

NO. 80209-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CECIL DAVIS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Frederick W. Fleming, Judge

APPELLANT'S OPENING BRIEF

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Portions stricken pursuant to this Court's July 9, 2010, order granting respondent's motion to strike and the January 14, 2011, order amending and clarifying the Court's July 9, 2010 order.

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A. ASSIGNMENTS OF ERROR

1. The trial judge erred when he refused to recuse himself from the case after initiating and engaging in ex parte contact with prosecutors.

2. The trial court erred when it entered the following findings of fact and conclusions of law in support of its denial of the motion for recusal:¹

a. Finding of fact II to the extent it implies defense counsel were focusing exclusively on the mitigation package and not preparing for trial prior to January 8, 2007;

b. Finding of fact VII, that the court merely engaged in a "ministerial act," to the extent this implies the court did not engage in ex parte communications or that the court's actions involved an unimportant matter;

c. Finding of fact IX, that its decision involved "a brief acceleration of the dates" and was made "certainly without ex parte communication with the State";

d. Conclusions of law I through IV.

3. The court erred in granting the State's request to remove two prospective jurors for cause.

4. The court erred in excluding the testimony of Davis' aunts, which was relevant mitigating evidence.

¹ The court's written findings of fact and conclusions of law are attached to this brief as appendix A.

5. The court erred in entering findings of fact I, II, III, IV and V, and conclusions of law I and II on the State's Motion to Exclude Video Taped Interviews.²

6. The court erred in admitting the rebuttal testimony of a police sergeant in violation of Davis' constitutional rights.

7. The court's instruction no. 6 violated Davis' constitutional rights.

8. The court's failure to provide the jury with Davis' proposed instruction no. 5 violated his constitutional rights.

9. Prosecutorial misconduct during closing argument violated Davis' rights under the Eighth and Fourteenth Amendments to have his jury consider all mitigating evidence.

10. Additional flagrant misconduct denied Davis a fair trial.

11. Davis' death sentence violates the Eighth and Fourteenth Amendments to the United States Constitution and article 1, § 14 of Washington's Constitution because it is cruel and unusual.

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² The court's written findings of fact and conclusions of law are attached to this brief as appendix B.

13. Cumulative error denied Davis his right to a fair sentencing trial.

14. Davis' sentence is excessive and disproportionate.

15. There was insufficient evidence to support the jury's death verdict.

16. The death verdict was the result of passion and prejudice.

Issues Pertaining to Assignments of Error

1. The Code of Judicial Conduct prohibits judges from engaging in ex parte contact and requires them to act in a manner that maintains the integrity and impartiality of the judiciary. In Davis' case, the trial judge initiated and engaged in ex parte contact with prosecutors, resulting in acceleration of the trial date without any input from the defense and without regard to the fact defense counsel could not possibly proceed under the new schedule. Where the judge's impartiality was reasonably questioned, was the judge's refusal to recuse himself error?

2. This Court has held that knowledge of prior proceedings is insufficient to disqualify a potential juror for cause. A prospective juror's husband told her he thought a former juror previously saw Davis in shackles. Although the juror could follow the law and base her verdict on

the evidence alone, the court removed her over defense objection. Did this deny Davis his rights to due process and trial by an impartial jury?

3. Was appellant also denied his rights to due process and trial by an impartial jury where the court removed a prospective juror for cause who expressed scruples about the death penalty but could follow the court's instructions?

4. By statute and constitutional mandate, individuals have the right to present any and all relevant mitigating evidence during the penalty trial. The defense sought to present the videotaped testimony of Davis' two aunts discussing, among other relevant topics, Davis' long history of mental problems, his difficult childhood, and their wish that Davis' life be spared. Did the exclusion of this evidence deny Davis his statutory right to present mitigating evidence, violate his constitutional rights to due process, and violate prohibitions against cruel and unusual punishment?

5. Was it a violation of the prohibition against cruel and unusual punishment and appellant's right to a fair trial where the court allowed the State in rebuttal to present irrelevant and improper opinion testimony from a police sergeant on his opinion of Davis' mental health?

6. Evidence at trial established that Davis suffers "a major mental illness." The court refused to instruct the jury it could consider as

a mitigating factor Davis' major mental illness. Instead, the court instructed jurors they could consider whether Davis suffers an "extreme mental disturbance," implying that anything less -- including a major mental illness -- was not a proper consideration. Did this violate the prohibition against cruel punishment and Davis' constitutional right to due process?

7. The United States Supreme Court has made clear that for death penalty trials to pass constitutional muster, jurors must be permitted to consider all "compassionate or mitigating factors." One such factor is whether to spare the defendant's life through mercy, a word that simply means compassion. At Davis' trial, however, the prosecutor repeatedly told jurors they were prohibited as a matter of law from considering compassion, unless they were feeling compassion for someone other than Davis. This effectively removed consideration of mercy or compassion as a mitigating factor. Does this misconduct, which violated Davis' constitutional rights, require a new trial?

8. In addition to removing mercy and compassion from consideration, prosecutors repeatedly made improper arguments, appealed to jurors' passions and prejudices, referred to matters outside the record, argued facts unsupported by the record, and commented on Davis' failure to testify. Does this also require a new trial?

9. Did the cumulative effects of the trial court errors deny Davis his right to a fair sentencing trial?

10. A statutory scheme that fails to protect against arbitrary, discriminatory, and random application of the death penalty violates the Eighth Amendment's proscription against cruel and unusual punishments. In State v. Cross,³ a slim majority of this Court upheld Washington's scheme. New data, however, reveal that whether an individual will face the penalty in Washington turns not on the circumstances of the defendant or the crime, but on happenstance, including which county prosecutes the case and whether funding is available to pursue the penalty. Does Washington's scheme now violate the Eighth Amendment?

11. Article 1, § 14 of Washington's Constitution offers greater protection than the Eighth Amendment. In addition to violating the Eighth Amendment, does Washington's death penalty scheme also violate this provision?

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³ State v. Cross, 156 Wn.2d 580, 132 P.2d 80, cert. denied, 549 U.S. 1022 (2006).

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13. Is Davis' sentence excessive and disproportionate?

14. Was the evidence insufficient to support the jury's verdict that no sufficient mitigating circumstances merited leniency?

15. Did the prosecutor's improper arguments, the court's failure to properly instruct the jury that major mental illness was a mitigating factor it could consider, and the court's exclusion of relevant mitigating evidence result in a death verdict based on passion and prejudice?

B. STATEMENT OF THE CASE

1. Procedural History

On February 6, 1998, Cecil Davis was convicted of premeditated first-degree murder. State v. Davis, 141 Wn.2d 798, 807, 10 P.3d 977 (2000). The jury found aggravating circumstances of rape, robbery, and burglary and in a special sentencing trial it found insufficient mitigating evidence to warrant leniency. Id. at 822; RCW 10.95.050. Davis was sentenced to death on February 23, 1998. Id. at 823.

Davis appealed his conviction and death sentence. This Court affirmed both in 2000. Davis, 141 Wn.2d at 888.

Davis then filed a personal restraint petition. This Court granted the petition, holding Davis was prejudiced in the sentencing phase of his trial because his trial counsel did not object to Davis being shackled. The case was remanded for a new penalty trial. In re Pers. Restraint of Davis, 152 Wn.2d 647, 757-758, 101 P.3d 1 (2004).

A new penalty trial was held in Pierce County Superior Court. RCW 10.95.050(4). On retrial, the jury found insufficient mitigating evidence to warrant leniency and Davis was again sentenced to death. CP 1167, 1195.

2. Substantive Facts⁴

a. State's case

On January 25, 1997, Yoshiko Couch was found dead in the upstairs bathtub of her home. RP 2392-2395. Her body was naked from the waist down, on her face were wet towels, and in the bathtub was blood and fecal matter. RP 2395-2406. There was a strong smell of solvent in the room and on the wet towels, which was consistent with the cleanser "Goof-Off."

⁴ "RP" refers to that part of the verbatim report of proceedings sequentially numbered and identified as volumes 1 through 28. Citation to the other volumes will be "RP" followed by the date of the hearing.

RP 2425, 2482. A can of "Goof-Off" was found on the bathroom floor near the bathtub. RP 2407. Comet cleanser was also found in the bathroom and throughout the house. RP 2406-2407. A white powder substance, consistent with Comet, was found on Couch's abdomen and vagina. RP 2406, 2488.

Medical Examiner Roberto Ramoso testified Couch's vagina was lacerated. The laceration was likely caused by penetration with a hard foreign object, not a penis, occurring before Couch died. RP 2720-2721. The amount of blood that would likely be lost from the laceration was consistent with the amount of blood found on a sleeping bag in one of the bedrooms. RP 2719-2720. Couch's face was injured and the injuries were likely caused by a blunt object or pressure on her neck and face. RP 2713-2717.

Couch's skin was blistered consistent with contact with the chemical xylene. RP 2682, 2687, 2725. The skin around her nose also showed evidence of contact with xylene. The injury was consistent with towels soaked in xylene being placed over her face. RP 2730. Xylene is a solvent and Couch's blood contained 21.2 milligrams per liter of the chemical. RP 2672, 2674. Ramoso opined the xylene in Ms. Couch's blood was most likely introduced by inhalation and skin absorption. RP 2732. Ramoso

concluded Couch died of asphyxia by suffocation and neck compression and xylene toxicity. RP 2731.

Evidence indicated the front door to the Couch home was forced open. RP 2405. In the utility box outside the Couch home, police discovered a severed television cable. RP 2446-2448. Couch's open purse was found on the hallway floor outside the doorway to a bedroom. RP 2477. Although Couch usually carried money in her purse, the purse did not have any money in it. RP 2980; Ex. 83. It also appeared that a wedding band was missing from Couch's left ring finger. RP 2480.

Couch's husband had suffered several strokes, was essentially bedridden, and lived in the lower lever of the house. RP 2397, 2976. He was in his bed when Couch's body was found. RP 2397.

Davis lived in his mother's home with other family members. RP 2509. The house was across the street from the Couch house. RP 2418-2419. On the evening of January 24, 1997, there was a family gathering at Davis' mother's home. RP 2511. At about 2:30 a.m., Davis was outside smoking with two teenagers who were at the gathering, Keith Burks and Anthony Wilson. RP 2562-2563.

Burks testified⁵ that while he, Wilson, and Davis were outside smoking, Davis said he needed to rob somebody and looked in the direction of Couch's house across the street. RP 2635-2638. Davis' sister, Lisa Taylor, came outside and told the men to come inside because she was locking the house for the night. RP 2640. Davis then said "I need to kill me a motherfucker." RP 2641. Burks went back inside the house and Davis and Wilson remained outside. RP 2641.

A few minutes later, Wilson came back to the house. RP 2642. He appeared scared and told Burks that Davis kicked in the door of a house across the street and started beating the woman who lived there and rubbing her breasts. RP 2643-2647.

After the discovery of Couch's body, police searched Davis' mother's home. They found a carton of Kool cigarettes. RP 2777. They also found a package of meat in the freezer. RP 2774. The meat was packaged and priced by the Fort Lewis Commissary and the carton of cigarettes did not have a tax stamp, which is consistent with cigarettes sold at the Commissary. RP 2849-2866. The Couches shopped at the Commissary and Mr. Couch smoked Kool cigarettes. RP 2973-2974.

⁵ Burks testified at Davis' original trial but was deceased at the time of this trial. His testimony from the original trial was read to the jury. RP 2634.

A garbage bag next to the door leading out to the back of the house contained cigarette butts, a can of Pepsi Cola, a can of Coca-Cola, glass bottles of Olde English beer, cans of Budweiser Light beer, and Kool cigarette butts and packs. RP 2777. A fingerprint lifted from an empty Kool Mild cigarette carton matched Couch's left thumb. RP 2790.

An examination of a pair of Davis' tennis shoes showed chemicals found in Comet cleanser. RP 2805-2806. Bloodstains consistent with Couch's DNA (Couch was Japanese and 1 in 625 persons of Japanese/Asian descent would share this DNA type) were also found on Davis' tennis shoe. RP 2897-2918, 2926. A hair sample taken from a bedspread found in one of Couch's bedrooms contained one hair that was microscopically similar to Davis' head hair sample and one hair microscopically similar to Davis' pubic hair sample. RP 2750-2751, 2756-2757.

At Davis' original trial, his sister testified that while police were at the Couch house investigating the crime, Davis saw police talking to one of the neighbors and said, "that bitch is next." RP 2605. The day after the murder, Davis offered to sell a gold wedding band to his mother for ten dollars. RP 2515. On January 25, 1997, Davis was seen by his brother with a pack of Kool Mild cigarettes and cans of Coca-Cola, Pepsi Cola,

and Budweiser Light beer and some cash. Davis did not have any of these items before the murder. RP 2523-2535.

After Davis was arrested, he had a conversation with Shelby Johnson, another inmate at the Pierce County Jail. He told Johnson the newspaper said he (Davis) raped Couch. According to Johnson, Davis said he might have killed the "old bitch" but he did not rape her. RP 2841-2843.

Maria Rodriguez, Couch's daughter, testified about the impact of her mother's death on the family. At the time her mother was killed, her father was bedridden and Couch took care of him. RP 2976. Her father became depressed after the killing and did not have the will to do anything. RP 2982. He died nine months later. RP 2984. Rodriguez said she still goes to counseling off and on to help her deal with her anger and pain over her mother's death and her daughter is afraid of the dark and worries about Rodriguez's safety. RP 2984. Couch also helped raise Rodriguez's younger brother's children, so for them her death was like losing a mother. RP 2984.

The jury was given a detailed account of Davis' criminal history and the sentences he received. Davis' record includes prior convictions for (1) robbery in the second degree in 1986, (2) perjury in the second

degree in 1986, (3) assault in the fourth degree in 1988, (4) assault in the second degree in 1990, (5) criminal trespass in the first degree in 1990, (6) driving without a valid operator's license in 1992, (7) driving without a valid operator's license in 1993, (8) theft in the third degree in 1992, (9) violation of a domestic violence pretrial no-contact order in 1995 and (10) second degree murder in 1996. RP 2957-2967, 3081-3082. (Exs. 193-200, 221).

b. Defense case

Davis was born in 1959. RP 3420. His mother, Cozetta Taylor, had three other children when Davis was born. The father of her other children was Benny Taylor. Davis' father was George Davis. Id. Davis' father left Taylor in 1960, a few years after Davis was born, and she had two other children by another man. RP 3421, 3424.

In 1966, Taylor started living with Ira Jones. By all accounts Jones was a mean man and did not get along with Davis. RP 3425. Jones would beat Taylor's children with a belt, but Davis was the one who generally received the most beatings. RP 3425-3426. Jones died in 1972. RP 3426.

Although Davis was a sickly child, Taylor left him with babysitters because she had to work. RP 3422. Taylor remembered when Davis was

in school he was placed in special education classes. RP 3422-3423. Taylor testified that despite Davis' conviction she loved him. RP 3431.

Davis' younger sister, Connie Cunningham, testified she was close to Davis when they were children. RP 3434-3435. She said Davis was always behind in school and never had many friends. RP 3435. When Davis was young, other children called him slow. RP 3436.

Cunningham recalled that when Jones entered their lives, he gave Davis and his siblings "a lot of whoopings." RP 3437. Davis, however, got the worst of it because he could not remember things as well as his siblings. RP 3437-3438. Despite Davis' conviction, Cunningham said she still loves Davis. RP 3431.

Although Davis was in special education classes, he did not complete high school. He dropped out of school in the 10th grade and joined the Army. RP 3244-3245, 3423, 3426-3427. In 1982, while in the military, Davis was involved in a car accident resulting in post-concussive disorder. RP 3245. He also suffered from major neurological problems. RP 3246. Davis' ex-wife explained that after the car accident, Davis became irritable, combative, and paranoid. RP 3248. After leaving the service, Davis and his wife came to Tacoma and he eventually moved into his mother's home. RP 3427-3430.

Dr. Richard Kolbell, a neuropsychologist retained to evaluate Davis, interviewed Davis, reviewed Davis' medical and psychological records, and administered a number of psychological tests. RP 3094-3095, 3096-3099. One test was the Wechsler Adult Intelligence Scale-III, an I.Q. test. RP 3096. Davis scored a 68, which Kolbell explained shows Davis' intellectual abilities are borderline to mildly impaired. RP 3100.⁶ The other tests showed Davis' mental and psychological attributes were also borderline to impaired. RP 3104. When Dr. Kolbell evaluated him, Davis was taking prescribed medication to control his blood pressure, diabetes, anxiety, and psychotic disorders and taking mood stabilizer medication. RP 3109-3110.

Neuropsychologist Lloyd Cripes did previous evaluations of Davis, which Dr. Kolbell reviewed. RP 3109. Dr. Cripes, who evaluated Davis in 1994 and 1997, found Davis' I.Q. in 1994 was 82 and in 1997 it was 81, which are considered in the low average range. RP 3111. Dr. Cripes, however, used an older I.Q. test so there was a margin of error in his conclusions. RP 3112-3113.

Dr. Kolbell opined that Davis is not mentally retarded but he does suffer from cognitive disorder not otherwise specified with multiple etiologies. RP 3117. He explained the diagnosis means Davis' mental

⁶ In the past, the term used was mild mental retardation. RP 3107.

abilities are impaired and there are multiple causes for the impairment.

Id.

Neurologist Dr. Barbara Jensen evaluated Davis in 1997. RP 3200-3206. An electro encephalogram (EEG), which measures the electrical activity of the brain to determine how the brain functions, showed Davis suffers from moderately severe brain slowing and disorganization. RP 3208-3217. Dr. Jensen testified there were multiple possible causes for Davis' slow brain activity, including the way Davis was born, infections, use of alcohol or cocaine, the head trauma he suffered or medications he had taken. RP 3217-3219. When the EEG was performed, Davis was taking medication for depression, anxiety and psychosis. RP 3218.

Dr. Zukee Mathews, a forensic psychiatrist, evaluated Davis between April and July 2006. RP 3231-3232, 3237-3238; ex. 234. His evaluation was based on interviews with Davis and others, including family members, and a review of Davis' medical and mental health records and reports, school records, and court records. RP 3239-3241.

Davis' school records showed he had difficulty following through with tasks. In the second grade, Davis' I.Q. was 81 and it was determined he had a learning disability, which is classified in the DSM-IV⁷ as a mental

⁷ Am. Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders.

illness. RP 3243-3244. When Davis was in the fifth grade, his I.Q. was 71 and a year later it was 73. RP 3243-44. Dr. Mathews also explained that mental illness can be inherited. Davis' paternal grandmother suffered from schizophrenia and was hospitalized several times. RP 3247.

Dr. Mathews testified that in 1994, Dr. Cripes opined Davis suffered from mental illness and brain function abnormalities that were either congenital or environmental. RP 3250. In 1997, Dr. Cripes noted Davis' mental illness had deteriorated since his 1994 evaluation and Davis' mental illness was being treated with a number of drugs. RP 3251. In 1998, a Dr. Grubb found Davis suffered from major depression. RP 3319.

Dr. Mathews opined Davis suffers from a major mental illness. RP 3255. Dr. Mathews also diagnosed Davis with cognitive disorder not otherwise specified and with major depression with psychotic features. RP 3256. In addition, Dr. Mathews explained a diagnosis is classified under an axial system. RP 3257. Axis I is the primary diagnosis, Axis II refers to cognitive or personality disorders, Axis III with medical problems impacting a person's psychological state, Axis IV reviews stressors in a person's life, and Axis V is referred to as Global Assessment of Functioning (GAF). RP 3257-3258. The GAF measures a person's overall mental state and is scored from zero to 100. RP 3258. Davis' GAF was scored

at 40, which means he suffers from mental impairment, including occasional auditory hallucinations and suicidal thoughts. RP 3259.

Clinical psychologist Dr. Kenneth Muscatel was asked by the State to evaluate Davis as well. RP 3357-3360. He too administered the same I.Q. test as Dr. Kolbell and reviewed Davis' mental health records. RP 3361-3365. In addition, Dr. Muscatel had Davis perform a number of other tests, including a reading mastery test, Trial Making test, which determines a person's ability to process information and think flexibly, and a test to determine if Davis was malingering. RP 3366, 3371-3372.

The results of the I.Q. test showed Davis with a verbal I.Q. of 76, a performance I.Q. of 74 and an overall I.Q. of 74, which places Davis in the 4th percentile of the population. RP 3368. Davis' reading and math skills are at the fourth grade level and he processes information poorly. RP 3370, 3372. There was no evidence of malingering. RP 3372.

Under the Axis I scale, Dr. Muscatel likewise diagnosed Davis with cognitive disorder not otherwise specified, but ruled out mental retardation. RP 3374, 3395. Under the Axis II scale, he diagnosed Davis with personality disorder not otherwise specified with borderline intellectual skills. RP 3373, 3376-3377. Dr. Muscatel gave Davis a GAF score of 50. RP 3377.

Dr. Muscatel also indicted there were potentially multiple causes for Davis' mental illness, including his brain injury, drug and alcohol use, medications, and general psychiatric problems. RP 3374-3375, 3405. In addition, Dr. Muscatel said Davis shows signs of post-traumatic stress syndrome caused by his abusive childhood. RP 3375.

C. ARGUMENTS

Because the death penalty qualitatively differs from all other punishments, there must be reliability in the determination that death is the appropriate punishment. Johnson v. Mississippi, 486 U.S. 578, 584, 108 S. Ct. 1981, 1986, 100 L. Ed. 2d 575 (1988); State v. Bartholomew, 101 Wn.2d 631, 638, 683 P.2d 1079 (1984) (citing Gardner v. Florida, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977)). Thus, claimed sentencing errors in a capital case are subjected to a correspondingly higher degree of scrutiny than in noncapital cases. Caldwell v. Mississippi, 472 U.S. 320, 329, 105 S. Ct. 2633, 2639-40, 86 L. Ed. 2d 231 (1985); State v. Gregory, 158 Wn.2d 759, 849, 147 P.3d 1201 (2006). Procedural rules, including rules regarding arguments raised for the first time on appeal, are also construed more liberally in the sentencing phase. State v. Gregory, 158 Wn.2d at 849; State v. Lord, 117 Wn.2d 829, 849, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856 (1992).

1. JUDGE FLEMING WAS REQUIRED TO RECUSE HIMSELF AFTER INITIATING EX PARTE CONTACT WITH PIERCE COUNTY PROSECUTORS.

a. Judge Fleming's Improper Contact

Following remand from this Court for a new trial on the penalty phase, attorneys Ronald Ness and John Cross were appointed to represent Davis on January 14, 2005. CP 599. Neither attorney had been involved with the case previously. RP (1/14/05) 15. Deputy Prosecuting Attorneys John Neeb and John Hillman represented the State. RP (1/14/05) 6; CP 667-68.

As one of their first acts, Ness and Cross filed a Declaration of Prejudice against Judge Fleming and argued that because he presided over the prior trial, during which Davis had been wrongfully sentenced to die, he should recuse himself to ensure confidence Davis would be treated fairly during the retrial. RP (1/20/05) 3-4; CP 603.

On January 20, 2005, Judge Fleming found the Declaration untimely and refused to remove himself. RP (1/20/05) 5; CP 604-05. The parties then addressed scheduling. The defense had not been provided discovery. RP (1/20/05) 5. Judge Fleming was told the defense would be submitting mitigation materials with the goal of convincing Pierce County to abandon its decision to seek the death penalty. RP (1/20/05) 5-6. Defense counsel

informed the court its work with a mitigation specialist and various experts would take significant time. Moreover, apart from discovery the State would provide, Davis' counsel in the PRP proceedings had already provided 15,000 to 20,000 pages of materials to review. RP (1/20/05) 7. Judge Fleming set a status conference for March 4, 2005, and trial for September 12, 2005. RP (1/20/05) 9-10; CP 600.

At the March 4 status conference, defense counsel informed Judge Fleming that the defense was reviewing a "mountain of materials" and "thus far the defense team sort of generally has expressed some incredulity about the September trial date" RP (3/4/05) 7. Judge Fleming noted that before trial, they would need a hearing to discuss trial logistics, including the number of prospective jurors for the venire and whether his courtroom could accommodate such a large group. RP (3/4/05) 7-8. Defense counsel commented that the discussion was premature. Judge Fleming responded that "if we do everything we can ahead of time, then we'll keep our trial date." RP (3/4/05) 8-9. At the parties' request, the court set the next status conference for April 29, 2005. RP (3/4/05) 6, 9; CP 608.

On April 29, defense counsel informed Judge Fleming that the mitigation expert estimated another 700 to 800 hours to review all necessary documentary evidence and interview some 70 witnesses for the mitigation

package. RP (4/29/05) 5. Regarding trial preparation, the defense had completed only a cursory review of the discovery received from the State and PRP counsel. RP (4/29/05) 4. Moreover, the defense was still in the process of retaining experts to address psychological issues not previously raised. RP (4/29/05) 5. The State conceded this case had two to three times the discovery of a typical capital case. RP (4/29/05) 9. At defense counsel's request, Judge Fleming continued trial to April 4, 2006, and set a status hearing for July 15, 2005. RP (4/29/05) 13, 15; CP 612.

On July 15, the parties indicated they would "continue to work on things" and, at their request, Judge Fleming scheduled another status hearing for September 16, 2005. RP (7/15/05) 3; CP 615.

On September 16, the State indicated it had provided the defense with "a considerable amount of discovery" that very day. RP (9/16/05) 4. The discovery receipt indicates the defense received 2,300 pages of transcript from Davis' first trial plus close to 3,000 pages of additional materials. CP 617. Another status hearing was set for November 18, 2005. RP (9/16/05) 5; CP 616.

By November 18, the defense had received nearly 100,000 pages of materials. RP (11/18/05) 5. With the goal of trying to meet the April

4, 2006 trial date, Judge Fleming set an omnibus hearing for January 20, 2006. RP (11/18/05) 4-5; CP 618-620.

On January 20, defense counsel informed Judge Fleming they were still working on the mitigation package and were nowhere near ready for trial; the defense could not yet identify all of its trial witnesses. RP (1/20/06) 3-5. Counsel requested a new trial date of January 2007. RP (1/20/06) 7, 15.

Judge Fleming was not pleased. RP (1/20/06) 6, 8. He noted it had been eight years since the previous jury imposed a death sentence, and the decision was upheld on appeal. RP (1/20/06) 10. Judge Fleming continued:

Then it got reversed because they may have seen somebody walking -- may have seen somebody walking in shackles. . . . And now we are eight years hence and back -- I just think that everyone -- litigants, society, everyone has a right to have these matters resolved in a reasonable period of time.

RP (1/20/06) 10-11.

Defense counsel responded that they were making the motion as early as possible knowing the new trial date had to be set with the court's schedule in mind. RP (1/20/06) 12. They were now much further along in their preparation of the case and previously could not have been certain of the time necessary to prepare for trial. RP (1/20/06) 12-13. Moreover,

whether Davis had been sentenced to die eight years earlier was irrelevant to their current preparation. RP (1/20/06) 13.

Judge Fleming assured the parties his personal schedule would not interfere with the trial. RP (1/20/06) 16. Neither the defense nor the prosecution wanted to begin the case until after the Thanksgiving and Christmas holidays. RP (1/20/06) 16. Therefore, Judge Fleming set trial for January 8, 2007, and indicated this would be the final continuance to allow the defense to prepare. RP (1/20/06) 19; CP 621. He once again expressed his displeasure:

I want to be responsible and fair to both sides. And as you can tell I don't think we are being now. But after listening to you, Mr. Ness and Mr. Neeb, I'll give you almost -- well, it will be another year. To me, that is wrong. But maybe the state of our law now in this state requires it, and maybe it's the fair and just thing to do. But I'm not so sure.

RP (1/20/06) 18.

Although defense counsel was not opposed, Judge Fleming declined the State's request to set a series of status hearings to track progress on the case. RP (1/20/06) 9-10, 13-14, 19-20. Judge Fleming then had Davis confirm his desire to start trial on January 8, 2007. RP (1/20/06) 20.

There were no hearings in the case for the next eight months. CP 1317. Although the parties had been informed trial would begin January

8, 2007, Judge Fleming scheduled a vacation for the month of February 2007 and, in October 2006, realized the January 20 date would not work for him. RP (11/3/06) 8; CP 637-38, 656.

Without consulting the parties, Judge Fleming decided that rather than wait until January 8, voir dire would begin on December 4, 2006, and opening statements would begin on January 2, 2007.⁸ RP (11/3/06) 12-3. He contacted Jury Administration and indicated he would need 150 individuals for the venire. He reserved the only courtroom that could accommodate a group that large, and he arranged for security beginning on December 4. RP (11/3/06) 13, 16. He also made plans to clear his usual Friday calendars to add an additional day to each trial week. CP 945.

On October 24, Judge Fleming had a court reporter contact Neeb and direct him to come to Judge Fleming's courtroom at 1:30 p.m. CP 657. There was no similar call to defense counsel. Shortly before 1:30 p.m., Judge Fleming ran into Deputy Prosecutor Hillman in the hallway outside the courtroom. He told Hillman he had decided to accelerate the trial date and directed Hillman to follow him into chambers. CP 657.

⁸ Although Judge Fleming did not consult with either side before changing the trial date, it appears his judicial assistant had previously mentioned the possibility of such a change to Deputy Prosecutor Neeb, who then mentioned this to defense counsel. CP 638, 657.

In chambers, Judge Fleming told Hillman to complete a scheduling order setting trial for December 4, 2006. He instructed Hillman to sign, indicating he had received a copy, and directed him to provide the order to defense counsel for signature. Neeb arrived as requested by the court. Judge Fleming gave him the same direction to obtain defense counsel's signature. CP 638, 657. Neeb brought the order to defense counsel. Ness signed it, but added "defense objects to dates indicated." CP 639. The following day, October 25, 2006, Judge Fleming had his assistant call Ness to ensure he returned the signed order for filing. The order was filed that same day. CP 622-623.

The defense could not be ready to proceed with jury selection on December 4; nor could the defense be prepared for the presentation of evidence beginning January 2. With the January 8 date in mind, Ness already had several court matters to handle in November and December -- two trials and two oral arguments in federal court, and a homicide trial in Clallam County. CP 626. Moreover, anticipating Davis' trial would be over by March, Ness had scheduled a vacation for the last two weeks of March. CP 626. Similarly, Cross had relied on the January 8, 2007 trial date. CP 626. He had a number of hearings and trials set for December in Jefferson, Kitsap, and Pierce Counties. CP 630-631.

Moreover, neither of the two defense experts could change their schedules to accommodate an earlier trial. The defense had anticipated trial lasting at least seven to eight weeks and, with that timeframe in mind, Dr. Kolbell and Dr. Matthews had arranged their schedules to testify in February. CP 626-628, 630, 633-34. The mitigation specialist was not available in December, and the defense did not anticipate providing the prosecutor's office with a complete mitigation package until December 1, 2006, or just three days before Judge Fleming's new date for jury selection. CP 635-36.

The court's accelerated schedule also diminished the time available to the defense under Superior Court Special Proceeding Rule 5. The rule provides, "[i]f the defendant may offer at the special sentencing proceeding expert testimony concerning his or her mental condition, the defendant shall notify the prosecuting attorney at least 30 days prior to the start of jury selection. . . ." SPRC 5(a). The defense planned to provide notice by December 1, well in advance of the January 8 trial date. With voir dire now scheduled for December 4, however, the defense could not comply with the rule. CP 627.

b. Defense Motion To Recuse

On October 31, 2006, defense counsel filed a motion asking Judge Fleming to recuse himself based on his ex parte contact with the deputy prosecutors. Counsel also filed a motion to reschedule trial until after February 2007. CP 625-655. The State opposed the recusal motion, but did not oppose the request to reschedule trial. CP 656-661.

Judge Fleming heard the defense motions on November 3, 2006. RP (11/3/06) 4. Defense counsel argued there could be no doubt Judge Fleming had engaged in ex parte communications and an objective observer would conclude that by accelerating the trial date, Judge Fleming had disregarded Davis' rights and the needs of his counsel. RP (11/3/06) 5-6, 10-11.

Prosecutors conceded "that the defense does have an argument that the Court engaged in ex parte communication with the State" and "by accelerating the trial date for a month, defense counsel certainly has an added argument that they couldn't possibly have been prepared," thereby exacerbating the situation. RP (11/3/06) 6-7. But prosecutors believed that ultimately there was no appearance of bias because they did not desire an accelerated trial date and the State would not benefit from the court's

order if the court simply abandoned its revised schedule and set trial for a date agreeable to both sides. RP (11/3/06) 7-10.

Judge Fleming was unapologetic. He again focused on the fact this case had been on his calendar since 1997. RP (11/3/06) 12. He reminded everyone that trial had once been scheduled for April 2006 and that he had granted the continuance to January 2007 "against [his] better judgment." RP (11/3/06) 14.

Judge Fleming indicated the decision to move the trial date was the product of his own judgment. RP (11/3/06) 12. He did not seek input because he considered the matter his responsibility. RP (11/3/06) 15. And because he believed the defense should have been prepared to begin trial way back in April 2006, he saw no reason they could not be prepared to pick a jury in December 2006. RP (11/3/06) 15.

Judge Fleming described acceleration of the trial date as a "ministerial act." RP (11/3/06) 16. He found that there was no ex parte contact and not even an appearance of prejudice to Davis or the defense team. RP (11/3/06) 13-14. He agreed, however, to abandon his accelerated schedule and set a new trial date for April 2, 2007. RP (11/3/06) 17-26; CP 662. Judge Fleming entered written findings of fact and conclusions of law in support of his decision. CP 943-948.

c. Judge Fleming Was Required to Recuse Himself

By initiating ex parte contact with prosecutors in this case, Judge Fleming violated several Canons of the Code of Judicial Conduct, requiring that he recuse himself from further involvement in the case.

The preamble to the Code of Judicial Conduct underscores the vital role judges play in the public's perception of an unbiased justice system:

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

Code of Judicial Conduct, Preamble.

To these ends, the CJC provides, "Judges should participate in establishing, maintaining, and enforcing high standards of judicial conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective." Code of Judicial Conduct, Canon 1. Further, "Judges should respect and comply with the law and act at all times in a manner that promotes public

confidence in the integrity and impartiality of the judiciary." Code of Judicial Conduct, Canon 2(A).

One type of conduct that undermines confidence in the integrity and impartiality of the judiciary is ex parte communication, which the CJC expressly forbids:

Judges should accord to every person who is legally interested in a proceeding, or that person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. . . .

Code of Judicial Conduct, Canon 3(A)(4).

Although the CJC does not define "ex parte communication," this Court recognizes several definitions, including "[a] communication between counsel and the court when opposing counsel is not present." State v. Watson, 155 Wn.2d 574, 579, 122 P.3d 903 (2005) (quoting BLACK'S LAW DICTIONARY 296 (8th ed. 2004)). "Moreover, courts generally apply the term ex parte communication to communications made by or to a judge, during a proceeding, regarding that proceeding, without notice to a party." Watson, 155 Wn.2d at 579-580 (footnotes omitted).

Both the definition of "ex parte communication" and application of that definition are legal questions this Court reviews de novo. Watson, 155 Wn.2d at 578. Judge Fleming's finding that he did not engage in ex parte

contact is incorrect. Without defense counsels' knowledge, Judge Fleming summoned both prosecutors to his courtroom, told one attorney to draft the order significantly accelerating the trial date, and told both attorneys to obtain a signature from the defense. The judge initiated this contact, these were communications concerning a pending proceeding, and defense attorneys were not given notice, much less present.

By engaging in ex parte communications, Judge Fleming violated CJC Canon 1 (requiring observance of standards preserving integrity and independence of court), Canon 2(A) (requiring judges to act in a manner that promotes confidence in the integrity and impartiality of the court), and Canon 3(A)(4) (prohibiting initiation of ex parte communications). While Judge Fleming dismissed the private meeting in his chambers as "ministerial," the prohibition against ex parte communications does not recognize that distinction. It is quite broad, applying to any communications "concerning" a pending proceeding. Canon 3(A)(4).

The only remaining question is whether violation of these Canons required Judge Fleming's recusal. "Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned" Code of Judicial Conduct, Canon 3(D)(1). "[A]ctual prejudice is not the standard. The CJC recognizes that where a trial judge's decisions

are tainted by even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating." State v. Sherman, 128 Wn.2d 164, 205, 905 P.2d 355 (1995). "The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that 'a reasonable person knows and understands all the relevant facts.'" Sherman, 128 Wn.2d at 206 (quoting In re Drexel Burnham Lambert Inc., 861 F.2d 1307, 1313 (2nd Cir. 1988)).

A reasonable person would question Judge Fleming's impartiality. This is a death penalty case. A man's life is in jeopardy. Capital cases require heightened levels of care to ensure a reliable and just verdict. See, e.g., Murray v. Giarratano, 492 U.S. 1, 8, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989) ("the Constitution places special constraints on the procedures used to convict an accused of a capital offense and sentence him to death."); Lockett v. Ohio, 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) (finality of death penalty requires "a greater degree of reliability"); State v. Lord, 117 Wn.2d at 888 ("Because the death penalty qualitatively differs from all other punishments, there must be reliability in the determination that death is the appropriate punishment . . . capital sentencing determinations are subjected to a correspondingly higher degree of scrutiny than sentencing in noncapital cases.").

To ensure the greatest care and reliability, there are special rules applicable to capital cases. See generally Superior Court Special Proceeding Rules (SPRC). There must be two trial attorneys, one of whom must be specially qualified for appointment in capital cases, and both of whom must meet rigorous requirements regarding experience and skill. SPRC 2. There are special requirements designed to maintain an accurate and complete record of all proceedings. SPRC 3. There are special requirements to ensure review of all mental issues concerning the accused. SPRC 5. And, there are special requirements for maintaining all trial records and evidence while the defendant is still alive. SPRC 7.

In light of the need for extra care and caution in death penalty cases, Judge Fleming's decision to accelerate the trial schedule without any notice or opportunity to object -- with only the prosecuting attorneys present -- is extraordinary.

An objective observer would recognize that the defense did not want Judge Fleming on this case from the beginning. He had presided over Davis' original penalty phase trial, resulting in the death sentence this Court vacated based on Davis' visible leg shackles. CP 475, 504-508. Davis unsuccessfully attempted to remove him by filing an affidavit of prejudice. CP 603 ("I do not feel that I will receive a fair trial with Judge Frederick

Fleming and therefore request that another Judge be appointed to act as trial judge in my case.").

An objective observer would recognize that defense counsel, who had not represented Davis in the prior guilt phase or penalty phase, had an enormous amount of information to review in preparation for trial -- nearly 100,000 pages of materials. RP (11/18/05) 5. The State even commented -- in Judge Fleming's presence -- that the case involved two to three times the discovery in a typical capital case. RP (4/29/05) 9. The defense was exploring psychological issues not raised in prior proceedings. RP (4/29/05) 5. Moreover, the defense was devoting significant time to preparation of a new mitigation package, including interviews with 70 witnesses located in various parts of the United States, and collection and review of documentary evidence, which counsel estimated was four times the material prior counsel had examined. RP (4/29/05) 5.

An objective observer would recognize that from the time the defense indicated it could not be ready for trial until January 2007, Judge Fleming was displeased. Although irrelevant to current counsel's preparation, Judge Fleming noted it had been eight years since Davis was sentenced to death and that his sentence had been affirmed on appeal. RP

(1/20/06) 10. He stated he did not think the continuance was "responsible" or "fair." RP (1/20/06) 18-19.

An objective observer would also detect from Judge Fleming's choice of words that he did not think much of this Court's decision in Davis' PRP reversing that death sentence. After noting the sentence was affirmed on direct appeal, he said, "[t]hen it got reversed because they may have seen somebody walking -- may have seen somebody walking in shackles" and again noted it had been eight years since the original death verdict. RP (1/20/06) 10. Of course, that "somebody" was Davis himself and there was no uncertainty about it. This Court expressly found that a juror saw Davis in leg restraints on two occasions. CP 482-483.

An objective observer also would understand that when Judge Fleming set the January 8, 2007 trial date, the parties made it clear they did not want to start a trial until after New Year's Day, and Judge Fleming agreed that was appropriate. Judge Fleming also assured the parties his personal schedule would not interfere with the trial. RP (1/20/06) 16. Moreover, he passed on the opportunity to stay updated on progress in the case through regular status hearings. RP (1/20/06) 13-14, 19-20. And he had previously indicated there would be a pretrial hearing to discuss trial logistics, including the number of jurors for the venire. RP (3/4/05) 7-8.

Yet, based on his personal schedule, and without seeking any current information from defense counsel, Judge Fleming chose to start jury selection on December 4 -- a date that fell before Christmas and New Year's Day. And without consulting the defense about this new date, he reserved a courtroom for voir dire, reserved jurors for the venire, arranged for security to be present beginning on the new date, and -- to further accelerate proceedings -- cleared his Friday calendar so that everyone could be in trial five days a week instead of four. Taking these actions without any input from the defense would be troubling in any criminal case. It is particularly troubling in a death penalty trial.

It had been eight months since Judge Fleming was informed of defense counsel's progress. He knew the defense had been working with experts on the psychiatric issues and knew or should have known that any experts to be called at trial would have arranged their schedules based on a January 8 start date. Moreover, Judge Fleming surely knew this was not defense counsel's only case and they likely had other matters scheduled for December. This was not Judge Fleming's first death penalty trial. He also knew that based on the January 8 trial date, SPRC 5(a) did not require the defense to disclose its experts until 30 days prior to that date.

Below, prosecutors pointed out that they did not benefit from the ex parte communication or accelerated trial schedule. RP (11/3/06) 7. But prosecutors did not object to the contact, either. They should have known better. And regardless of what prosecutors wanted, the *appearance* of judicial bias is undeniable. In the privacy of the judge's chambers, and at Judge Fleming's express direction, prosecutors drafted an order making it impossible for defense counsel to properly defend Davis at a trial to determine whether he would live or die.

Finally, an objective observer would be disturbed by Judge Fleming's response to the defense motion to recuse. He again focused on the fact this case had been on his calendar since 1997, which was irrelevant to whether current counsel would be prepared to meet an accelerated date without prior notice or input. While Judge Fleming obviously regretted his decision setting the case for January 2007, he had made it clear his personal schedule would not interfere with that date and he would not begin trial until after the holidays. Thus, the defense had every right to rely on the January 8 date. Judge Fleming's stated belief that counsel could begin in December because he felt they should have been ready the previous April reveals little insight or concern for defense counsel's needs or Davis' rights.

Judge Fleming violated several CJC Canons when he initiated ex parte communications with prosecutors. Those communications resulted in an accelerated trial schedule that made it impossible for defense counsel to adequately prepare to defend Davis' life. Because a reasonable person would question his impartiality in this matter, he was required to recuse himself.

2. THE COURT ERRED IN EXCLUDING TWO PROSPECTIVE JUROR'S FOR CAUSE IN VIOLATION OF DAVIS' CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, §§ 3, 21 AND 22 OF THE WASHINGTON CONSTITUTION.

A criminal defendant is guaranteed the right to trial by an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution, as well as under article I, §§ 3, 21 and 22 of the Washington Constitution.⁹ Taylor v. Louisiana, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975); State v. Rupe, 108 Wn.2d 734, 748, 743 P.2d 210 (1987), cert. denied, 486 U.S. 1061 (1988). A trial court infringes on this

⁹ Article 1, § 3 provides: "No person shall be deprived of life, liberty, or property, without due process of law." Article 1, § 21 provides, in part: "The right of trial by jury shall remain inviolate" Article 1, § 22 provides, in part: "In criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed." The Sixth Amendment provides, in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury"

right when it excuses for cause jurors who voice "general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Witherspoon v. Illinois, 391 U.S. 510, 522, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968); Uttecht v. Brown, 551 U.S. 1, 127 S. Ct. 2218, 2231, 167 L. Ed. 2d 1014 (2007); Gray v. Mississippi, 481 U.S. 648, 658-59, 107 S. Ct. 2045, 95 L. Ed. 2d 622 (1987); State v. Brett, 126 Wn.2d 136, 157, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996), vacated on other grounds sub nom., In re Pers. Restraint of Brett, 142 Wn.2d 868, 16 P.3d 601 (2001).

A trial court may dismiss a juror for cause only if the juror's views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." State v. Hughes, 106 Wn.2d 176, 181, 721 P.2d 902 (1986) (quoting Wainwright v. Witt, 469 U.S. 412, 424, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985)); State v. Davis, 141 Wn.2d at 856-57. "The crucial inquiry is whether the potential juror could follow the court's instructions and obey his oath, notwithstanding his views on capital punishment." Dutton v. Brown, 812 F.2d 593, 595 (10th Cir.), cert. denied, 484 U.S. 836 (1987); see also State v. Gregory, 158 Wn.2d at 814 ("Under the Witt test, a juror may express scruples about capital punishment, or even

personal opposition to the death penalty, so long as he or she can ultimately defer to the rule of law."). This Court has applied these standards in interpreting the Washington Constitution. State v. Brown, 132 Wn.2d 529, 593-604, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998).

a. Juror 39

During voir dire, prospective juror 39 admitted she was against the death penalty. RP 838-839. She said, however, she would vote in favor of retaining the death penalty as a sentencing option. RP 839. She said that although it would be difficult and she would not be "entirely comfortable," she could vote for the death penalty in an appropriate case and could impose the death penalty in this case if warranted. RP 839-842, 862.

After counsel questioned her, the juror volunteered that her husband mentioned something to her about Davis. RP 863. Her husband conducted an Internet search and told her he thought the case was about Davis being seen in leg irons, which had influenced the decision of a jury member. RP 864. At that point in the conversation, the juror stopped her husband from mentioning anything else to her. Id. She said she could keep him from doing something like that again. RP 865.

The prosecutor told the court he did not challenge the juror for cause and suggested the court instruct her to disregard what she heard, ask her to prevent it from happening again, and report it if it did happen again. RP 866. Defense counsel agreed with the prosecutor's suggestion and noted Davis "has not been shackled in any way, shape or form at this point." RP 867.

Even though neither counsel challenged juror 39 for cause, the court was troubled. The prosecutor attempted to ease the court's concerns by pointing out the potential jurors were already told Davis is a convicted murderer and the juror did not know for certain what her husband told her related to this case. RP 868. The prosecutor nonetheless told the court that if it dismissed the juror for cause, he did not believe that would constitute an abuse of discretion. RP 869. Defense counsel pointed out it was public knowledge that Davis was shackled in a previous trial and reiterated that Davis was not requesting the juror be dismissed. Id.

The court found that juror 39 was "intelligent, could be fair to both sides, would listen to the evidence and make a conscientious decision based on the evidence" RP 871. Despite those findings, it dismissed the juror in an "abundance of caution." RP 870. The court indicated it did not want to take the chance she may be "tainted" because "she knows at

one time, in one proceeding, that Mr. Davis was seen in shackles" RP 871. The court made no finding the juror was biased or lacked impartiality.

A juror is not appropriately dismissed for cause even if the juror has knowledge of the facts surrounding the actual crime or the defendant's prior convictions. Patton v. Yount, 467 U.S. 1025, 1035, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984); State v. Rupe, 108 Wn.2d at 750. "The relevant question is not whether the community remembered the case, but whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant." Yount, 467 U.S. at 1035.

This Court's decision in Rupe is instructive. Rupe was sentenced to death. On appeal, this Court reversed his death sentence and remanded for a new sentencing hearing. State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984). Rupe was again sentenced to death. On appeal from his second death sentence, Rupe argued the trial court erroneously denied his challenge for cause concerning a juror who had read or heard that Rupe had been sentenced to death in the prior proceeding and appealed. This juror stated that he thought the first jury had done a good job. Rupe, 108 Wn.2d at 750. Citing Patton v. Yount, this Court held that knowledge of prior proceedings alone is insufficient to establish juror bias. Id.

Here, the juror's husband told her that he thought the case about Davis had to do with being seen in shackles in a previous proceeding. Her knowledge of a previous proceeding involving Davis was far less detailed than what the juror knew in Rupe. Furthermore, she did not know if what she was told was true. All potential jurors were told Davis was convicted of aggravated murder and they were only going to be asked to decide whether he should be sentenced to death or life without parole and, as the prosecutor pointed out, the juror did not even know if what her husband told her related to this case. RP 868. There is nothing in the record to show the information she received from her husband would have had any effect on her ability to decide the case fairly and impartially.

The court also instructed all potential jurors not to discuss the case. Juror 39 obviously took that admonishment seriously because she told her husband to stop talking to her about what he found on the Internet and she voluntarily told the court about her conversation with her husband. She also told the court she could keep her husband from discussing the case with her in the future, and if he tried, she promised she would tell the court. RP 865. Jurors are presumed to follow the court's instructions. State v. Montgomery, 163 Wn.2d 577, 596, 183 P.3d 267 (2008). It is not only presumed juror 39 would follow the court's instructions, the record shows

she did and there is no reason to believe she would not have followed an additional admonishment to disregard what she heard, prevent it from happening again, and report it if it did happen again, as was suggested by the prosecutor. RP 866.

Davis did not challenge the juror for cause because of her conscientious scruples against the death penalty, which indicated she would carefully consider whether death was an appropriate sentence. There is no finding she was biased and, as in Rupe, her limited knowledge of a prior proceeding does not establish bias. Additionally, the court's findings show the juror would have been impartial and there is nothing in the record to suggest her ability to perform her duties as a juror was substantially impaired. If the failure to dismiss a potential juror in a capital case who had detailed knowledge about the prior proceeding was not an abuse of discretion, as this Court held in Rupe, dismissing a juror with conscientious scruples against the death penalty and who had far less knowledge about the prior proceeding surely was an abuse of discretion.

The exclusion for cause of prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members and violates due process. Gray v. Mississippi, 481 U.S. at 658. Where the trial court excuses a juror who qualifies as impartial, the remedy

is reversal of the sentence. Id. at 659-60. Because the court erroneously dismissed juror 39 from the jury, Davis' sentence should be reversed.

b. Juror 1

In her answers to the written questionnaire, juror 1 stated she was in favor of the death penalty, it was appropriate in most murder cases, she was personally capable of imposing the death penalty, and Washington State should retain the death penalty. RP 330. When questioned, juror 1 agreed the death penalty would be appropriate for someone who killed one person, depending on the circumstances. RP 310. She said she did not know if she could impose the death penalty, but it would depend on the facts of the crime. RP 316. Under further questioning, she said she did not think she could vote for death and that her feelings about the death penalty could "possibly" interfere with her ability to vote on the death penalty in this case. RP 318-319. She said she did not "think" she could send someone to death because she would feel really bad if she did. RP 333. She also said that she would do her duty as a juror. RP 332.

When questioned by the court, the juror said she did not think she could vote for the death penalty, but in an appropriate case "I think I could." RP 352. When the court asked her again if "in the appropriate

case, can you or can you not [vote for death]," she answered "I can in the appropriate case, yes." RP 353.

In response to further questions by counsel, the juror said she did not know if she could vote for the death penalty. RP 365. She said "I think my personal feelings would probably get in the way." RP 368.

The State moved to dismiss juror 1 for cause and the court granted the motion. RP 369. Davis objected to the dismissal. RP 369-70.

A juror may express scruples about capital punishment, or even personal opposition to the death penalty, so long as he or she can ultimately defer to the rule of law. Lockhart v. McCree, 476 U.S. 162, 176, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986); State v. Gregory, 158 Wn.2d at 814. "The crucial inquiry is whether the venireman could follow the court's instructions and obey his oath, notwithstanding his views on capital punishment." Dutton v. Brown, 812 F.2d at 595.

Although juror 1 expressed a personal discomfort with imposing the death penalty on anyone, she did not waiver in her belief that death was appropriate in some murder cases. Additionally, she said she could perform her duty as a juror despite her personal misgivings about imposing the death penalty.

On this record it cannot be said the juror's personal views or feelings about the death penalty would have prevented or substantially impaired the performance of her duties as a juror in accordance with the court's instructions. The court erroneously dismissed juror 1 and, as a result, Davis' sentence should be reversed. Gray v. Mississippi, 481 U.S. at 659-60.

3. EXCLUSION OF RELEVANT MITIGATION EVIDENCE VIOLATED THE EIGHT AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE 1, §§ 3 AND 14 OF THE WASHINGTON CONSTITUTION, AND DAVIS' RIGHT TO PRESENT MITIGATING EVIDENCE.

Davis sought to introduce as mitigation evidence the audio/video testimony of his two paternal aunts, Eula Brooks and Lillie Jones. Ex. 226. The State moved to exclude the evidence and its motion was granted. CP 1192. The exclusion of the evidence violated Davis' constitutional and statutory right to present mitigating evidence.

The Eighth¹⁰ and Fourteenth Amendments to the United States Constitution, and article 1, §§ 3 and 14¹¹ of the Washington Constitution, require admission of any relevant mitigating evidence in the sentencing phase of a capital case. State v. Bartholomew, 98 Wn.2d 173, 194, 654 P.2d 1170 (1982) (Bartholomew I), vacated on other grounds by 463 U.S. 1203, 103 S. Ct. 3530, 77 L. Ed. 2d 1383 (1983), aff'd on remand, 101 Wn.2d 631, 683 P.2d 1079 (1984) (Bartholomew II) (citing Lockett v. Ohio, 438 U.S. 586, and Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982)).

A capital defendant also has a statutory right to present relevant mitigating evidence regardless of whether the evidence is admissible under evidence rules. RCW 10.95.060(3)¹²; see also RCW 10.95.070 (at the sentencing phase the jury may consider "any relevant factors"); see also McKoy v. North Carolina, 494 U.S. 433, 441-42, 110 S. Ct. 1227, 108

¹⁰ The Eighth Amendment declares: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The amendment applies to the states through the Fourteenth Amendment. Robinson v. California, 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962).

¹¹ Article 1, § 14 provides: "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted."

¹² "The court shall admit any relevant evidence which it deems to have probative value regardless of its admissibility under the rules of evidence." RCW 10.95.030(3).

L. Ed. 2d 369 (1990) (the Constitution requires states to allow consideration of mitigating evidence in capital cases and such evidence cannot be excluded under rules of evidence, by statute or because it is "legally irrelevant").

Thus, a defendant is given wide latitude to present mitigating evidence. Bartholomew II, 101 Wn.2d at 645. Only evidence that is so unreliable that it has no probative value at all can be excluded at the sentencing phase. Rupe v. Wood, 93 F.3d 1434, 1440 (9th Cir. 1996), cert. denied, 519 U.S. 1142 (1997).

A defendant may introduce any evidence of mitigating circumstances that might merit leniency as well as evidence "concerning the facts and circumstances of the murder" at the special sentencing proceeding. State v. Pirtle, 127 Wn.2d 628, 671, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996). Mitigating evidence includes any facts that do not constitute a legal excuse for the offense but which, in fairness and mercy, may justify a less severe punishment or serve as a basis for a sentence less than death. Lockett, 438 U.S. at 604; Pirtle, 127 Wn.2d at 671.

The defense mitigation investigator interviewed Davis' two paternal aunts, Eula Brooks and Lillie Jones, and the interview was recorded on a

DVD. RP 3037-3038, 3041; Exs. 226, 227, 228.¹³ Davis sought to present the DVD in which his two paternal aunts testify about Davis' troubled youth, his family history, including the mental problems suffered by his paternal grandmother, which landed her in a mental hospital, and their concern over his fate. Exs. 226, 227, 228. Both women live in Kansas City and because of their health and age were unable to come to the trial and testify in person. Exs. 226-227; RP 3041.

Davis' aunts testified that when Davis was a baby he suffered from some kind of disability and was not a normal child because of mental health problems. Exs. 226, 227, 228. Davis' mother did not adequately care for and neglected her children, including Davis, and she never tried to motivate him. Exs. 226, 227. There was never enough food in the house and Davis and his siblings would often go hungry. Exs. 226, 227. Davis' father too was neglectful. He did not care for or even buy food for his children. Ex. 228.

In addition, the two women testified that like Davis, his father had difficulty in school and never graduated from high school. Exs. 226, 227, 288. And, Davis' paternal grandmother suffered from mental illness, which

¹³ Exhibit 225 is the original DVD. Exhibit 226 is the redacted version of the DVD, which Davis sought to admit. Exhibits 227 and 228 are the women's declarations.

eventually led to her hospitalization, where she was given shock treatments. Exs. 226, 228. Both women testified they cared for Davis and believed because of his mental health problems he should not put to death, but instead should be institutionalized for the remainder of his life. Exs. 226, 227, 288.

The State moved to exclude the testimony. It argued the testimony was inadmissible because it was partly based on hearsay, neither woman was subject to cross-examination but available to testify at trial, and their testimony was irrelevant. RP 3045-3054.

The trial court sustained the State's objections. RP 3054-3055; 3057. The court found the evidence inadmissible because it was hearsay, only "minimally relevant," and the information could be presented through Davis' mother or others. RP 3057. Before making the ruling, the court viewed the DVD and recognized the evidence was favorable to Davis.

I'm hesitant because family and the jury being able to see a nice lady -- two nice ladies -- testify has, I have to say a positive impact potentially. But, it has to be admissible under our rules, and its not going to go unheard.

RP 3057.

The court entered written findings and conclusions. CP 1189-1192. The court found the testimony was based in part on hearsay (findings I and II), the testimony concerning Davis' mother was irrelevant (finding II) and

the testimony about Davis' school problems and his grandmother's mental health problems could be presented through other witnesses (finding V). CP 1189-1192. The court also found the two women available to testify. (finding IV). Id. The court concluded the defense offer of proof supporting admission of the testimony was insufficient (conclusion I) and the evidence was inadmissible (conclusion II). CP 1192.

A trial court's factual findings must be supported by substantial evidence. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). If the findings are supported by substantial evidence, this Court must next determine whether the findings support the trial court's conclusions of law. State v. Vickers, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). If a conclusion of law is incorrectly denominated as a finding of fact, it is reviewed de novo as a conclusion of law. City of Tacoma v. William Rogers Company, Inc., 148 Wn.2d 169, 181, 60 P.3d 79 (2002).

The court's decision to exclude the testimony on hearsay grounds was incorrect as a matter of law. A statute, the sentencing court, or an evidentiary ruling cannot bar consideration of mitigating evidence. State v. Finch, 137 Wn.2d 792, 863-64, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999). This Court held in Bartholomew I that under both the federal and state constitutions and RCW 10.95.060(3), "mitigating evidence may

not be excluded from the sentencing hearing on the grounds that it is inadmissible under, for example, the state hearsay rule." Bartholomew I, 98 Wn.2d at 194. Even if some of the women's testimony was based on hearsay, that is not a legally sufficient basis for its exclusion.

Ruling the testimony inadmissible because it was only "minimally relevant" is also legally wrong. "The threshold to admit relevant evidence is low and even minimally relevant evidence is admissible." State v. Gregory, 158 Wn.2d at 835 (citing State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002)). Even if the testimony were only "minimally relevant," it was nonetheless admissible.

Another reason the court gave for excluding the evidence, that it could be presented by Davis' mother, is factually unsupported. Davis' aunts testified in part that Davis' mother was neglectful and a bad parent. In addition, they testified about Davis' father and his paternal family history. There were no other defense witnesses who could testify about those subjects. Although Davis' mother testified at trial, it was unreasonable to expect that she would testify she was a neglectful and bad parent and unlikely she would do so. And, even if she did, a reasonable juror would likely discount the testimony, believing she was only making herself look bad to save her son's life.

Furthermore, the women's testimony about Davis' mother was relevant mitigating evidence, contrary to the court's conclusion. A defendant in a capital case is entitled to present evidence on "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett, 438 U.S. at 604. The testimony regarding Davis' neglectful mother and father was an aspect of Davis' life, part of his background, and could provide a basis for finding mercy, resulting in a sentence less than death. See Penry v. Lynaugh, 492 U.S. 302, 328, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) (jury must be able to consider any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime), abrogated on other grounds Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

The court's finding the evidence inadmissible because other witnesses could present evidence about Davis' grandmother's mental illness and hospitalization is also factually unsupported. There were no other witnesses who had any personal first hand knowledge of the facts concerning Davis' grandmother and her mental illness and shock treatments. Moreover, there were no other witnesses for that matter who had personal knowledge about Davis' father and that part of Davis' family history.

The court's conclusion that excluding the testimony was proper because the women were available to testify is also unsupported by the evidence. The women testified they were unable to travel to Washington because of their age and health problems. Exs. 226, 228. That testimony was uncontroverted. Moreover, even if the women had been able to travel to Washington, a rule of evidence excluding testimony where the declarant does not testify at trial cannot support the exclusion of relevant mitigating evidence. Rupe v. Wood, 93 F.3d at 1439-1441; Bartholomew I, 98 Wn.2d at 194.

The only question is whether the testimony was relevant mitigating evidence. The United States Supreme Court has recently held "Our line of cases in this area [consideration of mitigating evidence] has long recognized that before a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider a defendant's moral culpability and decide whether death is an appropriate punishment for that individual in light of his personal history and characteristics and the circumstances of the offense." Abdul-Kabir v. Quarterman, 550 U.S. 233, 263-264, 127 S. Ct. 1654, 167 L. Ed. 2d 585 (2007) (emphasis added); see also Eddings, 455 U.S. at 115 ("Nor do we doubt that the evidence Eddings offered was relevant mitigating evidence Evidence of a

difficult family history and of emotional disturbance is typically introduced by defendants in mitigation." (internal citations omitted); Cole v. Dretke, 418 F.3d 494, 501 (5th Cir. 2005) (evidence of family history and emotional disturbance are relevant mitigating factors), reversed on other grounds, Abdul-Kabir, 550 U.S. 233. Because the testimony centered on Davis' troubled personal and family history, it was relevant to the mitigating factors of mercy, leniency, and moral culpability and served as a basis for punishment less than death.

Had the jury considered this evidence, even one juror could have believed that because Davis' parents neglected him during his formative years, his mental health issues were present since birth, and learning and mental health issues run in his family, in fairness and mercy his life should be spared. Moreover, that there were family members other than his sister and mother who stood behind him and cared about his fate could also have led a juror to show mercy.

As the trial court correctly noted, the evidence had a potential positive impact on Davis' defense. Consistent with the trial court's assessment, other courts have also recognized this type of evidence can be crucial in a capital case. "Evidence regarding social background and mental health is significant, as there is a 'belief, long held by this society, that

defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional or mental problems, may be less culpable than defendants who have no such excuse.'" Douglas v. Woodford, 316 F.3d 1079, 1090 (9th Cir.) (quoting Boyde v. California, 494 U.S. 370, 382, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990)), cert. denied, 540 U.S. 810 (2003).

The proffered testimony addressed directly Davis' social background, mental, emotional, and learning difficulties, and his family history. As such it was highly relevant and probative mitigation evidence. Additionally, the State exploited its successful but erroneous arguments to exclude Davis' aunts' testimony by later arguing to the jury that although Davis has a large family, the jury only heard from two family members. RP 3519. That argument was not only unfair under the circumstances, it would have had less impact, if any, had the testimony from Davis' two aunts been admitted. The improper exclusion of the testimony requires reversal of Davis' death sentence. See Skipper v. South Carolina, 476 U.S. 1, 6-8, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986) (improper exclusion of relevant mitigating evidence requires reversal).

4. THE ADMISSION OF IMPROPER REBUTTAL TESTIMONY AND A POLICE OFFICER'S OPINION TESTIMONY THAT HE HAD NO CONCERNS ABOUT DAVIS' MENTAL STATUS VIOLATED THE PROHIBITION AGAINST CRUEL PUNISHMENT UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, § 14 OF THE WASHINGTON CONSTITUTION AND HIS RIGHT TO A FAIR TRIAL UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, § 3 OF THE WASHINGTON CONSTITUTION.

The prosecution moved to admit Tacoma Police Department Sergeant Tom Davidson's testimony about his experience interviewing suspects, witnesses, and victims, and his opinion of Davis' mental status during a police interrogation shortly after the murder. RP 3446-3447, 3450. The prosecution argued the testimony was relevant to rebut the testimony of the defense mental health experts. RP 3447.

Davis objected. He argued the testimony did not rebut any evidence presented by the defense because there was no defense evidence that Davis was unable to understand and answer questions posed to him during the interrogation. RP 3448. Davis also argued the officer was not a mental health expert so his testimony could not possibly rebut the testimony of the defense mental health experts. RP 3449. Davis further argued that the officer's interviewing or interrogation experiences were irrelevant. RP 3452.

The court overruled Davis' objections. The court ruled the officer could testify about his observations of and interaction with Davis and analogized the testimony to a police officer's testimony that a defendant appeared intoxicated. RP 3451-3454.

Davidson was allowed to testify that in his career he has done undercover work, which has brought him into contact with people who had different educational levels. RP 3459. Over Davis' relevancy objection, Davidson testified that some people who did not graduate from high school were much more intelligent than he expected. RP 3459-3460. Davidson said that he uses his own scale when making observations about a person's mental status. RP 3461. He testified there were times when he interviewed persons who did not appear to be very smart but they communicated differently than he expected. RP 3462.

Davidson then told the jury he interviewed Davis on January 31, 1997. RP 3463. According to Davidson, during the interview, Davis "never exhibited any signs that he didn't understand why he was there, what we were talking to him about, any of the questions we asked him. His responses were appropriate." RP 3465. Davidson said Davis did not demonstrate any difficulty when the subject matter changed or when a different officer asked him a question and there was nothing about his

interview with Davis that gave him any cause for concern about Davis' mental status. RP 3465-3466.

The Eighth and Fourteenth Amendments to the United States Constitution and article 1, §§ 3 and 14 of the Washington Constitution require the penalty phase of a capital case be fundamentally fair and the evidence reliable. Bartholomew II, 101 Wn.2d at 639-640. Admission of improper rebuttal evidence violates the right to a fair trial:

Rebuttal evidence should be admitted only if it is relevant to a matter raised in mitigation by the defendant. Evidence might be relevant, for instance, if it casts doubt upon the reliability of defendant's mitigating evidence. We do not intend, however, that the prosecution be permitted to produce any evidence it cares so long as it points to some element of rebuttal no matter how slight or incidental. The court in determining whether to admit the prosecution's evidence should apply a balancing test similar to that contemplated by ER 403. The court must balance the extent to which the evidence tends to rebut defendant's mitigating information against the extent to which the evidence is otherwise prejudicial to defendant. Only if the rebuttal value of the evidence outweighs the prejudicial effect should the evidence be admitted.

State v. Bartholomew I, 98 Wn.2d at 197-198; see also State v. Gentry, 125 Wn.2d 570, 622-23, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995) (evidence admitted to rebut matters raised in mitigation must be relevant and its rebuttal value must outweigh the prejudicial effect).

Rebuttal testimony offered by the State is generally allowed only where a new matter has been developed by the testimony of the defense witnesses. State v. White, 74 Wn.2d 386, 394-95, 444 P.2d 661 (1968); State v. Swan, 114 Wn.2d 613, 652-53, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991). The purpose of rebuttal evidence is "to allow plaintiff to answer new matters presented by the defendant." State v. Burns, 53 Wn. App. 849, 851, 770 P.2d 1054 (1989), aff'd, 114 Wn.2d 314 (1990).

Davidson's testimony was improper rebuttal evidence. The prosecutor argued Davidson's testimony was relevant to rebut Davis' mitigation evidence regarding his mental status. Davis, however, did not present any testimony or evidence that he was unable to understand or answer any questions when interviewed by any of the mental health experts or police. None of the mental health experts testified that Davis had problems communicating. Davidson's testimony did not cast doubt on the reliability of any of the mitigation evidence and was correspondingly irrelevant.

Moreover, Davidson testified that he did not have any concerns about Davis' mental status. His testimony was a thinly veiled opinion that Davis was not mentally impaired, contrary to the testimony of the mental

health experts, including the expert retained by the State. Davidson's testimony was improper opinion testimony.

Davidson was not qualified to give an expert opinion about Davis' mental state. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." ER 702. Expert opinion testimony about a person's mental status is admissible only if the expert holds the opinion with a reasonable degree of medical and psychological certainty. Medcalf v. Dep't of Licensing, 133 Wn.2d 290, 310, 944 P.2d 1014 (1997). Davidson has no training in psychology or psychiatry. RP 3461. Davidson does not qualify as a mental health expert. And, Davidson's testimony was not helpful because his observations of others based on his own "scale" and his observation of Davis during the interrogation has no relevance to Davis' mental illness diagnosis. Davidson's testimony was not admissible as expert opinion testimony under ER 702.

Additionally, Davidson's opinion about Davis' mental health was not admissible as a lay opinion. Lay opinion testimony is admissible if it is "(a) rationally based on the perception of the witness, [and] (b) helpful

to a clear understanding of the witness' testimony or the determination of a fact in issue." ER 701. A lay witness may relate only observations to the jury and let jurors form their own opinions and conclusions. Ashley v. Hall, 138 Wn.2d 151, 156, 978 P.2d 1055 (1999). For example, an officer may not offer his opinion as a lay witness on the defendant's state of mind. State v. Farr-Lenzini, 93 Wn. App. 453, 460-461, 970 P.2d 313 (1999).

Davis' mitigation evidence consisted of testimony by a number of mental health professionals that his cognitive abilities are impaired. The State did not offer any testimony by any doctor or mental health professional to rebut this evidence. Instead, it was allowed to present Davidson's testimony that he did not have any concerns about Davis' mental status. Davidson rendered his opinion solely on his perception of Davis' conduct during the police interview. Whether Davis was able to understand and answer questions posed to him during that interview, however, does not lead to the logical conclusion that the diagnosis that Davis' cognitive abilities are impaired is unreliable, as argued by the State. Because Davidson's opinion testimony about Davis' mental status was based on Davidson's perception of Davis' ability to understand and answer the interview questions, it did not help the jury determine the fact at issue --

whether Davis' cognitive abilities are impaired. Davidson's opinion was improperly admitted as lay opinion testimony under ER 701.

Further, in deciding to admit Davidson's testimony, the trial court failed to balance the probative value of the evidence against its prejudice to Davis' case as required under ER 403 and this Court's decision in Bartholomew I. Bartholomew I., 98 Wn.2d 173, 197-198. Doubtful cases should be resolved in favor of the defendant. State v. Wade, 98 Wn. App. 328, 334, 989 P.2d 576 (1999). An independent review of the record shows the improper opinion testimony was unfairly prejudicial. The prosecutor used the improper evidence to argue there "wasn't a single thing wrong with his [Davis'] brain then," RP 3528, despite the expert testimony to the contrary.

In the end, the prosecutor was allowed to exploit the testimony by using it to persuade jurors to conclude that if a seasoned police officer did not have any concerns about Davis' mental health, then they too should not have any concerns despite defense evidence to the contrary. Because Davis' mental health was key mitigation evidence, the admission of the improper opinion testimony denied him the right to a fair trial and reliable determination that death was the appropriate punishment. Thus, Davis' sentence should be reversed.

5. THE COURT'S FAILURE TO GIVE DAVIS' PROPOSED INSTRUCTION NO. 5 VIOLATED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, § 3 OF THE WASHINGTON CONSTITUTION AND RIGHT TO BE FREE FROM CRUEL PUNISHMENT UNDER ARTICLE 1, § 14 OF THE WASHINGTON CONSTITUTION AND THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Davis took exception to the court's instruction no. 6 and requested the jury be given his proposed instruction no. 5. RP 3476, 3479-3480; CP 1120, 1165. The court refused.

The court's instruction no. 6 told the jury, in part:

You are also to consider as mitigating circumstances any other factors concerning the offense or the defendant that you find to be relevant, including but not limited to, the following:

Whether the murder was committed while the defendant was under the influence of extreme mental disturbance, or

Whether, at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect.

CP 1165.

Davis' proposed instruction no. 5 was identical to the court's instruction no. 6, except in two significant ways. It deleted the "Whether, at the time of the murder, the capacity of the defendant to appreciate the

wrongfulness of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect" language and replaced it with "Whether the defendant suffers from a major mental illness." CP 1120. In refusing Davis' proposed instruction, the court reasoned Davis could argue a major mental illness is an appropriate mitigating factor under the "extreme mental disturbance" language in the court's instruction no. 6. RP 3476, 3480.

Although "the Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances," Zant v. Stephens, 462 U.S. 862, 890, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983), the Eighth and Fourteenth Amendments do "require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. at 604. That requirement is also mandated under article 1, §§ 3 and 14 of the Washington Constitution. Bartholomew II, 101 Wn.2d at 646-47. Mitigating evidence must be within the effective reach of the sentencer. Johnson v. Texas, 509 U.S. 350, 368, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993).

Moreover, a defendant is entitled to have the jury instructed on his theory of the case if there is evidence to support the theory. State v. Williams, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997); State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). The right to due process of law requires that the jury be fully instructed on the defense theory of the case. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). The standard for reviewing jury instructions used during the penalty phase of the capital sentencing proceeding is whether there is a reasonable likelihood the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant mitigating evidence. Boyde v. California, 494 U.S. 370, 380, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990).

This Court has held that in the penalty phase in a capital case, the "better practice" is for the court not to enumerate non-statutory mitigating factors in the jury instructions. Gentry, 125 Wn.2d at 651. The Gentry Court, however, observed it was not error for the trial court to instruct the jury on non-statutory mitigating factors when requested by the defendant. Id.

Here, the court chose to list some mitigating factors in its instruction to the jury. The two mitigating factors listed in the court's instruction no. 6 are statutory. RCW 10.95.070(2) and (6). The problem with the

instruction is that it precluded the jury from considering evidence that Davis suffers from a major mental illness as a mitigating factor.

Instruction no. 6 told the jury it could consider as a mitigating factor "any other factors concerning the offense or the defendant that you find to be relevant, including but not limited to" the two listed statutory factors. CP 1165. Including the two listed statutory factors following the "included but not limited to" language led jurors to believe those were the only two mitigating factors addressing mental illness it could consider. The evidence that Davis suffers from a major mental illness, however, does not fall under those listed factors.

Davis presented testimony that in addition to suffering from a cognitive disorder not otherwise specified, slow brain activity, and impaired intellectual abilities, he also suffers from a "major mental illness." RP 3255. The major mental illness diagnosis does not fall under either the "extreme mental disturbance" or "substantially impaired as a result of mental disease or defect" statutory factors.

"Extreme" means "existing in the highest or the greatest possible degree: very great: very intense." Webster's Third New International Dictionary at 807 (1993). "Substantial" means "considerable in amount, value, or worth." *Id.* 2280. "Major" means "notable or conspicuous in

effect or scope." Id. at 1363. Thus, by common definition, a "major" or "notable or conspicuous in effect or scope" mental illness does not rise to the level of an "extreme" or "highest or the greatest possible degree" mental disturbance or a "substantial" or "considerable" mental impairment. In other words, the instruction's two listed mitigating factors addressing mental illness do not encompass a "major" mental illness diagnosis.

Because jurors would have concluded the two mitigating factors listed in the instruction were the only ones related to mental illness they could consider, and Davis' diagnosis that he suffers from a major mental illness is not encompassed in those two factors, the instruction effectively disallowed the jury from considering Davis' major mental illness diagnosis as a mitigating factor. Davis' proposed instruction, on the other hand, would have properly allowed the jury to consider as a mitigating factor his major mental illness diagnosis.

The court's failure to give Davis' proposed instruction and instead instructing the jury in a way that limited its ability to consider the major mental illness diagnosis as a mitigation factor deprived Davis of his constitutional right to have the jury consider as a mitigating factor "any aspect of the offense or the defendant." Lockett v. Ohio, 438 U.S. at 604. And, because Davis' theory of the case was that his major mental illness

was a mitigating factor, the failure to instruct the jury as proposed denied him his constitutional right to an instruction on his theory of the case. Thus, Davis' sentence should be reversed.

6. PROSECUTORIAL MISCONDUCT DENIED DAVIS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION TO HAVE THE JURY CONSIDER ALL MITIGATING EVIDENCE AND TO A FAIR TRIAL.

A prosecutor is a quasi-judicial officer, obligated to seek verdicts free of prejudice and based on reason. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). A prosecutor has a special duty in trial to act impartially in the interests of justice and not as a "heated partisan." State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). He may "strike hard blows, [but] he is not at liberty to strike foul ones." Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).

Consistent with these duties, prosecutors must not urge guilty verdicts on improper grounds. They must not misstate the law or otherwise mislead the jury. State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984) ("misstating the law of the case to the jury is a serious irregularity having the grave potential to mislead the jury."). Prosecutors may not refer

to matters outside the evidence or argue facts unsupported by the record; nor may they appeal to jurors' passions and prejudices because such arguments inspire verdicts based on emotion rather than evidence. State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988); State v. Gibson, 75 Wn.2d 174, 176, 449 P.2d 692 (1969), cert. denied, 396 U.S. 1019 (1970); State v. Huson, 73 Wn.2d at 662-63.

At Davis' trial, prosecutors violated each and every one of these prohibitions.

- a. Misconduct Denied Davis His Eighth and Fourteenth Amendment Rights To Have The Jury Consider All Mitigating Evidence, Including Mercy and Compassion.

The Eighth Amendment to the United States Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Amendment, applicable to the States through the Fourteenth Amendment, "stands to assure that the State's power to punish is 'exercised within the limits of civilized standards.'" Woodson v. North Carolina, 428 U.S. 280, 287-288, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976) (quoting Trop v. Dulles, 356 U.S. 86, 100, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958)).

To pass constitutional muster, death penalty statutes must "allow the particularized consideration of relevant aspects of the character and

record of each convicted defendant before the imposition upon him of a sentence of death." Woodson, 428 U.S. at 303. Noting the death penalty is qualitatively different from any other punishment, the Woodson Court reasoned:

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

Woodson, 428 U.S. at 304 (striking down a death penalty statute that did not permit consideration of an offender's individual characteristics).

Two years after Woodson, in Lockett v. Ohio, the Supreme Court held that individuals facing the death penalty possess an absolute right to have juries consider their individual circumstances as mitigating evidence:

the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Lockett, 438 U.S. at 604 (footnote omitted); see also Eddings v. Oklahoma, 455 U.S. at 113-115 (jurors may not be limited in their consideration of mitigating evidence).

Consistent with constitutional requirements, RCW 10.95.030(2) permits a death sentence only when jurors conclude "there are not sufficient mitigating circumstances to merit leniency[.]" Notably, the appropriateness of the exercise of mercy -- based on either the facts of the offense or the defendant's circumstances -- is a mitigating circumstance the jury must be permitted to consider. Washington Pattern Jury Instruction 31.07; State v. Mak, 105 Wn.2d 692, 752-754, 718 P.2d 407 (1986) (approving definition of "mitigating circumstance" that includes mercy), cert. denied, 479 U.S. 995 (1986); State v. Gentry, 125 Wn.2d at 648 (same).

Davis' jury was instructed on mercy as follows:

You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. You should bear in mind that your verdict must be based upon reason and not upon emotion. Throughout your deliberations you must not be influenced by passion, prejudice or sympathy. You may find mercy for the defendant to be a mitigating circumstance.

CP 1159 (emphasis added).

A mitigating circumstance is a fact about either the offense or about the defendant which in fairness or in mercy may be considered as extenuating or reducing the degree of moral culpability or which justifies a sentence of less than death, although it does not justify or excuse the offense.

The appropriateness of the exercise of mercy is itself a mitigating factor you may consider in determining whether the State has proved beyond a reasonable doubt that the death penalty is warranted.

You are also to consider as mitigating circumstances any other factors concerning the offense or the defendant that you find to be relevant

CP 1165 (emphasis added).

There is no statute or pattern instruction defining "mercy." Jurors are expected to apply the commonly accepted, dictionary definition of the word. See Mak, 105 Wn.2d at 754 (looking to Webster's Dictionary for definition); see also American Legion Post No. 32 v. City of Walla Walla, 116 Wn.2d 1, 8, 802 P.2d 784 (1991)(where the Legislature has not defined a legal term, courts may resort to dictionary definition for term's plain and ordinary meaning).

Webster's Dictionary defines "mercy" as "compassion":

1 **a:** compassion or forbearance shown to an offender or subject : clemency or kindness extended to someone instead of strictness or severity . . . **b:** a sentence of imprisonment rather than of death imposed in clemency on a person convicted of first-degree murder 2 **a:** a blessing regarded as an act of divine favor or compassion . . . **b:** a fortunate event or circumstance . . . 3: relief of distress : compassion shown to victims of misfortune

Webster's Third New Int'l Dictionary 1413 (1993).

This is not surprising, since the words mercy and compassion have been associated for thousands of years: "For the Lord is full of compassion and mercy, longsuffering, and very pitiful, and forgiveth sins, and saveth in time of affliction." Ecclesiasticus 2:11 (Authorized King James Version

1611). "The Lord is full of compassion and mercy: longsuffering, and of great goodness. He will not always be chiding: neither keepeth he his anger forever." Psalm 103:8 (Authorized King James Version 1611). "In the Name of God, the Merciful, the Compassionate . . . Praise belongs to God, the Lord of all Being, the All-merciful, the All-compassionate, the Master of the Day of Doom." The Koran, sura 1 (Arberry translation 1964).

There can be no doubt compassion, like mercy, is a proper focus in a death penalty trial. Indeed, in holding that consideration of an individual's unique circumstances is a "constitutionally indispensable part of the process of inflicting the death penalty," the Supreme Court specifically identified compassion as the necessary consideration. Woodson, 428 U.S. at 304 (requiring consideration of "compassionate or mitigating factors stemming from the diverse frailties of humankind.").

Consistent with historical practice, courts have routinely associated the two terms. See, e.g., Arave v. Creech, 507 U.S. 463, 471, 113 S. Ct. 1534, 123 L. Ed. 2d 188 (1993) (defining "pitiless" under Idaho death penalty statute to mean "devoid of, or unmoved by, mercy or compassion"); United States v. Jackson, 327 F.3d 273, 299 (4th Cir.) (defense counsel not ineffective for presenting "the jury with a choice between harsh justice

and the jury's compassion" as part of "appeal for mercy" in death penalty case), cert. denied, 540 U.S. 1019 (2003); United States v. Lee, 532 F.2d 911, 912 (3rd Cir.) ("Though justice should be tempered with mercy, the guilty verdict of a jury may not be conditioned upon the compassion of a sentencing judge."), cert. denied, 429 U.S. 838 (1976); United States v. McDougal, 16 F. Supp. 2d 1047, 1048 (E.D. Ark. 1998) (reducing defendant's sentence out of "mercy and compassion"); Hendricks v. Calderon, 864 F. Supp. 929, 945 (N.D. Cal. 1994) ("A plea for mercy in the abstract will have little effect if trial counsel fails to give an adequate basis in law and fact upon which the jury could express compassion for a defendant by sparing him the penalty of death."), aff'd 70 F.3d 1032 (9th Cir. 1995), cert. denied, 517 U.S. 1111 (1996); State v. Conyers, 58 N.J. 123, 275 A.2d 721, 728-729 (N.J. 1971) (when jurors are told not to consider bias or sympathy as part of their fact finding function, they should be informed this is "not to bar consideration of mercy or compassion in dealing with the penalty issue.").

Mercy and compassion, however, must be distinguished from "sympathy," a term the United States Supreme Court has found improperly requires "emotional responses that are not rooted in the aggravating and mitigating evidence" and which jurors may be instructed not to consider.

Saffle v. Parks, 494 U.S. 484, 492-495, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990); California v. Brown, 479 U.S. 538, 542-543, 107 S. Ct. 837, 93 L. Ed. 2d 934 (1987).

In In re Rupe, 115 Wn.2d 379, 798 P.2d 780 (1990), this Court discussed Parks and Brown at length, upholding the validity of a penalty phase instruction that provided, "Throughout your deliberations you will permit neither sympathy nor prejudice to influence you." Rupe, 115 Wn.2d at 383-388. This Court reasoned that "permitting the jury to base its decision on sympathy is incompatible with the constitutional requirement of channeled discretion in death sentencing decisions." Rupe, 115 Wn.2d at 388. Moreover, decisions based on emotional sympathy could work against a defendant and would hinder meaningful appellate review. Rupe, 115 Wn.2d at 388-389.

But the Rupe Court distinguished "no-sympathy instructions," which prohibit "sympathy as a purely emotional response to the evidence," from jurors' consideration of mercy. Rupe, 115 Wn.2d at 391, 397. The Court reasoned:

Instruction 9 directed the jury that "[m]itigating circumstances, as referred to in these instructions, means any relevant factors which do not constitute a justification or excuse of the offense in question, but which, in fairness and mercy, may be considered as cause for a less severe punishment." . . . Contrary to petitioner's claim, this instruction

is not inconsistent with the no-sympathy instruction. The instruction directs the jury that mitigating evidence is evidence which in fairness *and* mercy may call for leniency.¹⁴ The instruction clearly ties the reference to "mercy" to "fairness" and to the mitigating circumstances which defendant presents. The jury is thus directed to engage in a "reasoned moral response" to defendant's mitigating evidence, as required, rather than an emotional reaction.

Rupe, 115 Wn.2d at 397; see also Parks, 494 U.S. at 493 (jury's decision based on mitigating evidence must be a "reasoned moral response . . . rather than an emotional one.").

Following Rupe, this Court has consistently recognized the distinction between mercy and sympathy. See Pirtle, 127 Wn.2d at 677 (noting that sympathy relies on an emotional response while mercy relies on a "reasoned moral response"); Gentry, 125 Wn.2d at 648 (upholding giving of no-sympathy instruction and distinguishing sympathy from mercy).

Since "mercy" means "compassion," compassion and sympathy are similarly distinguishable. "Although the trial court may not preclude the jury from considering compassion, 'the prosecutor may discourage the jury from having mere sympathy not related to the evidence in the case affect

¹⁴ Whereas the instruction in Rupe described "fairness and mercy," the instruction in Davis' case used the phrase "fairness or in mercy." CP 1165. There is no meaningful distinction. State v. Pirtle, 127 Wn.2d at 678 ("Telling the jury they may use mercy and fairness can have no different effect than telling them they may use mercy or fairness.").

its decision. . . ." State v. Murillo, 349 N.C. 573, 609-610, 509 S.E.2d 752 (1998), cert. denied, 528 U.S. 838 (1999) (quoting State v. Rouse, 339 N.C. 59, 93, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832 (1995)). Indeed, it is worth noting once again that when the United States Supreme Court dictated what jurors *must* consider as mitigating evidence, the Court did not use the word "mercy." It used the term "compassionate factors." Woodson, 428 U.S. at 304.

In light of the historical and judicial association between mercy and compassion, the common understanding that mercy means compassion, and the Woodson Court's directive that jurors be permitted to consider compassion in deciding a capital defendant's fate, the State's closing argument in Davis' case is difficult to fathom.

The trial deputy argued:

In capital cases it seems to be there is a tendency to get what I would call misguided compassion. What happens is the attention is focused on the aggravated murderer instead of where it should be, which is on the victims of these crimes.

Compassion is an emotion. Emotion is forbidden from playing a part in your decision in this case. When you look through those jury instructions -- you each have a copy of them and you are going to get the originals -- you can look through them as many times as you want and you will not see the word "compassion" anywhere. You will see the word "emotion." "Your verdict must be based upon reason and not emotion. You must not be influenced by passion,

prejudice, or sympathy." Quite frankly, you must not be influenced by compassion, prejudice or sympathy.

We tell you to check those things at the door. Don't bring in your anger at this defendant and sentence him to death because of it. Don't bring in your sympathy and compassion and sentence him to life because of it.

You should keep the compassion in this case where it belongs. Feel sorry for Mrs. Couch. Feel sorry for her family. Feel sorry for the defendant's family. None of them did anything to deserve to be here involved in this case. Do not feel sorry for this defendant, because he is about to get a sentence, a penalty, that he richly deserves.

But, by the same token, you cannot let that emotion be the reason for your decision. When you sentence this defendant to death, it must be for the right reasons, and those reasons are the evidence and the law.

RP 3505-3506.

While making this argument, the prosecutor used several PowerPoint slides emphasizing for jurors that compassion is an emotion, it is not found in the jury instructions, compassion was appropriate for everyone but Davis, and jurors were forbidden from employing compassion when determining Davis' fate. CP 1237.

Later, the prosecutor told jurors that all of the defense evidence had been designed to make them feel sorry for Davis and sympathetic toward him, "exactly the things the Judge has forbidden you from doing." RP at 3525. As before, the deputy used a consistent PowerPoint slide to

emphasize the point. CP 1248. The trial deputy also noted that while the instructions permitted jurors to consider mercy, there was no requirement that they consider mercy and he encouraged them not to show Davis any mercy. RP 3534-3539.

Since "mercy" means "compassion," and the deputy prosecutor expressly told jurors they could not consider compassion when deciding whether Davis should live or die, the State's argument precluded jurors from considering mercy as a mitigating circumstance. It rendered the word meaningless. This misstatement of the applicable law directly violated Davis' right, under the Eighth and Fourteenth Amendments, to have his jury consider all mitigating evidence.

Where, as here, the prosecutor's closing argument violates the defendant's constitutional rights, reversal is required unless the State can prove the offending remarks were harmless beyond a reasonable doubt. State v. French, 101 Wn. App. 380, 386, 4 P.3d 857 (2000), review denied, 142 Wn.2d 1022 (2001); State v. Fleming, 83 Wn. App. 209, 213-216, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997); see also State v. Warren, 165 Wn.2d 17, 26 n.3, 195 P.3d 940 (2008) (acknowledging that a direct violation of a constitutional right might call for constitutional standard of review but declining to reach the issue), cert.

denied, ___ S. Ct. ___ (April 20, 2009). Moreover, because such misconduct rises to the level of manifest constitutional error, the absence of a defense objection does not preclude appellate review. Fleming, 83 Wn. App. at 216.

The test for determining whether a constitutional error is harmless is "[w]hether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). Restated, "An error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred. A reasonable probability exists when confidence in the outcome of the trial is undermined." State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted). It is undermined here.

Both the defense evidence and argument centered on convincing jurors to spare Davis' life by granting him mercy. Counsel repeatedly reminded jurors they possessed the authority to grant mercy. RP 3543 ("You may find mercy for the defendant to be a mitigating circumstance."); RP 3544 ("mercy is a mitigating circumstance"); RP 3546 ("A mitigating

circumstance is a fact . . . which, in fairness or in mercy, may be considered as extenuating or reducing the degree of moral culpability"); RP 3549 ("And you are told twice in the instruction that mercy in and of itself can be a mitigating circumstance.").

Counsel reminded jurors of the evidence regarding Davis' personal circumstances warranting mercy -- his difficult home life as a child, his struggles in school, his borderline intelligence, his history of major mental illnesses and chemical dependency. RP 3544-3549. And to convince jurors to grant Davis mercy, counsel quoted from Shakespeare's Merchant of Venice:

The quality of mercy is not strain'd, it droppeth as the gentle rain from heaven upon the place beneath: it is twice blest; it blesseth him that gives and him that takes; 'tis mightiest in the mightiest: it becomes the throned monarch better than his crown; his scepter shows the force of temporal power, the attribute to awe and majesty, wherein doth sit the dread and fear of kings; but mercy is above this sceptred sway; it is enthroned in the hearts of kings, it is an attribute to God himself; and earthly power doth then show likest God's when mercy seasons justice. . . .

RP 3550. Counsel then made one last plea for mercy on Davis' behalf.

RP 3551.

But all of this fell on deaf ears given the prosecutor's closing argument. The trial deputy told jurors that the concept of mercy is difficult to define. CP 1252 (PowerPoint); RP 3534 (argument). Indeed, because

the term is not defined in the jury instructions, jurors would have looked to the attorneys for guidance. The trial deputy also told Davis' jury that compassion was an emotion and decisions based on emotion were forbidden. RP 3505-3506 ("Compassion is an emotion. Emotion is forbidden from playing a part in your decision in this case."; "When you look through those jury instructions . . . you can look through them as many times as you want and you will not see the word 'compassion' anywhere."; "You must not be influenced by compassion . . ."; "Don't bring in your sympathy and compassion and sentence him to life because of it.").

By forbidding consideration of compassion, jurors were precluded from considering mercy as well. This violation of Davis' rights under the Eighth and Fourteenth Amendments to the United States Constitution denied him a fair penalty trial.

- b. In Their Attempts To Remove Mercy and Compassion From Consideration, Prosecutors Also Misstated the Evidence, Argued Facts Not In Evidence, and Played On Jurors' Passions In Violation of the Eighth and Fourteenth Amendments.

In the State's effort to convince jurors they should not show Davis mercy by sparing his life, prosecutors also repeatedly misstated the

evidence, argued facts for which there was no evidence, and played on jurors' passions.¹⁵

There is no evidence regarding what was said between Davis and Couch inside the home or the extent to which Couch resisted Davis. Yet, the prosecutor told a tale to jurors in which Couch repeatedly resisted, begged for mercy, and was provided false assurances by Davis before he chose not to grant her mercy and unilaterally "sentenced" her to die.

The prosecutor told jurors, "When you are considering whether to show this defendant any mercy, you should consider the final few minutes of Mrs. Couch's life." RP 3535. He indicated that the pictures and videos from the scene were like "silent movies" and did not reveal what really happened during the crime, which is what he wanted jurors to focus on when deciding if Davis should be granted mercy. RP 3535-3536.

The trial deputy then launched into a rendition of events that included a script of what was said after Davis entered the home. After telling jurors they could be certain Mrs. Couch's first reaction was to tell Davis to leave, the prosecutor continued:

¹⁵ This is not prosecutor John Neeb's first visit to this Court on issues of misconduct during closing argument. In Gregory, this Court found that Neeb had resorted to facts outside the evidence to convince jurors they should not spare the defendant's life. This Court concluded the misconduct could not have been cured with a jury instruction and required reversal of Gregory's death sentence. State v. Gregory, 158 Wn.2d at 864-867.

he dragged her up the stairs into her living room. And, you know what, that's probably when Mrs. Couch started to beg. Maybe she changed her attitude about "get out of my house," and at that point she was telling Cecil Davis, "Leave me alone. Take whatever you want. Take anything you want, just leave me alone, leave my house."

. . . .

The defendant dragged her down the hallway to the bedroom. At that point, you can be sure that Mrs. Couch's voice changed from begging to pleading, "Please let me go. Please don't hurt me anymore. I'll do anything you want. Just stop."

RP 3536-3537.

The prosecutor asked rhetorically, "What mercy did the defendant show Mrs. Couch?" 3537. He then told jurors that Mrs. Couch continued begging Davis to stop while in the bedrooms. RP 3537 ("and still she is begging the defendant to stop"); RP 3537 ("She's still got to be begging.").

The prosecutor maintained this theme when describing events in the bathroom. After once again asking jurors to consider "[w]hat mercy did the defendant show Mrs. Couch," the prosecutor continued:

And then he dragged her to the bathroom and he sat her on that bathtub. Maybe he told her, "You know what, cooperate with me here and I'll let you live," because you know Mrs. Couch wasn't going into that tub and going to her death quietly or voluntarily. And you can be sure that she was screaming and fighting and begging. And, who knows, maybe Mrs. Couch even said, "Have mercy on me." And what mercy did the defendant show her? And as she struggled and fought just to breathe, she was

rewarded with poisonous toxic chemicals. And you can be sure she wasn't quiet still, because you know that Mrs. Couch knew that she was very close to death. She had to give everything she could. And what mercy did the defendant show her?

Eventually, Mrs. Couch stopped struggling. And, eventually, she stopped breathing. And probably the most compelling thing about this case that can be said is that at that point Mrs. Couch finally got some relief, finally got some mercy, but it wasn't anything this defendant did. It wasn't anything that he should be rewarded for. And so, when you decide how much mercy or whether to show mercy to this defendant, you should consider those final few minutes of Yoshiko Couch's life on this earth.

RP 3538-3539.

Earlier in his closing, the prosecutor had equated the bathtub to a "death chamber." RP 3512 ("Davis made Mrs. Couch sit on this toilet while he prepared her death chamber, the bathtub."). He then continued:

Cecil Davis forced Mrs. Couch into this bathtub. And you know that she struggled and you know that she fought, because she knew that she was going to die. By this point in time, Mrs. Couch had to know that there wasn't any way Cecil Davis was going to stop. He may very well have promised her that if she got in the tub and got cleaned up so that the evidence was gone, he would let her live. He may have said that, but you know she didn't believe it, not by now.

RP 3512.

In addition to providing this fictional dialogue to jurors, the deputy prosecutor also noted that Davis was entitled to certain protections at trial:

Justice for a defendant means that they receive due process of law, representation by counsel, the right to confront witnesses, that they have a fair and impartial jury, and that they receive a fair trial. Cecil Davis has had every single one of those things.

RP 3500. He then contrasted these protections to the "rights" Davis chose not to bestow on Mrs. Couch:

The death penalty is called state-sponsored murder by some. The fact of the matter is that argument is entirely too simplistic. The only similarity between the two things is that death results. The only similarity between murder and the death penalty is that death results. But, there are significant differences. This defendant enjoyed all of the rights that I have talked to you about. Mrs. Couch had no rights. The defendant was her judge, jury, and executioner; no due process, no trial, no chance to present mitigation.

RP 3502.

The prosecution added an additional claim, not supported by the evidence, that Mrs. Couch was still alive when her vagina was scrubbed with an abrasive pad -- "he put her in the bathtub, degraded her with no clothing on the bottom, scrubbed her vagina, and then he suffocated her."

RP 3574.

Prosecutors also repeatedly argued that evidence of Davis' background and psychological issues was not "true mitigation." During their initial argument, they claimed these were merely "excuses" designed to make jurors feel sorry for him. RP 3524-25; see also 3529 (asking

jurors to consider Davis' mitigation evidence in terms of whether it excused his crime). Prosecutors made the same claim during rebuttal. The trial deputy repeatedly told jurors that none of the evidence offered regarding Davis' background or his psychological troubles was evidence of a "mitigating circumstance." Rather, at best these were "excuses." See RP 3555-3569.

Remarkably, defense counsel did not object to any of the above arguments or factual assertions. But because these arguments, like prosecutors' arguments that jurors could not consider compassion, denied Davis his right under the Eighth and Fourteenth Amendments to have his jury consider all mitigating evidence, they should be assessed under the constitutional harmless error standard and addressed for the first time on appeal. Even under a non-constitutional standard, however, reversal is still appropriate because the misconduct was flagrant, ill-intentioned, and no curative instruction could obviate the resulting prejudice. Belgarde, 110 Wn.2d at 507-08.

Although impossible to verify, it seems as though the deputy prosecutors used a Florida case, State v. Urbin, 714 So.2d 411 (Fla. 1998), as a guide to their closing argument in Davis' case. The same acts of

misconduct the Florida Supreme Court *criticized* in Urbin were employed throughout the State's closing argument here. The similarities are uncanny.

Urbin was charged with first-degree murder committed during the course of a robbery and sentenced to die. Urbin, 714 So.2d at 413. Similar to the closing argument in Davis' case, the trial deputy told jurors, "I'm going to ask you not be swayed by pity or sympathy." Id. at 421. However, he then continued, "I'm going to ask you what pity, what sympathy, what mercy did the defendant show Jason Hicks. . . ." Id. The prosecutor continued, "If you are tempted to show this defendant mercy, if you are tempted to show him pity, I'm going to ask you to do this, to show him the same amount of mercy, the same amount of pity that he showed Jason Hicks on September 1, 1995, and that was none." Id.

The Florida Supreme Court found this blatantly impermissible because it was an unnecessary appeal for jurors to vote for death based on their sympathies for the victim. Id. (citing Rhodes v. State, 547 So. 2d 1201, 1206 (Fla. 1989) (finding same mercy argument improper); Richardson v. State, 604 So.2d 1107, 1109 (Fla. 1992)).

Like prosecutors in Davis' case, the prosecutor in Urbin also created an imaginary dialogue between the defendant and the victim designed to convince jurors they should not use mercy to spare the defendant's life.

Citing a previous case in which the Court had rejected this tactic, State v.

Garron, 528 So.2d 353 (Fla. 1988), the Urbin Court said:

We also note that the prosecutor, as in *Garron*, went far beyond the evidence in emotionally creating an imaginary script demonstrating that the victim was shot while "pleading for his life." We find that, as in *Garron*, the prosecutor's comments constitute a subtle "golden rule" argument,¹⁶ a type of emotional appeal we have long held impermissible. By literally putting his own imaginary words in the victim's mouth, *i.e.*, "Don't hurt me. Take my money, take my jewelry. Don't hurt me," the prosecutor was apparently trying to "unduly create, arouse and inflame the sympathy, prejudice and passions of [the] jury to the detriment of the accused." *Barnes v. State*, 58 So.2d 157, 159 (Fla. 1951); *see Garron*, 528 So.2d at 359 nn. 6, 8 & 9; [*State v.*] *Bertolotti*, 476 So.2d [130] at 133 [(Fla. 1985)].

Urbin, 714 So.2d at 421 (footnote added).

Like prosecutors in *Davis*' case, the prosecutor in Urbin also repeatedly labeled the defense mitigation evidence with the pejorative term

¹⁶ "Golden rule arguments" are based on the golden rule -- do unto others as you would have them do unto you -- and generally involve "urging the jurors to place themselves in the position of one of the parties to the litigation, or to grant a party the recovery they would wish themselves if they were in the same position." Adkins v. Aluminum Company of America, 110 Wn.2d 128, 139, 750 P.2d 1257 (1988) (quoting J. Stein, *Closing Argument* § 60, at 159 (1985)). As in Urbin, the prosecutor's argument in *Davis*' case is a modified version of this -- do unto *Davis* as he did unto Mrs. Couch. While this Court has been unwilling to impose a per se prohibition on golden rule arguments during the penalty phase of death penalty cases, it has warned that these arguments must be based on the actual evidence and cannot be presented in an inflammatory manner. State v. Rice, 110 Wn.2d 577, 605-609, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910 (1989). In *Davis*' case, prosecutors violated both of these requirements.

"excuses." The Florida Supreme Court found this improper given that the defense evidence was indeed competent and proper mitigation evidence for jurors' consideration. Id. at 422 n.14.

The Urbin Court also cited its earlier opinion in Bertolotti v. State, 476 So.2d 130 (Fla. 1985). Urbin, 714 So.2d at 421. Similar to the argument in Davis' case -- that Davis had due process, lawyers, and a jury, none of which Mrs. Couch had when asking for mercy -- prosecutors in Bertolotti argued that during the last few minutes of her life, the victim (unlike the defendant) had "no lawyers to beg for her life." Bertolotti, 476 So.2d at 133. The Supreme Court also found this to be misconduct. Id.

Only ill-intention can explain the State's repeated references to "facts" not in evidence and its misstatements of the evidence in Davis' case. The sheer number of violations demonstrates this was flagrant. Moreover, no curative instruction could obviate the prejudice once jurors heard these assertions. Prosecutors successfully created a disturbing (albeit fictional) vision in jurors' minds of a particularly cruel individual who committed his crimes against Mrs. Couch, made false promises to gain her compliance (clean up in the tub and I'll let you live), scrubbed her vagina with an SOS pad while she was still alive, and -- aimed directly at the heart of the defense case -- ignored her repeated and express pleas for mercy before

putting her to death. Once jurors heard these assertions, no jury instruction was capable of erasing the images from their minds.

Prosecutors hoped to tap jurors' emotions, their passions, and their sympathies to gain a death sentence. As previously discussed, at one point during closing, the prosecutor expressly asked jurors to focus their compassion and emotions on anyone but Davis, including Mrs. Couch and her family. RP 3505 ("In capital cases it seems to be there is a tendency to get what I would call misguided compassion. What happens is the attention is focused on the aggravated murderer instead of where it should be, which is on the victims of these crimes."); RP 3506 ("You should keep the compassion in this case where it belongs. Feel sorry for Mrs. Couch. Feel sorry for her family. Feel sorry for the defendant's family. None of them did anything to deserve to be here involved in this case. Do not feel sorry for this defendant, because he is about to get a sentence, a penalty, that he richly deserves.")

The prosecutor then added:

But, by the same token, you cannot let that emotion be the reason for your decision. When you sentence this defendant to death, it must be for the right reasons, and those reasons are the evidence and the law.

RP 3506. This comment is ironic given that counsel had just finished imploring jurors to direct their sorrow and emotion toward the victim and

is a prime example of paralipsis (emphasizing something by claiming to downplay or omit it).

Ultimately, the State accomplished through improper means what it apparently recognized it could not accomplish through proper means. It undermined Davis' plea for mercy with a fictional account of events inside the Couch home and argument designed to play on jurors' emotions and sympathies. This further denied Davis a fair trial. State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994) ("if the misconduct cannot be remedied and is material to the outcome of the trial, the defendant has been denied his due process right to a fair trial.").

c. Additional Facts Unsupported by the Record

In the opening and closing arguments, both prosecuting attorneys asked the jurors "If not now, then when? And if not Cecil Davis, then who?" in extolling them to sentence Davis to death. RP 2364, 3492. Davis objected to the arguments but his objections were overruled. Id.

A defendant can be prejudiced by the prosecutor's improper arguments during the penalty phase of a capital case. State v. Pirtle, 127 Wn.2d at 672. Where there is an unsuccessful objection to the prosecutor's misconduct, reversal is required were there is a substantial likelihood the

misconduct affected the verdict. State v. Luvene, 127 Wn.2d 690, 701, 903 P.2d 960 (1995). The improper comments were prejudicial.

The arguments improperly appealed to jurors to decide whether to sentence Davis to death based on emotion rather than evidence. The comments implied that if the jurors did not vote for death than nobody would ever receive the death penalty, regardless of the circumstances of the crime or the character of the defendant. The comments effectively told the jury that if it did not vote for death in this case, the death penalty itself would become a nullity. The effect was to convince jurors that regardless of the mitigating evidence, to spare Davis' life would be an assault on the death penalty itself.

Moreover, there was no evidence of the circumstances of the crime or the sentences received by others convicted of aggravated murder. By asking the rhetorical question, prosecutors led the jurors to erroneously infer that Davis' crime was worse than other aggravated murders and his mitigation evidence less compelling than the mitigation evidence in other capital cases. The prosecutors' comments can only be construed as improperly referring to matters outside the record.

d. Comment on Davis' Failure to Testify

In rebuttal, the prosecutor outlined in detail the circumstances of the murder. RP 3569. He then told the jury that Davis took Couch's wedding ring, money and groceries and asked, "Are those the actions of somebody who was remorseful?" Id. Davis' objection was overruled so the prosecutor continued. Id. He told the jury Davis left Couch with her vagina exposed and rubbed her vaginal area with Comet and an SOS pad and again asked, "Are those the actions of somebody who is remorseful?" Id. Davis again objected but the objection was overruled. Id. The prosecutor went on to remind the jury of the photographs showing Couch when she was found, that Davis was heard to say "that bitch is next" when referring to a neighbor, and his statement to Johnson where he allegedly referred to Couch as a "fucking old bitch" and again asked "Are those the actions of somebody who is remorseful?" RP 3570. Davis' objections were overruled. Id.

Both the United States and Washington Constitutions guarantee a criminal defendant the right to be free from self-incrimination, including the right to silence. A comment by the prosecuting attorney on the defendant's failure to testify is prohibited by the Fifth Amendment to the United States Constitution and violates the due process protections of the

Fourteenth Amendment. Griffin v. California, 380 U.S. 609, 615, 85 S. Ct. 1229, 14 L. Ed. 2d 106, reh. denied, 381 U.S. 957, 85 S. Ct. 1797, 14 L. Ed. 2d 730 (1965); State v. Brett, 126 Wn.2d 136, 176, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996). A prosecuting attorney's comment on a defendant's silence or failure to testify is likewise prohibited under article I, § 9 of the Washington Constitution. State v. Easter, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996). A defendant's Fifth Amendment protections apply to the sentencing phase in a capital case. Estelle v. Smith, 451 U.S. 454, 462-63, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981) (citations omitted).

It is misconduct for the State, in closing argument, to make a statement the jury would naturally and necessarily accept as a comment on the defendant's failure to testify. State v. Sargent, 40 Wn. App. 340, 346, 698 P.2d 598 (1985). There was no witness testimony that Davis expressed remorse; therefore, evidence of remorse could have only come from Davis' testimony. Davis, however, did not testify or make any allocution statement. Because testimony of remorse had to come from Davis, the prosecutor's argument that the circumstances of the crime showed Davis lacked remorse would have led the jury to naturally accept the prosecutor's argument as a comment on Davis' failure to testify. Thus, the prosecutor's

argument violated Davis' constitutional rights to due process and silence. See Dinkins v. State, 894 S.W.2d 330, 356 (Tex.Crim.App.), cert. denied, 516 U.S. 832 (1995) (the prohibition against commenting on post-arrest silence includes testimony regarding a defendant's contrition or remorse because such testimony can only come from the defendant); see also Lesko v. Lehman, 925 F.2d 1527 (3d Cir.) (improper comment on defendant's Fifth Amendment privilege required reversal of death sentence where prosecutor commented in closing argument that defendant, who testified regarding mitigating evidence, did not say he was sorry), cert. denied, 502 U.S. 898 (1991).

Furthermore, remorse is defined as "a gnawing distress arising from a sense of guilt for past wrongs," Webster's Third New International Dictionary 1921 (1993), or "deep and painful regret for wrongdoing," Random House Dictionary of the English Language 1214 (1966). By definition, remorse necessarily occurs after time for reflection.

Here, the prosecutor argued the circumstances of the crime itself showed Davis lacked remorse. Because remorse is regret or contrition, the circumstances or evidence of the crime will not show remorse or lack of remorse. The argument was improper because there was no basis for the

prosecutor to argue that Davis' acts in committing the crime showed a lack of remorse

Reversal is required unless the State can demonstrate this misconduct, which violated Davis' constitutional right not to testify, was harmless beyond a reasonable doubt. French, 101 Wn. App. at 386; Fleming, 83 Wn. App. at 213-216; State v. Traweek, 43 Wn. App. 99, 106-108, 715 P.2d 1148, review denied, 106 Wn.2d 1007 (1986), disapproved on other grounds by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991).

The prosecutor's lack of remorse argument was extremely prejudicial. In a capital prosecution, remorse is a pivotal issue. See Stephen P. Garvey, Aggravation and Mitigation on Capital Cases: What Do Jurors Think? 98 Colum. L.Rev. 1538, 1560-61 (1998) (referring to statistical analysis that showed jurors were more likely to vote for death if the defendant expressed no remorse); William S. Geimer and Anthony Amsterdam, Why Jurors Vote for Life or Death: Operative Factors in Ten Florida Death Penalty Cases, 15 Am. J.Crim. L. 1, 39-40 (1987-88) (noting jurors report that defendant's demeanor, including "lack of remorse," was an operative factor in their decision to impose the death penalty in thirty-two percent of the cases examined).

The importance jurors place on remorse in deciding whether to vote for death rendered the prosecutor's improper argument prejudicial. The improper argument likely led jurors to vote for death regardless of the mitigating evidence because the argument impermissibly told jurors Davis had an obligation to testify he was remorseful by making the impermissible inference the crime itself showed a lack of remorse.

e. Cumulative Error

Even if no single instance of misconduct denied Davis a fair trial, the combined effect most certainly did. See State v. Fleming, 83 Wn. App. at 216 (misconduct "taken together and by cumulative effect" may deny defendant fair trial); Suarez-Bravo, 72 Wn. App. at 367 (looking at cumulative impact).

7. DAVIS' SENTENCE VIOLATES THE EIGHTH AMENDMENT AND ARTICLE 1, § 14 OF WASHINGTON'S CONSTITUTION.

In 2006, a bare majority of this Court upheld the constitutionality of Washington's death penalty statute against an Eighth Amendment challenge that it does not sufficiently safeguard against "freakish and wanton application" of the penalty. State v. Cross, 156 Wn.2d 580, 132 P.2d 80 (2006) (citing Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L.

Ed. 2d 346 (1972); Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976)).

Because the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," stare decisis does not play its typical role concerning constitutional challenges to capital punishment. See Furman, 408 U.S. at 327, 330 (Marshall; J., concurring) (quoting Trop v. Dulles, 356 U.S. at 101). Davis asks this Court to revisit the issue and find, based on new data regarding the penalty's use, that the scheme violates the Eighth Amendment.

Moreover, in Cross, Washington's statute was not tested against the more stringent requirements of article 1, § 14. See Cross, 156 Wn.2d at 622 ("Under the United States Constitution (the only constitution pleaded here), Washington's death penalty is constitutional . . ."). Davis also asks this Court to find his death sentence unconstitutional under our state Constitution.

a. Historical Overview

The Eighth Amendment provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Eighth Amendment applies to the States through the Due

Process Clause of the Fourteenth Amendment. See Robinson v. California, 370 U.S. at 667.

Thirty-seven years ago, in Furman v. Georgia, the United States Supreme Court concluded that existing death penalty statutes across the United States violated the Eighth Amendment. Furman, 408 U.S. at 239-240. Although each of the five justices comprising the majority wrote a separate concurring opinion, there was a common theme: the statutes violated the Eighth Amendment because they failed to protect against arbitrary, discriminatory, and random application of capital punishment.

Justice Douglass focused on the "selective and irregular use" of the death penalty as well as the capricious selection of those chosen for death and the absence of any meaningful distinction from cases in which the penalty was imposed and those in which it was not. Id. at 245, 248 n.11.

He noted:

There is increasing recognition of the fact that the basic theme of equal protection is implicit in "cruel and unusual" punishments. "A penalty . . . should be considered 'unusually' imposed' if it is administered arbitrarily or discriminatorily." The same authors add that "(t)he extreme rarity with which the applicable death penalty provisions are put to use raises a strong inference of arbitrariness."

Id. at 249 (footnotes omitted; quoting Goldberg & Dershowitz, Declaring the Death Penalty Unconstitutional, 83 Harv.L.Rev. 1773, 1790)).

Justice Brennan noted the Eighth Amendment guards against abuses of power and that the words "cruel and unusual punishments" were aimed at safeguarding against the State arbitrarily inflicting severe punishments. Id. at 266, 274. Like Douglass, critical to Brennan's analysis was the infrequency with which the death penalty was being imposed:

when a severe punishment is inflicted "in the great majority of cases" in which it is legally available, there is little likelihood that the State is inflicting it arbitrarily. If, however, the infliction of a severe punishment is "something different from that which is generally done" in such cases, Trop v. Dulles, 356 U.S., at 101 n.32, 78 S. Ct., at 598, there is a substantial likelihood that the State, contrary to the requirements of regularity and fairness embodied in the Clause, is inflicting punishment arbitrarily. . . .

Id. at 276-77 (footnote omitted); see also Id. at 293 ("When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily.").

Justice Stewart added:

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

Id. at 309-310.

Similarly, Justice White concluded "that the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." Id. at 313.

While Furman was decided in 1972, the Justices' observations apply equally to Washington's current death penalty scheme.

- b. Davis' Sentence Violates the Eighth and Fourteenth Amendments.

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Meanwhile, even in counties that can still afford to seek the death penalty, many of this state's most prolific killers are spared. Gary Ridgeway -- who murdered 48 women, often dumping their bodies and returning to rape the corpses -- was permitted to plead guilty to avoid the death penalty and was sentenced to life in prison in 2003.

; Cross, 156 Wn.2d at 648 (Johnson, J., dissenting).

Benjamin Ng, who, with his accomplices, killed 13 people after hog-tying them and shooting them execution style, received a life sentence. State v. Ng, 104 Wn.2d 763, 765-770, 713 P.2d 63 (1985). Kwan Mak,

Ng's co-defendant, also ended up with a life sentence.

Cross, 156 Wn.2d at 649 (Johnson, J., dissenting).

David Rice, convicted of killing four members of a family, including two children, by bludgeoning, strangling, and stabbing them to death, received a life sentence. State v. Rice, 110 Wn.2d at 580-590; Cross, 156 Wn.2d at 649-650 (Johnson, J. dissenting).

Charles Finch, convicted of killing a blind man and then killing a police officer responding to the scene, received a life sentence.

State v. Finch, 137 Wn.2d at 801-803.

Richard Clark, convicted of kidnapping, raping, and stabbing to death seven-year-old Roxanne Doll, received a life sentence.

State v. Clark, 143 Wn.2d 731, 739-743, 24 P.3d 1006, cert. denied, 534 U.S. 1000 (2001).

Spokane County permitted Robert Yates to avoid the death penalty by pleading guilty to 13 counts of premeditated murder occurring in three different counties. State v. Yates, 161 Wn.2d 714, 728-732, 168 P.3d 359 (2007), cert. denied, 128 S. Ct. 2964 (2008). Yet Pierce County successfully sought the death penalty against Yates for 2 counts of murder involving similar circumstances. Id. at 729-730, 732-33.

State v. Cross revealed the core problem with Washington's death penalty statute. Cross had brutally killed three people -- his wife and her two children -- by repeatedly stabbing them. Cross, 156 Wn.2d at 592. He argued that because serial killer Gary Ridgway, who admittedly murdered 48 women, had been spared the death penalty in a plea bargain, his death sentence for far fewer murders was disproportionate. In 2006, a narrow majority of this Court found that a "rational explanation exists for Gary Ridgway escaping a death sentence and Dayva Cross not." Id. at 622. Five justices found the procedures in RCW 10.95 sufficient to protect against arbitrary and unfair death verdicts. Id. at 623-24.

The four-justice dissent, however, concluded that Cross' sentence was disproportionate because "[t]he Ridgway case does not 'stand alone,' as characterized by the majority, but instead is symptomatic of a system where all mass murderers have, to date, escaped the death penalty." Id. at 641 (Johnson, J., dissenting). The dissent also stated:

Properly recognizing and analyzing what has happened in the administration of capital cases in this state inevitably leads to the conclusion that the sentence of death in this case, and generally, is disproportionate to the sentences imposed in similar cases. Contrary to what we had expected to find when we established an analytical framework to conduct our statutory review, that the worst of the worst offenders would be subject to the death penalty, what has happened is the worst offenders escape death. . . .

Id.

In the three years since this Court decided Cross, the validity of this conclusion has become apparent. There is no longer a reasoned basis to distinguish those cases in which the death penalty is sought and those in which it is not, and in the subset of cases where the penalty is sought, there is no way to distinguish those cases where the penalty is imposed from those in which it is not.

The legislative response to Furman has failed in Washington. Despite the Legislature's best intentions and best efforts, it did not create a capital sentencing scheme that is fair and just. It created a scheme even more arbitrary than those struck down in Furman. No meaningful basis can be discerned to distinguish the cases where death is imposed from those in which it is not. Based upon the pertinent data, executing Davis is unconstitutional under the Eighth and Fourteenth Amendments.

c. Davis' Sentence Violates Article 1, § 14 of Washington's Constitution.

Were this Court to conclude that Davis' death sentence violates article 1, § 14 of the Washington Constitution, it would not be the first court to overturn a death penalty scheme on state constitutional grounds. See People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880 (Cal.) (preceding Furman v. Georgia by four months), cert. denied, 406 U.S. 958 (1972).

Article 1, § 14 provides, "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." The state framers considered and rejected the language of the Eighth Amendment, which only prohibits punishment that is both "cruel" and "unusual." U.S. Const. Amend. VIII; State v. Fain, 94 Wn.2d 387, 393, 617 P.2d 720 (1980) (citing The Journal of the Washington State Constitutional Convention: 1889, 501-02 (B. Rosenow ed. 1962)).

Because of the differences in text and history, this Court has long held that article 1, § 14 provides greater protection than its federal counterpart. State v. Thorne, 129 Wn.2d 736, 772, 921 P.2d 514 (1996); Fain, 94 Wn.2d at 393. The only exception is where a capital defendant wishes to waive general appellate review. The Washington Constitution does not bar such a waiver any more than the Eighth Amendment does. State v. Dodd, 120 Wn.2d 1, 21-22, 838 P.2d 86 (1992). In all other contexts, however, article 1, § 14 provides greater protection than the federal Constitution. Thorne, 129 Wn.2d at 772-773 and n.10.

Because it has been established that article 1, § 14 provides greater protection than the Eighth Amendment, analysis under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), is unnecessary. State v. Roberts,

142 Wn.2d 471, 506 n.11, 14 P.3d 713 (2000). Rather, this Court will "apply established principles of state constitutional jurisprudence." Id.

Under those established principles, this Court examines four factors to determine whether a particular sentence violates article 1, § 14: (1) the nature of the offense; (2) the legislative purpose behind the statute and whether that purpose can be equally well served by a less severe punishment; (3) the punishment the defendant would have received in other jurisdictions for the same offense; and (4) the punishment meted out for other offenses in the same jurisdiction. Fain, 94 Wn.2d at 397, 401 n.7; see also Harris v. Kastamā, 98 Wn.2d 765, 770, 657 P.2d 1388 ("The calculation of the constitutional proportionality of penalties must be based upon a consideration of all the factors enumerated in *Fain*."), cert. denied, 464 U.S. 844 (1983).

A sentence may be proportional under the Eighth Amendment, yet violate article 1, § 14. See Fain, 94 Wn.2d at 391, 402 (acknowledging that defendant's sentence would not violate the federal Constitution, but reversing it as cruel punishment under the state Constitution). Further, a sentencing statute may be facially constitutional, but still violate the cruel punishment clause as applied to a particular defendant. Thorne, 129 Wn.2d at 773 n.11.

A review of the Fain factors shows that as applied to Davis, the death penalty constitutes cruel punishment in violation of the state constitution. Accordingly, his sentence must be vacated and his case remanded for entry of a life sentence without the possibility of parole.

(i) *Nature of the offense*

The death penalty is appropriate only for "a narrow category of the most serious crimes." Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). It "must be reserved for those crimes that are 'so grievous an affront to humanity that the only adequate response may be the penalty of death.'" Kennedy v. Louisiana, ___ U.S. ___, 128 S. Ct. 2641, 2659, 171 L. Ed. 2d 525 (2008) (quoting Gregg v. Georgia, 428 U.S. at 184).

Although Davis' crime is very serious, it is far less serious than the mass murders whose perpetrators have been sentenced to life. Cecil Davis was sentenced to death for a single-victim crime. In the last 45 years, no one else in our state has been involuntarily executed for killing just one person. See <http://www.doc.wa.gov/offenderinfo/capitalpunishment/executedlist.asp> (Joseph Chester Self executed June 20, 1963); State v. Self, 59 Wn.2d 62, 64, 366 P.2d 193 (1961) (sentenced to death for killing a

taxi cab driver), cert. denied, 370 U.S. 929 (1962). Davis' execution would be a wanton and freakish exception to this trend.

(ii) *Legislative purpose*

The second consideration is the legislative purpose behind the sentencing statute, and whether that purpose can be equally well served by a less severe punishment. This Court assesses the consideration with caution, out of respect for separation of powers, but the factor may not be overlooked entirely because it is ultimately this Court's duty to determine whether a sentence is constitutional. Fain, 94 Wn.2d at 402. "The ultimate power to interpret, construe, and enforce the constitution of this State belongs to the judiciary." Washington State Labor Council v. Reed, 149 Wn.2d 48, 62, 65 P.3d 1203 (2003) (Chambers, J., concurring).

The principal purposes of capital punishment are retribution and deterrence. Gregg, 428 U.S. at 183. Unless imposition of the death penalty on a particular type of defendant measurably contributes to one or both of these goals, it is "'nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." Atkins, 536 U.S. at 319 (quoting Enmund v. Florida, 458 U.S. 782, 798, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982)).

Killing Cecil Davis would not further these legislative goals.

Retribution is not served by administering one involuntary execution every 45 years. Unpredictable application of the death penalty only divides victims' families into arbitrary categories of worthy and unworthy.

Of the justifications for punishment, it is retribution that "most often can contradict the law's own ends" and "[w]hen the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." Kennedy, 128 S. Ct. at 2650. Executing a single-victim defendant while sentencing notorious mass murderers to life in prison makes a mockery of the notion that capital punishment is reserved for the worst offenders. "Where the death penalty is not imposed on Gary Ridgway, Ben Ng, and Kwan Fai Mak, who represent the worst mass murderers in Washington's history, on what basis do we determine on whom it is imposed?" Cross, 156 Wn.2d at 652 (Johnson, J., dissenting); see also Atkins, 536 U.S. at 319 (retributive goal not served by executing those with "lesser culpability").

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Not only would Davis' execution not deter murder, it may actually encourage it. Putting a single-victim defendant to death while sparing dozens of the state's multiple-victim killers creates a perverse incentive for killers to take more lives in the hope their fates would match that of Ridgway, Mak, and Ng instead of Davis.

In sum, the purposes behind the death penalty would be equally -- if not better -- served by resentencing Davis to life in prison without the possibility of parole. The second Fain factor counsels against execution.

(iii) *Punishment in other jurisdictions*

The third Fain factor also favors Davis. In evaluating punishment in other jurisdictions, this Court looks not to the static state of affairs, but to trends that signal "evolving standards of decency." Fain, 94 Wn.2d at 397. This method of analysis tracks that of the Eighth Amendment, but our state Constitution requires a more cutting-edge response to the latest trends to enforce its stronger protection against cruel punishment. See id. at 399-400 (reviewing same national trends as United States Supreme Court reviewed in Rummel v. Estelle, 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed.

2d 382 (1980), but reaching a different result that was more protective of defendant's rights).

In most jurisdictions, Cecil Davis would not be executed.

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And of the 35 states with the death penalty, 14 have not executed a single-victim defendant this decade. See <http://www.deathpenaltyinfo.org/executions> (searchable database of all executions since 1977); see also Kennedy, 128 S. Ct. at 2656-2657 (looking to current statistics on number of executions); Roper v. Simmons, 543 U.S. 551, 564, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (considering it significant that "even in the 20 states without a formal prohibition on executing juveniles, the practice is infrequent"); Atkins, 536 U.S. at 316 (similarly finding it significant that "even in those States that allow the execution of mentally retarded offenders, the practice is uncommon").

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Professional opinions track those of the public. See Roper, 543
U.S. at 561 (considering views of "respected professional organizations");

Atkins, 536 U.S. at 316 n.21 (citing opinions of professionals "with germane expertise").

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Justice John Paul Stevens recently concluded that "the death penalty represents 'the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. . . .'" Baze v. Rees, ___ U.S. ___, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008) (Stevens, J., concurring) (quoting Furman, 408 U.S. at 312).

Oregon Supreme Court Justice Martha Walters recently urged her colleagues to "consider our state's experience in imposing the death penalty and to examine its constitutionality anew" in light of the fact that in 2008, "jurists who had voted many times to affirm sentences of death have reassessed the constitutionality of the death penalty in light of their experiences with its administration and objective evidence of the evolving standards of decency." State v. Davis, 345 Or. 551, 201 P.3d 185, 210 (2008) (Walters, J., concurring).

Similarly, after debunking the notion that the death penalty serves its intended purposes, Mississippi Supreme Court Presiding Justice Oliver

Diaz recently urged other members of the court to reconsider the validity of capital punishment:

The death penalty is . . . reduced to "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Furman v. Georgia*, 408 U.S. 238, 312, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (White, J., concurring and casting decisive vote). In these 36 years since the high court ruled in *Furman*, American and Mississippian experience have served only to underscore this constitutional truism, and history proffers no reason to believe that the next 36 will not follow accordingly. I cast no illusions for myself that my conclusion will persuade a majority of this Court's members, whose sober judgments in capital cases I deeply respect, even as I disagree just as deeply. Neither do I doubt that, for the time being, Justice Stevens' decision to "no longer . . . tinker with the machinery of death," *Callins v. Collins*, 510 U.S. 1141, 1145, 114 S. Ct. 1127, 127 L. Ed. 2d 435 (1994) (Blackmun, J. dissenting from denial of certiorari), will fall upon unconvinced colleagues at the high court. But I am convinced that the progress of our maturing society is pointed toward a day when our nation and state recognize that, even as murderers commit the most cruel and unusual crime, so too do executioners render cruel and unusual punishment.

But because I would make that day today, I dissent.

Doss v. State, ___ So.2d ___, 2008 WL 5174209, *18-*19 (Miss. 2008).

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Ultimately, regardless of the total number of states, countries, judges, or citizens who have abandoned their support for the death penalty, it is "the consistency of the direction of change" that mandates reversal. Atkins, 536 U.S. at 315 (emphasis added); accord Roper, 543 U.S. at 565-66 (holding juvenile death penalty unconstitutional despite small number of states recently abolishing it). As demonstrated above, the overwhelming trend both nationally and internationally is away from capital punishment, particularly for single-victim defendants. These trends require a reevaluation of the constitutionality of Davis' execution and reversal of his death sentence. See Atkins, 536 U.S. at 314 (reevaluating and overruling 13-year-old prior case affirming death sentence for mentally retarded because "much has changed since then"); Roper, 543 U.S. at 574

(reevaluating and overruling 16-year-old prior case affirming death sentence for juveniles for same reason).

Like the first two Fain factors, the third also dictates that Davis' execution would violate the cruel punishment clause.

(iv) *Punishment for similar offenses in Washington*

Evaluation of the fourth and final Fain factor, punishment for similar offenses in Washington, unquestionably shows that Davis' execution would be unconstitutionally cruel.

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Moreover, as discussed above, no single-victim defendant has been involuntarily executed since Joseph Self was hanged in 1963. See Kennedy, 128 S. Ct. at 2657 (reversing death sentence for child rape in part because "no individual has been executed for the rape of an adult or child since 1964"). Indeed, only one person has been involuntarily executed in this state in the last 45 years, and that defendant murdered three victims, including a child. State v. Campbell, 103 Wn.2d 1, 5-6, 691 P.2d 929 (1984), cert. denied, 471 U.S. 1094 (1985). Although 300 people have been convicted of aggravated murder since 1981, and more than 100 of

these cases involved multiple victims, no one else has been involuntarily executed.

Moreover, the trial reports and reported cases contain numerous brutal cases with more than one victim in which a death sentence was not imposed. See, e.g., Trial Report No. 10 (Steven Carey; burned his wife and child to death); Trial Report No. 59 (Thomas Baja; broke into residence, shot and killed wife and her male companion); Trial Report No. 69 (Lawrence Sullens; shot and killed two adult victims, beat and shot 11-year-old girl, leaving her to die, set fire to residence); Trial Report No. 81 (Martin Sanders; raped and killed two 14-year-old victims); Trial Report No. 86 (Frederick Peerson; killed a man -- after torturing him -- killed a woman, and then engaged in shoot-out with police); Trial Report No. 95 (Kenneth Schrader; murdered his wife and then a police officer); Trial Report No. 101 (Minviluz Macas; set fire to home, killing husband and her two young sons); Trial Report Nos. 107-108 (David Simmons and Henry Dailey; killed husband and wife); Trial Report No. 120 and State v. Russell, 125 Wn.2d 24, 30-36, 882 P.2d 747 (1994) (George Russell; sexually assaulted and bludgeoned three women to death); Trial Report No. 128 (Tommy Metcalf; held elderly couple hostage before suffocating them); Trial Report No. 130 (Cherno Camara; killed his two children and injured

his former wife with a hatchet); Trial Report No. 157 (Vincent Sherrill; killed three young victims); Trial Report No. 161 (Nga Ngoeung; shot four high school students, two of whom died); Trial Report No. 167 (Jack Spillman; killed and sexually mutilated two women); Trial Report No. 168 (Scott Pierce; beat, choked, and drowned two young victims in racially motivated attack); Trial Report No. 172 (James Thomas; murdered woman and strangled her 13-year-old daughter after raping her); Trial Report No. 174 (Timothy Blackwell; shot and killed his wife and her two friends in courthouse); Trial Report No. 182 and State v. Ellis, 136 Wn.2d 498, 500, 963 P.2d 843 (1998) (Joey Ellis; bludgeoned mother and two-year-old half-sister to death); Trial Report No. 185 (Robert Parker; sexually assaulted, stabbed, and strangled two women); Trial Report No. 186 (Gerald Davis; murdered two elderly women after raping one); Trial Report No. 203 and State v. Francisco, 107 Wn. App. 247, 250, 26 P.3d 1008 (2001) (Marvin Francisco; shot four young victims, two of whom died); Trial Report No. 219 (Billy Neal, Sr.; stabbed three victims to death); Trial Report No. 238 (Michael Thornton; killed two young men, one with a hammer and one with a gun); Trial Report No. 232 and State v. Leuluaialii, 118 Wn. App. 780, 783-84, 77 P.3d 1192 (2003), review denied, 154 Wn.2d 1013 (2005) (Kenneth Leuluaialii; shot female victim in face, male victim forced lie on

bed while shot repeatedly in leg and abdomen); Trial Report No. 234 (Kenneth Ford; one victim killed with a knife and two additional victims killed with a gun); Trial Report No. 238 (Michael Thornton; killed two young men, one with a hammer and one with a gun); Trial Report No. 256 (Kevin Cruz; shot and killed two co-workers); Trial Report No. 275 (Richard Prather; stabbed and killed wife and two children); Trial Report No. 278 (Melvin Johnson; killed sister, niece, and great niece).

Because the punishment meted out in Washington for offenses comparable to Davis' (or worse) is usually life without the possibility of parole, the fourth Fain factor also supports a finding that Davis' death sentence is cruel. And because all four Fain factors indicate Davis' sentence violates article 1, § 16, his death sentence should be vacated and his case remanded for imposition of a life sentence without the possibility of parole.

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9. CUMULATIVE ERROR DENIED DAVIS HIS RIGHT TO A FAIR SENTENCING PROCEEDING.

The Due Process Clauses of the state and federal constitutions guarantee the right to a fair trial. Const. art. 1, § 3; U.S. Const. amend. XIV. Reversal is required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless. Moore v. Tate, 882 F.2d 1107, 1109 (6th Cir. 1989); State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963). Whether cumulative error has denied Davis a fair trial depends on whether it is reasonably probable that the cumulative effect of the errors materially affected the outcome. State v. Perrett, 86 Wn. App. 312, 322-23, 936 P.2d 426, review denied, 133 Wn.2d 1019 (1997).

The trial judge's failure to recuse himself, the improper exclusion of prospective jurors, the prosecutor's improper arguments, the exclusion of relevant mitigating evidence, the admission of irrelevant rebuttal evidence, and the failure to properly instruct the jury combined to prejudice the jury and deny Davis his right to a fair trial. As a result of the errors,

there is a reasonable probability the outcome of the sentencing proceeding was materially affected. Therefore, Davis' sentence should be reversed.

10. MANDATORY STATUTORY REVIEW.

The legislature has directed this Court to review every death penalty to ensure that it meets the following statutory standards:

(a) Whether there was sufficient evidence to justify the affirmative finding to the question posed by RCW 10.95-.060(4); and

(b) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. For the purposes of this subsection, "similar cases" means cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965, in which the judge or jury considered the imposition of capital punishment regardless of whether it was imposed or executed, and cases in which reports have been filed with the supreme court under RCW 10.95.120;

(c) Whether the sentence of death was brought about through passion or prejudice.

(d) Whether the defendant was mentally retarded within the meaning of RCW 10.95.030(2).

RCW 10.95.130(2).

Davis makes the following arguments to assist this Court's independent statutory review under RCW 10.95.030(2). RCW 10.95-.030(1).

a. Davis' Sentence Is Excessive And Disproportionate.

In every case in which an individual has been sentenced to die, this Court must decide "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." RCW 10.95.130(2)(b). "Similar cases" means "death eligible cases." Cross, 156 Wn.2d at 630.

In comparing Davis and his offense to other defendants and their offenses, this Court considers four factors: (1) the nature of the crime, (2) the aggravating circumstances, (3) criminal history, and (4) personal history. Cross, 156 Wn.2d at 630-31. The court's "touchstone is whether the penalty in a particular case is freakish and wanton or given for a forbidden reason." Id. at 632.

Almost a decade ago, this Court found that Davis' death sentence was not excessive or disproportionate when compared to other cases in which the penalty was imposed. Davis, 141 Wn.2d at 879-885. But much has changed since 2000, and intervening events, including the Ridgeway case and new data on the death penalty in Washington, dictate a different conclusion in 2009. See In re Jeffries, 114 Wn.2d 485, 489, 789 P.2d 731 (1990) ("intervening developments" require reconsideration of proportionality).

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This Court has affirmed three death sentences since 2000, none of which involved circumstances similar to Davis' case. In the first, the defendant asked to die, did not present any mitigating evidence, and waived his right to appeal. State v. Elledge, 144 Wn.2d 62, 69-79, 26 P.3d 271 (2001). The other two cases involved multiple victims. In State v. Cross, the defendant brutally stabbed and killed his wife and two of her three daughters. Cross, 156 Wn.2d at 592. This crime was of greater magnitude than Davis' offense, yet this Court was merely one vote shy of reversing Cross' sentence. Id. at 641-652 (Johnson, J., dissenting) (joined by Madsen, Sanders, and Owens, J.J.). In State v. Yates, the defendant was a serial killer, convicted of killing two prostitutes by shooting them in the head and encasing their heads in plastic bags. He had previously been convicted of 13 additional murders. Yates, 161 Wn.2d at 728-732.

Whereas Cross and Yates were sentenced to death for killing multiple victims, as discussed previously, numerous individuals who were also convicted of brutally killing multiple victims have been given life sentences. See, e.g., Trial Report No. 10 (Steven Carey); Trial Report No. 59 (Thomas Baja); Trial Report No. 69 (Lawrence Sullens); Trial

Report No. 81 (Martin Sanders); Trial Report No. 86 (Frederick Peerson); Trial Report No. 95 (Kenneth Schrader); Trial Report No. 101 (Minviluz Macas); Trial Report Nos. 107-108 (David Simmons and Henry Dailey); Trial Report No. 120 (George Russell); Trial Report No. 128 (Tommy Metcalf); Trial Report No. 130 (Cherno Camara); Trial Report No. 157 (Vincent Sherrill); Trial Report No. 161 (Nga Ngoeung); Trial Report No. 167 (Jack Spillman); Trial Report No. 168 (Scott Pierce); Trial Report No. 172 (James Thomas); Trial Report No. 174 (Timothy Blackwell); Trial Report No. 182 (Joey Ellis); Trial Report No. 185 (Robert Parker); Trial Report No. 186 (Gerald Davis); Trial Report No. 203 (Marvin Francisco); Trial Report No. 219 (Billy Neal); Trial Report No. 238 (Michael Thornton); Trial Report No. 232 (Kenneth Leuluaialii); Trial Report No. 234 (Kenneth Ford); Trial Report No. 238 (Michael Thornton); Trial Report No. 256 (Kevin Cruz); Trial Report No. 275 (Richard Prather); Trial Report No. 278 (Melvin Johnson). Permitting all of these men to live, while killing Davis, is freakish and wanton.

Another important event since 2000 was the 2003 conviction and sentencing of Gary Ridgeway for 48 murders. Sentencing Ridgeway to life in prison placed him in the company of Washington's other most notorious killers who, despite committing Washington's worst offenses, are routinely

spared the penalty of death. Where Ridgeway, Ng, Mak, Rice, and Clark are permitted to live, killing Davis is freakish and wanton.

Indeed, it appears most prosecutors recognize that sparing Ridgeway makes the subsequent execution of almost anyone else freakish and wanton. Since Ridgeway's conviction and life sentence in 2003, there have not been any new convictions for aggravated murder in which the State sought the death penalty, even in cases with multiple victims. Compare Trial Report 265 (Ridgeway) with Trial Reports 266-298.

And yet -- Davis, convicted before Ridgeway was spared, faces death. "No rational explanation exists to explain why some individuals escape the penalty of death and others do not." Cross, 156 Wn.2d at 652 (Johnson, J., dissenting). Davis's sentence is excessive and disproportionate.

b. There Was Insufficient Evidence To Support The Jury's Death Verdict.

This Court is mandated to review all sentences of death to determine whether there was "sufficient evidence to justify the affirmative finding to the question posed by RCW 10.95.060(4)."²⁵ RCW 10.95.130(2)(a). In conducting that review, this Court views the evidence in the light most

²⁵ "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" RCW 10.95.060(4).

favorable to the prosecution to determine if any rational trier of fact could have found sufficient evidence to justify the conclusion beyond a reasonable doubt. Cross, 156 Wn.2d at 627.

In Davis' appeal from his first trial, this Court held a rational trier of fact could find sufficient evidence to support the jury's conclusion that Davis did not merit leniency. Davis, 141 Wn.2d at 878-879. Although in this trial Davis presented some of the same mitigating evidence regarding his upbringing and personal history,²⁶ the expert testimony was different.

Dr. Muscatel, who evaluated Davis on behalf of the State, testified Davis has a verbal I.Q. of 76, a performance I.Q. of 74 and an overall I.Q. of 74, putting him the 4th percentile of the population. RP 3368. At the first trial, expert testimony indicated Davis' I.Q. was 81. Davis, 141 Wn.2d at 876-877.

At Davis' first trial there was expert testimony that Davis suffered from a learning disability and impaired neuropsychological functioning. Davis, 141 Wn.2d at 877. At that trial Dr. Olsen also opined Davis suffered from certain anti-social, borderline, and schizotypal personality

²⁶ At both trials there was testimony Davis did not graduate from high school and while in school was in special education classes, he was taunted by other children because he was slow, suffered physical abuse at the hands of a surrogate father, and received a brain injury as a result of a car accident while in the military. Davis, 141 Wn.2d at 876-877; RP 3245, 3422-3423, 3425-3426, 3436-3438.

disorders, but there was no indication of an altered brain structure because his brain scan and brain wave tests were normal. Davis, 141 Wn.2d at 876-877.

In contrast, at this trial Dr. Mathews opined Davis suffers from a major mental illness and he and the other experts diagnosed Davis with cognitive disorder not otherwise specified and with major depression with psychotic features. RP 3117, 3256, 3374. Dr. Jensen testified the results of an electro encephalogram (EEG), which measures the electrical activity of the brain to determine how the brain functions, showed Davis suffers from moderately severe brain slowing and disorganization. RP 3208-3217.

The evidence presented at this trial regarding Davis' mental illness and brain impairment changes the result of the sufficiency of the evidence analysis this Court conducted after the first trial. The evidence at this trial shows Davis' mental illness and impaired brain function is more severe than what the evidence showed at the first trial. Based on the new evidence, combined with the original mitigating evidence, the jury in this case could not reasonably have determined there was insufficient evidence to merit leniency. Thus, Davis' death sentence should be reversed.

c. The Death Sentence Was A Result Of Passion And Prejudice.

This Court must independently review a death sentence to determine whether the sentence was brought about by passion or prejudice. RCW 10.95.130(2). As the above arguments show, numerous errors infected the trial, resulting in a death verdict brought about by passion and prejudice.

The prosecutor's improper arguments focused the jury on facts not supported by the record and Davis' right to remain silent. Darden v. Wainwright, 477 U.S. 168, 181-182, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986) (prosecutor's comments manipulating or misstating the evidence or commenting on defendant's silence implicates right to a fair trial). The improper arguments invited the jury to vote for death based on sympathy for the victim and fictitious conversations between Davis and Couch. See Urbin v. State, 714 So.2d at 418-22. The improper arguments told the jury compassion (and therefore mercy) was not legally a mitigating factor. See Woodson, 428 U.S. at 304 (jurors must consider as mitigating evidence "compassionate factors.").

The failure to give Davis' proposed instruction prevented the jury from properly applying mercy and prevented Davis from arguing his major mental illness was a proper mitigating factor. And, the court's exclusion of testimony by Davis' aunts denied Davis the right to have the jury

consider all relevant mitigating evidence. These errors allowed the jury to render its decision based on the nature of the crime without properly considering the mitigating factors. See Buchanan v. Angelone, 522 U.S. 269, 274, 118 S. Ct. 757, 139 L. Ed. 2d 702 (1998) (the Eighth Amendment requires that a capital sentencing jury's discretion be guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty in order to eliminate arbitrariness and capriciousness).

Thus, given the number and nature of the errors, the jury's death verdict resulted from "passion and prejudice" and was unreliable. Davis' sentence should be reversed.

D. CONCLUSION

The trial judge was required to step down from Davis' case once he initiated ex parte communications and violated several Canons of the Code of Judicial Conduct.

The trial judge erred in excluding two qualified jurors, excluding relevant mitigation evidence, admitting the State's improper rebuttal evidence, and rejecting a jury instruction necessary to argue Davis' theory of the case.

Prosecutors engaged in misconduct when they misstated the law, misstated the facts, mislead the jury, argued facts not in evidence, commented on Davis' failure to testify, and played on jurors' passions and prejudices in order to obtain a death verdict.

Davis' sentence violates the Eighth Amendment to the United States Constitution and article 1, § 14 of Washington's Constitution because it is cruel and unusual.

S T R I C K E N

Under the mandatory review provisions of RCW 10.95.130, Davis' sentence is excessive and disproportionate, there was insufficient evidence to support the jury's death verdict, and the verdict is the result of passion and prejudice.

Davis respectfully asks this Court to vacate his death sentence.

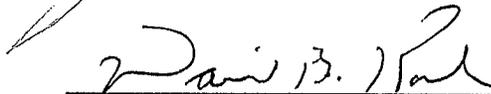
DATED this 29 day of May, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Attorneys for Appellant

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	NO. 80209-2
)	
CECIL DAVIS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29TH DAY OF MAY, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S OPENING BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] KATHLEEN PROCTOR
PIERCE COUNTY PROSECUTING ATTORNEY
930 TACOMA AVENUE SOUTH
ROOM 946
TACOMA, WA 98402

- [X] CECIL DAVIS
DOC No. 920371
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF MAY, 2009.

x Patrick Mayovsky

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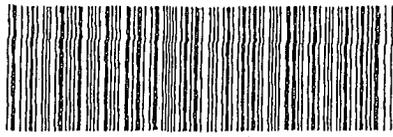
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Appendix N	Statutes on Controlled Substances/Legend Drugs
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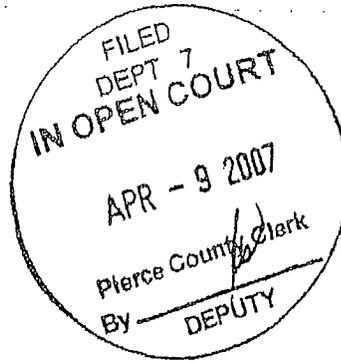
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APPENDIX A

Findings and Conclusions on Motion for Recusal



97-1-00432-4 27505987 FNFL 05-16-07



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 97-1-00432-4

vs.

CECIL EMILE DAVIS,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON MOTION FOR RECUSAL FOR EX PARTE CONTACT

On November 3, 2006, this matter came on for hearing, the Honorable Frederick W. Fleming, presiding. The State was represented by John M. Neeb and John C. Hillman, Deputy Prosecuting Attorneys, and the defendant was present and represented by his attorneys, Ron Ness and John Cross. At that hearing, the court heard the defendant's motion asking the court to recuse itself on the grounds that the court engaged in improper ex parte communication with the State regarding the scheduling of the penalty phase hearing in this case.

The court, having reviewed the pleadings submitted by the parties, heard the arguments of counsel, and entered oral ruling on the motion, hereby enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

I.

This case was returned to Pierce County Superior Court in January of 2005. The penalty phase was set to begin in April of 2006. In January of 2006, the court reluctantly granted a second continuance of the penalty phase, setting it for January 8, 2007. The primary purpose of that continuance was defense counsel's representation that his mitigation specialist needed more time to prepare a mitigation packet for the elected prosecutor in an effort to get the State to dismiss the death penalty notice.

II.

The court believed the parties were continuing to prepare this matter for a penalty phase proceeding, rather than having nothing substantive done while the mitigation packet was being prepared. In other words, the court expected the parties to be prepared to go forward with a penalty phase proceeding on the January 8, 2007, date, not just use that date as the deadline for submitting a mitigation packet and beginning to prepare for the penalty phase hearing.

III.

During the early fall of 2006, the court reviewed its calendar and realized the date set for the penalty phase hearing, January 8, 2007, would potentially result in the proceeding not being completed before the end of that month, especially given the necessity of individual voir dire and the fact that the jury would have to be presented with evidence of the murder. The court had previously scheduled a recess for the entire month of February, 2007.

IV.

In order to accommodate the penalty phase hearing in this case without the potential for a month-long recess, the court determined, sua sponte, that it would accelerate the beginning date for

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the penalty phase to January 2, 2007, a total of four working days. The court took steps to ensure the necessary court room and jail staff would be available. The court also planned to have this case in session on Fridays rather than the normal civil morning and criminal afternoon schedule. The court took these steps in order to better ensure the penalty phase proceeding could be completed by the end of January, 2007. The court believed it was in the State's best interest, the defendant's best interest, and the interest of judicial economy that this penalty phase hearing be completed without a month-long interruption. The court made all of these decisions and took all of these actions on its own, without consulting the State or defendant.

V.

The court also determined, sua sponte, that it would schedule the jury selection process of this penalty phase hearing to begin on December 4, 2006. That was an acceleration of thirty days, but the court knew that the jury selection would be done on an individual basis, after each juror completed an extensive questionnaire. Given the amount of time that had passed since this case first came back to Pierce County Superior Court, and given the fact that defense counsel had been on the case virtually the entire time, the court did not believe this brief acceleration would be prejudicial to the defendant in the presentation of his defense.

VI.

The court intended to use whatever time was necessary during the month of December to conduct jury voir dire and seat a jury that would return to hear the penalty phase beginning on January 2, 2007. In other words, if jury selection finished early, the court would still recess until January 2, 2007. The court believed this schedule would still allow the State and defendant whatever time was still necessary to be fully prepared. After making this decision, the court took steps to ensure a jury venire would be available, the appropriate court room would be available

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when the entire panel was present, and that jail staff were aware of its intentions. Again, all of these actions were taken without the court consulting the State or the defendant in this case.

VII.

Shortly after the court made those decisions, in October of 2006, the judge happened to cross paths with one of the deputy prosecutors involved in this case, John Hillman, in a common hallway in the courthouse as the judge and the prosecutor were heading for their respective court appearances. The judge directed Mr. Hillman to come with him and prepare a scheduling order that set out the new dates the court had decided to use for this penalty phase hearing. The judge then directed Mr. Hillman to get defense counsel's signature on that order so it could be filed with the court clerk. There was no conversation between Mr. Hillman and the judge about this case, either substantively or procedural, during the time Mr. Hillman prepared the order. The entirety of the "communication" between the judge and Mr. Hillman was the judge's direction to complete a written order on the form used for these cases so his decision could be given to both parties. That was a ministerial act because the decision had already been made and the court did not elicit input from or engage in discussion with Mr. Hillman about the case or about the merits of its decision.

VIII.

The other deputy prosecutor in this case, John Neeb, was also in the court room the judge was using that afternoon (CD 2). The court told Mr. Neeb that it had directed Mr. Hillman to complete a scheduling order with the new dates on it and ordered Mr. Neeb to ensure defense counsel got the order and signed it. That was the entirety of the "communication" between the court and Mr. Neeb.

IX.

It is the court's responsibility and obligation to ensure its cases proceed in an expeditious and economical manner. In this case, the court determined a brief acceleration of the dates for the penalty phase hearing would be necessary for judicial economy and would not prejudice either party. The court's decision was made without communication of any kind with the parties, and certainly without ex parte communication with the State. The court's decision needed to be communicated to the parties, and the manner of communicating that decision was to direct one of the deputy prosecutors to complete a scheduling order with the new dates on it and ordering that order be given to defense counsel for one or both of their signatures.

Being duly advised in the law, and based on the foregoing findings, the court hereby enters the following conclusions of law:

CONCLUSIONS OF LAW

I.

The court's decision to accelerate the dates for this penalty phase hearing were made on its own without contact or input from either side, so the court did not engage in ex parte contact with the State in respect to setting the dates.

II.

The court's act of ordering the deputy prosecutors in the case to reduce the decision to writing and get defense counsel's signature was a ministerial act, not a substantive discussion.

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III.

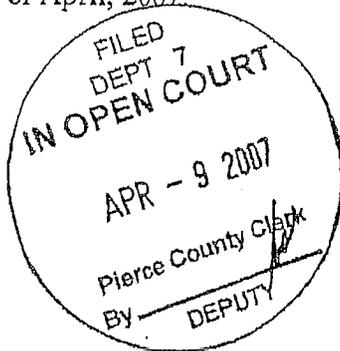
One of the primary purposes of the prohibition against ex parte contact is to ensure the proceeding is not only fair in fact, but appears fair. When a neutral and unbiased observer learns what occurred in this case, there is no appearance of fairness issue either.

IV.

The defendant's motion for recusal is denied. For the reasons set forth in a separate order, however, the court will continue the penalty phase hearing in this case to April 2, 2007.

The court's oral ruling on this motion was given in open court in the presence of the defendant on November 3, 2006.

These findings and conclusions were signed in open court in the presence of the defendant this 9th day of April, 2007.



Frederick W. Fleming
FREDERICK W. FLEMING, JUDGE

Presented by:

Approved as to form:

John M. Neeb
JOHN M. NEEB
Deputy Prosecuting Attorney
WSB # 21322

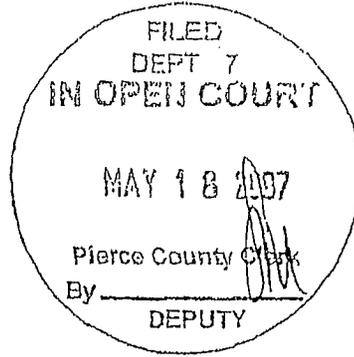
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John Cross
JOHN CROSS
Attorney for Defendant
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APPENDIX B

Findings and Conclusions on Taped Interviews



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

CECIL EMILE DAVIS,

Defendant.

CAUSE NO. 97-1-00432-4

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON STATE'S MOTION TO EXCLUDE VIDEO TAPED INTERVIEWS

Beginning on April 2, 2007, this matter came on for a penalty phase hearing, the Honorable Frederick W. Fleming, presiding. The State was represented by John M. Neeb and John Hillman, Deputy Prosecuting Attorneys, and the defendant was at all times present and represented by his attorneys, Ronald Ness and John Cross.

As part of its case, the defense indicated its intention to present to the jury two video taped interviews conducted by Mary Goody, defendant's mitigation specialist. Ms. Goody was expected to testify she interviewed Lillie Mae Jones and Eula Mae Brooks, who were represented to be the defendant's paternal aunts. The defense marked two DVDs as exhibits, D225 and D226, the former of which was unredacted interviews that included opinions about the sentence and the latter redacted interviews intended to be played. The defendant also marked D227 and D228, copies of declarations from Ms. Jones and Ms. Brooks, respectively.

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The State moved in limine to exclude the testimony of Ms. Goody and the playing of the video tapes, asserting three grounds: hearsay, relevance, and lack of personal knowledge.

The court reviewed the declarations and viewed the redacted DVD. The court heard the arguments of counsel and reviewed the case law submitted on the issue. The court also considered the applicable evidence rules. At the conclusion of the hearing, the court granted the State's motion and excluded the proffered testimony and video interviews. The court now enters the following findings of fact and conclusions of law supporting its decision.

FINDINGS OF FACT

I.

There were several topics Ms. Jones and Ms. Brooks discussed in their interviews that were clearly based on information told to them by others. That information was offered for the truth of the matters asserted. As such, those portions of the interviews were hearsay.

II.

In addition, there were matters mentioned by Ms. Jones and Ms. Brooks that gave clear indication they had no personal knowledge. For example, both women mentioned having "no idea" the defendant was having any trouble in school. Both woman also mentioned they had very little contact with Cecil Davis when he was a child.

III.

Further, much of what Ms. Brooks and Ms. Jones had to say was information about Cozetta Taylor, the defendant's mother, which had no relevance at this hearing. These were not subjects that related to the conditions of the defendant's upbringing as much as they were commentary about their opinions of Mrs. Taylor's life style. Moreover, many of the things the

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women said were their reasons for not having much contact with the defendant and his immediate family, even though they were in the same geographical area at the time.

IV.

The court does not find there is a sufficient basis to conclude Ms. Jones and/or Ms. Brooks are unavailable to testify at this proceeding. To the extent either of them had relevant and admissible information, the defense could have them present in court to testify.

V.

The court also finds that much of the proffered testimony is information that will be presented to the jury by other means. Certainly Mrs. Taylor can testify about the defendant's grade school years and/or problems in school, as can the defendant's younger brother, Donnie Cunningham. The defendant will also be able to get information about the psychiatric hospitalization of the defendant's paternal grandmother if he lays the proper foundation through the mental health witnesses.

VI.

The court is mindful of the 9th Circuit opinion in Rupe that suggests the evidence rules are of secondary import if the proffered evidence is relevant. Even if that opinion were controlling, however, the court finds the method proposed by the defendant is not proper because it does not allow any basis for cross-examination at all.

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From the above findings of fact, the court hereby enters the following conclusions of law:

CONCLUSIONS OF LAW

I.

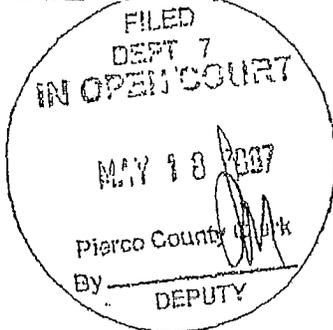
The defendant's offer of proof as to the reasons for presented the video recorded interviews of Ms. Jones and Ms. Brooks is not sufficient for admission.

II.

The State's motion to exclude the video taped interviews of Eula Mae Brooks and Lillie Mae Jones is granted.

The court's oral ruling on this motion was given in open court in the presence of the defendant on May 7, 2007.

These findings of fact and conclusions of law were signed in open court in the presence of the defendant this 18th day of May, 2007.



Frederick W. Fleming
FREDERICK W. FLEMING, JUDGE

Presented by:

Approved as to form:

copy received

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John Cross
JOHN CROSS
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APPENDIX N

Statutes on Controlled Substances/Legend Drugs

CWest's Revised Code of Washington Annotated CurrentnessTitle 69. Food, Drugs, Cosmetics, and Poisons (Refs & Annos)Chapter 69.50. Uniform Controlled Substances Act (Refs & Annos)Article IV. Offenses and Penalties

→ 69.50.401. Prohibited acts: A--Penalties

(1) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

(2) Any person who violates this section with respect to:

(a) A controlled substance classified in Schedule I or II which is a narcotic drug or flunitrazepam, including its salts, isomers, and salts of isomers, classified in Schedule IV, is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years, or (i) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (ii) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine;

(b) Amphetamine, including its salts, isomers, and salts of isomers, or methamphetamine, including its salts, isomers, and salts of isomers, is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years, or (i) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (ii) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine. Three thousand dollars of the fine may not be suspended. As collected, the first three thousand dollars of the fine must be deposited with the law enforcement agency having responsibility for cleanup of laboratories, sites, or substances used in the manufacture of the methamphetamine, including its salts, isomers, and salts of isomers. The fine moneys deposited with that law enforcement agency must be used for such clean-up cost;

(c) Any other controlled substance classified in Schedule I, II, or III, is guilty of a class C felony punishable according to chapter 9A.20 RCW;

(d) A substance classified in Schedule IV, except flunitrazepam, including its salts, isomers, and salts of isomers, is guilty of a class C felony punishable according to chapter 9A.20 RCW; or

(e) A substance classified in Schedule V, is guilty of a class C felony punishable according to chapter 9A.20 RCW.

CREDIT(S)

[2005 c 218 § 1, eff. July 24, 2005; 2003 c 53 § 331, eff. July 1, 2004. Prior: 1998 c 290 § 1; 1998 c 82 § 2; 1997 c 71 § 2; 1996 c 205 § 2; 1989 c 271 § 104; 1987 c 458 § 4; 1979 c 67 § 1; 1973 2nd ex.s. c 2 § 1; 1971 ex.s. c 308 § 69.50.401.]

West's RCWA 69.50.401, WA ST 69.50.401

CWest's Revised Code of Washington Annotated CurrentnessTitle 69. Food, Drugs, Cosmetics, and Poisons (Refs & Annos)Chapter 69.50. Uniform Controlled Substances Act (Refs & Annos)Article III. Regulation of Manufacture, Distribution and Dispensing of Controlled Substances

→ 69.50.308. Prescriptions

(a) A controlled substance may be dispensed only as provided in this section.

(b) Except when dispensed directly by a practitioner authorized to prescribe or administer a controlled substance, other than a pharmacy, to an ultimate user, a substance included in Schedule II may not be dispensed without the written prescription of a practitioner.

(1) Schedule II narcotic substances may be dispensed by a pharmacy pursuant to a facsimile prescription under the following circumstances:

(i) The facsimile prescription is transmitted by a practitioner to the pharmacy; and

(ii) The facsimile prescription is for a patient in a long-term care facility. "Long-term care facility" means nursing homes licensed under chapter 18.51 RCW, boarding homes licensed under chapter 18.20 RCW, and adult family homes licensed under chapter 70.128 RCW; or

(iii) The facsimile prescription is for a patient of a hospice program certified or paid for by medicare under Title XVIII; or

(iv) The facsimile prescription is for a patient of a hospice program licensed by the state; and

(v) The practitioner or the practitioner's agent notes on the facsimile prescription that the patient is a long-term care or hospice patient.

(2) Injectable Schedule II narcotic substances that are to be compounded for patient use may be dispensed by a pharmacy pursuant to a facsimile prescription if the facsimile prescription is transmitted by a practitioner to the pharmacy.

(3) Under (1) and (2) of this subsection the facsimile prescription shall serve as the original prescription and shall be maintained as other Schedule II narcotic substances prescriptions.

(c) In emergency situations, as defined by rule of the state board of pharmacy, a substance included in Schedule II may be dispensed upon oral prescription of a practitioner, reduced promptly to writing and filed by the pharmacy. Prescriptions shall be retained in conformity with the requirements of RCW 69.50.306. A prescription for a substance included in Schedule II may not be refilled.

(d) Except when dispensed directly by a practitioner authorized to prescribe or administer a controlled substance, other than a pharmacy, to an ultimate user, a substance included in Schedule III or IV, which is a prescription drug as

determined under RCW 69.04.560, may not be dispensed without a written or oral prescription of a practitioner. Any oral prescription must be promptly reduced to writing. The prescription shall not be filled or refilled more than six months after the date thereof or be refilled more than five times, unless renewed by the practitioner.

(e) A valid prescription or lawful order of a practitioner, in order to be effective in legalizing the possession of controlled substances, must be issued in good faith for a legitimate medical purpose by one authorized to prescribe the use of such controlled substance. An order purporting to be a prescription not in the course of professional treatment is not a valid prescription or lawful order of a practitioner within the meaning and intent of this chapter; and the person who knows or should know that the person is filling such an order, as well as the person issuing it, can be charged with a violation of this chapter.

(f) A substance included in Schedule V must be distributed or dispensed only for a medical purpose.

(g) A practitioner may dispense or deliver a controlled substance to or for an individual or animal only for medical treatment or authorized research in the ordinary course of that practitioner's profession. Medical treatment includes dispensing or administering a narcotic drug for pain, including intractable pain.

(h) No administrative sanction, or civil or criminal liability, authorized or created by this chapter may be imposed on a pharmacist for action taken in reliance on a reasonable belief that an order purporting to be a prescription was issued by a practitioner in the usual course of professional treatment or in authorized research.

(i) An individual practitioner may not dispense a substance included in Schedule II, III, or IV for that individual practitioner's personal use.

CREDIT(S)

[2001 c 248 § 1; 1993 c 187 § 19; 1971 ex.s. c 308 § 69.50.308.]

West's RCWA 69.50.308, WA ST 69.50.308

END OF DOCUMENT

C

West's Revised Code of Washington Annotated Currentness

Title 69. Food, Drugs, Cosmetics, and Poisons (Refs & Amos)

Chapter 69.50. Uniform Controlled Substances Act (Refs & Amos)

Article II. Standards and Schedules

→ 69.50.208. Schedule III

Unless specifically excepted by state or federal law or regulation or more specifically included in another schedule, the following controlled substances are listed in Schedule III:

(a) Any material, compound, mixture, or preparation containing any quantity of the following substances having a stimulant effect on the central nervous system, including their salts, isomers, and salts of isomers whenever the existence of those salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Any compound, mixture, or preparation in dosage unit form containing any stimulant substance included in Schedule II and which was listed as an excepted compound on August 25, 1971, pursuant to the federal Controlled Substances Act, and any other drug of the quantitative composition shown in that list for those drugs or which is the same except for containing a lesser quantity of controlled substances;

(2) Benzphetamine;

(3) Chlorphentermine;

(4) Clortermine;

(5) Phendimetrazine.

(b) Depressants. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system:

(1) Any compound, mixture, or preparation containing:

(i) Amobarbital;

(ii) Secobarbital;

(iii) Pentobarbital;

or any salt thereof and one or more other active medicinal ingredients which are not listed in any schedule;

(2) Any suppository dosage form containing:

(i) Amobarbital;

(ii) Secobarbital;

(iii) Pentobarbital;

or any salt of any of these drugs and approved by the Food and Drug Administration for marketing only as a suppository;

(3) Any substance which contains any quantity of a derivative of barbituric acid, or any salt of a derivative of barbituric acid;

(4) Chlorhexadol;

(5) Lysergic acid;

(6) Lysergic acid amide;

(7) Methyprylon;

(8) Sulfondiethylmethane;

(9) Sulfonethylmethane;

(10) Sulfonmethane;

(11) Tiletamine and zolazepam or any of their salts--some trade or other names for a tiletamine-zolazepam combination product: Telazol, some trade or other names for tiletamine: 2-(ethylamino)-2-(2-thienyl) cyclohexanone, some trade or other names for zolazepam: 4-(2-fluorophenyl)-6,8-dihydro-1,3,8-trimethylpyrazolo-[3,4-c][1,4]-diazepin-7(1H)-one flupyrazapon.

(c) Nalorphine.

(d) Anabolic steroids. The term "anabolic steroid" means any drug or hormonal substance, chemically and pharmacologically related to testosterone (other than estrogens, progestins, and corticosteroids) that promotes muscle growth, and includes:

(1) Boldenone;

(2) Chlorotestosterone;

(3) Clostebol;

(4) Dehydrochloromethyltestosterone;

(5) Dihydrotestosterone;

(6) Drostanolone;

- (7) Ethylestrenol;
- (8) Fluoxymesterone;
- (9) Formebolone;
- (10) Mesterolone;
- (11) Methandienone;
- (12) Methandranone;
- (13) Methandriol;
- (14) Methandrostenolone;
- (15) Methenolone;
- (16) Methyltestosterone;
- (17) Mibolerone;
- (18) Nanrolone [nandrolone];
- (19) Norethandrolone;
- (20) Oxandrolone;
- (21) Oxymesterone;
- (22) Oxymetholone;
- (23) Stanolone;
- (24) Stanozolol;
- (25) Testolactone;
- (26) Testosterone;
- (27) Trenbolone; and

(28) Any salt, ester, or isomer of a drug or substance described or listed in this subsection, if that salt, ester, or isomer promotes muscle growth. Except such term does not include an anabolic steroid which is expressly intended for administration through implants to cattle or other nonhuman species and which has been approved by the secretary of health and human services for such administration. If any person prescribes, dispenses, or distributes such steroid for human use such person shall be considered to have prescribed, dispensed, or distributed an anabolic steroid within the meaning of this subsection.

(c) Narcotic drugs. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any salts thereof calculated as the free anhydrous base or alkaloid, in limited quantities as set forth in this subsection:

- (1) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium;
- (2) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;
- (3) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium;
- (4) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;
- (5) Not more than 1.8 grams of dihydrocodeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;
- (6) Not more than 300 milligrams of ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;
- (7) Not more than 500 milligrams of opium per 100 milliliters or per 100 grams, or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;
- (8) Not more than 50 milligrams of morphine per 100 milliliters or per 100 grams with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

The state board of pharmacy may except by rule any compound, mixture, or preparation containing any stimulant or depressant substance listed in subsection (a)(1) and (2) of this section from the application of all or any part of this chapter if the compound, mixture, or preparation contains one or more active medicinal ingredients not having a stimulant or depressant effect on the central nervous system, and if the admixtures are in combinations, quantity, proportion, or concentration that vitiate the potential for abuse of the substances having a stimulant or depressant effect on the central nervous system.

The controlled substances listed in this section may be rescheduled or deleted as provided for in RCW 69.50.201.

CREDIT(S)

[1993 c 187 § 8; 1986 c 124 § 5; 1980 c 138 § 3; 1971 ex.s. c 308 § 69.50.208.]

West's RCWA 69.50.208, WA ST 69.50.208

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▼
West's Revised Code of Washington Annotated Currentness
Title 69. Food, Drugs, Cosmetics, and Poisons (Refs & Annos)
*Chapter 69.41, Legend Drugs—Prescription Drugs (Refs & Annos)
→ 69.41.030. Sale, delivery, or possession of legend drug without prescription or order prohibited—Exceptions—Penalty

(1) It shall be unlawful for any person to sell, deliver, or possess any legend drug except upon the order or prescription of a physician under chapter 18.71 RCW, an osteopathic physician and surgeon under chapter 18.57 RCW, an optometrist licensed under chapter 18.53 RCW who is certified by the optometry board under RCW 18.53.010, a dentist under chapter 18.32 RCW, a podiatric physician and surgeon under chapter 18.22 RCW, a veterinarian under chapter 18.92 RCW, a commissioned medical or dental officer in the United States armed forces or public health service in the discharge of his or her official duties, a duly licensed physician or dentist employed by the veterans administration in the discharge of his or her official duties, a registered nurse or advanced registered nurse practitioner under chapter 18.79 RCW when authorized by the nursing care quality assurance commission, an osteopathic physician assistant under chapter 18.57A RCW when authorized by the board of osteopathic medicine and surgery, a physician assistant under chapter 18.71A RCW when authorized by the medical quality assurance commission, a physician licensed to practice medicine and surgery or a physician licensed to practice osteopathic medicine and surgery, a dentist licensed to practice dentistry, a podiatric physician and surgeon licensed to practice podiatric medicine and surgery, or a veterinarian licensed to practice veterinary medicine, in any province of Canada which shares a common border with the state of Washington or in any state of the United States: PROVIDED, HOWEVER, That the above provisions shall not apply to sale, delivery, or possession by drug wholesalers or drug manufacturers, or their agents or employees, or to any practitioner acting within the scope of his or her license, or to a common or contract carrier or warehouseman, or any employee thereof, whose possession of any legend drug is in the usual course of business or employment: PROVIDED FURTHER, That nothing in this chapter or chapter 18.64 RCW shall prevent a family planning clinic that is under contract with the department of social and health services from selling, delivering, possessing, and dispensing commercially prepackaged oral contraceptives prescribed by authorized, licensed health care practitioners.

(2)(a) A violation of this section involving the sale, delivery, or possession with intent to sell or deliver is a class B felony punishable according to chapter 9A.20 RCW.

(b) A violation of this section involving possession is a misdemeanor.

CREDIT(S)

[2003 c 142 § 3, eff. July 27, 2003; 2003 c 53 § 323, eff. July 1, 2004; 1996 c 178 § 17; 1994 sp.s. c 9 § 737; 1991 c 30 § 1; 1990 c 219 § 2; 1987 c 144 § 1; 1981 c 120 § 1; 1979 ex.s. c 139 § 2; 1977 c 69 § 1; 1973 1st ex.s. c 186 § 3.]

West's RCWA 69.41.030, WA ST 69.41.030

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Wash. Admin. Code 246-883-020

WASHINGTON ADMINISTRATIVE CODE
TITLE 246. HEALTH, DEPARTMENT OF
CHAPTER 246-883. PHARMACEUTICAL-SALES REQUIRING PRESCRIPTIONS
Current with amendments adopted through December 3, 2008.

246-883-020. Identification of legend drugs for purposes of chapter 69.41 RCW.

(1) In accordance with chapter 69.41 RCW, the board of pharmacy finds that those drugs which have been determined by the Food and Drug Administration, under the Federal Food, Drug and Cosmetic Act, to require a prescription under federal law should also be classified as legend drugs under state law because of their toxicity or potential for harmful effect, the methods of their use and the collateral safeguards necessary to their use, indicate that they are only safe for use under the supervision of a practitioner.

(2) For the purposes of chapter 69.41 RCW, legend drugs are drugs which have been designated as legend drugs under federal law and are listed as such in the 2002 edition of the *Drug Topics Red Book*. Copies of the list of legend drugs as contained in the *Drug Topics Red Book* are available for public inspection at the headquarters office of the State Board of Pharmacy, 1300 Quince Street S.E., P.O. BOX 47863, Olympia, Washington 98504-7863. To obtain copies of this list, interested persons must submit a written request and payment of seventy-six dollars for each copy to the board.

(3) There may be changes in the marketing status of drugs after the publication of the above reference. Upon application of a manufacturer or distributor, the board may grant authority for the over the counter distribution of certain drugs which had been designated as legend drugs in this reference. These determinations will be made after public hearing and will be published as an amendment to this chapter.

Statutory Authority: RCW 69.41.075 and 18.64.005(7), 02-14-049, S 246-883-020, filed 6/27/02, effective 7/28/02. Statutory Authority: RCW 69.41.075, 18.64.005, 00-06-078, S 246-883-020, filed 3/1/00, effective 4/1/00. Statutory Authority: RCW 69.41.075, 96-21-041, S 246-883-020, filed 10/11/96, effective 11/11/96. Statutory Authority: RCW 18.64.005, 92-09-070 (Order 264B), S 246-883-020, filed 4/14/92, effective 5/15/92. Statutory Authority: RCW 18.64.005 and chapter 18.64A RCW, 91-18-057 (Order 191B), recodified as S 246-883-020, filed 8/30/91, effective 9/30/91. Statutory Authority: RCW 18.64.005 and 69.44.075 69.41.075, 85-18-091 (Order 196), S 360-32-050, filed 9/4/85. Statutory Authority: RCW 18.64.005 and 69.41.075, 83-20-053 (Order 176), S 360-32-050, filed 9/29/83. Statutory Authority: RCW 69.41.075, 81-10-025 (Order 160), S 360-32-050, filed 4/28/81. Statutory Authority: 1979 1st ex. s. c 139, 79-09-138 (Order 149, Resolution No. 9/79), S 360-32-050, filed 9/5/79.

WAC 246-883-020, WA ADC 246-883-020

WA ADC 246-883-020
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C

Effective: [See Text Amendments]

United States Code Annotated CurrentnessTitle 21, Food and Drugs (Refs & Annos)Chapter 13, Drug Abuse Prevention and Control (Refs & Annos)Subchapter I, Control and EnforcementPart C, Registration of Manufacturers, Distributors, and Dispensers of Controlled Substances

→ § 829, Prescriptions

(a) Schedule II substances

Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule II, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act [21 U.S.C.A. § 301 et seq.], may be dispensed without the written prescription of a practitioner, except that in emergency situations, as prescribed by the Secretary by regulation after consultation with the Attorney General, such drug may be dispensed upon oral prescription in accordance with section 503(b) of that Act [21 U.S.C.A. § 353(b)]. Prescriptions shall be retained in conformity with the requirements of section 827 of this title. No prescription for a controlled substance in schedule II may be refilled.

(b) Schedule III and IV substances

Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule III or IV, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act [21 U.S.C.A. § 301 et seq.], may be dispensed without a written or oral prescription in conformity with section 503(b) of that Act [21 U.S.C.A. § 353(b)]. Such prescriptions may not be filled or refilled more than six months after the date thereof or be refilled more than five times after the date of the prescription unless renewed by the practitioner.

(c) Schedule V substances

No controlled substance in schedule V which is a drug may be distributed or dispensed other than for a medical purpose.

(d) Non-prescription drugs with abuse potential

Whenever it appears to the Attorney General that a drug not considered to be a prescription drug under the Federal Food, Drug, and Cosmetic Act [21 U.S.C.A. § 301 et seq.] should be so considered because of its abuse potential, he shall so advise the Secretary and furnish to him all available data relevant thereto.

CREDIT(S)

(Pub.L. 91-513, Title II, § 309, Oct. 27, 1970, 84 Stat. 1260.)

ENACTMENT OF SUBSECTION (E)

<Pub.L. 110-425, §§ 2, 3(j), Oct. 15, 2008, 122 Stat. 4820, 4832, provided that, effective 180 days after Oct. 15, 2008, except as otherwise provided, subsection (e) is added at the end to read:>

<(e) Controlled substances dispensed by means of the internet>

<(1) No controlled substance that is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act may be delivered, distributed, or dispensed by means of the Internet without a valid prescription.>

<(2) As used in this subsection:>

<(A) The term "valid prescription" means a prescription that is issued for a legitimate medical purpose in the usual course of professional practice by-->

<(i) a practitioner who has conducted at least 1 in-person medical evaluation of the patient; or>

<(ii) a covering practitioner.>

<(B)(i) The term "in-person medical evaluation" means a medical evaluation that is conducted with the patient in the physical presence of the practitioner, without regard to whether portions of the evaluation are conducted by other health professionals.>

<(ii) Nothing in clause (i) shall be construed to imply that 1 in-person medical evaluation demonstrates that a prescription has been issued for a legitimate medical purpose within the usual course of professional practice.>

<(C) The term "covering practitioner" means, with respect to a patient, a practitioner who conducts a medical evaluation (other than an in-person medical evaluation) at the request of a practitioner who-->

<(i) has conducted at least 1 in-person medical evaluation of the patient or an evaluation of the patient through the practice of telemedicine, within the previous 24 months; and>

<(ii) is temporarily unavailable to conduct the evaluation of the patient.>

<(3) Nothing in this subsection shall apply to-->

<(A) the delivery, distribution, or dispensing of a controlled substance by a practitioner engaged in the practice of telemedicine; or>

<(B) the dispensing or selling of a controlled substance pursuant to practices as determined by the Attorney General by regulation, which shall be consistent with effective controls against diversion.>

21 U.S.C.A. § 829, 21 USCA § 829

END OF DOCUMENT