

NO. 80209-2

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

**SUPREME COURT OF THE
STATE OF WASHINGTON**

BY _____
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

CECIL DAVIS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frederick W. Fleming

No. 97-1-00432-4

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

JOHN M. NEEB
Deputy Prosecuting Attorney
WSB #21322

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

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

1. Did the trial court properly deny defendant's motion for judicial recusal based upon an ex parte communication with the State about scheduling, when no reasonable person viewing the situation would conclude the communication resulted in the judge appearing to be unfair?
2. Did the trial court properly exercise its discretion in dismissing two jurors for cause when one indicated that she would never be able to personally vote for the death penalty and the other had information about the case that was virtually identical to information this court had deemed inherently prejudicial to the decision making process in a penalty phase?
3. Has defendant failed to demonstrate the trial court abused its discretion in excluding a video tape of statements made by two of defendant's aunts when the statements were irrelevant, not made under oath, and would not be subject to cross-examination?
4. Did the trial court properly allow the State to present rebuttal evidence that responded to defense mitigation evidence regarding the severity of defendant's cognitive disabilities?

5. Did the trial court's instruction regarding mitigating factors, given in the manner preferred by this court, properly inform the jury of the relevant law and allow the defendant to argue his theory of the case?
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8. Should this court summarily reject defendant claims that Washington's capital punishment statutes violate the Eighth Amendment and Const. art. 1, §14, when these claims have been repeatedly rejected in prior opinions and defendant offers no legal argument as to why this court should revisit the issue?
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10. Has defendant failed to articulate a basis for finding an unconstitutional delegation of legislative authority when he never identifies what aspect of legislative authority has been improperly delegated?

11. Should this court refuse to review defendant's claim that Washington's capital punishment statutes violate Const. art. 1, §14, when it was not raised below and the record was not sufficiently developed to assess whether there has been a constitutional violation as required by RAP 2.5?

12. After conducting mandatory review, should this court uphold the jury's death verdict when it was an appropriate verdict, consistent with death verdicts in similar cases, based upon sufficient evidence, and not brought about by passion or prejudice?

B. STATEMENT OF THE CASE.

1. Procedure

In March 1998, defendant Cecil Emile Davis was found guilty by a jury of his peers of murder in the first degree with aggravating circumstances; the same jury returned a sentence of death. The defendant's conviction and sentence were affirmed by this court in *State v. Davis*, 141 Wn.2d 798, 10 P.3d 977 (2000). Defendant filed a personal restraint petition, and after a reference hearing, this court affirmed the

conviction but reversed the death sentence and remanded for a new penalty phase hearing. *In re Davis*, 152 Wn.2d 647, 101 P.3d 1 (2004).

The defendant's first appearance back in Pierce County Superior Court was on January 14, 2005. CP 595-596. His penalty phase hearing was continued twice at his request. *See Orders for Continuance of Penalty Phase Hearing*, CP 613, 621. While the penalty phase hearing was pending, the defense brought a motion requesting the trial court recuse itself. CP 637-654, 655; 11/3/06 RP 1-28.¹ That motion was denied, and the court's ruling was reduced to written findings of fact and conclusions of law. *Findings of Fact and Conclusions of Law on Motion for Recusal for Ex Parte Contact*, CP 943-48. The trial court then granted another motion to continue the penalty phase hearing. *Order Continuing Sentencing Hearing*, CP 662.

Defendant brought a motion to dismiss the death penalty based upon evolving standards of decency and equal protection, CP 713-723, as well as a motion to dismiss based upon international law. CP 724-737. The court denied both these motion and entered findings of fact on its ruling. 3/30/07 RP 4-27; CP 1079-1082, 1083-1085.

¹ The State will refer to the 28 volumes of sequentially paginated verbatim reports of proceedings as "RP." All other transcripts will be referred to with the date of the hearing preceding the "RP." Thus the transcript for November 3, 2006 would be referred to as "11/3/06 RP"

The jury selection for the penalty phase hearing began on April 2, 2007, the Honorable Frederick W. Fleming, presiding. RP 1–3622. During voir dire, the court excluded Juror No. 1 for cause based upon her inability to return a death verdict. RP 308–70. The court also excluded Juror No. 39 for cause based upon information she knew about the prior proceedings. RP 838–73.

The jury was sworn and trial of the penalty phase began on April 27, 2007, RP 2330. When discussing jury instructions, defendant objected to the court’s failure to give his proposed instruction, CP 1120, that contained a non-statutory mitigating factor of “whether defendant suffers from a major mental illness.” CP 1118-1120,² *see* Appendix A. The court gave an instruction that did not include defendant’s express language, but did include two statutory mitigating factors that addressed mental health issues. CP 1157-1166, Instruction No. 5, *see* Appendix B.

The jury returned a sentence of death on May 15, 2007. Sentencing Verdict, CP 1167. That sentence was formally ordered by the court May 18, 2007. Warrant of Commitment & Judgment and Sentence, CP 1193–1203. This appeal automatically follows.

² The defendant proposed two alternatives to instruction No. 5, but later opted for the instruction found on CP1120 as his preferred choice. *See* Appellant’s brief at p. 67. There is also a duplicate copy of these proposed alternatives in the court file. CP 1121-1123.

2. Facts

a. Facts Relating to Crime

In January of 1997, defendant Cecil Emile Davis was living with his mother, Cozetta Taylor, at 2012 E. 57th St. in Tacoma. RP 2508–09. On January 24, 1997, there was a party at the house that was attended by a number of the defendant’s family members. RP 2511. Some of the younger family members also had friends in attendance, including Keith Burks and George Wilson.³ RP 2511, 2561, 2634.

The victim in this case, Yoshiko Couch, was a 65-year-old woman who lived with her disabled husband on E. 57th St. RP 2970. Their house was across the street and one house up from the Taylor residence.

In the early morning hours of January 25, 1997, the defendant was on the front porch with Wilson and Burks.⁴ RP 2563, 2636. While they were on the porch, the defendant said “I need to rob somebody.” RP 2638. As he said that, the defendant was looking directly at the Couch residence across the street. RP 2640. They walked a short distance from the house, and on their way back, the defendant said “I need to kill me a

³ George Anthony Wilson was charged as a co-defendant in this murder in Pierce County Cause Number 97-1-00433-2. He was convicted of murder in the first degree (felony murder) and sentenced to 304 months in prison. His conviction was affirmed as part of the original appeal in this case. *State v. Davis*, 141 Wn.2d 798, 10 P.3d 977 (2000).

⁴ Burks died between his testimony at the first trial in 1998 and the penalty phase hearing in 2006, so his testimony was presented as former testimony at the current penalty phase hearing.

mother fucker.” RP 2641. Shortly after that, Burks went inside the Taylor house, but the defendant and Wilson remained outside. RP 2641.

A short time later, Wilson came back to the Taylor house and entered the basement through a sliding glass door. RP 2642. Wilson’s eyes were wide and he was scared, and he made several statements to Keith Burks. RP 2643. Wilson said he thought they were going over to the Couch home to “rip the lady off,” but after the defendant kicked open the door and entered, he started “beating on her and rubbing all over.” RP 2643. Some time between 3:00 and 4:00 a.m. on January 25, 1997, one of the defendant’s nieces woke up and moved from one part of the house to another to sleep. RP 2623. At that time, she looked throughout the house for the defendant, she saw Burks and Anthony asleep, but the defendant was not in the house at that time. RP 2623-24

The next morning, neighbors of the Couches came to pick up Mrs. Couch. RP 2394. When one of them knocked on the front door, it swung open because it was not closed tight. RP 2395. A broken piece of door frame and the door “striker plate” were lying on the floor just inside the house. RP 2396. They went inside and found Mrs. Couch lying dead in the bathtub. RP 2398–99. Mr. Couch, who was bedridden after having several strokes, was in his bed in a downstairs bedroom. RP 2396–97. A telephone, normally within Mr. Couch’s reach on a nightstand, was on the floor inside the closet in his room. RP 2398–99. Mrs. Couch would often sleep on the couch in her husband’s bedroom downstairs. RP 2977-78.

Mrs. Couch's purse was lying open on the floor in a hallway. There was white powder strewn all over the living room floor and furniture, as well as on the floors and bedding in two bedrooms. RP 2407; There was a wet sponge on the banister rail and swirl marks on some furniture as if an attempt to clean up had been made. RP 2455. One of the bedspreads had a very large blood stain, with a large chunk of body tissue in it. RP 2474. Several hairs were collected from the bedspread. RP 2490.

Mrs. Couch was lying face up in the bathtub. RP 2406. There were several inches of bloody water in the tub, and she was naked from the waist down. RP 2398. There was bloody tissue directly below her vagina on the bottom of the bathtub. RP 2688-89. Her vaginal area was covered with a smeared white substance and appeared to have been scrubbed. RP 2406. There was a strong chemical smell in the bathroom. RP 2407.

Mrs. Couch's face was covered with several soaking wet towels, which were the source of the strong chemical smell. RP 2696-97. There was an empty can of "Goof Off" in the bathroom, which was later determined to be the source of the smell and the substance that soaked the towels on Mrs. Couch's face. RP 2432. When the towels were removed so Mrs. Couch's face could be seen, her skin had been chemically burned and was "sloughing" off. RP 2687-88. Mrs. Couch's nostrils were full of a white substance. RP 2729-30.

During autopsy, it was determined that Mrs. Couch suffered a large and significant laceration of her vagina at the innermost wall. RP 2717-19. That injury was made by a foreign object that had penetrated her vagina and occurred while Mrs. Couch was alive. RP 2720-21. Mrs. Couch inhaled a significant amount of fumes from the Goof Off cleanser, suffocating her to death. RP 2731. She had 21.2 mg/l of xylene in her bloodstream at the time of her death, where any amount over 3 mg/l can be fatal. RP 2674, 2677-78. Mrs. Couch also had damage to her throat, including a broken hyoid bone that was evidence of being strangled to death.⁵ RP 2730-33. Mrs. Couch was alive when she was in the bathtub, as evidence by her bleeding and the fact that she inhaled xylene from the Goof Off on the towels. RP 2733-34.

The morning Mrs. Couch was discovered dead, the defendant had cigarettes to smoke, where the night before he had been borrowing them from his brother. RP 2528. The cigarettes were Kool Mild cigarettes, which the defendant had never been seen smoking before that day. RP 2528. The defendant also had cans of Coke and Pepsi and Bud Light and Budweiser; he had cans of Coke and Pepsi hidden under his bed. RP 2528, 2532-33. He cooked several small packages of meat that did not have a regular store label on them and that were not normally seen at Cozetta Taylor's house. RP 2533-34. After the police arrived across the

⁵ The Couches kept Goof Off in the garage of the house. RP 2979.

street, the defendant washed clothing twice, and what he washed was just the clothing he had been wearing the night before. RP 2535–36.

That same morning, the defendant showed several members of his family a small ring that was a plain gold band. RP 2512–15. The ring did not fit all the way down on his finger but stopped about halfway down his pinkie finger. RP 2617. Cozetta Taylor had never seen that ring before that morning, and the defendant offered to sell the ring to her. RP 2515. Mrs. Couch’s children said she wore a plain gold wedding band, and a picture was found in her wallet that showed her wearing that type of ring. RP 2979. That ring could not be found when Mrs. Couch’s daughter went through her things after her death. RP 2981. When Mrs. Couch was found dead, she was not wearing any jewelry.

During a search warrant served on the Taylor residence,⁶ police recovered the packaging from the meat, cigarette cartons, and cans of Pepsi. The meat and cigarettes were purchased from the Ft. Lewis commissary, where Mrs. Couch shopped, and receipts found in the Couch residence showed the recent purchase of similar items. RP 2973–74. Mr.

⁶ The search warrant was obtained after multiple members of the defendant’s family were interviewed. Those interviews also gave the police probable cause to search for a pair of Sears-brand “Die Hard” boots, which would yield DNA from tiny blood stains that would inculpate the defendant in the stomping death of Jane Hungerford-Trapp in April of 1996. The defendant was eventually charged with and convicted of Murder 2 in 2006, a conviction which was presented to the jury in this penalty phase and has been affirmed on appeal. *State v. Davis*, 146 Wn. App. 1037, *rev. denied*, 165 Wn.2d 1030 (2009).

Couch smoked Kool Mild cigarettes. RP 2974. Mrs. Couch's fingerprint was found on one of the cigarette cartons. RP 2777, 2790-91.

The defendant's tennis shoes were also collected from his mother's house. RP 2771-72. The shoes had a white powdery substance on them, which was chemically tested to be consistent with Comet cleanser. RP 2810. The shoes also had small blood stains on them. RP 2818-24. DNA profiles were obtained from Mrs. Couch's blood, from the defendant's blood, and from the blood found on the defendant's tennis shoes. RP 2914. That DNA processing determined the defendant was excluded as the source of the blood, but Mrs. Couch was not. RP 2918-19; *see also* Plaintiff's Exhibit 219 (table setting out probabilities of a random match).

The defendant's family also told police the defendant watched the police presence at the Couch home that morning. At one point he saw a woman that was also a neighbor of the Taylors and Couches talking to police, and he made the statement: "that bitch [is] next." RP 2605 (quote of Lisa Taylor at first trial in 1998).

After the defendant was in jail, he was in the same "tank" as an inmate named Shelby Johnson. RP 2838. The defendant and Johnson had a conversation about the newspaper one day. RP 2838-39. The defendant was "agitated" about something he thought was in the paper. RP 2841. Johnson did not turn over the newspaper immediately, and the defendant said: "I may have killed the old fucking bitch, but I did not rape the old

bitch.” RP 2843. “If the paper says I raped the old bitch, I am gonna file a suit against them.” RP 2843.

b. Facts relating to penalty phase hearing

The State presented the defendant’s criminal history to the jury, which included convictions for second degree robbery in 1986, second degree perjury in 1986, fourth degree assault in 1998, second degree assault with a deadly weapon enhancement and first degree criminal trespass in 1990, driving without a license in 1992, third degree theft in 1992, driving without a license in 1993, domestic violence violation of a protection order in 1995, and second degree murder in 2006.⁷ RP 2954–2967; RP 3080–82; Plaintiff’s Exhibits 193–193A, 194–196, 198–200, 221–221A.

The defendant put on a case in the penalty phase. In that case, the defense called Richard Kolbell, Ph.D, Dr. Barbara Jessen, Dr. Zakee Matthews, Kenneth Muscatel, Ph.D, Cozetta Taylor, and Donnie Cunningham.

Dr. Kolbell, a neuropsychologist, testified that he gave defendant a battery of tests to assess his ability to concentrate, pay attention, track conversations, reason, problem solve, exercise judgment, make decisions and control impulses, as well as testing his memory and language function. RP 3096–99, 3141–42. After this testing, Dr. Kolbell concluded

that defendant's full scale IQ was 68, which is in the "borderline to mildly impaired" range. RP 3100. But when Dr. Kolbell took into account how defendant actually functions on a daily basis, he concluded that defendant "is better characterized as functioning in the borderline range than the impaired or mentally retarded range." RP 3108, 3153-55. Dr. Kolbell testified that standard IQ tests are reformatted about every 15 years to take into account better education and information sources that were not available in the past as far as establishing a "norm" and that giving a person a test formatted for an outdated norm will produce an inaccurate result. RP 3106. Dr. Kolbell did not use the same test as had been given defendant in the past. RP 3111.

As a result of his testing, Dr. Kolbell diagnosed defendant as having a "cognitive disorder, not otherwise specified," which he said meant the many of the defendant's mental abilities were impaired. RP 3118. Dr. Kolbell also diagnosed defendant as having an anti-social personality disorder. RP 3119. Dr. Kolbell acknowledged that doctors examining defendant in the past thought that he was malingering and that he was trying to present himself as more impaired than what he was. RP 3158-61. Dr. Kolbell opined that defendant has the ability to follow the rules and that he knows right from wrong. RP 3167. He testified that people with antisocial personality disorders may be persistent liars, have

⁷ This murder was committed in April of 1996.

recurring difficulties with the law, violate the rights of others, have an extreme sense of entitlement, engage in aggressive and violent behavior, have a low tolerance for boredom, lack remorse for hurting others, and show impulsiveness. RP 3169-70. Dr. Kolbell agreed that all of these descriptors could be applied to defendant. RP 3170. Dr. Kolbell testified that he wasn't retained to assess defendant's cognitive abilities at the time of the crime but what they were in 2006. RP 3177. Dr. Kolbell agreed that from a review of the police report, it appeared defendant had very goal directed behavior when committing the crimes against *Mrs. Couch*. RP 3179-81. Dr. Kolbell agreed that the circumstances of the crime as well as defendant's efforts to destroy evidence showed a level of cognitive functioning. RP 3180-81.

Dr. Barbara Jessen testified that an MRI taken in 1997 showed no physical abnormalities with defendant's brain. RP 3208. Defendant also submitted to an EEG in 1997, which examines electrical activity in the brain. RP 3209-17. The EEG showed that defendant had generalized moderately severe slowing of his electrical activity. RP 3217. Dr. Jessen testified that such slowing could be present from birth, could be the result of infection or trauma to the brain, it could be due to medications, or from past alcohol and drug abuse or diabetes. RP 3217-3219, 3226. At the time of the EEG, defendant was on medications that would account for the decreased electrical activity. RP 3218. Defendant also reported prior alcohol and cocaine abuse that would account for the decreased activity.

RP 3219. Dr. Jessen testified that you could not make a definitive diagnosis as to the cause by looking at the EEG. RP 3219. Dr. Jessen testified that when she interviewed the defendant in 1997, he was alert and oriented; he had no difficulty with his speech or in communicating with her. RP 3219-22. Dr. Jessen concluded that there was no objective evidence that defendant had any neurological deficits of a gross nature. RP 3228.

Dr. Zakee Matthews, a psychiatrist, testified the defendant had “a major mental illness” and “a cognitive disorder.” RP 3296. Dr. Matthews said the defendant’s cognitive disorder meant that “his brain is not functioning as your and my brain would be functioning” and “he has difficulty processing, organizing information.” RP 3256. Dr. Matthews based his opinion on the defendant’s poor performance in school, including difficulty following through with tasks and learning difficulty; in the doctor’s opinion, this cognitive disorder or learning disability was a sufficient basis to diagnose a “mental illness.” RP 3241–44. Dr. Matthews could not state with reasonable psychiatric certainty that defendant suffered from dementia or that he was mentally retarded. RP 3287. Dr. Matthews did not diagnose defendant as having schizophrenia. RP 3276, 3278. Dr. Matthews acknowledged that the manner in which defendant committed his crime against *Mrs. Couch* did not show evidence of disorganized behavior. RP 3307-08.

Dr. Muscatel, a clinical psychologist, testified about his examination and testing of the defendant; his opinion was that defendant had a cognitive disorder and psychotic disorder. RP 3356-75, 3396-98. He discussed the differences in IQ scores that resulted from different testing being done by 3 different mental health professionals (Drs. Cripe, Kolbell, and himself), even though a couple of the tests were done just a few months apart; he discussed factors that could or could not account for these differences. RP 3382-94. Dr Muscatel did not find defendant to be mentally retarded but stated he did test in the "borderline intellectual range." RP 3394-96. Dr. Muscatel included a second diagnosis of "psychotic disorder not otherwise specified by history" based solely upon defendant's self reporting that he has auditory hallucinations and paranoid thoughts. RP 3399. Dr. Muscatel also diagnosed a personality disorder with antisocial features. RP 3376, 3401. Dr. Muscatel indicated that he would classify defendant as having mild to moderate neuropsychological difficulties and that there are thousands, if not millions, of people in this country that have similar disabilities. RP 3403.

In addition to this evidence regarding defendant's mental condition, the defense admitted defendant's school records showing that he took special education classes. RP 3350; Defendant's Exhibit 223. He also presented testimony from his mother and brother.

Cozetta Taylor, defendant's mother, testified that defendant was born in 1959, the fourth of her seven children. RP 3419-21. The

defendant's father, George Davis, left in 1960 and had no part in raising defendant. *Id.* She testified that he was put in some special education classes and that he did "sometimes okay" in these. RP 3423. Sometime in 1966 or '67, Mr. Jones came into defendant's life in a surrogate father role. RP 3424-25. Mr. Jones was strict with the children and would give "whoopings" with a belt for misbehavior; defendant got the most of these. RP 3425. Ms. Taylor testified that defendant stayed in school until the eleventh grade then went into the Army for several years. RP 3427-28. Defendant was proud of his military service. RP 3431. She indicated that most of her children and numerous grandchildren live locally and that it is a close family. RP 3431-33. She testified that she loves her son very much despite what he has done. RP 3431.

Donnie Cunningham, defendant's younger brother, testified that he was very close with the defendant and they would do sports and "everyday normal kid stuff" together. RP 3434-35. He indicated that his older brother was behind other kids in school and did not have a lot of friends there; he suffered some taunting-being called slow. RP 3435-36. Mr. Cunningham also described Mr. Jones as a strict disciplinarian; he testified that both he and defendant got "whoopings," but that defendant got more, usually for not doing something he had been told to do. RP 3437-38. He testified that after Mr. Jones passed, that defendant started getting into trouble in small ways, but then defendant went into the Army. RP 3439. Defendant later lived with his brother in Renton for about a year;

defendant got a job which he kept until the company downsized and he was laid off. RP 3439-42. Mr. Cunningham testified that -despite what defendant has done - he still loves his brother. RP 3442. Mr. Cunningham saw his brother the night he murdered Ms Couch; he did not see anything about his brother's mental condition that night which caused him any concern. RP 3442-45.

In rebuttal, the State presented the testimony of Tacoma Police Department Sgt. Tom Davidson. RP 3455 – 3566. Sgt. Davidson testified about his contact with the defendant just a few days after Mrs. Couch was murdered, saying the defendant understood his rights, made eye contact with the person to whom he was speaking at the time, and was able to change the subject without appearing confused or losing track. RP 3464–66. In that interview, which included four different detectives and lasted about two and one-half hours, the defendant never did anything to give Sgt. Davidson any question about his mental functioning. RP 3463, 3466.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR RECUSAL THAT WAS BASED ON EX PARTE COMMUNICATION FROM THE JUDGE TO THE STATE.

The defendant asked the trial court to recuse itself from presiding over this matter based on "ex parte communication with the State," which made the trial court appear to be biased. The trial court denied that

motion, which the defendant now claims was error. That claim should fail.

The term “ex parte communication” is defined as “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)). The term “ex parte” is further defined as “[d]one or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested; of or relating to court action taken by one party without notice to the other.” *Watson*, at 579 (quoting *Black’s Law Dictionary*, at 616).

Communications between the court and one party are prohibited both by the Rules of Professional Conduct and the Code of Judicial Conduct.

Judges should accord 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.

CJC 3(A)(4). Further, the Judicial Code requires:

Judges should disqualify themselves in a proceeding in which their impartiality might be reasonably questioned.

CJC 3(C)(1). Read in conjunction, these two provisions appear to suggest the primary purpose of the prohibition against ex parte communication is for the court to avoid the appearance of bias or unfairness.

When a party requests the court disqualify itself, the standard is not actual prejudice; the appearance of partiality is sufficient to erode public confidence in the judicial system. *Sherman v. State*, 128 Wn.2d 164, 205, 905 P.2d 355 (1995). The test for partiality is an objective test that uses a reasonable person standard and assumes that person knows all the facts. *Id.*, at 206. Ultimately, not all ex parte communication warrants the trial court's disqualification. If a reasonable person with knowledge of all the facts would question whether the judge was still impartial based on some action taken or not taken, the judge should recuse himself from further involvement in the case. If a reasonable person with knowledge of all the facts would conclude the trial court was still impartial in the case, the judge should not have to recuse himself.

In the instant case, the defendant requested the trial court recuse itself from further proceedings in this case. Defendant's Motion for Recusal, CP 655; Memorandum in Support of Motion for Recusal, CP 637 – 654. The State filed a response. State's Response to Motion for Recusal, CP 656 – 661. On November 3, 2006, the court held a hearing on the defendant's motion. Verbatim Report of Proceedings, hereinafter

“11/3/06 RP,” 1 – 28. The court set forth written findings of fact and conclusions of law denying the defendant’s motion. Findings of Fact and Conclusions of Law on Motion for Recusal for Ex Parte Contact, CP 943 – 948. The defendant’s motion concerned contact between the court and one of the deputy prosecutors on October 24, 2006.

That morning, the judge’s court reporter contacted one of the deputy prosecutors to tell him to come to the courtroom at 1:30 p.m. that afternoon. (The facts below come from the parties’ briefs.) Shortly before that time, the judge saw the other deputy prosecutor in the case in a public hallway. The court required the deputy prosecutor to follow him to chambers, where the court directed the deputy to complete a scheduling order setting a new trial for the beginning of the penalty phase hearing. The court directed the deputy prosecutor to sign the order acknowledging he had received it, and the court ordered the deputy prosecutor to provide a copy of the order to defense counsel. The deputy prosecutor complied with the court. During the time the deputy prosecutor was in the judge’s chambers, there was no conversation between them about the substance of the case, nor was there any discussion about the State’s opinion about the action being taken by the judge.

The State concedes the contact between the judge and the deputy prosecutor comes within the definition of ex parte communication. The

question in this case is not simply whether the court engaged in ex parte communication, however. The question is whether a reasonable person with knowledge of all the facts would conclude the court's action causes it to appear biased or unfair. The answer to that question is no.

In January of 2006, the trial court signed an order continuing the penalty phase hearing on defense motion to the date of January 8, 2007. *See* Order Continuing Penalty Phase Hearing for the Final Time, CP 621. On October 24, 2006, the court directed the State to prepare an order that changed the date of the penalty phase hearing. *See* Scheduling Order, CP 622. There is no allegation being made that the court engaged the deputy prosecutor in any discussion about the case, particularly the scheduling of the penalty phase hearing. The court simply used the deputy prosecutor as the person to write down the dates the court had chosen on its own initiative. Nothing happened during the time the deputy prosecutor was completing the order that related to the case itself. The deputy prosecutor's actions were no different than if the court had used its judicial assistant to fill out the scheduling order and provide it to the parties.

The critical factor that is missing from the defendant's claim of error here is the existence of any appearance of unfairness. Neither the State nor defense was consulted about the court's decision to change the date of the penalty phase hearing. Neither party was aware the court was

considering it until the court ordered its decision reduced to writing.

There is no argument to be made that the State benefited from the court's action or that the defendant suffered from it. The facts are the State was not seeking an accelerated penalty phase hearing date, and the defense was not seeking an accelerated penalty phase hearing. The court's action affected each party equally. If a reasonable person were told those facts, it could not conclude the trial court was biased or unfair towards one party.

The court's actions in the instant case gain context when compared with several other situations. In one, a trial court judge was reviewing an administrative judge's decision to terminate a doctor employed by the State on grounds he was using drugs. *Sherman v. State*, 128 Wn.2d 164, 905 P.2d 355 (1995). While hearing the case, the judge directed an employee to gather information about how a doctor is monitored when recovering from drug addiction. The Washington Supreme Court found this action should have resulted in recusal as the information received by the judge, even if inadvertent, was relevant to an important issue in the case before him at the time. *Sherman*, at 206.

Another case where the question of whether ex parte communication creates an appearance of partiality in which a judge should have recused himself arose in the context of Justice Richard Sanders visit to the Special Commitment Center (SCC) on McNeil Island. *In re*

Discipline of Richard Sanders, 159 Wn.2d 517, 145 P.3d 1208 (2006).

Justice Sanders visited the SCC while several residents had cases challenging their detention pending before the Washington Supreme Court. *Sanders*, at 521. While there, Justice Sanders spoke with residents, several of whom had cases pending, about their ability to control their sexual urges; volitional control was an issue before the court on the pending cases. *Sanders*, at 522. The Washington Supreme Court said Justice Sanders' actions "created serious concern . . . about the appearance of partiality." *Sanders*, 159 Wn.2d at 523.

The key factor in these cases appears to be whether the judge has communication that directly relates to the subject matter of the case that is pending in the court. If so, the judge should recuse himself from further involvement in the case. But if the communication does not affect the court's determination of any issue, then even if the communication should not have occurred, recusal is not necessary because the trial court's impartiality cannot reasonably be questioned.

In the instant case, the communication from the court to the deputy prosecutor was a direction to reduce a previously made decision to writing and to provide the resulting order to the other side. The communication from the court was not for the purpose of obtaining any information about the case. There was no information exchanged during the communication

that affected the court's decision or that caused the decision to be made one way or another. At the time of the communication, there was no motion pending before the court about the schedule of the penalty phase hearing. In fact, the communication itself simply informed the State of the court's decision and ordered the State to convey that same information to the defense. The court could have, and should have, chosen a different means to communicate its decision to change the date of the penalty phase hearing, but the specific manner chosen affected both parties the same and does not create an appearance of partiality.

The court's continuing impartiality can also be seen in its actions after the ex parte communication occurred. After denying the defendant's motion to recuse itself, the trial court granted a motion, brought by the defense and agreed to by the State, to continue the penalty phase hearing, not just back to the date that had originally been set, but to a date further out that the defense sought.

The trial court did not violate the appearance of fairness, or create an appearance of partiality, when it communicated its decision to change the date of the penalty phase hearing to the State without defense counsel present. The court's denial of the defendant's motion to recuse itself for ex parte communication was proper and should be upheld.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN EXCUSING TWO JURORS FOR CAUSE SO THAT DEFENDANT'S CASE WAS TRIED BY A FAIR AND IMPARTIAL JURY.

The Sixth Amendment guarantees a defendant the right to a trial by a fair and impartial jury. *State v. Brett*, 126 Wn.2d 136, 157, 892 P.2d 29 (1995)(citing *State v. Rupe*, 108 Wn.2d 734, 748, 743 P.2d 210 (1987), *cert. denied*, 486 U.S. 1061 (1988)). To ensure this right, a juror may be excused for cause if his views would “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” *State v. Hughes*, 106 Wn.2d 176, 181, 721 P.2d 902 (1986) (quoting *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S. Ct. 844, 83 L. Ed 2d 841 (1985)); *see also* RCW 4.44.170(2).

In death penalty cases improper removal of a member of the venire for cause is scrutinized more closely where removal is based on that person's opposition to the death penalty. *See Gray v. Mississippi*, 481 U.S. 648, 107 S. Ct. 2045, 95 L. Ed. 2d 622 (1987). In *Witherspoon v. Illinois*, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968), the Supreme Court held that “a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.” 391 U.S., at 522. The defendant showing a juror's exclusion

done in violation of the principles set forth *Witherspoon*, is entitled to a new penalty hearing. *Davis v. Georgia*, 429 U.S. 122, 97 S. Ct. 399, 50 L. Ed. 2d 339 (1976). But when a juror is erroneously excluded for cause for reasons other than her views on capital punishment, defendant is not entitled to the same automatic remedy of a new proceeding. As a general rule, a trial court's erroneous venire rulings do not constitute reversible constitutional error "so long as the jury that sits is impartial." *United States v. Martinez-Salazar*, 528 U.S. 304, 313, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000)(quoting *Ross v. Oklahoma*, 487 U.S. 81, 88, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988)); see also *United States v. Prati*, 861 F.2d 82, 87 (5th Cir.1988)("Only in very limited circumstances ... will such an unintentional mistake warrant reversal of a conviction."). In *Ross*, the Supreme Court stated:

We decline to extend the rule of *Gray* beyond its context: the erroneous "*Witherspoon* exclusion" of a qualified juror in a capital case. We think the broad language used by the *Gray* Court is too sweeping to be applied literally, and is best understood in the context of the facts there involved.

Ross, 487 U.S. at 87-88, 108 S. Ct. 2273 (internal citation omitted)

When the trial court's erroneous exclusion is not founded in *Witherspoon*, then the pertinent inquiry is that set forth in *Ross*: whether the jurors that actually sat were impartial as required by the sixth amendment. *Jones v. Dretke*, 375 F.3d 352, 356 (5th Cir. 2004).

- a. The trial court acted within its discretion in excusing Juror 1 on the State's challenge for cause.

The defendant argues the trial court abused its discretion in excusing Juror 1, whom the State challenged for cause. This argument should be rejected. The record supports the conclusion that the juror's feelings about being personally involved in a death decision would have prevented or substantially impaired her ability to perform her duty.

The process of "death qualifying" a jury in a capital case has consistently been upheld by the United States Supreme Court and has specifically been upheld in Washington. *State v. Gentry*, 125 Wn.2d 570, 634, 888 P.2d 1105 (1995)(citations omitted). Attorneys may question a prospective juror about the death penalty and challenge the juror for cause if the juror's views on capital punishment would prevent or substantially impair the juror's performance of his or her duties. *Gentry*, 125 Wn.2d at 634. It is not required that the juror's bias be "unmistakably clear" before dismissal for cause is permissible. *Witt*, 469 U.S. at 424-25, 105 S. Ct. 844 (rejecting the test set forth in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968)). A trial judge can dismiss a juror when "left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Witt*, 469 U.S. at 425-26, 105 S. Ct. 844; *State v. Gregory*, 158 Wn.2d 759, 813, 147 P.3d 1201, 1230 (2006). The issue for the trial court is whether a juror can

“ultimately defer to the rule of law” despite having some scruples about capital punishment. *Gregory*, 158 Wn.2d at 814.

Ultimately, the determination of whether a juror can set aside their personal feelings and follow the law involves a factual determination about the juror’s credibility. *Id.* This Court and the United States Supreme Court have recognized that a reviewing court must give deference to a trial court’s factual finding that a prospective juror’s views on the death penalty would prevent the juror from trying the case fairly and impartially. *Wainwright*, 469 U.S. at 425-26; *State v. Gregory*, 158 Wn.2d at 813; *Gentry*, 125 Wn.2d at 634. “[T]he manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. . . .” *Wainwright*, 469 U.S. at 428 n.9 (quoting *Reynolds v. United States*, 98 U.S. 145, 156-57, 25 L. Ed. 244 (1879)). “The trial judge is in the best position upon observation of the juror’s demeanor to evaluate the responses and determine if the juror would be impartial.” *Brett*, 126 Wn.2d at 158 (citing *Rupe*, 108 Wn.2d at 749).

Accordingly, a trial court’s ruling in a capital case on a challenge to a prospective juror for cause will not be reversed absent a manifest abuse of discretion. *Gregory*, 158 Wn.2d at 813-14; *Gentry*, 125 Wn.2d at 634. “The question is not whether [the reviewing court] might disagree with the trial court’s findings, but whether those findings are fairly supported by the record.” *Gentry*, 125 Wn.2d at 635 (citing *Wainwright*,

469 U.S. at 434).

All prospective jurors in this case were required to fill out a lengthy written questionnaire. *See* CP 1168-1188. The questionnaire included extensive questions regarding the jurors' views on the death penalty. *Id.* The questionnaires were completed on April 3, 2007. CP 1128. The jurors were then questioned individually by the attorneys and the court outside the presence of other jurors over several days. CP 1129-43.

In her questionnaire, Juror No. 1, who was twenty years old, indicated that she was neutral about the death penalty and that she hadn't given it much thought. Juror No.1 Questionnaire at p. 5. She indicated that she thought the death penalty was generally appropriate in murder cases. *Id.* at pp. 6, 8. In her questionnaire she indicated that she thought she would be personally capable of voting to impose the death penalty. *Id.* at p.9.

A week after completing her questionnaire, Juror No. 1 was brought in to court for individualized questioning. RP 304-308. She indicated that she still thought that the death penalty was an appropriate punishment for murder but that, as she thought about it, she became unsure if she wanted to be in a position where she had to decide someone's fate. RP 315. She indicated that she would probably vote for life because she would not want to have it on her conscience that she was sending someone to his death. RP 318, 333. When the court asked Juror

No. 1 which of the following two statements best described how she felt:
1) under no circumstance would you consider voting for the death penalty;
or 2) you could consider the death penalty in an appropriate case; Juror
No. 1 indicated that the first statement better articulated her position. RP
333-34. Upon questioning, Juror No 1 gave some seemingly contradictory
answers as to her views about the death penalty and whether she would be
able to return a death verdict. RP 352. But ultimately, under questioning
by defense counsel, Juror No. 1 indicated clearly that while she felt the
death penalty was appropriate for serial killers, such as Ted Bundy, she
could not personally make such a decision. RP 367.

DEFENSE COUNSEL: Well, there are cases that are
appropriate?

JUROR NO. 1: Yes.

DEFENSE COUNSEL: Okay. And what you are saying is
—tell me if I’m wrong—is that even in an appropriate case,
you couldn’t?

JUROR NO 1: I don’t think—I don’t think I could
personally do it, no. I don’t think I would feel comfortable
with making that decision.

DEFENSE COUNSEL: Under any circumstance?

JUROR NO. 1: Under any.

DEFENSE COUNSEL: Pardon?

JUROR NO. 1: Yeah, under any circumstance.

RP 367-68. The court granted the State's challenge for cause shortly after her responses to these questions. RP 368-69.

The record supports the trial court's finding that the juror's views about the death penalty would have substantially impaired her ability to follow the court's instructions. The trial court had the opportunity to observe the juror's demeanor as she responded to questions from the attorneys. As the questioning progressed it became clear that while Juror No. 1 did not have a philosophical opposition to the death penalty on an abstract level, on a practical level she could not vote for a death verdict. Juror No. 1 thought that she would be incapable of returning a death verdict - *even in a situation where the penalty was appropriate*- because of how she would feel about her personal involvement in such a decision. Juror No. 1, indicated that she would feel "bad" or "guilty" if she did so and that her personal feelings would get in the way. RP 352, 368.

It is not unreasonable for there to be a degree of disconnect between a person's intellectual or abstract beliefs and that same person's ability to act in conformity with those beliefs on a concrete level. A person might believe that employment as a soldier, law enforcement officer, or firefighter is a noble and honorable profession, yet know that, personally, she lacks the courage needed to pursue such a calling. A person might believe that citizens should have the right to own guns, yet be completely uncomfortable with the idea of owning a gun herself, or having one in the house. A trial court is not limited to disqualifying only

those jurors who would never (or always) vote for the death penalty, *Witt*, 469 U.S. at 421, but can excuse those who cannot set aside their own predilections in deference to the rule of law. *Lockhart v. McCree*, 476 U.S. 162, 176, 106 S. Ct. 1758, 1766-67, 90 L. Ed. 2d 137 (1986). Juror No. 1 recognized that while she was not philosophically opposed to the death penalty, she was uncomfortable with having any personal participation in the death decision. Her focus was not on following the law, but rather how she would feel about having a hand in saying that someone else should die. Juror No. 1's responses indicate that she could not put aside her own personal feelings and follow the law. Such answers demonstrate that this juror held personal views that would substantially impair her ability to perform the duties of a juror. The trial court did not abuse its discretion in removing her for cause.

- b. The trial court acted within its discretion in excusing Juror 39 for cause based upon her having information that the defendant had been shackled in the prior proceeding.

RCW 4.44.170 sets forth the grounds upon which jurors may be removed for cause. Jurors may be removed for cause if they: (1) possess a state of mind "which satisfies the court that the challenged person cannot try the issue impartially and without prejudice," (2) if they are related to one of the parties, (3) if they have sat on a jury in a previous trial of the same case, or (4) if they have an interest in the litigation. RCW 4.44.170,

.180. The trial court's dismissal of a prospective juror in a capital case will not be reversed on appeal absent a manifest abuse of discretion. *State v. Elmore*, 139 Wn.2d 250, 278-79, 985 P.2d 289 (1999). An abuse of discretion is present only if there is a clear showing that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons." *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995). A decision is "manifestly unreasonable" if the court adopts a view that no reasonable person would take despite applying the correct legal standard to the supported facts. *State v. Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 922 (1990). A decision is based "on untenable grounds" or made "for untenable reasons" if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

Here the trial court properly excused Juror 39 because she possessed information about the first trial that would prejudice her ability to fairly do her duty in deciding whether the death penalty would be imposed. The reason for this excusal is rooted in the procedural history of this case.

This case was back in the trial court for a new penalty phase hearing because the defendant had been successful in his collateral attack on his sentence. *In re PRP of Davis*, 152 Wn.2d 647, 101 P.3d 1 (2004). Defendant had been shackled in the first trial without the trial court having

found that extraordinary circumstances⁸ existed to justify such action. *Davis*, 152 Wn.2d at 693-98. After a reference hearing on defendant's personal restraint petition, this Court determined that despite efforts to hide the defendant's shackles "one juror saw Davis in shackles for brief glimpses on two occasions during the guilt phase [and that n]o jurors saw Davis in shackles during the penalty phase." *Id.* at 704. The Court described these glimpses as being "partial and fleeting." *Id.* at 705. The Court found that this un-objected to shackling was harmless as to the guilt phase because there was overwhelming evidence of defendant's guilt. *Id.* at 698-702. But in addressing whether this error could be harmless as to the penalty phase, the Court noted that the inquiry changed with regard to the penalty phase and became:

'[W]hether there is a reasonable possibility that, absent errors, the sentencer-including an appellate court, to the extent it independently reweighs the evidence-would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.' Prejudice is shown when there is a reasonable probability that, absent the error, the jury 'would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'

Davis, 152 Wn.2d at 702, quoting *Strickland v. Washington*, 466 U.S. 668, 695, 104 S. Ct. 2052, 80 L. Ed. 2d 674(1984)(internal citations

⁸ Shackling may be permissible when there is evidence which indicates that the defendant poses an imminent risk of escape, that the defendant intends to injure someone in the courtroom, or that the defendant cannot behave in an orderly manner while in the courtroom. *Davis* 152 at 695.

omitted)(brackets in original). In the penalty phase, a jury properly considers a defendant's character and tries to assess his future dangerousness or the probable lack of future dangerousness which is a far more subjective task than what a juror is asked to do in the guilt phase. *Davis*, 152 Wn.2d 704. A defendant is prejudiced by a jury seeing him in shackles during trial because it might conclude that the judge views the defendant as a dangerous man with uncontrollable behavior. *Id.* at 693, 705. The court in *Davis* concluded that the one juror's two partial and fleeting glimpses of Davis's shackles was prejudicial and that it could not find that this error was harmless as to the penalty phase; the court remanded for a new penalty hearing. *Davis* at 705.

In trying to seat a new jury for this second penalty phase hearing, the following occurred during the questioning of Juror No. 39. Both prosecution and defense counsel had questioned this juror and passed her for a challenge for cause. RP 859, 862. Before leaving the courtroom, Juror No. 39 indicated that she had a question and then disclosed that her husband had talked to her about the case and that she heard something before she had a chance to get him stopped. RP 862-864. She stated that she heard the following:

He said that he thought the case was about that the defendant was seen in leg irons and that had influenced the decision of a jury member during the original trial and that he thought that this is what this case was about is that there were leg irons involved or something. And that's all I heard and all I know because I stopped him.

RP 864. She stated that she had not discussed this with any of the other jurors. RP 872. After the juror was sent back to the jury room, the court discussed this development with counsel. Neither side moved to excuse the juror for cause. RP 866-867. The court, however, expressed its concern that this juror had virtually the same knowledge about the defendant being in shackles as what had been known by the juror in the first hearing and that, further, the Supreme Court had found such knowledge to be reversible error; the court articulated its belief that it was risky to proceed with her on the jury and suggested that it would be best to excuse her. RP 867-68. Neither side voiced objection to the court's proposal to excuse her for cause, although neither party thought that it was required. RP 868-70. The court reached its decision stating:

It's unfortunate, first of all that [her husband] went online to find this information, and further that she couldn't stop him fast enough to keep him from talking about what he found on the Internet. But, we are where we are and that includes the very thing that they said was error, reversible error.

We have a unique situation here in this type of a proceeding, and I'm just, out of—as they always say—an abundance of caution, I'm going to excuse her

So, bring her out, please. One more thing, for the record. I think the record, other than this, would reflect that this juror is intelligent, could be fair to both sides, would listen to the evidence and make a conscientious decision based on the evidence that is heard in this proceeding, but I can't take a chance and not follow the ruling of the court that she may be tainted because she knows at one time, in one

proceeding, that Mr. Davis was seen in shackles, which carries with it, the court has said, an inference of he is dangerous.

RP 870-71. Thus, it is clear that the trial court excused Juror 39 not because of her beliefs for or against the death penalty under *Witt* and *Witherspoon*, but because she had outside⁹ information that could improperly influence her decision on whether to return a death verdict.

This record does not demonstrate any abuse of discretion. It is clear that the trial court was trying to insure that the jury in defendant's case was free from any improper and prejudicial information that could taint the deliberative process in deciding whether to impose the death penalty. The trial court was also concerned that failure to remove the juror might result in a second reversal leading to a third penalty phase. The court noted that the juror who had seen the shackles in the first trial had testified that this had had no impact on his deliberation, but this testimony had not mattered to the Supreme Court's analysis. RP 866. Defense counsel agreed that from his reading of the decision "the Supreme Court said it doesn't matter whether the judge found this juror credible, it doesn't matter whether the juror said it didn't impact her[, but w]hat mattered was that the juror saw shackles." RP 870. This comment indicates that the defense counsel agreed with the court's reading of the

⁹ Meaning information that would not be adduced during the penalty phase and properly before the jury.

prior ruling that any knowledge of the defendant being shackled would preclude the juror from being able to fairly decide defendant's fate. A trial judge does not abuse his discretion by taking a step that promotes both fairness to the defendant and judicial economy. When the court announced its belief that excusing the juror was the safest course of action and asked counsel for input, defendant not object to the court's proposed action or argue that this juror should not be excused. This is another factor showing that the court was well within its discretion in excusing the juror.

Defendant relies upon *State v. Rupe*, 108 Wn.2d 734, 750, 743 P.2d 210 (1987) and *Patton v. Yount*, 467 U.S. 1025, 1035, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984) to support his claim. Both of these cases stand for the proposition that a juror's knowledge of prior proceedings in the same case does not necessarily establish juror bias requiring excusal for cause. In *Rupe*, the trial court denied Rupe's challenge for cause on a juror who was aware that Rupe had been sentenced to death in a prior proceeding and had successfully appealed that sentence. *Rupe*, 108 Wn.2d at 750. The trial court denied the challenge for cause after the juror gave assurances that he could render a verdict based upon the evidence presented at the hearing. *Id.* This Court did not find the trial court's denial of the challenge for cause to be an abuse of discretion. At issue in *Rupe* was whether a juror's knowledge that a prior jury had come to one conclusion about whether Rupe should receive the death penalty would

override that juror's ability to assess the evidence for himself and come to his own conclusion. After receiving the juror's assurances that it would not, the trial judge was convinced that it would not be a factor and denied the challenge for cause. But in defendant's case, it was not just that Juror No. 39 knew that there had been a prior proceeding, it was that she knew information about the defendant being shackled that should not be known by any juror who would be deciding whether or not defendant should receive the death penalty. This distinguishes the instant case from *Rupe*. Moreover, just because the trial court's denial of the challenge for cause was upheld in *Rupe*, does not mean that the trial court would have abused of discretion in granting Rupe's challenge for cause. *Rupe* does not control the facts presented here; defendant cannot show an abuse of discretion, when the trial court acted to protect the defendant's right to a fair and impartial jury.

Finally, because the removal of Juror No. 39 was clearly for reasons other than her views about the death penalty, any error in excusing her does not entitle defendant to a new penalty hearing. Rather under *Ross*, defendant must show that the jurors who did sit on his panel were not fair and impartial. Defendant makes no claim on appeal that any of the jurors who decided his case were not fair and impartial and should have been removed for cause.

In the case now before the court, Juror No. 39 had information virtually identical to information that this Court had deemed prejudicial to

the penalty phase in an earlier decision *in the same case*. Given the prior Supreme Court holding in *In re PRP of Davis*, the trial court's concern was reasonable and its actions appropriate. Defendant has failed to demonstrate an abuse of discretion in removing Juror No. 39 for cause.

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT EXCLUDED TESTIMONY FROM EULA BROOKS AND LILLIE JONES.

This Court reviews rulings on the admissibility of evidence to determine if the trial court manifestly abused its discretion. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). The same standard of review applies in a capital case as a non-capital case, but in a penalty phase hearing, the court gives the issue "more searching scrutiny." *State v. Gregory*, 158 Wn.2d 759, 849, 147 P.3d 1201 (2006).

Generally, the rules of admissibility are relaxed in a penalty phase hearing, because "[t]he Washington capital punishment statute requires admission at the sentencing phase of 'any relevant evidence which it deems to have probative value regardless of its admissibility under the rules of evidence.'" *State v. Bartholomew*, 101 Wn.2d 631, 645, 683 P.2d 1079 (1984)¹⁰(quoting RCW 10.95.060(3)). The relaxed standards for evidence in a penalty phase are not without limitation, however.

The phrase “any relevant evidence” means evidence that relates to mitigation of punishment. *Bartholomew*, 101 Wn.2d at 645. In a capital sentencing hearing, a “mitigating circumstance” is defined as “a fact about either the offense or about the defendant.” See WPIC 31.07 (citing RCW 10.95.070, see Appendix C). Thus, at a penalty phase hearing, evidence is admissible only if it relates to either the crime or the defendant and is relevant to a determination of mitigation of punishment.

This court has further discussed the limitations on the evidence the defendant may present in a penalty phase hearing, stating: “[m]itigating evidence’ is not defined as any evidence, regardless of its content or relevance, that would disincline the jury to impose the penalty of death.” *State v. Pirtle*, 127 Wn.2d 628, 671, 904 P.2d 245 (1995). Rather, “mitigating evidence is that which ‘in fairness and mercy, may be considered as extenuating or reducing the degree or moral culpability.’” *Pirtle*, at 671 (quoting *Bartholomew*, 101 Wn.2d at 647).

Even relevant evidence is not always admissible in a capital case. Washington follows standards set out by the United States Supreme Court for admission of evidence in a penalty phase. See, e.g., *Bartholomew*, 101 Wn.2d at 645 (citing *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978)).

¹⁰ Subsequent appellate history not listed.

The Eighth Amendment to the United States Constitution allows States to put a limit on the type of evidence that is admissible in a penalty phase hearing of a capital case and the manner in which it is presented. *Oregon v. Guzek*, 546 U.S. 517, 526, 126 S. Ct. 1226, 163 L. Ed. 2d 1112 (2006). And the Washington Supreme Court has held for years that the state constitution also allows for limits on what can be presented in a penalty phase hearing. See *Bartholomew*, 101 Wn.2d at 640 (holding that due process and cruel punishment clauses of the state constitution are offended when evidence is admitted in a penalty phase without regard to evidence rules).

In this case, the defendant wanted to present a digital video recording of Lillie Jones and Eula Brooks during his case-in-chief in the penalty phase. The court heard an offer of proof that included watching each of the videos. RP 3038–3058. After reviewing the interviews, the court found that the videos were inadmissible both because they were not relevant and because they were hearsay. RP 3054–55; 3058. The court’s ruling was proper and should be upheld because the proffered testimony was irrelevant, unreliable, and cumulative evidence.

Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable.” ER 401. In the context of a penalty phase

hearing, evidence is only relevant if it has probative value and relates to the defendant or to the circumstances of his offense. RCW 10.95.060; WPIC 31.07.

Although under RCW 10.95.060, “the court shall admit any relevant evidence which it deems to have probative value regardless of its admissibility under the rules of evidence,” the admissibility is not unfettered. For example, this Court has approved the admission of a polygraph test - categorically inadmissible at trial - in a penalty phase hearing. *Bartholomew*, 101 Wn.2d at 646. However, the *Bartholomew* court held that the trial court can exclude the evidence when it finds that the examiner was not qualified or the test was done improperly. *Id.* Moreover, if the court does admit the polygraph, the examiner must testify in court and be subject to cross-examination. *Id.*

The *Bartholomew* decision indicates that the linchpin of the admissibility of mitigating evidence is its reliability. As such, the evidence being offered, even if the content is relevant, must be presented in an acceptable form. The relaxed rules of evidence do not include eliminating the requirement that the evidence be presented from the witness stand, under oath, and subject to cross-examination. *See* ER 603; ER 612. Each of those requirements is critically important to both the jury’s ability to evaluate the evidence and to the State’s ability to confront

the evidence to give the jury a measure of its true worth. The State found no case in which mitigating evidence was allowed before the jury without being subject to cross-examination by the State.

In the instant case, the defendant attempted to present “testimony” from Eula Brooks and Lillie Jones, two paternal aunts of the defendant. The defendant’s aunts spoke for fifteen to twenty minutes each, with virtually all of it relating to themselves and their immediate family, mother and father, brothers, and the circumstances of their own upbringing. *See* Defendant’s Exhibit 226. That evidence failed any definition of relevance, had no probative value, and was categorically inadmissible, even in a penalty phase hearing.

In the brief moments when Ms. Jones and Ms. Brooks spoke of the defendant, they each expressed ignorance of his having any difficulty in school. *Id.* That information was presented to the witness by the defense mitigation specialist conducting the interview, not stated by the witness being interviewed. Each stated that had she known the defendant was having troubles, she would have tried to help. *See id.* This testimony amounts to “what if” testimony that explains what would have happened some decades past if certain information were known at the time. It not only fails even the broadest definition of relevant, but also lacks any mitigating qualities as related to the defendant or his crime.

Even if the evidence was relevant, it was being offered via the playing of a videotaped interview with a defense investigator, where neither witness took a formal oath and neither was subject to cross-examination. The court was well within its discretion to find that the proffered testimony was not taken by a “qualified” examiner and/or that it was not taken “under proper conditions” as required under *Bartholomew*.

Finally, even if the trial court abused its discretion in finding that the evidence was irrelevant and that the method of presenting the evidence was improper, the court’s error was harmless because the excluded evidence was cumulative. The same information was presented to the jury repeatedly in the penalty phase hearing by witnesses who testified under oath from the witness stand, including the defendant’s mother, Cozetta Taylor, the defendant’s brother, Donnie Cunningham, and the several expert witnesses. *See, e.g.*, RP 3119–20 (Kolbell); RP 3243–44 (Matthews); RP 3422–23 (Cozetta Taylor); RP 3435–36 (Donnie Cunningham). The defendant’s school records were also submitted to the jury as an exhibit. *See* RP 3350 (Defense Exhibit 223 admitted without objection).

The only other possible relevant information came in the form of each woman’s opinion that Cozetta Taylor was a “bad mother” and Cecil Davis “did not have a good childhood.” *See* Exhibit 226. In the context

of the interviews, the opinion appears to be a judgment relating to Ms. Taylor having had multiple children with different men and not being married at the time. Those “good mother” opinions were not relevant, and the “bad childhood” opinions were covered repeatedly, albeit not in identical wording, by multiple witnesses who actually testified. *See, e.g.*, RP 3424–26 (Cozetta Taylor describing defendant getting beaten with a belt by his step-father); RP 3437–38 (Donnie Cunningham describing beatings defendant got from his step-father).

Evidence of whether Ms. Taylor was a “good mother” and whether Cecil Davis had a “bad childhood” was either presented to the jury through multiple testifying witnesses or was available to the defense through witnesses that were local and available, including Cozetta Taylor, Lisa Taylor, Donnie Cunningham, and the defendant’s other siblings who were residing in Washington at the time of the penalty phase hearing. *See* RP 3432 (testimony of Cozetta Taylor that her children all reside in the local area).

Compounding the problematic nature of the proffered testimony was the fact that the defendant’s aunts were never listed on any witness list filed by the defendant in the penalty phase; the fact that the State received notice of the defendant’s intent one week before they were offered to the court; and the fact that in an offer of proof, the defense gave

no explanation for the timing and nature of the actions. *See* RP 3037, 3038-43.¹¹ Thus, for the trial court, the choice was to disallow the evidence, ensuring an appellate issue and a basis to challenge a death sentence; or allow the evidence in its presented form, letting the jury hear “testimony” in the absence of an oath requiring the truth and ensuring the State would have no ability to challenge the subject matter.

A case involving the death penalty is unique and both should be, and is, held to the highest possible standards. Those standards, however, should not be altered to such a degree that the outcome of a death penalty case can be manipulated by anyone involved. The rules that are in place for the procedures that safeguard the presentation and taking of evidence, and the role of the jury, can only remain inviolate if the procedures used ensure the evidence presented is done so in a reliable manner. The trial court in this case properly exercised its discretion when it excluded the video taped interviews of the two persons proffered by the defense.

In sum, a constitutional mandate that the jury not be precluded from considering as a mitigating factor any aspect of a defendant’s character or record is not a *carte blanche* for the defendant to proffer any evidence, in any shape or form, and have it go to the jury. The Eighth

¹¹ The Clerk’s Papers do not contain any Witness List filed by the defendant for the Penalty Phase Hearing in 2007.

Amendment allows states to put a limit on the type of evidence that is admissible and the manner in which it is presented. A court serves as a gatekeeper and decides what evidence is relevant, probative, and reliable to be considered by the jury. This court properly excluded the unsworn video recording of defendant's aunts as the content of their interviews was irrelevant, unreliable, and cumulative.

4. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT ALLOWED THE STATE TO PRESENT THE TESTIMONY OF TACOMA POLICE DEPARTMENT SGT. TOM DAVIDSON DURING ITS REBUTTAL CASE.

In a capital sentencing phase, the State is entitled to put forth evidence in a rebuttal case that rebuts mitigating evidence put forward by the defendant. *State v. Bartholomew*, 101 Wn.2d 631, 642, 683 P.2d 1079 (1984). Rebuttal evidence is limited to evidence that is "relevant to a matter raised in mitigation by defendant." *Id.* at 643. Rebuttal evidence is relevant if it "casts doubt upon the reliability of defendant's mitigating evidence." *Id.* The court should balance the extent to which the proposed evidence tends to rebut the defense evidence against any prejudice to the defendant from its admission, similar to the balancing test done at trial under ER 403. *Bartholomew*, at 643.

In the instant case, the defendant presented a number of witnesses in his case-in-chief in the penalty phase. Dr. Richard Kolbell was called to establish the defendant had a mental disorder. Kolbell said he tested the defendant's ability to concentrate, pay attention, and track conversations, tested his memory and language function, and tested his ability to reason, problem solve, exercise judgment, make decisions, and control impulses. RP 3096-99. Kolbell said his testing was designed to measure the defendant's functional levels as far as ability to converse, follow train of thought, speak coherently and in complete sentences, and track subject matter. RP 3141-42. Kolbell also tested the defendant's IQ as 68, which is in the "borderline" or "mildly impaired" range. RP 3100. As a result of his testing, Kolbell said the defendant had a "cognitive disorder, not otherwise specified," which he said meant the many of the defendant's mental abilities were impaired. RP 3118. Kolbell also said the defendant had an anti-social personality disorder. RP 3119. Kolbell testified his opinion of the defendant's cognitive disorder was based in part on information provided to him by the defendant's family members. RP 3107-08.

The defense also presented the testimony of Barbara Jessen, who said the defendant had an abnormal electroencephalogram in 1997, and although she could not give a reason for it or an explanation for what that

meant to his ability to function normally, she allowed the abnormality could have resulted from prescription medications, prolonged cocaine and/or alcohol use, or diabetes. RP 3206, 3208, 3216–17, 3225–26.

The defense also presented Dr. Zakee Matthews, who testified the defendant had “a major mental illness” and “a cognitive disorder.” RP 3296. Dr. Matthews factored into his opinion the defendant’s poor performance in school, including difficulty following through with tasks and learning difficulty, and said the defendant’s cognitive disorder itself was a mental illness. RP 3241–44. Dr. Matthews said the defendant’s cognitive disorder meant that “his brain is not functioning as your and my brain would be functioning” and “he has difficulty processing, organizing information.” RP 3256. Dr. Matthews said the defendant’s lower IQ, and his slowness at picking up and assimilating information, factored into the mental illness diagnosis, and he said the defendant’s “cognitive abilities have been in question since elementary school.” RP 3295–96.

A capital sentencing hearing is unlike any other proceeding in the criminal justice system in several ways, one of which is the significantly relaxed standard of relevance for proposed mitigating evidence. With such a low standard for admission of mitigating evidence, the State must be afforded some latitude in rebuttal, as cross examination and rebuttal evidence are the only ways for the State to challenge mitigation evidence.

In response to the defense mitigation evidence, the State called Tacoma Police Department Sergeant Tom Davidson. RP 3455 – 3566. The purpose of his testimony was to rebut the testimony presented during the defense case about the defendant's mental status. Sgt. Davidson set out his experience in dealing with suspects and witnesses in investigations, including those of varying degrees of education and mental acuity. RP 3459–63. He also said that he can request a person being booked into jail be seen by mental health professionals to evaluate an observed or apparent mental problem. RP 3462–63. Sgt. Davidson then described his observations of the defendant during an interview with him just a few days after Mrs. Couch was murdered. Sgt. Davidson gave his opinion that the defendant understood his rights, made eye contact with the person to whom he was speaking at the time, and was able to change the subject without appearing confused or losing track. RP 3464–66. During the entire interview, which included four different detectives and lasted about two and one-half hours, the defendant never did anything to give Sgt. Davidson any question about his mental functioning. RP 3463, 3466.

This testimony directly addressed testimony presented in the defense case by Dr. Kolbell, Dr. Mathews, and Dr. Muscatel. Those witnesses had given testimony about the defendant's level of mental functioning, but virtually all of their testimony involved tests given to the

defendant in custody, in some cases years after the crime in 1997 and then interpreted by the witnesses. The witnesses then gave opinions of “major mental illness,” “cognitive disorder,” and “learning disability.” Sgt. Davidson’s testimony set out for the jury how the defendant engaged in an adversarial setting, where he was engaged in a back and forth conversation that jumped around as opposed to filling out test forms while somebody watched him. Also, Sgt. Davidson testified about how the defendant performed “cognitively.” His testimony that the defendant was calm, rational, and completely coherent within just a few days of Mrs. Couch’s murder was relevant to the jury’s determination about whether any of the mental problems described by the defense witnesses were in fact mitigating of his conduct that night.

The court heard a motion to exclude Sgt. Davidson’s testimony and agreed it was proper rebuttal evidence. RP 3446–54. During that hearing, the court did not do a formal balancing test under ER 403, but the subject matter of Sgt. Davidson’s testimony was not inherently prejudicial, like prior bad acts or incriminating statements would be. While the testimony did involve a formal interview in police custody, any potential prejudice was certainly minimized, lessened, or even completely eliminated by the fact that the defendant was before this jury already convicted of murder,

and further by the State eliciting the defendant denied any involvement in Mrs. Couch's killing during that interview.

To the extent the court should not have allowed the State to present the testimony, that testimony was not prejudicial to the defendant. The testimony in many respects mirrored that of the defense experts, as far as the ability to and level of cooperation the defendant showed. The only difference was Sgt. Davidson's opinion that he did not have a concern about the defendant's mental status at the time of the interview. While that testimony was relevant on the question of the weight to give the defense experts, it was not medical or mental health opinion evidence, and given the overwhelming evidence supporting the jury's finding in the penalty phase, the testimony of Sgt. Davidson did not affect the outcome, and any error in the admission of that testimony was harmless beyond a reasonable doubt.

The trial court properly exercised its discretion in allowing the State to elicit the testimony of Sgt. Davidson to rebut evidence presented during the defense case in the penalty phase hearing. That exercise of discretion should be upheld. To the extent the evidence should not have been allowed, that error did not affect the outcome of the penalty phase hearing and was harmless beyond a reasonable doubt.

5. DEFENDANT'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED WHEN THE COURT PROPERLY INCLUDED, IN ITS INSTRUCTION TO THE JURY, STATUTORY MITIGATING FACTORS AND DIRECTED THE JURY TO CONSIDER ANY OTHER RELEVANT MITIGATING FACTORS CONCERNING THE OFFENSE OR THE DEFENDANT.

“[T]he Eighth and Fourteenth Amendments 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. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); *see also Abdul-Kabir v. Quarterman*, 550 U.S. 233, 247, 264, 127 S. Ct. 1654 L. Ed. 2d 585 (2007)(“sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty...”). While the sentencing process is “fatally flawed” if a statute or a judicial interpretation precluded the jury from giving meaningful effect to a defendant’s mitigating evidence, failure to include a mitigating factor in a jury instruction is not necessarily fatal. *See Johnson v. Texas*, 509 U.S. 350, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993); *State v. Gentry*, 125 Wn.2d 570, 888 P.2d 1105 (1995).

RCW 10.95.070 lists eight statutory factors that a jury may consider in deciding whether leniency is merited. The jury may also

consider any other relevant nonstatutory factor. *See* RCW 10.95.070; *State v. Rupe*, 101 Wn.2d 664, 701, 683 P.2d 571 (1984).

Whether or not relevant nonstatutory factors should be included in a jury instruction as a matter of law is an issue to be resolved by the trial court. *See State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984), *appeal after remand* 104 Wn.2d 844, 710 P.2d 196 (1985). “If nonstatutory factors are included, those factors should be supported by case law and the evidence, and should be carefully articulated to avoid commenting on the evidence.” *Gentry*, 125 Wn.2d 570, 650 (*citing* comments to WPIC 31.07).

However, “[t]he preferred manner of instructing the jury on mitigating circumstances is to include whatever *statutory* mitigating factors the defendant requests be included in the instructions, *but not include specific nonstatutory factors.*” *State v. Gentry*, 125 Wn.2d 570, 648, 651, 888 P.2d 1105 (1995)(emphasis added). An instruction which informs the jury that any relevant mitigating factors can be considered and lists, as nonexclusive, the statutory factors set forth in RCW 10.95.070 is proper. *In re Rupe*, 115 Wn.2d 379, 397, 798 P.2d 780 (1990); *cited with approval* in *Gentry*, 125 Wn.2d at 650.

The *Gentry* court specifically reasoned:

There is no constitutional requirement that each relevant mitigating circumstance be the subject of a specific instruction to the jury. The requirement is that such evidence be allowed to be presented to the jury, but a

specific instruction as to each potentially mitigating factor is not mandated. *Johnson v. Texas*, 509 U.S. 350, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993). In *Johnson*, the United States Supreme Court recently held that although youth is a mitigating circumstance that a capital sentencing jury must be allowed to consider, an instruction on youth as a mitigating factor is not mandated so long as the mitigating evidence is “within ‘the effective reach of the sentencer.’” *An instruction which allows the jury to consider as mitigating circumstances any other factors concerning the offense or the defendant that the jury finds to be relevant allows the mitigating factors to be within the effective reach of the jury.*

125 Wn.2d at 650-651 (emphasis added).

In this case, in its instruction to the jury, the court included two statutory mitigating factors - RCW 10.95.070(2) and (6)¹² – and did not include defendant’s proposed nonstatutory factor “whether the defendant suffers from a major mental illness.” RP 3476-3480; CP (Instruction 5). The court’s instruction to the jury unambiguously directed the jury “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 [two statutory factors].” CP (Instruction 6)

¹² The statutory mitigating factors in the court’s instruction to the jury read:
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 (Instruction No. 6).

(emphasis added). Under *Johnson*, *Gentry*, and *Rupe*, *supra*, the court not just instructed the jury properly – it did so in “the preferred manner.”

On appeal, defendant argues that the “but not limited to” language combined with the two statutory factors confused the jury, where the jury did not understand that it could consider any other mitigating factors. Appellant’s Opening Brief, p. 70-71. Defendant’s argument fails because it is unsubstantiated and flies in the face of the plain language of the instruction. Moreover, this Court should presume that the jury properly followed the instructions. *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008); *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990).

Finally, defendant claims the court’s failure to include the nonstatutory mitigating factor in its instruction to the jury precluded him from arguing his theory of the case.¹³ However, defendant’s argument fails because the jury instruction permitted defendant to argue his theory of the case, and the defense counsel did argue that the defendant suffered from a major mental illness, and that the illness was a mitigating factor.

The defense counsel talked about defendant’s mental illness in his opening statement. RP 3088-3089. Defendant also presented testimony of

¹³ “Jury instructions are sufficient when, read as a whole, they accurately state the law, do not mislead the jury, and permit each party to argue its theory of the case.” *State v. Teal*, 152 Wn.2d 333, 338, 339, 96 P.3d 974 (2004); *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

Doctor Richard Kolbell, a forensic psychologist. RP 3090-3188. He testified that defendant had cognitive disorder with multiple etiologies and antisocial personality disorder. RP 3118, 3119, 3164, 3167-3170. Doctor Zakee Matthews, a psychiatrist, opined that defendant suffered from a cognitive disorder, which is a major mental illness, post-traumatic stress disorder, and symptoms of dementia. RP 3255, 3276-3278, 3287, 3293-3294, 3296. In part, he based his opinion on the reports of other psychiatrists who had diagnosed and treated defendant. RP 3251-3254. Doctor Kenneth Mark Muscatel, a clinical psychologist, also diagnosed defendant with a cognitive disorder, a psychotic disorder, a personality disorder, and post-traumatic stress disorder. RP 3374-3377, 3396, 3398.

The defense counsel in closing argument argued that defendant's difficult childhood, low IQ, and various disorders were mitigating factors justifying a sentence of less than death. RP 3544-3549. He emphasized defendant's slow brain activity, depression, and substance abuse, and he specifically argued that defendant's cognitive disorder was a mitigating factor:

All three of the doctors, including the doctor that was retained by the State, all came to the same conclusion, that Cecil has cognitive disorder; that he has a learning disorder, significant; that he has psychotic features. So, I suggest to you, ladies and gentlemen, that these are exactly what the instructions talk about when they talk about mitigating circumstances.

RP 3546-3447. The defense counsel also underscored that the jury could consider any mitigating factor that it found to be relevant:

The law is that you as jurors are to consider anything that you may find relevant. And that's in Instruction No. 6: You are also to consider as mitigating circumstances any other factors concerning the offense or the defendant - - the defendant - - that you find to be relevant.

And then it goes on to these two areas that can be included, but it is not limited to that: Whether the murder was committed while Cecil Davis was under the influence of extreme mental disturbance...

RP 3548.

The prosecutor too in his closing argument talked about each of defendant's alleged mitigating factors, including his cognitive, personality, and post-traumatic stress disorders. RP 3515-3526, 3555-3566. Although the prosecutor ultimately argued that the jury should reject all of those factors as extenuating or reducing the degree of defendant's moral culpability, his argument gave the jury "a meaningful basis to consider the relevant mitigating qualities" of the proffered evidence. *Johnson*, 509 U.S. at 369.

In sum, defendant's constitutional rights were not violated where the court correctly instructed the jury on the law. The court used the manner preferred by this court, which is to include only those statutory mitigating factors in the instruction, and directed the jury that it could also consider as mitigation any other factors concerning the defendant or the offense that the jury found relevant to the issue. Defendant was able to

argue that his major mental illness was a mitigating factor, which justified a sentence of less than death, and argued just that. The instructions and argument provided the jury with a meaningful basis to consider defendant's mental illness. The trial court's instructions on this issue were proper.

6. THERE WAS NO PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT.

The defendant raises several claims of prosecutorial misconduct during closing argument in the guilt phase. The law on this issue has been stated a number of times but has remained the same for some time:

Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect. Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request. The failure to object to a prosecuting attorney's improper remark constitutes a waiver of such error unless the remark is deemed to be so flagrant and ill intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.

State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). This standard has been often repeated. See, e.g., *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 113 S. Ct. 164, 121 L. Ed. 2d 112 (1992); *State v. Gentry*, 125 Wn.2d at 639-40; *State v. Brett*, 126 Wn.2d 136, 174, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S.

Ct. 931, 133 L. Ed. 2d 858 (1996); *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998); *State v. Finch*, 137 Wn.2d 792, 839, 975 P.2d 967 (1999), *cert. denied*, 528 U.S. 922, 120 S. Ct. 285, 145 L. Ed. 2d 239 (1999); *State v. Elmore*, 139 Wn.2d 250, 985 P.2d 289 (1999); *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006); *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007).

If the claim of misconduct being raised on appeal was addressed by the trial court, this court reviews the trial court's ruling for an abuse of discretion. *Stenson*, 132 Wn.2d at 718 (*citing Brett*, 126 Wn.2d at 174 and *Lord*, 117 Wn.2d at 887). In *Gentry*, this court further explained who bears the burden of proof on this issue and when reversal is required, stating:

The defendant bears the burden of establishing that the conduct complained of was both improper and prejudicial. (Citations omitted). If the defendant proves the conduct was improper, the prosecutorial misconduct still does not constitute prejudicial error unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict.

Stenson, 132 Wn.2d at 718. "The same standards of review that apply to the guilt phase apply to the penalty phase in a capital case." *Gregory*, 158 Wn.2d at 858 (*citing State v. Davis*, 141 Wn.2d 798, 870-72, 10 P.3d 977 (2000)).

It is also well-established that “a prosecuting attorney has wide latitude in drawing and expressing reasonable inferences from the evidence.” *Gentry*, 125 Wn.2d at 641. Put another way, even statements that are improper are prejudicial “only where ‘there is a substantial likelihood the misconduct affected the jury’s verdict.’” *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007)(quoting *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) and internally quoting *Brown*, 132 Wn.2d at 561). “Failure to object to a prosecutor’s improper remark constitutes a waiver, unless the remark was “so flagrant and *ill-intentioned* that it evinces an enduring and resulting prejudice.” *Gregory*, 158 Wn.2d at 858-59 (quoting *State v. Davis*, 141 Wn.2d at 872 and *Gentry*, 125 Wn.2d at 640).

This court must not consider the statements being alleged as improper by themselves. Rather, the court must look to the entirety of the record from the penalty phase, including the evidence, instructions, and arguments of both parties:

A reviewing court does not assess “[t]he prejudicial effect of a prosecutor’s improper comments . . . by looking at the comments in isolation but by placing the remarks ‘in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.’”

Yates, 161 Wn.2d at 774 (quoting *McKenzie* and internally quoting *Brown*).

In the instant case, the defendant claims prosecutorial misconduct in four instances. Each of those claims must fail.

- a. The State's argument properly discussed "passion, sympathy and prejudice" and focused the jury on reason, not emotion.

Defendant's first claim is the State violated his right to have the jury consider mercy as a mitigating circumstance by using the word "compassion" when discussing reason versus emotion. That claim is wholly without merit.

The court instructed the jury:

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.

Court's Instructions to the Jury, Instruction 1, CP 1159. In argument, the deputy prosecutor stated:

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 murdered 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 3505-06.

From a reading of the instruction and the argument, it is not apparent what the defendant’s claim could be. What the defendant has created is a claim that the State committed misconduct when it equated the words passion and sympathy from the instructions with the word “compassion.” In his argument, the defendant claims the word compassion can only appropriately be equated with the word “mercy.” The defendant’s argument must fail for three reasons.

First, the State’s argument was legally correct. In context, the State was telling the jury exactly what the law requires, which is that the jury based its verdict solely on the evidence and the law, not on emotions.

The State later, again without objection, discussed the concept of mercy, specifically reminding the jury that it was allowed to find mercy a mitigating circumstance. *See* RP 3534–35. The specific wording used should never be as important as the message conveyed. And it is clear from the argument the message was this: evidence, law, and reason, but not emotion.

Second, the State’s argument was grammatically correct. The word “compassion” is defined as: “deep feeling for and understanding of misery or suffering and the concomitant desire to promote its alleviation.” *Webster’s Third New International Dictionary (2002)*, at 462. Moreover, as part of its definition, that same dictionary says the word “sympathy” is a synonym for the word compassion. *Id.*

Third, there was no objection to this argument by defense counsel.¹⁴ The defendant did not establish the State’s argument was misconduct at all, much less flagrant and ill-intentioned misconduct. The State’s argument was proper, legally and grammatically, so it can hardly be said that argument caused an “enduring and resulting prejudice” that could not have been cured by an instruction from the court.

¹⁴ There is no claim made by defendant that defense counsel was deficient at any point in their representation.

- b. The State's argument was confined to the evidence and reasonable inferences from the evidence.

The defendant next makes several claims lumped together that appear to challenge the State's closing argument as a whole. Singled out or together, the defendant's claim lacks merit.

The defendant's primary claim in this regard is the State's description of the contact between the defendant and his victim the night of the murder. This argument must be viewed through the long-standing principal of closing argument, which is the State has wide latitude in drawing and expressing reasonable inferences from the evidence. *Gentry*, 125 Wn.2d at 641. The question really comes down to this: is it a reasonable inference that when an smaller, older woman is being savagely attacked by a bigger, younger man, that attack including burglary, robbery, rape, and murder, she will try to do anything she can to stop her attacker, including physically struggling and verbally communicating? The State says the answer to that question is yes.

In its closing argument, the State went through the evidence presented relating to the night of Mrs. Couch's murder. In detailing that evidence, the State included a potential dialogue Mrs. Couch may have used to try and stop the attack. The questions for this court really come down to these: 1) is it reasonable to conclude Mrs. Couch yelled at her

intruder to get out when he first burst into her home; 2) is it reasonable to conclude Mrs. Couch physically fought her attacker when he was dragging her around her home; 3) is it reasonable to conclude Mrs. Couch begged her attacker not to rape her; 4) is it reasonable to conclude Mrs. Couch begged for her life when it became obvious to her that her attacker intended to kill her. If the answer to these questions is yes, the defendant's argument is frivolous. If the answer to these questions is arguably yes, the defendant's argument must be rejected. If the answer to these questions is no, the court must consider the defendant's argument on its merits.

The court's analysis of the issue must include one other layer. The entirety of the argument the defense on appeal claims was wholly inappropriate was made at the penalty phase hearing without objection from the defense. There is a presumption the defendant received effective assistance of counsel. There must be a reason, then, that defense counsel did not object. Defense counsel was present when the argument was made and is in the best position to determine whether the argument was designed to appeal to emotion.

In recent Washington death penalty cases, it appears only one time has a death sentence been reversed for prosecutorial misconduct in closing argument. In that case, this court concluded the prosecutor's argument

was flagrant and *ill-intentioned*; that result was reached primarily because the subject matter of the argument was excluded by the trial court on the State's motion, and the State's reference during closing argument "blatantly violated" the court's order. *Gregory*, 158 Wn.2d at 864–67. Even so, the question of whether that conduct required reversal was "a close question." *Id.* at 866.

The argument that was made was confined to the facts of the case. It was a discussion of the horrific, brutal, and savage actions of the defendant. In the absence of objection, this court is confined to a determination of whether the challenged statements were flagrant and *ill-intentioned*, and if so, whether they could have been cured by an instruction from the court.

Given the argument related solely to the facts of the case, this court should find the argument was proper. At the very worst, the court should find that the argument was not flagrant and *ill-intentioned*. If this court finds the latter, it should also find that the trial court could have sustained the argument, stricken the comments made to that point, and restricted the State from further arguments in this regard. *See Yates*, 161 Wn.2d at 780–81 (prosecutor's "is human life that cheap?" comment regarding defendant getting 3 years for each of 14 other murders than the ones for which he was on trial was improper, but trial court sustaining defense objection and

stating “That’s improper argument. Jury is to disregard that argument.” cured the improper remark).

In a death penalty case, great deference should be given to the trial court’s ability to control the information presented to the jury, either as evidence or during argument. That is so because a jury is presumed to follow the court’s instructions. *Yates*, 161 Wn.2d at 780–81. In the absence of an objection from the defense that gives the court an opportunity to address a claim of improper argument, this court should only find a claimed error is reversible error in the most egregious of circumstances. This is not one of those circumstances.

The defendant claims the State committed misconduct when it questioned the validity of his mitigating evidence. It is not the substance of the argument being challenged. Rather, it is the very fact of the argument. It is difficult and even impossible to comprehend what the State could have said that would not run afoul of the defendant’s argument here. The very purpose of closing argument is to challenge and/or explain the evidence the jury was presented. Would the defendant require the State to concede his mitigating evidence is sufficient? Or perhaps just repeat what it was and tell the jury to decide? Put another way, *of course* the State questioned the validity of what the defendant presented. It is the jury’s job not just to consider the existence of mitigation evidence, but to

assess the quality of it and the weight to be given in making its ultimate determination. It should not be “remarkable” to this court that a veteran capital defense lawyer raised no objection to proper argument from the State.

The defendant claims the State committed misconduct when it suggested the jury show the same quantity of mercy to the defendant that he showed to Mrs. Couch. This exact same argument was heard and rejected by this court, in what might be said to be irony, in this defendant’s direct appeal from the first time a jury sentenced him to death. *See Davis*, 141 Wn.2d at 873.

- c. The State’s use of the words “if not now, then when? And if not Cecil Davis, then whom?” was proper, was not arguing facts outside the record, and did not appeal to the emotions of the jury.

During the penalty phase hearing, the State several times used the phrase “If not now, then when? And if not Cecil Davis, then whom?” *See* RP 2364, RP3495. Defendant claims this was misconduct for several reasons, none of which has merit.

Defendant claims the use of those words suggested to jurors that his “crime was worse than other aggravated murders and his mitigation evidence less compelling” than other defendants. *Brief of Appellant*, at 97.

Virtually the same argument was rejected by this court in *Gregory*, where the defense claimed the State's use of the phrase "the worst of the worst" to describe the defendant amounted to a comparison of the defendant with others the jury did not know about and should. *See Gregory*, 158 Wn.2d at 857–58.

The defendant's argument also ignores context. In opening, immediate preceding those two questions, the State told the jury: "Because you will be deciding in this case what punishment is appropriate and not just what is sufficient, you should also keep two other questions in mind as the case proceeds along." RP 2364. It is clear the State intended those "if not" questions to be confined to the issue of punishment for this defendant, for this crime, and in the context of what punishment was appropriate for him alone.

Defendant's argument can also only be seen in the manner he suggests if the balance of the State's closing argument is ignored. Throughout its argument, the State consistently focused on this defendant's behavior during the crime, this defendant's career as a criminal, and this defendant's lack of legitimate mitigating evidence, as the reasons to sentence him to death. The State argued:

Cecil Davis does deserve to die for what he did to Mrs. Couch, for what he is, for who he is, and for what he's done.

. . . The evidence cries out for a sentence of death; the horrible, savage nature of this crime, the career criminal nature of the defendant.

. . .
The defendant deserves death for what he did, for what he is.

RP 3539–40.

The death penalty is appropriate in this case because the evidence proves beyond a reasonable doubt that he deserves the highest punishment allowed, and a sentence of death in this case is justice. That's why it's the right decision.

RP 3567.

This is a clear example of why this court must not consider any statement in isolation, but must consider the entire context of the argument, the issues in the case, the evidence addressed in the argument, and the court's instructions. *See Yates*, 161 Wn.2d at 774. As a whole, the State's argument focused on Cecil Davis and no other, and the State's argument focused on what sentence he should receive in this case based on the facts of the crime and the totality of the evidence presented about the defendant.

- d. The State's argument did not comment on the defendant's silence.

The defendant's final claim is the prosecutor commented during rebuttal argument on the defendant's failure to testify. This claim also fails.

There is no dispute about the law. The State is prohibited from commenting on the defendant's silence, either after his arrest or at trial. A direct comment is one in which the State specifically references the defendant's silence. *State v. Curtis*, 110 Wn.2d 6, 9, 13, 37 P.3d 1274 (2002). An indirect comment is one in which the prosecutor mentions actions of the defendant from which the jury could infer the defendant attempted to invoke the right to silence. *State v. Pottorf*, 138 Wn. App. 343, 347, 156 P.3d 955 (2007).

This case could never be interpreted as a direct comment on silence. An indirect comment on silence is reviewed under the non-constitutional harmless error standard that asks whether there is a reasonable probability the reference affected the outcome of the trial. *State v. Romero*, 113 Wn. App. 779, 790–92, 54 P.3d 1255 (2002).

In rebuttal argument, the State was discussing the evidence presented at the trial and attempting to address that evidence to the potential questions the jury might have during deliberations. One of those questions almost certainly would have been addressed to what the defendant's feelings were. The jury had heard significant evidence during the defense case about the defendant's life, his struggles, and his mental deficiencies. They heard several times the defendant just doesn't think like a normal person does.

A decision to impose the death penalty is unlike any other for a juror. It's a decision about the very life of the defendant. It is only natural a juror would ask "I wonder if he feels sorry for what he did?" In rebuttal argument, the State focused the jury on the defendant's actions as demonstrating lack of remorse. Never once during closing arguments did the State mention the defendant's interview with detectives after his arrest, either for what he said or what he did not say. Never once during argument did the State suggest the defendant should have testified at his penalty phase hearing or spoken to them any other way. It has long and often been said "actions speak louder than words." The State simply posited the defendant's actions were those of a cold, calculated, and remorseless killer. The State told the jury that conclusion could be seen from his actions. Each and every time the State discussed remorse, it set out facts presented to the jury during the penalty phase hearing and asked: "are those the *actions* of somebody who is remorseful?" *See* RP 3569–70 (emphasis added).

Taken to its logical conclusion, the defendant's argument would preclude the State from ever discussing the actions of the defendant during the crime when the defendant exercised his right to remain silent from arrest through trial. It simply cannot be that discussing the defendant's actions during the crime is a comment on the defendant's silence. Under

any standard, there is no possibility at all this portion of the State's argument affected the jury's verdict.

7. DEFENDANT IS NOT ENTITLED TO RELIEF UNDER THE DOCTRINE OF CUMULATIVE ERROR.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Id.* "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999)(internal quotation omitted). "[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials." *Brown v. United States*, 411 U.S. 223, 232, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973)(internal quotation omitted). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. *Rose*, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that

the error did not contribute to the verdict that was obtained. *Id.* at 578; *see also State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)(“The harmless error rule preserves an accused’s right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.”).

The doctrine of cumulative error, however, recognizes the reality that sometime numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) (“although none of the errors discussed above alone mandate reversal....”). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court’s weighing those errors. *State v. Russell*, 125 Wn.2d 24, 93-4, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995). There are two dichotomies of harmless error that are relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test and therefore they will weigh more on the scale when accumulated. *See Id.* Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *Id.* Second, there are errors that are harmless because of the strength of the untainted evidence and there are errors that are harmless

because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. *See, e.g., Johnson*, 90 Wn. App. at 74. Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See, e.g., State v. Stevens*, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990)(“Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.”).

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. Compare, *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970)(holding that three errors amounted to cumulative error and required reversal), with *State v. Wall*, 52 Wn. App. 665, 679, 763 P.2d 462 (1988)(holding that three errors did not amount to cumulative error), and *State v. Kinard*, 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979)(holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, *see, e.g., State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963)(holding that failure to instruct the jury (1) not to use codefendant’s confession against Badda, (2) to disregard the prosecutor’s statement that the State was forced to file charges against defendant because it believed defendant had committed a felony, (3) to

weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, *see, e.g., State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984)(holding that four errors relating to defendant's credibility combined with two errors relating to credibility of State witnesses amounted to cumulative error because credibility was central to the State's and defendant's case); *State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1992)(holding that repeated improper bolstering of child-rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated so many times that a curative instruction lost all effect, *see, e.g., State v. Torres*, 16 Wn. App. 254, 554 P.2d 1069 (1976)(holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. *See Stevens*, 58 Wn. App. at 498.

In the instant case, for the reasons set forth above, defendant has failed to establish that his penalty phase hearing was so flawed with prejudicial error as to warrant relief. Defendant has failed to show that there were any errors in the trial. He has failed to show that there was any prejudicial error much less an accumulation of it. Defendant is not entitled to relief under the cumulative error doctrine.

8. DEFENDANT PRESENTS NO COMPELLING ARGUMENT AS TO WHY THIS COURT SHOULD REVISIT ITS MANY DETERMINATIONS THAT WASHINGTON'S CAPITAL PUNISHMENT STATUTES DO NOT VIOLATE THE EIGHTH AMENDMENT OR ARTICLE 1, § 14 OF THE STATE CONSTITUTION.

Davis contends that his death sentence violates the Eighth amendment of the federal constitution prohibiting "cruel and unusual punishments." Appellants Brief at p. 102. Essentially, he argues that Washington's death penalty scheme is unconstitutional under *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) as it is imposed arbitrarily, thereby making it cruel and unusual punishment under the Eighth Amendment. He also argues that it violates Article 1 §14 of the state constitution prohibiting "cruel punishment." As argued below, this court has repeatedly rejected such constitutional claims; defendant ignores these prior pronouncements and fails to articulate any compelling reason why this court should revisit these claims.

- a. This court has repeatedly found that Washington's death penalty scheme does not violate the Eighth Amendment's prohibition of cruel and unusual punishment.

Over the years there have been numerous challenges to Washington's death penalty statute as being violative of the Eighth Amendment's prohibition against cruel and unusual punishment. An Eighth Amendment claim focuses on whether the challenged provision "fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with ... open-ended discretion." *Maynard v. Cartwright*, 486 U.S. 356, 361-62, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988). To determine whether there is a violation, the court "looks to the sentencing scheme as a whole to determine that 'discretion under the statute was sufficiently controlled by clear and objective standards.'" *State v. Campbell*, 103 Wn.2d 1, 30, 691 P.2d 929 (1984), citing *Pulley v. Harris*, 465 U.S. 37, 45, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984), citing *Gregg v. Georgia*, 428 U.S. 153, 197-98, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). The Eighth Amendment also precludes modes of punishment that are inconsistent with modern "standards of decency," as evinced by objective indicia, the most important of which is legislation enacted by the country's legislatures[.]” *Penry v. Lynaugh*, 492 U.S. 302, 330-331, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989). Using this analysis, the United State Supreme Court has precluded imposition of the death penalty on certain classes of defendants,

such as the insane, *Ford v. Wainwright*, 477 U.S. 399, 410, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986), the mentally retarded, *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), accomplices who did not have an intent to kill or major participation in acts that showed an indifference to human life, *Tison v. Arizona*, 481 U.S. 137, 158, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987), or juveniles, *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L.Ed.2d 1 (2005).

This Court has repeatedly rejected Eighth Amendment challenges to RCW 10.95, Washington's capital punishment statutes. *State v. Yates*, 161 Wn.2d 714, 792-94, 168 P.3d 356 (2007)(noting the statute has eight statutory protections in addition to mandatory proportionality review that prevent arbitrary and capricious application of the death penalty and specifically rejecting claims that it violates an international treaty or that one prosecutor's decision to allow Yates to avoid the death penalty by pleading guilty to 13 murders while another sought the death penalty on two additional murders rendered the statute unconstitutional or disproportionate); *In re Davis*, 152 Wn.2d at 750-53 (rejecting claims that the statute discriminates against minorities and the poor); *In re Brown*, 143 Wn.2d 431, 460-61, 21 P.3d 687 (2001)(rejecting claims that "budgetary constraints" rendered the sentence unconstitutional); *State v. Dodd*, 120 Wn.2d 1, 92-96, 838 P.2d 86 (1992)(holding RCW 10.95 does not violate Eighth Amendment because it allows defendant to waive his general right to appellate review); *Matter of Harris*, 111 Wn.2d 691, 763

P.2d 823(1988)(rejecting claim that Washington’s statute does not meet the standard of reliability that death is the appropriate punishment); *State v. Mak*, 105 Wn.2d 692, 758-60, 718 P.2d 407 (1986); *State v. Rupe*, 101 Wn.2d 664, 697-700, 683 P.2d 571 (1984); *State v. Bartholomew*, 98 Wn.2d 173, 192-98, 654 P.2d 1170 (1982)(although provision allowing prosecution to present non-conviction data must be stricken as violative of Eighth Amendment, that portion may be severed without affecting constitutionality of remainder of statute);

Defendant once again asserts that RCW 10.95 violates the Eighth Amendment. In the trial court, defendant brought two motions to dismiss premised on the Eighth Amendment. CP 713-723, 724-737. Defendant argued that there should be a categorical ban on executing anyone that was “convicted of a single-victim murder.” CP 715. He presented no evidentiary support using objective indicia, such as legislation enacted by legislatures throughout this country, despite the Supreme Court’s clear statement that this was the most important of all objective criteria. CP 720 He offered no citations to authority in the pleading nor submitted any other evidentiary support in conjunction with his motion to support the factual claims made therein. CP 713-723. In addition to being factually unsupported, defendant’s arguments were premised primarily on who had been executed in Washington since 1976. The State responded that 38 of the 50 states have a death penalty and all 38 allow the death penalty to be imposed on single –victim murderers. CP 812-832. The court denied the

motion finding that there was not a local or national evolving standard of decency that had reach a consensus that single victim killers should be exempt from the death penalty. 3/30/07 RP 4-18; CP 1079-1082. On appeal, defendant does not assign error to any of the court's findings on this ruling. Defendant also brought a motion to dismiss arguing that international law and international treaties required a finding that the death penalty violates the Eighth Amendment. CP 724-737. There were no citations to authority made in the pleading or other evidentiary support attached to the pleading to support the factual claims made therein. *Id.* The trial court denied the motion and entered findings of facts. 3/30/07 RP 19-27; CP 1083-1085. On appeal, defendant does not assign error to any of the court's findings on this ruling.

In his appeal, defendant abandons some of the arguments he raised below and raises new ones in support of his claim that the Washington death penalty provisions violate the Eighth Amendment. He presents no *legal* arguments as to how the statutes fail to present clear and objective standards so that jurors are adequately informed as to what they must find to impose the death penalty; this type of argument is the core of an Eighth Amendment claim and defendant does not present one in his brief. Nor does he assert that he belongs to a class of persons the Eighth Amendment exempts from application of the death penalty. In short, he presents no true Eighth Amendment claim. Instead, he presents a series of arguments and questionable statistics to try to demonstrate that the same reasons that

five justices struck down the death penalty in *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), could be found to apply to Washington's current death penalty scheme. See Appellant's brief at pp.103-114. Defendant completely ignores that after *Furman*, the United States Supreme Court upheld the death penalty under statutory schemes that did sufficiently direct the jury with clear and objective standards to guide its death penalty determination, *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), and that this Court has repeatedly found that Washington's statute comports with the Eighth Amendment under the standards set forth in *Gregg*. Nothing has changed in the text of the statute to require reexamination of any Eighth Amendment claim. Defendant cites to no United States Supreme Court case issued since *Yates* -the last time this Court rejected an Eighth Amendment challenge - that would necessitate any reexamination of the statute under new controlling authority. This court should summarily reject this claim as it has done so many times in the past.

- b. This court has held that Washington's death penalty scheme does not violate Article 1, § 14 of the state constitution.

Defendant contends that Washington's death penalty statute, RCW 10.95, violates the state constitution's prohibition against cruel punishment found in article 1, § 14. Appellants brief at pp.102-03. His argument implies that this court has never assessed the constitutionality of

RCW 10.95 under the state constitution by pointing out that it was not assessed in *State v. Cross*, 156 Wn.2d 580, 622, 132 P.3d 80 (2006). See Appellant's Brief at p. 103. This is incorrect.

This court has repeatedly examined whether RCW 10.95 violates article 1, § 14 and always found that it does not. *State v. Yates*, 161 Wn.2d 714, 792, 168 P.3d 359 (2007)(holding that chapter 10.95 RCW violates neither the Eighth Amendment nor article 1, section 14 as that provision has not been interpreted as providing more protection than its federal counterpart); *State v. Gentry*, 125 Wn.2d at 631 (noting that Const. art.1, §14 need not be interpreted more broadly than federal counterpart and holding introduction of victim impact evidence does not violate it); *State v. Dodd*, 120 Wn.2d 1, 20-22, (analyzing Const. art.1, §14 under *Gunwall* factors and concluding that it does not extend greater protection¹⁵ than the Eighth Amendment and does not preclude a defendant from waiving a general review of his conviction); *State v. Lord*, 117 Wn.2d

¹⁵ When analyzing the *Gunwall* factors, the court in *Dodd* acknowledged that there had been an instance where the court had found a violation of Const. art. 1, § 14 where there would not be a claim under the Eighth Amendment, see *State v. Fain*, 94 Wn.2d 387; 617 P.2d 720(1980) and an instance where the court had stated that it would find a violation of the state constitution even if there was no Eighth Amendment violation, see *State v. Bartholomew*, 101 Wn.2d at 683. Both *Fain* and *Bartholomew* predated *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986), which established the analytical framework for assessing whether the state constitution should be interpreted more broadly than its federal counterpart. Thus, the holdings reached in *Fain* and *Bartholomew* were done without this critical analysis of whether Const. art. 1, § 14 should be interpreted more broadly; after conducting this analysis in *Dodd*, this court concluded that it should not.

829, 915-16, 822 P.2d 177(1991); *Matter of Harris*, 111 Wn.2d 691, 763 P.2d 823 (1988); *State v. Jeffries*, 105 Wn.2d 398, 428, 717 P.2d 722 (1986)(noting that the court has previously rejected defendant’s claim that the death penalty violates Const. art.1, §14) *State v. Campbell*, 103 Wn.2d 1, 31-35, 691 P.2d 929(1984), *cert. denied*, 471 U.S. 1094, 105 S. Ct. 2169, 85 L. Ed. 2d 526 (1985)(finding “no grounds for invalidating the death penalty as cruel punishment in violation of Const. art. 1, § 14”); *State v. Rupe*, 101 Wn.2d 664, 697-99, 683 P.2d 571 (1984)(holding that “so long as the sentencing procedures sufficiently protect against juries imposing the death penalty in an arbitrary manner, the death penalty is not per se unconstitutional” and noting that “to hold that the death penalty is per se unconstitutional [under the state constitution] would be to substitute [the court’s] moral judgment for that of the people of Washington.”)

Prior to *Dodd*, which engaged in a *Gunwall* analysis and concluded that the constitutional article 1, § 14 need not be interpreted more broadly than its federal counter part, this Court had articulated four factors to be considered in analyzing claims of cruel punishment under the state constitution. Those factors are: (1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment the defendant would have received in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction. *State v. Fain*, 94 Wn.2d 387, 397, 617 P.2d 720. Defendant asserts a violation using this analysis.

Despite this Court's long history of rejecting arguments that Washington's death penalty statutes violate the state constitution prohibition against cruel punishment, defendant asserts this claim on appeal. He did not raise this claim in the trial court. In the trial court, only one of defendant's motions to dismiss made any reference to Const. art. 1, § 14. CP 714. His motion, however, contains no argument regarding the state constitution or the *Fain* factors; the arguments are entirely based upon federal cases and the Eighth Amendment. CP 713-723. There were no citations to authority made in the pleading or other evidentiary support attached to the pleading to support the factual claims made therein. *Id.* The trial court findings denying this motion did not mention the state constitution. CP 1079-1082. Defendant has not assigned error to any of the findings on this ruling.

Thus, to the extent that defendant relies upon Const. art. 1, § 14, review is constrained by RAP 2.5 as ordinarily, the court does not address issues raised for the first time on appeal. RAP 2.5(a); *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). The rules of appellate procedure provide an exception for "manifest error affecting a constitutional right." RAP 2.5(a)(3). But this narrow exception "is not intended to swallow the rule, so that all asserted constitutional errors may be raised for the first time on appeal." *State v. Trout*, 125 Wn. App. 313, 317, 103 P.3d 1278 (2005). "Manifest error" requires defendant to demonstrate actual prejudice and he must make a plausible showing that

the asserted error had *practical and identifiable* consequences in the trial of the case. *State v. Ohara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009).

In determining whether the error was identifiable, the trial record must be sufficient to determine the merits of the claim. *If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.*

Id. (internal citations and quotations omitted)(emphasis added).

In presenting his argument regarding the *Fain* factors, defendant refers the court to factual information¹⁶ that is not found in the trial record to support his factual claims. See Appellant's brief at p. 117, 120, 122 - 124, 126, 128, 129-131. Because the facts that defendant needs to argue his claimed error are not in the record, his claim is not manifest and may not be raised under RAP 2.5. Nor can defendant show how his claimed error had any practical and identifiable consequences in the trial of his case. His claim that the Washington's death penalty violates the state constitution did not affect the presentation of evidence, the court's instructions, the burden of proof, or the jury's deliberation; his trial was unaffected by this claim. Therefore, this newly raised claim does not meet the criteria of RAP 2.5 and should be summarily rejected.

As noted above, this court has repeatedly rejected claims that Washington's capital punishment statutes violate the state constitutional

¹⁶ The State has filed a motion to strike many of the appendices to the Appellant's Brief as failing to comply with RAP 10.3(8).

prohibition against cruel punishment. If defendant wanted to assert a new challenge to this long standing controlling authority, he needed to raise this claim in the trial court and present his evidence to support the factual claims underlying his argument. The State would have had the opportunity to develop the record with competing evidence¹⁷ and argument. If this had been done the issue would have been properly presented for appellate review. It is not properly before this court for review.

Defendant asks this court to become a legislative entity and to override the desire of the people of this state to have the death penalty as an available sanction for certain homicides.

Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment

¹⁷ In order to support his claim that public support of the death penalty is waning, defendant cites to information put out on the 2008 year end report from the Death Penalty Information Center to support his factual contention that the “latest Gallup Poll shows a 16% drop in public approval of capital punishment since 1994.” Appellant’s brief at p. 123. While this may be literally true, it is also literally true that the latest Gallup Poll shows a 23% increase in public opinion in support of the death penalty since 1966. *See*, <http://www.gallup.com/poll/123638/In-U.S.-Two-Thirds-Continue-Support-Death-Penalty.aspx>. Looking objectively at the information the Gallup Poll has collected since 1936 regarding the death penalty, it shows that there was a drop in public support for the death penalty in the 1960s and a spike in public support in the early 1990s, but that for the most part public opinion has been in support of the death penalty at a fairly constant rate between 60-70%. *Id.* Defendant also claims that the decrease in the number of executions nationwide in 2007 and 2008 provides evidence that support for the death penalty is waning. Had this been raised below, the State could have presented evidence that while *Baze v. Rees*, 553 U.S. 35, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008) was pending at the United State Supreme Court, there was a virtual moratorium on executions by lethal injections in this country. Since the *Baze* case has issued there have been numerous executions, including 52 in 2009. *See*, <http://deathpenaltyinfo.org/executions>. These are but two examples of how the State could have presented opposing information had this issue been raised and litigated below.

is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.

Gregg, 428 U.S. at 175 (footnote omitted)(quoting *Dennis v. United*

States, 341 U.S. 494, 525, 71 S. Ct. 857, 95 L. Ed. 1137 (1951)

(Frankfurter, J., concurring in affirmance of judgment). This court has long recognized that arguments about the morality of the death penalty is an issue for the legislature not the court.

Clearly the mandate of the people of Washington, as expressed through the legislative and initiative processes, is to impose the death penalty. We, as Justices, are bound to uphold and enforce this law absent a constitutional prohibition. We must not superimpose personal morality nor utilize strained interpretations of the law to sidestep this difficult issue.

State v. Campbell, 103 Wn.2d at 34. This court should decline the invitation to step out of its judicial role.

9. DEFENDANT MAY NOT CHALLENGE WHETHER THE LEGISLATURE UNCONSTITUTIONALLY DELEGATED ITS AUTHORITY BY AMENDING RCW 10.95.180 AS HE DID NOT RAISE THIS CLAIM IN THE TRIAL COURT AND DID NOT DEVELOP A SUFFICIENT RECORD TO MAKE THIS CONSTITUTIONAL CLAIM MANIFEST.

As a general rule, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a). A defendant may claim error for

the first time on appeal only if it is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)(citing *State v. Scott*, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988)); *State v. Lynn*, 67 Wn. App. 339, 342, 835 P.2d 251 (1992). The rationale to limiting even potential constitutional errors is sound:

[P]ermitting every possible constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited resources of prosecutors, public defenders and courts.

McFarland, at 333 (citing *Lynn*, 67 Wn. App. at 344). The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant’s rights; it is this showing of actual prejudice that makes the error “manifest,” allowing appellate review. *State v. McFarland*, 127 Wn.2d at 333. If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest. *McFarland*, 127 Wn.2d at 333 (citing *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)).

For example, in *McFarland*, the appellate court declined to find any prejudice with respect to the warrantless arrest. The court held:

[I]t is not enough that the Defendant allege prejudice - actual prejudice must appear in the record. In each case, because no motion to suppress was made, the record does not indicate whether the trial court would have granted the

motion. Without an affirmative showing of actual prejudice, the asserted error is not “manifest” and thus is not reviewable under RAP 2.5(a)(3).

McFarland, 127 Wn.2d at 334.

RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court.

This exception is not intended to swallow the rule, so that all asserted constitutional errors may be raised for the first time on appeal. Indeed, criminal law has become so largely constitutionalized that any error can easily be phrased in constitutional terms.

State v. Trout, 125 Wn. App. 313, 317, 103 P.3d 1278 (2005); *accord State v. Lynn*, 67 Wn. App. 339, 342-43, 835 P.2d 251 (1992). For an alleged constitutional error to be “manifest,” it must have had an “unmistakable, evident or indisputable” impact in the trial. *Lynn*, 67 Wn. App. at 345; *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)(“[A]n alleged error is manifest only if it results in a concrete detriment to the claimant’s constitutional rights.”).

Defendant asserts for the first time on appeal that the 1986 legislative amendment to RCW 10.95.180(1) constitutes an unconstitutional delegation of its legislative authority to the department of corrections, in violation of article 2, §1 of the Washington Constitution. Brief of Appellant at p. 132. In a footnote, defendant asserts that he may properly raise this as a constitutional issue under RAP 2.5, citing three

cases. *See* Appellant's brief at p 131, n. 23. As will be discussed more completely below, any assessment as to whether there has been an improper delegation requires consideration of many facts on which the record on review in this case is silent. As such, this court should find that the issue is not properly before the court.

- a. The record below does not contain the necessary information to assess whether there has been a constitutional violation under the relevant legal standards.

The legislature may delegate authority to an administrative agency to implement statutory directives if two requirements are met: (1) it provides standards that in general terms define what is to be done and the agency that is to do it; and (2) procedural safeguards exist to control arbitrary administrative action and abuse of discretionary power. *State v. Simmons*, 152 Wn.2d 450, 455, 98 P.3d 789 (2004), *citing State v. Crown Zellerbach Corp.*, 92 Wn.2d 894, 900, 602 P.2d 1172 (1979)(*citing Barry & Barry, Inc. v. Dep't of Motor Vehicles*, 81 Wn.2d 155, 500 P.2d 540 (1972)).

The procedural safeguards required to satisfy the second requirement need not necessarily be articulated within the challenged statute. For example in the *Crown Zellerbach* case, the corporation had successfully moved for dismissal in the trial court for dismissal of criminal charges stemming from its alleged failure to comply with conditions

contained in a permit for a hydraulic project that had been issued by the Departments of Fisheries and Game. *Crown Zellerbach*, 92 Wn.2d at 896. At issue was the constitutionality of a statute that authorized the two agencies to issue permits for hydraulic projects with conditions that would properly protect the fish life affected by the proposed project; a violation of these conditions was a gross misdemeanor. *Id.* The corporation had convinced the trial court that the statute was an unconstitutional delegation of legislative authority, but this Court reversed. *Id.* at 898-99. In addressing whether there were sufficient procedural safeguards, the court noted that while there were no safeguards expressly indicated within the statute, safeguards were available under the administrative procedures act (APA), and judicial review of any APA proceedings prior to the initiation of any criminal proceedings. Additionally, once a criminal prosecution had been filed, then there would be all of the procedural safeguards given to any criminal defendant. *Id.* at 900-01.

Similarly, in *State v. Simmons*, this Court was faced with a challenge that the legislature had improperly delegated its authority to define crimes to the department of corrections (DOC) in enacting the proscription against persistent prison misbehavior found in RCW 9.94.070, in that it allowed DOC to define the term “serious infraction.” 152 Wn.2d at 455. Simmons, who had raised his challenge in the trial court, did not dispute that the first requirement for proper legislative delegation had been met but contended that there were inadequate

safeguards against arbitrary administrative actions or abuses of discretion. This Court disagreed finding that while DOC was exempt from APA rulemaking requirements that the department had re-promulgated its disciplinary code in 1998 in a manner that was consistent with the APA and that the disciplinary code contained several procedural and notice safeguards, including the opportunity to appeal any adverse disciplinary hearing finding. 152 Wn.2d at 457. It also required that the prisoner be notified of what conduct constituted a serious infraction, and that he might be charged with a felony if he committed such an infraction when he no longer had any earned early release credit available. *Id.* This Court also noted that DOC rule making provided for public scrutiny and judicial review of disciplinary actions and that if a criminal prosecution should arise that the defendant would be afforded of the procedural safeguards attendant to a criminal prosecution. The court concluded that these were sufficient safeguards and that there was no improper delegation of authority. *Id.* at 458.

b. Defendant's constitutional challenge to RCW 10.95.180(1) is not manifest.

Unlike the defendants in *Crown Zellerbach* and *Simmons*, who raised their claim in the trial court, defendant asserts for the first time on appeal that the legislature improperly delegated its authority. He argues the 1986 legislative amendment to RCW 10.95.180(1) constitutes an

unconstitutional delegation of its legislative authority to the department of corrections. The current statute reads as follows:

(1) The punishment of death shall be supervised by the superintendent of the penitentiary and shall be inflicted *by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death* and until the defendant is dead, or, at the election of the defendant, by hanging by the neck until the defendant is dead. In any case, death shall be pronounced by a licensed physician.

(2) All executions, for both men and women, shall be carried out within the walls of the state penitentiary.

RCW 10.95.180 (emphasis added). Prior to a legislative amendment in 1986 the statute had indicated that lethal injection was to be “continuous, intravenous administration of a lethal dose of *sodium thiopental* until death is pronounced by a licensed physician.” See Laws 1986, ch. 194, § 1 (emphasis added).¹⁸

Defendant contends that the failure of the legislature to identify the lethal substances to be given a condemned inmate constitutes an improper delegation of authority to DOC. He concedes that the Legislature has defined in general terms what is to be done and which agency is to do it, but argues that there are insufficient procedural safeguards to prevent arbitrary action and abuse of discretionary power. Brief of Appellant at

¹⁸ Prior to 1996 the default method of execution was hanging with the option for the defendant to elect lethal injection, but in 1996 the Legislature amended the statute so that the default became lethal injection with the defendant’s option to elect hanging. Laws 1996, ch. 251, § 1.

p.133. Specifically, he argues that DOC has instituted a policy - Policy 490.200 - to address the execution of a condemned inmate and that this policy was adopted in an arbitrary and capricious manner. Brief of Appellant at p. 137.

Because this issue was not raised in the trial court, the record on review does not contain a copy of Policy 490.200 or any information as to how this policy was enacted. In order to present his argument, defendant attaches as an appendix to his brief a document that purports to be this challenged DOC Policy 490.200. *See* Appendix L to Appellant's Brief. Under the rules of appellate procedure "[a]n appendix [to a brief] may not include materials not contained in the record on review without permission from the appellate court, except as provided in Rule 10.4(c)." RAP 10.3(a)(8); *Den Beste v. State, Pollution Control Hearings Bd.*, 81 Wn. App. 330, 332-33, 914 P.2d 144 (1996). The exceptions set forth in RAP 10.4(c) allows for the wording of statutes, rules, regulations, jury instructions, findings of fact to be set forth in an appendix or for a copy of an exhibit (that is part of the record on review) to be appended. RAP 10.4(c). Defendant's Appendix L does not comply with these rules and

the same is true of Appendices M, O and as to a portion of Appendix N.¹⁹
This Court should not consider these improper appendices.²⁰

Defendant cannot present his argument on appeal without reliance on these improper appendices. *See* Appellant's Brief at pp. 131-140. If this issue had been raised in the trial court, the defendant could have presented this information to the trial court in support of his constitutional challenge. If this had been raised below, the State would have had an opportunity to: 1) ensure that the copy of the policy under consideration by the court was authentic, current, and complete; 2) adduce evidence as to how such a policy was promulgated; 3) explore any procedural safeguards that are in place surrounding the implementation of a lethal injection; and, 4) and cross-examine any witnesses presented by defendant in support of his constitutional challenge. As this claim was not raised below, none of the relevant factual information as to whether sufficient procedural safeguards exist was developed. As the record on review does not contain any of the necessary information to determine whether has been an unconstitutional delegation of authority, this court has insufficient information to determine whether a constitutional violation occurred. Consequently, defendant is unable to show any *manifest* constitutional

¹⁹ Appendix N contains the wording of some statutes, which is not improper, and copies of some pages from a pharmacy treatise, which was not made part of the record in the trial court and so is not properly attached as an appendix under RAP 10.3(a)(8) and RAP 10.4(a)(c).

²⁰ The State has filed a motion to strike appendices independently of this brief.

error from the record before this court. Defendant may not raise this issue for the first time on appeal as he cannot show clear and detrimental error affecting his rights from the record on review.

The State would note that this claim of improper delegation of legislative authority in RCW 10.95.180 is currently pending before the court in a least one other case, *Brown and Gentry v. Eldon Vail, et.al*, Supreme Court Case Number 83474-1, which is set for oral argument on March 18, 2010. From the briefing filed in this other case it would appear that the plaintiffs, both of whom are under a death sentence, brought their constitutional challenge at the trial court level, where it was fully litigated. Thus, this Court will be addressing the identical issue on a proper record.²¹ Refusing to consider defendant's improperly raised claim here will not necessarily preclude him from reaping any benefit that may flow from the Court's consideration of this issue in the other case.

- c. Defendant fails to identify what aspect of legislative authority has been improperly delegated as the Legislature has clearly defined a crime and a punishment in Title 10.95 RCW.

While defendant argues that there has been an improper delegation of legislative authority, his argument does not articulate what aspect of

²¹ There was an Associated Press report on March 3, 2010 indicating that the death penalty protocol has changed from a three drug system to a one drug system, thus, it is perhaps premature to address which protocol would apply to defendant's execution.

legislative authority has been properly delegated. The three cases defendant relies upon, *In re Personal Restraint of Powell*, 92, Wn.2d 882, 602 P.2d 711 (1979), *Crown Zellerbach*, *supra*, and *Simmons*, *supra*, all concerned claims that the legislature had improperly delegated its responsibility for defining the elements of crimes to some administrative agency without sufficient guidelines. Defendant's challenge does not concern an improper delegation of the authority to define the elements of a crime.

The Legislature has determined that the punishment for aggravated murder shall be either life with out the possibility of parole or death. RCW 10.95.030. It has further determined that when a jury returns a verdict for death, this punishment shall be imposed by lethal injection unless the condemned defendant opts for hanging. RCW 10.95.180(1). Defendant cites no authority to support his contention that the language "intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until the defendant is dead" does not sufficiently define a punishment.²² He sites to no analogous cases where any court has found an improper delegation of legislative authority for failing to articulate the precise protocol to be used in capital executions.

²² Previous challenges to whether Washington capital punishment provisions involved an improper delegation of legislative authority have focused on whether it gave prosecutors too much discretion to determine when to seek it. *State v. Benn*, 120 Wn.2d 631, 667, 845 P.2d 289 (1993).

The State can find no analogous cases where a condemned defendant has alleged that the Washington Legislature improperly delegated its authority by failing to identify the thickness, length, or material of the rope to be used in hanging. The State can find no cases where a defendant has alleged that in establishing the length of incarcerations for lesser crimes that the Legislature acted improperly by failing to articulate the daily living conditions of an inmate for the duration of his sentence.

Every other jurisdiction that has examined this issue has rejected the argument that the legislature's failure to identify the substances to be used in lethal injection for capital punishment constitutes an improper delegation of legislative authority. *Sims v. State*, 754 So.2d 657, 668-70 (Fla. 2000); *State v. Deputy*, 644 A.2d 411, 420-22 (Del. Super. Ct. 1994), *aff'd*, 648 A.2d 423 (Del. 1994); *State v. Osborn*, 102 Idaho 405, 631 P.2d 187, 201 (1981); *Ex parte Granviel*, 561 S.W.2d 503, 514-15 (Tex. Crim. App. 1978).

Although the State's primary argument is that this issue is not properly before the court for review, the court may also reject it for failing to articulate any constitutional violation.

- d. There are sufficient external procedural safeguards in place to prevent arbitrary action or an abuse of discretion in the implementation of the death penalty.

Although the record below is silent as to what, if any, internal procedural safeguards exist within the department of corrections to protect a criminal defendant under sentence of death from being subject to arbitrary or abusive discretionary administrative actions in the manner of execution, there are many apparent external safeguards. A person charged with a capital offense may challenge the protocols in the trial court as being an unconstitutional delegation of legislative authority thereby obtaining judicial review at the trial and appellate levels. A defendant subject to a capital sentence could also obtain judicial review by challenging the constitutionality of the protocols in a personal restraint proceeding under Title 16 of the Rules of Appellate procedure. Finally, as has been shown by Cal Brown and Jonathan Gentry, judicial review is available by filing an independent action in the trial court, again resulting in judicial review at multiple levels. *See* Supreme Court Case No. 83474-1, an appeal from Thurston County Superior Court Case No. 08-2-02080-8. These are the same type of procedural safeguards that this Court found to be sufficient in *Crown Zellerbach*.

Before anyone is executed in the State of Washington, his death sentence will have been subject to judicial review. *State v. Dodd*, 120 Wn.2d 1, 14-15, 838 P.2d 86 (1992). Any person under a death sentence

has many avenues of seeking judicial review of the manner of execution. It should also be noted that in addition to the procedural safeguards present by the state justice system, that a person under sentence of death has the ability to seek relief in the federal justice system as well. It cannot be reasonably argued that a person under sentence of death cannot get judicial review of the manner and procedures used in an execution. *See, e.g., Baze v Rees*, 553 U.S. 35, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008)(whether three drug lethal injection protocol violates Eighth Amendment); *Rupe v. Wood*, 853 F.Supp 1307 (1994), *overruled as moot*, 93 F.3d 1434 (1996)(whether hanging that might resulting decapitation violates Eighth Amendment).

Although the State's primary argument is that this issue is not properly before the court for review, the court may also reject it for defendant's failure to demonstrate the absence of either of the two requirements of a proper legislative delegation. Defendant concedes that the legislature defined in general terms what is to be done and the agency that is to do it. Appellant's brief at p. 133. But even on the limited record presented here, it would appear that there are sufficient external procedural safeguards to control any potential arbitrary administrative action or abuse of discretionary power. The court should find this claim to be without merit.

10. AFTER CONSIDERING FACTORS RELEVANT TO MANDATORY REVIEW, THIS COURT SHOULD UPHOLD DEFENDANT'S DEATH SENTENCE.

This court must review defendant's death sentence as required by RCW 10.95 to determine: (a) whether there was sufficient evidence to justify the affirmative finding by the jury that there were not sufficient mitigating circumstances to warrant leniency; (b) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant; (c) whether the sentence of death was brought about by passion or prejudice; and (d) whether the defendant was mentally retarded.

This Court has previously conducted mandatory review on the death verdict returned by the jury in defendant's first penalty phase hearing and determined that it was not freakish or wantonly imposed. *State v. Davis*, 141 Wn.2d 798, 879-88, 10 P.3d 977 (2000). The current appeal follows a new penalty phase hearing where there were some differences in the evidence presented from the first penalty phase hearing, although some factors remain unchanged from the prior appeal.

- a. Defendant makes no claim that he is mentally retarded.

RCW 10.95.030(2) provides that no person who is mentally retarded shall be executed. The statute further provides that when a defendant contends that he is mentally retarded so as to prohibit execution,

the defense bears the burden to prove mental retardation by a preponderance of evidence. In addition, the law imposes the duty upon the trial court to make a finding as to the existence of mental retardation. To be considered mentally retarded under the statute a person must have a “significantly subaverage intellectual functioning,” which is defined as an IQ of 70 or below. *Davis*, 141 Wn.2d at 886-887. None of the mental health experts who testified at trial diagnosed defendant as being mentally retarded. RP 3108, 3153-55, 3287, 3394-96. Defendant does not assert on appeal that he is mentally retarded within the meaning of RCW 10.95.030. Defendant’s inaction constitutes waiver of any claim that he was mentally retarded. This is consistent with his position in his prior appeal. *Davis*, 141 Wn.2d at 885-86.

- b. There was sufficient evidence to justify the affirmative finding by the jury that there were not sufficient mitigating circumstances to merit leniency.

In addressing the sufficiency of evidence in a capital case, this court determines whether sufficient evidence exists to support the jury’s finding that there were not sufficient mitigating circumstances to merit leniency. *Elmore*, 985 P.2d at 321, citing *State v. Stenson*, 132 Wn.2d at 756. The test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found sufficient evidence to justify the jury’s finding beyond a reasonable doubt. *State v.*

Brown, 132 Wn.2d 529, 551, 940 P.2d 546 (1997); *State v. Gentry*, 125 Wn.2d at 654.

In applying this test, the court does not duplicate the jury's role and reweigh the aggravating circumstances against the mitigating factors, but rather the court considers the circumstances of the crime along with any mitigating factors and determines whether a rational jury could have concluded the mitigating circumstances do not outweigh the circumstances of the crime. *Elmore, supra, citing State v. Dodd*, 120 Wn.2d 1, 24-25, 838 P.2d 86 (1992); *State v. Rice*, 110 Wn.2d 577, 623- 25, 757 P.2d 889 (1988). The mere presence of mitigating factors does not require reversal if the jury is convinced the circumstances of the crime outweigh the proposed mitigating factors. *Elmore, supra, citing Brown*, 132 Wn.2d at 553.

Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find sufficient evidence to support the jury's conclusion that defendant did not merit leniency.

Defendant offered mitigation evidence from several mental health experts.²³ Dr. Richard Kolbell, a neuropsychologist, testified that he gave defendant a battery of tests to assess his ability to concentrate, pay attention, track conversations, reason, problem solve, exercise judgment,

²³ While defendant presented expert testimony regarding his mental functioning at his first trial, he did not present the same experts as he did in the proceeding below.

make decisions, and control impulses, as well as testing his memory and language function. RP 3096–99, 3141–42. After this testing, Dr. Kolbell concluded that defendant’s full scale IQ was 68, which is in the “borderline to mildly impaired” range. RP 3100. But when Dr. Kolbell took into account how defendant actually functions on a daily basis, he concluded that defendant “is better characterized as functioning in the borderline range than the impaired or mentally retarded range.” RP 3108, 3153-55. Dr. Kolbell testified that standard IQ tests are reformatted about every 15 years to take into account better education and information sources that were not available in the past as far as establishing a “norm” and that giving a person a test formatted for an outdated norm will produce an inaccurate result. RP 3106. Dr. Kolbell did not use the same test as had been given defendant in the past. RP 3111.

As a result of his testing, Dr. Kolbell diagnosed defendant as having a “cognitive disorder, not otherwise specified,” which he said meant the many of the defendant’s mental abilities were impaired. RP 3118. Dr. Kolbell also diagnosed defendant as having an anti-social personality disorder. RP 3119. Dr. Kolbell acknowledged that doctors examining defendant in the past thought that he was malingering and that he was trying to present himself as more impaired than what he was. RP 3158-61. Dr. Kolbell opined that defendant has the ability to follow the rules and that he knows right from wrong. RP 3167. He testified that people with antisocial personality disorders may be persistent liars, have

recurring difficulties with the law, violate the rights of others, have an extreme sense of entitlement, engage in aggressive and violent behavior, have a low tolerance for boredom, lack remorse for hurting others, and show impulsiveness. RP 3169-70. Dr. Kolbell agreed that all of these descriptors could be applied to defendant. RP 3170. Dr. Kolbell testified that he wasn't retained to assess defendant's cognitive abilities at the time of the crime but what they were in 2006. RP 3177. Dr. Kolbell agreed that from a review of the police report, it appeared defendant had very goal directed behavior when committing the crimes against *Mrs. Couch*. RP 3179-81. Dr. Kolbell agreed that the circumstances of the crime as well as defendant's efforts to destroy evidence showed a level of cognitive functioning. RP 3180-81.

Dr. Barbara Jessen testified that an MRI taken in 1997 showed no physical abnormalities with defendant's brain. RP 3208. Defendant also submitted to an EEG in 1997, which examines electrical activity in the brain. RP 3209-17. The EEG showed that defendant had generalized moderately severe slowing of his electrical activity. RP 3217. Dr. Jessen testified that such slowing could be present from birth, could be the result of infection or trauma to the brain, it could be due to medications or from past alcohol and drug abuse or diabetes. RP 3217-3219, 3226. At the time of the EEG, defendant was on medications that would account for the decreased electrical activity. RP 3218. Defendant also reported prior alcohol and cocaine abuse that would account for the decreased activity.

RP 3219. Dr. Jessen testified that you could not make a definitive diagnosis as to the cause by looking at the EEG. RP 3219. Dr. Jessen testified that when she interviewed the defendant in 1997, he was alert and oriented; he had no difficulty with his speech or in communicating with her. RP 3219-22. Dr. Jessen concluded that there was no objective evidence that defendant had any neurological deficits of a gross nature. RP 3228.

The defense also presented Dr. Zakee Matthews, a psychiatrist, who testified the defendant had “a major mental illness” and “a cognitive disorder.” RP 3296. Dr. Matthews said the defendant’s cognitive disorder meant that “his brain is not functioning as your and my brain would be functioning” and “he has difficulty processing, organizing information.” RP 3256. Dr. Matthews based his opinion on the defendant’s poor performance in school, including difficulty following through with tasks and learning difficulty; in the doctor’s opinion, this cognitive disorder or learning disability was a sufficient basis to diagnose a “mental illness.” RP 3241–44. Dr. Matthews could not state with reasonable psychiatric certainty that defendant suffered from dementia or that he was mentally retarded. RP 3287. Dr. Matthews did not diagnose defendant as having schizophrenia. RP 3276, 3278. Dr. Matthews acknowledged that the manner in which defendant committed his crime against *Mrs. Couch* did not show evidence of disorganized behavior. RP 3307-08.

Dr. Muscatel, a clinical psychologist, testified about his examination and testing of the defendant; his opinion was that defendant had a cognitive disorder and psychotic disorder. RP 3356-75, 3396-98. He discussed the differences in IQ scores that resulted from different testing being done by 3 different mental health professionals (Drs. Cripe, Kolbell, and himself), even though a couple of the tests were done just a few months apart; he discussed factors that could or could not account for these differences. RP 3382-94. Dr. Muscatel did not find defendant to be mentally retarded but stated he did test in the "borderline intellectual range." RP 3394-96. Dr. Muscatel included a second diagnosis of "psychotic disorder not otherwise specified by history" based solely upon defendant's self reporting that he has auditory hallucinations and paranoid thoughts. RP 3399. Dr. Muscatel also diagnosed a personality disorder with antisocial features. RP 3376, 3401. Dr. Muscatel indicated that he would classify defendant as having mild to moderate neuropsychological difficulties and that there are thousands, if not millions, of people in this country that have similar disabilities. RP 3403.

In addition to this evidence regarding defendant's mental condition, the defense admitted defendant's school records showing that he took special education classes. RP 3350; EX 223. He also presented testimony from his mother and brother.

Cozetta Taylor, defendant's mother, testified that defendant was born in 1959, the fourth of her seven children. RP 3419-21. The

defendant's father, George Davis, left in 1960 and had no part in raising defendant. *Id.* She testified that he was put in some special education classes and that he did "sometimes okay" in these. RP 3423. Sometime in 1966 or '67, Mr. Jones came into defendant's life in a surrogate father role. RP 3424-25. Mr. Jones was strict with the children and would give "whoopings" with a belt for misbehavior; defendant got the most of these. RP 3425. Ms. Taylor testified that defendant stayed in school until the eleventh grade then went into the Army for several years. RP 3427-28. Defendant was proud of his military service. RP 3431. She indicated that most of her children and numerous grandchildren live locally and that it is a close family. RP 3431-33. She testified that she loves her son very much despite what he has done. RP 3431.

Donnie Cunningham, defendant's younger brother, testified that he was very close with the defendant and they would do sports and "everyday normal kid stuff" together. RP 3434-35. He indicated that his older brother was behind other kids in school and did not have a lot of friends there; he suffered some taunting-being called slow. RP 3435-36. Mr. Cunningham also described Mr. Jones as a strict disciplinarian; he testified that both he and defendant got "whoopings," but that defendant got more, usually for not doing something he had been told to do. RP 3437-38. He testified that after Mr. Jones passed, that defendant started getting into trouble in small ways, but then defendant went into the Army. RP 3439. Defendant later lived with his brother in Renton for about a year;

defendant got a job which he kept until the company downsized and he was laid off. RP 3439-42. Mr. Cunningham testified that -despite what defendant has done - he still loves his brother. RP 3442. Mr. Cunningham saw his brother the night he murdered *Mrs. Couch*; he did not see anything about his brother's mental condition that night which caused him any concern. RP 3442-45.

This mitigation evidence might be summarized as showing the following:

1. Defendant has cognitive disabilities. These prevented him from doing well at school and subjected him to some taunting from other children, but are not so severe as to prevent him from functioning on a day to day level. He has shown that he can hold a job- including one in the military- for an extended time. These cognitive disabilities do not prevent him from engaging in goal directed behavior. None of the mental health professionals who have examined defendant or tested his IQ are of the opinion that he is mentally retarded.
2. Defendant has an antisocial personality disorder, but not a mental illness which prevents him from understanding right from wrong. He can control his behavior if he chooses to do so. He has many personality traits that make him dangerous and likely to re-offend.
3. Defendant has self reported hearing auditory hallucinations, but never reported that these voices told him to hurt someone else. Two doctors concluded that defendant was prone to over-reporting or exaggerating his symptoms.
4. In 1997 an EEG showed defendant had decreased or abnormal electrical activity in his brain. It is unknown whether: 1) it was a temporary condition due to current medications or physical illness; 2) the defendant was born

with this decreased level of electrical activity; 3) it was the result of damage caused by drug use, alcohol use, diabetes, or head trauma.

5. Defendant was raised in loving family although it lacked a consistent father figure and money was in short supply. One surrogate father figure who did have some longevity -staying with defendant's mother several years until his death - was a strict disciplinarian; this man used corporal punishment when any of the children did not do as they were told. Defendant got more "whoopings" with a belt than his siblings did, but there is no indication that this punishment was inflicted without reason.

6. Defendant is still loved by his family despite what he has done.

Looking at the evidence presented in mitigation, none of it makes defendant less culpable for his crimes or presents a reason for sparing his life. The circumstances surrounding this crime show defendant felt a "need" to kill someone the way someone else might "need" a cigarette or "need" a piece of chocolate. He acted on that "need" choosing the nearest victim available who was not a friend or family member. His crime was vicious, brutal, and cruel. The jury heard defendant's criminal history containing crimes of assault, robbery, perjury, theft, and another murder. The jury heard that he has personality traits that make it likely he will continue to break the law. Essentially, the jury heard evidence that the defendant craves violence and, while having the ability to control his behavior, he chooses not to; he *chooses* to fulfill his cravings. The jury heard the devastation his *choice* caused in the Couch family. RP 2968-

2985. A low IQ, decreased electrical activity in the brain in 1997, and some “whoopings” with a belt is not sufficient mitigation to make the defendant deserving of leniency in light of the nature of his crime and his personal history. This court should uphold the jury’s finding.

c. The verdict did not result from passion or prejudice.

The jury was instructed that the only evidence it was to consider was the testimony of witnesses and the exhibits admitted during the penalty phase. CP 1158, Penalty Phase Inst. No. 1. It was explicitly told that the arguments of counsel were not evidence and to disregard any remark or argument that was not supported by the evidence. CP 1159, Penalty Phase Inst. No. 1. Lastly, the jurors were instructed that they were not to be influenced by passion, prejudice, or sympathy. CP 1159, Penalty Phase Inst. No. 1. Nothing in the record even hints that they disregarded this instruction. *See State v. Sagastegui*, 135 Wn.2d 67, 94-95, 954 P.2d 1311 (1998).

Defendant argues that the jury’s passions were somehow inflamed by the argument of the prosecutor in the penalty phase- alleging the prosecutor argued facts not in evidence and invited the jury to base its verdict on sympathy for the victim. The propriety of the prosecution argument was addressed in the earlier section of the brief dealing with claims of prosecutorial misconduct. It is important to note that there were

no objections to the argument on this basis at trial, indicating that the argument was not as emotionally charged as defendant now argues on appeal. Defendant does not address the fact that the only way for him to succeed in his argument, is for this court to conclude that the jury disregarded all of the court's instructions noted above. It is a fundamental precept that juries are presumed to heed the court's instructions. *See State v. Lord*, 117 Wn.2d 829, 861, 822 P.2d 177 (1991). This court should reject the invitation to casually abandon such a fundamental principle.

Defendant also asserts that an erroneous jury instruction caused the jury to return a verdict based on passion and prejudice. The propriety of the court's instruction was addressed earlier in the brief. Furthermore, defendant fails to explain how - even assuming the instruction misstated the law - it encouraged the jury to return a verdict based upon passion and prejudice. He does not articulate how the wording of the allegedly erroneous instruction introduced extraneous or prejudicial information into the trial or how it encouraged the jury to return a verdict based solely upon emotional appeal. Defendant has failed to articulate any credible reason for finding the verdict was the result of passion and prejudice.

- d. The sentence was not disproportionate when compared to other similar cases.

In performing its proportionality review, this Court compares the case to all aggravated murder cases, to see whether the sentence is wanton,

freakish, or otherwise disproportionate. The purpose of this proportionality review is to “avoid two systemic problems associated with imposition of capital punishment: random arbitrariness and imposition in a racially discriminatory manner.” *State v. Davis*, 141 Wn.2d at 880. The court does this by considering “‘the crime and the defendant’ in comparison with other ‘similar cases’” to determine whether the imposition of a death sentence was wanton or freakish. *Id.*

RCW 10.95.130(2)(b) defines the comparison pool as follows:

“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 (emphasis added).

“Similar cases” means other death eligible cases and includes those in which the death penalty was sought and those in which it was not. *State v. Yates*, 161 Wn.2d 714, 788, 168 P.3d 359 (2007); *State v. Davis*, 141 Wn.2d 798, 880, 10 P.3d 977 (2000). The scope of “similar cases” covers a broader spectrum than what might initially be thought. It includes cases where: 1) the prosecution alleged aggravated murder, but never sought the death penalty, and the defendant entered a plea or was convicted as charged at trial; 2) the prosecution alleged aggravated murder and the defendant entered into a plea agreement to avoid the death penalty; 3) the capital charge went to trial, but the jury did not find defendant guilty of

aggravated murder; 4) the capital charge went to trial and the jury found defendant guilty of aggravated murder, but did not return a verdict of death; and, 5) the capital charge went to trial and the jury found defendant guilty of aggravated murder and returned a death verdict.

In performing this review, this Court has looked at a number of factors, including the nature of the crime, the defendant's criminal record, and the extent of any mitigating factors. *State v. Pirtle*, 127 Wn.2d 628, 687, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S. Ct. 2568, 135 L. Ed. 2d 1084 (1996); *see also Gentry*, 125 Wn.2d at 653-54; *State v. Benn*, 120 Wn.2d 631, 677-78, 845 P.2d 289, *cert. denied*, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993); *State v. Rice*, 110 Wn.2d 577, 623 25, 757 P.2d 889 (1988), *cert. denied*, 491 U.S. 910, 109 S. Ct. 3200, 105 L. Ed. 2d 707 (1989). The court has acknowledged that this type of review may not be easily quantified:

We have quantified those factors that are easily quantifiable in order to be as objective as possible. By this we do not suggest proportionality as is a statistical task or can be reduced to a number, but only that numbers can point to areas of concern. At its heart, proportionality review will always be a subjective judgment as to whether a particular death sentence fairly represents the values inherent in Washington's sentencing scheme for aggravated murder.

Pirtle, 127 Wn.2d at 687. A statistical approach is not required. *State v. Elmore*, 139 Wn.2d at 308. If the facts of defendant's case are similar to some of the facts taken from cases in which the death penalty was upheld, the proportionality review is satisfied. *Id.*

Proportionality review does not preclude variation on a case by case basis, nor does it guarantee that the death penalty is always imposed in superficially similar cases. *Lord*, 117 Wn.2d at 910. Precise uniformity is unworkable because of the nature of the offenses and because juries are directed to tailor their decision to the individual circumstances of the crime. *Id.* “Precise uniformity is not possible because ‘the brutal and extreme [crimes] with which we deal in death penalty cases are unique and cannot be matched up like so many points on a graph.’” *State v. Davis*, 141 Wn. 2d at 881. Comparing death penalty cases to one another is not an exact science, nor could it ever be:

Our proportionality review is guided by two fundamental goals: to avoid “random arbitrariness and imposition of the death sentence in a racially discriminatory manner.” Consistent with these objectives, we have noted that our proportionality review:

does not guarantee there will be no variations from case to case, nor that a sentence of death will be uniformly imposed in all superficially similar circumstances. Mathematical precision is unworkable and unnecessary. “There is no constitutional or statutory requirement to ensure an unattainable degree of identity among particular cases which are invariably unique.” Instead, we must determine whether a death sentence has been imposed generally in similar cases, and not imposed wantonly and freakishly.

State v. Elledge, 144 Wn.2d 62, 80, 26 P.3d 271 (2001)(citations omitted, quoting *State v. Brown*, 132 Wn.2d 529, 555, 940 P.2d 546 (1997)).

Further, a decision to afford one defendant mercy, and not another, does not violate the constitution. *State v. Mak*, 105 Wn.2d 692, 724, 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986)(quoting *Gregg v. Georgia*, 428 U.S. 153, 199, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976)). Essentially defendant's argument regarding proportionality is that his sentence is freakish and wanton because: 1) none of the men whose cases this court found similarly brutal in the first appeal have been executed for their crimes; 2) since his first appeal, the three cases that the court has upheld on proportionality review are factually different than his; and 3) murderers, including Ridgeway, who killed multiple victims, have been given life sentences. This is precisely the type of analysis rejected by this court in *Lord*, *Elledge*, and *Davis*.

Additionally, defendant argues that what happens to a case on appeal or collateral review should have an impact on whether this Court continues to consider it a "similar" case. The correct category of cases to consider are those where death was sought and imposed as a sentence—regardless of what happened to the case on appeal. *See generally, State v. Elledge*, 144 Wn.2d 62, 79 n 5, 26 P.3d 271 (2001). This Court has rejected the argument that only non-vacated death sentences can be considered for purposes of determining proportionality. *Id.* The court noted that it "will continue to utilize cases in which the death penalty was ultimately vacated, so long as the penalty determination was not overturned on the basis of the penalty being disproportionately imposed."

Id. at 79 n.5, citing *State v. Elmore*, 139 Wn.2d 250, 311 n.26, 985 P.2d 289 (1999).

Below, the State addresses the factors this court has articulated as being the proper ones for consideration in proportionality review:

i. Aggravating circumstances.

Only one aggravating factor is needed for imposition of the death penalty. RCW 10.95.030(2). Juries have returned death verdicts based on a single aggravator²⁴ or on two aggravators.²⁵ This court has found the death penalty is not disproportionate when based upon a single aggravator or two aggravators. *State v. Elledge*, 144 Wn.2d 62, 81, 26 P.2d. 271 (2001)(single); *State v. Elmore*, 139 Wn.2d 250, 309, 985 P.2d 289 (1999); *State v. Stenson*, 132 Wn.2d 668, 758-60, 940 P.2d 1239 (1997)(two); *State v. Brown*, 132 Wn.2d 557, 940 P.2d 456(1997)(single), *State v. Gentry*, 125 Wn.2d at 656-58 (single); *State v. Benn*, 120 Wn.2d at 692-95 (single). This court is “not merely looking for the number of aggravators but, more importantly, at the nature of the aggravating circumstances.” *Cross*, 156 Wn.2d at 633.

This aspect has not changed from the prior appeal. The first jury found that three aggravating factors applied to defendant’s crime and the jury was instructed that the crime was aggravated because defendant

²⁴ See Report of the Trial Judge (TR) for: Luvane TR No. 135; J. Gentry, TR No. 119; G. Benn, TR No. 75; B. Harris, TR No. 29.

committed the murder in the course of and furtherance of, or in the immediate flight from; 1) a robbery in the first or second degree, 2) a rape in the first or second degree, or 3) a burglary in the first or second degree. *Davis*, 141 Wn.2d at 882; CP 1161-62.

The finding of three aggravating circumstances marks this crime as one of the most serious. *State v. Woods*, 143 Wn.2d 561, 617, 23 P.3d 1046 (2001). As the court found in the previous appeal, the death sentence is not excessive or disproportionate in comparison with other cases where the death penalty was imposed. *See Davis*, 141 Wn.2d at 883. There is no reason for the court to reach a different conclusion in this appeal.

ii. Nature of the crime.

In the early morning hours of January 25, 1997, defendant stood on the porch of his mother's house and stated "I need to rob somebody" and "I need to kill me a motherfucker." Within a few minutes, defendant was breaking into the home of his 65 year old neighbor, Yoshiko Couch. George Wilson, who had gone over to the Couch residence with defendant so they could "rip the old lady off," described defendant as kicking in the door "and started beating on her and rubbing [her] all over." The crime scene and the condition of the victim's body reveal the brutality of what occurred. *Mrs.* Couch was beaten. She had a long hard object, not a

²⁵ *See* TR for: R. Elmore, No. 165; Jeffries, No.15; Mak , No. 13.

penis, shoved up her vagina; this caused a one and three-quarters inch wound to her vaginal wall, which bled profusely. At some point, the defendant tried to asphyxiate her manually. Ultimately, he took her to the bathroom where he asphyxiated her with a household cleanser containing xylene. "Her body was found lying on its back, with the legs apart, submerged in bloody water approximately five to six inches deep. In the bathtub were biological tissue (blood clot), fecal matter, and *Mrs. Couch's* undergarment. Wet towels and clothing were piled on top of the head and chest areas emitting a strong chemical odor. The body was not clothed from the waist down." *See Davis*, 141 Wn.2d at 809 (footnotes omitted).

Having thus satisfied his "need to kill," defendant took steps to destroy evidence, then shopped his way out of the house, taking with him the victim's wedding ring, some Kool cigarettes, Pepsi, beer, and packages of meat.

The nature of this crime has not altered from the first appeal. In the prior appeal the court found that the defendant's crime was "particularly brutal" that involved substantial conscious suffering of the victim similar to other cases where the death penalty had been upheld by the court. *Davis*, 141 Wn.2d at 881-82. This is as true today as it was then.

iii. Criminal history.

Defendant's death sentence is not disproportionate when his criminal history is considered. Defendant's criminal history consisted of record includes prior convictions for (1) robbery in the second degree committed in 1986 (Ex. 193), (2) perjury in the second degree in 1986 (Ex. 194), (3) assault in the fourth degree in 1988 (Ex. 195), (4) assault in the second degree in 1990 (Ex. 196), (5) criminal trespass in the first degree in 1990 (Ex. 196), (6) driving without a valid operator's license in 1992 (Ex. 197), (7) theft in the third degree in 1992 (ex. 198), (8) driving without a valid operator's license in 1993 (Ex. 199), (9) violation of a domestic violence pretrial no-contact order in 1995 (Ex. 200), and (10) intentional murder in the second degree committed in 1996 (Ex. 221). ; RP 2954-2967; Report of the Trial Judge("TR") No. 281. Defendant's conviction for murder was entered in 2006 and was not before the jury in the prior penalty phase hearing. TR 281; *Davis*, 141 Wn.2d at 883.

In the pool of similar cases, only a small number of other defendants had a prior conviction for murder or manslaughter: 1) *State v. Vidal*, 82 Wn.2d 74, 508 P.2d 158 (1973)(two murders); 2) *State v. Braun*, 82 Wn.2d 157, 509 P.2d 742 (1973)(each defendant had a prior murder conviction); 3) R. Hughes, TR No. 23 (murder); 4) B. Harris, TR No. 29 (manslaughter); 5) C. Harris, TR No. 38 (murder); 6) D. Williams, TR No. 44 (murder); 7) P. St. Pierre, TR No. 34 (murder); 8) B. Lord, TR No. 47 (murder); 9) J. Gentry, TR No. 119 (manslaughter); 10) C. Finch,

TR No. 154 (manslaughter); 11) M. Roberts, TR No. 176 (murder); 12) D. Smith, TR No. 191 (murder); 13) J. Elledge, TR No. 183 (murder); 14) D. Smith, TR No. 191 (murder); 15) R. Yates, TR No. 251 (thirteen murder convictions and one attempted murder conviction). Almost two thirds of these defendants were sentenced to death - Vidal, Braun, B. Harris, Lord, Gentry, Finch, Roberts, Elledge, and Yates.

Even without the murder conviction, this court previously described defendant's criminal history as showing "a history of violence toward others" and as being "comparatively more extensive than that of other appellants who received the death penalty." *Davis*, 141 Wn.2d at 883. Defendant's criminal history shows a pattern of violence towards others over a ten year period. *See State v. Brown*, 132 Wn.2d 529, 559, 940 P.2d 546 (1997). Now, he has been convicted of two different murders. This factor must weigh very heavily with the court in finding that defendant's death sentence was not disproportionately imposed.

iv. **Personal history.**

Defendant makes no argument that anything has changed regarding his personal history since this factor was examined in the first appeal. At that time, this Court found that the subjective factors in defendant's "personal history are not sufficient to override the circumstances and consequences of his crime." *Davis*, 141 Wn.2d 884. The Court noted that the evidence of a difficult childhood and the diagnosed personality

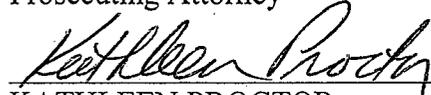
disorders found in defendant's personal history were similar to, or less severe than, those seen in other aggravated murder cases where the death penalty had been upheld. *Id.* Defendant's sentence is not disproportionate on the basis of this factor.

D. CONCLUSION.

For the foregoing reasons the court should uphold the jury's determination that death is the appropriate sentence for defendant and his crime.

DATED: March 15, 2010

MARK LINDQUIST
Pierce County
Prosecuting Attorney



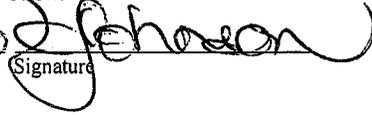
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811



JOHN M. NEEB
Deputy Prosecuting Attorney
WSB #21322

Certificate of Service:

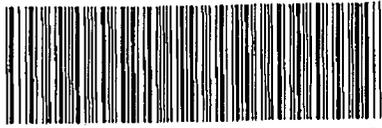
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3/15/10 
Date Signature

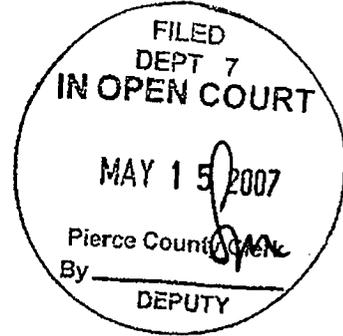
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STATE OF WASHINGTON
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APPENDIX “A”

*Defendant’s Proposed Instruction
(Alternative)*



97-1-00432-4 27506026 DFPIN 05-16-07



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff

vs.

DAVIS, CECIL EMILE,

Defendant

Cause No. 97-1-00432-4

DEFT PROPOSED INSTRUCTION
(ALTERNATIVE)

INSTRUCTION NO. 5

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, including, but not limited to, the following:

Whether the murder was committed with the defendant was under the influence of extreme mental disturbance; or

Whether the defendant is mentally retarded; or

Whether the defendant suffers from a major mental illness.

INSTRUCTION NO. 5

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.

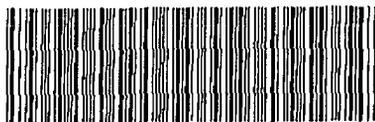
You are also to consider as mitigating circumstances any other factors concerning the offense or the defendant that you find to be relevant, including, but not limited to, the following:

Whether the murder was committed with the defendant was under the influence of extreme mental disturbance; or

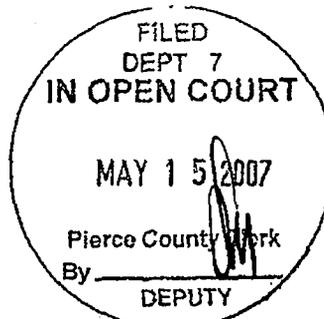
Whether the defendant suffers from a major mental illness.

APPENDIX "B"

*Court's Instructions to the Jury
Penalty Phase Proceeding*



97-1-00432-4 27506042 CTINJY 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.

**COURT'S INSTRUCTIONS TO THE JURY
PENALTY PHASE PROCEEDING**

DATED this 15TH day of May, 2007.

[Handwritten Signature]
JUDGE FREDERICK W. FLEMING

INSTRUCTION NO. 1

It is your duty to determine the facts in this case from the evidence produced in court. It also is your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

The only evidence you are to consider consists of the testimony of the witnesses and the exhibits admitted into evidence during this special sentencing phase. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence that either was not admitted or that was stricken by the court. You will not be provided with a written copy of testimony during your deliberations. Any exhibits admitted into evidence will go to the jury room with you during your deliberations.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by each party bearing on the question. Each party is entitled to the benefit of the evidence whether produced by the party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given the testimony of each. In considering the testimony of any witness you may take into account the opportunity and ability of the witness to observe, the witness' memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

The attorney's remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.

The attorneys have the right and the duty to make any objections that they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections by the attorneys.

The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during this hearing or in giving these instructions, you must disregard the apparent comment entirely.

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.

INSTRUCTION NO. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a just verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

INSTRUCTION NO. 3

You are instructed as follows:

The defendant has been found guilty of Aggravated Murder. That means the defendant was found guilty beyond a reasonable doubt of Premeditated Murder in the First Degree, and that an aggravating circumstance existed.

The crime included the following elements: On or about the 25th day of January, 1997, in the State of Washington, defendant Cecil Emile Davis, acting with premeditated intent to cause death, suffocated or asphyxiated Yoshiko Couch, thereby causing her death.

The aggravating circumstance was as follows: The murder was committed in the course of, in furtherance of, or in immediate flight from a Robbery in the First or Second Degree, a Rape in the First or Second Degree, or a Burglary in the First or Second Degree.

A person commits Robbery in the First Degree when he inflicts bodily injury during the commission of a robbery. A person commits Robbery in the Second Degree when he commits robbery. Robbery is the unlawful taking of personal property, with intent to commit theft thereof, from another person or in the presence of another person, against that person's will, by the use or threatened use of immediate force, violence, or fear of injury to that person.

A person commits Rape in the First Degree when he engages in sexual intercourse with another person by forcible compulsion, and when he inflicts serious injury on the other person or when he feloniously enters into the building where the victim is situated. A person commits Rape in the Second Degree when he engages in sexual intercourse with another person by forcible compulsion or when the victim is incapable of consent by reason of being physically helpless.

A person commits Burglary in the First Degree when, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a dwelling and while in the dwelling assaults any person. A person commits Burglary in the Second Degree when, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building.

INSTRUCTION NO. 4

During the sentencing phase proceeding, the State has the burden of proving to you beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency. If the State meets this burden the death penalty will be imposed. The defendant does not have to prove the existence of any mitigating circumstances or the sufficiency of any mitigating circumstances.

The defendant is presumed to merit leniency, which would result in a sentence of life in prison without possibility of release or parole. This presumption continues throughout the entire proceeding unless you find during your deliberations that it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If after such consideration, you have an abiding belief that there are not sufficient mitigating circumstances to merit leniency, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 5

The question you are required to answer is as follows:

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?

If you unanimously answer "yes", the sentence will be death. If you unanimously answer "no", or if you are unable to agree on a unanimous answer, the sentence will be life imprisonment without possibility of release or parole.

A person sentenced to life imprisonment without the possibility of release or parole shall not have that sentence suspended, deferred, or commuted by any judicial officer. The Board of Prison Terms and Paroles or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation. The Department of Social and Health Services or its successor or any executive official may not permit such prisoner to participate in any sort of release or furlough program.

INSTRUCTION NO. 6

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, 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.

INSTRUCTION NO. 7

Upon retiring to the jury room for your deliberation of this matter, your first duty is to select a presiding juror.

It is this person's duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed and that every juror has a chance to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted in evidence, these instructions, and a sentencing verdict form. You will not receive the original certified documents relating to the defendant's criminal history. You will receive scanned copies of those exhibits. You are to consider the scanned copies you receive as if they were originals.

You must answer one question. All twelve of you must agree before you answer the question "yes" or "no". If you do not unanimously agree then answer "no unanimous agreement". When you have arrived at an answer, fill in the verdict form to express your decision. The presiding juror should then sign the verdict form and notify the judicial assistant who will conduct you into court to declare your verdict.

APPENDIX “C”

RCW 10.95.070



West's Revised Code of Washington Annotated Currentness

Title 10. Criminal Procedure (Refs & Annos)

Chapter 10.95. Capital Punishment--Aggravated First Degree Murder (Refs & Annos)

→ **10.95.070. Special sentencing proceeding--Factors which jury may consider in deciding whether leniency merited**

In deciding the question posed by RCW 10.95.060(4), the jury, or the court if a jury is waived, may consider any relevant factors, including but not limited to the following:

- (1) Whether the defendant has or does not have a significant history, either as a juvenile or an adult, of prior criminal activity;
- (2) Whether the murder was committed while the defendant was under the influence of extreme mental disturbance;
- (3) Whether the victim consented to the act of murder;
- (4) Whether the defendant was an accomplice to a murder committed by another person where the defendant's participation in the murder was relatively minor;
- (5) Whether the defendant acted under duress or domination of another person;
- (6) Whether, at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental disease or defect. However, a person found to be mentally retarded under RCW 10.95.030(2) may in no case be sentenced to death;
- (7) Whether the age of the defendant at the time of the crime calls for leniency; and
- (8) Whether there is a likelihood that the defendant will pose a danger to others in the future.

CREDIT(S)

[1993 c 479 § 2; 1981 c 138 § 7.]

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West's RCWA 10.95.070

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