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To:
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Subject: Reply to State's Response

Reference:

Supreme Court No. 94294-3 - State of Washington v. Thomasdinh Newsome Bowman
Court of Appeals 73069-0-1
Thomasdinh Bowman,
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Attachments:

Reply to State's Response
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No. 94294-3

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

THOMASDINH BOWMAN,

Petitioner.

Appellant.

No. 73069-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION ONE

ANSWER TO RESPONDENT FOR REVIEW

THIS DOCUMENT SENT BY E-MAIL

Reply to State's Response

First, the Petitioner would like to apologize for any difficulty in finding citations to support Bowman's Pro Se briefing. Limited experience, resources, space, and naive legal assumptions have conspired to reduce the effectiveness of Bowman's appeal. Bowman objects to the State's implication that his undeveloped legal semiotics are grounds for dismissing his appeal to the injustice inflicted upon him. Bowman firmly believes the evidence presented at trial cannot support his conviction and that this case must be dismissed. If he is insane to believe so, then the case should then be sent for retrial for ineffective assistance of counsel regarding an insanity defense.

To address the State's argument that the SAG issues were not pursued in the Court of Appeals, this can be attributed to several reasons: (1) A highly relevant case - State v. Hummel, 196 Wn. App. 329; 383 P.3d 592; (Wash. Ct. App. 2016) - was just ruled on and was not available for analysis at the time. (2) Based on the Court of Appeals choice to have their opinion of Bowman's appeal unpublished and only provide generic statements of the SAG's lack of merit, it would appear that a fair analysis was not done. (3) The issues were numerous, intertwined, and complex. This required the court to have the patience to commit to a full review and the courage to declare "this is wrong and the law needs to be updated."

The State alleges that Bowman's SAG and this Petition for Review contains matters outside of the record. Bowman contends that all assertions are factual and are supported by the record and evidence The State alludes to "alleged statements of the prosecutors" ignoring that each statement is cited to the page and line number in the transcripts. To illustrate, please consider Section 5.14 False Fake Number from the SAG at p29 and its accompanying transcript highlights excerpted for clarity in Appendix pXXIV. While it's true that a paraphrased description of the error is written without citations to save space, it is accompanied with direct quotations from the transcripts and their citations. Two other short and clear examples are Section 5.1 Unfortunate Coincidence at SAG p24 with transcript highlights in Appendix pXIII, and Section 5.11 Rummaging in SAG at p28 with the transcript highlights in Appendix pXXII. These three issues should clearly show that the State repeatedly fabricated testimony evidence and attributed it to Bowman. These examples also show how directly correcting the prosecutors failed to deter their continued emphasis in closing arguments. Bowman can't make the State acknowledge the

evidence, but he does request that this court review the evidence before accepting the State's generic assertions.

Because the Court of Appeals has dismissed the SAG issues with generic arguments, it is impossible to address their reasoning directly. This document will instead refer to a few of the arguments made in the SAG and emphasize through a brief legal analysis how they were improperly ignored and should be reviewed by this court. It is hoped that by re-presenting the SAG issues here, that the severity of the issues and the need for remand and dismissal becomes clear.

Also, a clerical error in Counsel's numbering of the Pro Se issues caused two different ordering systems to be used. For clarification, they are repeated here with the proper numbering:

6. LIGHT MOST FAVORABLE TO THE STATE

   Can the light most favorable to the State used in a sufficiency challenge be artificial?

7. FILING CABINET ANALOGY

   Is a Filing Cabinet a reasonable analog for a Computer System connected to the Internet?

8. SLANDER CAMPAIGN

   Does a slander campaign of false characterizations, misquotations, projected slogans, and personal opinions meet the threshold of prosecutorial misconduct that is incurable by jury instructions?

9. NO DUTY TO RETREAT

   Is a person expected to pursue illegal and dangerous acts as methods of retreat when faced with grave personal threat?

10. RIGHT TO REMAIN SILENT BEFORE TRIAL

    Can the State argue that a defendant's silence before trial supports the State's theory of the defendant fabricating testimony?

11. PREMEDITATION DISPROVES SELF-DEFENSE

    If a person acts in justifiable self-defense, can a judgment of premeditated murder of a stranger be upheld?

In this Reply to the State's Response, the Petitioner has added legal analysis which the State indicated was lacking.

Issue #6 - LIGHT MOST FAVORABLE TO THE STATE

A fundamental issue in this case is the sufficiency of evidence. Specifically, for the conviction of murder in the first-degree, the State must prove beyond a reasonable doubt the essential element of premeditation. "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). Because this is a constitutional issue, review is warranted under RAP 13.4(b) (3).

The "reviewing court must consider the evidence presented at the trial in the light most favorable to the prosecution." Jackson v. Virginia, 443 U.S. 307, 319 (1979). The question for this court is: "Can any light, originating from reason, illuminate premeditation given the evidence?"

The Petitioner asserts that if the jury did find premeditation, it was illuminated by the artificial light of "mere speculation dressed up in the guise of evidence." Juan H. v. Allen, 408 F.3d 1262, 1277 (9th Cir. 2005). "we will not uphold a conviction, however, that was obtained by nothing more than 'piling inference upon inference,' or where the evidence raises no more 'than a mere suspicion of guilt'." U.S. v. Rahseparian, 231 F.3d 1257, 1262 (2000) (citations omitted) "such [an inference] is infirm because it is not based on the evidence." U.S. v. Jones, 44 F.3d 860, 865 (1995). "More than a 'mere modicum' of evidence is required to support the verdict." Jackson supra, 320.

Premeditation can be inferred from a wide variety of circumstantial evidence. For this case, the most relevant are: (1) motive, (2) weapon, (3) stealth, (4) method of killing, (5) evidence of planning, (6) evidence at the scene, and (7) subsequent conduct which suggests the existence of a plan.

(1) Motive: The court acknowledged no apparent motive [RP:11/17:21.5]. Bowman and the victim had no prior relationship [RP:11/19 Sup:1.24] and the State presented no financial or other material benefit for Bowman to gain.

(2) Weapon: The weapon was a semi-automatic Glock 19 9 mm [RP:11/18:21.9] that was established as Bowman's daily self-defense concealed carry weapon [RP:12/4:27.5] for which Bowman had a valid concealed carry permit for many years prior to the incident [RP:12/4:15.18]. The weapon was readily accessible and on Bowman's person as was Bowman's routine since he started working in the South of Downtown (SODO) District [RP:12/4:16.15].

(3) Stealth: It may be possible to draw stealth from firing through and shattering the window of Bowman's convertible BMW with the top down [RP:11/25:29.15-20] at a red light at a busy intersection in rush hour traffic [RP:11/19:54:15-20], but this seems unreasonable. Further, the victim's wounds indicate that he was facing Bowman during the shooting [RP:12/3:71.9].

Issue #6.1 - Method of Killing

The witnesses consistently reported hearing 3-5 shots fired in rapid succession [RP:11/20:101:1,6,11 and RP:11/20:129.19 and RP:11/20:130,18]. The victim was hit four times in the head [RP:12/3:69.12]. The question is whether these wounds allow the inference of premeditation?

There is a string of cases involving the inference of premeditation from multiple shots and multiple stab wounds. A brief review follows:

In State v. Ra, 144 Wn.App. 688 (2008), the evidence that the defendant brought a loaded firearm to the scene of the crime, provoked a confrontation with the victim, and then fired multiple shots at the victim will support a finding of premeditation. *id. at* 703. There was also testimony of deliberate aiming and pauses between shots. *id. at* 703-04.

In State v. Barajas, 143 Wn.App. 24 (2007), "the evidence showed that Mr. Barajas went into his house to retrieve a gun, loaded it, attempted to hide himself from the officers, fired multiple shots, and admitted to aiming his gun at Deputy Lane's body while firing. This was sufficient evidence to support the jury's finding of premeditation." *id. at* 37.

In State v. Cross, 156 Wn.2d 580 (2006), the court held that "Multiple blows are strong evidence of premeditation." *id. at* 627. The stepdaughter was stabbed 22 times.

In State v. Rehak, 67 Wn.App. 157, 834 P.2d 651 (1992), it was held that evidence showing the victim was shot three times in the head, two times after he had fallen on the floor, was sufficient to establish premeditation.

In State. v. Ollens, 107 Wn.2d 848, 733 P.2d 984 (1987), the court directly addressed the issue of “Given multiple stab and slash wounds, is there sufficient evidence to send the question of premeditation to a jury?" *id. at* 850. "[N]ot only did Ollens stab the victim numerous times, he thereafter slashed the victim's throat. This subsequent slashing is an indication that respondent did premeditate on his already formed intent to kill." *id. at* 853.

In summary, it has been observed that “[S]tanding alone, multiple wounds and sustained violence cannot support an inference of premeditation." State v. Ortiz, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992); See also People v. Anderson, 70 Cal. 2d 15, 25, 447 P.2d 942, 73 Cal. Rptr. 550, (1968) ("If the evidence showed no more than the infliction of multiple acts of violence on the victim, it would not be sufficient to show that the killing was the result of careful thought and weight of consideration.")

As an alternative, the multiple shots might be construed as one long continuous act. In Bingham, the court held that manual strangulation alone is insufficient evidence to support a finding of premeditation where no evidence was presented of deliberation or reflection before or during the strangulation. ... [M]anual strangulation involves one continuous act." State v. Sherrill, 145 Wn.App. 473, 486 (referencing State v. Bingham, 105 Wn,2d 820 (1986))

The court in Austin v. United States, 382, F.2d 129 (D.C. Cir. 1967) found "[V]iolence and multiple wounds, while more than ample to show an intent to kill, cannot standing alone support the inference of a calmly calculated plan to kill requisite for premeditation and deliberation, as contrasted with an impulsive and senseless, albeit sustained, frenzy." *id. at* 139. The victim was stabbed 26 times and the knife left embedded in the victim's skull. The court held this evidence was insufficient to prove the elements of premeditation and deliberation, concluding that: “[T]he Government was not able to show any motive for the crime or any prior threats or quarrels between appellant and deceased which might support an inference of premeditation and deliberation. Thus the jury could only speculate and surmise, without any basis in the testimony or evidence, that appellant acted with premeditation and deliberation.” *id.*

In this case, there was a single, rapid string of fire directed at a single area; the head [RP:12/3:69.4] and [RP:12/3:85.21-24]. In the self-defense video Exhibit 237 shown to the jury, the instructor demonstrated how he would react to a scenario, similar to the one in this case, by shooting six rounds in a similar string of fire in less than 2 seconds. The entire act in this case took approximately the same length of time.

Based on legal precedent and the facts of this case, it should be unreasonable to infer premeditation from the number of shots Bowman fired.

Issue #6.2 Previous Planning

The record shows that both Bowman and his wife had planned to celebrate their anniversary [RP:12/2:109.19] and [RP:12/2:110.8] on the day of the incident. Bowman was leaving work as usual and headed home to take his wife out to dinner [RP:12/4 Sup:9.6]. There are no statements or indications that Bowman intended to do anything else on that fateful day.

It could be argued that at some point during the day, Bowman could have premeditated murder. But it has been noted that "Having the opportunity to deliberate is not evidence the defendant did deliberate, which is necessary for a finding of premeditation." State v. Bingham, 105 Wn.2d 820, 826 (1986)

Without a criminal motive, the State based its case on the theory that Bowman was a "Student of Murder" [RP:11/19 Sup:7.13] who chose to kill for the "thrill" of it [RP:12/3:170.4]. This is troubling because the State used character and propensity for violence evidence as the foundation for the State's charge of premeditated first degree murder.

In U.S. v. Brown, 880, F.2d 1012 (9th Cir. 1988), "The Government read Brown's prior wrongful acts [two incidents where Brown behaved dangerously; *id. at* 1013-14] as showing that Brown derives a thrill from creating violence, and that the motive behind the killing was the desire to obtain this thrill." *id. at* 1014. The court held "We conclude the prior bad act evidence fails to show any motive which would in turn be relevant to show the required intent." *id. at* 1015. And warned "The prior acts clearly established Brown's propensity for violence, but that is precisely the use of evidence barred by Rule 404(b)." *id.*

Let us assume arguendo that one may infer premeditation from a propensity for violence. The only evidence offered to infer Bowman's violent tendencies or fascination with killing were two digital books found in the Library folder on one of the many hard drives at Bowman's place of business [RP:11/5:58.6 and 58.16] and Bowman's work journal [RP:11/6:79.7]. We will now examine these further.

Issue #6.2.1 - Two Books

Assuming arguendo that Bowman knew of and read the two books (see Issue #7 for why this is a poor premise and Bowman's testimony that he never read them [RP:12/8:71.19 and 75.20]), the question for this court becomes: "Is it legally appropriate to infer from Bowman's possession of these books an intent to kill a stranger?" We enter this line of reasoning with the warning: "We ought to be wary when the government wants to use what people read against them." U.S. v. Curtin, 489 F.3d 935, 959 (9th Cir. 2007).

Wigmore describes the nature of this inference as at least a three-step process because "an act is not evidential of another act"; there must be an intermediate step in the inference process that does not turn on propensity. "[I]t cannot be argued: Because A did an act last year, therefore he probably did the act X as now charged." WIGMORE ON EVIDENCE § 192, at 1857.

To use these books for a non-propensity based theory, there must be some similarity among the proffered evidence and the act in question. “Wigmore calls this the ‘abnormal factor’ that ties the acts together. WIGMORE, § 302. Once this connection is established, then other reasonable inferences, such as intent or motive, can logically flow from introduction of the prior acts.” State v. Wade, 98 Wn.App. 328, 335 (Wash. Ct. App. 1999)

In People v. Shymanovitz, 157 F.3d 1154 (9th Cir. 1998), the prosecutor vigorously argued that he behaved consistent with the magazine articles found in his possession. *id. at* 1155. The court noted “[N]either knowledge of the illegality of the conduct of which he was accused nor knowledge of the nature of the specific acts identified by the prosecutor constituted an element of the offense. More import, such knowledge would in no way tend to prove his guilt on any of the charges brought against him. Accordingly, it is highly unlikely that the government

introduced the magazines to address the issues it argued they were relevant to during the prosecutor's closing arguments." *id. at* 1157.

In SHYMANOVITZ, similar to this case, the point of contention was his intent. Neither knowledge of criminal acts nor knowledge of method were at issue.

This circuit has held "The mere possession of reading material that describes a particular type of activity makes it neither more nor less likely that a defendant would intentionally engage in the conduct described and thus fails to meet the test of relevancy under Rule 401." Shymanovitz supra, 1158.

In State v. Rogers, 270 F.3d 1076 (2001), [T]he judge had an obligation to keep the prosecutor from suggesting that Rogers should be convicted because he owned seditious literature, that anyone who would read a book called The Anarchist's Cookbook must hold his legal obligations in contempt, or that possession of the book implied that Rogers wanted to become a sniper." *id. at* 1081.

For this petition, let us continue in arguendo by assuming that these books are direct representations of Bowman's thoughts and dreams. CURTIN counters that “Fantasies and dreams are not intentions, or close to them. The reading material people get from libraries, bookstores, newsstands, and the internet should generally not be used to prove that they intended to do what it portrays" Curtin supra, 965.

Further, the books here described professional hitman, and contract killers [RP:12/8:8.4], not the random killing of a stranger as argued [RP:12/8:7.24]. Note that in these two passages the court asserts these are manuals “on how to kill strangers” and then explains the information in the manuals “contains many lurid passages regarding best practices for hitmen”. Hitmen are professionals who are paid to kill specific people; aka targets. Hitmen do not engage in thrill kills. A similar discrepancy occurred in CURTIN where "the stories describe a different fantasy from what Curtin was charged with intending to do." *id. at* 962. In this case, since there was no suggestion of any killing for hire, the State distorted the “best practices for hitmen” into “how to kill strangers”.

Even if “violent criminals have books related to violence” were a true statement, logic does not allow the corollary that “people with books on violence are violent criminals”. See Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing*: *Empirical Validity or Political Rhetoric*? 22 Stan.L.& Pol'y Rev. 545, 579-80 (2011) (“[R]esearchers conducting comprehensive reviews of empirical literature often conclude there is little evidence of any direct impact of viewing child pornography on the commission of contact sexual offenses. In general, the literature supports the view that while child molesters may possess child pornography, those that possess child pornography are generally not likely to engage in contact offenses against children. Instead, child molesters are merely a small subset of child pornographers.”) And therefore, only a small subset of the readers of these books are likely to act on their information.

Our circuit has noted: “No inference of any kind can be drawn about a person's character from the kinds of books that he reads. We have no basis in human experience to assume that persons of 'good' character confine their reading matter to 'good' books, or that persons who read peaceful books are peaceful people, or that persons who read books involving violence are violent people.” U.S. v. Giese, 597 F.2d 1170, 1207 (9th Cir. 1979) (Hufstedler, J., dissenting).

An alternative approach is to consider a similar analysis used by the Court of Appeals in reviewing convictions for possession of a controlled substance with intent to deliver. It has been consistently held that bare possession of a controlled substance does not suffice to support an inference of intent. For example, in State v. O'Connor, 155 Wn.App.282, 290, 229 P.3d 880 (2010), the Court of Appeals noted, "Mere possession of a controlled substance, including quantities greater than needed for personal use, is not sufficient to support an inference of intent to deliver"; rather, "[a]t least one additional fact must exist, such as a large amount of cash or sale paraphernalia, suggesting an intent to deliver.” State v. Vasquez, 178 Wn.2d 1, 322, 309 P.3d 318 (2013).

Another analog to consider in our search for intent is with forged documents. This line of reasoning also fails: "Just as mere possession of a controlled substance does not support an inference of an intent to deliver or manufacture, neither does mere possession of forged identification cards support an inference of an intent to injure or defraud." Vasquez supra, 322.

The Washington Court of Appeals has warned that “When the State offers evidence of prior acts to demonstrate intent, there must be a logical theory, other than propensity, demonstrating how the prior acts connect to the intent required to commit the charged offense. That a prior act 'goes to intent’ is not: a 'magic [password] whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in [its name].' " State v. Wade, 98 Wn.App. 328, 334 (1999)

As a final consideration, let us argue that instead of possessing these books, Bowman lived with the authors. This still fails to allow the inference of premeditation as "One does not become a participant in a conspiracy merely by associating with conspirators known to be involved in crime.” State v. Jones, 44 F.3d 860, 866 (1995)

In summary, premeditation cannot be inferred from Bowman's possession of these books. As in SHYMANOVITZ, "Here there is simply no doubt that a wide gulf separates the act of possessing written descriptions or stories of criminal conduct from the act of committing the offenses described." Shymanovitz supra, 1159.

Issue #6.2.2 – Journal

From Bowman's work journal the State offered excerpts [RP:12/1:17.15] to support their theory. Specifically descriptions of movie props and story concepts [RP:12/1:110.23 and 112.7] and [RP:12/8:80.2]. Directly surrounding the excerpts are references and descriptions clearly in the context of the entertainment industry [RP:12/1:115.20-25] and [RP:12/4:111.3]. The State argued that "everything is a movie" [RP:12/8:79.15] to presumably make the notes apply to every context.

In State v. Whalen, 1 Wn.App. 785, 464 P.2d 730 (1970), the defendant was charged with rape and arrested with a handwritten note on his person containing "nine steps for the commission of rape in an automobile" (*id. at* 787), which was deemed on appeal "inflammatory far beyond its probative value and should not have been admitted.” *id. at* 794.

In comparison, Whalen's only evidence of the purpose or context of the writings was his self-serving testimony "He said the notes on the piece of yellow paper constituted an outline for a short story he was planning to write.” *id. at* 788. Bowman's writings were surrounded by

references to movies, movie directors, writers, and the like [RP:12/2:104.4 and RP:12/9:18.16-25].

In Stevens v. Barns, No. 2:11-cv-3390 MCE CKD P (E.D. Cal. May. 2, 2013), the defendant was a gang member charged with murdering a rival gang member. On the defendant's walls were writings signed by him with phrases such as “nigga be a Star or nigga be a bitch, watch a FAB nigga slippin' and bust his shit" and "It's random season, killing random niggas for no reason". *id. at* 2. The district court reasoned that the inference of premeditation was "strengthened by the writing in [sic] room expressing his willingness to kill others and his hostility to members of rival gangs," though on appeal the court found "As evidence of planning, this too is weak." *id. at* 13.

In State v. Hanson, 731 P.2d 1140 (Wash. Ct. App. 1987), "Absent an obvious reason why Hanson would have committed the crime, the jury may have seized on the correlation between certain elements of his fiction and aspects of his personal life, to conclude that Hanson was a violent person who was likely to commit this violent crime." *id. at* 661.

If the law is such that one is punished for imagining crime, we verge on the world of thought crimes in George Orwell's book 1984. "Johnny Cash probably would not have written Folsom Prison Blues without imagining himself a murderer imprisoned for life -- 'I shot a man in Reno, just to watch him die' -- but there is no reason to suppose that he ever intended to murder in real life." U.S. v. Curtin, 489 F.3d 935, 961 (9th Cir. 2007).

Ultimately, “A writer of crime fiction, for example, can hardly be said to have displayed criminal propensities through works he or she has authored.” Hanson supra, 662.

Assuming arguendo that the context of the writings is irrelevant, and these writings are Bowman's direct and personal fantasy: can Bowman's descriptions of TV shows, guns, injections, garrotes, and car hijackings allow a reasonable inference of premeditation on murder?" This train of reasoning quickly derails with the stark fact that "Fantasy is not reality." Curtin supra, 961. "Fantasy is constitutionally protected." *id. at* 960. Likewise, Jacobson v. United States 503 U.S. 540, 551 (1992) "the Supreme Court held a person's inclinations and 'fantasies ...are his own and beyond the reach of the government.' " And "However repulsive a person's dreams or

fantasies may be, they offer little support for an inference of an intention to act on them." Curtin supra, 965.

Therefore, it would be unreasonable to infer premeditation from Bowman's journal entries.

Issue #6.3 - Evidence at the Scene

In State v. Russell, 125 Wn.2d 24 (1994), “The crime scenes revealed that steps had been taken to ensure certain evidence was not left behind.” *id. at* 81. Thus, premeditation was inferred from evidence not left at the scene. It should then be reasonable to conclude that evidence left at a crime scene would tend to indicate a lack of premeditation.

The scene of this case contained four significant pieces of evidence: (1) glass from Bowman's vehicle [RP:11/20:192.16], (2) shell casings from Bowman's gun [RP:11/20:187.15], (3) tire tread marks from Bowman's vehicle's abrupt acceleration [RP:11/20:186.3], and (4) numerous eyewitnesses. In each instance, a moment of forethought would have prevented it from becoming evidence.

Specifically, (1) Glass: Bowman could have either rolled down or shot around his window since the convertible top was down [RP:11/25:29.18]; (2) Shell Casings: Bowman could have used his concealed carry revolver [RP:12/4:27.9] preferably with a silencer. Using a silencer is common sense AND it is also appears in the articles but the following underlined text was surgically redacted by the court when this sentence was read into the record: “Well-made handguns of suitable caliber are undoubtbly the best short-range tools of killing known to man. A handgun is easy to carry, easy to conceal, easy to use. Also it is fairly easy to silence a handgun..." [RP:11/10:32.25 to 33.3]; (3) Tire Tread Marks: Bowman could have calmly driven away or otherwise not leave in such a panic. (4) Eyewitnesses: Either Bowman should have had the convertible’s top up or after the shooting put it up or chose a more secluded location. Bowman and the victim were stopped at a red light and none of the eyewitnesses noticed either Bowman or the victim's vehicle until after the shooting: time was not at issue for performing these simple preparations. The eyewitnesses only noticed Bowman because of his erratic driving [RP:12/4 Sup:18.11] and [RP:11/20:35.22 to 36.20] and [RP:11/20:104.5-9].

Therefore, it is unreasonable to infer premeditation from evidence at the scene.

Issue #6.4 Subsequent Actions

Bowman testified that immediately before the shooting he thought the victim was arming himself, and then immediately after the shooting, seeing the victim unphased [RP:12/4:69.4-21], Bowman abruptly left the scene in a panic [RP:12/4:72.1-25]. The witnesses described seeing Bowman moments immediately following the gun fire [RP:11/20:35.22-36.12] [RP:11/20:103.5-8] fleeing into oncoming traffic [RP:11/20:39.4-6] [RP:11/19:74.4] , through a red light across heavy traffic[RP:11/20:129.19-24], and towards his house [RP:11/19 Sup:6.4-17].

Based on common sense, it is unreasonable to infer premeditation from Bowman's choice to risk a fatal accident over waiting for the light to change or making a U-turn and stealthily leaving the scene. It may be possible to infer premeditation from Bowman's choice to immediately head home. But this circuit has noted: "No reasonable trier of fact could find evidence of criminal culpability in the decision of a teenager to run home from the scene of a shooting" Juan H. v. Allan, 408 F.3d 1262, 1277 (9th Cir. 2005)

After Bowman arrived home, were his actions indicative of having a plan? The record indicates that he was shocked [RP:12/4:161.15-18], and didn't respond for several hours [RP:12/4:77.12-23]. The actions in the following weeks as Bowman tried to hide his involvement indicate that simple planning would have avoided the need to acquire a new phone [RP:12/4:87.8-23], travel 175+ miles to Portland and 175+ miles back to Seattle to replace his window, or change his routine by having to not drive his primary vehicle while changing its tires and appearance [RP:11/19:12.2-17].

In mining Bowman's subsequent actions for intent, notice that everything he did was a reaction to his circumstances. The State asserts this evidence proves Bowman was acting on a plan, but there is nothing in the evidence to distinguish it from the evidence of someone who did not have a plan. His reactions were obviously not the result of planning. It should be noted that "Intent may not be inferred from conduct that is patently equivocal." State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985).

Therefore, premeditation cannot be inferred from Bowman's actions following the incident.

Issue #6.5 - Recent Law

The extreme weakness of the evidence against Bowman is well-illustrated by comparing this case with State v. Hummel, 196 Wn.App. 329, 383 P.3d 592 (Wash. Ct. App. 2016) where this circuit reversed the conviction based on evidence more inculpatory than the evidence here.

In HUMMEL, there was a litany of incriminating direct and circumstantial evidence: (1) financial motive (*id. at* 5), (2) criminal wrongdoing (sexual contact with a minor) (*id. at* 2), (3) evidence of an embarrassing confrontation (*id. at* at 10), (4) disposal of the body (*id. at* 11), (5) proactively lying to conceal the death (*id. at* 24), (6) conflicting testimony which tended to show continued deception and perjury, and (7) a criminal conviction for continuing to cash the victim's disability checks (*id. at* 15).

The Court of Appeals ruled that though there was evidence of guilt, there was no evidence to show deliberation or reflection to prove premeditation. *id. at* 26. Ultimately finding that "we must remand to dismiss the conviction with prejudice." *id. at* 28.

Issue #6.6 - Conclusion

The Petitioner believes this case is an example of one of the rare occasions noted in: "[W]e acknowledge our obligation under Jackson to identify those rare occasions in which "a properly instructed jury may ...convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt[.]" U.S. v. Nevils, 598 F.3d 1158, 1164 (9th Cir. 2010) (citing Jackson v. Virginia, 443 U.S. 307, 317)

It has been noted that “the need for the evidence does not make the evidence more likely to prove that which is offered to prove”. U.S. v Stout, 509 F.3d 796, 800 (6th Circuit. 2007). No amount of stating “Is there overwhelming proof that he [Bowman] did it with premeditate intent? Yes.” [RP:12/9:57.22] should make the evidence stronger when the facts support self-defense.

Because this case is in conflict with the decisions of both the Court of Appeals and the Supreme Court, this case warrants review under RAP 1 3.4(b)(1) and (2). And because this is a question of constitutional due process, review is warranted under RAP 13.4(b)(3).

Issue 7 - FILING CABINET ANALOGY

The trial court abused its discretion when it admitted evidence on the foundation that Bowman's 12 Terabytes (Tb) of data was comparable to a filing cabinet [RP:11/10:5.9-12]. Details of the factual issues are in SAG pages 5-8. Here, we will briefly examine the scale and constitutional issues as found in precedent case law.

This circuit has considered this issue but at a scale many orders of magnitude smaller in U.S. v. Curtin, 489 F.3d 935 (9th Cir. 2007). "According to his testimony, he downloaded 147 stories, combined in a single.zip file. The prosecutor never asked Curtin whether he actually read the five stories admitted. And we cannot assume he did, because the volume of material. The five stories admitted vary from 12 to 36 pages single-spaced, an average of 20.4 pages. If they are representative, Curtin had to plow through 2,998 single-space pages of this garbage to have read them all, three times the length of War and Peace. The content of the stories cannot be relevant to show what was in Curtin's mind without foundation to support an inference that he read them." *id. at* 962.

In CURTIN, the defendant was arrested with the equivalent of 2,998 pages of literature stored in an electronic device on his person. In this case, we have approximately 1.5 billion pages stored on a business computer [RP:11/10:8.14]. Even if we consider only the single folder in which most of the digital evidence was found, a rough estimate is still 52.5 million pages of literature (3.5 percent of 12 Terabytes) [RP:12/2:74.16-21].

This circuit has also noted: "Criminal activity is a wildly popular subject of fiction and nonfiction writing -- ranging from the National Enquirer to Les Miserables to In Cold Blood. Any defendant with a modest library of just a few books and magazines would undoubtedly possess reading material containing descriptions of numerous acts of criminal conduct." People v. Shymanovitz, 157 F.3d 1154, 1159 (9th Cir. 1998).

"Undoubtedly there was other reading material in Shymanovitz' residence that was discovered but neither seized nor introduced into evidence. To allow the prosecutors to parade before the jury snippets from a defendant's library -- the text of two magazine articles and descriptions of four magazines -- would compel all persons to choose the contents of their

libraries with considerable care; for it is the innocent, and not just the guilty, who are sometimes the subject of good-faith prosecutions." *id.*

By extrapolation from a small physical library in SHYMANOVITZ, to a single packet of digital stories, to the 12 TB of data on "Bowman's Computer"[RP:11/10:8.14], it should be clear that a "File Cabinet" [RP:11/10:5.9-12]. is not a suitable analogy for analyzing the foundation for admitting the supposed evidence in this case.

By downplaying the scale of Bowman's library, the trial court erred in analyzing the importance of these First Amendment, constitutionally protected articles. This is understandable considering the law surrounding an accused's reading material has remained uncertain. "Without further guidance from the Supreme Court, trial court judges have struggled to balance the interests of the accused while still giving the prosecution a chance to present its case effectively." See Muthena Alsahlani, *The Admissibility of an Accused's Choice of Reading Material as Evidence Under Federal Rule of Evidence 404(b): What Are the Constitutional Implications of this Type of Evidence?* Volume 34 Criminal and Civil Confinement 349, 353 (2008).

The landmark cases in this circuit start with SHYMANOVITZ (1998), followed 10 years later with CURTIN (2007), and must be updated 10 years later today (2017) with this case. In the instant, the constitutional concerns are broader than most cases of "reading material" as the size of Bowman's library has been compared to the Library of Congress [RP:11/3:8.25]. Proper safeguards must be in place to prevent using a person's library card as foundation for knowledge of any specific book found in library.

Bowman's counsel failed to place import on this First Amendment issue, but the trial court understood that these articles were protected and "legal to be in the possession of someone" [RP:11/6:36.8]. Aiding to the confusion is the issue of ineffective assistance of counsel in properly arguing how constitutional safeguards were bypassed. This was unfair to Bowman.

The State argued that "These [articles] are part of the crime. They're not prior acts. They're everything to do with what happened on that day." [RP:11/6:28.14]. The context and full content of these articles contradicts the State's assertion. Many of the discrepancies are discussed in the SAG.

The fact that the State was able to argue the admission of these articles with a straight face supported by the trial court is an amazing act in itself. “Neither the First Amendment freedom of speech nor the propensity rule can provide any protection for a defendant if reading material is casually admitted into evidence under a wide variety of evidentiary rules. Instead courts should adopt a clear, predictable standard that appreciates the constitutional significance of an individual’s chosen reading material.” See Jessica Murphy, *Swiss Cheese That’s All Hole: How Using Reading Material to Prove Criminal Intent Threatens the Propensity Rule, 83* Wash. L.Rev. 317, 344 (2008).

As CURTIN noted, “barring an exceptional circumstance, such as instructions for committing a crime otherwise hard to accomplish, used against one who accomplished it, what people read or fanaticize should not be used to prove what they intend to do.” U.S. v. Curtin, 489 F.3d 935, 961-962 (9th Cir. 2007).

In this case, it would be hard to construe Bowman’s actions as hard to accomplish or requiring knowledge beyond what the average American adult might consider common knowledge.

The articles admitted into evidence from the supposed “filing cabinet” were common knowledge, found in constitutional protected reading material, located in a library of immense size. Because the Court of Appeal's holding in this case is contrary to other cases of this circuit, this is a constitutional issue, and because the ruling here would apply to anyone with an interest in crime shows or having a modest library, review is warranted under RAP 13.4(b) (1), (2), (3), and (4).

Issue #8 - SLANDER CAMPAIGN

This case has not been marred by a single instance of slander. This case has been made putrid from a systematic campaign of improper attacks on Bowman's character. The SAG outlines and cites the worst instances.

The issue at trial was not Bowman's character, it was his specific intent during a specific act. U.S. v. Curtin, 489 F.3d 935, 944 (9th Cir. 2007) notes "Character evidence is of slight

probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion."

It was accepted that Bowman lied about his name to the window repair sales people, and failed to disclose the real reason for the broken window to his wife. But the fire of these fibs must be quenched: "In practical terms, ‘a defendant's attempt to fabricate evidence after an alleged violation of the law is not sufficient to establish guilt.’ ” U.S. v. Rahseparian, 231 F.3d 1257, 1263 (2000). "Courts have limited the probative value of false exculpatory statements because the most probable and obvious inference to be· drawn therefrom is that the defendant 'surmised he was implicated in some sort of criminal activity.' " *id. at* 1264 (citing U.S. v. Nusraty, 867 F.2d 759, 765 (2nd Cir 1989)).

In brief: The State (1) fabricated and falsely attributed to Bowman disparaging remarks [see SAG p24 - Unfortunate Coincidence], (2) misstated Bowman's testimony - changing an "easy to get to" gun [RP:12/8:131.17] to an expedition requiring ruffling [RP:12/4:67.25] and rummaging [RP:12/9:90.18], (3) misstated evidence to discredit Bowman's testimony - confusing the jury with when the phone was turned off [see SAG p28 - When and Where was the Phone Turned Off], (4) created lies and attributed them to Bowman [see SAG p29 - False Fake Number], (5) likened Bowman to a serial killer who keeps souvenirs of his kills [RP:12/9:71.22 and 72.11], (6) speculated on Bowman's supposed pleasure derived from the violent event [RP:12/9:67.4 and 93.25], (7) classified Bowman as someone who lives "in his own reality, his own world” [RP:12/9:72.19], (8) described Bowman as "someone who has no feelings. Someone who cannot feel" [RP:12/9:56.7] and similarly disparaging descriptors (see SAG p31 - No Feeling No Humanity), (9) a liar [see SAG Appendix pXXX and pXXXI for excerpts and variations], and (10) repeatedly characterized Bowman as someone obsessed with death and killing [see SAG Section 3.5 Death Death Death p17 and SAG Appendix pI and pVIII].

The central theme of the State’s case was the theory that Bowman was a “Student of Murder” [RP:11/19 Sup:7.13]. This is hard to classify as anything other than a character trait with the implication of a propensity for violence. The State’s entire closing argument [RP:12/9:56.5 thru 95.3 and 120.23 thru 125.11] is based entirely on painting Bowman with a criminal character and a propensity to kill without remorse.

None of the State's characterizations bore any semblance to the record or reality. The issue this court is asked to examine is why the Court of Appeals completely ignored the State's impropriety.

Because this case cites numerous examples of misconduct of the nature deemed prejudicially unfair in most courts, review is warranted under RAP 13.4(b) (1) and (2).

Issue #11 - PREMEDITATION DISPROVES SELF-DEFENSE

The State told the jury that "premeditation disproves self-defense" [RP:12/9:122.16]. The error in this statement of law can be illustrated in the following hypothetical scenario:

> John, a white supremacist, publicly states he hates black people and thinks about killing them all of the time. John tells a friend that he is "waiting for any chance to do one in." While walking home from work, several witnesses observe him being jumped by several black individuals who proceed to beat and rob him. John fires several shots, hitting and killing one of his attackers. After the shots, the rest of his attackers run away.
>
> Was this self-defense or premeditated murder? When a police officer trains to shoot an attacking criminal, is that premeditation of murder?

Murder in the first degree requires an "unlawful" intent to kill. Self-defense is explicitly made a "lawful" act under Washington law. State v. McCullum 98 Wn.2d 484, 494-496 (1983). Acting in self-defense thus negates premeditated murder in the first degree.

The State was partially correct "Since self-defense is inconsistent with the crime of murder in the first degree, proof of the elements of the crime beyond a reasonable doubt necessarily disproves the presence of a lawful killing in self-defense." McCullum Supra 500-01. But premeditation is only one of the requisite elements.

The State argued in opening "there is premeditation that occurred long in advance" [RP:11/19 Sup: 3.16-19] and in closing that "we have premeditation way before" [RP:12/9:90.12] by virtue of Bowman being a "Student of Murder." This misconstrued

Bowman's exercise of his First Amendment right to possess reading materials as all the proof necessary to complete the State's burden of disproving self-defense.

In a different analysis, let us look to another state of mind. This Court has found that "a person acting in self-defense cannot be acting recklessly. Thus if a jury is able to find that a defendant acted recklessly, it has already precluded a finding of self-defense." State v. Hanton, 94 Wn.2d, 129, 134 (Wash. 1980)

But recklessness occurs during the act and is mutually exclusive to self-defense. Premeditation occurs at any point in time before the act and applies in conjunction if there is sufficient connectivity. Therefore no amount of premeditation can disprove self-defense. Thus the explicit ruling from State v. Roberts, 88 Wn.2d 337, 493, 562 P.2d 1259 (1977) that the prosecution bears the burden of proving beyond a reasonable doubt the absence of self-defense.

It has been noted that "[I]t is improper for the prosecutor to misstate the law generally, and particularly to attempt to absolve the prosecution from its prime facie obligation to overcome reasonable doubt on all elements." People v. Hill (1998) 17 Cal.4th 800 , 72 Cal.Rptr.2d 656; 952 P.2d 673 (citations omitted).

This was ultimately a misstatement of the law which allowed the jury to convict Bowman of first degree murder even if the jury believed that he acted in self-defense. Because this holding is contrary to legal precedent, review is warranted under RAP 13.4(b) (1) and (2).

CERTIFICATE OF SERVICE

I, Thomasdinh Bowman, do hereby declare that I have served all parties my ANSWER TO RESPONDENT FOR REVIEW by Email or US Mail and / or in person as follows:

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