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Court of Appeals
Division III
State of Washington

NO. 31185-6

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

KELLY EUGENE SMALL

APPELLANT,

V.

STATE OF WASHINGTON

RESPONDENT

AMENDED BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial court abuse its discretion where it admitted a portion of the indented writing that was evidence of the defendant's flight and guilty conscience?
2. Did the trial court err by imposing an exceptional sentence on count 3 where the jury found the statutory aggravating factor of sexual motivation, that gave the court authority to impose the sentence independent of RCW 9.94A.533(8) ?
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B. STATEMENT OF THE CASE

1. Substantive Facts ¹

Omak Police officers were dispatched to South Juniper Street in Omak in the early morning hours of February 25, 2006. The officers were responding to a report of an elderly woman having been beaten and raped. RP Trial (Hereinafter "RP") 1842-43, 1896, 1989, 2110.

¹ In his brief, the Appellant relies significantly upon the declaration for probable cause (CP 905-915) that was prepared in order to meet the 72 hour filing deadline after the defendant's arrest and preliminary appearance. The declaration of probable cause consists of a brief 7-page summary from Det. Koplin. The Appellant's reliance and citations to the probable cause declaration for the substance of the investigation, interviews, or the record in the cases, is dubious.

Officers made contact with the victim, 75-year-old Bonnie Marriott, and observed injury to her face and hands. Ms. Marriott was distraught and scared, and was unsure if the defendant was still in her house. RP 1845, 1897, 1991-93.

Officers made entry into Ms. Marriott's residence, and checked around the exterior of the house. RP 1847, 1899, 1990. Officers located a window air conditioner lying on the ground that had been pulled out of a bedroom window and was still plugged into an outlet inside the residence. RP 1848, 1906-07, 1938, 1995. Officers found disturbance of dust on the windowsill, a lamp knocked over, and a partial footprint left on an envelope inside the bedroom where the air conditioner had been removed. RP 1854, 1871, 1907-08, 1909, 1939, 1940, 1968. The back door of the residence was still locked when police checked the residence. RP 1917, 1942.

Ms. Marriott stated that she had laid down to sleep on her couch in the living room around 11:00 pm on February 24. RP 2117-18. All of her doors were locked. RP 2130. The next thing she recalled seeing was a man standing under the light in the hallway of her residence. RP 2118. The man was wearing a hooded sweatshirt and cap, making it difficult to see his face. RP

1849, 1898, 2133-34, 2118-19. She did not know the suspect was the defendant Kelly Small. RP 2150-53.

The defendant said, "I just want sex, then I'll leave". RP 2119. The defendant then came over toward Ms. Marriott and ripped the telephone cord out of the wall. He then told Ms. Marriott to "Take off your clothes". RP 2119, 2125. The defendant then yanked off Ms. Marriott's clothing and got on top of her. RP 2119-20.

During the attack, the defendant raped Ms. Marriott vaginally, rectally, and orally. Ms. Marriott suffered significant injury to her face, neck, and hands, genitalia, and exhibited what appeared to bruising to the inner part of her thighs in the shape of fingers and thumb marks. During the attack, the defendant beat Ms. Marriott, and strangled her several times using his hands and the phone cord. RP 1849-50, 1868-69, 1882, 1890, 2120, 2121-22, 2470-72, 2474-79, 2481-83.

At one point, Ms. Marriott said to the defendant: "I'm 75 years old. You wouldn't do this to your grandmother," The defendant responded "Yes, I would." RP 2120, 2142.

While attempting to rape Ms. Marriott the defendant found that her vaginal tissues were dry, so the defendant dragged Ms.

Marriott into the bathroom and put water on her. Ms. Marriott managed to open the window and yell for help, but to no avail. RP 2123. Whenever Ms. Marriott resisted, the defendant called her a “bitch” and hit her or strangled her. RP 2124.

Ms. Marriott testified that her first husband of 21 years had been a detective with the Snohomish County Sheriff’s Department, so Ms. Marriott was accustomed to listening for details of crimes. As a result, Ms. Marriott thought in the event that she survived the attack, she wanted to remember as much as she could about the defendant. RP 2112, 2149.

Ms. Marriott described the defendant as a white male, about five foot, eight inches tall, 140 to 150 pounds, dark hair, slender build, but strong. The defendant was wearing a t-shirt with lettering over a sweatshirt, and ball cap that he had taken off at some point during the attack. RP 1849, 1898, 2133-34.

Ms. Marriott indicated she was choked to unconsciousness. RP 1899, 2123, 2162. She believed the attack went on for possibly an hour and one-half. RP 2124. Ms. Marriott told the officers she fought back and hit the defendant with a rubber mallet and with her phone. RP 1852, 1919, 1961-62, 1970, 2125, 2141. She also tried to scratch the defendant. RP 2126. Before the defendant left, he

cleaned under Ms. Marriott's fingernails, and cut her with his knife. RP 2126-27.

The defendant's sister testified that she recalled seeing a gash on the side of the defendant's head above his left eye, sometime in late February or early March of 2006. RP 2270-71, 2401.

After the defendant left her alone, Ms. Marriott managed to get out of the house and cross the street to a neighbor's house for help. RP 2129, 2139.

At the scene, Ms. Marriott reported to law enforcement that she had been raped and may have suffered some broken ribs. RP 1899, 2140. Ms. Marriott also suffered permanent hearing loss in one ear from being hit, and had one of her front teeth knocked out. RP 2121-22, 2458. Ms. Marriott indicated to law enforcement that she thought the defendant was going to kill her. RP 2207. She thought the defendant had left the same way he had entered her residence. RP 2207.

Officers recovered the phone and observed the phone cord was torn in half and there appeared to be blood on the phone. RP 1852-1854, 1858, 1876, 1919, 1942-43, 1961, 1972. The recovered phone was packaged and sent to the state crime lab for

DNA analysis (and ultimately compared to the defendant's DNA). RP 1888, 1944-45, 2012-13, 2026-27, 2036, 2049-50, 2888. A full DNA profile was developed from the samples taken from the telephone. RP 2350-52. The major contributor of both samples taken from the phone was the same male. The result was entered into CODIS. RP 2353-55.

After the attack, Ms. Marriott never returned to her house out of fear, because the defendant had not been caught or identified. RP 2149, 2457. Ms. Marriott also met with a montage artist after the attack to complete a drawing of the suspect. RP 1885, 2136-39.

The identity of the suspect in the attack remained unknown. Detective Jeff Koplín was assigned as an investigator in the still unresolved case in April 2009. RP 2864. Detective Koplín contacted the defendant on Friday, January 15, 2010. RP 2864, 2990. During the interview, the detective discussed some of the details about the 2006 rape and strangulation of the elderly woman (Ms. Marriott). Det. Koplín told the defendant that the suspect had left his DNA at the crime scene and that they believed when they found the male who matched the DNA, they would have the person responsible for the crime. RP 2867-68. The defendant said he was

not aware of the case at all. RP 2867. The defendant told the detective about several locations where he had lived in the past, but did not mention living next door to Ms. Marriott's residence. RP 2872.

Det. Koplín subsequently learned from the defendant's wife, Marla Small that they had previously lived next door to Ms. Marriott. RP 2872, 2875, 3080, 2249. The Smalls lived next to Ms. Marriott until May of 2005. RP 2277-78. Ms. Marriott recalled meeting Mrs. Small and the Small's son during the time they lived next door, but did not know Mr. Small. RP 2150-53. Detective Koplín also learned that the defendant's best friend, Terry Paul, lived across the street from Ms. Marriott's residence at the time of the attack. RP 2878, 3080-81, 2245-47, 2248, 2249-50.

During the January 15, interview with the defendant, Detective Koplín obtained a voluntary DNA swab to compare to the DNA sample recovered from Ms. Marriott's phone. RP 2881.

The weekend that followed Det. Koplín's interview with the defendant was a three day weekend due to the Martin Luther King holiday. RP 2900. When Det. Koplín returned to work after the holiday, he learned that the defendant's wife had reported the

defendant as a missing person. RP 2902, 2225-26. The defendant had left, taking with him personal effects, a vehicle, and an ATV.

Det. Koplín discovered that the defendant had sold the ATV on January 19, 2010 to a local power sports dealership for a low value of \$3000. RP 2907, 3089-92, 2216. The Blue Book value of the ATV was between \$7,000 and \$7,500, but the defendant told the dealer he needed the money. RP 3092, 3098, 3126. The title for ATV was held in the name of the defendant and his wife. The defendant forged his wife's signature on the title to complete the sale. RP 3093-94, 3096. The defendant's wife did not authorize the defendant to sign the title and she learned about the sale of the ATV after it was sold from the dealership. RP 3138-39.

When Det. Koplín initially met with the defendant's wife about the missing person report, he told Ms. Small that if she learned anything about his whereabouts, where the four-wheeler was, or anything that happened, that she needed to let me know immediately. RP 2215-16. After that initial contact, and while the defendant was missing, Det. Koplín attempted to contact Marla Small multiple times without success. On January 30, 2010, the detective learned that the defendant had returned to the area. RP 2910-13, 2241-42.

The defendant was contacted by Det. Koplín on January 30, 2010. The defendant told Det. Koplín that he had sold the ATV in order to pay for a trip. The defendant stated he had flown to Los Angeles, CA, and then had ridden a bus all over the country. RP 2916-17. The defendant told Det. Koplín that his bags were stolen from a bus depot in Las Vegas, NV. RP 2917.

Det. Koplín interviewed the defendant on February 1, 2010. RP 2921. During the interview, the defendant changed his story about his bags and said he left them at the Circus-Circus Hotel in Las Vegas. RP 2932, 2414. The defendant stayed at the Circus-Circus hotel from January 22 to January 29, 2010. RP 2944. The defendant abandoned his bag at the hotel when he checked out. RP 2946.

On February 1, 2010, Det. Koplín received results from the crime lab's DNA analysis and comparison. The DNA profile from the telephone samples and the defendant's DNA profile from the sample provided to Det. Koplín on January 15, 2010, matched. RP 2931, 2381-82, 2388-90, 2402.

Det. Koplín re-interviewed the defendant on February 2, 2010. RP 2402. The defendant said he had sold the four-wheeler for traveling money, and then he just took off on the spur of the

moment, without telling his wife. RP 2405-06. The defendant said he had not told any of his family about being interviewed by Det. Koplín on January 15, 2010, or that he provided a DNA sample. RP 2429.

The defendant abandoned his Jeep at the Sea-Tac airport, leaving his keys and cell phone inside the Jeep. RP 2413, 2442. The defendant went as far south as El Paso, Texas, where he was contacted by Border Patrol Agents, who viewed his ID, but did not apparently run a computer check of his ID. RP 2409-10. The defendant then travelled north to Phoenix and then to Las Vegas. RP 2410.

Det. Koplín contacted the Circus-Circus Hotel and requested that they hold the bag left by the defendant until it could be picked up by Las Vegas Metropolitan Police and transported to Omak PD. RP 2932-33, 2950, 2957-58, 2962, 2415-17. The bag contained clothing, a shaving kit, a red spiral bound notebook, and receipts. RP 2934, 2946, 2959, 2418. The notebook had been purchased by the defendant on January 23, 2010. RP 2426-27.

Writing impressions were visible on the inside cover of the notebook and on the top sheet of paper. RP 2934-35. The notebook and a separate letter written by the defendant were sent

to the state crime lab for analysis and comparison. RP 2017-2019, 2028, 2936-37, 2980. At the state crime lab, the impressions left in the notebook were viewed with low beams of light and angles to form shadows within the indentations, and using an electrostatic detection device. RP 2973-2975, 2979. Images of the indented writings taken during the crime lab examination were admitted as exhibits. RP 2986-3000. Images of the impressions were also annotated and the corresponding exhibits with the annotations were also admitted. RP 3000-3002. The indentations from the front cover of the notebook were consistent with more than one letter being written on top of it, creating some overlapping indentations. RP 3019, 3020'. Once the indented writings were developed, any person could read the decipherments of the indented writing. RP 3011.

The known sample of the defendant's handwriting was compared to the indented writings and the crime lab concluded the defendant was probably the source of the indented writing. RP 3006, 3008. The conclusion was made based solely on similarities between the writing; and independent of the actual content of the indented writing, or that it was recovered from the defendant's bag that he had left in Las Vegas. RP 3009-3011, 3015-16.

The court noted that there was no objection to any of the crime lab scientist's testimony about the indented writings, and ruled that the procedures the scientist used met the *Fry* test under Evidence Rule 702. The court ruled that developing the images was beyond common understanding, and the method used was generally accepted in the scientific community. RP 3038. The crime lab scientist was found to have adequate training and experience, was an expert in enhancing and developing indented writing, and was a trained expert and experienced in the area of handwriting identification. RP 3038

From the inside front cover of the notebook, Det. Koplin pointed out the following statements:

- "put you through, I'm sorry, I've put drinking and partying and my friends first. Fuck, I hate myself for it"
- "You were always a great wife and wonderful mother. I just wish you could say that you had 26 wonderful years, but I know you can't."
- "know you can't?"
- "Of your family, of your family."
- "Cody, you're the man of the house,"
- "Please tell your kids that I," ... "wreck (sic) so they don't have to go through life like you two"
- "the best."
- "weren't very old,"

- “sorry I can’t be there for, you.”
- “I know that I will never see my grandkid ever again. Victory is an angel.”²
- “and Cody, I’m sorry I will never see your son”³
- “Both of you take care of your mother.”
- “And, Cody, you’re the man of the house now,”
- I wasn’t always bad, there was some good,”
- “by the time,”
- “why I left,”
- “because I’m not going to prison for life” “I’m going to hell instead,”
- “I don’t want this to,”
- “I love all of you, Bye,”

RP 3050-3067.

A second DNA swab was taken from the defendant on May 11, 2012, pursuant to court order. The second DNA swab was also sent for analysis and comparison. RP 2897-98. The DNA profile from the second sample matched the first sample from the defendant, and also matched the profile from the telephone samples. RP 2391-93.

² The defendant’s granddaughter’s name was Victoria. RP 3058.

³ The defendant’s son Cody was expecting the birth of a child. RP 3059, 3068-3070.

The defendant was charged by information with attempted first degree murder, rape in the first degree, burglary in the first degree, and forgery. CP 224-233. The State also filed a special allegation of sexual motivation for the attempted murder and burglary counts, pursuant to RCW 9.94A.835. CP 224-233. The State also filed a notice of intent to seek a sentence above the standard range pursuant to RCW 9.94A.537, based on the aggravating factors of: manifest deliberate cruelty, that the victim was particularly vulnerable or incapable of resistance, sexual motivation, invasion of the victim's privacy, and that the victim was present in the residence when the crime was committed. CP 408-409.

2. Procedural Facts

The defendant moved for severance of the case involving Ms. Marriott, from the case involving victim Sandra Bauer. The reason stated for the motion was so the defendant would be able to testify in the case involving Sandra Bauer, and not testify in the case involving Bonnie Marriott. RP 6/26/12 545-46. Defense counsel argued:

Your Honor, I'd like to turn to severance next. Much of the severance argument that we put forward in our first brief regarding this was the concern that the prejudicial effect would outweigh the concern for judicial economy, and I know the Court is very familiar with our argument on that. I also know that we went through the factors that the Court needed to consider in determining whether we should be severed to prevent prejudice, and then we talked about the differences in the crimes, that they are recurring over -- occurring over roughly a 12-year period, one in 1998, one in 2006, and the one more recently 2010, and we've also talked about the strength and weaknesses.

Two new, and we're not saying that those were not good arguments and we still believe that the Court should sever based on those arguments, but two new issues have come up. One is that specifically because of the evidence regarding the letter, if we assume that the Court is not going to recognize a privacy interest, and we assume that the Court is going to allow that letter into evidence, Mr. Small has the right to testify. And because he is a Defendant in a criminal case, he has the right to testify as to some and remain silent as to others. And that severance is considered in a situation, and can be granted, where a Defendant makes a showing that he has important testimony to give concerning one count, and that would be in the Bauer case regarding that letter, and a strong need to refrain from testifying about the other. That in itself brings us to a higher concern and a higher level of scrutiny that we would ask the Court to give on severance.

RP 6/26/12 545-46. The defendant's concern was that he could not offer an explanation regarding the blood on the phone in the Marriott case, and sought severance so the he could offer explanations for the DNA found in the Bauer case, and the letter.

Defense stated:

...he's got an explanation about some of it, but he doesn't have an explanation about all of it.

I think severance is going to be a bigger issue than it probably was previously when we heard this because of this letter. There's

some things he needs to explain and some things he needs to remain silent on.

RP 6/26/12 548, 549. Defense further stated:

If it were -- If we had joined trials and the evidence brought for Bonnie Marriott with her description of the attack and the evidence in there, specifically the DNA that was on the phone, yes, that would be very strong evidence and could lead the jury to conclude that not only did he do that, but he must've committed Bauer's murder and potentially rape,...

What I would agree with the Court candidly on is that the evidence that is strong in the Marriott case is the type of DNA evidence that is the blood on the phone....

Whereas the hairs are, are a different level, a different explanation, but, as I've said candidly to the Court, that is the most -- that is the State's strongest part of the DNA is the blood on the phone, and it is something that we would like severed so that we can argue in the Bauer case explanations for the DNA, explanations for the letter, and then separate the Marriott case.

RP 6/26/12 553, 555, 556. ⁴

The court noted that the defendant had been told about the DNA found in both the Bauer case and in the Marriott case on January 15, 2010, before he was asked to provide a voluntary sample, and that he fled within a few days of receiving that information. RP 7/10/12 612-613.

⁴ Defense cited to *State v. Weddel*, 29 Wn. App. 461, 468, 629 P.2d 912, 916 (1981) (for the proposition that severance is required only if the defendant makes a convincing showing to the trial court that he has both important testimony to give concerning one count and a strong need to refrain from testifying about the other.) RP 6/26/12 549.

The court ruled that evidence of the defendant's flight was admissible in the Marriott trial. RP 8/7/12 775. The Court then heard further argument regarding the indented writing on August 7, 2012. The defendant argued that the letter was not "relevant" because there is a single reference to something that occurred "12 years ago". RP 8/7/12 775-76, CP 449.⁵ However, the writing did not contain reference to, or the names of, either victim; it was primarily saying goodbye to his family. RP 8/7/12 778-79.

The court also noted that defense did not believe there was prejudice resulting from general references to another investigation during the trial. RP 8/7/12 773-74. The court advised the defense that it should be prepared, to make suggestions regarding what part should be redacted, if any, and specific arguments about each. RP 8/7/12 787. In weighing the admissibility, the State referred the court to Tegland, *Courtroom Handbook on Washington Evidence*, 801(d)(2), (subpart 10), on evidentiary effective of admissions, indicating that general admissions by party opponent are simply

⁵ Although the defendant argued that this would have been the time frame of the Bauer murder in its attempt to exclude the evidence in the case regarding Ms. Marriott, the defendant was also unwilling to stipulate to such facts and agree that the letter, or any portion therein referred to the Bauer case. RP 8/7/12 775-76, CP 449.

evidence and they're not binding. They may be denied or explained by the party making the admission, so we would just ask the Court to consider that in making the determination. RP 8/7/12 787.

The court allowed admission of the material from inside the front cover of the notebook, listed as 1 through 12 in the offer of proof, and the last sentence that "*I'm not going to prison for life. I'm going to hell instead. I love you all. Bye.*" RP 8/14/12 1787, 1789. The court concluded that the writing was consistent with the State's argument and evidence that the defendant was told that both crimes were committed by the same person, or at least they were related because the DNA was found, that the defendant provided the DNA sample, and that the defendant then left town. RP 8/14/12 1789-90.

Prior to trial, the defendant proposed a set of jury instructions to the court, including "to convict" instructions from WPIC 35.19.01, 40.02, 60.02, and 130.02. Each of the instructions contained the language:

If you find from the evidence that each of these elements (or the numbered elements) has been proved beyond a reasonable doubt, **then it will be your duty to return a verdict of guilty.** (Emphasis added.)

CP 279-327. This “duty to return a verdict of guilty” language in the defendant’s proposed jury instructions was utilized in the court’s “to convict” instructions that were provided to the jury without objection. CP 185-223.

Following trial, the jury found the defendant guilty of count 2 rape in the first degree, count 3 burglary in the first degree, and count 4 forgery. CP 150. The jury hung on count 1, attempted murder in the first degree and on the lesser-included offense of attempted murder in the second degree. CP 147. The court ordered a mistrial on count 1. RP 2763.

The jury also found aggravating factors applied to counts 2 and 3. CP 149. In count 2 rape, the jury found that the defendant’s conduct manifested deliberate cruelty to the victim, and that the defendant knew the victim was particularly vulnerable or incapable of resistance. CP 149, 40. In count 3 burglary, the jury found that the burglary was committed with sexual motivation, and the victim of the burglary was present at the time of the burglary. CP 149, 40.

The court imposed an exceptional sentence on counts 2 and 3, based on the aggravating factors found by the jury. CP 39-42, 46-63. The court imposed an additional 120 months on count 2, above the top end of the standard range. The court imposed 24

months on count 3 above the top end of the standard range. CP 46-63.⁶

C. ARGUMENT

1. The trial court did not abuse its discretion where it admitted a portion of the indented writing that was evidence of the defendant's flight and guilty conscience.

After the defendant fled the state and began staying in Las Vegas, he purchased the spiral bound notebook. He wrote a letter, or letters, that left identifiable indentations in the notebook cover and remaining front page. The writings contained no specific identifying reference to either of the defendant's victims, or specific details about the crimes. The writings *did* indicate that the defendant was not planning to return, his desire not to go to prison, his remorse, and directions to his family on how to explain his absence to his grandchildren.

The Appellant's argument that the writing was irrelevant as to the reason the defendant left is incorrect, and ignores the text of

⁶ The State filed a sentencing memorandum, arguing that the finding by the jury that the defendant committed the burglary with sexual motivation makes the underlying offense a sex offense for which an exceptional sentence can be imposed and citing the 1992 case of *State v. Spisak*, 66 Wash.App. 813, 834 P.2d 57. CP 67-75. This was a different basis than RCW 9.94A.533(8), for the court to impose an exceptional sentence.

the writing. The writing corroborated the defendant's effort to flee and not return to face legal proceedings. The defendant's acts included leaving without advising family or friends, selling an ATV for cash by forging the title, abandoning his car and cell phone, and travelling to the US-Mexican border. The writing was additional evidence of flight.

The primary reason the defendant fled was evident from the timing and manner of his flight in relation to the DNA sample obtained by Det. Koplin and the information that matching DNA was found at the crime scenes. The evidence of the writing was relevant and not prejudicial in light of the other evidence offered.

Evidence of flight and guilty conscience is admissible under ER 402. Conduct that is inconsistent with a party's position, or that implies consciousness of guilt, will ordinarily be relevant and admissible. See Tegland, *Courtroom Handbook on Washington Evidence* 2015-16, 402:2, pg. 133. Evidence of flight is admissible if it creates a reasonable and substantive inference that defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution. Actual flight is not the only evidence in this

category; evidence of resistance to arrest, concealment, assumption of a false name, and related conduct are admissible if they allow a reasonable inference of consciousness of guilt of the charged. *State v. Freeburg*, 105 Wn. App. 492, 497-98, 20 P.3d 984, 987 (2001); *State v. Bruton*, 66 Wash.2d 111, 112–113, 401 P.2d 340 (1965).

It is an accepted rule that evidence of the flight of a person, following the commission of a crime, is admissible and may be considered by the jury as a circumstance, along with other circumstances of the case, in determining guilt or innocence. *Bruton*, 66 Wn.2d at 112. The law makes no nice or refined distinctions as to the manner or mode of flight, and the range of circumstances which may be shown as evidence of flight is broad. However, the circumstance or inference of flight must be substantial and real. It may not be speculative, conjectural, or fanciful. In other words, the evidence or circumstances introduced and giving rise to the contention of flight must be substantial and sufficient to create a reasonable and substantive inference that the defendant's departure from the scene of difficulty was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate

effort to evade arrest and prosecution. *Bruton*, 66 Wn.2d at 112-13.

Admissibility of evidence is not prohibited, simply because it may infer guilt of another charge, as demonstrated in *State v. Barnett*, 70 Wash.2d 420, 423 P.2d 527 (1967):

We see no valid reason, whether confession or admissions against interest, to exclude the letters from evidence. Written as they were from another state at the defendant's instance, on her own volition in her behalf and for her benefit, there can be no denying their voluntary character. Nothing in the record suggests that either letter was involuntary coerced. That the letters might lead some jurors from the return address, signature and contents to suspect the truth, i. e., that defendant wrote the letters while serving time in California penal institution, or enable the jurors to see in the language an admission of forgery instead of larceny, does not affect their admissibility.

Any voluntary statements by one suspected or accused of crime relating to facts or circumstances which indicate wither a consciousness of guilt or which tend to show a connection with conditions or events tending to connect the accused with the crime charged are receivable in evidence as admissions against interest. *State v. Dooley*, 133 Wash. 392, 233 P. 16 646 (1925); *State v. Godwin*, 143 Wash. 93, 254 P. 838 (1927). And this is the rule even though explanations from the persons making the statements might well render them less damaging or even innocuous. The true test of admissibility is whether the evidence is competent, relevant, and material to any issue before the jury. *State v. Morris*, 422 19 P.2d 27 (1966).

That damaging evidence might induce one on trial for a crime to take the witness stand in explanation of it gives no ground for excluding such evidence, for this objection could be made against nearly all competent and material evidence tending to establish guilt or tending to connect the defendant with conditions, events and circumstances from which guilt may be reasonably inferred.

Similarly in *State v. Thuna*, 59 Wash.689, 691, 109 P. 331 (1910), the Court admitted evidence in letter form, which contained admissions to other crimes:

It is also argued that the court erred in receiving in evidence certain letters written by the appellant to a friend, because such letters showed that the appellant was guilty of other crimes beside the one charged, and also because some of these letters did not show that the appellant was living with the woman referred to therein. Certain of the letters did show that the appellant was guilty of other crimes, but they also showed conclusively that the appellant had been for some time living with the woman, that she was a common prostitute for hire, and that the appellant knew the facts. The letters were therefore clearly admissible and evidence upon this charge. It is true that other crimes may not be shown for the purpose of conviction upon the one charged, but these letters showed guilt of the crime charged and were therefore competent. They were not to be excluded entirely because they at the same time contained admissions of other crimes

Thus, simply because the letter at issue in this case could have referenced another crime, this factor does not make it inadmissible in the present case regarding victim Bonnie Marriott. When looking at the sentences and words, taken together as a whole, it is clear that this letter is a general expression of remorse, an explanation for why he left the State of Washington, and a "goodbye" letter to his family. At the time the letter was written, the defendant had just recently fled the State of Washington after being interviewed by Detective Koplín and after being told that the two crime scenes had matched DNA.

The overriding reason that defense gave for severance and their attempt to suppress the writing in Marriott, was that they did not want to have to explain the writing by having the defendant testify, where the defendant could not explain the blood on the phone. The defendant's strong desire to keep out relevant evidence, is not a basis to exclude it. ⁷

Similarly, the evidence is not subject to exclusion under ER 403. Rule 403 authorizes the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." It should be emphasized that ER 403 is not concerned with irrelevant evidence. The rule is

⁷ Under ER 801(d)(2), as a general rule, evidentiary admissions by a party-opponent are simply evidence and are not binding. They may be denied or explained by the party making the admission. See Tegland, *Courtroom Handbook on Washington Evidence* 2015-16, 801:25, pg. 383.

Normal, everyday admissions (say, in an oral statement or in a letter written to an associate) are simply evidence of the admitted fact. An admission is not binding or conclusive, and the party against whom the admission operates may seek to explain the admission, may deny making the admission, or may introduce evidence contrary to the admitted fact. The weight to be attributed to an admission is ultimately for the trier of fact to decide in the light of all the other pertinent evidence in the case. See Tegland, *Courtroom Handbook on Washington Evidence* 2015-16, 801:25, pg. 383 (citing *McCormick on Evidence*, section 254 (two-volume 7th ed.)). See, e. g., *Bardsley v. Truax*, 64 Wash. 400, 116 P. 1075 (1911))

concerned with evidence that admittedly tends to prove or disprove a fact of consequence, but that also possesses one or more of the undesirable characteristics listed in the rule. *5 Wash. Prac., Evidence Law and Practice* § 403.1 (5th ed.).

ER 403 contemplates a balancing process. Nearly all evidence will have some probative value, and nearly all evidence will possess some undesirable characteristics. The question is whether the balance is tipped towards admissibility or exclusion. The balance may be tipped towards admissibility either because the evidence is highly probative, or because the counterbalancing undesirable characteristics are minimal. The balance may be tipped towards exclusion either because the evidence is of minimal probative value (regardless of undesirable characteristics) or because its undesirable characteristics are so pronounced that they outweigh the probative value of the evidence. *5 Wash. Prac., Evidence Law and Practice* § 403.2 (5th ed.)

Nearly all evidence is prejudicial in the sense that it is offered for the purpose of inducing the trier of fact to reach one conclusion and not another. This is not the sense in which the term “prejudice” is used in Rule 403. Nothing in Rule 403 authorizes the

exclusion of evidence merely because it is “too probative”. Rule 403 is instead concerned with what is rather loosely termed “unfair prejudice”, usually meaning prejudice caused by evidence that is more likely to arouse an emotional response than a rational decision among the jurors. If the evidence is distinctly prejudicial in this sense, and if other less inflammatory evidence is available to adequately make the same point, the balance is tipped towards exclusion. *5 Wash. Prac., Evidence Law and Practice* § 403.3 (5th ed.)⁸

When applying Rule 403, the burden is on the party seeking to exclude the evidence. The rule permits exclusion only when the probative value of the evidence is substantially outweighed by one

⁸ The Appellant’s argument in the Brief of Appellant, pg. 26, that “*Here the defense had arguable evidence to counter the State’s DNA evidence linking Mr. Small to the crime scene and apparent evidence of flight.*” is without any foundation and does not support his claim of prejudice from admitting the writing. There was no evidence or colorable explanation provided by defense to dispute the presence of his DNA found in two different samples taken from the phone in Ms. Marriott’s residence.

Additionally, the Appellant argued in the Brief of Appellant, pg. 24, that: The jury in this trial had no inkling whatsoever that before the letters were written, police had told Mr. Small they had DNA showing the two crimes were committed by the same person and that the state “misled” the jury as to Mr. Small’s actual knowledge of the status of DNA recovery from the two crime scenes and attributed words of despondency and possible suicide to this Marriott case that may instead relate solely to the Bauer murder or something else.

The argument is absurd in light of the fact that the limitations were *wholly* attributable to the defense motions to sever the cases and the courts evidentiary rulings that sought to avoid prejudicing the jury.

of the factors mentioned in the rule. When the balance is even, the evidence should be admitted. *5 Wash. Prac., Evidence Law and Practice* § 403.2 (5th ed.)

A trial court's admission of evidence is reviewed for abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). A trial court's rulings on the admissibility of evidence will not be disturbed absent an abuse of the court's discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Abuse of discretion exists when a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons. *Id.* The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law. *State v. Williamson*, 100 Wash.App. 248, 257, 996 P.2d 1097 (2000).

The text of the rule requires balancing the prejudicial costs of the evidence against its benefits. If its probative value is not 'substantially' outweighed by the danger of unfair prejudice, the court has no discretion to exclude the evidence; it must be admitted. However, if the balance is substantially in favor of prejudice, the judge need not exclude the evidence, but merely has

the discretion to do so. *Lockwood v. AC & S, Inc.*, 44 Wash. App. 330, 722 P.2d 826 (1986).

There was no abuse of discretion in admitting the writing in the present case. ER 401 defines relevant evidence broadly as “evidence having *any tendency* to make the existence of any fact ... more probable or less probable ...” (emphasis added). Minimal logical relevance is all that is required. In his treatise, Karl Teglund dispels any misunderstandings to the contrary—

Rule 401 rejects any notion of “legal relevance”; i.e. that the evidence must have a greater degree of probative value than people would expect in the conduct of ordinary, everyday affairs. The admissibility of evidence having only marginal relevance is governed by Rule 403, not Rule 401.

The test for probative value under Rule 401 *should not be confused with the sufficiency of the evidence to take the case to the jury, nor should it be confused with the sufficiency of the evidence to satisfy the overall burden of proof. The latter two concepts relate to weight, not admissibility*,⁹ and the tests under the latter two concepts are more rigorous than the nominal “any tendency” test for relevance under Rule 401.

5 Wash. Prac., Evidence Law and Practice § 401.4, at 218(emphasis added).⁹

⁹ See also *State v. Bebb*, 44 Wn. App. 803, 814, 723 P.2d 512 (1986) *aff'd*, 108 Wn.2d 515, 740 P.2d 829 (1987)(defendant's statement on a California prison form that he was involved in a possible unknown offense in Washington was admissible in murder trial where the statement had some tendency, when

With reference to materiality, ER 401 defines relevant evidence as evidence that tends to prove or disprove “any fact that is *of consequence* to the determination of the action...” (Emphasis added). Facts that are “of consequence” include facts that offer direct evidence of an element of a claim or defense; also included are facts that imply an element of a claim or defense (circumstantial evidence), as well as facts bearing on the credibility or probative value of other evidence (background information and evidence offered to impeach or to rehabilitate a witness).

To state the same point in the negative, evidence that makes no difference to the outcome of the case—evidence that cannot affect the validity of a claim or defense, even if true—is immaterial and does not meet the test of relevance under Rule 401. 5 Wash. Prac., Evidence Law and Practice § 401.4, at 218-20(emphasis added).

In *State v. Burkins*, 94 Wn. App. 677, 693, 973 P.2d 15, 25 (1999), in a prosecution for murder, a rope found at the crime scene and was offered by the State on the theory that the

viewed in conjunction with other evidence, to make defendant's guilt more probable).

defendant planned to use it to bind the victim's hands, and that it was evidence of premeditation regardless of whether the defendant actually used the rope to bind the victim. Whether evidence actually plays a part in a crime is not the definition of relevant evidence. To be relevant, and admissible at trial, evidence need only have a tendency to make the existence of a fact that is of consequence to the determination of the action more probable. ER 401; *Burkins*, 94 Wn. App. at 693. The court found the presence of the rope at the scene of the crime tended to make the State's theory that *Burkins* planned to bind Anderson's hands more probable and was admissible relevant evidence. *Burkins*, 94 Wn. App. at 693. See also *State v. Ames*, 89 Wn. App. 702, 707-08, 950 P.2d 514, 516-17 (1998) (in prosecution for assault, trial court properly allowed witness to testify about a fight he observed between two men even though witness was unable to identify the defendant, because the testimony was probative of both the nature and the degree of the crime); *State v. Jones*, 26 Wn. App. 551, 614 P.2d 190 (1980)(no abuse of discretion in permitting state to show that defendant's palm print had been found at the scene of the crime even though State could not prove when the print was made; defendant's alibi that he had left the print on an earlier occasion

went only to the weight of the State's evidence and could be believed or disbelieved by the jury).

There was no abuse of discretion in admitting the writing.

2. The trial court did not err by imposing an exceptional sentence on count 3 where the jury found the statutory aggravating factor of sexual motivation, that gave the court authority to impose the sentence independent of RCW 9.94A.533(8).

Appellant argues that the court erred by imposing an additional 24 months for Count 3 based on RCW 9.94A.533(8)(a).¹⁰

¹⁰ RCW 9.94A.533 (a) The following additional times shall be added to the standard sentence range for felony crimes committed on or after July 1, 2006, if the offense was committed with sexual motivation, as that term is defined in RCW 9.94A.030. If the offender is being sentenced for more than one offense, the sexual motivation enhancement must be added to the total period of total confinement for all offenses, regardless of which underlying offense is subject to a sexual motivation enhancement. If the offender committed the offense with sexual motivation and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020: (i) Two years for any felony defined under the law as a class A felony or with a statutory maximum sentence of at least twenty years, or both;...

(b) Notwithstanding any other provision of law, all sexual motivation enhancements under this subsection are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other sexual motivation enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be

In the current case, the jury found *multiple* aggravating factors for counts 2 and 3. The court imposed 24 months based on the jury's finding of sexual motivation in count 3. The consecutive sentence imposed by the court was permissible under RCW 9.94A.535. RCW 9.94A.535 gives the court the authority to impose an exceptional / consecutive sentence outside the standard range based on aggravating circumstances where the current offense includes a finding of sexual motivation by the jury, pursuant to RCW 9.94A.835.¹¹

RCW 9.94A.835 states:

(1) The prosecuting attorney shall file a special allegation of sexual motivation in every criminal case, felony, gross misdemeanor, or misdemeanor, other than sex offenses as defined in RCW 9.94A.030 when sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding of sexual motivation by a reasonable and objective fact finder.

(2) In a criminal case wherein there has been a special allegation the state shall prove beyond a reasonable doubt that the accused committed the crime with a sexual motivation. The court shall make a finding of fact of whether or not a sexual motivation was present at the time of the

¹¹ The current version of RCW 9.94A.835 was recodified from RCW 9.94A.127 in 2001, by Laws 2001, ch. 10, § 6. RCW 9.94A.127 was passed in 1990. The current version of RCW 9.94A.835 is substantially the same as the original version of RCW 9.94A.127. See <http://leg.wa.gov/CodeReviser/documents/sessionlaw/1990c3.pdf?cite=1990%20c%203%20C2%A7%20601>. (Link last viewed May 1, 2016).

The current version of RCW 9.94A.535 was recodified from RCW 9.94A.390 pursuant to 2001 c 10 § 6. RCW 9.94A.390 was passed in 1990. The current version of RCW 9.94A.535(3)(f) is substantially the same as the original version of RCW 9.94A.390(2)(e). See <http://leg.wa.gov/CodeReviser/documents/sessionlaw/1990c3.pdf?cite=1990%20c%203%20C2%A7%20601>. (Link last viewed May 1, 2016).

commission of the crime, or if a jury trial is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether or not the defendant committed the crime with a sexual motivation. This finding shall not be applied to sex offenses as defined in RCW 9.94A.030.

(3) The prosecuting attorney shall not withdraw the special allegation of sexual motivation without approval of the court through an order of dismissal of the special allegation. The court shall not dismiss this special allegation unless it finds that such an order is necessary to correct an error in the initial charging decision or unless there are evidentiary problems which make proving the special allegation doubtful.

Where a trial court has made a special finding of sexual motivation, the underlying crime is treated as a sexual offense for which an exceptional sentence may be imposed. *State v. Spisak*, 66 Wn. App. 813, 821, 834 P.2d 57, 62 (1992).

Although RCW 9.94A.533 provides a mandatory sentencing enhancement where sexual motivation is found, it does not limit in any way the courts ability to impose an exceptional sentence under RCW 9.94A.535. There was no error where the court imposed an additional 24-month consecutive sentence.

An exceptional sentence is subject to appellate review under RCW 9.94A.585(4), which provides:

To reverse a sentence which is outside the sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing judge are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

If a trial court has given valid reasons for imposing an exceptional sentence, and if the evidence supports those reasons,

the court need not justify the length of the exceptional sentence. *State v. Zatkovich*, 113 Wash.App. 70, 52 P.3d 36 (2002). A reviewing court determines the appropriateness of an exceptional sentence by answering three questions: (1) whether evidence in the record supports the sentencing judge's reasons, under the clearly erroneous standard of review; (2) whether those reasons justify departure from the standard range as a matter of law; and (3) whether the sentence is clearly too excessive or too lenient, under the abuse of discretion standard of review. *E.g. State v. Ferguson*, 142 Wash.2d 631, 646, 15 P.3d 1271, 1279 (2001); RCW 9.94A.210(4).

The additional 24 months was based on the jury finding of sexual motivation. The jury finding in the record supports the court's sentence. The jury finding was a statutory aggravating factor justifying an exceptional sentence as a matter of law. The sentence was not an abuse of discretion.

Even if Court of Appeals were to determine that the reason supporting sentencing departure was invalid, remand is necessary only if it is not clear whether trial court would have imposed the same sentence based on valid factors alone. *E.g., State v. Smith*,

82 Wash.App. 153, 916 P.2d 960 (1996). In the present case, the court's intent to impose exceptional sentences was clear.

3. The trial court did not err in giving "to convict" instructions that used language proposed by the defendant and that were not objected to by the defendant.

The Appellant argues the "to convict" instructions used at trial violated his constitutional right to a jury trial, claiming the instructions mislead the jury about its power to acquit. However, the defendant proposed the language in the instructions that he now uses as a basis to claim error. Moreover, the arguments offered by the Appellant are the same rehashed arguments that have been offered and rejected in each division of the Court of Appeals.

Jury instructions are sufficient if they are not misleading, permit the parties to argue their cases, and properly inform the jury of the applicable law when read as a whole. *State v. Meggyesy*, 90 Wash.App. 693, 698, 958 P.2d 319 (1998), *abrogated on other grounds by State v. Recuenco*, 154 Wash.2d 156, 110 P.3d 188 (2005). In *State v. Wilson*, 176 Wn. App. 147, 149, 307 P.3d

823, 824 (2013), the defendant assigned error to the trial court's instruction to the jury that “[i]f you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.” *Wilson* at 149-50. The language of this instruction is from 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal*. The defendant in *Wilson* argued that, under Washington law, juries never have a duty to return a verdict of guilty and that the instruction violates article I, sections 21 and 22 of the Washington Constitution. The rationale that underlies *Wilson*’s challenge had already been rejected in cases arising from Division One and Division Two of this court. *Wilson* at 150 (citing *Meggyesy*, 90 Wash.App. 693, 958 P.2d 319; *State v. Brown*, 130 Wash.App. 767, 124 P.3d 663 (2005)).

In *Meggyesy*, the defendants challenged the same jury instruction as the defendant in *Wilson*. The defendants opposed the instruction that required the jury to return a guilty verdict upon finding proof of each element beyond a reasonable doubt and, instead, asserted that a proper instruction should have informed the jury that it “may” convict upon a finding of proof beyond a reasonable doubt. *Wilson* at 150 (citing *Meggyesy* at 698.)

Division One upheld the language in the challenged jury instruction. *Id.* The court concluded that the instruction did not implicate the federal constitutional right to a jury trial or misstate the law. *Wilson at 150.* The court determined the defendants essentially proposed a jury nullification instruction, and that the defendants were not entitled to an instruction that permitted the jury to acquit against the evidence. *Wilson at 150.*

The court also conducted a six-step *State v. Gunwall* 106 Wash.2d 54, 720 P.2d 808 (1986), analysis and concluded that there was no independent state constitutional basis to invalidate the challenged instructions. *Wilson at 150.* Of particular importance, the court reviewed state constitutional history and pre-existing state law and determined that the Washington Constitution does not provide a broader right to a jury trial with respect to the challenged jury instructions. *Wilson at 150, (citing Meggyesy at 702–03.*

The *Wilson* court pointed out that the defendant in *Brown* also challenged the jury instruction, claiming that the “to convict” language affirmatively misled the jury about its power to acquit, and that the word “duty” conveyed to the jury that it could not acquit if the elements had been established. *Wilson at 151 (citing Brown, 130 Wash.App. at 771, 124 P.3d 663).*

Division Two concluded that *Brown* raised the same issues that were addressed in *Meggyesy*, and then rejected the defendant's argument based on *Meggyesy*. *Wilson at 151*. Further, the *Brown* court held that the purpose of the instruction is to provide the jury with the law applicable to each particular case, and that jury nullification is not a law to be applied. *Wilson at 151*.

The defendant in *Wilson* requested that the court reconsider the issue. He raised the same challenge as in *Brown* and used the same constitutional arguments set forth in *Meggyesy*. Despite the defendant's request, the *Wilson* court agreed with the reasoning in the aforementioned cases and held that such an instruction is equivalent to notifying the jury of its power to acquit against the evidence and that a defendant is not entitled to a jury nullification instruction. *Wilson at 151* (citing *State v. Bonisisio*, 92 Wash.App. 783, 794, 964 P.2d 1222 (1998); *Meggyesy*, 90 Wash.App. at 700, 958 P.2d 319)). The court in *Wilson* held that the defendant's constitutional right to a jury trial was not violated by the "to convict" jury instruction. *Wilson at 151*.

Wilson is dispositive; the instruction in the present case did not misstate the law. Moreover, court decisions since *Wilson* have continued to reject the exact same argument offered by Appellant in

this case. The State Supreme Court has also continued to deny review.

In *State v. Moore*, 179 Wn. App. 464, 468-69, 318 P.3d 296, 299 (2014) review denied, 180 Wn.2d 1019, 327 P.3d 55 (2014).

The court found the challenged instruction left for the jurors the role of evaluating the facts and applying the law as given to them, consistent with their oath. Thus, the challenged instruction permitted the jury to draw the ultimate conclusion of guilt or innocence, as the jury is required to do. *Moore*, 179 Wn. App. at 468-69. The *Moore* court went on to state:

“This issue was settled by *Meggyesy*, and affirmed in *Brown* and *Wilson*. We reaffirm and uphold the to convict instruction given here: ‘If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.’ This is a correct statement of the law. Jurors have a duty to apply the law given to them. This instruction does not invade the province of the jury nor otherwise violate a defendant's right to a jury trial. The trial court does not err in giving the instruction when requested.” *Moore*, 179 Wn. App. at 468-69.

In *State v. Nicholas*, 185 Wn. App. 298, 299, 341 P.3d 1013, 1014 (2014), the court's first statement was: “*We thought that this issue was resolved.*” *Nicholas* at 299 (citing *State v. Moore*, 179 Wash.App. 464, 465, 318 P.3d 296, review denied, 180 Wash.2d 1019, 327 P.3d 55 (2014)). In rejecting the defendant's claim,

Nicholas noted that each division of this court has approved, at least once, the propriety of the “duty to convict” instruction.

Nicholas at 300.

The Appellant’s constitutional right was not violated by the unchallenged “to convict” instructions in this case. The arguments offered by the Appellant have been *repeatedly* rejected in the strongest terms, and they are legally unsound.

D. CONCLUSION

The trial court did not abuse its discretion where it admitted a portion of the indented writing that was evidence of the defendant’s flight and guilty conscience. The court carefully weighed the evidentiary issues in determining which portions of the writing were admissible in order to limit prejudice to the defendant.

The trial court did not err by imposing an exceptional sentence on count 3 where the jury found the statutory aggravating factor of sexual motivation, that gave the court authority to impose the sentence independent of RCW 9.94A.533(8). The record supports the basis for the court’s imposition of the exceptional sentence.

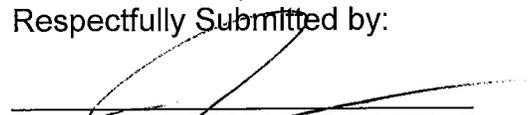
The trial court did not err in giving “to convict” instructions that used language proposed by the defendant and that were not

objected to by the defendant. The argument raised on appeal has been rejected repeatedly. There is no basis to consider the challenge to the "to convict" instructions in this case.

The defendant's convictions and sentence should be affirmed.

Dated this 9 day of May 2016

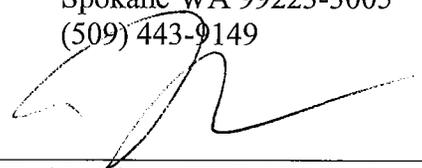
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PROOF OF SERVICE

I, Karl F. Sloan, do hereby certify under penalty of perjury that on May 9, 2016, I provided email service, a true and correct copy of **Amended Brief of Respondent**, to:

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