

COURT OF APPEALS  
DIVISION THREE  
OF THE STATE OF WASHINGTON

79068 0

RECEIVED

STATE OF WASHINGTON )  
 )  
 Respondent, )  
 )  
 v. )  
 )  
 Anthony Dion Davis )  
 (your name) )  
 )  
 Appellant. )

SK  
The Office of the Clerk  
Washington Court of Appeals, Division Three  
P.O. \_\_\_\_\_

No. 238342

STATEMENT OF ADDITIONAL  
GROUNDS FOR REVIEW

I, Anthony D. Davis, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

GROSS ABUSE OF APPELLANT'S 5<sup>th</sup> AMENDMENT RIGHT TO REMAIN SILENT AND THE ATTEMPTED SUPPRESSION OF THAT FACT. (SEE BRIEF SUMMARY)  
- MIRANDA LAW, RIGHT TO COUNSEL, RIGHT TO REMAIN SILENT

Additional Ground 2

TRIAL PROCEDURAL ERRORS; CRR 3.5 & CRR 4.5  
(SEE BRIEF SUMMARY). THESE ERRORS ARE SUPPORT FOR "ADDITIONAL GROUND 1"

If there are additional grounds, a brief summary is attached to this statement.

Date: 29 JULY 2005

Signature: 



①★

Ground/Error

1. I should be released from confinement because: COURT ERRORED IN ALLOWING PART OF A STATEMENT MADE IN CONTEXTS WITH THE APPELLANT INVOKING HIS U.S. CONSTITUTIONAL AMEND. 5<sup>th</sup> RIGHT TO REMAIN SILENT AFTER REQUESTING COUNSEL. POLICE ERRORED BY ASKING THE APPELLANT ADDITIONAL QUESTIONS AFTER THE APPELLANT INVOKED HIS RIGHT TO REMAIN SILENT THE PARTIAL STATEMENT HEARD BY THE JURY LED TO

2. The following facts support this Ground/Error: A UNFAIR TRIAL AND VIOLATED DUE PROCESS.

COA NO. 23834-2-III, RECORD CITE (PGS. 276-300)

STATEMENT OF ADDITIONAL GROUNDS (RAP 10.10)

ANTHONY DION DAVIS, APPELLANT, COA NO. 23834-2-2-III

NO. 04-1-01928-6 APPELLANT HEARE PRO SE

3. The following reported court decisions support this Ground/Error: US V. BURSON, 952 F2d 1196 (10<sup>th</sup> Cir. 1991) ;\* ALSTON V. REDMAN, 34 F3d 1237 (3<sup>rd</sup> Cir. 1994) ;\* EDWARDS V. ARIZONA. 451 U.S. 477, 68 LEd 2d 378, 101 Sct 1890 (1981) ;\* THOMPSON V. KEOHANE, 516 US 99, 133 LEd 2d 383, 116 Sct 457 (1995) ;\* US V. MELGAR, 139 F3d 1005 (4<sup>th</sup> Cir. 1998) ;\* BLACKMON V JOHNSON, 145 F3d 205 (5<sup>th</sup> Cir. 1998) ;\* MARTINEZ V. CITY OF OXNARD, 270 F3d 852 (9<sup>th</sup> Cir. 2001) ;\* JOCKS V TAVERNIER, 316 F3d 128 (2<sup>nd</sup> Cir. 2003) ;\* DICKERSON V. US, 530 US 428, 147 LEd 2d 405, 120 Sct 2326 (2000)

4. The following statutes and constitutional provisions support this Ground/Error: - U.S. CONST. AMENDS. 5<sup>th</sup>, 6<sup>th</sup>, 14<sup>th</sup> MIRANDA LAW, RIGHT TO REMAIN SILENT, RIGHT TO FAIR TRIAL, DUE PROCESS

5. This Petition is the best way to obtain the relief that I am requesting because of: \_\_\_\_\_



1.1 \* Ground/Error

1. I should be released from confinement because: "IF SUSPECT REQUESTS COUNSEL IN AN INTERROGATION CONTEXT, FIFTH AMENDMENT AFFORDS HIM PROTECTION REGARDLESS OF SUBJECT OF INTERROGATION." - US V. AMELGAR, 139 F3d 1005 (4th Cir. 1998)

2. The following facts support this Ground/Error: BECAUSE OFFICER TAYLOR'S VERSION OF THE STATEMENT WAS ALTERED AND THE APPELLANT STILL SAID THE ORIGINAL STATEMENT DURING HIS TESTIMONY, THE APPELLANT'S DEFENSE WAS RENDERED INOPERABLE WHEN THE PROSECUTOR ASKED THE JURY TO DECIDE WHO WAS TELLING THE TRUTH, A 20 YEAR VETERAN POLICE OFFICER OR THE DEFENDANT/APPELLANT.

3. The following reported court decisions support this Ground/Error: \_\_\_\_\_

4. The following statutes and constitutional provisions support this Ground/Error: \_\_\_\_\_

5. This Petition is the best way to obtain the relief that I am requesting because of: \_\_\_\_\_



- CRR 3.5 CONFESSION PROCEDURE  
VIOLATION

①

Ground/Error

- ①. I should be released from confinement because: THE CRR 3.5 HEARING WAS CONDUCTED IN VIOLATION OF THE RULE, THE CRR 3.5 IS A PRELIMINARY HEARING HELD IN THE OMNIBUS HEARING, OR A TIME IS SET BEFORE TRIAL THE CRR 3.5 CONFESSION PROCEDURE IS HELD TO DETERMINE IF A CONFESSION STATEMENT IS ADMISSIBLE. THE STATEMENT IN QUESTION IS NOT A CONFESSION AND THE 3.5 HEARING WAS CONDUCTED ON THE SECOND DAY OF TRIAL.
- ②. The following facts support this Ground/Error: THE RECORD CLEARLY SHOWS A PRELIMINARY HEARING; 3.5, HELD DURING A RECESS OF THE SECOND DAY OF OPEN TRIAL. THE APPELLANT NEVER HAD A OMNIBUS HEARING CRR 4.5. NOR DID HE CONFESS; THE JURY NEVER KNEW ABOUT THE CRR 3.5 HEARING NESTED IN THE TRIAL, NOR DID THEY GET THE FACTS AND RECORD FROM THE COURT AS PROVIDED IN THE RULE. THE CRR 3.5 IS NOT THE CORRECT VEHICLE FOR SUPPRESSION OF EVIDENCE
- ③. The following reported court decisions support this Ground/Error: RECORD CITE (Pgs. 276-300)

- ④. The following statutes and constitutional provisions support this Ground/Error: SUPERIOR COURT CRIMINAL RULES (CRR) RULES: CRR 3.5, 3.6, 4.5

- LEADING TO CONST. AMEND. VIOLATION OF FAIR TRIAL & DUE PROCESS

CONST. AMENDS. 5<sup>th</sup>, 14<sup>th</sup>

5. This Petition is the best way to obtain the relief that I am requesting because of: \_\_\_\_\_



②

Ground/Error

①. I should be released from confinement because: THE PROSECUTOR WANTED A PART OF A STATEMENT SUPPRESSED; HOWEVER, NOTHING WAS SUBMITTED IN WRITING SUPPORTED BY AN AFFIDAVIT PROVIDING THE AUTHORITIES FOR SUCH A MOTION. IN FACT, A MOTION WAS NEVER HEARD. A EVIDENTIARY HEARING WAS NEVER CONDUCTED. THE STATEMENT (NON-CONFESSION) "THERE'S NOTHING WRONG WITH HER, WE HAD AN ARGUMENT,

②. The following facts support this Ground/Error: I WANT TO TALK TO MY ATTORNEY." IS A DENIAL OF THE PLAINTIFF'S CLAIMS AND THE APPELLANT INVOKING HIS RIGHT TO COUNSEL AND TO REMAIN SILENT. THE PROSECUTOR WANTED A PART OF THE STATEMENT ADMITTED, AND PART SUPPRESSED. THE PROSECUTOR WANTED ADDITIONAL STATEMENTS SUPPRESSED. THIS WAS NOT A EVIDENTIARY HEARING, THIS WAS OPEN TRIAL DURING A RECESS.

3. The following reported court decisions support this Ground/Error: RECORD CITE (PGS. 276 - 300)

④. The following statutes and constitutional provisions support this Ground/Error: SUPERIOR COURT CRIMINAL RULES (CR R) RULE: 3.6

- LEADING TO CONST. AMEND. VIOLATION OF FAIR TRIAL & DUE PROCESS

CONST. AMENDS. 5<sup>th</sup>, 14<sup>th</sup>

8. This Petition is the best way to obtain the relief that I am requesting because of: \_\_\_\_\_



- 3.5 HEARING, SUPPRESSION OF EVIDENCE FAVORABLE TO THE DEFENDANT.

③

Ground/Error

①. I should be released from confinement because: THE STATEMENT IN QUESTION IS EXTREMELY IMPORTANT, IT SHOWS THAT OFFICER TAYLOR VIOLATED THE APPELLANT'S FIFTH AMENDMENT RIGHTS. THE OFFICER QUESTIONED THE APPELLANT AFTER HE INVOKED HIS RIGHT TO REMAIN SILENT. THE OFFICER NEVER READ THE APPELLANT HIS MIRANDA RIGHTS. THIS WAS CLEARLY EVIDENCE FAVORABLE TO THE APPELLANT.

②. The following facts support this Ground/Error: THE CRR 3.5 HEARING, CONDUCTED WITHOUT PRIOR WARNING OR PROPER AUTHORITY, DURING A RECESS OF OPEN TRIAL, WAS USED UNLAWFULLY TO SUPPRESS PART OF A STATEMENT THAT REFLECTED THE GROSS ERRORS MADE BY THE POLICE. THE POLICE NEVER CONTACTED THE APPELLANT IN PERSON. THE STATEMENT WAS SAID OVER A CELL PHONE. THE ARGUMENT THE PLAINTIFF AND THE APPELLANT HAD WAS TELEPHONIC.

X. The following reported court decisions support this

Ground/Error: RECORD CITE (PGS. 276-300)

④. The following statutes and constitutional provisions support this Ground/Error: SUPERIOR COURT CRIMINAL RULES (CRR) RULES: 3.5, 3.6, 4.5

- CONST. AMENDS 5<sup>th</sup>, 6<sup>th</sup>, 14<sup>th</sup>  
MIRANDA CASE LAW.

X. This Petition is the best way to obtain the relief that I am requesting because of: \_\_\_\_\_



- CRR 4.5 Omnibus Hearing  
VIOLATION  
- STATEMENTS to the COURT OF APPEALS

(4)

Ground/Error

1. I should be released from confinement because: ISSUES OR STATEMENTS the PROSECUTOR HAD QUESTION WITH SHOULD HAD BEEN ADDRESSED DURING the Omnibus Hearing NOT OPEN TRIAL WITH NO PRIOR WARNING. The APPELLANT NEVER HAD AN Omnibus HEARING. The RIGHT to the HEARING AFTER the APPELLANT PLEAD NOT GUILTY WAS NOT AFFORDED to him

2. The following facts support this Ground/Error: "THE STATEMENTS HERE AND THE RECORD EVIDENCE PRESENT MAJOR CONSTITUTIONAL RIGHTS VIOLATIONS AND THE SUPPRESSION OF THAT FACT. THE APPELLANT FROM HIS CELL, SINCERELY ASKS THE RESPECTFUL COURT OF APPEALS DIVISION III TO INVESTIGATE INTO THE MERITS OF THESE CLAIMS. THE APPELLANT BEGS THE COURT OF APPEALS TO USE ITS POWERS OF DISCRETION TO REDIRECT COUNSEL FOR THE APPELLANT TO PREPARE AN

3. The following reported court decisions support this Ground/Error: ADDITIONAL BRIEF SO THAT THESE ISSUES CAN BE PROPERLY PRESENTED TO THIS HONORABLE COURT IN A MANNER THAT PLEASES THE COURT. THANK YOU FOR TAKING THE TIME TO READ THIS PACKAGE." - MIA DAVIS  
- (RAP 10.10 (A))

4. The following statutes and constitutional provisions support this Ground/Error: SUPERIOR COURT CRIMINAL RULES (CRR) RULE 4.5

5. This Petition is the best way to obtain the relief that I am requesting because of: \_\_\_\_\_



# SUPERIOR COURT CRIMINAL RULES (CrR)

Effective July 1, 1973  
Including Amendments Received Through  
October 1, 2004

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1. SCOPE, PURPOSE AND CONSTRUCTION

RULE 1.1 SCOPE

These rules govern the procedure in the courts of general jurisdiction of the State of Washington in all criminal proceedings and supersede all procedural statutes and rules that may be in conflict and shall be interpreted and supplemented in light of the common law and the decisional law of this state. These rules shall not be construed to affect or derogate from the constitutional rights of any defendant.

RULE 1.2 PURPOSE AND CONSTRUCTION

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, effective justice, and the elimination of unjustifiable expense and delay.

RULE 1.3 EFFECT

Except as otherwise provided elsewhere in these rules, on their effective date:

- (a) Any acts done before the effective date in any proceedings then pending or any action taken in any

2. PROCEDURES PRIOR TO ARREST AND OTHER SPECIAL PROCEEDINGS

RULE 2.1 THE INDICTMENT AND THE INFORMATION

(a) Use of Indictment or Information. The initial pleading by the State shall be an indictment or an information in all criminal proceedings filed by the prosecuting attorney.

(1) *Nature.* The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the prosecuting attorney. Allegations made in one count may be incorporated by reference in another count. It may be alleged that the means by which the defendant committed the offense are un-

proceeding pending under rules of procedure in effect prior to the effective date of these rules and any constitutional right are not impaired by these rules.

(b) These rules also apply to any proceedings in court then pending or thereafter commenced regardless of when the proceedings were commenced, except to the extent that in the opinion of the court, the former procedure should continue to be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedures of these rules.

RULE 1.4 PROSECUTING ATTORNEY DEFINITION

Whenever used in these rules, prosecuting attorney shall include deputy prosecuting attorneys, or such other person as may be designated by statute.

RULE 1.5 STYLE AND FORM

[Reserved. See CR 141]  
 [Adopted effective September 1, 1990; amended effective September 1, 2000.]

known or that the defendant committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice.

(2) *Contents.* The indictment or the information shall contain or have attached to it the following information when filed with the court:

(f) the name, address, date of birth, and sex of the defendant;

(ii) all known personal identification numbers for the defendant, including the Washington driver's operating license (DOL) number, the state criminal identification (SID) number, the state criminal process control number (PCN), the JUVIS control number, and the Washington Department of Corrections (DOC) number.

(b) **Surplusage.** The court on motion of the defendant may strike surplusage from the indictment or information.

(c) **Bill of Particulars.** The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within 10 days after arraignment or at such later time as the court may permit.

(d) **Amendment.** The court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.

(e) **Defendant's Criminal History.** Upon the filing of an indictment or information charging a felony, the prosecuting attorney shall request a copy of the defendant's criminal history, as defined in RCW 9.94A.030, from the Washington State Patrol Identification and Criminal History Section.

[Amended effective July 1, 1984; September 1, 1986; March 18, 1994.]

**Comment**

Supersedes RCW 10.37.020, .025, .026, .035, .180; RCW 10.40.080; RCW 10.46.170. The purpose of section (f) is to ensure that the defendant's criminal history is available when and if the court is required to determine the validity of a plea agreement.

**Comment to Adoption of Cr 2.1[(e)]**

The purpose of the rule is to ensure that the defendant's criminal history is available when and if the court is required to determine the validity of a plea agreement.

**RULE 2.2 WARRANT OF ARREST AND SUMMONS**

(a) **Warrant of Arrest.**

(1) *Generally.* If an indictment is found or an information is filed, the court may direct the clerk to issue a warrant for the arrest of the defendant.

(2) *Probable Cause.* Before ruling on a request for a warrant the court may require the complainant to appear personally and may examine under oath the complainant and any witnesses the complainant may produce. A warrant of arrest may not issue unless the court determines that there is probable cause to believe that the defendant committed the offense charged. The court shall determine probable cause based on an affidavit, a document as provided in RCW 9A.72.082 or any law amendatory thereto, or sworn testimony estab-

lishing the grounds for issuing the warrant. Sworn testimony shall be recorded electronically or stenographically. The evidence shall be preserved and shall be subject to constitutional limitations for probable cause determinations and may be hearsay in whole or in part.

(3) *Ascertaining Defendant's Current Address.*

(i) Search for Address. The court shall not issue a warrant unless it determines that the complainant has attempted to ascertain the defendant's current address by searching the following: (A) the District Court Information System database (DISCIS), (B) the driver's license and identifier database maintained by the Department of Licenses; and (C) the database maintained by the Department of Corrections listing persons incarcerated and under supervision. The court in its discretion may require that other databases be searched.

(ii) Exemptions from Address Search. The search required by subdivision (i) shall not be required if (A) the defendant has already appeared in court after filing of the same case, (B) the defendant is known to be in custody, or (C) the defendant's name is unknown.

(iii) Effect of Erroneous Issuance. If a warrant is erroneously issued in violation of this subsection (a)(3), that error shall not affect the validity of the warrant.

(b) **Issuance of Summons in Lieu of Warrant.**

(1) *Generally.* If an indictment is found or an information is filed, the court may direct the clerk to issue a summons commanding the defendant to appear before the court at a specified time and place.

(2) *When Summons Must Issue.* If the indictment or information charges only the commission of a misdemeanor or a gross misdemeanor, the court shall direct the clerk to issue a summons instead of a warrant unless it finds reasonable cause to believe that the defendant will not appear in response to a summons, or that arrest is necessary to prevent bodily harm to the accused or another, in which case it may issue a warrant.

(3) *Summons.* A summons shall be in writing and in the name of the State of Washington, shall be signed by the clerk with the title of the office, and shall state the date when issued and the county where issued. It shall state the name of the defendant and shall summon the defendant to appear before the court at a stated time and place.

(4) *Failure To Appear on Summons.* If a person fails to appear in response to a summons, or if service is not effected within a reasonable time, a warrant for arrest may issue.

(c) **Requisites of a Warrant.** The warrant shall be in writing and in the name of the State of Washington, shall be signed by the clerk with the title of the office, and shall state the date when issued and the county where issued. It shall specify the name of the defendant, or if the defendant's name is unknown, any name

or description by which the defendant can be identified with reasonable certainty. The warrant shall specify the offense charged against the defendant and that the court has found that probable cause exists to believe the defendant has committed the offense charged and shall command that the defendant be arrested and brought forthwith before the court issuing the warrant. If the offense is bailable, the judge shall set forth in the order for the warrant, bail, or other conditions of release.

(d) **Execution; Service.**

(1) *Execution of Warrant.* The warrant shall be directed to all peace officers in the state and shall be executed only by a peace officer.

(2) *Service of Summons.* The summons may be served any place within the state. It shall be served by a peace officer who shall deliver a copy of the same to the defendant personally, or it may be served by mailing the same, postage prepaid, to the defendant at the defendant's address.

(e) **Return.** The officer executing a warrant shall make return to the court before whom the defendant is brought pursuant to these rules. At the request of the prosecuting attorney any unexecuted warrant shall be returned to the issuing court to be canceled. The person to whom a summons has been delivered for service shall, on or before the return date, file a return with the court before which the summons is returnable. For reasonable cause, the court may order that the warrant be returned to it.

(f) **Defective Warrant or Summons.**

(1) *Arrestment.* No person arrested under a warrant or appearing in response to a summons shall be discharged from custody or dismissed because of any irregularity in the warrant or summons, but the warrant or summons may be amended so as to remedy any such irregularity.

(2) *Issuance of New Warrant or Summons.* If during the preliminary examination of any person arrested under a warrant or appearing in response to a summons, it appears that the warrant or summons does not properly name or describe the defendant or the offense with which the defendant is charged, or that although not guilty of the offense specified in the warrant or summons, there is reasonable ground to believe that the defendant is guilty of some other offense, the judge shall not discharge or dismiss the defendant but may allow a new indictment or information to be filed and shall thereupon issue a new warrant or summons.

(g) **Failure to Issue Warrant—Dismissal.** Upon five days' notice to the prosecuting attorney, the court shall dismiss a charge without prejudice if (i) 90 days have elapsed since the indictment or information was filed and (ii) on the date that the order of dismissal is entered, no warrant has been issued and the defendant has not appeared in court.

[Amended effective September 1, 1983; September 1, 1986; September 1, 1995; September 1, 2005.]

**Comment**

Supersedes RCW 10.31.010, .020.

**RULE 2.3 SEARCH AND SEIZURE**

(a) **Authority to Issue Warrant.** A search warrant authorized by this rule may be issued by the court upon request of a peace officer or a prosecuting attorney.

(b) **Property or Persons Which May Be Seized With a Warrant.** A warrant may be issued under this rule to search for and seize any (1) evidence of a crime, or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) weapons or other things by means of which a crime has been committed; or (4) person or persons about to be committed; or (5) person or persons whose arrest there is probable cause, or who is unlawfully restrained.

(c) **Issuance and Contents.** A search warrant may be issued only if the court determines there is probable cause for the issuance of a warrant. There must be an affidavit, a document as provided in RCW 9A.72.085 or any law amendatory thereto, or sworn testimony establishing the grounds for issuing the warrant. The sworn testimony may be an electronically recorded telephonic statement. The recording or a duplicate of the recording shall be a part of the court record and shall be transcribed if requested by a party if there is a challenge to the validity of the warrant or if ordered by the court. The evidence in support of the finding of probable cause shall be preserved and shall be subject to constitutional limitations for such determinations and may be hearsay in whole or in part. If the court finds that probable cause for the issuance of a warrant exists, it shall issue a warrant or direct an individual whom it authorizes for such purpose to affix the court's signature to a warrant identifying the property or person and naming or describing the person, place or thing to be searched. The court shall record a summary of any additional evidence on which it relies. The warrant shall be directed to any peace officer. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person, place or thing named for the property or person specified. It shall designate to whom it shall be returned. The warrant may be served at any time.

(d) **Execution and Return With Inventory.** The peace officer taking property under the warrant shall give to the person from whom or from whose premises the property is taken a copy of the warrant and a receipt for the property taken. If no such person is present, the officer may post a copy of the search warrant and receipt. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person from whose possession or premises the property is taken, or in the presence of at least one person other than the officer. The court shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) **Motion for Return of Property.** A person aggrieved by an unlawful search and seizure may move the court for the return of the property on the ground that the property was illegally seized and that the person is lawfully entitled to possession thereof. If the motion is granted the property shall be returned. If a motion for return of property is made or comes on for hearing after an indictment or information is filed in the court in which the motion is pending, it shall be treated as a motion to suppress.

(f) **Searches of Media.**

(1) **Scope.** If an application for a search warrant is governed by RCW 10.79.015(3) or 42 U.S.C. § 20000a et seq., this section controls the procedure for obtaining the evidence.

(2) **Subpoena Duces Tecum.** Except as provided in subsection (3), if the court determines that the application satisfies the requirements for issuance of a warrant, as provided in section (c) of this rule, the court shall issue a subpoena duces tecum in accordance with CR 45(b).

(3) **Warrant.** If the court determines that the application satisfies the requirements for issuance of a warrant and that RCW 10.79.015(3) and 42 U.S.C.

§§ 20000a et seq. permit issuance of a search warrant rather than a subpoena duces tecum, the court may issue a warrant.  
[Amended effective September 1, 1983; September 1, 1986; September 1, 1995.]

**Comment**

Supersedes RCW 10.79.010, .030.

**Comment—1986**

The addition of cautionary language regarding the use of hearsay evidence in making a finding of probable cause is identical to the amendment proposed for CR 2.2(a). A similar warning is presently found in CR 4.7(b)(2). The committee was concerned that a rule user might be misled into believing that CR 2.3(c) codified all the decisional law governing the use of hearsay evidence. The proposed change will provide a warning to consult case law or otherwise make an examination beyond the rule. The remaining amendments to sections (c), (d), and (e) reflect the committee's decisions on style. The committee decided to substitute "court" for "judge", and to change gender-specific pronouns in rules which were otherwise being amended.

### 3. RIGHTS OF DEFENDANTS

#### RULE 3.1 RIGHT TO AND ASSIGNMENT OF LAWYER

(a) **Types of Proceedings.** The right to a lawyer shall extend to all criminal proceedings for offenses punishable by loss of liberty regardless of their denomination as felonies, misdemeanors, or otherwise.

(b) **Stage of Proceedings.**

(1) The right to a lawyer shall accrue as soon as feasible after the defendant is taken into custody, appears before a committing magistrate, or is formally charged, whichever occurs earliest.

(2) A lawyer shall be provided at every stage of the proceedings, including sentencing, appeal, and post-conviction review. A lawyer initially appointed shall continue to represent the defendant through all stages of the proceedings unless a new appointment is made by the court following withdrawal of the original lawyer pursuant to section (c) because geographical considerations or other factors make it necessary.

(c) **Explaining the Availability of a Lawyer.**

(1) When a person is taken into custody that person shall immediately be advised of the right to a lawyer. Such advice shall be made in words easily understood, and it shall be stated expressly that a person who is unable to pay a lawyer is entitled to have one provided without charge.

(2) At the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any

other means necessary to place the person in communication with a lawyer.

(d) **Assignment of Lawyer.**

(1) Unless waived, a lawyer shall be provided to any person who is financially unable to obtain one without causing substantial hardship to the person or to the person's family. A lawyer shall not be denied to any person merely because the person's friends or relatives have resources adequate to retain a lawyer or because the person has posted or is capable of posting bond.

(2) The ability to pay part of the cost of a lawyer shall not preclude assignment. The assignment of a lawyer may be conditioned upon part payment pursuant to an established method of collection.

(3) Information given by a person to assist in the determination of whether the person is financially able to obtain a lawyer shall be under oath and shall not be available for use by the prosecution in the pending case in chief.

(e) **Withdrawal of Lawyer.** Whenever a criminal cause has been set for trial, no lawyer shall be allowed to withdraw from said cause, except upon written consent of the court, for good and sufficient reason shown.

(f) **Services Other Than a Lawyer.**

(1) A lawyer for a defendant who is financially unable to obtain investigative, expert, or other services necessary to an adequate defense in the case may request them by a motion to the court.

(2) Upon finding the services are necessary and that the defendant is financially unable to obtain them, the court, or a person or agency to whom the administration of the program may have been delegated by local court rule, shall authorize the services. The motion may be made ex parte, and, upon a showing of good cause, the moving papers may be ordered sealed by the court, and shall remain sealed until further order of the court.

The court, in the interest of justice and on a finding that timely procurement of necessary services could not await prior authorization, shall ratify such services after they have been obtained.

(3) Reasonable compensation for the services shall be determined and payment directed to the organization or person who rendered them upon the filing of a claim for compensation supported by affidavit specifying the time expended and the services and expenses incurred on behalf of the defendant, and the compensation received in the same case or for the same services from any other source.

[Amended effective September 1, 1986; September 1, 1995.]

**Comment**

Supersedes RCW 10.01.110; RCW 10.40.030; RCW 10.46.050.

#### RULE 3.2 RELEASE OF ACCUSED

If the court does not find, or a court has not previously found, probable cause, the accused shall be released without conditions.

(a) **Presumption of Release in Noncapital Cases.** Any person, other than a person charged with a capital offense, shall at the preliminary appearance or re-appearance pursuant to rule 3.2.1 or CRJ 3. 2.1 be ordered released on the accused's personal recognizeance pending trial unless:

(1) the court determines that such recognizeance will not reasonably assure the accused's appearance, when required, or

(2) there is shown a likely danger that the accused:

(a) will commit a violent crime, or

(b) will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice.

For the purpose of this rule, "violent crimes" are not limited to crimes defined as violent offenses in RCW 9.94A.030.

In making the determination herein, the court shall, on the available information, consider the relevant facts including, but not limited to, those in subsections (c) and (e) of this rule.

(b) **Showing of Likely Failure to Appear—Least Restrictive Conditions of Release.** If the court determines that the accused is not likely to appear if released on personal recognizeance, the court shall impose the least restrictive of the following conditions that will reasonably assure that the accused will be present for later hearings, or, if no single condition gives that assurance, any combination of the following conditions:

(1) Place the accused in the custody of a designated person or organization agreeing to supervise the accused;

(2) Place restrictions on the travel, association, or place of abode of the accused during the period of release;

(3) Require the execution of an unsecured bond in a specified amount;

(4) Require the execution of a bond in a specified amount and the deposit in the registry of the court in cash or other security as directed, of a sum not to exceed 10 percent of the amount of the bond, such deposit to be returned upon the performance of the conditions of release or forfeited for violation of any condition of release;

(5) Require the execution of a bond with sufficient solvent sureties, or the deposit of cash in lieu thereof;

(6) Require the accused to return to custody during specified hours or to be placed on electronic monitoring, if available; or

(7) Impose any condition other than detention deemed reasonably necessary to assure appearance as required.

If the court determines that the accused must post a secured or unsecured bond, the court shall consider, on the available information, the accused's financial resources for the purposes of setting a bond that will reasonably assure the accused's appearance.

(c) **Relevant Factors—Future Appearance.** In determining which conditions of release will reasonably assure the accused's appearance, the court shall, on the available information, consider the relevant facts including but not limited to:

(1) The accused's history of response to legal process, particularly court orders to personally appear;

(2) The accused's employment status and history, enrollment in an educational institution or training program, participation in a counseling or treatment program, performance of volunteer work in the community, participation in school or cultural activities or receipt of financial assistance from the government;

(3) The accused's family ties and relationships;

(4) The accused's reputation, character and mental condition;

(5) The length of the accused's residence in the community;

(6) The accused's criminal record;

(7) The willingness of responsible members of the community to vouch for the accused's reliability and assist the accused in complying with conditions of release;

(8) The nature of the charge, if relevant to the risk of nonappearance;

(9) Any other factors indicating the accused's ties to the community.

(d) **Showing of Substantial Danger**—Conditions of Release. Upon a showing that there exists a substantial danger that the accused will commit a violent crime or that the accused will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice, the court may impose one or more of the following nonexclusive conditions:

- (1) Prohibit the accused from approaching or communicating in any manner with particular persons or classes of persons;
- (2) Prohibit the accused from going to certain geographical areas or premises;
- (3) Prohibit the accused from possessing any dangerous weapons or firearms, or engaging in certain described activities or possessing or consuming any intoxicating liquors or drugs not prescribed to the accused;
- (4) Require the accused to report regularly to and remain under the supervision of an officer of the court or other person or agency;
- (5) Prohibit the accused from committing any violations of criminal law;
- (6) Require the accused to post a secured or unsecured bond or deposit cash in lieu thereof, conditioned on compliance with all conditions of release. This condition may be imposed only if no less restrictive condition or combination of conditions would reasonably assure the safety of the community. If the court determines under this section that the accused must post a secured or unsecured bond, the court shall consider, on the available information, the accused's financial resources for the purposes of setting a bond that will reasonably assure the safety of the community and prevent the defendant from intimidating witnesses or otherwise unlawfully interfering with the administration of justice.
- (7) Place the accused in the custody of a designated person or organization agreeing to supervise the accused;
- (8) Place restrictions on the travel, association, or place of abode of the accused during the period of release;
- (9) Require the accused to return to custody during specified hours or to be placed on electronic monitoring, if available; or
- (10) Impose any condition other than detention to assure noninterference with the administration of justice and reduce danger to others or the community.

(e) **Relevant Factors—Showing of Substantial Danger.** In determining which conditions of release will reasonably assure the accused's noninterference with the administration of justice, and reduce danger to others or the community, the court shall, on the available information, consider the relevant facts including but not limited to:

- (1) The accused's criminal record;
- (2) The willingness of responsible members of the community to vouch for the accused's reliability and

assist the accused in complying with conditions of release;

- (3) The nature of the charge;
  - (4) The accused's reputation, character and mental condition;
  - (5) The accused's past record of threats to victims or witnesses or interference with witnesses or the administration of justice;
  - (6) Whether or not there is evidence of present threats or intimidation directed to witnesses;
  - (7) The accused's past record of committing offenses while on pretrial release, probation or parole; and
  - (8) The accused's past record of use of or threatened use of deadly weapons or firearms, especially to victim's or witnesses.
- (f) **Delay of Release.** The court may delay release of a person in the following circumstances:

- (1) If the person is intoxicated and release will jeopardize the persons safety or that of others, the court may delay release of the person or have the person transferred to the custody and care of a treatment center.
- (2) If the persons mental condition is such that the court believes the person should be interviewed by a mental health professional for possible commitment to a mental treatment facility pursuant to RCW 71.05, the court may delay release of the person.
- (3) Unless other grounds exist for continued detention, a person detained pursuant to this section must be released from detention not later than 24 hours after the preliminary appearance.

(g) **Release in Capital Cases.** Any person charged with a capital offense shall not be released in accordance with this rule unless the court finds that release on conditions will reasonably assure that the accused will appear for later hearings, will not significantly interfere with the administration of justice and will not pose a substantial danger to another or the community. If a risk of flight, interference or danger is believed to exist, the person may be ordered detained without bail.

(h) **Release After Finding or Plea of Guilty.** After a person has been found or pleaded guilty, and subject to RCW 9.95.062, 9.95.064, 10.64.025, and 10.64.027, the court may revoke, modify, or suspend the terms of release and/or bail previously ordered.

(i) **Order for Release.** A court authorizing the release of the accused under this rule shall issue an appropriate order containing a statement of the conditions imposed, if any, shall inform the accused of the penalties applicable to violations of the conditions imposed, if any, shall inform the accused of the penalties applicable to violations of the conditions of the accused's release and shall advise the accused that a warrant for the accused's arrest may be issued upon any such violation.

(j) **Review of Conditions.**

(1) At any time after the preliminary appearance, an accused who is being detained due to failure to post bail may move for reconsideration of bail. In connection with this motion, both parties may present information by proffer or otherwise. If deemed necessary for a fair determination of the issue, the court may direct the taking of additional testimony.

(2) A hearing on the motion shall be held within a reasonable time. An electronic or stenographic record of the hearing shall be made. Following the hearing, the court shall promptly enter an order setting out the conditions of release in accordance with section (1). If a bail requirement is imposed or maintained, the court shall set out its reasons on the record or in writing.

(k) **Amendment or Revocation of Order.**

(1) The court ordering the release of an accused on any condition specified in this rule may at any time on change of circumstances, new information or showing of good cause amend its order to impose additional or different conditions for release.

(2) Upon a showing that the accused has willfully violated a condition of release, the court may revoke release and may order forfeiture of any bond. Before entering an order revoking release or forfeiting bail, the court shall hold a hearing in accordance with section (1). Release may be revoked only if the violation is proved by clear and convincing evidence.

(l) **Arrest for Violation of Conditions.**

(1) **Arrest With Warrant.** Upon the court's own motion or a verified application by the prosecuting attorney alleging with specificity that an accused has willfully violated a condition of the accused's release, a court shall order the accused to appear for immediate hearing or issue a warrant directing the arrest of the accused for immediate hearing for reconsideration of conditions of release pursuant to section (k).

(2) **Arrest Without Warrant.** A law enforcement officer having probable cause to believe that an accused released pending trial for a felony is about to leave the state or has violated a condition of such release under circumstances rendering the securing of a warrant impracticable may arrest the accused and take him forthwith before the court for reconsideration of conditions of release pursuant to section (k).

(m) **Evidence.** Information stated in, or offered in connection with, any order entered pursuant to this rule need not conform to the rules pertaining to the admissibility of evidence in a court of law.

(n) **Forfeiture.** Nothing contained in this rule shall be construed to prevent the disposition of any case or class of cases by forfeiture of collateral security where such disposition is authorized by the court.

(o) **Accused Released on Recognizance or Bail—Absence—Forfeiture.** If the accused has been released on the accused's own recognizance, on bail, or has deposited money instead thereof, and does not appear when the accused's personal appearance is necessary or violated conditions of release, the court, in addition to

the forfeiture of the recognizance, or of the money deposited, may direct the clerk to issue a bench warrant for the accused's arrest.

[Amended effective July 1, 1976; September 1, 1955; September 1, 1968; September 1, 1991; September 1, 1995; April 3, 2001; September 1, 2003.]

Comment

Supersedes RCW 10.16.59; RCW 10.19.010; RCW 10.25.020; RCW 10.25.030; RCW 10.45.010; RCW 10.45.020; RCW 10.64.025

**RULE 3.2.1 PROCEDURE FOLLOWING WARRANTLESS ARREST—PRELIMINARY APPEARANCE**

(a) **Probable Cause Determination.** A person who is arrested shall have a judicial determination of probable cause no later than 48 hours following the person's arrest unless probable cause has been determined prior to such arrest.

(b) **How Determined.** The court shall determine probable cause on evidence presented by a peace officer or prosecuting authority in the same manner as provided for a warrant of arrest in rule 2.2(a). The evidence shall be preserved and may consist of an electronically recorded telephonic statement. If the court finds that release without bail should be denied or that conditions should attach to the release on personal recognizance other than the promise to appear for trial, the court shall proceed to determine whether probable cause exists to believe that the accused committed the offense charged, unless this determination has previously been made by a court. Before making the determination, the court may consider an affidavit, a document as provided in RCW 9A.72.085 or any law amendatory thereto, or sworn testimony, and further may examine under oath the affiant and any witnesses the affiant may produce. Sworn testimony shall be electronically or stenographically recorded. The evidence shall be preserved and shall be subject to constitutional limitations for probable cause determinations, and may be hearsay in whole or in part.

(c) **Court Days.** For the purpose of section (a) Saturday, Sunday and holidays may be considered judicial days.

(d) **Preliminary Appearance.**

(1) **Adult.** Unless a defendant has appeared or will appear before a court of limited jurisdiction for a preliminary appearance pursuant to C.R.J. 3.2.1(a), a defendant whether detained in jail or subjected to court-authorized conditions of release shall be brought before the superior court as soon as practicable after the detention is commenced, the conditions of release are imposed or the order is entered, but in any event before the close of business on the next court day. A person is not subject to conditions of release if the person has been served with a summons and the only obligation is to appear in court at a future date.





Information or indictment is filed in the adult division of the superior court...

(2) Defendant Not Detained in Jail. The defendant shall be arraigned not later than 14 days after that appearance...

(b) Objection to Arraignment Date—Loss of Right to Object. A party who objects to the date of arraignment on the ground that it is not within the time limits prescribed by this rule...

(c) Counsel. If the defendant appears without counsel, the court shall inform the defendant of his or her right to have counsel before being arraigned.

RULE 42 PLEAS

(a) Types. A defendant may plead not guilty, not guilty by reason of insanity or guilty. Multiple Offenses. Where the indictment or information charges two or more offenses in separate counts...

(c) Pleading Insanity. Written notice of an intent to rely on the insanity defense, and/or a claim of present incompetency to stand trial, must be filed at the time of arraignment or within 10 days thereafter...

(d) Voluntariness. The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.

(e) Agreements. If the defendant intends to plead guilty pursuant to an agreement with the prosecuting attorney, both the defendant and the prosecuting attorney shall, before the plea is entered, file with the court their understanding of the defendant's criminal history...

(f) Withdrawal of Plea. The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice.

defendant is not represented and is unable to obtain counsel, counsel shall be assigned by the court, unless otherwise provided.

(d) Waiver of Counsel. If the defendant chooses to proceed without counsel, the court shall ascertain whether this waiver is made voluntarily, competently and with knowledge of the consequences.

(e) Name. Defendant shall be asked his or her true name. If the defendant alleges that the true name is one other than that by which he or she is charged, it must be entered in the minutes of the court...

(f) Reading. The indictment or information shall be read to defendant, unless the reading is waived, and a copy shall be given to defendant.

[Amended effective September 1, 2003.]

Comment

Supersedes RCW 10.40.010, .030, .040; RCW 10.46.030 in part, .040.

(g) Written Statement. A written statement of the defendant in substantially the form set forth below shall be filed on a plea of guilty.

Form for written statement of defendant, including fields for Superior Court of Washington, Plaintiff vs. Defendant, and Statement of Defendant on Plea of Guilty to Non-Sex Offense (STDPFG).

- 1. My true name is:
2. My age is:
3. I went through the grade.
4. I HAVE BEEN INFORMED AND FULLY UNDERSTAND THAT:
(a) I have the right to representation by a lawyer and that if I cannot afford to pay for a lawyer, one will be provided at no expense to me.
(b) I am charged with:
The elements are:

- 5. I UNDERSTAND I HAVE THE FOLLOWING IMPORTANT RIGHTS, AND I GIVE THEM ALL UP BY PLEADING GUILTY:
(a) The right to a speedy and public trial by an impartial jury in the county where the crime is alleged to have been committed.
(b) The right to remain silent before and during trial, and the right to refuse to testify against myself.
(c) The right at trial to hear and question the witnesses who testify against me.
(d) The right at trial to testify and to have witnesses testify for me. These witnesses can be made to appear at no expense to me.
(e) I am presumed innocent unless the charge is proven beyond a reasonable doubt or I enter a plea of guilty.
(f) The right to appeal a finding of guilt after a trial.
6. IN CONSIDERING THE CONSEQUENCES OF MY GUILTY PLEA, I UNDERSTAND THAT:

(a) Each crime with which I am charged carries a maximum sentence, a fine, and a STANDARD SENTENCE RANGE as follows:

Table with 4 columns: COUNT, OFFENSE, STANDARD RANGE, TOTAL ACTUAL CONFINEMENT, GOVERNMENT CATEGORY, and MAXIMUM AND FINE.

- (b) The standard sentence range is based on the crime charged and my criminal history. Criminal history includes prior convictions and juvenile adjudications or convictions, whether in this state, in federal court, or elsewhere.
(c) The prosecuting attorney's statement of my criminal history is attached to this agreement. Unless I have attached a different statement, I agree that the prosecuting attorney's statement is correct and complete. If I have attached my own statement, I assert that it is correct and complete. If I am convicted of any additional crimes between now and the time I am sentenced, I am obligated to tell the sentencing judge about those convictions.
(d) If I am convicted of any new crimes before sentencing, or if any additional criminal history is discovered, both the standard sentence range and the prosecuting attorney's recommendation may increase. Even so, my plea of guilty to this charge is binding on me. I cannot change my mind if additional criminal history is discovered even though the standard sentencing range and the prosecuting attorney's recommendation increase or a mandatory sentence of life imprisonment without the possibility of parole is required by law.

(e) In addition to sentencing me to confinement, the judge will order me to pay \$500.00 as a victim's compensation fund assessment. If this crime resulted in injury to any person or damage to or loss of property, the judge will order me to make restitution, unless extraordinary circumstances exist which make restitution inappropriate. The amount of restitution may be up to double my gain or double the victim's loss. The judge may also order that I pay a fine, court costs, attorney fees and the costs of incarceration. For crimes committed prior to July 1, 2000: In addition to sentencing me to confinement, the judge may order me to serve up to one year of community supervision if the total period of confinement ordered is not more than 12 months. If the crime I have been convicted of falls into one of the offense types listed in the following chart, the court will sentence me to community custody for the community custody range established for that offense type unless the judge finds substantial and compelling reasons not to do so. If the period of earned release awarded per RCW 9.94A.150 is longer than that will be the term of my community custody. If the crime I have been convicted of falls into more than one category of offense types listed in the following chart, then the community custody range will be based on the offense type that dictates the longest term of community custody.

OFFENSE TYPE	COMMUNITY CUSTODY RANGE
Serious Violent Offenses	24 to 48 months or up to the period of earned release, whichever is longer.
Violent Offenses	18 to 36 months or up to the period of earned release, whichever is longer.
Crimes Against Persons as defined by RCW 9.94A.41(2)	9 to 18 months or up to the period of earned release, whichever is longer.
Offenses under Chapter 69.50 or 69.52 RCW (Not sentenced under RCW 9.94A.120(6))	9 to 12 months or up to the period of earned release, whichever is longer.

(f) During the period of community custody I will be under the supervision of the Department of Corrections, and I will have restrictions and requirements placed upon me. My failure to comply with these conditions will render me ineligible for general assistance, RCW 74.04.005(6)(h), and may result in the Department of Corrections transferring me to a more restrictive confinement status or other sanctions. The prosecuting attorney will make the following recommendation to the judge: -

- (g) [ ] The prosecutor will recommend as stated in the plea agreement, which is incorporated by reference.
- (h) The judge does not have to follow anyone's recommendation as to sentence. The judge must impose a sentence within the standard range unless the judge finds substantial and compelling reasons not to do so. If the judge goes outside the standard range, either the state or I can appeal that sentence. If the sentence is within the standard range, no one can appeal the sentence.
- (i) If I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. I understand that I may not possess, own, or have under my control any firearm unless my right to do so is restored by a court of record and that I must immediately surrender any concealed pistol license. RCW 9.41.040.
- (k) Public assistance will be suspended during any period of imprisonment. DNA identification analysis. For offenses committed on or after July 1, 2002, I will be required to pay a \$100 DNA collection fee.
- (m) NOTIFICATION RELATING TO SPECIFIC CRIMES: IF ANY OF THE FOLLOWING PARAGRAPHS DO NOT APPLY, THEY SHOULD BE STRICKEN AND INITIALED BY THE DEFENDANT AND THE JUDGE. This offense is a most serious offense or strike as defined by RCW 9.94A.030, and I have at least two prior convictions for most serious offenses, whether in this state, in

(a) The judge may sentence me as a first-time offender instead of giving a sentence within the standard range of 1 year under RCW 9.94A.030. This sentence could include as much as 90 days' confinement, and up to two years community supervision if the crime was committed prior to July 1, 2000, or up to two years of community custody. If the crime was committed on or after July 1, 2000, plus all of the conditions described in paragraph (e). Additionally, the judge could require me to undergo treatment, to devote time to a specific occupation, and to pursue a prescribed course of study or occupational training. If this crime involves a kidnapping offense involving a minor, I will be required to register where I reside, study or work. The specific registration requirements are set forth in the "Offender Registration Attachment." If this is a crime of domestic violence, I may be ordered to pay a domestic violence assessment of up to \$100.00. If I, or the victim of the offense, have a minor child, the court may order me to participate in a domestic violence perpetrator program approved under RCW 26.50.150.

(b) If this crime involves prostitution, or a drug offense associated with prostitution, I will be required to undergo testing for the human immunodeficiency virus (HIV) (AIDS), gonorrhea, and syphilis. The judge may sentence me under former RCW 9.94A.120(b) for offenses committed before July 1, 2001, or RCW 9.94A.660 for offenses committed on or after July 1, 2001. The sentence could include a period of total confinement in a state facility for one-half of the midpoint of the standard range plus all of the conditions described in paragraph (b). During confinement, I will be required to undergo comprehensive substance abuse assessment and to participate in treatment. The judge will also impose community custody of at least one-half of the midpoint of the standard range that must include appropriate substance abuse treatment, a condition that must include appropriate substance abuse treatment, require me to devote time to a specific employment or training activity, and to pay certain costs, pay thirty dollars per month to offset the cost of monitoring and require other conditions, including affirmative conditions. If the judge finds that I have a chemical dependency that has contributed to the crime, the judge may order me to participate in rehabilitative programs or treatment to promote affirmative conduct reasonably related to the circumstances of the crime for which I am pleading guilty.

(c) If this crime involves the manufacture, delivery, or possession with the intent to deliver methamphetamine or amphetamine, a mandatory methamphetamine clean-up fund of \$3,000.00 will be assessed. RCW 69.50.401(a)(1)(n). If this crime involves a violation of the state drug laws, my eligibility for state and federal food stamps, welfare, and education benefits will be affected. 20 C.S.S. § 19071 and 21 U.S.C. § 862a.

(d) If this crime involves a motor vehicle, my driver's license or privilege to drive will be suspended or revoked. If I have a driver's license, I must now surrender it to the judge. If the crime involves the offense of vehicular homicide while under the influence of an intoxicating liquor or any drug, as defined by RCW 46A.02, committed on or after January 1, 1999, an additional two years shall be added to the present sentence for each vehicular homicide for each offense as defined in RCW 46A.025(3). The crime of \_\_\_\_\_ has a mandatory minimum sentence of at least \_\_\_\_\_ months in total confinement. The law does not allow any reduction of this sentence. If the mandatory minimum sentence is not the same as the mandatory sentence of the imprisonment without the possibility of parole described in paragraph (m), this distinct criminal conduct and the sentence imposed on counts \_\_\_\_\_ and \_\_\_\_\_ will run consecutively unless the judge finds substantial and compelling reasons to do otherwise.

(e) I understand that the offense(s) I am pleading guilty to include a deadly weapon or firearm enhancement. Deadly weapon or firearm enhancements are mandatory. They must be served in total confinement, and they must run consecutively to any other sentence and to any other deadly weapon or firearm enhancements. RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and one or more convictions for the felony crimes of theft of a firearm or possession of a stolen firearm. The sentences imposed for these crimes shall be served consecutively to each other. A consecutive sentence will also be imposed for each firearm unlawfully possessed.

(f) I understand that if I am pleading guilty to the crime of unlawful practices in obtaining assistance as defined in RCW 74.08.231, no assistance payment shall be made for at least 9 months if this is my first conviction and for at least 12 months if this is my second or subsequent conviction. This suspension of benefits will apply even if I am not incarcerated. RCW 74.08.290.

(g) I plead guilty to:

count \_\_\_\_\_

- court \_\_\_\_\_ Information. I have received a copy of that information in the \_\_\_\_\_ and voluntarily.
9. I make this plea freely and voluntarily.
  10. No one has threatened harm of any kind to me or to any other person to cause me to make this plea.
  11. No person has made promises of any kind to cause me to enter this plea except as set forth in this statement.
  12. The judge has asked me to state what I did in my own words that makes me guilty of this crime. This is my statement: \_\_\_\_\_

[I] Instead of making a statement, I agree that the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea. My lawyer has explained to me, and we have fairly discussed, all of the above paragraphs and the "Offender Registration" Attachment, if applicable. I understand them all. I have been given a copy of this "Statement of Defendant on Plea of Guilty." I have no further questions to ask the judge.

Defendant \_\_\_\_\_

I have read and discussed this statement with the defendant and believe that the defendant is competent and fully understands the statement.

Prosecuting Attorney:	Bar # _____	Defendant's Lawyer:	Bar # _____
Print Name _____		Print Name _____	

- (a) The foregoing statement was signed by the defendant in open court in the presence of the defendant's lawyer and the undersigned judge. The defendant asserted that [check appropriate box] \_\_\_\_\_
- (b) The defendant had previously read the entire statement above and that the defendant understood it in full.
- (c) The defendant's lawyer had previously read to him or her the entire statement above and that the defendant understood it in full.
- (d) An interpreter had previously read to the defendant the entire statement above and that the defendant understood it in full. The interpreter's Declaration is attached, understands the charges and the consequences of the plea. There is a factual basis for the plea. The defendant is guilty as charged.

Date: \_\_\_\_\_ Judge \_\_\_\_\_

INTERPRETER'S DECLARATION

I am a certified interpreter or have been found otherwise qualified by the court to interpret in the \_\_\_\_\_ language, which the defendant understands, and I have translated the \_\_\_\_\_ Identify document being translated

for the defendant from English into that language.

The defendant has acknowledged his or her understanding of both the translation and the subject matter of this document. I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Date: \_\_\_\_\_ Location: \_\_\_\_\_ Interpreter \_\_\_\_\_

SUPERIOR COURT OF WASHINGTON FOR \_\_\_\_\_

NO.

STATE OF WASHINGTON

Plaintiff \_\_\_\_\_

STATEMENT OF DEFENDANT ON PLEA OF GUILTY TO SEX OFFENSE (STDRG)

vs. Defendant \_\_\_\_\_

1. My true name is: \_\_\_\_\_
2. My age is: \_\_\_\_\_ grade.
3. I went through the \_\_\_\_\_ grade.
4. I HAVE BEEN INFORMED AND FULLY UNDERSTAND THAT:
  - (a) I have the right to representation by a lawyer and that if I cannot afford to pay for a lawyer, one will be provided at no expense to me.
  - (b) I am charged with: \_\_\_\_\_ The elements are: \_\_\_\_\_

5. I UNDERSTAND I HAVE THE FOLLOWING IMPORTANT RIGHTS, AND I GIVE THEM ALL UP BY PLEADING GUILTY.

- (a) The right to a speedy and public trial by an impartial jury in the county where the crime is alleged to have been committed.
- (b) The right to remain silent before and during trial, and the right to refuse to testify against myself.
- (c) The right at trial to hear and question the witnesses who testify against me.
- (d) The right at trial to testify and to have witnesses testify for me. These witnesses can be made to appear at no expense to me.
- (e) I am presumed innocent unless the charge is proven beyond a reasonable doubt or I enter a plea of guilty.
- (f) The right to appeal a finding of guilt after a trial.

6. IN CONSIDERING THE CONSEQUENCES OF MY GUILTY PLEA, I UNDERSTAND THAT: \_\_\_\_\_

Each crime with which I am charged carries a maximum sentence, a fine, and a STANDARD SENTENCE RANGE as follows:

COUNT NO.	OFFENDER SCORE	STANDARD RANGE ACTUAL CORREMENT (including enhancements)	PLUS Enhancements	TOTAL ACTUAL CORREMENT (standard range plus enhancements)	COMMUNITY CUSTODY For crimes committed prior to July 1, 2001 For crimes committed after to July 1, 2001 (see paragraph (d))	MAXIMUM FINE AND FINE
1						
2						
3						

(F) Felony, (D) other deadly weapon.

- (b) The standard sentence range is based on the crime charged and my criminal history. Criminal history includes prior convictions and juvenile adjudications or convictions, whether in this state, in federal court, or elsewhere.
- (c) The prosecuting attorney's statement of my criminal history is attached to this agreement. Unless I have attached a different statement, I agree that the prosecuting attorney's statement is correct and complete. If I am convicted of any additional crimes between now and the time I am sentenced, I am obligated to tell the sentencing judge about those convictions.
- (d) If I am convicted of any new crimes before sentencing, or if any additional criminal history is discovered, both the standard sentence range and the prosecuting attorney's recommendation may increase. Even so, my plea of guilty to this charge is binding on me. I cannot change my mind if additional criminal history is discovered even though the standard sentencing range and the prosecuting attorney's recommendation increase or a mandatory sentence of life imprisonment without the possibility of parole is required by law. In addition to sentencing me to confinement, the judge will order me to pay \$500.00 as a victim's compensation fund assessment. If this crime resulted in injury to any person or damage to or loss of property, the judge will order me to make restitution, unless extraordinary circumstances exist which make restitution inappropriate. The amount of restitution may be up to double my gain or double the victim's loss. The judge may also order that I pay a fine, court costs, attorney fees and the costs of incarceration.

(f) For sex offenses committed prior to July 1, 2000: In addition to sentencing me to a term of confinement, the judge may order me to serve up to one year of community custody or to one year of community supervision if the total period of confinement ordered is not more than 12 months. If the period of community custody or supervision is longer than one year, the judge will order me to serve three years of community custody or up to the period of earned early release, whichever is longer. During the period of community custody, I will be under the supervision of the Department of Corrections, and I will have restrictions and requirements placed upon me.

For sex offenses committed on or after July 1, 2000 but prior to September 1, 2001: In addition to sentencing me to confinement, the judge may order me to serve up to one year of community custody. If the total period of confinement ordered is not more than 12 months, the judge will sentence me to community custody. If the period of confinement is over one year, the judge will sentence me to community custody for a period of 36 to 48 months or up to the period of earned release, whichever is longer. During the period of community custody to which I am sentenced, I will be under the supervision of the Department of Corrections, and I will have restrictions and requirements placed upon me.

(g) Sentencing under RCW 9A.04.010: If this offense is for any of the offenses listed in subsection (a) or (b), below, the judge will impose a maximum term of confinement consisting of the statutory maximum sentence of the offense and a minimum term of confinement either within the standard range for the offense or outside the standard range if an exceptional sentence is appropriate. The minimum term of confinement that is imposed may be increased by the Intermediate Sentence Review Board if the Board determines by a preponderance of the evidence that it is more likely than not that I will commit sex offenses if released from custody. In addition to the period of confinement, I will be sentenced to community custody for any period of time I am released from total confinement before the expiration of the maximum sentence. During the period of community custody I will be under the supervision of the Department of Corrections and I will have restrictions and requirements placed upon me and I may be required to participate in rehabilitative programs.

(aa) If the current offense is any of these offenses or attempt to commit any of these offenses:

Rape in the first degree	Rape of a child in the first degree committed when I was at least 18 years old
Rape in the second degree	Rape of a child in the second degree committed when I was at least 18 years old
Child molestation in the first degree committed when I was at least 18 years old	Child molestation in the first degree committed when I was at least 18 years old
Any of the following offenses with a finding of sexual motivation:	Any of the following offenses with a finding of sexual motivation:
Murder in the first degree	Murder in the first degree
Homicide by abuse	Homicide by abuse
Kidnapping in the second degree	Kidnapping in the second degree
Assault in the first degree	Assault in the first degree
Burglary in the first degree	Burglary in the first degree

Rape in the first degree	Rape in the second degree
Rape of a child in the first degree	Rape of a child in the second degree
Child molestation in the first degree	Child molestation in the second degree
Any of the following offenses with a finding of sexual motivation:	Any of the following offenses with a finding of sexual motivation:
Murder in the first degree	Murder in the second degree
Homicide by abuse	Homicide by abuse
Kidnapping in the second degree	Kidnapping in the first degree
Assault in the second degree	Assault in the first degree
Burglary in the first degree	Burglary in the first degree

(h) If this offense is for a sex offense that is not listed in paragraph (f)(i), then in addition to sentencing me to a term of confinement, the judge may order me to serve up to one year

(5) The prosecuting attorney will make the following recommendations to the judge: ...

(a) The prosecutor will recommend as stated in the plea agreement, which is incorporated by reference.

(b) The judge does not have to follow the prosecutor's recommendation as to sentence, but may impose a sentence within the standard range unless the judge finds exceptional compelling reasons not to do so. If the judge finds such reasons, the judge must appear on the record and explain the reasons for the departure from the standard range. If the judge finds such reasons, the judge must appear on the record and explain the reasons for the departure from the standard range.

(c) If the judge finds such reasons, the judge must appear on the record and explain the reasons for the departure from the standard range. If the judge finds such reasons, the judge must appear on the record and explain the reasons for the departure from the standard range.

(d) If the judge finds such reasons, the judge must appear on the record and explain the reasons for the departure from the standard range. If the judge finds such reasons, the judge must appear on the record and explain the reasons for the departure from the standard range.

(e) The prosecuting attorney will make the following recommendations to the judge: ...

(6) For sex offenses committed on or after September 1, 2001:

(i) Sentencing under RCW 9A.04.010: If this offense is for any of the offenses listed in subsection (a) or (b), below, the judge will impose a maximum term of confinement consisting of the statutory maximum sentence of the offense and a minimum term of confinement either within the standard range for the offense or outside the standard range if an exceptional sentence is appropriate. The minimum term of confinement that is imposed may be increased by the Intermediate Sentence Review Board if the Board determines by a preponderance of the evidence that it is more likely than not that I will commit sex offenses if released from custody. In addition to the period of confinement, I will be sentenced to community custody for any period of time I am released from total confinement before the expiration of the maximum sentence. During the period of community custody I will be under the supervision of the Department of Corrections and I will have restrictions and requirements placed upon me and I may be required to participate in rehabilitative programs.

(ii) If the current offense is any of these offenses or attempt to commit any of these offenses:

Rape in the first degree	Rape of a child in the first degree committed when I was at least 18 years old
Rape in the second degree	Rape of a child in the second degree committed when I was at least 18 years old
Child molestation in the first degree committed when I was at least 18 years old	Child molestation in the first degree committed when I was at least 18 years old
Any of the following offenses with a finding of sexual motivation:	Any of the following offenses with a finding of sexual motivation:
Murder in the first degree	Murder in the first degree
Homicide by abuse	Homicide by abuse
Kidnapping in the second degree	Kidnapping in the second degree
Assault in the first degree	Assault in the first degree
Burglary in the first degree	Burglary in the first degree

Rape in the first degree	Rape in the second degree
Rape of a child in the first degree	Rape of a child in the second degree
Child molestation in the first degree	Child molestation in the second degree
Any of the following offenses with a finding of sexual motivation:	Any of the following offenses with a finding of sexual motivation:
Murder in the first degree	Murder in the second degree
Homicide by abuse	Homicide by abuse
Kidnapping in the second degree	Kidnapping in the first degree
Assault in the second degree	Assault in the first degree
Burglary in the first degree	Burglary in the first degree

(h) If this offense is for a sex offense that is not listed in paragraph (f)(i), then in addition to sentencing me to a term of confinement, the judge may order me to serve up to one year

may order me to participate in a domestic violence perpetrator program approved under RCW 5A.50.130.

(f) If the judge finds that I have a chemical dependency that has contributed to the offense, the judge may order me to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which I am pleading guilty.

(g) If this offense involves a motor vehicle, my driver's license or privilege to drive will be suspended or revoked. If I have a driver's license, I must now surrender it to the judge.

(h) The crime of \_\_\_\_\_ has a mandatory minimum sentence of at least \_\_\_\_\_ years of total confinement. The judge does not allow any reduction of this sentence. This mandatory minimum sentence is not the same as the mandatory sentence of the imprisonment without the possibility of parole described in paragraph (e).

(i) I am being sentenced for two or more serious violent offenses arising from separate and distinct criminal conduct and the sentences imposed on counts \_\_\_\_\_ and \_\_\_\_\_ will run consecutively unless the judge finds substantial and compelling reasons to do otherwise.

(j) I understand that the offense(s) I am pleading guilty to include a deadly weapon or firearm enhancement. Deadly weapon or firearm enhancements are mandatory. They must be served in total confinement, and they must run consecutively to any other sentence and to any other deadly weapon or firearm enhancements.

7. I plead guilty to \_\_\_\_\_ count \_\_\_\_\_ in the \_\_\_\_\_ Information. I have received a copy of that Information.

8. I make this plea freely and voluntarily.

9. No one has threatened harm of any kind to me or to any other person to cause me to make this plea.

10. No person has made promises of any kind to cause me to enter this plea except as set forth in this statement.

11. The judge has asked me to state what I did in my own words that makes me guilty of this crime. This is my statement:

[ ] Instead of making a statement, I agree that the court may review the police report and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea. My lawyer has explained to me, and we have fully discussed, all of the above paragraphs and the "Offender Registration" Attachment. I understand them all. I have been given a copy of this "Statement of Defendant on Plea of Guilty." I have no further questions to ask the judge.

Defendant: \_\_\_\_\_ I have read and discussed this statement with the defendant and believe that the defendant is competent and fully understands this statement.

Prosecuting Attorney: Bar # \_\_\_\_\_ Defendant's Lawyer Bar # \_\_\_\_\_

Print Name \_\_\_\_\_ Print Name \_\_\_\_\_

The foregoing statement was signed by the defendant in open court in the presence of the defendant's lawyer and the undersigned judge. The defendant asserted that (check appropriate box):

(a) I, the defendant, had previously read the entire statement above and that the defendant understood it in full.

(b) The defendant's lawyer had previously read to him or her the entire statement above and that the defendant understood it in full, or

(c) An interpreter had previously read to the defendant the entire statement above and that the defendant understood it in full. The Interpreter's Declaration is attached.

I find the defendant's plea of guilty to be knowingly, intelligently and voluntarily made. Defendant understands the charges and the consequences of the plea. There is a factual basis for the plea. The defendant is guilty as charged.

Date: \_\_\_\_\_ Judge \_\_\_\_\_

INTERPRETER'S DECLARATION

I am a certified interpreter or have been found otherwise qualified by the court to interpret in the \_\_\_\_\_ language, when the defendant understands, and I have translated

Identify document being translated

for the defendant from English into that language.

The defendant has acknowledged his or her understanding of both the translation and the subject matter of this document. I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Date: \_\_\_\_\_ Interpreter \_\_\_\_\_

Location: \_\_\_\_\_

Case Name: \_\_\_\_\_ Case No.: \_\_\_\_\_

"OFFENDER REGISTRATION" ATTACHMENT: OFFENDER REGISTRATION FOR SEX OFFENSE OR KIDNAPPING OFFENSE (If required, attach to Statement on Plea of Guilty.) Because this crime involves a sex offense or a kidnapping offense involving a minor as defined in RCW 9A.44.130, I will be required to register with the sheriff of the county of the state of Washington where I reside. If I am not a resident of Washington but I am a student in Washington or I am employed in Washington or I carry on a vocation in Washington, I must register with the sheriff of the county of my school, place of employment, or vocation. I must register immediately upon being sentenced unless I am in custody, in which case I must register at the time of my release with the person designated by the agency that has me in custody and I must also register within 24 hours of my release with the sheriff of the county of the state of Washington where I will be residing or if not residing in the state of Washington, where I am a student, where I am employed, or where I carry on a vocation.

If I leave this state following my sentencing or release from custody, but later move back to Washington, I must register within 30 days after moving to this state or within 24 hours after moving so if I am under the jurisdiction of this state's Department of Corrections. If I leave this state following my sentencing or release from custody, but later while not a resident of Washington, I become employed in Washington, carry on a vocation in Washington, or attend school in Washington, I must register within 30 days after hours after doing so if I am under the jurisdiction of this state's Department of Corrections.

If I change my residence within a county, I must send written notice of my change of residence to the sheriff within 72 hours of moving. If I change my residence to a new county within this state, I must send written notice of the change of address at least 14 days before moving to the county sheriff in the new county of residence. I must register with the sheriff of the new county within 24 hours of moving and I must also give written notice of my change of address to the sheriff of the county where last registered within 10 days of moving. If I move out of Washington State, I must send written notice within 10 days of moving to the new state or foreign country to the county sheriff with whom I last registered in Washington State.

If I move to another state, or if I work, carry on a vocation, or attend school in another state I must register a new address, fingerprints, and photograph with the new state within 10 days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. I must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom I last registered in Washington State.

If I am a resident of Washington and I am admitted to a public or private institution of higher education, I shall, within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier, notify the sheriff of the county of my residence of my intent to attend the institution. If I become employed at a public or private institution of higher education, I am required to notify the sheriff for the county of my residence of my employment by the institution within 10 days of accepting employment or by the first business day after beginning to work at the institution, whichever is earlier. If my enrollment or employment at a public or private institution of higher education is terminated, I am required to notify the sheriff for the county of my residence of my termination of enrollment or employment within 10 days of such termination.

If I lack a fixed residence, I am required to register. Registration must occur within 24 hours of release in the county where I am being supervised if I do not have a residence at the time of my release from custody or within 48 hours, excluding weekends and holidays, after ceasing to have a fixed residence. If I enter a different county and stay there for more than 24 hours, I will be required to register in the new county. I must also report in person to the sheriff of the county where I am registered on a weekly basis. The weekly report will be on a day specified by the county sheriff's office, and shall occur during normal business hours. I may be required to provide a list of the locations where I have stayed during the last seven days. The lack of a fixed residence is a factor that may be considered in determining a sex offender's risk level and shall make me subject to disclosure to the public at large pursuant to RCW 4.24.550.

If I apply for a name change, I must submit a copy of the application to the county sheriff of the county of my residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If I receive an order changing my name, I must submit a copy of the order to the county sheriff of the county of my residence and to the state patrol within five days of the entry of the order. RCW 9A.44.130(7).

Date: \_\_\_\_\_ Defendant's signature \_\_\_\_\_

(h) Verification by Interpreter. If a defendant is not fluent in the English language, a person the court has determined has fluency in the defendant's language shall certify that the written

statement provided for in section (g) has been translated orally or in writing and that the defendant has acknowledged that he or she understands the translation.

[Amended effective September 1, 1988; July 1, 1984; September 1, 1986; September 1, 1991; March 19, 1998; September 1, 1995; November 7, 1995; January 2, 1996; September 1, 1996; April 8, 1997; March 9, 1999; September 1, 1999; December 28, 1999; December 26, 2000; April 16, 2002; August 6, 2002; August 3, 2004.]

#### RULE 4.3 JOINDER OF OFFENSES AND DEFENDANTS

(a) **Joinder of Offenses.** Two or more offenses may be joined in one charging document, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:

- (1) Are of the same or similar character, even if not part of a single scheme or plan; or
- (2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

(b) **Joinder of Defendants.** Two or more defendants may be joined in the same charging document:

- (1) When each of the defendants is charged with accountability for each offense included;

(2) When each of the defendants is charged with conspiracy and one or more of the defendants is also charged with one or more offenses alleged to be in furtherance of the conspiracy; or

(3) When, even if conspiracy is not charged and all of the defendants are not charged in each count, it is alleged that the several offenses charged:

- (i) were part of a common scheme or plan; or
- (ii) were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others.

(c) [Reserved].

(d) [Reserved].

(e) **Improper Joinder.** Improper joinder of offenses or defendants shall not preclude subsequent prosecution on the same charge for the charge or defendant improperly joined.

[Amended effective September 1, 1986; September 1, 1995.]

#### RULE 4.3.1 CONSOLIDATION FOR TRIAL

(a) **Consolidation Generally.** Offenses or defendants properly joined under rule 4.3 shall be consolidated

#### RULE 4.3A CONSOLIDATION FOR TRIAL [RENUMBERED]

[Renumbered as 4.3.1 effective April 3, 2001.]

#### RULE 4.4 SEVERANCE OF OFFENSES AND DEFENDANTS

(a) **Timeliness of Motion—Waiver.**

(1) A defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require. Severance is waived if the motion is not made at the appropriate time.

(2) If a defendant's pretrial motion for severance was overruled he may renew the motion on the same ground before or at the close of all the evidence. Severance is waived by failure to renew the motion.

(b) **Severance of Offenses.** The court, on application of the prosecuting attorney, or on application of the defendant other than under section (a), shall grant a severance of offenses whenever before trial or during trial with consent of the defendant, the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense.

(c) **Severance of Defendants.**

(1) A defendant's motion for severance on the ground that an out-of-court statement of a codefendant referred to him is inadmissible against him shall be granted unless:

- (i) the prosecuting attorney elects not to offer the statement in the case in chief;
- (ii) deletion of all references to the moving defendant will eliminate any prejudice to him from the admission of the statement.

(2) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (1), should grant a severance of defendants whenever:

- (i) if before trial, it is deemed necessary to protect a defendant's rights to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant; or
- (ii) if during trial upon consent of the severed defendant, it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant.

(3) When such information would assist the court in ruling on a motion for severance of defendants, the court may order the prosecuting attorney to disclose any statements made by the defendants which he intends to introduce in evidence at the trial.

(4) The assignment of a separate cause number to each defendant of those named on a single charging document is not considered a severance. Should a defendant desire that the case be severed, the defendant must move for severance.

(d) **Failure to Prove Grounds for Joinder of Defendants.** If, pursuant to section (a), a defendant moves to be severed at the conclusion of the prosecution's case or of all the evidence, and there is not sufficient evidence to support the grounds upon which the moving defendant was joined or previously denied severance, the court shall grant a severance if, in view of this lack of evidence, failure to sever prejudices the moving defendant.

(e) **Authority of Court to Act on Own Motion.** The court may order a severance of offenses or defendants before trial if a severance could be obtained on motion of a defendant or the prosecution.

[Amended effective December 28, 1993.]

#### Comment

Supersedes RCW 2A.04.010.

#### RULE 4.5 OMNIBUS HEARING

(a) **When Required.** When a plea of not guilty is entered, the court shall set a time for an omnibus hearing.

(b) **Time.** The time set for the omnibus hearing shall allow sufficient time for counsel to (i) initiate and complete discovery (ii) conduct further investigation if the case, as needed; and (iii) commence plea discussions.

(c) **Checklist.** At the omnibus hearing, the trial court on its own initiative, utilizing a checklist established in the form of the omnibus application by plaintiff and defendant (see section (b)) shall:

- (i) ensure that standards regarding provision of counsel set have been complied with;
- (ii) ascertain whether the parties have completed discovery and, if not, make orders appropriate to expedite completion;
- (iii) make rulings on any motions, other requests then pending, and ascertain whether any additional motions, or requests will be made at the hearing or continued portions thereof;
- (iv) ascertain whether there are any procedural or constitutional issues which should be considered;
- (v) upon agreement of counsel, or upon a finding that the trial is likely to be protracted or otherwise unusually complicated, set a time for a pretrial conference; and
- (vi) permit defendant to change his plea.

(d) **Motions.** All motions and other requests prior to trial should be reserved for and presented at the omnibus hearing unless the court otherwise directs. Failure to raise or give notice at the hearing of any error or issue of which the party concerned has knowledge may constitute waiver of such error or issue. Checklist

forms substantially like the memorandum required by section (h) shall be made available by the court and utilized at the hearing to ensure that all requests, errors and issues are then considered.

(e) Continuance. Any and all issues should be raised either by counsel or by the court without prior notice, and if appropriate, informally disposed of. If additional discovery, investigation or preparation, or evidentiary hearing, or formal presentation is necessary for a fair and orderly determination of any issue, the omnibus hearing should be continued from time to time until all matters raised are properly disposed of.

(f) Record. A verbatim record (electronic, mechanical or otherwise), shall be made of all proceedings at the hearing.

(g) Stipulations. Stipulations by any party shall be binding upon that party at trial unless set aside or modified by the court in the interests of justice.

(h) Memorandum. At the conclusion of the hearing, a summary memorandum shall be made indicating disclosure made, rulings and orders of the court, stipulations, and any other matters determined or pending. Such summary memorandum shall be in substantially the following form:

Copy Received \_\_\_\_\_ Date Filed by Clerk \_\_\_\_\_

SUPERIOR COURT OF WASHINGTON FOR \_\_\_\_\_ COUNTY

THE STATE OF WASHINGTON, ) Plaintiff, ) No. \_\_\_\_\_ Application ) by Plaintiff and ) Defendant ) Defendant

Date \_\_\_\_\_ Purpose: To prepare for trial or plea and to determine the extent of discovery to be granted to each party.

MOTION BY DEFENDANT

Comes now the defendant and makes the applications or motions checked off below:

- 1. To dismiss for failure of the indictment (for information) to state an offense. Granted \_\_\_\_\_ Denied \_\_\_\_\_
2. To sever defendant's case and for separate trial
3. To sever counts and for a separate trial
4. To raise more definite and certain.
5. For discovery of all oral written or recorded statements made by defendant to investigating officers or to third parties and in the possession of the plaintiff.
6. For discovery of the names and addresses of plaintiff's witnesses and their statements.

MOTION BY PLAINTIFF

- 7. To inspect physical or documentary evidence in plaintiff's possession.
8. To suppress physical evidence in plaintiff's possession because of (1) illegal search, (2) illegal arrest. Hearing set for \_\_\_\_\_.
9. For a hearing under rule 3.5.
10. To suppress evidence of the identification of the defendant.
11. To take the deposition of witnesses.
12. To secure the appearance of a witness at trial or hearing.
13. To inquire into the conditions of pretrial release. Affirmed \_\_\_\_\_ Modified to \_\_\_\_\_

To Require the Prosecution

- 14. To state:
(a) If there was an informer involved;
(b) Whether he will be called as a witness at the trial; and
(c) To state the name and address of the informer or claim the privilege.
15. To disclose evidence in plaintiff's possession, favorable to defendant on the issue of guilt.
16. To disclose whether it will rely on prior acts or convictions of a similar nature for proof of knowledge or intent.
17. To advise whether any expert witness will be called, and if so, supply:
(a) Name of witness, qualifications and subject of testimony;
(b) Report.

- 18. To supply any reports or tests of physical or mental examinations in the control of the prosecution.
19. To supply any reports of scientific tests, experiments, or comparisons and other reports to experts in the control of the prosecution, pertaining to this case.
20. To permit inspection and copying of any books, papers, documents, photographs or tangible objects which the prosecution:
(a) Obtained from or belonging to the defendant; or
(b) Which will be used at the hearing or trial.

- 21. To supply any information known concerning a prior conviction of persons whom the prosecution intends to call as witnesses at the hearing or trial.
22. To inform the defendant of any information he has indicating entrapment of the defendant.
Dated this \_\_\_\_ day of \_\_\_\_\_, 19\_\_

Attorney for Defendant \_\_\_\_\_

II

The plaintiff makes the application or motions checked:

- 1. Defendant to state the general nature of his defense.
2. Defendant to state whether or not he will rely on an alibi and, if so, to furnish a list of his alibi witnesses and their addresses. Granted \_\_\_\_\_ Denied \_\_\_\_\_
3. Defendant to state whether or not he will rely on a defense of insanity at the time of the offense.

- (a) If so, defendant to supply the name(s) of his witness(es) on the issue, both lay and professional.
(b) If so, defendant to permit the prosecution to inspect and copy all medical reports under his control or the control of his attorney.
(c) Defendant will also state whether or not he will submit to a psychiatric examination by a doctor selected by the prosecution.

- 4. Defendant to furnish results of scientific tests, experiments or comparisons and the names of persons who conducted the tests.
5. Defendant to appear in a lineup.
6. Defendant to speak for voice identification by witnesses.
7. Defendant to be fingerprinted.
8. Defendant to pose for photographs (not involving a reenactment of the crime).
9. Defendant to try on articles of clothing.
10. Defendant to permit taking of specimens of material under fingernails.
11. Defendant to permit taking samples of blood, hair and other materials of his body which involve no unreasonable intrusion thereof.
12. Defendant to provide samples of his handwriting.
13. Defendant to submit to a physical external inspection of his body.
14. Defendant to state whether there is any claim of incompetency to stand trial.
15. For discovery of the names and addresses of defendant's witnesses and their statements.
16. To inspect physical or documentary evidence in defendant's possession.
17. To take the deposition(s) of witness(es).
18. To secure the appearance of a witness at trial or hearing.

- 19. Defendant to state whether his prior convictions will be stipulated or need be proved.
20. Defendant to state whether he will stipulate to the continuous chain of custody of evidence from acquisition to trial.
Dated this \_\_\_\_ day of \_\_\_\_\_, 19\_\_

Prosecuting Attorney \_\_\_\_\_

It is so ordered this \_\_\_\_ day of \_\_\_\_\_, 19\_\_

Judge \_\_\_\_\_

[Amended effective September 1, 1995.]

Supersedes RCW 10.46.030 in part. Comment

RULE 4.6 DEPOSITIONS

(a) When Taken. Upon a showing that a prospective witness may be unable to attend or prevented from attending a trial or hearing or if a witness refuses to discuss the case with either counsel and that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion of a party and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place.

(b) Notice of Taking. The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time and may change the place of taking.

(c) How Taken. A deposition shall be taken in the manner provided in civil actions. No deposition shall be used in evidence against any defendant who has not had notice of and an opportunity to participate in or be present at the taking thereof.

(d) Use. Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as witness, or as substantive evidence under circumstances permitted by the Rules of Evidence.

(e) Objections to Admissibility. Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions. [Amended effective September 1, 1985.]

RULE 4.7 DISCOVERY

(a) Prosecutor's Obligations. (1) Except as otherwise provided by protective orders or as to matters not subject to disclosure, the prosecuting attorney shall disclose to the defendant the following material and information within the prosecuting attorney's possession or control no later than the omnibus hearing: (i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with any written or recorded

statements and the substance of any oral statements of such witnesses;

(ii) any written or recorded statements and the substance of any oral statements made by the defendant, or made by a codefendant if the trial is to be a joint one;

(iii) when authorized by the court, those portions of grand jury minutes containing testimony of the defendant, relevant testimony of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, and any relevant testimony that has not been transcribed;

(iv) any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and scientific tests, experiments, or comparisons;

(v) any books, papers, documents, photographs, or tangible objects, which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belonged to the defendant; and

(vi) any record or prior criminal convictions known to the prosecuting attorney of the defendant and of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial.

(2) The prosecuting attorney shall disclose to the defendant:

(i) any electronic surveillance, including wiretapping, of the defendant's premises or conversations to which the defendant was a party and any record thereof;

(ii) any expert witnesses whom the prosecuting attorney will call at the hearing or trial, the subject of their testimony, and any reports they have submitted to the prosecuting attorney;

(iii) any information which the prosecuting attorney has indicating entrapment of the defendant.

(3) Except as is otherwise provided as to protective orders, the prosecuting attorney shall disclose to defendant's counsel any material or information within the prosecuting attorney's knowledge which tends to negate defendant's guilt as to the offense charged.

(4) The prosecuting attorney's obligation under this section is limited to material and information within the knowledge, possession or control of members of the prosecuting attorney's staff.

(b) **Defendant's Obligations.**

(1) Except as is otherwise provided as to matters not subject to disclosure and protective orders, the defendant shall disclose to the prosecuting attorney the following material and information within the defendant's control no later than the omnibus hearing: the names and addresses of persons whom the defendant intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witnesses.

(2) Notwithstanding the initiation of judicial proceedings, and subject to constitutional limitations, the

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court on motion of the prosecuting attorney or the defendant, may require or allow the defendant to:

(i) appear in a lineup;

(ii) speak for identification by a witness to an offense;

(iii) be fingerprinted;

(iv) pose for photographs not involving reenactment of the crime charged;

(v) try on articles of clothing;

(vi) permit the taking of samples of or from the defendant's blood, hair, and other materials of the defendant's body including materials under the defendant's fingernails which involve no unreasonable intrusion thereof;

(vii) provide specimens of the defendant's handwriting;

(viii) submit to a reasonable physical, medical, or psychiatric inspection or examination;

(ix) state whether there is any claim of incompetency to stand trial;

(x) allow inspection of physical or documentary evidence in defendant's possession;

(xi) state whether the defendant's prior convictions will be stipulated or need to be proved;

(xii) state whether or not the defendant will rely on an alibi and, if so, furnish a list of alibi witnesses and their addresses;

(xiii) state whether or not the defendant will rely on a defense of insanity at the time of the offense;

(xiv) state the general nature of the defense.

(3) Provisions may be made for appearance for the foregoing purposes in an order for pretrial release.

(c) **Additional Disclosures Upon Request and Specification.** Except as is otherwise provided as to matters not subject to disclosure the prosecuting attorney shall, upon request of the defendant, disclose any relevant material and information regarding:

(1) Specified searches and seizures;

(2) The acquisition of specified statements from the defendant; and

(3) The relationship, if any, of specified persons to the prosecuting authority.

(d) **Material Held by Others.** Upon defendant's request and designation of material or information in the knowledge, possession or control of other persons which would be discoverable if in the knowledge, possession or control of the prosecuting attorney, the prosecuting attorney shall attempt to cause such material or information to be made available to the defendant.

If the prosecuting attorney's efforts are unsuccessful and if such material or persons are subject to the jurisdiction of the court, the court shall issue suitable subpoenas or orders to cause such material to be made available to the defendant.

(e) **Discretionary Disclosures.**

(1) Upon a showing of materiality to the preparation of the defense, and if the request is reasonable, the court in its discretion may require disclosure to the defendant of the relevant material and information not covered by sections (a), (c) and (d).

(2) The court may condition or deny disclosure authorized by this rule if it finds that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment, resulting from such disclosure, which outweigh any usefulness of the disclosure to the defendant.

(f) **Matters Not Subject to Disclosure.**

(1) **Work Product.** Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of investigating or prosecuting agencies except as to material discoverable under subsection (a)(3)(iv).

(2) **Informants.** Disclosure of an informant's identity shall not be required where the informant's identity is a prosecution secret and a failure to disclose will not infringe upon the constitutional rights of the defendant. Disclosure of the identity of witnesses to be produced at a hearing or trial shall not be denied.

(g) **Medical and Scientific Reports.** Subject to constitutional limitations, the court may require the defendant to disclose any reports or results, or testimony relative thereto, of physical or mental examinations or of scientific tests, experiments or comparisons, or any other reports or statements of experts which the defendant intends to use at a hearing or trial.

(h) **Regulation of Discovery.**

(1) **Investigations Not to Be Impeded.** Except as is otherwise provided with respect to protective orders and matters not subject to disclosure, neither the counsel for the parties nor other prosecution or defense personnel shall advise persons other than the defendant having relevant material or information to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor shall they otherwise impede opposing counsel's investigation of the case.

(2) **Continuing Duty to Disclose.** If, after compliance with these rules or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, the party shall promptly notify the other party or their counsel of the existence of such additional material, and if the additional material or information is discovered during trial, the court shall also be notified.

(3) **Custody of Materials.** Any materials furnished to an attorney pursuant to these rules shall remain in the exclusive custody of the attorney and be used only for the purposes of conducting the party's side of the case, and shall be subject to such other terms and conditions as the court may provide.

(4) **Protective Orders.** Upon a showing of cause, the court may at any time order that specified disclosure be

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restricted or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled must be disclosed in time to permit the party's counsel to make beneficial use thereof.

(5) **Excision.** When some parts of certain material are discoverable under this rule, and other parts are discoverable as much of the material shall be disclosed as is consistent with this rule. Material excised pursuant to judicial order shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

(6) **In Camera Proceedings.** Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosure, or portion of such showing, to be made in camera. A record shall be made of such proceedings. If the court enters an order granting relief following a showing in camera, the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

(7) **Sanctions.**

(i) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.

(ii) Willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

[Amended effective September 1, 1986.]

#### Comment

Supersedes RCW 10.57.030, .033; RCW 10.46.030 in part.

### RULE 4.8 SUBPOENAS

Subpoenas shall be issued in the same manner as in civil actions.

#### Comment

Supersedes RCW 10.46.030 in part; RCW 10.46.050

### RULE 4.9 PRETRIAL CONFERENCE [RESCINDED]

[Rescinded effective September 1, 1983.]

### RULE 4.10 MATERIAL WITNESS

(a) **Warrant.** On motion of the prosecuting attorney or the defendant, the court may issue a warrant, subject to reasonable bail, for the arrest of a material witness. The warrant shall issue only on a showing, by affidavit or on the record in open court, that the testimony of the witness is material and that:

- (1) The witness has refused to submit to a deposition ordered by the court pursuant to rule 4.6; or
- (2) The witness has refused to obey a lawfully issued subpoena; or
- (3) It may become impracticable to secure the presence of the witness by subpoena.

Unless otherwise ordered by the court, the warrant shall be executed and returned as in rule 2.2.

(b) **Hearing.** After the arrest of the witness, the court shall hold a hearing no later than the next judicial day after the witness is present in the county from which the warrant issued. The witness shall be entitled to be represented by a lawyer. The court shall appoint a

**5. VENUE**

**RULE 5.1 COMMENCEMENT OF ACTIONS**

(a) **Where Commenced.** All actions shall be commenced:

- (1) In the county where the offense was committed;
- (2) In any county wherein an element of the offense was committed or occurred.

(b) **Two or More Counties.** When there is reasonable doubt whether an offense has been committed in one of two or more counties, the action may be commenced in any such county.

(c) **Right to Change.** When a case is filed pursuant to section (b) of this rule, the defendant shall have the right to change venue to any other county in which the offense may have been committed. Any objection to venue must be made as soon after the initial pleading is filed as the defendant has knowledge upon which to make it.

**Comment**

Supersedes RCW 10.55.019, .020, .050, .040, .050, .060, .110.

**6. PROCEDURES AT TRIAL**

**Comment**

RCW 14-46.070 is superseded in part by all of CR

**RULE 6.1 TRIAL BY JURY OR BY THE COURT**

(a) **Trial by Jury.** Cases required to be tried by jury shall be so tried unless the defendant files a written waiver of a jury trial, and has consent of the court.

(b) **Number of Jurors.** Unless otherwise provided by these rules, the number of persons serving on a jury shall be 12, not including alternates. If prior to trial on a noncapital case all defendants so elect, the case shall be tried by a jury of not less than six, or by the court.

lawyer for an indigent witness if it is required to protect the rights of the witness.

(c) **Release/Detention.** Upon a determination that the testimony of the witness is material and that one of the conditions set forth in section (a) exists, the court shall set conditions for release of the witness pursuant to rule 3.2. A material witness shall be released unless the court determines that the testimony of such witness cannot be secured adequately by deposition and that further detention is necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to rule 4.6. [Adopted effective September 1, 1991.]

**RULE 5.2 CHANGE OF VENUE**

(a) **When Ordered—Improper County.** The court shall order a change of venue upon motion and showing that the action has not been prosecuted in the proper county.

(b) **When Ordered—On Motion of Party.** The court may order a change of venue to any county in the state: (1) Upon written agreement of the prosecuting attorney and the defendant;

(2) Upon motion of the defendant, supported by affidavit that he believes he cannot receive a fair trial in the county where the action is pending.

(c) **Discharge of Jury.** When the court orders a change of venue it shall discharge the jury, if any, without prejudice to the prosecution, and direct that all the papers and proceedings be certified to the superior court of the proper county and direct the defendant and the witnesses to appear at such court.

**Comment**

Supersedes RCW 10.25.080, .090, .100, RCW 10.46.180.

(c) **Juror Unable to Continue.** If a case has not yet been submitted to the jury and a juror is unable to continue and no alternate jurors were selected or none are available, or if a case has been submitted to the jury and a juror is unable to continue, all defendants may elect to continue with the remaining jurors. The court shall declare a mistrial for any defendant who does not elect to continue with the remaining jurors. If some, but not all, defendants elect to continue with the trial, the court shall proceed with the trial for those defendants unless the court determines manifest necessity requires a mistrial.

(d) **Trial Without Jury.** In a case tried without a jury, the court shall enter findings of fact and conclusions of law. In giving the decision, the facts found and

the conclusions of law shall be separately stated. The court shall enter such findings of fact and conclusions of law only upon 5 days' notice of presentation to the parties. [Amended effective September 1, 1983.]

**Comment**

Supersedes RCW 10.49.020.

**RULE 6.2 JURORS' ORIENTATION**

All jurors will be given a general orientation when they report for duty.

(a) **Juror Handbook.** A copy of the Juror's Handbook to Washington Courts prepared by the Superior Court Judges' Association of the State of Washington and the Washington State Magistrates Association shall be provided to all petit jurors by the court in which they are to serve.

(b) **Juror Information Sheet.** Prior to the commencement of a petit juror's term of service, a juror information sheet shall be furnished to the juror by the court in which the person is to serve. The format of the information sheet shall be consistent with recommendations of the Administrator for the Courts. [Amended effective July 1, 1974; September 1, 1984.]

**RULE 6.3 SELECTING THE JURY**

When the action is called for trial, the jurors shall be selected at random from the jurors summoned who have appeared and have not been excused. [Amended effective September 1, 1993.]

**RULE 6.4 CHALLENGES**

(a) **Challenges to the Entire Panel.** Challenges to the entire panel shall only be sustained for a material departure from the procedures prescribed by law for their selection.

(b) **Voir Dire.** A voir dire examination shall be conducted for the purpose of discovering any basis for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges. The judge shall initiate the voir dire examination by identifying the parties and their respective counsel and by briefly outlining the nature of the case. The judge and counsel may then ask the prospective jurors questions touching their qualifications to serve as jurors in the case, subject to the supervision of the court as appropriate to the facts of the case.

(c) **Challenges for Cause.** (1) If the judge after examination of any juror is of the opinion that grounds for challenge are present, he or she shall excuse that juror from the trial of the case. If the judge does not excuse the juror, any party may challenge the juror for cause.

(2) RCW 4.44.150 through 4.44.200 shall govern challenges for cause.

(d) **Exceptions to Challenge.**

(1) **Determination.** The challenge may be excepted to by the adverse party for insufficiency and, if so, the court shall determine the sufficiency thereof, assuming the facts alleged therein to be true. The challenge may be denied by the adverse party and, if so, the court shall try the issue and determine the law and the facts.

(2) **Trial of Challenge.** Upon trial of a challenge, the Rules of Evidence applicable to testimony offered upon the trial of an ordinary issue of fact shall govern. The juror challenged, or any other person otherwise competent, may be examined as a witness by either party. If a challenge be determined to be sufficient, or if found to be true, as the case may be, it shall be allowed, and the juror to whom it was taken excluded; but if not so determined or found otherwise, it shall be disallowed.

(e) **Peremptory Challenges.**

(1) **Peremptory Challenges Defined.** A peremptory challenge is an objection to a juror for which there is no reason given, but upon which the court shall exclude the juror. In prosecutions for capital offenses the defense and the state may challenge peremptorily 12 jurors each; in prosecution for offenses punishable by imprisonment in the state Department of Corrections 6 jurors each; in all other prosecutions, 3 jurors each. When several defendants are on trial together, each defendant shall be entitled to one challenge in addition to the number of challenges provided above, with discretion in the trial judge to afford the prosecution such additional challenges as circumstances warrant.

(2) **Peremptory Challenges—How Taken.** After prospective jurors have been passed for cause, peremptory challenges shall be exercised alternately first by the prosecution then by each defendant until the peremptory challenges are exhausted or the jury accepted. Acceptance of the jury as presently constituted shall not waive any remaining peremptory challenges to jurors subsequently called. [Amended effective December 26, 2000.]

**Comment**

Supersedes RCW 10.49.030, .040, .050, .060.

**RULE 6.5 ALTERNATE JURORS**

When the jury is selected the court may direct the selection of one or more additional jurors. In its discretion, to be known as alternate jurors. Each party shall be entitled to one peremptory challenge for each alternate juror to be selected. When several defendants are on trial together, each defendant shall be entitled to one challenge in addition to the challenge provided above, with discretion in the trial judge to afford the prosecution such additional challenges as circumstances warrant. If at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged, and the clerk shall draw the name of an alternate who shall take the juror's place on the jury. Alternate jurors who do not replace a regular juror may be discharged or temporarily excused after the jury

retires to consider its verdict. When jurors are temporarily excused but not discharged, the trial judge shall take appropriate steps to protect alternate jurors from influence, interference or publicity, which might affect that juror's ability to remain impartial and the trial judge may conduct brief voir dire before seating such alternate juror for any trial or deliberations. Such alternate juror may be recalled at any time that a regular juror is unable to serve, including a second phase of any trial that is bifurcated. If the jury has commenced deliberations prior to replacement of an initial juror with an alternate juror, the jury shall be instructed to disregard all previous deliberations and begin deliberations anew.

[Amended effective September 1, 1989; April 20, 1990.]

#### Comment

Supersedes RCW 10.49.070.

### RULE 6.6 JURORS' OATH

The jury shall be sworn or affirmed well and truly to try the issue between the State and the defendant, according to the evidence and instructions by the court.

#### Comment

Supersedes RCW 10.49.100.

### RULE 6.7 CUSTODY OF JURY

(a) **Generally.** During trial and deliberations the jury may be allowed to separate unless good cause is shown, on the record, for sequestration of the jury.

(b) **Communication Restricted.** Unless the jury is allowed to separate, the jurors shall be kept together under the charge of one or more officers until they agree upon their verdict or are discharged by the court. The officer shall keep the jurors separate from other persons and shall not allow any communication which may affect the case to be made to the jurors, nor make any himself, unless by order of the court, except to ask the jurors if they have agreed upon their verdict. The officer shall not, before the verdict is rendered, communicate to any person the state of the jurors' deliberations or their verdict.

(c) **Motions.** Any motions or proceedings concerning the separation or sequestration of the jury shall be made out of the presence of the jury.

[Amended effective September 20, 1976; September 1, 1983.]

#### Comment

Supersedes RCW 10.49.110.

### RULE 6.8 NOTE TAKING BY JURORS

In all cases, jurors shall be allowed to take written notes regarding the evidence presented to them and keep these notes with them during their deliberation. The court may allow jurors to keep these notes with them in the jury room during recesses, in which case jurors may review their own notes but may not share or discuss the notes with other jurors until they begin deliberating. Such notes should be treated as confidential.

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tial between the jurors making them and their fellow jurors, and shall be destroyed immediately after the verdict is rendered.

[Amended effective October 1, 2002.]

### RULE 6.9 VIEW OF PREMISES BY JURY

The court may allow the jury to view the place in which any material fact occurred. In such event it shall order the jury to be conducted in a body, in the custody of a proper officer of the court to the place which shall be shown to them by the judge. The defendant shall be present at the view. During the view, no person other than the judge or person authorized by him shall speak to the jury on any subject relating to the trial.

### RULE 6.10 DISCHARGE OF JURY

The jury may be discharged by the court on consent of both parties or when it appears that there is no reasonable probability of their reaching agreement.

### RULE 6.11 JUDGE—DISABILITY

(a) **Disability of Judge During Jury Trial.** If, before the judge submits the case to the jury, he or she is unable to continue with the trial, any other judge assigned to or regularly sitting in the court, upon becoming familiar with the record of the trial, may proceed with the trial. Upon defendant's objection to the replacement, a mistrial shall be granted. If, after the judge submits the case to the jury, he or she is unable to continue, the case shall proceed before another judge.

(b) **Disability of Judge During Nonjury Trial.** If a judge before whom trial without jury has commenced is unable to proceed with the trial, a mistrial shall be granted.

[Amended effective December 26, 2000.]

### RULE 6.12 WITNESSES

(a) **Who May Testify.** Any person may be a witness in any action or proceeding under these rules except as hereinafter provided or as provided in the Rules of Evidence.

(b) **When Excused.** A witness subpoenaed to attend in a criminal case is dismissed and excused from further attendance as soon as he or she has given his or her testimony-in-chief and has been cross-examined thereon, unless either party makes requests in open court that the witness remain in attendance; and witness fees will not be allowed any witness after the day on which his or her testimony is given, except when the witness has in open court been required to remain in further attendance, and when so required the clerk shall note that fact in his or her journal.

(c) **Persons Incompetent to Testify.** The following persons are incompetent to testify: (1) Those who are of unsound mind, or intoxicated at the time of their production for examination; and (2) children who do not have the capacity of receiving just impressions of the facts about which they are examined or who do not have

the capacity of relating them truly. This shall not affect any recognized privileges.

(d) **Not Excluded on Grounds of Interest.** No person offered as a witness shall be excluded from giving evidence by reason of his or her interest in the result of the action, as a party thereto or otherwise, but such interest may be shown to affect his or her credibility. [Amended effective January 1, 1975; April 1, 1979; September 1, 1991; December 26, 2000.]

#### Comment

See RCW 10.01.130.

### RULE 6.13 TESTIMONY IN LIEU OF WITNESSES

(a) **Deposition.** Upon a determination that the testimony of a witness is material, and that it appears probable that the witness will not voluntarily appear at the trial, the court may order the taking of his or her deposition. Pending the taking of the deposition the provisions of C.R. 3.2 shall apply.

(b) **Test Report by Expert.**

(1) **Certification Required.** Subject to subsection (b)(5) of this rule, the official written report of an expert witness which contains the results of any test of a substance or object which are relevant to an issue in a trial shall be admitted in evidence without further proof or foundation as prima facie evidence of the facts stated in the report if the report bears or has attached a certification stating that the certifier has performed a test on the substance or object in question, the name of the person from whom the substance or object was received, the certificate is attached to a true and complete copy of the certifier's official report, the report was made by the certifier, and the qualifications of the certifier to make such tests. The certificate shall be signed by the certifier with the title of his office and his business address and telephone number.

(2) **Form.** The certificate shall be in substantially the following form:

The undersigned certifies under penalty of perjury that:

1. He performed a test on the (substance) (object) in question;
2. The person from whom he received the (substance) (object) in question is \_\_\_\_\_;
3. The document on which this certificate appears or to which it is attached is a true and complete copy of my official report; and
4. Such document is a report of the results of a test which report and test were made by the undersigned who has the following qualifications and experience:

Signature \_\_\_\_\_

#### Title

Business Address and Telephone

(3) **Notice Requirements.** The court shall exclude such report if:

(i) a copy of the report and certificate has not been served on the defendant or the defendant's attorney at least 15 days prior to the trial date or, upon a showing of cause, such lesser time as the court deems proper; or

(ii) in the case of an unrepresented defendant, a copy of this rule in addition to a copy of the report and certificate has not been served on the defendant at least 15 days prior to the trial date or, upon a showing of cause, such lesser time as the court deems proper; or

(iii) at least 7 days prior to the trial date or, upon a showing of cause, such lesser time as the court deems proper, the defendant has served a written demand upon the prosecutor to produce the expert witness at the trial.

[Amended effective January 1, 1975; January 1, 1979; July 1, 1979; December 26, 2000.]

#### Comment

Supersedes RCW 10.16.145, 150, modifies and supplements RCW 10.16.145, 150, operates in part RCW 10.16.145, 150.

### RULE 6.14 INSTRUMENTS

In any case the court on motion of the prosecuting attorney may order that a witness shall not be excused from giving testimony or producing any papers, books, menus or things, on the ground that such testimony may tend to incriminate or subject the witness to a penalty or forfeiture; but the witness shall not be prosecuted or subjected to criminal penalty or forfeiture for or on account of any transaction, matter, or fact concerning which the witness has been ordered to testify pursuant to this rule. The witness may nevertheless be prosecuted for failing to comply with the order to answer, or for perjury or the giving of false evidence.

[Amended effective December 26, 2000.]

### RULE 6.15 INSTRUMENTS AND ARGUMENT

(a) **Proposed Instructions.** Proposed jury instructions shall be served and filed when a case is called for trial by serving one copy upon counsel for each party, by filing one copy with the clerk, and by delivering the original and one additional copy for each party to the trial judge. Additional instructions, which could not be reasonably anticipated, shall be served and filed at any time before the court has instructed the jury.

Not less than 10 days before the date of trial, the court may order counsel to serve and file proposed instructions not less than 3 days before the trial date.

Each proposed instruction shall be on a separate sheet of paper. The original shall not be numbered nor include citations of authority.

Any superior court may adopt special rules permitting certain instructions to be requested by number from any published book of instructions.

(b) [Reserved]

(c) Objection to Instructions. Before instructing the jury, the court shall supply counsel with copies of the proposed numbered instructions, verdict and special finding forms. The court shall afford to counsel an opportunity in the absence of the jury to object to the giving of any instructions and the refusal to give a requested instruction or submission of a verdict or special finding form. The party objecting shall state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused. The court shall provide counsel for each party with a copy of the instructions in their final form.

(d) Instructing the jury and Argument of Counsel. The court shall read the instructions to the jury. The prosecution may then address the jury after which the defense may address the jury followed by the prosecution's rebuttal.

(e) Deliberation. After argument, the jury shall retire to consider the verdict. The jury shall take with it the instructions given, all exhibits received in evidence and a verdict form or forms.

(f) Questions from Jury During Deliberations.

(1) The jury shall be instructed that any question it wishes to ask the court about the instructions or evidence should be signed, dated and submitted in writing to the bailiff. The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response.

Written questions from the jury, the court's response and any objections thereto shall be made a part of the record. The court shall respond to all questions from a deliberating jury in open court or in writing. In its discretion the court may grant a jury's request to rehear or replay evidence, but should do so in a way that is least likely to be seen as a comment on the evidence, in a way that is not unfairly prejudicial and in a way that minimizes the possibility that jurors will give undue weight to such evidence. Any additional instruction upon any point of law shall be given in writing.

(2) After jury deliberations have begun, the court shall not instruct the jury in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate.

(g) Several Offenses. The verdict forms for an offense charged or necessarily included in the offense charged or an attempt to commit either the offense

charged or any offense necessarily included therein may be submitted to the jury.

[Amended effective January 2, 1974; September 1, 1986; October 1, 2002.]

RULE 6.16 VERDICTS AND FINDINGS

(a) Verdicts.

(1) Several Defendants. If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if a jury cannot agree with respect to all the defendant or defendants as to whom it does not agree may be tried again.

(2) Return of Verdict. When all members of the jury agree upon a verdict, the presiding juror shall complete and sign the verdict form and return it to the judge in open court.

(3) Poll of Jurors. When a verdict or special finding is returned and before it is recorded, the jury shall be polled at the request of any party or upon the court's own motion. If at the conclusion of the poll, all of the jurors do not concur, the jury may be directed to retire for further deliberations or may be discharged by the court.

(b) Special Findings. The court may submit to the jury forms for such special findings which may be required or authorized by law. The court shall give such instruction as may be necessary to enable the jury both to make these special findings or verdicts and to render a general verdict. When a special finding is inconsistent with another special finding or with the general verdict, the court may order the jury to retire for further consideration.

(c) Forms.

(1) Verdict. The verdict of the jury may be in substantially the following form:

We, the jury, find the defendant guilty [or not guilty] of the crime of \_\_\_\_\_ as charged in count number \_\_\_\_\_

Signature of Presiding Juror

(2) Special Findings. Special findings may be substantially in the following form:

Was the defendant \_\_\_\_\_ (name) armed with a deadly weapon at the time of the commission of the crime charged in count number \_\_\_\_\_? Yes ( ) No ( )

[Amended effective September 1, 1995; December 26, 2000.]

Comment

Supersedes RCW 10.61.050, .055 in part, 040, .050.

7. PROCEDURES FOLLOWING CONNECTION

RULE 7.1 PROCEDURES BEFORE SENTENCING

(a) Generally. At the time of or within 3 days after, a plea, finding, or verdict of guilt of a felony, the court may order that a presentence investigation and report be prepared by the Department of Corrections. The court shall also then:

(1) Set a date, time, and place for sentencing in compliance with the time requirements of RCW 9.94A.110.

(2) Order the defendant to return at the designated date, time, and place; and

(3) Set a date at least 10 days before sentencing for delivery of the presentence report, if any, to the court, to the prosecuting attorney, and to the defendant or defense counsel.

(b) Report. The report of the presentence investigation shall contain the defendant's criminal history, as defined by RCW 9.94A.050, such information about the defendant's characteristics, financial condition, and the circumstances affecting the defendant's behavior as may be relevant in imposing sentence or in the correctional treatment of the defendant, information about the victim, and such other information as may be required by the court.

(c) Notice of New Evidence. At least 3 days before the sentencing hearing, defense counsel and the prosecuting attorney shall notify opposing counsel and the court of any part of the presentence report that will be controverted by the production of evidence.

(d) Other Reports. Any interested person, as designated in RCW 9.94A.110, may submit a report separate from that furnished by the Department of Corrections. [Formerly CR 7.2, renamed as CR 7.1 and amended, eff. July 1, 1984. Amended, eff. September 1, 1986.]

Comment

This rule is designed to implement RCW 9.94A.110 and related statutes concerning the sentencing procedure. The entire rule is new; it replaces the prior CR 7.2, Presentence Investigation, portions of which are incorporated into the new rule.

Section (a) is adapted from Minn. R. Crim. P. 27.03. The rule states that the court may order a presentence investigation and report, giving the court a measure of discretion to dispense with a report when the appropriate sentence can readily be determined on the basis of the sentencing guidelines score sheet. The rule codifies the existing practice of requiring the writer of the report to send copies to counsel and to the court.

Section (b) is substantially the same as the prior rule, CR 7.2(b). The reference in the prior rule to the defendant's "prior criminal record" is replaced by a reference to the defendant's "criminal history" in order to parallel the statutory language.

The reference to "helpful" information is replaced by a reference to "relevant" information because much of what is "helpful" under the prior rule will become irrelevant under a system of presumptive sentencing.

Section (c) ensures that both parties will receive reasonable notice of any intent to controvert the presentence report by the production of new evidence. The combined effect of sections (a)(3) and (c) is that each party will have 7 days to examine the report before giving the required notice.

Section (d) makes it clear that persons who are permitted under RCW 9.94A.110 to present "arguments" at sentencing may do so in writing.

Unlike the prior rule, CR 7.2(c), the rule contains no provision concerning the nondisclosure of "harmful" portions of the presentence report. The Commission concluded that the provision was no longer necessary because much of what might be "harmful" under the prior rule will no longer be relevant under presumptive sentencing and will not be included in the report. If a report under the presumptive sentencing system does contain information that the court may believe should be kept confidential, the court may fashion an appropriate remedy on a case-by-case basis.

RULE 7.2 SENTENCING

(a) Generally. The court shall state the precise terms of the sentence and shall assure that the record accurately reflects all time spent in custody in connection with the offense or behavioral incident for which sentence is imposed. Pending such action the court may release or commit the defendant, pursuant to rule 3.2.

(b) Procedure at Time of Sentencing. The court shall, immediately after sentencing, advise the defendant: (1) of the right to appeal the conviction; (2) of the right to appeal a sentence outside the standard sentence range; (3) that unless a notice of appeal is filed within 30 days after the entry of the judgment or order appealed from, the right to appeal is irrevocably waived; (4) that the superior court clerk will, if requested by the defendant appearing without counsel, supply a notice of appeal form and file it upon completion by the defendant; (5) of the right, if unable to pay the costs thereof, to have counsel appointed and portions of the trial record necessary for review of assigned errors transcribed at public expense for an appeal; and (6) of the time limits on the right to collateral attack imposed by RCW 10.73.090 and 100. These proceedings shall be made a part of the record.

(c) Record. A verbatim record of the sentencing proceedings shall be made.

(d) Judgment and Sentence. For every felony sentencing, the clerk of the court shall forward a copy of the uniform judgment and sentence to the Sentencing Guidelines Commission. The uniform judgment and sentence shall be a form prescribed by the Administra-

for the Courts in conjunction with the Supreme Court Pattern Forms Committee. If the sentence imposed departs from the applicable standard sentence range, the court's written findings of fact and conclusions of law shall also be supplied to the Commission. [Formerly CrR 7.1, renumbered as CrR 7.2 and amended, eff. July 1, 1984. Amended, eff. September 1, 1986; September 1, 1991; September 17, 1993; September 1, 1995.]

#### Comment

The prior rule, CrR 7.1, is adopted as CrR 7.2. In section (a), the added language is suggested by Minn.R.Crim.P. 27.03. The deleted language addressed matters that are now covered in more detail in RCW 9.94A.110.

Section (b) is the same as the corresponding section in the prior rule, except that subsections (1) and (2) are modified to reflect the provisions of RCW 9.94A.210.

Section (c), concerning the withdrawal of a guilty plea, is deleted. In the existing rules, the point is covered in both CrR 4.2 and CrR 7.1. (See rule 4.2.) The language of the two provisions differs, but they appear to be the same in substance. There is no apparent distinction between the two provisions in the cases that have interpreted them. No loss of substance occurs when the provision in CrR 7.1 is deleted, leaving the point governed by CrR 4.2.

Section (c) is suggested by Minn.R.Crim.P. 27.03. Section (d) is suggested by Minn.R.Crim.P. 27.03.

### RULE 7.3 JUDGMENT

A judgment of conviction shall set forth whether defendant was represented by counsel or made a valid waiver of counsel, the plea, the verdict or findings, and the adjudication and sentence. The court may order that its sentence include special conditions or requirements, including a specified schedule for the payment of a fine, restitution, or other costs, or the performance of community service. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk. [Amended effective July 1, 1984.]

#### Comment

The rule codifies the existing practice allowing the court to impose special conditions on its sentence. The rule makes it clear that special conditions, including a specified schedule, may likewise be imposed with respect to an order for community service, restitution, or costs. (See RCW 9.94A.200, referring to terms and conditions of restitution.)

The rule is, of course, subject to any statutory restrictions on the court's sentencing authority. For example, a statute requires that a sentence of confinement for more than 60 days must be served on consecutive days (RCW 9.94A.120). The rule would not permit the court to order that such a sentence be served on intermittent days.

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discretion, by which the defendant was prevented from having a fair trial;

(6) Error of law occurring at the trial and objected to at the time by the defendant;

(7) That the verdict or decision is contrary to law and the evidence;

(8) That substantial justice has not been done.

When the motion is based on matters outside the record, the facts shall be shown by affidavit.

(b) **Time for Motion; Contents of Motion.** A motion for new trial must be served and filed within 10 days after the verdict or decision. The court on application of the defendant or on its own motion may in its discretion extend the time until such time as judgment is entered.

The motion for arrest of judgment shall identify the specific reasons in fact and law as to each ground on which the motion is based.

(c) **New Charges After Arrest of Judgments.** When judgment is arrested and there is reasonable ground to believe that the defendant can be convicted of an offense properly charged, the court may order the defendant to be recommitted or released to answer a new indictment or information. If judgment was arrested because there was no proof of a material element of the crime the defendant shall be dismissed.

(d) **Rulings on Alternative Motions in Arrest of Judgment or for a New Trial.** Whenever a motion in arrest of a judgment and, in the alternative, for a new trial is filed and submitted in any superior court in any criminal cause tried before a jury, and the superior court enters an order granting the motion in arrest of judgment, the court shall, at the same time, in the alternative, pass upon and decide in the same order the motion for a new trial. The ruling upon the motion for a new trial shall not become effective unless and until the order granting the motion in arrest of judgment is reversed, vacated, or set aside in the manner provided by law.

(e) **Disposition of Motion.** The motion shall be disposed of before judgment and sentence or order deferring sentence.

[Formerly CrR 7.6. Amended, effective September 1, 1983. Renumbered as CrR 7.5 and amended, effective December 26, 2000.]

### RULE 7.6 PROBATION

(a) **Probation.** After conviction of an offense the defendant may be placed on probation as provided by law.

(b) **Revocation of Probation.** The court shall not revoke probation except after a hearing in which the defendant shall be present and apprised of the grounds on which such action is proposed. The defendant is entitled to be represented by counsel and may be released pursuant to CrR 3.2 pending such hearing. Counsel shall be appointed for a defendant financially unable to obtain counsel.

[Formerly CrR 7.5. Renumbered as CrR 7.6, effective December 26, 2000.]

### RULE 7.7 POST-CONVICTION RELIEF [RESCINDED]

[Rescinded effective July 1, 1976.]

### RULE 7.8 RELIEF FROM JUDGMENT OR ORDER

(a) **Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time if its attention is directed to the motion of any party and after such notice, if any, as the court orders. Such mistakes may be corrected before review is accepted by an appellate court and thereafter may be corrected pursuant to RCW 9.94A.210.

(b) **Mistakes; Inadvertence; Excusable Neglect; and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:**

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(2) Newly discovered evidence which by its disclosure could not have been discovered in time to move for a new trial under rule 7.5.

(3) Fraud (whether heretofore denominated intrinsic or extrinsic, misrepresentation, or other misconduct) of an adverse party;

(4) The judgment is void;

(5) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1) and (2) not more than a year after the judgment, order, or proceeding was entered or taken, and is thereafter subject to RCW 10.73.093, 1094.130, and 10.46. A motion under section (b) does not affect the finality of the judgment or suspend its operation.

(c) **Procedure on Vacation of Judgment.**

(1) **Motion.** Application shall be made by motion stating the grounds upon which relief is asked, and supported by affidavits setting forth a concise statement of the facts or errors upon which the motion is based.

(2) **Initial Consideration.** The court may deny the motion without a hearing if the facts alleged in the affidavits do not establish grounds for relief. The court may transfer a motion to the Court of Appeals for consideration as a personal restraint petition if such transfer would serve the ends of justice. Otherwise, the court shall enter an order fixing a time and place for hearing and directing the adverse party to appear and show cause why the relief asked for should not be granted.

[Adopted effective September 1, 1980; amended, effective September 1, 1981, and December 26, 2000.]

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3. MISCELLANEOUS

**RULE 8.1 TIME**

Time shall be computed and enlarged in accordance with CR 6.

**RULE 8.2 MOTIONS**

Rules 3.5 and 3.6 and CR 7(b) shall govern motions in criminal cases.

[Amended effective September 1, 1995.]

**RULE 8.3 DISMISSAL**

(a) **On Motion of Prosecution.** The court may, in its discretion, upon written motion of the prosecuting attorney setting forth the reasons therefor, dismiss an indictment, information or complaint.

(b) **On Motion of Court.** The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

[Amended effective September 1, 1995.]

**Comment**

Superstatutes RCW 3.0.46.0390.

**RULE 8.4 SERVICE, FILING, AND SIGNING OF PAPERS**

CR 5 shall govern service and filing of written motions (except those heard ex parte) in criminal cases. All pleadings, motions, and legal memoranda signed by an attorney shall include the attorney's Washington State Bar Association membership number in the signature block.

[Amended effective September 1, 1990.]

**RULE 8.5 CALENDARS**

In setting cases for trial, unless otherwise provided by statute, preference shall be given to criminal over civil cases, and criminal cases where the defendant or a witness is in confinement shall have preference over other criminal cases.

**RULE 8.6 EXCEPTIONS UNNECESSARY**

CR 4.6 shall govern exceptions to rulings and orders in criminal cases.

**RULE 8.7 OBJECTIONS**

Objections in criminal cases shall be taken as in civil cases.

**RULE 8.8 DISCHARGE**

Upon acquittal, or whenever the court shall direct any criminal prosecution to be dismissed, the defendant shall be released from custody or conditions of release on such charge and any bail shall be exonerated.

**Comment**

Superstatutes RCW 10.64.090.

**RULE 8.9 CHANGE OF JUDGE**

Any right under RCW 4.12.050 to seek disqualification of a judge will be deemed waived unless, in addition to the limitations in the statute, the motion and affidavit is filed with the court no later than thirty days prior to trial before a pre-assigned judge. If a case is re-assigned to a different judge less than forty days prior to trial, a party may then move for a change of judge within ten days of such reassignment, unless the moving party has previously made such a motion.

[Adopted effective October 19, 1999.]

**SUPERIOR COURT SPECIAL PROCEEDINGS  
RULES—CRIMINAL (SPRC)**

Effective December 30, 1997

Including Amendments Received Through  
October 1, 2004

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- 2. Appointment of Counsel.
- 3. Court Reporters; Filing of Notes.
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- 6. Proportionality Questionnaires.
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See Index to Part IV, *infra*.

**RULE 1. SCOPE OF RULES**

(a) Except as otherwise stated, these rules apply to all stages of proceedings in criminal cases in which the death penalty has been or may be decreed. These rules do not apply in any case in which imposition of the death penalty is no longer possible.

(b) Except when inconsistent with these rules, the Superior Court Criminal Rules and the Rules of Appellate Procedure shall continue to apply in capital cases.

[Adopted effective December 30, 1997.]

**RULE 2. APPOINTMENT OF COUNSEL**

At least two lawyers shall be appointed for the trial and also for the direct appeal. The trial court shall retain responsibility for appointing counsel for trial. The Supreme Court shall appoint counsel for the direct appeal. Notwithstanding RAP 15.2(f) and (h), the Supreme Court will determine all motions to withdraw as counsel on appeal.

A list of attorneys who meet the requirements of proficiency and experience, and who have demonstrated that they are learned in the law of capital punishment by virtue of training or experience, and thus are qualified for appointment in death penalty trials and for appeals will be recruited and maintained by a panel created by the Supreme Court. All counsel for trial and appeal must have demonstrated the proficiency and commitment to qualify representation which is appropriate to a capital case. Both counsel at trial must have five years' experience in the practice of criminal law (and) be familiar with and experienced in the utilization of expert witnesses and evidence, and not be presently serving as appointed counsel in another active trial level death penalty case. One counsel must be, and both may be, qualified for appointment in capital trials on the list, unless circumstances exist such that it is in the defendant's interest to appoint otherwise qualified counsel.

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learned in the law of capital punishment by virtue of training or experience. The trial court shall make findings of fact if good cause is found for not appointing list counsel.

At least one counsel on appeal must have three years' experience in the field of criminal appellate law and be learned in the law of capital punishment by virtue of training or experience. In appointing counsel on appeal, the Supreme Court will consider the list, but will have the final discretion in the appointment of counsel.

[Adopted effective December 30, 1997, amended effective January 1, 2003.]

**Comment**

If the period of time for filing the death notice has passed, and the death notice has not been filed, the court may then reduce the number of attorneys to one to proceed with the murder trial.

**RULE 3. COURT REPORTERS;  
FILING OF NOTES**

(a) At the commencement of a capital case, the trial court will designate one or more court reporters for that case. To the extent practical, only designated reporters will report all hearings.

(b) As soon as possible after each hearing, the court reporter will transmit stenographic notes, any audio or video tapes, and any other electronic data medium containing notes of the hearing to the courtroom clerk.

(c) The courtroom clerk will index the notes on a records inventory, noting the date of the notes. The courtroom clerk will have the court reporter initial the inventory log as each set of notes is received by the courtroom clerk.

(d) The stenographic notes, any audio or video tapes, and any other electronic data medium containing notes of any hearing shall be stored by the clerk's office in an exhibit box labeled with the defendant's name and cause



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1 MS. HAYES: Yes.

2 THE COURT: Thank you very much, ma'am. You're  
3 excused.

4 THE WITNESS: Do I leave the photographs right  
5 there?

6 THE COURT: If you would hand them back to counsel.  
7 Actually you can hand them to me unless you're going to  
8 be working with them again.

9 MS. HAYES: I'm not, Your Honor.

10 THE COURT: Thank you.

11 Ms. Hayes, are you prepared to call your next  
12 witness?

13 MS. HAYES: Your Honor, I believe that this is the  
14 time that we had suggested we take a break.

15 THE COURT: We will take our afternoon recess at  
16 this time. We'll be in recess for approximately 20  
17 minutes. It may be a little longer than 20 minutes, so  
18 we'll be back to the court no sooner than 3 o'clock or  
19 maybe sometime shortly thereafter. Until then we'll be  
20 in recess. I'm staying on the bench.

21 **(JURY OUT)**

22 THE COURT: Do we have the officer here for the--

23 MS. HAYES: Detective Pogachar is going to go check.  
24 They were to report at 2:30.

25 THE DETECTIVE: They're both here. Both the

1 officers are here.

2 THE COURT: Oh, great. Thank you. Are both  
3 officers going to be necessary for the 3.5?

4 MS. HAYES: No, Your Honor. I would just need to  
5 have Officer Mel Taylor.

6 THE COURT: Officer Mel Taylor. Could you page him?

7 MS. HAYES: It's Tramell for the record. It's the  
8 same officer, but it's Tramell, who goes by Mel.

9 THE COURT: Sir, before taking the stand, would you  
10 raise your right hand to be sworn?

11 **TRAMELL TAYLOR**

12 called as a witness by the plaintiff,  
13 having been sworn or affirmed,  
14 testified as follows:

15 THE COURT: Thank you very much. You may take the  
16 stand.

17 MS. HAYES: I believe we need to wait one moment for  
18 the defendant to return.

19 MR. COSSEY: I don't know where he went.

20 THE COURT: He's returning. For record clarity and  
21 for the defendant, I want you to know I've just sworn the  
22 officer. I don't think you were here during that  
23 swearing. I didn't recognize you had stepped out, but  
24 the officer has been sworn.

25 Ms. Hayes.

MS. HAYES: Thank you, Your Honor.



1 protection team, and also the meth team.

2 Q I'm going to take you to May 7<sup>th</sup> of 2004. Were you on  
3 duty that night?

4 A Yes, I was.

5 Q Did you have occasion to make contact with a Bobbi Dewey?

6 A Yes.

7 Q And how did that come about?

8 A On that particular shift I received a domestic violence  
9 call at her address.

10 Q And we're not going to go through the entire incident  
11 now, but we're going to just go to a notation you made in  
12 your report. Have you had a chance to review your  
13 report?

14 A Yes.

15 Q Do you have it with you?

16 A Yes, I do.

17 Q Would it help if you could refer to that for your  
18 testimony?

19 A Yes.

20 MS. HAYES: Unless there's any objections?

21 MR. COSSEY: Not for the 3.5 hearing.

22 Q (By Ms. Hayes) Did you have an occasion during the  
23 investigation of that domestic violence call to talk to  
24 an Anthony Davis?

25 A Yes, I did.

1 Q How did that occur?

2 A At the end of the call or the conclusion of the call the  
3 victim gave me his cell phone number.

4 Q And why was that?

5 A I needed to interview him reference the domestic violence  
6 call.

7 Q And did you then make contact with him on his cell phone?

8 A Yes, I did.

9 Q And at that time was he in custody?

10 A No, he was not.

11 Q Had he been contacted by you anytime prior to that?

12 A No.

13 Q Had he ever been told he was under arrest?

14 A No.

15 Q When you called Mr. Davis, what did you note how that  
16 phone call started off?

17 A Initially I called the cell phone number that was  
18 supplied to me, asked for Mr. Davis. Initially he  
19 thought that I was someone else.

20 Q What someone else did he think you were?

21 A He was basically accusing me of being the victim's new  
22 boyfriend.

23 Q And what was your response?

24 A I repeatedly told him that I was a police officer for the  
25 City of Spokane.

1 Q And did he finally accept that?

2 A Yes, he did.

3 Q And then what did he say?

4 A Referring to my report, he--once I believe that he  
5 realized that I was the police, he said that "there's  
6 nothing wrong with her."

7 Q Did he say anything else?

8 A He explained to me that they had just got into an  
9 argument.

10 Q And anything else?

11 A And that he would not make any further statements without  
12 his attorney or his lawyer.

13 Q And did you inquire as to where he was?

14 A Yes, I did.

15 Q And did he tell you where he was located?

16 A Yes. He told me that he was at Chan's Restaurant down on  
17 Third.

18 MS. HAYES: Your Honor, for the purposes of the 3.5  
19 hearing those are the statements that were made to the  
20 officer.

21 THE COURT: Thank you.

22 Mr. Cossey.

23 MR. COSSEY: I don't have any cross examination,  
24 Your Honor. The statements are pretty clear.

25 I do have argument on some of the statements though.

1           THE COURT: Referencing argument, before we get to  
2           that, I believe I should probably inform the defendant of  
3           his right to testify at this particular time at this  
4           hearing and the criteria and obligations.

5           Sir, it's my duty to inform you that you may but you  
6           need not testify at this hearing on the circumstances  
7           surrounding the statement.

8           If you do testify at the hearing, you will be  
9           subject to cross examination with respect to the  
10          circumstances surrounding the statement and with respect  
11          to your credibility.

12          If you do testify at this hearing, you do not by  
13          testifying waive the right to remain silent during the  
14          trial, and, if you do testify at this hearing, neither  
15          the fact that you testified at the hearing shall be  
16          mentioned to the jury unless the defendant testifies  
17          concerning the statement at trial.

18          Do you understand that, sir?

19          THE DEFENDANT: Partly, sir. Is this--

20          THE COURT: Basically what we're saying, if you wish  
21          to testify at this hearing with regard to the subject  
22          matter, you can, and, if you do, you're going to be  
23          subject to cross examination, but, if you do testify at  
24          this hearing, that doesn't mean you've waived your right  
25          to remain silent for the rest of the trial.

1           If you do testify during the trial, then you open up  
2 yourself again to cross examination.

3           MR. COSSEY: Your Honor, we're not going to be  
4 testifying.

5           THE DEFENDANT: I didn't know this was a separate  
6 trial.

7           MR. COSSEY: It's kind of a mini-mini-little one.

8           THE COURT: Right. It's a mini-hearing only to  
9 determine whether or not the statements that have just  
10 been discussed will be admissible later in the trial.

11          MR. COSSEY: He's not going to testify.

12          THE DEFENDANT: Thank you.

13          THE COURT: No more questions of this witness?

14          MS. HAYES: I have one matter I need to clear up if  
15 I could.

16          THE COURT: Yes.

17 Q (By Ms. Hayes) Officer Taylor, you indicated that the  
18 defendant refused to tell you where he was located?

19 A Earlier in the interview with the victim one of the  
20 questions I asked her is where would he be right now.  
21 She explained that he would probably be down at Chan's.

22 Q So the information that he might be at Chan's came from  
23 the victim, not from Mr. Davis?

24 A Right. But the background noise that I heard on the cell  
25 phone sounded like some type of a bar or a restaurant.

1 THE COURT: It sounded like Chan's. You couldn't  
2 tell whether it was Chan's, but it sounded like the  
3 background noise from a place like Chan's or that  
4 environment?

5 THE WITNESS: Correct.

6 Q (By Ms. Hayes) But he did not tell you his location?

7 A No.

8 MS. HAYES: Your Honor, the State would seek to  
9 admit the statements from Mr. Davis. You are ready for  
10 argument?

11 THE COURT: I'm ready.

12 MS. HAYES: Okay. Where he accused the officer of  
13 being the new boyfriend, the officer identifying himself  
14 several times, and then where the defendant stated  
15 "There's nothing wrong with her. We got into an  
16 argument."

17 I don't think it's necessary to have him testify  
18 that he's not making a statement without his lawyer. I  
19 don't know if that's the statement that Mr. Cossey was  
20 having the problems with. That's not the one that I  
21 think is most relevant to this hearing or to this trial,  
22 and also that he refused to give his location.

23 THE COURT: What you're seeking admission is the  
24 colloquy, I guess, about the boyfriend; "No, I'm not the  
25 boyfriend. I'm a police officer," not necessarily the

1 statement that "I'm not making any further comment  
2 without a lawyer"?

3 MS. HAYES: Right.

4 THE COURT: And also the fact that he refused to  
5 identify where he was?

6 MS. HAYES: Right, and that he stated, "There's  
7 nothing wrong with her. We got into an argument."

8 THE COURT: "It was just an argument."

9 MS. HAYES: Yes.

10 And basically, Your Honor, I don't think there's any  
11 argument as to whether or not he was in custody. He's  
12 not anywhere near the officer. He was on a cell phone.  
13 He could have hung up at any time. As Officer Taylor  
14 testified, he was completing his investigation, offering  
15 obviously to give the other party an opportunity to tell  
16 what happened.

17 So I would say that this does not fall within the  
18 confines of a custodial interrogation. It was  
19 investigatory, and there was no one in custody, so we  
20 should be allowed to admit those in trial.

21 THE COURT: Thank you.

22 Mr. Cossey.

23 MR. COSSEY: Thank you, Your Honor.

24 I think I'm going to split some hairs. I'm not  
25 going to beat my head against the custodial interrogation

1 two-pronged test. I've tried that on a telephone call,  
2 and it's never worked, so I doubt it's going to work  
3 today.

4 So I would agree with counsel that my client was not  
5 in custody, especially since the officer didn't even know  
6 where he was except suspected from the victim. That is  
7 not an issue.

8 But there is an issue with the statement. The  
9 difference is in any argument I agree the statement "At  
10 first Davis accused me of being the new boyfriend that  
11 Dewey had been seeing" and the statement about telling  
12 him several times, "I'm a police officer," I think that's  
13 fine. I don't think there's any issue with that. I  
14 think that comes in pursuant to my--I guess I would say  
15 stipulation.

16 The problem is the way it's written. It's written  
17 as this is a complete statement, "There's nothing wrong  
18 with her," comma. "We got into an argument," comma.  
19 "But I'm not making a statement without my lawyer." That  
20 is a--he is at that point asking for his constitutional  
21 rights to be observed, and counsel is asking you to go  
22 until he actually makes the final at the end of his  
23 sentence, "I want my lawyer."

24 As you know, if there's any question, you must err  
25 on the side of caution and err on the side in this regard

1 he is saying, "There's nothing wrong with her, we got  
2 into an argument, but I want my lawyer." That is part of  
3 a statement that he's saying to this police officer that  
4 during that part of this particular conversation he is  
5 asking this officer to observe his constitutional rights  
6 to a lawyer, to remain silent. And at that point I think  
7 that should not be allowed in. "There's nothing wrong  
8 with her, we got into an argument, I'm not making a  
9 statement without my lawyer." That is a complete  
10 statement.

11 THE COURT: And you don't object to that complete  
12 statement as you've just quoted going in?

13 MR. COSSEY: No. If you had the police report in  
14 front of you, it would be easier.

15 THE COURT: Everything after "I want my lawyer"  
16 period, everything after that you're saying doesn't go?

17 MS. HAYES: I think that goes without saying. But  
18 I'm saying, "There's nothing wrong with her, we got into  
19 an argument, I'm not making a statement without my  
20 lawyer." I think that whole phrase?

21 THE COURT: Comes out.

22 MS. HAYES: It's a phrase?

23 THE COURT: "There is nothing wrong with her, we  
24 just had an argument" should not be admitted.

25 MR. COSSEY: That's part of the statement. I'm

1       trying to think of a couple cases where an officer has  
2       him in a room over at the Public Safety Building and he's  
3       asking him questions, and, as he's asking him questions,  
4       he's saying, "You know, I wasn't there, man, but, you  
5       know, I better talk to my lawyer," case law says that's  
6       it. It stops. They don't get to take that little extra  
7       bit and say until you mention lawyer. They're saying  
8       that that whole phrase he's utilizing his right to remain  
9       silent.

10       Even this officer is saying--and I'm getting a frown  
11       because I'm using semantics here. But, if you look at  
12       it, you've got a comma, comma, comma. This is a complete  
13       phrase. I don't think it's fair to my client to take  
14       part of the phrase when in that whole sentence as written  
15       by the officer he's raising that issue about having a  
16       lawyer.

17       Now, the second prong, "When asked he refused to  
18       tell his location," that is after he says, "I'm not  
19       making a statement 'til I talk to my lawyer." He should  
20       have stopped immediately and not asked any more  
21       questions, and that should be out too.

22       MS. HAYES: And I don't know if Mr. Cossey--  
23       Mr. Cossey elected not to ask the officer any questions.

24       THE COURT: He said he didn't have any questions of  
25       this witness. He was just going to argument.

1 MR. COSSEY: He testified directly from his report  
2 accurately.

3 MS. HAYES: And I don't recall if I asked him at  
4 what time he refused to give his location. I know the  
5 way it's written in the report, but I don't think I  
6 specifically asked the officer--

7 THE COURT: Let's just deal with the statement  
8 though that he's talked about. I think we can clarify  
9 the sequence on that, but help me with the other.

10 MS. HAYES: Sure.

11 Your Honor, when he said, "There's nothing wrong  
12 with her, we got into an argument," there's no way that  
13 officer could have known that the defendant's next  
14 statement was going to be "But I'm not going to make a  
15 statement because I want a lawyer." Because the officer  
16 wrote that with a comma doesn't make it any less of a  
17 complete sentence. "There's nothing wrong with her. We  
18 got into an argument. I'm not making a statement without  
19 my lawyer." That's where it stops. Those first two  
20 statements, he did not say "I want to have a lawyer" and  
21 then proceed to make those two statements. He made those  
22 first. And without a crystal ball, without reading his  
23 mind, no one could have known that his next statement was  
24 going to be "I'm not making a statement without my  
25 lawyer."

1           So those statements very clearly come in according  
2 to the case law, and then I suppose what's left is  
3 determining when he talked about the location.

4           MR. COSSEY: Why don't we deal with this first,  
5 Judge?

6           THE COURT: This issue right here?

7           MR. COSSEY: Yeah. I agree with counsel. She's a  
8 hundred percent right. I'm not criticizing this officer.  
9 It has nothing to do with him.

10          THE COURT: I've got a question to the officer I'd  
11 like to ask.

12          Officer, the statement immediately before the  
13 defendant made the comment about there's nothing wrong  
14 with her and then went on, was that in response to a  
15 question that you had asked?

16          THE WITNESS: Well, initially after I called him I  
17 explained to him that I was a police officer  
18 investigating a domestic violence between him and the  
19 victim.

20          THE COURT: It seems as though when you were  
21 testifying that, when he became convinced who you were,  
22 that you were a police officer and not the other  
23 individual, were there any questions asked after that--  
24 after the defendant recognized or accepted that you were  
25 a police officer?

1 THE WITNESS: No. My exact statement from that  
2 point on, once I believe that he believed that I was the  
3 police, was that I needed to obtain his side of the  
4 story.

5 THE COURT: Okay.

6 THE WITNESS: And that's when he said--

7 THE COURT: That drew the response?

8 THE WITNESS: Yes.

9 THE COURT: Okay.

10 MR. COSSEY: What response?

11 THE WITNESS: His response as there's nothing wrong  
12 with her.

13 MR. COSSEY: Well, the response is: "There's  
14 nothing wrong with her, we got into an argument, I'm not  
15 making a statement without a lawyer." You have quotes.

16 THE COURT: I'm done with my question.

17 MR. COSSEY: Maybe I should ask some more questions  
18 then to maybe make it easier.

19 THE COURT: Sure.

20 CROSS EXAMINATION

21 BY MR. COSSEY:

22 Q Officer, do you have your police report in front of you?

23 A Yes, I do.

24 Q Would you agree with me that you have in quotations the  
25 statements that he made to you?

1 A Yes.

2 Q And those quotations start out by saying, "He finally  
3 said, quote, quotations, 'There's nothing wrong with  
4 her,' comma, 'we got into an argument,' comma, 'I'm not  
5 making the statement without my lawyer,' period,  
6 quotations." Would you agree that is an accurate  
7 rendition of your police report? You can look at it;  
8 it's okay.

9 A Yes, that's correct. That's what I typed in the report.

10 Q So you quoted the whole phrase, including the phrase that  
11 he wanted to talk--he wanted a lawyer?

12 A Except that wasn't one fluid answer.

13 Q Why isn't it? You have the whole thing in quotes with  
14 commas.

15 A Meaning what's in quotation is the answers that he gave  
16 me during the cell phone conversation.

17 MR. COSSEY: I think the point is made, so I will  
18 leave it up to the Court. But again the argument is the  
19 same. It doesn't change the fact. Counsel is right, but  
20 this--

21 THE COURT: What if those weren't commas? What if  
22 they were periods?

23 MR. COSSEY: Exactly.

24 THE COURT: We're talking about punctuation.

25 MR. COSSEY: Even if they were periods, the problem

1 is this. We're not on an even playing field here. This  
2 is not an even playing field. They have the burden, and  
3 the burden is, if there's any caution at all, you have to  
4 err on the side of my client, and that's what I'm asking  
5 the Court to do because there is an ambiguity there.

6 MS. HAYES: If there's any doubt whatsoever, I think  
7 that the fact that the officer may have used  
8 inappropriate punctuation in trying to get it into the  
9 quote. His intent was to make sure what the defendant  
10 said was contained in quotations, and that happens all  
11 the time. The fact that he used commas instead of  
12 periods I don't think is the issue to decide whether or  
13 not these statements were voluntary and not subject to  
14 *Miranda* warnings or that he continued to talk to him, and  
15 he wanted to get those statements in after he asserted  
16 his right to an attorney, and they're complete sentences.  
17 "There's nothing wrong with her. We got into an  
18 argument."

19 THE COURT: Let me just interrupt. Do you agree  
20 with the concept that, if a defendant in requesting an  
21 attorney before making any further statement makes the  
22 request in the context of other things, that that entire  
23 request and those other statements made during the  
24 request, the whole ball of wax comes out, not just  
25 anything beyond "I want an attorney"?

1 MS. HAYES: No, absolutely not. He made two  
2 statements voluntarily and then was not going to say  
3 anything else. "I'm not making any statements without my  
4 attorney," not "Disregard everything I said because I  
5 really need to have an attorney." He made the two  
6 statements voluntarily, and then he said, "I'm not going  
7 to make a statement without my lawyer."

8 THE COURT: I'm a little bit up against it because I  
9 don't have any law in front of me about when a defendant  
10 says--and I'm not going to reference this particular case  
11 but a hypothetical. "I went in the house, and I was  
12 carrying a gun, and I didn't intend to shoot her, but I  
13 did, and I don't want to say anything else without an  
14 attorney." Would in your mind that statement come in?

15 MS. HAYES: Absolutely. Absolutely.

16 THE COURT: And Mr. Cossey is saying, no, there's  
17 law saying no, you can't do that because it's within the  
18 context of saying "I want an attorney," so in that  
19 context. It seems sequentially that Ms. Hayes is right.  
20 I mean, sequentially I say this, I say this, I say this,  
21 I'm not saying any more without an attorney.

22 MS. HAYES: Well, I think the distinction here, Your  
23 Honor, is *Miranda* versus Sixth Amendment right to an  
24 attorney. This is not a *Miranda* issue clearly. It's the  
25 right to have an attorney, and that has to be made

1           unequivocally, absolutely unequivocally. You can say,  
2           "I'm thinking about getting a lawyer." It doesn't work.  
3           So it's not, if there's any ounce of doubt, it goes to  
4           the defendant's favor. The case law is clear. It has to  
5           be unequivocal, and until he said, "I'm not making a  
6           statement without my lawyer," there was no assertion of  
7           any rights as to those other two statements, none.

8           THE COURT: Do you want to include us here, or are  
9           you just chatting?

10          MR. COSSEY: Well, there was one other issue, and  
11          that was refuse to tell me his location.

12          THE COURT: We'll get to that later.

13          I think I have enough to make up my mind, right,  
14          wrong, or indifferent. I think I know where I am on  
15          that. Let's get that decided, and that's--I don't have  
16          before me anything definitive that's been cited as the  
17          law for this specific kind of circumstance, but applying  
18          what I understand and what I think makes sense this  
19          defendant is telling him things that he's voluntarily  
20          telling this officer and saying, "But I'm not telling you  
21          anything else beyond that. I want to get a lawyer." So  
22          at the time he wants the lawyer there's no more  
23          questioning, and, if there was additional questioning,  
24          and I'm shown a signal here, anything beyond that I think  
25          is out, but anything up to that point is in. I think his

1 statement is, in effect, "I'm telling you this and I'm  
2 telling you this, but I'm not telling you any more until  
3 I get an attorney." So I think what he told the officer  
4 before is admissible. I don't believe anything after  
5 that is admissible, including his refusal to identify  
6 where he is.

7 Anything further on that?

8 MS. HAYES: No. That was the only question I think  
9 was still to be cleared up is when he made that  
10 assertion.

11 THE COURT: I'm comfortable enough--that's right.  
12 But we don't know.

13 Officer, when did he deny or refuse to tell you  
14 where he was, after he said he wanted counsel or before?

15 THE WITNESS: Initially at the beginning of the  
16 phone conversation.

17 THE COURT: Before he indicated he wanted an  
18 attorney?

19 THE WITNESS: Yes.

20 THE COURT: Sequentially it's later, as I understand  
21 it, in your report.

22 THE WITNESS: Yes.

23 THE COURT: Well, why?

24 THE WITNESS: Well, to explain that I did not  
25 contact the defendant.

1 THE COURT: Okay. To explain why you never did go  
2 there or talk to him in person?

3 THE WITNESS: Right.

4 THE COURT: In the event we have testimony, I don't  
5 know if you want to cross on that, but the testimony from  
6 the officer is the refusal to identify where he was came  
7 before the comment that he wanted counsel.

8 Q (By Mr. Cossey) Officer, so your testimony, even though  
9 in your report the last thing you state in a sequential  
10 order is he refused to give, identify his location,  
11 you're saying that actually should have been in your  
12 report at the beginning?

13 A Well, it was at the end of the report to explain that we,  
14 the police, never did contact the defendant.

15 MR. COSSEY: Okay.

16 THE COURT: With that understanding, the denial  
17 being made, the refusal to identify where he was, where  
18 the defendant was being made before the defendant  
19 identified he wanted counsel, before making any other  
20 statement, that would be admissible.

21 MR. COSSEY: I want to make sure. I'm sure that  
22 officer knows this, but he should not mention the request  
23 for an attorney in front of the jury.

24 THE COURT: Do not mention that last statement, "I  
25 don't want to say anything more without an attorney."

1 That's not to be discussed from the stand. Everything up  
2 to that point is okay.

3 My understanding, Ms. Hayes, you're not intending to  
4 go into the "You're the boyfriend," "No, I'm not, I'm a  
5 police officer"?

6 MS. HAYES: Yes.

7 THE COURT: Yes, you are?

8 MS. HAYES: Yes.

9 THE COURT: I thought you weren't going to go into  
10 that?

11 MS. HAYES: No. I said I wasn't offering, "I want  
12 an attorney."

13 THE COURT: Fair enough.

14 Now we have time for the jury, but we're going to  
15 give the staff a break here. So we'll be in recess.  
16 We'll be in recess for about 10 or 15 minutes.

17 **(RECESS)**

18 THE COURT: Are we ready for the jury?

19 MS. HAYES: Yes.

20 THE COURT: Would you please bring in the jury?

21 **(JURY IN)**

22 THE COURT: Welcome back, Ladies and Gentlemen.  
23 Again thank you for your patience. We had some matters  
24 that we needed to clear up on the record, and then  
25 obviously we needed to take a break for the staff, and

1 we're now ready to continue.

2 Ms. Hayes, are you prepared to call your next  
3 witness?

4 MS. HAYES: Yes, Your Honor. The State calls  
5 Officer Tramell Taylor.

6 THE COURT: Would you please page Officer Taylor?

7 Sir, I'm going to swear you in on this matter.

8 **TRAMELL TAYLOR**

9 called as a witness by the plaintiff,  
10 having been sworn or affirmed,  
11 testified as follows:

12 THE COURT: Thank you very much. You may take the  
13 stand.

14 DIRECT EXAMINATION

15 BY MS. HAYES:

16 Q Good afternoon, Officer. Would you please state your  
17 name for the record, spelling your last name?

18 A The last name is Taylor, T-A-Y-L-O-R. First name is  
19 Tramell, T-R-A-M-E-L-L.

20 Q And your business address?

21 A West 1100 Mallon in Spokane, Washington.

22 Q Who do you work for?

23 A City of Spokane Police Department.

24 Q What are your present duties with the City of Spokane  
25 Police Department?

A I'm currently assigned to patrol. I work the south side

1 of town.

2 Q And what shift do you work?

3 A It's a power shift. It starts at 5 o'clock in the  
4 afternoon, and it runs 'til 3:40 in the morning.

5 Q How long have you been with the police department?

6 A About 19 years.

7 Q And could you please tell the jury what your prior  
8 training is?

9 A I've been assigned with the police department for 19  
10 years, 12 years with the SWAT team as a team leader, 10  
11 years as an FTO or field training officer, training  
12 recruits. I'm currently assigned to the dignitary  
13 protection team and also the meth team.

14 Q And were you on duty on May 7<sup>th</sup> of 2004?

15 A Yes, I was.

16 Q And which area of Spokane were you working?

17 A On that shift I was assigned to the north side of town.

18 Q Did you have occasion to respond to an address on North  
19 Nevada?

20 A Yes, I did.

21 Q And could you tell the jury why you responded there?

22 A That call from dispatch was a call reference a domestic  
23 violence.

24 Q Do you recall the address?

25 A Referring to my report the address is North 8424 Nevada

1 Street, Apartment No. 276.

2 Q And that is in the City of Spokane?

3 A Yes.

4 Q And the State of Washington?

5 A Yes.

6 MS. HAYES: Your Honor, may I approach the witness?

7 THE COURT: You may.

8 MS. HAYES: For the record I'm showing defense  
9 counsel what's been marked as State's Exhibit No. 40.

10 Q (By Ms. Hayes) Officer Taylor, I'm handing you what's  
11 previously been marked for identification as State's  
12 Exhibit No. 40. Do you recognize that?

13 A Yes, I do.

14 Q Would you tell the jury what that is?

15 A This is a printout or document of the actual radio  
16 transmission for the call that was given to us that  
17 night.

18 Q And how does that work? Can you just explain to the  
19 jury, when you're in your car and you get a call, what  
20 happens?

21 A All of the information that's being given to us over the  
22 police radio at the same time is being recorded and  
23 transmitted into text.

24 Q And from that CAD report can you tell what time you  
25 received the call?

1 A The call was dispatched at 2131 or 9:31 p.m.

2 Q Can you tell from that report when you arrived on scene?

3 A Yes. We arrived on scene at 9:51.

4 Q So about 20 minutes; did I get that right?

5 A Yes.

6 Q I never want to trust my math. Once you arrived on  
7 scene, what did you do?

8 A We approached the address of the apartment. I do recall  
9 that the way that we received the call was that we  
10 weren't sure if the suspect was still on the scene or  
11 not.

12 Q So what did you do?

13 A Prior to knocking on the front door we checked in the  
14 parking lot area to see if the suspect was still there.

15 Q And was he there?

16 A No, he was not.

17 Q What did you do next?

18 A We then made contact with the complainant or the person  
19 who called the police.

20 Q Who was that?

21 A That would be Mrs. Dewey.

22 Q What was her first name?

23 A Referring to my report, Bobbi.

24 Q And who was with you?

25 A Officer Ennis was working with me that night.

1 Q After you made contact with Bonnie Dewey, what did you  
2 do?

3 A I interviewed Ms. Dewey, and Officer Ennis interviewed  
4 her daughter.

5 Q Were those interviews going on simultaneously?

6 A Yes, but in different rooms of the apartment.

7 Q Which room were you in with Bobbi Dewey?

8 A In the bedroom.

9 Q And where was Officer Ennis with Taylor Buchanan?

10 A In the main living room area.

11 Q Can you describe what Bobbi Dewey's demeanor was when you  
12 were talking to her?

13 A I could tell that she had been crying, that she was  
14 upset, and that something had happened at the address.

15 Q And did she tell you what happened?

16 MR. COSSEY: Your Honor, may we approach?

17 THE COURT: Yes.

18 **(BENCH DISCUSSION)**

19 MR. COSSEY: I do not want to put my objection in  
20 front of the jury, but, when you have a professional  
21 reiterating what's been told, I think it's getting  
22 cumulative and really irrelevant what she's telling all  
23 these people. There's been several people who have  
24 testified, "This is what she told me." They've been lay  
25 witnesses, and I think at this point I'm going to object.

1 It's pretty cumulative, all these people coming in and  
2 saying exactly the same thing, what she told them. She's  
3 been in court. She says it. The best thing to do is  
4 have her testify what she has done. To continue to have  
5 all these people saying what she said to them is not  
6 appropriate.

7 I think it's objectionable based on not only  
8 hearsay. Even though they're in court and testified,  
9 that doesn't mean that everybody gets to say what she  
10 told them. That is several basics of direct examination  
11 that is not being adhered to, and I don't have any  
12 problem with the other people, and I didn't object on  
13 that. But when the experts and the professionals are  
14 going to say it, that's my objection.

15 MS. HAYES: I'd be offering this pursuant to excited  
16 utterances, and I believe that one of the biggest things  
17 that I guess at issue here is the victim's credibility,  
18 whether she was consistent with her statements. Coming  
19 into court eight months later, was that consistent with  
20 what she told the officers when she was under the stress  
21 of the event? I think that her credibility is absolutely  
22 at issue, and I think, if it fits into one of the  
23 exceptions, then it should be allowed.

24 THE COURT: Is your exception based on the fact it's  
25 not an excited utterance?

1 MR. COSSEY: There's been no foundation of excited  
2 utterance.

3 THE COURT: He was the responding officer. Do you  
4 want to--

5 MS. HAYES: Yeah. He said that she was--

6 THE COURT: He did testify that she had been crying  
7 and appeared to be upset.

8 MS. HAYES: Right.

9 THE COURT: The testimony that has already been  
10 accepted has been testimony at about the same period of  
11 time with her same state of mind, so I think the excited  
12 utterance has been established.

13 The other problem I guess that has been raised is:  
14 Is this unduly cumulative, unduly repetitive? There has  
15 been an issue raised, at least in opening, of an alibi  
16 defense, or at least the defendant is going to testify  
17 that he wasn't there. Leaving in the wings here who's  
18 telling the truth and the consistency of her report to  
19 the others that is otherwise admissible, I think at this  
20 time it isn't unduly repetitive. For that reason I'm  
21 going to allow it. But we don't have to spend a whole  
22 bunch of time on it.

23 MS. HAYES: Okay.

24 **(END OF BENCH DISCUSSION)**

25 THE COURT: Ms. Hayes.

1 MS. HAYES: Thank you, Your Honor.

2 Q (By Ms. Hayes) Officer Taylor, you stated that Ms. Dewey  
3 told you what had occurred?

4 A Yes.

5 Q Can you tell us what Ms. Dewey told you had happened?

6 A She told me that her boyfriend, her live-in boyfriend,  
7 had assaulted her.

8 Q Did she identify who that was?

9 A Yes.

10 Q Who was that?

11 A Anthony Davis.

12 Q Did she give you any details as to how the assault  
13 occurred?

14 A Yes.

15 Q You may refer to your report.

16 A Yes, she did.

17 Q And what did she tell you?

18 A Some of the things she told me, she explained to me that  
19 Mr. Davis grabbed her around her neck with both of his  
20 hands, choked her, threw her up against the wall, threw  
21 her against the television and the VCR.

22 Q Did she indicate what led up to the actual physical  
23 fight?

24 A Yes, she did.

25 Q What did she say?

1 A She said that their relationship was coming to an end or  
2 they were breaking up.

3 Q And did she indicate what she had said to him just prior  
4 to the assault?

5 A She mentioned that right before the actual assault she  
6 told him that he had a few weeks to pack his things and  
7 move out.

8 Q And did she tell you any other statements that the  
9 defendant made to her?

10 A Yes.

11 Q What did she say?

12 A Referring to my report, she told me that Davis told her  
13 that he was going to kill her.

14 Q What else?

15 A That he would take out her and her daughter.

16 Q And if you refer to your report, that first paragraph on  
17 Page 3, did he make any other statements?

18 A And at one point he told her that he would put her to  
19 sleep as he had his hands on her throat.

20 Q And if you would review that paragraph and see if there's  
21 anything else that she reported to you. The third line  
22 from the bottom of that first paragraph is what I'm  
23 referring to.

24 A I'm sorry. Where are you referring to?

25 Q The third line from the bottom of the first paragraph

1 where you have it in quotes.

2 A Oh. Her exact words, "Bitch, you don't know me. I'm  
3 from Chicago. I will kill you."

4 Q Then did she indicate to you where he assaulted her as  
5 far as on her body?

6 A She mentioned that he had both of his hands around her  
7 neck, that he was choking her, he slammed her head up  
8 against the wall, and that he also slammed her to the  
9 floor as he held her around her neck.

10 Q Did you make any observations as to Bobbi Dewey's neck  
11 area?

12 A Yes. I observed that her neck was red as if she had been  
13 assaulted or something had injured her neck.

14 Q So the injuries, would they be consistent with what she  
15 told you happened?

16 A Yes.

17 Q After he assaulted her, did she indicate that her  
18 daughter was involved in any way?

19 A Yes. Sometime during the assault her daughter came into  
20 the bedroom.

21 Q And then did she tell you what happened after her  
22 daughter came in the bedroom?

23 A Yes. Mr. Davis told the daughter to leave.

24 Q And did she tell you that after her daughter came into  
25 the room that anything else had occurred? And you may

1 refer to your report. I'm referring to when the assault  
2 went from the bedroom into the hallway. Did she tell you  
3 what happened in the hallway?

4 A Well, after they left the bedroom, she mentioned that  
5 Mr. Davis swung at the light or the ceiling light and  
6 caused it to break with his hand.

7 Q And did you make any observations in that area as to if  
8 that had happened?

9 A Yes. I observed that the light was broken and that there  
10 was glass on the floor.

11 Q Did she indicate to you whether or not anything else had  
12 been broken in her apartment?

13 A In the living room I believe there was a picture frame  
14 that was also broken.

15 Q And did you make any observations as to any other damage  
16 that she indicated to you had occurred?

17 A I observed a dent in the wall or the sheetrock as if  
18 something had pressed up against it.

19 Q Did she indicate to you whether or not she had assaulted  
20 the defendant?

21 A As far as hitting him? No. She did not indicate that to  
22 me.

23 Q Did she indicate to you how she responded to the threats  
24 that he was making? And I refer again to the last  
25 paragraph of your report on Page 3.

1 A During the assault she explained to me that she was just  
2 trying to get him to calm down.

3 Q Did she indicate to you what Mr. Davis was wearing during  
4 the assault?

5 A She indicated that he didn't have any clothes on.

6 Q And did she indicate to you whether or not she had any  
7 injuries on her hands?

8 A Yes. I observed a cut or two on her hands. She  
9 explained to me that that was from the glass.

10 Q And then did she tell you that Mr. Davis left the  
11 apartment?

12 A Yes.

13 Q Are you aware of whether or not there were photographs  
14 taken?

15 A Yes. There were photographs taken.

16 Q And how do you know that?

17 A I called for a corporal, who had the camera, and called  
18 him to the scene.

19 Q And is that the general procedure that the police  
20 department uses?

21 A Yes.

22 Q So you don't have a camera in your car?

23 A No. I do not.

24 MS. HAYES: May I approach the witness?

25 THE COURT: You may.

1 Q (By Ms. Hayes) Officer Taylor, I am showing you what's  
2 been previously admitted already as State's Exhibits 1  
3 through 13, and we'll go through those one at a time. Do  
4 you recognize that first photograph?

5 A Yes. The first photograph is the actual numbers above  
6 the apartment door.

7 Q And the second photograph?

8 A Would be a picture of Ms. Dewey.

9 Q And the next photograph, No. 3?

10 A This is a picture of the right side of Ms. Dewey's neck  
11 and face.

12 Q And are you able to observe in that photograph anything  
13 that you observed on Bobbi Dewey that night?

14 A Yes. These are the same injuries or bruises that I  
15 observed on her neck on the night of.

16 Q Okay. And Exhibit No. 4?

17 A This is the same picture of Ms. Dewey, but the left side  
18 of her neck and shoulder.

19 Q And are there any observable marks?

20 A Yes. There's bruising on the left side of her neck,  
21 shoulder, and collarbone.

22 Q And No. 5?

23 A A picture of Ms. Dewey's left hand.

24 Q And why is that significant?

25 A This is the same cut that I observed on her hand on the

1           night of.

2       Q   No. 6?

3       A   A picture showing a bruise on the left side of Ms. Dewey.

4       Q   And that's her upper chest area?

5       A   Yes.

6       Q   No. 7?

7       A   Another picture showing a bruise or an injury on the

8           right shoulder, chest area.

9       Q   No. 8?

10      A   This is a photograph I believe taken in the living room

11           showing the broken lamp and picture frame with the broken

12           glass.

13      Q   And is that what you observed?

14      A   Yes, on the night of.

15      Q   No. 9?

16      A   No. 9, the same picture but at a wide angle of the broken

17           lamp and picture frame.

18      Q   No. 10?

19      A   No. 10 is a picture of the hallway between the bedroom

20           and the living room of the broken glass on the floor.

21      Q   No. 11?

22      A   No. 11 is a picture of the ceiling light between the

23           bedroom and the living room, and this is the light that

24           she explained to me that he had reached up and broke with

25           his hand.

1 Q So it would have had a globe or something?

2 A Yeah, some type of a glass fixture.

3 Q And I believe Exhibit No. 12.

4 A No. 12 is a picture of broken glass in the same area  
5 between the bedroom and the hallway, which came from the  
6 broken light fixture.

7 Q And No. 13?

8 A No. 13 is a picture of the TV laying on the floor in her  
9 bedroom where she explained to me that she was thrown up  
10 against.

11 Q And that's the way that you had observed it as well?

12 A Yes, on the night of.

13 Q Okay. Going back to your report--and for the record  
14 those were previously admitted, those exhibits--after the  
15 officer came and took the pictures, the corporal came and  
16 took the pictures, what did you do?

17 A Well, we wanted to ascertain where Mr. Davis was at that  
18 time.

19 Q And how did you ascertain where he might be?

20 A I asked Ms. Dewey where he would be or if she knew where  
21 he would go. She said that, if he would be anywhere, it  
22 would be at Chan's Dragon Inn, the restaurant down on  
23 Third Avenue.

24 Q And with that information what did you do?

25 A I had officers on the south side of town go to the

1 restaurant and look for the vehicle that he was driving.

2 Q And were they able to locate him or the vehicle?

3 A No, they weren't.

4 Q At some time during your investigation towards the end of  
5 your investigation did you have an opportunity to speak  
6 with Mr. Davis?

7 A Yes, I did.

8 Q Would you please tell the jury how that came about?

9 A While I was interviewing Ms. Dewey, she gave me  
10 Mr. Davis's cell phone number.

11 Q And then what did you do?

12 A At the end of the call I called Mr. Davis's cell phone.

13 Q And what did he say to you?

14 A Initially after I explained to him that I was the police  
15 and that I was investigating a domestic violence  
16 incident, he didn't believe that I was the police.

17 Q Did you have him identify himself?

18 A After I called the phone number, I asked for Anthony  
19 Davis.

20 Q And then he identified himself?

21 A Yes, he did.

22 Q And when he didn't believe you were the police, what did  
23 he say to you?

24 A Initially he thought that I was a boyfriend or a new  
25 boyfriend that Ms. Dewey had been seeing.

1 Q And did he believe you, that you were the police?

2 A Eventually I felt that he believed that I was the police.

3 Q Did you have to say it more than once?

4 A Yes, I did.

5 Q After you believed that he was convinced that you were a  
6 police officer, did he make any statements to you?

7 A Yes, he did.

8 Q And I would refer you to your report in the quotations.

9 And can you tell the jury the statements that he made to  
10 you?

11 A After I felt that he was convinced that I was the police,  
12 one of the things he said was that "there's nothing wrong  
13 with her."

14 Q And did he say anything else?

15 A He continued by saying that they had got into an  
16 argument.

17 Q And during the time that you had him on the telephone did  
18 you ask him where he was?

19 A Yes, I did. At the beginning of the phone conversation.

20 Q And did he tell you where he was?

21 A No, he did not.

22 Q And in your report what did you state, the last line of  
23 that paragraph?

24 A That we did not contact or locate.

25 Q If you look at that paragraph, it begins with "When

1       asked." Did you make that notation?

2       A Yes, I did.

3       Q And what is the rest of that notation you made?

4       A He basically refused to tell me where he was at.

5       Q After this phone call with Mr. Davis, what did you do?

6       A I completed the report, also completed an affidavit of  
7       probable cause.

8       Q And that was to refer charges?

9       A Yes.

10               MS. HAYES: If I could have just one moment, Your  
11       Honor?

12               THE COURT: Yes.

13               MS. HAYES: I have no further questions at this  
14       time, Your Honor.

15               THE COURT: Mr. Cossey, cross.

16               MR. COSSEY: Thank you, Your Honor.

17                               CROSS EXAMINATION

18       BY MR. COSSEY:

19       Q Good afternoon, Officer Taylor.

20       A Hello.

21       Q I believe you and I know each other, several years ago.

22               You're the officer in charge at the scene--

23       A Yes.

24       Q --when you arrived? Who was the other officer that came  
25       with you?

1 A At that night it was Officer Ennis.

2 Q Basically you're in charge of the scene and who's  
3 interviewing and who's doing what; correct?

4 A Not exactly. That night we were assigned together, or  
5 partners in the car.

6 Q But you're the one that put together the affidavit of  
7 probable cause?

8 A I was the one officer who interviewed the primary victim  
9 or Ms. Dewey, so therefore I had all of her statements or  
10 what had happened.

11 Q You don't make the determination at that point to send it  
12 to the prosecutor's office. It goes to a detective;  
13 correct?

14 A Correct.

15 Q In fact Detective Pogachar?

16 A Correct.

17 Q Did you make recommendations at that time?

18 A No, other than developing the probable cause.

19 Q So you didn't determine the charging language at that  
20 time?

21 A No, I did not.

22 Q And you arrived at the scene about 9:51?

23 A Yes, correct.

24 Q And you received the call at 9:14?

25 A We--as in me and Officer Ennis, we did not receive the

1 call at that time. I believe that was the time that the  
2 call was received through 911.

3 Q Law enforcement was contacted around 9:14, and that  
4 information is passed on to you, and then you respond?

5 A Yes, correct.

6 Q Now, when you first arrived on the scene, did you observe  
7 anybody present in the home or outside the home except  
8 Taylor and Ms. Dewey?

9 A We did not observe anyone outside of the home.

10 Q And she was describing the injuries, and you're looking  
11 at the scene; correct?

12 A Yes.

13 Q You went in the bedroom where she described that she had  
14 been thrown against the wall or pushed against the wall?

15 A Yes.

16 Q Which is it?

17 A Where she had been thrown against the wall or in the  
18 corner where the TV and the VCR was at.

19 Q Did she tell you how many times that happened? You can  
20 refer to your report if you want.

21 A No. She did not indicate how many times.

22 Q You are trained in responding to domestic violence  
23 situations; would you agree with that statement?

24 A Yes.

25 Q And part of your training is to get as complete and

1           accurate a statement from someone that's alleging  
2           domestic violence as possible; correct?

3       A    Yes.

4       Q    In fact it's important to do as complete and accurate  
5           report as possible at that initial scene to gather as  
6           much information as possible; agreed?  I mean that's why  
7           you're there is to gather information; correct?

8       A    It's a preliminary investigation.

9       Q    Did you do a subsequent investigation?

10      A    No, we did not.

11      Q    So this is your main investigation; correct?

12      A    Correct.

13      Q    You didn't do another one that I don't know about?

14      A    Correct.

15      Q    So this is your main investigation?

16      A    Correct.

17      Q    So, when you do your main investigation, the purpose of  
18           your training and to be fair to all the parties,  
19           including someone who's being accused, is to do as  
20           complete and detailed an investigation as possible;  
21           correct?

22      A    Correct.

23      Q    You wouldn't want to do a half-baked investigation;  
24           correct?

25      A    Correct.

1 Q So when you do the interview how long did your interview  
2 last with Ms. Dewey?

3 A I would have to approximate how long I was in--

4 Q But can you tell by your CAD report?

5 A No. I would say that I spoke with Ms. Dewey for about 10  
6 to 15 minutes in the bedroom.

7 Q Was that sufficient time in your professional opinion to  
8 get all the information that you needed on what happened?

9 A Based on what she was telling me how it took place, yes,  
10 that was enough time.

11 Q So in that 10 to 15 minutes, which is understandable, you  
12 got enough information from her you felt you got the  
13 complete story; correct?

14 A No, I did not.

15 Q You did not feel you got the complete story--

16 A No.

17 Q --from Ms. Dewey? There was more from Ms. Dewey's story  
18 that you didn't get?

19 A I got the statement from Ms. Dewey or her side of what  
20 had taken place. I felt that it wasn't complete until I  
21 had spoke to the other people involved.

22 Q Which were?

23 A Mr. Davis.

24 Q Mr. Davis. Did you get anything from Mr. Davis that  
25 changed your opinion of what Ms. Dewey had told you?

1 A That changed my opinion?

2 Q Did anything that you got from further investigation with  
3 Mr. Davis change any of the facts that you thought were  
4 incorrect or anything regarding Ms. Dewey's statements to  
5 you?

6 A Based on the fact that she had told me what had happened,  
7 I observed the TV, the VCR turned over, her injuries, the  
8 damage to the property, and then for Mr. Davis to tell me  
9 that they had only got into an argument I felt that  
10 someone was not being truthful.

11 Q So your statement with Ms. Dewey that you got in that 10-  
12 to 15-minute interview, did you feel that you got all the  
13 information you could from Ms. Dewey during that 10 to 15  
14 minutes?

15 A No.

16 Q Did you have to leave for some reason?

17 A No.

18 Q Did she have to leave? Was she going someplace?

19 A Yes, she was.

20 Q Where was she going?

21 A She was concerned about Mr. Davis returning to the  
22 apartment, and she wanted out.

23 Q You're still there, and the other officer is still there.  
24 She didn't feel safe with you two there?

25 A She didn't feel safe with us leaving her there with--

1 Q All right. I understand when you're leaving she doesn't  
2 feel safe. I'm talking about while you're standing there  
3 and you're doing the interview. The interview occurred  
4 in the bedroom; correct?

5 A Correct, yes.

6 Q In the 10- to 15-minute interview you didn't cut her  
7 short and tell her that you needed to go; correct?

8 A Correct.

9 Q Maybe I'm being confusing here. You go to a domestic  
10 violence situation, and you're interviewing the main  
11 witness; agreed?

12 A Yes.

13 Q You want to get all the information you can from that  
14 witness at that particular time; agreed? I mean, you  
15 didn't do a follow-up investigation of her later; did  
16 you?

17 A No, but I knew that there would be a follow-up  
18 investigation.

19 Q When was the follow-up investigation done?

20 A I'm not sure of the exact date.

21 Q Would it surprise you if it was done a long period of  
22 time later?

23 A No.

24 Q Would that be normal?

25 A How long?

1 Q Months?

2 A Yeah. I would be surprised if it was done months later.

3 Q So, if I'm understanding you, your testimony is you're  
4 really going in doing a quick, brief interview with the  
5 expectation that somebody else down the road is going to  
6 do a more thorough investigation? Is that what you're  
7 telling me?

8 A Not exactly.

9 Q Okay. Tell me what you're telling me. Maybe I'm  
10 confused.

11 A We received the call. We responded. There was  
12 allegations of someone being assaulted. At that time  
13 being the police, we will go there, contact the person,  
14 the complainant, or the victim, obtain their statement,  
15 see if there's any evidence involving the statement.  
16 Once probable cause is developed, or we have reason to  
17 believe that, yes, something happened and someone did it,  
18 at that point there is enough information--

19 Q I guess I'm confused. Isn't your job when you arrive--  
20 and I'm not trying to trick you because I mean everybody  
21 has told me--officers have always told me they try to do  
22 the best they can and get as much information when they  
23 do that initial interview as possible. And you're  
24 telling me you don't think you did enough of an interview  
25 with her?

1 A I could have conducted a sit-down interview at the police  
2 station and went over every exact detail, every exact  
3 statement that she made.

4 Q Let me ask you this. Let me ask you a different  
5 question. You said, and I'm going to quote you, you  
6 observed a dent in the wall; correct?

7 A Correct.

8 Q A dent. She told you she was thrown against the wall.  
9 Did she ever tell you that she was thrown against the  
10 wall five times?

11 A No, she did not.

12 Q It's not in your report. I can tell you that. So, if it  
13 had been, you certainly would have put that in your  
14 report; wouldn't you agree with that?

15 A She did not indicate how many times she was thrown  
16 against the wall.

17 Q If I was to tell you that she has testified she was  
18 thrown five times against the wall, is that consistent  
19 with what you saw on the wall in her bedroom?

20 A I guess that's possible.

21 Q Is that consistent?

22 A Is that consistent? It could be.

23 Q Okay. Did she ever mention to you in your interview that  
24 he took her head several times, several times--we'll find  
25 out the number--against the metal foot part of the bed?

1 Did she ever tell you that?

2 A That she was thrown against--

3 Q Not against the floor. You have already testified that  
4 she was slammed to the floor and into the wall. Did she  
5 ever tell you that her head was slammed four or five  
6 times into the foot of the metal bed?

7 A No. I do not recall that, no.

8 Q In this 10- or 15-minute interview in the bedroom did she  
9 ever direct you to show you where she was thrown down and  
10 where she was hit?

11 A Yes, she did.

12 Q And she never mentioned to you about hitting the bed or  
13 being hit against the wall four to five times; is that  
14 correct?

15 A She mentioned that she was thrown against the wall. I  
16 observed the dent in the wall. She mentioned that she  
17 was thrown.

18 Q To the floor?

19 A To the floor.

20 Q Again my question. I agree you've testified to that,  
21 and, Officer, I agree with you, you testified to that,  
22 but nowhere in your report does it say that she was  
23 thrown five times against the wall?

24 MS. HAYES: Objection, Your Honor. This has been  
25 asked and answered.

1 THE COURT: The last time through it.

2 A No.

3 Q (By Mr. Cossey) Okay. What about the bed?

4 A No.

5 Q During your 10- or 15-minute interview with her in the  
6 room did she have plenty of time in your opinion to give  
7 you those kind of details during that interview?

8 A Based on my experience--

9 Q She'll get to ask that. I've got to go this way or I'm  
10 going to get really confused here.

11 Did she have opportunity and time during that  
12 interview to explain that kind of violence to you in your  
13 interview if it had occurred?

14 A Yes, she had time.

15 Q And you had an opportunity to observe her physically?

16 A Yes.

17 Q Did you do a check of her head?

18 A Yes, I did.

19 Q And in your report I don't note anything that you see any  
20 trauma or any cuts or bleeding or anything like that.

21 A Not from her head, no.

22 Q Did you see any injuries to her head--and I've got your  
23 report. Did you see any injuries to her head that would  
24 be consistent with someone being thrown with force  
25 against a metal footboard four or five--metal bedpost or

1           whatever, bedpost four or five times?

2           A   Not at that time, no.

3           Q   Was there a later time?

4           A   I do know that injuries will develop over a period of  
5           time, so at the time that I was there and she told me  
6           this I did not observe any--

7           Q   Consistency to that?

8           A   Right.

9           Q   What about the wall four or five times?

10          A   I observed one dent.

11          Q   Can you describe the dent?

12          A   It was a circular dent as if you would take a basketball  
13          or a hard round object and push it up against sheetrock.

14          Q   How deep was it?

15          A   It was deep enough to see the impression.

16          Q   Was it deep enough to take a photograph? Obviously it  
17          is; right?

18          A   Yes.

19          Q   Did anybody photograph it?

20          A   I'm not certain if that was photographed.

21          Q   Whose decision would it be to photograph that?

22          A   At the time that I called the corporal or the officer  
23          with the camera I explained to him about the damage that  
24          was in the apartment and the photographs that I wanted  
25          taken.

1 Q Did that include the dent?

2 A Yes.

3 Q So he took a picture of the dent.

4 A A picture of the dent should have been taken.

5 Q You can't tell from the dent if it was a shoulder,  
6 another object or a head; can you?

7 A No, I cannot.

8 Q Was the TV broken; do you recall?

9 A As far as turning it on?

10 Q I mean, how was it fallen off? Did it look like it hit  
11 the floor hard and shattered or broke in pieces?

12 A No, other than the fact that it was on the floor.

13 Q When you were in the interview, did you notice any  
14 other--a cut on the finger or anything like that on  
15 Ms. Dewey?

16 A Other than the cut on her hand?

17 Q No, the cut on her hand. You saw the cut on the hand?

18 A Yes, I did.

19 Q And she told you that was caused by glass?

20 A Yes.

21 Q Did she give you any more detail than it was caused by  
22 glass?

23 A No, other than it was caused by the glass.

24 Q At any time she said it was caused by glass did she ever  
25 say that he caused the cut on her hand?

1 A If I recall, she told me that the cut was caused by the  
2 broken glass.

3 Q Okay.

4 MR. COSSEY: Your Honor, I'm going to reserve  
5 Officer Taylor for possible recall.

6 THE COURT: Any redirect?

7 MS. HAYES: Yes.

8 REDIRECT EXAMINATION

9 BY MS. HAYES:

10 Q Officer Taylor, do you recall what day of the week this  
11 was? Would it be on your cover sheet?

12 A Yes, it should be.

13 Q Do you want to check?

14 And do you have a copy of--it would be Page 1 of  
15 your report--

16 A Yes.

17 Q --incident report? Reported on what date?

18 A The day of the week was Friday.

19 Q And you said you worked the power shift. And that is  
20 from what time?

21 A From 5 in the afternoon to 3:40 in the morning.

22 Q And on a Friday evening from 5 in the afternoon 'til 3 in  
23 the morning would that be a busy time for the power  
24 shift?

25 A Yes.

1 Q About how many calls, based on your years of experience  
2 with the police department, would you get on a Friday  
3 night on that kind of a shift?

4 A An average of 20 to 30 calls. That shift on that  
5 particular day of the week is probably the busiest  
6 throughout a 24-hour period.

7 Q Have you worked the other shifts?

8 A Yes, I have.

9 Q So during the time that you're on you're being dispatched  
10 to 20 or 30 calls? Is that what you're saying?

11 A Yes.

12 Q And is it practical at 30 calls to transport the  
13 complainant to the police station and conduct an  
14 interview?

15 A No, it's not.

16 Q And under what circumstances would that happen in  
17 Spokane?

18 A For an example a serious crime such as a homicide or a  
19 shooting.

20 Q And domestic violence calls, do you get a lot of those on  
21 a Friday night?

22 A Yes, we do.

23 Q And when you contacted Bobbi Dewey, you said you spent 10  
24 or 15 minutes with her; is that right?

25 A That would be in the bedroom actually talking to her face

1 to face.

2 Q And during that time she told you that she had a live-in  
3 boyfriend?

4 A Yes.

5 Q He assaulted her?

6 A Yes.

7 Q Threatened to kill her?

8 A Yes.

9 Q Threatened to kill her daughter?

10 A Yes.

11 Q Broke stuff in the apartment?

12 A Yes.

13 Q Said that he was eating in the bedroom?

14 A Yes.

15 Q And that they had been breaking up?

16 A Yes.

17 Q She told you that she gave him a couple weeks to move  
18 out?

19 A Yes.

20 Q And that he called her into the bedroom and shut the door  
21 behind her?

22 MR. COSSEY: Awful leading now, Judge.

23 MS. HAYES: Your Honor, he suggested that--

24 THE COURT: We're going through a litany of items  
25 here that the officer did obtain. I think it's

1           legitimate. There is somewhat leading nature to it, but  
2           I'm going to allow it.

3           MS. HAYES: Thank you, Your Honor.

4           Q (By Ms. Hayes) She told you that Mr. Davis called her  
5           into the bedroom and shut the door behind her?

6           A Yes.

7           Q That he jumped up from the bed, put his hands around her  
8           neck?

9           A Yes.

10          Q And he said to her, "Bitch, you don't know me. I'm from  
11          Chicago, and I will kill you"?

12          A Yes.

13          Q And did you take the time to put that in quotes?

14          A Yes.

15          Q And that he grabbed her by the throat and then threw her  
16          against the TV, VCR, and the wall?

17          A Yes.

18          Q And did you make observations as to her injuries?

19          A Yes.

20          Q And did you make any observations as to the TV and the  
21          VCR?

22          A Yes.

23          Q And then did she tell you--did she take the time and you  
24          took the time to listen--that he then slammed her head  
25          into the wall?

1 A Yes.

2 Q And did you observe the wall?

3 A Yes.

4 Q And then did she tell you that he threw her to the floor  
5 near the foot of the bed?

6 A Yes.

7 Q And that he held her there?

8 A Yes.

9 Q And that her daughter came into the room to try to help  
10 her?

11 A Yes.

12 Q And did she tell you that while he was on top of her he  
13 again said, "Bitch, I will kill you and I will take both  
14 you and your daughter out right now"?

15 A Yes.

16 Q And did you make a note of that in your report?

17 A Yes, I did.

18 Q And did she tell you that she believed that Mr. Davis was  
19 going to kill her and her daughter?

20 A Yes, she did.

21 Q And that while he was on top of her with his hands around  
22 her throat he said, "Bitch, I will put you to sleep right  
23 now"?

24 A Yes.

25 Q And did you make a note of that in your report?

1 A Yes, I did.

2 Q Did you put that in quotations?

3 A Yes, I did.

4 Q And why did you put it in quotations?

5 A Because those were her statements. She relayed to me  
6 that that's how she felt and that's what she believed.

7 Q And did she then tell you that he picked her up from the  
8 floor and held her up against the wall in the hallway?

9 A Yes.

10 Q And he continued to yell and threaten her?

11 A Yes.

12 Q And then he swung at the ceiling light with his hands and  
13 smashed the light fixture?

14 A Yes.

15 Q And that he cut his hand when he smashed it?

16 A (No response.)

17 Q In your report he smashed out the light fixture and had a  
18 cut on his hand?

19 A Yes.

20 Q That he went into the living room and took a picture off  
21 the wall?

22 A Yes.

23 Q And that he smashed this picture and the glass frame over  
24 his knee?

25 A Yes.

- 1 Q And that detail was in your report?
- 2 A Yes.
- 3 Q And did she also tell you that he broke a lamp in the  
4 living room?
- 5 A Yes, she did.
- 6 Q And you made observations as to the broken ceiling light,  
7 the smashed picture, and the broken lamp?
- 8 A Yes, I did.
- 9 Q And you noted in your report there was a large amount of  
10 broken glass on the floor in the living room?
- 11 A Yes.
- 12 Q And did she tell you while they were in the living room  
13 he continued yelling at them and he punched the wall with  
14 his fist?
- 15 A Yes.
- 16 Q And that you observed a dent where he hit it?
- 17 A Yes.
- 18 Q And that during this time she was trying to get him to  
19 calm down?
- 20 A Yes.
- 21 Q And that she told you that he finally went into the  
22 bedroom where he got dressed?
- 23 A Yes.
- 24 Q And that he had been eating McDonald's food in there?
- 25 A Yes.

1 Q And that he was completely undressed during the entire  
2 assault?

3 A Yes.

4 Q And when he realized she had a cut on her hand, he said,  
5 "Did I do that?"

6 A Yes.

7 Q And she said that she thought it was an accident?

8 A Yes.

9 Q And that she cut her hand while she was trying to pick up  
10 glass?

11 A Yes.

12 Q And did she tell you that after he got dressed he left  
13 the apartment?

14 A Yes, she did.

15 Q And that she called the police?

16 A Yes.

17 Q And did you call the corporal to have photographs taken?

18 A Yes, I did.

19 Q And did you try to find the suspect?

20 A Yes, we did.

21 Q Did you make a phone call?

22 A Yes, I did.

23 Q And did you send out other units out looking for the  
24 suspect?

25 A Yes, I did.

1 THE COURT: Just a little slower.

2 MS. HAYES: Sorry.

3 Q (By Ms. Hayes) And during that time that you were having  
4 this interview was your partner having an interview with  
5 her daughter?

6 A Yes, he was.

7 Q And did he write a report as well?

8 A Yes, he did.

9 Q And the 10 or 15 minutes that you were there you took  
10 down this detailed information?

11 A Yes, I did.

12 Q And you believed that this was the information that was  
13 important for the detective to read about?

14 A Yes.

15 Q And that was during 20 or 30 calls on a Friday night?

16 A Yes, it was.

17 MS. HAYES: One moment, Your Honor.

18 Q (By Ms. Hayes) Based on your investigation you determined  
19 a crime had been committed?

20 A Yes, I did.

21 Q And you followed procedure and forwarded that to the  
22 police department for a detective to follow up on?

23 A Yes.

24 MS. HAYES: No further questions, Your Honor.

25 THE COURT: Mr. Cossey, other than reserving are

1           there any other questions?

2                   MR. COSSEY: Yes, there is, Your Honor.

3                                   RECROSS EXAMINATION

4 BY MR. COSSEY:

5 Q Ms. Hayes just went into a litany of things you have in  
6 your police report; right?

7 A Correct.

8 Q Every single one of those was derived from the statement  
9 you got from Ms. Dewey; correct?

10 A Correct.

11 Q All the information you got was from Ms. Dewey; correct?

12 A I'm sorry. I don't understand.

13 Q Well, everything you're putting in the police report is  
14 not your personal knowledge; it's from Ms. Dewey; agreed?

15 A Yes, right, agreed.

16 Q At no time with all these details Ms. Hayes just had you  
17 do does she ever mention being thrown numerous times  
18 against the wall; correct?

19 A Correct.

20 Q Numerous times against the metal bedpost; correct?

21 A Correct.

22 Q And never that he threatened and grabbed her hand and was  
23 going to break her pinky?

24 A Correct.

25                   MR. COSSEY: No further questions.

1 MS. HAYES: I have no further questions, Your Honor.

2 THE COURT: Subject to your reservation can this  
3 witness be excused?

4 MR. COSSEY: Yes, Your Honor.

5 THE COURT: Thank you very much, sir. You're  
6 excused.

7 It's 4:30 on the button. So at this particular time  
8 I think we'll recess.

9 Do you have a witness available that would be short?

10 MS. HAYES: I have the other officer, and it's a  
11 fairly detailed report. It's an interview with the  
12 daughter.

13 THE COURT: So that's going to take a little bit of  
14 time?

15 MS. HAYES: I would think so.

16 THE COURT: We're going to recess at this time.  
17 It's 4:30. We'll resume tomorrow morning at 9 o'clock  
18 for testimony. Hopefully we will be ready to go right at  
19 9 o'clock. There may be some matters we'll be addressing  
20 immediately before that, but I suspect those will be able  
21 to be completed.

22 I'm going to remind you of the things that we  
23 discussed before. That is not to discuss this case  
24 between or among yourselves nor with anyone else nor  
25 allow others to discuss it with you. Do not stay in the

1 presence of any who are discussing it.

2 I have not seen any media present, nor do I believe  
3 there will be any media coverage. However, in the event  
4 you do hear or see reports of this matter, do not listen  
5 or view those nor have any who have seen it discuss it  
6 with you.

7 When you return tomorrow morning, if you will return  
8 directly to the jury deliberation room. Don't linger in  
9 the halls.

10 Leave your notepads face down on your seats, and we  
11 will be in recess and see you tomorrow morning. Thank  
12 you very much.

13 I will stay on the bench.

14 **(JURY OUT)**

15 THE COURT: Mr. Cossey, I presume you've received a  
16 copy of the jury instructions of the State's?

17 MR. COSSEY: I did, Your Honor.

18 THE COURT: What I'm thinking is having you review  
19 those tonight, get some time in your spare time to read  
20 and review those so that tomorrow morning--I may be a tad  
21 late. When I say that, I don't know how much before  
22 9 o'clock I'll be here. I'll be here by 9 definitely.  
23 There's a matter that I have to take care of that may  
24 prevent me from being here by a quarter after 8 or  
25 8 o'clock or certainly not before that, but I should be

1 here before 9.

2 I'd like to continue with the testimony. We need to  
3 have some time to do the jury instructions, and the more  
4 you can know where you're going to be with them. I'll  
5 try to review them tonight as well, and any additional or  
6 supplemental that you have in mind, if you could have  
7 those ready to go.

8 **(ADJOURNED)**

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