

NO. 88906-6

RECEIVED BY E-MAIL

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent

v.

BYRON EUGENE SCHERF,

Appellant

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

SETH A. FINE
KATHLEEN WEBBER
Deputy Prosecuting Attorneys
Attorneys for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

TABLE OF CONTENTS

I. COUNTER-ASSIGNMENTS OF ERROR 1

II. ISSUES 1

 A. ISSUES RELATING TO PRE-TRIAL EVIDENTIARY RULINGS. 1

 B. ISSUES RELATING TO NOTICE OF SPECIAL SENTENCING PROCEEDING..... 4

 C. ISSUES RELATING TO TRIAL. 6

 D. ISSUES RELATING TO STATUTORY REVIEW..... 8

III. STATEMENT OF THE CASE..... 9

IV. ARGUMENT RELATING TO PRE-TRIAL EVIDENTIARY RULINGS 18

 A. THE TRIAL COURT PROPERLY DENIED THE MOTION TO SUPPRESS EVIDENCE OBTAINED FROM THE SERVICE OF SEARCH WARRANT 11-32..... 18

 1. Facts Relating To The Service Of Search Warrant 11-32. 18

 2. Chapter 70.02 RCW Does Not Protect Documents Held By The Defendant In His Cell. 21

 3. The Search Warrant Was Supported By Probable Cause..... 25

 4. The Warrant Described the Items To Be Seized With Particularity. 36

 5. The Warrant Particularly Described The Location Of The Search, And The Search Did Not Exceed The Scope Of The Warrant..... 41

 6. If The Court Erred When it Denied The Defendant's Suppression Motion It Was Harmless. 44

 B. THE DEFENDANT'S STATEMENTS WERE PROPERLY ADMITTED INTO EVIDENCE..... 46

1. The Circumstances Leading To The Defendant's Statements To Police.	46
2. The Defendant Was Provided A Lawyer At the Earliest Opportunity.....	63
a. The Defendant Was Not Taken Into Custody For Purposes Of The Rule Until He Was First Contacted In Connection With The Murder Investigation.....	64
b. Regardless of When The Defendant's Right To A Lawyer Accrued, He Was Provided An Attorney At The Earliest Opportunity	65
c. If The Defendant Was In Custody For Purposes Of CrR 3.1, Then Any Failure To Comply With The Rule Was Harmless.....	71
3. The Defendant's Transfer from Prison To Jail Does Not Constitute A Basis To Suppress His Statements.	75
4. CrR 3.2.1 Does Not Affect The Admissibility Of The Defendant's Confession.	76
5. The Defendant Voluntarily Confessed To Officer Biendl's Murder.	84
a. The Defendant Was Not In Custody For Fifth Amendment Purposes	84
b. The Defendant Voluntarily Gave Statements To Police	87
c. The Defendant's Constitutional Right To Counsel Had Not Attached When He Provided Statements To The Police	95
C. THE COURT PROPERLY EXERCISED ITS DISCRETION WHEN PORTIONS OF THE DEFENDANT'S RECORDED STATEMENTS WERE NOT REDACTED.	97
1. Statements Regarding Ointment, Shoelaces, And Cartoon.	97
2. Officer's Questions Regarding Murder.	99
3. Statements Regarding Resolution Of The Case.	101

4. The Defendant's Own Statements Regarding Penalty Were Relevant And Not Improperly Admitted.	104
5. The Defendant's Statements That He Chose To Reject the Advice Of His Counsel.	106
V. ARGUMENT RELATING TO NOTICE OF SPECIAL SENTENCING PROCEEDING.....	111
A. THE NOTICE OF SPECIAL SENTENCING PROCEEDING WAS TIMELY FILED.	111
1. When Statutes Require That Action Be Taken "Within X Days After" A Specified Event, They Have Never Been Construed As Precluding Action Prior To That Event.	111
2. The Interpretation Urged By The Defendant Would Defeat The Statute's Purpose, By Potentially Allowing Defendants To Preclude Application Of The Death Penalty By Pleading Guilty At Arraignment.....	114
3. Other Provisions Of The Death Penalty Statutes Provide Further Support For The Trial Court's Interpretation.....	116
4. The "Rule Of Lenity" Is Inapplicable To This Issue.....	118
B. A 46-DAY DELAY IN DECIDING WHAT CHARGES TO FILE AND WHETHER TO SEEK THE DEATH PENALTY DOES NOT VIOLATE THE DEFENDANT'S RIGHTS.	120
C. THE PROSECUTOR'S DECISION TO SEEK THE DEATH PENALTY WAS BASED ON A PROPER INVESTIGATION OF POTENTIAL MITIGATING CIRCUMSTANCES.	122
D. NEITHER THE CONSTITUTION NOR COURT RULES MANDATE DISCOVERY OF HOW THE PROSECUTOR EVALUATED THE EVIDENCE.	127
E. THIS COURT HAS ALREADY HELD THAT AN ALLEGATION CONCERNING THE ABSENCE OF MITIGATING CIRCUMSTANCES NEED NOT BE INCLUDED IN THE INFORMATION.	132

F. BECAUSE THERE IS NO EVIDENCE THAT THE DEFENDANT SUFFERS FROM AN INTELLECTUAL DISABILITY, THE PRECISE DEFINITION OF THAT TERM IS IRRELEVANT.....	133
G. THIS COURT HAS REPEATEDLY REJECTED CLAIMS THAT THE DEATH PENALTY VIOLATES THE FEDERAL OR STATE CONSTITUTIONS.....	139
VI. ARGUMENT RELATING TO TRIAL	141
A. THE TRIAL COURT'S DECISIONS ABOUT QUESTIONS IN THE DEATH QUALIFICATION PORTION OF VOIR DIRE WERE PROPERLY LIMITED TO THE APPLICABLE LAW . THE COURT ACTED WITHIN ITS DISCRETION WHEN IT RULED ON CHALLENGES TO JURORS FOR CAUSE.....	141
1. Facts Relating To The Procedure Used For Jury Selection. ...	141
2. The Court's Rulings During The Death Qualification Portion Of Voir Dire Properly Limited Questions To The Applicable Law.	145
3. The Court Properly Exercised Its Discretion When It Denied Six Of The Defendant's Challenges For Cause.....	151
4. The Court Properly Exercised Its Discretion To Grant Two Of The State's Challenges To Jurors For Cause.	160
B. THE PROSECUTOR DID NOT COMMIT ERROR THAT PREJUDICED THE DEFENDANT.	166
1. Jury Selection.....	167
2. Opening Statements And Closing Arguments.....	174
a. Whether The Argument Regarding The Jury's Job Was Erroneous Has Not Been Preserved For Review. In The Context Of The Entire Argument It Was Not Prejudicial Error	175
b. Reference To Finding Officer Biendl Lying Under A Cross	179
c. The Law Of Premeditation Was Correctly Argued.....	180

C. THE COURT'S INSTRUCTIONS PROPERLY STATED THE APPLICABLE LAW, WERE NOT MISLEADING, AND ALLOWED THE DEFENDANT TO ARGUE HIS THEORY OF THE CASE...	185
1. The Premeditation Instruction Accurately Stated The Law And Permitted The Parties To Argue Their Theories Of The Case.....	185
2. The Penalty Phase Closing Instruction Was Not Confusing....	189
D. EVIDENTIARY RULINGS IN THE PENALTY PHASE DID NOT DEPRIVE THE DEFFENDANT OF HIS RIGHT TO A FAIR TRIAL, OR TO APPEAR, DEFEND, OR CONFRONT WITNESSES.....	192
1. Evidence The Defendant Was Serving A Sentence Of Life Without Parole Was Not Unfairly Prejudicial.	192
2. Argument Regarding The Bible Was Properly Limited.	196
3. Rebuttal Evidence Showing That Sex Offender Treatment Would Not Have Prevented the Murder Was Properly Permitted.....	200
E. THE CUMULATIVE ERROR DOCTRINE DOES NOT APPLY WHERE THE DEFENDANT HAD NOT SHOWN ANY ERROR THAT DEPRIVED HIM OF A FAIR TRIAL.	206
F. IN A CAPITAL SENTENCING PROCEEDING, THE JURY CANNOT PROPERLY CONSIDER REASONS FOR "MERCY" THAT ARE NOT BASED ON FACTS ABOUT THE CRIME OR THE DEFENDANT.	208
VII. ARGUMENT RELATING TO STATUTORY REVIEW.....	212
1. The Jury Reasonably Determined That The Few Mitigating Circumstances Offered By The Defendant Are Insufficient To Merit Lenience.....	212
2. The Sentence Imposed On The Defendant Is Not Disproportionate To The Sentences In Those Few Cases That Are Comparable.....	214
a. Nature Of The crime.....	215
b. Aggravating Circumstances	217

c. Defendant's Criminal History	218
d. Defendant's Personal History	219
3. The Verdict Was Not Produced By Improper Appeals To The Jury's Passion Or Prejudice.	220
4. The Record Shows That The Defendant Does Not Have An Intellectual Disability.....	220
VIII. CONCLUSION.....	221

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>Adams v. Ingalls Packing Co.</u> , 30 Wn.2d 282, 191 P.2d 699 (1948)	112, 113, 115
<u>City of Seattle v. Winebrenner</u> , 167 Wn.2d 451, 219 P.3d 686 (2009).....	116
<u>Dando v. West Wind Corp.</u> , 67 Wn.2d 104, 406 P.2d 927 (1965)..... 113, 114	
<u>Dawson v. Hearing Comm.</u> , 92 Wn.2d 391, 597 P.2d 1353 (1979)	215
<u>In re Carrier</u> , 173 Wn.2d 791, 272 P.3d 209 (2012).....	67
<u>In re Cliff Ave. Improvement</u> , 122 Wash. 335, 210 P. 676 (1922).....	113
<u>In re Cross</u> , 180 Wn.2d 664, 327 P.3d 660 (2014).....	140, 206, 207
<u>In re Elmore</u> , 162 Wn.2d 236, 172 P.2d 335 (2007).....	106, 109
<u>In re Littlefield</u> , 133 Wn.2d 39, 940 P.2d 1362 (1997).....	98
<u>In re Rupe</u> , 115 Wn.2d 379, 798 P.2d 780 (1990).....	178, 210, 211
<u>In re Yates</u> , 177 Wn.2d 1, 296 P.3d 872 (2013).....	145
<u>McKee v. American Home Products Corp.</u> , 113 Wn.2d 701, 782 P.2d 1045 (1989).....	127
<u>O'Day v. King County</u> , 109 Wn.2d 796, 749 P.2d 142 (1988).....	138
<u>State v Anderson</u> , 153 Wn. App. 417, 220 P.3d 1273 (2009), <u>review denied</u> , 170 Wn.2d 1002 (2010).....	178
<u>State v. Ager</u> , 128 Wn.2d 85, 904 P.2d 715 (1995).....	139
<u>State v. Aguirre</u> , 168 Wn.2d 350, 229 P.3d 669 (2010).....	185
<u>State v. Allen</u> , 182 Wn.2d 364, 341 P.3d 268 (2015).....	167
<u>State v. Anderson</u> , 44 Wn. App. 644, 723 P.2d 464 (1986), <u>review dismissed</u> , 109 Wn.2d 1015 (1987).....	25, 178
<u>State v. Athan</u> , 160 Wn.2d 354, 158 P.3d 27 (2007).....	85
<u>State v. Barber</u> , 170 Wn.2d 854, 248 P.3d 494 (2011).....	82
<u>State v. Beadle</u> , 173 Wn.2d 97, 265 P.3d 863 (2011).....	99
<u>State v. Benn</u> , 120 Wn.2d 631, 845 P.2d 289, <u>cert. denied</u> , 510 U.S. 944 (1993).....	187, 190, 191
<u>State v. Berg</u> , 147 Wn. App. 923, 198 P.3d 529 (2008).....	199, 204
<u>State v. Bingham</u> , 105 Wn.2d 820, 719 P.2d 109 (1986).....	181
<u>State v. Blackwell</u> , 120 Wn.2d 822, 845 P.2d 1017 (1993).....	129
<u>State v. Bradford</u> , 95 Wn. App. 935, 978 P.2d 534 (1999), <u>review denied</u> , 139 Wn.2d 1022 (2000).....	79, 81
<u>State v. Braun</u> , 82 Wn.2d 157, 509 P.2d 742 (1973).....	219
<u>State v. Brett</u> , 126 Wn.2d 136, 892 P.2d 29 (1995), <u>cert. denied</u> , 516 U.S. 1121 (1996).....	185

<u>State v. Broadway</u> , 133 Wn.2d 118, 942 P.2d 363 (1997) ...	77, 87, 89, 90
<u>State v. Brooks</u> , 97 Wn.2d 873, 651 P.2d 217 (1982).....	180
<u>State v. Brown</u> , 132 Wn.2d 529, 940 P.2d 546 (1997), <u>cert. denied</u> , 523 U.S. 1007 (1998).....	185, 187, 213, 218
<u>State v. Camarillo</u> , 115 Wn.2d 60, 794 P.2d 850 (1990).....	92, 176
<u>State v. Carpenter</u> , 63 Wn.2d 577, 388 P.2d 537 (1964).....	82, 83
<u>State v. Charlton</u> , 90 Wn.2d 657, 585 P.2d 142 (1978).....	175
<u>State v. Clark</u> , 143 Wn.2d 731, 24 P.3d 1006, <u>cert. denied</u> , 534 U.S. 1000 (2001).....	26, 27, 36, 37, 39, 187
<u>State v. Crane</u> , 116 Wn.2d 315, 804 P.2d 10 (1991), <u>cert. denied</u> , 501 U.S. 1237 (1991).....	102, 202, 203
<u>State v. Cross</u> , 156 Wn.2d 580, 132 P.3d 80, <u>cert. denied</u> , 549 U.S. 1022 (2006).....	139, 141, 209, 210, 215
<u>State v. Davis</u> , 175 Wn.2d 287, 290 P.3d 43 (2012), <u>cert. denied</u> , 134 S.Ct. 62 (2012).....	passim
<u>State v. Donald</u> , 178 Wn. App. 250, 316 P.3d 1081 (2013), <u>review</u> <u>denied</u> , 180 Wn.2d 1010 (2014).....	204
<u>State v. Emery</u> , 174 Wn.2d 741, 278 P.3d 653 (2012).....	167, 175, 176, 177
<u>State v. Eugene Main</u> , 82 Wn.2d 157, 509 P.2d 742 (1973).....	219
<u>State v. Evans</u> , 163 Wn. App. 635, 260 P.3d 934 (2011)....	118, 119, 178
<u>State v. Finch</u> , 137 Wn.2d 792, 975 P.2d 967 (1999).....	122, 217
<u>State v. Fire</u> , 145 Wn.2d 152, 34 P.3d 1218 (2001).....	159
<u>State v. Fisher</u> , 96 Wn.2d 962, 639 P.2d 743, <u>cert. denied</u> , 457 U.S. 1137 (1982).....	41, 166
<u>State v. Fleming</u> , 83 Wn. App. 209, 921 P.2d 1076 (1996), <u>review</u> <u>denied</u> , 131 Wn.2d 1018 (1997).....	175
<u>State v. Frampton</u> , 95 Wn.2d 469, 627 P.2d 922 (1981).....	114
<u>State v. Franco</u> , 96 Wn. 2d 816, 639 P.2d 1320 (1982).....	137
<u>State v. Gefeller</u> , 76 Wn.2d 449, 458 P.2d 17 (1969).....	204
<u>State v. Gentry</u> , 125 Wn.2d 570, 888 P.2d 1105, <u>cert. denied</u> , 516 U.S. 843 (1995).....	181, 193, 211
<u>State v. Gonzalez</u> , 110 Wn.2d 738, 757 P.2d 925 (1988).....	129
<u>State v. Greathouse</u> , 113 Wn. App. 889, 56 P.3d 569 (2002), <u>review denied</u> , 149 Wn.2d 1014 (2003).....	98
<u>State v. Gregory</u> , 158 Wn.2d 759, 147 P.3d 1201 (2006) ..	102, 103, 105
<u>State v. Greiff</u> , 141 Wn.2d 910, 10 P.3d 390 (2000).....	207
<u>State v. Griffith</u> , 91 Wn.2d 572, 589 P.2d 799 (1979).....	180

<u>State v. Guloy</u> , 104 Wn.2d 412, 705 P.2d 1182 (1985), <u>cert. denied</u> , 475 U.S. 1020 (1986).....	98, 108
<u>State v. Harmon</u> , 50 Wn. App. 755, 750 P.2d 664, <u>review denied</u> , 110 Wn.2d 1033 (1988).....	180
<u>State v. Harris</u> , 106 Wn.2d 784, 725 P.2d 975 (1986), <u>cert. denied</u> . 480 U.S. 9410 (1987).....	79, 127
<u>State v. Hoffman</u> , 64 Wn.2d 445, 392 P.2d 237 (1964)....	81, 82, 83, 167, 180
<u>State v. Keating</u> , 61 Wn.2d 452, 378 P.2d 703 (1963).....	82, 83
<u>State v. Kern</u> , 81 Wn. App. 308, 914 P.2d 114, <u>review denied</u> , 130 Wn.2d 1003 (1996).....	43
<u>State v. Kincaid</u> , 103 Wn.2d 304, 692 P.2d 823 (1985).....	34
<u>State v. Kirkpatrick</u> , 89 Wn. App. 407, 948 P.2d 882 (1997), <u>review denied</u> , 135 Wn.2d 1012 (1998).....	65, 69, 70, 72
<u>State v. Kroll</u> , 87 Wn.2d 829, 558 P.2d 173 (1976).....	176
<u>State v. Le</u> , 103 Wn. App. 354, 12 P.3d 653 (2000).....	44
<u>State v. Llamas-Villa</u> , 67 Wn. App. 448, 836 P.2d 239 (1992).....	42
<u>State v. Lyons</u> , 174 Wn.2d 354, 275 P.3d 314 (2012).....	27
<u>State v. Maddox</u> , 152 Wn.2d 499, 98 P.3d 1199. (2004).....	27
<u>State v. Mak</u> , 105 Wn.2d 692, 718 P.2d 407 (1986).....	210
<u>State v. Martin</u> , 94 Wn.2d 1, 614 P.2d 164 (1980).....	114
<u>State v. Maupin</u> , 128 Wn.2d 918, 913 P.2d 808 (1996).....	199
<u>State v. McEnroe</u> , 179 Wn.2d 32, 309 P.3d 426 (2013).....	131, 132
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	134
<u>State v. Medlock</u> , 86 Wn. App. 89, 935 P.2d 693, <u>review denied</u> , 133 Wn.2d 1012 (1997).....	95
<u>State v. Michael Robtoy</u> , 98 Wn.2d 30, 653 P.2d 284 (1982).....	217
<u>State v. Monfort</u> , 179 Wn.2d 122, 312 P.3d 637 (2013).....	41, 123
<u>State v. Mullins</u> , 158 Wn. App. 360, 241 P.3d 456 (2010), <u>review denied</u> , 171 Wn.2d 1006 (2011).....	66
<u>State v. Neth</u> , 165 Wn.2d 177, 196 P.3d 658 (2008).....	26
<u>State v. Pawlyk</u> , 115 Wn.2d 457, 800 P.2d 338 (1990).....	128
<u>State v. Perrone</u> , 119 Wn.2d 538, 834 P.2d 611 (1992).....	36
<u>State v. Pettitt</u> , 93 Wn.2d 288, 609 P.2d 1364 (1980).....	130
<u>State v. Pierce</u> , 169 Wn. App. 533, 280 P.3d 1158 <u>review denied</u> , 175 Wn.2d 1025 (2012).....	69
<u>State v. Pirtle</u> , 127 Wn.2d 628, 904 P.2d 245 (1995), <u>cert. denied</u> , 518 U.S. 1026 (1996).....	40, 105, 125, 126
<u>State v. Puapuaga</u> , 164 Wn.2d 515, 192 P.3d 360 (2008).....	22
<u>State v. Radcliffe</u> , 164 Wn.2d 900, 194 P.3d 250 (2008).....	96

<u>State v. Rafay</u> , 168 Wn. App. 734, 285 P.3d 83 (2012), <u>review denied</u> , 176 Wn.2d 1023 (2013).....	202
<u>State v. Rice</u> , 110 Wn.2d 577, 757 P.2d 889 (1988), <u>cert. denied</u> , 491 U.S. 910 (1989).....	187
<u>State v. Riley</u> , 121 Wn.2d 22, 846 P.2d 1365 (1993)	38, 39, 43
<u>State v. Rinkes</u> , 49 Wn.2d 664, 306 P.2d 205 (1957)	32
<u>State v. Ritchie</u> , 126 Wn.2d 388, 894 P.2d 1308 (1995)	131
<u>State v. Roberts</u> , 142 Wn.2d 471, 14 P.3d 713 (2000).....	219
<u>State v. Ross</u> , 141 Wn.2d 304, 4 P.3d 130 (2000)	77
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994). 167, 175, 183	
<u>State v. Saenz</u> , 175 Wn.2d 167, 283 P.3d 1094 (2012)	193
<u>State v. Salavea</u> , 151 Wn.2d 133, 86 P.3d 125 (2004)	120
<u>State v. Sargent</u> , 111 Wn.2d 641, 762 P.2d 1127 (1988).....	79, 84
<u>State v. Schulze</u> , 116 Wn.2d 154, 804 P.2d 566 (1991).....	63
<u>State v. Smith</u> , 82 Wn. App. 327, 917 P.2d 1108 (1996), <u>review denied</u> , 130 Wn.2d 1023 (1997).....	107
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997), <u>cert. denied</u> , 523 U.S. 1008 (1998)	36, 37, 39
<u>State v. Stevens</u> , 58 Wn. App. 478, 794 P.2d 38, <u>review denied</u> , 115 Wn.2d 1025 (1990).....	207
<u>State v. Talley</u> , 122 Wn.2d 192, 858 P.2d 217 (1993).....	130
<u>State v. Templeton</u> , 148 Wn.2d 193, 59 P.3d 632 (2002)	72
<u>State v. Thien</u> , 138 Wn.2d 133, 977 P.2d 582 (1999)	26
<u>State v. Thomas</u> , 166 Wn.2d 380, 208 P.3d 1107 (2009)	34
<u>State v. Thomas Braun</u> , 82 Wn.2d 157, 509 P.2d 742 (1973).....	219
<u>State v. Tracy M.</u> , 43 Wn. App. 888, 720 P.2d 841 (1986).....	123
<u>State v. Trevino</u> , 127 Wn.2d 735, 903 P.2d 447 (1995)	72
<u>State v. Unga</u> , 165 Wn.2d 95, 196 P.3d 645 (2008).....	84, 87
<u>State v. Votova</u> , 149 Wn.2d 178, 66 P.3d 1050 (2003)	114
<u>State v. Vreen</u> , 143 Wn.2d 923, 26 P.2d 236 (2001).....	99
<u>State v. W.R., Jr.</u> , 181 Wn.2d 757, 336 P.3d 1134 (2014)	102
<u>State v. Wade</u> , 44 Wn. App. 154, 721 P.2d 977, <u>review denied</u> , 107 Wn.2d 1003 (1986).....	67
<u>State v. Walden</u> , 131 Wn.2d 469, 932 P.2d 1237 (1997)	139
<u>State v. Warner</u> , 125 Wn.2d 876, 889 P.2d 479 (1995).....	71, 86
<u>State v. Winter</u> , 39 Wn.2d 545, 236 P.2d 1038 (1951).....	20, 82, 83
<u>State v. Yates</u> , 161 Wn.2d 714, 168 P.3d 359 (2007), <u>cert denied</u> , 554 U.S. 922 (2008).....	139, 147, 151, 159, 162, 163, 165
<u>Wash. Ass'n for Retarded Citizens v. City of Spokane</u> , 16 Wn. App. 103, 553 P.2d 450 (1976).....	130, 131

<u>West v. Thurston County</u> , 168 Wn. App. 162, 275 P.3d 1200 (2012), <u>review denied</u> , 176 Wn.2d 102 (2013)	76
<u>Westerman v. Cary</u> , 125 Wn.2d 277, 892 P.2d 1067 (1994).....	79

FEDERAL CASES

<u>Arizona v. Ring</u> , 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).....	34, 35
<u>Atkins v. Virginia</u> , 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).....	133, 135, 138
<u>Berkemer v. McCarty</u> , 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).....	85
<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).....	33
<u>Booth v. Maryland</u> , 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987).....	105
<u>Caliendo v. Warden of California Men's Colony</u> , 365 F.3d 691 (9 th Cir. 2004)	171, 172
<u>Corley v. United States</u> , 556 U.S. 303, 129 S.Ct. 1558, 173 L.Ed.2d 443 (2009).....	81, 83
<u>Culombe v. Connecticut</u> , 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961).....	81
<u>Davies v. Miller</u> , 130 U.S. 284, 9 S.Ct. 560, 32 L.Ed. 932 (1889)	113
<u>Gray v. Mississippi</u> , 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987).....	165
<u>Hall v. Florida</u> , ___ U.S. ___, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014).....	135, 136, 137
<u>Howes v. Fields</u> , ___ U.S. ___, 132 S.Ct. 1181, 182 L.Ed.2d 17 (2012)	71, 85, 86
<u>Hudson v. Palmer</u> , 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984).....	22
<u>Kirby v. Illinois</u> , 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972)	96
<u>Lockart v. McCree</u> , 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986).....	146
<u>Mallory v. United States</u> , 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957).....	81, 82, 84
<u>Mattox v. United States</u> , 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892).....	170, 171
<u>McNabb v. United States</u> , 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed.2d 819 (1943).....	81, 82, 84
<u>McNeil v. Wisconsin</u> , 501 U.S. 171, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991).....	95

<u>Minnesota v. Murphy</u> , 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984).....	85
<u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).....	1, 3, 53, 56, 58, 59, 60, 62, 71, 80, 85, 86, 88
<u>Morgan v. Illinois</u> , 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992).....	146, 147
<u>Payne v. Tennessee</u> , 501 U.S. 808, 111 S.Ct. 2497, 115 L.Ed.2d 720, (1991).....	105
<u>Penry v. Lynaugh</u> , 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).....	134, 135
<u>Remmer v. United States</u> , 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954).....	170, 171
<u>Rock v. Arkansas</u> , 438 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987).....	203
<u>Steele v. United States</u> , 267 U.S. 498, 45 S.Ct. 414, 69 L.Ed. 757 (1925).....	41
<u>United States v. Bass</u> , 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971).....	118
<u>United States v. Felix –Jerez</u> , 667 F.2d 1297 (9 th Cir. 1982).....	101
<u>United States v. Gouveia</u> , 467 U.S. 180, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984).....	96
<u>United States v. Hayes</u> , 794 F.2d 1348 (9 th Cir. 1986), <u>cert. denied</u> , 479 U.S. 1086 (1987).....	38
<u>United States v. Madelbaum</u> , 803 F.2d 42 (1 st Cir. 1986)	178
<u>United States v. Martinez-Salazar</u> , 528 U.S. 304, 120 S.Ct. 774, 144 L.Ed.2d 729 (2000).....	158, 159
<u>United States v. Sanchez</u> , 176 F.3d 1214 (9 th Cir. 1999)	178
<u>United States v. Scheffer</u> , 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998).....	203
<u>United States v. Spilotro</u> , 800 F.2d 959 (9 th Cir. 1986).....	39
<u>United States v. Vasquez</u> , 645 F.3d 880 (9 th Cir. 2011), <u>cert. denied</u> , 132 S.Ct. 1778 (2012)	37
<u>Victor v. Nebraska</u> , 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994).....	197, 198
<u>Wainwright v. Witt</u> , 469 U.S. 412, 105 S.Ct 844, 83 L.Ed.2d 814 (1985).....	146
<u>Weatherford v. Bursey</u> , 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977).....	129
<u>Witherspoon v. Illinois</u> , 391 U.S. 510, 522, 88 S.Ct. 1170, 20 L.Ed.2d 776 (1968).....	145

<u>Wolff v. McDonnell</u> , 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).....	65, 68
<u>Woodson v. North Carolina</u> , 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).....	192, 193, 195

OTHER CASES

<u>Cherry v. State</u> , 959 So.2d 702 (2007).....	136
<u>Commonwealth v. Tedford</u> , 598 Pa. 639, 960 A.2d 1 (2008)	166
<u>People v. Brisbon</u> , 544 N.Ed.2d 297 (Ill. 1989), <u>cert denied</u> , 494 U.S. (1990).....	195
<u>People v. Sandoval</u> , 4 Cal.4 th 155, 14 Cal Rptr.2d 342, 841 P.2d 682 (1992).....	197
<u>State v. Acker</u> , 627 A.2d 170, <u>cert denied</u> , 634 A.2d 530 (N.J. 1993)	178
<u>State v. Fauci</u> , 282 Conn. 23, 917 A.2d 978 (2007)	166
<u>State v. Flowers</u> , 589 S.E.2d 391 (N.C. 1997), <u>cert denied</u> , 522 U.S. 1135 (1998).....	195
<u>State v. Leutschaft</u> , 759 N.W.2d 414 (Minn. App.), <u>review denied</u> , 2009 Minn. LEXIS 196 (Minn. 2009)	166
<u>Williams v. State</u> , 789 P.2d 365 (Alaska 1990)	178

WASHINGTON CONSTITUTIONAL PROVISIONS

Article 1, §7	22
Article 1, §9	84
Article 1, §14	139
Article 1, §22	84, 95

U.S. CONSTITUTIONAL PROVISIONS

Fourth Amendment.....	22, 36, 41, 44
Fifth Amendment.....	84, 87, 95
Sixth Amendment.....	3, 33, 34, 63, 84, 91, 95, 96, 145, 202
Eighth Amendment.....	105, 135, 139, 192, 208
Fourteenth Amendment.....	81, 145, 202, 208

WASHINGTON STATUTES

Laws of 1993, ch. 479	134
RCW 10.94.010.....	116
RCW 10.94.040(2)	124
RCW 10.95.....	19, 117
RCW 10.95.020(1)	27
RCW 10.95.020(2)	27
RCW 10.95.030.....	34
RCW 10.95.030(2)	34, 133
RCW 10.95.030(2)(a).....	135

RCW 10.95.030(2)(c)	137
RCW 10.95.040	111, 114, 123
RCW 10.95.040(1)	31, 123
RCW 10.95.040(2)	111, 114, 123, 124
RCW 10.95.060(4)	32, 148, 177
RCW 10.95.070	32, 34
RCW 10.95.070(2)	32, 158
RCW 10.95.070(6)	32
RCW 10.95.110	117
RCW 10.95.120	117
RCW 10.95.130	212, 214
RCW 10.95.130(2)(1)	212
RCW 10.95.130(2)(a)	135
RCW 10.95.130(2)(b)	135, 214
RCW 10.95.130(2)(c)	135
RCW 10.95.130(2)(d)	135
RCW 10.95.130(2)(e)	135
RCW 10.95.170	117
RCW 46.61.502(1)(a)	137
RCW 70.02	1, 21, 23, 24
RCW 70.02.020(1)	23
RCW 70.02.030(1)	23
RCW 70.02.040	24
RCW 70.02.090	23
RCW 70.02.200	24
RCW 70.02.210	24
RCW 72.02.010(18)	23
RCW 72.68	2, 75
RCW 72.68.040	75, 91
RCW 72.68.050	75, 91
RCW 9.94A.030(37)	193
RCW 9.94A.570	193
RCW 9A.32.020(1)	180
RCW 9A.32.030	19
RCW 9A.32.030(1)(a)	27

COURT RULES

CrR 1.1	64
CrR 3.1	2, 64, 65, 71
CrR 3.1(b)(1)	64, 65
CrR 3.1(c)(1)	64
CrR 3.1(c)(2)	64, 66, 81, 212

CrR 3.2.1	3, 76, 77, 79, 80, 81, 83
CrR 3.2.1(a)	79
CrR 3.2.1(d)(1)	76, 80
CrR 4.7(a)	128
CrR 4.7(f)(1)	128, 129
ER 403	98, 107
ER 404(b)	203
RAP 10.3(a)(6)	76
RAP 2.4(a)	208

OTHER AUTHORITIES

ABA Guidelines for Appointment and Performance of Defense

Counsel in Death Penalty Cases (2003) p 1024-26	33, 40
Department of Correction policy 420.320	24, 35
Fla. Stat. Annot. § 921.137	136
HB 1504 (2013)	140
HB 1739 (2015)	140
HB 2468 (2012)	140
K. Tegland, 5 Washington Practice, Evidence Law and Practice § 1.03.14 (5 th Ed. 2014)	205
National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved 4/10/10), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited Sept. 24, 2014)	166
American Bar Association Resolution 100B (Adopted 8/9-10/10) http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b _authcheckdam.pdf (last visited Sept. 24, 2014)	166
SB 5369 (2015)	140
SB 5372 (2013)	140
SB 5456 (2011)	140
SPRC 1	109
SPRC 2	109, 110
SPRC 5(g)	35
Webster's New Universal Unabridged Dictionary 639 (2 nd ed. 1979)	157
WPIC 31.07	208, 211, 212
WPIC 31.08	189

I. COUNTER-ASSIGNMENTS OF ERROR

(1) The trial court erred when it concluded that the defendant was in custody for purposes of Miranda at the point that he was held for an infraction of the prison rules, and before prison officials had reason to believe the defendant had committed a crime.

(2) The trial court erred in giving penalty instruction no. 5 (1 CP 120). The text of the instruction is set out in section VI.F.

II. ISSUES

A. ISSUES RELATING TO PRE-TRIAL EVIDENTIARY RULINGS.

(1) A magistrate issued a search warrant for written materials in the possession of the prison, including medical records that related to the defendant. Probable cause for the warrant was based in part on information contained in some of the defendant's medical records found in his cell.

(a) Does RCW 70.02, relating to release of information by health care providers, apply to records that the defendant kept in his cell, a location where the defendant had no expectation of privacy?

(b) Was the search warrant supported by probable cause to believe evidence of the crime of Aggravated First Degree Murder would be found in the written materials?

(c) Did the warrant sufficiently describe the place to be searched?

(d) Was the defendant prejudiced when police obtained information about the defendant's medical history while in prison?

(2) Was the defendant provided access to counsel as soon as feasible after he was taken in custody for the murder and requested counsel as required by CrR 3.1?

(3) If the defendant was not provided access to counsel in violation of CrR 3.1, was the error harmless so that his statements, given days later, were admissible in evidence?

(4) The defendant was serving a sentence at the Department of Corrections when he committed a murder. He was thereafter transferred to the Snohomish County jail. He was booked on the murder charge 22 days after he was transferred to the jail, and brought before the court the next day.

(a) Was 72.68 RCW, governing detention of prisoners sentenced to the Department of Corrections (DOC) by county jails, violated when the defendant was transferred from the prison to the jail?

(b) If the statute was violated, is the remedy for violation of that statute to suppress the defendant's confession?

(c) Was the defendant brought before the court as soon as practicable as contemplated by CrR 3.2.1?

(d) If not, should the court continue to consider any delay as one circumstance potentially affecting the voluntariness of the defendant's confession, rather than adopting the federal exclusionary rule?

(e) Was the defendant in custody when he confessed to the murder? If so, was his confession voluntary?

(f) When the defendant had not been charged with the murder at the time he confessed to the murder, had his Sixth Amendment right to counsel attached?

(5) (Issue raised by respondent) When the defendant was serving a sentence for a prior conviction, and prison personnel apprehended the defendant for violation of prison rules before those personnel had reason to believe the defendant had committed a crime, was he "in custody" at the point he was apprehended for the purposes of Miranda? (Respondent's assignment of error 1)?

(6) After the court found the defendant's statements were voluntary and admissible the defense moved to redact portions of those statements for other evidentiary reasons?

(a) Did the defendant waive an argument that he makes for the first time on appeal that some of the statements were more prejudicial than probative and other statements were misleading?

(b) Was it an abuse of discretion to deny a motion to redact certain portions of the statements when the court found those portions were relevant to show the defendant's statements were all a knowing and voluntary waiver of his rights, and therefore credible?

(c) Did the defendant's unsolicited statement regarding the death penalty improperly tell the jury what penalty to impose?

(d) Was it misleading to permit evidence the defendant was choosing to reject the advice of counsel when he spoke to two criminal defense attorneys approximately one week before he made his first confession to the police?

B. ISSUES RELATING TO NOTICE OF SPECIAL SENTENCING PROCEEDING.

(7) By statute, a notice of special sentencing proceeding must be filed "within 30 days after the defendant's arraignment."

Does this statutory provision preclude filing the notice immediately before arraignment?

(8) The prosecutor filed the notice of special sentencing proceeding 46 days after the murder and five days after the filing of charges in Superior Court. Did this constitute undue delay in filing the notice?

(9) The prosecutor filed the notice after considering extensive materials about the crime and the defendant's history. Did the prosecutor adequately base his decision on adequate consideration of potential mitigating factors?

(10) The prosecutor provided full discovery of the information that he considered before deciding to file the notice. Was he also required to explain which portions of that information he considered "mitigating"?

(11) Should this court reconsider its decision that the information in an aggravated murder case need not allege that absence of mitigating factors?

(12) Should this court determine the correct definition of "intellectual disability," where there is no evidence that the defendant is disabled under any definition?

(13) Should this court reconsider its repeated holdings that the death penalty does not violate either the state or federal constitution?

C. ISSUES RELATING TO TRIAL.

(14) Did the trial court improperly limit the scope of the death qualification portion of jury selection when it precluded defense counsel from making statements that were contrary to the law given by the court?

(15) Did the court improperly deny defense challenges to jurors for cause when, viewing the entire voir dire colloquy in context, the record shows that the court had a tenable basis to conclude those jurors could impartially deliberate in a death penalty case?

(16) Did the trial court improperly grant two of the State's for cause challenges to jurors when their answers strongly indicated that their ability to set aside their beliefs about the death penalty was substantially impaired?

(17) Did the prosecutor commit error that likely affected the outcome of the guilt and penalty phase of the trial by being too nice to jurors during jury selection?

(18). When the victim of a murder was found lying in a chapel underneath a cross, was it error for the prosecutor to reference her location when outlining the evidence in opening statements?

(19) The prosecutor made three references to the jurors "job" between opening statement and closing argument during the penalty phase. When the defendant did not object to those arguments did he waive any claim of error when the arguments were not improper, and if they were, any prejudice could have been cured by an instruction?

(20) Did the defendant waive any claim that the prosecutor committed error in arguing the law of premeditation, when the defense did not object to the arguments, the jury was correctly instructed on the law of premeditation, and the arguments were consistent with that instruction?

(21) Did the trial court err in rejecting the defendant's proposed modified WPIC instruction defining premeditation in favor of the unmodified version of that instruction?

(22) Was the penalty phase instruction confusing, when it included options for a unanimous "yes," unanimous "no," or "no unanimous agreement"?

(23) Was the defendant unfairly prejudiced in the penalty phase when the court allowed evidence that he was serving a sentence of life without parole at the time he committed the murder?

(24) When the parties agreed that the Bible should not be argued as a basis on which the jury should decide the penalty, did the trial court err by granting the State's motion in limine to exclude argument about the Bible on that basis?

(25) Was the defendant denied the right to present a defense when State was permitted to rebut some of the evidence that he proposed introducing in mitigation?

(26) Is the defendant entitled to a new trial under the cumulative error doctrine?

(27) (Issue raised by respondent) Should juries be instructed that the appropriateness of the exercise of mercy can be a mitigating factor apart from facts about the offense or the defendant? (Respondent's assignment of error 2)?

D. ISSUES RELATING TO STATUTORY REVIEW.

(28) Was there sufficient evidence to justify the jury's finding that there were not sufficient mitigating factors to merit leniency?

(29) Was the sentence of death excessive or disproportionate to the penalty imposed in similar cases?

(30) Was the sentence of death brought about through passion or prejudice?

(31) Does the defendant have an intellectual disability?

III. STATEMENT OF THE CASE

On January 29, 2011, at about 8:40 p.m., the defendant Byron Scherf, strangled Officer Jayme Bindle in the chapel at the Monroe Correctional Complex (MCC). Ex. 115, page 4. At the time of the murder, the defendant was serving a sentence of life without parole for first degree rape and first degree kidnapping. He was sentenced as a persistent offender based on prior convictions for second degree assault and for first degree rape and first degree assault. 5/3/13 RP 6410; ex. 169.

Officer Biendl had worked at the prison since 2002. She had been assigned to the chapel since 2005. She was considered a good worker and was named officer of the year in 2008. As part of her employment she was given regular defensive tactics training. In addition to that training, officers are trained to be careful about what they say and do around the inmates. Inmates are known to monitor the officers' routines to look for areas where they can breach

security or compromise the staff. Officers were also trained to observe the inmates to determine each offender's baseline behavior. 5/1/13 RP 6155; 5/2/13 RP 6207, 6223, 6242, 6253; 5/6/13 RP 6553-55, Ex. 55.

Prisoners were permitted to move between buildings only at certain times. A movement is called 10 minutes prior to the time it occurs. If an offender wanted to go to the chapel he had to request permission to be put on a call-out list. The officer at the chapel then checked each inmate who was given permission to be at the chapel from a roster. The last movement of the day was at 8:30 p.m., when all prisoners were to return to their cells for a final count. 5/1/13 RP 6025-27; 5/2/13 RP 6216-17.

On January 29 the defendant had a visit from his wife in the afternoon. The defendant had not been himself for about three weeks prior to that day. Officers noted that the defendant and his wife did not appear to be getting along as well as they had in prior visits. The defendant's wife left earlier than normal. 5/2/13 RP 6234-36, 6244-49, 6255-57.

After the defendant's wife left, he went to the chapel. When the 8:30 recall was called the defendant and inmate Robert Dean "Tennessee" Price were the last two inmates to leave. As Price was

leaving he noticed the defendant had left his coat. Price took the coat from the sanctuary and found the defendant in one of the offices. Price gave the defendant his coat at 8:32 p.m. Price waited for the defendant to shut down the computer, and the two left the building. As they were leaving the defendant said he had to go back for his hat. Price waited for the defendant until another officer told Price to go back to his cell. The defendant did not exit the chapel while Price was waiting. 5/6/13 RP 6503-11, 6549.

Officers began a count of the 820 prisoners housed at the Washington State Reformatory (a division of MCC) at 9:00 p.m. The count involved going to each prisoner's cell and confirming that prisoner was there before locking him inside. Of the 189 prisoners housed on the A unit, all but the defendant were in their cells. Officers searched for the defendant at that time. A count matching each offender with his picture confirmed that the defendant was the only one missing. 5/1/13 RP 6020, 6032-35, 6058; 5/2/13 RP 6278.

After the defendant was discovered missing, Officer Maynard passed by the chapel looking for him. The officer initially observed that it was dark. When he passed by a second time at about 9:15, he noticed lights on inside. That was unusual because the chapel should have been closed and locked at that time.

Officer Maynard and other officers found the defendant sitting in the chapel outside of the sanctuary. The defendant claimed that he had fallen asleep, and that Officer Biendl must have missed him when she closed the chapel. He was escorted to the shift office where he met with Lieutenant Briones. From the shift office the defendant was transported to the Intensive Management Unit (IMU) to be held pending an investigation for a major infraction. Officers noticed the defendant had blood on his jacket and shirt. The defendant first said he fell while running and cut himself. He later said that he had been jumped by three other inmates earlier in the day. A nurse at IMU examined the defendant and saw that he had a cut on his finger. The defendant told the nurse he did not know how that happened. Officers reviewed video recordings from earlier in the day, but found no evidence the defendant had been assaulted. 5/1/13 RP 6087-88, 6113, 6126-29, 6137-38, 6158, 6178.

When prison officers come on shift they exchange a metal "chit" for equipment. The equipment is returned at the end of each officer's shift and the chit removed from the board. About 10:15 p.m., an officer noticed that Officer Biendl's chit was still present and her gear had not been returned even though her shift ended at 9:00 p.m. Sergeant Boe was in charge of checking out officers

leaving the prison that night. He did not see Officer Biendl leave the prison at the end of her shift. When Lieutenant Briones heard she had not turned in her gear he knew Officer Biendl was in the chapel. He ordered a response team to immediately report there with a medical team. Once there officers looked for Officer Biendl all over the chapel. The lights in the sanctuary had been turned off, and so the lighting was initially dim. They ultimately found her in the sanctuary. 5/1/13 RP 6047-50, 6049, 6079, 6159; 5/2/13 RP 6280-81, 6265-66, 6271, 6297, 6326-30.

Officer Biendl was found lying on her back with her feet toward the back of the stage. She was cold to the touch and had no pulse. Her tongue was sticking out of her mouth and her eyes were slits and glazed over. She had a microphone cord wrapped around her neck three times. When the cord was removed she had deep, discolored welts on her neck. The cord was embedded with hair, blood, and skin. 5/2/13 RP 6271-75, 6283-84, 6297-99, 6309: Ex. 43,44, 46.

Officers attempted to resuscitate Officer Biendl and called for medical help. When EMTs arrived they did everything they could to save Officer Biendl, but were unable to revive her. When EMTs turned Officer Biendl over and saw that she had lividity they got

permission from the doctor to stop resuscitation efforts. 5/2/13 RP 6283-86, 6300-03, 6334-35, 6339-41, 6348-58.

While the defendant was in IMU, he was issued new clothing and then placed in a segregation cell. While there an officer heard the defendant say to himself that he should not have done this. The prison was ordered locked down after Officer Biendl was found. An offender whose actions cause a lockdown is in danger because a lockdown results in loss of privilege for other inmates. As a result the defendant was transferred from IMU to a cell in the medical wing, where he would be isolated from other offenders for his own safety and to protect the integrity of the investigation. 5/1/13 RP 6178, 6194; 5/2/13 RP 6381-91; 5/3/13 RP 6380-82.

Once at the medical wing the defendant indicated that he had suicidal thoughts. He was thereafter put on suicide watch. One of the officers watching the defendant had a rapport with him. The defendant called the officer over and said "I'm sorry. I'm sorry for what happened out there." 5/3/13 RP 6401, 6417.

Monroe Police were called to investigate the murder. They secured the crime scene and obtained a warrant for the defendant's body. Police photographed the chapel. They collected and recorded evidence there from about midnight to 8:00 a.m. Officer Biendl's

radio was found in the front row of seats. It was missing the microphone. Police noticed at 3:40 a.m. that the defendant's hands were very red in comparison to the rest of his body. There were clear marks across the palm of his hand, consistent with holding a cord and squeezing down. 5/3/13 RP 6421-27; 5/6/13 RP 6440-89.

Officer Biendl was examined by Dr. Thiersch, the medical examiner. Prior to her death she had been in good health. He found that she had injuries that were consistent with a ligature being scraped across her face. He also found defensive wounds on her hands and arms and an injury to her right thigh. She had petechia on her eyes common in strangulation. He opined that she died as a result of strangulation by ligature. Her death would have required constant pressure for 4-5 minutes in order to cut off the blood flow to her brain. 5/8/13 RP 6734, 6745, 6753-54, 6757-58, 6764-65.

Lieutenant Briones recognized that the prison would be locked down for a prolonged period of time. During a prolonged lockdown prisoners are allowed out of their cells only to take a shower and to retrieve laundry brought to the inmate's unit. A prolonged lockdown causes a significant amount of disruption in the prison population as a result of inmates' resentment for what is perceived to be unjustified punishment. That resentment led to

several problems with other inmates. For that reason the defendant was ultimately transferred to the Snohomish County Jail. 3/3/13 RP 6381-86.

While at the jail, Detectives Walvatne and Bilyeu assisted the Monroe Police Department by photographing the defendant over a series of days pursuant to search warrants. During that time the defendant sent several kites requesting that the detectives contact him. The defendant ultimately agreed to give the detectives three statements confessing to Officer Biendl's murder. 5/6/13 RP 6608-6623; 5/7/13 RP 6664-6684.

The defendant was advised of his rights in each interview before he made any statements. Ex. 115 at 1-3; Ex. 118 at 1-2. In his first interview the defendant began by stating:

I guess I'll just get right to the point. I'm responsible for the death of the Corrections Officer at Monroe correctional Facility. I strangled her to death on January 29th at approximately 8:40 P.M. in the chapel.

Ex. 115 at 4.

The defendant went on to explain that he had gone to services in the chapel and had been a volunteer there 2 to 3 years before the murder. He was familiar with the layout of the chapel and knew where the security cameras were. He knew that the only

place he could kill Officer Bindle without being seen on camera was in the sanctuary. Ex. 115 at 4-9.

The defendant said that he had become angry with Officer Biendl sometime between 8:15 and 8:30 p.m. as a result of something she said to him. The defendant walked away from her and stewed about it in the office for a time. He first thought about beating her up. By the time Price brought him his coat the defendant had decided to kill Officer Biendl. Officer Biendl told the defendant it was time to leave when Price gave the defendant his coat. The defendant told Biendl he was just shutting down the computer. He then checked to make sure there was no one left in the chapel. He closed a gate so other officers would not be alerted that the chapel was not secure. The defendant then followed Officer Biendl into the sanctuary where she was finishing locking up. He rushed toward her and attacked her. When she grabbed for her radio microphone she tried to call for help. The defendant tore the microphone off her uniform and threw it away. Initially the defendant got Officer Biendl in a headlock. He kneed her as she struggled to get away from him. During the struggle she bit the defendant on the finger. The defendant body slammed Officer Biendl to the ground. He grabbed a microphone cord and used it to

strangle Officer Biendl when he was unable to kill her with his bare hands. Ex. 115 at 13-27, 32; Ex. 118 at 31.

On February 23, 2011 the defendant was booked on a charge of aggravated first degree murder. 9 CP 1621. On March 11, 2011 the State filed an Information charging him with aggravated first degree murder. 16 CP 3135. On March 16, 2011 the defendant was arraigned on the charge. The State filed a notice of special sentencing proceeding at the arraignment. 3/16/11 RP 2-4.

IV. ARGUMENT RELATING TO PRE-TRIAL EVIDENTIARY RULINGS

A. THE TRIAL COURT PROPERLY DENIED THE MOTION TO SUPPRESS EVIDENCE OBTAINED FROM THE SERVICE OF SEARCH WARRANT 11-32.

1. Facts Relating To The Service Of Search Warrant 11-32.

On February 3, 2011 Detective Wells from the Sheriff's Office assisted in serving search warrant 11-28. Warrant 11-28 authorized the search and seizure of items from the defendant's cell, which had been removed to the internal investigations office of the prison. During the course of that search Detective Wells found

various extensive records and documentation pertaining to inmate Scherf. Such records included; prior psychiatric evaluations (some of which appeared to have handwritten notes and bracketed sections written on them in blue pen), medical records, military

records (specifically a document I observed from the U.S. Army at Fort Knox),. . . Of further note were comments within the paperwork that I believe were a portion of Scherf's psychological records indicating that Scherf would not do well with, or would not interact well with female prison guards and/or female prison officials.

12 CP 2355.

Detective Wells sought an additional warrant because he believed that warrant 11-28 did not authorize seizure of some of the evidence that had been removed from the defendant's cell. 12 CP 2354, 2362-2366; 11/14/11 RP 238-242. Warrant 11-32 authorized the detective to search and seize evidence of the crime of "Aggravated First degree Murder RCW 9A.32.030, and, RCW 10.95." 12 CP 2353. The warrant authorized the search and seizure of

WSR inmate property and storage room
WSR Administration Building

Any and all records, documents, papers, writings both typed and handwritten, books or any other personal records for inmate Byron E. Scherf 08-13-1958, DOC #287281. Such records and papers are to include; 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 writings in the margins of such books.

12 CP 2351.

Pursuant to this warrant Detective Wells obtained the boxes of documents originally removed from the defendant's cell. He also obtained copies of the defendant's medical records from Ms. Mandella, the nursing supervisor at WSR. Ms. Mandella handed over those copies to Detective Wells outside of the Medical Records area. 11/14/11 RP 217-222, 239-240.

Detective Wells then obtained a copy of the defendant's central file maintained by WSR from Ellen Winter, the records management supervisor. The central file contains six sections: (1) legal documents relating to an offender's stay; (2) documents relating to an offenders movement which included warrants checks; (3) documents regarding an offender's classification and infraction history; (4) miscellaneous paperwork that included visit applications; (5) medical information including psychological reports; and (6) documents from the Reception Center including court documents describing the offender's criminal history. With the exception of psychological reports, criminal history, rap sheets, chemical dependency reports, social security numbers, and victim

impact statements the central file is open to the public. 11/14/11 RP 223-224, 228-229, 240.

2. Chapter 70.02 RCW Does Not Protect Documents Held By The Defendant In His Cell.

Before trial the defendant moved to suppress documents obtained pursuant to search warrant 11-32. The defendant argued that the affidavit in support of the warrant articulated no evidence that would establish probable cause to believe evidence of the crime under investigation would be found in those documents. The defendant also argued that the warrant was overbroad because there was no limit on the type or age of record to be seized. The defendant also argued that the officer exceeded the scope of the warrant by serving it at the medical records unit of the prison hospital when the warrant only authorized a search of the inmate property storage room and the WSR Administration building. Finally the defendant argued that he had a privacy interest in his medical records kept in his cell and in the central file pursuant to RCW 70.02. 12 CP 2322; 13 CP 2404-2411.

The trial court denied the defendant's motion to suppress records obtained pursuant to warrant 11-32. The court held that no warrant was required for documents obtained from the defendant's

cell because he had no expectation of privacy in that location. The court reasoned that since the penalty and any mitigation of penalty were part of the crime under investigation, the requirements for a nexus between the crime and the documents to be seized and for particularity had been satisfied. Lastly, the court found that the officer had not exceeded the scope of the warrant because it had been served at the location authorized by the warrant. 12 CP 2288-2293.

The defendant did not have a reasonable expectation of privacy in items held in his prison cell under either the Fourth Amendment or Washington Constitution, Art. 1, §7. Hudson v. Palmer, 468 U.S. 517, 525-526, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), State v. Puapuaga, 164 Wn.2d 515, 524, 192 P.3d 360 (2008). The defendant concedes that he had no privacy interest under the Fourth Amendment in those items seized from his cell and searched. Brief of Appellant at 129. Instead he argues that he had a statutory right to privacy in the medical records kept in his cell pursuant to chapter 70.02 RCW. He argues that the remaining affidavit was insufficient to establish probable cause to search and seize copies of his medical records and central file.

Chapter 70.02 RCW relates to release of information by health care providers and health care facilities. A health care provider is defined as "a person who is licensed, certified, registered, or otherwise authorized by the law of this state to provide health care in the ordinary course of a business or practice of a profession." RCW 72.02.010(18).

Except as authorized elsewhere in this chapter, a health care provider, an individual who assists a health care provider in the delivery of health care, or an agent and employee of a health care provider may not disclose health care information about a patient to any other person without the patient's written authorization. A disclosure made under a patient's written authorization must conform to the authorization.

RCW 70.02.020(1).

A patient may authorize a health care provider or health care facility to disclose the patient's health care information. A health care provider or health care facility shall honor an authorization and, if requested, provide a copy of the recorded health care information unless the health care provider or health care facility denies the patient access to health care information under RCW 70.02.090.

RCW 70.02.030(1)

A patient may revoke in writing a disclosure authorization to a health care provider at any time unless disclosure is required to effectuate payments for health care that has been provided or other substantial action has been taken in reliance on the authorization. A patient may not maintain an action against the health care provider for disclosures made

in good-faith reliance on an authorization if the health care provider had no actual notice of the revocation of the authorization.

RCW 70.02.040

See also RCW 70.02.200 and RCW 70.02.210 (outlining when a health care provider or health care facility may disclose health care information without the patient's authorization)

70.02 RCW does not limit any disclosure by the patient of his personal medical or mental health records. Thus, whatever protection chapter RCW 70.02 afforded the defendant in the confidentiality of his medical and psychological records did not apply to those records that he chose to keep in his cell. Copies of those records kept in the defendant's cell were not held by a health care provider or facility, but by the patient himself.

Further the records were not kept confidential. The defendant's cell was not a private area, but rather was subject to periodic searches by corrections staff. Department of Correction policy 420.320 states that "searches will be conducted professionally, thoroughly, and frequently on a scheduled and random basis in an effort to minimize the introduction or flow of contraband and enhance the security in Department facilities and the safety of staff, offenders, and the public." The policy applied to

offender living units. The defendant assuredly was aware of this policy. Not only had he spent much of the previous thirty years within the prison system, the policy indicates it was included in the offender manual. 12 CP 2369.

The medical records that the defendant kept in his cell were not confidential. This situation is analogous to a patient who invites an unnecessary third party into a consultation with a physician or psychologist. In that circumstance the communication is not confidential and there is no bar to using the patient's communications in later litigation. State v. Anderson, 44 Wn. App. 644, 650, 723 P.2d 464 (1986), review dismissed, 109 Wn.2d 1015 (1987). Because records kept in the defendant's cell were not protected from disclosure by statute, evidence obtained from their review to support warrant 11-32 need not be stricken from the warrant when considering the remaining arguments raised by the defendant.

3. The Search Warrant Was Supported By Probable Cause.

The defendant argues that the affidavit in support of search warrant 11-32 failed to establish probable cause to search for evidence of the crime of aggravated first degree murder. He argues that when the evidence of his medical records from warrant 11-28

is excised from the affidavit in support of warrant 11-32, it does not establish probable cause to believe evidence of his mental state would be found in the medical or central files. The defendant argues that Detective Wells statements are speculative and conclusory, and therefore do not support finding probable cause to search for evidence of the crime. Brief of Appellant at 131-132.

Probable cause to search exists if the affidavit in support of a warrant states facts and circumstances that are sufficient to support a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched. State v. Thien, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Probable cause may be supported by specific facts, along with reasonable inferences drawn by the attesting officer based on his training and experience. Id. at 148. A magistrate may also draw reasonable inferences from the facts and circumstances set forth in the affidavit. State v. Clark, 143 Wn.2d 731, 748, 24 P.3d 1006, cert. denied, 534 U.S. 1000 (2001).

A trial court's decision upholding the warrant is a legal conclusion that this court reviews de novo. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). In contrast, a magistrate's determination that the warrant is supported by probable is reviewed

for an abuse of discretion. State v. Maddox, 152 Wn.2d 499, 509, 98 P3d 1199. (2004). The search warrant affidavit is reviewed in a commonsense and not hypertechnical manner. State v. Lyons, 174 Wn.2d 354, 360, 275 P.3d 314 (2012). All doubts are resolved in favor of upholding the warrant. Clark, 143 Wn.2d at 748. Applying these standards, the trial court correctly concluded that there was probable cause to support issuance of warrant 11-32.

Police were investigating Aggravated First Degree Murder when they sought warrant 11-32. 12 CP 2353. Evidence that bore on the defendant's ability to form the intent to cause the death of another person, and to premeditate that intent was relevant to that crime. Evidence the defendant was physically capable of committing that crime was likewise relevant to the investigation of that crime as well. RCW 9A.32.030(1)(a). Further, evidence relating to the aggravating factors also related to the crime. In this case evidence showing that the defendant knew Officer Biendl was a corrections officer at the time of the murder and that the defendant was serving a term of imprisonment was relevant to the investigation. RCW 10.95.020(1), (2).

The affidavit in support of warrant 11-32 attached and incorporated by reference the affidavit for warrant 11-28. Each

affidavit set out numerous facts that established a nexus between the murder and the defendant, and evidence relating to the murder and the defendant's medical records and prison central file. 12 CP 2354, 2361-2366; Appendix A.

The affidavit supporting warrant 11-28 stated the defendant was missing from the daily count when he was found at the chapel. The defendant had made an excuse to go back to the chapel after all other inmates had left. He had blood on his hands and clothes when corrections officers found him. About one hour later, Officer Biendl was found dead in the chapel with a cord wrapped around her neck. There appeared to be blood stains on the carpet around her body. The defendant had a history of recording the details of a prior assault in a book the defendant possessed. 12 CP 2364-2366. These facts establish probable cause to believe that Officer Biendl had been murdered, that the defendant was responsible for her death, and that he acted with premeditated intent to do so. Those facts also establish 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.

The affidavit supporting warrant 11-32 set forth facts that bore on his mental and physical abilities. The defendant had

numerous papers and books in his cell, including medical and psychological reports. The defendant had written his thoughts on some of those reports. There were also papers relating to the defendant's history in the military, in prison, and in school. Those papers set forth opinions on how the defendant would relate to females in authority roles, and his reaction to those opinions. The military records showed the defendant acknowledged a problem with authority figures. It also set out facts demonstrating the defendant faked a psychological disorder so that he would be discharged from the military early. The affidavit also states that independent from any records in the defendant's cell, the police learned that the defendant regularly took medication from a "pill line," and that the defendant deviated from that routine on the date of the murder. The affidavit also stated that the prison kept a central file for the defendant. 12 CP 2354-2356.

The trial court concluded that search warrant 11-32 was supported by probable cause to believe there was evidence of a crime of murder in the defendant's medical and prison files. It concluded that "of a crime" included evidence relating to punishment as well as the elements of the offense. It found that facts bearing on the defendant's medical records were relevant to a

deviation from his normal routine on the night of the murder, as well as evidence relating to aggravating and mitigating factors. 12 CP 2286-93; Appendix B. A review of the warrant demonstrates that the court was correct.

Because the defendant had medical and psychological reports in his cell, and because the defendant regularly obtained medication from the prison, it was reasonable to believe that the prison would have a medical file for the defendant that included medical and psychological evidence bearing on the defendant's mental and physical condition. Medical and psychological reports could reveal that the defendant was capable of forming the premeditated intent to commit the murder, by demonstrating the lack of any mental disease or defect. It was also reasonable to believe that medical records would contain evidence regarding the types and frequency of medications the defendant took. Those records could support evidence that the defendant was in the chapel at the time of the murder, as well as what effect those medications had on his mental status.

Similarly it was reasonable to believe the central prison file would have evidence that bore on the defendant's ability to form premeditated intent to kill. Evidence the defendant had filed

grievances had been found in his cell. 12 CP 2355. Other similar evidence could be found in the central file. What the defendant had written could shed light on whether he was capable of logical, calculated, goal driven thought. Since the central file contained information about his classification it might shed light on whether the defendant had any association with the chapel. Records showing the defendant went to the chapel before the murder could demonstrate the defendant knew Officer Biendl was a corrections officer at the time she was killed. It was also reasonable to believe the central file would include evidence regarding the defendant's sentence, which would prove he was serving a term of imprisonment at the time of the murder.

Additionally, from the facts outlined in the two affidavits it was reasonable to conclude that there may be evidence relating to mitigation in both the medical and central files. Prior to seeking the death penalty the elected prosecutor is required to determine if there is reason to believe there are not sufficient mitigating circumstances to merit leniency. RCW 10.95.040(1). If a notice of special sentencing proceeding is filed, the jury is required to answer the question "having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt

that there are not sufficient mitigating circumstances to merit leniency?" RCW 10.95.060(4). Two mitigating factors relate to the defendant's mental state at the time of the murder. RCW 10.95.070(2) (whether the defendant was under extreme mental distress), RCW 10.95.070(6)(whether the defendant's capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law was substantially impaired due to mental disease or defect.) .

The defendant argues that the search warrant affidavit did not establish probable cause that evidence of the crime would be found in the defendant's medical or prison file. He argues that no facts linked the records to Officer Biendl's death, or the defendant's responsibility for that death, noting that all of the records pre-dated the murder. Brief of Appellant at 134.

The warrant was issued for "evidence of" aggravated first degree murder. "Of" is broadly defined as meaning "in the most general sense; proceeding from; belonging to; relating to; connected with; concerning." State v. Rinkes, 49 Wn.2d 664, 666, 306 P.2d 205 (1957). Since facts outlined in the affidavit supported the inference that the files contained evidence that related to the elements of the crime, the aggravating factors, and any mitigation,

those facts did establish probable cause to search those files. It did not matter that information in those files predated the crime. Evidence of the defendant's mental state at earlier times would be relevant to show his mental state at the time of the crime. Additionally, evidence relating to mitigation will always include the defendant's history; sometimes including evidence that long pre-dates the crime. ABA Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases at 1024-26 (2003).

The defendant challenges the trial court's decision finding a search warrant for "evidence of a crime" included evidence relating to sentencing factors. The trial court relied on the Supreme Court's reasoning in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). 12 CP 2290. Blakely made clear that the Sixth Amendment right to jury trial includes the right to have every fact that enhances punishment pleaded and proved to a jury. Id. at 303 (holding the statutory maximum sentence a judge may impose is the maximum based solely on the facts reflected in the jury verdict or admitted by the defendant). Thus, any fact that bears on the decision the jury must make is all part "of the crime" under investigation.

Death is classified as a greater penalty than life without parole. RCW 10.95.030, Arizona v. Ring, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). In order to impose the death penalty, a jury must have found the additional fact that there were not sufficient mitigating circumstances to merit leniency. RCW 10.95.030(2), RCW 10.95.070. Mitigating circumstances include facts about the defendant. 1 CP 120. They were therefore part "of the crime" when police were investigating an aggravated first degree murder case.

The defendant argues that evidence bearing on mitigating circumstances is not part of the crime of aggravated first degree murder, citing this Court's decisions in State v. Thomas, 166 Wn.2d 380, 208 P.3d 1107 (2009), and State v. Kincaid, 103 Wn.2d 304, 692 P.2d 823 (1985). In each of these cases this Court held that the aggravating factors were not elements of aggravated first degree murder, but "aggravation of penalty factors." Kincaid, 103 Wn.2d at 312, Thomas, 166 Wn.2d at 388.

Neither of these cases supports the argument that evidence relating to the sentence for a crime is not part of the crime under investigation. For Sixth Amendment purposes both the elements of the crime and sentencing enhancers perform the same function

regardless of what the State chooses to call them. Ring, 536 U.S. at 604-605. Because both “elements” and “penalty factors” must be found before the court can impose punishment for a crime, they are both part of the same crime under investigation.

Moreover this argument directly conflicts with the defendant’s argument that the Information in this case failed to establish all of the elements of the crime. He faults the charging document for failing to include a reference to the death penalty, or that there “were not sufficient mitigating factors to merit leniency.” Brief of Appellant at 121. While the State disagrees that the Information had to allege a lack of mitigating circumstances, the defendant’s position that it did require such notice is a tacit admission that whether or not mitigating circumstances existed is part “of the crime” of aggravated first degree murder.

The defendant also challenges the trial court’s decision based on SPRC 5(g). That rule relates to a mental examination of the defendant done for the purpose of a special sentencing proceeding. The rule does not limit the investigation into or use of medical or psychological reports created as a result of evaluation or treatment for some other purpose. The rule therefore does not create a privacy interest in records resulting from an evaluation or

treatment at some time prior to the offender committing an aggravated first degree murder so as to defeat a search warrant issued for those records.

4. The Warrant Described the Items To Be Seized With Particularity.

A valid warrant under the Fourth Amendment must particularly describe the person or thing to be seized. To comply with this requirement, the warrant must be "sufficiently definite so that the officer executing the warrant can identify the property sought with reasonable certainty." How much specificity is required depends on the circumstances and the kinds of items involved. State v. Stenson, 132 Wn.2d 668, 692, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). A description is valid if it is as specific as the circumstances permit. State v. Perrone, 119 Wn.2d 538, 546, 834 P.2d 611 (1992). A warrant that lists generic classifications of items satisfies the particularity requirement if probable cause for those items is shown and a more specific description would be impossible to provide. Stenson, 132 Wn.2d at 692. Whether a warrant satisfies the particularity requirements is reviewed de novo. Clark, 143 Wn.2d at 753. The warrant is tested

in a common sense, practical manner, and not in a hyper-technical sense. Stenson, 132 Wn.2d at 692.

This court found a warrant seeking “personal records, correspondence, photographs, and film” was sufficiently specific in Stenson. The authorization limited the search to evidence showing a relationship between the defendant and his wife and one of the victims and his wife. This court reasoned that limitation provided sufficient particularity because there was probable cause to believe a crime had been committed and the relationship between the two couples related to the crime. Stenson, 132 Wn.2d at 693-94. Similarly, a warrant authorizing seizure of a gang’s meeting minutes was sufficiently specific because it only authorized seizure of documents recording the gang’s criminal activity, and not all documents maintained by the gang. United States v. Vasquez, 645 F.3d 880 (9th Cir. 2011), cert. denied, 132 S.Ct. 1778 (2012).

In Clark, this court also upheld a search warrant that authorized the search of trace evidence in the defendant’s van. Because the term included a wide variety of items which could not be identified before the warrant was authorized, the generic term did not render the warrant impermissibly broad. Clark, 143 Wn.2d at 754-55.

The warrant in this case is similar to warrants that were held to be sufficiently particular. The warrant itself authorized the search for "records, documents, papers, writings both typed and handwritten, books or any other personal records for inmate Byron E. Scherf 08-13-1958, DOC#287281" 12 CP 2351. The warrant further describes what those specific records entail, i.e. education, military, psychological, medical, and prison records. Prison records were further defined as records of his work history, housing history, and disciplinary issues. 12 CP 2351-52. The warrant therefore limited the search to a specific inmate's records, and to specific kinds of records. As discussed, warrants 11-28 and 11-32 established probable cause that the defendant committed an aggravated first degree murder. Evidence related to that crime if it shed light on the defendant's mental status regarding elements of the offense and sentencing considerations.

The affidavit supporting warrant 11-32 further described with particularity those documents authorized to be seized. 12 CP 2352. Because the affidavit was attached to the warrant and incorporated therein, the court may rely on it to determine if the warrant is sufficiently particular. United States v. Hayes, 794 F.2d 1348, 1354 (9th Cir. 1986), cert. denied, 479 U.S. 1086 (1987); State v. Riley,

121 Wn.2d 22, 29, 846 P.2d 1365 (1993). The affidavit described specific books by title and specific documents by their content, including documents drafted by the defendant. The court could reasonably infer that some of those items would be in the central file, such as the defendant's grievances, the historical prison records, and education records from courses taken while in prison. The affidavit also described some specific information in medical records that were sought.

A more specific description of those documents could not be given. Other than what police saw when serving warrant 11-28 on the contents of the defendant's cell, there was no way to know what other records would be in the defendant's medical and central files. As in Clark and Stenson, the warrant limited the scope of the search as narrowly as possible under the circumstances.

The defendant argues that warrant 11-32 was similar to the one the court held overbroad in United States v. Spilotro, 800 F.2d 959 (9th Cir. 1986). There, a warrant authorized seizure of records that were evidence of violations of 13 different statutes, indicated by statutory citation. Those statutes encompassed a broad range of crimes. The court held that the warrant was not sufficiently particular, noting the government could have narrowed the warrant

by describing in greater detail the items one commonly expects to find on the premises used for criminal activity, or by describing the criminal activities in greater detail. Id. at 964.

The warrant here is nothing like the warrant at issue in that case. The warrant identified a specific crime and specific documents. As the trial court found, the specific crime is unlike any other crime in that the defendant's entire medical, criminal, and social history is at issue in an aggravated murder case. The medical history is relevant to the mental elements of the offense. The medical, criminal, and social history is relevant to mitigation. See ABA Guidelines at 1024-26.

The defendant asserts that no case has upheld a warrant on the basis that everything about the accused is evidence of a crime. He cites the SPRC as authority that it is not.

This court has held that before a death penalty notice may be filed, the prosecutor must perform an individualized weighing of mitigating factors. State v. Pirtle, 127 Wn.2d 628, 642, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996). While information from the defense is desirable because subjective factors are better known to the defendant, a prosecutor need not wait for the defense to provide that information before making that determination. Id. at

642; State v. Monfort, 179 Wn.2d 122, 135, 312 P.3d 637 (2013).

These authorities support the conclusion that everything about the defendant is relevant in a possible death penalty case. The SPRC does not undercut this conclusion.

5. The Warrant Particularly Described The Location Of The Search, And The Search Did Not Exceed The Scope Of The Warrant.

The Fourth Amendment requires a warrant to particularly describe the place to be searched. This requirement is met when the description in the warrant allows an officer to ascertain and identify the place to be searched with reasonable effort. Steele v. United States, 267 U.S. 498, 503, 45 S.Ct. 414, 69 L.Ed. 757 (1925). The purpose of the requirement is to provide assurances that the police will not mistakenly search a place that was not authorized. The party challenging a warrant bears the burden to prove the premises were not reasonably identified. State v. Fisher, 96 Wn.2d 962, 967, 639 P.2d 743, cert. denied, 457 U.S. 1137 (1982).

The warrant described the location to be searched generally as the Washington State Reformatory located at 16550 177th Avenue S.E., Monroe, Washington. It further described specific locations within the reformatory to be searched as the inmate

property and storage room and the administration building. 12 CP 2353. Detective Wells initially served the warrant by going to WSR. He first was escorted to the inmate property and storage room where he collected the boxes referenced in the search warrant affidavit. He then collected the medical records at the medical records area located in the same building. The central file was obtained at the administration building. 11/14/11 RP 237-240.

The defendant challenges the warrant on the basis that it did not particularly describe the medical records room as one of the places to be searched. Because the medical records room was not specifically included in the warrant, he argues the medical records seized pursuant to the warrant should have been suppressed. Brief of Appellant at 138-39. This argument is based on a hyper-technical reading of the warrant and therefore should be rejected.

The medical records room was located on the WSR premises. It was not a separate premise and therefore was encompassed within the scope of the warrant. State v. Llamas-Villa, 67 Wn. App. 448, 453-54, 836 P.2d 239 (1992). The defendant cites no authority that a warrant describing a premise in both general and specific terms excludes a search of any other specific place located generally within that premise. He does not

show that the medical records room is outside the scope of the warrant.

A search warrant for records is served once the officer gives it to an official associated with the business retaining those records on the premises of that business. State v. Kern, 81 Wn. App. 308, 914 P.2d 114, review denied, 130 Wn.2d 1003 (1996). As in Kern, once the detective gave the warrant to Investigator Padilla at the property room, the warrant was served. 11/14/11 RP 238. Retrieving the documents from various locations within WSR did not exceed the scope of the permissible search. Like the bank records at issue in Kern, the medical records here were all maintained on the WSR premises. Under these circumstances there was no likelihood that the detective would mistakenly search someplace not authorized by the warrant.

Finally, because the affidavit was incorporated by reference any defect in the description of the place to be searched was cured. Riley, 121 Wn.2d 22. The affidavit specifically referenced "records retention" 12 CP 2353. A commonsense reading of the phrase indicates the location of the search was to be anyplace at WSR where records were retained. Since the medical records were retained at the medical records unit, the officer did not exceed the

scope of the warrant by standing outside that unit when he was handed the medical records by a WSR employee.

6. If The Court Erred When it Denied The Defendant's Suppression Motion It Was Harmless.

The defendant argues that the court committed constitutional error when it did not suppress all of his medical records seized pursuant to the search warrant, and all other documents seized from his cell except the non-medical records. He argues that he was prejudiced when the State used those records to deny him the right to present full mitigation information before the death penalty notice was filed. He also argues the records precluded him from presenting evidence at sentencing that he sought treatment, without the State's ability to rebut that evidence showing treatment would have done no good in preventing the murder.

If evidence was obtained in violation of the defendant's Fourth Amendment rights, then the error may be harmless. Constitutional error is harmless if after reviewing the untainted evidence the result would have been the same without the error. State v. Le, 103 Wn. App. 354, 367, 12 P.3d 653 (2000). Here the record shows that if the court erred in not suppressing evidence obtained pursuant to warrant 11-32, the error was harmless.

The defendant's medical records were only a part of what the elected prosecutor considered when he filed the notice of special sentencing proceeding. The defendant's criminal history, including his status as a persistent offender, as well as other facts was considered in that decision. 8/3/11 RP 173-74; 13 CP 2559-60, 2586. As the defendant acknowledged before trial, the prosecutor could withdraw the death penalty notice. 3/25/13 RP 1937. The defendant was not precluded from presenting the elected prosecutor with information that would have supported that decision, and he was invited to do so. 13 CP 2568. Whether or not the prosecutor had access to the defendant's medical records had no effect on the ultimate decision to file the notice or not withdraw it.

The defendant stated that he wanted to produce evidence that he sought sex offender treatment in the penalty phase to show his willingness to participate in programs while imprisoned. 5/13/13 RP 6990-92. He did produce evidence showing that he participated in programs that were not sex offender treatment. 5/13/13 RP 7024-25, 7030-34. He was not precluded from presenting evidence that he sought sex offender treatment in prison. Rather he was precluded from presenting unrebutted evidence in that regard.

5/13/13 RP 6990-96. Unrebutted evidence that he sought sex offender treatment would not have changed the outcome. The jury considered the proper penalty in light of the crime that the defendant had been found guilty of and other unrebutted mitigating evidence that he produced. 1 CP 119. Given the defendant's criminal history of violence and the nature of the crime, that single piece of unrebutted evidence would not have changed the outcome of the penalty phase.

B. THE DEFENDANT'S STATEMENTS WERE PROPERLY ADMITTED INTO EVIDENCE.

1. The Circumstances Leading To The Defendant's Statements To Police.

DOC Officer Maynard located the defendant in the chapel shortly after 9:00 p.m. on January 29, 2011. The defendant made a comment that he had fallen asleep and Officer Biendl had not found him. At that time the defendant was escorted to the shift lieutenant's office for investigation of an infraction violation of prison rules. Once they got there, Officer Swan noticed the defendant had blood on his collar and asked the defendant about it. The defendant claimed he had fallen while running. 4/9/12 RP 389-395, 449, 500, 513.

While in the shift office, the defendant admitted to Lieutenants Briones and Shimogawa that he was intending to escape. The defendant then stated he would not say anything further until he had an attorney. As staff were preparing to transport the defendant to segregation, Lieutenant Briones noticed blood on the defendant's collar and shirt. Briones believed the defendant had been the victim of an assault and had manufactured the escape attempt to avoid going back to where he had been assaulted. When asked, the defendant said he had been struck in the face playing handball earlier. Once the defendant got to segregation at IMU, he told Officer Swan that he had been jumped by three Mexicans. The defendant also told Swan that he was suicidal. When the defendant was examined by nurse Kagichu, he said that his finger had been bit. He also stated that he had suicidal thoughts. As a result of that statement and his prior history of attempted suicide, Dr. Goins, a prison psychologist, put the defendant on suicide watch. Suicide watch involves taking precautions to remove items from the inmate that he may use to harm himself. 4/9/12 RP 450-454, 480, 499-503, 561, 568-69; 5/8/12 RP 537-548.

When Officer Biendl was found dead in the chapel, the defendant was being held for two infractions: interfering with the count and an escape attempt. After she was found, the defendant was put in an observation cell on direct watch. About 11:50 p.m., the defendant was transported to a mental health cell at WSR for his own safety.¹ The murder resulted in locking down the prison, resulting in other prisoners losing privileges. Prison officials feared that the defendant would be targeted for retaliation if he was not isolated from other prisoners. The defendant was also restricted from access to items he would normally have in his cell due to a concern for self-harm and to preserve any potential evidence. 4/9/12 RP 507-10, 518-19.

On January 30, 2011 at 3:40 a.m., Detective Robinson from the Monroe Police Department contacted the defendant and read him his rights. The defendant told the detective that he wanted an attorney, so the detective asked the defendant no questions. Det. Robinson did not immediately contact an attorney for the defendant for two reasons related to the investigation and increased security at the prison.

¹ The escort from IMU to the mental health cell was video recorded and admitted as trial exhibit 125. The video shows the defendant was outside for approximately 9 minutes during the transport.

After first meeting the defendant, Det. Robinson was told by corrections staff that the defendant was licking his hands. Based on that information, the detective determined that it was imperative that he immediately obtain a warrant to preserve evidence. The detective took a few photographs of the defendant. He then prepared a search warrant and obtained judicial approval to serve it. Sometime between 8:15 and 9:00 a.m., after the detective obtained a warrant and while waiting for the forensic nurse examiner to arrive to assist in serving it, the defendant re-contacted the detective. The defendant said that if the detective got him an attorney quickly, he would talk to the detective. Det. Robinson then contacted the on-call public defender, Jason Schwarz. Mr. Schwarz arrived around 10:25 and met privately with the defendant. 4/10/12 RP 602, 611-18; 5/7/12 RP 850-854.

In addition to the immediate need to obtain a warrant, there were security measures that restricted the ability to put the defendant in contact with an attorney. The prison was on lockdown at that time, due to a concern about other inmates being involved in an escape attempt. Det. Robinson's movements about the prison were restricted. There were also restrictions on cell phone use and inmate communications. It was difficult for Det. Robinson to arrange

to have Mr. Schwarz meet with the defendant when the detective contacted the lawyer. The detective was unable to comply with Mr. Schwarz's request to have the defendant consult telephonically. Mr. Schwarz was informed that he had to come to the prison. The prison had a policy that required a background check before someone like Mr. Schwarz could come into the part of the prison where the defendant was housed, which was one of the most secure areas of the prison. Det. Robinson successfully pressed to have that prerequisite waived. When Mr. Schwarz arrived at the prison, he was escorted to and from the defendant's cell. 4/10/12 RP 621-22; 5/7/12 RP 851-856.

Prison officials discussed alternatives for housing the defendant because continued housing at the prison presented the risk of danger to him, to prison employees, and to the integrity of the investigation into Officer Biendl's murder. Pursuant to a longstanding agreement with the Snohomish County jail to board prisoners at the jail, DOC made arrangements to transfer the defendant to the jail. On February 1, 2011 Superintendent Frakes issued an Order to Detain, requesting the Snohomish County Jail to take custody of the defendant. 5/9/11 RP 1093-94; 9 CP 1618-20.

Detective Ryan rode in the van as a witness while Corrections officers escorted the defendant to the jail. Det. Ryan did not question the defendant during transport. The defendant did ask the detective for a Bible and his glasses. The defendant said he wanted the Bible to give him direction on whether to make a statement to police. The defendant said he understood the situation, knew what an attorney would recommend, but ultimately would make his own decision about whether he cooperated with police. The detective did not promise the defendant that he would get those items, but said that he would check on the status of those items. 5/7/12 RP 861-74.

Prison personnel advised jail staff that the defendant had made a suicide threat after the murder. As a result, the jail continued safety protocols by placing the defendant on a 15-minute behavior watch. He was initially placed in a rubberized safety cell. The cell had no sink or toilet that the inmate could hit his head on. It had a grated hole for human waste which could be flushed by notifying an officer outside the cell to flush it. On February 2 the defendant told Greg White, a mental health professional (MHP), that he wanted to be transferred to another jail cell. Mr. White discussed with command staff how quickly that could be

accomplished. By February 3, Edward DePra, another MHP at the jail, determined that the defendant was safe to be transferred to a normal cell. The defendant was moved to a different segregation cell that day. 4/10/12 RP 632; 5/7/11 RP 774; 5/9/11 RP 1184-87, 1226.

Between February 1 and February 15, the defendant was evaluated by MHPs Elizabeth Bellmer, White, and DePra. Ms. Bellmer assessed the defendant on February 1 to determine if he was suicidal. Ms. Bellmer observed that the defendant was functioning within normal limits and was able to communicate with her. She concluded that the defendant was not suicidal at that time, although she believed it was appropriate to place certain restrictions on the defendant, such as restricting his access to his glasses. Thereafter the defendant was seen by Mr. White and Mr. DePra each day for two weeks. During that time, the defendant's intellectual functioning remained within normal limits. His thought process was reality-based, organized, and goal-oriented, and he was able to advocate for his needs and requests. He did not appear to be in any distress during that time. At one point the defendant joked with Mr. White, greeting him by saying "what's up doc?" On one occasion the defendant apologized to Mr. White for perspiring

as he had been exercising in his cell just before Mr. White's visit. The defendant expressed to Mr. White that being in isolation was not a hardship for him, since it was similar to conditions he experienced when he was 12 and 13 years old in juvenile detention. 5/9/12 RP 1207-10, 1224, 1231-1242, 1261-62. Further, years earlier the defendant told a prison psychologist that he needed solitude. Without it he said that his anxiety level rose and added to his feelings of desperation. 5/9/12 RP 1274-75.

On February 1, Detectives Walvatne and Bilyeu of the Snohomish County Sheriff's Office were asked to assist the Monroe Police in their investigation by serving a search warrant that involved taking a series of photographs of the defendant. The photographs were to document whether the defendant had any injuries. On that date, the detectives met with the defendant at the jail and read him his Miranda rights. The detectives were aware that the defendant had requested an attorney, so they asked no questions or made any comments about the murder. 4/10/12 RP 625-28; 5/7/11 RP 768-71.

During the second photo session on February 2, Det. Walvatne again read the defendant his rights, which the defendant acknowledged he understood. Police did not ask the defendant any

questions. The defendant inquired about being moved to a different cell. Det. Walvatne told the defendant he did not have any control over where the defendant was placed. 4/10/11 RP 630-31.

Also on February 2 at about 1:30 p.m., the defendant met privately with his assigned public defender, Neil Friedman, for about 45 minutes. Mr. Friedman is an experienced criminal defense attorney, having spent more than twenty years trying felonies, including more than ten homicides. Four or five officers were involved in transporting the defendant from his cell to the room where Mr. Friedman and his investigator met with him. Jail staff told Mr. Friedman they would need additional time to set up an interview with the defendant again, in order to ensure there was sufficient manpower to escort the defendant to the visiting room. Mr. Friedman went on a short vacation after that meeting.² 5/7/12 RP 879-885, 895, 98-99.

On February 3, the detectives returned to find the defendant was moved to a different cell. They had not done anything to facilitate that move. The defendant was read his rights, but no

² The defendant states that it took 2-3 days to set up an interview with Mr. Friedman. Mr. Friedman testified that was his impression, but the record does not support his assumption. At the latest a visit could be postponed until the next shift in order to accommodate staffing levels. 5/9/12 RP 1140-41.

questions were asked. At the end of the photo session, the defendant asked the detectives for their business cards in case he wanted to contact them. 4/10/11 RP 632-33.

On February 4, Det. Walvatne was at the Monroe Police Department when he learned the defendant was asking to see either him or his attorney. Dets. Walvatne and Bilyeu arranged to have the defendant transported to the Sheriff's Office. When they met the defendant, he clarified that he did not want to talk to the detectives "today." The detective apologized for the confusion and did not ask the defendant any further questions before he was transported back to the jail. 4/10/11 RP 634-35.

On February 5, Dets. Walvatne and Bilyeu met the defendant for another photo session. Det. Walvatne read the defendant his rights but asked no questions. At the end of the photo session, the defendant made an unsolicited statement that he was starting to get mad. "These conditions need to change. If things change, I might talk to you." The defendant explained that he wanted a blanket, eyeglasses, toiletries, access to a phone, writing materials, and contact with his family. Det. Walvatne explained that he had no control over that, but would pass on the concerns to jail staff. Det. Walvatne then told Lieutenant Kane about the

defendant's requests. Lieutenant Kane passed on the requests to MHP DaPra. Mr. DaPra spoke with the defendant and confirmed that he was not suicidal. Mr. DaPra then conferred with Mr. White and corrections staff about the requests. Afterwards Mr. DaPra gave the defendant several items that the defendant had requested including a Bible, pencil, envelope, eyeglasses, and extra safety blankets. The defendant then told Mr. DaPra to tell the detectives that he was ready to give them a statement. 4/10/12 RP 636-39; 5/7/10 RP 777-79; 5/9/12 RP 1189-94, 1202-03.

On February 7, Det. Walvatne was doing follow-up work at the prison when he got word from the jail staff that the defendant had completed a kite requesting to meet with Dets. Walvatne and Bilyeu. The detectives then met the defendant in the segregation unit where he was housed. Det. Walvatne read the defendant his Miranda rights. The defendant confirmed that he understood them and wanted to talk to the detectives. He agreed to a taped interview. The defendant showed the detectives a piece of paper which contained a list of items that he wanted before he would talk to detectives about the crime. The defendant stated that he understood why he was in segregation and that "I don't have a problem being here." The defendant explained that he wanted his

case disposed of quickly in the best interests of justice and the families involved. The detectives explained to the defendant that they could transmit the list of his requests to jail staff, but had no control over his living conditions. 4/10/12 RP 639-44; 5/7/12 RP 780-83; CrR 3.5 hg. ex. 6.

Walvatne and Bilyeu then met with Captain Parker and gave him the defendant's list. Captain Parker is in charge of operations of the jail. The detectives did not tell Parker that the defendant had agreed to confess if his requests were granted. Nor did they ask for any special consideration on the defendant's behalf. Captain Parker reviewed the defendant's list and discussed the defendant's status with Mr. DaPra. He agreed that the defendant was entitled to some items, but not entitled to others. Captain Parker then spoke with the defendant about what he could and could not have. The defendant was allowed hygiene items, visits, better access to the phone, cleaning supplies, newspaper, and the hot water in his cell was repaired. The defendant's request to cease daily cell searches and commissary access was denied based on his current classification. His request for more linens and a razor was granted once approved by the MHPs. 4/10/12 RP 648; 5/7/12 RP 783-85; 5/9/12 RP 1106, 1113-23.

On February 9, Dets. Walvatne and Bilyeu went back to the jail for a fifth photo session. They again read the defendant his Miranda rights, which the defendant confirmed that he understood. They asked no questions during the photo session. After the detectives left, they were informed by jail staff that the defendant had completed a kite requesting to meet with them. They waited until the defendant had completed his dinner and recreation hour before having him transported to the Sheriff's Office. The detectives again read the defendant his Miranda rights, and they confirmed that the defendant wanted to talk to them. The defendant appeared alert and coherent. He agreed to answer most of the detectives' questions, but he warned that there may be questions he would not answer. Thereafter he gave a videotaped statement confessing to Officer Biendl's murder. During the course of the interview they took a break at the defendant's request. The defendant refused to talk about his wife, or what Officer Biendl said to the defendant before the defendant murdered the officer. After giving the statement the defendant was returned to the jail by corrections staff. 4/10/12 RP 649-657; 5/7/12 RP 785-94; CrR 3.5 hg. Ex. 10 at 4, 12-13.

On February 10, Dets. Walvatne and Bilyeu were informed by jail staff that the defendant had completed another kite asking

the detectives to come to his cell as soon as possible. When the detectives arrived they advised the defendant of his Miranda rights. The defendant said he understood and confirmed that he wanted to talk to the detectives. The defendant then asked the detectives to arrange a meeting for him with the prosecutor, Mr. Frakes and Eldon Vail, the superintendent of the Department of Corrections. The detectives told the defendant they could make no promises but would pass on his requests. Det. Walvatne then asked if the defendant would agree to another interview to clear up some things from the interview the day before. The defendant agreed to that second interview. Det. Walvatne later learned from Lieutenant Harrison that the defendant had a meeting with his attorney that afternoon. The detective asked the lieutenant to have the defendant complete another kite if he still wanted to talk to the detectives after talking with his attorney. 4/10/12 RP 658-60; 5/7/12 RP 794-98.

Mr. Friedman met with the defendant on the afternoon of February 10. Although the defendant did not have any contact with Mr. Friedman between their first meeting on February 2 and this meeting, had the defendant wanted to contact his attorney he would have been able to do so. The defendant had been given an inmate handbook when he arrived at the jail instructing him how to

contact his lawyer. There was a phone with direct dial to the public defender's office. The defendant was informed that calls to his attorney would not be monitored. The defendant used that phone on February 4 during the public defender's office hours. The defendant could also write a kite requesting contact with his attorney as he had done when requesting contact with the detectives. During the time that that defendant was not allowed a pencil, he was permitted to request one for the purpose of writing a kite. 5/7/12 RP 893, 903-05; 5/9/12 RP 1128-33, 1139-40; CrR 3.5 hg. ex. 52; ex 11.

Mr. Friedman learned that there was going to be a meeting between the defendant and the prosecutor the next day. Mr. Friedman advised his client not to do that. After this meeting Mr. Friedman spoke to several attorneys who had experience with death penalty cases. Based on what he learned, Mr. Friedman wrote to the prosecutor's office to lodge an objection to the meeting. 5/7/12 RP 893-94.

The defendant wrote another kite asking to meet with Dets. Walvatne and Bilyeu again after he met with Mr. Friedman. The detectives then met with the defendant and read him his Miranda rights. The defendant said he understood and confirmed that he

wanted to talk to police. Thereafter the defendant gave a second video recorded interview confessing to Officer Biendl's murder. The defendant confirmed that he was speaking with the detectives against the advice of counsel. 4/10/12 RP 661-664; 5/7/12 RP 798-799; CrR 3.5 hg. ex. 13.

On the morning of February 11, the defendant was transported to the Sheriff's Office where he met with his attorney Mr. Friedman. Detectives read the defendant his constitutional rights and the defendant confirmed that he wanted to talk to the detectives. The two assigned deputy prosecutors were down the hallway. They indicated that they would not speak to the defendant unless Mr. Friedman agreed to the meeting. Mr. Friedman did not agree to the meeting so the deputy prosecutors left. The defendant was upset that his attorney would not consent to a meeting with the prosecutors. He commented that he would find another way to make it happen. The defendant stated he wanted to talk to the detectives again, and Mr. Friedman advised against another interview. 4/10/12 RP 665-68; 5/7/12 RP 799-801, 893.

About one and one half hours after the defendant returned to the jail Dets. Walvatne and Bilyeu were informed that the defendant had written another kite asking for them to speak with him. The

detectives went to the jail and advised the defendant of his Miranda rights. The defendant confirmed that he understood and wanted to talk to police to clarify some things about his confession. He asked to be interviewed at the Sherriff's Office because he was concerned about leaks to the media. The defendant was then transported back to the Sheriff's Office where he gave a third video recorded interview. 4/10/12 RP 669-674; CrR 3.5 hg. ex 17.

On February 12, Dets. Walvatne and Bilyeu went to the jail for the last photo session with the defendant. The defendant was informed of his Miranda rights but asked no questions. The detectives were informed the defendant had written a kite seeking to speak with a local television news station. Pursuant to jail policies any such request had to be made through the inmates' attorney. When the defendant learned about the policy he stated that Mr. Friedman would not allow that. The defendant suggested that he might have to fire Mr. Friedman and write a letter directly to the media. 4/11/12 RP 680-83; 5/7/12 RP 803-05.

On February 14, the detectives learned that the defendant had completed another kite asking to talk to them. Dets. Walvatne and Bilyeu contacted the defendant at the jail and read him his rights. This was the eighteenth time the defendant had been read

his rights in eleven days. When Detective Walvatne advised the defendant that he had a right to an attorney the defendant said "screw him." The defendant then told the detectives that he had a kite that he wanted them to give to the prosecutor. In the kite the defendant admitted to murdering Officer Biendl. He asked the prosecutor to seek the death penalty. 4/11/12 RP 683-88; 5/7/12 RP 805-07; CrR 3.5 hg. ex. 23.

2. The Defendant Was Provided A Lawyer At the Earliest Opportunity.

The defendant's was charged with Aggravated First Degree Murder in Everett District Court on February 24, 2011. On March 11, 2011 the charge was filed in Superior Court. 9 CP 1617, 16 CP 3135. Prior to February 24 the defendant had not been charged, and therefore his Sixth Amendment right to counsel had not accrued. State v. Schulze, 116 Wn.2d 154, 161, 804 P.2d 566 (1991). Although the defendant references the Sixth Amendment he does not rely on it to argue his statements should have been suppressed. Instead the defendant argues that his confession pre-dating formal charges should be suppressed because his right to counsel under CrR 3.1 was violated.

The right to a lawyer accrues as soon as feasible after the defendant is taken into custody. CrR 3.1(b)(1). When a person is taken into custody he shall be immediately advised of his right to a lawyer. CrR 3.1(c)(1). At the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, the telephone number of the public defender, and any other means necessary to place the person in communication with a lawyer. CrR 3.1(c)(2).

The defendant argues that CrR 3.1 was violated when he was not placed in contact with an attorney after he first requested one at 9:00 p.m. on January 29. However, his right to counsel did not accrue until at least 3:40 a. m. when the defendant was contacted by the investigating detective. His right was not violated because a combination of the detective's investigative duties and DOC security measures and policies precluded an earlier meeting with the attorney.

a. The Defendant Was Not Taken Into Custody For Purposes Of The Rule Until He Was First Contacted In Connection With The Murder Investigation.

The criminal rules are designed to address procedure in "criminal proceedings." CrR 1.1. At 9:00 p.m. on January 29 the defendant was not under investigation for a criminal

matter but rather for a prison infraction. No one was aware that a murder had been committed at that time, and so no criminal investigation had commenced. Since the defendant had not been taken into custody for a criminal proceeding, his right to counsel had not accrued under CrR 3.1(b)(1). Nor did the defendant have a constitutional right to counsel in regard to the investigation for a prison disciplinary proceeding. Wolff v. McDonnell, 418 U.S. 539, 570, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). Thus there was no obligation to make efforts to put the defendant in contact with an attorney at the time that he was restrained for the prison infraction at 9:00 p.m.

b. Regardless of When The Defendant's Right To A Lawyer Accrued, He Was Provided An Attorney At The Earliest Opportunity.

The purpose of CrR. 3.1 is to provide the defendant with a meaningful opportunity to contact counsel. State v. Kirkpatrick, 89 Wn. App. 407, 948 P.2d 882 (1997), review denied, 135 Wn.2d 1012 (1998). Cases construing this rule have found that the timing of access to counsel depends on the circumstances of the case. Thus the exigencies of the police investigation are weighed against a defendant's request for immediate access to counsel.

CrR 3.1(c)(2) does not require officers to interrupt the service of a search warrant or pre-booking procedures to provide the defendant with the means and opportunity to contact counsel where there is no reason to interrupt those procedures. A reason to interrupt those procedures may exist if a person in custody must make immediate decisions which will bear on how the defense is ultimately structured. One example may be in the context of a DUI investigation. In that case the "earliest opportunity" to provide that person access to counsel may require the police suspend their procedures in order to do so. State v. Mullins, 158 Wn. App. 360, 370, 241 P.3d 456 (2010), review denied, 171 Wn.2d 1006 (2011).

Thus where the defendant was arrested for a murder that had been committed three days earlier, police were not required to interrupt the service of a search warrant on the defendant's body and the pre-booking procedures to provide the defendant access to counsel when he requested an attorney after advice of rights. The defendant's confession under those circumstances was admissible when the defendant re-initiated contact with the police before those procedures had been completed. Id.

Similarly a defendant's confession was properly admitted even though he had requested an attorney after advice of rights in

State v. Wade, 44 Wn. App. 154, 157, 721 P.2d 977, review denied, 107 Wn.2d 1003 (1986), abrogated on other grounds, In re Carrier, 173 Wn.2d 791 (2012). In Wade the defendant was being booked on a robbery when he confessed to a second officer assigned to take photographs of the defendant. In rejecting the defendant's claim that his rights under CrR 3.1 had been violated the court reasoned the defendant waived his right to remain silence before police had an opportunity to put him in contact with counsel. Id. at 159.

Here the defendant requested counsel during the course of the criminal investigation in to Officer Biendl's murder at 3:40 a.m. The circumstances were hectic, with numerous activities related to the investigation and prison security being performed simultaneously. It was important for the detective to prioritize working on a search warrant given information that evidence may be dissipating due to the defendant's actions.

It was also difficult for the detective to arrange for the defendant to be in contact with counsel due to the security concerns. Over forty years ago, the U.S. Supreme Court recognized that the nature of prisons created an environment that justified limitations on constitutional rights for prisoners. The court

observed that prisons were populated by offender who repeatedly employed illegal and often violent means to attain their ends. Inmates “may have little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life.” The relationships between inmates are complex and varied. Guards and inmates co-exist in an environment of unremitting tension. Wolff, 418 U.S. at 561-62.

The Court’s observations about prison life then are no less true today. As Lieutenant Briones described, prisoners commonly violated the rules as a ploy to be placed in segregation for their own security after being victimized by other prisoners. The defendant’s claim that he had been attacked by other prisoners supported Briones’ initial belief that had been the defendant’s motivation when he missed count. By murdering Officer Biendl, the defendant created even greater risks to prison security than those normally address by the usual prison procedures. After the murder a facility wide lockdown was announced, meaning prisoners would not be allowed out of their cells to eat or for recreation or programs. A lockdown creates tension with other inmates. Even in IMU, where the defendant was originally placed, there have been incidents where offenders have ganged up on an inmate, assaulting the

inmate with urine or feces, or verbally harassing or threatening the inmate to mentally drain that inmate. Additionally, the defendant's suicide threats necessitated other restrictions on his confinement. 4/9/12 RP 502-03, 505, 509-10, 515-16, 518-19; 5/7/11 RP 931.

If these same realities justify a limitation on inmates' constitutional rights, then they certainly bear on the application of a court rule created right. Given the security challenges presented by the defendant's actions, and the pressing need to obtain a warrant for potential evidence before the defendant could further compromise it, Det. Robinson provided the defendant access to a lawyer at the earliest opportunity.

The defendant argues that he should have been put in contact with an attorney at 9:00 p.m., when he first requested one. He relies on Kirkpatrick, supra and State v. Pierce, 169 Wn. App. 533, 280 P.3d 1158 review denied, 175 Wn.2d 1025 (2012). In Kirkpatrick, police arrested the defendant in Port Angeles at the police station for a murder committed in Lewis County. Upon his arrest the defendant requested an attorney. Although there were presumably procedures available at the police station to give the defendant the opportunity to contact counsel, the police did not employ them. Instead they transported the defendant back to Lewis

County, where on the way the defendant made incriminating statements. Under these circumstances the court found CrR 3.1 had been violated. Kirkpatrick, 89 Wn. App. at 414.

The circumstances in Kirkpatrick are far different than those presented here. First the defendant's request for counsel did not take place during normal working hours in a police station that had procedures set up to provide arrestees with access to counsel. It took place in a prison during the middle of the night in the midst of heightened security procedures resulting from a murder investigation that had just commenced. Even if prison inmates could have telephone access to counsel during normal operations, telephone access for inmates had been suspended and Det. Robinson's cell phone use had been restricted for security purposes. 4/10/12 RP 621. Access to counsel could not occur over the phone, but only in a face to face meeting. Det. Robinson faced logistical limitations getting an attorney who had not been previously screened into the prison facility. The defendant's own suicide threats created additional management issues for the prison staff. Given these limitations the defendant was provided counsel at the earliest opportunity.

In the foregoing cases there was a definite point in time in which the defendant was taken into custody and his rights under CrR 3.1 accrued. Here that time is not clear because the defendant was already in custody pursuant to his prior conviction at the time Officer Biendl was found murdered, and the defendant was not arrested for the murder until weeks later. Prisoners are not "in custody" under Miranda simply because they are incarcerated. State v. Warner, 125 Wn.2d 876, 885, 889 P.2d 479 (1995), Howes v. Fields, ___ U.S. ___, 132 S.Ct. 1181, 182 L.Ed.2d 17 (2012). For that reason, the State challenges the trial court's conclusion that for the purposes of Miranda the defendant was in custody from the time he was placed in restraints at the chapel and argues at the earliest the defendant was taken into custody for purposes of CrR 3.1 at the time he was first read his Miranda warnings. 7 CP 1245. See section B.5.a.

c. If The Defendant Was In Custody For Purposes Of CrR 3.1, Then Any Failure To Comply With The Rule Was Harmless.

If the court concludes that the defendant was taken into custody at the chapel, and further concludes that despite the prison conditions occasioned by discovering Officer Biendl's murder and the resulting investigation did not preclude officers from providing

access to counsel earlier than when it occurred, any violation of CrR 3.1 is harmless.

A violation of a court rule is harmless unless within reasonable probabilities the outcome of the trial would have been materially affected if the error had not occurred. State v. Templeton, 148 Wn.2d 193, 59 P.3d 632 (2002). Violation of CrR 3.1 was harmless where the defendant was advised of his right to counsel and actually spoke to counsel before he gave incriminating evidence. State v. Trevino, 127 Wn.2d 735, 745, 903 P.2d 447 (1995). An unreasonable delay in providing access to counsel was similarly harmless where aside from the tainted confession there was substantial evidence supporting the defendant's conviction. Kirkpatrick, 89 Wn. App. at 416. Error in advising a defendant of his CrR 3.1 rights was harmless where no questioning occurred before the officer advised the defendant of his right to counsel and there was no evidence that but for that error the defendant would have requested counsel before answering questions or submitting to tests. Templeton, 148 Wn.2d at 220.

Here the error is harmless because the defendant actually spoke to an attorney before he was ever questioned by law enforcement about the murder. He first spoke to Mr. Schwarz on

January 30. 5/7/12 RP 853-55. A few days later he spoke to Mr. Friedman, a public defender with extensive experience in homicide cases. Mr. Friedman advised the defendant not to talk to the prosecutor. He further took action to keep the defendant from being questioned by filing a notice of desire not to be interrogated. 5/7/12 RP 883-87.

The evidence shows that even if the defendant had spoken to an attorney earlier, he would not have followed counsel's advice not to speak to police. Det. Robinson advised the defendant of his right to remain silent within hours of the crime. Det. Walvatne re-advised the defendant of his rights eighteen times of the next two weeks. 4/11/12 RP 684. Despite counsel's advice the defendant repeatedly sent kites to police stating that he wanted to talk to them. He confirmed he wanted to talk to police when asked. 4/11/12 RP 639-42, 649-51, 658-63. The defendant was upset with Mr. Friedman when he would not consent to a meeting with the prosecutor, stating that he would find another way to make it happen. The defendant suggested that he might seek to represent himself. Shortly after this exchange the defendant sent another kite requesting an interview with detectives. When he was again read his rights the defendant interrupted the detective to make it clear

that he did not want Mr. Friedman's advice in that regard. 4/10/12 RP 664, 668-74; 4/11/12 RP 683-85.

Even without the defendant's confession, the evidence overwhelmingly showed the defendant committed a premeditated first degree murder. All other prisoners had returned to their cells at the last recall of the day. Only the defendant remained behind in the chapel with Officer Biendl. The defendant's ruse, claiming he had forgotten his hat in order to return after recall had been called, supported the conclusion that he thought about killing her beforehand. Before officers found her body the defendant made unsolicited statements incriminating him in her murder. The microphone cord wrapped around her neck multiple times demonstrates that the defendant acted intentionally to cause her death. The medical examiner's testimony established that it took 4-5 minutes of constant pressure on Officer Biendl's airway during the course of a violent struggle to cause her death. These facts also establish both intent and premeditation.

Given the strength of the case without the defendant's confessions, his access to counsel, and his demonstrated desire to speak to police despite advice of counsel, any error resulting from a

CrR 3.1 violation was harmless. Even if this Court finds the rule had been violated, the defendant is not entitled to a new trial.

3. The Defendant's Transfer from Prison To Jail Does Not Constitute A Basis To Suppress His Statements.

The defendant argues that his transfer from the prison to the Snohomish County Jail violated RCW 72.68 and as a result statements he made while housed at the jail should be suppressed. This argument should be rejected because no statutory violation occurred. Moreover the defendant had not provided a reasoned argument why, even if the statute was violated, the court should suppress his otherwise voluntary statements.

RCW 72.68.040 permits the Secretary of the Department of Corrections to contract with counties for detention of prisoners sentenced to the Department of Correction in county jails. RCW 72.68.050 requires the superintendent to send the court clerk in the county from which the defendant was sentenced a notice of transfer, and to keep a copy of the notice of transfer on file as a public record. The court's finding that there was an oral agreement between DOC and Snohomish County is supported by an affidavit from Deputy Superintendent Frakes that there had been a long-standing agreement between the two agencies to board DOC

prisoners at the jail. 9 CP 1619. A public record of the transfer was available. 9 CP 1620. There was no statutory violation resulting from transferring the defendant from MCC to the jail.

Even if these statutes were violated, the defendant provides no argument why his statements should be suppressed as a result of such violation as required by RAP 10.3(a)(6). "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." West v. Thurston County, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012), review denied, 176 Wn.2d 102 (2013). There is no statutory remedy for a violation of those provisions. As discussed below the defendant's confession was completely voluntary. Transferring the defendant from the prison to the jail did nothing to overbear his will to resist questioning by the detectives.

4. CrR 3.2.1 Does Not Affect The Admissibility Of The Defendant's Confession.

The defendant argues that his confession should have been suppressed because he was not brought before the court as soon as practicable after he was detained as required by CrR 3.2.1(d)(1). He argues the court should adopt the exclusionary rule adopted by federal courts for violation of a similar prompt presentment rule.

The argument should be rejected because the defendant was not detained as contemplated by CrR 3.2.1 when he was transferred to the Snohomish County jail. Additionally the federal exclusionary rule has not been adopted by this court, and this case presents no compelling reason why this court should overrule prior decisions rejecting that per se rule.

The trial court found that the defendant was transferred to the jail on February 1, 2011 “for his own protection, to serve his DOC sentence in the jail, a place that was also more convenient to his attorney, and more conducive to his safety, rather than being detained as a result of the new crime.”³ For that reason the court concluded that CrR 3.2.1 had not been violated when the defendant was not brought before a judge “as soon as practicable” after February 1. 7 CP 1248. The defendant challenges this finding. Challenged findings of fact are verities if they are supported by substantial evidence. State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997).

Substantial evidence in the record supports the trial court’s findings. An affidavit from then Superintendent of MCC Scott

³ The trial court included these factual findings in its conclusions of law. Findings of fact that are mislabeled as conclusions of law are treated as factual findings. State v. Ross, 141 Wn.2d 304, 309, 4 P.3d 130 (2000).

Frakes states that the defendant was transferred to the Snohomish County for his own safety and the safety of others at MCC, to protect the integrity of the investigation into Officer Biendl's murder at the prison, and to permit law enforcement officers who were investigating that murder to have easier access to the defendant. 9 CP 1618-19. The transfer was not an arrest on any charge. Superintendent Frakes' had no arrest power. The order of detention was to ensure the defendant would not be released by the jail without notice to DOC. Id. The defendant was not arrested on the charge of murder until February 23 when Det. Hatch formally booked the defendant into the Snohomish County jail on that charge. 9 CP 1621.

The defendant ignores this evidence and instead argues that the DOC press release, stating that the defendant was transferred to help police investigators, demonstrates that he was detained in the jail as the result of a new crime. Brief of Appellant at 151. The press release does not negate the other evidence presented that supports the court's findings. The investigation into Officer's Biendl's murder had no impact on the defendant's custody status because he was being held as a result of his third strike conviction. Ex. 169.

The court found that the defendant was “in custody” for “the purposes of the Miranda” decision at that point. CP 1245. The defendant relies on this finding to claim he was “detained” for purposes of CrR 3.2.1 from the moment he was handcuffed at the chapel. These terms are not interchangeable because they relate to different procedural protections that are triggered by different actions. CrR 3.2.1 is entitled “Procedure Following Warrantless Arrest-Preliminary Appearance” and relates to the procedure after a warrantless arrest. CrR 3.2.1(a). The primary purpose of a preliminary appearance is for a judicial determination of probable cause and to review conditions of release. Westerman v. Cary, 125 Wn.2d 277, 291, 892 P.2d 1067 (1994). Another purpose of the rule is to prevent unlawful detention and to eliminate the opportunity for improper police pressure. State v. Bradford, 95 Wn. App. 935, 948, 978 P.2d 534 (1999), review denied, 139 Wn.2d 1022 (2000).

The Miranda protections apply to custodial interrogations by a State agent. State v. Sargent, 111 Wn.2d 641, 647, 762 P.2d 1127 (1988). Custody for Miranda purposes means the suspect’s freedom of action is curtailed to a degree associated with formal arrest. State v. Harris, 106 Wn.2d 784, 789-90, 725 P.2d 975 (1986), cert denied. 480 U.S. 9410 (1987). An arrestee is entitled to

Miranda warnings if he is arrested and subject to interrogation. But he is not entitled to a preliminary hearing unless he is thereafter confined or subject to court authorized conditions.

For that reason the trial court's conclusion that the defendant was in custody for purposes of Miranda once he was handcuffed at the chapel is consistent with its conclusion that no CrR 3.2.1 violation occurred when the defendant was not brought before a judge as soon as practicable after he was transferred to the jail. 7 CP 1245. 1248. The record supports that the defendant was not confined pursuant to an arrest on any charge until Det. Hatch booked him on first degree murder February 23, 2011. 8 CP 1621.

Additionally the defendant was not entitled to an earlier hearing under CrR 3.2.1 because he was in custody pursuant to his prior conviction. Since he had been convicted of those crimes a probable cause determination had already been made on those charges before he was transferred to the Snohomish County jail.

Even if the defendant had been detained as contemplated by CrR 3.2.1(d)(1), suppression of his statements made after he was transferred to the jail is not appropriate. It should be recognized that the facts in this case are highly unusual. The defendant was not in the community and then arrested and brought to jail -- the situation

contemplated in CrRLJ 3.2.1. Instead, the defendant was already in custody pursuant to a lawful conviction. His transfer to the Snohomish County jail did not change that status. This court has said that a delay in the preliminary appearance does not automatically mean a defendant's statements are suppressed. State v. Hoffman, 64 Wn.2d 445, 450, 392 P.2d 237 (1964). Rather the delay is one consideration when determining whether a confession was involuntary. Bradford, 95 Wn. App. at 949.

The defendant asks this Court to overrule Hoffman and instead adopt the McNabb-Mallory rule. McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed.2d 819 (1943); Mallory v. United States, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957). That rule makes inadmissible confessions obtained outside of the time prescribed in FRCP 5(a). Corley v. United States, 556 U.S. 303, 129 S.Ct. 1558, 173 L.Ed.2d 443 (2009). While that exclusionary rule applies to federal prosecutions, the court has refused to apply it to the states through the Fourteenth Amendment. Rather the question in state prosecutions continues to be whether the defendant's confession was voluntary under the totality of the circumstances. Culombe v. Connecticut, 367 U.S. 568, 600-02, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961).

This court will not overrule a prior decision unless there has been a clear showing that the rule it announced is both incorrect and harmful. State v. Barber, 170 Wn.2d 854, 863-64, 248 P.3d 494 (2011). A decision is incorrect if it is based on an inconsistency in the court's precedent, with this state's constitution or statutes, or with public policy considerations. It may also be incorrect if the authority it relies on to support a proposition does not actually support it. Id. at 864. A decision is harmful if it has a detrimental impact on the public interest. Id. at 865.

The decision in Hoffman is not inconsistent with prior authority, law, or public policy. In addition to its decision in Hoffman, this court has repeatedly rejected the McNabb-Mallory exclusionary rule. State v. Winter, 39 Wn.2d 545, 549-50, 236 P.2d 1038 (1951); State v. Keating, 61 Wn.2d 452, 455, 378 P.2d 703 (1963); State v. Carpenter, 63 Wn.2d 577, 388 P.2d 537 (1964).

Nor is the rule in Hoffman harmful to the public interest. The defendant points to dicta in Hoffman that "future developments" or evidence that law enforcement are persistently causing undue delay between arrest and arraignment may dictate reconsideration of its decision to reject the per se exclusionary rule for violation of the prompt presentment rule. Hoffman, 64 Wn.2d at 450. The

record does not support any reason for this court to reconsider its earlier decisions in this regard.

The record in this case relates solely to a single case investigated jointly by two police agencies. It does not demonstrate a pervasive disregard for the CrR 3.2.1 requirements by law enforcement throughout the state. As to this case, there is no evidence of any delay between arrest and arraignment since the defendant was not arrested on the murder charge until his February 23 booking and then charged on February 24. 8 CP 1617, 1621.

The United States Supreme Court adopted the exclusionary rule as a check on federal officers to prevent them from secretly interrogating arrestees. Corley, 566 U.S. at 308. The defendant's presence at the Snohomish County jail was no secret; DOC publicly announced his transfer there. 8 CP 1689. While one purpose of the prompt presentment rule is to prevent coercive police interrogations, as discussed below the defendant's confession to Officer Biendl's murder was completely voluntary. Overruling Hoffman, Winter, Keating, and Carpenter by adopting the per se federal rule would do nothing to promote the purposes of CrRLJ 3.2.1. Instead it would deprive the jury of reliable evidence on which to determine the case. In short, the defendant's case

provides no reasonable basis to depart from this Court's earlier decisions rejecting the McNabb-Mallory exclusionary rule.

5. The Defendant Voluntarily Confessed To Officer Biendl's Murder.

The defendant contends that his right to remain silent pursuant to the Fifth Amendment and article 1, §9 and his right to counsel under the Sixth Amendment and article 1, §22 were violated when he gave statements to detectives while housed at the Snohomish County jail. He argues that his statements should have been suppressed. Because he was not in custody and no charges had been filed when he gave those statements, and because those statements were completely voluntary, no violation of his rights occurred. It was not error to admit those statements into evidence.

a. The Defendant Was Not In Custody For Fifth Amendment Purposes.

Washington Constitution article 1, §9 and the Fifth Amendment provide coextensive protection against compelled self-incrimination. State v. Unqa, 165 Wn.2d 95, 100, 196 P.3d 645 (2008). The Fifth Amendment privilege against self-incrimination generally must be asserted by the person holding that privilege. Sargent, 111 Wn.2d at 648. A person who is not in custody and who does not assert his Fifth Amendment right to remain silent is

considered to have acted voluntarily if he chooses to respond to questions which could reasonably be expected to elicit incriminating evidence. Minnesota v. Murphy, 465 U.S. 420, 429, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984). The presumption of voluntariness dissipates once the person is taken into custody. Id. at 429-430. In that situation, before the defendant's statements are admitted into evidence, the State must show by a preponderance of the evidence that the defendant knowingly, voluntarily, and intelligently waived his Miranda rights. State v. Athan, 160 Wn.2d 354, 380, 158 P.3d 27 (2007).

The trial court concluded that for purposes of the Miranda decision the defendant was in custody from the time that he was placed in restraints in the chapel and escorted to the shift lieutenant's office. 7 CP 1245. The record does not support the conclusion that the defendant was in custody for that purpose when he gave his tape recorded statements to the detectives.

A suspect is in custody once his "freedom of action is curtailed to a 'degree associated with formal arrest.'" Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L.Ed.2d 317 (1984). In the context of Miranda "custody" involves circumstances thought to present a serious danger of coercion. Howes, 132 S.Ct.

at 1189. Because the custodial setting is not unfamiliar to a prisoner and isolation from other prisoners during an interrogation often benefits a prisoner, he is not "in custody" unless he is subject to more than normal restrictions. Id., at 191-92; Warner, 125 Wn.2d at 885.

The defendant was held in the jail pursuant to his conviction for a prior offense. By the time that he gave his statements to the police, he had been transferred to a regular jail cell in segregation. All of the restrictions placed on him by MHPs relating to his suicide threat had been removed. He had access to everything any other inmate housed in that area of the jail was entitled to. The defendant's restrictions were no more than those normally incident to his incarceration on the prior charge. The defendant was the one that directed when and where he gave his statements. These circumstances demonstrate that the defendant's confinement did not have the coercive effect contemplated in Miranda case authority. This court should find that he was not "in custody" for the purposes of Miranda. The court should therefore presume that his statements were voluntary when he did not assert his right to remain silent by seeking out police to give his statements.

b. The Defendant Voluntarily Gave Statements To Police.

Even if the defendant was "in custody" for purposes of Fifth Amendment analysis, his statements were voluntarily given. A defendant's custodial statements are admissible if, under the totality of the circumstances surrounding the interrogation, the suspect knowingly and voluntarily decided to forgo his right to remain silent and have the assistance of counsel. Unga, 165 Wn.2d at 100.

Whether police conduct was used to exert pressure on the defendant and whether the defendant had the ability to resist that pressure are relevant to the inquiry. Factors bearing on the voluntariness of a confession include whether the defendant was advised of his right to remain silent and have counsel present during a custodial interrogation; his age, maturity, education, physical and mental health; and the length and place of the interrogation. Id. at 101. Whether police made any promises to the defendant and if those promises overbore the defendant's will are also relevant. Broadaway, 133 Wn.2d at 132. An officer's agreement to inquire into a defendant's request is not a promise to induce the defendant to make a confession. Id. at 134.

The trial court found that the defendant met with attorneys twice before his first interview with police. He met with Mr. Friedman again before he gave his third statement to police and provided them the kite addressed to the prosecutor acknowledging that he murdered Officer Biendl. The defendant was given a handbook at the jail advising him how to contact counsel via phone and kite. He had access to a phone in which he could call his attorney during business hours at least once. The defendant did not make any effort to contact his attorney while at the jail. 7 CP 1218, 1221-23, 1224, 1227, 1236, findings 26, 34, 37-38, 41, 47, 49, 50, 54, 80-81.

The court also found that Dets. Walvatne and Bilyeu knew the defendant had requested counsel. They advised the defendant of his Miranda rights on each occasion that they contacted him to serve the search warrant or when the defendant requested contact with them. The detectives did not question the defendant when they served the search warrant. When the defendant spoke with detectives, they made no threats or promises to him. 7 CP 1221, 1224, 1226-27, 1236, findings 33, 43, 51, 56, 82.

The court found that when the detectives did talk to the defendant it was after he had sent a kite requesting contact with

them. Before each interview he was advised of his rights and confirmed that he wanted to talk to police. The interviews with the defendant were conducted on his own terms, with the defendant answering some questions but not others. In the last interview the defendant questioned the detectives. 7 CP 1228-30, 1232-35, findings 59, 60, 63, 71, 72-78.

The defendant does not challenge any of the forgoing findings of fact. They are therefore verities on appeal. Broadaway, 133 Wn.2d at 131. The defendant also does not challenge the court's finding that during the February 9 interview the defendant knew what he was doing and answered questions appropriately. 7 CP 1233-34; FF 74. During the February 11 interview the defendant offered cogent reasoned answers to questions that the detectives had asked at earlier interviews but not during that interview. 7 CP 1239, finding 89. He also does not challenge the court's finding that the defendant said that he had no problem being "in here" and that he understood why he was in isolation. 7 CP 1229-30, finding 61.

The defendant does challenge the court's finding that he was functioning within normal limits, was reality based, not disturbed, and during the time he was at the jail he showed no signs of suffering any distress. Substantial evidence presented though the

three MHPs at the jail support these findings. 5/9/12 RP 1207-10, 1224, 1231-1242, 1261-62. Those findings are therefore verities on appeal. Broadaway, 133 Wn.2d at 131.

The defendant also challenges the court's findings regarding his ability to contact counsel through a kite and how long it would take to arrange a visit with his attorney. Captain Parker testified that even when the defendant was restricted from having a pencil in his cell, he could have requested one to write a kite to meet with counsel. The defendant had access to a pencil at least three days before he first spoke to police. The defendant did have access to a phone and could have called his attorney at least once during business hours. An attorney visit could be accommodated at the latest by the next shift, a matter of hours. 5/7/12 RP 790; 5/9/12 RP 1128, 1138-1141, 1188-91.

These findings support the court's conclusion that the defendant's statements to the detectives were voluntary. The defendant was fully advised by police and his counsel about his right to remain silent. The defendant had the opportunity to seek further advice from counsel before making his statements, but he chose not to. The police did not question the defendant at any time except when the defendant sought an interview. Instead he made a

reasoned decision to talk about the murder to police because it was "best for him and his conscience." 7 CP 1236.

The defendant argues that his statements were not voluntary because his conditions of confinement were unbearable, that he was improperly denied access to counsel pursuant to CrR 3.2.1 and the Sixth Amendment, and that he was improperly transferred to the jail under RCW 72.68.040 and .050. He argues these circumstances resulted in isolating the defendant and coercing him into providing a statement.

The defendant relies on the testimony of Dr. Grassian, the psychologist who testified on his behalf at the suppression hearing, to support his claim that his conditions of confinement were so oppressive, deplorable, and intolerable, that the defendant felt that he could not continue another minute, causing the defendant to negotiate for better conditions. Dr. Grassian based his conclusions on his 3 hour interview with the defendant conducted 14 months after the murder. 5/8/2012 RP 986-87, 1032.

The doctor's testimony regarding the defendant's conditions and his reaction to those conditions was refuted by other evidence showing the defendant was not suffering from any mental distress that overbore his will to resist and caused him to confess to the

crime. Dr. Grassian also testified that the defendant confessed to a prior rape and assault because of the intolerable guilt he felt about it, not as a result of the conditions of confinement. 5/8/12 RP 1026-1027. In his confession the defendant demonstrated that same level of remorse, when he broke down crying, and said "she didn't deserve to die...the bible says if you take a life you give a life. Ex. 115 at 55. The court's findings, supported by that substantial evidence, indicate that it did not find credible Dr. Grassian's testimony that the defendant was forced to bargain for better conditions with a confession. That determination is not reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The defendant also relies on other evidence to refute the court's finding that he was not suffering from the conditions of confinement to the point of desperation so that he felt he had to confess to murder in order to gain relief from them. 7 CP 1244. But that evidence does not support the defendant's claim that the conditions were so onerous they forced him to confess.

The defendant refers to "lights blazing for 24 hours a day." While lights were kept on while the defendant was in the safety cell, there is no evidence they were kept on continuously after the defendant was moved to segregation, within two days of his arrival

at the jail, and six days before he gave his first statement to police. The defendant also refers to poor ventilation and the odor of human waste. There was no evidence the cells were poorly ventilated. Even the grated holes in the safety cells could be and were flushed. CP 1216, 1218. The defendant was initially permitted hygiene items under supervision while he was still on suicide watch. He was permitted hygiene items in his cell after he was transferred to segregation on February 3. 7 CP 1220, 1225. The defendant was fed, with the exception of the first two meals of the day on January 30. CP 1220; 4/10/12 RP 607. The defendant had telephone access from the time that he was transferred to segregation. He exercised that privilege beginning February 4, five days before he gave the police his first statement. Although the time he was allowed to make calls did not usually coincide with the public defender's office hours, he had other means of contacting counsel if he wished to do so. CP 1222-26. The defendant himself said that he had been treated exceptionally well by the Monroe Police, the Sheriff's office, and with one exception, personnel at the jail. Ex. 115 at 52-53.

The defendant also claims that the delay in bringing him to court for a first appearance demonstrates that his statements were

involuntary. Contrary to his assertions however, he was not denied meaningful access to counsel, nor was he held incommunicado. He had private consultations with both Mr. Schwarz and Mr. Friedman days before he decided to give the police a statement.⁴ He could have written a kite to have further contact with counsel if he had wanted to. It did not take days, but rather hours to arrange a visit. Mr. Friedman was qualified to represent the defendant; he had experience trying homicides. Mr. Friedman recognized when he needed assistance from death penalty qualified attorneys, and sought their advice. Given the defendant's repeated statements that he would decide for himself whether to talk to the police or not, it is unlikely that SPRC qualified counsel would have made a difference in the defendant's decision to give a statement.

The record does not support the defendant's argument that access to counsel was pre-conditioned on making a statement or that he was granted favors as an inducement to give a statement. While the defendant's access to things was originally restricted due

⁴ The defendant states that Mr. Schwarz was "forced to bend down and communicate with through (sic) a little slot in an otherwise solid, closed door." Brief of Appellant at 169-70. To the extent this statement is meant to suggest that the conditions of the first interview impaired the defendant's access to advice of counsel, the evidence refutes that. Ex. 125 shows that the door had a large window above the slot. Mr. Schwarz did not testify that he was forced to bend down, only that he squatted down to look at the defendant through the slot. 5/7/12 RP 153-54.

to the suicide watch, the defendant had previously been on suicide watch and was familiar with those conditions. 5/9/12 RP 1273-75. Police never questioned the defendant about the murder until the defendant summonsed the detectives to his cell and told them he wanted to make a statement. Detectives repeatedly told the defendant that they would pass along his requests but had no control over his living conditions. The defendant's conditions of confinement gradually improved when MHPs were satisfied the defendant was not a danger to himself. Other conditions, like the lack of hot water, were not purposefully imposed on the defendant, and were remedied as soon as Captain Parker learned about them.

c. The Defendant's Constitutional Right To Counsel Had Not Attached When He Provided Statements To The Police.

The right to counsel under the Sixth Amendment and article 1, §22 are interpreted coextensively. State v. Medlock, 86 Wn. App. 89, 99, 935 P.2d 693, review denied, 133 Wn.2d 1012 (1997). A defendant's rights under the Fifth and Sixth Amendments are separate and distinct. McNeil v. Wisconsin, 501 U.S. 171, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991). The Sixth Amendment right does not attach until a prosecution has been commenced. Id. at 175. A prosecution is commenced upon filing a formal charge, at a

preliminary hearing or at arraignment. Kirby v. Illinois, 406 U.S. 682, 689, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972); State v. Radcliffe, 164 Wn.2d 900, 905, 194 P.3d 250 (2008).

Here the defendant was not charged until February 24, 14 days after he gave the police his first recorded statement. 8 CP 1617. His right to counsel had therefore not attached at the time he gave his statements to the detectives. The defendant ignores this fact and instead argues his right to counsel under the Sixth Amendment was violated when he spoke to police. He points to his request for counsel within hours after Officer Biendl's murder had been discovered and again on February 4 when the detectives mistakenly were told that the defendant had requested to meet with them. He then argues that the police used the search warrants to gain access to him in violation of his right to counsel.

Under circumstances similar to those presented in this case, the U.S. Supreme Court has held that an inmate being investigated for a crime committed in prison does not have a Sixth Amendment right to counsel until he has been charged with a crime. United States v. Gouveia, 467 U.S. 180, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984). Nor did the right accrue because the police investigation involved the defendant's body. Kirby, 406 U.S. at 690. Like the

inmate in Gouveia, the defendant's detention in segregation while the murder was being investigated did not trigger his right to counsel. Nor did the defendant's right accrue when police served the search warrant to photograph the defendant's body. The defendant's statements were not inadmissible as a result of a violation of any right under that constitutional provision.

C. THE COURT PROPERLY EXERCISED ITS DISCRETION WHEN PORTIONS OF THE DEFENDANT'S RECORDED STATEMENTS WERE NOT REDACTED.

The defendant argues that certain portions of the recorded statements constituted error. Because no error occurred, or if error occurred it was harmless, the argument should be rejected.

1. Statements Regarding Ointment, Shoelaces, And Cartoon.

Police located A&D ointment and shoelaces concealed in a potted plant during the search of the chapel. 5/6/13 RP 6479. The defendant told police that he hid those items in the plant because he thought it would look bad if those items were found in his pocket. The defendant also told police he gave Officer Biendl a cartoon of a wolf in sheep's clothing two days before the murder. Ex. 115 at 30, 40-41. The defense moved to exclude those statements on the basis that they were not relevant. 1/16/13 RP 1606-07, 1612. He now argues that the evidence should have been redacted because

it was unfairly prejudicial and likely to mislead the jury under ER 403. Because he did not raise that specific objection at trial, the issue has been waived. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986).

If the court considers the issue, no error occurred. A trial court's decision regarding the admission of evidence is reviewed for an abuse of discretion. State v. Greathouse, 113 Wn. App. 889, 918, 56 P.3d 569 (2002), review denied, 149 Wn.2d 1014 (2003). "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." In re Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). The trial court ruled that these two items of evidence were relevant to show the defendant was present in the chapel when the murder happened and that he knew Officer Biendl before the murder. 1/16/13 RP 1610-11, 1614. Evidence confirming that the defendant was present at the time of the murder tended to show that he committed the murder. Evidence that the defendant knew Officer Biendl beforehand helped show that he premeditated the murder and he knew that she was a corrections officer. The court had tenable reasons for admitting the evidence, so it did not abuse its discretion when it overruled the defendant's objection.

This evidence was not unfairly prejudicial. Evidence is unfairly prejudicial if it is likely to evoke an emotional response rather than a rational decision. State v. Beadle, 173 Wn.2d 97, 120, 265 P.3d 863 (2011). Nor was the evidence particularly confusing. See State v. Vreen, 143 Wn.2d 923, 932, 26 P.2d 236 (2001) (no error in excluding evidence regarding defendant's pretrial statement that contradicted evidence that he stipulated to). Neither the items the defendant said he used for running nor the cartoon were particularly unusual items. The cartoon in particular was the type of dark humor one might expect circulating in a prison. These items were not likely to evoke an emotional response or confuse the jury, particularly when considered next to the defendant's graphic description of how he murdered the officer.

2. Officer's Questions Regarding Murder.

The defendant objected to the detective's question asking what the defendant would tell Officer Biendl if she could hear him, claiming that it was irrelevant and unfairly prejudicial. The court ruled that the question was relevant because the defendant refused to answer it, demonstrating the defendant's will had not been overcome, thus lending credibility to the substance of his

statements. It ruled that the probative value substantially outweighed any prejudice. 1/16/13 RP 1615-18.

The defendant objected to the detective's follow up question referencing the murder, arguing that this was a legal conclusion. 1/16/13 RP 1653-54. The court overruled the objection on the basis that reference to murder did not prejudice the defendant in light of other circumstances that were anticipated to be presented to the jury. 1/16/13 RP 1654-55.

The defendant argues that the trial court erred when it did not exclude these portions of his statements. The court's reasoning establishes a tenable basis on which to admit the evidence.

The questions did not presuppose the defendant was guilty. The answer to "If she could hear you what would you tell her?" could have been an inculpatory statement like "I'm sorry I killed you." Or it could have been an exculpatory statement like "I hope that whoever did this to you is caught." Or it could be a neutral statement like the defendant's actual response that he did not want to talk about that subject at that time. 1/61/13 RP 1615; Ex. 115 at 42.

Nor was the question a trick question, trapping the defendant into saying something he would not otherwise have said. When the

officer asked the question the defendant had already admitted that he had strangled the officer to death. Ex. 115 at 4, 43; ex. 118 at 6. For that reason this was unlike the improper “when did you stop beating your wife” question cited by the defendant in United States v. Felix–Jerez, 667 F.2d 1297, 1303 (9th Cir. 1982). Nor were the questions unfairly prejudicial. They were merely follow-up questions to statements the defendant made explaining his relationship with Officer Biendl and how he caused her death.

For that same reason the court did not abuse its discretion by not redacting the reference to a “murder” in the second interview, when Det. Walvatne talked to the defendant about the clothes he wore. 1/16/13 RP 1653-55; ex. 118 at 6. Whether the defendant committed a murder was not at issue; the defendant had admitted murdering Officer Biendl by strangling her. Ex. 115 at 4. The detective's use of the term “murder” did not add anything to what the defendant had already admitted.

3. Statements Regarding Resolution Of The Case.

The defendant argues that several of the statements improperly invited the jury to infer guilt and absence of mitigation because he exercised his constitutional right to a jury trial. He points to the detectives' statement “I need your help with regarding

a speedy resolution." 1/16/13 RP 1650. This was the defendant's statement in a kite he wrote to the detective. The detective was confirming that the defendant wrote it. Ex. 118 at 2-3. He also points to his statement that the "bible says if you take a life you give a life." 1/16/13 RP 1631; ex. 115 at 60. The defendant additionally points to statements he made regarding a quick resolution to the case for the sake of Officer Biendl's family.⁵ Lastly he points to the February 14 kite he wrote to the prosecutor, asking the prosecutor to charge him with aggravated first degree murder and stating that he would plead guilty at arraignment. Ex. 123.

The State may not draw any adverse inference from the defendant's exercise of a constitutional right. State v. Gregory, 158 Wn.2d 759, 806-07, 147 P.3d 1201 (2006). The question is whether the prosecutor manifestly intended to comment on the right. State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991), cert. denied, 501 U.S. 1237 (1991). A constitutional right has not been improperly infringed upon as long as the focus of the question is not upon the exercise of the constitutional right itself. Gregory, 158

⁵ The defendant also refers to alleged statements regarding the "horror" for Officer Biendl's family. Brief of Appellant at 176-77. No doubt her murder was horrific for them. However, the defendant's citations to the record do not reference that horror.

Wn.2d at 807.

In Gregory the prosecutor asked a rape victim how she felt about testifying against the defendant. In closing argument, the prosecutor referenced those statements to argue that the victim would not have put herself through the trial to avenge a broken condom, which was the defense theory of the case. Id. at 806. This court found that the evidence and argument resulted in no improper comment on the defendant's right to cross examine the witness. The court reasoned that the focus was on the credibility of the witness, rather than the exercise of the constitutional right.

The record here even more strongly supports the conclusion that the evidence did not constitute a comment on the defendant's exercise of his right to trial or the sentence that should be imposed. The State offered these statements because they were straightforward explanations about why the defendant was talking to the police. The evidence supported the conclusion that his statements were voluntary, and therefore credible. 1/16/13 RP 1616, 1634, 1638-39, 1647. In closing argument, the prosecutor argued that the defendant's statements established the elements of the crime. He but never referenced the defendant's reasons for confessing or suggested that he made a broken promise to plead

guilty. Rather, he reminded the jury that "every defendant has a right to a jury trial and put the State's evidence to the test and have a jury decide whether the State has proved the case beyond a reasonable doubt." 5/9/13 RP 6898, 6902-09, 6936-37. Nor did the prosecutor suggest that the defendant's exercise of his right to trial was a reason there were insufficient mitigating circumstances to merit leniency. 5/14/13 RP 7134-43, 7163-69. Under these circumstances the trial court did not err when it denied the defendant's motion to redact those portions of his recorded statements.

4. The Defendant's Own Statements Regarding Penalty Were Relevant And Not Improperly Admitted.

The court allowed admission of the entire text of the February 14 kite where the defendant asked the prosecutor to charge him with aggravated first degree murder and seek the death penalty. The defendant promised in that kite to plead guilty to the charge. Ex. 123; 5/7/13 RP 6686. This evidence bore on the credibility of the defendant's prior statements. The kite represented the defendant's unsolicited confession to the crime, lending credence to his earlier statements in response to the detectives' questions.

The defendant argues that the February 14 kite improperly told jurors what sentence to impose. He claims that this opinion violates the Eighth Amendment, citing State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996); and Gregory, 158 Wn.2d at 853. In each of these cases, this court held that the Eighth Amendment bars victim impact testimony that argues for a particular punishment.

Neither of these cases addresses whether it is error to admit a defendant's own statement about what an appropriate penalty should be. Victim impact statements addressing the nature of the crime or the punishment that should be imposed can be emotionally charged and therefore inconsistent with the reasoned decision making required in capital cases. Booth v. Maryland, 482 U.S. 496, 508, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), overruled, Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2497, 115 L.Ed.2d 720 (1991). In contrast a defendant's own statement is unlikely to generate the kind of negative emotional response possible from a victim's statement. The defendant's statement here regarding punishment may have actually mitigated toward leniency, since the defendant was taking personal responsibility for his crime, signaling his

remorse. Remorse is relevant when determining penalty. In re Elmore, 162 Wn.2d 236, 263, 172 P.2d 335 (2007).

5. The Defendant's Statements That He Chose To Reject the Advice Of His Counsel.

Finally the defendant argues that portions of his statements indicating that he had met with counsel and was talking to police against advice of counsel were cumulative, because there already was a waiver of right to counsel at the beginning of each statement. He argues that the evidence was misleading because there had been a delay in obtaining counsel for him, and when counsel was provided the attorneys he spoke to were not qualified to handle capital cases.

The defendant objected to evidence that Det. Walvatne asked the defendant about a statement that he made to Det. Ryan concerning not always listening to advice of counsel. The detective also asked the defendant about having met with counsel before speaking to the detective. In each instance the defendant acknowledged that he had been advised not to speak to the police and he chose to reject that advice. He primarily objected to this evidence on the basis that it was hearsay, not relevant, and was more prejudicial than probative. Counsel also argued that the

evidence was "somewhat cumulative" 1/16/13 RP 1632-34, 1645, 1652-53; CP 1067-71. The court held the evidence relevant to the voluntariness of the confession. It determined that the possible prejudice was speculative, and that any prejudice was outweighed by the probative value. 2/16/13 RP 1691-94.

Relevant evidence may be excluded if it constitutes "needless presentation of cumulative evidence." ER 403. Evidence is not necessarily cumulative simply because it comes in through several sources that are consistent. A trial court does not abuse its discretion by permitting multiple accounts of an event where each account presents a perspective that assists the State in proving its case. State v. Smith, 82 Wn. App. 327, 333, 917 P.2d 1108 (1996), review denied, 130 Wn.2d 1023 (1997).

The defendant argues that since each statement that he gave included an express waiver of right to counsel, evidence he actually spoke with an attorney before giving the statement was unnecessary. The evidence presented two different perspectives on the voluntariness, and therefore the credibility, of the defendant's statements. The express waivers demonstrate that the defendant intellectually understood his rights. The statements about consultations with counsel demonstrate in a concrete way that he

understood the right and was willingly proceeding in spite of counsel's advice.

The defendant did not object to the evidence on the basis that it was misleading. That basis for redaction has not been preserved for review. Guloy, 104 Wn.2d at 422. If the Court decides to review this basis, however, the evidence was not misleading.

The defendant claims that the evidence was misleading because police did not timely provide him access to counsel. But the defendant talked to two different attorneys before he decided to provide police with a statement. He asked for counsel on January 29-30. He spoke with counsel on the morning of January 30 and again on February 2. Police did not question him thereafter until he contacted them and agreed to give a statement, 7 days later. 4/9/12 RP 480, 500; 4/10/12 RP 613, 615, 629-31, 636-39, 649-53. The opportunity for advice of counsel before giving a statement was the critical fact. A short delay in arranging for counsel to meet with the defendant did not diminish the voluntariness of the defendant's ultimate decision to provide a statement several days later.

The defendant also asserts that evidence he had spoken with an attorney before deciding to give a statement was misleading because the attorneys assigned to his case were not

SPRC 2 qualified attorneys. That rule applies to all stages of proceedings in criminal cases where the death penalty may be decreed. SPRC 1. There was nothing misleading about evidence that the defendant talked to an attorney before deciding to give a statement because no charges had been filed against the defendant at the time and he was therefore not entitled to death-penalty qualified counsel.

Even if the rule applied at the time the defendant made his statements, the rule contemplates that a defendant may be represented by "otherwise qualified counsel" who is learned in the law of capital punishment by virtue of training or experience. SPRC 2. An attorney who may not be experienced in capital cases, but who has experience handling homicide cases, may nonetheless provide competent representation to a defendant facing the death penalty. Elmore, 162 Wn.2d at 256, n. 4. Mr. Friedman certainly falls within that category, having worked as a criminal defense attorney for approximately 25 years at the time of trial. Mr. Friedman handled numerous homicide cases, some with the deputy prosecutors assigned the case and with the elected prosecutor. When he was unclear about some matter related to representing

the defendant, Mr. Friedman obtained the advice of attorneys who had previously handled capital cases. 5/7/13 RP 893, 895.

The record also makes clear that Mr. Schwarz and Mr. Friedman both gave the defendant the same advice the defendant now appears to argue SPRC 2 qualified counsel would give; i.e. do not give the police a statement. After talking to Mr. Schwarz, the defendant told Det. Ryan that he knew what his attorney would recommend and he would make his own decision about making a statement. The defendant later clarified that his attorney told him not to make a statement, but he had decided to make one anyway. 5/7/12 RP 853, 874; ex. 115 at 55; ex. 118 at 4; ex. 124 at 4. The defendant does not explain why an SPRC 2 qualified attorney giving the same advice would have made a difference. The record demonstrates that it would not. Evidence that the defendant spoke to an attorney before deciding to give a statement was not misleading simply because the assigned attorney did not appear on an SPRC 2 list.

V. ARGUMENT RELATING TO NOTICE OF SPECIAL SENTENCING PROCEEDING

A. THE NOTICE OF SPECIAL SENTENCING PROCEEDING WAS TIMELY FILED.

1. When Statutes Require That Action Be Taken “Within X Days After” A Specified Event, They Have Never Been Construed As Precluding Action Prior To That Event.

The prosecutor filed the notice of special sentencing proceeding at the beginning of the arraignment hearing. 3/16/11 RP

2. The defendant claims that the prosecutor was required to wait a few minutes until arraignment was over. This “error,” he claims, renders the notice invalid. The defendant waited until 46 days after arraignment to raise the issue, thereby avoiding any possibility that the alleged error could be corrected. 15 CP 2874.

The procedure for filing a notice of special sentencing proceeding is set out in RCW 10.95.040(2):

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

The defendant argues that the phrase “within 30 days after the defendant’s arraignment” precludes service or filing of the notice prior to arraignment. In other words, he claims that the phrase is synonymous with “between the defendant’s arraignment and 30 days thereafter.” This interpretation should be rejected.

This court decided a substantially identical issue in Adams v. Ingalls Packing Co., 30 Wn.2d 282, 191 P.2d 699 (1948). That case construed a statute governing perfection of conditional sales contracts. Such contracts had to be filed in the auditor’s office “within ten days after the taking of possession by the vendee.” The vendor had filed the contract a day *before* the vendee took possession. The vendee’s receiver argued that the statute required filing *after* the vendee took possession. This court rejected that argument. It held that the statute fixed the termination of the permissible period but not its commencement. Id. at 285-86.

In reaching this conclusion, the court cited two prior cases. One dealt with an appeal from a street improvement assessment. By statute, such appeals had to be filed “within 10 days after the ordinance becomes effective.” The court held that an appeal filed *prior* to the effective date of the ordinance was valid: “[T]he use of the word ‘within’ itself is not necessarily limited to the time

preceding the commencing of the period named, but ... it does fix the termination of the period." In re Cliff Ave. Improvement, 122 Wash. 335, 339, 210 P. 676 (1922).

In the other case cited in Adams, the U.S. Supreme Court construed a statute governing assessment of customs duties. Protests of such assessments had to be made "within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs." The court held that a protest made *before* final ascertainment was valid. "The clause ... fix[es] only the *terminus ad quem*, the limit beyond which the notice shall not be given, and not ... the *terminus a quo*, or the first point of time at which the notice may be given. Davies v. Miller, 130 U.S. 284, 288-89, 9 S.Ct. 560, 32 L.Ed. 932 (1889).

Subsequent to Adams, this court continued to apply the same interpretation. The court construed a statute requiring that chattel mortgages be filed "within ten days from the time of the execution thereof." In a dictum, the court said that "such statutes fix the *Terminus ad quem*, that is the limit beyond which the filing time shall not extend, rather than the *Terminus a quo*, or the first point in the filing time." Dando v. West Wind Corp., 67 Wn.2d 104, 110, 406

P.2d 927 (1965). The defendant does not cite even a single case applying a contrary interpretation.

2. The Interpretation Urged By The Defendant Would Defeat The Statute's Purpose, By Potentially Allowing Defendants To Preclude Application Of The Death Penalty By Pleading Guilty At Arraignment.

This result is further supported by rules of statutory construction. "The language of a statute should be construed to carry out, rather than defeat, the statute's purpose." State v. Votova, 149 Wn.2d 178, 184, 66 P.3d 1050 (2003). As the defendant acknowledges, RCW 10.95.040 was designed to avoid the problems identified in State v. Martin, 94 Wn.2d 1, 614 P.2d 164 (1980), and State v. Frampton, 95 Wn.2d 469, 627 P.2d 922 (1981). See Brief of Appellant at 92. Those cases involved a former version of the death penalty statute. That version allowed defendants to avoid the death penalty by pleading guilty at arraignment, before the notice of special sentencing proceeding was filed. This possibility rendered the entire statute unconstitutional.

RCW 10.95.040(2) avoids the possibility, by precluding the defendant from pleading guilty "during the period in which the prosecuting attorney may file the notice of special sentencing

proceeding.” Under the defendant’s interpretation, however, the notice may not be filed until *after* arraignment. Thus, the arraignment itself is not “during the period in which the prosecutor can file the notice.” Consequently, the defendant’s interpretation would allow defendants to plead guilty at arraignment, before the notice can be filed. In the trial court, the defendant specifically asserted that this possibility existed. 15 CP 2892-93. This is precisely what that the statute was intended to prevent.

In contrast, under the interpretation required by Adams, the notice may be filed prior to arraignment. Consequently, arraignment itself falls during the period in which the prosecuting attorney may file the notice. A defendant can therefore not plead guilty at arraignment without the prosecutor’s consent. The legislative purpose is thus fulfilled.

The defendant claims that this interpretation “renders the word ‘within’ meaningless and unnecessary.” Brief of Appellant at 87. To refute this claim, it is only necessary to consider how the statute would read without that word: “The notice of special sentencing proceeding shall be filed and served ... ~~within~~ thirty days after the defendant’s arraignment.” That language would establish a specific date for filing. If construed literally, it would not

permit filing either before or after that date. The word "within" establishes a time limit rather than a specified date. It is not superfluous.

3. Other Provisions Of The Death Penalty Statutes Provide Further Support For The Trial Court's Interpretation.

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. See City of Seattle v. Winebrenner, 167 Wn.2d 451, 460-62 ¶¶16-19, 219 P.3d 686 (2009) (construing statute setting mandatory minimum sentences for DUI when offenders have prior convictions for offenses "within seven years of the arrest for the current offense"). 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.

The defendant also points to other portions of RCW ch. 10.95 that contain similar language. RCW 10.95.110 (requiring clerk to commence preparation of report of proceedings within 10 days after entry of judgment and sentence), RCW 10.95.120 (requiring judge to submit a proportionality report within 30 days after entry of judgment and sentence), RCW 10.95.170 (requiring offender to be imprisoned within 10 days after entry of judgment and sentence), 10.95.190 (requiring return of death warrant within 20 days after execution). These provisions do not support the defendant's arguments. In some of these situations, the action could not reasonably be taken prior to the specified event (for example, the death warrant could not be returned prior to the execution). The legislature would have no reason to enact a statute barring actions that are essentially impossible. In other situations, there is no reason to preclude an early start. For example, if a Clerk wanted to commence preparation of the report of proceedings *before* sentencing, why would the legislature wish to prevent that? Or if a sentencing judge wished to provide copies of the proportionality report to the parties at sentencing, before the judgment was filed, why would the legislature stop the judge from doing so? These statutory provisions are entirely consistent with

the standard construction of this language: it sets a termination date, not a start date.

4. The “Rule Of Lenity” Is Inapplicable To This Issue.

Finally, the defendant seeks to invoke the “rule of lenity.” Under that rule, “[i]f a penal statute is ambiguous and thus subject to statutory construction, it will be strictly construed in favor of the defendant.” This rule “helps further the separation of powers doctrine and guarantees that the legislature has independently prohibited particular conduct prior to any criminal law enforcement.” State v. Evans, 177 Wn.2d 186, 193 ¶ 11, 298 P.3d 724, 728 (2013), citing United States v. Bass, 404 U.S. 336, 348, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971).

The issue here, however, does not involve a statute setting either crimes or punishments. Construing the statute in one way or another neither provides notice of what acts are prohibited nor implicates separation of powers concerns. Since the purposes of the rule of lenity are not implicated, that rule should not be applied.

Nor is the defendant’s proposed interpretation truly “lenient.” Although he personally would benefit, future defendants would not. Rather, the effect of accepting his argument would be to prevent future prosecutors from giving early notice of their intent to seek the

death penalty. The defendant himself complains that he was harmed by the prosecutor's *delay* in filing the notice. Brief of Appellant at 98-102. As discussed below, this argument is unfounded in the present case. It nonetheless illustrates that early filing of the notice can be advantageous to defendants. This being so, an interpretation precluding early filing is not "lenient," so the rule of lenity is inapplicable.

In any event, the "rule of lenity" adds little if anything to the analysis of the present case. In applying that rule, the court will first determine whether the statute is ambiguous. If it is, the court will determine whether statutory construction clearly resolves the ambiguity. Only if it does not will the "rule of lenity" be applied. Evans, 177 Wn.2d at 192-94 ¶¶ 8-12.

Here, the statute is not ambiguous. Statutory requirements that an action be taken "within X days after" some event have *never* been construed as precluding that action *prior* to the event. Moreover, adopting the defendant's construction would clearly defeat the statute's purpose. The "rule of lenity" therefore has no application. Under a correct construction of the statute, the notice of special sentencing proceeding was timely filed.

B. A 46-DAY DELAY IN DECIDING WHAT CHARGES TO FILE AND WHETHER TO SEEK THE DEATH PENALTY DOES NOT VIOLATE THE DEFENDANT'S RIGHTS.

Immediately after arguing that the notice of special sentencing proceeding was filed too soon, the defendant claims that it was filed too late. He argues that the "prosecutor's intentional, lengthy delay in charging and filing of the death penalty notice prior to arraignment" resulted in a denial of the right to counsel.

It is not clear what "lengthy delay" the defendant is talking about. The murder was committed on January 29. The defendant was assigned counsel on February 1. 4 CP 898. Charges were filed in District Court on February 24 and in Superior Court on March 11. 4 CP 900; 16 CP 3135. The notice of special sentencing proceeding was filed on March 16. 16 CP 3109. That date is only 46 days after the murder and a mere 5 days after the filing of Superior Court charges.

To establish a due process violation from pre-charging delay, the defendant must first show that the delay caused prejudice. If this showing is made, the court then examines the State's reasons for the delay. State v. Salavea, 151 Wn.2d 133, 139, 86 P.3d 125 (2004).

Here, the defendant claims that he was prejudiced because he was "unable to obtain funds to retain experts, seek assistance with investigating mitigation, and time to adequately review and analyze the discovery before the prosecutor's decision to seek the death penalty." Brief of Appellant at 102. This argument is absurd. If the notice had been filed earlier, counsel would have had *less* opportunity to influence the *prosecutor's* decision. After the notice was filed, the defense had over two years to develop evidence that might influence the *jury's* decision. There is no showing of prejudice.

Nor is there any showing of any improper reason for the delay. A prosecutor is entitled to investigate the case before deciding whether charges should be filed. Routine investigative delay does not violate due process. Salvea, 151 Wn.2d at 146. Forty-six days was a minimal amount of time to investigate this case, determine what charges would be filed, and review information about the defendant to determine whether there were sufficient mitigating circumstances to warrant leniency. The slight pre-charging delay did not violate the defendant's rights.

C. THE PROSECUTOR'S DECISION TO SEEK THE DEATH PENALTY WAS BASED ON A PROPER INVESTIGATION OF POTENTIAL MITIGATING CIRCUMSTANCES.

The defendant next argues that the prosecutor provided an inadequate opportunity to investigate and present mitigating evidence before the notice of special sentencing proceeding was filed. This argument reflects a misunderstanding of the nature of the prosecutor's decision.

This court has never recognized a prosecutor's discretion to file charges or to seek the death penalty as a judicial function. A prosecutor need not hold a public hearing before deciding whether to file charges; the decision to prosecute is based on the prosecutor's ability to meet the proof required by the statute. Additionally, this court has emphasized that when making the determination to seek the death penalty the prosecutor does not determine the sentence; the prosecutor merely determines whether sufficient evidence exists to take the issue of mitigation to the jury. The jury or the judge makes the determination of guilt and the appropriate sentence, not the prosecutor.

State v. Finch, 137 Wn.2d 792, 809-10, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999) (citations and footnote omitted).

Due process does not require a hearing to decide whether a person can be charged with a crime. This is because the filing of charges does not affect the defendant's liberty interest. That interest is affected only if the defendant is convicted by a fact-finder

and sentenced by the court. State v. Tracy M., 43 Wn. App. 888, 892, 720 P.2d 841 (1986).

Under RCW 10.95.040, a prosecutor is not required to conduct "an exhaustive investigation into mitigating circumstances. A county prosecutor's investigation satisfies RCW 10.95.040(1) so long as it enables him or her to determine whether 'there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.'" State v. Monfort, 179 Wn.2d 122, 133 ¶ 20, 312 P.3d 637 (2013). The prosecutor need not investigate the case to the same extent as defense counsel. Id. at 132-33 ¶ 19. Such investigations typically take many months if not years. See 5 CP 908-09 (defense memo listing time frames for "mitigation packets" in other cases). In the present case, the defendant's "mitigation specialist" continued to investigate the case until at least the eve of trial – over two years after arraignment. 3 CP 601-02 (defendant's ex parte motion for additional funding for mitigation specialist).⁶ This is far more than the 30 days that RCW 10.95.040(2) allows for the

⁶ This motion describes the "work yet to be done by mitigation specialist" as of the month that trial begin. Over the State's objection, the trial court granted the defendant's motion to keep this portion of the document sealed while the case is on appeal. Consequently, the State is unaware of the nature of the work that was being performed at that time.

prosecutor's decision.

Even assuming that defendants have some right to present information to the prosecutor, the prosecutor here gave the defense more than the amount of time contemplated by statute. Counsel was appointed for the defendant on February 1, 2011. One of the attorneys who represented him through the trial was appointed on February 14. The prosecutor requested mitigation information by March 8, so that he could file the notice by March 16. 4 CP 898-903. This was 43 days after the appointment of counsel – more than the 30-day period for this decision that is specified by RCW 10.94.040(2).

Nor was this the end of the prosecutor's willingness to consider mitigation. On the eve of trial, he was still willing to reconsider his decision:

If the defense has discovered any mitigating evidence in [the two years since the defendant's arraignment], they are free to present it to the Prosecutor. He will reconsider his decision on the basis of that evidence. If he decides that the mitigating evidence is sufficient to merit leniency, he will agree to have the notice of special sentencing proceeding stricken.

Indeed, the prosecutor said that he would "welcome the opportunity" to consider any mitigating evidence that had become

available." 5 CP 886; see 3/25 RP 1950 (same offer made in open court).

The defense *never* took advantage of this opportunity. Even at trial, nothing was presented in mitigation that was not known to the prosecutor at the time he made his initial decision. It is absurd to suggest that if the prosecutor had waited a few more weeks or months his decision would somehow have been different.

The defendant's arguments here are analogous to those that this court rejected in State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996). There, the prosecutor made a tentative decision to seek the death penalty only three days after the murders. He then gave the defense 30 days to present mitigating evidence before filing the notice.

On appeal, the defendant argued that he should have received a greater opportunity to present mitigation. The court rejected this argument:

Had the prosecutor in this case announced a decision [three days after the murders] and then refused to accept any additional evidence, it would indicate an unwillingness to engage in [an] individualized weighing... However, that is not what happened here. The prosecutor announced a tentative decision, specifically said he would look at mitigating evidence developed by the defense, and then waited the full 30 days.

Moreover, the prosecutor had a “substantial amount of information” about the defendant, in view of his extensive contact with local law enforcement officers. In view of these facts, the prosecutor did not abuse his discretion in deciding to file the notice. Id. at 642-43.

Although the prosecutor did not wait out the full statutory period in this case, the defense had more time to present mitigation information than it did in Pirtle. There, the notice was filed 33 days after the murders. Here, it was filed 46 days after the murder, which was 43 days after counsel was appointed for the defendant. There, the prosecutor had extensive information about the defendant due to his lengthy criminal record. Here, the prosecutor had even more extensive information, since the defendant had been imprisoned for most of his adult life.

Even more significantly, the prosecutor there was willing to reconsider his decision for only 30 days. Here, the prosecutor was willing to reconsider his decision for over two years. If it is permissible for the prosecutor to make a tentative decision subject to reconsideration within 30 days, it is equally permissible to make a tentative decision subject to reconsideration at any time before trial. The prosecutor’s decision-making process did not violate due process requirements.

The defendant's brief lists two additional issues connected with this subject. Both involve the prosecutor's willingness to consider mitigating information after the notice was filed. One issue asks whether this procedure violated the "presumption of leniency." The other issue asks whether the procedure violated the requirement of an individualized inquiry into the defendant's character and circumstances. Brief of Appellant at 10, issues nos 4, 5. Neither issue is supported by any argument. Issues that are not supported by argument will not be considered on appeal. McKee v. American Home Products Corp., 113 Wn.2d 701, 705, 782 P.2d 1045 (1989). In any event, this court rejected has rejected similar arguments. In re Harris, 111 Wn.2d 691, 692-95, 763 P.2d 823 (1988), cert. denied, 490 U.S. 1075 (1989) (upholding prosecutor's policy of seeking death penalty unless defendant called his attention to evidence of mitigating circumstances).

D. NEITHER THE CONSTITUTION NOR COURT RULES MANDATE DISCOVERY OF HOW THE PROSECUTOR EVALUATED THE EVIDENCE.

The defendant filed a motion seeking "discovery of the evidence of mitigating circumstances considered by the prosecuting attorney in seeking to impose the death penalty against Mr. Scherf in this matter." 13 CP 2577. In response, the State asserted that the

defense had already been provided all of the discovery materials that the Prosecutor had reviewed. 13 CP 2559. The defense did not dispute this assertion. Rather, they sought to have the prosecutor to identify, within that discovery, "those materials which the prosecutor considered as mitigating under the statute." 8/3/11 RP 173. The defendant has assigned error to the trial court's denial of this motion. Brief of Appellant at 1, assignment of error 3; *Id.* at 11, issue no. 6.

Although this issue involves discovery, the defendant cites no authority dealing with discovery issues. The information that the defendant sought does not fall within any of the prosecutor's discovery obligations set out in CrR 4.7(a). Moreover, CrR 4.7(f)(1) precludes discovery of work product:

Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda to the extent they contain the opinions, theories, or conclusions of investigating or prosecuting agencies except as to material discoverable under subsection (a)(1)(iv) [*i.e.*, reports of experts].

The work-product doctrine "shelters the mental processes of the attorney." This doctrine applies in criminal cases to both the prosecution and the defense. State v. Pawlyk, 115 Wn.2d 457, 476-77, 800 P.2d 338 (1990). Here, the purpose of the motion was to

determine what specific matters the Prosecutor considered to be "mitigating." 8/3/11 RP 175-76. The motion thus sought disclosure of the opinions and conclusions that the Prosecutor reached from his review of the evidence. Such disclosure is barred by CrR 4.7(f)(1).

Constitutional analysis does not change this conclusion. In general, there is no constitutional right to discovery in criminal cases. Weatherford v. Bursey, 429 U.S. 545, 559, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977). A defendant does have a right to disclosure of evidence that is favorable to the defendant and material to guilt or punishment. State v. Blackwell, 120 Wn.2d 822, 828, 845 P.2d 1017 (1993). To establish a right to discovery, "[a] defendant must advance some factual predicate which makes it reasonable likely the requested [documents] will bear information material to this or her defense." Id. at 830. The mere *possibility* that an item of evidence might help the defense does not give rise to a right of discovery. State v. Gonzalez, 110 Wn.2d 738, 750, 757 P.2d 925 (1988).

Here, the defendant was given full discovery of potentially mitigating evidence. The prosecutor's analysis of that evidence is not an exculpatory fact. The defendant made no showing that

disclosure of the defendant's mental processes would result in information material to the defense.

Rather than argue discovery obligations, the defendant raises a different claim: that failure to disclose this information makes the prosecutor's decision "unreviewable." Brief of Appellant at 110-15. The same argument could, however, be raised in any case. Although prosecutors have broad charging discretion, the exercise of that discretion can be reviewed under some circumstances. For example, even in non-capital cases, courts can determine whether the prosecutor improperly applied a mandatory charging policy. State v. Pettitt, 93 Wn.2d 288, 296, 609 P.2d 1364 (1980). Courts can also determine whether the prosecutor's decision complied with constitutional requirements such as equal protection. State v. Talley, 122 Wn.2d 192, 214, 858 P.2d 217 (1993). The possibility of this kind of review has never mandated discovery of the prosecutor's analysis of the evidence.

Nor does the absence of such discovery render a prosecutor's decision unreviewable. A decision is not rendered arbitrary and capricious simply because the decision-maker did not explain the reasons for that decision. Wash. Ass'n for Retarded Citizens v. City of Spokane, 16 Wn. App. 103, 110, 553 P.2d 450

(1976). For example, when judges impose an exceptional sentence, they are not required to explain their reasons for the *length* of that sentence. Appellate courts will nonetheless determine whether the sentence imposed was “clearly excessive.” The absence of a statement of reasons does not prevent this review. State v. Ritchie, 126 Wn.2d 388, 392-96, 894 P.2d 1308 (1995).

In capital cases as well, this court has been able to review charging decisions without disclosure of the prosecutor’s mental processes. This occurred, for example, in State v. McEnroe, 179 Wn.2d 32, 309 P.3d 426 (2013). The prosecutor there, in announcing his decision to seek the death penalty, stated that he had considered mitigating circumstances. Defense counsel asked for clarification concerning the information he had considered. The prosecutor responded that he “considered the facts and circumstances alleged that formed the basis for charging the [defendants] and also considered mitigation materials submitted by defense counsel.” Id. at 15-16. Based on this information, this court concluded “that the prosecutor did as the statute directed: he considered whether the mitigating circumstances sufficed to merit leniency.” Id. at 40-41 ¶¶ 15-16.

There is no indication in McEnroe that the prosecutor provided a list of what portions of the information he considered to be mitigating or non-mitigating. Nonetheless, his general disclosure of the information considered was sufficient to warrant review by this court. The same is true here. The prosecutor specifically disclosed the extensive information that he relied on. This is sufficient for the limited review to which prosecutorial decisions are subject.

E. THIS COURT HAS ALREADY HELD THAT AN ALLEGATION CONCERNING THE ABSENCE OF MITIGATING CIRCUMSTANCES NEED NOT BE INCLUDED IN THE INFORMATION.

The defendant argues that the information was insufficient because it failed to allege the absence of mitigating circumstances. After his brief was written, this court issued its decision in McEnroe. There, the court rejected an identical argument. It held that allegations concerning mitigating factors need not be included in the information. It is sufficient if the notice of special sentencing proceeding alleges that there are not sufficient mitigating circumstances to merit leniency. Id., 181 Wn.2d at 385-86 ¶¶ 22-23. The Notice in the present case included such an allegation. 16 CP

3098. The charging documents satisfied constitutional requirements.

F. BECAUSE THERE IS NO EVIDENCE THAT THE DEFENDANT SUFFERS FROM AN INTELLECTUAL DISABILITY, THE PRECISE DEFINITION OF THAT TERM IS IRRELEVANT.

Both statutory and constitutional authority precludes imposition of the death penalty against a person with an intellectual disability. RCW 10.95.030(2); Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). These prohibitions have no bearing on the present case. There is no evidence that the defendant suffers from any intellectual disability. To the contrary, a psychologist hired by the defense characterized him as a “reasonably bright guy.” His IQ has been measured, on different occasions, as 106 (which is average) and 110 (which is above average). 5/8/12 RP 1027. In college-level courses, he had a cumulative GPA of 3.5. Ex. 197.

The defendant nonetheless argues that there is an inconsistency between the statutory and constitutional definitions of “intellectual disability.” He claims that this supposed inconsistency precludes imposition of the death penalty against him – even though there is no evidence that he fits *either* definition. This issue was not raised in the trial court. Consequently, it can be considered

on appeal only if it establishes a "manifest error affecting a constitutional right." State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The court should hold that no such error has been shown.

To understand how the statutory and constitutional prohibitions fit together, it is helpful to review their history. The statutory prohibition was enacted in 1993. Laws of 1993, ch. 479. At that time, there was no constitutional requirement for any such prohibition. Only four years before, the U.S. Supreme Court had held that "mental retardation" did not, by itself, preclude imposition of a death sentence. Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

The statutory prohibition included the following definitions:

(a) "Intellectual disability" means the individual has: (i) Significantly subaverage general intellectual functioning; (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.

(b) "General intellectual functioning" means the results obtained by assessment with one or more of the individually administered general intelligence tests developed for the purpose of assessing intellectual functioning.

(c) "Significantly subaverage general intellectual functioning" means intelligence quotient seventy or below.

(d) "Adaptive behavior" means the effectiveness or degree with which individuals meet the standards of personal independence and social responsibility expected for his or her age.

(e) "Developmental period" means the period of time between conception and the eighteenth birthday.

(e) "Developmental period" means the period of time between conception and the eighteenth birthday.

RCW 10.95.030(2)(a)-(e).

Nine years after this statute was enacted, the U.S. Supreme Court overruled Penry. The court held that execution of "mentally retarded" offenders constitutes cruel and unusual punishment in violation of the Eighth Amendment. Atkins, 536 U.S. at 321. The court specifically pointed to the Washington statute as part of the "national consensus" against imposing the death penalty against such individuals. Id. at 314-16. In a footnote, the court quoted a definition of "mental retardation" that was similar to the definition in RCW 10.95.030(2)(a). The court also noted that "'mild' mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70." Atkins, 536 U.S. 308 n. 3.

Last year, the U.S. Supreme Court expounded on the definition of "intellectual disability" in Hall v. Florida, ___ U.S. ___,

134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014). That case involved a statute that defined “intellectual disability” as requiring “performance that is two or more standard deviations from the mean score on a standardized intelligence test.” Fla. Stat. Annot. § 921.137. The Florida Supreme Court had interpreted this statute rigidly. If the defendant scored above 70 on a standard intelligent test, he could not be considered “intellectually disabled” – even if the deviation from a score of 70 lay within the range of measurement error. Cherry v. State, 959 So.2d 702, 712-13 (2007).

The U.S. Supreme Court held that under this interpretation, the statute was unconstitutional: “[W]hen a defendant’s IQ test score falls within the tests acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits.” Hall, 134 S.Ct. at 2001. The court noted that the Washington statute “might be interpreted to require a bright-line cutoff,” but it might not be interpreted in this manner. Id. at 1996-97. The interpretation of the Washington statute was, of course, not in issue.

A close examination of the Washington statute shows that it is significantly different from the Florida statute. The Florida statute

required that intellectual disability be proved by "performance ... on a standardized intelligence test." The Washington statute contains no such restriction. Under RCW 10.95.030(2)(c), a defendant must have an "intelligence quotient seventy or below." There is, however, no restriction on how this can be proved. If a defendant had a test score slightly above 70, he could still introduce other evidence to show that his true IQ was lower than 70. This is precisely what the Florida statute had been interpreted as not allowing. Hall, 134 S.Ct. 1994-95.

Comparable Washington statutes have been interpreted as allowing challenges to test scores. For example, the crime of driving while under the influence can be committed by driving with "an alcohol concentration of 0.08 or higher as shown by analysis of the persons' breath or blood." RCW 46.61.502(1)(a). Despite this statutory language, evidence of breath testing is not conclusive. The defendant can use either expert or lay testimony to show that a measurement over that level was in error. State v. Franco, 96 Wn.2d 816, 828-29, 639 P.2d 1320 (1982). Similarly, under RCW 10.95.030(2)(c), a test score over 70 is not conclusive. The defendant can still offer other testimony to establish that his true IQ is under that level. Such a construction is particularly appropriate if

it would render the statute constitutional. "Where possible and appropriate, we will strive to construe a statute to uphold its constitutionality." O'Day v. King County, 109 Wn.2d 796, 806, 749 P.2d 142 (1988).

Ultimately, however, the correct interpretation of the statute is irrelevant. Atkins does not say that statutes must contain a correct definition of "intellectual disability" – it says that a person may not be executed if he has such a disability. If the statutory and constitutional definitions are identical, there is no problem. If they overlap, a defendant is entitled to the protection of both. And if the statutory definition is narrower, the defendant is still entitled to the protection of the constitutional definition.

In this case, there is no evidence that the defendant is intellectually disabled under *any* definition. As already mentioned, his IQ has been measured as 106 and 110. There is no indication that these scores are within the range of measurement error for a true score of 70. Nor is there any showing that he has manifested any "deficits in adaptive behavior," either during the "developmental period" or at any other time. Under any definition of "intellectual disability," *none* of the criteria have been established.

A defendant is not entitled to an instruction on a defense unless the evidence supports that instruction. This remains true even if the State bears the burden of disproving that defense. See, e.g., State v. Walden, 131 Wn.2d 469, 473-74, 932 P.2d 1237 (1997) (self-defense); State v. Ager, 128 Wn.2d 85, 93, 904 P.2d 715 (1995) (good faith claim of title). If intellectual disability is considered a "defense," there was no evidence that the defendant has one. Consequently, jury instructions on the subject were neither necessary nor proper. Any discrepancy between the constitutional and statutory definitions of "intellectual disability" has no relevance to this case.

G. THIS COURT HAS REPEATEDLY REJECTED CLAIMS THAT THE DEATH PENALTY VIOLATES THE FEDERAL OR STATE CONSTITUTIONS.

The defendant claims that the death penalty in Washington is administered in a way that violates the Eighth Amendment of the U.S. Constitution or Article 1, § 14 of the Washington Constitution. Similar arguments have been repeatedly rejected by this court. E.g., State v. Davis, 175 Wn.2d 287, 342-45 ¶¶ 105-12, 290 P.3d 43 (2012), cert. denied, 134 S. Ct. 62 (2013); State v. Yates, 161 Wn.2d 714, 792-93 ¶¶ 117-119, 168 P.3d 359 (2007), cert. denied, 554 U.S. 922 (2008); State v. Cross, 156 Wn.2d 580, 621-25 ¶¶ 82-

95, 132 P.3d 180, cert. denied, 549 U.S. 1022 (2006); see In re Cross, 180 Wn.2d 664, 730-34 ¶¶ 151-56, 327 P.3d 660 (2014) (refusing to reconsider court's decision on direct appeal).

In urging that the court yet again reconsider this issue, the defendant points to the Governor's announcement of a "moratorium" on the death penalty. That announcement has no legal effect. The Governor has the constitutional power to commute death sentences – but so far, he has not done so in a single case. Clearly the Governor is unwilling to transform his words into action.

Since the Governor's announcement, the legislature has yet again examined the propriety of the death penalty. In the last legislative session, bills to abolish the death penalty were introduced in both houses. Neither of them made it out of committee. HB 1739 (2015) SB 5369 (2015). Similar bills in prior legislatures met the same fate. E.g., SB 5372 (2013); HB 1504 (2013), HB 2468 (2012); SB 5456 (2011). Clearly, the elected representatives of the people of Washington do not believe that the death penalty is inconsistent with evolving standards of decency. In the face of these decisions by the legislature, relying on the Governor's pronouncement would in effect give him the power to unilaterally repeal duly-enacted statutes.

The defendant places heavy reliance on an unpublished statistical analysis by a University of Washington professor. In the past, this court has refused to consider similar materials. Davis, 175 Wn.2d at 344-45 ¶ 112. Expert testimony should be presented at the trial level, subject to cross-examination and refutation by opposing experts. It cannot be considered via a "Statement of Additional Authority." There is no basis for overruling this court's repeated rejection of the defendant's claims.

VI. ARGUMENT RELATING TO TRIAL

A. THE TRIAL COURT'S DECISIONS ABOUT QUESTIONS IN THE DEATH QUALIFICATION PORTION OF VOIR DIRE WERE PROPERLY LIMITED TO THE APPLICABLE LAW. THE COURT ACTED WITHIN ITS DISCRETION WHEN IT RULED ON CHALLENGES TO JURORS FOR CAUSE.

1. Facts Relating To The Procedure Used For Jury Selection.

Jury selection commenced when the venire was convened at Comcast Area. There the court read the jury the information and gave general instructions. The court informed jurors that if they found the defendant guilty they would have to answer the question: "having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency." The court also defined mitigating circumstances. 4/2/13 RP 2041-51.

Thereafter the court conducted individual voir dire to consider the jurors' qualification to serve on a death penalty case. The court identified the focus of the inquiry as the "juror's views on the death penalty with regard to the law." 4/3/13 RP 2055. The court noted the issue was whether juror's attitudes toward the death penalty would prevent or substantially impair the performance of their duties as jurors in accordance with their instructions and their oaths. 4/4/13 RP 3006. Once individual voir dire was complete, general voir dire was conducted. 4/30/13 RP 5883-5991.

Prior to individual voir dire, defense counsel indicated that he intended to use a hypothetical incorporating a defendant who had been convicted of a murder committed while he was serving a life without parole sentence. He proposed asking "given these hypothetical facts, what is your opinion about the death penalty being the only appropriate punishment for this particular guilty murderer." 4/4/13 RP 3007-09. The court did not preclude the defense from using the hypothetical. It stated that questions concerning juror's attitudes toward circumstances that might be mitigating were proper. Questions that asked what jurors thought the law was would not be allowed. 4/4/13 RP 3012-13.

The court expressed concern about the hypothetical when it was presented without reference to the legal framework because it shed no light on whether a juror's attitude toward the death penalty would disqualify the juror from serving on a death penalty case. 4/5/13 RP 3275. The court believed the hypothetical did provide information about what the juror thought about particular mitigating circumstances, information potentially relevant to a peremptory challenge. However it did not inform the court whether a juror's attitudes about the death penalty were so strong they could not be set aside in favor of the court's instructions and the juror's oath. 4/9/13 RP 3714; 4/10/13 RP 3732-34.

Defense counsel did inquire about juror's attitudes regarding mitigation under the hypothetical circumstances. Counsel asked Juror no. 3 what she thought about the death penalty as the only appropriate circumstance for a convicted murderer serving a sentence of life without parole. However, the court sustained an objection to defense counsel's characterization of juror's duty "to make an individual moral judgment about whether there are sufficient mitigating circumstances to warrant leniency." The court reasoned the question was improper because the court was not going to instruct the jury that it was to make a moral judgment

about the death penalty. The court stated that questions about whether the jury would employ moral judgments in deciding what constituted a mitigating circumstance could be asked. Thereafter counsel asked Juror no. 3 whether she would use her moral judgment in answering whether there were not sufficient mitigating circumstances to merit leniency. 4/4/13 RP 3070-77. The court later clarified its ruling: it would not preclude any party asking about jurors' thought process, including whether morality would weigh in consideration of mitigating circumstances. The court would not permit questions that were contrary to the instructions given by the court. 4/5/13 RP 3168.

The court also sustained an objection when counsel asked Juror no. 73 generally what he thought a mitigating factor might be. The court explained that a juror's idea of what constituted a mitigating circumstance was not helpful to assessing her qualification as a juror in that case. Counsel was permitted to ask the juror if she could give meaningful consideration to mitigating circumstances generally and also whether the juror would consider specific circumstances as mitigating. 4/15/13 RP 4288-91.

The defense did ask jurors about their perspectives on various circumstances that might constitute a mitigating

circumstance. Jurors were asked whether they thought an abusive childhood might constitute a mitigating circumstance. 4/4/13 RP 3104, 3142; 4/5/13 RP 3235, 3272; 4/9/13 RP 3504. Jurors were also asked if someone had been denied treatment for some condition whether that would be considered a mitigating circumstance. 4/9/13 RP 3505. A person's background, his good behavior as a prisoner, and relationship to the victim were also suggested as possible mitigating factors. 4/10/13 RP 3796; 4/11/13 RP 3905.

2. The Court's Rulings During The Death Qualification Portion Of Voir Dire Properly Limited Questions To The Applicable Law.

A defendant's Sixth and Fourteenth Amendment right to a fair trial includes the right to an unbiased jury. In re Yates, 177 Wn.2d 1, 30, 296 P.3d 872 (2013). A juror in a capital case is not disqualified from service due to bias simply because he or she has general objections to the death penalty. Witherspoon v. Illinois, 391 U.S. 510, 522, 88 S.Ct. 1170, 20 L.Ed.2d 776 (1968). Nonetheless the State has a legitimate interest in excluding jurors from service whose opposition to the death penalty would not allow them to act impartially, and thereby frustrate the administration of the State's death penalty scheme by automatically voting against imposition of

that penalty. Wainwright v. Witt, 469 U.S. 412, 416, 105 S.Ct 844, 83 L.Ed.2d 814 (1985). Similarly a defendant facing the death penalty has an interest in excluding jurors who would automatically impose that sentence upon conviction for a capital crime. Morgan v. Illinois, 504 U.S. 719, 733, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992).

Thus, a juror who has a firmly held belief regarding the death penalty may nonetheless serve if he or she is able to temporarily set aside that belief in deference to the law as given by the court. Lockart v. McCree, 476 U.S. 162, 176, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986). The standard to determine whether a juror's views are so biased as to disqualify that juror is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Witt, 469 U.S. at 424. In order to ascertain a juror's bias in this regard, a party must be afforded the opportunity to inquire about a juror's views on the death penalty. McCree, 476 U.S. at 170 n. 7; Morgan, 504 U.S. at 736. A general inquiry into whether the juror would "follow the law" does not satisfy this right. A more thorough inquiry is permitted because a juror may honestly state he could follow the law without understanding that maintaining his beliefs about the

death penalty may prevent him from doing so. Morgan, 504 U.S. at 735-36.

The defendant argues that the court unconstitutionally limited him to essentially “follow the law” type inquiry by its treatment of the relevant qualifying issue in individual voir dire. The scope of voir dire is within the discretion of the trial court. The court’s decision will not be disturbed on appeal absent an abuse of that discretion and a showing that the defendant’s rights have been substantially prejudiced. State v. Yates, 161 Wn.2d 714, 747, 168 P.3d 359 (2007), cert denied, 554 U.S. 922 (2008). Here the record demonstrates that the court gave the defense great latitude in questioning jurors during the initial death qualification portion of voir dire. The defense was permitted to ask questions that the court believed were more appropriate for an exercise of peremptory challenges, even though the focus at that point related to jurors’ bias in relation to the death penalty. Although the court sustained a few objections to defense questions, those rulings were limited to misstatements of the law or questions that were irrelevant to the juror’s specific or general qualifications to serve.

The defendant claims that he was prohibited from asking questions about terms that were not defined in the instructions. The

portions of the record cited by the defendant do not involve any discussion about undefined terms. Rather the court agreed with the defense that it was entitled to inquire whether jurors would consider mitigating circumstances. 4/4/13 RP 3013-14. It also agreed that the defense could inquire whether jurors would use moral judgments, or any other thought process, in considering any mitigating circumstance. But it prohibited the defense from characterizing the jurors' decision as a moral judgment about the death penalty. 4/4/13 RP 3070-75. Thereafter defense counsel was permitted to ask about moral judgments in connection with jurors' thought processes. 4/4/13 RP 3077-81.

This limitation was proper because in deliberating on the sentence the question the jury must decide is not whether the death penalty is morally correct or not. Rather it must decide whether the State had proven there were not sufficient mitigating circumstances to merit leniency. RCW 10.95.060(4). Whether and how a juror would consider mitigating circumstances can reveal whether a juror truly understands his or her obligation under the law to set aside personal beliefs about the death penalty.

The defendant states that the court disapproved questions asking jurors' views on what constituted mitigation. The court did

disapprove a general question about what the juror thought a mitigating circumstance was. It permitted the defense to inquire regarding specific circumstances and whether jurors could give those circumstances consideration. 4/15/13 RP 4287-91. It was proper to place this limitation on questioning.

A juror who has no previous opportunity to consider the question would probably not be able to provide any meaningful response. Even if a juror could come up with a circumstance he or she considered mitigating on the spot, it would not answer the ultimate question presented at this point of jury selection: whether the juror could put aside any personal convictions and follow the law by considering anything that might be a mitigating circumstance. The court was correct when it observed that a juror's opinion as to whether a circumstance was mitigating or not did not disqualify the juror for cause in light of this question. Limited only by the court's instruction, jurors were free to determine what did or did not constitute a mitigating circumstance, and what weight to give that circumstance. 1 CP 120. The court correctly observed that what a juror may believe constitutes a mitigating circumstance may be relevant to a peremptory challenge, but it did not affect whether the juror was subject to a challenge for cause. 4/9/13 RP 3714.

Finally the defendant challenges the court's view that the hypothetical employed by the defense could not provide a basis for a challenge for cause. The court's concern was that, untethered to any discussion of the law, the question provided no insight into whether the juror's views would prevent or substantially impair the juror's ability to follow the law and her oath. 4/5/13 RP 32724; 4/9/13 RP 3714. Because the focus of the individual voir dire was to suss out this fact, the court properly concluded that answers to the hypothetical without reference to the law could not form the basis for a challenge for cause.

The court properly limited questions in voir dire to those supported by the law. The court's view of the defendant's hypothetical did not preclude the defendant from asking relevant questions. The defense was fully able to inquire into what jurors thought about mitigating circumstances and the thought processes they would employ when considering those circumstances. The defendant was therefore not deprived of the right to inquire into juror's bias that may have disqualified any juror from service.

3. The Court Properly Exercised Its Discretion When It Denied Six Of The Defendant's Challenges For Cause.

In order to ensure that a jury is impartial in a capital case, the court must be satisfied that the prospective jurors will be able to impose the death penalty if the state meets the statutorily mandated burden of proof. Yates, 161 Wn.2d at 742. A juror whose views substantially impair his or her ability to do that may be removed for cause. However it is impermissible to remove a juror for cause if the juror could follow the law despite his or her views on the death penalty. Uttecht v. Brown, 551 U.S. 1, 9, 127 S.Ct. 2218, 167 L.Ed.2d 014 (2007). The trial court's assessment of the juror's qualifications under this standard is afforded great deference. Id.; Yates, 161 Wn.2d at 743. Deference is afforded the court because the trial judge has the opportunity to observe the juror's demeanor, which is an important aspect of assessing the attitude and qualifications of the juror. Id

The defendant argues that the court improperly denied his challenge for cause to jurors' number 10, 11, 16, 32, 57, and 80. Although the defendant points to isolated statements made by each juror, a review of the entire colloquy with each juror shows that the

court had a tenable basis on which to conclude the juror would follow the law.

In individual voir dire of each juror the defense asked a version of the following hypothetical:

In this example, you and the 11 other jurors have sat at the guilt phase of an aggravated first-degree murder case, sat in judgment on a defendant, and found that the defendant guilty. You have found that he is guilty beyond not only a reasonable doubt, but beyond any doubt. . . .

Now, let's assume that in your deliberations, you also concluded that there was no excuse for this murder. The defendant was not intoxicated, the defendant was not on drugs, the defendant was not under duress, the defendant was not acting in self defense; this was just a guilty murderer. He planned a murder, he intended to murder; he, in fact, did murder an innocent person; okay?

Furthermore, this guilty murderer committed this murder while he was serving a sentence of life without the possibility of parole in prison, and his innocent victim was a female law enforcement officer. . .

Given that hypothetical situation, what is your opinion about the death penalty being the only appropriate punishment for that circumstance?

4/4/13 RP 3140-41.

Juror 10 indicated he did not have strong beliefs for or against the death penalty. He stated that he could weigh and determine whether there were not sufficient circumstances to merit leniency. When asked the defense hypothetical without reference to

mitigating circumstances, the juror stated he would have a hard time not voting for the death penalty "without knowing any additional facts." But when counsel suggested potential mitigating circumstances the juror stated he would consider them. 4/4/13 RP 3134-35, 3139-42. Given this colloquy the trial court had a tenable basis on which to conclude the defense hypothetical, without reference to the law, did not establish the juror was so biased he was unqualified to serve.

Juror 11 had no strong feelings about the death penalty. He stated that his mindset would not cause him to decide the case without reference to the evidence or the court's instructions. Although the juror abhorred violence and was unhappy about being put in the position of having to possibly decide the case, he answered affirmatively when asked directly whether he would give meaningful consideration to mitigating circumstances as justifying a second life without possibly parole sentence. The answer gave the court a valid basis on which to conclude the juror qualified at that point. 4/5/13 RP 3171, 3173, 3178-80, 3197-99.

Juror 16 began by affirming that before making a decision on the death penalty she would want to hear all the facts, and that she could follow the court's instructions on the law, even if she

disagreed with those instructions. Although she stated the death penalty was appropriate when she was read the defense hypothetical, she clarified that she could keep an open mind throughout the proceedings and would hold the state to its burden of proof when read the court's instructions. 4/5/13 RP 3267-69, 3271, 3277, 3282. These answers support the court's conclusion that the juror was qualified to serve.

Juror 32 repeatedly stated that he would consider all the evidence presented in making his decision. He would not speculate on reasons that might be mitigating, but were not presented. 4/9/13 RP 3529, 3534, 3536-37, 3540-42. Although the juror indicated the death penalty would be appropriate given the limited facts presented in the defense hypothetical, that answer only revealed what the juror would do under those circumstances. It did not show the juror could not follow the court's instructions. 4/9/13 RP 3538-39, 3545-46.

Juror 53 gave some contradictory answers to the prosecutor and defense attorney's questions, which left some doubt that the juror would follow the court's instructions. The court concluded the juror had not understood the lengthy recitation of instructions given before questioning began. It gave the parties a second chance to

inquire by specifically referring to the instructions. 4/11/13 RP 3919-21. When he was questioned on each instruction individually, juror 53 agreed that he could start with a presumption of leniency and give consideration to any mitigating factors before making a decision. The juror did indicate that he thought that the death penalty was the most appropriate penalty in the defense hypothetical. 4/11/13 RP 3924-27. But because the court found that the juror gave no impression that he would not set aside his beliefs regarding the death penalty rather than following the instructions of the court, the court passed the juror for cause. 4/11/13 RP 3928.

Juror 80 stated she was neither for nor against the death penalty; she believed it was appropriate in some cases, but was not automatically appropriate in every murder case. In response to defense questions, she characterized herself as a person who was more likely to vote for the death penalty in the hypothetical given by the defense "unless I've been presented a mitigating circumstance that changes my view on it." 4/17/13 RP 4478, 4492-96. She later admitted she was confused by the court's instructions. When the prosecutor went through them again juror 80 stated that she could presume the defendant merited leniency, and that she would consider any argument for why something would constitute a

mitigating circumstance meriting leniency. She agreed that she could follow the court's instructions, even if she did not personally agree with the law. 4/17/13 RP 4497-4502. The court believed Juror 80's answers were consistent with her responses on her questionnaire; there she stated that she would set aside her personal beliefs if they differed from the court's instructions on the law. It therefore denied a challenge for cause. 4/17/13 RP 4512-13.

The court gave thoughtful reasons for denying the motions to excuse the jurors for cause. It did not apply a mechanical standard, passing a juror simply because the juror responded "yes" when asked if he or she could "follow the law." None of these jurors had any prior experience with a death penalty case, which resulted in some confusion about their duty as jurors. While some of the jurors had an idea of what may or may not constitute a mitigating circumstance, none stated that he or she would not consider mitigating circumstances or not presume leniency once any confusion about what their duty was had been cleared up. The court, who was in the best position to observe the jurors' demeanor when they responded, had tenable bases on which to pass the jurors for a cause. The court did not err when it denied the defense challenges to these jurors.

The defendant relies on answers these jurors gave when asked the hypothetical question posed by defense counsel to argue the court erred by not granting his challenges for cause. He argues their answers demonstrated they would not give meaningful consideration to mitigating circumstances. The hypothetical was, however, misleading. Each time the hypothetical was asked the juror was told there was "no excuse" for the crime. To a non-lawyer, an "excuse" is something that "extenuates or justifies a fault." Webster's New Universal Unabridged Dictionary 639 (2nd ed. 1979). The distinction between a legal "excuse" and a "mitigating circumstance" is likely to be lost on the average juror.

This confusion was demonstrated by answers several jurors gave when asked the hypothetical. Juror 10 initially stated "without knowing any additional facts" he thought the death penalty was appropriate. But he also said he would have to consider "all of the incidents and facts that have come out along the way." 4/4/13 RP 3141-42. Juror 16 initially stated the death penalty would be appropriate under the hypothetical, but suggested mental illness may be a mitigating circumstance. When counsel told the juror that mental illness did not excuse the murder, Juror 16 said that she would need to "listen to the full case and all the facts being

presented” before deciding on the death penalty. 4/5/13 RP 3271-72. Juror 42 also suggested mental illness may be a mitigating circumstance, but counsel claimed that this was a legal excuse which would be ruled out if the defendant had been found guilty. 4/10/13 RP 3378. This was untrue: the statute specifically recognizes “extreme mental disturbance” as a mitigating factor. RCW 10.95.070(2).

Given the problems with the hypothetical question the court was justified in giving less weight to jurors’ answers to that question than jurors gave to other questions. When all of the jurors’ answers were viewed in context, the trial court was justified in finding the jurors’ views did not disqualify them from serving on a death penalty case.

The defendant argues that he is entitled to have his death sentence vacated because he was forced to exercise peremptory challenges to the six jurors he claims the court should have excused for cause. He argues that he could have used those challenges to excuse ten other jurors who actually sat on the panel. The court rejected this argument in United States v. Martinez-Salazar, 528 U.S. 304, 315, 120 S.Ct. 774, 144 L.Ed.2d 729 (2000). “A hard choice is not the same as any choice.” Id.

Rather, where a defendant elects to cure that kind of error by exercising a peremptory challenge, and no biased juror decided the case, then neither the defendant's constitutional right nor his right to exercise peremptory challenges pursuant to rule has been violated. Martinez-Salazar, 529 U.S. at 307, Yates, 161 Wn.2d at 74. This is true even where the defendant has exercised all of his available peremptory challenges. State v. Fire, 145 Wn.2d 152, 154, 34 P.3d 1218 (2001).

The defendant addresses this requirement by pointing to isolated statements made by ten of the jurors during the death qualification phase of jury selection. He does not argue any of those jurors should have been excused for cause. Nor did he challenge any of those jurors for cause at trial. 4/4/13 RP 3108; 4/5/13 RP 3241, 3305; 4/8/13 RP 3359; 4/9/13 RP 3510; 4/10/13 RP 3716, 3780, 3805; 4/12/13 RP 4036; 4/19/13 RP 5524. By failing to challenge the jurors for cause he implicitly concedes that the jurors were not biased so that a death verdict was a foregone conclusion upon a guilty verdict.

Moreover the record supports the conclusion that each of the jurors that the defendant identifies was impartial. None of the jurors expressed a strongly held opinion for or against the death penalty

that would override their ability to follow the judge's instructions on the law. The jurors all indicated that they would be able to consider anything that constituted a mitigating circumstance before rendering a verdict. Several jurors agreed that mitigating circumstances may justify a life prison sentence even if the defendant were already serving the sentence when the crime was committed. 4/4/13 RP 3098-99, 3014-15; 4/5/13 RP 3228, 3234-35, 3238; 4/8/13 RP 3347-48, 3355; 4/9/13 RP 3494-95, 3503-05; 4/10/13 RP 3745, 3755-56, 3757, 3769, 3772, 3790-92, 3795; 4/12/13 RP 4019, 4029-30; 4/19/13 RP 5507-09.

The record demonstrates that the trial court had a tenable basis on which to deny each of the defendant's six challenges to jurors for cause. Because the defendant elected to use his peremptory challenges to remove those jurors from the panel and the remaining jurors who were seated were not biased, he is not entitled to have his sentence reversed.

4. The Court Properly Exercised Its Discretion To Grant Two Of The State's Challenges To Jurors For Cause.

The defendant claims the court erred when it granted the State's motions to excuse jurors 37 and 75 for cause. Because the record demonstrates that each juror's attitudes towards the death

penalty would substantially impair their duties as jurors, the court properly exercised its discretion by granting those motions.

Juror 37 expressed great reluctance to be a juror in a death penalty case. Although she stated in her questionnaire that she supported the death penalty, she did not want to make a life-or-death decision. When asked whether she would be comfortable making the decision, she paused for a long time and then admitted she would not. 4/9/13 RP 3612, 3614. She gave conflicting answers when asked if she could follow the court's instructions on the law. She agreed she could answer whether there were not sufficient mitigating circumstances to merit leniency, but she would "be careful not to go too far out of bounds of what is the law." 4/9/13 RP 3618, 3620, 3628. The court initially denied the State's motion to excuse juror 37 for cause, reasoning that whether the juror was comfortable with a death penalty case was not the standard by which her ability to serve was measured.

Upon further questioning by the prosecutor and defense attorney, it became clearer that the juror's opinions about the death penalty would substantially impair her duty as a juror. Initially the juror refused to answer the prosecutor's direct question whether she would vote "yes" if the State had met its burden of proof.

Instead she answered that she was “not the best person to do it” because she was conflicted about the penalty. Ultimately she stated that she could not vote for the death penalty under any circumstances. 4/9/13 RP 3633-34. She then told defense counsel that she could follow the law in determining whether the State met its burden of proof. 4/9/13 RP 3639-40.

Juror 37 agreed she had given conflicting answers. Because her answers were inconsistent the court inquired further. The court directly asked her whether she could decide the case even though she was uncomfortable doing it, or if her feelings and experiences would substantially impair her in carrying out the law as instructed by the court. She responded that she could not do that. 4/9/13 RP 3641-42.

A juror’s equivocal answers alone do not require that a juror be removed for cause. State v. Rupe, 108 Wn.2d 734, 749, 743 P.2d 210 (1987), cert denied, 486 U.S. 1061 (1988). However, a trial court does not abuse its discretion by removing a juror who responds equivocally when the court is left with the definite impression that the juror is unable to apply the law impartially. Yates, 161 Wn.2d at 742. Thus the court did not err in excluding a juror who stated that she was could follow the courts instructions,

but also stated that she had strong feelings against the death penalty, and would find it difficult to consider both alternatives at sentencing. State v. Brown, 132 Wn.2d 529, 603, 940 P.2d 546 (1997), cert denied, 523 U.S. 1007 (1998). Similarly there was no abuse of discretion when the court weighed some answers more heavily than others when it excused a juror who initially stated she was opposed to the death penalty in all circumstances, but then stated that she could vote to impose the death penalty. Yates, 161 Wn.2d at 743.

Here juror 37's answers were much the same as those who were excused for cause in Brown and Yates. Although when the juror was pressed she stated that she would follow the law, the distinct impression was that it would be very difficult for her to do so if it meant the State had met its burden of proof at the sentencing phase. She ultimately confirmed that she could not follow the courts instructions if it meant returning a death verdict. Given her answers, the court did not abuse its discretion when it concluded that the juror was substantially impaired in the performance of her duty as a juror and excused her.

The defendant faults the court for intervening and questioning the juror, complaining that court left her with the

impression that it did not accept her clear statement that she understood her obligation, and would follow the law. The record clearly shows a juror who was equivocal in this regard. Even the juror recognized that her answers were contradictory. The defendant cites no authority for the proposition that a judge may not question a juror in this circumstance. Because the jurors were questioned individually at this stage of the proceeding, what the court did in respect to other jurors who were challenged for cause could have no impact on Juror 37. The court was entitled to clarify the juror's position, by asking her to answer the question whether she could put her discomfort aside and follow the law. Because she answered that direct question negatively, the court was justified in removing her for cause.

The defendant also argues that the court improperly excused Juror 75 because he stated that he could put aside his opposition to the death penalty and follow the law. Juror 75 clearly stated that he would vote against the death penalty regardless of the facts or circumstances or the court's instructions. 4/17/13 RP 4572-73. He did not want to be a party to killing another human being. He believed that it was a sufficient mitigating circumstance that the

defendant was alive and was a human being to merit leniency.
4/17/13 RP 4574.

This juror's answers were very similar to those given by Juror 74 in Yates. That juror voiced strong opposition to the death penalty and would probably never vote for the death penalty. But she also responded to defense counsel that she could follow the court's instructions "if I had to, probably." This court found no abuse of discretion in dismissing that juror. Yates, 161 Wn.2d at 745-46.

Here Juror 75's answers were even less equivocal than the juror's answers in Yates. The juror's position that being alive and human were sufficient mitigating circumstances to merit leniency meant that in no case would he vote for the death penalty. Coupled with his direct statement that he would never vote for the death penalty, this justified the court in concluding the juror's beliefs substantially impaired the juror in his duty to follow the court's instructions and his oath.

The defendant argues that because jurors 37 and 75 were wrongfully excused he is entitled to a new sentencing hearing, citing Gray v. Mississippi, 481 U.S. 648, 668, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987). The trial court in Gray concluded the juror in question was qualified after she stated she could consider the

death penalty in an appropriate case. Nonetheless the court excused the juror for reasons unrelated to her position on the death penalty. Id. at 653. In those circumstances the erroneous exclusion of a death qualified juror required a new sentencing hearing. Id. at 668. Unlike the juror in Gray, the jurors here left the court with the distinct impression that they would not consider the death penalty under any circumstance. Since the court did not erroneously excuse them, the defendant is not entitled to a new sentencing hearing.

B. THE PROSECUTOR DID NOT COMMIT ERROR THAT PREJUDICED THE DEFENDANT.

The defendant asserts that several instances of prosecutor error deprived him of a fair trial.⁸ A defendant bears the burden to

⁸ Although this court has often used the term "prosecutorial misconduct," it has recognized that the term is "a misnomer when applied to mistakes made by the prosecutor during trial." State v. Fisher, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase "prosecutorial misconduct" to intentional acts, rather than mere trial error. See ABA Resolution 100B (Adopted Aug. 9-10, <http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf>; NDAA, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf. A number of appellate courts agree that "prosecutorial misconduct" is an unfair phrase that should be retired. See, e.g., State v. Fauci, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); State v. Leutsch, 759 N.W.2d 414, 418 (Minn. App.), review denied, 2009 Minn. LEXIS 196 (Minn. 2009); Commonwealth v. Tedford, 598 Pa. 639, 960 A.2d 1, 28-29 (2008).

prove that the prosecutor's statements were improper and that they had a prejudicial effect. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). Comments alleged to be improper are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the court's instructions. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). When the claimed error had been objected to at trial, the defendant bears the burden to show that the prosecutorial error resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. State v. Allen, 182 Wn.2d 364, 341 P.3d 268, 273 (2015).

Failure to object waives any claim of error unless the remark caused an "enduring and resulting" prejudice that could not have been neutralized by a jury instruction. Russell, 125 Wn.2d at 86. Under this standard the defendant must show that (1) the prejudicial effect of the error on the jury could not have been cured by any instruction and (2) that the erroneous argument resulted in prejudice that "had a substantial likelihood of affecting the jury verdict." State v. Emery, 174 Wn.2d 741, 761, 278 P.3d 653 (2012).

1. Jury Selection.

The defendant argues that prosecutor Paul Stern committed error by being too ingratiating toward jurors during jury selection.

He specifically points to three instances where defense counsel raised the issue with the court.

In the first instance Mr. Stern thanked Juror 17 after he was excused until general voir dire began. 4/5/13 RP 3306. Defense counsel pointed out that Mr. Stern said “thanks for coming” or smiled at each juror as they left the courtroom. She acknowledged the seating arrangements made an awkward situation but suggested that kind of contact should be kept at a minimum. The court instructed Mr. Stern to limit himself to “just a glance or something of that nature.” 4/5/13 RP 3307

The second instance occurred 10 days later. Ms. Halverson remarked that with almost every juror that day she had seen some kind of interaction between Mr. Stern and jurors. She asked the court to remind Mr. Stern to not make eye-contact with the jurors, or smile or say good-bye to those jurors who had not been excused. The court had not noticed such interaction, but remarked that if it was happening it was unfair for Mr. Stern to somehow ingratiate himself with some jurors in a way that the defense could not. Mr. Stern stated he only said something to those jurors who had been excused. 4/15/13 RP 4455.

In the third instance Mr. Stern questioned Juror 105. The juror stated that she could vote for the death penalty if she found there were no mitigating circumstance meriting leniency. As he walked away from the juror Mr. Stern mumbled "Good. I hope you will. Thank you ma'am." Although the judge did not hear the remark defense counsel did. The court admonished Mr. Stern to not repeat that kind of remark. Mr. Stern assured the court he would not. 4/18/13 RP 4993, 4996-97.

From this record the defendant argues that the prosecutor's conduct was improper because it allowed him to forge a bond with jurors. He states that opportunity was unavailable to defense counsel. He speculates that aside from these three instances, Mr. Stern continued to make eye contact and smile at jurors throughout jury selection.

The jurors who ultimately were sworn to serve on the defendant's case were jurors 5, 14, 17, 21, 40, 42, 44, 57, 60, 68, 69, and 91. 4/30/13 RP 5951-61. Neither any of the jurors who were questioned on April 15 nor Juror 105 served on the jury. 4/15/13 RP 4268. Mr. Stern's conduct with those jurors could not have affected the verdict. With the exception of Juror 17, the defendant relies on speculation to assert that Mr. Stern likely

continued to smile and personally thank each juror during voir dire. With the exception of juror 60 the record does not reveal that happened regarding any of the jurors who actually served on his case. 4/4/13 RP 3109, 3306; 4/5/13 RP 3241-42; 4/8/13 RP 3361; 4/9/13 RP 3510, 3513; 4/10/13 RP 3760-62, 3780-81, 3805-06; 4/12/13 RP 4205-07; 4/17/13 RP 4686-87; 4/23/13 RP 5524-25.

The defendant's speculation is insufficient to establish that, even if smiling and thanking jurors is improper, Mr. Stern acted improperly as to 10 of the 12 jurors. For that reason his claim that Mr. Stern's conduct was improper should fail as to those jurors as well. If Mr. Stern did not smile and thank jurors as they left, the basis on which the defendant claims that he committed error does not exist.

As to the two remaining jurors, number 17 and 60, the record does reveal that Mr. Stern did thank each juror as they exited the courtroom after individual voir dire. The defendant relies on a line of cases that hold that private communication or contact with a jury about a matter pending before the jury is presumptively prejudicial to argue Mr. Stern's conduct was improper. Mattox v. United States, 146 U.S. 140, 150, 13 S.Ct. 50, 36 L.Ed. 917 (1892); Remmer v. United States, 347 U.S. 227, 229, 74 S.Ct. 450, 98

L.Ed. 654 (1954), Caliendo v. Warden, 365 F.3d 691 (9th Cir. 2004).

This kind of communication is presumptively prejudicial when it is not de minimis and it raises the risk of influencing the verdict. Caliendo, 365 F.3d at 697. The presumption of prejudice may be overcome by evidence that contact with the juror was harmless. Mattox, 146 U.S. at 150, Remmer, 347 U.S. at 229.

In Mattox the court considered the prejudice to a defendant in a capital case where a jury, while deliberating, was exposed to comments from the bailiff and a news article opining that the defendant was guilty of the crime. Mattox, 146 U.S. 142-44. In that circumstance the court found the defendant had been prejudiced beyond a reasonable doubt. Id. at 150.

In Caliendo a state's witness had a twenty-minute conversation about matters unrelated to the case with three jurors during a recess at trial. The evidence was conflicting, and the witness's testimony central to the state's case. Where one of the juror's commented that the witness was "doing a good job as an officer" the court found that the improper conversation bolstered the witness's credibility. Caliendo, 365 F.3d at 699.

In Caliendo the court enumerated several factors to be considered when assessing whether contact with a juror may result

in influencing the verdict. Unauthorized contact is one factor. Other factors include the length and nature of the contact, the identity and role at trial of the parties involved, evidence of actual impact on the juror, and the possibility of eliminating the prejudice though a limiting instruction. Caliendo, 365 F.3d at 697-98. When these factors are applied to the present case, Mr. Stern's conduct was not erroneous, and the defendant was not prejudiced.

Mr. Stern's conduct occurred in open court during the portion of trial where attorneys were permitted to talk to jurors. Thus communicating with the jurors was not unauthorized contact. While the court cautioned Mr. Stern to keep his contact with jurors at the conclusion of each juror's individual voir dire to a minimum, thanking a juror as he or she left the courtroom is in itself brief, de minimis contact.

Although defense counsel believed she was at a disadvantage as a result of the physical layout of the courtroom, she also had the opportunity to talk to jurors, smile at them and thank them during and after questioning them. Mr. Stern's expression of gratitude did not convey any additional information to jurors that they would not already be presented at trial. Nor was he a witness, whose credibility was at issue in trial. Further, jurors

were instructed to ignore any remark from counsel that was not supported by the evidence and the law in the court's instructions. And it was instructed to "not let your emotions overcome your rational thought process." 2 CP 309-10. Even if thanking jurors as they left the courtroom had created some emotional tie to the prosecutor, these instructions neutralized that effect.

The defendant argues that the contact was not de minimus and the presumption of prejudice cannot be overcome. He points to Mr. Stern's closing argument in the penalty phase in which he reminded jurors that they had said that if the facts and law supported it, they could vote for the death penalty. The defendant did not object to any of these statements at trial. 5/15/13 RP 7134. Thanking jurors 17 and 60 occurred about one month before they deliberated.⁹ Given the length of time that had passed, and the volume of evidence presented the jury, it was unlikely that conduct swayed those jurors so much that they would have disregarded the evidence and court's instructions and voted for the death penalty, simply because Mr. Stern argued that they should.

The defendant has failed to show any possible prejudice with respect to the vast majority of jurors because they either did not

deliberate or because the record does not reflect that he did the acts complained of with those who did deliberate. As to the jurors that Mr. Stern smiled at and thanked, he has failed to show that conduct was not de minimis conduct that was likely to have affected the verdict.

2. Opening Statements And Closing Arguments.

The defendant claims the prosecutor committed error in opening statements by stating that prison officials "upon the stage, under the cross, they find Jayme Biendl, on her back blood coming out of her mouth dead." 5/1/13 RP 6004. He also claims that during closing arguments in the guilt phase of the case, the prosecutor misstated the law on premeditation. 5/9/13 RP 6936-37, 6940-41, 6898. He states the prosecutor also misstated the law in opening statements and closing arguments of the penalty phase by telling jurors what their job was and reminding them of a promise made in voir dire to return a death verdict if the law and the facts supported it. 5/1/13 RP 6006; 5/13/13 RP 7134, 7143.

Any claim that the challenged arguments were erroneous has been waived for two reasons. First, the arguments were proper.

⁹ Juror 17 was questioned on April 5. 4/5/13 RP 3306. Juror 60 was questioned on April 9. 4/9/13 RP 3510.

Second, even if these arguments were improper, a timely objection and instruction to disregard the argument could have cured any potential prejudice resulting from them.

a. Whether The Argument Regarding The Jury's Job Was Erroneous Has Not Been Preserved For Review. In The Context Of The Entire Argument It Was Not Prejudicial Error.

The defendant does not address the criteria for review of the "job" arguments articulated in Russell. Instead he argues that the issue may be raised for the first time on appeal because earlier precedent clearly held the argument was improper. He cites State v. Charlton, 90 Wn.2d 657, 663-64, 585 P.2d 142 (1978); and State v. Fleming, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997). In each of these cases the court focused on whether the prosecutor's conduct was "flagrant and ill-intentioned" to consider whether the claim of error may be raised for the first time on appeal. These cases pre-date this court's recent clarification that reviewing courts should focus less on whether the prosecutor's conduct was flagrant and ill-intentioned and more on whether the resulting prejudice could be cured. Emery, 174 Wn.2d at 665. That is because an objection is usually required not only to prevent counsel from making additional improper remarks, but also to prevent abuse of the appellate process Id. If the Court does

focus on the prosecutor's conduct it was not improper, and therefore not "flagrant and ill-intentioned."

The first challenged reference to the jury's job occurred at the end of opening statements. An opening statement is an opportunity for the prosecutor to outline the material evidence and reasonable inferences therefrom that the State intends to introduce. State v. Kroll, 87 Wn.2d 829, 835, 558 P.2d 173 (1976). Just prior to the challenged statement the prosecutor reviewed some of the defendant's statements that he anticipated the jury would hear. The prosecutor stated the jury would have the opportunity to "decide what to make of" the defendant's confession." 5/1/13 RP 6005-06. In this context the remark "His words. Our evidence. Your job" referred to evidence the State anticipated the jury would hear and for which the jury would have to weigh its credibility. Because the trier of fact does weigh the credibility of the evidence, the remark did not misstate the law, and was therefore not improper. Camarillo, 115 Wn.2d at 71.

The second two challenged references to the jury's job occurred in the prosecutor's closing argument during the penalty phase. A jury's job is to determine whether the State proved the charged offenses beyond a reasonable doubt. Emery, 174 Wn.2d

at 760. In a death penalty case the jury has an additional job to determine whether they are convinced “beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency.” RCW 10.95.060(4); 1 CP 118. The court defined a mitigating circumstance as “a fact about either the offense or about the defendant which in fairness or in mercy may be considered as extenuating or reducing the degree of moral culpability, or which justifies a sentence of less than death, although it does not justify or excuse the offense.” 1 CP 120. The prosecutor’s arguments were an accurate discussion of these two instructions.

The reference to “one more job” jurors referred to their evaluation of the facts presented at trial and during the sentencing proceeding. The prosecutor distinguished “facts” from “philosophies” about the death penalty. He then proceeded to discuss the “facts” that may be considered mitigation. He explained why those facts were insufficient mitigating circumstances to merit leniency. 5/14/11 RP 7135-42. The prosecutor concluded by stating “your job. To decide if there are sufficient extenuating circumstances, sufficient mitigating circumstances, to merit leniency.” 5/14/11 RP 7143. In the context of the entire argument the statement “you have one more job to do” was a reference to

evaluating the facts proved to them. It was an argument to base their decision on reason and not emotion, "on the law given to you, not on sympathy, prejudice, or personal preference." 1 CP 116. The argument correctly stated the law. In re Rupe, 115 Wn.2d 379, 798 P.2d 780 (1990).

Because the arguments correctly stated the law, they are different from those arguments found improper in the cases cited by the defendant. None of the challenged arguments suggested the jury had a duty to solve the case, determine the truth of what happened on a particular day, or return a guilty verdict or death sentence. State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2010); State v. Evans, 163 Wn. App. 635, 260 P.3d 93 (2011) (improper to argue jury's duty is to solve a case or determine the truth of what happened); United States v. Madelbaum, 803 F.2d 42 (1st Cir. 1986); Williams v. State, 789 P.2d 365 (Alaska 1990); State v. Acker, 265 N.J. Super 351, 627 A.2d 170 (App. Div.), cert denied, 634 A.2d 530 (N.J. 1993); United States v. Sanchez, 176 F.3d 1214 (9th Cir. 1999) (improper to argue the jury had a duty to return a guilty verdict). Instead the prosecutor's argument told jurors that their duty was to correctly apply the law as given by the court to the evidence presented at

trial. Because the arguments were not improper, they do not constitute prosecutor error.

b. Reference To Finding Officer Biendl Lying Under A Cross.

During opening statements the prosecutor outlined the anticipated testimony at trial. He described the events leading up to finding Officer Biendl in the chapel.

They're walking around, and they're looking, and they're somewhat frantic, because they have an expectation that something bad may have happened.

And up on the stage, under the cross, they find Jayme Biendl, on her back, blood coming out of her mouth, dead.

5/1/13 RP 6004.

The defendant did not object to this statement. He argues that the statement was an improper attempt to stir the passions and prejudice of the jury by likening Officer Biendl to a Christ figure. His challenge is waived however because even if this Court believed the brief reference to a cross had that effect, a timely objection and instruction to disregard the reference could have neutralized any possible prejudice.

Moreover, the comment was not improper. The statement accurately described the evidence the State anticipated the jury would hear. Officers described seeing Officer Biendl in the

sanctuary on the stage. Without objection witnesses identified photos showing Officer Biendl's position, lying under the cross. 5/2/13 RP 6283, 6288, 6298, 6333; Ex. 43, 44. The prosecutor did not suggest that Officer Biendl was a saintly figure. Rather he described her in secular terms as an employee at the prison who had been well regarded by her colleagues. 5/1/13 RP 5986-87. In the context of the entire opening statement, the reference to Officer Biendl's location when she was found did not convey that she was a Christ-like figure. The remark, based on facts, was not likely to stir the passions of the jury.

c. The Law Of Premeditation Was Correctly Argued.

Premeditation and intent are distinct elements of first degree murder. State v. Brooks, 97 Wn.2d 873, 876, 651 P.2d 217 (1982). Premeditation must "involve more than a moment in time." RCW 9A.32.020(1). The amount of time to premeditate may be very short, but it must be appreciable. State v. Harmon, 50 Wn. App. 755, 760, 750 P.2d 664, review denied, 110 Wn.2d 1033 (1988), State v. Griffith, 91 Wn.2d 572, 577, 589 P.2d 799 (1979). It is "the deliberate formation of and reflection, weighing or reasoning for a period of time, however short." Hoffman, 116 Wn.2d at 82-83.

Premeditation may be proved by circumstantial evidence. To prove the element of premeditation, the evidence must show both an opportunity to deliberate and deliberation on the intent to kill. State v. Bingham, 105 Wn.2d 820, 826, 719 P.2d 109 (1986). Evidence of motive, planning, preparation, multiple assaults, and prolonged struggle will support a finding of premeditation. State v. Gentry, 125 Wn.2d 570, 598-99, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995).

The defendant argues that the prosecutor misstated the law regarding premeditation and intent by focusing on the amount of time needed for deliberation and not discussing the requirement that the defendant actually deliberated before making the decision to commit the murder. The defendant did not object to any of the arguments he identifies as a misstatement of the law. The issue is therefore waived unless the arguments were erroneous and an instruction would not have cured the prejudice.

Here the jury was properly instructed on the law of premeditation. 2 CP 317. The jury was instructed to disregard any remark made by the lawyers that was not supported by the evidence or the law in the court's instructions. 2 CP 309. If the prosecutor's remarks were improper, these instructions cured any

prejudice. However the prosecutor did not misstate the law of premeditation. For that reason as well the claim of error is waived.

The defendant cites four instances where the prosecutor referenced the amount of time necessary to deliberate in closing and rebuttal arguments. Taken in context of the entire argument and the issues framed by the defense, the prosecutor's arguments did not suggest that the jury need not find the defendant actually deliberated before finding the element of premeditation had been proved.

The first statement the defendant relies on to support his argument was made at the beginning of the prosecutor's closing argument. The defendant only cites the portion of the argument where the prosecutor quoted the jury instruction on premeditation. Right after that quote the prosecutor stated "You heard lots of evidence in this case that establishes for you that there was much more than a moment in time involved in his deliberation, in his plan to kill Officer Biendl." 5/9/13 RP 6898 (emphasis added).

Thereafter the prosecutor reviewed the evidence that established that the defendant had deliberated on committing the murder before he killed Officer Biendl. The prosecutor noted that the defendant had manipulated the time and place of the murder to

ensure that no witnesses would be present. He talked about the time it took to kill Officer Biendl and the struggle that ensued between them resulting in her defensive wounds. He also referred to the defendant's statements admitting that he "stalled for time" until everyone had left the chapel "because he knew he was going to kill her" and that by the time Tennessee Price had brought him his coat the defendant had already decided to kill her. 5/9/13 RP 6898-6903.

The remaining arguments the defendant challenges were made in response to arguments the defense attorney made in closing. 5/9/13 RP 6936-37, 6940-41. A prosecutor is permitted to make a fair response to the arguments of defense counsel. Russell, 125 Wn.2d at 87.

In closing defense counsel conceded the murder was intentional. However, he argued the evidence did not show that he had deliberated beforehand. Counsel pointed to the defendant's statement that he experienced escalating rage in response to something Officer Biendl said. Counsel then argued that the defendant's reaction after the murder suggested that he had not thought about the consequences from murdering her, he did not have a motive, and he did not prepare for the murder by having a

weapon handy. Counsel discussed buying an insurance policy and digging a grave beforehand as examples of motive and preparation.
5/9/13 RP 6925-33.

This argument suggested that in order to prove premeditation the evidence needed to show an elaborate plan that took a significant amount of time to formulate and perform. The challenged arguments were the prosecutor's response to that argument. The prosecutor read the instruction on premeditation and then argued that the instruction did not require any specific act after the intent was formed and before the murder was committed.
5/9/13 RP 6936-37. The prosecutor then reviewed the evidence the defendant designed a plan to kill Officer Biendl before he killed her.
5/9/13 RP 6939-42.

Contrary to the defendant's claim, the prosecutor discussed both the time and deliberation elements of the definition of premeditation. The prosecutor did not directly or by inference suggest to the jury that they could find he had premeditated the murder simply because "more than a moment in time" elapsed before he killed Officer Biendl. Because the arguments did not misstate the law they were not error.

C. THE COURT'S INSTRUCTIONS PROPERLY STATED THE APPLICABLE LAW, WERE NOT MISLEADING, AND ALLOWED THE DEFENDANT TO ARGUE HIS THEORY OF THE CASE.

Jury instructions are sufficient when read as a whole are an accurate statement of the law, are not misleading, and allow the parties to argue their theories of the case. State v. Aguirre, 168 Wn.2d 350, 363-64, 229 P.3d 669 (2010). A court need not give a party's proposed instruction if it is repetitious or collateral to instructions already given. State v. Brown, 132 Wn.2d 529, 605, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998).

The defendant challenges the court's decision to give the standard WPIC instruction rather than his proposed instruction defining premeditation. He also argues the verdict form in the penalty phase was misleading. Alleged instructional errors are reviewed de novo. State v. Brett, 126 Wn.2d 136, 171, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996).

1. The Premeditation Instruction Accurately Stated The Law And Permitted The Parties To Argue Their Theories Of The Case.

The State proposed the standard WPIC instruction defining premeditation. The instruction informed the jury that:

Premeditation means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will

still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

3 CP 423¹⁰.

The defendant proposed a modified version of that instruction which in addition informed jurors that "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." 2 CP 339.

The defense argued that the court should give its proposed instruction because it more clearly drew a distinction between forming the intent to commit a murder, and premeditating that intent. 5/8/13 RP 6823-25. Ultimately the court rejected the defense proposed instruction and instead gave the standard instruction proposed by the State. The court reasoned that the standard instruction allowed the defense to argue its theory of the case, and that the undefined term "reflect" could be confusing to jurors. 5/8/13 RP 6825-26.

¹⁰ The State's proposed instruction differed slightly from the standard WPIC in that it used the term "premeditation" rather than "premeditated."

The defendant argues that the court erred when it rejected his proposed modified instruction defining premeditation. He recognizes that this court has repeatedly approved the instruction given by the trial court. Brief of Appellant at 218; see Brown, 132 Wn.2d at 604-06; Clark, 143 Wn.2d at 770-71, 24 P.3d 1006 (2001), State v. Benn, 120 Wn.2d 631, 647-58, 845 P.2d 289, cert. denied, 510 U.S. 944 (1993). This court has specifically found no error in rejecting a proposed instruction including the language that the defendant proposed here. State v. Rice, 110 Wn.2d 577, 603-04, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910 (1989).

Nevertheless the defendant argues that not giving his proposed instruction allowed prosecutors to argue premeditation was established once the intent to commit the murder had been formed. As discussed above, the prosecutor did not argue that premeditation was established by proof the defendant intended to commit the crime. The arguments that the defendant cites in support of his challenge to the premeditation instruction responded to arguments that premeditation involved some kind of detailed plan. The prosecutor did not argue that premeditation occurred at the same moment he formed the intent. Nor could the prosecutor make that argument when the instructions are considered as a

whole. Instead he argued from the evidence that the defendant formed a plan to kill Officer Biendl some amount of time before he entered the chapel and murdered her. 5/9/13 RP 6937-41.

In addition to the instruction defining premeditation, the court gave a separate instruction defining intent. The instruction told jurors that "a person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime." 2 CP 316. Unlike the instruction on premeditation, intent did not require any thought beforehand or prior deliberation. The court further distinguished the two mental elements in the "to convict" instruction, separating them out as distinct elements of the offense. 2 CP 315. Taken together, the court's instructions clearly distinguished the two mental states necessary to find the defendant guilty of premeditated first degree murder. As such they permitted the defendant to argue his theory of the case that the murder had been intended, but not premeditated.

While the added language in the defendant's proposed instruction further defined "premeditation," it was redundant to other language in the instruction. The instruction already told the jury that premeditation meant "thought over beforehand" which required "deliberation." "Mental process of thinking beforehand, deliberation,

reflection, and weighing or reasoning” added nothing to the definition.

Because the instructions given by the court were a correct statement of the law, allowed the parties to argue their theories of the case, and were not misleading, the court did not err when it gave the standard instruction defining premeditation. Because the defendant’s proposed instruction included redundant and possibly confusing language, the court did not err when it declined to give his proposed instruction.

2. The Penalty Phase Closing Instruction Was Not Confusing.

At the penalty phase the State proposed the closing instruction set out in WPIC 31.08. In part that instruction stated “you must answer one question. All twelve of you must agree before you answer the question ‘yes’ or ‘no’. If you do not unanimously agree then answer ‘no unanimous agreement.’” 4 CP 739. The defense objected to the phrase “or no” arguing the jury was only required to be unanimous to answer the question “yes.” 5/14/13 RP 7125-28.

The court gave the instruction proposed by the State. In addition it provided a verdict form that permitted jurors to answer “‘YES’ (in which case the defendant shall be sentenced to death), ‘NO’ (in which case the defendant shall be sentenced to life

imprisonment without the possibility of release or parole), [or] 'NO UNANIMOUS AGREEMENT' (in which case the defendant shall be sentenced to life imprisonment without the possibility of release or parole)." 5/14/13 RP 7127-29; 1 CP 111-12, 121-22.

The defendant argues the court erred by including "or no" in the concluding instruction because it failed to follow what he characterizes as the dictate of Benn by removing the challenged language. In re Benn, 134 Wn.2d 868, 931-32, 952 P.2d 116 (1998). In Benn the defendant argued the instruction at issue here improperly encouraged a unanimous verdict. Id. at 928. This court agreed that the option to return a unanimous "no" verdict was unnecessary since one "no" vote could result in the same sentence as twelve "no" votes. Id. at 931. This court suggested the issue could be avoided by removing the "or no" language. Id. n. 18. However it did not require that the unanimous "no" option be removed from the concluding instruction in a special sentencing proceeding. After the decision in Benn this court has continued to reject a challenge to the penalty phase closing instruction on that basis. State v. Cross, 156 Wn.2d 580, 616, 132 P.3d 80, cert. denied, 549 U.S. 1022 (2006).

The defendant also argues that the instruction was misleading because most jurors understand that a non-unanimous decision will result in a hung jury and retrial. Reading all of the instructions in context however it is unlikely that jurors would reach that conclusion. The verdict form specifically states that a non-unanimous verdict will still result in a sentence. This court recognized that “the likelihood the jury was misled—either as to the consequences of a non-unanimous decision or as to its ability to report a nonunanimous decision—is extremely remote.” Benn, 134 Wn.2d at 932¹¹.

The penalty phase concluding instruction did not misstate the law nor was it misleading. The court did not commit reversible error when it gave the standard WPIC instruction.

¹¹ In addition the defense discussed with each juror in the death qualification phase of voir dire what the outcome of the sentencing phase would be in the event one juror voted for life without parole. 4/4/13 RP 3105-08; 4/5/13 RP 3236-37; 4/8/13 RP 3357-58; 4/9/13 RP 350-08; 4/10/13 RP 3752-53, 3775-77, 3797, 3802; 4/12/13 RP 4202-03, 4301-32, 4202-04; 4/17/13 RP 4682-84; 5/23/13 RP 5523. These discussions make it even less likely that jurors would become confused by an otherwise clear instruction.

D. EVIDENTIARY RULINGS IN THE PENALTY PHASE DID NOT DEPRIVE THE DEFFENDANT OF HIS RIGHT TO A FAIR TRIAL, OR TO APPEAR, DEFEND, OR CONFRONT WITNESSES.

1. Evidence The Defendant Was Serving A Sentence Of Life Without Parole Was Not Unfairly Prejudicial.

"In capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (citation omitted). At trial, the defendant sought to limit the jury's consideration of his record during the penalty phase. He argued that it was unfairly prejudicial to allow jurors to consider his life without parole sentence when life without parole was one option if he were to be convicted in this case. 4/2/13 RP 2058-60; 4 CP 687-89. The State opposed the motion on the basis that it was relevant information regardless of whether a judge or jury performed the sentencing function. 4/2/13 RP 2061; 4 CP 713-15. The court denied the motion, finding the evidence was relevant and admissible at the penalty phase. 4/25/13 RP 5859.

This court has found a defendant's sentence is relevant and admissible in a special sentencing proceeding, even when that

sentence is an exceptional sentence. This court reasoned that an exceptional sentence is authorized by law, and is carefully regulated by case law. Gentry, 125 Wn.2d at 637-38. Like an exceptional sentence, a sentence of life without parole is authorized is authorized and regulated by law. It may only be imposed under certain circumstances. RCW 9.94A.030(37), 9.94A.570. The prosecution bears the burden to prove that prior convictions count as strike offenses. A trial court's determination that an offender's history qualifies him for a sentence under those statutes is reviewed de novo. State v. Saenz, 175 Wn.2d 167, 172, 283 P.3d 1094 (2012).

An offender's sentence is part of the offender's record that the court contemplated was necessary for the jury to consider as part of a constitutionally permissible death penalty sentencing hearing. Woodson, 428 U.S. at 305. The defendant does not dispute this, but he asks the court to carve out an exception for those offenders who are already serving a life without parole sentence. He argues that the evidence will deprive him of the presumption of leniency and will invite the jury to impose a per se death penalty similar to the mandatory death penalty found unconstitutional in Woodson. Brief of Appellant at 225.

To support his argument the defendant points to responses that eight jurors gave during defense questioning in voir dire.¹² Each juror was asked his or her opinion about whether life without parole was an appropriate sentence in a hypothetical case. The case involved a murder committed without excuse or justification while the offender was serving a sentence of life without parole. The hypothetical did not include consideration of any mitigating circumstances. 4/4/13 RP 3140-42; 4/5/13 RP 3187-89, 3255-56; 4/9/13 RP 3699-3701; 4/17/13 RP 4492-93; 4/18/13 RP 4846-48; 4/24/13 RP 5621-22.

Those limited responses do not support the defendant's argument that admitting evidence of his sentence as a persistent offender would result in an automatic death sentence. Many jurors recognized that the hypothetical was incomplete, and that it did not account for the possibility of any mitigating circumstances. Jurors agreed that mitigating circumstances did bear on what an appropriate sentence would be. 4/4/13 RP 3143-47; 4/5/13 RP 3194, 3249-51, 3257; 4/8/13 RP 3402-13; 4/9/13 RP 3708; 4/17/13

¹² There were a total of 136 jurors individually questioned. See generally 4/4/13 RP through 4/25/13 RP 5851.

RP 4487-88, 4496-4502; 4/18/13 RP 4857; 4/24/13 RP 5616, 5629-32.

These responses demonstrate that jurors understood that the death penalty was not automatic even if some evidence might weigh more heavily toward that result. Admitting evidence of the defendant's persistent offender status did not have the same mandatory result present in Woodson. The defendant was therefore not unfairly prejudiced when the court admitted that evidence.

Finally, courts have found no error in arguments advocating for the death penalty because prior life without parole sentences proved insufficient. State v. Flowers, 589 S.E.2d 391 (N.C. 1997), cert denied, 522 U.S. 1135 (1998); People v. Brisbon, 544 N.Ed.2d 297 (Ill. 1989), cert denied, 494 U.S. (1990). In Flowers the defendant was charged with murdering an inmate while he was serving a sentence for a capital crime. The prosecutor argued for the death penalty, arguing that a second life sentence would not protect other inmates and guards that were forced to be around him. The court found the argument was a proper deterrence argument. Flowers, 489 S.E. 2d at 413. In Brisbon the prosecutor argued that the death penalty was appropriate because the defendant continued to commit violent crimes even after being

sentenced to a virtual life without parole term. Brisbon, 544 N.E.2d at 300. The court found the argument was proper because it focused on the defendant's criminal history, and lack of positive response to incarceration. It distinguished the argument from an earlier case because the argument was not solely designed to inflame the passions and fears of the jury. Id. at 301.

In each of these cases evidence the defendant had been serving a life without parole, or virtual life without parole sentence was before the jury. The relevance of that evidence was properly argued by the prosecutor as bearing on deterrence, and the unlikelihood of rehabilitation. Because the evidence is relevant for those purposes, the court here did not err when it allowed the State to introduce evidence of the defendant's persistent offender sentence here.

2. Argument Regarding The Bible Was Properly Limited.

The defendant made two references to the Bible in his statements to police. In a video recorded statement, the defendant told police the reason he was talking to them because "she didn't deserve to die...so...the bible says if you take a life, you give a life." Ex. 15 at 55. The defendant wrote a kite that he intended to be given to the prosecutor that began "My position is simple. The Bible

says: 'Whoever kills a man [woman] shall surely be put to death' (Leviticus 24:17, 21) and: 'Whoever sheds man's blood, by man his blood shall be shed.'" Ex. 123. The defendant objected to each of these statements on the basis that it was not voluntarily made. 5/24/12 RP 1314-49. The court found the statements were voluntary and admissible. CP 1241, 1245-55. The defendant objected to the reference to the Bible specifically in his video recorded statement on the basis that it was not relevant and the defendant's statement that he deserved the death penalty invaded the province of the jury. 1/16/13 RP 1631-32. The court ruled that the statement was relevant to show he caused Officer Biendl's death and that his statements were voluntary. It found the probative value of those statements was not outweighed by the prejudice to the defendant. 1/16/13 RP 1635-36.

Before the penalty phase, the State moved to prohibit in closing argument a general invocation of the Bible as authority on which to find the death penalty should not be imposed. The motion was based on authority holding it was improper to rely on biblical sources to undermine the law as given to the jury by the court. People v. Sandoval, 4 Cal.4th 155, 194, 14 Cal Rptr.2d 342, 841 P.2d 682 (1992), affirmed sub nom Victor v. Nebraska, 511 U.S. 1,

114 S.Ct. 1239, 127 L.Ed.2d 583 (1994).The State did not oppose argument about the evidence presented, including the defendant's own references to the Bible. 3 CP 571-72; 5/13/13 RP 6971-72.

The defense agreed that the Bible should not be cited as a basis on which to decide the penalty phase. Rather, counsel sought to argue that the jury should not consider the Bible when deciding the penalty phase. The court granted the State's motion, but it permitted the parties to address the evidence about the Bible that had been admitted during the guilt phase. 5/13/13 RP 6972-75.

The defendant now argues the court erred in granting the motion in limine. He argues that since the State was permitted to introduce the defendant's references to the Bible into evidence, he should have been permitted to address that evidence in closing. The record reflects that the court did permit the defense to address the evidence in closing. The court's ruling did not preclude the defense from arguing that the defendant's references to the Bible cannot form the basis for the jury's decision in the penalty phase.

The defendant argues that the State "clearly opened the door to rebutting the inference that the Bible required" the death penalty in his case. He cites several cases for the proposition that once evidence supporting one position is offered both rules of

evidence and constitutional principles permit the defendant to introduce evidence presenting a contradictory position. State v. Berg, 147 Wn. App. 923, 939, 198 P.3d 529 (2008) (evidence rules permitted testimony about detective's experience in other cases when he asked whether any family members had corroborated victim's report of sex abuse); State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (defendant had a due process right to introduce evidence that a murder victim was seen in the presence of another person one day after the State alleged the defendant kidnapped and killed the victim).

None of these authorities are relevant to the circumstances of this case. The parties agreed on the scope of argument as it related to the Bible quotes, i.e. that it was the secular law that controlled, and the religious laws had no bearing on the jury's decision. The State did not make the argument that the defendant alleges opened the door for rebuttal. The only reference the prosecutor made to the Bible quotes in closing anticipated an argument that the jury should ignore the defendant's words but "you can't ignore his actions, and you can't ignore his history." 5/14/13 RP 7143. The argument downplayed what the defendant had said the Bible required in this circumstance, focusing instead on the

defendant himself. It was consistent with how the parties agreed the argument should be limited.

The defendant did rebut the prosecutor's arguments by also focusing on the defendant instead of his Bible quotations. Counsel pointed out that while defendant had been in prison most of his adult life, his behavior was exemplary except for the murder. That exemplary behavior was a mitigating circumstance meriting leniency. 5/14/13 RP 7144-46, 7149-51.

3. Rebuttal Evidence Showing That Sex Offender Treatment Would Not Have Prevented the Murder Was Properly Permitted.

The defense sought to introduce evidence that the defendant asked for sex offender treatment after his 1995 convictions for first degree rape and first degree kidnapping for the purpose of showing that despite his sentence of life without parole he was still willing to take part in any programs available to him in prison. The proposed evidence would show that there is sex offender treatment in prison, but only for offenders who will eventually be released. 5/13/13 RP 6989, 6998-91, 6995; ex. 169.

The State did not object to the proposed evidence. Instead it argued the evidence raised an inference that the murder would have been preventable had the defendant been given the sex

offender treatment he had requested. The State sought to rebut that inference by evidence showing that treatment would not have prevented this crime. It offered the testimony of the defendant's last treatment provider who treated the defendant up to two days before the rape that resulted in the persistent offender sentence. It also offered the defendant's sworn statements that the treatment that he had received would not have prevented his crime. The State also sought to explain why those who will not be released are not eligible for that kind of treatment by producing evidence that one component of sex offender treatment for prisoners occurs in the community. Alternatively, the State agreed the proposed evidence would not be presented if the defense also stipulated that sex offender treatment would have had no impact on preventing the murder but was offered to show that he attempted to improve himself. 5/13/13 RP 6981-87.

The court agreed that the defense proposed evidence raised an inference that had the Department of Corrections provided the defendant the treatment that he requested, it might have prevented the murder. It determined that evidence rebutting that inference was probative of that question. It therefore permitted the State to

rebut the proposed evidence if the defendant sought to introduce it.
5/13/13 RP 6989-90, 6994.

The defendant now argues that the court erred when it ruled that absent a stipulation, the State could present its proposed rebuttal evidence if the defendant introduced evidence that he sought sex offender treatment. He also argues that the court erred when it ruled that the State could rebut evidence that the State did not treat people who would not be released from custody with the opinion that the defendant was not amenable to treatment. He argues these rulings infringed on his constitutional right to present a defense.

A criminal defendant has a right to a meaningful opportunity to present a complete defense under both the Due Process Clause of the Fourteenth Amendment and the Confrontation Clause of the Sixth Amendment. Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L.Ed.2d 636 (1986). Thus he may not be precluded from presenting competent, reliable evidence that is not otherwise inadmissible. Id. State v. Rafay, 168 Wn. App. 734, 794-95, 285 P.3d 83 (2012), review denied, 176 Wn.2d 1023 (2013). The right is limited, however. Evidentiary rulings do not abridge a defendant's right to present a defense so long as they are not "arbitrary" or

“disproportionate to the purposes they are designed to serve.” United States v. Scheffer, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998), quoting Rock v. Arkansas, 438 U.S. 44, 55, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987). Rules excluding evidence are arbitrary or disproportionate “only where it has infringed upon a weighty interest of the accused.” Id.

A defendant’s right to present a defense was infringed when he was prohibited from presenting evidence that challenged the credibility of his confession and there was no rational justification for excluding the evidence. Crane, 476 U.S. at 687, 690-91. However that right was not infringed when, pursuant to court rule, a court excluded evidence that a defendant passed a polygraph test. Excluding that kind of evidence promoted the legitimate interest of ensuring that only reliable evidence was introduced at trial, limiting credibility determinations to the fact finder, and avoiding litigation on collateral matters. Scheffer, 523 U.S. at 309.

Similarly, excluding evidence pursuant to ER 404(b) did not infringe the defendant’s right to present a defense. The court rule ensured the reliability of evidence introduced at trial, and avoided litigation on collateral matters. Excluding evidence under that rule did not significantly undermine any fundamental element of the

defense, since it did not exclude other evidence that was relevant to the defense. State v. Donald, 178 Wn. App. 250, 268, 316 P.3d 1081 (2013), review denied, 180 Wn.2d 1010 (2014).

Contrary to the defendant's argument, he was not precluded from introducing evidence that he had asked for sex offender treatment before he committed the murder. Instead the court's ruling presented the defense with a tactical choice. The defendant could choose to not introduce the evidence and instead rely on evidence that he had participated in other programming while in prison after his 1995 conviction, to establish that he was willing to participate in programming as a mitigating factor. Or he could introduce the proposed evidence, knowing that it would be rebutted through evidence presented by the State.

The defendant cites no authority for the proposition that a court's evidentiary ruling that results in such a tactical choice violates his constitutional right to present a defense. The court's ruling was based on the rule that when a party has raised a material issue the opposing party is generally permitted to introduce evidence to explain, clarify, or rebut that evidence. Berg, 147 Wn. App. at 939, State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). The rule is designed to prevent evidence limited to "half-

truths.” Id. Allowing the jury to hear full information about a material issue fosters reliable results. “The rule is based on the belief that an adversary system is essential to determining the truth.” K. Tegland, 5 Washington Practice, Evidence Law and Practice § 1.03.14 (5th Ed. 2014).

The court’s ruling did not preclude the defendant from presenting evidence that his participation in programming while in prison was a mitigating factor that should be considered by the jury. The defendant admitted evidence he had applied for several correspondence courses of study. He admitted evidence of his participation and completion of various classes while in prison. He also admitted evidence that he worked in Prison Industries after his 1995 conviction and was considered a good worker. 5/13/13 RP 7024-25, 7030-34, 7043-49; 5/14/13 RP 7130.

The jury was allowed to consider the defendant’s participation in programs while in prison as a mitigating factor that might merit leniency. The defense recognized that the proposed evidence regarding the defendant’s attempts at getting sex offender treatment after his 1995 conviction could raise an inference that had he received such treatment, it could have prevented this murder. Counsel argued that the Department knew the defendant

was an untreated sex offender with prior rape convictions, and in making the decision to not provide him sex offender treatment they had a duty "manage him appropriately."¹³ 5/13/13 RP 6995. The court appropriately permitted the State to rebut that evidence should the defendant choose to admit his proposed evidence. His constitutional right to present a defense was not abridged.

E. THE CUMULATIVE ERROR DOCTRINE DOES NOT APPLY WHERE THE DEFENDANT HAD NOT SHOWN ANY ERROR THAT DEPRIVED HIM OF A FAIR TRIAL.

The defendant argues that he is entitled to a new trial and dismissal of the death notice as a result of cumulative error. Under the cumulative error doctrine a defendant is entitled to a new trial when the combined effect of an accumulation of errors produce a trial that is fundamentally unfair even when any one of the errors alone would be harmless. In re Cross, 180 Wn.2d 665, 678, 327 P.3d 660 (2014). The doctrine does not apply when there are no errors, or few errors that had little or no effect on the outcome of the

¹³ Counsel concluded by stating that evidence that sex offender treatment was not available to the defendant because of his life without parole sentence was not intended to show that the Department of Corrections failed in some way. This last argument directly conflicts with the argument that the Department was aware of what who they were dealing with in relation to the defendant. The inference that the Department should "manage him appropriately" in light of evidence that he was an "untreated sex offender" clearly infers that the Department had failed in a significant way. For that reason the court permitted rebuttal evidence that the defendant had been a treated sex offender and despite that treatment he reoffended.

trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000), State v. Stevens, 58 Wn. App. 478, 498, 794 P.2d 38, review denied, 115 Wn.2d 1025 (1990).

The defendant bears the burden to prove that multiple trial errors occurred, and that the accumulated prejudice affected the outcome of the trial. Cross, 180 Wn.2d at 678. "There is no prejudicial error under the cumulative error rule if the evidence is overwhelming against a defendant." Id.

Here, as discussed above, the defendant has failed to prove that any prejudicial error occurred in his trial. Even if this court should conclude some error occurred, no prejudice accrued to the defendant.

Moreover, the evidence at trial was overwhelming. It showed that the defendant used a ruse to get alone with Officer Biendl. He was familiar with the chapel and knew the only place he would be undetected by security cameras was in the sanctuary. There he attacked Officer Biendl. When he was unable to strangle her with her bare hands, he used a microphone cord to accomplish that deed. Even without the defendant's detailed confession, the independent evidence strongly supported the conclusion that the defendant committed a calculated, premeditated murder. The

cumulative error doctrine does not provide a basis on which to grant the defendant a new trial or overturn his death sentence.

F. IN A CAPITAL SENTENCING PROCEEDING, THE JURY CANNOT PROPERLY CONSIDER REASONS FOR “MERCY” THAT ARE NOT BASED ON FACTS ABOUT THE CRIME OR THE DEFENDANT.

The State has assigned error to the trial court’s instruction defining “mitigating circumstances.” If this court orders a new penalty phase, this issue should be considered for the guidance of the court on remand. See RAP 2.4(a). Even if the case is not remanded, the court should consider this issue for the guidance of trial courts in future cases. The challenge involves optional language in a pattern instruction, WPIC 31.07. As explained below, this language introduces an improper arbitrary element into the jury’s deliberations.

This court has explained the constitutional principles governing mitigating circumstances:

Under the Eighth and Fourteenth Amendments, the finder of fact in a capital proceeding must not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Notwithstanding this requirement, the trial court maintains its traditional authority to exclude, as irrelevant, evidence not bearing on the defendant’s

character, prior record, or the circumstances of his offense.

State v. Davis, 175 Wn.2d 287, 318 ¶ 47, 290 P.3d 43 (2012), cert. denied, 134 S.Ct. 62 (2012).

Here, the trial court gave the following instruction over the State's objection.

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 or moral culpability, or which justifies a sentence of less than death, although it does not justify or excuse the offense.

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

1 CP 120, Penalty phase inst. no. 5.

The first paragraph of this instruction correctly reflects the principles explained in Davis. It allows the jury to consider any fact about the offense or the defendant that would justify a sentence less than death. No limitation is placed on the kind of facts that the jury can consider, provided they relate to the offense or the defendant.

The second paragraph, however, undercuts this principle. It allows the jury to consider "the appropriateness of the exercise of mercy" as a mitigating factor. Nothing in the instruction requires that

this "mercy" be tied to any fact about the offense or the defendant. Unless that paragraph is entirely redundant, it implies that the jury can apply "mercy" even though it is *unrelated* to the offense or the defendant. This is precisely why the trial court included this language: the court believed that "the idea of mercy appears to have some independence from facts related at least to the crime, if not to the defendant." 5/14/13 RP 7121. As Davis shows, this concept is wrong.

Although this language has been included in the pattern instruction, the Committee has expressed concern about this language.

[T]he committee has placed the last paragraph of the instruction in brackets. This paragraph allows the jury to consider "the appropriateness of the exercise of mercy" as a mitigating factor. This paragraph appears in the instruction that was approved in [State v. Mak, 105 Wn.2d 692, 718 P.2d 407 (1986).] The court did not, however, address any issues relating to this specific language. Arguably, this paragraph could be construed as allowing the jury to apply "mercy" arbitrarily, for reasons unrelated to the offense or the defendant. See In re Rupe, 115 Wn.2d 379, 388, 798 P.2d 780 (1990) (modern death penalty jurisprudence was designed to end "the historical pattern of juries according discretionary 'mercy' to murderers who were sympathetic because they happened to be white and privileged, at the expense of those who were not sympathetic because they happened to be otherwise").

Comment to WPIC 31.07.

This concern is well founded. This court has emphasized that sentencing decisions in capital cases must be “based on reason rather than caprice or emotion.” Rupe, 115 Wn.2d at 388, 798 P.2d 780 (1990). “[T]he sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant’s background, character, and crime rather than mere sympathy or emotion.” Id. at 384-85. Accordingly, this court has held that sympathy is not a proper factor for the jury to consider. Rupe, 115 Wn.2d at 388.

The court has, however, distinguished between “sympathy” and “mercy.” “Sympathy” is an emotional factor, while “mercy” is based on reason. State v. Gentry, 125 Wn.2d 570, 648, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995). The first paragraph of the instruction reflected this principle. It allowed the jury to base its decision on any factor that was rationally related to the offense or the defendant. The second paragraph, however, suggests that the jurors can exercise mercy simply because they wish to be merciful, without regard to any facts. “Mercy” applied in this manner is simply another name for sympathy.

The optional second paragraph of WPIC 31.07 is incorrect. This court has never considered the issues related to this instruction. The court should now make it clear that this language should not be used in any future proceedings in this or any other case.

VII. ARGUMENT RELATING TO STATUTORY REVIEW

Under RCW 10.95.130, this court is required to answer four questions: (1) Was there sufficient evidence to justify the finding that there were no sufficient mitigating factors to merit leniency? (2) Was the sentence of death excessive or disproportionate to the penalty imposed in similar cases? (3) Was the sentence of death brought about through passion or prejudice? (4) Does the defendant have an intellectual disability? The court should answer the first question "yes" and the remaining questions "no."

1. The Jury Reasonably Determined That The Few Mitigating Circumstances Offered By The Defendant Are Insufficient To Merit Lenience.

The first statutory question asks this court to determine whether there was sufficient evidence to justify the jury's finding that there were not sufficient mitigating circumstances to merit leniency. RCW 10.95.130(2)(1). In answering this question, "this court must determine whether, after viewing the evidence in the

light most favorable to the prosecution, any rational trier of fact could have found sufficient evidence to justify [the jury's] conclusion beyond a reasonable doubt." State v. Brown, 132 Wn.2d 529, 551, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998).

In this case, the evidence of mitigating factors was very weak. There was no evidence that the defendant suffers from any kind of mental disorder. There was no evidence that he was the victim of abuse or mistreatment. There was no evidence of strong provocation – according to the defendant's confession, he killed Officer Biendl because she said some "pretty foul things." Ex. 115 at 13.

The defendant relies on basically two mitigating factors. One of them is the defendant's record of accomplishment in prison. Brief of Appellant at 280. These "accomplishments," however, must be viewed differently in light of the defendant's description of the murder. He told police that, because of the things Officer Biendl said to him, "all these offenses that I had been stuffin' for years and years and years just started running." Ex. 115 at 15. So all of the defendant's "accomplishments" concealed a murderous anger that was building underneath.

In Washington prisons, 85% of the offenders have a history of violence. 5/13 RP 7087. The Washington State Reformatory has been in operation since 1913. Yet no correctional officer was ever before killed there. 5/13 RP 7097. Given these facts, the jury could view this defendant as the most dangerous person to be incarcerated at the Reformatory in almost a century. A jury could reasonably decide that the defendant's prison "accomplishments" deserve little weight as a mitigating factor.

The only other mitigating factor pointed out by the defendant is his expressions of remorse. This remorse, however, comes from a man who had previously raped two women and assaulted a third with a knife. Ex. 165-70. Given the defendant's repeated commission of violent crimes, a jury could decide that his remorse means very little. The jury's finding is supported by substantial evidence.

2. The Sentence Imposed On The Defendant Is Not Disproportionate To The Sentences In Those Few Cases That Are Comparable.

The second question calls on this court to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases." RCW 10.95.130(2)(b). There are at present 376 "similar cases" under the statutory definition: 341

cases in which proportionality questionnaires have been filed, and 35 other cases in which the judge or jury considered the imposition of capital punishments, and the case was reported in the appellate reports since January 1, 1965.

[O]ur goal in proportionality review is to ensure that the death penalty's imposition is not freakish, wanton, or random and is not based on race or other suspect classifications... [W]e must consider at least (1) the nature of the crime, (2) the aggravating circumstances, (3) the defendant's criminal history, and (4) the defendant's personal history, as well as any additional substantive challenges to the proportionality of the sentence.

State v. Davis, 175 Wn.2d 287, 348 ¶ 119, 290 P.3d 43 (2012), cert. denied, 134 S.Ct. 62 (2012) (citations omitted). These factors do not indicate disproportionality.

a. Nature Of The crime.

This crime was committed within a prison. This court has recognized the "unique needs and objective of penal institutions."

[A] prison is a tightly controlled environment populated by persons who have chosen to violate the criminal law, many of whom have employed violence to achieve their ends. Tension between guards and residents is unremitting; frustration, resentment, and despair are commonplace.

Dawson v. Hearing Comm., 92 Wn.2d 391, 396, 597 P.2d 1353 (1979). Because of these facts, crimes committed within a prison cannot be readily compared to those committed outside.

This case illustrates some of the unique problems associated with crimes committed in prisons. Correctional officers must deal with inmates on a daily basis. They must maintain their alertness, while avoiding excessive emotion or fear. 5/13/13 RP 7087-88. This murder caused serious harm to other prisoners, both in the short and long term. In the short term, the prison was "locked down" for an entire month, which confined all the inmates to their cells for that time. 5/13/13 RP 7093-94. In the long run, inmates serving life without parole were denied the opportunity to participate in most Correctional Industries work. 5/13 RP 7060. These effects would not result from a murder committed under other circumstances.

There appears to be only one prior case that involved a murder committed within a prison: Dennis Williams, no. 44. The victim there was a fellow inmate. There was evidence that the offender had suffered substantial physical and sexual abuse as a child. In the special sentencing proceeding, the jury was unable to agree on a verdict. Thus, even when there was evidence of substantial mitigating factors, some jurors believed that those circumstances were insufficient to merit leniency. This one

comparable case does not establish that the death penalty is disproportionate in the present case

b. Aggravating Circumstances.

There were two aggravating circumstances here: the defendant was serving a term of confinement, and the victim was a correctional officer. As already mentioned, there is only one other case in which the defendant was in prison at the time of the crime. There are five cases involving crimes committed by escapees who were potentially eligible for the death penalty.¹⁴ Two of these (Robtoy and Campbell) received death sentences. In two of the three remaining cases, there was evidence of substantial mitigating factors.¹⁵

There are no other cases in which the victim was a correctional officer. The defendant cites a number of cases in which the victim was a law enforcement officer. In two of these, the jury returned a death sentence.¹⁶ In most of the other cases, the

¹⁴ Michael Robtoy, 98 Wn.2d 30, 653 P.2d 284 (1982); Charles Campbell, no. 9; David Lennon, no. 35; Gene King, no. 58; Brodie Walradt, no. 227. In a sixth case, the defendant was ineligible for the death penalty because of his youth. Vy Thang, no. 206.

¹⁵ Both King and Walradt had suffered abuse as children. In Walradt, the jury was unable to reach a verdict at the penalty phase.

¹⁶ Nedley Norman, no. 16A; Charles Finch, no. 154.

offender had no prior history of violent offenses.¹⁷ Several of these offenders also had significant mental health problems.¹⁸ These cases are not truly comparable to the present case. In one case where the offender did have a history of violent crimes, the jury failed to reach a verdict at the penalty phase.¹⁹ There are no cases that involve the combination of aggravating factors that existed in the present case.

c. Defendant's Criminal History.

The defendant's criminal history includes five prior violent offenses: first degree assault; second degree assault; first degree kidnapping, and two convictions for first degree rape. Ex. 165-70. This places him in a very select group. Only four other offenders had five or more prior violent convictions. Three of them received the death penalty.²⁰ Even when defendants had only four prior violent felonies, two out of four received the death penalty.²¹

¹⁷ Lonnie Link, no. 26; Darrin Hutchinson, no. 68; Patrick Hoffman, no. 71; Elmer McGinnis, no. 72; Kenneth Scharder. No. 95; Sap Kray no. 212; Nicholas Vasquez, no. 224; Thomas Roberts, no. 257; Ronald Matthews, no. 272; Jose Guillen, no. 274.

¹⁸ Hutchinson; Schrader; Vasquez; Roberts; Matthews. These is also true of one of the offenders with a prior violent offense: Juan Gonzales, no. 188.

¹⁹ Roberts Hughes, no. 23. Hughes had only two prior violent offenses.

²⁰ Cal Brown, no. 140; Michael Roberts, no. 176; Robert Yates, no. 251. In the fourth case, the offender accepted responsibility by pleading guilty. Billy Ballard, no. 321.

The defendant claims that death has not been imposed “for criminal history alone and in the absence of some fact about the crime that was egregious.” Brief of Appellant at 290. The cases do not support this claim. Roberts stabbed and strangled a man after tying him to a chair. State v. Roberts, 142 Wn.2d 471, 481-82, 14 P.3d 713 (2000). Braun kidnapped and murdered a young woman. State v. Braun, 82 Wn.2d 157, 158, 509 P.2d 742 (1973). Neither of these crimes appears exceptionally egregious of itself. Both death sentences appear to reflect the severity of the offender’s criminal history.

d. Defendant’s Personal History.

The defendant has offered nothing about his personal history that would serve to explain or mitigate this crime. Unlike many other offenders, there is no evidence that he has a history of abuse or any mental disorder. As discussed above, the defendant’s prior history of good behavior in prison deserves little weight.

In short, the defendant’s criminal history puts him in a group

²¹ Thomas Braun, 82 Wn.2d 157, 509 P.2d 742 (1973); Dwayne Woods, no. 177. The other two offenders had substantial mitigating circumstances. Eugene Maine, 82 Wn.2d 157, 509 P.2d 742 (1973) (lesser participant in the crime); Paul Vickers, no. 204 (offender’s brother provided key inculpatory evidence).

that has usually received the death penalty. In other respects, there are very few crimes that are truly comparable. The circumstances of the crime had a very harmful effect on the prison community – inmates and officers alike. Nothing about the penalty marks it as freakish, wanton, or random.

3. The Verdict Was Not Produced By Improper Appeals To The Jury's Passion Or Prejudice.

The third statutory question is whether the verdict was brought about through passion or prejudice. In answering this question, the court will consider whether the sentence was the product of appeals to the passion or prejudice to the jury. Cross, 156 Wn.2d at 634-35 ¶ 126. The defendant's challenges to the prosecutor's arguments are discussed above in section VI.B.2. As explained there, the verdict was not the product of passion or prejudice.

4. The Record Shows That The Defendant Does Not Have An Intellectual Disability.

The last statutory question is whether the defendant has an intellectual disability. The defendant has never asserted that he does, either here or in the trial court. As discussed above, his IQ has been measured as 106 (which is average) and 110 (which is

above average). 5/8/12 RP 1027. He meets none of the requirements for an intellectual disability.

VIII. CONCLUSION

The defendant received a fair trial. His guilt was overwhelmingly proved. The jury properly found that the minimal mitigating circumstances do not justify leniency. The judgment and sentence should be affirmed.

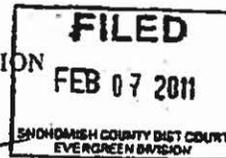
Respectfully submitted on July 1, 2015.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 
SETH A. FINE, #10937
Deputy Prosecuting Attorney
Attorney for Respondent

By: 
KATHLEEN WEBBER, #16040
Deputy Prosecuting Attorney
Attorney for Respondent

SNOHOMISH COUNTY DISTRICT COURT-EVERGREEN DIVISION



STATE OF WASHINGTON
COUNTY OF SNOHOMISH

NO. 11-32
SEARCH WARRANT

TO ANY PEACE OFFICER IN THE STATE OF WASHINGTON:

Upon the sworn complaint made before me it appears that there is probable cause to believe that the crime(s) of: **Aggravated Murder in the First Degree R.C.W. 9A.32.030, and R.C.W. 10.95**

Has been committed and that evidence of that crime; or contraband, the fruits of crime, or things otherwise criminally possessed; or weapons or other things by means of which a crime has been committed or reasonably appears about to be committed; or a person for whose arrest there is probable cause, or who is unlawfully restrained are concealed in or on certain premises, vehicles or persons within Snohomish County, Washington.

Previous Search Warrant regarding this investigation was approved by Judge Lyon of the Evergreen District Court on 02-03-2011. Prior search warrant authored by Detective Tolbert of the Monroe Police Department and approved by Judge Lyon is herein incorporated by reference.

YOU ARE COMMANDED TO:

1. Search, within ten (10) days of this date, the premises, vehicle or person described as follows:

The Washington State Reformatory (WSR) located at 16550 177th Avenue S.E. Monroe, Washington within the boundaries of Snohomish County. Specific areas within the reformatory to be search are as follows;

**WSR inmate property and storage room.
WSR Administration Building.**

2. Search, seize, and examine if located, the following property or person(s):

Any and all records, documents, papers, writings both typed and handwritten, books or any other personal records for inmate Byron E. Scherf 08-13-1958, DOC#287281. Such records and papers are to include; 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

001194

2351

APPENDIX A

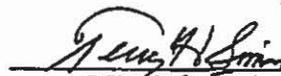
disciplinary issues, books, books with specific selections highlighted, underlined or bookmarked and writings in the margins of such books.

2A. The Affidavit for this Search Warrant is attached to the court's copy, and is incorporated by reference.

3. Promptly return this warrant to me or the clerk of this court; the return must include an inventory of all property seized.

A copy of the warrant and a receipt for the property taken shall be given to the person from whom or from whose premises property is taken. If no person is found in possession, a copy and receipt shall be conspicuously posted at the place where the property is found.

Dated: 2/7/2011



JUDGE Pro Tem
Terry H. Simon

PRINTED OR TYPED NAME OF JUDGE

AFFIDAVIT FOR SEARCH WARRANT PAGE 2 OF 6

Homicide Investigation, and Force Science Institute Certification. Your affiant is also a current member of the Snohomish County Multi-Agency Response Team (S.M.A.R.T.) which is responsible for the investigations of police use of force incidents, in-custody death investigations, and police involved shootings.

The affiant's belief is based upon the following facts and circumstances:

On 02-03-2011 at approximately 1519 hours I arrived at the Washington State Reformatory (WSR) located at 16550 177th Avenue S.E. in Monroe, Washington within the boundaries of Snohomish County in order to assist the Monroe Police Department in the service of a search warrant within the prison facility. I was previously advised that Detective Tolbert of the Monroe Police Department had obtained a signed search warrant from Judge Lyon of the Evergreen Division of Snohomish County District Court that authorized the search of certain areas of the prison for specific items. That search warrant and affidavit are herein incorporated by reference and attached with this search warrant and affidavit.

My duties upon arrival at WSR were to assist in the service of the search warrant upon the property room within the facility for the stored property of inmate Byron E. Scherf 08-03-1958 DOC#287281, a search of inmate Scherf's prison cell (#A1-12), and the WSR Internal Investigations Office located on the 3rd floor of the administration building. The first location searched was the inmate property and storage room.

Correctional Officer (C/O) Payne collected inmate Scherf's property and brought it to investigators to search. That property included cardboard boxes (total of 11 boxes), one clear plastic hobby kit, an electric guitar case containing an electric guitar and accessories and a television. The boxes were itemized with tags posted on the exterior of the boxes listing the number of the box with Scherf's name and DOC number on them.

I read a copy of the search warrant that Detective Tolbert had obtained and what the warrant authorized the search for. The following is an excerpt from the prior search warrant authored by Detective Tolbert for items to be searched for and seized,

"Seize, if located, the following property or person(s): ELECTRIC GUITAR, ELECTRIC GUITAR STRINGS, ELECTRIC GUITAR AMP CORD, ANY WIRE OR METAL THAT CAN BE POSSIBLY TRANSFORMED INTO A TOOL USED TO DEFEAT LOCKS OR DOORS, NEWSPAPER OR OTHER DOCUMENTS RELATING TO CARTOON/COMIC LOCATED IN BIENDL'S OFFICE AT CHAPEL, ALL PERSONEL JOURNALS OR PAPERS REGARDING JOURNALING REFERENCING THE CRIME, ANY AND ALL HAT'S THAT BELONG TO INMATE/SUSPECT SCHREF." * It should be noted that the inmate's name is Scherf, not Schref.

At approximately 1527 hours I opened sealed box #2 of #7. I conducted a thorough and diligent search of the contents of this box. Within this box were, (1) Brushy Creek hot pot, (1) West Bend fan, (1) power strip, (1) clear plastic mug with black lid, (1) round Tupperware style container, and one tall clear plastic Rubbermaid container with blue lid. There were no items within this box indicate of journaling, or writings. The box was then resealed at which time I conducted a search of box #4 of #7.

At approximately 1536 hours I opened sealed box #4 of #7 and conducted a thorough and diligent search of the contents. I discovered that the box contained toiletries and no items of journaling or writing. The box was then resealed at which time I obtained box #7 of #7.

At approximately 1547 hours I opened sealed box #7 of #7. Upon doing so I observed several books of various files, folders containing miscellaneous paperwork with Scherf's name on them, and loose paperwork that also contained Scherf's name on them.

AFFIDAVIT FOR SEARCH WARRANT PAGE 3 OF 6

Of the books within this particular box were the titles; "Abide in Christ", "The Release of the Spirit", and, "Holiness-Truth and the Presence of God". While searching the interior pages of each book I observed that several selections had been underlined and that side comments appeared to have been handwritten upon some of the pages within the books. Furthermore, copies of The Bible were also included within this particular box. I observed that one copy of The Bible was bookmarked in the new testament portion at John Chapter 6 and John Chapter 7. While searching the pages of the bibles I noted that there had been some underlined and/or highlighted passages as well.

Within the documents within this particular box I noted there were various extensive records and documentation pertaining to inmate Scherf. Such records included; prior psychiatric evaluations (some of which appeared to have handwritten notes and bracketed sections written on them in blue pen), medical records, military records (specifically a document I observed from the U.S. Army at Fort Knox), educational and schooling records (specifically a transcript from Walla Walla Community College showing Scherf's classes and grades, several of which he received the grade of A in), various historical prison records for Scherf, and prior apparent grievances that appeared to have been authored by Scherf that were sent to prison officials from inmate Scherf. Of further note were comments within the paperwork that I believe were a portion of Scherf's psychological records indicating that Scherf would not do well with, or would not interact well with female prison guards and/or female prison officials. Handwriting on some of these records appeared to indicate a bracketed portion of the record in blue pen. It appeared as though this bracketed portion of the document was information from one of Scherf's family members who had been interviewed. The words; "Oh really" were handwritten in blue pen near this bracketed section of the record. It was apparent that the subject who bracketed this portion of the records and wrote those words next to it was questioning the veracity of what the family member had said about Scherf in the record. There also appeared to be certificates of educational achievements within the paperwork in this box.

Additionally I located one piece of lined notebook paper with the R.C.W. for Assault in the Second Degree handwritten in blue pen on it. The spelling appeared accurate, the penmanship was legible, the format of the R.C.W. appeared appropriate, and the words were appropriately written between the lines on the paper. This piece of paper was collected as evidence.

The three books listed above; (Abide in Christ, The Release of the Spirit, and, Holiness-Truth and the Presence of God) were also collected as evidence due to extensive underlining of various passages and apparent handwritten side comments upon some of the pages.

At approximately 1755 hours I assisted in a search of two additional boxes that had been stored in the Internal Investigations office within the administration building of the prison. Investigator Padilla of WSR provided access to the Internal Investigations office and directed us to the two sealed boxes of contents that had been previously collected from Scherf's prison cell. Detective Pince elected to itemize these boxes as boxes #1 and #2.

I opened one of the boxes and observed a workbook and extensive amounts of paperwork within the box. Upon review of the workbook it appeared as though it was a self assessment workbook with question and answer portions within the book. The questions appeared to have been written by the author of the book with blank space after the question for the individual working on the book to handwrite the answers. There were several locations within this book that had handwritten data that appeared to have been written in pencil. The handwriting appeared to be legible and logical in response to the questions posed within the workbook. I did observe that there was an approximate ten to fifteen item list of goals that Scherf appeared to have handwritten in the back of the workbook. This book was at the top of the stack of paperwork within this box. This box was resealed and no items were removed from it. There were documents within this box with Scherf's name on them verifying the contents as Scherf's. A detailed examination of the remaining paperwork, books and documents within these boxes was suspended at this time.

AFFIDAVIT FOR SEARCH WARRANT PAGE 4 OF 6

hen saw one item of paperwork at the top of the box that Detective Pince was searching. This document appeared to be titled as; "Details of My Life History." This was a typed document that, according to Detective Pince, spoke about the author's child history, joining the military, brief synopsis of general references of prior crimes and running afoul of the law without specific crime details, use and/or abuse of drugs and alcohol, recidivism, and religion. Of particular note in this paper were comments pertaining to the author's military history. The paper spoke of how the author joined the Army in June of 1976 and "bailed" in August of 1976. The paper further noted that the author received an honorable discharge from the Army because the author was able to "pull a psychological scam." The paper further explained that the author had problems with authority figures and alluded to this being a reason for the psychological honorable discharge from the military. There were documents in this box with Scherf's name on them. No items were removed from the box and this box was resealed as well. Investigator Padilla advised that both of these boxes would be transported to the prison property room with the rest of Scherf's property.

Additionally I have learned through the continued investigation that Scherf frequently attended what is referred to as the "pill line" within the prison. It is my understanding that inmates gather at a certain location within the prison at certain times to obtain their medications. It is my understanding that Scherf was one such inmate and that he deviated from routine by not going to the "pill line" to receive his medication on the date of the murder which was 01-29-2011. This medical information will reveal that; Scherf was not present for "pill line", did not obtain his medication from "pill line" on the date of the murder, and deviated from a normal routine of attending "pill line." I believe that a deviation in this routine provides insight into intent and motivation of Scherf to commit the crime. Furthermore, the medical record of medications taken by Scherf will reveal any likely side effects should he miss a dose as is suspected occurred on the date in question. Additionally, I believe that this medical record will show that Scherf has previously missed doses of his medications in the past and will show a general history and routine of the exercise of attending "pill line."

I believe that all of the aforementioned documentation is relevant to the crime of Aggravated First Degree Murder as well as to any form of mental defense or claims of mental retardation that I believe would likely be proposed by the suspect at trial or for mitigation for leniency during or prior to sentencing. I know and have experienced an unrelated murder case in which, initially, the defendant faced a potential sentence of death. In that case the defendant pled guilty prior to trial. However, from that experience I know that a defendant's defense and/or mitigation package for leniency or mitigating factors to not pursue the death penalty includes an exhaustive amount of historical information to include; schooling and educational background, childhood experiences, child rearing, family background data, life history to include work history and the use and/or abuse of drugs and alcohol, criminal records to include arrest history, medical records, psychological evaluation records, and various other forms of historical and background data.

I know that underlined passages in books, handwritten writings in books and on documents have significance and meaning to that individual. Those underlined or highlighted passages may provide insight into an individual's beliefs, world view, agreement or alignment with the author's belief system or disagreement of same, either of which provide insight into the individual doing the underlining or highlighting of specific excerpts or portions of a writing. I know that the above listed documents and property bore Scherf's name on or within them and the above listed items of documentation were stored and maintained within Scherf's prison property or were collected directly from his cell which is a one-man cell. I have no information at this time to suggest that any of the data previously mentioned does not belong to Scherf or that any of the writings, underlinings or highlighting, that were viewed within the aforementioned documents were done by anybody other than Scherf.

I believe that the requested information will reveal additional evidence of the crime listed above showing that Scherf was capable of forming the requisite intent to commit the crime listed above. Additionally, I believe that

AFFIDAVIT FOR SEARCH WARRANT PAGE 5 OF 6

information contained within the prison records maintained by WSR for Scherf, writings, documentation and books collected within Scherf's property will refute a claim of mental retardation or refute a form of mental defense or any type of medical defense of physical limitation or physical handicap rendering Scherf incapable of physically committing the above listed crime. It has been my experience that mental defenses are fairly common and that a defense of some form indicative of mental defect or handicap is likely in this case. I believe that the following information maintained by WSR as well as that contained within the property of Scherf refute such claims as follows;

1. Schooling and educational data, specifically showing which particular college level courses were taken by Scherf and what grades he attained, several of which showed the grades of A indicating that Scherf was successful in taking and completing college level courses.
2. Certificates of academic achievement or accomplishments can provide insight into Scherf's intelligence and academic interests.
3. The format, logic, penmanship, and spelling within writings can provide insight and give an indication of the intelligence level of Scherf.
4. Psychological records and documentation can provide a record of formal diagnoses or a lack of any mental conditions or defects and can also include data pertaining to medications prescribed or recommended as well as formal assessments and recommended treatment plans for Scherf.
5. Medical records and documentation can provide a record of physical limitations, handicaps, medication data or a lack of any physical ailments, handicaps, or limitations.
6. Military records can provide reasons for discharge, disciplinary issues, and training for Scherf.
7. Work history records can provide insight into the type of jobs performed, what any job requirements may have been, records of absences, disciplinary issues, and reasons for termination or release.
8. Prison records can show historical information for the duration of Scherf's inmate history which includes medical information, psychological information, disciplinary issues, records of housing, visitation records, recreational activities, and work history.

On 02-04-2011 I requested Detective Pince to contact Investigator Padilla of WSR to verify what records WSR would maintain for Scherf. Detective Pince called Investigator Padilla and advised me that he had been informed that there is a central file maintained by WSR for each inmate which includes Scherf. I believe that this file maintained by WSR will contain all of the above listed and requested information.

I believe that a diligent and thorough search and examination of all records maintained by WSR for Scherf, Byron E. 08-03-1958 as well as the writings, documents, books, paperwork and records maintained within Scherf's property as listed above will result in the location of additional evidence of the crime listed above.

I am requesting the authorization of a search warrant to search, seize and examine all prison records maintained by WSR to include; psychological records, medical records, work history, and recreational activity.

Additionally I am requesting the authorization to search, seize and examine all documents, records, writings and books listed above that are currently stored within inmate Scherf's prison property.

001200

AFFIDAVIT FOR SEARCH WARRANT PAGE 6 OF 6

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

B. Scott Kelly
Affiant

Snohomish County Sheriff / Deputy #1308
Agency, Title and Personnel Number

Subscribed and Sworn to before me this 7 day of February

Ed Stemler
Judge Pro Tem

Issuance of Warrant Approved:
D.P.A. Ed Stemler #19175

ORIGINAL

Evergreen Division District Court for Snohomish County

STATE OF WASHINGTON

- NO. 11-28

COUNTY OF SNOHOMISH

SEARCH WARRANT

TO ANY PEACE OFFICER IN THE STATE OF WASHINGTON:

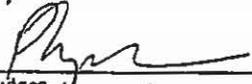
Upon the sworn complaint made before me it appears that there is probable cause to believe that the crime of Murder 2nd Degree (RCW 9A.32.050) has been committed and that evidence of that crime; or contraband, the fruits of crime, or things otherwise criminally possessed; or weapons or other things by means of which a crime has been committed or reasonably appears about to be committed; or a person for whose arrest there is probable cause, or who is unlawfully restrained are concealed in or on the premises, vehicles or persons within Snohomish County, Washington.

YOU ARE COMMANDED TO:

1. Search, within ten (10) days of this date, the premises, packages, vehicle or person described as follows: The prison cell # A-112-L of inmate Byron E. SCHERF with a date of birth of 08-13-1958, DOC# 287281, incarcerated at the Washington State Department of Corrections, Washington State Reformatory Unit (WSRU) at 16550 - 177th Ave SE Monroe, WA 98272. The prison cell is where prisoners store personal property, papers, contraband and other effects. WSR Property Room to include WSR Property Storage Room where most of the contents of the cell have been stored for safekeeping. WSR/DOC Internal Investigations Office located in the DOC Administration Building on the 3rd Floor.
2. Seize, if located, the following property or person (s): ELECTRIC GUITAR, ELECTRIC GUITAR STRINGS, ELECTRIC GUITAR AMP CORD, ANY WIRE OR METAL THAT CAN BE POSSIBLY TRANSFORMED IN TO A TOOL USED TO DEFEAT LOCKS OR DOORS, NEWSPAPER OR OTHER DOCUMENTS RELATING TO CARTOON/COMIC LOCATED IN BIENDL'S OFFICE AT CHAPEL, ALL PERSONEL JOURNALS OR PAPERS REGARDING JOURNALING REFERENCING THE CRIME. ANY AND ALL HAT'S THAT BELONG TO INMATE/SUSPECT SCHREF.
3. Promptly return this warrant to me or the clerk of this court, the return must include an inventory of all property seized.
4. The affidavit is attached and incorporated by reference.

A copy of the warrant and a receipt for the property taken shall be given to the person from whom or from whose premises property is taken. If no person is found in possession, a copy and receipt shall be conspicuously posted at the place where the property is found.

Dated: 2/3/2011



Judge
Patricia Lyon

Printed or Typed Name of Judge

EVERGREEN DIVISION
DISTRICT COURT FOR SNOHOMISH COUNTY

STATE OF WASHINGTON

NO. 11-28

COUNTY OF SNOHOMISH

AFFIDAVIT FOR A SEARCH WARRANT

The undersigned on oath states: That the affiant believes that:

- X Evidence of the crime of: Murder 2nd Degree, RCW 9A.32.050
- X Contraband, the fruits of a crime and
- X Electric Guitar, Electric Guitar Strings, Electric Guitar Amp Cords, Any wire or Metal that can be possibly transformed/bent in to a tool used to defeat locks or doors, Newspaper and other documents relating to cartoon/comic located in CCO Biendl's office at the WSR Chapel, All personal journals or papers regarding journaling possibly referencing past crimes, future crimes and or thoughts, any hat's belonging to Inmate/Suspect SCHERF. Will be located within SCHERF's property.

Affiants Training and Experience

I (Affiant) have been a police officer for over 6 years. Affiant is currently assigned as a Washington State Certified Narcotics K9 Handler with the Monroe Police Department, and has been a narcotics K9 handler for 3 years and 11 months. The affiant has received training in the following, narcotics enforcement training in the basic law enforcement academy, and attended the 80-hour DEA Basic Narcotics Academy. The affiant has also received training in the Washington State required 80 hours Narcotics K9 Handler Course, which includes the Washington State Narcotics K9 Handler Certification Test required for completion of the course. The affiant is also qualified in the use of NIK polytesting narcotics identification and screening system, which is a means for rapidly screening and presumptively identifying substances suspected of being abused drugs, narcotics, and hallucinogens. The affiant has also received specialized training from the California Narcotics Officer's Association on Mexican drug trafficking, emphasizing the tricks and trends subjects in this organization will use to distribute narcotics. Other training received from the California Narcotics Officers' Association included the developing and managing confidential informants, major drug trafficking investigations, drugs and gangs, street development, which included training on cutting, weighing, packaging, and simulated administration of controlled

substances, and warrant and raid planning. The affiant has also received over 120 hours of training in highway drug interdiction. The training utilized practical application and lecture, to assist law enforcement in noticing indicators through observation and interview techniques, which would lead an investigator to possible drug trafficking vehicles, and the location of their hidden compartments. The affiant has received formalized training sponsored by the DEA and the 420 Group regarding Hidden Vehicle Compartments and Drug/Contraband Trafficking. The Affiant has attended a 24 hours seminar presented by the MidWest Counterdrug Training Center (MCTC) on

concealment techniques. The course focused on concealed compartments in vehicles, residences, furniture, and commercial locations, which are utilized by criminal organizations to conceal narcotics, currency, and weapons. The course also looked at concealment techniques used by criminal organizations to avoid police detection, such as concealed counter-surveillance devices (RF detectors) and hidden cameras. Affiant has also received specialized training on designer drugs. The training included the street terms used to identify designer drugs, and methods used to conceal, transport, and use various designer drugs. Some of the drugs emphasized in the training were: MDMA (ecstasy), rohypnol, ketamine, gamma hydroxybutyric acid (GHB), and lysergic acid diethylamide (LSD). The affiant has also received 24 hours of formal training from the DEA regarding indoor marijuana grow operations. The affiant has written and or been involved in over 45 search warrants, where illegal narcotic and or equipment have been located.

That affiant's belief is based upon the following facts and circumstances:

On January 29th 2011 at approximately 2114 hrs, WSR/DOC Correction Officer's were notified that an inmate was missing during a scheduled inmate count. At about 9:20pm DOC Officer Maynard reported the prison chapel doors were propped open and the lights were on. This was unusual as the chapel regularly closes at 2030 hrs. Officer Maynard called for two additional CCO's to assist in searching the chapel. DOC LT. Briones and LT. Shimogawa also responded to the chapel. Inmate Byron SCHERF was reported as being located sitting on a chair in the entrance to the chapel just outside the sanctuary doors. LT. Shimogawa observed as LT. Briones asked inmate SCHERF, "What's going on?" Inmate SCHERF stated, "I'm LWOP (Life without parole). I've had it, I plan to escape." Inmate SCHERF explained he hid under the desk and planned to jump the wall to escape. According to CCO Maynard's report SCHERF had blood on his hands and clothing when they contacted him seated in the blue chair with a metal frame inside the main WSR Chapel doors. Inmate SCHERF is serving life in prison for rape 1st degree, kidnapping 1st degree and assault 2nd degree.

On January 29th 2011 at approximately 2225 hrs, the deceased body of WSR/DOC Corrections Officer Jayme L. Biendl (DOB 02-06-1976) was located inside the WSR/DOC Religious Chapel, located at 16770 170th Ave Se Monroe, Washington 98272. CCO Biendl is assigned to guard the prison chapel. CCO Biendl's post is a self-relieving post that is scheduled to end at 2030 hrs. The suspect, identified as Byron E SCHERF (08-03-1958) DOC# 287281 was taken in to custody inside the chapel as he sat in a blue chair with a metal frame located inside the main entrance to the chapel just outside the entrance to the sanctuary doors.

When CCO Biendl's body was discovered CCO Biendl was lying on a grey multi-colored carpet located on the stage area in the religious chapel sanctuary. It was reported by first arriving rescuers and other Correction Officer's that CCO Biendl had a black cord wrapped around her neck when she was discovered. While on scene I observed several dark red colored staining, consistent with blood staining on the carpet around CCO Biendl's body. I also observed a black music amplifier cord lying on the floor just above

CCO Bindl's head. It was later determined based on other inmate musicians that the amplifier cords on the chapel stage are used by inmates to connect an electric guitar. Upon review of photos taken at the scene during the initial investigation I observed several other dark colored stains around CCO Biendl's body and on other parts of the grey multi-colored carpet leading up to and away from CCO Biendl's body. The carpet staining is consistent with blood-staining left possibly by suspect SCHERF and or victim CCO Biendl.

On 02/01/2011, CCO Maynard spoke to SCISO Major Crimes Detective Scott Wells and identified the chair SCHERF was sitting in when he was located on January 29, 2011 prior to the body of CCO Biendl's body being discovered inside the chapel sanctuary. The chair is still located inside the WSR Chapel doors, just outside the entrance to the Chapel Sanctuary.

On 02/01/11, MPD Detective Buzzell interviewed a DOC inmate regarding the homicide of CCO Biendl. The DOC inmate told MPD Detective Buzzell SCHERF gave CCO Biendl a cartoon/comic possibly from a newspaper or other publication printed on a piece of paper that referenced a wolf in sheep's clothing. I know through experience and research "A Wolf in Sheep's Clothing" is an idiom of Biblical origin. It is used of those playing a role contrary to their real character, with whom contact is dangerous. The DOC inmate told MPD Detective Buzzell that the cartoon/comic was given to CCO Biendl by SCHERF on or about the day the homicide occurred (01/29/2011) according to the DOC inmate's statement.

During my conversation with MPD Detective Buzzell, MPD Detective Robinson advised me that he had seen that cartoon/comic taped to the wall in CCO Biendl's Office in the WSR Chapel.

On 02/02/2011, MPD Evidence Tech J. Stuvland and I served Evergreen District Court Search Warrant 11-24. Evidence Tech Stuvland and I collected carpet samples, a cartoon/comic referencing "A wolf in sheep's clothing", a blue chair with a metal frame and a bent piece of wire that resembles a paper clip opened up and an additional piece of wire attached in the center. The bent wire was located in a trashcan in a room that was accessed by suspect SCHERF the evening on 01/29/2011 according to witness statements obtained by investigating detectives on 02/02/2011. The wire is bent in a way that may be used to pick/defeat a lock or by pass a locked door by manipulating the door locking mechanism (cylindrical) to allow the door to open without actually un-locking the door. All items were secured and transported back to Monroe Police Department.

On 02/03/2011 during Investigator briefing regarding all inmate and Correction Officer's interviews that had taken place on 02/02/2011 were discussed. During the discussion Inmate Price told Investigators that on 01/29/2011 he exited the WSR Chapel with SCHERF and just as they were about to exit the fence SCHERF told him he had forgotten his hat and walked back in the Chapel. Inmate Price told investigators that he did not wait for SCHERF and walked back to his cell.

During the briefing MPD Detective P. Ryan told me during the initial search of SCHERF's cell on 01/30/2011 he observed guitar strings and an electric guitar. The bent wire located in the WSR Chapel room referenced above may have been constructed out of guitar string wire. During the initial search it was also noted that the cell contained books and other publications/ documents. Detective Barry Hatch also told me that he was informed by DPA Ed Stemler of information regarding SCHERF obtained in a Presentence or Intake Summary Report that was obtained. The report indicated that on 10/08/1995 Post Fall Idaho police contacted SCHERF regarding tampering with golf carts. The PF Idaho Police reported SCHERF was intoxicated and while attempting to identify SCHERF they located a written statement in an address book belonging to SCHERF where he documented his assault against his victim.

On 02/03/2011, WSR/DOC Internal Investigation Officer Padilla told me that some contents from SCHERF's cell had been removed and taken to the Property Room, processed and placed in the Property Storage Room. I was then contacted by CCO B Frantz and told that some of the boxes containing documents are also being stored in the WSR/DOC Internal Investigations Office.

I believe that evidence of the crime of Murder 2nd Degree will be located in the prison cell # A-112-L of inmate Byron E. SCHERF with a date of birth of 08-13-1958, DOC# 287281, incarcerated at the Washington State Department of Corrections, Washington State Reformatory Unit (WSRU) at 16550 - 177th Ave SE Monroe, WA 98272. The prison cell is where prisoners store personal property, papers, contraband and other effects. WSR Property Room to include WSR Property Storage Room where most of the contents of the cell have been stored for safekeeping. WSR/DOC Internal Investigations Office located in the DOC Administration Building on the 3rd Floor where boxes of documents have been moved to and stored.

James Tolbert

James Tolbert
Affiant

Monroe Police Department, Officer #2041

Agency, title and personnel number

Subscribed and sworn to before me on this 4 day of Feb 2011

[Signature]
Judge

Issuance of warrant approved:

EXHIBIT 2

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH**

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO WASH

2011 NOV 28 AM 9:35

FILED

STATE OF WASHINGTON.

Plaintiff,

No. 11-1-00404-4

vs.

BYRON E. SCHERF

Defendant.

**Memorandum Decision
Denying Motion to Suppress**



CL15043186

This matter came before the Court on November 14 for a hearing on the defense Motion to Suppress evidence of a search pursuant to CrR 3.6. The court took testimony and has considered the briefs and argument of counsel on the issues before the court.

FACTS

On January 29, 2011, police began an investigation into the homicide of Corrections Officer Jamie Bindle at the Monroe Correctional Complex. Inmate Byron Scherf was immediately identified as the suspect in this investigation.

On February 1, 2011, the contents of Mr. Scherf's cell were inspected and stored by MCC Corrections Officer Payne in eleven boxes, some of which were taken to the MCC internal investigations office, and others taken to the inmate property and storage room. Mr. Scherf was transferred from the MCC to the Snohomish County Jail on that date. On February 3, 2011, Detective Wells of the Snohomish County Sheriff's Office aided in review of the boxes at the MCC internal investigations office, and the MCC inmate property and storage room, while executing Search Warrant 11-28. Boxed materials Det. Wells looked at while executing Search Warrant 11-28 included books and other documents including Mr. Scherf's name, the report of one or more psychiatric examinations of the defendant, medical, schooling and military records. Det. Wells believed that the books and documents he observed were beyond the scope of search warrant 11-28. Those boxes containing books and documents remained at MCC and they were

154

then all stored at the inmate property and storage room. Through his investigation, Detective Wells became aware of information that on the day of Officer Bindle's death Mr. Scherf had not attended the "pill line," and so had not received his medication, thus deviating from his daily routine.

On February 7, 2011, Detective Wells obtained a second Search Warrant, number 11-32, issued by Everett District Court Judge *pro tem* Terry Simon. In relevant part, the warrant permitted Detective Wells to search the premises described as:

The Washington State Reformatory (WSR) located at 16550 177th Avenue S.E. Monroe, Washington within the boundaries of Snohomish County. Specific areas within the reformatory to be searched are as follows; [sic] WSR inmate property and storage room. [sic] WSR Administration Building.

Warrant 11-32 at 1. The warrant did not mention the Reformatory's Medical Records Department. In relevant part, the warrant permitted Detective Wells to seize materials described as:

Any and all records, documents, papers, writings both typed and handwritten, books, or any other personal records for inmate Byron Scherf.... Such records are to include; [sic] School 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 with specific sections highlighted, underlined or bookmarked and writings in the margins of such books.

Id. at 1-2. Both the warrant and its supporting affidavit "incorporated by reference" Warrant 11-28. *Id.* at 1.

Warrant 11-32 also incorporated by reference Detective Wells' supporting affidavit. The affidavit identified a broader search location than identified in the warrant. Instead of just "WSR Administration Building," a specific place, the affidavit sought to search "WSR records retention." The affidavit also noted Detective Wells' theory on the relevance of the materials to the alleged crime of aggravated first degree murder. He indicated his belief that Mr. Scherf's failure to take medication on the day in question was relevant to determining motive, any side effects of missing a dose of his medication, and his general history and routine of attending "pill Line". Detective Wells also indicated that medical records would be relevant to mitigation or

leniency during or prior to sentencing, and to refute an affirmative mental defense. Search Warrant 11-32 found probable cause to believe the crime of Aggravated Murder in the First Degree, RCW 9A.32.030 and RCW 10.95, had been committed.

Detective Wells executed Warrant 11-32 at the Monroe Corrections Facility. Returns on the warrant indicate that searches occurred in the Property and Storage room, the Administration Building, and the Medical Records office, netting the State three boxes of Mr. Scherf's personal property, WSR's Central File for Mr. Scherf, and Mr. Scherf's medical records maintained by WSF, respectively.

DECISION

Documents seized from Defendant's prison cell

Detective Wells seized books and documents taken from defendant's prison cell by MCC investigators. Those boxes were at the MCC property storage room when seized pursuant to warrant 11-32. Those records were described in part as:

...prior psychiatric evaluations (some of which appeared to have handwritten notes and bracket sections written on them in blue pen), medical records, military records (specifically a document I observed from the U. S. Army at Fort Knox), educational and schooling records (specifically a transcript from Walla Walla Community College showing Scherf's classes and grades, several of which he received the grade of A in), various historical prison records for Scherf, and Prior apparent grievances that appeared to have been authored by Scherf that were sent to prison officials from inmate Scherf. Of further note were a portion of Scherf's psychological records indicating that Scherf would not do well with, or would not interact well with female prison guards or female prison officials. Handwriting on some of these records appeared to indicate a bracketed portion of the record in blue pen.

Search Warrant affidavit 11-32, page 3. The Affidavit for Search Warrant 11-32 was expressly incorporated by reference into the search warrant. Detective Wells had previously looked at much of the contents of the boxes containing those documents and books. A search Warrant was not required for him to do so. There was no question what was to be seized or where it had come from and was currently located.

Prisoners have no reasonable expectation of privacy in their cells. *State v. Garza*, 99 Wn. App. 291, 295, 994 P.2d 868 (2000); citing *Hudson v. Palmer*, 468 U. S. 517, 104 S. Ct. 3194, 82 L.Ed.2d 393 (1984). The United States Supreme Court held that:

society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell.

Hudson, 468 U.S. at 526.

Even if the search warrant was necessary to affect the seizure of records which came from defendant Scherf's cell, the warrant described them with sufficient particularity. *State v. Higgins*, 136 Wn. App. 87, 92-93, 147 P.3d 649 (Div. II 2006); *U. S. v. Mann*, 389 F.2d 869 (9th Cir. 2004). A prison shares none of the attributes of privacy of a home, automobile, an office or a hotel room. *Lanza v. New York*, 370 U.S. 139, 82 S.Ct. 1218 (1962). Some of those documents were medical records. As they came from defendant's cell they need be accorded no privacy protections greater than any other documents from that cell. All documents and records which came from the defendant's cell were legally seized by Detective Wells pursuant to Search Warrant 11-32.

Nexus With a Crime

The Fourth Amendment to the United States Constitution provides that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searched and seizures, shall not be violated and no warrants shall issue, but on probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Article 1, Section 7 of the Washington Constitution provides citizens of Washington State greater privacy protections than the Fourth Amendment. To meet the probable cause requirement of the Fourth Amendment, there must be a nexus between a crime and the items to be seized on execution of a search warrant and the place to be searched. *State v. Thein*, 138 Wn.2d 133, 140; 977 P.2d 582 (1999). The crime alleged on the face of the Search Warrant and Affidavit is Aggravated Murder in the First Degree. The defense argues that there is no nexus between the items to be seized in the warrant and the crime alleged and therefore no probable cause was established. CrR 2.3 (b) provides that:

A warrant may be issued under this rule to search for and seize any (1) evidence of a crime...

An affidavit for a search warrant establishes probable cause if it sets forth facts sufficient for a reasonable person to conclude that the defendant is probably involved criminal activity and that the police will find evidence of that criminal activity at the place to be searched. *State v. Ollivier*, 161 Wn. App. 307, 317-17, 254 P.3d 883 (Div. I 2011). Any doubts as to the existence of probable cause, by a court reviewing the sufficiency of a search warrant affidavit are resolved in favor of upholding the warrant. *State v. J-R Distributors*, 111 Wn.2d 764, 774, 765 P.2d 281 (1988). A reviewing court is to give great deference to the issuing magistrate's determination of probable cause. *State v. Cord*, 103 Wn.2d 361, 366, 693 P.2d 81 (1985).

The word "of" means "proceeding from; belonging to; relating to; connected with; [or] concerning." *State v. Rinkes*, 49 Wn.2d 664, 666, 306 P.2d 205 (1957). "Evidence of a crime," as used in CrR 2.3 (b), is broader than evidence proving a crime was committed. It also includes evidence "relating to, connected with or concerning" a crime. Evidence relating to the sentence the court is empowered to impose is evidence of a crime.

An accusation which lacks any particular fact which the law makes essential to the punishment is ... no accusation within the requirements of the common law, and is no accusation in reason.

Blakely v. Washington, 542 U.S. 296, 301-302, 124 S.Ct. 2531 (2004); quoting 1 *Bishop, Criminal Procedure* Sec. 87, p.55 (2d Ed. 1872). As further indicated in the next section, there was a nexus between the documents authorized in the search warrant and accompanying affidavit and the facts which must be proved to a jury on a charge of Aggravated First Degree Murder at trial.

Particularity-medical records/Central records

Warrant 11-32 and its supporting affidavit do not limit the time period for the medical records sought. Mr. Scherf argues that seeking thirty years worth of medical records fails to satisfy the requirement of particularity. However, the State is obliged to consider mitigation evidence in determining the sentence it will seek. RCW 10.95.040. Facts bearing upon the sentence are not divorced from facts bearing upon the prima facie crime. *Blakely v. Washington, supra*. Thus, facts bearing upon mitigation are part and parcel of the evidence to be proven by the state at trial. A defendant's mental capacity at the time of the offense is a statutory consideration for a jury in a capital case. See RCW 10.95.070 (6). It stands to reason that any

medical records throughout a person's life indicating mental health issues are relevant in a case with potential capital punishment. No argument has been presented, and this Court can think of none, for why thirty year old medical records which might mitigate for leniency toward Mr. Scherf, either before seeking the death penalty or at trial, are irrelevant. As Mr. Scherf faces the possibility of a death sentence, pursuant to Washington law, the entire medical history has relevance to the factual issues to be ultimately determined at trial. The medication portion of the file was also relevant evidence as to whether the defendant was absent from the "pill line". No further particularity was required for the medical records.

The same can be said for the defendant's DOC central file. As the State asserts, documents from that file would be strong proof at trial that the defendant was in prison serving a lawful sentence on the date of the murder. Evidence of DOC disciplinary proceedings or the lack thereof would have relevance as to mitigation issues. The basis for obtaining those records are set forth on Page 5 of Affidavit for Search Warrant 11-32. They include:

1. Schooling and educational data, specifically showing which particular college level courses were taken by Scherf and what grades he attained, several of which showed the grades of A indicating that Scherf was successful in taking and completing college level courses.
2. Certificates of academic achievement or accomplishments can provide insight into Scherf's intelligence and academic issues.
3. The format, logic, penmanship, and spelling within writings can provide insight and give an indication of the intelligence level of Scherf.
4. Psychological records and documentation can provide a record of formal diagnoses or a lack of any mental conditions or defects and can also include data pertaining to medications prescribed or recommended as well as formal assessments and recommended treatment plans for Scherf.
5. Medical records and documentation can provide a record of physical limitations, handicaps, medication data or lack of any physical ailments, handicaps, or limitations.
6. Military records can provide reasons for discharge, disciplinary issues, and training for Scherf.
7. Work history records can provide insight into the type of jobs performed, what any job requirements may have been, records of absences, disciplinary issues, and reasons for termination or release.

8. Prison records can show historical information for the duration of Scherf's inmate history which includes medical information, psychological information, disciplinary issues, records of housing, visitation records, recreational activities, and work history.

All of the bases set forth above are relevant to the penalty phase of an aggravated first degree murder trial or mitigation issues. They concern evidence relating to the crime. *Rinkes, supra*. The evidence which may be considered in a capital case is unique and cannot be compared to the more limited evidentiary requirements of other non-capital cases. See RCW 10.97.070. This case is factually distinguishable from *U. S. v Spilotro*, 800 F.2d 959 (9th Cir. 1986), in which probable cause was established for loan sharking and bookmaking, and *State v. Riley*, 121 Wn.2d 22, 846 P.2d 1365 (1993), in which involved convictions for computer trespass and possession of a stolen access device.

The defendant argues that Detective Wells should have reviewed the Central File Index to narrow the search. But there is no evidence Det. Wells had knowledge such an index existed or of what kind of information may be found within each of the subsections of the central file identified in the index. Exhibit 3. He was under no obligation conduct a detailed investigation into how the DOC inmate central file is structured before applying for a search warrant. The scope of the search for documents authorized by Search Warrant 11-32 was sufficiently particular, considering the nature of the alleged crime.

Warrant Executed When it Was Served

Search Warrant 11-32 authorized a search of the premises, vehicle or person described as follows:

The Washington State Reformatory (WSR) located at 16550 177th Avenue S. E., Monroe, Washington within the boundaries of Snohomish County. Specific areas to be search are as follows;

WSR inmate property and storage room.
WSR Administration Building

Search Warrant Affidavit 11-32 also described the Washington State reformatory at the same address as the property to be searched. It described specific areas within the reformatory to be searched as:

WSR inmate property and storage room
WSR Records Retention

First, the Search warrant specified that the affidavit for this Search Warrant is attached to the Court's copy, and is incorporated by reference. When reading the language of the search warrant and the affidavit together, it is clear that that the affiant, Detective Wells, was seeking to obtain medical records of Byron Scherf, wherever retained within the Washington State Reformatory (WSR records Retention).

Second, the Search Warrant was initially served at the WSR inmate property and storage room. Detective Wells then walked to the 3rd floor of the medical clinic to retrieve the defendant's medical records which were copied for him. He was not present when they were copied. Det. Wells testified that he again served a copy of the search warrant on nursing supervisor Mandela. This service was unnecessary. No physical search of the medical records storage room was conducted or contemplated by Det. Wells. In this case, execution of the warrant occurred when it was served at the WSR property room. No further service was required. *State v. Kern*, 81 Wn. App. 308, 914 P.2d 114 (Div. I 1996). It made no difference if the medical records were in the next building or stored electronically on a server in New Jersey. The search for the records was properly delegated to Washington State Reformatory employees. There was no need for police supervision of that search. *Kern, supra* at 315-316. The retrieval and copying of the records and turning them over to Detective Wells was ministerial. There was no prejudice to the defendant. *State v. Parker*, 28 Wn. App. 425, 626 P.2d 508 (Div. III 1981). This case is distinguishable on its facts from *U. S. v. Stanley*, 596 F.2d 866 (9th Cir. 1979) and other cases in which a physical search occurred at a location not named in the Search Warrant. The fact that the search warrant in this case does not list the medical clinic on its face is not a basis for suppression of the medical records.

The defendant's motion to suppress is denied.

Dated this 23rd day of November, 2011.


Thomas J. Wynne
Judge

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BYRON E. SCHERF,

Appellant.

No. 88906-6

DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 1st day of July, 2015, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Supreme Court via Electronic Filing and Rita J. Griffith, griff1984@comcast.net; and Mark A. Larranaga, mark@jamlegal.com; I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at the Snohomish County Prosecutor's Office this 1st day of July, 2015.



DIANE K. KREMENICH
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office