

NO. 88906-6

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

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STATE OF WASHINGTON,

Respondent,

v.

BYRON EUGENE SCHERF,

Appellant.

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

Honorable Thomas J. Wynne and Honorable George F.B. Appel, Judges

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. RESPONDENT’S STATEMENT OF THE CASE IS NOT A “FAIR STATEMENT OF FACTS AND PROCEDURE RELEVANT TO THE ISSUES PRESENTED FOR REVIEW.”

RAP 10.3 (5) provides that the Statement of the Case portion of an appellate brief should be a “fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.” Respondent’s Statement of the Case omits many facts which are essential to the fair presentation which should guide this Court’s decision.¹ Brief of Respondent (BOR) 9-18.

Appellant set out the relevant facts in full detail for the Court in the Statement of the Case in his Opening Brief of Appellant (AOB) at 18-77, and will note here only a few of respondent’s important omissions.

For one example, respondent writes that Scherf had not been himself for the three weeks before January 29, 2011, and that he and his wife “did not appear to be getting along as well as they had in prior visits” on the afternoon of the twenty-ninth. As set out in Scherf’s Opening Brief, the visiting room officers did testify that Scherf’s visit with his wife

¹ Additionally, citing to pages only at the close of a paragraph makes it difficult to determine the purported basis in the record of the specific facts in the paragraph. In some instances citations are not provided until the end of an entire page of text. See e.g., BOR 48-49.

that afternoon was shorter than usual, RP 6241, and that Scherf and his wife were not embracing and holding hands as they usually did. RP 6235-36, 6245, 6255-56. These officers did also describe the behavior of Scherf and his wife as having been “off” that day and for perhaps the previous week. RP 6236. Respondent omits, however, that an actual videotape of the visiting room that afternoon undercut the credibility of the officers’ testimony; the video showed Scherf and his wife embracing one another. RP 6892. Also omitted by respondent is that Scherf sent his wife loving e-mails in the weeks prior to January 29, 2011. RP 6892-93.

For another example, respondent asserts, as fact, that Scherf was transferred to the Snohomish County Jail from the Washington State Reformatory (WSR), not to aid in the investigation of the crime, but because of the resentment and difficulties created when a prison is on lockdown status. BOR 16. The news release issued by the Department of Corrections, however, states otherwise. The release is unambiguous that Scherf was transferred “in order to help police investigators”:

MONROE – Offender Byron Scherf was transferred this evening from Monroe Correctional Complex to Snohomish County Jail where he will be incarcerated while the Monroe Police Department investigates the death of Officer Jayme Biendl.

Scott Frakes, Superintendent of Monroe Correctional Complex, decided to transfer Scherf in order to help police investigators.

CP 1689 (emphasis added). Other omitted facts substantiate this investigative purpose. A Monroe police officer accompanied Scherf during the transfer to the Snohomish County Jail. RP 861-969. And Scherf was clearly transferred to make it easier for the police to meet with him; he was immediately contacted by detectives from the Snohomish County Sheriff's department on his arrival at the jail. RP 6608-6708.

More generally, respondent's "Statement of the Case" begins by focusing not only on the details of Scherf's criminal history, but on general assertions that inmates "monitor officers' routines to look for areas where they can breach security or compromise the staff," implying that Scherf was this type of inmate. BOR 9-10. Respondent does not include that in his thirty years in prison, Scherf had only two major infractions. RP 7021-34. It does not include any other of the extensive evidence of his good behavior as an inmate or that his supervisor at the WSR print shop described Scherf as a good, productive worker who helped train others in addition to attaining proficiency for himself. RP 7040-48.

Respondent included many details of Scherf's confessions to Detectives Walvanthe and Bilyeu, but omitted that they made a deal with him to provide relief from his condition of confinement in exchange for his confession. CrR.3.5 exhibit 10, at 2, 12. BOR at 17-18. Even so,

what stands out from this presentation by respondent of Scherf's confession, is that it describes an unplanned and unpremeditated murder.

Respondent also sets out other facts in the argument portions of respondent's brief; these facts will be addressed in the relevant reply arguments in this brief. It remains true, however, that the initial overview of the case presented by respondent is less than complete or fair.

2. TRIAL COURT ERRED IN NOT DISMISSING THE DEATH NOTICE WHEN THE PROSECUTION FAILED TO STRICTLY COMPLY WITH RCW 10.95.040(2).

This court requires strict compliance with the death penalty statute, including the filing of a notice to seek special sentencing proceeding under RCW 10.95.040. State v. Luvane, 127 Wn.2d 690, 719, 903 P.2d 960 (1995); State v. Dearbone, 125 Wn.2d 173, 177, 883 P.2d 303 (1994). Because the prosecution did not comply with RCW 10.95.040 when it filed a notice before, not after arraignment as specifically mandated by RCW 10.95.040(2), Scherf's death sentence should be dismissed.²

a. Appellant had no obligation to object to improper notice.

Before addressing the substantive argument, the respondent first complains that the defense prevented the prosecution from curing its

² In its statement of case section, respondent claims the "State filed a notice of special sentencing proceeding at the arraignment." BOR at 18. This is misleading. The special sentencing proceeding was filed before Scherf was arraigned on aggravated first degree murder. RP 2.

noncompliance with RCW 10.95.040 by waiting 46 days after arraignment to challenge the notice. BOR 111. Neither RCW 10.95.040 nor case law interpreting the statute places any obligation on the defense to timely object to an improper or inadequate notice. On the other hand, because the notice requirement is a specific statute in Chapter 10.95, and not a rule of criminal procedure, compliance with the statute rests exclusively with the prosecution. Dearbone, 125 Wn.2d at 177.³

Moreover, the respondent's position that defense must alert the prosecution of its non-compliance would require counsel to violate her ethical and constitutional obligations. As this Court held in Luvene, such an obligation would require counsel to provide ineffective assistance of counsel and take action wholly inconsistent with her client's best interest. Luvene, 127 Wn.2d 690, 719 ("The result of any stipulation to reopen the period after it had expired would have been to re-expose Luvene to the death penalty at a time when the State was precluded by the statute from seeking it. If the defense counsel had stipulated to reopening the period, such an action would constitute reversible error resulting from ineffective assistance of counsel."). Case law clearly dictates that if the prosecution elects to seek the death penalty, the burden rests exclusively with the

³ By comparison see Criminal Rules (CrR) 3.3(d)(3)(requiring a party to timely object to trial setting) and CrR 4.1(2)(b)(requiring party to timely object to date of arraignment).

prosecution to strictly comply with RCW 10.95.040 or lose the authority to seek the death penalty. Luvene, 127 Wn.2d 690; Dearbone, 125 Wn.2d 173. Because the prosecution did not comply with the requirements of RCW 10.95.040(2), it was prohibited from requesting that the death penalty be imposed. RCW 10.95.040(3).

Further, the state deliberately filed the notice early and provided written reasons for doing so – to get around the prohibition against pleading guilty after arraignment. This was not an inadvertent error, but presumably a reasoned choice made by a prosecutor familiar with the requirements of the statute.

b. The plain language of the statute, its purpose and history, the rules of statutory construction, and the rule of lenity demonstrate the notice was not timely.

Scherf's argument is based first on the plain language of the statute which does not need construing. However, its purpose and history, the rules of statutory construction, and the rule of lenity also clearly support his argument. AOB 82-97. Under any of these standards, the state failed to file the notice properly under the statute.

i. Respondent's argument ignores and runs afoul of long-standing principles of statutory interpretation.

Even though RCW 10.95.040(2) specifically requires a death notice be filed "within thirty days after the defendant's arraignment," the

respondent claims the statute only sets a termination date to file a death notice, and thus a death notice may be filed anytime before arraignment. BOR 111-112. To support this claim, the respondent invites this court to look at decade-old civil cases to interpret unambiguous terms in RCW 10.95.040(2). BOR 111-113. The respondent's request is inconsistent with, and contrary to, the principles of statutory interpretation and should be rejected. Respondent is also inconsistent in its claims that RCW 10.95.040(2) should be interpreted under the authority of the civil cases interpreting other statutes and rules and that the rule of lenity could not apply because the statute is unambiguous and not in need of interpretation. BOR 117.

The primary objective of statutory interpretation is to determine and give effect to the intent and purpose of the legislature. State v. Watson, 146 Wn.2d 947, 954, 51 P.3d 66 (2002). To determine legislative intent, courts first look to the language of the statute, and if the statute is clear on its face, its meaning must be derived from the plain language of the statute alone. Id. at 954. State v. Evans, 177 Wn.2d 186, 193, 98 P.3d 724 (2013); see also Carter v. United States, 530 U.S. 255, 271, 120 S. Ct. 2159, 2170, 147 L. Ed. 2d 203 (2000) (“In analyzing a statute, we begin by examining the text, not by ‘psychoanalyzing those who enacted it.’”) quoting Bank One Chicago, N.A. v. Midwest Bank & Trust Co., 516 U.S.

264, 279, 116 S.Ct. 637, 133 L.Ed.2d 635 (1996) (Scalia, J., concurring in part and concurring in judgment)(internal citations omitted).⁴

A statute is ambiguous only if “susceptible to two or more reasonable interpretations,” and “is not ambiguous merely because different interpretations are conceivable.” HomeStreet, Inc. v. State Dept. of Revenue, 166 Wn.2d 444, 452, 210 P.3d 297 (2009) (quoting State v. Hahn, 83 Wn.App. 825, 831, 924 P.2d 392 (1996)). Only if a statute is deemed ambiguous does the court resort to further principles of statutory construction, legislative history, and relevant case law to assist in interpreting it. Watson, 146 Wn.2d at 955. And if a statute is ambiguous and thus subject to further statutory construction, it will be “strictly construed” in favor of the defendant. Evans, 177 Wn.2d at 193; State v. Hornaday, 105 Wn.2d 120, 127, 713 P.2d 71 (1986).

The respondent asks this court to consider case law to interpret the

⁴ This principle is long-standing. See e.g., People’s v. Organization for Washington Energy Power v. State of Washington, 101 Wn.2d 425, 429-30, 677 P.2d 922 (1984)(“Where the language of a statute is plain, free from ambiguity and devoid of uncertainty, there is no room for construction because the meaning will be discerned from the wording of the statute alone.”); State v. Young, 125 Wn.2d 688, 694, 888 P.2d 146 (1995)(“To determine [legislative] intent, we must first look to the language of the statute itself.”); State v. Wentz, 149 Wn.2d 342, 346, 68 P.3d 342 (2003)(where language of statute is clear, legislative intent is derived from the language of the statute alone); and State v. Evans, 177 Wn.2d 186, 192, 298 P.3d 724 (2013)(“[W]e derive legislative intent solely from plain language. . .”).

plain, unambiguous language of RCW 10.95.040(2), but cannot make the threshold showing that RCW 10.95.040(2) is ambiguous. Indeed, it has conceded it is not. BOR 119.

The respondent's urging the Court to look at old civil cases to interpret RCW 10.95.040(2) is inconsistent with its claim that the rule of lenity is not applicable. BOR 119. If the meaning of the language of the statute is plain, then the court does not look to other cases interpreting different statutes to interpret it; if the language is ambiguous, the rule of lenity applies.

The respondent cannot have it both ways. RCW 10.95.040(2) is either clear and unambiguous to which searching case law for interpretation is inappropriate; or it is ambiguous and the rule of lenity is applicable. The respondent's position is inconsistent and at odds with the long-standing principles of statutory interpretation and should be rejected.

ii. Plain language of the statute requires notice must be filed within thirty days after arraignment, not at any time before arraignment.

RCW 10.95.040 specifically requires a death notice be filed "within" thirty-days "after" an arraignment. Legislative definitions included in the statute are controlling, but undefined terms in the statute are given plain and ordinary meaning ascertained from a standard

dictionary. Evans, 177 Wn.2d at 193; see also Sandifer v. U.S. Steel Corp., 134 S.Ct. 870, 876, 187 L.Ed.2d 729 (2014) quoting Perrin v. United States, 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979)(“It is a ‘fundamental canon of statutory construction’ that, ‘unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.”).

The ordinary, contemporary and common meaning of “within” is being “inside the range or bounds of,” and “occurring inside a particular period of time.” The Oxford English Dictionary, Sixth Edition (2006). “After” is defined as “in the time following an event” and “next to and following in order or importance.” Id. Thus, the plain language of RCW 10.95.040 requires a death notice be filed inside two periods of time -- the arraignment and 30 days following the arraignment. This clear meaning of the statute is reinforced further by the equation of the period in which “the defendant may not tender a plea of guilty to the charge of aggravated first degree murder” to “the period in which the prosecuting attorney may file a notice of special sentencing proceedings.” RCW 10.95.040(2).

In light of these principles, the respondent nonetheless urges this court to look at decade-old civil cases to define the plain language in RCW 10.95.040 to mean that it establishes only an end date to file a death notice. BOR 111-114. This argument fails for many reasons. First, as

mentioned, it ignores the ordinary, contemporary and common meaning of “within” and “after” found in RCW 10.95.040(2), leading to absurd results.⁵ See AOB 88-89. Second, the respondent’s argument would effectively and unacceptably ignore the terms “within” and “after” specifically referenced in the statute. See State ex rel. Schillberg v. Barnett, 79 Wn.2d 578, 584, 488 P.2d 255 (1971) (it is well-settled principle of statutory interpretation that each word of a statute is to be accorded meaning); State v. Johnson, 179 Wn.2d 534, 544, 315 P.3d 1090 (2014)(“To be reasonable, an interpretation must, at a minimum, account for all the words in a statute.”). Finally, if the legislature intended what the respondent suggests, the statute would have been written as such.⁶ The

⁵ There exists an overabundance of common examples that illustrate the absurdity in the respondent’s position that “within” a period “after” an event means anytime before the event: for instance, a teacher telling his students that exam results will be posted *within* 30 days *after* the exam is taken or a court ordering an opinion be issued *within* 60 days *after* oral argument. In neither example would a person under the common, ordinary and plain meaning, conclude the events (posting results, issuing an opinion) could be done *before* the event (taking the exam, oral argument).

⁶ Consider the following three examples: (1) Notice shall be filed and served within thirty days after the defendant’s arraignment (RCW 10.95.040(2)); (2) Notice shall be filed and served within thirty days of the defendant’s arraignment (RCW 10.94.010); and (3) Notice shall be filed and served before or within thirty days after the defendant’s arraignment (respondent’s). According to the respondent, these three statements have the exact same meaning. The plain meaning of each, however, demonstrates they do not. The first sets a condition precedent beyond which the notice may be filed. The second is arguably ambiguous and the

word “before” is simply nowhere in RCW 10.95.040(2) and cannot be added. State v. Delgado, 148 Wn.2d 723, 727-28, 63 P.3d 792 (2003), quoting Davis v. Dep’t of Licensing, 137 Wn.2d 957, 964, 977 P.2d 554 (1999) (“Courts, when interpreting a criminal statute, will give it a literal and strict interpretation, and cannot add words or clauses to an unambiguous statute; courts assume the legislature ‘means exactly what it says.’”).

RCW 10.95.040(2) is unambiguous. It’s clear and plain meaning dictates that a death notice must be filed within 30 days after a person’s arraignment and not before.

iii. The respondent’s reliance on civil cases does not support redefining the plain language of RCW 10.95.040.

Ignoring long-standing principles of statutory interpretation, the respondent, resorting to old civil cases to redefine the plain language of the statute, argues that RCW 10.95.040(2) only sets out a termination date. In Adams v. Ingalls Packing Co., 30 Wn.2d 282, 285-286, 191 P.2d 699 (1948), the primary case cited by the respondent, held only that a time period set out as “within ___ days after ___” is not necessarily limited to the time after the initiating event.

third expressly allows for filing either before or after the condition (*i.e.*, arraignment).

We have held on appeal from the Superior Court to this court, that a notice of appeal is premature if given before the judgment is entered and upon the ground that there is no judgment to appeal from⁷. . . That the use of the word ‘within’ itself is not necessarily limited to the time preceding the commencing of the period named, but that it does fix the termination of the period. . . [citations omitted]

Adams, 30 Wn.2d at 285 (quoting In re Improvement of Cliff Avenue, 122 Wash. 335, 210 P.676, 677 (1922)(emphasis added).

The Adams court then excused the premature filing of a memorandum of conditional sales – which had already been signed by both parties – because it was not contrary to the purpose for which the statute requiring filing was enacted. Similarly, in the other two cases cited by respondent, the purpose of the provision was just as well served by the premature filings: in Davies v. Miller, 130 U.S. 284, 288-289, 9 S. Ct. 560, 32 L. E. 2d 932 (1889), the “whole purpose” was “to give the collector an opportunity to revise” the rates and duties and this purpose was “well accomplished by giving notice as soon as the goods were

⁷ The Rules of Appellate Procedure now expressly provide that “A notice of appeal or notice for discretionary review filed after the announcement of the decision but before entry of the decision will be treated as filed on the day following the entry of the decision.” RAP 5.2(g). This demonstrates that the language in RAP 5.2(a) “a notice of appeal must be filed in the trial court within the longer of (1) 30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed, or (2) the time provided in section (e)” would otherwise exclude notices filed between the announcement or the decision and its entry. Moreover, the exception of RAP 5.2(g) is narrow and does not excuse the filing of a notice of appeal at some earlier time.

entered” and the duties determined. In In re Cliff Ave. Improvement, the court did not determine precisely when the ordinance in question was effective, but upheld that filing which may have been before its effective date; the court noted that the city council had been through with the subject at the relevant time in any event. In re Cliff Ave. Improvement, 122 Wash. at 339,

These civil cases, in which the reviewing court made a determination that the purposes of the notice requirements were well served in the case at hand, do not apply to a criminal capital case where the purpose of the premature filing of the notice was to evade the purpose of the statute. The prosecutor here set out orally and in writing that the notice was being filed before arraignment in order to avoid the restriction in RCW 10.95.040 against entering a plea of guilty at arraignment or within 30 days after. RP 2; CP 3115-3117.

The notices in the cited cases are far different than the notice provisions of a death penalty statute, which have been held by this court to not be subject to substantial compliance. Luvene, 127 Wn.2d 690 (1995); Dearbone, 125 Wn.2d 173, 177 (1994) (“We decline to graft the doctrine of substantial compliance onto RCW 10.95.040. . . Substantial compliance is neither proof of good cause under RCW 10.95.040(2), nor is it an exception to the time limit established by the statute”).

And although respondent faults appellant for not citing cases in which a contrary interpretation was applied (BOR at 114), in fact, both Adams and In re Cliff Ave. Improvement, cite three cases dismissing appeals which were filed prematurely, prior to the entry of judgment. Cliff Ave., 122 Wash. at 339 (“We have held, on appeals from the superior court to this court, that a notice of appeal is premature if given before judgment is entered, and that upon the ground that there is no judgment to appeal from. Bartlett v. Reichennecker, 5 Wash. 369, 32 Pac. 96 [1892]; Robertson v. Shine, 50 Wash. 433, 97 Pac. 497 [1908]; Inman v. City of Seattle, 86 Wash. 603, 150 Pac. 1055 [1915].”).

iv. Respondent’s argument that appellant’s interpretation of RCW 10.95.040 would defeat the statute’s purpose lacks legal support.

The respondent also argues that its interpretation of RCW 10.95.040 is the only way to carry out the statute’s purpose. BOR 114-116. It suggests that a death notice must be filed prior to an arraignment in order for the arraignment to fall “during the period in which the prosecuting attorney may file the notice.” BOR 115. The respondent argues to interpret RCW 10.95.040(2)’s specific language that a notice must be filed “after arraignment” would reduce the statute to the same constitutional defects of the previous death penalty statute since, according to the respondent, an arraignment is not “during the period in which the

prosecutor can file a notice” and thus a defendant could avoid the death penalty by pleading guilty before a death notice is filed. BOR 114-115.

This Court’s decision in State v. Ford, 125 Wn.2d 919, 923, 891 P.2d 712 (1995), demonstrates the flaws of the respondent’s interpretation. In Ford, this court, citing State v. Martin, 94 Wn.2d 1, 4, 614 P.2d 922 (1981), acknowledged that a defendant’s right to plead guilty has been established by court rule⁸, but held that it can be limited or qualified. Ford, 125 Wn.2d at 714; Martin, 94 Wn.2d at 4-5. In fact, RCW 10.95.040(2) was cited as one such limitation:

For example, the Legislature responded to State v. Martin, 94 Wash.2d 1, 614 P.2d 164 (1980) by restricting the right to plead guilty during the 30–day period when the State may decide to seek the death penalty. Laws of 1981, ch. 138, § 4 (codified at RCW 10.95.040(2)) states in relevant part:

Except with the consent of the prosecuting attorney, during the period in which the prosecuting attorney may file the notice of special sentencing proceeding, the defendant may not tender a plea of guilty to the charge of aggravated first degree murder nor may the court accept a plea of guilty to the charge of aggravated first degree murder or any lesser included offense.

In the 30–day interim following the defendant’s arraignment for aggravated murder, while the State is determining whether it will seek the death penalty, the court may not accept a guilty plea from the defendant.

⁸ See CrR 4.2 (a) (“A defendant may plead not guilty, not guilty by reason of insanity or guilty.”)

However, this statutory limitation on the court's ability to accept a guilty plea explicitly applies only “during the period in which the prosecuting attorney may file the notice of special sentencing proceeding”. RCW 10.95.040(2). The statutory restrictions on accepting guilty pleas apply only once a defendant is charged with aggravated first degree murder. See RCW 10.95.040(1).

Ford, 125 Wn.2d at 924, fn.1 (emphasis added).

RCW 10.95.010 also illustrates the point.⁹ As noted, the legislature enacted RCW 10.95.040 in response to Martin. Id.; Martin, 94 Wn.2d at 8 (“Clearly the legislature did not anticipate the possibility that an accused might plead guilty to a charge of first degree murder. Thus, it simply failed to provide for that eventuality.”). In short, contrary to the respondent’s assertion, the legislature enacted RCW 10.95 to foreclose the possibility of a person entering a guilty plea at arraignment (absent consent from the prosecution); thus allowing a person to enter a plea pursuant to court rule 4.2 would violate RCW 10.95.010 since it would permit a court rule to “supersede” or “alter” other provisions of the statute, namely RCW 10.95.040.

Finally, the respondent’s position erroneously equates arraignment with entry of a plea. To the contrary, “arraignment” consists of asking the

⁹ RCW 10.95.010 states that “no rule promulgated by the supreme court of Washington pursuant to RCW 2.04.190 and 2.04.200, now or in the future, shall be construed to supersede or alter any of the provisions of this chapter.”

defendant his or her true name, CrR 4.1(e), reading of the information to the defendant, unless he or she waives the reading, and providing a copy of the information to him or her. CrR 4.1(f). CrR 4.2 sets out the provisions related to the entry of a plea. Most importantly, RCW 10.40.060, Pleading to Arraignment, makes the distinction clear:

In answer to the arraignment, the defendant may move to set aside the indictment or information, or he or she may demur or plead to it, and is entitled to one day after arraignment in which to answer thereto if he or she demands it. (emphasis added).

An arraignment is something distinct from entry of a plea, which can take place a day after arraignment.

A death notice can only be filed after a defendant is arraigned on aggravated first degree murder since, as explained in Ford, the restriction on the right to plead guilty applies only “during the period in which the prosecuting attorney may file the [death] notice”, which itself only applies once a defendant is charged with aggravated murder. Moreover, there has never been a case in the forty-plus years of RCW 10.95 that has legally or practically taken the position advanced by the respondent.

v. Other provisions of RCW 10.95 support appellant’s reading of the statute.

The respondent suggests that the legislature by changing the language in former RCW 10.94.010 to the current RCW 10.95.040 sought

to eliminate the commencement date for filing a death notice, leaving only a termination date:

The defendant points out that a prior version of the statute required filing “within 30 days of the defendant’s arraignment.” Former RCW 10.94.010. He argues that the change from “of” to “within” should be considered meaningful. The meaning is not, however what he suggests. This court has recognized that the word “of” can be ambiguous. It can be construed as setting a time limit operating in both directions. The former statute arguably established both a *terminus a quo* (30 days before arraignment) and a *terminus ad quem* (30 days after arraignment). By changing the word “of” to “within”, the legislature eliminated the commencement date, leaving only a termination date.

BOR 116 (citations omitted)(emphasis added).

The respondent’s assertion is significantly flawed as it misstates the appellant’s position and the change in the statute. Scherf did not argue the change from “of” to “within” should be considered meaningful. Scherf demonstrated how the legislature’s change from “of” to “after” (not “within”) was meaningful. AOB 91-95.

The legislature clarified any ambiguity created by the word “of” in former RCW 10.94.010 when it intentionally replaced it with “after” in RCW 10.95.040.¹⁰ Consequently, RCW 10.95.040 eliminates any

¹⁰ RCW 10.94.010 states that a notice must be filed “within thirty days of the defendant’s arraignment” and RCW 10.95.040 changed the language to read: “within thirty days after the defendant’s arraignment.” (emphasis added). Both statutes contained the word “within”. See

argument that so long as a notice was filed within 30 days **of** the defendant's arraignment, it could be filed before or after the arraignment. The change from "of" to "after" is significant and meaningful since courts assume the legislature 'means exactly what it says.'" State v. Delgado, 148 Wn.2d 723, 727-728, 63 P.3d 792 (2003), quoting Davis v. Dep't of Licensing, 137 Wn.2d 957, 964, 977 P.2d 554 (1999).

In the Opening Brief, Scherf cites a number of provisions in 10.95 which would lead to absurd results if interpreted to set only ending dates. AOB 87-90. Respondent's only response is that "[t]he legislature would have no reason to enact a statute barring actions that are essentially impossible." BOR 117. Of course, it would not be impossible, just absurd, to imprison an offender prior to entry of judgment or to submit a proportionality report prior to entry of judgment and sentence.

vi. This court should not rewrite the statute

What respondent is really asking is that this Court should rewrite the notice provisions of the death penalty statute. If, as respondent argues, the statute as it is written only sets an ending date, a prosecutor could file the notice at any time after the commission of a crime, even prior to filing an information. This would contradict the plain language of RCW 10.95.040(2), as the accused would not yet be a defendant and might not

footnote 5, supra.

have an attorney on whom to serve the notice. There would be no case in which to “file” the notice¹¹ since CrR 2.1 and article. 1, section 25 of the Washington Constitution provides that a criminal prosecution commences when the State files an information or indictment; the court does not acquire jurisdiction until that time. State v. Barnes, 146 Wn.2d 74, 81, 43 P.3d 490 (2002) (citing State v. Westphal, 62 Wn.2d 301, 382 P.2d 269, cert. denied, 375 U.S. 947 (1963)).

Thus, to adopt respondent’s argument, this Court would have to determine a beginning point never set by the legislature. This would be improper under State v. Frampton, 95 Wn.2d 469, 627 P.2d 922 (1981), and State v. Martin, *supra*, and the separation of powers doctrine. Brown v. Owen, 165 Wn.2d 706, 718, 206 P.3d 310 (2009), quoting Carrick v. Locke, 125 Wn.2d 129, 135, 882 P.2d 173 (1994) (Although the Washington Constitution does not contain a formal separation of powers clause, “[n]onetheless, the very division of our government into different branches has been presumed throughout our state history to give rise to a vital separation of powers doctrine”).

¹¹ As it was in this case, qualified counsel filed a civil suit to authorize filing a case number in order to obtain funds to conduct a mitigation investigation, but was unsuccessful because the judge in the case ruled that the Superior Court lacked jurisdiction to take any action absent the filing of an information. CP 900, 1667-1668.

Statutory construction does not permit the courts to rewrite a statute. In re Parentage of C.A.M.A., 154 Wn.2d 52, 109 P.3d 405 (2005) (“Courts do not amend statutes by judicial construction nor rewrite statutes to avoid difficulties in construing them and applying them.”) Here, there is no difficulty in construing or applying the plain language of RCW 10.95.040(2): the purpose of the statute was to give the prosecutor 30 days after arraignment to decide whether to file a death notice by providing that the defendant could not enter a guilty plea during this time. Requiring the prosecutor to file the notice during this 30 day period furthers this purpose. The prosecutor sought to evade the dictates of the statute and the statute cannot be rewritten and certainly not for this reason.

vii. Respondent’s claim that the rule of lenity does not apply lacks merit.

Finally, if this Court finds the plain language of RCW 10.95.040(2) ambiguous and thus subject to statutory construction, it must be strictly construed in Scherf’s favor. City of Seattle v. Winebrenner, 167 Wn.2d 451, 462, 219 P.3d 686 (2009).

Oddly, respondent asserts not only that the rule of lenity does not apply because RCW 10.05.040(2) “does not involve a statute setting either crimes or punishments,” but also that the “defendant himself complains that he was harmed by the prosecutor’s delay in filing the notice.” BOR

118-119 citing AOB 98-102. This latter position is entirely contrary to the argument at those pages which establish that appellant was denied his right to qualified counsel at a critical stage of the proceedings - including the inability to investigate and present mitigation evidence - because of the combination of delay in filing charges and the premature filing of the death notice before arraignment. AOB 98-110. Appellant cannot, in fact, think of any instance in which a defendant would benefit from the early filing of the death notice and respondent cites none. BOR 118-119.¹²

The respondent's initial claim that the rule of lenity does not apply because the issue at hand does not involve a statute setting either crimes or punishment is also wrong. Courts apply the rule of lenity whenever a criminal statute is ambiguous. Evans, 177 Wn.2d at 193. This includes statutes not only pertaining to criminal sanctions, but also community custody, probation, post-conviction context, and to procedural statutes affecting an accused's rights. State v. Slattum, 173 Wn.App. 640, 658, 295 P.3d 788, review denied, 178 Wn.2d 1010, 308 P.3d 643 (2013). And clearly a statute determining whether the punishment of death may be imposed affects one's rights. In fact, this Court has held as much: that

¹² On the other hand, there are cases, including this one, that contest on appeal the limited time to conduct mitigation investigation. See e.g., AOB 102-109; State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995); In re Harris, 111 Wn.2d 691, 763 P.2d 823 (1988).

because the imposition of the death penalty is qualitatively different than any other sentence, then “[t]he determination of whether a defendant will live or die must be made in a particularly careful and reliable manner and in accordance with the procedures established by the Legislatures.” State v. Luvene, 127 Wn.2d 690, 719, 903, P.2d 960, n. 8 (1995).

This Court should construe the statute in Scherf’s favor under the rule of lenity as well as all other rules of statutory construction.

3. THE PROSECUTOR’S DELAY IN CHARGING AND FILING THE DEATH NOTICE WITHOUT PROVIDING THE DEFENSE THE OPPORTUNITY TO REVIEW, INVESTIGATE AND PRESENT MITIGATION EVIDENCE WAS FUNDAMENTALLY UNFAIR AND A DENIAL OF DUE PROCESS.

The respondent argues that the process in which the death notice was filed in this case was employed in a fair manner.¹³ BOR 120-133. According to the respondent a process in which the prosecutor withholds filing of charges so qualified counsel won’t be appointed; does not permit

¹³ Before addressing the issues, the respondent remarks, “[i]mmediately after arguing that the notice of special sentencing proceeding was filed too soon, the defendant claims that it was filed too late.” BOR 120. The respondent’s comment is baffling. At no time has Scherf argued or claimed that the death notice was filed too late. On the contrary, he has repeatedly argued the premature filing of the death notice violated RCW 10.95.040(2). AOB 77 – 97, pgs. 4-24, supra. What Scherf has questioned is the late filing of charges [coupled with the premature filing of the death notice], which resulted in his inability to have qualified counsel during critical stages of the proceeding, inability to seek necessary experts, inability to review discovery and conduct, prepare and present mitigation. AOB 98-110.

qualified counsel time to obtain experts, review discovery, or investigate and present mitigation evidence before the death notice decision is made; and then makes an unreviewable decision to seek the death penalty is fundamentally fair and constitutionally permissible. However, this court has held that because the death penalty is qualitatively different than all other sentences, this court has required that “[t]he determination whether a defendant will live or die must be made in a particular careful and reliable manner and in accordance with the procedures established by the Legislature.” Luvane, 127 Wn.2d at 719, n.8.

The respondent contends that although RCW 10.95.040 does not require the prosecution to consider defense mitigation before deciding whether to file a death notice, the prosecutor nonetheless gave the defense more than enough time to present mitigation information since the defense had 43 days (February 1, 2011, to March 8, 2011) to provide it, more than the 30-day period specified by RCW 10.95.040(2). BOR 123-25.

This argument is misleading. First, although counsel was appointed to represent Scherf on February 1, 2011, that counsel was not qualified to represent someone facing the death penalty.¹⁴ Qualified

¹⁴ Superior Court Special Proceeding Rule (SPRC) 1 and 2 mandates that whenever the death penalty may be decreed, at least one counsel appointed must be qualified for appointment in capital cases.

counsel was not appointed until February 14, 2011, only three weeks before the prosecutor decided to file the death notice. As a result, Scherf was denied specially-qualified counsel during the critical stage -- prior to the prosecutor deciding whether to file a death notice.

Second, the prosecutor didn't provide the first batch of discovery (pages 1-3470) until March 2nd, and the second batch (pages 3471-6454) until March 11, 2011. Thus, unqualified counsel did not have the discovery during his appointment, and qualified counsel had less than a week to review approximately 7,000 pages of discovery. Finally, even though qualified counsel was appointed just a few weeks before the prosecutor decided to file the death notice, no formal charges had been brought, thus no criminal cause number existed, preventing counsel from obtaining funds because there was no criminal cause number during this period.¹⁵ The respondent's claim that the defense had 43 days to provide mitigation information is disingenuous.

The respondent, citing State v. Pirtle, 127 Wn.2d 628, 904 P2d 245 (1995), claims that the prosecutor's decision to file a death notice without allowing the defense an opportunity to participate in the process was proper. BOR 124-125. However, the situation in Pirtle is substantially

¹⁵ Because there was no cause number to access funds, qualified counsel was forced to initiate a civil law suit to authorize filing a case number. CP 900, 1667-68, 1679-80.

different than the one presented here. In Pirtle, the prosecutor, on the day charges were filed, announced a “tentative decision” to seek the death penalty, but offered to wait 30-days before filing the notice to consider mitigating evidence. Pirtle, 127 Wn.2d at 641-42. This Court held that the county prosecutor’s willingness to wait 30 days and consider mitigating evidence demonstrated an individualized approach. Id.

That is not what happened here. Indeed, the prosecutor did file a death notice without any input from the defense. The respondent argues, however, the process was fair because even though the death notice was filed, the prosecutor provided the caveat that it would consider mitigation up to the time of trial. BOR 124-126. Under the respondent’s approach, a death notice could be filed in every aggravated first degree murder case so long as the prosecutor indicates a willingness to consider mitigation evidence post-decision. Such an approach is intolerable. It would fly in the face of RCW 10.95.040(1), which permits the elected prosecutor to file a death notice only “when there is a reason to believe that there are not sufficient mitigating circumstances.” It would reduce the statute to an impermissible automatic death notice system. See e.g., State v. Petit, 93 Wn.2d 288, 295, 609 P.2d 1364 (1980) (finding a mandatory internal policy of always filing a habitual criminal charge whenever there was sufficient evidence to support it was an abuse of *prosecutorial* discretion).

Moreover, promising to consider input after the decision to file a death notice is made transfers the burden onto the defendant to disprove the standard set out in RCW 10.95.040(1). The prosecutor's decision to file a death notice would effectively be unchallengeable since it would always be the defendant's fault for failing to provide sufficient mitigating evidence after the death notice was filed.

Where the imposition of the death penalty lacks fundamental fairness, the punishment violates article I, section 14 of the state constitution. State v. Clark, 143 Wn.2d 731, 779, 24 P.3d 1006 (2001) (quoting State v. Bartholomew, 101 Wn.2d 631, 640, 683 P.2d 107 (1984)). Here, the prosecutor immediately knew it was going to seek the death penalty. See CP 2418 (detective's sworn statement drafted February 7, 2011, referencing evidence sought for purposes of a capital sentencing proceeding). The prosecutor intentionally delayed filing charges and withheld discovery to prevent Scherf from having prepared, qualified counsel during the critical stage. As a result, the defense was completely removed from the process. And although the statute does not require that the prosecutor receive mitigation evidence from the defense, this Court has held it's desirable because the public is better served when the prosecutor, in exercising his or her executive function, takes a holistic approach in considering whether to file a death notice. State v. Monfort,

179 Wn.2d 122, 312 P.3d 637 (2013); State v. McEnroe, 179 Wn.2d 32, 43, 209 P.3d 428 (2013). That did not occur here.

4. IF A PROSECUTOR’S DISCRETION UNDER RCW 10.95.040(1) IS UNREVIEWABLE, A DEATH SENTENCE SOUGHT UNDER THE STATUTE IS UNCONSTITUTIONALLY ARBITRARY AND CAPRICIOUS.

As set out above, the defense was prevented from providing input to the prosecutor before the death notice was filed. The death notice filed by the prosecutor merely stated the standard set out in RCW 10.95.040: “By this notice, the State alleges that there are not sufficient mitigating circumstances to merit leniency.” CP 3098.¹⁶ Citing State v. McEnroe, 179 Wn.2d 32, 309 P.3d 426 (2013), the respondent argues that such a nominal notice is not only sufficient, but RCW 10.95.040 is reviewable even though the prosecutor is not required to disclose the basis for his or her decision to file a death notice. BOR 131-32.

In Monfort, the majority of this Court concluded that the prosecutor’s death notice decision under RCW 10.95.040(1) is a “subjective determination” and only requires the prosecutor have “reason

¹⁶ In a different context, a charging document requires more than just citing to the statute. See e.g., State v. Zillyette, 178 Wn2d 153, 162, 307 P.3d 712 (2013). This court concluded, however, that the death penalty notice need not necessarily be included in the charging document. McEnroe, 181 Wn.2d at 385, citing State v. Siers, 174 Wn.2d 269, 271, 275-77, 274 P.3d 358 (2012).

to believe that there are not sufficient mitigating circumstances to merit leniency” before a notice is filed. Monfort, 179 Wn.2d at 136. The Court went on to explain that the statute does not require the prosecutor to base his or her determination on a checklist of mitigating factors or guidelines, or that the judge or defense share the prosecutor’s belief. Id. at 136-37. Ultimately, this Court concluded the prosecutor complied with RCW 10.95.040:

[T]he record shows the county prosecutor had reason to believe that the defense had insufficient mitigation evidence. The prosecutor explained to the trial court that he understood the defense's recalcitrance to mean one of two things: either the defense did not want to show the prosecution its evidence before trial or it had insufficient mitigating evidence. The defense responded that it had decided not to share its evidence for both reasons. Thus, the defense's response gave rise to a reason to believe that there were not sufficient mitigating circumstances to merit leniency.

Monfort, 179 Wn. 2d at 135.

No such record exists in this case. First, as mentioned, the prosecution took intentional actions to prevent the defense from participating in the process before deciding whether to file a death notice. Second, when the defense requested the court to order the prosecution to provide the basis for its decision, the request was denied. CP 2577-86. Finally, when the defense challenged the prosecution’s lack of discretion in filing the death notice, the trial court acknowledged that the

prosecutor's discretion to file a death notice under RCW 10.95.040 was, for all practical purposes, unreviewable. CP 843-844; RP 1955-60.

Whether the prosecutor's decision under RCW 10.95.040 is a "subjective determination" as the majority in Monfort concluded (179 Wn.2d at 136) or contains an "objective" component as urged by the concurrence (179 Wn.2d at 137-38) and Scherf (AOB 115), the prosecutor's decision must be such that permits judicial review. Monfort, 179 Wn.2d at 137-38 (Gordon McCloud, J., concurrence); see also Evitts v. Lucey, 469 U.S. 387, 401, 105 S.Ct. 830, 838-39, 83 L.Ed.2d 821 (1985) ("When a state opts to act in field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution - and, in particular, in accord with the Due Process Clause.").

The decision-making process employed here – where the prosecution intentionally prevents defense participation and is not obligated to set out any reason for its decision other than merely citing to the statute, and, as the trial court acknowledged, makes a decision that is unreviewable – is unconstitutional. Under a process employed here, there is no way for this Court to review whether a decision to file a death notice is based on impermissible factors cloaked as legitimate. See Gregg v. Georgia, 428 U.S. 153, 189, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1974)

(opinion of Stewart, Powell, and Stevens, JJ.) (“Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”).

5. THE CHARGING DOCUMENTS LACKED ESSENTIAL ELEMENTS OF THE CRIME OF CAPITAL FIRST DEGREE MURDER.

In the Opening Brief, Scherf raised the issue that the United States Supreme Court’s decision in Alleyne v. United States, __U.S.__, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), made “insufficiency of mitigation” as required RCW 10.95.040(1) and RCW 10.95.060(4) an essential element of aggravated first degree murder that must be included in the charging document. AOB 115-123. Relying on State v. McEnroe, supra, which was issued after the appellant’s opening brief was filed, the respondent claims that the death notice is sufficient as long as it alleges that there are not sufficient mitigation circumstances to merit leniency. BOR 132-33.

Scherf acknowledges this court’s decision in McEnroe but also recognizes this Court did not reach the question whether the insufficient mitigation finding is a factual determination. McEnroe, 181 Wn.2d at 385. As such, Scherf continues to rely on the argument advanced in the

opening brief. AOB 115-123.

6. THE STANDARD EMPLOYED IN RCW 10.95.030 IS UNCONSTITUTIONAL.

In Hall v. Florida, __U.S.__, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), the United States Supreme Court concluded that a state law that defined intellectual disability as requiring an intellectual quotient (IQ) test score of 70 or less was unconstitutional. The respondent first argues that this issue was not raised at trial and therefore should not be considered on direct appeal. BOR 133-34. It is undisputed that the Hall decision had not been issued at time of Scherf's trial. Moreover, this Court has followed the lead of the United States Supreme Court when deciding whether to give retroactive application to newly articulated principles of law. State v. Evans, 54 Wn.2d 438, 444, 114 P.3d 627 (2005). Under this approach, "A new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a clear break from the past. Id. (emphasis added). Finally, it is self-evident that the decision addressed in Hall is a "manifest error affecting a constitutional right" otherwise the United States Supreme Court would not have decided the issue. Hall, 134 S.Ct. 1986 (finding overly restrictive statute violates the Eighth Amendment).

The respondent next argues that RCW 10.95.030, Washington’s statute defining intellectual disability, is not affected by Hall. BOR 136-37. In Hall the United States Supreme Court, after concluding that Florida’s statute unconstitutionally restrictive, noted that “at most nine States mandate a strict IQ score cut off at 70” and “[o]f these, four States [including Washington] appear not to have considered the issue in their courts.” Hall, 134 S.Ct. at 1996-97.

RCW 10.95.030 does mandate a bright-line rule found to be unconstitutional in Hall. Under RCW 10.95.030(2), a defendant must establish an intellectual disability, which is defined as someone who has (i) significantly subaverage general intellectual functioning (further defined as possessing an IQ score of seventy or below) RCW 10.95.030(2)(c)); (ii) existing concurrently with deficits in adaptive behavior; and (iii) both significantly subaverage general intellectual functioning and deficits in adaptive behavior were manifested during the developmental period. RCW 10.95.030(2)(c) (emphasis added). It is generally presumed that use of the word “and” in a statute indicates the legislature's intent that two provisions be applied conjunctively, while use of the word “or” indicates an intent that the provisions be applied disjunctively. State v. Tiffany, 44 Wash. 602, 603–04, 87 P. 932 (1906); State v. Irizarry, 111 Wn.2d 591, 602, 763 P.2d 432 (1988) (Callow, J.,

concurring and dissenting). As such, RCW 10.95.030(2) requires that a defendant must establish, among other things, that he or she has an IQ score of 70 or less in order to meet the definition of intellectual disability. See State v. Davis, 141 Wn.2d 798, 885-86, 10 P.3d 977 (2000), reversed on other grounds, In re Davis, 152 Wn.2d 647, 101 P3d 1 (2007). The rigid definition in RCW 10.95.030(2), like the Florida statute in Hall, is unconstitutional.

Finally, the respondent argues that the constitutionality of RCW 10.95.030 has no relevance to this case. BOR 138-39. However, RCW 10.95.030 is relevant to this case for at least two reasons. First, as noted in the opening brief, the Sixth Amendment mandates that any facts necessary to impose a statutory maximum are elements of a crime and must be found by a jury, including whether the defendant has an intellectual disability. AOB at 127. In McEnroe, this Court, although not reaching the question whether the insufficiency of mitigation finding is a factual determination for purposes of the Sixth and Fourteenth Amendments, concluded that the notice of special sentencing proceeding afforded the statutorily required notice that the state intended to prove the absence of sufficient mitigation. McEnroe, 181 Wn.2d at 385. Here, the prosecution's death notice specifically alleged that in addition to believing no mitigation circumstances existed to merit leniency, "at the time the crime was

committed, the defendant did not have an intellectual disability as defined in RCW 10.95.030(2).” CP3098. Consequently, the prosecution provided notice that it intended to prove that the defendant did not have an intellectual disability under unconstitutionally restrictive standards in RCW 10.95.303(2). The respondent then argues that evidence was presented that characterized Scherf as a “reasonably bright guy” with an IQ above 70. BOR 133. However, as noted by the respondent, this information was not provided to the jury, but part of a pre-trial hearing. BOR 133, citing to 5/8/12 RP 1027.

Secondly, this Court is statutorily mandated to determine, among other facts, whether a defendant sentenced to death has an intellectual disability within the meaning of RCW 10.95.030(2). RCW 10.95.130(2)(d). This determination is mandatory and must be addressed whether or not it was raised at trial. See e.g., RCW 10.95.130(2)(d), State v. Elledge, 144 Wn.2d 62, 85-86, 26 P.3d 271 (2001). As such, this Court is unable to conduct its statutorily obligated review using the unconstitutionally-restrictive definition of RCW 10.95.030.

7. THE TRIAL COURT ERRED IN DENYING SCHERF’S MOTION TO SUPPRESS PHYSICAL EVIDENCE.

Respondent failed to address Scherf’s statutory right of privacy in his medical records that he retained even though the Department of

Corrections (DOC) had the right, for security reasons, to inspect records he kept in his cell. This statutory right is the essential beginning point for the suppression of physical evidence issue on appeal, and the failure to address the issue is a tacit concession that the police improperly searched and seized the medical records in Scherf's cell.

Scherf's argument that the trial court erred in denying his motion to suppress the medical records taken by the police from his property collected from his cell and other documents and medical records kept elsewhere at WSR is as follows:

(1) Under RCW 70.02 the Department of Corrections had a duty to protect Scherf's privacy in the medical records kept in his cell absent a valid warrant, and the warrant (11-28) the officers obtained did not authorize the search for or seizure of medical records.

RCW 70.02.005(4) provides that "[p]ersons other than health care providers [such as the DOC] obtain, use and disclose health record information in many different contexts and for many different purposes" and, therefore, "[i]t is the public policy of this state that a patient's health care information survives even when the information is held by persons other than health care providers." Thus, the DOC, even if not a health care provider, had a duty to protect Scherf's privacy in the medical records held in his cell even if the DOC itself – like a health care provider

-- had the authority to use and review those records.

DOC, in fact, recognizes its responsibility to protect this right to privacy through policy 640.020, Offenders Health Records Management, which provides that medical information “is confidential and may only be disclosed as authorized by law.”¹⁷ CP 2328, 2331.

Although the police obtained a warrant for the cell search, the warrant Det. Wells obtained, 11-28, authorized the search and seizure of only “personal journals or papers regarding journaling referencing the crime,” not medical records. CP 2416. See AOB 129-131. There was no valid basis for searching the medical records in Scherf’s cell.

2. Since information from the medical records in Scherf’s cell was improperly obtained in violation of his statutory right under RCW 70.02.005, that information should have been excluded from the affidavit in support of warrant 11-32, the warrant authorizing the search of Scherf’s stored property, his central file and medical records. Without this information, the affidavit was insufficient to provide probable cause to believe that evidence of a crime would be found there.

None of the remaining documents -- all of which pre-dated the

¹⁷ Scherf’s central file, for the section which contained his medical records, also had a warning in red, “No document in this section of the file may be disclosed to a member of the public without approval of the public disclosure classification officer.” RP 223-228

crime -- nor Det. Wells's speculation about defenses which he imagined a defendant might assert -- established probable cause to believe that Scherf's medical records or central file would contain evidence related to the death of Officer Biendl. See AOB 132-134. Further, the trial court's conclusion that every aspect of a defendant facing a potential capital charge is evidence of a crime is inconsistent with controlling authority by the Court and the rules governing capital cases. AOB 132-136.

3. Warrant 11-32, which authorized the seizure of every document held by WSR pertaining to Scherf, including his medical records, failed to meet the particularity requirement of the Fourth Amendment. These documents were not evidence of the murder Scherf was alleged to have committed.

4. Because the medical records room was not included in the place to be searched under the warrant, the search and seizure of the medical records were beyond the scope of the warrant. If a search of the entire WSR was authorized by the warrant, it was overbroad for this reason as well. See AOB 138-139.

In responding to these arguments, respondent does not address the statutory right of privacy created by RCW 70.02, and errs in concluding that the state has the right to obtain any and all information about a person who commits a crime, particularly one with a potential death sentence.

- a. **Respondent does not address the statutory right of privacy in medical records, tacitly conceding that this right was violated by the search of those records from Scherf's cell.**

Respondent does not address Scherf's statutory right of privacy created by RCW 70.02.005(4). Respondent argues only that RCW 70.02 does not limit disclosure by a patient of his own medical records and that the medical records in Scherf's cell were not confidential because they were subject to searches by corrections staff. BOR 23-24. The only authority cited, State v. Anderson, 44 Wn. App. 644, 650, 723 P.2d 464 (1986), review dismissed as moot, 109 Wn.2d 1015 (1987), predated the 1993 effective date of RCW 70.02, and dealt with the confidentiality of communications between patient and physician when a third party is present and the defendant is presenting an insanity defense. Anderson does not address disclosure of medical records at all.

While DOC had security reasons for periodic search of the medical documents Scherf kept in his cell, under RW 70.02.005, DOC also had a duty to protect his privacy interest in the documents by preventing disclosure to law enforcement absent a warrant. RCW 70.02.005. In other words, the information was effectively held by DOC because it was housed in Scherf's cell. Scherf did not authorize disclosure to anyone outside of the Department; only DOC could authorize a search of his cell.

Under those circumstances, DOC had a continuing duty to protect Scherf's interest in its "proper use and disclosure" of his medical records even though the information was available to the DOC. RCW 70.02.050.

b. Respondent does not address the sufficiency of the search warrant affidavit without the improperly searched medical records from Scherf's cell.

Respondent's argument that the affidavit for warrant 11-32 established probable cause to search and seize Scherf's medical records and central file assumes that the documents Det. Wells reviewed in his cell, including the medical records, were properly considered by the issuing magistrate. BOR 28-29. Scherf's argument is that these documents should be excised from the affidavit as illegally obtained under RCW 70.02.005, the argument respondent failed to address. AOB 128.

The one argument presented by respondent to establish probable cause independent of the medical records in Scherf's cell, is its assertion that the affidavit in support of warrant 11-28, which was incorporated into the affidavit in 11-32, establishes "probable cause to believe that the defendant wrote about plans to murder an officer, and those writings would be found in books and papers in his possession." What the affidavit said, however, was that in a former case, "while attempting to identify SCHERF they [the police] located a written statement in an address book belonging to SCHERF where he documented his assault against his

victim.” BOR 28. Thus, the actual affidavit refers to one instance and makes clear that Scherf wrote the details of the assault after it occurred and not his plans to commit it. With regard to the death of Officer Biendl, Scherf could not have written the details of the murder in any book in his cell because he had not returned to his cell after leaving the sanctuary. There was no probable cause that any of the documents in his medical records or central file would contain plans to murder an officer.

What respondent is actually arguing, though, is that anything about a suspect of a crime is evidence of a crime – evidence the accused could form intent or other mental element to commit the crime or was physically or mentally capable of committing it. BOR 27. Although tied to the crime of aggravated murder by respondent, virtually anything about a suspect of any crime could potentially relate to his or her ability to form intent or physically commit a crime; and, under the state’s logic, could provide the basis for searching anything related to the suspect. Respondent cites no authority for this broad claim, which would render the Fourth Amendment and article 1, section 7 meaningless. See BOR 27-31.

Respondent’s fall-back argument – also unsupported by authority - is that since Scherf faced a potential death sentence, all of the documents about him would be evidence of a crime because it could potentially contain mitigation. BOR 32-35. The only authority cited by respondent

or relied on by the trial court was Blakely v. Washington, 542 U.S. 296, 124 S. Ct, 2531, 159 L. Ed. 2d 403 (2004), cited for the proposition that “the Sixth Amendment right to jury trial includes the right to have every fact that enhances punishment pleaded and proved to a jury.” BOR 33. As noted in AOB at 135, however, this Court has never held that absence of mitigation is an element of capital murder.¹⁸ And, again, such a broad holding that anything about a suspect in a capital case is evidence of a crime because it could be mitigation would deprive the suspect of any constitutional protections under the Fourth Amendment or article 1, section 7.

In fact, in Washington, the state is restricted in the evidence it can present to the jury in the penalty phase trial to evidence of the accused’s record of conviction, evidence that would be admissible in the guilt phase and evidence to rebut mitigation introduced by the defendant. In re Cross, 180 Wn.2d 664, 696, 327 P.3d 660 (2014). And to protect the defendant in a capital case, the Superior Court Special Proceedings Rules in criminal cases (SPRC) provide that discovery of defense penalty phase evidence can be deferred until after the guilt phase of trial. SPRC 4. Further, SPRC

¹⁸ If this Court now holds that absence of mitigation is an element of the crime, Scherf was not properly charged and his death sentence cannot stand. AOB 115-124.

5 provides for non-disclosure of expert witness reports concerning the defendant's mental condition and data relied upon by the experts in making that report until after a guilty verdict, and then only if the defendant elects to present expert testimony on his mental condition at the special sentencing proceedings. SPRC 5(g). To allow the state to search documents related to the defendant's penalty phase mitigation evidence would be directly contrary to the protections set out in these rules.

c. Under the authority cited by respondent, warrant 11-32 described the items to be seized with insufficient particularity.

Respondent argues that the all-inclusive search of "records, documents, papers, writings both typed and handwritten, books or any other personal records for inmate Byron E. Scherf," authorized by warrant 11-32, was limited "by [the listing in the warrant of] what those specific records entail." BOR 38. In fact, the further listing is not a limitation at all, but a list that "such records and papers are to include" particular kinds of documents:

Schooling and educational documentation and records, certificates of educational achievement, military records, psychological evaluations and assessments, psychological records, medical records to include medication information, prison records to include work history, housing history, and disciplinary issues, books, books with specific selections highlighted, underlined or bookmarked and writing in the margins of such books.

CP2351. This contrasts with the true limitations in the cases cited by respondent. Respondent cites State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998), where the search of “personal records, correspondence, photographs and film” was upheld because it was limited “to evidence showing a relationship between the defendant and his wife and one of the victims and his wife.” BOR 37. Here, the search could have been limited to evidence showing the relationship between Scherf and Officer Biendl, but was not. In United States v. Vasquez, 645 F.3d 880 (9th Cir. 2011), cert. denied, 132 S. Ct. 1778 (2012), the search was upheld “because it only authorized seizure of documents recording the gang’s criminal activity, and not all documents maintained by the gang.” BOR 37. Here, again, the search was in no way limited to improper activity by Scherf related to Officer Biendl or any other prison staff.

Although respondent tries to distinguish United States v. Spilotro, 800 F.2d 959, 964 (9th Cir. 1986), from warrant 110-32, on the grounds that Spilotro involved “violations of 13 different statutes,” the constitutional problem for the Spilotro court was the failure to identify items commonly associated with the relevant criminal activity in question or to describe the type or contents of records sought with regard to that activity. The Court found that “notebooks, notes, documents, address

books and other records, etc.” did not meet the particularity requirement of the Fourth Amendment. The list of “records, documents, papers, writings both typed and handwritten, books or any other personal records for Byron Scherf,” was no more particular. The fact that the warrant specified certain documents as included under these general terms did not limit the scope of the search or tie the documents to criminal activity or to any particular content.

Warrant 11-32 authorized the search and seizure of virtually any and every paper having anything to do with Scherf; it was overbroad. AOB 135-137. The affiant or magistrate could have, but did not limit it in any way.

d. Respondent’s argument that warrant 11-32 authorized the search of any document relating to Scherf found anywhere at WSR is not supported by the plain language of the warrant.

Respondent’s argument is that:

Retrieving the documents from various locations within WSR did not exceed the scope of the permissible search. Like the bank records at issue in [State v. Kern, 81. Wn. App. 308, 914 P.2d 114, review denied, 130 Wn.2d 1003 (1006)] the medical records here were all maintained on the WSR premises.

BOR 43. In Kern, however, as noted in the Opening Brief of Appellant, the warrant described with particularity the place to be searched as the bank premises; the only issue was whether bank employees could copy the

records the officials were to provide. Kern is not apposite. AOB 139.

In contrast, warrant 11-32 expressly provides that the “specific areas within the reformatory to be search [sic] are as follows,” and identifies those areas the “WSR inmate property and storage room and WSR Administration Building.” CP 2351. These identified areas do not include the medical records room. See AOB at 138-139. And while the Affidavit For Search Warrant was incorporated by reference, the affiant’s reference to “WSR Records Retention” did not identify the “medical records room as a place to be searched.” CP 2422-2423.

e. The error was not harmless.

The prosecution used the knowledge it gained from these records – especially the medical records – to deny Scherf his right to present mitigation prior to the filing of the death notice and at sentencing. CP 899-900, 1667-68, 1679-80, 2566, 2568, 3568. Even though Scherf did not seek to present mental health experts, he was prevented from presenting evidence of his continuing wish to be treated and willingness to try to change by the prosecutor’s threatened use of all his mental health records to prove that he was not treatable. RP 6988-89, 6990-96. AOB at 140.

Respondent asks this Court to disregard this prejudice by asserting that the jury would not have given consideration to Scherf’s wish to be treated and willingness to try to change. BOR 45-46. This is, however,

among the types of mitigating evidence that is most persuasive to jurors. See, e.g., John H. Blume, Sheri Lynn Johnson & Scott E. Sundby, Competent Capital Representation: the Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation, 36 HOFSTRA L.Rev. 1035, 1040-41 (jurors are persuaded for life by evidence of remorse.) (citing Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, But Was He Sorry?: the Role of Remorse in Capital Sentencing, 83 CORNELL L.REV. 1599, 1620-1621, among other authority). The exclusion should require reversal of Scherf's death sentence.

8. THE TRIAL COURT ERRED IN NOT SUPPRESSING VIDEOTAPED STATEMENTS.

a. Respondent's statement of facts "leading to the defendant's statement to the police" omit the critical facts.

Detective Bilyeu: [Y]ou're telling us that you're ready to talk to us, you're ready to give us a confession in your own words as long as some of these things [e.g. eyeglasses, access to a phone, writing materials, Bible, blanket, hot water, toiletries, visits, newspaper, contact with family] are taken care of I know our bosses are gonna ask, hey if we do all this for Scherf what's the next list gonna say.

Byron Scherf: [T]here's not gonna be a next list. . . . if this doesn't happen, then I, then everything is off the table.

CrR 3.5 Ex. 10, at 12; RP 606-609. This explicit agreement to confess to

the murder of Officer Jayme Biendl in exchange for some of the things necessary to alleviate the conditions of his confinement, between Scherf and Snohomish County Sheriff's Detectives Walvatne and Bilyeu, was videotaped. Id. Scherf's offer to give "a full confession provided that the stipulation of things that I've listed on the sheet of paper were taken care of prior to that," and his statement that he would "complete the agreement" after he received the items were in writing. Id. at 2; RP 649-652, 788-796. Whether or not respondent acknowledges it in its brief, there was an explicit agreement and understanding that Scherf would confess in order to obtain relief from the onerous conditions of his confinement. RP 606-609. The agreement is well memorialized in the record.

Respondent tries to minimize the adverse conditions – e.g., the "rubberized safety cell" with only a hole in the floor for a toilet wasn't so bad because it could be flushed by an officer from outside the cell and Scherf's walk through the January dark and rain wearing only a suicide smock during his transfer to the mental health cell wasn't so bad because it lasted only nine minutes.¹⁹ BOR 48, 51. Moreover, respondent tries to

¹⁹ At the CrR 3.5 hearing defense expert Dr. Stuart Grassian provided Scherf's account of the conditions of his confinement: On January 30, he was walked to the suicide cell in the late evening in the rain and cold in a smock and had nothing with which to dry himself once in the cell. He

justify these conditions as necessary for Scherf's safety e.g., "the cell had no sink or toilet that the inmate could hit his head on," but then argues inconsistently that Scherf was not suicidal, functioning within normal limits and "able to advocate for his needs and requests" at the time he offered to confess in order to alleviate them. BOR 51-52. His deprivations were for his safety, but he had no mental health problems calling for safety measures, according to respondent. BOR 51-52. However, neither the prison authorities, police investigators nor respondent in its brief have ever taken the position that Scherf was entitled to humane treatment without having to bargain for it even if he was suicidal or in mental distress.²⁰

In fact, as respondent sets forth, Scherf tried asking for the things he needed from the people with whom he had contact -- Monroe Det.

received no food for a significant time and was without any amenities; after a few days he was taken to another rubber hospital cell with no toilet and water only sporadically. RP 996-997. He did not have enough to eat, was very cold and unable to brush his teeth or shower. RP 997. Lights were on 24 hours a day and the guards woke him every fifteen minutes; he could not contact his family and had nothing to distract himself with. RP 998. He began having increasingly morbid thoughts and hyperventilating, sweating and torturing himself with what he had done. RP 999. At times he felt that he could not continue another minute. RP 999.

²⁰ A psychologist at WSR testified that she would not ask for a dry cell for a suicide watch, nor deny food and that hygiene items ordinarily would be restricted but not denied. RP 955. She testified that she was going to see that he be given a mattress and maybe blankets before learning he would be transferred to the jail. RP 959.

Ryan during the trip to the jail and Snohomish County Sheriff Detectives Walvatne and Bilyeu who saw him daily. BOR 51, 54, 55-56. He got a few improvements as a result, but he did not get real relief until he agreed to give a taped confession. He was not even given his eyeglasses which he needed to read.²¹ RP 637.

Respondent does not dispute that no pictures taken by Detectives Walvatne and Bilyeu, purportedly to see the development of bruises over time – which were the excuse for their virtual daily access to Scherf -- were used at trial. AOB 34, n. 12. Respondent says only that the “photographs were to document whether the defendant had any injuries,” essentially a non-issue in the case. BOR 53.

Respondent also admits that Walvatne and Bilyeu were aware from the outset that Scherf asked to have an attorney present when he was interviewed by the police, but did nothing to arrange that. BOR 53 (“The detectives were aware that the defendant had requested an attorney, so they asked no questions . . .”). Respondent does not dispute that when these detectives learned that Scherf asked again to speak to his attorney or the defense investigator on February 4, they did nothing to see that he got to talk to his attorney. BOR 55; RP 635, 777. The jail staff and

²¹ There was testimony that Scherf was given an orientation manual and other information about contacting an attorney, but he wasn’t allowed his glasses so that he could read them.

prosecutor knew of this request, as well, and did nothing. RP 634-635, 707, 711, 822. On the same day, Scherf told MHP DaPre that he wanted to talk with his attorney's investigator and DaPre relayed the information to the jail captain. RP 1229. Defense counsel was not contacted. RP 891. Based on this evidence, the trial court found that Scherf wanted to talk to his attorney at that time.²² RP 1421.

Respondent also does not dispute that during the time when the detectives were visiting Scherf for an hour or two a day in the Snohomish County Jail and obtained his confession, he met with his appointed attorney only once, or that his appointed counsel, who was not qualified to represent a defendant in a capital case, believed – mistakenly or otherwise – that it would take two or three days for him to arrange to talk to Scherf again. BOR 54, 59-60. Although Walvatne and Bilyeu may have advised Scherf that he had a right to an attorney, they did nothing to provide him with one when he requested to see his lawyer. RP 635, 777. Moreover, from February 1 through February 14 Scherf was unable to successfully complete any phone calls from jail. RP 692-693. The phone outside his

²² In his statement of additional grounds, grounds 9, Scherf assigned error to Undisputed Finding of Fact #41, “Scherf did not avail himself of any of the means to contact a lawyer.” It is clear that the record shows that he did make the jail administration, the police detectives and the mental health provider aware of his desire to talk to his attorney and they did nothing.

cell was not working. RP 1117-1118.

Respondent sets out excuses for why Scherf was not provided with an attorney when he requested one in the shift lieutenant's office or when he requested one from Det. Robinson after Officer Biendl's body was discovered (BOR 48-50), but did not explain why Det. Robinson was able to arrange an attorney promptly after being told by Scherf that if he got to talk to an attorney quickly, he might make a statement. RP 615. In fact, Det. Robinson could have provided Scherf with a phone and the number of a public defender without delaying the application for a search warrant appreciably and without compromising the security of the institution. He could also have contacted attorney Schwarz at that time, but didn't.

b. The trial court erred in not suppressing Scherf's statements under CrR 3.1.

i. He was not provided timely access to counsel.

It is undisputed that Scherf asked to speak with an attorney at 9:00 p.m. on January 29, after he was placed in handcuffs and taken to the shift lieutenant's office, and that he was not given any opportunity to speak with an attorney until twenty-four hours later. RP 394. Criminal Rule 3.1 requires more – it requires immediate means to communicate with an attorney as soon as feasible after a person is taken into custody. See AOB 145-146.

Respondent's argument is that Scherf was not entitled to contact an attorney when he first asked to speak to an attorney in the shift lieutenant's office because he was in custody only for a prison infraction at that time (BOR 63-65), and that the delay in providing access to an attorney after he told Det. Robinson he wished to speak with one was justified by "the detective's investigative duties and DOC security measures and policies." BOR 64-71.

First, however, respondent admits and relies on the fact that Scherf was being investigated for an attempted escape at 9:00 p.m. on January 29, in its argument justifying the delay in providing access to counsel: "The prison was on lockdown at that time, due to a concern about other inmates being involved in an escape attempt." BOR 49; RP 394, 480, 499-450. In fact, the officer who discovered Scherf in the chapel and handcuffed him testified that he considered him to be making an escape attempt. RP 394. Scherf was entitled to access to counsel at that time because he was being investigated for the crime of attempted escape, RCW 9A.76.110. and there was no evidence that he could not have been allowed a phone call to an attorney then.

Second, respondent cites no authority that police are entitled to deny access to counsel under the circumstances present at WSR on January 29 and 30. Reliance on State v. Mullins, 158 Wn. App. 360, 370,

241 P.3d 456 (2010), review denied, 171 Wn.2d 1006 (2011), and State v. Wade, 44 Wn. App. 154, 157, 721 P.2d 977, review denied, 106 Wn.2d 1003 (1986), abrogated on other grounds, In re Carrier, 173 Wn.2d 791 (2012), is misplaced.

The excuses justifying delay in allowing contact with an attorney respondent identifies are: a need to obtain a search warrant (BOR 57), the risk to prison security and the lockdown of other inmates (BOR 68); past incidents in IMU in which inmates were harassed (BOR 68); restrictions on phone use by inmates and cell phone use (BOR 70); and restriction on any other contact with counsel beside face-to-face meetings. BOR 70. These claims are mere assertions and, while the institution may have preferred not to allow Scherf access to a telephone to contact an attorney, it was not shown that such access was impossible or even difficult. Scherf could have talked with an attorney while Det. Robinson applied for a search warrant; there was no warrant to be served at the time which required Scherf's immediate availability. There are phones throughout WSR, undoubtedly also in the hospital or medical unit. Moreover, no explanation has been cited to explain either why the contact had to be in person or why a cell phone could not have been used. In fact, once Scherf indicated that he would talk to Det. Robinson if he could consult with an attorney quickly, all of difficulties went away and Robinson was able to

contact Schwarz and arrange for him to enter WSR. RP 615-616.

In Mullins, the court discussed three other cases, including Wade, before concluding that, under the facts of the case, Mullins's rights under CrR 3.1 had not been violated. Mullins, 158 Wn. App. at 366-370. Mullins had invoked his right to counsel during an interview in which he was not in custody and was allowed to leave once he invoked them. Later, he turned himself in to the police; at that time, two deputies executed a warrant for taking pictures of him and collecting trace evidence from him. Id. 362-366. Mullins was again advised of his rights and told the detectives he would talk to them after he had been appointed counsel. After the evidence was collected, Mullins was allowed to wait in a room where he had access to a telephone while the deputies completed the pre-booking form. When he heard the deputies discussing one of the questions on form, he went into the room where they were in and began talking. They reminded him of his rights before he began volunteering incriminating statements. In response, Mullins said he understood his rights, but had something he wanted to get off his chest. Id. at 363-364.

The Mullins court noted that in Wade the court held that the defendant waived his right to counsel before the police had an opportunity to provide him with a phone and list of potential attorneys. Mullins, at 366-367; Wade, 44 Wn. App. at 159. Wade had been arrested as a suspect

in a robbery; he requested an attorney at the time of arrest, but he was taken first to the booking area where he initiated a conversation with an officer he knew who was there. Wade, at 157. The officer read Wade his rights and Wade waived them. Id. The holding in Wade was premised on the conclusion that the police may complete the routine booking or pre-booking procedure before providing access to counsel. Id. at 159.

The court, in Mullins, also discussed State v. Kirkpatrick, 89 Wn. App. 407, 413-414, 948 P.2d 882 (1997), review denied, 135 Wn.2d 1012 (1998), and State v. Jaquez, 105 Wn. Ap. 699, 20 P.3d 1035 (2001). In Kirkpatrick, the defendant was arrested and questioned by Lewis County deputies about a murder in Port Angeles, Washington; he denied involvement in the crime, but admitted he was in the parking lot when a clerk was killed. When told he wasn't free to leave, he demanded a lawyer. The deputies, however, made no effort to contact a lawyer for Kirkpatrick and drove him to Lewis County; during the four-hour drive, Kirkpatrick initiated conversation and confessed. Kirkpatrick, 89 Wn. App. at 409. The Kirkpatrick court held that "the State has not shown reasonable efforts to contact an attorney, why such efforts could not have been made, or a valid waiver by Kirkpatrick before the 'earliest opportunity' arose." Kirkpatrick, at 415-416. Similarly here, the state has not shown why contact could not have been made at the time or a valid

waiver obtained before the “earliest moment” arose.

In Jaquez, the court held that the police had not acted at the earliest opportunity where the defendant was made to wait while other officers drove the victim to Jaquez’s location for an attempted show-up identification. Jaquez, 105 Wn. App. at 717,

In affirming the denial of suppression, the Mullins court distinguished Wade from Kirkpatrick and Jaquez because it involved only a short wait for the officers to complete the execution of a warrant and pre-booking procedures, and because Mullins was not in “close custody” as in Kirkpatrick. Moreover, in Mullins, the court conceded that the earliest opportunity might not always be after pre-booking procedures. Mullins. 158 Wn. App. 370.

In State v. Pierce, 169 Wn. App. 407, 948 P.2d 533, 280 P.3d 1158 (2012), review denied, 175 Wn.2d 1025 (2012), the court held that the police providing Pierce with a phone and the number of the public defender’s office which was closed for the day was insufficient to provide him access to counsel. Under this authority, Scherf was not provided with timely access to counsel.

Respondent further asks this Court to hold that Scherf forfeited his right to counsel under CrR 3.1 because he was in prison at the time of the crime and at the time he was taken into custody – both because prisons

have rules against such things as inmates making calls at night (BOR 49) and because prisoners are bad people (BOR 67-68) -- but this argument is unsupported by any relevant authority and should be disregarded.²³ See Grant County v. Bohme, 89 Wn.2d 953, 958, 577 P. 2d 138 (1978) (“Where no authorities are cited, the court may assume that counsel, after diligent search, has found none. We therefore do not consider points unsupported by argument or law.”) At the time Scherf requested to speak to an attorney in the shift lieutenant’s office not even the prison staff were aware that a murder had been committed and a call to an attorney would not have caused any safety concerns and, by the time Det. Robinson met with him, all of the inmates at WSR had been determined by picture count to be safely in their cells and likely unaware of the death of Officer Biendl. RP 506. Later, Scherf spoke with attorney Schwarz without any disruption to the safety of those at the institution or its orderly operation. This argument serves no purpose other than to disparage Scherf.

Further, respondent argues that Scherf was not entitled to contact an attorney because he was in prison and in custody when accused of

²³ Respondent asserts that “the exigencies of the police investigation are weighed against a defendant’s request for immediate access to counsel.” BOR 65. No authority is cited for this proposition. Wade, Mullins, and Kirkpatrick hold that the police may complete pre-booking procedures and execute warrants for evidence from the accused, but not if there are exigencies which mandate more immediate access. Mullins, at 370.

murdering Officer Biendl: “Here that time [when he was taken into custody] is not clear because the defendant was already in custody pursuant to his prior conviction at the time Officer Biendl was found murdered.” BOR 71. Respondent cited State v. Warner, 125 Wn.2d 876, 885, 889 P.3d 479 (1995), and Howes v. Fields, ___ U.S. ___, 132 S. Ct. 1181, 182 L. Ed. 2d 12 (2012), in support of this argument. Neither of these cases hold, however, that being in custody on an unrelated matter means that the person being questioned is not in custody for purposes of Miranda. In fact, in Mathis v. United States, 291 U.S. 1, 88 S. Ct. 1503, 20 L. Ed. 2d 381 (1968), the United States Supreme Court expressly held that a person who otherwise meets the requirements for Miranda custody is not taken outside the scope of Miranda because he was incarcerated on an unconnected offense.

Warner recognizes this implicitly in holding that custodial means “more than just the normal restrictions on freedom incident to incarceration.” Warner, 125 Wn.2d at 885. Warner cited State v. Sargent, 111 Wn.2d 641, 762 P.2d 1127 (1988), which held that the defendant was in custody when interrogated by a probation officer in the King County Jail visiting area because the booth was locked. Warner, however, was in group therapy class and the counselors who led the class were not, the court held, state agents for purposes of Miranda. Fields was questioned in

a conference room in prison about criminal activity which occurred before he was incarcerated. Fields was found not to be in custody because he was told that he was free to leave the conference room at any time.

Under this authority, Scherf was in custody for purposes of Miranda. He was handcuffed as soon as he was discovered at the chapel and placed in leg irons to be escorted to segregation from the shift lieutenant's office. RP 394-395, 429, 450. Ordinarily, prisoners are not handcuffed as they move about the institution. RP 464. Scherf remained handcuffed in the shift lieutenant's office. RP 488. Pictures were taken of him and his clothes were taken as evidence. RP 482-483, 503, 515. He was placed on direct watch with monitoring every fifteen minutes. RP 510, 581. And when he finally was allowed some contact with an attorney it was through the cuff port of a solid door. RP 604-605.

ii. The error was not harmless

Respondent argues that the error in not providing Scherf access to counsel was harmless because he talked to counsel before being questioned by law enforcement officers, because he would not have followed counsel's advice, and because the evidence against him was "overwhelming" without his confession. BOR 72-74.

What the record shows is that Scherf requested an attorney three times over the course of twelve hours during which time he was in

conditions of extreme deprivation. At that time, he wished to have the advice of counsel. When Scherf was denied access, he began the process of bargaining to be allowed contact with an attorney by saying he would then talk to the police if allowed to see a lawyer. RP 615. Even when Schwarz came to WSR, he was only allowed to talk to Scherf through the cuff port of an isolation cell. Scherf was held essentially incommunicado before and after this brief, awkward exchange. He had no means of reinitiating contact with Schwarz, nor was his request to have counsel available any time he was moved honored. Like the defendant in Kirkpatrick he was alone with the police during the drive to the Snohomish County Jail and alone with Detectives Walvatne and Bilyeu every day; when he requested to see his attorney, nothing was done to arrange that by the jail staff, the prosecutor, the detectives and MHP who were aware of Scherf's request. RP 707-711, 822. Moreover, Scherf made incriminating statements before he was permitted to talk to Schwarz: he said he felt like hurting himself (RP 532); he asked for a Bible (RP 39); he sat on the floor and said "I shouldn't have done this" (RP 574); he called over a guard and said he was sorry. RP 583.

By the time Scherf finally met with nonqualified appointed counsel, he had been in the state of isolation and deprivation for so long that his will was overborne. His mental state was undermined in contrast

to his early eagerness to seek the advice and assistance of counsel. Moreover, appointed counsel was not qualified to represent Scherf, and did little or nothing to help him. RP 854-858, 885. His inattention contrasts with the actions of qualified counsel once they were appointed.²⁴

The prosecutor featured Scherf's videotaped confession in his arguments to the jury and asked the jury to convict Scherf and impose a death sentence based on the confession. Had Scherf been provided with the immediate means to contact an attorney, he would not likely have made the confession. The failure to provide Scherf timely access to counsel was not harmless.

c. The trial court erred in not suppressing Scherf's statements because he was detained illegally at the Snohomish County Jail.

RCW 72.68.040 provides that for an inmate sentenced to DOC custody to be transferred or housed in a county facility, there must be a contract between DOC and the facility. RCW 72.68.050 requires that the notice of the contract must be recorded by the Clerk of the Court from which the sentence of the inmate being transferred originated and kept on file as a public record.

Respondent argues that these requirements were met by the

²⁴ For one example, once appointed, SPCR2 qualified counsel filed a civil lawsuit to authorize the filing a case number in order to obtain discovery and funds to conduct investigation. CP 900, 1667-68, 1679-80.

declaration of Superintendent Scott Frakes that DOC “has a long standing agreement with Snohomish County Jail to house DOC offenders as boarders,” and an Order to Detain signed by Superintendent Frakes. BOR 75-76; CP 1619-1620. No authority is cited for the proposition that this oral agreement was a contract. Moreover, respondent does not provide any evidence that a notice of the contract was recorded by the Clerk of Spokane County, the county from which Scherf’s sentence originated, or that it was kept on file as a public record. BOR 75-76.

The requirements of the statutes were not met and Scherf’s detention at the Snohomish County Jail was illegal. Scherf was prejudiced by this illegality. The conditions of confinement and isolation at the Snohomish County Jail and his daily contact with the police brought him to the point of confessing in exchange for ways of making his confinement tolerable – conditions which were unnecessary for any legitimate penological or mental health reasons.

d. The trial court erred in not suppressing Scherf’s statements under CrR 3.2.1.

CrR 3.2.1 requires that any accused person detained in jail be brought before the superior court as soon as practicable after the detention is commenced. One of the primary purposes of the rule is to prevent unlawful detention and eliminate the opportunity and incentive to use

improper police pressure. Culombe v. Connecticut, 367 U.S. 568, 584-585, 81 S.Ct. 1860, 6 L. Ed. 2d 1037 (1961) (prompt presentment statutes are responsive “to the known risk of opportunity for third-degree practices which is allowed by delayed judicial examination”); State v. Bradford, 95 Wn. App. 935, 948, 978 P.2d 534 (1999), review denied, 139 Wn.2d 1022 (2009) (a purpose of CrR 3.2.1 is to eliminate the opportunity for improper police pressure).

Here Scherf was detained for over three weeks before being brought before the court. He was detained first at WSR in conditions far more restrictive than his conditions of confinement prior to the death of Officer Biendl. After his transfer to the Snohomish County Jail, he succumbed to the pressure of the adverse conditions there.

Although respondent argues otherwise (BOR 77-78), Scherf was clearly detained in the Snohomish County Jail because of the commission of a new crime. He simply would not have been transferred there if authorities didn't believe that he was responsible for the death of Officer Biendl; they clearly had enough evidence to charge him at the time of the transfer. In a press release, Superintendent Frakes announced that Scherf was incarcerated in the jail “[w]hile the Monroe Police Department investigates the death of Jayme Biendle [sic].” RP 1689. Even Superintendent Frakes's after-the-fact affidavit rationalizing the transfer

acknowledges that it “would also allow easier access to him by such persons as the law enforcement personnel investigating the murder of Correctional Officer Biendl.” CP 1619.

As the trial court found, Scherf was in custody for Miranda at the point he was handcuffed at the chapel. He was placed in leg irons soon after and detained in a special area at WSR under unusually restrictive conditions and secreted away from staff and other inmates. But whether or not this custody triggered the protections of CrR 3.2.1, Scherf was clearly confined at the Snohomish County Jail for investigation of the murder of Officer Biendl and to provide the police access to him.

While Scherf’s custody on a charge unrelated to the death of Officer Biendl did not by itself trigger the requirements of CrR 3.2.1, the state cannot evade CrR 3.2.1 to Scherf’s disadvantage by holding him for a new crime and allowing the police virtually unlimited access to him merely because he would be in custody on another matter if the new crime had not occurred. The state should not be able to delay “formal” arrest to manipulate the procedures enacted to protect the accused from undue and unfair pressure. This is particularly true where, as here, the delay is unnecessary to investigate a crime further in order to determine that a suspect should be charged. United States v. Valenzuela-Espinoza, 697 F.3d 742, 752-53 (9th Cir. 2012).

Had Scherf been promptly taken before a court and qualified counsel appointed to represent him, he would not have given any statements to Detectives Walvatne and Bilyeu. Qualified counsel would have visited him in the jail and remained in contact with him, demanded to be present during the photographic sessions or put a stop to them entirely and worked with the jail to alleviate the conditions of his confinement; such actions are required of qualified counsel. See, American Bar Association Guideline for Appointment and Performance of Defense Counsel in Death Penalty Cases, No. 10.5, infra, n.28.

Because Scherf statements to the police were rendered involuntary by the failure to take him promptly before the court, they should have been suppressed under State v. Hoffman, 64 Wn.2d 445, 392 P.2d 237 (1964) (agreeing that a suspect's confession could become involuntary if not promptly presented to the court) whether or not the McNabb-Mallory rule, rendering any confession made without promptly bringing the suspect before the court inadmissible, is adopted.²⁵

Although respondent argues that the Hoffman court's rejection of

²⁵ McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed.819 (1943); Mallory v. United States, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957). Under the McNabb-Mallory rule, an arrested person must be brought before a magistrate judge without unreasonable delay; and violations will "generally render inadmissible confessions made during periods of detention that violate the prompt presentment requirement."

McNabb-Mallory should not be overruled -- because Scherf's case is only one case and does not reflect a persistent pattern of delay -- his case is a capital case and unique in that the crime was committed in prison. That this fact pattern is rare should not, however, allow the state to detain a person for as long as they see fit, or to obtain an unwarranted advantage, merely because he is in custody on another matter. Certainly this should not be permitted when it is clear that the accused would have been arrested and taken into custody if he had not been serving a sentence already.

- e. **Scherf's statements should have been suppressed since, under the totality of the circumstances, they were involuntary and constituted a denial of due process under the state and federal constitutions.**

A confession is not voluntary if, under the totality of the circumstances, it was coerced. State v. Broadaway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997). Relevant circumstances include the condition of the defendant, the defendant's mental abilities, and the conduct of the police. State v. Rupe, 101 Wn.2d 664, 678-79, 683 P.2d 571 (1984). More specifically, in making the inquiry, the court must consider any promises or misrepresentation by the officers. Broadaway, 133 Wn.2d at 131-132 (citing United States v. Springs, 17 F.3d 192, 194 (7th Cir.) cert. denied, 613 U.S. 955 (1994) and United States v. Walton, 10 F.3d 1024, 1029-1030 (3rd Cir. 1993)). The court must determine whether there is a causal

relationship between promises and the confession. Walton, at 1029-1030. A confession is coerced if it is extracted in exchange for a promise from the police, or is a result of improper influence. State v. DeLeon. 185 Wn. App. 171, 202, 341 P.3d 315 (2014).

The test is whether, considering the totality of the circumstances, the government obtained the statement by physical or psychological coercion or improper inducement so that the suspect's will was overborne. Hayes v. Washington, 373 U.S. 503, 513-14, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963).

United States v. Couthavlis, 260 F.3d 1148, 1158 (9th Cir. 2001).

Further, the question of voluntariness is ultimately a legal question requiring independent determination by the reviewing court. Arizona v. Fulminante, 499 U.S. 279, 286, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (noting the normal deference given to state court findings, but holding that the "issue of voluntariness is a legal question requiring independent federal determination").

Scherf's confessions were involuntary under this authority. He expressly confessed in exchange for items on a list which the detectives agreed to try to obtain for him. As quoted above, Det. Bilyeu even made it clear that he and Walvatne had to convince their superiors that the list was the full extent of the quid pro quo, that there were not going to be any future lists. And Scherf made it equally clear that he would not confess

unless and until the state provided the necessary inducement.

And while respondent goes to great length to argue that there were no problems with the conditions of Scherf's confinement at the time of the agreement, BOR 91-93, the representations in that argument are simply not borne out by the plain terms of the agreement or the record. For one example, respondent asserts that "[w]hile lights were kept on while the defendant was in the safety cell, there is no evidence that they were kept on continuously after the defendant was moved to segregation." BOR 92. However, on February 7, in his offer to the detectives, one of the things Scherf asked for on his list was for the ability to turn off the lights. RP 640-649, 781-785.

Further, the record reflects, for example, that when moved to segregation, Scherf still had no running water in his cell, and that he had access to a telephone only when he had his hour out of his cell and he had to be shackled and taken to another room to try to use the phone; he did not have a pencil. RP 1324-1326. Shackling included waist chain, leg irons and handcuffs. RP 1057. His hour of recreation outside his cell could be in the middle of the night or broken up into two periods. RP 1058-1059. Before he could have any item in his cell, such as a Bible or reading material, it had to be checked and authorized by the detectives. RP 1060. Even when he was shackled and taken to a phone, he was

unable to complete any phone calls before February 16.²⁶ RP 1320. He did not have a Bible, reading material, his glasses, something to write with, bed linens, hot water and hygiene items because he was still requesting them. RP 1335-1336. In short, Scherf's offer to confess in exchange for these items demonstrates their significance and importance to him and that everything was not fine with his living conditions.

Respondent asserts that Scherf could have a pencil if he asked for one. BOR 90. There was evidence in the record, however, that when attorney Schwarz asked for a pen at WSR, he was denied one unless he promised to share the information he wanted to write down with the pen. RP 854-856.

Scherf described the conditions of his confinement and mental state to Dr. Grassian. Respondent argues that because the trial court did not agree with Dr. Grassian's opinion that the confession was involuntary, the doctor's factual report of what Scherf told him could not be considered by this Court. BOR at 92. But that is not the case. While the trial court may not have agreed with the opinion of this expert, that is certainly not a

²⁶ Without citing to the record, respondent represents that Scherf "could have called his attorney at least once during business hours." BOR 90. While it is not clear what this means, it establishes that reaching his attorney by phone was not something he could easily do. Respondent, in fact, concedes that Scherf did not ordinarily have access to the phone during the hours that the public defender's office was open. BOR 90.

finding that Dr. Grassian was untruthful in conveying Scherf's factual account of the conditions of his confinement or his mental state at the time he agreed to confess. Dr. Grassian is a respected psychiatrist who graduated cum laude from Harvard University and who has testified many times as an expert. RP 982. His research on the psychiatric effects of solitary confinement was cited with approval in Justice Kennedy's concurrence in Davis v. Ayala, ___ U.S. ___ 135 S. Ct. 2187, 2210, 192 L. Ed. 2d 323 (2015), and Justice Breyer's dissent in Glossip v. Gross, ___ U.S. ___, 135 S. Ct. 2726, 2765, 192 L. Ed. 2d 761 (2015). There is certainly no basis in the record – and no legal authority – to treat his factual testimony as less worthy than the testimony of any other witness.

Respondent argues that Scherf was repeatedly advised that he had the right to counsel and that he could have contacted an attorney on his own had he chosen to do so. BOR 90. In fact, at WSR, it was only after he said he would talk to Det. Robinson if he could speak to an attorney quickly, that he was given access to Schwarz. RP 615-616. After that initial meeting, Scherf had no means to contact Schwarz again, and his request through Schwarz to have an attorney present when he was moved, was not honored. RP 855-856. At the Snohomish County Jail, Scherf had access to a phone only when the public defender's office was closed, and the phone did not work in any event. Respondent concedes this, and

argues only that on one occasion in all of the relevant days, Scherf could have contacted an attorney by phone. BOR 90. Scherf did not have easy access to a pencil. And when he told jail staff or the mental health providers that he wished to talk to his attorney or the defense investigator, nothing happened. RP 634-635, 707-711, 822, 885, 1228-1229. Even when the prosecutor was told of his request, nothing happened. RP 634-635, 707. Scherf asked to speak to his attorney on February 4, but his attorney was not informed of this request. The next day, Scherf began seeking help from the detectives in obtaining relief. They responded because he offered to make a confession in exchange for the help.

Scherf's statements were involuntary under the totality of the circumstances. From the outset, he was deprived of counsel and isolated in dire conditions. Although he spoke briefly with attorney Schwarz, he had no means of contacting him again and his request, through Schwarz, to be provided with counsel at the time he was moved to Snohomish County Jail was not honored. His conditions remained dire and he remained isolated and unable to contact his family or to sleep, read or keep warm there. From the outset, Scherf had suicidal thoughts. He was not brought before the court and did not have qualified counsel appointed who would have met with him immediately, remained in contact with him, made sure he was not alone with the detective on a daily basis, and helped

address his concerns and alleviate his mental distress. At the same time, Detectives Walvatne and Bilyue contrived to meet with Scherf every day for prolonged sessions; they were able to talk with him and gain his confidence. Given that their photographic sessions were unnecessary for any issue at trial, it must be inferred that their intent was to gain incriminating information from him. And certainly when Scherf offered to confess in exchange for a few necessities to make his daily life tolerable, they did not say that they would ask for these things on his behalf without his confession. They agreed to get these things – but nothing more – in exchange for the confession. Scherf was brought to the point of bargaining because of onerous conditions, his mental state, his isolation, the absence of qualified or effective counsel and the continuing daily presence of the police detectives. See AOB 157-173. His confession was a result of these factors and involuntarily given. He was coerced by the contrived deprivation of his confinement and the promise of help if he confessed. His confession should not have been admitted.

Further, in its brief, respondent asserts astonishingly that, in any event, Scherf was not in custody for Fifth Amendment purposes. His restrictions, however, were at all times greater than those imposed during his incarceration of the prior charge. At WSR, Scherf moved freely, without handcuffs or escort, throughout the institution, including to his job

in prison industries. At the Snohomish County Jail he could only move outside his cell when accompanied by a four- or five- man guard escort in waist chain and leg irons. See BOR at 54; RP 652 (shackles removed before he gave a statement). He was out of his cell for one hour of every twenty-four, his phone calls were not getting through, and lights were on in his cell for twenty-four hours a day. RP 692-693, 718. Under Warner, custodial means “more than just the normal restrictions on freedom incident to incarceration.” Warner. 125 Wn.2d at 885; State v. Sargent (supra) (in which the defendant was in custody when interrogated by a probation officer in the King County Jail visiting area because the booth was locked). Scherf was clearly in custody for purposes of Miranda, both at WSR and the Snohomish County Jail.

9. THE TRIAL COURT ERRED IN NOT REDACTING PORTIONS OF SCHERF’S VIDEOTAPED STATEMENTS AND IN ADMITTING HIS KITE ASKING FOR THE DEATH PENALTY.

The trial court erred in refusing to redact portions of the videotaped statements which were irrelevant, unfairly prejudicial, and apt to confuse; as well as statements which improperly commented on guilt, the exercise of constitutional trial rights, and what penalty to impose.

a. Statements regarding ointment, shoelaces and cartoon

Respondent asserts that because Scherf objected on relevance

grounds at trial, he waived for appeal any issue that statements about the ointment, shoelaces and the cartoon he provided to Officer Biendl were unfairly prejudicial and apt to confuse or mislead. BOR 97-98. In considering whether evidence is relevant and admissible, however, the court must always decide whether its “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” Rules of Evidence Title IV, Relevancy and its Limits, ER 403.

Respondent further asserts that even if the issue is not waived, the evidence was admissible to establish that Scherf was in the chapel and knew Officer Biendl. BOR 96. These were not contested issues and any minimal probative value was outweighed by the probability that the jurors considered this as evidence that Scherf disobeyed prison rules, speculated about what he intended to use them for or were otherwise confused about the meaning and relevance of the evidence. Scherf was unfairly prejudiced by the admission of this irrelevant evidence.

b. Opinions as to guilt and questions aimed at putting Scherf in a bad light

Scherf’s videotaped statements were admissible against him at trial under ER 801(2)(i), because they were his statements which the state elected to use against him at trial. ER 801(2)(i) did not provide a basis for

introducing statements or questions by the detectives, particularly ones that expressed the detectives' opinion of his guilt, were aimed at putting Scherf in a bad light and which he chose not to answer. Although respondent argues that there are tenable reasons for admitting this evidence, it is hard to credit that anyone would seriously argue that a detective's opinion that the defendant had committed a murder or a question asking the defendant if he was not sorry he did – particularly where the defendant chose not to answer the question – would be admissible at trial if they had not been videotaped along with statements made by the defendant. The mere fact that they were videotaped did not make them admissible and, as set out in AOB 175-176, they were excludable as opinion as to guilt and invaded the province of the jury. The court erred in refusing to exclude this unfairly prejudicial evidence.

c. Statements implying guilt from the exercise of state and federal constitutional rights

Respondent concedes that it is always improper for the state to ask the jury to draw any adverse inference from the defendant's exercise of a constitutional right, BOR 102, but nevertheless asserts that the state properly presented evidence to the jury of: (1) Det. Walvantne's asking Scherf for his help in reaching a speedy resolution to the case; (2) Scherf's statements about the Bible requiring him to forfeit his life; (3) his

statements about Officer Biendl's family deserving to have the matter dealt with quickly because of the horror of her death to them; and (4) his statement that he wanted to be charged with aggravated murder and the death penalty and would plead guilty. BOR 101-104. Respondent claims that, because the prosecutor did not expressly make the argument, this evidence did not invite the jury to find Scherf guilty because he did not spare Officer Biendl's family, but instead exercised his rights to go to trial. The state, however, presented the evidence and the jury was free to infer from it that by going to trial, Scherf was punishing Officer Biendl's family and making them prolong the horror of her death. See AOB 177-179. The introduction of this evidence was manifestly intended to focus on Scherf's failure to honor these words by exercising his trial rights; the evidence "naturally and necessarily" focused on Scherf's exercise of his trial rights. State v. Gregory, 158 Wn.2d 759, 806-807, 147 P.3d 1201 (2006); State v. Ramirez, 49 Wn. App. 332, 336, 742 P.2d 726 (1987). The trial court erred in refusing to exclude this unfairly prejudicial evidence which burdened Scherf's exercise of his constitutional rights to trial and a fair and impartial jury.

d. Improper comment on penalty

Respondent asserts that the Eighth Amendment limits only victim statements about what penalty should be imposed and that a defendant's

statement that he deserved the death penalty because the Bible requires taking of your life if you take a life was therefore properly admitted. BOR 105. Contrary to respondent's analysis, Scherf's opinion of what punishment the Bible required was irrelevant to the jury's decision and its individualized consideration of mitigation in his case. It likely influenced the jury and deprived him of a fair punishment. See AOB 180.

e. Statements about meeting with counsel

Respondent asserts that Scherf's statements that he met with an attorney and was not listening to counsel's advice in providing a confession were neither cumulative nor misleading. BOR 106-110. As set out in AOB 180-182, the statements were cumulative of the express waivers on the tapes. They were misleading because the state delayed providing an attorney to Scherf when he requested one at WSR, made it difficult for him to consult with counsel when one was made available, failed to honor further requests to speak to an attorney and failed to provide him qualified counsel.²⁷ AOB 180-182; see Sections 3 and 8(b)(i) this Reply Brief.

²⁷ On these factual issues, respondent argues that the reasons Scherf could not be put in contact with an attorney when he requested one at 3:40 a.m. in the shift lieutenant's office were the exigencies of getting a warrant and cell phone restrictions. BOR 48-50. The record shows, however, that once Scherf indicated that he would give a statement if he could talk to an attorney, these exigencies evaporated. RP 619, 635, 850.

Had qualified counsel been appointed initially, she would have met with Scherf immediately, reassured him of her commitment to helping him, been present anytime the police detectives met with him, and worked to improve the onerous conditions which led him to confess.²⁸ This why

²⁸ The American Bar Association “Guideline for the Appointment and Performance of Defense Counsel in Death Penalty Cases.” Revised February 2003, Guideline 10-5, Hofstra Law Review, Vol. 31:913, at 1005-1008, outlines the duties of qualified counsel as follows:

Guideline 10.5 – RELATIONSHIP WITH THE CLIENT

- A. Counsel at all stages of the case should make every appropriate effort to establish a relationship of trust with the client, and should maintain close contact with the client.
- B.
 - 1. Barring exceptional circumstances, an interview of the client should be conducted within 24 hours of initial counsel’s entry into the case.
 - 2. Promptly upon entry into the case, initial counsel should communicate in an appropriate manner with both the client and the government regarding the protections of the client’s rights against self-incrimination, to effective assistance of counsel, and to preservation of the attorney-client privilege and similar safeguards.
 - 3. Counsel at all stages of the case should re-advise the client and the government regarding these matters as appropriate.
- C. Counsel at all stages of the case should engage in continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case, such as:
 - • • • •
 - 7. relevant aspects of the client’s relationship with correctional, parole or other governmental agents (e.g., prison

SPRC apply “to all stages of proceedings in which the death penalty has been or may be decreed.” SPRC 1.

The statements on the tapes implying that Scherf had been adequately provided access to qualified counsel were misleading at best and the trial court erred in not redacting them from the videotaped statement.

10. THE TRIAL COURT IMPROPERLY RESTRICTED THE SCOPE OF *VOIR DIRE*, IMPROPERLY GRANTED STATE CHALLENGES FOR CAUSE AND IMPROPERLY DENIED DEFENSE CHALLENGES.

a. Unconstitutionally narrow view of *voir dire*

Scherf is challenging the trial court’s limitation on the scope of *voir dire* as too narrow to provide him with a jury constitutionally able to make a fair and impartial death penalty decision and to fully consider relevant mitigating circumstances. See AOB 183-190. The trial court was explicit; individual *voir dire* was to focus on “whether or not the juror is likely to follow his or her oath or instruction” or whether there was any “impediment” or “tendency” which would make the juror unable to follow his or her oath or instruction. RP 3732-3733. The trial court did not consider the juror’s willingness to fully consider all relevant mitigation as is constitutionally required. See AOB 188.

medical providers or state psychiatrists).

Respondent does not dispute that, to keep the single focus on a juror's saying he or she was willing to follow instructions, the trial court excluded questions which used words not defined in the instructions or which assumed the jurors would be making an individual moral judgment in deciding whether to impose the death penalty.²⁹ RP 3013-3014, 3067, 3070-3072. BOR 143, 148. Respondent does not dispute that the court ruled that answers to hypothetical questions asking jurors to assume the defendant had been found guilty of aggravated murder with no reason for the crime could not provide a basis for a challenge for cause. RP 3274-3275. BOR 143, 150. It is similarly undisputed that the court ruled that a juror's view that certain things were not mitigation could not disqualify the prospective juror, RP 3714, and that defense counsel could not ask prospective jurors generally what they believed constituted a mitigating factor. RP 4288-4291; BOR 143-144. 149. Counsel could ask only if the would-be jurors thought specific circumstances might be mitigation. RP

²⁹ After an extensive argument on the point, the trial court affirmed that it would not permit "anybody to ask questions that tell the jurors that they will be doing something that is not the same as the instructions tell them what they will be doing? The jurors can consider morality, I think, in deciding what is a mitigating circumstance. I'm not saying they must. I don't know what else they might consider." RP 3168. The court allowed the defense to ask only "about the thought processes of the jurors." RP 3168. To permit defense counsel to assume that they would be making a moral judgment "will be allowing the jurors to be misled about the process." RP 3169.

3014, 3142, 3236, 3272; BOR 144.

Respondent asserts, nevertheless, that the trial court “gave the defense great latitude in questioning jurors during the initial death qualification portion of *voir dire*.” BOR 147. Respondent further asserts that the trial court’s rulings that (1) “a juror’s opinion as to whether a circumstance was mitigating or not did not disqualify the juror for cause,” BOR 149, or (2) the defense hypothetical “untethered to any discussion of the law. . . provided no insight into the juror’s ability to follow the law or her oath,” BOR 150, were proper. On the trial court’s prohibiting the defense from asking prospective jurors about making individual moral judgment in answering the penalty-phase question, respondent asserts that allowing questions of jurors about whether morality would weigh in their consideration of mitigating circumstances was a sufficient alternative. BOR 144.

These arguments by respondent fail to acknowledge that the constitution requires that counsel must be able to examine prospective jurors on whether they will fully consider mitigation as well as whether they will follow the law. AOB 188-191. Morgan v. Illinois, 504 U.S. 719, 736-738, 112 S. Ct. 3333, 119 L. Ed. 2d 492 (1992).

It is essential for counsel to be able to voir dire prospective jurors on their views on and ability to make the individual moral decision they

would be required to make as members of a capital jury.

While there are antecedent factual determinations jurors must make, including the existence of a statutory aggravating circumstance, the final decision the jurors must make is not factual in nature. As the courts have noted, this is an “awesome responsibility,” and the jury must make a “reasoned moral decision” whether life imprisonment without the possibility of parole or the death penalty is the appropriate punishment.

Blume, Johnson, Sundby, Competent Capital Representation, *supra*, 26 HOFSTRA L.Rev. at 1035-1036 (emphasis in original) (citing California v. Brown, 479 U.S. 538, 545, 107 S. Ct. 837, 93 L. Ed. 2d 934 (1987) (O’Connor, J. concurring) (“[T]he sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant’s background, character, and crime. . . .”); Caldwell v. Mississippi, 472 U.S. 320, 329-30, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985) (quoting McGautha v. California, 402 U.S. 183, 208, 91 S. Ct. 1454, 23 L. Ed. 2d 711 (1971) (noting that “jurors [are] confronted with the truly awesome responsibility of decreeing death.”); *See also*, e.g., Brewer v. Quarterman, 550 U.S. 286, 289, 127 S. Ct. 1706, 167 L. Ed. 2d 622 (2007); Simmons v. South Carolina, 512 U.S. 154, 172, 114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994).

[W]hen the jury is not permitted to give meaningful effect or a “reasoned moral response” to a defendant’s mitigating evidence – because it is forbidden from doing so by statute or a judicial interpretation of a statute – the sentencing process is fatally flawed.

Abdul-Kabir v. Quarterman, 550 U.S. 233, 264-265, 127 S. Ct. 1654, 167 L. Ed. 2d 585 (2007).

The trial court unconstitutionally limited the scope of *voir dire* and, as a result, Scherf did not receive a fair and impartial jury willing to fully consider mitigation.

b. Improper denial of defense challenges for cause

The trial court's unconstitutionally narrow view of *voir dire* deprived Scherf of his right to fully explore prospective juror's views on the death penalty or mitigation. This view also resulted in the erroneous denial of six defense challenges for cause.

In its brief, respondent asserts that a review of the "entire colloquy with each juror shows that the court had a tenable basis on which to conclude each juror would follow the law," and accuses appellant of relying on isolated statements by prospective jurors. BOR 151-152. The opposite is true; a reading of the entire colloquy demonstrates clearly that Jurors 10, 11, 16, 32, 57 and 60 should have been excused for cause.

For example, respondent cites the record, RP 3139-3142, as showing that Juror 10 stated he would consider mitigating circumstances. BOR 153. What these pages show is that Juror 10 said he would consider whether a person had a tough childhood as mitigation, but that "it wouldn't be an overriding fact," RP 3143. When specifically asked about

what he considered mitigation, Juror 10 listed, besides the defendant's background, factors relating to guilt rather than mitigation. RP 3144. Juror 10 also gave his view that if the defense did not present any mitigation, he would not believe there was any. RP 3146. Most importantly, both before and after the discussion of mitigation, Juror 10 expressed his belief that if there were no excuse or provocation for the crime, that a sentence of life without parole would be too lenient. RP 3142, 3144.

With respect to Juror 11, respondent again relies entirely on that prospective juror's isolated answer that he could meaningfully consider mitigation. BOR 153. Juror 11 also stated that he already had, in *voir dire*, "a certain level of animosity," "partly [towards] the accused, you know, the person who, you know, did the act that's caused all this." RP 3180. He also said that he didn't know if he could be a fair juror, given his level of disgust with the gruesome parts of the trial, and that this was a possibility if not necessarily a probability. RP 3183, 3185. He stated that he would not be able to give meaningful consideration to life without parole if the defendant were already sentenced to life without and there was no excuse for the murder itself. RP 3187-3189. It is hard to believe that anyone would want a juror who expressed hostility to them and was possibly unable to be fair to them to be deciding whether they lived or

died.

Juror 16, said that she would follow the court's instructions and would consider other factors in the penalty phase, but if the murder were unprovoked and the defendant were already serving life without parole, she could impose the death penalty. RP 3269, 3271. The court ruled that the defense hypothetical – the jury had found the defendant guilty of premeditated murder with no reason or excuse for the crime – “untethered to instructions” could not provide a basis for a challenge for cause. RP 3274-3275. In other words, as long as the prospective juror said they would follow instructions, it did not matter that they would not actually consider anything but an excuse for the crime as mitigation.

Similarly, Juror 32 was not excused because he said he could follow the law and the court's instructions, even though he was clear in his views that if the crime were premeditated he would vote to impose the death penalty and that mitigation, in his eyes, was limited to something that would negate the wrong done. RP 3533-3536. Juror 53 also indicated he could follow the court's instructions and listen to all of the mitigation before deciding, but repeatedly showed his belief that those who committed some “heinous crimes . . . they don't deserve to be on earth anymore. And that's what I believe.” RP 3901. He repeatedly indicated that if the murder were premeditated and there was no excuse such as

diminished capacity, then death was the only sentence. RP 3904-3905, 3910-3913, 3915-3916, 3925. The court acknowledged that Juror 53 should be excused if he acted on his feelings and acknowledged that the court was not sure Juror 53 understood the instructions, but that he would not be excused because he did not say he had problems with the instructions. RP 3928. Juror 80 also indicated that she would follow the court's instructions, but clearly also indicated her preference for death, her belief that a person should receive death if they could not be rehabilitated and her belief that neither remorse nor confessing constituted mitigation. Juror 80 had also read about the case and knew both that Scherf was serving a previous life without parole sentence and had given a confession. RP 4484-4486.

The trial court erred in denying these six challenges for cause.

c. Biased jurors sat on the jury

As set out by respondent, United States v. Martinez-Salazar, 528 U.S. 304, 120 S. Ct. 774, 144 L. Ed. 2d 729 (2000), a non-capital case, holds that to establish a constitutional error where the trial court errs in denying a defense challenge for cause and the defense uses a peremptory to remove the juror, the defense must show that there were biased jurors actually sitting on the jury that reached a verdict. BOR 158.

Here, even given the narrow scope of *voir dire*, it is clear that

biased jurors did sit on the deliberating jury. Juror 40, for example, indicated that mental illness was the only thing she could think of that would justify a sentence of less than death. For another example, Juror 14, after agreeing that she would have to consider all of the evidence before reaching a penalty-phase decision, said “Honestly, I mean, if there’s someone out there who has not learned from their experiences and commits the same crime over and over, I mean, I feel like there’s no other choice,” than the death penalty. RP 3234, 3238. Others expressed similar unwillingness to fully consider mitigation and similar beliefs that a death sentence was the appropriate sentence. See AOB 54-55.

Respondent argues that notwithstanding this evidence of bias, because the defense did not challenge any of these jurors who actually sat for cause, there were no biased jurors seated on the jury. BOR at 159. No authority is cited for this. Most of the sitting jurors could have been challenged for cause and had exhibited bias towards the death penalty and an unwillingness to fully consider mitigation. See AOB 194-195.

Scherf was denied his right to a fair and impartial jury by the trial court’s limitation on the scope of *voir dire* and improper denial of challenges for cause and should be given a new trial.

d. Improper granting of state’s challenges for cause

Respondent agrees that under Gray v. Mississippi, 481 U.S. 648,

107 S. Ct. 2045, 95 L. Ed. 2d 622 (1987), the wrongful excusing of a capital juror who could have fairly deliberated on the jury requires a new sentencing trial. BOR 165-166. Respondent argues only that Jurors 37 and 75 were properly excused.³⁰ Id. According to respondent, Juror 37 responded equivocally and Juror 75 “clearly stated he would vote against the death penalty regardless of the facts or circumstances or the court’s instructions.” BOR 164. The record shows otherwise.

Juror 37 repeatedly assured the court that she could impose the death penalty and follow the law. RP 3610-3614, 3828. She said unequivocally, “I know that I could do what I need to do,” and “I would feel that I would make the decision based on the evidence.” RP 3615, 3616. She assured the court and counsel that she could answer the statutory question, “Yes, I think I could answer that.” RP 3620. Even when she indicated that she would not want to have to make the life and death decision, she reaffirmed that she could follow the law and fairly consider the evidence. RP 3639-3640. She reaffirmed that regardless of how uncomfortable she was, that she would be able to fairly consider the evidence and answer the statutory question. RP 3639-3640. It was only after the trial court continued questioning Juror 37 – even though she

³⁰ Scherf challenges the court’s granting of the state’s challenge of Juror 4 in his Statement of Additional Grounds, but respondent does not address this challenge.

never said she could not or would not follow the law – that she finally said she would rather not sit and could not decide the statutory question.³¹ RP 3642.

While Juror 75 indicated initially that he opposed the death penalty and could not impose it regardless of the instructions, RP 4572-4573, he nevertheless concluded that he would have to consider and follow the law even if this would be hard and he would have a hard time doing so and did not believe the law was just. RP 4574-4575. Juror 75 should not have been excused for cause.

Jurors 37 and 75 should not have been excluded for cause. Even those who “firmly believe that the death penalty is unjust” may be jurors in a capital case if they can set aside those beliefs and follow the law. Lockhart v. McCree, 476 U.S. 162, 176, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986).

The trial judge proceeded through individual *voir dire* denying defense challenges for cause if a juror indicated at some point he or she would follow the law, regardless of expressed belief that the death penalty was the appropriate sentence for premeditated murder where the defendant was serving a sentence of life without parole. The court acknowledged,

³¹ The court did not question any other prospective juror who was challenged for cause. RP 3155, 31-97-3200, 3282-2383, 3546-3547, 3925-3929, 4505-4511, 4574-4578.

for example, that Juror 53 should be excused if he acted on his feelings about the death penalty, but denied the defense challenge for cause because Juror 53 did not say he would not follow the instructions. RP 3928. The court applied a different standard to the state's challenges and even continued questioning Juror 37 after she reiterated for a final and sixth or seventh time, that she could answer the statutory question. This lack of even-handedness, even if unintentional, has serious consequences: research has demonstrated that death-qualified jurors are distinguishable from excludables and are more likely to find capital defendants guilty and sentence them to death.³² While, as respondent sets forth, a trial judge is

³² See "The Role of Death Qualification in Jurors' Susceptibility to Pretrial Publicity," *Journal of Applied Social Psychology*, 2007, 37, 1, pp. 115-123, at 116.

[Death-qualified jurors] are more likely to be male, Caucasian, financially secure, politically conservative and Christian (Butler & Moran, 2002, Hans, 1986). Death-qualified jurors are more likely to trust prosecutors; view prosecution witnesses as more believable, credible, and helpful; consider inadmissible evidence even if a judge has instructed them to ignore it; and infer guilt from a defendant's failure to take the witness stand (Hans, 1986). Death-qualified jurors tend to be hostile to psychological defenses (Butler & Wasserman, 2006), more likely to believe in the infallibility of the criminal justice process, and less likely to agree that even the worst criminals should be considered for mercy (Butler & Moran, 2002; Butler & Wasserman, 2006; Ellsworth, Bukaty, Cowan, & Thompson, 1984, etc.)(studies cited fully in the article's endnotes).

entitled to deference because of his opportunity to observe a juror's demeanor, BOR 151, this Court need not defer where the trial court applies the wrong legal standard or the factual findings are inconsistent and confusing. Seattle v. Williams, 128 Wn.2d 341, 347, 908 P.2d 359 (1959) (de novo review for questions of law); State v. Finch, 137 Wn.2d 792, 856, 975 P.2d 967 (1999) (factual findings not supported by substantial evidence were contradictory and confusing).

Scherf was denied his right to have qualified jurors with scruples against the death penalty sit on his jury and his death sentence should be reversed for this reason.

11. THE PROSECUTORIAL MISCONDUCT DEPRIVED SCHERF OF A FAIR TRIAL.

The fundamental legal principles relied on by appellant in the prosecutorial misconduct issues on appeal – with the exception of the prosecutor's ingratiating himself with the jurors -- is that the misconduct was either so "flagrant and ill-intentioned" or so pervasive that instructions to the jury to disregard what they had heard could not cure the prejudice. See In re Glasmann, 175 Wn.2d 697, 704, 286 P.3d 673 (2012) (citing State v. Thorgerson, 172 Wn.2d 438, 443, 258 P.3d 43 (2001) and State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1999) (failure to object

Id.

to the prosecutor's misconduct can be overcome on appeal where the misconduct is so flagrant and ill-intentioned that an instruction would not have cured the prejudice)); Glasmann, at 707 (quoting State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011) ("the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect").

In In re Personal Restraint of Glasmann, despite the defendant's failure to object, "the misconduct ... was so pervasive that it could not have been cured by an instruction." 175 Wn.2d 696, 707, 285 P.3d 673 (2012). Here, as in Glasmann, "[T]he cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." Id. (alteration in original) (quoting State v. Walker).

State v. Lindsay, 180 Wn.2d 432, 326 P.3d 125 (2014).

Citing State v. Emery, 174 Wn.2d 741, 761, 278 P.3d 653 (2012), respondent argues that this Court is moving away from the flagrant and ill-intentioned standard. BOR 175. Both Glasmann and Lindsay, however, are more recent authority than Emery and refer to the flagrant and ill-intentioned standard. But, in any case, no instruction would have cured the prejudice of the prosecutor's painting a mental picture of Officer Biendl as a Christ figure lying under the cross, or the pervasive prejudice of the prosecutor's improper arguments that it was the jurors' job to

convict, that the jurors had sworn repeatedly that they “would” impose the death penalty or that premeditation requires only some time “once you formed the intent.” The prosecutor’s misconduct should require reversal of Scherf’s conviction and sentence.

a. The prosecutor’s improperly ingratiating himself with the jurors

Respondent concedes that prosecutor Paul Stern personally interacted with two of the jurors who actually sat on the jury, Jurors 17 and 60. BOR 170. The record, however, demonstrates that he interacted with other seated jurors as well. Defense counsel objected after the *voir dire* of jurors 1 through 17, that Stern smiled and thanked each juror. RP 3307. When given the opportunity, Stern did not deny having done that. RP 3307. Jurors 5 and 14, as well as juror 17 were in that group. When defense counsel objected again, after several days of *voir dire*, counsel said only that she had been watching that day, not that it had happened only on that day, as respondent asserts. RP 4455; BOR 172-173. Her statement implied that she had been concerned and made a point of watching that day. Stern responded, “I think the only people I said anything to have been the ones that have been excused.” RP 4455 (emphasis added). This exchange, however, occurred after the *voir dire* of Juror 83 who had not been excused. Thus, Stern interacted with at least

four and likely more, if not all, of the sitting jurors. And he did so after being admonished by the court. RP 3307.

Respondent argues that this personal contact was not improper because it was in the open courtroom “where attorneys were permitted to talk to jurors,” and it was harmless because it did not convey any additional information and because the jurors were instructed to not let emotions overcome their rational thought processes. BOR 172-173.

Stern’s ingratiating himself with the jury, in fact, occurred after individual *voir dire* of a prospective juror had been completed and was not a part of the court proceedings; it was not part of the verbatim report of the proceedings. It was, at best, immaterial that it occurred in the courtroom instead of the hallway; the exchange was a personal and private communication of gratitude and appreciation from the prosecutor to jurors who would be making the death penalty and guilt decision. The trial court recognized that it was improper contact and asked that it be kept to the minimum. RP 3307.

As set in the Opening Brief such private communications are, by bright-line rule, presumptively prejudicial and invalidate the verdict unless they are shown by the government to be harmless. AOB 208-211. The presumption extends to banter which is not directed to influencing the verdict. United States v. Caballero, 936 F.2d 1292, 1298-99) (D.C. Cir.

1991). Even where the contact is accidental – which it was not here – the presumption applies if the contact could have influenced the jurors. Caliendo v. Warden of California Men’s Colony, 365 F.3d 691, 696-697. (9th Cir. 3004).

Here, the contact was not de minimus; it was intentional and continued even after defense counsel and the court asked for it to stop. It was presumptively prejudicial. It was intended to forge a bond between the state and prosecution against the defense. The prosecutor relied on this bond implicitly in closing by telling the jurors that you “told us repeatedly that if the facts were warranted, if the law supported it, this is something you would do.” RP 7134. Respondent did not even try to meet its burden of proving that the unauthorized communication was not prejudicial, but argued only that “the defendant has failed to show any possible prejudice.” BOR 173. Scherf should receive a new trial before a fair and impartial, untainted jury.

b. Misconduct in opening and closing statements

Respondent does not dispute that it is misconduct to tell the jury that it is its job to decide the facts, to solve the crime, to determine the truth or to return a guilty verdict; or that it is misconduct to tell the jurors that they would be violating their oath if they disagreed with the state’s theory. AOB 209-2111 BOR 174-170. Respondent’s argument is

primarily that the prosecutor made none of these improper arguments and also that any issue of misconduct arising from the prosecutor's opening and closing arguments were waived by defense counsels' failures to object. The record shows that the misconduct occurred and could not have been cured by objection.

In opening, the prosecutor read Scherf's statement asking the state to charge him with aggravated first degree murder with the death penalty and saying he would plead guilty at arraignment. RP 6006. The prosecutor then concluded, "His words. Our evidence. Your job." RP 6006. Respondent asserts, nonetheless, that "His words. Our evidence. Your job" did not refer to Scherf's request to be found guilty and receive the death penalty, but the prosecutor's earlier statement to the jury that they would have a chance to decide "what to make of the defendant's confession." BOR 176.

The prosecutor did tell the jurors that they would have to judge the statement – whether it expressed remorse, guilt, self-interest, or manipulation. RP 6005. But then the prosecutor explicitly told them that whatever they made of the statement, it was Scherf's simple request to be found guilty and receive a death sentence. The prosecutor's statement, "His words. Our evidence. Your job" clearly referred to Scherf's "simple" request.

But whether it is remorseful, or pride, or manipulation . . . You will hear him say, “I did a lot of soul searching and . . . you know, she didn’t deserve to die.”

And you will hear him articulate, in his own handwriting, in his own penmanship: “My position is simple,” he wrote.

“I senselessly took the life of an innocent person, Jayme Biendl, Monroe Correctional Officer . . . I ask you to charge aggravated first degree murder (with the death penalty) at my arraignment and I will plead guilty. . . Sincerely, Byron Scherf.” February 14, 2011.

“My position is simple . . . I senselessly look the life of an innocent person, Jayme Biendl.”

His words. Our evidence. Your job.

RP 6005-6006.

In the closing penalty phase argument, the prosecutor thanked the jurors for their guilty verdict and then told them, “But you have one more job to do,” and described that job as imposing the death penalty as they had sworn “repeatedly” to do if the facts and law allowed. RP 7134. He ended that argument, by again quoting Scherf’s statement “if you take a life, you give a life,” and concluded, “You have one more job to do. You know what we are asking you to do: to write ‘yes’ on that verdict form.” RP 7143. Again, respondent argues that it is not the immediate context which explains this reference to “job,” but to their evaluation of whether there was sufficient mitigation. BOR 177. The record shows otherwise.

STERN: Thank you, Judge.

It would be remiss of me if I did not begin my comments by thanking you for your verdict last week, taking the facts and the findings the facts as you found. But you have one more job to do. You are all here because you have told us repeatedly, under oath, through questions, that if the facts were there, if the law was there, that, Yes, you would vote for the death penalty. You have told us repeatedly that if the facts were warranted, if the law supported it, this is something that you would do.

RP 7134. At the close of the penalty phase argument, the prosecutor returned to the “job” theme. He quoted Scherf again, “If you take a life, you give a life. That’s all I can say.” He continued:

Your job. To decide if there are sufficient extenuating circumstances, to merit leniency. Maybe you’ll be invited to ignore his words, but you cannot ignore his actions, and you can’t ignore his history.

You have one more job to do. You know what we are asking you to do: To write “yes” on that verdict form. .

...

RP 7134. See e.g., United States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) (Court finds error for the prosecutor to try to exhort the jury to “do its job” - concluding that such an appeal, whether by the prosecutor or defense counsel, “has no place in the administration of justice.”); see also United States v. Mandelbaum, 803 F.2d 42, 43-44 (1st Cir.1986) (decrying a prosecutor's comment to the jury to do its duty: “There should be no suggestion that a jury has a duty to decide one way or

the other; such an appeal is designed to stir passion and can only distract a jury from its actual duty: impartiality.”).

This misconduct was cumulative and so pervaded the prosecutor’s argument that no instruction could cure the prejudice. The jurors never promised, under oath or otherwise that they would impose a death sentence; only that they could. It was never their job to find Scherf guilty or to impose a death sentence on him. Tying these themes together increased the prejudice of each and should require the reversal of his conviction and death sentence.

Similarly the prosecutor repeatedly told the jurors that premeditation required nothing more than the deliberate formation of the intent to kill – “once you formed the intent, ‘the killing may follow immediately after formation of the settled purpose.’ The purpose was settled. At that point it was a done deal.” RP 6937. “Maybe I’ll beat her up. No, not good enough. I’m going to kill her. The decision is when it was.” RP 6937. “And if you have an abiding belief that when he walked through that sanctuary door he was going to kill her, you are satisfied beyond a reasonable doubt that he had premediated his design to kill her.” RP 6941. AOB 212-214.

Respondent cites an instance in which the prosecutor referred to “his plan to kill Officer Biendl.” BOR 182; RP 6896. Respondent also

cites the prosecutor's noting that Scherf made sure no one else was around, the length of time of the struggle, the defensive wounds, his stalling for time and his decision to kill her by the time Price had brought him his coat. BOR 183. None of these arguments by the prosecutor addressed that premeditation requires "the deliberate formation of and reflection upon the intent to take a human life" and must involve the "mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time however short." State v. Brown, 132 Wn.2d 529, 585-586, 940 P.2d 546 (1997).

The affirmatively erroneous statements together with the absence of statements to the jury indicating that premeditation requires "reflection and weighing," misstated the law of premeditation, likely confused and misled the jury and should require reversal of Scherf's conviction and death sentence. It constituted misstatement of the burden of proof on premeditation, the primary factual issue for the jury to decide.

12. THE TRIAL COURT ERRED IN REFUSING TO GIVE THE DEFENSE PROPOSED INSTRUCTION ON PREMEDITATION AND GIVING THE STATE'S INSTRUCTION INSTEAD, AND IN REFUSING TO REMOVE THE WORDS "OR NOT" FROM THE PENALTY PHASE INSTRUCTION NO. 6.

a. The premeditation instruction

Respondent does not dispute the well-established principle that

parties are entitled to instructions that correctly state the law, are not misleading and allow each party to argue its theory of the case. AOB 214-216; BOR 185-189. Neither does respondent dispute that the defense-proposed premeditation instruction is a correct statement of the law – a direct quotation from opinions of this Court defining premeditation. AOB 215-219; BOR 185-189. Respondent’s only defense of the trial court’s failure to give the defense requested instruction on premeditation is that the word “reflect” might be confusing (BOR 186), that this Court has approved the instruction given by the trial court in other cases (BOR 187), and that the additional language proposed by the defense was “redundant to other language in the instruction.” (BOR 188).

The defense-proposed premeditation instruction added the words:

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

RP 6896; CP 339.

The words “thought over beforehand” do not convey the mental processes of reasoning, weighing or reflecting on a decision. A person can think beforehand, “I will kill her,” without reasoning, weighing or reflecting on that decision. The word “reflecting” is not obscure,

particularly in context of “thinking beforehand, deliberation, reflection, and weighing or reasoning.” It is no more obscure that the word “any deliberation” which is in the instruction given by the court and also undefined. In fact, giving alternatives is clarifying. CP 317.

Premeditation was the issue for the jury. Scherf was entitled to a correct statement of the law to defend his life – with an instruction making it clear that something more than intent to kill and a moment in time is necessary to prove premeditation. The need could not be clearer. The prosecutor argued: “if you have an abiding belief that when he walked through the sanctuary door he was going to kill her, you are satisfied beyond a reasonable doubt that he had premeditated his design to kill her.” RP 6941. The failure to give the defense-proposed instruction on premeditation should require reversal of Scherf’s conviction.

b. Penalty phase instruction No. 6

Respondent asserts that it is not misleading to give an instruction that says “All twelve of you must agree before you answer the [statutory penalty-phase question] ‘yes’ or ‘no,’” when only a “yes” answer is required to be unanimous. BOR 189-191. Simple logic and the relevant statutes show that it is misleading and confusing.

Nothing in the Washington death penalty statute provides for a distinction between a unanimous or non-unanimous “no” verdict. RCW

10.95.060 (4) provides only that “[i]n order to return an affirmative answer . . . the jury must find unanimously.” (emphasis added). RCW 10.95.080(1) provides that an affirmative answer results in a death sentence; RCW 10.95.080(2) provides that if the jury does not answer affirmatively the sentence will be life without parole. To differentiate between unanimous and non-unanimous verdicts, as set out in the Court’s Instruction No. 6, implies a duty to reach a unanimous verdict for a life without parole sentence that does not exist.

The prejudice is not just in confusing or misleading the jury as to what is required of them under the Washington death penalty statutes; as the United States Supreme Court recognized in Mills v. Maryland, 486 U.S. 367, 105 S. Ct. 1860, 100 L. Ed. 2d 384 (1988), the prejudice is in the possibility of misleading them about what they may personally consider as mitigation during their deliberations: “Where the underlying statute does not require unanimity, due process will not tolerate instructions which could reasonably be interpreted by a jury to preclude consideration of any mitigating factor unless such factor was unanimously found to exist.” AOB 221. Respondent does not address Mills.

The error in not removing the “or no” from Instruction No. 6, should require reversal of Scherf’s death sentence.

13. THE TRIAL COURT PROPERLY GAVE PENALTY PHASE INSTRUCTION NO. 5.

Respondent asks this Court to hold that the underlined language in the trial court's penalty phase instruction No. 5 "introduces an improper arbitrary element into the jury's deliberations":

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

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

CP 120. BOR 208-212. Respondent's argument is that this language is improper because "mercy" is not "tied to any fact about the offense or the defendant," and permits a decision based on sympathy and emotion rather than reason. BOR 210. Respondent is mistaken in arguing that the language is either improper or an invitation to an arbitrary decision.

First, the United States Supreme Court held in Gregg v. Georgia, 428 U.S. 153, 199, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (joint opinion of Stewart, Powell and Stevens J.J.), that "[n]othing in any of our cases suggests that the decision to afford an individual mercy violates the

constitution.”³³ The Court upheld the Georgia death penalty scheme even though the statute did not require the jury to find any mitigating circumstances in order to recommend mercy. Gregg, at 197.

In fact, in State v. Pirtle, 127 Wn.2d 628, 679, 904 P.2d 245 (1995), this Court approved of the language in instruction 5 because it “inform[ed] the jury that mercy is always an appropriate mitigating factor.”

Second, Kansas has the same instruction as penalty phase instruction no. 5 for capital cases, Kansas pattern jury instruction 54.050, and the Supreme Court quoted it in Kansas v. Marsh, 548 U.S. 163, 176, 126 S. Ct. 2516, 165 L. Ed. 2d 429, in deciding the Kansas death penalty scheme was constitutional.

In addition to Kansas, other states explicitly permit consideration of mercy as mitigation. For example, Vermont’s pattern instruction on mitigation allows the jury to consider “circumstances which in fairness, sympathy or mercy may lead you as jurors individually or collectively to decide against imposing the death penalty.” OUI-CR 4-78 Death Penalty Proceedings -- Jury’s Determination of Mitigating Circumstances. For

³³ The holding that it is not unconstitutional to afford an individual mercy is not contradicted by holdings that a state may constitutionally preclude a decision based on emotion or passion. See, e.g., Saffle v. Parks, 494 U.S. 484, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990).

another example, in People v. Kircher, 194 Ill.2d 582, 743 N.E.2d 54 (2000), the court held that mercy is a relevant mitigating factor in a capital case in Illinois. In People v. Ervine, 41 Cal.4th 745, 220 P.3d 820, cert. denied, 131 S. Ct. 96 (2010), the California Supreme Court affirmed an instruction permitting the jury to consider “sympathy, pity or compassion” in determining whether to impose the death sentence.

Third, consideration of the “appropriateness of the exercise of mercy” does not invite an arbitrary or emotional response. “Appropriate” means “suitable or fitting for a particular purpose, person or occasion.” The Random House Dictionary (2nd ed. Unabridged 1987). Or “specifically suitable; fit.” Webster’s Third International Dictionary, (Unabridged 2002). The language in penalty phase instruction no. 5, therefore supports the constitutional requirement that jurors must make a “reasoned moral response” to mitigating evidence in deciding whether to impose a death sentence. Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); Eddings v. Oklahoma, 455 U.S. 105, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); Abdul-Kabir v. Quarterman, 550 U.S. 233, 264, 127 S. Ct. 1654, 167 L. Ed. 2d 585 (2007). Instructing the jurors that they may consider as mitigation a determination that the exercise of mercy would be “appropriate” in the case is precisely the reasoned and moral consideration which has been upheld by this Court and is not an invitation

to an emotional or arbitrary response. State v. Gentry, 125 Wn.2d 570, 648, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995); In re Rupe, 115 Wn.2d 379, 397, 793 P.2d 780 (1990); State v. Pirtle, 127 Wn.2d 628, 677-678, 904 P.2d 245 (1995).

What the language in penalty phase instruction no. 5 assures is that a juror may vote for life if mercy seems appropriate in the context of the case, whether the jury unanimously agrees that specific factors such as a difficult childhood, limited intellect, substance addictions, age or missed opportunities have been proven. It is appropriate to allow jurors to temper justice with mercy in deciding whether to impose a death sentence.

14. THE TRIAL COURT’S PENALTY PHASE RULINGS ALLOWING THE STATE TO INFORM THE JURORS THAT SCHERF WAS SERVING A SENTENCE OF LIFE WITHOUT PAROLE, PROHIBITING THE DEFENSE FROM INTRODUCING EVIDENCE THAT SCHERF REQUESTED SEX OFFENDER TREATMENT, AND RESTRICTING THE DEFENSE FROM ARGUING THAT THE BIBLE SAID THINGS OTHER THAN “AN EYE FOR AN EYE” DENIED HIM A FAIR TRIAL.

a. Informing the jury that Scherf was already serving life without parole

Under the court’s instructions, the jurors knew that Scherf was facing one of two sentences – life without the possibility of parole or death. CP 111-112, 119, 121. The court’s allowing the prosecutor to tell

them he was already serving life without parole, made it appear to the jurors that the only way to impose additional punishment for his crime was to vote for a death sentence. See AOB 223-225.³⁴ Respondent does not address this issue, but relies on two out-of-state cases, State v. Flowers, 489 S.E.2d 391 (N.C. 1997), cert. denied, 522 U.S. 1135 (1998);³⁵ and People v. Brisbon, 544 N.E.2d 297 (Ill. 1989), cert. denied, 494 U.S. (1990), neither of which involved a sentence of life without parole or the defendant's not receiving additional punishment if a death sentence were not imposed. BOR 195.

The jury had the judgments and sentences from Scherf's prior convictions and knew he was in prison for a substantial amount of his life.

³⁴ See e.g., State v. Smith 755 S.W.2d 757, 767 (Tenn. 1988), overruled in part on other grounds, State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992) (improper to tell the jurors that "to give life, a punishment of life, in this second killing is the equivalent of giving no punishment at all."); State v. Bigbee, 885 S.W.2d 797, 810 (Tenn. 1994) (reversing for, among other misconduct, "Another life sentence is no skin off his nose,") superseded by statute on other grounds as stated in State v. Stout, 46 S.W.3d 689 (Tenn. 2001); People v. Kuntu, 752 N.E.2d 380, 403 (Ill. 2001) – vacated a death sentence because prosecutor argued that because life imprisonment was the mandated punishment for two or more killings, the failure to impose a death sentence in the case where the defendant killed seven people would "be giving the defendant five free murders." Argument was "simply an inflammatory statement with no basis in either law or fact, it is tantamount to the conclusion that, as a matter of law, a person who kills more than two persons should be sentenced to death."

³⁵ Respondent's citation State v. Flowers, 589 S.E.2d 391 (N.C. 1997), is wrong.

From this, the prosecutor could make all of the arguments respondent urges as reasons for introducing evidence he was serving life without parole. BOR 196. Nothing was gained by introducing the evidence except unfair prejudice and the deprivation of the presumption of leniency. AOB 223-225. The introduction of the evidence that Scherf was already serving life without parole was constitutional error and should require reversal of his death sentence.

b. Exclusion of argument based on the Bible

The state was permitted to present evidence to the jurors that Scherf said the Bible required him to give up his life, RP1631, 1635, and his kite to the prosecutor quoting “an eye for an eye” from the Bible as a reason for deserving the death penalty. RP 687-806, 1669. What Scherf was not permitted to remind the jurors was that there are contrary views in the Bible other than “an eye for an eye.” RP 6972-6975.

MR SCOTT: . . . I think we would need to what I anticipate is, arguing in sort of rebuttal of this, is that there are lots of things in the Bible which Scherf could have quoted which would support the opposite position, turn the other cheek, you know, cast the first stone, those kinds of things. He chose to do this because that’s the way he was feeling at the time. . . . But we can’t simply leave this unanswered, as it’s evidence that was admitted over our objection, it talks about biblical authority for taking his life, and it’s from Scherf, so it’s very, very compelling and prejudicial in that regard.

....

THE COURT: I will grant 5 [To prevent the defense from arguing against the death penalty based upon the Bible]; except that the defense is not precluded from arguing – for that matter, the State is not precluded from arguing anything based on the evidence, and the evidence does include a reference to a biblical passage and I don't see anything improper in an argument that merely draws attention to the state of mind of the defendant at the time, which is in effect what the defense proposed argument would do. So that's where I would draw the line.

RP 6975. In other words, the defense could argue only that Scherf's citing the "eye for an eye" quotation from the Bible reflected his state of mind, not that there were other quotations which were forgiving in the Bible.

Respondent argues that the state did not make any argument that opened the door to the argument the defense wanted to make. BOR 196-199. The state, however, presented the evidence in which Scherf said that the Bible required the taking of his life. Having introduced that evidence, the defense was entitled to rebut that evidence by reminding the jury that the Bible had other points of view as well. See AOB 225-228. The error in excluding the evidence was constitutional. Id. Simmons v. South Carolina, 512 U.S. 154, 164-165, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994); Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); Ake v. Oklahoma, 470 U.S. 68, 83-87, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985); State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996);

Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

c. Not allowing evidence that Scherf asked for sex offender treatment

The trial court ruled that absent a stipulation that sex offender treatment would have absolutely no impact on preventing the crime, evidence that Scherf asked for sex offender treatment ten years earlier or that the DOC does not treat people who are not going to be released would open the door to a significant amount of evidence about how sex offender treatment had not prevented a prior rape and opinion testimony that Scherf was not treatable. RP 6981-6986, 6990-6996. The court did not consider an instruction which limited the jury's consideration of his request for treatment to assessing Scherf's state of mind or willingness to participate in treatment.

Respondent does not address the issue of an instruction limiting the request to Scherf's state of mind, but argues instead that the evidence would be akin to unreliable evidence that a defendant passed a polygraph exam (BOR 203), that it was not related to a weighty interest of Scherf's (BOR 203), that other relevant evidence was admitted at the penalty phase (BOR 203-205), and that the evidence could have been introduced along

with the state's rebuttal. BOR 204-205.

Scherf, however, did not seek to introduce any sort of unreliable evidence that he was innocent because he passed a test or had completed some type of unproven treatment; and his evidence was mitigation at the penalty phase of his capital trial, a weighty interest.

Most importantly, respondent's argument that Scherf should have introduced his evidence knowing it would open the door to the state's evidence assumes that the trial court's ruling on such rebuttal was legally correct. In fact, the state's evidence did not rebut the evidence the defense sought to introduce, nor address the purpose for which it was admitted – to show something about Scherf's willingness to participate in programs in prison. The proper limiting instruction was one which limited the jury's consideration to this purpose.

The exclusion of the evidence denied Scherf his right to present mitigating evidence at his capital sentencing trial and should require reversal of his death sentence.

15. CUMULATIVE ERROR DENIED SCHERF A FAIR TRIAL.

Respondent denies that any prejudicial errors occurred in Scherf's guilt or penalty-phase trials and that the evidence at trial was "overwhelming." BOR 207. On the point of the strength of the case,

respondent described a spur-of-the-moment crime – an attempt to commit the crime with bare hands and the subsequent use of a cord that happened to be there -- and then says these facts proved a “calculated, premeditated murder.” BOR 207.

As set forth in opening brief, there was a significant factual question for the jury on the question of premeditation and mitigation; the many errors which individually and cumulatively denied him a constitutionally fair trial. AOB 231.

16. PROPORTIONALITY REVIEW UNDER RCW 10.95.130(2)(b) DEMONSTRATES THAT THE DEATH PENALTY IN WASHINGTON VIOLATES FURMAN V. GEORGIA.

Nearly 40 years ago, the United States Supreme Court upheld the death penalty under the belief that statutes contained safeguards sufficient to ensure that the penalty would be applied reliably and not arbitrarily. Gregg v. Georgia, 428 U.S. 153, 187, 96 S. Ct. 2909, 49 L.Ed.2d 859 (1976)(joint opinion of Stewart, Powell and Stevens, JJ.). Washington State’s death penalty statute was one such statute. In enacting RCW 10.95.130(2)(b), the legislature provided an avenue for this Court to determine whether the administration of Washington’s death penalty has remedied the problems identified in Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 333 L. Ed. 2d 346 (1972). State v. Cross, 156 Wn.2d 580,

630, 132 P.3d 80, cert. denied, 549 U.S. 1022, 127 S.Ct. 559, 16 L.Ed.2d 415 (2006); State v. Davis, 175 Wn.2d 287, 397, 290 P.3d 42 (2012) (Wiggins, J., dissenting). In his Opening Brief, Scherf challenged the constitutionality of Washington's death penalty because after over forty years it is abundantly clear that it has not. AOB 232-275.

Respondent makes no response to appellant's constitutional arguments, other than to merely assert that Scherf's constitutional challenges have been rejected in the past (BOR 139-140). However, this Court is specifically tasked with a continuous obligation to consider whether Washington's death penalty is not administered in a freakish, wanton, random or discriminatory manner. If, as the respondent claims, such constitutional challenges were to remain dormant, then the requirement that trial reports be filed with this Court under RCW 10.95.120 would be unnecessary and meaningless.

After the filing of the Opening Brief, Justice Breyer, joined by Justice Ginsberg, questioned the continued validity of the death penalty in light of "almost 40 years of studies, surveys, and experience," all of which strongly indicate that the experiment to administer the death penalty in a constitutionally permissible manner has failed. Glossip v. Gross, 576 U.S. ___, 135 S.Ct. 2726 (Breyer, J., dissent)(2015). Justice Breyer concluded that today's administration of the death penalty involved three

fundamental constitutional defects: (1) serious unreliability; (2) arbitrariness in application; and (3) unconscionably long delays that undermine the death penalty's penological purpose. Id.

Forty years of Washington's death penalty system establishes the same constitutional flaws. A review under 10.95.130(2)(b) demonstrates that the death penalty in Washington: (1) is cruel and unusual punishment when considered in light of evolving standards of decency; (2) is unconstitutional because this Court's review cannot guarantee both lack of arbitrariness and individualized sentencing; and (3) is unconstitutional because of geographical arbitrariness, racism, absence of valid case characteristics associated with charging and sentencing, and absence of a complete and valid set of case reports. AOB 232-278.

a. Evolving standards of decency

Proportionality is a concept "which develops gradually in response to society's changes." State v. Fain, 94 Wn.2d 387, 396, 617 P.2d 720 (1980). "As the United States Supreme Court has said in reference to the Eighth Amendment, its scope is not static; rather, it 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'" Fain, 94 Wn.2d at 396-397, citing Trop v. Dulles, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958). A "claim that punishment is excessive [under the Eighth Amendment] is judged not by

the standards that prevailed in 1685 or when the Bill of Rights was adopted, but rather by those that currently prevail.” Atkins v. Virginia, 536 U.S. 304, 31, 122 S. Ct. 2242, 153 L. Ed. 335 (2002). Specifically on the point of evolving standards, Justice Breyer notes:

In sum, if we look to States, in more than 60% there is effectively no death penalty, in an additional 18% an execution is rare and unusual, and 6%, *i.e.*, three States, account for 80% of all executions. If we look to population, about 66% of the Nation lives in a State that has not carried out an execution in the last three years. And if we look to counties, in 86% there is effectively no death penalty. It seems fair to say that it is now unusual to find capital punishment in the United States, at least when we consider the Nation as a whole. . . .

Judged in that way [consistency of direction of change] capital punishment has indeed become unusual.

Glossip. 135 S.Ct. at 2774 (Breyer, J. dissent).

Washington State is no different. In his Opening Brief, Scherf established that a review of eligible capital cases over the last four decades unquestionably demonstrates that nearly every county in Washington has discontinued its use of capital punishment. AOB 240-247. The consistent direction away from capital punishment is demonstrated by the fact that from 1981-1985 twenty-four of Washington’s thirty-nine counties sought the death penalty in at least one case (61.5%), but from 2011-2014 that number dropped to two counties (5%). AOB 244-247.

Since the filing of the Appellant’s Opening brief, the trend has

continued. Presently, not a single county is seeking the death penalty; and when the death penalty has recently been sought, juries are not imposing it. This trend is best captured by looking at the most recent cases in which a death notice was filed (all in King County): none resulted in a death sentence. In State v. Monfort, No. 09-1-07187-6, nearly six years since the incident and a six-month trial, a unanimous jury deliberated for less than an hour and returned a sentence of life in prison without parole.³⁶ In State v. McEnroe, No. 07-C-08716-4, the prosecutor filed a death notice, but a split jury, nearly seven years after the incident, sentenced McEnroe on six counts of aggravated first degree murder to life in prison without the death penalty.³⁷ The King County Prosecutor initially filed a death notice against McEnroe's co-defendant, Michelle Anderson, describing the incident as "one of the worse crimes we've ever had in King County."³⁸ But after the jury verdicts against imposing death penalty in

³⁶ "Monfort sentenced to life in prison for killing Seattle police officer", Seattle Times, Sarah Jean Green, July 23, 2015. <http://www.seattletimes.com/seattle-news/crime/monfort-sentenced-to-life-in-prison-for-killing-seattle-police-officer/>

³⁷ "Split jury spares Carnation killer McEnroe from death", Seattle Times, Jennifer Sullivan, Steve Miltich, May 13, 2015. <http://www.seattletimes.com/seattle-news/crime/mcenroe-escapes-death-sentence-for-6-carnation-murders/>

³⁸ "Prosecutors won't seek death penalty for Michelle Anderson", Seattle Times, Jennifer Sullivan, July 29, 2015. <http://www.seattletimes.com/seattle-news/crime/prosectors-wont-seek->

both Monfort and McEnroe, the prosecutor withdrew the death notice against Anderson.

The national trend away from the death penalty is apparent. AOB 239.³⁹ The local trend is constant and swift: nearly every county has discontinued seeking the death penalty; that jurors have discontinued imposing it illustrates the point that the imposition and implementation of the death penalty have become increasingly unusual. See e.g., Glossip, 135 S.Ct. at 2772.

The respondent attempts to argue against the enormous swell of evidence trending away from society's acceptance of the death penalty by pointing out that Governor Inslee has not commuted any death sentences and that bills to abolish the death penalty did not get voted on by the Legislature this year. BOR 140. On the specific alleged proof offered by respondent to show that standards have not evolved away from support for the death penalty, it should be noted first that the sign-in sheet for the hearing on the proposed bill to eliminate the death penalty, HB 1739, on

[death-penalty-for-michele-anderson/](#)

³⁹ Most recently James Holmes, the Aurora theater shooter, received a life sentence from a Colorado jury, after being convicted of killing 12 people and injuring many more. "James Holmes Sentenced to Life in Prison for Aurora Theater Shooting", The Huffington Post, Ryan Grenoble, August 7, 2015. http://www.huffingtonpost.com/entry/james-holmes-death-penalty_55c3e0f8e4b0f1cbf1e47a40

February 18, 2015, had forty-four names, all but one of which signed in as supporting the bill. See Appendix A. Second, Governor Inslee’s position on the death penalty is a matter of public record. His statement on the hearing on HB 1739 indicated his support:

I fully support the bipartisan bills introduced this year to end the death penalty. I put a moratorium on the use of capital punishment last year because of its unequal application in our state, the soaring costs and delay, and the fact that nearly 80 percent of the death sentences in our state since 1981 have been overturned.

I look forward to further discussion with lawmakers about this.⁴⁰

Further, on the issue of the evolving standards of decency, the July 31, 2015 editorial in the Seattle Times, occasioned by the recent, post-Opening-Brief-of-Appellant verdicts in King County capital cases, summarizes relevant shifts in consensus against the continued use of the death penalty in Washington.

The Seattle Times,⁴¹ “It’s Time for the State to End the Death Penalty”:

In theory, the death penalty is the ultimate punishment for the most serious murders in Washington. But in practice, it is pursued too randomly and with too little success to

⁴⁰ <http://www.governor.wa.gov/news-media/gov-jay-inslee's-statement-today's-hearing-regarding-repeal-washington's-death-penalty>.

⁴¹ Editorial board members are editorial page editor Kate Riley, Frank A. Blethen, Ryan Blethen, Brier Dudley, Mark Higgins, Jonathan Martin, Thanh Tan, Blanca Torres, William K. Blethen (emeritus) and Robert C. Blethen (emeritus).

justify its exorbitant costs and moral quandary.

This week, King County Prosecutor Dan Satterberg wisely took the death penalty off the table in the last of three recent capital murder cases. No more death-penalty cases are pending in the state's largest county. There should not be any more in the future.

Two recent juries delivered life sentences in worst-of-the-worst capital murder cases. A jury took just one hour to unanimously decide Christopher Monfort — convicted of assassinating Seattle police officer Timothy Brenton and attempting to kill more — deserved a life-without-parole sentence.

Satterberg this week halted pursuit of the death penalty against Michele Anderson, accused of orchestrating the murder of six members of her family. Her co-defendant, Joseph McEnroe, received a life, not death, sentence. Satterberg explained it would be inequitable for him to continue to pursue the death penalty.

Inequity has been a hallmark of the death penalty. Pierce and Kitsap counties have been much more likely to pursue the death penalty than King or Snohomish counties, which are more able to absorb an estimated \$1 million in legal and investigative costs associated with capital cases. Costs for the three recent King County death-penalty cases are an astonishing \$15 million.

A capital-murder case can push poorer counties to the brink of bankruptcy, as Clallam County found in recent years. A state fund to ease the burden of aggravated murder cases paid just \$3.4 million of the more than \$23 million requested statewide, according to The Associated Press. Such stark fiscal reality inevitably influences prosecutors.

A death penalty delivered based on ZIP code is — not justice — is not justice at all.

Satterberg knows that pursuing a death sentence rarely

results in death. Since the death penalty was reinstated in Washington in 1981, prosecutors have sought a death sentence in 90 of 268 eligible cases. Juries delivered a death sentence in 32.

Of those, only five were executed, and three were effectively volunteers who waived appeals. Just twice in 34 years has the state executed defendants who exhausted appeals. The nine men currently on death row will remain there at least until 2016 because Gov. Jay Inslee has imposed a moratorium.

The muddled history of the death penalty demands a change in course. The Legislature briefly debated repeal this year. Lawmakers next year should rise to the task, air arguments and vote.

Until then, Satterberg should read the winds of social change and not seek the death penalty again.

July 31, 2015.

Most recently in State v. Santiago, 318 Conn. 1, ___ A.3d ___ (2015), the Connecticut Supreme Court concluded the state's death penalty unconstitutional in light of contemporary standards of decency. In reaching this conclusion, the Connecticut court considered, among other evidence, that jury verdicts may be "'a significant and reliable objective index of contemporary values because [juries are] so directly involved' in the administration of criminal justice." Santiago, at 28 (quoting Enmund v. Florida, 458 U.S. 782, 794, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982)).

The Court, in Santiago, also considered more generally that "although capital punishment remains legal in a majority of jurisdictions

within the United States, the number of states eschewing the death penalty continues to rise” and that it is the “consistency of the direction of change” that is significant. Santiago, at 30 (quoting Atkins v. Virginia, 536 U.S. 304, 315, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)). “Even within those jurisdictions where it remains legal, ‘use of the death penalty (in terms of executions and especially death sentences) has declined significantly in recent years.” Santiago, at 30 (quoting C. Steiker & J. Steiker, Report to the American Law Institute Concerning Capital Punishment, in A.L.I., Report of the Counsel to Membership of American Law Institute on the Matter of the Death Penalty (April 15, 2009) annex B, p. 2. To support the point, the Santiago court set out that the number of executions per year has fallen 60% since 1999 and that 90% of the executions occurred in just the four states of Texas, Missouri, Florida and Oklahoma. Id.

The Connecticut Supreme Court also relied on the Beckett Report and Governor Inslee’s moratorium on the death penalty in determining the evolving standards of decency and the direction of change, even though respondent asks this Court not to. Santiago, at 30, 64.

Justice Breyer concluded that “[d]espite the Gregg Court’s hope for a fair administration of the death penalty, 40 years of further experience make it increasingly clear that the death penalty is imposed arbitrarily, *i.e.*, without the ‘reasonable consistency’ legally necessary to

reconcile its use with the Constitution's commands. Glossip, 135 S.Ct. at 2760, Eddings v. Oklahoma, 455 U.S. 104, 112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). And since 2006, seven Washington State Supreme Court justices; the Governor of the state; and numerous reports, studies and media outlets have reached the same conclusion. See AOB 232-242.

One factor leading to inconsistent administration is the lack of reliability in imposition. For example, Justice Breyer cited to overwhelming evidence that innocent people have been and continue to be wrongfully incarcerated and executed; and the unreliability "soars" when the definition of "exoneration" is expanded to encompass "erroneous" instances in which courts failed to follow legally required procedures. Glossip, 135 S.Ct. at 2758-59 (between 1973 and 1995, courts identified prejudicial error in 68% of the capital cases before them).

Washington's unreliability percentage is even higher. Since the enactment of Washington death penalty statute in 1981, there have been thirty-three death sentences imposed; twenty-four of which have completed their appellate review, resulting in eighteen or 75% reversed due to prejudicial error. See An Analysis of the Economic Costs of Seeking the Death Penalty in Washington State, Seattle University

(January 1, 2015).⁴²

The results of the updated study by Katherine Beckett, which this Court accepted for consideration in State v. Allen Gregory, No. 88086-7, reflects the same infirmities in capital sentencing in Washington as those identified by the Seattle Times' editorial board, Justice Beyer in Glossip, and the Connecticut Supreme Court in Santiago as well as other constitutional infirmities. Katherine Beckett and Heather Evans, The Role of Race in Washington Capital Sentencing, 1981-2014 (Report).⁴³

Beckett found that the county in which the case is adjudicated may determine whether the death penalty will be sought or imposed (Beckett, at 19-20), while valid case characteristics may not. Case characteristics explained only 9% of the basis for the prosecutor's decision to seek the death penalty, and explained only 21% of the jury's decision to impose it. Becket at 25, 29. Prosecutors have been 4.4 times more likely to seek the death penalty if a law enforcement officer was the victim, even though this is just one of the many aggravating factors, and more likely to seek the death penalty if there was extensive publicity about the case. Beckett 25.

⁴² Full report can be found at:
http://www.law.seattleu.edu/Documents/korematsu/deathpenalty/The_Economic_Costs_of_Seeking_the_Death_Penalty_in_WA_FINAL.pdf

⁴³ Full report may be found at:
https://lsj.washington.edu/sites/lsj/files/research/capital_punishment_beckettevans_10-1.6.14.pdf

After controlling for other variables, Beckett and Evans found that juries are four and a half times more likely to impose the death penalty if the defendant is black. Beckett at 30.

b. Arbitrariness and racial bias

The Beckett report shows that the death penalty in Washington is arbitrarily imposed and imposed on impermissible factors such as race and the county where the crime occurred. The death penalty in Washington is still sought and imposed arbitrarily, randomly, infrequently and on the basis of race, in violation of Furman. It is unconstitutional for that reason.

[T]he death penalty must be equally available for similarly culpable offenders if a capital sentencing scheme is to fulfill a valid retributive purpose. To the extent that the ultimate punishment is imposed on an offender on the basis of his, or his victim's race, ethnicity, or socio-economic status, rather than the severity of his crime, his execution does not restore but, rather, tarnishes the moral order.

Santiago, at 41 (citations omitted).

c. Inability to provide individualized consideration and consistency

Contrary to the assertion of respondent, this Court has never considered or decided that the death penalty in Washington can be applied both consistently and with individualized consideration of each person charged with a capital crime as Furman and Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982), require. State v. Davis,

175 Wn.2d 287, 290 P.3d 42 (2011), is an example of how the majority overcomes the dissent's challenge to the lack of consistency in the imposition of the death penalty, by relying on the possibility that the differing verdicts are explained by individualized consideration.

Justice Fairhurst, joined by three other justices in dissent, found that “[o]ne could better predict whether the death penalty will be imposed on Washington’s most brutal murders by flipping a coin than by evaluating the crime and the defendant.” The majority ignored the dissenters’ claim that the death penalty was applied inconsistently and arbitrarily by concluding that the fact that there were more life sentences than death sentences in similar crimes proved that the jurors were making individualized determinations based on mitigation. Id. at 355. But no Washington case has decided that, in light of other aggravated murder cases, the death penalty is applied consistently and fairly – applied in a consistent and principled way -- but also humanely in light of “uniqueness of the individual.” Eddings v. Oklahoma, 455 U.S. 114, 110, 102 S. t. 869, 71 L. Ed. 1 (1982). This is what the constitution requires. Id.

The Connecticut Supreme Court relied on this “inherent conflict in the requirements that the eighth amendment’s ban on cruel and unusual punishment” imposes in declaring the death penalty unconstitutional:

On the one hand, Furman and its progeny stand for the

proposition that any capital punishment statute, to avoid arbitrariness and pass constitutional muster, must cabin the discretion of prosecutors, judges and juries by providing clear guidelines as to what specific types of crimes are eligible for the punishment of death. . . . The ultimate punishment must be reserved for the very worst offenders and may not be “wantonly [or] . . . freakishly imposed. Furman v. Georgia, *supra*, 408 U.S. 310 (Steward. J. concurring). On the other hand, since it decided Woodson v. North Carolina, *supra*, 428 U.S. 280, and Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), the United States Supreme Court has not wavered in its commitment to the principle of individualized sentencing; juries must be afforded unlimited discretion to consider any mitigating factor – any unique characteristic of the crime, the criminal or the victim before imposing the death penalty.

The question is whether the individualized sentencing requirement inevitably allows in through the back door the same sorts of caprice and freakishness that the court sought to exclude in Furman, or, worse, whether individualized sentencing necessarily opens the door to racial and ethnic discrimination in sentencing. In other words, is it ever possible to eliminate arbitrary and discriminatory application of capital punishment through a more precise and restrictive definition of capital crimes if prosecutors always remain free not to seek the death penalty for a particular defendant, and juries not impose it, for any reason whatsoever? We do not believe that it is.

Santiago, at 41. In support of this determination, the court noted that since Furman at least six members of the court have concluded that the demands of Furman and dictates of Woodson and Lockett irreconcilable, and cited a number of “concerns . . . expressed by legal scholars.” *Id.* at (and articles cited there). The court concluded that “the opportunity for

exercise of unfettered discretion at key decision points in the process has meant that the ultimate punishment has not been reserved for the worst of the worst. . . . Many who commit truly horrific crimes are spared, whereas certain defendant whose crimes are, by all objective measures, less brutal are condemned to death.” Santiago, at 45; see also, State v. Davis, 175 Wn.2d 287, 388, 290 P.3d 43 (2012) (Fairhurst, J., dissenting)(“Our system of imposing the death penalty defies rationality, and our proportionality review has become ‘an empty ritual’.”)

The two constitutional requirements of capital sentencing – consistency and individualized sentencing--cannot be reconciled, and the death penalty cannot be constitutionally applied for this reason.⁴⁴

d. Conclusion

Respondent is asking this Court not to consider the evolving standards which have resulted in the seeking or imposition of the death penalty dwindling to a rarity, not to look at the evidence that death is not sought on a principled or consistent basis and that it is, in fact, sought and

⁴⁴ Just recently United States Supreme Court Justice Antonin Scalia acknowledged as much when, while speaking at the University of Minnesota Law School, he remarked that capital jurisprudence has made it “practically impossible to impose it [capital punishment] but we [Supreme Court] have not formally held it to be unconstitutional”, but that “it wouldn’t surprise me if it did” fall. Scalia: ‘Wouldn’t Surprise Me’ if Death Penalty Struck Down. Associated Press, Brian Bakst, Oct. 20, 2015. <http://abcnews.go.com/US/wireStory/scalia-wouldnt-surprise-death-penalty-struck-34612784>

imposed for improper reasons. Respondent is asking this Court not to consider challenges that it has never resolved or should be reconsidered. This Court, however, should do both. In his Opening Brief, Scherf challenged the geographic disparity of seeking the death penalty by county prosecutors on equal protection grounds (AOB 259-261) and has challenged the adequacy of the case reports. AOB 267-275. Respondent does not address these challenges and Scherf will rely on the arguments in the opening brief.

For the reasons set out here and in the opening brief, Scherf asks that this Court hold the Washington capital sentencing scheme unconstitutional in light of the proven inability of proportionality review to protect against the arbitrary and unreliable imposition of the death penalty.

17. SCHERF'S DEATH SENTENCE SHOULD BE INVALIDATED UNDER THE MANDATORY REVIEW PROVISIONS OF RCW 10.95.130.

Respondent agrees that the four relevant questions on mandatory review are (a) whether there was sufficient evidence to justify the death sentence; (b) whether the sentence was brought on by passion and prejudice; (c) whether the sentence is excessive or disproportionate; and (d) whether the defendant had an intellectual disability within the meaning of RCW 10.95.030(2). BOR 212.

a. There was insufficient evidence to justify the jury's affirmative finding that there were insufficient mitigating circumstances to warrant leniency.

Because no corrections officer had been killed at the Washington State Reformatory before Officer Biendl's death, respondent argues that the mitigation was insufficient to warrant leniency because "the jury could view the defendant as the most dangerous person to be incarcerated at the Reformatory in almost a century." BOR 214. This argument overlooks the testimony of Scott Frakes, the warden at WSR at the time of the crime, which established that if the correctional officers had done their duty, been at their posts or taken basic, reasonable precautions, Officer Biendl would not have been killed in the chapel there on the evening of January 29, 2011. Frakes explained that on that evening, the officer whose job it was to oversee the inmates' movement from the chapel back to their cells simply did not check with Officer Biendl and neglected to check the program areas in the chapel as he should have. This officer had not paid attention to the inmates' comings and goings and had made log entries based on what he thought should have happened rather than what really happened. RP 7075. Had the officer simply been at his post, Scherf would have returned to his cell that evening. RP 7074. Had the officer merely paid attention, he would have been immediately aware that Scherf had not left the chapel.

After the fact, a team of well-known and respected correctional professionals from the National Institute of Corrections investigated and made recommendations for improvement of security in the Washington prison system; DOC adopted most of them. RP 7078. Had, for example, procedures for closing single-person posts required a second officer, as now is the case, the crime would almost surely had not been committed. RP 7081-83.

While the laxness of the security does not excuse the actions of Scherf, the jury heard evidence that it made the crime possible. The evidence certainly showed that an inmate did not have to be the most dangerous person of the century to commit a crime against an officer at WSR.

Respondent's other argument that the mitigation was insufficient is that Scherf's prior crimes showed he was not remorseful. BOR 214. This argument is unsupported by any evidence that remorse cannot be genuine under these circumstances and directly contradicted by Scherf's letter to his father. The letter demonstrated Scherf's remorse and puzzlement and despair at aspects of his life.

Similarly, Scherf's exhibited positive behavior in prison for over thirty years and at other points in his life, and engaged in many laudable activities above and beyond anything required of him; this was mitigation.

The fact of his sometimes having to ignore injustices or perceived injustices done to him by others contributed to his anger at Officer Biendl hardly established that he had been concealing a “murderous anger” throughout his time in prison. BOR 213. Indeed, it would seem likely that few prison inmates have not suppressed anger over their treatment by guards or other personnel. Respondent, in fact, quotes the court in Dawson v. Hearing Comm., 92 Wn.2d 391, 396, 597 P.2d 1353 (1979), to this effect: “Tension between guards and residents is unremitting; frustration, resentment and despair are commonplace.” BOR 215

In fact, despite respondent’s rhetorical language, nothing about the crime was particularly heinous or cruel, premeditated or sophisticated. It was not gratuitously violent or committed in the course of another crime. It was not committed for financial gain or against a vulnerable victim. Absent the aggravating factors Scherf was in prison and the victim a prison guard, he would not likely have been charged with aggravated or even first degree murder. Moreover, Scherf acknowledged the wrongfulness of his actions and repeatedly expressed remorse.

The facts that the victim was a prison guard and that Scherf had an extensive criminal history are insufficient alone to support a death sentence. See AOB 281-282 (The maximum penalty based solely on criminal history is life without the possibility of parole under the three-

strike law, RCW 9.94A.570; and a death sentence based entirely on the static aggravating factors would be an unconstitutional mandatory sentence.)

No reasonable trier of fact – unswayed by improper evidence and argument – should have found that there was insufficient mitigation to merit leniency.

b. Scherf’s death sentence was brought about through passion and prejudice.

Respondent does not separately address the issue that Scherf’s death sentence was brought about through passion and prejudice. BOR 220. Appellant’s argument on this issue is set out at AOB 283-286. It bears repeating, however, that Scherf’s case may be unique in that the prosecutor was permitted to argue to the jury that they should impose the death penalty because Scherf himself said that he deserved to die and should forfeit his life -- after quoting Scherf at the close of the penalty phase argument, the prosecutor argued “if you take a life, you give a life.” RP 7143. For this reason and for the other many reasons set out at AB 283-286, Scherf’s sentence was brought about through passion and prejudice and should be reversed.

c. Scherf's death sentence is disproportionate to the sentences imposed on others.

Scherf's case is disproportionate to the sentences imposed on others because the facts of his crime distinguish it from all other reported first degree murder cases – non-aggravated premeditated and felony murder as well as aggravated murder. With one possible exception, which includes descriptions of bruises and cuts on the victim's face in addition to the ligature, there are simply no reported first degree murder convictions involving strangulation which did not also involve a sexual assault or a separate beating of the victim.⁴⁵ See AOB 288-289.

Not only is his case disproportionate in light of all other strangulation cases, it is disproportionate in light of other cases involving mass murderers who are not serving death sentences such as Gary Ridgway (50+) TR 265, Kwan Fai Mak (13), Benjamin Ng (13) TR 14, Joseph McEnroe (6) TR 341, and Michelle Anderson (6).

In light of this, neither the aggravating factors nor Scherf's prior criminal history alone can make his sentence proportional.

⁴⁵ Since the Opening Brief, Trial Report 342 for Tyler Wolfgang Savage, has been filed. Savage was convicted of murdering and raping a sixteen-year-old girl. The death was by strangulation. The death penalty was not sought.

i. Facts of the crime

Respondent does not address that Scherf's death sentence is disproportionate in light of the facts of the crime, but instead argues that Scherf deserves a death sentence for two reasons which cannot seriously be regarded as justifying it – (1) because other inmates were “locked down” after the crime and (2) because some inmates are now denied work opportunities in Prison Industries. BOR 2015-2016. Prisoners are “locked down” for many reasons having nothing to do with the death of either another prisoner or prison staff.⁴⁶ Second, Scherf has never been accused of any misconduct related to working in Prison Industries. Many safety measures were introduced to improve prison security after the death of Officer Biendl; presumably the limitation on who can work in Prison Industries is one of them.

The one case cited by respondent as comparable in terms of facts did not involve death by strangulation. BOR 2016. The cited case, Dennis Williams, TR 44, involved the murder of a fellow inmate from whom Williams sometimes purchased drugs. TP 44. Although Williams was young and had had a difficult upbringing, he had a prior second degree murder conviction as his criminal history. TP 44. In any event,

⁴⁶ DOC policy 4.20.155 IV (A)(4) mandates written procedures for lockdowns. This confirms that lockdowns are certainly anticipated if not routine in prison.

Williams did not receive a death sentence. Scherf's death sentence is disproportionate considering the facts of Williams and other cases.

ii. Aggravating circumstances

Respondent cites five cases "involving escapees" from prison. BOR 217. Of those, death was initially imposed less often than not -- in only two of the five cases. Charles Campbell, TR 9, and Michael Robtoy, State v. Robtoy, 98 Wn.2d 30, 653 P.2d 284 (1982). Michael Robtoy was convicted under the prior Washington death penalty statute and his death sentence was vacated under State v. Frampton, 95 Wn.2d 649, 627 P.2d 922 (1981); he was on escape status when he killed two people in separate incidents and stole the property of one of them. Charles Campbell killed three people in a particularly brutal manner, one of them an eight-year-old child. State v. Campbell, 103 Wn.2d 1, 691 P.2d 929 (1984). These cases are not similar to Scherf's case and are more egregious in any event.

Respondent discounts the cases involving police officer victims. BOR 217-218. It is true, however, that none of these cases except Scherf's has resulted in a death sentence. Nedley Norman's death sentence imposed under a prior statute was reversed by State v. Frampton, *supra*, and Charles Finch's by jury verdict on retrial after reversal on appeal. TR 154. See AOB 289-291.

As respondent acknowledges, “there are no cases that involve the combination of aggravating factors that existed in the present case.” BOR 218. Comparison to both the law enforcement victim cases as well as the “escapee” cases both establish that Scherf’s sentence is disproportionate and excessive, particularly in light of the facts of the crime.

iii. Criminal history

As previously noted, Scherf’s criminal history alone cannot justify his death sentence. AOB 290. The maximum sentence that can be imposed solely for criminal history is life without parole under the three strikes law. Moreover, the Beckett study empirically shows that the number of prior convictions does not influence the jury’s decision to impose a death sentence in Washington. Beckett, at 29.

Respondent argues nonetheless that Scherf’s criminal history is comparable to the criminal histories of Cal Brown, TR. 140; Michael Roberts, TR. 176; Robert Yates, TR. 251; Dwayne Woods, TR 177, and Thomas Braun, who all were sentenced to death. RP 218-219. Respondent then argues that the facts in Roberts and Braun establish that criminal history can justify a death sentence even where the facts are not “exceptionally egregious.”⁴⁷

⁴⁷ Respondent seems to concede that the facts in the cases of Cal Brown, Robert Yates or Dwayne Woods are not comparable to the facts in

Braun was convicted under a prior death penalty statute. His crime was described by respondent as kidnapping and murdering a young woman. BOR 219. The facts set out in State v. Braun, 82 Wn.2d 157, 158, 509 P.2d 742 (1973), include a six-day crime spree involving taking pistols and ammunition in the burglary of a store; kidnapping and murdering a young woman and stealing her car in Washington; robbing a hotel in Washington; committing another murder and car theft in Oregon and then committing a murder, rape, and attempted murder in California. Braun had been tried and sentenced to death in California before being tried in Washington. Id.

Although the trial reports do not reflect this, Michael Roberts' conviction was overturned on appeal, State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000), and he subsequently entered a plea and was sentenced to life without parole on remand. He and his co-defendant were convicted of tying the victim in a chair, stabbing and strangling him; the ligature was loosened and tightened while the victim was alive. Id. at 180-181. The trial report describes the victim as being "repeatedly strangled." TR 176.

Scherf's case is not comparable to either Roberts or Braun and his death sentence is disproportionate under this factor as well.

Scherf's case.

iv. Scherf's personal history

Respondent dismisses out-of-hand Scherf's mitigation, his good prison record, many commendations and his remorse. Respondent argues that his criminal history "puts him in a group that has usually received the death penalty" and that his crime has had a "harmful effect on the prison community." BOR 219-220.

The group that respondent asserts "has usually received the death penalty" because of their criminal history includes eight people, only 50% of whom ultimately received a death sentence, after Michael Robert's death sentence was vacated for improper instructions. And the death sentences in the four remaining cases cited were no doubt imposed for reasons other than their criminal history, such as the number of victims of Robert Yates. State v. Yates, 161 Wn.2d 714, 168 P.3d 359, cert. denied, 554 U.S. 922 (2008). The Beckett study confirms this, at 29.

With regard to the alleged "harmful effect on the prison community," respondent cites no authority that this factor – even if established – would justify a death sentence. Murder likely has a harmful effect on some community, and, here, the prison officers and authorities shared the responsibility for the conditions at WSR which allowed the crime to be committed.

Scherf's death sentence was disproportional in light of these factors identified by respondent.

d. The definition of intellectual disability in RCW 10.95.030(2) is unconstitutional.

See Argument 6 above.

e. The “freakish, wanton and random” standard conflicts with the plain language of the statute and provides no review all.

As set out in the opening brief, if Scherf's case is considered in light of the other reported cases, his death sentence stands out as unusual and excessive. His sentence is disproportionate under RCW 10.95.130(b), even assuming for argument that it is not disproportionate under the “freakish, wanton and random” standard.⁴⁸ For this reason, the “freakish, wanton and random” fails to provide the review mandated by the statute. AOB 291-294. As the Beckett report shows, this standard fails to assure that proportionality review prevents the death penalty from being imposed in an arbitrary, unreliable or racist manner or protect against geographical disparity and reliance on improper reasons – such as the amount of pretrial publicity -- in charging the death penalty. AOB 291-294.

⁴⁸ Appellant does not concede that his case is not “freakish, wanton and random,” particularly in light of the fact that it would likely not have been charged as a first degree murder at all if not for the aggravating factors and his criminal history.

This Court should go beyond the “freakish, wanton and random” inquiry and find that Scherf’s death sentence is disproportionate to the sentences imposed in other cases under the statute.

B. CONCLUSION

Appellant respectfully submits that his conviction and death sentence should be reversed and remanded for retrial on the aggravated murder charge and dismissal of the death sentence.

Respectfully submitted,

DATED this 3rd day of November, 2015

/s/ Rita J. Griffith
Rita J. Griffith, WSBA # 14360
Attorney for Appellant

/s/ Mark A. Larrañaga
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CERTIFICATE OF SERVICE

I certify that on the 3rd day of November, 2015, I caused a true and correct copy of the Reply Brief of Appellant to be served on the following via e-mail and first class mail:

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NAME DATE at Seattle, WA

APPENDIX A

TESTIMONY / ATTENDANCE ROSTER
FEBRUARY 18, 2015
HB 1739

TESTIMONY/ATTENDANCE ROSTER

18 to text ①

28 signposts

Committee: Judiciary

Bill No.: HB 1739

Date/Time: February 18, 2015 8:00 a.m.

Short Title: Reducing criminal justice expenses by eliminating death penalty in favor of life incarceration

NAME	WISH TO TESTIFY? (YES/NO)	IF SO, INDICATE PRO/CON	ORGANIZATION	MAILING ADDRESS (FILL OUT COMPLETELY) DO NOT SAY "ON FILE"	TELEPHONE
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TESTIMONY/ATTENDANCE ROSTER

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Committee: Judiciary

Bill No.: HB 1739

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Short Title: Reducing criminal justice expenses by eliminating death penalty in favor of life incarceration.

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TESTIMONY/ATTENDANCE ROSTER

Committee: Judiciary Bill No.: HB 1739

Date/Time: February 18, 2015 8:00 a.m. Short Title: Reducing Criminal Justice Expenses by Eliminating Death Penalty in Favor of Life Incarceration.

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Please Print <u>Susan Eidschink</u>	<u>(No)</u>	<u>Pro</u>	<u>League of Women Voters of WA</u>	Street City, Zip Email <u>319 N Tacoma Ave #1704</u> <u>City, Zip Tacoma 98403</u> <u>Susan.eidschink@khanhous.net</u>	<u>253-365-4005</u>
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Please Print <u>DON FRANKS</u>	<u>NO</u>	<u>PRO</u>	<u>NON-AFFILIATED</u>	Street City, Zip Email <u>10624 3rd Aves</u> <u>BURien, WA 98148</u> <u>don.franks@progrill.com</u>	<u>206-280-7875</u>

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Please Print Peter A Collins	Yes	NA	Seattle University	Street City, Zip e-mail Seattle WA	206-296-5474
Please Print Al O'Brien	Yes		Seattle University Former Legislator	Street City, Zip e-mail Seattle WA	209 310-8074
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Please Print Bob Cooper	NO	PRO	WA ASSOC. of CRIMINAL DEFENSE LAWYERS & WA DEFENDER ASSOC	Street City, Zip e-mail //	//
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TESTIMONY/ATTENDANCE ROSTER

(5)

Committee: Judiciary

Bill No.: HB 1739

Date/Time: February 18, 2015

8:00 a.m.

Short Title: Reducing criminal justice expenses by eliminating the death penalty in favor of life incarceration.

NAME	WISH TO TESTIFY? (YES/NO)	IF SO, INDICATE PRO/CON	ORGANIZATION	MAILING ADDRESS (FILL OUT COMPLETELY) DO NOT SAY "ON FILE"	TELEPHONE
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TESTIMONY/ATTENDANCE ROSTER

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Committee: _____ Bill No.: HB 1739

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Please Print Erich Fulfs	No	Pro	WCADP	Street PO Box 46069 City, Zip Seattle WA 98146	425-466-3813
Please Print R.J. McKenzieSullivan	No	Pro		Street 14702 Old Hwy 455 City, Zip Tullock WA 98589 Email mckenzie@issu112@hotmail.com	360-280-9628
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