

No. 42318-9-II

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COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

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In re Personal Restraint Petition of

MARVIN SIDES FAIRCLOTH,

Petitioner

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STATE'S RESPONSE TO PERSONAL RESTRAINT PETITION

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A. AUTHORITY FOR RESTRAINT OF PETITIONER

Marvin Sides-Faircloth is restrained pursuant to the Judgment and Sentence entered by the court in Mason County Superior Court No. 95-1-00051-7. Appendix A.

B. STATE'S RESTATEMENT OF PETITIONER'S ISSUE PRESENTED FOR REVIEW

In 1996, a Mason County jury convicted Marvin Sides-Faircloth of murder in the first degree. His conviction became final on August 3, 1998, when Division II of the Washington Court of Appeals issued a Mandate that terminated review of his conviction. Appendix C.

More than twelve years later, Petitioner now seeks review of his conviction by way of this personal restraint petition by alleging newly discovered evidence. Faircloth now asserts that he has located an expert witness who would be expected to testify that Faircloth has recovered repressed memories that would suggest that he did not premeditate the murder for which he was convicted in 1996.

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The issue on review is whether Faircloth's personal restraint petition is time-barred and whether Faircloth's alleged recovered memories or the testimony of the proffered expert witness is newly discovered evidence that would entitle Faircloth to a new trial.

C. STATEMENT OF CASE

1) Summary of Facts

The following summary of facts is taken verbatim from the "Ruling Affirming Judgment and Sentence" issued by Division II of the Court of Appeals on February 24, 2008:

Keith Murphy and Marvin Faircloth resided in the home of Frank Faircloth, the murder victim.<sup>2</sup> At approximately midnight on February 26, 1995, the victim went upstairs in his home and visited the bedroom shared by Murphy and Faircloth. The victim witnessed both Murphy and Faircloth smoking cigarettes and "huffing"<sup>3</sup> paint. He told them that they would have to move out the next day. Shortly after the victim left their room, Murphy and West [sic] decided to kill him. Murphy grabbed a Jack Daniels bottle and Faircloth grabbed a spear-type object and the two headed downstairs to the victim's bedroom.<sup>4</sup>

Over a 25-minute period of time, the victim fought for his life by running from room to room while Murphy and Faircloth disconnected the telephone and attacked him with knives, the whisky bottle, a hammer, a long pole with a spike on the end and a

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table leg. Murphy and Faircloth made the victim tell them that he loved them. They called the victim a liar.

During the attack, the victim repeatedly called out to Bryce West, a 16-year-old resident, to call police. West, who was upstairs in his bedroom because Faircloth had threatened to kill him too if he came out, did not immediately call the police. After the victim finally died, Faircloth returned to West's bedroom, made him come downstairs and help clean up, and then Faircloth and Murphy took the victim's body into the woods where they smashed out his teeth (to conceal his identity) and burned him. After the two left the house with the body, West left and contacted the police.

<sup>2</sup>Frank Faircloth had adopted Marvin Faircloth. For clarity, this court will refer to Frank Faircloth as the victim.

<sup>3</sup>The process of "huffing" was described at length at trial but basically involves spraying aerosol paint into a plastic baggy and inhaling it quickly.

<sup>4</sup>According to the statement of Faircloth, the events transpired as follows:

A: He was laying in bed, then Keith walked in, looked at him, said "what the fuck," bam, right over the head with the bottle, Frank gets up, runs, tries to run from, from the room, I waited until he got in the living room, stabbed him with my spear, he falls to the ground and....

Q: Where [did] you stab him?

....

A: I don't know, I think in the back. Then ... ran upstairs real quick and came back downstairs he was trying to make a break for the door so I grabbed him and pulled him back in, a couple of knives came into the subject so he got stabbed a few times.

Ruling Affirming Judgment and Sentence, Case No. 20549-1-II, pg. 2-3.

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2) Procedural Facts and History

The Petitioner, Marvin Sides-Faircloth, is known in court documents by the name used here and is also known as Marvin Faircloth and sometimes as Marvin Sides Faircloth.

In February of 1996, the Petitioner was tried jointly with the codefendant, Keith Murphy, for the murder of Frank Faircloth. The trial court matter is captioned in the Superior Court of Mason County as "State of Washington v. Marvin Faircloth & Keith Murphy." Faircloth's trial court cause number is 95-1-00051-7; Murphy's trial court cause number is 95-1-00052-5.

The jury returned a guilty verdict in regard to both defendants. The court entered judgment and sentence against Faircloth on March 27, 1996. Sides-Faircloth timely filed a notice of appeal. The appeal is captioned as "State of Washington v. Marvin Faircloth" as case number 20549-1-II and is consolidated with codefendant's appeal, which is captioned as "State of Washington v. Keith Murphy," case number 20644-7-II. (Respondent requests that the record of these proceedings be incorporated by reference and included in the record of this personal restraint petition).

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On February 24, 1998, the Court of Appeals denied Faircloth's appeal and issued a "Ruling Affirming Judgment and Sentence."

Appendix B. One of the two issues on appeal was a challenge to the sufficiency of the evidence in regard to premeditation. (The other issue was a challenge to the exceptional sentence ordered by the trial court.) On August 3, 1998, the Court of Appeals issued a Mandate to certify its decision denying the appeal and sustaining the conviction. Appendix C.

On August 2, 2005, Faircloth filed a personal restraint petition in Division II of the Washington Court of Appeals. The case is captioned by the court as "Personal Restraint Petition of Marvin Sides Faircloth," cause number 33901-3. However, the cause number appearing on the face-page of Faircloth's petition is 20549-1-II, which is the cause number of the appeal for which a final mandate had issued in 1998. Additionally, paragraph one of Faircloth's petition erroneously reports the trial court case number as 95-1-00052-5, but this actually the trial court case number of Murphy, the codefendant. It appears that Faircloth's petition was indexed and linked to Murphy's trial court cause number, 95-1-00052-5, when the correct trial court cause number should be 95-1-00051-7.

(Respondent requests that the record of these proceedings be incorporated by reference and included in the record of this personal restraint petition).

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The issues and facts presented in Faircloth's prior petitions and appeal are important to determine procedural issues in his current petition. In his first personal restraint petition, in 2005 (hereinafter cited as 2005 PRP), Faircloth stated as follows:

Marvin Faircloth had a long history of sexual abuse by men and Frank Faircloth was sexually interested in Marvin, which was not reciprocal. RP Volume II, page 206 beg. line 13 -- page 207 line 7; Volume V, page 703, beg. line 3.... Dr. O'Shaunessy diagnosed Marvin Faircloth with post-traumatic stress disorder (PTSD). RP Volume V, page 704, beg. line 7.

2005 PRP, p.4 (citations to record appear in original).

Faircloth further asserts in his 2005 petition that "the defenses of self-defense and battered child syndrome were not presented to the jury... The court expressed concern about the non development of the child abuse syndrome as a defense...." 2005 PRP, p. 12-13. In his 2005 petition, Faircloth quoted the trial court as having stated: "And is it not also correct that the defense of an abused child syndrome has been a defense that you've been pursuing ever since the inception of the case on Feb 27th, 1995?" 2005 PRP, p. 13.

During the jury trial, psychologist and defense expert Dr. Kenneth Mark Muscatel presented testimony. In describing the difficulty of evaluating an individual's ability to premeditate intent to kill when that

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individual is voluntarily intoxicated by alcohol or other chemical substances, Dr. Muscatel testified that "part of this is a catch 22, which I have to let everybody know, if an individual is impaired and they're the reporter of experience by definition the more the impaired they are the poorer the reporter they're going to be...." RP 562. Dr. Muscatel further testified that given the multitude of witnesses who overheard Faircloth and his codefendant talk about wanting to kill the victim, the actual happening of the killing would not be consistent with an impulsive act. RP 572.

Faircloth asserts in his 2005 petition that there was a witness, Dr. O'Shaunessy, who could have testified at trial and "could have fully developed the battered child syndrome defense" and could have provided "evidence of the extensive and horrendous history of childhood physical, sexual and emotional abuse that Marvin Faircloth had endured." 2005 PRP, p. 21.

In his 2005 petition, Faircloth described the victim of his murder as having a "past pattern and practice... of statutory rape," and asserts that these circumstances caused Faircloth to experience "dissociation/PTSD." 2005 PRP, p. 27.

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On November 30, 2005, the Court of Appeals, Division II, issued its "Order Dismissing Petition" in regard to Faircloth's 2005 PRP, finding that it was time-barred. Appendix D.

More than five years later, on January 12, 2011, Faircloth filed a motion and order to show cause for a new trial in Mason County Superior Court, alleging that he had newly discovered evidence because he had located an expert witness, Dr. Laura Brown, who would say that he suffered from battered child syndrome. Dr. Brown prepared a declaration, which was filed with Faircloth's motion for a new trial and was subsequently transmitted to the Court of Appeals in support of Faircloth's personal restraint petition.

Dr. Brown states in her declaration, on page 3, that her opinion is based upon her belief that Faircloth has newly recovered memories of abuse inflicted against Faircloth by his victim. Every other fact or circumstance considered by Dr. Brown was known and available to the defense at the time of trial and was considered by experts at the time of trial. The abuse described by Dr. Brown is not materially distinguishable from the abuse described in Faircloth's 2005 PRP. Dr. Brown opines at page 10 of her declaration that had Faircloth had these memories available

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to him at the time of trial, they "might have been seen as mitigating factors."

The prosecutor filed briefing and supporting documents in response to Faircloth's motion. The trial court then transferred the matter, including the prosecutor's trial court response, to the Court of Appeals as a personal restraint petition, where the matter was indexed and linked to the trial court case number of 95-1-00051-7 and was given appeals court case number 41792-8-II. (Respondent requests that the record of these proceedings be incorporated by reference and included in the record of this personal restraint petition).

On April 8, 2011, the Court of Appeals dismissed Faircloth's personal restraint petition in case number 41792-8-II because Faircloth had not filed a substantive motion in the case.

Thereafter, on May 17, 2011, a new personal restraint petition (the current petition, to which this answer applies) was entered at the Court of Appeals as case number 42318-9-II. This petition is the same as 41792-8-II, which was dismissed, except that the current petition is complete because Petitioner has filed supporting memorandum and authorities. (Respondent's response and supporting documents are filed in case number 41792-8-II; so, to avoid repetitive or duplicate filings, Respondent

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requests that documents and pleadings in case number 41792-8-II be incorporated by reference into the current case).

D. STANDARD OF REVIEW FOR PERSONAL RESTRAINT PETITION

To obtain relief through a personal restraint petition, petitioner must show that he was actually and substantially prejudiced either by a violation of his constitutional rights or by a fundamental error of law. *In re Personal Restraint of Cook*, 114 Wn.2d 802, 814, 792 P.2d 506 (1990).

"Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders." *In re Personal Restraint of Hagler*, 97 Wn.2d 818, 824, 650 P.2d 1103 (1982).

When a personal restraint petition is based upon an assertion of newly discovered evidence, it is not enough to show that the evidence might change the result; instead, to prevail on collateral review Faircloth must show that the new evidence, if it is new evidence, will probably change the result. *State v. Peele*, 67 Wn.2d 724, 409 P.2d 663 (1966).

E. ARGUMENT

1. This Court Should Dismiss this Petition Because

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Petitioner Has Failed to Show Either Prejudicial  
Error or a Fundamental Defect Resulting in a  
Complete Miscarriage of Justice.

To overcome the finality of the jury's verdict of guilty and the finding on direct appeal sustaining the jury's verdict, Faircloth "must first overcome statutory and rule based procedural bars." *In re Personal Restraint of Grasso*, 151 Wn.2d 1, 10-11, 84 P.3d 859, 864 (2004), citing RCW 10.73.090, .140; RAP 16.4(d).

If Faircloth overcomes the procedural and rule-based bars to collateral review, he must then show "either a constitutional error that worked to his actual and substantial prejudice, or a nonconstitutional error that constitutes a fundamental defect inherently resulting in a complete miscarriage of justice." *Grasso* at 10-11.

Faircloth asserts that he has newly discovered evidence in the form of recovered memories and that he has located an expert witness who would testify that it is her opinion that Faircloth's recovered memories are probably true. The State disputes whether Faircloth's purportedly recovered memories are evidence, disputes that they are probably true, and also disputes whether they are newly discovered. However, even if Faircloth' assertion of new evidence was newly discovered, which it is

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not<sup>1</sup>, Faircloth's purportedly new evidence nevertheless does not indicate prejudicial error or that his trial was not fair, and it does not indicate that the jury's verdict of guilty was a complete miscarriage of justice.

To prevail on his effort to reverse the finality of his conviction based upon a claim of newly discovered evidence, Faircloth must show that the evidence would probably change the outcome of the trial. "Significantly, the standard is 'probably change,' not just possibly change the outcome." *State v. Gassman*, 160 Wn. App. 600, 609, 248 P.3d 155 (2011), citing *State v. Williams*, 96 Wn.2d 215, 223, 634 P.2d 868 (1981). "Defendants seeking postconviction relief face a heavy burden and are in a significantly different situation than a person facing trial." *Gassman* at 609, quoting *State v. Riofta*, 166 Wn.2d 358, 369, 209 P.3d 467 (2009).

Faircloth has not shown constitutional error and has not shown that his conviction was or is a miscarriage of justice, and his petition for collateral relief, therefore, should be dismissed. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 868 P.2d 835 (1994), *cert. denied*, 513 U.S. 849

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<sup>1</sup> According to the declaration of Dr. Laura Brown, filed in support of Faircloth's current petition, the first of the two repressed recollections was recovered by Faircloth "shortly after incarceration" in 1995 prior to trial, and the second of the two repressed recollections was recovered in 2000 in the presence of Faircloth's therapist and his attorney who subsequently represented Faircloth in his 2005 PRP. See Declaration of Dr. Laura Brown, starting at Page 4 Line 7 through Page 5 Line 23.

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(1994); *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 792 P.2d 506

(1990); *In re Gentry*, 170 Wash.2d 711, 245 P.3d 766 (2010).

Faircloth has not, and cannot, meet his threshold burden of showing that he has suffered actual and substantial prejudice, and this personal restraint petition, therefore, should be dismissed. *In re Grimsby*, 121 Wn.2d 419, 425, 853 P.2d 901 (1993). Merely presenting, more than ten years after the trial, the opinion of a different expert with an opinion that contradicts the opinion of trial experts and contradicts the inferences to be drawn from evidence presented at trial, does not entitle Faircloth to a new trial. See, e.g., *State v. Harper*, 64 Wn. App. 283, 823 P.2d 1137 (1992).

2. This Court Should Dismiss Petitioner's Claims  
that Were Raised and Rejected on Direct Review.

Faircloth asserts that his claim of newly discovered evidence is relevant to rebut evidence supporting the jury's finding that Faircloth premeditated the murder he committed.

In a direct appeal from the conviction, Faircloth raised the issue of sufficiency of the evidence regarding the element of premeditation.

Faircloth is barred from raising in a personal restraint petition an issue that

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has already been raised and decided on direct appeal, unless he can make a showing of constitutional error or a total miscarriage of justice. *In re Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994), *cert. denied*, 513 U.S. 849 (1994).

3. Petitioner's Personal Restraint Petition Should Be Dismissed Because It Is Barred by the One-Year Time Bar of RCW 10.73.090.

RCW 10.73.090 and RAP 16.4(d) bar personal restraint petitions that are not brought before the court within one year of the mandate issued after direct review of a trial court conviction. *In re Cruze*, 169 Wn.2d 422, 237 P.3d 274 (2010). The one-year time limit is mandatory, and it acts as a bar to consideration of a personal restraint petition that is filed outside the one-year time limit. *In re Bonds*, 165 Wn.2d 135, 196 P.3d 672 (2008).

However, RCW 10.73.100 provides statutory exemptions to the one-year time limitation. Specifically, RCW 10.73.100 provides that: "The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based... on... [n]ewly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion." To overcome the one-year time limitation, Faircloth

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must show that his newly discovered evidence is material, not merely cumulative or impeaching, was discovered after the trial, could not with due diligence have been discovered before verdict, and would probably have changed the outcome of the trial. *In re Pers. Restraint of Brown*, 143 Wn.2d 431, 453, 21 P.3d 687 (2001).

The evidence proffered by Faircloth is not newly discovered. Review of the trial record, the Court of Appeals' 1998 "Ruling Affirming Judgment and Sentence," and Faircloth's 2005 personal restraint petition, all show that as early as the pretrial period, and for several years after the judgment of guilty, Faircloth was aware of the potential defense of the battered child syndrome and was aware of facts or alleged facts to support that defense. The only facts or circumstances that can now be characterized as "newly discovered" are that Faircloth now asserts that he has recovered a memory of abuse and that he has located an expert witness who would testify that Faircloth's recovered memory is probably true.

But as evidenced by his prior personal restraint petition filed in 2005, even if Faircloth's recovered memory was believed by a jury, it is merely cumulative to other purported facts already known by Faircloth at the time of trial and facts known for several years before the current petition was filed. To fall within the newly discovered evidence exception

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to the one-year time limit, Faircloth must show that the "newly discovered evidence" is not merely cumulative or impeaching. *In re Pers. Restraint of Brown*, 143 Wn.2d 431, 453, 21 P.3d 687 (2001).

Faircloth was not reasonably diligent in discovering the evidence he now advances; neither was he diligent in bringing his petition for relief after the basis for relief was known to him. Because he was not diligent, the one-year time bar applies, and his petition should be dismissed. *In re Cruz*, 169 Wn.2d 422, 237 P.3d 274 (2010). All the information that Faircloth's new expert has relied upon to reach an opinion was available to Faircloth at the time of trial,<sup>2</sup> with the exception of Faircloth's purported recovered memory, which is not materially distinguishable from facts that he has alleged previously. Faircloth has not shown that even if he had exercised due diligence, the testimony of his current expert was not available during or before trial or that there was any reasonable excuse for his failing to bring his personal restraint petition for several years after the

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<sup>2</sup> Dr. Laura Brown enumerates the records upon which she relied in reaching her opinion on page 2, section 2(b). Dr. O'Shaunessy, Dr. Maxwell, Dr. Killoran, and Dr. Trowbridge each evaluated the defendant in anticipation of trial and offered expert testimony at Faircloth's trial. Bob Zornes was the private investigator hired by the defense, who interviewed Faircloth to assist defense counsel with trial preparation. The only record listed by Dr. Brown that was not specifically discussed during the trial is the report of the Faircloth Review Committee. That report, attached hereto as Appendix E, was transmitted by DSHS to Sam Davidson, trial attorney for Faircloth, via cover letter dated January 18, 1996 and in response to a defense subpoena for records in preparation for trial.

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issue was known to him. See, e.g., *State v. Onstead*, 875 So.2d 908, 917 (La. App., 5 Cir., 2004) (finding that petitioner seeking collateral relief based upon the discovery of a new expert failed to show that the expert could not have been located during trial and also finding that the additional evidence was not material).

Faircloth has not shown why he could not have located an expert to support his theory rebutting premeditation before or during trial. Thus, he has failed to show that he exercised diligence, and his petition should be dismissed. *State v. Evans*, 45 Wn. App. 611, 614-615, 726 P.2d 1009 (1986), citing *State v. Williams*, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981). Regardless whether Faircloth truly was abused by his victim or whether there is any factual basis to Faircloth's assertions of this kind, Faircloth has nevertheless advanced these assertions even before the trial began, and in his 2005 PRP he advances these assertions even further. Thus, these purported facts have been known to Faircloth for many years, and Faircloth, therefore, was not timely in seeking relief in the current petition. *In re Cruz*, 169 Wn.2d 422, 237 P.3d 274 (2010).

4. This Petition Should be Dismissed Because It Is a Successive Petition.

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Faircloth's direct appeal challenged the sufficiency of the evidence in regard to the element of premeditation. His 2005 PRP then alleged facts and circumstances that he offered as evidence against premeditation, including his assertions that he had been sexually abused by the victim. Faircloth now asserts in his current petition that he has additional evidence that consists of purportedly recovered memories and the opinion of an expert who opines that Faircloth's recovered memory is probably real or truthful.

Faircloth's recovered memory differs from all other evidence that he has possessed on the subject of premeditation only because it is slightly more of the same thing. This evidence is not significantly different in quantum or quality and is alike in substance with all prior evidence on this subject. Therefore, Faircloth's current petition is based on grounds similar to his prior petition and direct review and should be dismissed because it is a successive petition. *State v. Brand*, 120 Wn.2d 365, 370, 842 P.2d 470 (1992); RCW 10.73.140; RAP 16.4(d).

5. This Petition Should be Dismissed Because Petitioner Has Not Shown that His Restraint Is Unlawful Pursuant to RAP 16.4(c).

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Case No. 42318-9-II

Mason County Prosecutor  
PO Box 639  
Shelton, WA 98584  
360-427-9670 ext. 417

Faircloth has not met his burden of showing that any of the reasons for collateral review listed in RAP 16.4(c) apply to his conviction. He claims only that he now has, after more than a decade, a recovered memory and that he has the opinion of an expert with which to rebut evidence offered at trial. The evidence offered at trial proved beyond a reasonable doubt that Faircloth premeditated the murder for which he was convicted, but he now claims that he has recovered memories of prior abuse by the victim, which he would offer as evidence to show that the murder was not premeditated.

Faircloth has offered nothing to show that there are facts or law to support a contention that he received anything but a fair trial; thus, his petition should be dismissed. *State v. Williams*, 96 Wn.2d 215, 228, 634 P.2d 868 (1981).

6. Faircloth's Claim Has No Merit

Faircloth received a fair trial, and a competent jury hearing the evidence found him guilty beyond a reasonable doubt of premeditated

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murder. Viewing similar circumstances in an historical case, the court has previously written:

In sum, this strikes us as a classic case: the defendant loses, then hires a new lawyer, who hires a new expert, who examines the same evidence and produces a new opinion. We cannot accept this as a basis for a new trial. See P. Trautman, *Serving Substantial Justice—A Dilemma*, 40 Wash.L.Rev. 270 (1965). Inasmuch as there is no adequate legal basis for the order granting a new trial, it must be considered an abuse of discretion. *State v. Hoff*, 31 Wash.App. 809, 814, 644 P.2d 763, *review denied*, 97 Wash.2d 1031 (1982).

*State v. Evans*, 45 Wn. App. 611, 614-615, 726 P.2d 1009 (1986).

Expert witnesses testified at Faircloth's trial, the jury heard the testimony of expert witnesses and lay witnesses, and having seen the evidence and heard the testimony, the jury found the element of premeditation proved beyond a reasonable doubt.

What we have in the instant case is, purely and simply, a question of expert witness competency. Experience has taught us that such “experts” rarely agree. What may be a crucial “fact” to one, may not be to another.

Before affirming the grant of a new trial because the defense expert presented at trial overlooked or thought unimportant a fact or facts now deemed pertinent by an expert who did not testify, we must ask whether all of those defendants who could now unearth a new expert, who finds “new facts”—which if believed by the same jury might cause them to acquit—were denied a fair trial, *i.e.* failed to receive substantial justice. Surely we have to answer in the negative, or finality goes by the boards and the system fails.

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*State v. Evans*, 45 Wn. App. at 617–18, 726 P.2d 1009 (Reed, J., concurring). The only new fact available to Faircloth’s new expert is that Faircloth now claims to have recovered a previously repressed memory, but the memory that Faircloth now claims to have recovered is not substantively distinguishable from claims of abuse that were already advanced by his attorneys at trial and conceded in his 2005 PRP.

Thus, we have the same situation as in *Evans*, the retention of new counsel, who retains a new expert, who reviews the same evidence, and presents a new opinion. [The new expert’s] opinion does not constitute “material facts not previously presented and heard”, just as the opinion in *Evans* did not constitute “newly discovered evidence.”

*State v. Harper*, 64 Wn. App. 283, 293-294, 823 P.2d 1137 (1992).

It is not likely that the testimony of Faircloth’s new expert would change, or would have changed, the verdict of the jury. The new testimony is only a weak counterweight to evidence and other testimony that was presented at trial. Despite the weak and theoretical nature of the proffered new evidence, the testimony would not in any event change the outcome of the trial unless the jury believed the new evidence.

“However, nothing in the findings or the record shows that a jury would

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be required to, would, or for that matter should, believe it.” *State v. Evans*, 45 Wn. App. 611, 614, 726 P.2d 1009 (1986).

“When considering whether newly discovered evidence will probably change the trial's outcome, the trial court considers the credibility, significance, and cogency of the proffered evidence.” *State v. Gassman*, 160 Wn. App. 600, 609, 248 P.3d 155 (2011), citing *State v. Barry*, 25 Wn. App. 751, 758, 611 P.2d 1262 (1980).

Even if the jury believed that Faircloth has recovered memories of his victim abusing him, to add to the memories of abuse that he has continuously alleged, it does not follow that the jury would necessarily find that the abuse negated a finding of premeditation. And even if the jury believed that the abuse alleged by Faircloth led to a psychological condition, it does not necessarily follow that the element of premeditation would be negated. The jury could, and probably would, and for that matter should, still find that Faircloth premeditated the murder.

By bringing forth the discovery of a recovered memory, Faircloth has attempted to bring his petition within an exception to the one-year time bar. If, however, a new trial would render a result different than the guilty verdict of the jury that convicted Faircloth, it would probably be because in the fifteen years since Marvin Sides Faircloth murdered Frank

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Faircloth, memories have faded, witnesses have disbursed or possibly died, and because evidence has deteriorated, withered, or been lost, rather than because there is any legitimate materiality to Faircloth's purported recovered memories or the opinion of his new expert.

The State disputes whether Marvin Sides Faircloth ever suffered abuse by Frank Faircloth, but even if any such abuse ever did occur, the evidence in the trial record and the record on appeal proves beyond a reasonable doubt that Marvin Sides Faircloth premeditated a murder against Frank Faircloth and then carried out the premeditated murder of Frank Faircloth. The assertion of the recovery of previously repressed memories, on the facts of this case, does not create any probability that the overwhelming evidence of this case would be disproved, negated, or even rebutted.

#### F. CONCLUSION

Faircloth was aware of the battered child syndrome defense prior to and during trial. The jury convicted Faircloth of murder in the first degree, finding that Faircloth premeditated the murder. Faircloth filed a

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direct appeal challenging the sufficiency of the evidence in regard to the element of premeditation. Several years later, he filed a personal restraint petition in which he again raised the issue of premeditation and summarized proffered facts that described his mental condition, which he asserted was caused from abuse against him by his victim. Several years later Faircloth has filed the current personal restraint petition, alleging essentially the same exculpatory theories, but now asserting that he has recovered previously repressed memories and that he has the supporting opinion of an expert witness.

Faircloth has not been diligent in locating this evidence and has not been diligent in bringing his petition after the issues became known to him. The allegedly recovered memories are not materially different from the alleged abuse he described in his 2005 personal restraint petition.

Even if the allegedly recovered previously repressed memories were legitimate, and the State does not concede that they are, these memories do not support a contention that, had the trial jury known of these matters, the verdict would probably have been different.

Faircloth received a fair trial and was found guilty beyond a reasonable doubt. Faircloth has not met his burden of showing a fundamental miscarriage of justice.

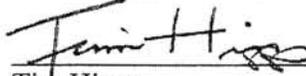
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PO Box 639  
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Accordingly, the prosecution respectfully asks the court to deny and dismiss Faircloth's personal restraint petition and sustain the finality of the jury's verdict.

DATED: December 5, 2011.

MICHAEL DORCY  
Mason County  
Prosecuting Attorney



Tim Higgs  
Deputy Prosecuting Attorney  
WSBA #25919

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## Appendix A

SUPERIOR COURT OF WASHINGTON  
COUNTY OF

STATE OF WASHINGTON, Plaintiff,

vs.  
Marvin Faircloth  
Defendant.

SID: WA1632144  
If no SID, use DOB: 9-8-76

No. 95-151-7

**JUDGMENT AND SENTENCE (JS)**

- Prison  
 Jail One Year or Less  
 First Time Offender  
 Special Sexual Offender Sentencing Alternative  
 Special Drug Offender Sentencing Alternative

RECEIVED & FILED  
MAR 27 1996  
PAT SWARTOS, Clerk of the  
Superior Court Mason Co. Wash

**I. HEARING**

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy)-prosecuting attorney were present.

**II. FINDINGS**

There being no reason why judgment should not be pronounced, the Court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 2 13 95  
(Date)  
by  plea  jury-verdict  bench trial of:

COUNT	CRIME	RCW	DATE OF CRIME
<u>1</u>	<u>murder in the first degree</u>	<u>9A.32.030</u>	<u>2/26/95</u>

as charged in the (\_\_\_\_\_ Amended) Information.

Additional current offenses are attached in Appendix 2.1.

A special verdict/finding for use of **firearm** was returned on Count(s) \_\_\_\_\_, RCW 9.94A.125, .310

A special verdict/finding for use of **deadly weapon other than a firearm** was returned on Count(s) \_\_\_\_\_, RCW 9.94A.125, .310

A special verdict/finding of **sexual motivation** was returned on Count(s) \_\_\_\_\_, RCW 9.94A.127

A special verdict/finding for **Violation of the Uniform Controlled Substances Act** was returned on Count(s) \_\_\_\_\_, RCW 69.50.401 and RCW 69.50.435, taking place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, in a public transit vehicle, or in a public transit stop shelter.

The defendant was convicted of **vehicular homicide** which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and is therefore a violent offense. RCW 9.94A.030

Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.400):

Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.360):

CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J Adult, Juv.	TYPE OF CRIME
1					
2					
3					
4					
5					

Additional criminal history is attached in Appendix 2.2.

The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.360

The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.360):

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	Plus Enhancement for Firearm (F), other deadly weapon finding (D) or VUCSA (V) in a protected zone	Total STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	0	<del>VI</del> V	240-320		240-320	Life

Additional current offense sentencing data is attached in Appendix 2.3.

2.4  EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence

above  within  below the standard range for Count(s) 4. Findings of fact and conclusions of law are attached in Appendix 2.4. The Prosecuting Attorney  did  did not recommend a similar sentence.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.142

The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.142):

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea

agreements are  attached  as follows: Exceptional Sentence should be imposed because of aggravating factors. No specific amount recommended but a doubling of the standard range was suggested.

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 [ ] The Court DISMISSES Counts \_\_\_\_\_

3.3 [ ] The defendant is found NOT GUILTY of Counts \_\_\_\_\_

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court:

<u>JASSCODE</u>	\$ _____	Restitution to: _____	
	\$ _____	Restitution to: _____	
<u>RTR/RJN</u>	\$ _____	Restitution to: _____	(Name and Address—address may be withheld and provided confidentially to Clerk's Office).
<u>PCV</u>	\$ <u>100</u> <sup>6PS</sup>	Victim assessment	RCW 7.68.035
<u>CRC</u>	\$ <u>943.70</u> <sup>6PS</sup>	Court costs, including	RCW 9.94A.030, 9.94A.120, 10.01.160, 10.46.190
		Criminal filing fee \$ <u>110</u> <sup>6PS</sup>	FRC
		Witness costs \$ <u>943.70</u> <sup>6PS</sup>	WFR
		Sheriff service fees \$ _____	SFR/SFS/SFW/WRF
		Jury demand fee \$ _____	JFR
		Other \$ _____	
<u>PUB</u>	\$ _____	Fees for court appointed attorney	RCW 9.94A.030
<u>WFR</u>	\$ _____	Court appointed defense expert and other defense costs	RCW 9.94A.030
<u>FCM</u>	\$ _____	Fine RCW 9A.20.021; [ ] VUCSA additional fine deferred due to indigency	RCW 69.50.430
<u>CDF/LDI/FCD</u>	\$ _____	Drug enforcement fund of _____	RCW 9.94A.030
<u>NTF/SAD/SDI</u>	\$ _____		
<u>CLF</u>	\$ _____	Crime lab fee [ ] deferred due to indigency	RCW 43.43.690
<u>EXT</u>	\$ _____	Extradition costs	RCW 9.94A.120
	\$ _____	Emergency response costs (Vehicular Assault, Vehicular Homicide only, \$1000 maximum)	RCW 38.52.430
	\$ _____	Other costs for: _____	
	\$ <u>Waived</u>	TOTAL	RCW 9.94A.145

[x] The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.142. A restitution hearing: [ ] shall be set by the prosecutor [x] is scheduled for June 27 at 9:00 A.M.

[ ] RESTITUTION. Schedule attached, Appendix 4.1.

[ ] Restitution ordered above shall be paid jointly and severally with: NAME of other defendant CAUSE NUMBER (Victim name) (Amount-\$)

RJN

[ ] The Department of Corrections may immediately issue a Notice of Payroll Deduction. RCW 9.94A.200010



4.6 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

- (a) CONFINEMENT. RCW 9.94A.400. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections:

640 months on Count \_\_\_\_\_ months on Count \_\_\_\_\_
\_\_\_\_\_ months on Count \_\_\_\_\_ months on Count \_\_\_\_\_
\_\_\_\_\_ months on Count \_\_\_\_\_ months on Count \_\_\_\_\_

Actual number of months of total confinement ordered is: 640
(Add mandatory firearm and deadly weapons enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and the following which shall be served consecutively:

The sentence herein shall run consecutively with the sentence in cause number(s) \_\_\_\_\_

but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.400

Confinement shall commence immediately unless otherwise set forth here: \_\_\_\_\_

- (b) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.120. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: \_\_\_\_\_

4.7 COMMUNITY PLACEMENT AND COMMUNITY CUSTODY. RCW 9.94A.120. Community placement is ordered for a community placement eligible offense (e.g., sex offense, serious violent offense, second degree assault, any crime against a person with a deadly weapon finding, Chapter 69.50 or 69.52 RCW offense), or community custody is ordered to follow work ethic camp if it is imposed, and standard mandatory conditions are ordered. Community placement is ordered for the period of time provided by law. While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at Department of Corrections-approved education, employment and/or community service; (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by the Department of Corrections. The residence location and living arrangements are subject to the prior approval of the Department of Corrections while in community placement or community custody.

[X] The defendant shall not consume any alcohol.

[X] Defendant shall have no contact with: Victims family, Mickey West Keith Murphy.

[ ] Defendant shall remain [ ] within [ ] outside of a specified geographical boundary, to wit: at direction of CO

[X] The defendant shall participate in the following crime related treatment or counseling services: \_\_\_\_\_

Substance abuse and alcohol follow up

[X] The defendant shall comply with the following crime-related prohibitions: \_\_\_\_\_

shall not consume BARS, tobacco, alcohol, or other substances

Other conditions: \_\_\_\_\_

Sanit + FO DA, BA

shall not unlawfully possess any weapon or firearm or explosives or ammunition

( [ ] See additional page for other conditions of sentence)

4.8 [ ] **WORK ETHIC CAMP**. RCW 9.94A.137, RCW 72.09.410. The court finds that defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. If the defendant successfully completes work ethic camp, the department shall convert the period of work ethic camp confinement at the rate of one day of work ethic camp to three days of total standard confinement. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.7.

4.9 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: \_\_\_\_\_

---

( [ ] See additional page for other conditions of sentence)

V. NOTICES AND SIGNATURES

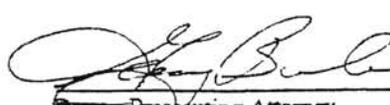
- 5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this judgment and sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090
- 5.2 **LENGTH OF SUPERVISION.** The defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to ten years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations. RCW 9.94A.145
- 5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.200010. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.200030
- 5.4 **RESTITUTION HEARING.**  
 Defendant waives any right to be present at any restitution hearing (sign initials): \_\_\_\_\_
- 5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. RCW 9.94A.200

Cross off if not applicable:

- 5.6 **FIREARMS.** You may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification, to the Department of Licensing along with the date of conviction or commitment). RCW 9.41.040, 9.41.047
- 5.7 **SEX OFFENDER REGISTRATION.** RCW 9A.44.130, 10.01.200. Because this crime involves a sex offense, you are required to register with the sheriff of the county of the state of Washington where you reside. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.  
 If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within 30 days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections.  
 If you change your residence within a county, you must send written notice of your change of residence to the sheriff within 10 days of moving. If you change your residence to a new county within this state, you must register with the sheriff of the new county and you must give written notice of your change of address to the sheriff of the county where last registered, both within 10 days of moving. If you move out of Washington state, you must also send written notice within 10 days of moving to the county sheriff with whom you last registered in Washington state.

5.8 **OTHER:** \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

DONE in Open Court and in the presence of the defendant this date: 3-20-96





\_\_\_\_\_  
 Prosecuting Attorney      Attorney for Defendant      JUDGE Print name: **JAMES B. SAWYER**  
 WSBA # 14632      WSBA # 6413      X MANVIR SINGH KANCH  
 Print name: Gary Burkson      Print name: SA Davide      Defendant

Translator signature/Print name: \_\_\_\_\_  
 I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the \_\_\_\_\_ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

CAUSE NUMBER of this case: 95-1-00051-7

I, PAT SWARTO, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action, now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: \_\_\_\_\_

Clerk of said County and State, by: \_\_\_\_\_, Deputy Clerk

**IDENTIFICATION OF DEFENDANT**

SID No. \_\_\_\_\_ Date of Birth \_\_\_\_\_  
(If no SID take fingerprint card for State Patrol)

FBI No. \_\_\_\_\_ Local ID No. \_\_\_\_\_

PCN No. \_\_\_\_\_ Other \_\_\_\_\_

Alias name, SSN, DOB: \_\_\_\_\_

Race:  Asian/Pacific Islander  Black/African-American  Caucasian  Hispanic  Male  
 Native American  Other: \_\_\_\_\_  Non-Hispanic  Female

**FINGERPRINTS** I attest that I saw the same defendant who appeared in Court on this document affix his or her fingerprints and signature thereto. Clerk of the Court: \_\_\_\_\_, Deputy Clerk. Dated: \_\_\_\_\_

DEFENDANT'S SIGNATURE: MARVIN SIDES VAICTOIA  
Left four fingers taken simultaneously | Left Thumb | Right Thumb | Right four fingers taken simultaneously



**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF MASON**

STATE OF WASHINGTON, )  
)  
)  
Plaintiff, )  
)  
VS. )  
)  
)  
MARVIN FAIRCLOTH )  
Defendant. )

NO. 95-1-00051-7

WARRANT OF COMMITMENT RECEIVED & FILED  
(WC)

MAR 27 1996

PAT SWARTZ, Clerk of the  
Superior Court, Mason Co. Wash

THE STATE OF WASHINGTON  
TO: The Sheriff of Mason County.

The defendant: KEITH MURPHY has been convicted in the Superior Court of the State of Washington of the crime(s) of:  
COUNT I: MURDER IN THE FIRST DEGREE

and the Court has ordered that the defendant be punished by serving the determined sentence of:

640 (Days) (Months) ~~JAIL~~/PRISON on Count No. I  
\_\_\_\_\_ (Days) (Months) JAIL/PRISON on Count No. \_\_\_\_\_  
\_\_\_\_\_ (Days) (Months) JAIL/PRISON on Count No. \_\_\_\_\_

PARTIAL CONFINEMENT. Defendant may serve the sentence, if eligible and approved, in partial confinement in the following programs, subject to the following conditions:

work crew             home detention  
 work release         day reporting

\_\_\_\_\_ (Days) (Months) of partial confinement in the County JAIL  
 \_\_\_\_\_ (Days) (Months) of total confinement in the county JAIL  
 \_\_\_\_\_ Days confinement converted to \_\_\_\_\_ hours community service

DEFENDANT shall receive credit for time served prior to this date:  
 To be calculated by the staff of the Mason County Jail  
 In the amount of \_\_\_\_\_ Days.

YOU, THE SHERIFF, ARE COMMANDED, to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence.

Warrant of Commitment

[ / ] YOU, THE SHERIFF, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence.

[ ] The DEFENDANT is committed for up to (30) days evaluation at the Western State Hospital or Eastern State Hospital to determine amenability to sexual offender treatment.

YOU, THE SHERIFF, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections pending delivery to the proper officers of the Secretary of the Department of the Department of Social and Health Services.

YOU, THE PROPER OFFICERS OF THE SECRETARY OF THE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, ARE COMMANDED to receive the defendant for evaluation as ordered in the Judgment and Sentence.

Dated this 27 Day of March, 1996.

By Direction of the HONORABLE

JAMES B. SAWYER II

Judge

PAT SWARTOS

Mason County Clerk

By Shirley Milam  
Deputy Clerk

cc: Prosecuting Attorney  
Defendant's Lawyer  
Defendant  
Jail  
Institutions (3)

MAR 27 1996

SUPERIOR COURT OF WASHINGTON  
COUNTY OF

PAT SWARTOS, Clerk of the  
Superior Court, Mason Co. Wash

STATE OF WASHINGTON, Plaintiff,

No.

vs.  
Marvin Faveloth  
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR  
AN EXCEPTIONAL SENTENCE

APPENDIX 2.4 JUDGMENT AND SENTENCE

An exceptional sentence [ ] above [ ] within [ ] below the standard range should be imposed based upon the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

Due to the Beating, Teasing and Torment of Frank Faveloth that occurred for a period of over 20 minutes, the court finds facts sufficient to warrant a finding of deliberate cruelty as an aggravating factor in imposing an exceptional sentence above the standard range -

II. CONCLUSIONS OF LAW

Deliberate cruelty was used by the defendant on the victim in committing the crime warranting a doubling of the standard range sentence.

Dated: 3-27-96

[Signature]  
Prosecuting Attorney  
WSBA # 4632  
Print name: Oggy Burleson

[Signature]  
Attorney for Defendant  
WSBA # 6413  
Print name: IA Pevide

[Signature]  
JUDGE Print name:  
**JAMES B. SAWYER**  
Marvin Faveloth  
Defendant

## Appendix B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

98 FEB 25 P3:12

FILED  
COURT OF APPEALS  
98 FEB 24 AM 10:04  
STATE OF WASHINGTON  
BY KENNETH

*Handwritten initials*

STATE OF WASHINGTON,

Respondent,

v.

MARVIN FAIRCLOTH,

Appellant.

No. 20549-1-II

95-1-51-7

consolidated with

STATE OF WASHINGTON,

Respondent,

v.

KEITH MURPHY,

Appellant.

No. 20644-7-II

95-1-52-5

RULING AFFIRMING  
JUDGMENT AND SENTENCE

Marvin Faircloth and Keith Murphy appeal their Mason County Superior Court convictions of murder in the first degree, RCW 9A.32.030, and their sentences in excess of the Sentencing Reform Act standard range imposed following the convictions. Faircloth and Murphy contend that State failed to provide sufficient evidence of premeditation and that the trial court erred in imposing an exceptional sentence based on deliberate cruelty.<sup>1</sup> After a brief review, this matter was set for determination as a motion on the merits. RAP 18.14.

<sup>1</sup>The SRA standard range sentence is 250-330 months. The trial court imposed 640 months for each defendant.

## FACTS

Keith Murphy and Marvin Faircloth resided in the home of Frank Faircloth, the murder victim.<sup>2</sup> At approximately midnight on February 26, 1995, the victim went upstairs in his home and visited the bedroom shared by Murphy and Faircloth. The victim witnessed both Murphy and Faircloth smoking cigarettes and "huffing"<sup>3</sup> paint. He told them that they would have to move out the next day. Shortly after the victim left their room, Murphy and West decided to kill him. Murphy grabbed a Jack Daniels bottle and Faircloth grabbed a spear-type object and the two headed downstairs to the victim's bedroom.<sup>4</sup>

Over a 25-minute period of time, the victim fought for his life by running from room to room while Murphy and Faircloth disconnected the telephone and attacked him with knives, the whiskey bottle, a hammer, a long pole with a spike on the end and a

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<sup>2</sup>Frank Faircloth had adopted Marvin Faircloth. For clarity, this court will refer to Frank Faircloth as the victim.

<sup>3</sup>The process of "huffing" was described at length at trial but basically involves spraying aerosol paint into a plastic baggy and inhaling it quickly.

<sup>4</sup>According to the statement of Faircloth, the events transpired as follows:

A: He was laying in bed, then Keith walked in, looked at him, said "what the fuck," bam, right over the head with the bottle, Frank gets up, runs, tries to run from, from the room, I waited until he got in the living room, stabbed him with my spear, he falls to the ground and . . .

Q: Where [did] you stab him?

. . . .

A: I don't know, I think in the back. Then . . . ran upstairs real quick and came back downstairs he was trying to make a break for the door so I grabbed him and pulled him back in, a couple of knives came into the subject so he got stabbed a few times.

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table leg. Murphy and Faircloth made the victim tell them that he loved them. They called the victim a liar.

During the attack, the victim repeatedly called out to Bryce West, a 16-year-old resident, to call police. West, who was upstairs in his bedroom because Faircloth had threatened to kill him too if he came out, did not immediately call the police. After the victim finally died, Faircloth returned to West's bedroom, made him come downstairs and help clean up, and then Faircloth and Murphy took the victim's body into the woods where they smashed out his teeth (to conceal his identity) and burned him. After the two left the house with the body, West left and contacted the police.

A jury convicted both Murphy and Faircloth of first degree murder. The trial court imposed exceptional sentences, citing deliberate cruelty via the "twenty minute torture death that these two individuals inflicted on Frank Faircloth" as the sole basis for imposing exceptional sentences. This consolidated appeal follows.

#### **PREMEDITATION**

Murphy and Faircloth contend that the State failed to prove the element of premeditation. This court review challenges to the sufficiency of the State's evidence on well-settled standards.

Evidence is sufficient to support a conviction if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *City of Seattle v. Slack*, 113 Wn.2d 850, 859 (1989); *State v. Green*, 94 Wn.2d 216 (1980). "A claim of

insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Sanchez*, 60 Wn. App. 687, 693 (1991) (quoting *State v. Porter*, 58 Wn. App. 57, 60 (1990)). The court must give deference to the trier of fact who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 416, *review denied*, 119 Wn.2d 1011 (1992). Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71 (1990). Circumstantial evidence is accorded equal weight with direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638 (1980).

The State has the burden of proving all the elements of a crime beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 494 (1983). In order to convict both Murphy and Faircloth of murder in the first degree, RCW 9A.32.030, the State had to prove beyond a reasonable doubt that Murphy and Faircloth caused the death of the victim with premeditated intent.

Premeditation has been defined as "the deliberate formation of and reflection upon the intent to take a human life." It involves the "mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." *State v. Ollens*, 107 Wn.2d 848, 850 (1987) (citing *State v. Robtoy*, 98 Wn.2d 30, 43 (1982); *State v. Brooks*, 97 Wn.2d 873, 876 (1982), *review denied*, 103 Wn.2d 1005 (1984)). Premeditation is a separate element of first degree murder, and is not synonymous with intent. *Brooks*, 97 Wn.2d at 876. The State bears the burden of

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proving beyond a reasonable doubt that the defendant premeditated the offense. *State v. Lane*, 112 Wn.2d 464, 472 (1989). It is not enough to show that premeditation was possible; there must be actual evidence that premeditation took place. *State v. Bingham*, 105 Wn.2d 820, 826 (1986).

Premeditation may be based on circumstantial evidence provided the evidence is substantial and the inferences drawn by the jury are reasonable. *State v. Pirtle*, 127 Wn.2d 628, 644 (1995). Evidence of sustained violence and defensive or multiple wounds on the victim may also indicate the presence of premeditation. *State v. Millante*, 80 Wn. App. 237, 248 (1995).

Murphy and Faircloth argue that their killing of the victim was not premeditated but a spur of the moment decision made by them together in their bedroom with diminished capacity because they had just finished huffing paint. They contend that there was no discussion or planning, they just did it. In response to the testimony of various witnesses that both, but primarily Faircloth, had discussed killing the victim in the months leading up to the murder, they contend that their conversations were "just statements"; they were not seriously contemplating murder.

Murphy and Faircloth's arguments regarding lack of premeditation are not persuasive. Not only did the State present substantial evidence that both had discussed killing the victim prior to the actual murder, but the fact that they made the decision to kill him while upstairs in their room, then grabbed weapons and proceeded downstairs to carry out their plan indicates premeditation, however short. *State v.*

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*Millante*, 80 Wn. App. at 248; *State v. Hoffman*, 116 Wn.2d 51, 82-83 (1991). Premeditation on the part of Faircloth is further evidenced by the fact that he left the attack, went upstairs to West's room to threaten him and have a cigarette, and then returned to finish the killing.

Murphy and Faircloth argue that they were unable to premeditate the killing because of the paint huffing, which they contend drove them to this impulsive act and rendered them incapable of planning the killing. However, in light of the testimony provided by Dr. Muscatel (who evaluated only Murphy) and Dr. Trowbridge (who evaluated both Murphy and Faircloth), this argument also fails.

While Dr. Muscatel explained in detail how the use of inhalants such as spray paint can rob one of one's impulse control, Muscatel conceded that Murphy's behavior was intentional, and that he did not discuss deliberation with him. Furthermore, while Muscatel contends that huffing could affect premeditation, he conceded that he did not know whether Murphy had the capacity to premeditate the killing.

Dr. Trowbridge, on the other hand, evaluated both Murphy and Faircloth and his opinion was that the behavior of both was planful, goal directed, and organized and was not random, incoherent, irrational or unsensible. It was his opinion that this was not an impulsive act on the part of Murphy or Faircloth and, while huffing paint can affect one's judgment, the effects of huffing are very short-acting. This combined with evidence of intentional behavior like unplugging the victim's phone and changing weapons, combined with the fact that both appellants have very accurate memories of what

transpired (unlike excessively drinking alcohol when people tend to black out), led Trowbridge to his opinion that this was "planful" behavior.

The State presented evidence that Murphy and Faircloth had a motive for killing the victim, procured weapons, and perpetrated a sustained and violent attack lasting over a period of time. *See Millante*, 80 Wn. App. at 248. They discussed killing the victim prior to the time of the crime and repeated their intention on the night of the crime. They unplugged the telephone and threatened to kill West. Viewing the evidence in the light most favorable to the State, there is sufficient evidence to establish premeditation on the part of both defendants.

#### **EXCEPTIONAL SENTENCES**

Murphy and Faircloth contend that the trial court erred in imposing exceptional sentences based upon deliberate cruelty. Both concede that deliberate cruelty is a factor that, as a matter of law, can justify an exceptional sentence. They argue that the facts of this case do not amount to deliberate cruelty. They are wrong.

Deliberate cruelty consists of gratuitous violence, or other conduct which inflicts physical, psychological or emotional pain as an end to itself, and which has not been considered in computing the presumptive range for the offense. *State v. Smith*, 82 Wn. App. 153, 163 (1996); *State v. Strauss*, 54 Wn. App. 408 (1989). These include cruel acts "of a kind not usually associated with the commission of the offense in question," *State v. Copeland*, 130 Wn.2d 244, 296 (1996), which exhibit callous disregard for the victim. *State v. Cannon*, 130 Wn.2d 313, 333 (1996).

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Here, the trial court cited the 20-minute torturous death of the victim as warranting the exceptional sentence imposed. The record fully supports this reason. Murphy and Faircloth brutalized the victim for over twenty minutes while he screamed for help and tried to escape. They repeatedly stabbed and beat him with a variety of weapons. The assaults leading to the murder took place in nearly every room in the house. They unplugged his phone so that he could not call for help. As they savaged the victim, Murphy and Faircloth forced the victim to tell them that he loved them. The record supports a finding of deliberate cruelty.<sup>5</sup> Accordingly, it is hereby

**ORDERED** that the judgments and sentences are affirmed.

**DATED** this 24<sup>th</sup> day of February, 1998.

  
\_\_\_\_\_  
Commissioner

cc: Eric Valley  
Thomas E. Doyle  
Robert M. Quillian  
Hon. James B. Sawyer  
Mason County Superior Court  
Cause No. 95-1-00051-7  
No. 95-1-00052-5

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<sup>5</sup>Neither Murphy nor Faircloth challenge the duration of 640 months imposed by the trial court.

## Appendix C

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# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RECEIVED  
IN COUNTY CLERK'S OFFICE

## DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MARVIN FAIRCLOTH &  
KEITH MURPHY,

Appellant.

No. 20549-1-II

consolidated with

No. 20644-7-II

MANDATE

Mason County Cause No.  
✓ 95-1-00051-7, 95-1-00052-5

98 AUG -4 AM 11:35

MASON COUNTY CLERK  
TAL SWARTZ COUNTY CLERK

BY \_\_\_\_\_ DEPUTY

The State of Washington to: The Superior Court of the State of Washington  
in and for Mason County

This is to certify that the Court of Appeals of the State of Washington, Division II, entered a Ruling Affirming Judgment and Sentence in the above entitled case on February 24, 1998. This ruling became the final decision terminating review of this court on June 9, 1998. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the determination of that court.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma, this 3rd day of August, 1998.

*David S. Doyle*  
Clerk of the Court of Appeals,  
State of Washington, Div. II

Indeterminate Sentence Review Board

Gary Bureson  
Mason Co Prosc Atty Ofc  
PO Box 639  
Shelton, WA. 98584

Thomas Edward Doyle  
Attorney At Law  
2633a Parkmont Lane SW  
Olympia, WA. 98502

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James Byron Sawyer  
Mason Co Superior Ct Judge  
P.O.Box X  
Shelton, WA. 98584

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## Appendix D

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FILED  
COURT OF APPEALS  
DIVISION II  
05 NOV 30 AM 11:07  
STATE OF WASHINGTON  
BY DEPUTY CLERK

(2)

No. 33901-3-II

ORDER DISMISSING PETITION

95-1-51-7

In re the  
Personal Restraint Petition of  
  
MARVIN FAIRCLOTH,  
  
Petitioner.

Marvin Faircloth seeks relief from personal restraint imposed following his 1996 conviction of first degree murder. Faircloth contends that he received ineffective assistance of counsel and that his exceptional sentence is unlawful under *Blakely v. Washington*, 542 U.S. 296 (2004).

Personal restraint petitions challenging a judgment and sentence generally must be filed within one year after the conviction becomes final. RCW 10.73.090(1). Faircloth's conviction became final when this court filed its mandate disposing of his direct appeal on August 3, 1998. No. 20549-1-II; see RCW 10.73.090(3)(b).

Because Faircloth's issues do not trigger an exception to the one-year statute of limitations, his petition must be dismissed as untimely. See RCW 10.73.100; see also *State v. Evans*, 154 Wn.2d 438, 448 (*Blakely* does not apply to convictions that were final before it was filed in 2004), cert. denied, 74 U.S.L.W. 3273 (2005).

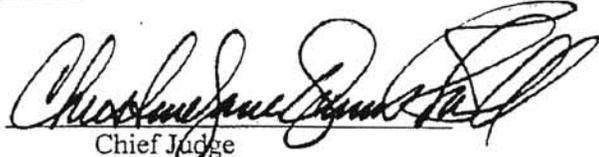
Accordingly, it is hereby

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33901-3-II/2

ORDERED that this petition is dismissed under RAP 16.11(b).

DATED this 30 day of November, 2005.

  
Chief Judge

cc: Marvin Faircloth  
Mason County Clerk  
County Cause No. 95-1-00052-5  
Therese M. Wheaton  
Gary P. Burleson

## Appendix E

RECEIVED JAN 22 1996

~~RECEIVED JAN 19 1996~~



STATE OF WASHINGTON

DEPARTMENT OF SOCIAL AND HEALTH SERVICES

PO Box 45714 • Olympia WA 98504-5714 • (206) 438-8415 • (SCAN) 585-8415 • (FAX) (206) 407-2125

January 18, 1996

RECEIVED  
FEB 16 2011  
MASON COUNTY  
PROSECUTOR

Sam Davidson  
PO Box 68  
Shelton, Wa. 98584

Dear Mr. Davidson:

You had subpoenaed certain records and reports relating to the Faircloth trial from the Department of Social and Health Services (DSHS). We have provided you with a number of documents you requested. At that time, we informed you that there may be other documents referring to Mr. Faircloth, and that we would share them with you. After review, we have determined that the enclosed Fatality Review is also disclosable. Delay occurred due to the need to determine the status of the document and do the redaction process.

The document was created at the request of DSHS by a panel of child welfare experts from outside the department. Their purpose was to identify areas of concern, as illustrated by the death of Mr. Faircloth, for further action by the department. Fatality Reviews are routinely conducted when a child death occurs. We felt that such a review was also warranted in this case. The preliminary findings are being examined by the department, and appropriate follow-up action is being taken. Redacted portions relate to minors in care and persons who are not employees of the Department of Social and Health Services.

As noted above, the findings of the report are preliminary to the department's review and taking of appropriate action. One such action has been the investigation of one of the allegations made in the report. With the concurrence of the affected employee, we have enclosed the findings of that investigation to assure the record is clear. We have redacted the social worker's name as the allegation was not substantiated and the names of minors.

We believe that we have provided all the documentation in our possession related to your request. If you have any questions regarding the material sent you, please let me know.

Sincerely,

Laurel Evans, Regional Administrator  
Division of Children and Family Services  
Department of Social and Health Services

cc: Rosalyn Oreskovich  
Lee Ann Miller

✓ Gary Burleson



## INTRODUCTION

The purpose of this report is to outline the findings of the Faircloth Review Committee and to lay out recommendations secondary to these findings. Initially, individual committee members were unsure of the scope of their review. However, after meeting for approximately 16 hours as a group, the scope of the review became clearer and the committee focused on the following areas: policies, procedures and practices of the Division of Children and Family Services (DCFS) in regard to this particular foster/adopt home and recommendations to aid in averting similar tragedies from occurring.

The Committee was clear at the outset, that the task of the group would be to focus on issues within the foster/adopt home that may have contributed to the death of a foster parent by two young men who were placed in the home by DCFS social workers. The report separates the issues into four categories (Licensing Issues, System Issues, Communication Issues and Social Work Practice Issues) - Overlap was found in all four areas. Approximately 40 hours of committee and staff time was spent reviewing case material and interviewing staff before the report could be written. Initially the review committee met in Region 6's, regional office. After the initial meeting, the committee refocused its work and reduced the number of DCFS staff participants to a minimum. The committee then held it's subsequent meetings in the Shelton DCFS office. In addition, several members of the committee spent two hours with Laurel Evans, Region 6, Administrator, going over the issues and recommendations of the Committee.

## COMMITTEE METHODOLOGY

The Committee was formed at the request of DCFS Headquarters staff and the Regional Administrator. The committee members were: Jill Cole, PhD., health and safety advocate, Director of Social Work, Children's Hospital and Medical Center; Catherine Middlebrook, DCFS Foster Home Licensing Supervisor, Region 5; Jody Wells; Foster Parent, Johnny Johnson, Shelton Chief of Police; Cathy Wilson, former Juvenile Court Administrator, Mason County; John Benner, Region 6 JRA, Assistant Regional Administrator; Darlene Flowers, MSW, Executive Director, Foster Parents Association of Washington State; Larry Pederson, MSW, Region 5, Area Manager and acting Regional Administrator at the time the review as commissioned; Maureen Martin, MA, Region 6, CPS Coordinator.

## INFORMATION REVIEWED:

The Committee reviewed the following: the case summary provided by Edith Hitchings, former CPS Supervisor, Shelton; the Frank Faircloth foster home licensing file; [REDACTED] selected files of children placed in the Faircloth foster family home in the six months preceding the foster parents death; and police reports.

The Committee interviewed: Edith Hitchings, former CPS Supervisor DCFS, Shelton; Pete Scott, Social Worker, Shelton DCFS; Kyle Smith, Social Worker, Shelton DCFS; Ray Marriott, Social Worker, Shelton DCFS; and Lu. Nichols, Licensor, Shelton DCFS.



The findings and recommendations of the Committee were reached by consensus.

## Findings Discussion

### FOSTER HOME LICENSING ISSUES:

1. Faircloth home was never re-examined when Mr. Frank Faircloth moved to Mason County from Clallam County where he was previously licensed. When Mr. Faircloth was originally licensed, per the request of the Quileute tribe in Clallam County in the late 1970's early 1980's, it was done by phone. When Mr. Faircloth moved to Mason County, only his home was re-examined. A formal social assessment was never completed on Frank.
2. Marvin, [REDACTED] was 18 years old. He was never really considered an "adult" by staff, even though legally, and for licensing purposes, he was an adult. Marvin had some very serious problems; i.e. [REDACTED] Had he been treated as an adult in this home and not another foster child, DCFS may have stopped placing children in the Faircloth foster home or even prevented a re-licensing from occurring, while he was in the home. (WAC 388-73-030 addresses the general qualifications of the licensee, adoptive applicants and persons on the premises.) This had serious ramifications for the other youngsters in this home.
3. Mr. Faircloth had off and on, a number of teens and young adults, usually former foster children, "unofficially" staying in his home for brief periods of time. WAC 388-73-304 talks about capacity in licensed homes and WAC 388-73-038 addresses the kinds of conditions which must be taken into account when determining how many children a home may be licensed for.
4. Some of the Shelton DCFS staff were aware that the foster parent had more children in his home than he was licensed for. However, it was unclear whether or not the licensor was aware that Frank took in children which were not placed by DCFS staff or private child placing agency staff.
5. Foster parents are sometimes put into conflicting roles. For example, we expected Mr. Faircloth to be a policeman, case manager, parent and social worker. In addition, Frank was a DSHS employee. Being a DSHS employee and foster parent complicated already complicated roles.

6. Mr. Faircloth did not attend foster parent scope which is mandatory advanced training, per DCFS Chapter 32.64, A., for those foster parents receiving exceptional cost care money. Yet he was utilized as a trainer and cared for youth who were difficult to parent and did receive exceptional cost monies.
7. Mr. Faircloth did not know the children coming into his home well enough to be able to make good decisions about whether or not it would be a good match with the children and adults he already had living in his home. Mr. Faircloth was not given enough information about children coming into his home. The lack of placement resources/choices results in placements being made that are not in the best interests of the children or foster parents; sometimes expediency is the driving force.
8. Mr. Faircloth was admitted to a psychiatric unit for treatment. No information is available in the file about this event. It appears that the supervisor (not the assigned worker) had a discussion with Frank about this. Neither licensing staff nor CWS staff asked for a release of information, so, no information was obtained from a physician. No documented assessment was made of the situation in order to formally determine the licensing or placement status during or subsequent to this time. Therefore, no attention was given to any issues regarding Mr. Faircloth's hospitalization and the possible impact on the children in his care.
9. There is often confusion surrounding what is a CPS referral and what is a licensing issue in a licensed facility. This lack of clarity usually means that the issue is not dealt with. For example, physical threats against Mr. Faircloth and one of the foster children in his home by Marvin were not seen as either a licensing or CPS issue, but as a CWS issue that the social worker attempted to resolve on his own.

#### SYSTEM ISSUES:

1. There was typically a lack of support for Mr. Faircloth as a foster parent. Issues were seen as issues of children only. This foster family home was not viewed as a "family unit". Staff need to remember there is a parent who is in need of support and protection as well. In this home, this lack of support and protection of the foster parent meant that problems in the home were minimized and issues were not looked at seriously. It also meant that this home was overtaxed and not monitored.

2. [REDACTED] was the foster home study. It appeared that [REDACTED] inadequate foster home studies. The studies of Mr. Faircloth's home assessed whether the house was acceptable, not whether the social plan for the child and the family dynamics were suitable. A good home study will address the strengths and weakness of a home and what the agency will do to aid their development in the weak areas.
3. There was inadequate counseling for the foster family. Counseling did not look at strengths and weaknesses of the foster family home and therefore did not address the impact of all the children coming and going. Counseling did not consider the family as a unit other than a few FRS sessions in 1994 and those sessions focused solely on house rules.
4. The placement referral process was not working. A "stop placement" had been initiated by the supervisor, yet workers placed children back in the home after several months. There is no indication or documentation that the staff and supervisor had a discussion or staffing around this issue. The stop placement was not formally lifted.
5. There appears to be significant confusion both in and outside of the Shelton DCFS office about reporting to Child Protective Services. Community people who are working with families believe that when they are calling the Child Welfare Services worker about an allegation of Child Abuse and Neglect, that they are making a Child Protective Service referral, when indeed that is not the case. In the Shelton office, they are told to call Child Protective Services intake directly, instead of having the Child Welfare Worker forward their call to intake or take a message and have intake call the referent.
6. There appears to be a lack of reporting to law enforcement by DCFS. An example of under reporting involved an incident with a knife and Marvin, [REDACTED] going into the 15 year old foster child's room, several weeks prior to the foster parents death. Marvin went into the bedroom of the 15 year old, threatened him with a knife and told the 15 year old, that he, Marvin, had a plan to kill Mr. Faircloth. Law enforcement was not notified and they should have been.
7. The Child Welfare Service worker did not report the 15 year old's allegation, to the 15 year old's therapist, that Marvin had threatened to kill him and had a plan to kill Mr. Faircloth.

8. The Child Welfare Services worker did not notify Child Protective Services that he had received information from the therapist about the death threat against the 15 year old foster child and Mr. Faircloth. It was unclear what the social worker did with this information.
9. There appears to be unclear communication between law enforcement and DCFS. Law enforcement had been to the Faircloth home on several occasions when the reporting issue to law enforcement was Domestic Violence. Law enforcement did not report this to DCFS. It was unclear if law enforcement knew that Mr. Faircloth was a foster parent. However, given that Shelton is a small community and the fact that some of the subjects had different last names, it is hard to believe that law enforcement did not know that Frank was a licensed foster parent. At a minimum, the question could be asked. The implications of violence in a foster home is critical in licensing, foster care and therapy.
  - a. Once reports are made there is inadequate communication, not just between agencies but also between DCFS units. Documentation and charting in the case file has been substantially delayed once reports are made. For example, the review committee found narrative and FRS documents that had been placed in the files months after this review process had started. The review committee was not told that additional material was being added to the files.
  - b. Investigations are questionable once reports are made. The knife incident is an example. Once something is investigated, again, there is poor documentation. The knife incident which happened January 1995, did not get into CAMIS until May 1995, months after the death of the foster parent. The social worker had hand written notes on the incident, however, they were not available to the review committee. The worker stated that he had given his hand written notes to clerical to input into CAMIS, therefore they were absent from the file. No one told the review committee that additional information was added to the file. In this case, staff attempted to second guess what was going on in the home, instead of letting law enforcement handle the situation.
10. DSHS staff who are licensed foster parents through DCFS present common problems in the following areas:
  - a. boundary issues
  - b. complicated placement issues
  - c. complicated treatment issues
  - d. communication issues
  - e. confidentiality issues

It is believed that in this case, the foster parent may have been reluctant to talk openly about his psychiatric hospitalization, his feelings of being overwhelmed, about his need to take time off, and about his feelings of inadequacy about controlling [REDACTED]. Being employed and located in the same office where he was licensed probably played a part in his not asking for help. It also contributed to inaccurate assumptions made by staff absent communication with Mr. Faircloth.

#### COMMUNICATION ISSUES:

1. Secrecy was prevalent during our review. Staff and the supervisor were reluctant to share information. Staff appeared to want to protect each other and themselves from unwanted scrutiny, in the review, in the office and in practice. This style appeared to be mirrored by Mr. Faircloth who did not share his concerns with DCFS staff about what was going on in his home. Some co-workers may have known his problems but no one shared information.
2. The culture in the office is one of a family that keeps secrets. This prevents other staff from having all information necessary to do their jobs. Instead of encouraging people to share information, the system in place does not take in new information. It appears that in this office, relationships bind loyalty. Even the therapist would not share information.
3. Important information is not shared equally with all staff. For example, the licensor was not privy to major issues involving the foster parent and the foster children in this home. In this case, the licensor was not usually consulted prior to workers making placements in foster homes. Most offices have a policy that states that all placements in foster homes need to be approved by the licensor or foster home placement team. It would appear that the licensor in this office was purposely kept out of the loop of information sharing. (It was unknown if the supervisor approved foster home placements and didn't share that information with the licensor). There is also a lack of communication between the supervisor and the licensor. For example, the supervisor spoke with Frank about his hospitalization, however, this discussion was not shared with the licensor.
4. There was poor communication between programs. For example, [REDACTED] (the 2nd foster child) [REDACTED] prior to placement with Frank Faircloth.

## SOCIAL WORK PRACTICE ISSUES:

1. Permanency planning was absent or very slow, in all the cases reviewed. The children involved were not moved through the system quickly. Permanent plans continually changed, even when it was apparent that the parents had made no changes. As a result of the lack of permanency, these children involved in Frank's death languished in foster care for years without a permanent home. The lack of an early permanent plan meant many of these children, in the Faircloth home, were labeled "hard to adopt" and did not achieve permanency until adolescence, if at all. The children reviewed for this report had been known to the system from 1 to 18 years!
2. Mental health treatment did not focus on the issues, only on the symptoms. It appears that episodic foster care was coupled with episodic treatment. For example, therapists were quick to terminate therapy with most of the children we reviewed because the foster children were hesitant to attend sessions. It appeared that the therapists and social workers involved with children in the Faircloth home, did not understand the underlying issues involved with children who are victims of child abuse and neglect. It also appeared that therapists did not understand adolescent issues. Treatment was episodic and individual versus family approach. For example, FRS dealt with "house rules" instead of looking at the family as a whole and what was going on in the family system. The FRS therapist did not address or pick up on the fact that [REDACTED] between Mr. Faircloth and Marvin [REDACTED] in several days, yet Mr. Faircloth stated he was thinking about [REDACTED]. Staff seemed to have a lack of understanding of family dynamics. For example, after Mr. Faircloth was hospitalized for emotional problems, no one picked up on the potential abandonment issues of the foster children in the home. The feeling of abandonment may have precipitated the fear that was acted out by several of the young men in Mr. Faircloth's home. This fear may have led to the increased instability in the home for the months leading up to Mr. Faircloth's death.
3. It appears that no therapist looked at the family as a whole to assess the family's strengths and weaknesses and form intervention around family issues. For example, there is no evidence that Marvin, [REDACTED] [REDACTED] was consulted about any new foster placements before they were made. There seemed to be a large number of therapists who did brief therapy with the teens involved. However, the therapists appeared not to know how to work with teens and gave up on them very quickly.

4. From interviewing staff and reviewing the files, it appears that there was no team approach in dealing with this home. Each foster child appears to have been treated in isolation and not as part of a larger family unit. The staff looked at bits and pieces of things that were going on in this home, but because each incident was such a small piece, no change had to be made. No one person had the full picture of what was occurring in the Faircloth foster family home.

RECOMMENDATIONS (for licensing system issues, practice issues, communication issues.)

We recognize that some recommendations may take additional resources. However, some recommendations can be implemented now, without additional resources. Our recommendations are as follows:

1. DCFS needs to revisit its policy on guardianships: they are too easy to vacate by both parents and children and may not receive adequate agency support in time of crisis. Two children in the foster home had been under a guardianship and [REDACTED]. No one seemed to know who was "responsible" for the child in the guardianship. For example, [REDACTED] was in a guardianship with Mr. Faircloth, yet when he had criminal behavior, DCFS was informed as well as Mr. Faircloth. This created a problem because the DCFS social worker was not current and up to date on the issues surrounding the child who was in the guardianship. It also meant that there was some confusion around who was "in charge" and who made decisions regarding the child in those type of situations. JRA staff dialogued periodically with the social worker for [REDACTED] even though technically, there was no longer a social worker assigned to [REDACTED]. Guardianships are seldom staffed in offices. If guardianships are to be "banked", (no ongoing services offered to the foster family), then those families need to have immediate response from DCFS when there are problems. From a clients (child and parents) perspective, it is in their best interest to have regular reviews, monitoring and services. Parts of this recommendation would require additional resources.

When a guardianship is being considered, an office staffing needs to occur that includes the licensor, supervisor, assigned social worker, and other children who are in the home.

2. Foster parents need a crisis plan for each child. This could be done without additional resources.

3. Active foster homes should be reviewed monthly, when there is not a crisis in the home. This could be done with some additional resources.
4. Ongoing support and assessment for active foster parents from a team. Members of this "team" would include, the licensor, social worker and professionals involved with the foster child/family. This would mean re-examining a foster home once a child turns 18, a child is adopted or a guardianship is established. This would be in addition to having someone review the foster home monthly. The "intensive" support/assessment could be done quarterly. This could be completed with additional resources.
5. Foster homes need to have complete home study assessments when they enter the system and when they transfer from one office to another. No home should be used without an adequate home study. The agency can not support a home if the strengths and weaknesses are unknown. A complete assessment would include an in depth autobiography and an in depth interview by the licensor of all issues addressed in the autobiography. In addition, discipline and parenting practices need to be discussed. All interviews need to be documented in the file.
6. DCFS should report to law enforcement all incidents in foster homes and licensed facilities, that could constitute a crime. (Not just those incidents involving weapons or threats to kill.) For example, several weeks prior to the foster parent's death, Marvin the 18 year old, went into the 15 year old foster child's room and threatened him with a knife and told of a plan he had to kill the foster parent. The incident was minimized and neither law enforcement nor CPS were notified. The foster child did not want law enforcement notified, however, that should not dictate whether or not DCFS generates a referral to law enforcement. This can be implemented immediately with no additional resources.
7. DCFS to develop and use specific guidelines for writing foster/adopt home studies. Home studies from the agency's point of view tend to be black and white; pass/fail. A good home study will identify strengths and weakness of a home and what the agency will do to aid their development in the weak areas. (This is already the practice in most offices and is certainly already in policy.)
8. Whenever a foster parent is hospitalized for any reason, DCFS must obtain a release of information from the foster parent and speak with the physician or therapist about the reason for the hospitalization and

any implications that would affect the person's ability to provide care for children or him/herself. This is not just an issue of reporting a hospitalization but a re-examination of the use of the foster family home. This can be completed with no additional resources.

9. There needs to be a limit on how many drug/alcohol addicted, assaultive youth are placed in any one home. DCFS staff can not expect the foster parent to set limits. DCFS staff must recognize when to say "no". This will mean recruiting more foster homes for hard to place children.
10. Foster care placements need to go through the foster home finder.
11. Foster parents need to be advised in the orientation training they receive, that they may be expected to participate with a child's therapy. This may mean individual counseling for the foster parent and may mean family counseling.
12. No home be licensed by phone. This issue has been resolved by WAC/RCW. (Mr. Faircloth in the 80's was licensed by phone when he lived in Clallam County. The licenser was a worker from Region 5).
13. Foster families need to be viewed as a family unit in order to assess their existing support system and impact of change on all family members. No additional resources needed.
14. An adoptive home study should assess the family and relate a social plan for the child, not just inform a judge if this is an acceptable adoptive home or not. No additional resources needed.
15. Continuation of the same social worker when a child becomes an adolescent. Some offices change social workers when children become adolescents. Workers tend to "specialize" but this often causes unnecessary change for a child. This typifies agency organization vs. child organization. In some offices, due to lack of staffing resources, this may not be feasible. However, this issue needs consideration. Some additional resources may be needed.
16. The Department should consider whether DSHS employees should be licensed as foster parents or be allowed to be adoptive parents.
17. DCFS staff should receive training on the use of inhalents by clients and their effect on behavior.

The final issues the committee wanted to address were suggestions for future critical incident reviews.

The agency needs to clarify, in advance, what kind of review is to take place, internal vs. external or a combination. Someone outside the agency needs to chair the review and that needs to be set up prior to the review process. DCFS also needs to send a support person to take notes. This may be an agency person or a contracted person. In this review, the facilitator took notes and read from the files. One person can not be expected to be the historian, note taker and facilitator. The type of report that the agency expects the committee to generate needs to be made clear at the beginning of the review. Therefore, questions need to be posed in advance. The scope of the review also needs to be clarified from the beginning. Finally, DCFS needs to limit the number of agency people on the review committee; one or two staff at the most. Other staff should be requested to attend on an "as needed" basis. The committee stated that DCFS expertise in certain areas in critical incident reviews is invaluable and needs to continue.