been free in cross-examination to make any of the points the trial court did when excluding the evidence.

5. The Trial Court Erred in Excluding Over Forty Defense Mitigation Witnesses and in Strictly Limiting the Testimony of the Witnesses who Testified

On April 13, 2009, pretrial hearings on the penalty phase began. 4/13/10 RP 12. The trial judge noted that the defense had added significantly to its initial disclosure of mitigation witnesses filed four months earlier. 4/13/10 RP 13. The new list included 79 witnesses. *Id.* The document listed the witnesses, their relationship to Schierman, and the proposed testimony, including his gentle nature, compassion, love of animals, family dynamics, efforts at recovery, and the effect of his

parents' divorce. CP 7931-35³². In response, the State filed a motion to exclude most of the witnesses as cumulative. CP 7921-7935. *See also*, 4/13/10 RP at 21-24.

In response, the defense noted that the trial court had, over defense objection, permitted the State to present at the guilt phase dozens of cumulative witnesses – particularly as to the firefighters and other first responders – because each allegedly had a particular perspective. 4/13/10 RP 25. Counsel pointed out each mitigation witness had something unique to say about Schierman. 4/13/10 RP 26. He noted that there were many mitigation witnesses because there were many people who knew Schierman and his background. *Id.*

The trial judge granted the State's motion, initially limiting the defense to 12 family members, 2 teachers and 15 other witnesses. *Id.* at 32-33. He specifically prohibited more than one treatment professional from Lakeside-Milam. *Id.* at 33, 56-57.

The court also ruled that lay persons could not offer their opinions about how Schierman's life experiences, including abusive parenting, affected him. *Id.* at 29-30. He made a small exception for Schierman's mother, who was permitted to talk about the effect his father's absence

³² It does not appear that the defense filed this document, but it is attached to the State's motion to exclude witnesses.

had on him, but “school counselors or friends” could not address that issue. 4/13/10 RP 30. The judge ruled that no penalty phase witness was permitted to testify about his or her opinion about the proper penalty to be imposed. *Id.* at 40. In addition, no witness could “testify regarding the impact of a death sentence or the defendant’s execution on them or anyone to whom they may refer.” *Id.* at 89.

As a result of the Court’s ruling, the defense filed “Defense List of Select Witnesses forced by Court and Offer of Proof on Excluded Witnesses,” CP 7889-7900, and a supplemental proffer at 7940-7941. In those documents, the defense set out a more detailed offer of proof regarding the excluded witnesses. The defense also moved to have the Court reconsider the limitations it placed on the defense. CP 7906-7914. After reviewing the new submissions, the court approved a small increase in defense witnesses:

I’m going to allow the defense to add, if they choose, the Reverend Tuny, I’m going to allow the defense to add, if they choose, Ed Morrison, I’m going to allow the defense to add two additional family members of the defense choosing, and as I’ve indicated already, I’m going to allow the addition of the three new witnesses from the department of adult juvenile detention.

In all other respects the court is denying the motion for reconsideration. The defense has made its selections within the numerical limits set by the court. I’ve reviewed again, as I’ve said, the more detailed summaries of testimony.

Nothing in those additional summaries changes the court's opinion and the basis for its earlier ruling.

4/15/10 RP 104.

The court specifically excluded the testimony of Michael Christensen, Schierman's uncle. 4/26/10 RP 10. Christensen, a former corrections officer, proposed to testify about the value of Schierman's continuing efforts to reach out to his family in a correctional setting.

4/26/10 RP 11. The court ruled this testimony was neither relevant nor probative. *Id.*

The court, on its own motion, limited the testimony of witnesses regarding their own lives and backgrounds:

I want to caution counsel for the defense. I have noticed a pattern throughout the examination of...both family and friends witnesses. It is not relevant about what those witnesses' children do for a living; how many grandchildren they have. None of that is relevant and will not be allowed from future witnesses.

It is neither probative nor relevant to any of the issues present in this phase of proceedings.

4/26/10 RP 13-14.

The State moved to exclude any testimony from Schierman's sister, Kinsey, about the effect of their biological father's anger and unpredictable behavior on her. 4/22/10 RP 15. The court permitted her to testify only about their father's effect on Schierman. *Id.* at 16. She was

also prohibited from testifying that she was proud of her brother's recovery at Lakeside-Milam. *Id.*

The defense submitted 54 photos of Schierman at various stages of his life to be admitted through Schierman's mother. The trial judge – on his own motion – limited the defense to 12 photos. The court also limited the defense to presenting 12 pieces of Schierman's artwork. 4/26/10 RP 151. The defense could not even present a photo showing all of his art at once. 4/27/10 RP 18.

The court erred first by excluding numerous witnesses on the basis that their testimony was cumulative. Much of the excluded testimony would have gone to Schierman's ability to form strong social bonds with others, and to touch their lives in positive ways. *See, e.g.*, CP 7893 (summary of Erica Akingcoye's proposed testimony).³³ That Schierman was able to form pro-social relationships with so many people from so

³³ 20. ERICA AK.INGCOYE - Erica is Conner's cousin. Conner and Erica saw each other each summer when Conner came to visit his mother's family. They attended vacation bible school together. Conner enjoyed the outdoors; they would hike; look for bugs and he had a great love for all animals big and small; growing up Conner was never mean or hateful; in fact he was a joy to be around; Wendy was the dominant parental influence while Conner's father was absent when she was around him; Conner was always bold and full of adventure; he was compassionate and confident; he was never afraid to be himself; Conner became her friend over time; they enjoyed writing and talking. At a reunion in 2003 they had a wonderful time and she saw many positive ways in which Conner was growing and maturing; they talked about their passions and the future – he wanted to work with animals; in jail Erica learned of Conner's increased relationship with God and was astounded by the way he was approaching such a terrible change in his life – he worked on himself; his love of learning was evident; Conner was never a whiner and never talked about his troubles but he was also a tremendous listener.

many walks of life is in and of itself proof of his “character.” The fact that these people were all shocked, saddened and bewildered by his acts of violence says something about the person Schierman was when he was not drinking or taking drugs. To a large extent, the sheer number of witnesses was the very point: a person who has touched and enhanced the lives of many people will likely be seen as more deserving of leniency than one who has done so with few people.³⁴

Such considerations do not generally apply at the guilt phase of a trial. For example, there is no need for two firefighters to testify if they played the same role in stopping the fire and made the same observations. Nevertheless, the trial court permitted the State to present redundant testimony from 22 firefighters covering over 1,000 transcript pages.

The trial court’s restriction on the witnesses discussing their own lives and family relationships raises similar concerns. The issue at the penalty phase is not merely whether the defendant has social relationships with friends, family, and other associates, but what sort of people these are. As the saying goes, “You are judged by the company you keep.” That a witness has her own close-knit group of loving friends and family and

³⁴ For example, in *State v. Davis*, 175 Wn.2d 287, 320, 290 P.3d 43, 57 (2012), *cert. petition filed* Apr. 5, 2013, the prosecutors noted in penalty phase closing argument that the defendant could find only a few friends and family members to testify on his behalf.

leads a pro-social life is relevant in assessing the value of her testimony that she would include Schierman in that group. *Cf. Williams v. Taylor*, 529 U.S. 362, 372 and n.4, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (district court noted that trial counsel failed to call some mitigation witnesses, and that the testimony of “a respected CPA in the community could have been quite important to the jury.”)

The court also erred in excluding lay testimony regarding the effect on Schierman of domestic violence and divorce. The court believed that friends and even school counselors were “unqualified” to make such a connection. In fact, even when the Rules of Evidence apply, lay witnesses may testify to the effect of abuse on others. *See State v. Claffin*, 38 Wn. App. 847, 690 P.2d 1186 (1984), *rev. denied*, 103 Wn.2d 1014 (1985) (in prosecution for indecent liberties and related crimes, child’s father was properly allowed to testify concerning his daughters’ unusual behavior around the time of the alleged abuse; “... parents long have been allowed to testify as to a child's physical appearance after sexual abuse ... and we can find no reason why radical behavioral changes are any more speculative.”).

The court likewise erred by forcing the defense to choose between James Aiken and Eldon Vail regarding the conditions of confinement in prison. 4/19/10 RP 22. The defense understandably chose Vail due to his

experience running Washington's DOC. But as counsel pointed out, Aiken provided a valuable and different perspective as an expert not only on Washington's system, but on those of other states. 4/13/10 RP 34-38. *See* also CP 7917-20; CP 7942-44 (declarations of Aiken). Counsel noted that Schierman might at some point be placed in a system different from the one familiar to Vail. 4/13/10 RP 35.³⁵

The proposed testimony of Kinsey Schierman on the effect of her father's abuse and unpredictability on her was relevant and probative. Because Kinsey and Conner grew up in the same household, it would be a reasonable inference that Conner would be affected in a similar way. To be sure, Kinsey could testify to outward signs of the effect on her brother. But her direct experience in dealing with that trauma would have been more powerful.

The trial court's exclusion of *any* testimony from Michael Christensen is especially puzzling. As a close relative of Schierman's *and* a former corrections officer, he was in a unique position to discuss Schierman's efforts to maintain family ties while incarcerated in the King County Jail.

³⁵*See, e.g., In re Matteson*, 142 Wn.2d 298, 300, 12 P.3d 585, 586 (2000).

The restrictions on photos of Schierman growing up are troubling in light of the trial court's decision to permit the State to admit the memorial video. *See* section L, below. That video dwells at length on still and moving pictures of the victims at all stages of their lives. Schierman argues below that it was error to focus to such an extent on the victims' life histories. But at the very least, the defendant should have had an equal opportunity to show that he, like the victims, had once been a child, loved and valued by his family.

Schierman should also have been permitted to present testimony regarding the effect of an execution on friends and family of the defendant because it is circumstantial evidence of his importance to them, which reflects on his character. It is true that this Court ruled otherwise in *State v. Stenson*, 132 Wn.2d 668, 753, 940 P.2d 1239, 1282 (1997), *cert. denied*, 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998). Other courts, however, have ruled that the Eighth Amendment requires the admission of such evidence.

The Oregon Supreme Court has permitted the presentation of testimony about the anticipated negative effect of his execution on others because it suggests something particular about his character and background.

While the witness's testimony may not offer any direct evidence about defendant's character or background, it does offer circumstantial evidence. A rational juror could infer from the witness's testimony that she believed that her daughter would be affected adversely by defendant's execution because of something positive about his relationship with his daughter and because of something positive about defendant's character or background. Put differently, a rational juror could infer that there are positive aspects about defendant's relationship with his daughter that demonstrate that defendant has the capacity to be of emotional value to others. In that inference, a juror could find an aspect of defendant's character or background that could justify a sentence of less than death.

State v. Stevens, 319 Or. 573, 584, 879 P.2d 162, 168 (1994). *See also*,

United States v. Wilson, 493 F.Supp.2d 491, 506-07 (E.D.N.Y. 2007)

(how Wilson's family would feel if he were executed may fairly be considered part of Wilson's "background").

In view of these well-reasoned cases, this Court should reverse its ruling in *Stenson*.

6. The Exclusion of Mitigation Evidence was Prejudicial, Particularly when Considered Cumulatively

The trial court's rulings eviscerated Schierman's penalty phase presentation. The jury never heard:

- actuarial testimony that Schierman would not present a danger to others in prison;
- expert testimony that Schierman's ability to control his actions and to understand their wrongfulness was diminished due to a history

of abuse by his father and long-term addiction to drugs and alcohol;

- expert testimony that his control was further diminished due to brain injuries;
- a wealth of indisputably relevant testimony from over 40 witnesses excluded as “cumulative”; and
- the effect that Schierman’s execution would have on friends and family members.

These improper exclusions violated Schierman’s right to present mitigation under the Eighth and Fourteenth Amendments to the United States Constitution, and Article 1, §§ 3 and 14 of the Washington Constitution. The State cannot show that any one of the trial court’s exclusions was harmless beyond a reasonable doubt. It follows with much greater force that the combined effect of the trial court’s rulings was not harmless.

L. THE TRIAL COURT VIOLATED SCHIERMAN'S RIGHT TO DUE PROCESS BY PERMITTING THE STATE TO INTRODUCE "VICTIM IMPACT" TESTIMONY THAT ENCOURAGED THE JURY TO APPLY THE DEATH PENALTY IN AN ARBITRARY MANNER

1. Relevant Facts

(a) *Memorial Video*

The State proposed to admit a video that was produced for the victims' memorial services. 4/15/10 RP 109-110. The defense position was that the State should be limited to one "in-life" photograph of each victim. *Id.* at 111-112. The defense argued that the video was intended to inflame the jury against the defendant. 4/19/10 RP 3-10. The prosecutor agreed that a video "communicates more to a jury than a still photograph," but maintained that the video was not inflammatory. 4/15/10 RP 114.

The trial judge reviewed the video and heard argument from both parties as to its admissibility. 4/15/10 RP 114; 4/19/10 RP 3-10. The judge found that the only objectionable portion of the video was the music. 4/19/10 RP 9. The video was admitted as State's Exhibit 1 and played for the jury without sound. 4/20/10 RP 39. The video begins with the words "In Loving Memory" and then moves to scenes of the burned residence, including the crime scene tape around the house. There is also a view of the flowers, balloons and notes left at that crime scene. Two other segments are captioned "Our Prayers Go Out to You" and "What we have

ever once enjoyed we can never lose . . . all that we love deeply becomes a part of us.” The video has pictures of each of the victims from a very young age. There is a clip of Olga with her newborn son in a hospital birthing suite, home videos of Justin and Andrew, and pictures of Olga and Lyuba as girls. There are many pictures of the extended family. The video ends with the phrase “you are gone but not forgotten, still alive in our hearts.”

At several points, the video fades from a still picture of one of the victims to a view of blue sky with wispy clouds, clearly connoting the victims’ souls rising to Heaven. At one point there is an animated graphic of the sun setting, apparently representing the ending of the victims’ lives.

The 15-minute video appeared to be professionally produced. It was clearly designed to tug at the heartstrings of the viewer.³⁶ It focused on all the most sentimental moments of the victims’ lives: the wedding of Olga and Leonid; the new mother kissing her newborn baby; the older brother hugging his toddler sibling; the father smiling fondly at his son.

³⁶ Schierman does not wish to demean the victims, their families, or the producers of this video in any way. The video was entirely appropriate for its intended purpose, that is, a memorial service for the victims. Its effectiveness, however, is the very reason it was inappropriate for use in court.

One segment in particular gives a good sense of how the video creates the maximum dramatic effect. At 11:40, the following words appear in large, flowing letters:

“You are gone
but not forgotten
Still alive in our hearts . . .”

Immediately following is video apparently taken from an airplane flying through clouds at sunset, clearly evoking the Heavens. The clouds then slowly fade away to reveal a gorgeous still photo of Lyuba standing on a bluff above a beautiful, blue sea. She has an expression of ecstasy as she looks upwards with one arm outstretched. The video then zooms in on her as she fades away into clouds. The video returns to the same still photo several times, at one point dissolving her image once again into the clouds.

The prosecutor described the memorial video as focusing “on family, the focus on faith, the focus on children, is exactly who these people were.” 4/19/10 RP 4. The defense argued that the video went much further than “in-life photos.” *Id.* at 7. Rather, it was a “well crafted, well engineered, religiously themed video[] to inflame the jury.” 4/19/10 RP 9. Counsel were correct.

We urge the Court to view the exhibit itself. A picture is worth a thousand words.

(b) *Victim Impact Testimony*

Lybov Botvina testified that she was the grandmother of Justin and Andrew Milkin and the mother of Olga Milkin and Lyuba Botvina. 4/19/10 RP 109. She came to the United States from the Ukraine in 1993 to get an education because that was not allowed in “the communist country.” *Id.* at 111. She and her family were refugees sponsored by the Catholic Church. *Id.*

Lybov described Olga as a loving mother, student and member of the “Christian Faith Center.” 4/19/10 RP 115. She testified about the trauma of being called to the fire department. *Id.* at 118. She said that she did not work for six months thereafter, nor celebrate holidays. *Id.* at 119, 123. Her youngest daughter had been so traumatized that she moved away. *Id.* at 112.

She described Olga as “full of faith, loving God.” *Id.* at 121. The prosecutor asked if the murders had “shaken her faith,” and she responded “it did not shake my faith, no.” *Id.* at 124. He asked: “Have you or your husband ever wished that you never came to this country from the Ukraine because of what happened?” *Id.* at 124. She replied: “Yeah, that’s what

my husband say, if I would know, I will lose my girl, I would have stayed in Ukraine no matter what.” *Id.*

Pavel Milkin testified that Andrew and Justin were his grandsons. *Id.* at 125. He, too, explained that his family (including Leonid) were political refugees from the Soviet Union. *Id.* at 126. He said that because his family believed in God, the family had a “really hard time” in the Ukraine. *Id.*

The prosecutor asked: “When you are a political or a religious refugee, how do you come to the United States from a place like the Soviet Union, how does that happen?” *Id.* at 127. Milkin answered:

We really want to be – have freedom, and when it’s Mr. Gorbachev open the gates to going where people wanted to feel free, and then we using this window and came to United States.

4/19/10 RP 127. On questioning from the prosecutor, Milkin discussed the need to find a sponsor and the reasons they chose to settle in Seattle. *Id.* at 127. He also described his relationship with his grandsons and daughter-in-law. *Id.* at 129-143.

Yelena Shidlovsky, Lyuba’s and Olga’s sister testified that Lyuba’s “faith was incredible.” *Id.* at 146. She discussed Olga’s activities teaching Sunday school and explained how Andrew and Justin went to

two churches. *Id.* at 151-152. The prosecutor asked: “How important was faith in Olga’s life?” *Id.* Shidlovsky replied:

Just like it was earlier said by my mom, we grew up, and pretty much the reason why we left former Soviet Union is because of religious persecution, and as a result we knew that this is something – freedom to really believe in God freely is something absolutely amazing and we should really treasure that, and knowing that you can freely go on Sunday to church was absolutely a privilege, and having a Bible, read the Bible, as well, and so for her that was just the cornerstone, this was something that was an important part of her life daily life. I’m not talking about Sundays, I’m talking about the conversation I had with her at some point when I was working during the work hours.

I called her and asked simple question, what are you doing? She said, “I’m just reading my Bible,” and that’s not something to brag about, that’s just that the fact that that was her life, to read the Bible and really believe according to the principles and be a good example. That’s why she was absolutely loved and adored by people around her. She had a lot of friends.

4/19/10 RP 152-53.

The prosecutor then asked whether the murders had affected her sense of security. *Id.* at 157. Shidlovsky responded that it had and that she had moved to the 20th floor of a building which had security cameras. *Id.*

Shidlovsky said the funeral was a horrific experience and that she could not say goodbye “because the caskets were closed, locked, the bodies were charred...” *Id.* at 159. The prosecutor asked a final open-

ended question: “Is there anything else that you’d like to tell us about, either, your sisters or your nephews?” *Id.* at 160. She said:

The bond we had as sisters has been shattered, crashed with images that we’ve seen here in court, disgusting, the stabbing, the blood, the fire, it’s really hard to realize that this is all reality.

Id.

Finally, the State called Leonid Milkin. He described how he had immigrated to the United States at 13. At that time he spoke no English. *Id.* at 162. He met Olga in high school and they were married in their early 20s. *Id.* at 162-63. Leonid explained that he enlisted in the army and was away from the family. *Id.* at 165. He explained how Olga bought and remodeled the family home while he was away. *Id.* at 167-168.

Leonid was permitted to testify about how his wife called him while he was in basic training to discuss the purchase of a house. 4/20/10 RP 19-21. When he returned home nine weeks later “everything was done.” *Id.* at 21. Leonid said that Olga wanted to become a nurse but he thought she would be a great surgeon. *Id.* at 24. He recalled how she saved a young patient from painful teeth extraction by recommending another doctor. *Id.* at 25. Leonid testified that Olga attended two churches. *Id.* He said that she was “very active” in ministering to others. 4/20/10 RP 26.

Leonid testified that Justin was popular with his peers. *Id.* at 28. He loved animals. *Id.* The prosecutor asked if Leonid had “a favorite sort of memory...about how unique Justin was?” *Id.* at 29. Leonid then described several memories. *Id.* at 29-33. Leonid described Lyuba as a “great” aunt who loved both boys. *Id.* at 34.

Leonid said that he had numerous pictures and videos of the family. *Id.* at 37. He said he looked at them on a regular basis because “that’s the only thing I have left in my family.” *Id.* at 38. O’Toole then asked whether a video had been shown at the memorial service. *Id.* at 39. Leonid said that there was and the memorial video was then admitted over objection and played to the jury. *Id.* At the close of the video Leonid said: “Can I say something?” 4/20/10 RP 40. When the prosecutor agreed, he said:

The last thing I want to say was about Olga, my wife, Olga, she was an amazing person. She was – she was everything and all I ever wanted. She was a great mother, a great wife, she was my best friend...I loved her. She was my soul mate and something I can never, never, replace, basically.

04/20/10 RP 40. The State then rested. *Id.*

2. Legal Standards

In *Bartholomew II*, supra, this Court strictly limited the State’s penalty phase case-in-chief to the defendant’s criminal record and the aggravating factors proved in the guilt phase. This left no room for

evidence of victim impact. Likewise, the U.S. Supreme Court initially found that victim impact testimony violated the Eighth Amendment.

While the full range of foreseeable consequences of a defendant's actions may be relevant in other criminal and civil contexts, we cannot agree that it is relevant in the unique circumstance of a capital sentencing hearing.

Booth v. Maryland, 482 U.S. 496, 504, 107 S.Ct. 2529, 2533, 96 L.Ed.2d 440, *reh'g denied*, 483 U.S. 1056, 108 S.Ct. 31, 97 L.Ed.2d (1987).

Victim impact testimony “creates an impermissible risk that the capital sentencing decision will be made in an arbitrary manner.” *Id.* at 505. For example, some families may be able to express their grief and loss in an “articulate and persuasive manner” while others “may be less articulate in describing their feelings even though their sense of loss is equally severe.”

Id.

Certainly the degree to which a family is willing and able to express its grief is irrelevant to the decision whether a defendant, who may merit the death penalty, should live or die.

Id.

Nor is there any justification for permitting such a decision to turn on the perception that the victim was a sterling member of the community rather than someone of questionable character. This type of information does not provide a principled way to distinguish[cases] in which the death penalty was imposed, from the many cases in which it was not.

Id. at 506 (citations and internal quotation marks omitted; alteration in *Booth*).

The *Booth* Court also rejected a second type of victim impact testimony: “the family members’ opinions and characterizations of the crimes.” *Id.* at 508.

[T]he formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant.

Id.

Two years later, the U.S. Supreme Court reached the same result where the prosecutor commented on personal qualities of the victim he inferred from the victim’s possession of a religious tract and voter registration card. *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876, *reh’g denied*, 492 U.S. 938, 110 S.Ct. 24, 106 L.Ed.2d 636 (1989).

While in this case it was the prosecutor rather than the victim’s survivors who characterized the victim’s personal qualities, the statement is indistinguishable in any relevant respect from that in *Booth*.

Id. 490 U.S. at 811.

In *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720, *reh’g denied*, 501 U.S. 1277, 112 S.Ct. 28, 115 L.Ed.2d 1110 (1991), the United States Supreme Court overturned *Booth* and *Gathers* to some

extent. The Eighth Amendment no longer erected a per se bar to victim impact testimony, but the *scope* of such testimony was still limited by the Due Process Clause of the Fourteenth Amendment. *Id.* at 825. The vote was six to three, but the three-Justice concurrence of Justice O'Connor (joined by Justices Kennedy and White) represents the holding of the Court on many points since it is more limited than the reasoning of the other three Justices in the majority.

Justice O'Connor noted that the rule in *Payne* overturns only half of the ruling in *Booth*; it does not affect the prohibition on "opinions of the victim's family about the crime, the defendant, and the appropriate sentence." *Id.* at 833.³⁷ Further, Justice O'Connor stressed that the elimination of the per se bar was not an invitation to admit victim impact testimony.

We do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We hold merely that if a State decides to permit consideration of this evidence, the Eighth Amendment erects no per se bar. If, in a particular case, a witness's testimony or a prosecutor's

³⁷ This Court has recognized the limited holding of *Payne*:

The Eighth Amendment prohibits the introduction of victim evidence and argument relating to the characterizations of the crime, the defendant, and the appropriate punishment. In overruling *Booth*, the *Payne* court explicitly retained the Eighth Amendment proscription against the introduction of victim evidence and argument concerning the crime and the appropriate sentence.

Pirtle, 127 Wn.2d at 672 (citations omitted). *See also Gregory*, 158 Wn.2d at 854.

remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment.

Id. at 831 (citation and internal quotation marks omitted). Justice O'Connor recognized the role of trial courts to exclude evidence that is "unduly inflammatory" and the role of appellate courts to "carefully review the record to determine whether the error was prejudicial." *Id.* at 831.³⁸ She found that the "line was not crossed in this case" where a single witness provided "brief" testimony that the surviving child victim cried for his missing mother and sister. *Id.* at 831.

All the Justices agreed that juries should not use victim impact testimony "to find that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy." *Id.* at 823.

Following *Payne*, lower courts have carefully limited victim impact evidence because it "involves the risk of injecting arbitrary factors into a capital sentencing hearing." *State v. Barnard*, 608 So.2d 966, 968 (La. 1992).

³⁸ A fourth Justice concurred on the latter point. "Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation." *Id.* at 836, (Souter, J. concurring).

[I]ntroduction of detailed descriptions of the good qualities of the victim or particularized narration of the . . . sufferings of the victim's survivors, which go beyond the purpose of showing the victim's individual identity and verifying the existence of survivors reasonably expected to grieve and suffer because of the murder, treads dangerously on the possibility of reversal because of the influence of arbitrary factors on the jury's sentencing decision.

Barnard, 608 So.2d at 972.

The more a jury is exposed to the emotional aspects of a victim's death, the less likely their verdict will be a 'reasoned moral response' to the question whether a defendant deserves to die; and the greater the risk a defendant will be deprived of Due Process.

Cargle v. State, 909 P.2d 806, 830 (Okla. Crim. App. 1995), *cert. denied*, 519 U.S. 831, 117 S.Ct. 100, 136 L.Ed.2d 54 (1996). Extensive details of this nature amount to a eulogy to the deceased.

Evidence about the victim's childhood and maturation have a similar effect, and are likewise irrelevant.

Comments about the victim as a baby, his growing up and his parents' hopes for his future in no way provide insight into the contemporaneous and prospective circumstances surrounding his death; nor do they show how the circumstances surrounding his death have . . . impacted a member of the victim's immediate family.

Conover v. Oklahoma, 933 P.2d 904 (Okla. Crim. App. 1997), citing *Cargle*, 909 P.2d at 828.

Washington's due process and cruel punishment clauses place additional limitations on the State's presentation of evidence at the penalty

phase. Const. Art. I, §§ 3 and 14. As noted above, *Bartholomew II* limited the State's penalty phase case-in-chief to the defendant's criminal record and evidence concerning statutory aggravating factors that would have been admissible at the guilt phase. *Bartholomew II*, 101 Wn.2d at 642-43. This holding was later harmonized with the victim's rights amendment to permit victim impact statements. *State v. Gentry*, 125 Wn.2d 570, 888 P.2d 1105, cert. denied, 516 U.S. 843, 116 S.Ct. 131, 133 L.Ed.2d 79 (1995). This Court warned, however, that such evidence must be strictly limited in view of *Bartholomew II*.

Because we conclude that victim impact statements do not per se violate the Washington State Constitution, this does not mean that any and all such evidence is admissible. Under *Bartholomew II*, ER 403 applies to capital sentencing proceedings. This allows a trial court to place certain reasonable limits on the amount and scope of victim impact evidence. The Supreme Court of California, which allows victim impact evidence in a capital case, warns that such evidence is not without limits. We agree. The jury must face its obligations soberly and rationally, and should not be given the impression that it may allow emotion to reign over reason. Therefore, in each case it is the trial court's function to strike a careful balance between the probative and the prejudicial.

Gentry, 125 Wn.2d at 642. The Court acknowledged the "danger" that victim impact testimony

will really result in allowing "victim worth" evidence and that the murder of more reputable victims may result in the death penalty for a defendant whereas the murder of those with less stature may not.

Id. at 629. The Court concluded, however, that such concerns did not justify banning all victim impact testimony. *Id.* In *Gentry* itself, the father of the victim limited his testimony to his daughter's interests and plans for the future, and the family's grief over her loss. *Id.* at 617.

Dissenting Justices Johnson, Madsen, and Utter argued that victim impact testimony inevitably draws the jury's focus to

emotional factors, the status of the victim in the community (i.e. "victim worth"), or the eloquence of the victim's friends and family, rather than . . . rational consideration of the defendant's individual culpability.

Id. at 678. "Such statements may unnecessarily supply jurors with information on the victim's race, religion, and social class." *Id.*

These inflammatory factors cannot help but infect the jury's decision-making process, leading to inconsistent imposition of the death penalty, thereby rendering the sentencing proceeding fundamentally unfair and denying the due process of law guaranteed in the Washington Constitution.

Id. at 679.

3. The Victim Impact Testimony in this Case Crossed the Lines Established by the U.S. and Washington Supreme Courts

In this case, the victim impact testimony went far beyond what is permitted by the federal and state due process clauses and the state cruel punishment clause. The extensive testimony from four witnesses, and the memorial video, cast an unrelenting focus on the worth of the victims and

their families. The themes throughout were the victims' goodness, beauty, piety, and glorious struggle to free themselves from communist oppression so that they could practice their Christian religion.

The memorial video, in particular, could only serve to inflame the passions of the jury. This case appears to be the first time that issue has arisen in Washington, but courts in other states have viewed with disfavor victim impact videos that are too lengthy, depict childhood pictures of adult victims, or are accompanied by evocative music. *See, e.g., United States v. Sampson*, 335 F.Supp.2d 166, 192 (D.Mass. 2004) (discussing preclusion of victim impact video 30 minutes in length featuring pictures "from birth to college"); *Salazar v. State*, 118 S.W.3d 880, 882-85 (Tex.Ct.App. 2003) (vacating sentence rendered due to 17-minute victim impact video containing 140 still photographs that spanned entirety of victim's life, including childhood).

Courts must exercise great caution in permitting the prosecution to present victim-impact evidence in the form of a lengthy videotaped or filmed tribute to the victim. Particularly if the presentation lasts beyond a few moments, or emphasizes the childhood of an adult victim, or is accompanied by stirring music, the medium itself may assist in creating an emotional impact upon the jury that goes beyond what the jury might experience by viewing still photographs of the victim or listening to the victim's bereaved parents." In order to combat this strong possibility, courts must strictly analyze evidence of this type and, if such evidence is admitted, courts must monitor the jurors' reactions to ensure that the proceedings do not

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become injected with a legally impermissible level of emotion.

People v. Prince, 40 Cal.4th 1179, 57 Cal.Rptr.3d 543, 156 P.3d 1015, 1093 (2007), *cert. denied*, 552 U.S. 1106, 128 S.Ct. 887, 169 L.Ed.2d 742 (2008).

Although the trial court excised the evocative music from Exhibit 1, that did not cure the overwhelmingly inflammatory nature of the video. It contained material that other courts have specifically found inadmissible, such as childhood photographs of adult victims – from birth to death. It hammered home the victims’ religious faith through inspirational images of the Heavens.

In upholding the use of a video in one capital case, the California Supreme Court emphasized that it did not include many of the elements present here.

The videotape is an awkwardly shot “home movie” depicting moments shared by Lance with his family shortly before he was murdered. The videotape does not constitute a memorial, tribute, or eulogy; it does not contain staged or contrived elements, music, visual techniques designed to generate emotion, or background narration; it does not convey any sense of outrage or call for vengeance or sympathy; it lasts only eight minutes and is entirely devoid of drama; and it is factual and depicts real events.

People v. Dykes, 46 Cal. 4th 731, 785, 209 P.3d 1, 48 (2009).

Here, the memorial video was professionally produced rather than a “home movie;” it did “constitute a memorial, tribute, or eulogy;” it did

contain “staged or contrived elements” and “visual techniques designed to generate emotion;” and it was certainly dramatic.

The prosecutor’s closing argument made explicit the themes evoked in the testimony and video. He pointed out that the victims had come to the United States for “one of the four freedoms” and that they were “the kind of people who live the classic American story.” 5/3/10 RP 40. He said that the victims “were two families that embodied the American dream” and that they gave “service” to their country. *Id.* at 47. In contrast, the prosecutor argued that Schierman had never been held accountable in his life and always had people “answering for him.” *Id.* at 54. He said that Schierman had led a privileged life including “vacations all over the country.” *Id.* at 55. He pointed out that Schierman had a “support system.” *Id.* at 56.

The prosecutor even compared the artwork made by the children to the artwork done by Schierman in jail.

It may not be Origami, taken up in the King County Jail for whatever purposes it might be used later. I would suggest to you that it is true artwork, true beauty in a child, but we don’t have that any more, because Justin’s home was burned to the ground hours later.

Id. at 42-43.

The prosecutor focused on the victims’ religion. He reminded the jury that he had asked about one of the victim’s faith in God. *Id.* at 39.

He asked the jury to recall the testimony about how Olga was “full of faith” and she loved God and served the church in the daycare. *Id.* at 39. He referred to the victims at least twice as “those four good people.” 5/3/10 RP 26, 36.

He also urged the jury to recall and rely on the memorial video. He stated that Olga was a “joy” and said: “You saw those images on the video. Any doubt that that is true?” *Id.* When speaking about one of the boys, the prosecutor said: “Do you remember the video? You can watch the video again during your deliberations.” *Id.* at 41-42.

Overall, the presentation in this case clearly crossed the line from victim impact to victim worth, a danger recognized by this Court and the U.S. Supreme Court. Just as the dissenting justices in *Gentry* feared, the focus turned to the victims’ status in the community, the eloquence of their family, and the victims’ religion. The presentation amounted to a eulogy – in words and images – to the victims. The unrelenting focus on the victims’ Christian religion and their saintly nature, including the religious imagery in the video, was particularly troubling. Christianity is, of course, the dominant religion in our country and state, so it seems likely that many of the jurors shared the victims’ religious beliefs.

It does not appear that the defense specifically objected to any of the victim impact testimony other than the memorial video. This Court

has held, however, that it will be more liberal in reviewing issues at the penalty phase of a capital trial. *See* section A, above. Further, as the U.S. Supreme Court has noted, the defense risks alienating the jury if it challenges testimony about the victims' good character. *Booth*, 482 U.S. at 507.

M. THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO USE A "TREATMENT JOURNAL" WHEN CROSS-EXAMINING SCHIERMAN'S STEPFATHER

1. Relevant Facts

Marilyn Lagerquist treated Schierman at Lakeside-Milam. 4/21/10 RP 94. When Schierman was admitted, he was depressed. *Id.* at 101. He was in the "late stage of alcohol and drug addiction." *Id.* at 105. Lagerquist described the course of Schierman's treatment. *Id.* She said he was dependent upon alcohol, amphetamines, cocaine and marijuana. *Id.* at 122.

Lagerquist testified that patients were instructed to write a journal as a part of their treatment. She said that it was common for patients to both exaggerate and minimize their experiences. *Id.* at 126-27. She testified that the treatment agency now recommended that patients later destroy their journals because the journals came from "a very toxic person, and their brain has been very affected by the drugs and alcohol..." *Id.* at 127-28.

Prior to the penalty phase, the State apparently gave notice that it intended to impeach certain mitigation witnesses with statements from a treatment journal. There was no testimony about where this journal came from, whether it was signed or how it was otherwise authenticated. The defense objected to the introduction of information from the journal citing *State v. Bartholomew*. The defense also argued that the State knew that none of the witnesses had ever seen Schierman's journal. 4/19/10 RP 47. The State argued that "there is an abundance of foundation, from the defendant's own writings and his descriptions to others of his past life." *Id.* at 45.

The court stated:

The fact that the witness has never seen the journal . . . maybe doesn't know at all about this incident, doesn't change the fact that there was a good faith basis for asking the question.

Id. at 48. The court made no other findings as to why information from the journal might be admissible on any basis.

The prosecutor used the journal in the cross-examination of Dean Dubinsky, Schierman's stepfather. Dean testified generally on direct examination about Schierman's upbringing, alcohol and drug problems, and his efforts at treatment and counseling.

Dean noted that Schierman visited his father David every other weekend. 4/20/10 RP 53. Dean knew that Schierman came from an alcoholic family. *Id.* at 49. Before Dean married Wendy, Schierman had tried to commit suicide. *Id.* at 60, 58. That led to counseling. *Id.* at 59. Nonetheless, Schierman lacked self-esteem. 4/20/10 RP 70. Schierman's father consistently told him that he was "worthless," messed up" or "screwed up." *Id.* at 70. His parents did not see signs of Schierman drinking excessively in high school. *Id.* at 68. But David was rarely sober. *Id.* at 69.

When Schierman turned 19, Wendy and Dean kicked him out. *Id.* at 72. Schierman became distant from the family. *Id.* at 75. Around the same time, Schierman's sister attempted suicide. *Id.* at 76. During her treatment, Wendy and Dean went to counseling at Lakeside-Milam. *Id.* at 77. Later Schierman returned to his father because he had no other place to live. *Id.* at 79-80. When that ended he returned to the Dubinsky home, but he was drinking heavily and disappearing for days. *Id.* at 80-81.

In the fall of 2004, Schierman was living with Mike Holley. *Id.* at 82. Schierman locked himself in his room after he had been drinking. 4/20/10 RP 83. But he refused to get help. *Id.* at 84. Wendy tried to see Schierman but he rebuffed her. *Id.* at 93. He disappeared again. *Id.* at 94. When he reappeared he was unwashed and looked terrible. *Id.* at 95. He

had a gun and was threatening suicide. *Id.* At that point Schierman went to Lakeside-Milam. *Id.* at 96.

Schierman completed a 28-day program. *Id.* at 100. He then moved into an Oxford house for 18 months. *Id.* at 101. Dean never worried about Schierman harming anyone. 4/20/10 RP 104. He had never seen Schierman combative. *Id.* at 106.

On cross-examination, the State had the journal marked as State's Exhibit 2. *Id.* at 115. The prosecutor asked Dean if he recognized "that photocopied collection of papers?" *Id.* He said that he did not. He stated that because the journal had come up in pretrial hearings, defense counsel sent him some items he believed were excerpts the day before. *Id.* at 115-116. The excerpts were typewritten but the original was handwritten. *Id.* at 116.

The prosecutor then asked about a journal entry describing "stealing cigarettes and clothes and getting in fights." *Id.* at 117. He then asked about the entry, "I was a really good actor." *Id.* at 118. Dean pointed out that he had already testified that he believed Schierman had a problem with authority. *Id.* at 119.

The prosecutor then read the following quotation from the journal:

[T]here was an incident when visiting my dad, I don't remember what set him off, but we ended up fighting, having played soft, JV, and varsity football all at once, I

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was a brick, excuse me, shithouse. Needless to say, I made short work of him, and didn't spend any weekends with my dad for a while after that.

4/20/10 RP 120. The prosecutor then read the following quote, which he characterized as referring to Schierman's father.

I put the back of his head through his wall a couple of times and he fell over. He lay there for a while. I formulated a plan, I decided to tell him in the morning, and knowing he wouldn't remember, that late in the night he went into a rage and punched a couple of holes in the wall. I gave his right hand a good couple stops till I heard bones break. This was to back up the wall-punching alibi.

Id. at 123-124. Dean replied:

I don't recall Dave ever having a broken hand and I don't remember – he never called to discuss with us about an assault like this that would have taken place. I would have imagined that there would have been some sort of communications, parent to parent, if there was something like this going on.

Id. at 124.

The prosecutor also asked whether Dean was aware that Schierman's drug use affected the animals. Dean said he was not. *Id.* at

122. The prosecutor then read the following excerpt:

I could lick the sweat off my upper lip and taste coke and E.

When I would handle animals, like puppies and kittens, they would start to act very weird. I believe some of the residual drugs came out in sweat and they soaked it up when I would hold them.

Id. at 122. Dean simply answered: "That was not in the excerpt." *Id.*

The prosecutor then read the following excerpt:

[I]t was around this time that I also started experimenting with hallucinogens, mostly shrooms and AMT, but I did acid a few times. I never had a bad time on shrooms. I would mostly watch movies, talk with fellow shroomers, look at blacklight posters and laugh like an idiot. It was the AMT that would really get me disconnected. I got lost in the U District for about 9 hours one time and ended up beating the shit out of a homeless person that I thought was an alligator.

4/20/10 RP 122-123. The prosecutor then asked: “does it change at all how you view the possibility of substance abuse affecting Mr. Schierman in terms of violently?” *Id.* at 123. Dean said that “all I can go on are by my personal experiences.” *Id.*

The prosecutor read the following quotation: “I had several close calls with police, often with handcuffs on, in the back of a cruiser, yet I never was arrested.” *Id.* at 125. Dean responded: “I would imagine he would have ended up in jail or we would have gotten a phone call or there would be some sort of write-up by the police office.” The only thing he was aware of was a speeding ticket. *Id.*

The prosecutor read the following quote:

I would get into fights, fall downstairs, all without remembering a lick of it. After a bad episode at a bar, where I sent one guy to the ER and just about broke another guy’s neck.

Id. at 126. O'Toole asked whether Dean was aware "of any of that kind of violence on the part of Mr. Schierman?" *Id.* Dean said: "Not until last night." *Id.* at 127.

On redirect, the defense brought out that these quotations were from a treatment journal, yet none had been corroborated. 4/20/10 RP 127-28. When defense counsel tried to question Dean about other, more exculpatory, entries, the prosecutor objected.

MR. O'TOOLE: Your Honor, I'll make the same objection. There is no foundation, this is hearsay.

MR. CONROY: Your Honor, this is the same journal.

THE COURT: I'll sustain the objection, there was no foundation. This witness has not indicated he's ever seen that portion of the journal. The questions from Mr. O'Toole were about the excerpts of the journal which had been sent to this witness by defense counsel yesterday, that he had reviewed.³⁹

MR. CONROY: All right.

BY MR. CONROY:

Q. How about page 3377, that talks about resentments, did you receive a copy of that at all?

A. No, no, I did not.

Q. Okay. How about page 3376, where it talks about third step, daily reading, and first step worked perfect every day, did you receive a copy of that?

³⁹ In fact, as noted above, O'Toole read many excerpts after establishing that Dean was not aware of them.

A. This was not part of the excerpts that I received.

Q. It appears to have a listing of places or jobs or something like that.

Did you receive that at all?

MR. O'TOOLE: Object.

THE COURT: Counsel, the witness just testified he hasn't seen that document before. Don't ask him what's on the document or testify yourself about what's on the document.

MR. CONROY: That's fine, Your Honor.

THE COURT: Thank you.

BY MR. CONROY:

Q. How about page 3373, did you receive a copy of that page, that talks about various things?

A. No, I did not.

Q. Okay. How about 3372, it talks about or appears to talk about foods and things.

Did you receive a copy of that page?

A. No, I did not.

Defense counsel then asked:

Q. Okay. Mr. Dubinsky, does the select references that Mr. O'Toole has chosen to excerpt from this journal, does that change your opinion or your testimony about how this tragedy has impacted your family and Conner?

MR. O'TOOLE: Objection on the grounds of relevance.

THE COURT: Sustain the objection.

4/20/10 RP 129-131.

2. Argument

The prosecutor's use of the journal put improper information before the jury.

RCW 10.95.070, entitled "Special sentencing proceeding—Factors which jury may consider in deciding whether leniency merited," provides:

In deciding the question posed by RCW 10.95.060(4), the jury, or the court if a jury is waived, may consider any relevant factors, including but not limited to the following:

(1) Whether the defendant has or does not have a significant history, either as a juvenile or an adult, of prior criminal activity.

In *Bartholomew II*, this Court held that

the due process and cruel punishment provisions of this state's constitution are offended ... in any case involving capital punishment by (1) allowing the introduction of any evidence regardless of its admissibility under the rules of evidence, including hearsay evidence, and (2) by allowing evidence of defendant's prior criminal activity regardless of whether defendant was charged or convicted as a result of such activity.

Bartholomew II, 101 Wn.2d at 640. The Court explained its rationale as follows:

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.

We deem particularly offensive to the concept of fairness a proceeding in which evidence is allowed which lacks reliability. 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.

Bartholomew II, 101 Wn.2d at 640. Part and parcel of that constitutional guarantee of fairness, the Court explained, was the requirement that the statutory mandates under RCW 10.95.060(3) to admit “any relevant evidence” during the special sentencing proceeding, and under RCW 10.95.070 for the jury to consider “any relevant factors”, must be limited to mitigating factors. The admission by the court and consideration by the jury of aggravating factors, on the other hand, must be restricted to meet the evidentiary, state and federal constitutional standards we have articulated. “Specifically, evidence of nonstatutory aggravating factors must be limited to the defendant’s criminal record, evidence that would have been admissible at the guilt phase, and evidence to rebut matters raised in mitigation by the defendant.” *Bartholomew II*, 101 Wn.2d at 642.

By “criminal record,” this Court meant that only the defendant’s “record of convictions” would be admissible. *Bartholomew I*, 98 Wn.2d at 197; *see also State v. Brown*, 132 Wn.2d 529, 622, 940 P.2d 546 (1997) (prior conviction evidence constitutionally permissible when limited to

record of convictions). To establish a defendant's criminal history, "adjudications of guilt" may be admitted, while "mere allegations or charges not resulting in convictions" are inadmissible. *Pirtle*, 127 Wn.2d at 668-69 (emphasis omitted) (citing *Bartholomew II*, 101 Wn.2d at 641).

The dispositive inquiry is whether the prior adjudication is "sufficiently reliable to warrant admission." *Pirtle*, 127 Wn.2d at 669; *State v. Roberts*, 142 Wn.2d 471, 527-28, 14 P.3d 713, 744 (2000), *as amended on denial of reconsideration* (2001). In *Bartholomew I*, the Court emphasized that objective, reliable evidence was admissible because of its value to the jury. *Bartholomew I*, 98 Wn.2d at 196. In *State v. Lord*, this Court said that the trial court must, therefore, employ a balancing test to determine the proper scope of cross-examination or the admissibility of rebuttal evidence:

The court must balance the extent to which the evidence tends to rebut defendant's mitigating information against the extent to which the evidence is otherwise prejudicial to defendant. Only if the rebuttal value of the evidence outweighs the prejudicial effect should the evidence be admitted.

Lord, 117 Wn.2d at 891 (quoting *Bartholomew II*, 101 Wn.2d at 643 (quoting *Bartholomew I*, 98 Wn.2d at 198)).

Here, the prosecutor attempted to "impeach" Dean Dubinsky with other criminal acts. Any probative value of the rebuttal, however, did not

outweigh the unfair prejudice. Dean never made sweeping statements about Schierman's peacefulness. He limited his comments to what he had personally observed in particular situations, while acknowledging that he "had heard some stories . . . about Conner being in a fight at a bar or something." 4/20/10 RP 104. Even if it were true that Schierman engaged in some violent acts that Dean did not know about, that would not meaningfully impeach his testimony. Schierman's boastful statements about his fighting ability, however, undoubtedly had a strong impact on the jury. Further, as Dean seemed to suggest in his testimony, some of the journal entries were likely exaggerated or completely fictional. *Cf. State v. Hanson*, 46 Wn. App. 656, 731 P.2d 1140, *rev. denied*, 108 Wn.2d 1003 (1987) (in a prosecution for assault in which defendant arguably put his character for peacefulness at issue, prosecutor improperly cross-examined defendant about his fictional writings, which included a violent character similar to himself). For example, Dean found it unlikely that he would not have heard of Schierman's father, David, having a broken hand had that truly happened, and the State never presented any evidence that David suffered such an injury. Similarly, Dean doubted the journal's account of the number and severity of Schierman's supposed run-ins with the police because Dean would likely have at least received a call from the police. The State made no attempt to corroborate the truth of any of the

information in the journal, including police records, which presumably would be readily available to the State. A witness from Schierman's treatment program noted that journals often contained unreliable histories.

The trial judge did not engage in any analysis on the record as to the prejudice or the probative value of the impeachment. He seemed to view it as sufficient that the journal was written by the defendant. The prosecutor's use of the journal therefore violated Washington's due process clause as interpreted in *Bartholomew*, as well as the federal due process clause.

Worse yet, the trial court also erred in forbidding Schierman's counsel to rehabilitate Dean with the positive aspects of the journal. The only conceivable basis for the prosecutor's cross-examination would come from ER 405, which permits cross-examination regarding specific incidents under some circumstances when a character trait of a person is at issue. The original proponent of the character evidence, however, has the opportunity to rehabilitate the witness.

The provision in Rule 405(a) allowing inquiry into specific incidents on cross-examination has been held to also allow such inquiry on redirect examination when, in context, the purpose of redirect examination is to impeach a party's own witness.

5A Wash. Prac., Evidence Law and Practice § 405.6 (5th ed.) citing *Government of Virgin Islands v. Roldan*, 612 F.2d 775 (3d Cir. 1979), *cert. denied*, 446 U.S. 920, 100 S.Ct. 1857, 64 L.Ed.2d 275 (1980).

Further, the defense had a right to complete the picture under ER 106:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it.

The prosecutor left the impression that Schierman portrayed himself in his own writings as a more violent person than the one Dean knew. The defense had a right to introduce more positive aspects of Schierman's writings.

By permitting the State to cherry pick those places where Schierman described anger or violence, without permitting proper redirect, the jury was left with a very skewed picture. The entire journal was marked as Penalty Phase Exhibit 2 and is in the record. It is 53 pages long. It begins with a poem and a five-page prayer. CMS 3334-3335.⁴⁰ The biographical section goes on for 23 pages. CMS 3339-3364. There, Schierman describes his nearly lifelong addictions. He wrote that he had

⁴⁰ "CMS" is the Bates prefix for the prosecutor's page numbering on this Exhibit.

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his first drink in seventh grade. CMS 3339. He describes his father's drinking and violence. He recounts his suicide attempts. CMS 3343, 3349, 3361. He describes his drug-induced hallucinations and blackouts. CMS 3345, 3358.

But he also describes his efforts at sobriety and his remorse about the effect of his addiction on his mother and stepfather. CMS 3351. The reference to "close calls with the police" appear to be times when the police noticed that Schierman was high in public. CMS 3352. Schierman also wrote about his return to his biological father's home in his late teens. At that time, his father had resumed excessive drinking and again physically attacked Schierman. CMS 3354. Throughout the journal there are expressions of guilt and remorse. *See e.g.* CMS 3349, 3351, 3356, 3362. He states that he is thankful that he has a "family that loves me enough to help me save my life." CMS 3363.

In particular, the State's excerpts, chosen to portray Schierman as violent, were taken out of context. For example, the entry regarding Schierman having a fight with his father was preceded by a lengthy paragraph describing how his father had thrown him down 19 stairs more than once. CMS 3340-3341. Schierman discusses a time in his sophomore year when his father "ended up fighting me." CMS 3342. He notes that by that time he was much bigger and stronger, implying that his

father was no longer a physical threat to him. CMS 3342. The portion emphasized by the prosecutor – “needless to say I made short work of him” – was actually crossed out by Schierman. CMS 3343. Schierman also notes that: “The last straw with my dad was him pulling a butcher knife on me.” CMS 3354.

In regard to the quotation regarding Schierman putting his father’s “head through the wall” the prosecutor ended his quotation with Schierman saying that his “alibi” would be that his father hurt himself while drunk. But the text continues as follows:

I guess I felt guilty about what I’d done defending myself, and didn’t want him to feel bad for how he acted. This is the last time I can remember trying to protect him.

CMS 3348. Thus, instead of appearing to engage in gratuitous violence against his father, the full text shows that Schierman defended himself and then tried to protect his father from realizing how he had attacked his son. Also lost in the prosecutor’s selective presentation was the theme that any violence between Schierman and his father was part of a long history of his father’s physical abuse.

The prosecutor’s objection based on hearsay should have been overruled for two reasons. First, neither side was technically submitting the journal entries for the truth of the matter asserted, but rather to support or impeach Dean Dubinsky’s testimony. *See* 5A Wash. Prac., Evidence

Law and Practice § 405.6 (5th ed.) Second, the rules of evidence do not apply in any event to the defense at the penalty phase of the trial.

Further, since the purported purpose of the cross-examination was to see whether it changed Dean's assessment of Schierman's character, it was error for the court to prohibit the defense from asking that very question on redirect.

The admission of the journal evidence was exceedingly prejudicial, especially since the jury heard only the very worst entries. As the prosecutor pointed out in the penalty phase closing argument, one relevant mitigating factor was Schierman's lack of significant criminal history. The prosecutor said: "He doesn't have any prior police contact that you know of." 5/3/10 RP 50. But the prosecutor mentioned Schierman's statements in the treatment journal regarding his contact with the police and the fact that the "defense would suggest to you that it is a journal for therapy or treatment." *Id.* He then said:

Who would believe that? Believe it? Don't believe it.
Disregard it.

Id.

Thus, the court's ruling excluding Schierman's attempted redirect testimony violated Washington's rules of evidence, Schierman's federal

due process right to rebut the State's penalty phase evidence,⁴¹ and Schierman's right to present mitigating evidence under the Eighth and Fourteenth amendments and Article I, §§ 3 and 14 of the Washington Constitution.

N. THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE UNRELIABLE HEARSAY STATEMENTS ATTRIBUTED TO SCHIERMAN REGARDING A "BUCKETFUL OF KNIVES" AND A "HOT CHICK"

1. Relevant Facts

Christopher O'Brien testified that he was friends with Schierman. He knew Schierman abused drugs and alcohol. 4/21/10 RP 67-68. Schierman was well liked and loved his mother, stepfather and sister. *Id.* at 71. O'Brien also discussed Schierman's drug and alcohol treatment. *Id.* at 73-74. Defense counsel asked no questions about the police investigation or about O'Brien's views on Schierman's guilt.

When the State cross-examined O'Brien, the prosecutor asked about a statement he had given to the police in 2006 when they were investigating the murders. That statement was apparently very much consistent with O'Brien's testimony on direct examination. *Id.* at 79-82. Nonetheless, the prosecutor used the statement to ask if the defendant was

⁴¹ See *Simmons v. South Carolina*, supra.

promiscuous when he drank. *Id.* at 81. O'Brien responded that Schierman was friendly and sometimes flirtatious when he drank. *Id.* at 81-82.

The prosecutor also asked about two statements O'Brien had relayed to the police but attributed to Mark Nanna.⁴² *Id.* at 82-83. The prosecutor suggested that Nanna told O'Brien that Schierman "had a bucketful of knives." 4/21/13 RP 83. O'Brien did not recall using that phrase but agreed that he told Detective Porter that Nanna helped Schierman move and might have some useful information. *Id.* at 83. Nanna, at some point, also told O'Brien that Schierman said there was a "hot chick across the street, washing her car in a bikini." *Id.* at 84. O'Brien said that he had not observed the knives or heard the comment.

The prosecutor read to O'Brien the following excerpt from Detective Porter's notes:

Nanna told O'Brien that Schierman had a bucketful of knives and that he observed Schierman playing with a knife similar to the first knife found at the crime scene, and Nanna also said that Schierman made a comment about the quote, hot chick, unquote, across the street, washing her car in a bikini. O'Brien also provided me with contact numbers for each person on our list for the previous week, including Nanna.

⁴² He is also referred to as Mark Gallante in the transcripts and clerk's papers. According to Chris O'Brien, "Nanna is now Gallante." 4/21/10 RP 86.

Id. at 85-86. O'Brien agreed that Nanna made the statement about the bikini but did not know whether Nanna was referring to a time before Schierman moved near the Milkin house. *Id.* at 86-87.

The court took a break and the defense returned with an objection and request to strike the question and answer regarding the hearsay from Nanna. The defense argued that it was inadmissible under the hearsay rules and under *State v. Bartholomew*. *Id.* at 88. The court overruled the objection and stated that the prosecutor had not admitted the statements "for the truth of the matters being asserted." 4/21/10 RP 90. Instead, they were "offered to indicate that O'Brien had heard them from Mr. Nanna, allegedly statements made by the defendant, and that, in fact, those statements were then conveyed to the police." *Id.* The court then gave the jury the following limiting instruction:

The testimony of Mr. O'Brien relates to the statements by Mr. Mark Nanna to Mr. O'Brien are not admitted for the truth of the matters asserted by Mr. Nanna to Mr. O'Brien, they are only admitted for the limited purposes of considering Chris O'Brien's testimony that Mark Nanna made these statements to him.

Id. at 93.

On April 27, 2010, the defense filed a written motion to strike the Nanna hearsay. CP 8145-49. This included a transcript of Detective Porter's interview of Mark Nanna, in which he denied any recollection of

seeing the knives or hearing the “hot chick” statement. CP 8147-48. Counsel pointed out that there was no good faith basis for the prosecutor’s cross-examination since he knew that Nanna would deny making the statements. CP 8148. The defense also noted that the prosecutor’s questioning did not rebut anything presented by the defense. CP 8147. The questioning was irrelevant and unfairly prejudicial under ER 401-03; it violated *Bartholomew*’s due process restrictions on the prosecutor’s rebuttal evidence, and it violated Schierman’s Sixth Amendment right to confrontation. CP 8146-48.

On April 28, 2010, the court considered the motion to strike the testimony regarding the “bucketful of knives” and “the hot chick.” The State believed its questioning was justified because it was not hearsay, but rather, offered to show O’Brien’s “state of mind.” 4/28/10 RP 4-5. In the State’s view, O’Brien had testified sympathetically towards the defendant but the evidence that he felt compelled to tell the police about Nanna’s statements “contravened” his sympathetic view of Schierman. *Id.* at 8.

The State also argued that it had a good faith basis to ask questions even though, when interviewed by the prosecutor and the police, Nanna did not recall seeing a “bucket full of knives” or hearing the “hot chick” remark. *Id.* at 13. The prosecutor stated that Nanna had avoided being interviewed by the police before ultimately agreeing to an interview. *Id.*

In addition, the prosecutor said that when finally contacted by the detective and the prosecutor “he was clearly being untruthful...he was trying to protect the defendant.” *Id.*

Defense counsel argued that if Nanna denied the statements, there was no good faith basis to ask the questions. In addition, the defense pointed out that the limiting instruction the court gave did not tell the jury that the hearsay was limited to O’Brien’s state of mind, although the prosecutor now insisted that was the only reason for his questions. 4/28/10 RP 19. The defense argued that the real reason the State sought to introduce the evidence was to bring in Nanna’s supposed incriminating statements through a side door. *Id.* at 21-22.

The court denied the motion to reconsider and said that examination on this issue was allowed because, according to the court, O’Brien wanted “to pretend that this conversation with detective Porter never occurred.” *Id.* at 23.

The defense wished to call the detective to present testimony that Nanna denied making the statements at issue. But it was concerned that the State would then be allowed to suggest that Nanna was being evasive with the police. *Id.* at 24. The court ruled that the detective could not testify that he thought Nanna was lying but that he could testify

regarding the attempts to contact Mr. Nanna over a period of many, many weeks and to relate the circumstances under which he was finally able to have this conversation with Mr. Nanna about these limited issues.

Id. at 24. As a result of this ruling, the defense did not call Detective Porter.

2. Argument

Unlike with mitigating evidence, the introduction of aggravating evidence must strictly comply with the rules of evidence. *Bartholomew II*, 101 Wn.2d at 640-41; *Gentry*, 125 Wn.2d at 626. While the State may admit evidence to rebut the defendant's case, that evidence must be

relevant to a matter raised in mitigation by defendant. Evidence might be relevant, for instance, if it casts doubt upon the reliability of defendant's mitigating evidence. We do not intend, however, that the prosecution be permitted to produce any evidence it cares to so long as it points to some element of rebuttal no matter how slight or incidental.

Bartholomew II, 101 Wn.2d at 643 (quoting *Bartholomew I*, 98 Wn.2d at 198). Relevant rebuttal evidence is subject to a balancing test similar to ER 403. It is admitted "[o]nly if the rebuttal value of the evidence outweighs the prejudicial effect." *Bartholomew I*, 98 Wn.2d at 198). *See also Lord*, 117 Wn.2d at 891.

Here, the evidence at issue had *no* rebuttal value. O'Brien said nothing on direct examination regarding his contacts with the police during the investigation of the murders. He did not suggest that he

thought Schierman was innocent. Yet the prosecutor questioned him about statements he made to the police suggesting a lead for investigating the crime. This information was highly prejudicial because it brought in through the back door the inferences that Schierman was obsessed with knives and that he had a sexual interest in the victims. Similarly, the suggestion that Schierman was “promiscuous” did not rebut anything O’Brien said in direct examination. The focus on sexuality tied in to the prosecutor’s theory that sex was the motivation for the murders. *See* Section H, above.

The State knew, of course, that it could not present Nanna himself as a witness at either the guilt or penalty phases. A party may not call a witness for the primary purpose of impeaching him with a prior inconsistent statement. *See, e.g., State v. Lavaris*, 106 Wn.2d 340, 721 P.2d 515, 517 (1986).

[I]t would be an abuse of the rule [Fed.R.Evid. 607], in a criminal case, for the prosecution to call a witness that it knew would not give it useful evidence, just so it could introduce hearsay evidence against the defendant in the hope that the jury would miss the subtle distinction between impeachment and substantive evidence-or, if it didn't miss it, would ignore it. The purpose would not be to impeach the witness but to put in hearsay as substantive evidence against the defendant, which Rule 607 does not contemplate or authorize....

Id. at 344-45, quoting with approval *United States v. Webster*, 734 F.2d 1191, 1192 (7th Cir. 1984). Had the State called Nanna to the stand, he would have denied any recollection of making the statements at issue, and it would have been improper to then impeach him with any prior inconsistent statements he may have made to O'Brien. As the quote above shows, an instruction telling the jury it could consider the statement only for impeachment would not be considered effective.

But what the State actually did here was even worse: it brought in the alleged prior inconsistent statements *without* first establishing that Nanna did not recall making such statements. This not only put the hearsay statements before the jury, but also gave the misleading impression that there was no dispute that the statements had been made. It follows with greater force that in this situation no limiting instruction could ensure the jury would not consider the statements for their supposed truth.

The trial court believed the statements were properly offered, not for their truth, but to show that Nanna made the statements to O'Brien, who then conveyed the statements to the police. It so informed the jury. As discussed above, it is not likely the jurors could follow that instruction.

But even if they could, there was no basis for admissibility. Whether or not O'Brien conveyed Nanna's supposed statements to the

police was irrelevant to any issue before the jury. At the April 28, 2010 hearing on this issue, the court suggested that the prosecutor's rebuttal was appropriate because O'Brien was reluctant to acknowledge his role in the investigation. But that reasoning is circular: it assumes that the prosecutor had a good reason in the first place for questioning O'Brien about his dealings with the police.

The prosecutor's position, by the time of the April 28 hearing, was that O'Brien's statement to the police somehow revealed his "state of mind" because it was "in contravention of his view of the picture that he tried to paint of this defendant before this jury." 4/28/10 RP 8. But that is nonsensical. O'Brien's actions regarding the police were commendable. Despite his friendship with Schierman, he felt a duty to pass on an apparent lead that came his way. That he did so in no way "contravened" his testimony that he knew Schierman as a friendly and loving person, who struggled at times with addiction. Nor did it establish any relevant "state of mind." At most, it showed that O'Brien was willing to consider that Schierman might be guilty. But guilt had already been established by the time of the penalty phase, and no witness was permitted to give an opinion on guilt at either phase of the trial. As the defense pointed out, the prosecutor's position was also inconsistent with the court's limiting instruction, which did not suggest that the evidence was admitted to prove

O'Brien's state of mind. The prosecutor's questions along these lines were a transparent effort to bring inadmissible hearsay before the jury. *Cf. State v. Aaron*, 57 Wn. App. 277, 280, 787 P.2d 949, 951 (1990) (State improperly elicited hearsay evidence on the pretext that it went to the investigating officer's state of mind).

Thus, even if Nanna's statements were indisputably true, they were not proper rebuttal to O'Brien's testimony. That they were disputed raises additional concerns. As noted above, the due process clauses of the state and federal constitutions, the Eighth Amendment and Article I, Section 14 of the Washington Constitution all require evidence to be reliable at the penalty phase of a capital trial. Regardless of the purpose for which they were admitted or considered by the jury, Nanna's supposed statements to O'Brien were unreliable because he did not recall making them. Further, Schierman was denied his right to confrontation under the Sixth Amendment and Article I, section 22 of the Washington constitution because the State presented Nanna's out-of-court statements without putting him on the stand so the defense could cross-examine him.

O. THE PROSECUTOR COMMITTED MISCONDUCT IN HIS CLOSING ARGUMENT BY COMPARING SCHIERMAN'S CRIME TO THE HOLOCAUST AND BY PERSONALLY ATTACKING DEFENSE COUNSEL

1. Relevant Facts

In his opening statement during the penalty phase, the prosecutor called this case a "mass murder" and "the obliteration of a family." 4/19/10 RP 95. The defense objected. *Id.* at 104. The trial judge overruled the objection. The prosecutor continued and told the jury that during the penalty phase it would be called upon to make a decision based upon evidence, not emotion. He then said:

You, in this case more than any other, you are truly the conscience of the community in this case, and the decision you make will be, in a very real sense, one that goes to moral culpability and to moral judgment, and that's why that language is in the definition of mitigating circumstances, whether there are facts about the crime or the defendant that reduce the defendant's moral culpability.

4/19/10 RP 58-59. The defense objected. *Id.* at 101.

Early in the penalty phase closing argument, the prosecutor again told the jury that they were the "conscious [sic] of the community." 5/3/10 RP 27. Defense counsel objected. *Id.* The trial judge said: "argument counsel; objection overruled." *Id.*

Later, the prosecutor argued:

I talked to you about the impact of what the defendant did on the future. It is also appropriate for how he committed the murders. I would suggest to you that it is

not too much of an exaggeration to say that the many ways, if you are living in age of terror, this is an age of post September 11, 2001. We now have a department of Homeland Security. We now have terror alerts. We now have terror alert levels and terror alert colors. I would suggest to you that terror is a word that is used.

CONNICK: I objection, your Honor.

THE COURT: Overruled. It is argument. The jury has been instructed.

O'TOOLE: Terror is a word, ladies and gentlemen, almost too casual in its use to describe the things that we use to describe. But what is real terror?

Well, there is the simple dictionary definition, 'terror is a s state of intense over-powering fear, a nightmare, and fear is dread, terror, horror, and panic.

5/3/10 RP 68-69.

The prosecutor then argued:

For this reason alone, and for all of the reasons that I have given you, there are simply no sufficient mitigating circumstances to merit leniency. For that reason alone the proper sentence is death.

There is a plaque outside of the Holocaust Museum in Washington, D.C., says the following, "thou shall not be a victim"—

CONNICK: Objection, your Honor.

CONROY: Objection.

THE COURT: Overrule the objection. This is argument.

CONNICK: Reference to the holocaust.

THE COURT: Overrule the objection. This is argument. The jury has been instructed.

O'TOOLE: That plaque says that 'thou shall not be a victim, thou shall not be a perpetrator, above all that thou shalt not be a bystander.'

You are not bystanders, for that, I thank you.

Id. at 73-74.

After the jury was excused, the following colloquy took place:

MR. CONROY: . . .The State has plenty to work with, but analogies to the Holocaust and the 9-11, and terror attacks are simply inappropriate.

The court knows that is totally out of line. You can't do that in the context of this closing arguments in the death penalty case.

We move for a mistrial.

We have moved to strike the panel.

We move to end in this process right now, because it is tainted. This is not funny.

THE COURT: Counsel, the comments, while arguably inappropriate, relating to the quote from the Holocaust museum plaque did not liken this case to the Holocaust. The quote was given in that context to give it, obviously, some sort of foundation.

The comment earlier about terror to which was objected to by counsel, was not, again, in the context of terrorism and likening this. It was simply a relationship explained of what terror was, what terror is and how it was experienced in this case.

These two references, by themselves, or in combinations, do not warrant granting a motion for a mistrial and striking this panel.

Counsel, do not interrupt the court. You should know better than that by now.

CONROY: Right. I do.

THE COURT: They do not, in and of themselves, or in combination, award granting the mistrial or striking the panel.

I will caution the counsel for the state, however, to be circumspect in any of the arguments along these very same lines.

CONROY: I want to add the comment to the mass murder to the list of the litany of objectionable phraseology stated by the prosecution to seek the death penalty in this case.

THE COURT: Very well. We will be in recess until 1 o'clock...

THE BAILIFF: Please rise. The court is in recess.

5/3/10 RP 75-76.

After lunch, however, the trial judge changed his mind:

I want to advise the jury that the court has ordered to be stricken from the record the last comments in closing arguments made by O'Toole, relating to the Holocaust museum and a plaque apparently outside of the museum.

That, and all references to that are stricken from the record. You are instructed to disregard all of the related comments made at that part of the closing arguments.

Id. at 78.

During the defense closing argument, counsel discussed a parable from the Bible where Jesus saved a woman from stoning by stating "he who is without sin among you, let him first cast the stone on her." *Id.* at 135. Later, defense counsel, after discussing the law further, said:

One thing that is not present with the transcript according to John. . . is any indication that there was a prosecutor there, much like the prosecutor with the one that you have just heard.

Who knows had there been a prosecutor like Mr. O'Toole reminding everybody of the harm or horror that had been done, who knows that the result may have been different, that woman would have died under the pile of rocks.

Id. at 141.

At the beginning of his rebuttal closing the prosecutor said:

I heard with interest the biblical story given by Mr. Conroy towards the end of his comments.

...

There is another trial, which is the trial of the crucifixion of Christ, which is the whole focus of the New Testament. That notwithstanding, I found it very interesting I could have objected at any point to that.

Having the prosecutor being compared to the person, I guess is Satan would oppose Christ in that little parable may be offensive or not, but I didn't object, because I wanted to see how far that Mr. Conroy had to go to convince you to pause or question.

I don't think that he has convinced himself. To compare me, as the person, who deposed a biblical story like that, I think that is all I need to say about the credibility or weight that you should give it.

5/3/10 RP 149-50 (emphasis added). The prosecutor then used the phrase, "Mr. Conroy says" or "complains" or "talks about" 21 more times in his rebuttal. 5/3/10 RP 150 (2 times), 153 (4 times), 154 (1 time), 156 (1 time), 157 (4 times), 159 (4 times), 160 (3 times), 161 (1 time).

2. Legal Standards

During closing argument, the prosecutor has an obligation to ensure that the accused continues to receive a fair and impartial trial. U.S. Const. Amends VI and XIV.

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935).

A prosecutor is a quasi-judicial officer, obligated to seek verdicts free of prejudice and based on reason. *State v. Charlton*, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096, 89 S.Ct. 886, 21 L.Ed.2d 787 (1969). A prosecutor has a special duty in trial to act impartially in the interests of justice and not as a “heated partisan.” *State v. Reed*, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). Consistent with these duties, prosecutors must not appeal to jurors’ passions and prejudices because

such arguments inspire verdicts based on emotion rather than evidence. *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988); *State v. Gibson*, 75 Wn.2d 174, 176, 449 P.2d 692 (1969), *cert. denied*, 396 U.S. 1019, 90 S.Ct. 587, 24 L.Ed.2d 511 (1970); *State v. Huson*, 73 Wn.2d at 662-63.

Prosecutorial misconduct is grounds for reversal if “the prosecuting attorney’s conduct was both improper and prejudicial.” *State v. Monday*, 171 Wn.2d 667, 675-76, 257 P.3d 551, 555 (2011) (citing *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009), and *Gregory*, 158 Wn.2d at 858). The Court examines the effect of a prosecutor’s improper conduct by examining that conduct in the full trial context, including the evidence presented, “the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.” *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting *State v. Brown*, 132 Wn.2d at 561).

During closing argument, the deputy prosecutor has wide latitude to draw and express reasonable inferences based on the evidence. *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). But “appeals to the jury’s passion and prejudice are improper.” *State v. Echevarria*, 71 Wn. App. 595, 598, 860 P.2d 420 (1993); *see also Belgarde*, 110 Wn.2d at 507 (prosecutor has a duty to seek verdicts free from appeals to passion or

prejudice). In general, “appeals for the jury to act as a conscience of the community are not impermissible, unless specifically designed to inflame the jury.” *Finch*, 137 Wn.2d at 842 (quoting *United States v. Lester*, 749 F.2d 1288, 1301 (9th Cir. 1984)).

3. The Prosecutor Engaged in Argument that was Designed to Inflame the Jury

Here, the State began its closing argument in the penalty phase with a direct, unmistakable call to the jury to act as the conscience of the community. This was specifically designed to inflame the jury because that call was followed by references to the Holocaust and 9-11.

It is true that the State is not precluded from accurately characterizing the nature of a horrific crime. But the prosecutor also has a duty to seek verdicts that are free from appeals to passion or prejudice. *See State v. Burns*, 168 Wn. App. 734, 829, 285 P.3d 83, 131 (2012), *rev. denied*, 176 Wn.2d 1023, 299 P.3d 1171, *rev. denied*, 299 P.3d 1171, *cert. denied*, 2013 WL 2904771 (2013). In this case, the prosecutor began his arguments by telling the jury that Schierman committed a mass murder and the obliteration of a family. He then tied that into the Holocaust through references to the Holocaust Museum, and suggested that the jurors should vote for the death penalty so as not to be bystanders to Schierman’s “holocaust.”

In addition, the prosecutor talked about the DNA profiles that were generated in order to prove the crime and argued:

It identified the genetic profiles of Olga, Luybov, Justin, Andrew, and of Conner Schierman, based on their inherited genetic identity, based upon their genetic history, what they had received from their parents and received it from their parents, and so on.

The genetic history of all that came before, is the genetic profiles of all of the DNA profiles that we have in this case. But the DNA, if you think about it, also tells you something else. It gives you a measure of what has been lost forever. It tells you of the future that is obliterated.

5/3/10 RP 63-64. The prosecutor then discussed a science fiction story about in which one butterfly's death "was apparently the cause of every change that happened throughout time." *Id.* at 67. He then argued:

This man, in killing those four people, literally changed and destroyed history. Destroyed the future of a family. Not only with Olga and Luybov would have become, but what Justin and Andrew could have become. The defendant changed the history of those who would have come from Olga and Luybov and Justin and Andrew.

*Remember that quote [from the science fiction story],
"destroy this one life and you destroy a race, a people, an
entire history of life."*

Id. at 67-68 (emphasis added). Although the prosecutor was ostensibly discussing science fiction, the reference to destroying a race once again evoked the Nazi genocide of the Jews during World War II. This argument could only have been intended to inflame the jury's passions and prejudice them against the defendant. *See, e.g., People v. Tiller*, 94 Ill.2d

303, 320-21, 447 N.E.2d 174, 183 (1982), *cert. denied*, 461 U.S. 944, 103 S.Ct. 2121, 77 L.Ed.2d 1302 (1983) (prosecutor committed misconduct by comparing the defendant's three murders to the Nazi holocaust).

It is true, as noted above, that the trial court eventually instructed the jury to disregard the prosecutor's references to the Holocaust, but this was too little and too late. The trial court waited until after the prosecutor had completed his argument and until after the lunch break. Moreover, the trial court struck only the mention of the museum and the plaque. He did not caution the jury that it should not equate Schierman's crime with genocide. In any event, it is unrealistic to think that any limiting instruction could truly erase such inflammatory rhetoric from the jurors' minds.

4. The Prosecutor Engaged in Misconduct when, in Rebuttal, He Accused Opposing Counsel of Personally Attacking Him

Prosecutors may not "make unfounded and inflammatory attacks on the opposing advocate." *United States v. Young*, 470 U.S. 1, 9, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). A prosecutor violates the Sixth Amendment right to counsel if he personally attacks defense counsel, impugns defense counsel's integrity or character, or disparages the role of defense counsel in general. *Fisher*, 165 Wn.2d at 771 (Madsen J.,

concurring); *State v. Warren*, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008), *cert. denied*, 129 S.Ct. 2007, 173 L.Ed.2d 1102 (2009).

Such arguments also deny a defendant due process. In *United States v. Rodrigues*, 159 F.3d 439 (1998), *amended on denial of rehearing*, 170 F.3d 881 (9th Cir. 1999), the prosecutor's argument included the following:

I think, having heard [defense counsel] Mr. Neal, you all must be feeling somewhat confused . . . Mr. Neal has tried to deceive you from the start in this case about what this case is really about.

Id., 159 F.3d at 449. "The accusation was a gratuitous attack on the veracity of defense counsel." *Id.* at 450. Such argument undermined the presumption that jurors will follow the court's instructions.

The presumption in this case is affected by the prosecutor's unwarranted attack on defense counsel's integrity and veracity. The last thing the jurors heard as they went home for the night and thought about the case they would have to decide the next day was that the representative of the United States held defense counsel to be a liar. . . . When [the prosecutor] says the defendant's counsel is responsible for lying and deceiving, his accusations cannot fail to leave an imprint on the jurors' minds.

Id. at 451. The Court therefore reversed several counts "for denial of due process of law." *Id.*, citing *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144, *reh'g denied*, 478 U.S. 1036, 107 S.Ct. 24, 92 L.Ed.2d 774 (1986). The Ninth Circuit and this Court have reached similar results in other cases. *See United States v. Sanchez*, 176 F.3d

1214, 1224-25 (9th Cir. 1999) (prosecutor committed misconduct by insinuating that the defense was a sham); *Bruno v. Rushen*, 721 F.2d 1193 (9th Cir. 1983), *cert. denied*, 469 U.S. 920, 105 S.Ct. 302, 83 L.Ed.2d 236 (1984) (conviction reversed on habeas review where prosecutor suggested that defense counsel were retained to “lie and distort the facts and camouflage the truth in an abominable attempt to confuse the jury as to their client’s involvement with the alleged crimes”); *State v. Easter*, 130 Wn.2d 228, 234 n.4, 922 P.2d 1285 (1996) (prosecutor improperly asserted defense counsel misrepresented facts and law); *Reed*, 102 Wn.2d at 143 (prosecutor argued, among other things, that defense counsel were eloquent “city lawyers” who really had no case).

When, as here, defense counsel fail to object to improper argument, “the issue on appeal becomes whether any curative instruction would have effectively erased the prejudice.” *State v. Smith*, 144 Wn.2d 665, 679, 30 P.3d 1245 (2001), *as corrected*, 39 P.3d 294 (2002), citing *Belgarde*, *supra*. Appellate review is not precluded if the prosecutorial misconduct is so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct. *Id.* at 507. And, where misconduct invades a fundamental constitutional right, here the right to counsel, this Court may properly review the misconduct notwithstanding the absence of an objection. *Warren*, 165 Wn.2d at 27

n.3. Here, where the prosecutor's argument was essentially that the defense was creating smoke screens because it knew it had no case, an objection would have been seen as confirmation of the prosecutor's position.

The prosecutor began his rebuttal by telling the jury that defense counsel had compared him to Satan, although defense counsel said no such thing. The prosecutor then noted that he could have objected but he wanted to "see how far that Mr. Conroy had to go to convince you to pause or question." 5/3/10 RP 149. He then suggested that Conroy did not believe his own arguments: "I don't think that he has convinced himself." *Id.* at 150.

Thus, the prosecutor maintained that the defense was making improper, personal attacks on him because it knew that it had no case. The prosecutor then turned his entire rebuttal argument into a personal attack on defense counsel's arguments, rather than arguing the facts and the law. This misconduct violated Schierman's Sixth Amendment right to counsel and his Fourteenth Amendment right to due process.

It is true that defense counsel may not make an improper argument and provoke the prosecutor to respond in kind. *See United States v. Young*, 470 U.S. at 11. But here, the prosecutor deliberately twisted defense counsel's remarks into something sinister. Conroy never

compared the prosecutor to Satan. He merely suggested that the jurors should not let an eloquent prosecutor sway them from the more merciful path. Such argument did not provide the prosecutor a license to engage in misconduct.

5. There Is a Substantial Likelihood the Misconduct Affected the Jury's Penalty Phase Verdict

The prosecutor's improper comments are prejudicial "only where there is a substantial likelihood the misconduct affected the jury's verdict." *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007), *cert. denied*, 554 U.S. 922, 128 S.Ct. 2964, 171 L.Ed.2d 893 (2008) (internal quotation marks and citations omitted). Here, the two instances of misconduct, taken together, rose to the level of manifest constitutional error, which cannot be harmless in the penalty phase of a capital case. When Schierman's life hung in the balance, the State chose to engage in improper argument designed to inflame the jury against the defendant and his counsel. The State cannot show that this misconduct was harmless beyond a reasonable doubt.

P. CUMULATIVE ERROR

Even when no individual error is sufficiently prejudicial to warrant relief, the cumulative effect of the errors may require reversal. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000); *Cargle v. Mullin*, 317

F.3d 1196, 1206-07 (10th Cir. 2003); *Mak v. Blodgett*, 970 F.2d 614, 624-25 (9th Cir. 1992), *cert. denied*, 507 U.S. 951, 113 S.Ct. 1363, 122 L.Ed.2d 742 (1993); *Clark*, 143 Wn.2d at 771-72. Errors at the guilt phase must be cumulated with errors at the penalty phase when the sentencing jury considers the guilt-phase evidence, as it does in Washington. *Cargle*, 317 F.3d at 1207-08. Improper evidence that is harmless at the guilt phase may nevertheless affect the fairness of the penalty phase. For example, even if the Court were to find that the evidence and argument regarding sexual motivation was harmless error at the guilt phase, it should consider that error when assessing prejudice at the penalty phase.

Here, as discussed in all the arguments set out above, the proceedings were riddled with error from the jury selection process through the closing arguments at the penalty phase. In particular, the trial court repeatedly held the defense on a short leash while giving the prosecution free rein. *See, e.g.*, section F (trial court applied more favorable standard to prosecution challenges for cause than to defense challenges); section K (court excluded majority of defense mitigation witnesses although it had allowed prosecutor to present endless cumulative witnesses at guilt phase); section M (court permitted State to quote unfavorable portions of treatment journal when questioning Dean

Dubinsky but would not permit defense to complete the picture with favorable portions).

At least when considered cumulatively, the errors at the guilt and penalty phases deprived Schierman of his right to a fair trial under the Sixth Amendment (impartial jury) and the Fourteenth Amendment (due process) and Article I, § 3. The errors also rendered the imposition of the death penalty arbitrary and capricious in violation of Eighth Amendment and Article I, § 14.

Q. STATUTORY REVIEW

1. Introduction

RCW 10.95.130 requires this Court to review the following two issues in this case:⁴³

(b) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. For the purposes of this subsection, “similar cases” means cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965, in which the judge or jury considered the imposition of capital punishment regardless of whether it was imposed or executed, and cases in which reports have been filed with the supreme court under RCW 10.95.120;

⁴³ The statute also requires this Court to determine “whether the defendant had an intellectual disability within the meaning of RCW 10.95.030(2).” But that does not apply to Schierman.

(c) Whether the sentence of death was brought about through passion or prejudice

2. Washington's Death Penalty Statute has Yielded Wildly Disproportionate Outcomes

In this Court's most recent decision discussing proportionality and the death penalty in Washington, the majority rejected a very strong dissent and stated:

This denunciation of the death penalty's alleged "randomness" revives the proportionality challenge this Court rejected in *Cross*, 156 Wn.2d 580, 132 P.3d 80 (2006), a decision the dissent mentions only in a footnote on an unrelated issues.

Davis, 175 Wn.2d at 353-54. The majority also notes that this Court reaffirmed *Cross*⁴⁴ in *State v. Yates*. *Id.* at 354, fn. 28.

Schierman maintains that the dissents in *Cross* and *Davis* were correct. This Court should find that Washington's death penalty is imposed in a wanton and freakish manner. This Court should recognize that culling through the 300+ trial court reports for meaningful comparisons between those defendants who received the death penalty and those who did not is a futile exercise. In the 32 years since the enactment

⁴⁴*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).

of the current statute, this Court has never found the imposition of a death sentence disproportionate.⁴⁵

As the dissent in *Cross* pointed out, Washington does not send the “the most serious offenders who committed the most atrocious crimes in our state” to death row. *Cross* at 648.⁴⁶ Schierman, who has no criminal history and a multitude of mitigating factors, sits on death row while others who killed far more people do not. As the dissent in both *Cross* and *Davis* point out, Benjamin Ng and his accomplice Willie Mak killed 13 people after hogtying them and shooting them execution style, yet both ultimately received life sentences.⁴⁷ David Rice, convicted of killing four members of a family, including two children, by bludgeoning, strangling, and stabbing them to death, ultimately received a life sentence. *Rice v. Wood*, 77 F.3d 1138, 1139 (9th Cir.) (en banc), *cert. denied*, 519 U.S. 873,

⁴⁵ This is true even though nearly 20 years ago, a federal court found this Court’s review to be constitutionally inadequate under *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, *reh’g denied*, 409 U.S. 902, 93 S.Ct. 89, 34 L.Ed.2d 163 (1972), because it does not meaningfully police the application of the death penalty. *Harris ex.rel. Ramseyer v. Blodgett*, 853 F. Supp. 1239, 1288 (W.D. Wash. 1994), *aff’d*, 64 F.3d 1432 (9th Cir. 1995).

⁴⁶ It bears repeating that in 32 years Washington has only executed 5 men. No women have been sent to death row under the current statute. Only two men were executed against their will; the remaining three were volunteers.

⁴⁷ Ng’s jury rejected the death penalty. *State v. Ng*, 104 Wn.2d 763, 765-770, 713 P.2d 63 (1985). Mak’s death sentence was reversed by the Ninth Circuit in *Mak v. Blodgett*, *supra*. On remand, King County Superior Court Judge Laura Inveen ruled that the State could not seek the death penalty, and the State did not appeal.

117 S.Ct. 191, 136 L.Ed.2d 129 (1996). Spokane County permitted Robert Yates to avoid the death penalty by pleading guilty to 13 counts of premeditated murder occurring in three different counties. *Yates*, 161 Wn.2d at 728-732. And, of course, Gary Ridgway killed 48 women over the span of 30 years and he, too, received only a life sentence. *State v. Cross*, supra.

In *Davis* this Court said: “Ridgway’s sentence remains an isolated incident that does not bear on whether imposition of a sentence of death in Davis’s case is excessive or disproportionate.” *Id.* at 351. But proportionality is not served by simply throwing out the “high score” when it comes to number of victims and the brutality of the crimes. The four-justice dissent in *Cross* was correct when it concluded that Cross’s sentence was disproportionate because “[t]he Ridgway case does not ‘stand alone,’ as characterized by the majority, but instead is symptomatic of a system where all mass murderers have, to date, escaped the death penalty.” *Id.* at 641 (Johnson, J., dissenting).

Properly recognizing and analyzing what has happened in the administration of capital cases in this state inevitably leads to the conclusion that the sentence of death in this case, and generally, is disproportionate to the sentences imposed in similar cases. Contrary to what we had expected to find when we established an analytical framework to conduct our statutory review, that the worst of the worst offenders would be subject to the death penalty, what has happened is the worst offenders escape death. . .

Id.

In her dissent in *Davis*, Justice Fairhurst concluded:

When I look at the true statutory pool, I cannot escape the truth about Washington's death penalty. One could better predict whether the death penalty will be imposed on Washington's most brutal murderers by flipping a coin than by evaluating the crime and the defendant. Our system of imposing the death penalty defies rationality, and our proportionality review has become an "empty ritual." *Benn*, 120 Wn.2d at 709, 845 P.2d 289 (Utter, J., dissenting).

Davis, 175 Wn.2d at 388.

A majority of this Court should now agree with those well-reasoned dissents. This State would then join the many other states that have recently abolished the death penalty. Prior to 2007, no legislature had abolished the death penalty since the 1960s. But since 2007, New Jersey, New York, New Mexico, Illinois, Connecticut and Maryland have done so.

Other states have greatly reduced their use of the death penalty. Virginia's death row population has significantly decreased from a peak of 57 inmates in 1995 to 8 presently. The number of new death sentences in 2012 was the second lowest since the death penalty was reinstated in 1976, representing a nearly 75% decline. Only nine states carried out executions in 2012, equaling the fewest number of states to do so in 20 years. In 2012, use of the death penalty was clustered in a few states. Just

four states (Texas, Oklahoma, Mississippi and Arizona) were responsible for over three-quarters of the executions nationwide. *See* <http://deathpenaltyinfo.org/home>.⁴⁸

The fundamental constitutional flaws with capital prosecutions leading to its abolition are present in Washington's statute. This Court should recognize that inescapable fact. The Court should "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).

3. The Death Sentence in this Case was the Product of Passion or Prejudice

This Court:

will vacate sentences that were the product of appeals to the passion or prejudice of the jury, such as "arguments intended to 'incite feelings of fear, anger, and a desire for revenge' and arguments that are 'irrelevant, irrational, and inflammatory ... that prevent calm and dispassionate appraisal of the evidence.'"

Cross, 156 Wn.2d at 634-35 (citations omitted). As argued above, much of the State's case was an appeal to the passion or prejudices of the jurors. Those instances included conveying to the jury Leonid Milken's military

⁴⁸The Death Penalty Information Center is a national non-profit organization serving the media and the public with analysis and information on issues concerning capital punishment.

service, his family's flight to this country for religious freedom, the victims' faith, the display of many, many gruesome photographs, arguing that Schierman acted with sexual motivation without proof of such, and making a comparison between the crimes committed and the Holocaust. The effect was to emphasize that the victims were so "worthy" that Schierman deserved death regardless of the constraints of the law. This is a basis for reversal of the death sentence as well.

V. CONCLUSION

For the foregoing reasons, this Court should reverse Schierman's conviction and death sentence.

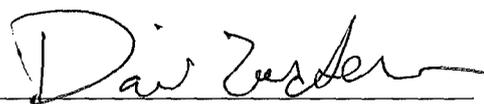
DATED this 15th day of November, 2013.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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