

NO. 73155-1

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SUPREME COURT
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SUPREME COURT OF THE
STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

ROBERT LEE YATES, JR., APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John A. McCarthy

No. 00-1-03253-8

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

By
DONNA MASUMOTO
Deputy Prosecuting Attorney
WSB #19700

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to show that the trial court erred in rejecting his arguments that due process and the principles of equitable estoppel should bar the Pierce County Prosecutor's office from obtaining the death penalty in this case?
2. Did the trial court act within its discretion in granting the State's challenges for cause against three potential jurors?
3. Can the defendant establish prejudice regarding the trial court's denial of his challenges for cause against four potential jurors when none of the jurors sat on this case because he had removed each with peremptory challenges?
4. Did the trial court act within its discretion in structuring voir dire to not allow a direct inquiry into all potential jurors' specific religious affiliation, but to allow other questions on the juror's religious beliefs when these beliefs might have impacted the juror's ability to be fair and impartial with regard to the death penalty?
5. Did the trial court properly instruct the jury as to the meaning of common scheme or plan in RCW 10.95.020(10) when its definition was consistent with this court's interpretation of that aggravating circumstance?

6. Is the evidence sufficient to support the jury's finding on the three aggravating circumstances?
7. Did the Second Amended Information allege all of the essential elements of the offense?
8. Did the trial court properly instruct the jury when it allowed the jury to consider the lesser offense of first degree premeditated murder even though it did not specifically label this offense in its instructions as a "lesser included offense"?
9. Did the trial court act within its discretion in admitting the expert testimony of Mark Safarik regarding crime scene analysis when he qualified as an expert and his testimony was helpful to the jury?
10. Did the trial court act within its discretion in admitting the expert testimony of Lynn Everson regarding the prostitution subculture when she qualified as an expert and her testimony was helpful to the jury?
11. Did the trial court act within its discretion in denying the defendant's motion to fund a defense expert on prostitution when the defendant failed to meet his burden of showing the services were necessary and not merely duplicative of the testimony of other witnesses?
12. Did the trial court act within its discretion in admitting photographic evidence?

13. Did the trial court act within its discretion in allowing use of a summary chart when the chart provided an accurate summary of the evidence, the jury was instructed that the chart itself was not evidence, and the chart did not go to the jury room during deliberations?

14. Has defendant failed to meet his burden of showing that the prosecutor engaged in improper conduct, as well as that he suffered resulting prejudice, in either the guilt or penalty phases of his trial?

15. Assuming that the SRA's procedural rules are applicable to a capital sentencing, has defendant failed to show any violation of those rules in that, under RCW 9.94A.589, the court had the discretion to run defendant's Pierce County sentence concurrently with the sentence imposed in the Spokane County case?

16. Has defendant failed to meet his burden in showing the unconstitutionality of RCW 10.95 et seq.?

17. After considering the mandatory review considerations set forth in RCW 10.95.130, should this court affirm the death sentence imposed by the jury when: 1) there was sufficient evidence to support its conclusion that defendant did not merit leniency; 2) his death sentence is not excessive or disproportionate compared to similar cases; 3) it was not brought about by passion or prejudice; and 4) defendant is not mentally retarded?

B. STATEMENT OF THE CASE.

1. Procedure

On July 17, 2000, the Pierce County Prosecutor's Office filed an information charging defendant with two counts of murder in the first degree with aggravating circumstances (aggravated murder). CP 1-5. The information was amended twice; the matter proceeded to trial on the following charges. CP 626-627,655-656, 1003-1004. Count I charged defendant with the premeditated murder of Melinda L. Mercer occurring on or about December 6-7, 1997. CP 1003. Count II charged defendant with the premeditated murder of Connie L. Ellis on or about September 11-19, 1998. CP 1004. On both counts the aggravating circumstances alleged were that "the murder was committed in the course of, in furtherance of, or in the immediate flight from the crime of robbery in the first or second degree" and /or "defendant committed the murder to conceal the commission of a crime" and/or "the defendant killed more than one victim, and the murders were part of a common scheme or plan during the May 1996 through October 1998." CP 1003-1004. The State alleged a firearm enhancement on each count, as well. Id. On appeal, defendant challenges the sufficiency of the information. Contemporaneous with the filing of the information, the prosecutor also filed a notice to defendant of consideration of special sentencing

procedure which invited the defendant to submit mitigation material to the prosecuting attorney. CP 6.

The State obtained an order of transfer of prisoner so that defendant would be brought to Pierce County from the Spokane County jail. CP 10-11, 13-14. Two attorneys filed a notice of appearance as defendant's counsel of record. CP 12. The case was pre-assigned to the Honorable John A. McCarthy. CP 16.

The court arraigned defendant on October 31, 2000; defendant entered a plea of "not guilty." RP 12-14. The court read the notice to defendant of consideration of special sentencing procedure. RP 15; CP 19. The court entered an order holding defendant without bail. CP 24-25. Additionally, the court entered an order extending the period for filing the notice to seek death penalty until January 15, 2001. CP 39.

The State served its notice of special sentencing proceeding on January 12, 2001. CP 87-90.

As can be expected in a capital case there were numerous pretrial motions, not all of which are mentioned below. Defendant filed a motion to equitably estop Pierce County Prosecutor's office from seeking the death penalty, CP 598-601, 701-712. The State filed a written response to this motion. CP 826-875. Because the parties expected John Ladenburg - the current Pierce County Executive and former Pierce County elected

prosecutor- to testify at the evidentiary hearing, the motion was heard by a visiting judge, the Honorable Gordon L. Godfrey. RP 609. The court denied the motion to equitably estop the Pierce County Prosecutor's office from seeking the death penalty. RP 781-788. The court entered findings and conclusions on this ruling. CP 2744-2748; RP 920-923. Defendant assigns error to this ruling on appeal.

Defendant filed a motion to change venue with supporting documentation regarding pretrial publicity. CP 594-595, 1037-1620. The State responded in writing as well. CP 1627-1636. After hearing some preliminary argument, the court determined that its decision on the motion should be deferred until the venire was questioned. RP 806-823. After voir dire, the court denied this motion. RP4050-4065.

The State filed a motion seeking admission of evidence under ER 404(b) of murders defendant committed in Spokane to show proof of common scheme or plan, identity, motive, and premeditation. CP 320-344. The court granted this motion and later entered findings and conclusions on this ruling. CP 1660, 3070-3074.

Defendant sought to suppress his statements, including non-custodial statements. CP 593, 743-759; see also, CP 945-957(State's response). The State opted not to admit defendant's custodial statements; the court found some of the other statements admissible, ruled one

statement inadmissible, and reserved rulings on the remainder. CP 1661-1662.

Defendant filed a motion to have RCW 10.95 declared unconstitutional, which the state opposed. CP 614-615, 721-737, 768-825. After hearing argument, the court denied this motion. RP 508-535; CP 1661. Defendant reasserts the unconstitutionality of RCW 10.95 on appeal.

Defendant moved to suppress evidence obtain pursuant to an alleged pretext stop. CP 630, 760-765. The State opposed this motion. CP 876-930. After hearing arguments, the court denied the motion to suppress but allowed the motion to be renewed if defendant wanted to provide additional briefing or evidentiary support. RP 537-551; CP 1661.

Defendant sought to have evidence of his gun collection, NRA membership, and fondness for hunting excluded from the trial. CP 2637-2639. The State opposed the motion on the grounds that some of this evidence was relevant to the issues before the jury. CP 2678-2680. Based upon the State's representations about the type of evidence it would seek to admit, the court denied the motion to exclude. RP 1016-1021; CP 3069. On appeal, defendant contends that the prosecutor committed misconduct by seeking to adduce this evidence.

At trial there was considerable debate over the meaning of the aggravating circumstance of common scheme or plan found in RCW 10.95.020(10). Both sides provided memorandum as to its meaning and suggested possible jury instructions. CP 1682(prosecution), 2723-2727 (defense), CP 2836-2837 (defendant's proposed alternative instruction). Defendant sought to have RCW 10.95.020(10) declared unconstitutional as being vague. CP 2645-2653. The State's opposed this motion. CP 2696-2699. The State's presented an offer of proof regarding the evidence it thought was admissible and relevant to prove this aggravator. CP 2809-2815. The court did not find the provision unconstitutional. RP 1041, 1073-1094; CP 3069. The court entered a tentative order regarding the instruction it would give on the common scheme or plan aggravator. CP 3330.

The State sought a pre-trial ruling as to which of its photographs of the victims' bodies- both crime scene and autopsy- would be admissible at trial. CP 2816-2821,2807-2808, 2886-28945(index of photos). Defendant objected to the admission of gruesome photographs. CP 2904-2911; see RP 1163-1170. After hearing from the medical examiner as to the relevance and necessity of the various photographs as well as to the argument of counsel, the court ruled on the admissibility of the various pieces of evidence. RP 1395-1518. The court entered an order delineating

its ruling. CP 3329-3331. The court's admission of some of these photographs is an issue on appeal.

The State also sought a ruling allowing expert opinion evidence on "linkage" evidence. CP 1690-1737, 2838-2839, see also CP 2914-3067 (State's reply). "Linkage" assessment involves analyzing a crime scene to determine if there are enough different and unique aspects to a behavior manifested at a crime scene to determine if the behavior at one crime scene is linked to another crime scene. RP 6846-6847. Defendant objected to the admission of such testimony, particularly to any testimony regarding post-mortem sex. CP 2852-2885, 3082-3121, 3130-3157, 3159-3160, 3175. After hearing argument, the court entered an order allowing the testimony, with some limitations. RP 1224-1317, 1357-1365; CP 3243-3245. The defense later filed another motion for the court to reconsider and exclude this testimony. CP 3933-3951. The State responded. CP 3952-3955. The expert testimony was adduced and defendant assigns error to this ruling on appeal.

The State sought a ruling from the court regarding the propriety of questioning members of the venire about their religious beliefs. CP 2798-2801, 3166-3174. The defense contended that it should be allowed to inquire. CP 2827-2832. After hearing argument, the court gave a ruling about the extent the attorneys could inquire regarding religious beliefs.

RP 1185-1201, 1788-1792. On appeal defendant has assigned error to the court's limitation of his questioning of venire.

The venire was given an information sheet from the court, a questionnaire asking for information that might be relevant to challenges for cause, and a questionnaire that dealt with hardship information. CP 3271-3303, 3304-3310. Several jurors were excused for hardship reasons. CP 3316. The State submitted a memorandum on what it considered to be the law regarding challenges for cause. CP 3262-3268. Defendant contested some of the court's rulings on challenges for cause and asked the court to reconsider. CP 3347-3358, 3359-3509. Defendant renewed his motion to remove Jurors No. 9, 29, 37, 76, and 120 for cause. RP 4051-4066, 4093-4135; CP 3549-3594. The court granted the challenge for cause on Juror No. 76 but denied the motion as to the rest. RP 4136-4145. On appeal, defendant raises claims that the court improperly granted some of the State's challenges for cause and that it improperly denied some of his challenges for cause.

The jury heard opening statements on August 12, 2002. RP 4234 The state rested its case-in-chief on September 11, 2002. At the close of the state's case-in-chief, the defendant moved to dismiss aggravating factors for insufficient evidence; the court denied the motion. RP 6998-7026, see also CP 4017-4027(State's memorandum). The State also

provided a memorandum on whether RCW 10.95.020(10) contained geographical limitations. CP 4059-4062. The defense later renewed its motion to dismiss the aggravators, which the court denied. RP 7406-7421. The defense rested its case on September 12, 2002. RP 7229. Several evidentiary issues from the guilt phase are raised on appeal.

Both the State and the defendant proposed instructions to the jury on guilt phase, CP 3956- 3988(prosecution); 4028-4039(defense), as well as supporting memorandum of authorities. CP 4063-4070 (prosecution), 4071-4080 (defense). There was considerable discussion over the propriety of the proposed instructions. RP 7242-7288,7307-7377, 7382-7396. The court gave twenty six instructions to the jury. CP 4085-4112. The defendant objected to the giving of four of them and the court's failure to give six of his proposed instructions. RP 7397-7404. On appeal, defendant raises several challenges to given instructions, particularly on the wording of the court's instruction on common scheme or plan and the failure to instruct on lesser included offenses.

After hearing the evidence and listening to the arguments of counsel, the jury found defendant guilty of two counts of aggravated murder. CP 4163, 4167. It found all three aggravators for both counts as well as that defendant was armed with a firearm when he committed each count. CP 4164-4165, 4168-4169, 4166,4170. Defendant asserts on

appeal that alleged misconduct by the prosecutor in the presentation of evidence and in argument requires reversal of these convictions.

Defendant also challenges the sufficiency of the evidence to support the jury's findings of the aggravating circumstances.

Both the State and defendant proposed jury instructions for the penalty phase. CP 4135-4142, 4156-4162 (defense). On appeal, there are no challenges to the propriety of the instructions the court gave in the penalty phase. CP 4440-4448.

After hearing the evidence presented in the penalty phase as well as closing arguments, the jury returned a verdict for a death sentence. CP 4481.

Defendant brought a motion for new trial based upon alleged juror misconduct, which was denied. RP 8328-8332, 835; CP 4482-4491.

Defendant also sought a new penalty phase on the basis of prosecutorial misconduct, which the court denied. RP 8332-8351; CP 4492-4502. On appeal, defendant assigns error to alleged prosecutorial misconduct in the penalty phase arguments.

At sentencing, defendant argued that the law required his death sentence to be served consecutively to his 408 year sentence on the Spokane case. RP 8352-8362; CP 4503-4512. The court rejected this argument and ordered the sentence in the Pierce County case to be served

concurrently with the Spokane County sentence. CP 4533-4554; RP 8362-8385. Defendant reasserts this argument on appeal.

The court entered an order staying entry of death warrant. CP 4533-4534. The court later entered an order of restitution in the amount of \$10,613.57. RP 8387-8397; CP 4569-4570.

Defendant filed a timely notice of appeal. CP 4526-4527.

2. Facts

a. The Pierce County murders of Melinda Mercer in 1997 and Connie Ellis in 1998.

In 1997, Melinda Mercer became a heroin addict and lost her job. RP 5321-22. Her addiction required her to use about a \$100 in heroin every day. RP 5323. She wanted to get help and was trying to get into a drug treatment program. RP 5323. But she had no means of supporting herself or her drug habit, and she turned to prostitution during the last week of November 1997. RP 5322, 5341.

In general, women who engage in prostitution do so because they see no other choice. RP 4423. Many live in the streets or in drug houses. RP 4423. Many begin working as prostitutes at a very young age when they leave or are forced out of their homes. RP 4423. Like Mercer, many of these women are drug addicts who prostitute themselves to obtain money for drugs. RP 4475. They are in a cycle of buying drugs, using the

drugs, and engaging in acts of prostitute to obtain more money for drugs.
RP 4475.

Mercer worked on Aurora Avenue in Seattle, an area of high prostitution. RP 5342. She would solicit by walking with the traffic and getting into cars. RP 5342. A "car date" is a common method used for the exchange of prostitution services. RP 4425. In areas of high prostitution, the John will drive around until he finds someone who meets his criteria, and he then will stop to make a pick up. RP 4425. The prostitute will look around, make sure the police are not nearby, and check to make sure the car has a passenger door handle in case a fast escape is later warranted. RP 4426. When the prostitute gets in to the car, they will discuss the act in question and make an agreement about the price. RP 4426. It is common for women working as prostitutes to get the money up front if at all possible. RP 4432. They do this because they do not have a lot of bargaining power. RP 4426. They need to get the money in the beginning so that they have it before they perform the sexual act. RP 4426. After getting the money, they hide it in their shoes, brassieres or underwear. RP 4433. Some will put it in their purses. RP 4433. They hide their money because they are frequently robbed. RP 4433.

During a "car date" with a female prostitute, the most commonly performed sexual activity is oral sex. RP 4433. Vaginal sex is less common but also performed. RP 4433. The performance of anal sex is the least common on a "car date" and close to non-existent. RP 4434.

Women working in prostitution do not want to engage in anal sex on a “car date” because it requires disrobing and turning their backs, which would make them vulnerable to harm. RP 4434.

Mercer was last seen alive on the night of December 6, 1997, in Seattle. RP 5324, 5341. A friend at the tavern saw Mercer was “dope sick” and needing heroin. RP 5324-25. Mercer left to go to Aurora Avenue to make some money, and she intended to come right back to the tavern to buy heroin. RP 5326, 5329. Mercer told her friend to call the police that if she did not return within an hour. RP 5329. At the time she left, Mercer was wearing a black tank top with a brassiere, a long floral skirt, a powder blue jacket, a black coat, and she had a purse and shoes. RP 5344-45. Mercer’s purse was big and made of fabric, and she used it to carry her makeup and needles for shooting up dope. RP 5327-28. Mercer never returned. RP 5330.

The following morning, Mercer’s nude corpse was found in a vacant lot in Tacoma that was used as a dump site for garbage. RP 5314, 5365, 5373, 5404. The area was secluded and nonresidential. RP 5365, 5443. Her body had been dumped in blackberry bushes. RP 5367, 5369. Some of her clothing had been thrown on top of her or in the surrounding

brush. RP 5372. These items included her lavender long-sleeved blouse,¹ her black coat, and her skirt. RP 5382. Some of her clothing was missing and not recovered, including her black tank top, brassiere, shoes, and socks. RP 5386. No purse, cash, or items of personal identification were found around the body. RP 5318; 5374-75, 5468.

Mercer's torso and legs had numerous linear scratches that appeared to be caused by the blackberry bushes. RP 5377. The scratches were in a straight line and very long. RP 5377. The scratches were likely caused by dragging the body into that area through the blackberry bushes. RP 5378. The soles of Mercer's bare feet were clean without evidence of injury, indicating that she did not walk to the scene through the blackberry thorns. RP 5385, 5478.

An autopsy was performed and revealed Mercer suffered three gunshot wounds to the back of the head on the left side. RP 5474. The entrance sites showed gun powder residue indicating that the killer shot Mercer while the gun was directly in contact with Mercer's scalp. RP 5498. Two of the bullets did not penetrate her brain. RP 5499, 5502. The third penetrated her brain but did not affect the areas that control consciousness and motor response. RP 5503. The gunshot wounds would

¹ A detective described this item as a "lavender long-sleeved blouse." RP 5382. This item appears to correspond with what the witness at the tavern described as the "powder blue brushed denim jacket" she saw Mercer wearing the night she disappeared. See RP 5344.

not necessarily have caused immediate death or unconsciousness. RP 5502. She could have remained alive for several minutes. RP 5504. A .25 caliber shell casing was found near the body. RP 5370.

During the autopsy, it was noted that Mercer's arms had needle puncture sites that indicated she was using intravenous drugs for days if not weeks prior to her death. RP 5483-84. Her toxicology report indicated both cocaine and heroin usage. RP 5484.

Mercer's blouse was heavily bloodstained on the left shoulder, collar, and front. RP 5470. It also had bloodstains on the upper back extending into the middle and lower back. RP 5471. These bloodstains indicate Mercer had been clothed and in an upright position when she was shot in the head. RP 5474-75. Purple underpants were recovered about 600 feet from Mercer's body near some clothing that did not appear related to the case. RP 5409, 5429-30. The underpants appeared too small to fit Mercer's body. RP 5435.

The killer had encased Mercer's head in plastic grocery bags sometime after shooting her, and her corpse was discovered with these bags still intact. RP 5372. Detective Margeson of the Tacoma Police Department was assigned to the case. RP 5362. During his 28-year career, Margeson had investigated approximately 140 to 150 homicides. RP 5372. Mercer's homicide investigation was the first in Margeson's career, and the first he had ever even heard of, involving a murderer who encased the victim's head in plastic bags. RP 5372.

At the time of the autopsy, the medical examiner untied the plastic bags and discovered four layers of bags. RP 5379. The bags covered her entire face, and the sides and back of her head. RP 5485. The four bags were tied together into a single knot. RP 5627. Portions of her hair were entangled in that knot. RP 5627. In addition, the two outermost bags had also been tied individually, as were the two innermost bags. RP 5379. All the knots were in the neck area. RP 5486. When the bags were removed from Mercer's head, the two outer bags had very little blood in them. RP 5496. The two innermost bags had blood pooling inside. RP 5497.

Both inner bags had a tear or an opening around Mercer's upper lip and the tip of her nose such that both nostrils were visible. RP 5539. The bag holes were consistent with Mercer having been alive when the bags were put over her head and using her teeth to create the holes. RP 5627. While she could have died from the gunshot wounds alone, being deprived of oxygen could have hastened her death. RP 5630.

Mercer's murder initially remained unsolved. In 1998, almost a year after the discovery of Mercer's body, the body of Connie Ellis was discovered in Pierce County. RP 5738-39. As in Mercer's case, the killer had also encased Ellis's head in plastic bags. RP 5908.

Like Mercer, Connie Ellis worked as a prostitute to support a heroin problem. RP 4471; 5765. Ellis had been in a methadone treatment program that required daily injections of methadone. RP 5764, 6014. Ellis worked as a prostitute to earn money for the methadone, and she

sometimes worked the corner right outside her methadone clinic. RP 5765, 6026.

After a relapse period, Ellis reentered the methadone treatment program on September 8, 1998. RP 5768, 6018. On September 17, 1998, she received a dose of methadone from her clinic and was not seen alive again. RP 6020. At the time of this last visit, a urinalysis revealed Ellis was again using heroin. RP 6027-28.

On October 13, 1998, a search and rescue dog in Pierce County discovered Ellis's body during an unrelated search. RP 5739, 5741. Her body was 10 feet down an embankment resting against two trees in a greenbelt where people discarded trash. RP 4379, 5750. The body was covered with foliage and was about 30 feet from the roadway. RP 4380, 5904. One leg protruded from around the tree against which she was resting. RP 4382. Her right leg was clothed in a stocking. RP 4382-83. Her body, which was badly decomposed, was clothed in a black and white checkered blouse, jeans, and white socks. RP 5752, 5753. No undergarments, purse, wallet, money, or any form of identification was found on or near the body. RP 5753-54; 5906-07. One tennis shoe was found some distance from the body. RP 5754. Due to her state of decomposition, it was estimated that Ellis had died one month earlier, or shortly after receiving her last methadone dose on September 17th. RP 5915.

The killer had used three plastic bags to encase Ellis's head. RP 5908. Ellis died of a single gunshot wound to the left side of her head. RP 5918-19. The hole in Ellis's skull was .25 inches in diameter, consistent with having been made by a .25 caliber bullet. RP 5930.

On the day Ellis's body was discovered in Pierce County, the Spokane Sheriff's Department learned of the case. RP 4853. A Spokane detective made a phone call to one of the Tacoma detectives involved in the case. RP 4855. The Spokane detective asked, "Will you just tell me one thing? Does she have plastic bags on her head?" RP 4855. Similarities were thereafter discovered between the homicides of Mercer and Ellis and a number of unsolved Spokane murders. RP 5418. Detectives from Tacoma and Spokane began meeting with each other to share information. RP 5417.

The unsolved Spokane murders involved 10 women who disappeared from the East Sprague Street corridor in Spokane, which was an area of high prostitution. RP 4424. The murders took place from 1996 to 1998. The chart below lists the victims' names, the date their bodies were discovered, and whether the victim's head had been encased in plastic bags:

	Name	Date Body Found	Plastic Bag
1)	Shannon Zielinsky	6-14-96	no (towel)
2)	Jennifer Joseph	8-26-97	no (towel)
3)	Heather Hernandez	8-26-97	no
4)	Darla Scott	1-05-97	two found in grave
5)	Shawn L. Johnson	12-18-97	two found on head
6)	Laurie Wason	12-8-97	three on head
7)	Sunny Oster	2-8-98	three on head
8)	Linda Maybin	4-1-98	two on head
	(Melinda Mercer	12-7-97	four on head)
9)	Melody Murphin	10-16-00 ²	three on head
10)	Michelin J. Darning	7-7-98	bag found near body
	(Connie Ellis	10-13-98	three on head)

Each of the Spokane victims worked as a prostitute. RP 6924.

Like Mercer and Ellis, each had a history of drug abuse and had been shot in the head with a .25 caliber handgun. RP 6924-25. The one exception was Jennifer Joseph, who had been shot with a .22 caliber weapon. RP 4779. All of them had been transported from the location where they had been killed to another location for disposal. RP 6925-26.

The bodies of the two earliest victims, Zielinski and Joseph, had been found with a towel on or near the corpse. RP 4551, 4751. The body of the fourth victim, Darla Scott, was found with two plastic bag in her

² Melody Murphin was last seen alive in 1998. Her body was not recovered until 2000, after Yates's arrest, and it was recovered from Yates's property where he had buried it next to his house. RP 6224-26, 6254.

grave site. RP 4876. Thereafter, the bodies of most of them had been found with plastic bags encasing their heads. RP 5037 (Johnson), 5093 (Wason), 5187 (Oster), 5225 (Maybin), 6518 (Murphin).

Robert Yates became a person of interest in the investigation. The Spokane murders began in 1996, the same year Yates was released from the Army and moved to Spokane. RP 5808. After leaving the Army, Yates obtained a job at Pantrol, which manufactured electrical control panels. RP 5808. He also became a member of the National Guard where he achieved the rank of Chief Warrant Officer IV. RP 5819, 5823. His duties brought him to the Tacoma area 20 to 30 times a year, primarily on weekends. RP 5819-20. Part of his duties included flying helicopters. RP 5820. A helicopter was generally available, as was carpooling, for transportation from Spokane to Fort Lewis near Tacoma. RP 5821. Yates preferred instead to drive his vehicle to the Tacoma area. RP 5822. He sometimes drove a black Ford van. RP 5823. Yates had installed in the back of his Ford van a homemade wooden platform bed covered with carpet. RP 5824, 5992.

In 1998, Yates was laid off from Pantrol. RP 5808. He obtained employment as a replacement worker during a strike at Kaiser Aluminum. RP 5808. Yates applied for a full-time civil service position as a National Guard instructor pilot. RP 5830-31. Money was an issue for Yates; Yates expressed to another officer anxieties or concerns about the timely receipt of his military pay. RP 5831. Every few months, he would make an

inquiry regarding when he would get his pay. RP 5833. Yates's wife also called about his military pay. RP 5833.

In July 1998, the Spokane police contacted possible witnesses in the area where Michelin Durning's body had been found, which was one block north of Pantrol. RP 5562. Yates was contacted. RP 5562. Yates gave the officer his name, date of birth, and address. RP 5563.

During the early morning hours of November 9, 1998, Yates was driving in the East Sprague Street area when he saw twenty-three-year-old Jennifer Robinson. RP 5001-04; 5011. At about 1:25 a.m., Yates drove past her in a Honda Civic, made a U-turn, and returned to contact her. RP 5011; 5011. Robinson got in his vehicle, and Yates told her he wanted oral sex. RP 5003-04. A police officer observed Yates pick her up, and pulled up behind them. RP 5003; 5011. Yates became very nervous and was worried he was going to get pulled over. RP 5004. Yates told Robinson his name was Robert and to tell the police that he knew Robinson's father and that he was giving her a ride home. RP 5005-06. Robinson did not want to go to jail, so she went along with that story. RP 5005. The officer stopped Yates's vehicle, and he pulled Robinson aside and asked her how she knew Yates. RP 5005; 5012. Robinson told the police that Yates was a friend of her father's, and that he was just giving her a ride home. RP 5006. Yates identified himself to the officer with his driver's license and told the same story. RP 5013-14. The officer allowed her to get back into Yates's car. RP 5006. Yates was "really nervous"

and “really scared” after the police let them go. RP 5007. Yates dropped her off at a gas station about three blocks away, and he was adamant about not going through with the sex act. RP 5007.

During the homicide investigations, the police had received two reports involving sightings of a white Corvette in relation to the disappearance of Jennifer Joseph and Heather Hernandez. RP 5678.

When Joseph’s corpse was found, it was discovered that a white mother of pearl button was missing from her blouse cuff. RP 6122-24. Yates became a person of interest to the police because of the Robinson incident, the interview at Patrol, and because he had once owned a white Corvette. RP 5801.

On September 15, 1999, a detective interviewed Yates in Spokane. RP 5800-01. Yates claimed to have never patronized any prostitutes in the Spokane area. RP 5803. He maintained his falsehood that he picked up Jennifer Robinson because her father had requested that he give her a ride. RP 5805. He denied owning any handguns. RP 5807. He admitted he had owned a white Corvette, but stated he had sold it to a friend named Rita Jones. RP 5807, 5809.

In January 2000, detectives located Rita Jones and the Corvette. RP 5972. In April 2000, the police seized and searched the Corvette. RP 6118. Under the front passenger seat, they found the white mother of pearl button missing from Jennifer Joseph’s blouse cuff. RP 6122-24. Dried blood was found on the passenger side seat buckle and in the fire

extinguisher bracket mounted behind the passenger seat. RP 6136-39; 6144. DNA analysis linked Jennifer Joseph to the blood in Yates's Corvette. RP 6765.

Sometime in early-2000, the subject of the Spokane serial killer came up in a conversation between Yates and other members of the National Guard. RP 5862. Yates commented, "They will never catch him. They will never catch the guy." RP 5862. Someone asked, "Why is that?" and Yates replied, "Well, there is just no evidence. They don't have anything on the guy." RP 5862. Someone said, "The trouble with those people is they keep doing it until they get caught." RP 5863. Yates had a startled reaction and said, "Well, there is just no evidence." RP 5863. Yates then left the room very quickly. RP 5863.

On April 18, 2000, the police arrested Yates. RP 6178.

On May 8, 2000, officers searched the Ford van. RP 5986. The carpeting tested positive for blood. RP 5995. The carpet padding and wood underneath also tested positive for blood. RP 5996. A bullet hole was discovered toward the bottom of the driver's side rear door. RP 6001. A second bullet hole was found on the driver's side paneling. RP 6003. The officers removed brown carpeting in the midsection of the van and found blue carpeting underneath. RP 6003. A square section of that carpeting had been cut out. RP 6003. A blood test on the edges of the cutout had a positive reaction for blood. RP 6004. The support beam for the bed also had three streaks that tested positive for blood. RP 6037. A

third bullet hole was found in the ceiling panel on the passenger side area of the sliding door. RP 6040. A spent bullet was also found. RP 6041.

A search warrant was also obtained of Yates's residence. The police recovered from Yates's home billeting documents and various receipts for gasoline purchases indicating Yates made trips from Spokane to the Tacoma area during the time periods in which both Mercer and Ellis were last seen alive. RP 6337-44. Specifically, Mercer was last seen alive on December 6, 1997. RP 5324. Receipts showed that Yates bought gas in Spokane on December 5, 1997. Billeting document revealed he stayed at Fort Lewis, which is near Tacoma, on December 5, 1997 through December 7, 1997. RP 6349. A gas receipt shows Yates bought gas at a Chevron station at 10515 Pacific Highway in Tacoma on December 6th. RP 6340.

Ellis was last seen alive at her methadone clinic on September 17, 1998. RP 6020. Gas receipts also showed that on September 17, 1998, Yates bought gas first in Spokane, then at Moses Lake, and finally in the Tacoma area. RP 6352. The police found a billeting receipt for September 18th to the 19th. RP 6352. On September 19, 1988, he bought gas at the same Chevron station in Tacoma where he had gone on December 6th. RP 6352. This Chevron station was about a quarter mile from where Ellis's body was found and about two miles from where Mercer's body was found. RP 6351.

A search warrant was obtained allowing for blood and hair samples to be extracted from Yates. RP 6181-91. Hairs were recovered from Melina Mercer's body and clothing during the autopsy, and several were found not consistent with Mercer's hair. RP 6327. Specifically, a hair that was taken from Mercer's skirt was found consistent with Yates's hair. RP 6330. This hair was sent to a DNA laboratory for analysis. RP 6331. The hair matched Yates's DNA profile. RP 6511-12. Yates's DNA profile would not be expected to be observed in at least 99.94 percent of North Americans. RP 6512.

In Yates's laundry room, the police found his canvas coat that had a stain on its left front pocket area. RP 6290-91, 6300, 6333; Plaintiff's Exhibit 622. This pocket area was tested for blood and yielded a positive result. RP 6333. DNA analysis linked Mercer to the blood found on Yates's coat. RP 6756.

Sperm had been detected on Mercer's anal, oral, and vagina swabs. RP 6456-57. DNA analysis linked this sperm to Yates. RP 6754, 6780-81. In addition, DNA analysis linked blood found in the Ford van's carpeting to Connie Ellis. RP 6639, 6767-68. Yates evidently had murdered Ellis in the back of his Ford van.

Records found in Yates's home indicated he had owned at least three guns, none of which were recovered in the search. A log of firearms he had owned listed a .22 caliber automatic pistol with a six-inch barrel. RP 6283. Joseph was killed with a .22 caliber. RP 6429. Records also

indicated he owned two Raven Arms handguns sequentially. A cancelled personal check indicated he bought one Raven .25 caliber automatic handgun on April 30, 1998, for \$60.51 from a store in Spokane. RP 6151-53, 6344. The police also recovered a photograph from a photo album that showed ownership of a second Raven .25 caliber semiautomatic handgun. RP 6347.

Analysis of the bullets recovered from the victims indicated Yates used three different guns on his victims. RP 6430. A .22 caliber was used with Joseph. RP 6429. A forensic examination revealed that the .25 caliber bullets that killed Mercer were fired from the same gun that killed Spokane victims Johnson, Oster, Wason, and Maybin. RP 6414. The forensic examination also established that the .25 caliber bullet that killed Ellis was fired from the same gun that was wounded Smith and killed Murphin, and that this was a *different* .25 caliber gun than the one used on Mercer and the others. RP 6427, 6430.

The day after Yates's arrest, Christine Smith, a former prostitute, telephoned the police to report that she had seen Yates's picture in the news media and recognized Yates as a John who had tried to murder her in 1998 in Spokane. RP 5678-79. Christine Smith testified at Yates's trial. Smith's testimony indicated she began working as a prostitute at age 18 to support her drug habit. RP 4489. On August 1, 1998, Smith wanted to get high, but had no money to buy drugs. RP 4494. She went out on the streets at 12:30 a.m. RP 4494. She wore a jacket with a Mickey Mouse

logo and carried a purse. RP 4495. Yates saw her as he drove by in his black 1979 Ford van. RP 4496. He drove around the block several times, and Smith would wave at him and make eye contact. RP 4496. After several minutes, he drove by and pointed to where he wanted her to go. RP 4497. Yates stopped the van, and Smith went up to it. RP 4497. She asked him if he was looking for a “date,” he said “yes,” and she got into the van. RP 4497. She asked him what he wanted, and he said oral sex. RP 4500. She told him her price was \$40.

She asked Yates, “[Y]ou are not that psycho killer that’s running around killing women, are you?” RP 4498. Yates gave what Smith thought was an unusual answer when he responded, “Boy, there sure are a lot of cops out here tonight, aren’t there.” RP 4498.

Smith insisted on going to a location where she was comfortable, despite Yates’s desire to go elsewhere. RP 4499. When they got to that location, Smith asked again if he was the serial killer. She told him she had four kids and did not want to die. RP 4502. He told her, “I have five kids. I wouldn’t do anything like that. I understand.” RP 4503. Yates then gave Smith \$40. RP 4504. She put the money in her pants pocket. RP 4504.

Smith attempted to perform oral sex on Yates, but he did not become erect. RP 4504-05. They moved to the back of the van and sat on the edge of the bed. RP 4505. Smith tried again, but Yates did not become erect. RP 4505. After about four minutes, Smith asked, “Well, is

there anything I can do different to help?" RP 4505. Yates suggested they go onto bed itself. RP 4505.

They sat side by side on the bed, and Yates took his pants off. She reached over to him and looked at his face. RP 4506. The last thing she heard was, "Okay," and then she felt a very hard blow to her head behind her left ear. RP 4506. She did not hear a gun discharge, but thought that she was just hit very hard. RP 4507. She never saw a gun or anything in Yates's hands. RP 4507.

She felt for a couple of minutes that she was going to black out. RP 4506. She thought of the prospect of leaving her daughter all alone in order to make herself not black out. RP 4506. She could see Yates out of her peripheral vision. RP 4506. He was just lying back on his arm watching what was happening. RP 4506-07.

And then he said, "Well, just give me all your money." RP 4507. He sounded befuddled or confused as if he did not know what else to do or say. RP 4507. At that point, she realized that Yates was trying to kill her. RP 4507. Her head felt wobbly and she replied, "Well, I can't get it. It's in my pocket. You'll have to get it." RP 4508. He said, "No. No, you get it." RP 4508. Smith got off the edge of the bed to get into her pocket. RP 4508. Yates kept staring at her. RP 4508. He said, "What was your name again?" RP 4508. She told him, "Christine," and he replied, "Well, Christine--[w]ell, what are we doing here?" RP 4508-09. She felt he was trying to discern her level of consciousness. RP 4509. At that point, she

was standing to get the money out of her pocket, and something in her made her get up and run for the door. RP 4509. She realized that there was no door handle to van's side door. RP 4510. She got out from the front passenger door. RP 4510. Yates did not have his pants on, and he did not pursue her. RP 4510. She left her purse and coat behind and ran away. RP 4510.

She heard Yates's van start up before she ran into a building. RP 4511. She found a security guard inside the building and was taken to a hospital. RP 4516. After this incident, she successfully underwent drug treatment and stopped working as a prostitute. RP 4520. Metal bullet fragments were removed from her skull. RP 4523. When the police searched Yates's home in 2000, the police found in his closet the Mickey Mouse jacket she had worn that night. RP 5684-86, 6289, 6298. DNA analysis linked a bullet fragment extracted from the roof of Yates's Ford van to Smith. RP 6772.

At some point after his arrest, Yates drew a map for police depicting where a body could be recovered on his own property. RP 6224. The police recovered Melody Murphin's body buried along the east side of Yates's house. RP 6226, 6241. The police excavated about two-and-a-half feet to reach the body. RP 6250. Yates had shot Murphin two times in the left side of her head near the back. RP 6522. He then encased her head in three plastic bags. RP 6234, 6258, 6517-18.

In Spokane County Superior Court, Yates was charged with ten counts of first degree murder in the deaths of Zielinski, Joseph, Hernandez, Scott, Johnson, Wason, Oster, Maybin, Dering, and Murphin. RP 6244. He was also charged with one count of attempted first degree murder with regard to Christine Smith. RP 6244. Yates entered guilty pleas to all of these charges. RP 5305.

b. Evidence from Spokane County Murders

Evidence from each of the Spokane County murders was admitted at Yates's trial in Pierce County as evidence of a common scheme or plan. The evidence is summarized as follows.

i. **Shannon Zielinski**

On June 14, 1996, Shannon Zielinski's body was found in a rural area about 17 miles from Spokane's East Sprague corridor. RP 4432, 4541-44. Zielinski had a drug problem and supported herself by working as a prostitute. RP 4430.

Zielinski's body was discovered roughly 20 feet off the roadway underneath two trees, and it was not visible from the road. RP 4550-53. Her body was substantially decomposed. RP 4549-50. A towel covered her torso. RP 4551, 4554. She was wearing a short, one-piece dress that was pulled up above her breast area and wadded under her armpits. RP 4558-59. Found nearby were pantyhose, two white socks, and a boot. RP 4559. No other clothing was found; nor was any money, purse or other

sort of carrying bag found. RP 4559. No underpants or brassiere was found. RP 4567.

Zielinski died as a result of two .25 caliber gunshot wounds to the left side of her head. RP 4635-37. The body was too decomposed for obtaining swabs from the mouth, vagina, and anus.

During the search of another van Yates had owned, a 1988 Chevrolet van, the police lifted the brown carpet in the van's rear portion and discovered a large blood stain that went through the carpet pad and into the plywood. RP 5933. DNA analysis linked this blood stain to Zielinski. RP 6776-77. Yates had evidently murdered Zielinski in the back of his Chevrolet van.

ii. Jennifer Joseph

On August 26, 1997, Jennifer Joseph's body was found by an alfalfa field in rural Spokane County about twelve miles from the Sprague corridor. RP 4593; 4595; 4736-38; 4741. The last time Joseph was seen alive was late one night on East Sprague where she was working as a prostitute. RP 4691. Joseph had made \$400 that night and was going to do one more "date" before going home. RP 4693. Joseph was wearing a blouse, slacks and black shoes. RP 4688. She carried her money in her shoe. RP 4690. She also carried a clear plastic pouch that contained condoms, cigarettes, and a canister of mace. RP 4690.

Joseph's body was found about 100 feet from the road concealed beneath a pile of brush. RP 4742, 4755. Vehicle track marks had been left on the road going to the alfalfa field. RP 4594, 4742. Joseph's body was severely decomposed. RP 4743-44. She was positioned on her back with both arms raised above the shoulders. RP 4743. Her body was nude except for a blouse that encased her arms and a brassiere that had been pushed over and behind her head. RP 4751, 4765. Her blouse was missing a mother of pearl button from the left cuff. RP 4765-66; 4770. The police found near the body a pair of black pants, a towel, a used condom, a pair of shoes, and a pair of underwear. RP 4751, 4753 4758, 4784.

Joseph had been shot in the back of the head, the left shoulder, and the chest. RP 4929, 4933, 4936. Gunshot residue on the shoulder indicated Yates had shot her at close range. RP 4935. During the autopsy, a .22 caliber bullet was removed from her skull. RP 4779. No purse, money, or canister of mace was found. RP 4785. The body was too decomposed to obtain swabs from the mouth, vagina, and anus. RP 4773.

DNA analysis linked blood in Yates's Corvette to Joseph. RP 6764-66. Her mother of pearl button was also recovered from Yates's Corvette. RP 6122-24.

iii. Heather Hernandez

On August 26, 1997, the same day police discovered Jennifer Joseph's body, Heather Hernandez's body was also discovered about 7 blocks north of the East Sprague corridor. RP 4791-92.

Hernandez was last seen working as a prostitute on an East Sprague street corner at around 7 p.m. RP 4682-85. She was wearing blue shorts, a white stretch t-shirt, and wedge white platform shoes. RP 4683. Underneath, she wore underpants and a brassiere. RP 4683-84. She also carried a black purse in which she had condoms and cigarettes. RP 4684.

Hernandez's decomposed body was found on a bushy strip of undeveloped property near recycling bins. RP 4794, 4796; 4799. Her body was nude except for a shirt that had been pulled up above the chest area. RP 4799. A brassiere was found next to the body, and its main strap and two shoulder straps were torn off. RP 4802-03, 6325.

Yates had shot her twice in the back of the head. RP 4812, 4814, 4946. No purse, cash, other clothing or shoes were present near the body. RP 4819-20.

iv. Darla Scott

On November 5, 1997, Darla Scott's body was found in a rural wooded area south of Spokane. RP 4858; 4890. Scott had a drug problem and had supported herself primarily through prostitution. RP 4452. She

was lying on her left side with her knees folded underneath her in a very shallow grave. RP 4860-61. The left portion of her body was unearched and had been eaten away by animals. RP 4861. A Safeway and an Eagle Hardware plastic bag were found under her hip area. RP 4876. A third bag was also found in the dirt near her body. RP 4899. The Eagle Hardware plastic bag appeared to contain blood. RP 4883.

Scott's body was nude except for the remains of a Mickey Mouse shirt on the upper part of her body. RP 4897, 4901. No purse, money, or other clothing was found in the area. RP 4902. Yates shot her twice in the left side of her head just above her ear with a .25 caliber gun. RP 4879, 4955, 4964. Gunshot residue on her scalp indicated the gun was within a few inches of her head when at least one of the shots was fired. RP 4957-57. DNA analysis linked sperm found on Scott's vaginal and anal swab to Yates. RP 6612.

v. Shawn Johnson

On December 18, 1997, Shawn Johnson's body was discovered about 10 miles from the East Sprague corridor in Spokane near a sewage treatment plant facility. RP 5017, 5026. Johnson worked as a prostitute in the East Sprague corridor of Spokane. RP 4454; 4981. She was a heroin addict and cocaine user. RP 4454; 4981-82. In the last months of her life, she used about a quarter gram of heroin on a daily basis. RP 4981. She lived about five miles from the East Sprague Street corridor, and she

owned a car. RP 4982. She was last seen leaving her residence to go make some money in the corridor. RP 4983. Her roommate told her not to go out because of the unsolved prostitute murders. RP 4983. Johnson still left, but planned on calling her roommate by 10:00 p.m. RP 4984. Johnson never returned. RP 4985.

Johnson's body was found almost exactly a mile from where Darla Scott's body was found. RP 5025. Yates had deposited her body in bushes by a tree at the bottom of an embankment about 20 feet away from the road. RP 5018, 5036. The road was gated, but a four-wheel-drive vehicle could be driven around the barricade. RP 5019, 5028.

Johnson's body was clothed in a black sweater, blue jeans, and black boots, but no underwear or brassiere was found on her body. RP 5037, 5059. No cash or personal effects such as a purse or car keys were found nearby. RP 5023, 5029. Johnson's car was later recovered in the 4100 block of East Sprague, the eastern boundary of the high prostitution area. RP 5029.

Johnson had two plastic bags over her head tied under the chin with several overhand knots. RP 5037, 5041, 5042. The outer bag had the image of a yellow smiley face. RP 5040. Liquid blood was contained inside the bags. RP 5042. Yates had shot her twice behind her ear with a .25 caliber gun. RP 5047, 5261-64. Both wounds showed gunshot residue and torn tissue indicating Yates had placed the weapon's muzzle in contact with Johnson's skin at the time the shot was fired. RP 5263, 5264.

A toxicology test revealed the presence of cocaine in her system. RP 5268. Her right arm had needle tracks indicating drug use. RP 5268. DNA analysis linked sperm found on Johnson's vaginal and anal swabs to Yates. RP 6611, 6750.

vi. Laurie Wason

On December 26, 1997, Laurie Wason's body was discovered in a wooded area near 14th and Carnahan in Spokane. RP 5081. Wason worked as a prostitute. RP 4457. She had relapsed into using heroin and was ashamed of this. RP 4457-58. Wason was last seen alive on October 30, 1997. RP 5218.

At the time Wason's body was found, it was clad in blue jeans, a sweater, and a red upper garment. RP 5088-98. The jeans had a rip in the right buttock area. RP 5091. The body had been covered with leaves and branches. RP 5088-89. The leaves had been brought from outside the area. RP 5089-90. One of Wason's feet was missing. RP 5084. The other foot had no shoe or sock on it. RP 5098. The body appeared to have been discovered by animals. RP 5084. No purse, backpack, money, or items of personal identification were found near the body. RP 5085, 5129.

She was dressed in a red jacket that was pushed up about six to eight inches above the waist. RP 5101. The shoulder straps of her brassiere were in place, but the cups were over the top of her breasts. RP 5101. A fabric imprint that matched the fabric of her brassiere was visible

on her skin below her breast. RP 5102. Such an imprint cannot occur too long after death. RP 5103. The imprint indicated the brassiere had been positioned normally on her breasts at the time of death, but had been removed from her breasts post mortem. RP 5102, 5281, 5300.

Yates had encased Wason's head in three plastic bags. RP 5093, 5099. The outer bag was a Shopko bag with some type of paper towel or napkin inside. RP 5099. The two inner bags were Albertson's bags. RP 5099. Yates had shot Wason twice from behind and above her left ear with a .25 caliber handgun. RP 5128-29, 5173-74, 5269. Both wounds had gunshot residue and torn tissue indicating Yates had placed the muzzle in contact with her skin when he fired. RP 5270.

Maggots were found in her head wounds indicating that flies laid eggs there before the plastic bags were placed on her head. RP 5273. Adult egg-laying flies are active only during daylight indicating the grocery bags had not been placed on her head until daylight. RP 5274. A toxicology report on her blood indicated that Wason had both heroin and cocaine in her system at the time of her death. RP 5281. DNA analysis linked sperm found on Wason's oral and anal swabs to Yates. RP 6606, 6611, 6753, 6761.

vii. Sunny Oster

On February 8, 1998, Sunny Oster's body was found in Cheney, which is 16 miles west of Spokane in a rural area close to Graham Road.

RP 5135; 5136. Oster had supported herself by working in prostitution. RP 5157-58. For 20 years starting in junior high, Oster had a drug problem, and her drug of choice was heroin. RP 5163.

In June 1997, Oster went to Spokane for drug treatment. RP 5163-64. In October 1997, she called her father and asked him to send her some money so she could come home. RP 5164, 5165. Her father asked her to stay in Spokane and complete the drug program. RP 5165. On October 2, 1997, Oster was discharged from the treatment center. RP 5207. By December 1997, she was missing. RP 5165.

Jerri Cummings was a school bus driver who traveled on Graham Road on a daily basis. RP 5136-37. She discovered Oster's body eight feet west of the roadway in a ditch that was about 12 inches deep. RP 5138, 5179. During that winter, she noticed on several occasions turn-around tire tracks close to where she would later discover Oster's body. RP 5138. She would notice these turn-around tracks between 6:15 a.m. and 6:30 a.m. RP 5138.

Oster's body was lying on the left side partially face down. RP 5180. Her right arm was at her side and folded underneath her midsection. Her left arm was extended backwards. RP 5180. She was wearing gray jeans, a brassiere, and a black sweater. RP 4192, 5180. The sweater was pulled up around her breasts exposing her midsection. RP 5180. She was not wearing underwear. RP 5193. The belt on her pants was buckled in front, but it was twisted completely around in the left hip region as if

reinserted in the pants in haste. RP 5194, 5197. She was barefoot, and her shoes were found nearby. RP 5180, 5184. No socks were nearby. RP 5180. No personal effects, such as a purse or backpack were found nearby. RP 5142, 5185.

Yates had shot Oster twice in the right side of her head with a .25 caliber gun. RP 5186, 5191, 5283. He encased her head in three plastic grocery bags. RP 5187. Blood was inside the bags. RP 5189. A toxicology report indicated Oster had both heroin and cocaine in her system at the time of death. RP 5286. DNA analysis linked sperm found on Oster's oral, vaginal, and anal swabs to Yates. RP 6611, 6751.

viii. Linda Maybin

On April 1, 1998, Linda Maybin's body was found about 20 miles from the East Sprague corridor in a rural area about 58 feet away from where Laurie Wason's body had been found several months earlier. RP 5094, 5175-76. Maybin worked as a prostitute. RP 4461, 5555. She had a drug problem, and her drug of choice was crack cocaine. RP 4460-61.

Maybin's body was found in a ditch near a roadway. RP 5170, 5213. Her body was covered with items consistent with yard waste such as leaves that were not from the immediate area, beauty bark, and dead flowers. RP 5170, 5214. During the search of the area, no cash or personal effects were found. RP 5220-21. Fragments of plastic bags were visible around her head area. RP 5225. The bags had been tied in knots.

RP 5229. She was wearing jeans, a red upper garment, and a jacket. RP 5227.

Yates shot Maybin on the left side of her head behind her left ear. RP 5290. The bullet was recovered from her skull. RP 5235, 5290. A paper towel was found in the front of her pants in the groin area. RP 5231. It had been folded into a small area, probably three inches square. RP 5231. Maybin was not wearing underwear. RP 5231. When her pants were removed, it was discovered that she had a condom protruding from her rectum with the open end of the condom to the outside. RP 5234. Swabs were taken of the condom's contents. RP 5237.

DNA analysis linked sperm found inside the condom to Yates. RP 6779. A hair found in the condom was also linked to Yates through DNA analysis. RP 6506.

ix. Michelyn Durning

On July 7, 1998, Michelyn Durning's body was discovered about two blocks north of Sprague Avenue. RP 5559-60, 5573. Durning was a substance abuser, and she supported herself by working as a prostitute. RP 5724-26. On July 4th, 1998, Durning told a friend she planned to go on "a date," or engage in prostitution activity, and then meet the friend at 4 p.m. RP 5725-28. She did not make that meeting and was not seen alive again. RP 5727.

Durning's body was hidden underneath a hot tub cover in a vacant lot. RP 5576-77. She was lying on her stomach. RP 5581. Her body was naked. RP 5584. No items of female clothing were found in the area. RP 5584. Durning was known to have carried a green backpack. RP 5724. No backpack, cash, purse, or item of personal identification was recovered. RP 5589. Unlike the other victims, Durning's head was not encased in plastic bags. A plastic bag, however, was found about 15 feet from the body. RP 5599.

Yates shot Durning on the right side of the head above her ear. RP 5592. A .25 caliber bullet shell casing was found caught in her matted hair. RP 5598. The bullet entered in the right temple area and exited from the left temple area. RP 5688. Maggots were observed in large concentrations in her head, in her vaginal canal and in her anal region. RP 5698. The concentration of maggots in the vaginal and anal areas was consistent with sexual activity. RP 5698. Sexual activity often results in moisture being liberated from the vaginal and anal areas out toward the surface of the body, which would then be an attraction for flies to lay their eggs. RP 5698. Toxicology tests revealed the presence of methamphetamine in Durning's body. RP 5699.

DNA analysis linked sperm found on Durning's vaginal swab to Yates. RP 6611, 6743.

x. Melody Murphin

The police discovered Melody Murphin's body buried by Yates's house. She had been shot in the head, and Yates had encased her head in plastic bags before burying her. RP 6518. Like the other victims, Murphin had a drug problem, and her drug of choice was heroin. RP 4463. She supported herself through prostitution. RP 4464. Murphin was last seen in the early part of May 1998. RP 6115.

Murphin's body was found lying on her back; her legs and knees were pulled right up to her chest, bound by a rope. RP 6254-55. No purse, backpack, cash, or personal identification was recovered during excavation of the body. RP 6240. Yates evidently had murdered Murphin in the back of his Ford van; DNA analysis linked a blood stain on the Ford van's bed frame to Murphin. RP 6770. Her body was decomposed and mostly skeletonized. RP 6518. The medical examiner estimated that she had been dead for months and potentially for years. RP 6519.

C. ARGUMENT.

1. NEITHER DUE PROCESS NOR EQUITABLE ESTOPPEL SHOULD PRECLUDE THE STATE FROM OBTAINING THE DEATH PENALTY IN THIS CASE.

Defendant brought a motion to preclude Pierce County from seeking the death penalty on the grounds of equitable estoppel. CP 598-601, 701-712. The court directed that there should be an evidentiary

hearing on the motion where the testimony would be adduced from the elected prosecutor from Spokane County, Steven Tucker, and from the former Pierce County elected prosecutor, John Ladenburg, among others. RP 627-788. A visiting judge, the Honorable Gordon Godfrey presided over this evidentiary hearing. RP 607, 609; CP 2744-2748³ (Findings of Fact and Conclusions of Law). The evidence at the hearing adduced the following:

Because a superior court in Washington has jurisdiction over crimes committed anywhere within the state, there is a protocol among the elected prosecutors of this state that before one county files charges regarding a crime that occurred solely in a different county, permission be obtained from the prosecutor of that other county. RP 634-635, 647-648, 709, 719. This protocol was developed so that the jurisdictional authority of one county's elected prosecutor is not infringed upon by another county's elected prosecutor. RP 719. Permission is given formally, in writing; the prosecutor of the county where the crime occurred appoints a prosecutor in the filing county as a special deputy.⁴ RP 647-648, 705-706.

Defendant was arrested on one count of murder in Spokane County in April, 2000. CP 2744. In May, defendant was charged with eight counts of aggravated murder, one count of attempted first degree murder

³ See appendix A.

⁴ See also RCW 36.27.040, Appendix B.

and one count of attempted first degree robbery. Id. These charges pertained to crimes that had occurred in Spokane County. CP 2744-2745. Ten to fourteen days prior to the filing of this information, a Spokane deputy prosecutor called defendant's lead counsel in Spokane, Richard Fasy, on the telephone and asked whether defendant would waive venue if the information alleged two homicides that had occurred in Pierce County. RP 673. Mr. Fasy would not agree to this proposal. RP 674. Mr. Fasy testified that the mere fact that he had been asked that question by the Spokane prosecutor led him to believe that the Spokane prosecutors had been given the authority to adjudicate the Pierce County cases, but he could not remember if the deputy prosecutor expressly stated that he had such authority. RP 675, 682. There is no evidence in the record that anyone from the Spokane prosecutor's office had spoken to the Pierce County prosecutor, John Ladenburg, to obtain his permission to adjudicate the Pierce County cases in Spokane prior to that call being made to Mr. Fasy. RP 632-635, 706-707.

According to Mr. Tucker, he received the authority to handle the Pierce County case from John Ladenburg while at the Washington Association of Prosecuting Attorneys (WAPA) summer conference in Chelan, around June 14, 2000. RP 632-634. At a meeting of all the elected prosecutors, there was a discussion regarding defendant's cases. Mr. Tucker testified that the consensus from this meeting was that the county with the most cases could handle all of them. RP 632-634. Mr.

Tucker testified that when he left that meeting he felt that he had Mr. Ladenburg's partial consent to handle the Pierce cases because Mr. Ladenburg "didn't say I couldn't handle them." RP 649-650. Mr. Ladenburg testified that he recalled a conversation occurring at the conference among the elected prosecutors regarding statewide jurisdiction and whether all of defendant's cases should be brought in one county. RP 707-709. Mr. Ladenburg testified that he never told Mr. Tucker that he could handle the Pierce County cases. RP 709-710. Mr. Ladenburg did hear Mr. Tucker discussing the possibility of making a deal with the defendant, but did not think that Mr. Tucker was seriously contemplating a plea resolution at that time. RP 708-710.

A few days after Chelan, based upon media reports, Mr. Ladenburg became concerned that Mr. Tucker was seriously considering plea bargaining with defendant. RP 710; CP 2745, FOF 4. Because he thought this action was ill-considered and premature, he called the WAPA office to arrange a conference call among several of the elected prosecutors to try to dissuade Mr. Tucker. RP 711, 735-736; CP 2745, FOF 4. Both Mr. Tucker and Mr. Ladenburg testified that a conference call among several experienced prosecutors occurred near the end of June, 2000,⁵ to discuss the plea negotiations occurring in the Spokane County cases. RP 637, 710-713, 719-720. Mr. Ladenburg testified that during

⁵ According to Mr. Tucker this call occurred on June 28, 2000. RP 637.

this conversation he told Mr. Tucker that he could not allow him [Tucker] to handle any Pierce County cases if he was going to plea bargain with the death penalty. RP 713, 736; CP 2745, FOF 4. Mr. Tucker also testified that during this phone conversation Mr. Ladenburg stated that he was adamantly opposed to any plea bargaining of the death penalty with regards to Mr. Yates and that he was opposed any settlement of the cases at that point in time. RP 655. Despite hearing Ladenburg's strong objections as to how he was handling the situation, Mr. Tucker testified that he still felt that he had the authority to include the Pierce County cases as part of his plea deal. RP 655, 663-664. Mr. Tucker acknowledged that he never represented, during the conference call, that he had the authority to handle the Pierce County cases. RP 654. Mr. Tucker also testified that he had not yet made a decision about a plea offer as of the date of this conference call. RP 638-639.

After this conference call, defendant, through his attorney Mr. Fasy, initiated plea negotiations with the Spokane County prosecutor hoping to reach a resolution where he would resolve, purportedly, all but one of the murders he committed in the State of Washington by pleading guilty in exchange for the death penalty not being sought. RP 651,676-677; CP 2745, FOF 2. The testimony indicates that the defense was bringing information to the prosecutor, in an effort to persuade him to negotiate a resolution. RP 651-652, 666-667, 675. Including in this information was a report from a polygrapher which the defense provided

as a show a good faith to confirm the other representations it had made. RP 694; CP 2746, FOF 5. Other than what may have been in this polygrapher's report, defendant did not provide any information regarding the Pierce County cases. RP 696; CP 2745-2746, FOF 5 and 6. The testimony of Mr. Fasy and Mr. Tucker are in accord that Mr. Tucker was representing that he had the authority to resolve cases from other counties, including Walla Walla, Skagit and Pierce. RP 640-642,646,675-676,681. However, according to Mr. Fasy, Tucker was making these representations in May and early June, prior to the WAPA conference. CP 709; RP 674-676.

Mr. Tucker testified that he did not make a decision to negotiate a plea agreement with defendant until July 1, 2000, and that negotiations lasted about ten days. RP 639, 641; CP 2746, FOF 6. The proposed plea agreement anticipated defendant waiving venue for the cases from other counties and required written authorization from the other counties for the cases to be filed in Spokane. RP 640-644, 658-659. Mr. Tucker knew that he needed a letter of cooperation from Pierce County before he could finalize the plea agreement. RP 658-659, 667-670.

On July 13, Mr. Tucker faxed a draft plea agreement and, on July 16, a request for a letter of cooperation to John Ladenburg. RP 641-642; CP 2746, FOF 6 and 7. On July 17, Mr. Tucker received communications from Mr. Ladenburg indicating that Pierce County was filing an information charging defendant with the two Pierce County cases and that

he had no authority to prosecute them in Spokane. RP 642, 644-645, 661; CP 2746, FOF 8. Because Mr. Ladenburg did not return the letter of cooperation, the Spokane plea offer was not finalized either with signatures on the agreement, or by entry of a plea. RP 670, 686. After Pierce County filed its own cases, defendant negotiated a new plea agreement with the Spokane prosecutor that did not include the Pierce County cases. RP 670; CP 2746-2747, FOF 9, 10 and 11. Mr. Fasy did not contact the Pierce County prosecutor in any attempt to revive the possibility of a global resolution. RP 686. Mr. Fasy did not raise any challenges to the plea bargaining process in Spokane County. RP 692-693, CP 2747, FOF 11 and 12.

After hearing the evidence the court denied the motion to preclude Pierce County from seeking the death penalty on the grounds of equitable estoppel. RP 781-788. The court entered findings of fact and conclusions of law regarding its determination. CP 2744-2748. Defendant reasserts this claim on appeal as well as alleging, for the first time, that due process principles should preclude the death penalty from being an available sentence in the Pierce County convictions.

- a. The challenged findings should be treated as verities on appeal.

An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities upon appeal. State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). As to challenged factual findings, the court reviews the record to see if there is substantial evidence to support the challenged facts; if there is, then those findings are also binding upon the appellate court. Id. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. Hill, at 644. Credibility determinations are for the trier of fact and are not subject to appellate review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The trial court's conclusions of law are reviewed de novo. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

In applying the above law to the case now on appeal, the court should treat the findings of fact as verities. Defendant has assigned error to four⁶ of the findings of fact pertaining to the motion for equitable estoppel. There is no argument in the brief, however, as to how these findings are unsupported by the evidence. In Henderson Homes, Inc v. City of Bothell, 124 Wn.2d 240, 877 P.2d 176 (1994), the Supreme Court was faced with an appellant who assigned error to the findings of fact but

⁶ Defendant challenges Findings No. 4, 5, 11, and 12. Br. of Appellant at pp 2-3.

did not argue how the findings were not supported by substantial evidence; made no cites to the record to support its assignments; and cited no authority. The court held that under these circumstances, the assignments of error to the findings were without legal consequence and that the findings must be taken as verities.

It is elementary that the lack of argument, lack of citation to the record, and lack of any authorities preclude consideration of those assignments. The findings are verities.

Henderson, 124 Wn.2d at 244; see also State v. Jacobson, 92 Wn. App. 958, 964 n.1, 965 P.2d 1140 (1998).

Because the defendant has failed to support his assignment of error to the trial court's findings of fact with argument, citations to the record, and citations to authority, this court should treat the assignments as being without legal consequence. The findings should be considered as verities upon appeal.

Because of the importance of two of the challenged findings, the State provides the following citations to the record to demonstrate that the findings are supported by substantial evidence. Finding of Fact No. 4 re: Motion for Equitable Estoppel states:

When it became apparent to the Pierce County Prosecutor's Office that Mr. Tucker was anticipating plea negotiations which included the possible elimination of the death penalty[,] a phone conference was arranged between [sic] Mr. Tucker, Mr. Ladenburg, and other death penalty familiar prosecutors including[,] but not limited to[,] King County prosecutor Norm Maleng and Yakima Prosecuting

Attorney Jeff Sullivan. Discussions included the problems posed with the prosecution, that DNA results were not back, philosophical positions of plea bargaining the death penalty at this stage of a proceeding, and other unstated issues. During that call, Mr. Ladenburg expressed his disapproval of Mr. Tucker's suggestion that he might plea bargain the death penalty in this case at this juncture. Mr. Ladenburg also told Mr. Tucker that if he was considering plea bargaining the death penalty[,] Mr. Ladenburg would not allow Mr. Tucker to handle the Pierce County cases. During this phone call[,] Mr. Ladenburg revoked any and all authority implied or otherwise that he had given to Mr. Tucker to prosecute or plea bargain the Pierce County murder cases that are the subject of this matter.

CP 2745. Both Mr. Tucker and Mr. Ladenburg testified regarding this conference call. RP 637, 710-713, 719-720. Mr. Tucker acknowledged in his testimony that during this phone conversation Mr. Ladenburg stated that he was adamantly opposed to any plea bargaining of the death penalty with regards to Mr. Yates and that he [Ladenburg] was opposed any settlement of the cases at that point in time. RP 655. Mr. Ladenburg testified that during this conversation that he told Mr. Tucker that he could not allow him [Tucker] to handle any Pierce County cases if he was going to plea bargain with the death penalty. RP 713, 736. Thus, the trial court's finding that, during this conference call, Mr. Ladenburg revoked any authority to resolve the Pierce County cases is supported by substantial evidence.

Defendant also challenged Finding of Fact No. 5 re: Motion for Equitable Estoppel, which states:

During the course of plea negotiations in Spokane during May and June, 2000, defendant through his attorney[,] Mr. Fasy[,] offered to plead guilty to the two Walla Walla murders and the Skagit County murder as well as to disclose the location of the remains of Melody Murfin of Spokane.

- a. Defendant never provided any written statements or other substantive evidence relevant to the Walla Walla and Skagit County murders. Mr. Tucker and police investigators who are familiar with those cases agree that those cases were weak in evidence and would not have been prosecutable.
- b. Defendant took a polygraph which was arranged by Mr. Fasy. The polygraph test evaluated defendant's truthfulness regarding the content of a handwritten statement that defendant wrote and provided to the polygrapher regarding his crimes. That handwritten statement has never been provided to police or prosecutors, who remain unaware of its content.

CP 2745-2746. Mr. Fasy testified that he approached Mr. Tucker and tried to interest him in a plea agreement by suggesting that defendant might be able to resolve cases from other counties as well as additional cases in Spokane, if he could avoid the death penalty. RP 676-677, 691. Mr. Tucker testified that based upon his review of the case reports on the Walla Walla and Skagit homicides, these cases were not prosecutable and, further, that he did not obtain any evidence from the defendant's counsel that would have made them prosecutable. RP 659-660. According to Tucker, it was only defendant's willingness to plead guilty to those crimes, as part of his plea agreement, that caused him to add them to the

amended information, which was filed just before the plea was entered in Spokane. RP 666-667. Fasy testified that he never gave defendant's handwritten statement -the information that was the basis for the polygrapher's questioning- to Tucker. RP 688. Tucker and Captain Walker each testified that he had never seen the handwritten statement, did not have input over the questions asked by the polygrapher and that he had not talked to defendant directly as part of any plea negotiations. RP 652-653, 657, 747-749. The polygraph examination had not been a requirement imposed by the plea agreement; it was something defendant's counsel chose to undertake to show to the Spokane prosecutor as confirmation of the assertions the defense were making in the negotiations. RP 656-657, 691, 694-695. Thus, this finding is also supported by substantial evidence.

- b. Under well established principles regarding the withdrawal of a plea offer, defendant has failed to show any due process violation.

Plea bargaining is an important component of our system of criminal justice. See Blackledge v. Allison, 431 U.S. 63, 71, 97 S. Ct. 1621, 1628, 52 L. Ed. 2d 136 (1977); Santobello v. New York, 404 U.S. 257, 260, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971); State v. Arko, 52 Wn. App. 130, 132, 758 P.2d 522 (1988). Plea bargaining saves the State and any witnesses the burdens of a trial and may result in a more timely and

favorable disposition of the charges pending against a defendant. See Blackledge, 431 U.S. at 71.

A criminal defendant does not have a constitutional right to plea bargain. State v. Wheeler, 95 Wn.2d 799, 804, 631 P.2d 376 (1981); Weatherford v. Bursey, 429 U.S. 545, 561, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977). A prosecutor has broad discretion over whether to enter into plea bargaining and may revoke an offer at any time before defendant enters his guilty plea or otherwise detrimentally relies on the agreement. Wheeler, 95 Wn.2d at 803-805; State v. Moen, 150 Wn.2d 221, 76 P.3d 721 (2003). When a plea bargain requires an amendment of the information, a trial court may refuse to allow the filing of the amended information if it feels that the reduction in charges is not in the interests of justice. State v. Haner, 95 Wn.2d 858, 862-864, 631 P.2d 381 (1981). It is clear that a trial judge has discretionary authority to refuse to accept a plea bargain under CrR 4.2(e). Haner, 95 Wn.2d at 861.

As stated in Wheeler, absent a guilty plea or some other form of detrimental reliance, the prosecution may revoke any plea proposal. Similarly, a defendant is free to change his mind about accepting the proposal until his plea is accepted by the court. In a situation where the prosecution revokes a proposal before a plea has been entered, a defendant must establish that he relied on the plea offer in a manner that makes a fair trial impossible in order to get specific performance of his plea. State v. Budge, 125 Wn. App. 341, 345, 104 P.3d 714 (2005); State v. Bogart, 57

Wn. App. 353, 357, 788 P.2d 14 (1990). It is the defendant's burden to establish detrimental reliance. Budge, 125 Wn. App. at 345; Bogart, 57 Wn. App. at 357. A claim of “psychological reliance” is insufficient to establish the necessary detrimental reliance on a plea offer. Wheeler, 95 Wn.2d at 805; Budge, 125 Wn. App. at 347.

Here the record is undisputed that defendant learned that the Pierce County Prosecutor’s Office would be filing its own cases and that these charges could not be included in any Spokane County resolution on July 17, 2000, prior to the entry of any plea. Therefore, defendant has the burden of establishing detrimental reliance that existed as of that date. As will be discussed below, he failed to meet that burden.

The trial court record shows that it was defendant’s goal to seek a global resolution of the murders he committed in Washington in a manner that would avoid his being subject to the possibility of the death penalty. The record indicates that defense counsel began to impart information to the Spokane County prosecutor in an effort to make this look like an attractive resolution. RP 676-677, 691; CP 2745, FOF 2 and 5. The record is devoid of any evidence that, prior to July 17, 2000, defendant’s counsel imparted information based upon a demand from the Spokane prosecutor that such information be provided. Thus, defendant seeks to claim detrimental reliance based on information that he choose to relay to the prosecution. Defendant had no guarantee that he would reach a plea agreement with the Spokane prosecutor at the time this information was

relayed. It is an unusual argument to assert that actions voluntarily undertaken when there was no guarantee of ultimately reaching accord on a plea offer, can be the basis for a claim of detrimental reliance. To adopt such an argument would give a criminal defendant the power to write his own plea offer by imparting unasked-for information to the prosecution, then claiming that he only relayed this information in detrimental reliance that an agreement would be reached. Adopting such a theory would completely rewrite the law regarding withdrawal of plea offers; this argument should be rejected by the court.

The record is further devoid of evidence that defense counsel imparted any information to the Spokane prosecutors which would have been admissible in court. The defense did not provide the defendant's handwritten statement outlining his Washington crimes. CP 2746, FOF 5(b). While the defense did provide the polygraph report, defense counsel acknowledged that this evidence would not be admissible in a trial. RP 695. Defense counsel also acknowledged the applicability of ER 410, which precludes the admissibility of statements made in the course of plea offers.⁷ RP 683. He could not provide an example, from his 23 years as a public defender, where proffer statements -made during plea negotiations -

⁷ ER 410 states, in the relevant part:
[E]vidence of ...an offer to plead guilty or nolo contendere to the crime charged or any other crime, or statements made in connection with, and relevant to, any foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

had been admitted as evidence at trial, although he did maintain that he thought it “possible to waive the attorney-client privilege.” RP 683. To show detrimental reliance, defendant must show that he relied on the plea offer in a manner that makes a fair trial impossible. As of July 17, 2000, the State had received no additional *admissible* evidence from the defendant. The trial court found that the Walla Walla and Skagit murders were not prosecutable and that defendant never provided any substantive evidence regarding those cases. CP 2746, FOF 5(a). Defendant did not disclose the location of Melody Murfin’s body until October, 2000. CP 2746, FOF 6(b). As defendant fails to show how a fair trial would be impossible as of July 17, 2000, he cannot show detrimental reliance.

The inability to show the impossibility of a fair trial is particularly true with regard to the Pierce County cases. Except for his indication that he was willing to resolve the Pierce County cases by pleading guilty to those murders, defendant fails to show that he imparted *any* information to the Spokane prosecutor regarding these crimes. Despite assertions that he imparted “substantial information” to the Spokane prosecutor, the record does not articulate the specifics of that information. RP 677, 691, 687-688. The record indicates only that defendant provided the polygraph report, and information that he was connected to the murders that occurred in Walla Walla, Skagit, and the Spokane murders involving Ms. Zielinski, Ms. Murphin, and Ms. Hernandez. RP 636-637, 696.

Finally, in both the trial court and on appeal, defendant seems to be arguing that the injury he suffered was: 1) that he now had to face the death penalty; or, 2) that the Pierce County Prosecutor's could use the crimes he pleaded guilty to as evidence in the Pierce County prosecution. RP 760-761, 768, 780; Brief of Appellant at 46. Undoubtedly, defendant was desirous of resolving all of his Washington murder cases without risk of facing the death penalty; this was the goal of his plea negotiations. However, defendant cannot show that he detrimentally relied on a plea offer simply by showing that he cannot accomplish his goal once the offer was withdrawn. Here, before any plea offer was finalized, defendant was informed that a resolution in Spokane would not involve the Pierce County cases. Defendant's dashed hopes for a global resolution of all his Washington murders resembles the claim of "psychological reliance" which was rejected in Wheeler as not meeting the legal standard for "detrimental reliance."

The State's use of the Spokane crimes as evidence of common scheme or plan under ER 404(b) was not dependant upon the defendant being convicted of those crimes. See, State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995). Defendant makes no showing that the only source for the evidence presented regarding the details of the Spokane crimes was from information he relayed to the Spokane prosecutor prior to July 17, 2000. Simply put, defendant cannot link the inability to complete a global resolution of all charges in Spokane to the availability of the evidence of

the Spokane crimes for use in the Pierce County trial. As for the evidence that defendant was *convicted* of these crimes, defendant opted to plead guilty in Spokane knowing he was facing charges in Pierce County. This evidence of “conviction” did not exist on July 17, 2000. Defendant decided to enter his guilty plea in Spokane because he thought it was in his own best interest to do so. RP 685. If defendant did not want Pierce County to have evidence of convictions then he should not have pleaded guilty in Spokane.

The trial court concluded that “defendant has failed to prove that he was injured in any way by representations made during the course of plea bargaining in Spokane County.” CP 2747, COL 2. The record supports this determination and defendant has failed to show any error. There has been no violation of due process under well established principles governing the withdrawal of a plea offer. Defendant is not entitled to specific performance of the July plea offer made by the Spokane prosecutor.

- c. The trial court properly found that the doctrine of equitable estoppel should not be applied in this case.

Equitable estoppel is based on the principle that “a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon.” Wilson v. Westinghouse Elec. Corp., 85

Wn.2d 78, 81, 530 P.2d 298 (1975). Courts generally do not favor applying equitable estoppel against the government. The rationale behind this rule was set forth by this court in Finch v. Matthews, 74 Wn.2d 161, 443 P.2d 833 (1968):

As a general rule the doctrine of estoppel will not be applied against the public, the United States government, or the state governments, where the application of that doctrine would encroach upon the sovereignty of the government and interfere with the proper discharge of governmental duties, and with the functioning of the government, or curtail the exercise of its police power; or where the application of the doctrine would frustrate the purpose of the laws of the United States or thwart its public policy; or where the officials on whose conduct or acts estoppel is sought to be predicated, acted wholly beyond their power and authority, were guilty of illegal or fraudulent acts, or of unauthorized admissions, conduct or statements; or where the public revenues are involved.
(Footnotes omitted.)

Finch v. Matthews, 74 Wn.2d at 169-170 (quoting, 1 A.L.R. 2d, 340-41 (1948)).

Defendant does not provide any authority to support his proposition that equitable estoppel can be applied against the government in a criminal case to bar a prosecution or to defeat the imposition of a sentence authorized by law. The State could find no Washington case where the doctrine had been so employed by the trial court or upheld by an appellate court. Federal case law exists indicating there is no authority to use the doctrine as a means of barring a criminal prosecution.

The case of United States v. Alexander, 736 F. Supp. 968 (D. Minn. 1990), involved an obscenity prosecution under the Racketeer Influenced and Corrupt Organizations ("RICO") Act; the defendants moved to dismiss the indictment on the grounds of selective prosecution alleging that the government had suddenly and unexpectedly reactivated its prosecution of obscenity. The court denied the defendants' motion, noting that no authority supported the equitable estoppel argument. Alexander, 736 F. Supp. at 993. Similarly, in United States v. Anderson, 637 F. Supp. 1106 (D. Conn. 1986), which concerned a criminal prosecution for failure to file federal income tax returns, the court "found no authority to support the defendant's contention that the doctrine of equitable estoppel may ever be invoked to defeat a criminal prosecution" and noted that "doctrines of equity, which typically can be invoked only by persons who have demonstrated their own 'clean hands,' seem unsuitable for general incorporation into the criminal law." Anderson, 637 F. Supp. at 1109. The most that can be said is that the United States Supreme Court has not foreclosed the possibility that it could be applied. See Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 60-61, 104 S. Ct. 2218, 2224, 81 L. Ed. 2d 42, 52-53 (1984).

Defendant assumes the availability of the doctrine in a criminal context. As will be discussed below, the application of the doctrine would interfere with the sovereignty of the Pierce County Prosecutor in deciding how justice should be administered in cases stemming from crimes

committed in Pierce County. This court should find that policy reasons forbid application of the doctrine as it would interfere with the proper functioning of government.

Washington courts have only employed the doctrine against the government in civil contexts. In those cases, a party must prove six elements before a court will apply equitable estoppel against the government. Kramarevcky v. Dep't of Soc. & Health Servs., 122 Wn.2d 738, 743, 863 P.2d 535 (1993). In order to establish equitable estoppel, a party must show that:

- (1) the government has made a statement or acted in a way that is inconsistent with a previous statement;
- (2) the party relied on the previous statement of the government;
- (3) the party's reliance on the government's previous statements was justifiable;
- (4) the party would be injured by allowing the government to repudiate its original statement;
- (5) estoppel should be applied to prevent a manifest injustice; and
- (6) government functions would not be impaired despite the application of estoppel.

Id. The party asserting equitable estoppel must prove each element of estoppel with clear, cogent and convincing evidence. In re Personal Restraint of Peterson, 99 Wn. App. 673, 680, 995 P.2d 83 (2000). Here,

defendant was unsuccessful in convincing the trial court that he had shown the necessary elements of equitable estoppel. CP 2744-2748.

As noted by some members of this court “the decision whether to prosecute or not, and the decision whether to enter into a plea agreement or not, is generally within the discretion of each county prosecutor” and “[h]ow that discretion is exercised affects the quality of law enforcement and the administration of justice within each county...[making it of vital importance to the separate counties to determine, individually, the character and emphasis of prosecutions.” State v. Bryant, 146 Wn.2d 90, 102, 42 P.3d 1278 (2002). Even defendant does not suggest or argue that the Spokane prosecutor had a greater or equal right than the Pierce County prosecutor did in deciding how the Pierce County cases should be prosecuted. Defendant’s argument acknowledges that Mr. Tucker’s authority was secondary or derivative of Mr. Ladenburg’s. The problem with defendant’s argument on appeal is that it simply ignores the trial court’s factual findings on critical points.

The trial court found that after the Chelan conference, Mr. Tucker believed that he had the authority to prosecute the Pierce County cases. CP 2745, FOF 3. The court did not find that Mr. Ladenburg had expressly given his permission but that Mr. Tucker had a “reason to believe” he had authority based upon the informal “conversations at that meeting with the prosecuting attorneys, including John W. Ladenburg, and based on the prosecutorial protocol of handling multi-venue prosecutions in one

venue.” CP 2745, FOF 3. The court went on to find that “any and all authority[,] implied or otherwise” was revoked when Ladenburg stated that he would not allow Tucker to handle the Pierce County cases during a conference call that included Tucker, Ladenburg, and several other prosecutors. CP 2745, FOF 4. According to Mr. Tucker’s testimony, this conference call occurred on June 28, 2000, at a point in time when he had not yet agreed to a plea resolution. RP 637, 639, 663-664, 668-670. Thus, all of the plea negotiations aimed at “global resolution” of defendant’s crimes occurred after Mr. Tucker’s authority had been revoked. CP 2745, FOF 2.

In his brief, defendant states that “Pierce County reneged on its earlier assurances” and that it did not “meticulously honor its word.” Brief of Appellant at pp. 45, 48. The record is devoid of any assurances made by John Ladenburg or Pierce County directly to defendant about Mr. Tucker’s authority to resolve the Pierce County cases. All of the assurances were given by Mr. Tucker. There is no evidence that defense counsel ever sought independent verification of Mr. Tucker’s representations. From Mr. Ladenburg’s perspective, he had never given Mr. Tucker express permission to prosecute the Pierce County cases, but had told him expressly that he did not have the authority to prosecute these cases. Nevertheless, Mr. Ladenburg continued to receive indications - from the media and Mr. Tucker - that Tucker was planning to include the Pierce cases in his plea offer. By filing the cases in Pierce County, Mr.

Ladenburg took public jurisdiction and control over what was rightfully his. If there was any improper action it was that of Mr. Tucker in refusing to defer to the authority of the elected prosecutor with the primary decision-making right. Thus, the use of equitable estoppel would be harmful in this instance as it would impair proper governmental functioning by allowing a Spokane County prosecutor to usurp the authority of the Pierce County prosecutor in determining how justice should be administered in the prosecution of crimes committed in Pierce County. See, CP 2747-2748, COL 2 and 4.

Moreover, the record does not support a conclusion that defendant acted in complete reliance upon Mr. Tucker's oral representations as to his authority. The record shows that prior to signing the document setting forth the terms of the plea offer, it was necessary to provide the defense with written proof that the other counties were agreeing to the "global resolution" in Spokane. RP 650, 658-659, 670. When Pierce County did not provide the written confirmation, the plea agreement fell through. RP 670, 686. These actions demonstrate only limited reliance of Mr. Tucker's oral representations. The defense relied upon the representations to the extent that it continued the negotiation process, but it is clear that defendant's attorneys wanted more formal proof of Tucker's authority before endorsing the written plea agreement.

The trial court concluded that defendant had failed to show that he had been injured by the representations made during the course of plea

bargaining. CP 2747, COL 4. The court failed to find any substantive evidence that had been relayed in the context of the plea negotiations occurring between June 28 and July 17, 2000. CP 2745- 2746. The same arguments made with regard to “detrimental reliance” in the previous section are applicable here with respect to the question of injury.

In short, defendant failed to meet his burden of showing by clear, cogent, and convincing evidence each of the six elements of equitable estoppel. The trial court properly denied the motion.

2. THE DEFENDANT’S CASE WAS TRIED BY A FAIR AND IMPARTIAL JURY.
 - a. The trial court acted within its discretion in granting the State’s three challenges for cause.

The defendant argues the trial court abused its discretion in excusing three prospective jurors whom the State challenged for cause. This argument should be rejected. The record supports the trial court’s findings that the jurors’ personal views about the death penalty would have prevented or substantially impaired their ability to perform their duties.

The Sixth Amendment guarantees a defendant the right to a trial by a fair and impartial jury. State v. Brett, 126 Wn.2d 136, 157, 892 P.2d 29 (1995) (citing State v. Rupe, 108 Wn.2d 734, 748, 743 P.2d 210 (1987), cert. denied, 486 U.S. 1061 (1988)). To ensure this right, a juror may be

excused for cause if his views would “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” State v. Hughes, 106 Wn.2d 176, 181, 721 P.2d 902 (1986) (quoting Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed 2d 841 (1985)); see also RCW 4.44.170(2).

The process of “death qualifying” a jury in a capital case has consistently been upheld by the United States Supreme Court and has specifically been upheld in Washington. State v. Gentry, 125 Wn.2d 570, 634, 888 P.2d 1105 (1995) (citations omitted). Attorneys may question a prospective juror about the death penalty and challenge the juror for cause if the juror’s views on capital punishment would prevent or substantially impair the juror’s performance of his or her duties. Gentry, 125 Wn.2d at 634.

This Court and the United States Supreme Court have recognized that a reviewing court must give deference to a trial court’s factual finding that a prospective juror’s views on the death penalty would prevent the juror from trying the case fairly and impartially. Wainwright, 469 U.S. at 425-26; Gentry, 125 Wn.2d at 634. “[T]he manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. . . .” Wainwright, 469 U.S. at 428 n.9 (quoting Reynolds v. United States, 98 U.S. 145, 156-57, 25 L. Ed. 244 (1879)). “The trial judge is in the best position upon observation of the juror’s demeanor to evaluate the

responses and determine if the juror would be impartial.” Brett, 126 Wn.2d at 158 (citing Rupe, 108 Wn.2d at 749).

Accordingly, a trial court’s ruling in a capital case on a challenge to a prospective juror for cause will not be reversed absent a manifest abuse of discretion. Gentry, 125 Wn.2d at 634. “The question is not whether [the reviewing court] might disagree with the trial court’s findings, but whether those findings are fairly supported by the record.” Gentry, 125 Wn.2d at 635 (citing Wainwright, 469 U.S. at 434).

All prospective jurors in this case were required to fill out a lengthy written questionnaire. See CP 3271-3303. The questionnaire included extensive questions regarding the jurors’ views on the death penalty. CP 3399-03. The jurors were then questioned individually by the attorneys and the court outside the presence of other jurors.

The trial court found in each of the three instances at issue that the juror’s views on the death penalty would have substantially impaired the juror’s ability to follow the court’s instructions. RP 2286, 2418, 2691. The record supports the trial court’s finding in each instance.

i. Juror 39 (RP 2275-87)

Juror 39 answered “no” in response to the written question: “In your opinion, should death ever be imposed as a sentence for punishment of a crime?” Confidential Juror Questionnaire (“CJQ”) #39, at 29. When asked in the questionnaire, “Which of the following best describes your

view of the death penalty,” she checked the box “Opposed in *every possible circumstance.*” CJQ #39, at 29 (emphasis added).

The prosecutor asked the juror whether she was “opposed in every possible circumstance to the death penalty?” RP 2275-76. Juror 39 answered, “Yes.” RP 2276. She affirmed that she believed death should not be imposed as a punishment for a crime. RP 2276. She was asked whether her views on the death penalty were based on religion, personal philosophy, or experience. She replied, “just a philosophy of mine, my personal opinion.” RP 2276. She was asked, “Is it correct that you said you’re opposed to the death penalty in every circumstance?” She replied, “Yes.” RP 2277. She was further asked, “And is it true that you believe that the death penalty should never be imposed as a sentence for a crime?” She responded, “Correct.” RP 2277.

Yet the juror also gave contradictory and inconsistent answers. She stated that in the penalty phase, she *could* vote to execute the defendant. RP 2279. She acknowledged this answer contradicted her statement that she opposed the death penalty in *every possible* circumstance. RP 2280. In response to a leading question posed by the defense, she stated that her strong beliefs against the death penalty would not affect her ability to follow the judge’s instruction.⁸ RP 2282.

⁸ The defendant’s attorney asked: “And your firm belief that--your strong belief that the death penalty, you’re generally opposed to it, won’t affect your ability to follow his instructions; is that right?”

The trial court inquired of the juror: “Would you ever vote for the death penalty?” Juror 39 responded:

I want to say, because my beliefs say[], no. I would do that if it has occurred, yes, if I’m supposed to, weighing all the evidence, yes.

RP 2282-83.

In ruling on the State’s challenge for cause, the court noted the juror’s responses to the questions were conflicted. RP 2285-86. The court noted that the juror had not filled out part of the questionnaire in which she was asked to describe what she believed were the best arguments against the death penalty or in favor of it. RP 2286. The trial court concluded:

I think there is cause to excuse her. I’m convinced that her ability is substantially impaired by her personal beliefs, and even in response to my question she drew upon her personal beliefs. So I’m going to excuse her for cause.

RP 2286. The juror’s responses were conflicted, and the trial court examined her demeanor to determine what weight could be given to her conflicting responses. The trial court’s finding that the juror’s views about the death penalty would have substantially impaired her ability to follow the court’s instructions is supported by the record. This finding should be affirmed.

ii. **Juror 52 (RP 2403-18)**

In her written questionnaire, Juror 52 was asked: "In your opinion, should death ever be imposed as a sentence for punishment of a crime?" Her response was, "No." CJQ #52, at 29. The next question asked, "Please state in greater detail your opinion about the death sentence." Juror 52 wrote, "I guess because I've been brought up in church, we're not to take a life." CJQ #52, at 29. She was asked, "Which of the following best describes your view of the death penalty," and Juror 52 checked the box for "Generally opposed with very few exceptions." CJQ #52, at 29. The questionnaire asked, "What is the best argument against the death penalty?" Juror 52 wrote: "No one has the right to take another life." CJQ #52, at 30.

During voir dire, the prosecutor followed up on the juror's written answer to a question indicating that she belonged to a church that had taken a stand on the death penalty:

Q: And can you tell me a little bit about that, what church it is and what the stand is?

A: I belong to the Church of God and Christ and they oppose the death penalty, ever taking a life.

RP 2403-04. The juror stated that she has been a member of the church all of her life, and the church derived its justification from the Bible's instruction, "[T]hou shalt not kill." RP 2404. The prosecutor asked whether the juror would be able to vote for the death penalty if the State proved that the death penalty was appropriate. RP 2410. The juror

replied, “Would I vote? That’s a hard thing, because it’s like going against what I’ve been taught to go against, to take a life. RP 2410. Juror 52 admitted it would make her uncomfortable to be asked to vote on whether or not an individual should be executed. RP 2412.

The juror later contradicted herself while being questioned by the defense. The juror answered “yes” to a series of questions posed by the defense attorney concerning civic duty. RP 2413-14. She then continued to answer “yes” to questions concerning whether she could follow the law and listen to the evidence. RP 2414-15.

The court granted the State’s challenge for cause finding as follows:

I think that her beliefs and opinions are substantially impaired. . . . her religious beliefs and personal commitment are such that she would decline the death penalty in this case, so I’ll excuse her for cause.

RP 2418.

The record supports the trial court’s finding that the juror’s views about the death penalty would have substantially impaired her ability to follow the court’s instructions. The trial court had the opportunity to observe the juror’s demeanor as she responded to questions from the attorneys. In particular, the court was in the best position to determine the juror’s credibility when she repeatedly responded “yes” to the defense’s line of structured questioning. As the United States Supreme Court has observed:

It is well to remember that the lay persons on the panel may never have been subjected to the type of leading questions and cross-examination tactics that frequently are employed, and that were evident in this case. Prospective jurors represent a cross section of the community, and their education and experience vary widely. Also, unlike witnesses, prospective jurors have had no briefing by lawyers prior to taking the stand. Jurors thus cannot be expected invariably to express themselves carefully or even consistently. Every trial judge understands this, and under our system it is that judge who is best situated to determine competency to serve impartially. The trial judge properly may choose to believe those statements that were the most fully articulated or that appeared to have been least influenced by leading [questions].

Patton v. Yount, 467 U.S. 1025, 1039, 104 S. Ct. 2885, 81 L. Ed. 2d 847

(1984). In this case, the juror answered “yes” to a series of structured questions posed by the defense. The trial court evaluated the juror’s written answers and her demeanor while answering questions in court. The trial court evidently found, based on her demeanor and manner while testifying, that some of her answers were entitled to more weight than others. The trial court’s factual finding that the juror’s religious beliefs would have impaired her ability to follow the law should be affirmed.

iii. Juror 74 (RP 2685-91)

The written questionnaire asked, “In your opinion, should death ever be imposed as a sentence for punishment of a crime?” Juror 74 answered, “No.” CJQ #74, at 29. The next written question asked the

juror to state in greater detail his or her opinion about the death sentence, and Juror 74 wrote, "I do not believe in the death penalty." CJQ #74, at 29. The questionnaire asked, "How strong is your opinion?" Juror 74 answered, "Very." The questionnaire asked, "Which of the following best described your view of the death penalty?" Juror 74 answered, "*Opposed in every possible circumstance.*" CJQ #74, at 29 (emphasis added). When asked what was the best argument against the death penalty, she wrote, "[A] person's life is not mine to take." CJQ #74, at 30. When asked what was the best argument in favor of the death penalty, she wrote: "No good argument." CJQ #74, at 30.

When questioned by the prosecutor, Juror 74 stated that it was her belief that death should never be imposed as punishment for a crime. RP 2685-86. She said she has held this belief for most of her adult life. RP 2686. She said her belief was based partly on her religion and partly on philosophy. RP 2686. She said: "I believe that if we cause another human being[']s death, we come down to the level of that person [if the death penalty is imposed]. RP 2686. The following exchange occurred between the prosecutor and the juror:

Q: If you were seated as a juror on this case, is it fair to say that because of those beliefs, there is no possibility you would vote for a death sentence for Mr. Yates?

A: I would say probably not, unless I followed the Court's rules which say if you proved your case, you know, but it would be a real difficult thing for me to do.

Q: Would having to serve on a jury and follow the Court's rules create a conflict between what the law permits and what your personal beliefs are?

A: I have always been good at following the rules.

Q: Sure.

A: I mean, that's just kind of the way I am.

Q: Right.

A: But it would cause me an extreme amount of anxiety if I had to impose the death penalty.

RP 2686-87.

The defense asked the juror if she could set aside her personal feelings and follow the judge's instructions, and the juror responded, "Yeah, if I had to, *probably*." RP 2688 (emphasis added).

In ruling on the State's challenge for cause, the court cited the juror's answers on the written questionnaire and to the prosecutor, and the court concluded:

I am satisfied that her beliefs or opinions would substantially impair the performance of her duties as a juror and the oath taken. So I am going to excuse her for cause.

RP 2691.

The record supports the trial court's finding that the juror's views about the death penalty would have substantially impaired her ability to follow the court's instructions. Her written answers to the questionnaire and to the prosecutor showed very firmly held beliefs against the death penalty. Her response of "Yeah, if I had to, *probably*" in response to defense counsel's question showed relative uncertainty as to whether she could follow the court's instructions. The trial court's finding should be affirmed.

iv. Hance is not persuasive authority because the United States Supreme Court has rejected the Eleventh Circuit's reasoning in Hance.

The defendant argues that the trial court erred in granting the State's challenges for cause, and he supports his argument by relying heavily on Hance v. Zant, 696 F.2d 940 (11th Cir.), cert. denied, 463 U.S. 1210 (1983), overruled on other grounds in, Brooks v. Kemp, 762 F.2d 1383 (1985). The United States Supreme Court has explicitly rejected the Eleventh Circuit's reasoning in Hance. See Wainwright v. Witt, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed.2d 841 (1985). This Court should decline the defendant's request to rely on Hance.

In Hance, the Eleventh Circuit interpreted then-existing Supreme Court precedent to require that a trial court could excuse for cause only

those jurors who make it “*unmistakably clear*. . . that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at trial. . . .” Hance, 696 F.2d at 954 (quoting Witherspoon v. Illinois, 391 U.S. 510, 522-23 n.21, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968)) (emphasis in original). The jurors in Hance responded to some questions regarding the death penalty by indicating they would refuse to vote for the death penalty, but in other responses appeared to vacillate on this position. Hance, 696 F.2d at 955. The Eleventh Circuit determined that the jurors’ responses regarding the death penalty were insufficient to justify exclusion for cause because the answers “were *not automatic and unequivocal*. On the contrary, they expressed uncertainty about their convictions and ambiguity about their feelings.” Hance, 696 F.2d at 955 (emphasis added). The Eleventh Circuit thus concluded that the jurors could only be excused where their opposition to the death penalty was automatic, unequivocal, and stated with unmistakable clarity. Hance, 696 F.2d at 955.

The United States Supreme Court explicitly rejected the Eleventh Circuit’s “automatic and unequivocal” test:

We therefore take this opportunity to clarify . . . the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. That standard is whether the juror’s views would ‘prevent or substantially impair the performance of

his duties as a juror in accordance with his instructions and oath.’ We note that, in addition to dispensing with [the] reference to ‘automatic’ decision making, this standard likewise does not require that a juror’s bias be proved with ‘unmistakable clarity.’ This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism.

Wainwright, 469 U.S. at 423.

The Wainwright court further emphasized the importance of appellate court deference to the trial judge who sees and hears the juror: “The trial judge[’s]. . . predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record.” Wainwright, 469 U.S. at 429. A finding of juror bias is a “factual issue.” Wainwright, 469 U.S. at 429. Wainwright establishes that the Eleventh Circuit’s reasoning in Hance is wrong. Hance is not persuasive authority for this case because the court applied the wrong standard in evaluating the challenges for cause.

Finally, the defendant argues that the trial court acted arbitrarily in granting the challenges for cause because the court declined to excuse for cause certain other jurors who also expressed some objection to the death penalty. This argument is not persuasive. During voir dire, the trial judge is required to assess the credibility of the potential jurors. See Patton, 467 U.S. at 1038. Each juror’s testimony and demeanor must be assessed individually in making any credibility determination. When a juror is

found credible in stating he or she can or cannot set aside personal views on the death penalty, this credibility assessment has no bearing on the credibility assessment of any other juror. The court should reject the defendant's arguments and affirm the trial court.

- b. The defendant cannot establish prejudice regarding the trial court's denial of his challenges for cause because he removed the jurors at issue through peremptory challenges.

The defendant next challenges the trial court's rulings denying his four challenges for cause against Jurors 9, 29, 100, and 120. The defendant cannot establish he is entitled to relief on this claim because none of the four jurors at issue sat on this case. The defendant exercised peremptory challenges against each of the four jurors, and he even had three unused peremptory challenges remaining at the close of voir dire. See CP 3746.

The Sixth Amendment and article I, section 22 of the Washington Constitution guarantee every criminal defendant "the right to a fair and impartial jury." Brett, 126 Wn.2d at 157. To ensure that right, a juror will be excused for cause if his or her views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Hughes, 106 Wn.2d at 181 (quoting Wainwright, 469 U.S. at 424). The court will reverse a trial court's denial

of a challenge for cause only upon finding a manifest abuse of discretion. Rupe, 108 Wn.2d at 748. A trial court need not disqualify a juror with preconceived ideas if the juror can “put these notions aside and decide the case on the basis of the evidence given at the trial and the law as given him by the court.” State v. Mak, 105 Wn.2d 692, 707, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986).

In United States v. Martinez-Salazar, 528 U.S. 304, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000), the United States Supreme Court held that when a defendant unsuccessfully challenges a juror for cause and then exercises a peremptory challenge to remove the juror from the panel, the defendant has “cured” any alleged error for Sixth Amendment purposes with regard to the unsuccessful challenge for cause. Martinez-Salazar, 528 U.S. at 316-17; Ross v. Oklahoma, 487 U.S. 81, 88, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988); Rupe, 108 Wn.2d at 749. “So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment [guarantee of a fair and impartial jury] was violated.” Ross, 487 U.S. at 88; see also Martinez-Salazar, 520 U.S. at 316.

This Court has adopted and applied the United States Supreme Court’s holding in Martinez-Salazar in analyzing whether the right to an impartial jury has been violated:

Washington law does not recognize that article I, section 22 of the Washington State Constitution provides more protection than does the Sixth Amendment to the United

States Constitution. Hence, Martinez-Salazar defines the scope of a defendant's right to an impartial jury in this situation.

State v. Fire, 145 Wn.2d 152, 164, 34 P.3d 1218 (2001); see also Fire, 145 Wn.2d at 167 (Alexander, C.J., concurring) (“We should . . . adopt the better rule that has been enunciated . . . in United States v. Martinez-Salazar. . .”).

In Fire, a trial court denied the defendant's challenge for cause against a juror, and the defendant then exercised a peremptory challenge against the juror. The defendant subsequently exhausted all six of his peremptory challenges. This Court found the defendant was not entitled to relief under Martinez-Salazar:

[I]f a defendant through the use of a peremptory challenge elects to cure a trial court's error in not excusing a juror for cause, exhausts his peremptory challenges before the completion of jury selection, and is subsequently convicted by a jury on which no biased juror sat, he has not demonstrated prejudice, and reversal of his conviction is not warranted.

Fire, 145 Wn.2d at 166.

The court in Fire also relied on its earlier holding in State v. Roberts, 142 Wn.2d 471, 14 P.3d 714 (2000). In Roberts, the defendant argued his constitutional right to an impartial jury was violated when the trial court denied his challenges for cause against 13 jurors. Four of the 13 jurors actually became seated in the jury box. The defendant then removed each of the four by using peremptory challenges, and none of the

13 jurors sat on his case. The defendant did not exhaust his peremptory challenges because the trial court offered to give the defendant two additional challenges that he ultimately did not use. This Court rejected the defendant's challenge that his right to an impartial jury was violated: "We hold because Roberts has not demonstrated that jurors who should have been removed for cause actually sat on the panel, his rights were not violated." Roberts, 142 Wn.2d at 518.

Under Martinez-Salazar, Roberts, and Fire, a defendant must demonstrate that a juror who *should* have been removed *actually sat* on the panel before he can establish his constitutional right to an impartial jury was violated. Martinez-Salazar, 528 U.S. at 316-17; Roberts, 142 Wn.2d at 518; Fire, 145 Wn.2d at 164. In this case, the trial court denied the defendant's four challenges for cause. The defendant thereafter removed each of the four jurors at issue, Jurors 9, 29, 100, and 120, by using his peremptory challenges. See CP 3745-46. In so doing, he did not deplete his peremptory challenges. Instead, he left three of his peremptory challenges unused at the close of voir dire. CP 3756. None of the jurors at issue sat on his case. Consequently, the defendant cannot show that he was deprived of the right to a fair and impartial jury. His arguments to the contrary should be rejected.

3. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN VOIR DIRE IN ALLOWING QUESTIONS ON THE JURORS' RELIGIOUS BELIEFS.

The defendant argues the trial court erred in preventing him from inquiring into the jurors' religious beliefs during voir dire. This argument should be rejected. The trial court allowed ample opportunity for the parties to probe the jurors' religious beliefs to determine whether the jurors could be fair and impartial. Potential jurors were required to answer written questions regarding the impact their religious beliefs might have on their view of the death penalty and ability to follow the law. During individualized voir dire, the parties were also allowed to question jurors regarding any impact religion might have on their ability to sit as jurors. The trial court acted well within its discretion during voir dire.

The purpose of voir dire is to enable the parties to learn a juror's state of mind to find out whether to raise a challenge for cause or use a peremptory challenges. State v. Laureano, 101 Wn.2d 745, 758, 682 P.2d 889 (1984). In contrast, it is not a function of voir dire "to educate the jury panel to the particular facts of the case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law." State v. Frederiksen, 40 Wn. App. 749, 752, 700 P.2d 369, review denied, 104 Wn.2d 1013 (1985) (quoting

People v. Williams, 29 Cal. 3d 392, 408, 628 P.2d 869, 174 Cal. Rptr. 317 (1981)).

The scope of voir dire is within the sound discretion of the trial court. State v. Robinson, 75 Wn.2d 230, 231-32, 450 P.2d 180 (1969). A trial court's discretion concerning the scope of voir dire is "limited only by the need to assure a fair trial by an impartial jury." Frederiksen, 40 Wn. App. at 752. "Absent an abuse of discretion and a showing that the accused's rights have been substantially prejudiced thereby, the trial judge's ruling as to the scope and content of voir dire will not be disturbed on appeal." Frederiksen, 40 Wn. App. at 752-53 (citing United States v. Robinson, 475 F.2d 376, 380 (D.C. Cir. 1973)). Under Frederiksen, the inquiry is therefore twofold: (1) did the trial court abuse its discretion; and if so, (2) can the defendant show he was substantially prejudiced? The defendant can neither show an abuse of discretion nor prejudice in this case.

The Washington Constitution provides: "[N]or shall any person be incompetent as a witness, or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony." Wash. Const. art. I, § 11. "Ordinarily at common law, inquiry on voir dire into a juror's religious affiliation and beliefs is irrelevant and prejudicial, and to ask such questions is improper." State v. Davis, 504 N.W.2d 767, 772 (Minn. 1993). "Questions about religious beliefs are relevant only if pertinent to

religious issues involved in the case, or if a religious organization is a party, or if the information is a necessary predicate for a voir dire challenge.” Davis, 504 N.W. 2d at 772 (citing Coleman v. United States, 379 A.2d 951, 954 (D.C. 1977)).

In this case, the trial court did allow extensive questioning on whether a juror’s religious beliefs would prevent the juror from being fair and impartial. Religion was not an issue in this case, but a juror’s religious views could have impacted the juror’s ability to follow the law with regard to the death penalty. The written juror questionnaire posed questions concerning the jurors’ religion. For example, Question 102 read:

Do you hold beliefs or convictions, whether moral or *religious* or philosophical, that could cause you to automatically vote **against** a death sentence without regard to any evidence that might be presented at the trial? Do you belong to any groups that have taken a position on the death penalty? If yes, what group(s)?

CP 3302 (italics added, bold in original). Question 103 posed the opposite question:

Do you hold beliefs or convictions, whether moral or *religious* or philosophical, that would cause you to automatically vote **in favor of** a death sentence if you found evidence for a guilty verdict for Aggravated First Degree Murder?

CP 3302 (italics added, bold in original). Each juror was required to answer these questions. The parties were then allowed to follow up with questions regarding the jurors’ responses. The trial court acted within its

discretion in allowing inquiry into religious beliefs during voir dire to determine whether jurors could be fair and impartial with regard to imposition of the death penalty.

The defendant nevertheless argues that the trial court erred in not allowing him to ask jurors the following questions he had proposed for inclusion in the jurors' written questionnaire:

1. What is your religious affiliation, if any?
2. What is the fundamental teaching of your religion?
3. What influence has religion had on your life?
4. Describe your religious beliefs or philosophy?

CP 2827. The trial court stated it had reservations about the first question that inquired *directly* into all prospective jurors' religious affiliation:

It's that first question that you are asking, what is your religious affiliation? I am not sure that that can be asked at this point in time. So I am not inclined to allow -- *I am denying that at this time subject to thinking about it further and maybe getting some additional information from you or the State on whether that direct question can be asked.*

RP 1200 (emphasis added). The court issued a tentative ruling denying the defense's request but subject to further information and argument.

There is no indication that the defense provided the court with supplemental information or raised the issue again for further argument.

Regarding the remaining three questions, the court suggested that counsel rewrite Questions 102 and 103 to expand on the inquiry into religious beliefs already presented:

I don't have any problem in expanding the death penalty questions to some extent, Questions 102 and 103, and get

some more information regarding whether or not they have religious beliefs that are going to affect their ability to be fair and impartial and require them to vote in favor of or against the death penalty.

RP 1200. As the court noted, these questions already inquired into jurors' religious beliefs as they relate to the death penalty. RP 1191. The record does not indicate the defense proposed any amendments to these two written questions despite the judge's invitation to do so. Questions 102 and 103 were included in the juror questionnaire unmodified. CP 3302.

In addition, each juror was also asked the following in the written questionnaire: "If you are selected as a juror in this case, you must follow the court's instructions regardless of what you believe the law is or ought to be. Will you follow this order? Will you have any difficulty following this order?" CP 3283. The next question posed was: "Do you have any *religious* or philosophical views which may cause you to feel uncomfortable sitting as a juror in a criminal case?" CP 3283.

At a subsequent hearing, the trial court specifically stated that it would allow the defense to ask follow-up questions if any juror wrote in the questionnaire that his or her religious or philosophical beliefs would affect the juror's ability to follow the court's instructions:

I think there is a question on the [juror questionnaire] as to whether they have any *religious*, moral or philosophical beliefs that prevent--that affect their ability to follow the Court's instructions on the law, *and I think you can follow-up questions on that issue, and I think it's appropriate to ask follow-up questions on that.*

RP 1790-91 (emphasis added). The defense has not pointed to any instance in which it was precluded from asking any such follow-up questions regarding religion. Nor did the defendant make any offer of proof that the court's ruling precluding him from directly asking jurors about their religious affiliation prevented his from fully inquiring into any juror's ability to be fair and impartial.

The defendant nevertheless claims that the trial court erred because asking jurors directly about their religious affiliation was relevant toward probing their attitudes on mercy. Yet he does not explain how knowing any juror's *specific* religious affiliation could have shed any light on how that individual juror would apply the concept of mercy. Moreover, during voir dire, the defense did ask prospective jurors *directly* about their attitudes toward the concept of mercy. See e.g., RP 1971, 2965. The defense also asked jurors directly for a personal definition of mercy. See e.g., RP 3001, 3244. The defense also asked jurors to clarify or elaborate on their answers to the written questions concerning whether their moral or religious beliefs would affect their decision on the death penalty issue. See e.g., RP 2507.

The defense was not precluded from probing whether a juror's religion had bearing on the juror's ability to be fair and impartial. Nor was the defense precluded from inquiring into jurors' attitudes toward

mercy. As such, the defendant cannot show that the trial court's decision to preclude *direct* inquiry into each potential juror's religious affiliation was an abuse of discretion. Nor can he show he suffered any prejudice from this decision. The trial court acted within its discretion in this case in allowing broad inquiry into the juror's religious beliefs with regard to the death penalty and the jurors' ability to be fair and impartial. The defendant's arguments to the contrary should be rejected.

4. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH REGARDING TO THE MEANING OF COMMON SCHEME OR PLAN IN THE AGGRAVATING CIRCUMSTANCE.

- a. Aggravating circumstances are sentencing enhancements; there is no substantive crime of "aggravated murder in the first degree" in Washington.

Although commonly referred to as "aggravated first degree murder" or "aggravated murder" Washington's criminal code does not contain such a crime in and of itself; the crime is premeditated murder in the first degree accompanied by the presence of one or more of the statutory aggravating circumstances listed in RCW 10.95.020.⁹ State v. Roberts, 142 Wn.2d 142 Wn.2d 471, 501, 14 P.3d 713 (2000); State v. Irizarry, 111 Wn.2d 591, 593-94, 763 P.2d 432 (1988); State v. Kincaid,

⁹ See Appendix C for RCW 10.95 et seq.

103 Wn.2d 304, 312, 692 P.2d 823 (1985). The aggravating circumstances operate as “‘aggravation of penalty’ provisions which provide for an increased penalty where the circumstances of the crime aggravate the gravity of the offense.” Kincaid, 103 Wn.2d at 312. A person convicted of “aggravated murder” will either receive a death sentence or be sentenced to life without the possibility of parole. RCW 10.95.080.¹⁰

Defendant contends that several federal decisions require this court to treat the aggravating circumstances set forth in RCW 10.95.020 as “an element of the offense of aggravated first degree murder.” Appellant’s brief at pp. 78-81, citing Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002); Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and Harris v. United States, 536 U.S. 545, 557-58, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2003). Defendant’s argument misconstrues the holdings of these cases.

In Apprendi, the court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum,” whether the statute calls it an element or a sentencing factor, “must be submitted to a jury, and proved beyond a reasonable doubt.” Apprendi v. New Jersey, 530 U.S. at 490. In Ring v.

¹⁰ See Appendix C.

Arizona, 536 U.S. 584, 592-593, and n 1, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002), the court applied Apprendi to an Arizona law that authorized the death penalty if the judge found one of ten aggravating factors and concluded that the defendant's constitutional rights had been violated because the judge had imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding. In Blakely v. Washington, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the court made clear that for “Apprendi purposes[, the statutory maximum] is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant;” it did not matter that the legislature had enacted a longer term which it labeled the “statutory maximum” for the crime. In Harris, the court clarified that McMillan v Pennsylvania, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed 2d 67 (1986), was still good law in that any sentencing factor that increases the mandatory *minimum* for a crime may be determined by a judge using a preponderance standard as long as the sentence ultimately imposed is one that could have been imposed lawfully without the court making such a determination. Harris, 536 U.S. at 538.

Nothing in any of these cases holds that if a state legislature wants certain facts to affect the length of sentence, that it must include such facts within the elements of the substantive crime. Rather these cases hold that you cannot avoid the constitutional requirement that the jury determine,

beyond a reasonable doubt, all relevant sentencing facts by labeling these determinations as “sentencing factors” rather than “elements” of the crime.

Under Washington’s capital penalty scheme, the jury¹¹ determines whether the state has proved beyond a reasonable doubt: 1) the elements of the substantive crime of first degree [premeditated] murder; 2) the existence of an aggravating circumstance under RCW 10.95.020 which acts as a sentencing enhancement; and, assuming the former have be established, 3) whether there are sufficient mitigating circumstances to merit leniency – which determines whether a defendant will receive a death sentence or life without the possibility of parole. RCW 10.95 et. seq.¹² This comports with the constitutional requirements of Apprendi, Ring, Harris, and Blakely.¹³ As the jury is determining all relevant facts using a beyond a reasonable doubt standard, the United States Supreme Court has no interest in whether Washington has opted to comport with the Sixth Amendment by enacting a base crime of murder which becomes aggravated by the finding of a sentencing enhancement provision or by enacting a substantive crime of “aggravated murder in the first degree.”

¹¹ This assumes that the defendant has not entered a plea of guilty or waived his right to a jury and submitted to a bench trial.

¹² See Appendix C.

¹³ This court has also noted that a jury may be properly instructed either by listing the aggravating circumstance in the “to convict” instruction so that it appears to be an element of the substantive crime or by giving a separate instruction setting for the aggravating circumstances with an accompanying verdict form. State v. Kincaid, 103 Wn.2d at 313.

The Kincaid, Roberts, and Irizarry decisions, setting forth the structure of Washington's capital penalty scheme, are still controlling authority.

- b. The trial court properly defined "common scheme or plan" as used in RCW 10.95.020(10).

The aggravating circumstances which will elevate a premeditated murder in the first degree into what is commonly referred to as aggravated murder in the first degree includes the following:

There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person;

RCW 10.95.020(10). In this case, the jury was asked to determine whether any of three aggravating circumstances existed, including one based upon RCW 10.95.020(10). CP 4100. The instructions asked the jury to determine whether:

There was more than one person murdered and the murders were part of a common scheme or plan.

CP 4100. The scope of this aggravating circumstance was the subject of a pretrial hearing. The trial court addressed the scope of this aggravator at the same time it ruled on the State's motion to admit evidence of the Spokane murders under ER 404(b)¹⁴ for the purpose of showing common scheme or plan, identification, motive, and premeditation. RP 179-240.

¹⁴ See Appendix D.

The court found that the evidence of the Spokane murders was admissible¹⁵ under ER 404(b) for the stated purposes and that, under a recent death penalty case, the definition of “common scheme or plan” set forth in State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995) should be used to determine the meaning of that phrase as it appears in RCW 10.95.020(10). RP 241-250. The court instructed the jury on the meaning of “common scheme or plan” as follows:

Instruction 20

A “common scheme or plan” means there is a connection between the crimes in that one crime is done in preparation for the other.

A “common scheme or plan” also occurs when a person devises an overarching criminal plan and uses it to perpetrate separate but very similar crimes.

CP 4106. The wording of this instruction was a subject of debate. RP 7260-7279. Both the defense and the prosecutor submitted proposed instructions on this topic, but, ultimately, the court devised its own instruction. CP 3974 (prosecutor’s proposed no. 17); CP 4035 (defendant’s proposed No. 7); RP 7260-7279. Defendant did not propose an instruction that was consistent with the court’s earlier ruling. Defendant’s proposed instruction did not include language to comply with

¹⁵ Defendant did not assign error to the trial court’s ruling on the admission of the 404(b) evidence. Appellant’s Opening brief at pp. 2-8. The propriety of this ruling is unchallenged on appeal.

the earlier ruling that a “common scheme or plan” in RCW 10.95.020(10) includes situations where a person has developed an overarching plan and used it to commit separate but similar crimes. CP 4035. Defendant objected to the giving of Instruction No. 20 and the court’s failure to give defendant’s proposed No 7.¹⁶ RP 7399. Defendant claimed that his proposed Instruction No. 7 was an accurate statement of the law. RP 7399. Defendant claimed that the court’s Instruction No. 20 relieved the state of its burdens as set forth by State v. Finch, 137 Wn.2d 792, 835, 975 P.2d 967 (1992) and Benn v. Lambert, 283 F.3d 1040 (9th Cir. 2002).¹⁷

Over the years, this court has described what is required by the common scheme or plan aggravating circumstances in various ways. The court has said that multiple murders are required and there must be a “nexus between the killings.” State v. Grisby, 97 Wn.2d 493, 647 P.2d 6 (1982), cert. denied, 459 U.S. 1211, 103 S. Ct. 1205, 75 L. Ed. 2d 446 (1983)(multiple killings in revenge for being sold bad quality drugs); State v. Dictado, 102 Wn.2d 277, 285, 687 P.2d 172 (1984)(killings were in furtherance of a gambling scheme). A scheme or plan is a “design, method, of action, or system formed to accomplish a purpose.” State v.

¹⁶ See Appendix E.

¹⁷ Defendant has apparently abandoned the argument that the Ninth Circuit’s construction of RCW 10.95.020(10) controls over the construction given by the Washington Supreme Court. Benn v. Lambert is not cited in the section of the appellant’s brief addressing this claim. Appellant’s brief at pp. 78-107; See also State v. Gonzales-Morales, 138 Wn.2d 374, 382, 979 P.2d 826 (1999). (Federal court holdings may be persuasive, but are not binding on state supreme court).

Kincaid, 103 Wn.2d at 314. In State v Finch, this court held that “the ‘nexus’ exists when an overarching criminal plan connects both murders.” State v. Finch, 137 Wn.2d 792, 835, 975 P.2d 967 (1992). In Finch, this court found sufficient evidence to support this aggravator when the jury could have found that the murder of a man, the roommate of Finch’s ex-wife, and the murder of a Washington State patrol trooper who responded to a scene after Finch called 911 were both committed in the course of the Finch’s plan to kill his ex-wife, himself, “and whoever else was at the trailer that evening or got in the way.” Finch, 137 Wn.2d at 836.

Four years after Finch, this court provided more guidance as to the scope of this aggravating factor with its decision in State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245, cert. denied, 518 U.S. 1026 (1996). That case involved a challenge to RCW 10.95.020(10) on vagueness grounds. In Pirtle, this court rejected the argument that there must be evidence of a plan to commit multiple murders to satisfy this aggravator. The court explained the evidence need not show the existence of a plan to kill the named individual or even that the killings be committed for precisely the same reasons, only that the killings are connected by a larger criminal purpose. Pirtle, at 663. This court held:

The use of common scheme or plan in Dictado and Grisby is consistent with the traditional understanding of common scheme or plan within the rules of evidence. This understanding, in turn, sheds light on the nature of the connection needed between the murders. Under the rules of evidence, common scheme or plan may refer to the

situation where “several crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan.” State v. Lough, 125 Wn.2d 847, 855, 889 P.2d 487 (1995). The term refers to a larger criminal design, of which the charged crime is only part. State v. Bowen, 48 Wn. App. 187, 192, 738 P.2d 316 (1987).

State v. Pirtle, 127 Wn.2d at 662. Thus, this court has held that it is appropriate to look at the meaning of “common scheme or plan” within the rules of evidence as guidance as to how the same language should be interpreted in RCW 10.95.020(10).

In State v. Lough, supra, this court held that the “plan” exception in ER 404 can apply to two different situations. The first is “where several crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan.” Lough, 125 Wn.2d at 855. The second is “when an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes.” Id. In Lough, the court was considering the propriety of admitting evidence that the defendant had surreptitiously drugged and raped four other women while each was in a relationship with the defendant as evidence of a common scheme or plan in a trial where defendant was charged with attempted rape and indecent liberties with a very similar fact pattern. The court reasoned that such evidence was not used to show propensity, but to show the defendant committed the charged crime pursuant to the same plan he had used to commit the other acts of misconduct. Lough, 125 Wn.2d at 861. The court concluded that using

this evidence a jury “could find that the Defendant was the mastermind of an overarching plan.” Id.

Most recently, this court stated that “a common scheme or plan exists when there are multiple murders with a nexus connecting them, such as an overarching purpose.” State v. Cross, ___ Wn.2d ___, ___ P.3d ___ (2006) (Slip Opinion No. 71267-1, filed March 30, 2006). The court was clear that the state did not have to show the “defendant premeditated to kill multiple or named victims” only that there is “an ‘overarching plan’ with a criminal purpose that connects the murders.” Id.

In the case below, the trial court considered the holdings of Finch and Pirtle in reaching its conclusion that the meaning of “common scheme or plan” in RCW 10.95.020(10) includes a crime that was committed pursuant to an overarching plan that a defendant has devised and used repeatedly to perpetrate separate but very similar crimes. RP 212-216, 246-247. Defendant argues that the trial court relied too heavily on Lough when that case never discussed the definition of the common scheme element in RCW 10.95.020(10). Appellant’s brief at pp. 82-84. It is not surprising that the court in Lough did not talk about the aggravated murder provisions in a case that dealt with charges of attempted rape, indecent liberties, and burglary. Even if the Lough court had chosen to discuss statutory provisions that were irrelevant to Lough’s case, any such discussion would have been dicta.

What is relevant and important is that when faced with a challenge to the scope of the “common scheme or plan” aggravating factor on vagueness grounds, the court found that the language in RCW 10.95.020(10) provided adequate notice because its meaning was consistent with the understanding of that phrase as it is used in the evidence rules. State v. Pirtle, 127 Wn.2d at 662. In doing so the court cited to Lough - a case that holds the “common scheme or plan” in ER 404 may refer to situations where several crimes are committed that are constituent pieces of a larger plan or it may refer to situations where an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes. Id. There is nothing in the Pirtle decision to suggest that the court was adopting only one meaning of that phrase as set forth in Lough. The trial court properly found that both types of situations described in Lough are within the meaning of “common scheme or plan” in 10.95.020(10).

Moreover, there is nothing in any of this court’s previous decisions regarding 10.95.020(10) that is inconsistent with the trial court’s interpretation. In Pirtle, the court stated that “common scheme or plan [in RCW 10.95.020(10)] *may refer to* the situation” where several crimes are constituent parts of a larger plan. 127 Wn.2d at 662 (emphasis added). The court did not say that the phrase *only* refers to this situation. In Finch, the court stated that a nexus between the killings exists when an overarching criminal plan connects both murders. Under Lough an

“overarching plan” may be one that is devised and used repeatedly to perpetrate separate but very similar crimes. This connection among the murders is demonstrated by the fact that the murders are linked together by their similarity even before the perpetrator is identified. See RP 176-177. Law enforcement recognizes a pattern and links separate killings together believing that two (or more) victims have fallen prey to the same plan. See CP 153, 320-337. It is the similarity about how the murders are committed that brings the crimes within the ambit of RCW 10.95.020(10) and not simply by the fact that the same person committed the crimes. For example, in the case before the court, the jury considered only whether the Pierce County homicides and the Spokane homicides demonstrated the existence of a common scheme or plan; the state did not seek admission of all of defendant’s prior killings. CP 320-337; RP 176-177,221-232. Although defendant had committed murders in Walla Walla and Skagit counties, these homicides were committed in a distinctly different manner such that they did not fit into the “overarching plan” that governed the other murders. Thus, two murders committed pursuant to the same devised plan are “connected” to one another in that they are both the

product of an overarching plan to commit as many murders as possible using a formula that has proved successful.¹⁸

According to defendant, RCW 10.95.020(10) only applies to murders that are connected by being constituent parts of a larger plan. CP 4035. In making this argument defendant simply ignores the language in Pirtle that says the courts should look to the meaning of “common scheme or plan” as used in the evidence rule. Moreover, to adopt this narrow interpretation would be to find that the legislature did not intend to enact an aggravating circumstance applicable to serial killers who use the same plan or formula over an extended period of time to kill multiple victims. The only aggravating factor that references multiple murders is RCW 10.95.020(10). RCW 10.95.020. This subsection refers to “murders” that “were part of a common scheme or plan” or that were “the result of a single act of the person..” RCW 10.95.020(10). A serial killer who kills three or more people over a period of time would not fall under the “single act” terms of the statute. If the Legislature meant to include serial killers in that group of murderers who might face the death penalty, then the only aggravating factor that could apply to their crimes is the “common scheme or plan” provision of RCW 10.95.020(10).

¹⁸ In another case, evidence of a developing overarching plan was adduced at trial. Wesley Allen Dodd’s diary revealed a man consumed with the process of developing a system whereby he could rape and murder children without being apprehended. State v. Dodd, 120 Wn.2d 1, 6-8, 838 P.2d 86 (1992). Fortunately, Dodd was apprehended before he had perfected a successful overarching plan.

The death penalty was re-established in Washington when the people of this state passed Initiative Measure 316 in 1975; it was modified two years by the legislature, but both enactments contained the “common scheme or plan language.” Laws of 1975-'76 2nd ex. sess. ch. 9; Laws of 1977 1st ex. sess. ch. 206. During 1974-1975, several murders commonly referred to as the “Ted murders” occurred in the Seattle area. CP 437. One of the lead proponents of Initiative 316, who also happened to be a state legislator, indicated that during the drafting of the initiative, serial type killings such as the “Ted murders” were included in its focus. The drafters intended serial killers to be covered by the common scheme or plan circumstance so that such killers might face the death penalty. CP 437-439. This statement indicates that the drafters of Initiative 316 considered the ordinary meaning of “common scheme or plan” to include multiple murders that were separate acts but which were committed in a very similar manner, thereby demonstrating an overarching plan.

Pierce County prosecutors are not alone in relying on this aggravating factor when faced with a prolific serial killer. King County used this aggravator to convict the most prolific serial killer in Washington, Gary Ridgeway, the Green River Killer, of aggravated murder in the first degree. In Ridgeway’s case the *only* aggravating circumstance found was that there was more than one person murdered and the murders were part of a common scheme or plan. Report of the Trial Judge No 265.

Below, the trial court carefully examined this court's holdings in several cases to determine the proper scope of "common scheme or plan" as set forth in RCW 10.95.020(10). After careful consideration it drafted an instruction that complied with all of this court's holdings. Defendant relies heavily on older cases, but fails to account for this court's more recent decision in Pirtle in presenting his argument. The trial court's instruction required the jury to find that there was an overarching criminal plan that connected the murders. This was a proper way to instruct the jury so that it found a nexus between the murders.

5. THE EVIDENCE IS SUFFICIENT TO SUPPORT
THE JURY'S FINDING ON THE THREE
AGGRAVATING FACTORS.

Due process requires that the State bear the burden of proving each element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). The applicable standard of review is whether, 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 or the aggravating sentencing factor beyond a reasonable doubt. See State v. Brown, 132 Wn.2d 529, 607, 940 P.2d 546 (1997)(aggravating factor in aggravated murder); State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993)(essential element).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v.

Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are considered equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

A defendant is guilty of murder in the first degree when, with premeditated intent to cause the death of another person, the defendant causes the death of that person. RCW 9A.32.030(10(a)). Yates does not contest the fact that sufficient evidence supports the jury’s finding that he murdered Mercer and Ellis with premeditated intent. Instead, the defendant challenges the sufficiency of the evidence supporting each of the three aggravating factors. The evidence in the record is sufficient to support each of the jury’s determinations that the defendant committed the murders: (1) as part of a common scheme or plan, (2) in the furtherance of a robbery, and (3) to conceal a crime.

- a. The State presented sufficient evidence that the murders of Connie Ellis and Melinda Mercer were part of a common scheme or plan.

A person commits aggravated first degree murder when he commits first degree premeditated murder, he kills more than one victim, and the killings are part of a common scheme or plan. RCW 10.95.020(10). Two or more murders may be part of a common scheme or plan if there is a nexus between them other than the killer. State v. Pirtle, 127 Wn.2d 628, 661-62, 904 P.2d 245 (1995). As discussed above, a common scheme or plan *also* occurs when a person devises an overarching criminal plan and uses it to perpetrate separate but very similar crimes. State v. DeVincintis, 150 Wn.2d 11, 19, 74 P.3d 119 (2003) (citing State v. Lough, 125 Wn.2d 847, 860, 889 P.2d 487 (1995)).

The defendant argues that the evidence is insufficient to show a nexus between Ellis and Mercer other than the fact that he killed them both. He does not raise a challenge to the sufficiency of the evidence that the defendant had an overarching criminal plan and used it to perpetrate separate but very similar crimes including the murders of Ellis and Mercer.

Even if the court were to review the sufficiency of the evidence of an overarching plan absent the defendant's challenge, the record amply supports the existence of such a plan. In this case, the defendant devised an overarching criminal plan that involved a consistent targeted victim

group of females with histories of drug usage who worked in prostitution and who were white or light skinned. RP 6924. Mercer and Ellis fit within this targeted group. The victims were not selected for who they were individually, but because they were part of this larger targeted group. RP 6924.

All of the victims had died from gunshot wounds from a handgun, including Mercer and Ellis. RP 6924. All had been shot in the head; and only one, Jennifer Joseph, was shot somewhere other than the head. RP 6925. All of the victims were shot with a .25 caliber handgun, with the exception of Jennifer Joseph, who was shot with a .22. RP 6925. Five of the victims were linked by exact matches from "Mag Tech" .25 caliber bullets: Mercer, Johnson, Wason, Oster, and Maybin. RP 6925.

None of the victims, including Mercer and Ellis, sustained any observable defensive injuries, or injuries suggesting they had been physically controlled prior to being shot, such as ligature marks, facial fractures, or injury to the neck. RP 6925.

Yates had encased seven of the victims' heads in plastic bags, including Mercer's and Ellis's. RP 6925. Scott had plastic bags in the grave with her. RP 6926. Two of the earliest victims had towels found with their bodies, Joseph and Zielinski. RP 6926. Five of the 13 victims had their clothing adjusted or removed after being shot (Joseph, Wason, Oster, Maybin, and Mercer). RP 6926.

All of the murder victims, including Mercer and Ellis, had been transported from the location where they were killed to a dump site. RP 6925-26. All of the victims' bodies had been dumped adjacent to roadways with minimal effort to prevent discovery, with the exception of Murfin, whom Yates had buried by his residence. RP 6926.

The record is sufficient to support the conclusion that Yates devised an over-arching plan that he used repeatedly to murder victims in his targeted victim group, and that he used this plan when he murdered Mercer and Ellis. The jury's finding to this effect should be affirmed.

- b. The State presented sufficient evidence that the murders of Connie Ellis and Melinda Mercer were committed in furtherance of a robbery.

A person commits aggravated first degree murder when he or she commits premeditated first degree murder and "the murder was committed in the course of, in furtherance of, or in the immediate flight" of committing first or second degree robbery. RCW 10.95.020(11)(a). A person commits robbery when he or she unlawfully takes property from another, against the other's will, by "use or threatened use of immediate force, violence, or fear of injury" RCW 9A.56.190. The "force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial." RCW 9A.56.190. When the murder and

robbery are part of the same transaction, “the fact that death may have momentarily preceded the actual taking of the property from the person does not affect the guilt” of the assailant. State v. Coe, 34 Wn.2d 336, 341, 208 P.2d 863 (1949).

To establish that a killing occurred in the course of, in furtherance of, or in the immediate flight from a felony, there must be a “causal” or “intimate connection” between the killing and the felony. State v. Brown, 132 Wn.2d 529, 610, 940 P.2d 546 (1997). The killing must be part of the “res gestae” of the felony, that is, in close proximity in terms of time and distance. Brown, 132 Wn.2d at 608.

The evidence is sufficient to support the finding that the defendant murdered Ellis and Mercer in the course of robbing them. The record shows that the killings were part of the “res gestae” of the robbery in that the murder and robbery occurred in close proximity in terms of time and distance.

Mercer and Ellis were both women who worked as prostitutes to support their drug habits. RP 5324-25 (Mercer), 5765 (Ellis). Prostitutes who are drug addicts are in a cycle of buying drugs, using the drugs, and engaging in acts of prostitution to obtain more money for drugs. RP 4475. When a woman working in prostitution gets into a car, she will discuss the act in question and the amount of money. RP 4426. It is common for prostitutes to get the money up front if at all possible. RP 4432. After getting the money, they commonly hide the money in their shoes,

brassieres or underwear. RP 4433. They hide their money because they are frequently robbed. RP 4433.

Mercer was last seen alive dope sick and needing heroin. RP 5324-25. She told a friend she planned to “do a trick” and then come back with the money to buy some heroin. RP 5326. She was wearing a black tank top, a brassiere, a long floral skirt, a denim-type blazer, a black coat, and she had a purse and shoes. RP 5327, 5344-45.

When Mercer’s nude body was discovered the following day, her brassiere, tank top, purse and shoes were missing. RP 5386. No cash or identification was found on or near her body. RP 5468.

When viewed in the light most favorable to the State, this evidence establishes that shortly after murdering Mercer, the defendant removed all her clothing, encased her head in plastic bags, transported and dumped her body, but retained for his own purposes her brassiere, tank top, purse, shoes and the money Mercer had obtained from him at the initiation of their meeting. Yates’s retention of Mercer’s items shortly after murdering her supports the jury’s finding that he murdered her in the furtherance of robbing her. The killing was part of the “res gestae” of the robbery in that the murder and robbery occurred in close proximity in terms of time and distance.

The evidence is also sufficient to support the aggravating factor with respect to Ellis’s murder. Like Mercer, Ellis also worked as a prostitute to earn money for her drug addiction. RP 5765. She received a

dose of methadone on September 17, 1998, and she never reappeared at her clinic after that dose. RP 6020. A urinalysis taken at the time of her last methadone dose revealed she was using heroin and cocaine. RP 6027-28. When her body was found, it was clothed in a blouse, jeans and socks. RP 5752-53. The body, however, had no undergarments. RP 5753. Nor did it have shoes, and a single tennis shoe was found some distance from the body. RP 5754. No purse wallet, money or any form of identification was found on or near the body. RP 5754, 5906-07. DNA analysis linked a bloodstain on the carpet pad of Yates's Ford van to Ellis. RP 6768 (Plaintiff's Exhibit 639).

When viewed in the light most favorable to the State, this evidence supports the finding that Yates murdered Ellis in the course of robbing her. He lured her into his van, negotiated for prostitution services, and led her to the back of the van where he shot her in the head. He encased her head in plastic bags and undressed her while searching for money. He dumped her body but retained her undergarments, one of her shoes, and the money he had exchanged up front for prostitution services. Once again, the killing was part of the "res gestae" of the robbery in that the murder and robbery occurred in close proximity in terms of time and distance.

The defendant argues that the evidence does not establish that Yates took money from either Mercer or Ellis, or that Yates's intent to rob them was connected in any way with the killing. In so arguing, he is

asking the court to apply the wrong standard of review. In a challenge to the sufficiency of the evidence, the court must view the evidence in the light *most favorable to the State*. See State v. Vargas, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). The evidence should not be viewed in the light most favorable to the defendant.

Women who work as prostitutes commonly hide their money in their brassieres, underwear, socks, and shoes. Yates disturbed these *specific items* of clothing after murdering both victims, thereby showing Yates *intended* to rob his murder victims. In a challenge to the sufficiency of the evidence, the court can “infer criminal intent from conduct, and circumstantial evidence as well as direct evidence carries equal weight.” Vargas, 151 Wn.2d at 201 (citing State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)). The court can therefore infer Yates’s intent to rob from specific items he disturbed on the body. Mercer’s brassiere and shoes were not only disturbed, but missing. While the defendant makes the argument that Ellis may not have been wearing any underwear, the court is required to view the evidence in the light most favorable to the State, not the defendant. The record indicates Ellis *had* been wearing shoes as one shoe was found near her body. RP 5754. The evidence reflects that Yates took her shoes off while searching for money, and he retained one of them. This evidence supports the finding that Yates took for his own purposes items from both victims during the course of searching their persons for money.

In addition, the evidence indicates Yates had a motive to steal money from the victims. His money concerns are evidenced by the fact that he and his wife made periodic inquiries regarding the timeliness of his pay from the National Guard. RP 5833. By murdering the women, Yates was able to patronize prostitutes without expending money for the services. He would negotiate for a sexual act, pay the money up front, murder the victim, and then recover the money from the victim. The evidence is sufficient to support the aggravating factor of robbery.

- c. The State presented sufficient evidence that the murders were committed to conceal a crime.

A person commits aggravated first degree murder if he commits first degree murder and he commits the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime. RCW 10.95.020(2). A person is guilty of patronizing a prostitute when '[h]e or she solicits or requests another person to engage in sexual conduct with him or her in return for a fee. RCW 9A.88.110(1)(c). Patronizing a prostitute is a misdemeanor. RCW 9A.88.110(3).

The record supports the jury's finding that Yates committed the murders of Mercer and Ellis in order to protect or conceal his identity as a person who patronized prostitutes. Yates did not want to be caught by the police patronizing prostitutes. This is evidenced from his behavior on November 9, 1998, after he had picked up a prostitute, Jennifer Robinson,

and told her he wanted oral sex from her. RP 5003-04. When Yates saw the police pull up behind them, Yates told Robinson to lie by telling them he knew her father and that he was giving her a ride home. RP 5005. Yates and Robinson each gave the police this false story, and the officer allowed Robinson to get back into Yates's car. RP 5006, 5013-14. Yates was "really nervous" and "really scared" after the police let them go. RP 5007. Yates then dropped Robinson off at a gas station about three blocks away, and he was very adamant about not going through with the sex act. RP 5007. This episode reveals Yates was nervous and fearful about being caught picking up prostitutes.

While the crime of patronizing a prostitute is only a misdemeanor offence, discovery of the crime would have affected Yates's ability to advance in the National Guard. If Yates's superiors in the National Guard learned that he was patronizing prostitutes, some form of discipline would probably have resulted. RP 5826. Any such discipline would have had a significant impact on his career in terms of promotions, job assignments, or forced retirement. RP 5827. The record reflects Yates was concerned about job assignments. Yates had applied for a full-time job with the National Guard. RP 5830-31. If Yates had been caught patronizing a prostitute, this would have affected his chance of getting this job assignment. The evidence is sufficient to support the jury's finding that Yates committed the murders of Ellis and Mercer in order to conceal the crime of patronizing a prostitute.

The defendant argues that the record is not sufficient to support the finding because he did not kill all of the prostitutes he patronized. He called as witnesses during his case-in-chief a number of women he patronized as prostitutes. In raising this argument, the defendant is again asking the court to apply the wrong standard of review. The court must look at all of the evidence in the light most favorable to the State, not the defendant. The fact Yates refrained from killing each and every prostitute he patronized is not probative of his motive *at the time he murdered Mercer and Ellis*. Nor is this fact relevant for assessing the sufficiency of the evidence. The defendant's arguments to the contrary should be rejected.

The record is sufficient to support the jury's determination that the defendant was motivated to conceal his crime of patronizing a prostitute when he murdered Ellis and Mercer. The court should affirm the jury's determination.

6. THE SECOND AMENDED INFORMATION
ALLEGED ALL OF THE ELEMENTS OF THE
OFFENSE.

A charging document is constitutionally sufficient under the Sixth Amendment and article I, section 22 if it includes all the essential elements of the crime. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). An "essential element is one whose specification is necessary to establish the very illegality of the behavior." State v.

Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992). The purpose of this rule is to apprise the defendant of the charges against him and to allow the defendant to present a defense. Vangerpen, 125 Wn.2d at 787.

The defendant raises two challenges to the Amended Information. First, he argues the Amended Information should have alleged as an essential element that there were not sufficient mitigating circumstances to merit leniency for sentencing purposes. Second, the defendant argues the Amended Information should have alleged with greater specificity the aggravating circumstances of robbery and common scheme or plan. The court should reject both of these claims.

- a. The absence of mitigating circumstances is not an essential element of the crime.

When a person is charged with aggravated first degree murder, the prosecutor is required to file within 30 days of arraignment a written notice of a “special sentencing” or death penalty proceeding if the prosecutor has decided to seek the death penalty. RCW 10.95.040(1). A prosecutor may seek the death penalty upon concluding that there are “not sufficient mitigating circumstances to merit leniency.” RCW 10.95.040(1). A jury would then determine in the penalty phase whether it can find “beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency.” RCW 10.95.060(4).

If the prosecutor misses this deadline or otherwise fails to provide the defendant with proper timely written notice, the prosecutor may not seek the death penalty. See e.g. State v. Dearbone, 125 Wn.2d 173, 178, 883 P.2d 303 (1994). These death penalty notice procedures “exist to ensure that the defendant is fully apprised that the death penalty is being sought and that it is the punishment that may ultimately be exacted.” State v. Wood, 143 Wn.2d 561, 590, 23 P.3d 1046 (2001).

The defendant argues the Amended Information charging him with aggravated murder should have contained notice of the “mitigating circumstances” language derived from the death penalty notice statutes. This argument should be rejected under State v. Clark, 129 Wn.2d 805, 811, 920 P.2d 187 (1996). In Clark, the defendant argued that the “mitigating circumstances” standard contained in RCW 10.95.040 was an element of the underlying crime of aggravated murder. The court rejected this contention and reasoned as follows:

The statutory death notice here is not an element of the crime of aggravated murder. Instead, the notice simply informs the accused of the penalty that may be imposed upon conviction of the crime. While we require formal notice to the accused by information of the criminal charges to satisfy the Sixth Amendment and art. I § 22, we do not extend such constitutional notice to the *penalty* exacted for conviction of the crime.

Clark, 129 Wn.2d at 811 (emphasis in original) (citations omitted).

Although the “mitigating circumstances” standard is not an element of the crime under Clark, defendants are in fact given timely

notice of this standard through the death penalty notice procedures. The defendant received notice in this case on January 12, 2001, a year and a half prior to the start of his trial in 2002. CP 87-89, 90. In this statutory notice, the prosecutor informed the defendant:

That further, there is reason to believe that there are not sufficient mitigating circumstances to merit leniency. The prosecution may open the sentencing phase only with the defendant's criminal record and evidence which would have been admissible at the guilt phase of the trial, as well as statement(s) from survivor(s) of the victim(s). Presentation of mitigating circumstances is the responsibility of the defendant. To date of this notice, such mitigating circumstances as have been submitted have been received and are not sufficient to merit leniency.

CP 88-89 (emphasis in italics added). The defendant's argument that he was also entitled to notice in his Information places form over substance and should be rejected under Clark.

b. Aggravating circumstances are not essential elements of the crime.

The defendant next argues that the aggravating circumstances alleged in the information are elements of the crime. He argues that these "elements" were not stated with sufficient specificity to apprise him of their meaning. The court should reject this argument. The court has "already held that under the statutory scheme in Washington the aggravating factors for first degree murder are not elements of the crime but are sentence enhancers that increase the statutory maximum sentence

from life with the possibility of parole to life without the possibility of parole or the death penalty.” State v. Thomas, 150 Wn.2d 821, 848, 83 P.3d 970 (2004) (citing State v. Kincaid, 103 Wn.2d 304, 307, 697 P.2d 823 (1985)); see also State v. Brett, 126 Wn.2d 136, 154, 892 P.2d 29 (1995); State v. Irizarry, 111 Wn.2d 591, 763 P.2d 432 (1988); State v. Mak, 105 Wn.2d 692, 741-42, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986).

In State v. Brett, the defendant was charged with aggravated first degree murder, and the information alleged that the murder was committed in the course of, in furtherance of, or in immediate flight from first degree burglary, robbery, or kidnapping. Like Yates, Brett asserted that the information violated the essential elements rule because it did not include the specific elements of the aggravating factors. Brett, 126 Wn.2d at 154. The court disagreed, stating that aggravating circumstances are not elements of the crime. Brett, 126 Wn.2d at 154-55.

The Amended Information in this case informed the defendant that the State was alleging the murders were committed in the course of, in furtherance of, or in immediate flight from the crime of first or second degree robbery. CP 1003-04. The Amended Information also informed him that the State alleged the defendant “killed more than one victim, and the murders were part of a common scheme or plan during the period of May 1996 through October 1998.” CP 1003-04. The defendant did in fact receive notice of the aggravating factors even though these factors are not

essential elements of the offense. Once again, his argument to the contrary places form over substance.

The defendant argues that aggravating circumstances should be deemed essential elements of the crime under Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). This argument should be rejected. In Apprendi, the Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum *must be submitted to a jury, and proved beyond a reasonable doubt.*” Apprendi, 530 U.S. at 490 (emphasis added). In Ring, the Court held that Arizona’s capital sentencing scheme violated the Sixth Amendment right to trial by jury. Ring, 536 U.S. at 609. The Court concluded that “[b]ecause Arizona’s enumerated aggravating factors operate as ‘the functional equivalent of an element of a greater offense,’ *the Sixth Amendment requires that they be found by a jury.*” Ring, 536 U.S. at 609 (quoting Apprendi, 530 U.S. at 494 n.19).

Apprendi and Ring concern a criminal defendant’s right to have a *jury* determine any fact that could increase his sentence beyond the statutory maximum. These cases do not concern the adequacy of any charging document. In fact, the Court in both Apprendi and Ring clearly and specifically indicated that those decisions did not concern or have any applicability to allegedly defective charging documents. See Apprendi,

530 U.S. at 477 n. 3. (“Apprendi has not here asserted a constitutional claim based on the omission of any reference to sentence enhancement or racial bias in the indictment”); Ring, 536 U.S. at 597 n.4 (“Ring does not contend that his indictment was constitutionally defective.”) Apprendi and Ring therefore do not stand for the proposition that the charging document in this case was deficient. Nor can they be interpreted as “overruling” this Court’s holding in Brett and other cases that aggravating circumstances are not essential elements of the offense.

The Court in both Apprendi and Ring noted that the Fourteenth Amendment has not been construed to include the Fifth Amendment right to presentment or indictment of a Grand Jury. Apprendi, 530 U.S. at 477 n.3; Ring, 536 U.S. at 597 n.4. The indictment clause of the Fifth Amendment therefore does not require that a criminal charging document in a state prosecution contain facts necessary for the State to obtain a sentencing enhancement, and other courts have reached this conclusion. See e.g. Muhammed v. Commonwealth, 269 Va. 451, 494, 611 S.E.2d 537 (2005) (“We hold that aggravating factors are not constitutionally required to be recited in a capital murder indictment”); Baker v. State, 367 Md. 648, 684, 790 A.2d 629 (2002), cert. denied, 535 U.S. 1050 (2002); State v. Cox, 337 Ore. 477, 499, 98 P.3d 1103 (2004), cert. denied, 126 S. Ct. 50 (2005).

In raising his arguments under Apprendi and Ring, the defendant is essentially asking this Court to read those decisions so broadly as to alter

federal constitutional jurisprudence by holding that the Fifth Amendment indictment clause *does* apply to the states through the Fourteenth Amendment. The State is not aware of any court in this country that has reached this conclusion. See e.g. North Carolina v. Hunt, 357 N.C. 257, 582 S.E.2d 593 (2003)(“Our independent review of decisions from our sister states reveals that to this date every state court addressing the above-noted issue has held that Ring does not require that aggravating circumstances be alleged in the indictment.”) This Court should join other state courts that have rejected Apprendi-based claims to conclude that aggravating sentencing factors need not be included in the charging document. See e.g. People v. McClain, 343 Ill. App. 3d 1122, 799 N.E.2d 322, 336, 278 Ill. Dec. 781 (Ill. App. 3d 2003)(Ring does not require that aggravating factors be pled in a state court indictment); Baker, 367 Md. at 683.

The defendant also argues that aggravating factors should be considered elements of the crime under State v. Goodman, 150 Wn.2d 774, 83 P.3d 410 (2004). Goodman is not on point. In Goodman, the defendant was charged with possession of “meth.” Goodman, 150 Wn.2d at 779. The defendant argued that the charging document did not include all of the essential elements because “meth” could be an abbreviation for a variety of substances, the possession of which carried different potential sentences. Goodman, 150 Wn.2d at 784. The court agreed, holding that “[b]ecause the statutory maximum sentence increased depending on which

controlled substance Goodman possessed, the identity of that controlled substance was a ‘fact that increases the penalty for a crime beyond the prescribed statutory maximum.’” Goodman, 150 Wn.2d at 786 (quoting Apprendi, 530 U.S. at 490). The defendant contends that aggravating factors also increase the sentence beyond the statutory maximum for first degree murder, and the elements of the factors must therefore be included in the information. In Goodman, however, it was not clear from the face of the information what maximum sentence the defendant faced. Depending on what “meth” meant, the maximum sentence could be five or ten years. Goodman, 150 Wn.2d at 786. In this case, however, the defendant was charged with aggravated first degree murder, for which the maximum penalty is life imprisonment with no possibility of parole or death if there are insufficient mitigating circumstances to merit leniency. RCW 10.95.030. The underlying elements or details of the aggravating factors would not change the maximum penalty. Goodman is therefore distinguishable.

The Amended Information was not deficient. The court should reject the defendant’s argument to the contrary.

7. THE TRIAL COURT PROPERLY ALLOWED THE JURY TO CONSIDER WHETHER THE DEFENDANT WAS GUILTY OF FIRST DEGREE PREMEDITATED MURDER BEFORE DETERMINING THE EXISTENCE OF AGGRAVATING FACTORS.

The defendant argues the trial court erred in not allowing the jury to consider the lesser offense of first degree premeditated murder. The defendant's argument should be rejected. The trial court did instruct the jury on this lesser offense, and the jury did have the option of convicting him only of first degree murder.

Aggravated first degree murder is not a crime in and of itself; the crime is premeditated murder in the first degree accompanied by the presence of one or more of the statutory aggravating circumstances listed in RCW 10.95.020. State v. Roberts, 142 Wn.2d 471, 501, 14 P.3d 717 (2000). Accordingly, in order for the State to prove a defendant committed aggravated first degree murder, the State must first prove that the defendant committed first degree murder:

A person is guilty of aggravated first degree murder, a class A felony, if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist. . . .

RCW 10.95.020. Under RCW 9A.32.030(1)(a), a person is guilty of first degree murder when he or she causes the death of another person with *premeditated* intent. In following this statutory framework, the trial court instructed the jury to first consider whether the defendant was guilty of the

crime of first degree premeditated murder. The court instructed the jury that if it found the defendant guilty of premeditated first degree murder, the jury was then to determine whether any aggravating circumstances existed. CP 4099, 4100, 4108-09. The trial court's instructions were derived from the standard Washington Pattern Instructions for first degree premeditated murder and aggravated murder. See WPIC 26.02 and 30.03. Under these instructions, the jury could have, if it had so chosen, found the defendant guilty only of first degree premeditated murder.

The defendant argues the court's jury instructions violated the Eighth Amendment under Beck v. Alabama, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), because the court declined to give his proposed jury instruction that *specifically* informed the jury that first degree premeditated murder was a "lesser included offense" of aggravated first degree murder.¹⁹ A defendant "may be found guilty of an offense the

¹⁹ The defense has proposed the following instruction, which the court declined to give: If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, the defendant may be found guilty of any lesser crime, the commission of which is necessarily included in the crime charged, if the evidence is sufficient to establish the defendant's guilt of such lesser crime beyond a reasonable doubt.

The crime of premeditated first degree murder with aggravating circumstances necessarily includes the lesser crime of premeditated first degree murder.

When a crime has been proven against a person and there exists a reasonable doubt as to which of two or more crimes that person is guilty, he or she shall be convicted only of the lowest crime.

CP 4030.