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King County Superior Court No. 06-1-06563-4 SEA

IN THE WASHINGTON STATE SUPREME COURT

STATE OF WASHINGTON,
Plaintiff-Appellee,
v.

CONNER MICHAEL SCHIERMAN,
Defendant-Appellant.

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

The Honorable Gregory Canova, Judge

APPELLANT'S REPLY BRIEF

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ORIGINAL

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I.
ARGUMENT IN REPLY

A. STANDARD OF REVIEW

Schierman rests on his opening brief at 15-16.

B. THE DISMISSAL OF JURORS FOR REASONS RELATED TO HARDSHIP, AND THE LATER IN-CHAMBERS HEARING ON SIX CHALLENGES FOR CAUSE, VIOLATED SCHIERMAN'S RIGHT TO BE PRESENT UNDER THE STATE AND FEDERAL CONSTITUTIONS

1. The Trial Judge's Consideration of Challenges for Cause on January 12, 2010, in Chambers Outside Schierman's Presence Requires Reversal Under *State v. Irby*¹

The State argues that the facts here are distinguishable from *Irby* because "an in-chambers conference addressing only legal matters does not implicate the right to be present." Brief of Respondent (BOR) at 36-37. But in *Irby* this Court soundly rejected that argument.

The State likens the "e-mail exchange" between the trial judge and counsel for the parties to a sidebar or chambers conference, proceedings that our court and other courts have said that a defendant has no due process right to attend. We disagree with the State's analogy to those sorts of proceedings. In our judgment, the e-mail exchange was a portion of the jury selection process. We say that because this novel proceeding did not simply address the general qualifications of 10 potential jurors, but instead tested their fitness to serve as jurors in this particular case.

Irby, 170 Wn.2d at 882.

¹ *State v. Irby*, 170 Wn.2d 874, 246 P.3d 796 (2011).

The assessment of fitness appears to have been far more detailed than the email exchange at issue in *Irby*. Here, in chambers, the trial judge asked the parties about Jurors 25, 44, 58, 76, 104 and 171. The parties explained why the jurors' answers made them unfit to serve on the panel. 1/12/10 RP 17-41. The judge considered those factual questions. For example, as to Juror 171, the defense stated that his views would prevent him from fully considering evidence about intoxication. The State argued that Juror 171's answers demonstrated that he could follow the law. The trial judge ruled:

With regard to Juror 171 the court is denying the challenge for cause. I do not find that this juror exhibited any indication that he would not be able to be a fair and impartial juror.

Id. at 20.

After the trial judge made his determinations in chambers, he returned to the bench and appears to have immediately called the jurors back in and read off the numbers of the jurors he had excused. As in *Irby*, there was no lapse of time during which counsel could have conferred with Schierman. 1/12/10 RP 41.²

² It is not even clear that Schierman had the opportunity to personally review the juror questionnaires. During pretrial hearing on November 10, 2009, Judge Canova explained that he would authorize the preparation of just two copies of each juror questionnaire for the defense and that, unlike in most cases, he would also authorize all counsel to remove their copies of the questionnaires from the courthouse for review. He stated to counsel:

2. Evaluating Hundreds of Hardship Requests in The Jury Coordinator's Office was A Portion of The Voir Dire in The Same Way that The Events in Irby were A Part of Voir Dire

The State attempts to distinguish the review of the hardship issues from the facts in *Irby*. As in *Irby*, the jurors here were “sworn.” The jurors who wished to be excused were told to provide the court with a written request under oath. There is no meaningful distinction on that basis.

And, the State argues that consideration of the hardship requests “was not a hearing at which judicial decisions were made.” BOR at 27.³ It maintains that under King County Superior Court’s jury excusal policy, “[n]o court hearing was needed.” *Id.* But, the King County jury policy always requires judicial determinations of hardship in capital cases. The policy states: “Jury staff shall not excuse jurors summoned to special panels absent approval from the assigned judge.” CP 21350. The trial

If you choose to share one of those copies with your expert, that’s up to you. I’m not allowing any additional copying by either side of any portions of the questionnaire. You will be allowed, unlike in most cases, to remove questionnaires from the courtroom, *but you are not allowed to share them with anyone else, besides counsel or co-counsel and any expert you may have retained for purposes of this case*, for purposes of jury selection.

11/10/09 RP 85 (emphasis added).

³ The State made a similar argument in *Irby*. This Court held that the fact that the proceedings were not taking place in the courtroom was “beside the point.” *Irby*, 170 Wn.2d at 883. What ought to have been happening in the courtroom was happening in cyberspace.” *Id.* Similarly, what was happening in the jury coordinator’s office should have been happening in the courtroom in Schierman’s presence.

judge believed that the hardship review phase was a critical one because he required that counsel be consulted on all of the requests before any action was taken. If there was a dispute, that dispute was resolved by the trial judge, not the jury room coordinator.

Regardless of who handles them, hardship excusals are “judicial decisions.” In *State v. Rice*, 120 Wn.2d 549, 560, 844 P.2d 416, 421-22 (1993), this Court held that the trial judge could *delegate* his authority to excuse jurors on “a showing of undue hardship, extreme inconvenience, public necessity, prior jury service once in the last two years, or any reason deemed sufficient by the court” to a court clerk. But the delegation of judicial decision-making to an administrator does not transform that judicial decision to an administrative one. It simply permits the clerk to make a judicial decision. The clerk assumes the judge’s duty under RCW 2.36.100.

As noted above, the trial judge did not truly delegate any discretion to the jury room coordinator here. The judge directed the coordinator to grant an excusal only if the parties agreed. Where there was disagreement, the issue had to be resolved by the judge.

The State argues that:

. . . the administrative evaluation of hardship requests examines only a juror’s claimed inability to attend court on a particular date or to serve as a juror generally; it does not

address the qualifications of the juror to sit in a particular case.

BOR at 29. But that was not true in *Irby* and was not true here.

In *Irby*, the trial judge summarized the information:

I note that 3, 23, 42 and 59 were excused after one week by the Court Administrator.

17 home schools, and 3 weeks is a long time.

77 has a business hardship.

36, 48, 49 and 53 had a parent murdered.

Any thoughts? If we're going to let any go, I'd like to do it today.

Irby, 170 Wn.2d at 878.

Here, the information that jurors provided under oath went even further beyond their mere availability. For example Juror 598600 responded to the Jury Summons:

On July 29, 1988 my 25 year old son, C.M., died by suicide after two heartbreaking years of "crack" cocaine use.

Discussing criminal behavior of any kind still causes me intense mental anguish.

Please excuse me from jury duty and remove my name from the list of citizens to be contacted.

CP 24210 (emphasis in original). This "hardship" request, considered out of the presence of Schierman, is identical to the claim of hardship in *Irby*

by the four jurors who had had a parent murdered. *See Irby*, 170 Wn.2d at 878.

Juror 934007's request demonstrates how "hardship" can bleed over into "cause." This juror asked to be excused because "I have strong racial views and other prejudices that I don't think would help as a juror." CP 23744 (excuse denied). Similarly, Juror 1098637 stated that serving would be an economic hardship, but "most importantly," the reason she should be excused was "my religion does not permit this." CP 23775 (excuse approved).

The additional information provided in these jurors' requests for "hardship" could allow the parties to use the hardship process as a guise for eliminating those jurors who they perceive would be less favorable to their side. For example, Juror 1379339 wrote:

I am the sole pastor of my Catholic church and need to be present for the daily sacramental and pastoral needs of my parishioners.

CP 23782. The United States Conference of Catholic Bishops states:

Our fundamental respect for every human life and for God, who created each person in his image, requires that we choose not to end a human life in response to violent crimes if non-lethal options are available.

Publication No. 5-723 at www.ccedp.org. This information provided regarding hardship also gave the parties significant insight into the juror's predilections regarding the death penalty.

3. The Error was Not Harmless

The State must prove that the error was harmless beyond a reasonable doubt. Although the State appears to agree that it has the burden on this issue, it persists in arguing that Schierman has failed to show that jurors were improperly excused or retained. But Schierman need not make that showing.

As in *Irby*, the State must show that the dismissal of jurors outside Schierman's presence, from the jury coordinator's office and in chambers, had "no chance to sit." *Irby*, 170 Wn.2d at 886. The State has not done so. And, as in *Irby*, it is not self-evident from the record that the many, many people who claimed economic or family hardship could not have served. As this Court said in *Irby*, had those jurors appeared:

questioning might have revealed that one or more of these potential jurors were not prevented by hardship from serving. Reasonable and dispassionate minds may look at the same evidence and reach a different result.

Id. at 886.

4. Schierman's Failure to Object is Not Fatal to this Claim

Under RAP 2.5(a)(3), this Court can and should consider this error because it is of constitutional magnitude and "manifest" from the record.

5. There is No Basis to Overrule *Irby*

Finally, the State argues that the *Irby* decision should be overruled because it is incorrect and harmful. The procedures employed in this case demonstrate why that is not true and why *Irby* was correctly decided.

To support its argument, the State significantly devalues the defendant's right to be present for jury selection at any stage. But, far from being "useless" or its benefit "but a shadow,"

[j]ury selection is the primary means by which [to] enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability[.]

Gomez v. United States, 490 U.S. 858, 873, 109 S.Ct. 2237, 104 L.Ed.2d 923, and cert. granted, judgment vacated on other grounds by *Salazar v. United States*, 491 U.S. 902, 109 S.Ct. 3181, 105 L.Ed.2d 690 (1989) (citations omitted). The defendant's presence "is substantially related to the defense and allows the defendant 'to give advice or suggestion or even to supersede his lawyers.'" *State v. Wilson*, 141 Wn. App. 597, 604, 171 P.3d 501 (2007) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 106, 54 S.Ct. 330, 78 L.Ed.2d 674 (1934), overruled on other grounds by *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964)); see also *United States v. Gordon*, 829 F.2d 119, 124 (D.C. Cir. 1987) (Fifth Amendment requires opportunity to give advice or suggestions to lawyer when assessing potential jurors). The constitutional right to be present and

participate in the selection of one's jury attaches at the outset of the process – “at least from the time when the work of empanelling the jury begins.” *Gomez*, 490 U.S. at 873 (quoting *Lewis v. United States*, 146 U.S. 370, 374, 13 S.Ct. 136, 36 L.Ed. 1011 (1892)).

The State argues this Court ignored *Rushen v. Spain*, 464 U.S. 114, 117-18, 104 S.Ct. 453 78 L.Ed.2d 267 (1983), *reh'g denied*, 465 U.S. 1055, 104 S.Ct. 1336, 79 L.Ed.2d 730 (1984), and *State v. Phillips*, 65 Wash. 324, 327, 118 P. 43 (1911). But *Rushen* did not address jury selection. The question in *Rushen* was whether, after jury selection, an ex parte communication between juror and judge in defendant's absence is subject to harmless error review. And, the Court in *Irby* did not ignore *Phillips*. The dissent argued that *Phillips* should control but the majority disagreed.

Finally, the State's argument is premised on the notion that only “plainly deserving” hardship requests are granted by court clerks under strictly enforced local policies. BOR at 33-34. As *Irby* and this case demonstrate, issues of “hardship,” as opposed to “cause,” are frequently combined or intermingled. Schierman does not agree that the proper criteria were applied because he was not present when the “hardship” determinations were being made. And even though the law permits a trial

judge to delegate a portion of jury selection to a court clerk, it does not follow that the defendant can be excluded from those proceedings.

C. THE DISMISSAL OF JURORS FOR REASONS RELATED TO HARDSHIP IN THE JURY COORDINATOR'S OFFICE AND THE DISMISSAL OF SIX JURORS FOR CAUSE AFTER AN IN-CHAMBERS HEARING VIOLATED SCHIERMAN'S AND THE PUBLIC'S RIGHT TO A PUBLIC TRIAL

1. Under This Court's Existing Precedent The Trial Court Violated Schierman's and The Public's Right to A Fair Trial⁴

⁴ This Court has the following cases pending. An opinion in any one of these cases may materially affect the resolution of Schierman's public trial issues. Should opinions be issued before a decision in this matter, Schierman will seek to file a supplemental brief.

State v. Koss, No. 85306-1, argued 10/15/13: Whether in a criminal prosecution conferences between the trial court and counsel on proposed jury instructions are subject to the constitutional right to a public trial.

State v. Njonge, No. 86072-6, argued 10/17/13: Whether in this criminal prosecution the trial court violated the defendant's constitutional right to a public trial when it closed the courtroom to spectators while considering and ruling on the dismissal of some prospective jurors for hardship.

State v. Slert, No. 87844-7, argued 10/17/13: Whether the trial court in this criminal prosecution violated the defendant's constitutional right to a public trial by conferring with counsel (but not the defendant) in chambers about whether some prospective jurors should be dismissed.

State v. Smith, No. 85809-8, argued 10/15/13: Whether the trial court in a criminal prosecution violated the defendant's constitutional right to a public trial when it held sidebar conferences with counsel on evidentiary matters outside the courtroom without first conducting the analysis required by *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

State v. Shearer and *State v. Grisby*, No. 86216-8 (consol. w/87259-7), argued 10/15/13: Whether in these criminal prosecutions the examination of one prospective juror in chambers during jury selection constituted a "de minimis" courtroom closure that did not violate the constitutional right a public trial.

State v. Frawley and *State v. Applegate*, No. 80727-2 (consol. w/86513-2), argued 10/17/13: Whether a defendant in a criminal prosecution may waive his or her

As a preliminary matter, contrary to the State's assertion, this Court has determined that a litigant has standing to assert the public's right to open proceedings under Const., art. I, § 10. *In re Det. of D.F.F.*, 172 Wn.2d 37, 256 P.3d 357 (2011) (Detainee had standing under state constitutional provision to challenge the constitutionality of court mental proceedings rule closing the hearing.)

This Court has long held that a public trial is "a core safeguard in our system of justice." *State v. Wise*, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012).

Be it through members of the media, victims, the family or friends of a party, or passersby, the public can keep watch over the administration of justice when the courtroom is open.

Id. Among other essential functions in ensuring both fairness in individual cases and public confidence in the judicial system, an open and accessible trial "deters perjury and other misconduct...provides for accountability and transparency...[and] allows the public to see, firsthand, justice done in its

constitutional right to a public trial, and if so, whether the defendants in these cases knowingly, voluntarily, and intelligently waived their right to a public trial during jury selection.

State v. Andy, No. 90567-3 argument set for 11/18/14: Whether a defendant's constitutional right to a public trial in a criminal prosecution was violated when trial proceedings continued after the close of the business day and the courthouse public entry was unlocked but a sign on the public entry door indicated that the courthouse closes at 4 p.m. and court closes at 5 p.m.

communities.” *Id.* See also *Arizona v. Fulminante*, 499 U.S. 279, 294-95, 111 S.Ct. 1246, 113 L.Ed.2d 302, *reh’g denied*, 500 U.S. 938, 111 S.Ct. 2067, 114 L.Ed.2d 472 (1991) (violation of the guarantee of a public trial requires reversal, even without a showing of prejudice, because “the values of a public trial may be intangible and unprovable in any particular case”).

The State appears to argue that the hardships are a “ministerial or administrative matter.” But as noted above in section B, this Court’s cases clarify that jury selection – particularly for cause challenges – are distinguishable from purely legal challenges that may be considered in chambers or at sidebar.

And the State’s arguments significantly undervalue the importance of jury selection. This Court’s recent decision in *State v. Saintcalle*, 178 Wn.2d 34, 309 P.3d 326, *cert. denied*, 134 S.Ct. 831, 187 L.Ed.2d 691 (2013), confirms that the act of dismissing jurors is a critical part of a criminal trial and, if not undertaken in a fair and open manner, is fraught with potential for undermining trust in the judicial system. More specifically,

[t]he petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge.

Batson v. Kentucky, 476 U.S. 79, 86, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (citing *Duncan v. Louisiana*, 391 U.S. 145, 156, 88 S.Ct. 1444, 20 L.Ed.2d 491, *reh'g denied*, 392 U.S. 947, 88 S.Ct. 2270, 20 L.Ed.2d 1412 (1968)). Consistent with that critical function, jury selection must be free from improper discrimination by the prosecutors, judges and even defense counsel because the harm of discrimination “extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.” *Batson*, 476 U.S. at 87; *see also Georgia v. McCollum*, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992) (prohibiting racially motivated peremptory strikes by defense counsel).

This Court has also recognized that discriminatory jury selection “undermine[s] public confidence in the fairness of our system of justice,” *Saintcalle*, 178 Wn.2d at 41-42 (lead opinion) (quoting *Batson*), and “offends the dignity of persons and the integrity of the courts.” *Id.* at 42. Since, as the Court emphasized in *Wise*, open and accessible court proceedings serve as an essential check on potential misconduct and foster public confidence in the judicial process, the dismissal of jurors in closed proceedings undermines that confidence. While there is no evidence in these cases that potential jurors were dismissed because of race or other improper reasons, it is the very lack of public oversight during part of the

selection process that defeats the public trial and public access guarantees and casts doubt on the integrity of the proceedings.

A majority of this Court recently explained in *Wise* that

unless the trial court considers the *Bone-Club* factors on the record before closing a trial to the public, the wrongful deprivation of the public trial right is a structural error presumed to be prejudicial.

Wise, 176 Wn.2d at 14. As a result, “deprivation of the public trial right...is not subject to harmless analysis.” *Id.*, citing *Fulminante*, 499 U.S. at 309-10 (certain constitutional defects in a trial “defy analysis by ‘harmless-error’ standards,” including abridgement of the right to self-representation and the right to a public trial).

The facts of this case demonstrate why a carefully conducted *Bone-Club* hearing is so important. Schierman himself could have objected even if his lawyers did not. The trial court could have made it clear that the closure was limited to straightforward hardships, but that any request that required the exercise of discretion or that appeared to be based upon “cause” rather than “hardship” had to be resolved in open court.⁵

⁵ As discussed above, this case demonstrates that it is not necessarily easy to separate the issues of “hardship” and “cause” in lengthy, complex cases.

2. Experience and Logic Support Schierman's Arguments

As argued in Schierman's opening brief, experience and logic demonstrate that to the greatest extent possible, jury selection should be conducted in open court. The State points to *State v. Rice*, supra, and *State v. Tingdale*, 117 Wn.2d 595, 817 P.2d 850 (1991), as "evidence" that the hardship excusals "have been conducted by the court clerk in non-public forums." BOR at 45. But that development is of recent origin. *Tingdale* was decided in 1991 and *Rice* in 1993. And, as argued above, that judges may delegate this function to court clerks does not necessarily mean that conducting those delegated duties behind closed doors – absent a *Bone-Club* hearing – is constitutional.

And, the appellants in *Rice* and *Tingdale* raised no open courtroom issues. Their challenges were based upon the statutory procedures in RCW Title 2.36 and 4.44. But, as this Court has clarified, statutory provisions cannot trump the state constitutional mandate for open court proceedings. *See, e.g., State v. Chen*, 178 Wn.2d 350, 355, 309 P.3d 410, 413 (2013) (presumption of privacy in RCW 10.77.210 arguably conflicts with our state constitutional requirement that all court records be presumptively open to public view and a blanket closure rule would be inappropriate where the public-trial-rights jurisprudence requires case by case analysis).

The State concedes that, although increased information about jury service and its hardships

may make for improved policymaking, that is separate from the question of whether it...furthers any of the other goals that the right to a public trial is in fact intended to serve.

BOR at 50-51. That statement assumes that the public has no right to know what is happening regarding jury hardships or to be involved in informed policy making.

The State does not really dispute Schierman's arguments at Appellant's Opening Brief (AOB) 28-35, except to suggest that the public is protected against collusion by the parties because the jury services manager was involved in the process and was utilizing the Court's "clear" written guidelines. But, as this Court can see from reviewing the entirety of the jury hardship responses at CP 23741-25089, the statutes and King County jury policy provide substantial room for discretion. In determining "undue hardship," the jury staff must determine if a "juror will be unable to meet the basic needs of the juror and the juror's family." CP 21350. Contrary to the State's argument, many, many jurors sought to be excused for financial hardship and job related reasons. CP 23763-23785. That is not surprising when the trial was projected to last several months. The State argues that the responses of the one juror showcased in Schierman's

opening brief are irrelevant because he did not appear for voir dire. BOR at 50. But that is precisely Schierman's point. The pay is so low that many citizens cannot appear – apparently even for one day.

3. There is Nothing “De Minimus,” “Trivial” or “Harmless” about the Courtroom Closures

Like this Court, the U.S. Supreme Court has repeatedly reaffirmed the principle that deprivation of the right to public trial is structural error and requires reversal of a conviction, “regardless of [the] actual impact on an appellant’s trial.” *United States v. Marcus*, 560 U.S. 258, 258-259, 130 S.Ct. 2159, 2164, 176, L.Ed.2d 1012 (2010); *see also, e.g., United States v. Gonzalez-Lopez*, 548 U.S. 140, 149, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006). While this Court “has not considered whether the public trial rights under the state and federal constitutions are coequal,” *Wise*, 176 Wn.2d at 9, it has concluded that the state constitution “provides at minimum the same protection of a defendant’s fair trial rights as the Sixth Amendment.” *Bone-Club*, 128 Wn.2d at 260 (emphasis added). The State is therefore hard-pressed to argue that a violation of the right to a public trial can be treated as harmless error under either the federal or Washington constitutions. *See also State v. Easterling*, 157 Wn.2d 167, 181, 137 P.3d 825 (2006) (“The denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject

to harmless error analysis.”); *State v. Strode*, 167 Wn.2d 222, 230, 217 P.3d 310 (2009) (lead opinion) (“This Court...has never found a public trial right to be trivial or de minimis”) (quoting *Easterling*, 157 Wn.2d at 180).

Further, applying harmless error analysis to open court violations would be unworkable because a violation of a defendant’s public trial right will inevitably implicate the public’s right to access criminal proceedings under Const., art. I, § 10, This Court has recognized that

[t]he section 10 guaranty of public access to proceedings and the section 22 public trial right serve complementary and interdependent functions in assuring the fairness of our judicial system.

Bone-Club, 128 Wn.2d at 259; see also *State v. Paumier*, 176 Wn.2d 29, 37, 288 P.3d 1126 (2012) (“The right to a public trial is a unique right that is important to both the defendant and the public”). However, “assessing the effects of a violation of the public trial right is often difficult,” and “[r]equiring a showing of prejudice would effectively create a wrong without a remedy.” *Paumier*, 176 Wn.2d at 37.

Given the complementary functions of the core constitutional rights embodied in sections 10 and 22, this Court has unequivocally concluded that “we do not require a defendant to prove prejudice when his right to a public trial has been violated.” *Id.* One reason for this standard is there is

no way to know whether anyone has good reason to object to the closure unless, as required by *Bone-Club*, the court inquires into that matter. *See Bone-Club*, 128 Wn.2d at 258. As a practical matter, there is no way for members of the public (such as journalists or relatives of the defendant) to assert their rights or demonstrate prejudice under Const., art. I, § 10 unless a trial court does the *Bone-Club* analysis before a hearing is closed.

Bone-Club requires little. It requires courts to “weigh the competing interests of the proponent of closure and the public.” 128 Wn.2d at 259. If a trial court follows the straightforward steps in *Bone-Club* and decides that a closure is necessary then, as previously noted, that decision is reviewed for abuse of discretion. But here, the trial court did not engage in the simple and straightforward balancing test long required.

4. There is No Basis for This Court to Overrule Its Previous Cases that Permit Schierman to Raise This Issue for The First Time on Appeal

This Court has consistently rejected the State’s argument for nearly 100 years, beginning with *State v. Marsh*, 126 Wash. 142, 217 P. 705 (1923). There, the defendant was tried in a closed juvenile court, waived his right to an attorney, and did not object to the closed proceedings. *Id.* at 143. On appeal, the State maintained “that because no objection or exception was entered or taken by the appellant at the time of the trial, the error, if any, cannot now be taken advantage of.” *Id.* at 145. This Court

unequivocally rejected the State's argument because it "ignores the force and effect of the constitutional provision. The right to a public trial is guaranteed." *Id.* at 146 (quotation omitted). Consistent with this guarantee,

[w]here the constitutional right has been invaded, it has been held by this court that no failure of objection or exception should stand in the way of considering errors based on the violation of such provisions.

Id. (citation and internal quotation marks omitted).

In addition, the State's waiver argument puts the procedural cart ahead of the constitutional horse. While a defendant can waive many constitutional rights, such as the right to a jury trial, such waivers must be "knowing, intelligent and voluntary." *State v. Stegall*, 124 Wn.2d 719, 724, 881 P.2d 979 (1994). Where, as here, there was no public, on-the-record colloquy about closing the proceedings, there is no way to determine whether a purported waiver was valid. That is one reason for requiring compliance with the *Bone-Club* factors.

The State also fails to consider that the public, not just defendants, must be informed about the reasons for closure and given an opportunity to object. As the Court explained in *Bone-Club*, "an opportunity to object [to a closure] holds no 'practical meaning' unless the court informs potential objectors of the nature of the asserted interests." 128 Wn.2d at 261 (citation omitted). Because the guarantees of sections 10 and 22 are so

overlapping and intertwined, this Court has concluded that trial courts have an “affirmative duty” to perform the *Bone-Club* analysis, regardless of whether a defendant has acquiesced in a court closure. *Strode*, 167 Wn.2d. at 228.

D. SCHIERMAN WAS DENIED HIS CONSTITUTIONAL RIGHT TO REPRESENTATION PURSUANT TO THE SIXTH AMENDMENT AND CONST., ART. I, § 22 WHEN SOME JURORS WERE EXCUSED WITHOUT THE PRESENCE OF, OR CONSULTATION WITH, HIS COUNSEL

The State argues that, as to the 100 jurors excused without review by counsel, Schierman invited or failed to preserve the error. In the alternative, the State argues that Schierman “ratified” the acts of the paralegal who was acting as his agent.

To some extent, the State’s argument depends upon its overall position that hardship excusals are “administrative” and can be undertaken with no input from the defendant. But *Irby*, discussed above, clarifies that jury selection – including hardship considerations – is a critical stage of the proceedings. And, as argued above, the trial court clearly believed that to be so because he did not permit the jury room staff to excuse any prospective juror without first conferring with counsel.

Contrary to the State’s argument, Schierman’s counsel objected to excusal of these 100 jurors. 10/28/07 RP 7. But even though defense counsel Pete Connick called to point out the mistake within 30 minutes, it

was too late because the jurors were irrevocably excused. *Id.* at 6-7. The trial judge stated that when Connick contacted the court he told the judge “he was not agreeing to excuse” any of these jurors. *Id.* at 6.

In an analogous setting, this Court has held that representation by a Rule 9 intern who fails to comply with the conditions placed upon her practice constitutes an absolute denial of the right to counsel, which requires reversal with no showing of prejudice. *City of Seattle v. Ratliff*, 100 Wn.2d 212, 219, 667 P.2d 630 (1983). In *Ratliff* this Court held that “counsel” as used in the Sixth Amendment and Const., art. I, § 22 includes only those persons authorized by the courts to practice law. *Id.* at 217. The State does not cite a single case or court rule that permits a paralegal to act as counsel or an “agent” of counsel during jury selection.⁶

The deprivation here, like the deprivation in *Ratliff*, was complete. There was no counsel present and the paralegal did not consult with either Schierman or defense counsel. *Bell v. Cone*, 535 U.S. 685, 697-98, 122 S.Ct. 1843, 1851-52, 152 L.Ed.2d 914, *reh’g denied*, 536 U.S. 976, 123 S.Ct. 2, 153 L.Ed.2d 866 (2002), provides no support for the State’s arguments. There, the aspects of counsel’s performance challenged by respondent – failing to adduce mitigating evidence and the waiver of

⁶ This Court has recently authorized limited practice by “legal technicians,” but even now they are not authorized to engage in jury selection.

closing argument – were specific attorney errors subject to the ineffective assistance of counsel standards.

E. THE STATUTORILY REQUIRED NOTICE OF DEATH PENALTY PROCEEDING WAS DEFECTIVE BECAUSE SCHIERMAN WAS NOT PROPERLY CHARGED WITH AGGRAVATED MURDER

The State maintains that the Notice of Special Sentencing Proceeding to Determine Whether Death Penalty Should be Imposed was valid despite its failure to file an information including all the elements of aggravated murder. Schierman's opening brief refutes that argument.

The State argues in the alternative that if it did not charge a valid aggravating factor until November 3, 2009, there was no requirement to file a notice of special sentencing proceeding before then. That argument is faulty because a charge of aggravated murder can stand despite a defective information but a death penalty notice cannot. Therefore, the original information triggered the time limit for the death penalty notice, even though it was insufficient to support the notice.

As the State has pointed out, Washington permits liberal amendment of an information. A defect in charging an element generally does not invalidate the prosecution as long as the error is corrected before trial. Even a defect that goes unnoticed throughout the trial may not require reversal because the information is liberally construed when it is

challenged after the verdict. *State v. Kjorsvik*, 117 Wn.2d 93, 105, 812 P.2d 86, 92 (1991). A defective information will even toll the statute of limitations. RCW 9A.04.080(4); *In re Thompson*, 141 Wn.2d 712, 10 P.3d 380, 388 (2000). Thus, despite the defective information, a prosecution for aggravated murder was ongoing from the time the original information was filed. The information therefore triggered the deadline for filing the death penalty notice.

Unlike an information, however, the requirements of the death penalty notice must be strictly followed. *See* AOB at 40-43. Those requirements include timely filing, and the existence of an aggravating factor “as defined by RCW 10.95.020.” The original death penalty notice was invalid because it was not based on a correct definition of the aggravating factor. The second attempt at a death penalty notice was invalid because it was filed long after the deadline passed.

Alternatively, the State should be estopped from arguing that the original information was insufficient to trigger the time limit for filing the death penalty notice because it gained a substantial advantage by purporting to file a proper charge of aggravated murder.

Judicial estoppel applies “only if a litigant’s prior inconsistent position benefited the litigant or was accepted by the court.” Either of these two results permits the application of judicial estoppel. Both are not required.

Cunningham v. Reliable Concrete Pumping, Inc., 126 Wn. App. 222, 230-31, 108 P.3d 147, 151 (2005) (quoting *Johnson v. Si-Cor, Inc.*, 107 Wn. App. 902, 909, 28 P.3d 832 (2001)). There is no requirement that the litigant intentionally misled the court. *Cunningham*, 126 Wn. App. at 233.

Here, the State's claim that it had charged aggravated murder prevented Schierman from pleading guilty to a non-capital offense. Under RCW 10.95.040 a defendant charged with aggravated murder has no right to enter a guilty plea until the State has decided whether to file a death penalty notice.

Further, when the State purported to file a proper death penalty notice on January 30, 2007, it simultaneously requested an order revoking bail. The State noted that a defendant has no right to bail once charged with a capital offense, citing Const., art. I, § 20⁷ and CrR 3.2. 1/30/07 RP 3. The trial court agreed. *Id.* at 4.

After that, over two years went by before the State acknowledged its error. During all of that time, Schierman was misled into believing he could not avoid the death penalty by pleading guilty and that he had no right to bail. Under these circumstances, the State should be estopped

⁷ Section 20 was amended in November 2010 to authorize denial of bail when the defendant faces life without parole, but that was after the events at issue here.

from arguing that its failure to file a valid aggravating factor in 2006 permitted it to file a death penalty notice over three years later.

F. SCHIERMAN WAS DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT, AND THE RIGHT TO AN IMPARTIAL JURY UNDER THE SIXTH AMENDMENT, BECAUSE THE TRIAL COURT APPLIED AN INCORRECT STANDARD REGARDING DEFENSE CHALLENGES FOR CAUSE, AND IMPROPERLY GRANTED STATE CHALLENGES

1. The Court Erroneously Applied The State's Proposed "Asymmetric" Standard

The State's position is that the a juror who is substantially impaired in his ability to follow the court's instructions due to his strong support of the death penalty is not subject to a challenge for cause, but a juror who is substantially impaired in her ability to follow the instructions because of her qualms about the death penalty *is* subject to a challenge for cause. Applying this double standard yields a jury remarkably receptive to imposing death. The State's argument that this double standard protects the defendant's rights is absurd.

The State's position is supported by only one case in the entire country. It is not supported by the language in *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222, 2232, 119 L.Ed.2d 492 (1992), itself or by any subsequent United States Supreme Court opinion.

In *Morgan*, the majority viewed the standard as the same for defense and prosecution.

We deal here with petitioner's ability to exercise intelligently his complementary challenge for cause against those biased persons on the venire who as jurors would unwaveringly impose death after a finding of guilt. Were voir dire not available to lay bare the foundation of petitioner's challenge for cause against those prospective jurors who would always impose death following conviction, his right not to be tried by such jurors would be rendered as nugatory and meaningless as the State's right, in the absence of questioning, to strike those who would never do so.

Morgan, 504 U.S. at 733-34.

Witherspoon and its succeeding cases would be in large measure superfluous were this Court convinced that such general inquiries could detect those jurors with views preventing or substantially impairing their duties in accordance with their instructions and oath. But such jurors – whether they be unalterably in favor of, or opposed to, the death penalty in every case – by definition are ones who cannot perform their duties in accordance with law, their protestations to the contrary notwithstanding.

Id. at 734-35. As discussed in the AOB at 50, the parties in *Morgan* phrased the issue in terms of “automatic” votes for death or life because that appeared to be the standard at the time of trial. Not until the decision in *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), did the Court adopt the more nuanced “substantial impairment” standard. However, as the above quote shows, the *Morgan* Court did clarify that “substantial impairment” was sufficient to strike jurors favoring either

death or life. And Justice Scalia's dissent does not help the State. He criticizes the majority for *failing* to create asymmetry. *See Morgan*, 504 U.S. at 750, fn. 5.

The State says that commentators support the conclusion that the two standards are "merely similar." *See* 42 Geo. L. J. Ann. Rev. Crim. Proc. 845, 867-68 (2013). But the cases cited in that article generally equate the two standards.

In *United States v. Fulks*, 454 F.3d 410, 427-28 (4th Cir. 2006), *cert. denied*, 551 U.S. 1147, 127 S.Ct. 3002, 168 L.Ed.2d 731 (2007), the court applied the *Witt* "substantial impairment" standard to jurors who favor death:

The Supreme Court has ruled that a juror should be excluded 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." *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) (internal quotation marks omitted). And, in a capital sentencing proceeding, a juror's duties include giving meaningful consideration to any mitigating evidence that the defendant can produce. *See Eddings v. Oklahoma*, 455 U.S. 104, 114, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (observing that sentencer may not refuse to consider any mitigating factor). Thus, where voir dire examination reveals that a juror "will fail in good faith to consider the evidence of ... mitigating circumstances as the instructions require him to do," he is excludable for cause. *Morgan*, 504 U.S. at 729, 112 S.Ct. 2222.

In *Miniel v. Cockrell*, 339 F.3d 331, 338 (5th Cir. 2003), *cert. denied*, 540 U.S. 1179, 124 S.Ct. 1413, 158 L.Ed.2d 81 (2004), the Court reasoned:

The Sixth Amendment right to a fair trial includes the right to an impartial jury. *Morgan v. Illinois*, 504 U.S. 719, 727, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992). In a capital sentencing context, a defendant has the right to challenge for cause a juror whose views on capital punishment would “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985).

The defendant in *United States v. Nelson*, 347 F.3d 701, 710 (8th Cir. 2003), *cert. denied*, 543 U.S. 978, 125 S.Ct. 486, 160 L.Ed.2d 355 (2004), *reh’g denied*, 543 U.S. 1082, 125 S.Ct. 949, 160 L.Ed.2d 831 (2005), argued that the trial court unconstitutionally denied his for-cause challenge on one juror and unconstitutionally granted the government’s for-cause challenges as to others. In discussing both side’s challenges, the Court said:

As a general rule, “a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” *United States v. Ortiz*, 315 F.3d 873, 892 (8th Cir.2002) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980)).

In *White v. Mitchell*, 431 F.3d 517, 541 (6th Cir. 2005), *cert. denied*, 549 U.S. 1047, 127 S.Ct. 578, 166 L.Ed.2d 457, *and cert. denied*, 549 U.S. 1034, 127 S.Ct. 581, 166 L.Ed.2d 434 (2006), the federal court reversed when the trial court failed to excuse Juror Sheppard. That court did not

focus on whether Sheppard would “automatically” impose the death penalty.

Rather, the court relied on the substantial impairment test. The Court said:

Sheppard stated repeatedly that she had doubts as to whether she could follow the law, and explicitly stated, in contrast to her earlier voir dire statements, that she did not think it would be fair to the defendant for her to sit on the jury. As we read Sheppard’s statements in their entirety, we are struck by the vacillating nature of her responses; she contradicts herself from question to question, sometimes openly equivocating during a single answer.

That the juror’s “doubts” about her ability to follow the instructions was enough to strike her shows that the Court was not following an “automatic death” standard. *See also, State v. Mickelson*, -- So.2d --, 2012-2539, 2014 WL 4356305 at *7 (La. 9/3/14) (referring to a defense challenge to a death-biased juror as a “reverse-*Witherspoon*” challenge, and applying the “substantial impairment” standard). *Morgan* was published in 1992 and it appears no court but one has ever described the government and defense standards as asymmetrical.

Finally, that the Legislature decided that jurors must be unanimous to impose the death penalty does not mean that the State is therefore entitled to a jury biased in the State’s favor. *Morgan* explicitly rejected that proposition. *Id.* at 734, n.8 The Court noted this argument was foreclosed by its decision in *Ross v. Oklahoma*, 487 U.S. 81, 85, 108 S.Ct. 2273, 101 L.Ed.2d 80, *reh’g denied*, 487 U.S. 1250, 109 S.Ct. 11, 101 L.Ed.2d 962 (1988). The

Court emphasized that no party is entitled to jurors who cannot impartially follow the court's instructions.

Regardless of federal standards, an "automatic death" standard could not possibly apply in Washington because of our unusual death penalty statute. RCW 10.95.060(4) requires jurors to render a verdict of life without parole unless they are convinced beyond a reasonable doubt "that there are not sufficient mitigating circumstances to merit leniency."

[T]he State's burden of proof necessarily carries with it a presumption in favor of the defendant. See . . . Comment, WPIC 31.05, 11 Wash.Prac. 352, 353-54 (2d ed. 1994).

State v. Brett, 126 Wn.2d 136, 191, 892 P.2d 29, 58 (1995), *cert. denied*, 516 U.S. 1121, 116 S.Ct. 931, 133 L.Ed.2d 858 (1996) (citation and internal quotation marks omitted). A juror who would even *presume* death to be the default penalty would unquestionably violate Washington's standards, even if he could consider death under some circumstances. Washington's standards for jury selection are in a sense asymmetrical, but only in favor of the defense. The legislature has set out a standard that favors life-biased jurors over death-biased ones since it is not only permissible but *required* that jurors presume they will vote for life.

2. The Trial Judge Denied The Defense Challenge to Juror 59 under The Wrong Standard

The trial judge refused to excuse Juror 59 by citing to *Morgan* and stating that the juror was qualified because he was “not going to be absolutely bullheaded about imposing the death penalty.” RP 12/8/09 RP 108. This was the incorrect standard.

And, under the “substantially impaired” standard, Juror 59 should have been excused. He stated that the death penalty was proper in cases except those where the mental disorders were proved to him by “hard fact.” 12/8/09 RP 101. This mind set directly violates Washington’s presumption of leniency. Further, Juror 59 also believed that the defendant and the lawyers would lie and that the defense lawyers had a greater propensity to lie. *Id.* Those statements further show that Juror 59 would be extremely skeptical of mitigating evidence, rather than presuming there were sufficient mitigating evidence to merit leniency. It is beyond dispute that Juror 59 was at least substantially impaired in his ability to follow the Court’s instructions.

3. The Trial Judge Denied The Defense Challenge to Juror 140 under The Wrong Standard

The State is incorrect when it argues that the trial judge excused Juror 140 under the correct standard. He did not. He refused to excuse

Juror 140 because she would not “automatically” vote for the death penalty. *See* 12/09/09 RP 47-48.⁸

Under the “substantial impairment” standard, Juror 140 should have been excused. The juror was absolutely unwilling to consider any mitigation other than possibly some proof that the defendant would better himself in prison. She never disavowed her stated position that if the defendant planned the murders, she would impose the death penalty. Like Juror 59, she was unwilling to presume that the mitigation actually at issue in this case could merit leniency. Therefore, she was substantially impaired in her ability to follow the Court’s instructions. Again, the trial court’s improper standard was decisive because of his conclusion that it was conceivable that under certain very narrow circumstances this juror might vote for life.

⁸ It is true that the trial judge has the benefit of viewing the prospective juror’s demeanor, but the Louisiana Supreme Court has identified that limits of that advantage.

Moreover, while the district court does have the benefit of seeing the facial expressions and hearing the vocal intonations of the members of the jury venire as they respond to questioning, giving the district court a distinct advantage in assessing the veracity and sincerity of the answers given, this unique perspective is primarily helpful in ferreting out unstated biases; not for downplaying stated predispositions. In this case, insofar as the mitigating circumstance of intoxication is concerned, the prospective juror's responses never wavered. Facial expressions and vocal intonations notwithstanding, Roy Johnson was consistent in verbalizing an unwillingness to consider alcohol or drug induced intoxication as a mitigating circumstance in determining the appropriate sentence in this case.

State v. Mickelson, --So.2d --, 2012-2539, 2014 WL 4356305 at *11 (La. 9/3/14).

4. The Trial Court Erred in Excusing Juror 280

The trial court erred in granting the State's challenge to Juror 280 because none of her answers on the questionnaire or in voir dire suggested views that would substantially impair her ability to perform her duties by voting to impose the death penalty in an appropriate case. And, under the facts, which included multiple murder counts, she was more than able to consider the death penalty.

G. THE CUMULATIVE IMPROPRIETIES IN THE SUMMONING AND SELECTING OF THE JURY VIOLATED SCHIERMAN'S RIGHT TO A FAIR AND IMPARTIAL JURY

The cumulative error doctrine permits reversal when there have been several trial errors that standing alone may not be sufficient to justify reversal, but when combined may deny a defendant a fair trial. *See, e.g., State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (three instructional errors and the prosecutor's remarks during voir dire required reversal); *State v. Alexander*, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992) (reversal required because (1) a witness impermissibly suggested the victim's story was consistent and truthful, (2) the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and (3) the prosecutor repeatedly attempted to introduce inadmissible testimony during the trial and in closing); *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730,

review denied, 78 Wn.2d 992 (1970) (reversing conviction because (1) court's severe rebuke of the defendant's attorney in the presence of the jury, (2) court's refusal of the testimony of the defendant's wife, and (3) jury listening to tape recording of lineup in the absence of court and counsel).

Here, four errors of constitutional magnitude occurred at the jury selection phase: (1) Schierman was not present for portions of the voir dire process, (2) Schierman and the public were excluded, (3) Schierman was unrepresented for a portion of jury selection and (4) the trial court used an improper asymmetrical standard when "death qualifying" the jury. The State argues that each error was harmless, but even if that were true, the accumulation of errors had a pervasive impact on the outcome at trial.

H. THE STATE PRESENTED A THEORY OF SEXUAL MOTIVATION AFTER THE PROSECUTOR AND JUDGE PROMISED THAT WOULD NOT BE AT ISSUE, AND THE PROSECUTOR ARGUED INFERENCES NOT SUPPORTED BY THE EVIDENCE

1. The Defense was Misled to Its Detriment

The State's response on this issue bears little resemblance to the claim actually raised by Schierman. He does not maintain that the prosecutor violated the trial court's final ruling regarding arguing sexual motivation. Rather, Schierman's main point is that defense counsel were misled when the prosecutor and judge promised that sexual assault and

sexual motivation would not be at issue, and then reneged on those promises after it was too late to voir dire the prospective jurors on sexual issues. In a related issue, the prosecutor argued some inferences that were not supported by the evidence.⁹

As discussed in the opening brief, defense counsel reasonably understood the prosecutor's stipulation that "there is no physical evidence of sexual assault of any of the victims" to mean that sexual motivation would not be an issue at trial. Later, when it appeared from certain expert witness disclosures that the prosecutor might have changed his mind, defense counsel promptly noted that they must conduct voir dire anew because they needed to know the juror's feelings about sexual assault. The trial court denied the request on the ground there would be no evidence of "sexual motivation or sexual assault, consistent with this Court's prior rulings and the prior representations of counsel for the State that that was not an issue in the case." 1/11/2010 RP 7.¹⁰

Understandably, after hearing that promise, defense counsel declined to probe the jurors' views on sexual offenses. It would have been

⁹ The State criticizes Schierman for failing to use the phrase "prosecutorial misconduct" as if those were magic words. In fact, that phrase is imprecise because it can refer to a wide range of errors with differing analyses. In this section, Schierman has focused on the particular errors by the court and prosecutor.

¹⁰ As the judge's comments shows, he too interpreted the prosecutor's stipulation to preclude any issue regarding sexual assault or sexual motivation.

foolish to put such thoughts in the jurors' minds when the issue would not otherwise come up.

Unfortunately, on the very day that voir dire concluded, the trial judge reneged. He rejected defense counsel's request to preclude the prosecutor from arguing sexual motivation. 1/19/2010 RP 149. The Court also denied all of the defense requests for alternative relief, which included new jury selection and an opportunity to re-interview the witnesses who would provide testimony that, according to the State, would support sexual motivation. *Id.* at 143-52.

The State maintains that it was an "obvious inference from the record" that "Schierman was motivated by lust." BOR at 115. But that was not obvious. That 20-something men engaged in "locker room talk" is hardly a sign that one of them was contemplating sexual assault and murder. Only Sean Winter testified that Schierman made a specific reference to a woman across the street from his apartment. The other people present on that day did not hear such a comment. In any event, noticing that there is a pretty woman in the neighborhood is not a precursor to criminal activity. That women's garments were strewn on the floor of the basement and were stuffed into the microwave does not suggest sexual motivation. According to the State's expert

the clothing may have been used to start the fire, and the available clothing in that area happened to belong to a woman. The State makes much of the fact that the female victims were found naked, but it was undisputed that the night was quite hot, so it would be natural to sleep naked. 4/8/2010 RP 130-31.

The State maintains this issue is not preserved because defense counsel did not object during the prosecutor's closing argument. But that was unnecessary because defense counsel strongly objected to such argument during the unsuccessful motion in limine on January 19, 2010. "The purpose of a motion in limine is to dispose of legal matters so counsel will not be forced to make comments in the presence of the jury which might prejudice his presentation." *State v. Kelly*, 102 Wn.2d 188, 193, 685 P.2d 564 (1984) (quoting *State v. Evans*, 96 Wn.2d 119, 123-24, 634 P.2d 845 (1981)). "Unless the trial court indicates further objections are required when making its ruling, its decision is final, and the party losing the motion in limine has a standing objection." *Kelly*, 102 Wn.2d at 193 (citation omitted).

The State insists that the trial prosecutor's description of the evidence was accurate, and to some extent it was. But that does not change the fact that the defense was misled into believing such evidence would not be presented or discussed. That some of the prosecutor's

arguments regarding sexual motivation were based on physical evidence admitted at trial shows that the State contradicted even the narrowest interpretation of its stipulation that there was no physical evidence of a sexual assault. *See* BOR at 111-15, discussing the physical evidence at length.

2. The State Argued Inferences Not Supported by The Evidence

Even if the defense had been properly informed that the State would argue sexual motivation, it would still be improper for the prosecutor to argue inferences not supported by the record. *See* AOB at 74-75. Schierman assigned error to this practice. *See* AOB at 2, assignment of error 7.

The most egregious example is the prosecutor's argument that certain marks on the defendant's head proved that he was lying prone over Olga Milkin. This required an unreasonable stacking of inference upon inference. Even if one assumes that the marks were caused by Schierman's necklace, there are many ways the necklace could have made a mark on his skin. For example, by his own account he collapsed on the floor in a drunken stupor. His head could have been pressed against the necklace for hours.

According to the State's brief, the necklace had "chunks of flesh in it." BOR at 114. This is a considerable overstatement. In fact, the State's expert, Dr. Blake, testified the necklace contained tiny, loose, cellular debris that could be seen under a stereo microscope. 2/17/2010 RP 30-32. Dr. Blake did not suggest that there was anything unusual about that.

I. THE PRESENCE OF NUMEROUS SOLDIERS IN UNIFORM, COUPLED WITH TESTIMONY THAT LEONID MILKIN WAS DEPLOYED IN A COMBAT ZONE AT THE TIME OF THE MURDERS, RENDERED THE TRIAL UNFAIR

The State maintains that uniformed soldiers did not prejudice the defense. Schierman has cited cases to the contrary. *See* AOB at 80-84. Another helpful case is *Balfour v. State*, 598 So.2d 731 (1992), which involved the murder of a policeman. Although the defendant's conviction and death sentence were reversed on other grounds, the Supreme Court of Mississippi recognized that "the *potential exists* for a coercive atmosphere when uniformed law officers sit together in a group." *Id.* at 756 (emphasis in original). "Consequently, we discourage this practice." *Id.*

We observe that the potential for an overbearing influence is easily diffused when the court requires law enforcement personnel to wear street clothes when attending trial in a spectator capacity or when uniformed personnel are dispersed in the courtroom.

Id. The same reasoning applies in this case. The soldiers supporting Mr. Milkin had every right to watch the trial, but there was no need for them to wear uniforms and to sit together near the prosecutor.

The State maintains that Schierman did not assign error to Mr. Milken's testimony that he was deployed in a war zone. In fact, assignment of error 8 expressly includes that issue. AOB at 2.

J. THE GUILT PHASE JURY INSTRUCTIONS REGARDING
PREMEDITATION, VOLUNTARY INTOXICATION, AND
LESSER INCLUDED OFFENSES VIOLATED SCHIERMAN'S
RIGHT TO DUE PROCESS

1. Premeditation

The State's main argument is that this Court has in recent cases affirmed the WPIC's definition of premeditation. Schierman conceded that point in his opening brief, while explaining why this Court should overrule those cases. *See* AOB at 89.

2. Voluntary Intoxication Instruction

Schierman and the State agree this Court properly interpreted RCW 9A.16.090 in *State v. Coates*, 107 Wn.2d 882, 735 P.2d 64 (1987). The State suggests that *Coates* further approved the jury instruction in *State v. Fuller*, 42 Wn. App. 53, 708 P.2d 413 (1985), *review denied*, 105 Wn.2d 1008 (1986), by citing that case with approval. But the *Coates*

court relied on *Fuller* only for the proposition that the State need not disprove intoxication. *Coates*, 107 Wn.2d at 890.

The State argues that the prosecutor's closing argument clarified the jury instruction. BOR at 151. But the prosecutor's explanation was essentially the same as the jury instruction. *Id.*¹¹

The State maintains that Schierman was not entitled to the jury instruction in the first place because there was insufficient evidence of intoxication. It notes there was no expert testimony that Schierman's intoxication negated the relevant mental states. However, "[a] defendant is entitled to have the jury instructed on [his] theory of the case if there is evidence to support that theory." *State v. Harvill*, 169 Wn.2d 254, 259, 234 P.3d 1166, 1168 (2010) (citation and internal quotation marks omitted). The trial court's decision that the evidence is sufficient is reviewed for abuse of discretion. By Schierman's account, he consumed substantial alcohol on the night of the incident, causing him to black out. This raised a reasonable inference that his mental state was affected. The trial court did not abuse its discretion in leaving it to the jury to decide whether Schierman's intoxication affected his mental state.

¹¹ The State also argues that portions of this argument were never raised below and therefore are waived. However, this instruction was manifest constitutional error that can be raised for the first time on appeal. RAP 2.5(a).

The State notes in a footnote that Schierman never argued he lacked the mental capacity to commit arson. But it is obvious why he did not. The arson took place the morning after Schierman's alcoholic binge.

3. Schierman was Entitled to Instructions on Manslaughter

The State concedes that the trial court erred in concluding that Schierman did not meet the "legal" basis for manslaughter instructions. BOR at 157. Schierman rests on his opening brief regarding the factual basis for the instructions. *See* AOB at 97.

K. THE TRIAL COURT VIOLATED SCHIERMAN'S
CONSTITUTIONAL AND STATUTORY RIGHTS TO
PRESENT RELEVANT MITIGATING EVIDENCE IN THE
PENALTY PHASE

1. Dr. Cunningham's Proposed Testimony

a. *The Issue is Properly Preserved*

The defense declined to present Dr. Cunningham because the trial court excluded much of his proposed testimony. The State contends that Schierman has not preserved the error because Dr. Cunningham did not take the stand and testify before the jury. The State relies on *State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013 (1989), *opinion corrected*, 787 P.2d 906 (1990), and two Court of Appeals cases applying *Brown*. All three cases deal with the same situation: a defendant declines to testify or

to present a defense because the trial court has ruled that such testimony will subject the defendant to significant impeachment or rebuttal.

A different rule applies, however, to rulings excluding evidence.

ER 103(a) states:

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . .

(2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

This Court applied that rule in *State v. Ray*, 116 Wn.2d 531, 806 P.2d 1220 (1991). There, the trial court excluded testimony from a defense witness. *Id.* at 536. The Court distinguished *Brown*.

In this case, the defendant testified at trial. The trial court's ruling was not pursuant to ER 609 and the court here did not have to perform the on-the-record balancing that ER 609 requires. *Brown*, 113 Wn.2d at 533, 782 P.2d 1013. Further, the evidence Ray offered was exculpatory and he arguably would not have the same incentive to "abuse ER 609" as the defendant trying to exclude damaging information about his past criminal history.

Id. at 543. In this setting, it is not even necessary to present a formal offer of proof. "The rule requires only that the substance of the testimony be apparent from the record." *Id.* at 539.

Similarly, in *State v. Benn*, 161 Wn.2d 256, 267-68, 165 P.3d 1232 (2007), *cert. denied*, 553 U.S. 1080, 128 S.Ct. 2871, 171 L.Ed.2d 813

(2008), the trial court prohibited the defense from using learned treatises to cross-examine the State's expert. Although the defense made no formal offer of proof, "the substance of the evidence was fairly apparent from Benn's questioning of the experts." *Id.* at 268.¹²

Here, the defense presented a detailed offer of proof regarding Dr. Cunningham's testimony. *See* AOB at 104-06.

b. The Court had No Basis to Reject Testimony Regarding Studies

The State also argues that the trial court properly prohibited Dr. Cunningham from testifying about research on risk factors in prison unless the studies took place in Washington. The State asks this Court to uphold that reasoning, even though it concedes that Washington courts routinely rely on actuarial risk assessments not based on Washington research. But the State provides no reasoned basis for departing from this Court's holdings.

¹² The Court of Appeals has applied the same analysis in a wide variety of settings in which the appellant alleges improper exclusion of evidence. *See, e.g., In re McGary*, 175 Wn. App. 328, 336-337, 306 P.3d 1005, *review denied*, 178 Wn.2d 1020, 312 P.3d 651 (2013) (defendant preserved review regarding exclusion of expert testimony without formal offer of proof); *Hensrude v. Sloss*, 150 Wn. App. 853, 859-60, 209 P.3d 543 (2009) (although appellant failed to include a written settlement offer in the record on appeal, testimony about that offer reviewed the court's exclusion of the settlement offer); *Wilson v. Olivetti N. Am., Inc.*, 85 Wn. App. 804, 811, 934 P.2d 1231, *review denied*, 133 Wn.2d 1017, 948 P.2d 388 (1997) (plaintiff's offer of proof was "detailed enough for the trial court, the parties, and this court to understand the issues"); *Thor v. McDearmid*, 63 Wn. App. 193, 204, 817 P.2d 1380 (1991) (although it may be desirable to have offers of proof in questions and answers from the witness, "if the substance of the excluded evidence is apparent, the offer is sufficient").

The State also suggests two additional reasons for rejecting Dr. Cunningham's studies, although the trial court did not rely on them: that Dr. Cunningham's methods were not actuarial risk assessments and that his work was not generally accepted in his field. BOA at 173-74.¹³ It is difficult to respond to these objections because they were not raised by the State or the trial court below.

Nevertheless, Dr. Cunningham's offer of proof does implicitly negate the State's arguments. First, of his 24 peer-reviewed scholarly articles, the titles of three expressly refer to actuarial risk assessments.¹⁴ Most of the other titles involve phrases referring to scientific assessment of risk, such as "rates and correlates of misconduct," "risk assessment and risk management," and "predictive factors for violent conduct." The State speculates that Dr. Cunningham's techniques do not meet the definition of actuarial risk assessments as described in *In Re Thorell*, 149 Wn.2d 724,

¹³ The State discusses at length alleged discovery violations by the defense, but it does not suggest that the trial court excluded, or could have excluded, Dr. Cunningham's testimony on that basis.

¹⁴ Cunningham, M.D. & Sorensen, J.R. (2007). Capital offenders in Texas prisons: Rates, correlates, and an actuarial analysis of violent misconduct. *Law and Human Behavior*, 31, 553-571. CP 8264.

Cunningham, M.D. & Sorensen, J.R. (2006). Actuarial models for assessment of prison violence risk: Revisions and extensions of the Risk Assessment Scale for Prison (RASP). *Assessment*, 13, 253-265. CP 8264.

Cunningham, M.D., Sorensen, J.R., & Reidy, T.J. (2005). An actuarial model for assessment of prison violence risk among maximum security inmates. *Assessment*, 12, 40-49. CP 8265.

753, 72 P.2d 708 (2003), *cert. denied*, 541 U.S. 990, 124 S.Ct. 2015, 158 L.Ed.2d 496 (2004), but there is no reason to believe they do not. In any event, this Court has never suggested that the risk assessments at issue in *Thorell* are the *only* type admissible in court.

Strangely, the State accepts that a psychologist may testify to an offender's risk of violence without giving *any* explanation why his opinion should be believed. *See* BOR at 171 (noting with approval that the trial court would have permitted Dr. Cunningham to present slide 35, which contains a conclusory statement that certain aspects of Schierman's background make him a low risk to offend in prison). Surely, the testimony is more reliable if the psychologist bases his opinion on peer-reviewed scientific studies showing that certain factors correlate with low risk.

Similarly, the offer of proof provides no basis for the State's speculation that Dr. Cunningham's work is not generally accepted in the scientific community. His 24 journal articles would not have been published if his peers rejected his methods. Further, he has received awards for his "distinguished" and "outstanding" contributions to research from the American Psychological Association, and the Texas Psychological Association. CP 8265.

The State relies on *In Re McGary*, supra, for the proposition that expert testimony may be excluded if it is not generally accepted. There, the Court of Appeals found that the trial court “was not manifestly unreasonable” in precluding a psychologist from relying on the “MATS-1” actuarial instrument, which he created. The psychologist testified that his test used six items from the Static-99 “plus age.” He conceded this instrument was not commonly used by others. In fact, the only ones using the instrument all belonged to the Sex Offender Crime Defense Association. *Id.* at 340-41. Here, however, the trial court did not question the general acceptance of Dr. Cunningham’s methods, and there does not appear to be any basis for doing so.

c. *The Trial Court Erred in Excluding Dr. Cunningham’s Testimony Regarding Schierman’s “Mental Disease or Defect”*

The trial court’s ruling on this issue, and the State’s response, amounts to a play on words. Under the heading of “Moral Culpability,” one of Dr. Cunningham’s proposed slides asked “what diminished his control?” The court correctly understood that Dr. Cunningham would opine that Schierman’s abuse at the hands of his father, and his addiction to alcohol and drugs, diminished his ability to control his actions and

therefore made him less morally culpable.¹⁵ Apparently, because Dr. Cunningham used the word “diminished,” the Court insisted that Schierman was attempting to relitigate the guilt phase by raising a claim of “diminished capacity.”

The defense raised no such claim. It was merely trying to show that Schierman’s “capacity . . . to conform his . . . conduct to the requirements of law was substantially impaired as a result of mental disease or defect.” *See* RCW 10.95.070(6). The State maintains that statutory mitigating factor was intended to mirror an insanity defense rather than a diminished capacity defense. But the categorization is irrelevant. Even if there were no statutory factor at all relating to mental problems, Schierman would have a constitutional right to present the mitigating evidence that his ability to control his conduct was impaired. *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 535, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (“Wiggins['] ... diminished mental capacity[s] further augment his mitigation case.”)

Further, whether the issue is phrased as diminished capacity or insanity, there can be varying levels of impairment. For example, in a

¹⁵ In AOB at 136, Schierman quoted the trial court on this point and stated that the court “correctly understood the nature of the proposed testimony.” Schierman did not mean to say, as the State now suggests, that he agrees that this testimony amounts to a legal defense of diminished capacity.

diminished capacity defense, a defendant must show that a mental disorder, “impaired the defendant’s ability to form the specific intent to commit the crime charged.” *State v. Ellis*, 136 Wn.2d 498, 521, 963 P.2d 843, 855 (1998). In some cases, the defendant’s ability to premeditate may be so diminished that the jury acquits on that element, yet it finds that the defendant was guilty of intending to kill. Similarly, a jury could find that a defendant had sufficient ability to premeditate, yet conclude that his level of mental impairment made him less culpable than someone thinking clearly at the time of the murder.

The State itself agrees that a defendant may introduce evidence of insanity at the penalty phase even though a higher level of insanity would be grounds for acquittal. BOR at 178. Yet, it insists that a different rule applies if the mental problems are characterized as diminished capacity.

As the trial court noted, Dr. Cunningham planned to draw a line between guilt phase and penalty phase issues. The first substantive slide at CP 8271 discusses the issues at the guilt phase. The next contrasts the guilt phase issues of “criminal responsibility” with the penalty phase issues of “Moral Culpability.” The next slide crosses out the criminal responsibility issues. The trial judge took that as “indicating, of course accurately, they have been resolved to the extent that any of them were actually issues in the guilt phase.” 4/30/10 RP 7. Yet, even though the phrase “What

diminished his control” appeared only in the “moral culpability” section, the court ruled: “Dr. Cunningham may not discuss that concept of what diminished his control. It is a diminished capacity defense . . . The issue is not relevant at this stage of the proceedings.” *Id.* at 8.

It is true the court did not exclude evidence Schierman was abused as a child and struggled with addictions. But he could not connect those problems with the crime itself. He could not present expert testimony that his sad history reduced his ability to control his actions on the night of the murders. This left him unable to counter the impression he was a cold-blooded, calculating killer, who just happened to have some problems in his life.

2. The Trial Court Erred in Excluding The Testimony of Dr. Mark McClung because The Judge did not Believe that Schierman Suffered Sufficiently Serious Head Injuries

The State’s primary argument is that Dr. McClung’s testimony was properly excluded because he could not say *with medical certainty* that Schierman’s head injuries diminished his ability to control violent behavior. The State presents no authority, however, that such a standard is appropriate at the penalty phase of a capital trial. It cites to *Tennard v. Dretke*, 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004), but that case actually supports the defense. In *Tennard*, the defense proffered weak evidence of mental retardation: a parole officer testified that,

according to prison records, Tennard had an IQ of 67. *Id.* at 277. The Fifth Circuit ruled this purported mitigation was not “constitutionally relevant” because Tennard presented no evidence of a “uniquely severe permanent handicap with which the defendant was burdened through no fault of his own,” and evidence that “the criminal act was attributable to this severe permanent condition.” *Id.* at 281, quoting *Tennard v. Cockrell*, 284 F.3d 591, 595 (5th Cir.), *cert. granted, judgment vacated*, 537 U.S. 802, 123 S.Ct. 70, 154 L.Ed.2d 4 (2002).

The Supreme Court held that this test “has no foundation in the decisions of this Court.” *Id.* at 284. Rather,

[r]elevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value. Thus, a State cannot bar the consideration of ... evidence if the sentencer could reasonably find that it warrants a sentence less than death.

Id. at 284-85 (citations and internal quotation marks omitted; ellipses in original). “Virtually no limits are placed on the relevant mitigation evidence a capital defendant may introduce concerning his own circumstances.” *Id.* at 285 (citation and internal quotation marks omitted). “[I]mpaired intellectual functioning is inherently mitigating.” *Id.* at 287. The defendant is not required to “establish a nexus between her mental capacity and her crime.” *Id.*

The impairment need not be substantial to be admissible. The Court noted other cases in which defendants presented evidence of low IQ although their IQ scores were 79 and 82, respectively. *Id.* at 288, citing *Wiggins*, 539 U.S. at 535, and *Burger v. Kemp*, 483 U.S. 776, 779, 789, n.7, 107 S.Ct. 3114, 97 L.Ed.2d 638, *reh'g denied*, 483 U.S. 1056, 108 S.Ct. 32, 97 L.Ed.2d 820 (1987).

The teaching of *Tennard* is that the Eighth Amendment requires the admission of mitigation evidence in a capital sentencing even when the mitigating value is uncertain. It is doubtful that a psychiatrist could testify *to a reasonable medical certainty* that a defendant with an IQ of 82 has an impairment that contributed to the commission of a murder. Yet, the defendant may make that argument all the same.

Washington's standards of admissibility are even more liberal, since the rules of evidence do not apply to the defense at the penalty phase. *See* RCW 10.95.060(3); *State v. Bartholomew*, 101 Wn.2d 631, 642, 683 P.2d 1079, 1086-87 (1984) (*Bartholomew II*). The only limitation is that the evidence be relevant.

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 than it would be without the evidence." ER 401. The threshold to admit relevant evidence is low and even minimally relevant evidence is admissible. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

State v. Gregory, 158 Wn.2d 759, 835, 147 P.3d 1201, 1241 (2006).

Here, the fact of consequence is whether Schierman's head injuries diminished his ability to control his conduct. Dr. McClung noted several factors pointing in that direction. That testimony would have made the fact at issue more probable, even though it would not have been "certain."

3. The Trial Court Erred in Excluding Over Forty Defense Mitigation Witnesses, and in Strictly Limiting The Testimony of The Witnesses Who Testified

Schierman will rely primarily on his opening brief on this issue, while noting a few new points.

First, the State is correct that Schierman has never objected to the trial court's ruling prohibiting witnesses from offering their opinion on the punishment.

The State suggests that the defense did not preserve error regarding excluding James Aiken. However, even after the trial court forced the defense to trim its witness list, the defense listed Aiken. When it turned out that Eldon Vail was available, they substituted him for one of the correctional officers – not for Aiken. The trial court then sua sponte excluded Aiken. *See* BOR at 189. Defense counsel were not required to object when they had already stated their desire to present Aiken's testimony. If they agreed with the Court's position, they would have

substituted Vail for Aiken and thereby kept the correctional officer as a witness.

As for Michael Christensen, Schierman's uncle, the trial court initially excluded his testimony in its entirety after learning he was a corrections officer who would testify about the value of Schierman's continuing efforts to maintain family ties in a correctional setting. 4/26/10 RP 10-11. It is true that the trial court later permitted Christensen to testify but, in view of the trial court's ruling, he could not discuss his corrections background or how that shaped his views of Schierman's behavior while incarcerated. *Id.* at 35-40.

Similarly, the trial court prohibited every witness except Schierman's mother from discussing how Schierman's life experiences, particularly his abusive father and his parents' divorce, affected him. It may be true that a few witnesses edged into such testimony without drawing an objection, but mostly the witnesses complied with the ruling.

It is not clear why two of the permitted 14 family members did not testify. Certainly, many more than 14 family members would have testified had the judge not excluded so many of them.

L. THE TRIAL COURT VIOLATED SCHIERMAN'S RIGHT TO DUE PROCESS BY PERMITTING THE STATE TO INTRODUCE "VICTIM IMPACT" TESTIMONY THAT ENCOURAGED THE JURY TO APPLY THE DEATH PENALTY IN AN ARBITRARY MANNER

The State argues this issue was not preserved for review. That is incorrect. Schierman objected to the introduction of the memorial video. 4/19/10 RP 4. And he objected to the presentation of anything more than one victim impact witness and one in-life photo of each victim. 4/15/10 RP 112. The trial judge overruled the objections. CP 7978. If trial counsel did not object to some improper statements from the State's witnesses in the penalty phase, the constitutional error was manifest and caused actual and substantial prejudice to Schierman. RAP 2.5(a)(3).

The State and Schierman have offered conflicting descriptions of the memorial video. No further written description on this point will be nearly as powerful as the Court watching the video itself.

The State cites to some California cases permitting the introduction of similar videos but even if those decisions were consistent with federal constitutional standards, they could not meet Washington's more stringent standards. *See* AOB at 148-50.

The admission of the memorial video coupled with the testimony of surviving family members regarding the victims' goodness, beauty, piety

and struggles, led to a verdict based upon emotion, sympathy for the family, and a comparison of the victims' worth to Schierman's.

The prejudice was enhanced by the erroneous admission of Schierman's treatment journal and the limitations on his mitigation evidence. *See* Sections K and M. This helped the prosecutor argue Schierman should be put to death because he was less worthy than the victims.

M. THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO USE A "TREATMENT JOURNAL" WHEN CROSS-EXAMINING SCHIERMAN'S STEPFATHER

The State maintains that Schierman preserved no objection on constitutional grounds to the prosecutor's use of the treatment journal. The State appears to be correct that trial counsel did not directly cite to *Bartholomew II*. Undersigned counsel apologize for erroneously stating otherwise. Nevertheless, the issue was preserved. *Bartholomew II*'s restrictions on unreliable evidence at the penalty phase, including criminal acts that did not result in convictions, was based primarily on Washington's due process clause, Const., art. I, § 3.¹⁶ *Id.* at 640-41.

We also find offensive to state due process the portion of RCW 10.95.060(3) which authorizes the admission of "evidence of the defendant's previous criminal activity

¹⁶ The Court also noted that, when these due process protections are not followed, the ensuing death sentence violates Washington's cruel punishment clause, Const., art. I, § 14.

regardless of whether the defendant has been charged or convicted as a result of such activity.”

Id. at 641.

In a written motion in limine filed on January 7, 2010, defense counsel moved to exclude various evidence including the treatment journal. CP 7222-24. The defense relied on ER 401 through 404, that is, that the evidence was irrelevant, unfairly prejudicial, and improper character evidence. The defense also relied on Const., art. I, § 3. CP 7224. Later, at the start of the penalty phase, defense counsel renewed their objection. 4/19/2010 RP 44-48. Defense counsel were particularly concerned that the State would attempt to inject alleged bad acts of the defendant in the guise of cross-examining defense mitigation witnesses. *Id.* at 44-45. The defense specifically moved to exclude any reference to the treatment journal. *Id.* at 47. The trial court denied the defense motion. *Id.* at 48. Under these circumstances, the defense adequately preserved an objection under the evidence rules and Const., art. I, § 3.

In the alternative, the Court should review the constitutional issue under RAP 2.5(a)(3) because the error is manifest and prejudicial. The State’s arguments that Schierman was not prejudiced actually help to demonstrate the manifest nature of the error. The State notes the

significant reasons why the journal should not be taken seriously. BOR at 219-220. That is exactly why it should not have come into evidence.

The trial prosecutor, on the other hand, portrayed the journal entries as fact while cross-examining Dean Dubinsky. *See* AOB at 158-60. The jury may well have been swayed by the prosecutor's selective use of the journal.

The State argues that Schierman was not prejudiced by the journal because his own statements to the detectives included admissions he "got into fights" when he was drinking. But again, the State is picking and choosing which statements were truth and which were fiction.¹⁷ Perhaps, in view of Dubinsky's testimony, the State could have asked him whether he had personal knowledge of Schierman's fights. But the cross-examination went far beyond that. The State used the journal to show that Schierman engaged in prior uncharged criminal acts – evidence inadmissible under *Bartholomew II*.

The State next argues that the journal entries were proper impeachment of Dubinsky. It relies on *State v. Lord*, 117 Wn.2d 829, 822 P.2d 177, 213 (1991), *cert. denied*, 506 U.S. 856, 113 S.Ct. 164, 121

¹⁷ If Schierman truly committed assaults against his father, or against people he met in bars, the State would surely have investigated those incidents. At trial, however, the State based such accusations solely on Schierman's questionable accounts in his journal and in his statement to the police.

L.Ed.2d 112 (1992), and *Brett*, 126 Wn.2d at 185-187. But those cases are not on point. In *Lord*, on questioning from the defense, Lord's father broadly stated that Lord

was a good boy, a loving kid and just a real good kid. I was proud of him to have him for my son. He was a great – I mean he just loved all the family like we love him. We're a real close family.

Lord, 117 Wn.2d at 892. This questionable testimony opened the door to cross-examination showing that Lord had been convicted of unlawful imprisonment against a family member. *Id.* at 892-94.

Similarly, in *Brett*, a program administrator with the Division of Juvenile Rehabilitation testified that Brett's crime "shocked" her because, based on all her experiences with Brett, she did not think he could take a life. *Id.* at 186. That opened the door to cross-examination that the witness knew of Brett's nearly fatal attack on a staff counselor at a juvenile corrections facility. In both *Lord* and *Brett*, a witness stated a broad opinion about the defendant which the witness well knew to be inaccurate. Under those circumstances, the prosecutor's rebuttal was proper.

Dean Dubinsky's testimony was different. He strove to give a fair portrayal of Schierman, based only on what he knew from personal experience. This included both positive and negative information. He truthfully stated that he had not personally seen Schierman be combative

and that, when Schierman came out of rehab, he was worried about a possible relapse, but not worried that Schierman would harm anyone. *See* AOB at 157-58. In the context of his personal knowledge, he stated that Schierman had no history of hurting people. 4/20/2010 RP 104.

Because the Court ruled that the treatment journal would be fair game on cross-examination, defense counsel attempted to pre-empt the issue by asking: “If Conner had began [sic] to write about assaultive behavior in that journal, would that surprise you?” Presumably, Dubinsky would have given the same answer he later gave the prosecutor: that he questioned the reliability of the information in the journal so it would not change his testimony. Such an answer should have ended the matter. Instead, the prosecutor successfully objected to the question on the ground of “relevance.” *Id.* at 105. Defense counsel then had Dubinsky clarify that he had never *seen* Schierman be violent *in Dubinsky’s presence*. *Id.* at 105-06. In cross-examination as well, Dubinsky stressed that his testimony was based on his personal experiences. *See, e.g.*, 4/20/1010 RP 123.

Certainly, the State was entitled to cross-examination to explore whether Dubinsky might not have known of all of Schierman’s activities. But the prosecutor did not need the treatment journal for that. Dubinsky readily admitted the point. *Id.* at 119.

As the State notes, Schierman's statement to the police came into evidence. He stated that he sometimes got into fights when drunk. But Dubinsky testified that he aware of that to some extent. 4/20/2010 RP 104. If the State believed there was a significant discrepancy between Schierman's statement to the police and Dubinsky's testimony, it could have brought that up in closing argument. But it is absurd to suggest that the excerpts from the treatment journal show that Dubinsky was not credible. *See* BOR at 224. As the State now seems to concede, there was strong reason to believe that the journal entries were largely fictional, or at least greatly exaggerated. By contrast, in *Lord* and *Brett*, the evidence of violence was undisputed and was well known to the defense witness.

Further, the prosecutor used the journal to go into matters that had little to do with Dubinsky's direct testimony, such as Schierman stealing cigarettes, being a "good actor," hitting his biological father, using drugs before playing with animals and using hallucinogens.

Schierman has also argued that, even if the prosecutor's use of the treatment journal was proper, the defense should have been allowed to put the State's excerpts in context and to admit additional excerpts which supported Dubinsky's testimony. AOB at 167-72. The State maintains that it was improper for the witness to read portions of the journal of

which he had no personal knowledge, but that is exactly what the State had him do. Dubinsky knew little of the information in the journal.¹⁸

The State also complains that appellate counsel have presented a more complete picture than trial counsel did of the helpful portions of the journal. That is not surprising, since the trial court completely shut down all defense efforts to discuss the journal. *Id.* at 128-31. It is clear from counsel's questions, however, that he was attempting to rehabilitate the witness by bringing out positive aspects of the journal.

The State notes that 5A Wash. Prac. Evidence Law and Practice § 405.6 (5th ed.) does not discuss rehabilitation of a witness after cross-examination. Schierman cited that section for the proposition that the prosecutor's objection based on hearsay was not well taken. *See* AOB at 170-71. The State does not appear to defend that basis for objection.

As for rehabilitation, it is well established that a party's cross-examination of a witness may open the door on redirect to rehabilitation

¹⁸ The State seems to argue that the prosecutor's use of the journal was proper because Dubinsky had seen some of the entries prior to taking the stand. But, at most, Dubinsky was shown few excerpts the day before he testified. 4/20/2010 RP 115-17. Whether he first viewed an excerpt on the stand or a few hours before is immaterial. In either case, it is undisputed that he had no personal knowledge of most of the information contained in the journal. In any event, the trial court permitted the prosecutor to introduce portions that Dubinsky had never seen. *See, e.g., Id.* at 122-23 (prosecutor reads lengthy excerpts aloud, although Dubinsky had not seen them).

on the same subject. *See, e.g., State v. Stevens*, 69 Wn.2d 906, 907-08, 421 P.2d 360, 361 (1966).

In any event, as Schierman pointed out in his opening brief, the defense is not restricted to the rules of evidence at the penalty phase. The only requirement is relevance. If the journal entries were sufficiently trustworthy to be relevant, as the State maintains, then surely they were admissible by the defense. The State does not even respond to that point.

The error here was not harmless beyond a reasonable doubt. It is true that Schierman told the police he got into fights in bars when he was drunk. But even if that were true, it would not be unusual for an alcoholic. The prosecutor's journal excerpts, such as Schierman supposedly breaking his father's bones, were far more damning.

N. THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE UNRELIABLE HEARSAY STATEMENTS ATTRIBUTED TO SCHIERMAN REGARDING A "BUCKETFUL OF KNIVES" AND A "HOT CHICK"

The essence of this claim is that the State brought unreliable hearsay before the jury in the guise of rebuttal evidence, when the hearsay rebutted nothing. The State's response to this issue is incomprehensible. It maintains that "[i]t was relevant that O'Brien heard the statements from Nanna and felt that they were important for the police to know." The State does not explain how such testimony rebutted anything O'Brien said on

direct examination. O'Brien never claimed that he had never heard anyone say something negative about Schierman; that he believed Schierman to be innocent; that Schierman was not attracted to women; or that Schierman had no access to knives. That O'Brien forwarded a potential lead to the police did not rebut his testimony concerning his friendship with Schierman. Surely, the State is not suggesting that a true friend would never cooperate in a homicide investigation.

Yet, the State brought out that Mark Nanna told O'Brien that Schierman referred to a "hot chick across the street" and that he had seen Schierman with a "bucketful of knives." Neither of those points would have rebutted O'Brien's testimony even had O'Brien himself made the prior statements. It follows with much greater force that O'Brien hearing Nanna make those statements failed to rebut O'Brien's testimony.

That the defense did not initially object to the wording of the Court's limiting instruction is irrelevant since, both before and after the limiting instruction was given, the defense moved to strike the testimony regarding Nanna in its entirety. That motion should have been granted since the testimony was inadmissible on any basis.

Likewise, whether or not O'Brien minimized his statements to the police regarding what Nanna told him was irrelevant because Nanna's statements should not have come up at all. Similarly, that the defense

chose not to call the detective who interviewed Nanna is irrelevant since the defense should not have been in the position of having to challenge Nanna's credibility.¹⁹

The State suggests that any error was harmless because there was other evidence that Schierman owned knives and that he made various sexual comments. As discussed in section H, above, the other testimony about sexuality should have been excluded. In any event, this particular statement was especially prejudicial because it suggested that Schierman was specifically focusing on one of the victims. There was other evidence that Schierman owned knives, but the trial court excluded as irrelevant and unfairly prejudicial any testimony that he "had a penchant for knives." 10/28/09 RP 98. Nanna's purported statement that Schierman had a "bucketful" of knives suggested such a penchant.

¹⁹ As noted in the opening brief, Nanna actually denied making the statements O'Brien attributed to him. That is why the State could not call Nanna as a witness. If the detective had been called to the stand, he would have acknowledged that Nanna denied the statements, but would also have testified that Nanna seemed evasive. Understandably, the defense did not wish to wade into that quagmire when Nanna's statements should not have been before the jury in the first place.

O. THE PROSECUTOR COMMITTED MISCONDUCT IN HIS CLOSING ARGUMENT BY COMPARING SCHIERMAN'S CRIME TO THE HOLOCAUST AND BY PERSONALLY ATTACKING DEFENSE COUNSEL

The defense does not dispute that the prosecutor may argue the facts of the crime and the evidence of the defendant's role in that crime. Were that all that the prosecutor did, the State's argument might be well taken. But, here, the prosecutor went far beyond the permissible boundaries when he argued Schierman's acts were like those of the 9/11 terrorists, called him a "mass murderer," alluded to the Holocaust and the "Butterfly Effect," and told the jury to act as the conscience of the community. It is improper for the prosecutor to make statements intended to inflame the jury's passions or prejudices or to divert the jury from deciding the case on the evidence and controlling law.

The State argues that the prosecutor's reference to 9/11 was made only to illustrate that the word "terror" has been "overused." The prosecutor then went on, however, to argue that Schierman's actions caused "real terror," suggesting that his crimes were as bad or worse than 9/11. That argument attempted to inflame the jury.

The State argues there is a definition of "mass murder" and cites to "scholars" who have defined it narrowly as the "murder of four victims." BOR at 240. But both of the authorities cited by the State clarify that they

are adopting arbitrary definitions. Fox and Levin state that their definition “includes crimes committed by Charles Manson and his followers but not those of Hitler’s Third Reich” – the example alluded to by the prosecutor here. J. Fox and J. Levin, *Multiple Homicide: Patterns of Serial and Mass Murder*, 23 *Crime & Just.* 407, 408 (1998). And the cited Congressional report discusses a wholly different type of crime – unexplained public mass shooting. Even there, the authors state: “There is no broadly agreed to, specific conceptualization of this issue, so this report uses its own definition for public mass shootings.” Congressional Research Service, *Public Mass Shooting in the United States: Selected Implications for Federal Public Health and Safety Policy*, R43004 page 1 (2013). The State’s post-hoc efforts to cloak the prosecutor’s argument as based on some sort of scholarship fails. Certainly, the jury would not have read those scholarly articles and would have easily interpreted the prosecutor’s use of the term “mass murder” to equate the murders here with genocide. The prosecutor made this connection by suggesting that the murders were the destruction of “a race, a people an entire history of life.” *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720, *reh’g denied*, 501 U.S. 1277, 112 S.Ct. 28, 115 L.Ed.2d 1110 (1991), did not authorize such argument, as the State suggests. *Payne* and *Gentry*, *supra*, provide for the limited introduction of victim impact consistent with

the Fourteenth Amendment and Const., art. I, §§ 3 and 14. *See* AOB at 145-150. Those decisions do not authorize a free-for-all. In *Payne*, Justice O'Connor recognized the role of trial courts to exclude evidence that is "unduly inflammatory" and the role of appellate courts to "carefully review the record to determine whether the error was prejudicial." *Id.* at 831. This Court should find that the prosecutor's closing argument crossed the line.

Finally, the State argues that the jury instructions cured all of the errors and remedied the trial court's failure to grant a mistrial. The court's instruction that the prosecutor's arguments are not evidence and that the jury's recollection controls, is not a cure-all for prosecutorial misconduct. *See, e.g., United States v. Mageno*, 12-10474, 2014 WL 3893792 (9th Cir. Aug. 11, 2014); *Gaither v. United States*, 413 F.2d 1061, 1079 (D.C. Cir. 1969). Here, the trial judge instructed the jury to disregard the Holocaust comments. But he made no instructions regarding the other inflammatory statements. Presumably then, the jury considered them as a proper description of the evidence, the effect of Schierman's crime and the "duty" as jurors.

As to the accusation that defense counsel personally attacked the prosecutor, this Court should note that defense counsel never stated or implied that the prosecutor was "Satan." He pointed out that in the

biblical story there was no prosecutor to urge the crowd to stone the accused to death. In rebuttal, the prosecutor premised all of his arguments on the notion there was no evidence to support mitigation – just Jim Conroy’s arguments.

Prosecutorial statements that malign defense counsel can severely damage an accused’s opportunity to present his or her case and are therefore impermissible. *State v. Lindsay*, 180 Wn.2d 423, 432, 326 P.3d 125, 130 (2014), citing *Bruno v. Rushen*, 721 F.2d 1193, 1195 (9th Cir. 1983) (per curium), *cert. denied*, 469 U.S. 920, 105 S.Ct. 302, 83 L.Ed.2d 236 (1984).²⁰ Despite Schierman’s failure to object, “the misconduct ... was so pervasive that it could not have been cured by an instruction.” *In re Personal Restraint of Glasmann*, 175 Wn.2d 696, 707, 286 P.3d 673 (2012). Here, as in *Glasmann*,

“[T]he cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.”

Id. (alteration in original) (quoting *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011), *review granted*, 175 Wn.2d 1022, 295 P.3d 728 (2012)). Federal courts have held that comments at the end of a

²⁰ The record makes it clear that counsel had a contentious relationship. On several occasions the trial judge admonished counsel regarding their statements to each other.

prosecutor's rebuttal closing are more likely to cause prejudice. *E.g.*, *United States v. Sanchez*, 659 F.3d 1252, 1259 (9th Cir. 2011) (significant that prosecutor made improper statement "at the end of his closing rebuttal argument, after which the jury commenced its deliberations"); *United States v. Carter*, 236 F.3d 777, 788 (6th Cir. 2001) (significant that "prosecutor's improper comments occurred during his rebuttal argument and therefore were the last words from an attorney that were heard by the jury before deliberations"). Here, the prosecutor's claim that defense counsel compared him to Satan came in rebuttal.

P. CUMULATIVE ERROR

As to almost all errors alleged by Schierman, the State argues in the alternative that they were harmless. In fact, the word "harmless" or "harmlessness" appears 57 times in its response brief. For example, it concludes the section regarding restrictions on mitigating evidence as follows:

Given the four brutal murders that Schierman committed and the extensive evidence in mitigation that was presented, any error in limiting the testimony in mitigation was harmless beyond a reasonable doubt.

BOR at 197.

The brutal nature of a crime, however, does not mean the death penalty is unavoidable. In this State, for example, a jury rejected the death

penalty for Benjamin Ng, who killed 13 people during a robbery by hog tying them and then shooting them in cold blood.

Appellate courts have recognized that errors can be harmful even in the most heinous cases. *See Smith v. Stewart*, 189 F.3d 1004, 1013 (9th Cir. 1999), *cert. denied*, 531 U.S. 952, 121 S.Ct. 358, 148 L.Ed.2d 288 (2000) (“[T]he horrific nature of the crimes involved here does not cause us to find an absence of prejudice”); *Hendricks v. Calderon*, 70 F.3d 1032, 1041 (9th Cir. 1995), *cert. denied*, 517 U.S. 1111, 116 S.Ct. 1335, 134 L.Ed.2d 485 (1996) (despite substantial evidence of aggravation, failure to present mitigating evidence was prejudicial).

As this Court is well aware, in Washington the vote of a single juror is sufficient for a verdict of life without parole. RCW 10.95.060(4). This Court cannot conclude beyond a reasonable doubt that no juror could have been swayed to vote for death by one or more of the errors in the presentation of evidence and argument. *See* AOB at 195-97 (discussing the cumulative effect of errors at the guilt and penalty phases.)

Q. STATUTORY REVIEW

The State maintains that this Court should not reverse its position on the constitutionality of the death penalty because the rulings in *State v. Davis*, 175 Wn.2d 287, 290 P.2d 43 (2012), *cert. denied*, 134 S.Ct. 62, 187 L.Ed.2d 51 (2013), and *State v. Cross*, 156 Wn.2d 580, 132 P.3d 80, *cert.*

denied, 549 U.S. 1022, 127 S.Ct. 559, 166 L.Ed.2d 415 (2006), are not harmful. The recent decision in *Jones v. Chappell*, -- F.Supp.2d --, 2014 WL 3567365 (July 16, 2014), provides additional support for the harmfulness of those rulings. On federal habeas review, a district judge for the Central District of California, found California's death penalty system unconstitutional because the few prisoners who are actually executed are selected in an arbitrary manner. The Court relied on *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, *reh'g denied*, 409 U.S. 902, 93 S.Ct. 89, 34 L.Ed.2d 163 (1972) (per curiam), which struck down all death penalty statutes existing at the time because they did not provide clear guidelines for selecting defendants for death. The main problem in California is the great delay in completing appeals and post-conviction proceedings. Because of that, only a tiny percent of the death row population are ever executed.

Of course, for an arbitrarily selected few of the 748 inmates currently on Death Row, that remote possibility may well be realized. Yet their selection for execution will not depend on whether their crime was one of passion or of premeditation, on whether they killed one person or ten, or on any other proxy for the relative penological value that will be achieved by executing that inmate over any other.

Jones v. Chappell, at *8.

The same concerns apply with greater force in Washington, because the arbitrary nature of our executions is not due solely to delay.

As the dissenting Justices in *Cross* and *Davis* pointed out, there is no rational basis for distinguishing the aggravated murder convicts who are sentenced to death from the ones sentenced to life without parole. No “penological value” has been achieved in choosing one defendant over another for the death sentence. If anything, the problems in Washington’s system more closely resemble those at issue in the *Furman* case than California’s problems. The issue here is not merely the arbitrary nature of which death-sentenced defendants are executed, but also the arbitrary manner in which they are selected for the death penalty in the first place. *See Jones v. Chappell* at *10 (conceding that *Furman* focused on the arbitrary selection of defendants for the death penalty, while noting that the same principles should apply to arbitrary executions).

But Washington also suffers from the problem of arbitrary executions. Under the current death penalty scheme only two prisoners have been executed against their will (Charles Campbell and Cal Brown). Three more were executed at their own request (Westley Dodd, Jeremy Sagastegui, and James Elledge). One (Clark Hazen) committed suicide. 18 prisoners have had their death sentences overturned: Dwayne Bartholomew, Gary Benn, James Brett, Richard Clark, Charles Finch, Michael Furman, Benjamin Harris, Patrick Jeffries, Brian Lord, Sammie Luvane, Kwan Fai Mak, Henry Marshall, Blake Pirtle, David Rice,

Michael Roberts, Mitchell Rupe, Darold Stenson and Covell Thomas. Nine remain on death row. Jonathan Gentry has been there for 23 years, Clark Elmore for 18, Dwayne Woods for 17,²¹ Davya Cross for 13 and Robert Yates for 12.²²

Thus, there is even more reason now than there was at the time of the *Cross* and *Davis* decisions to hold that Washington's death penalty system results in arbitrary results, in violation of Const., art. I, §§ 3 and 14.

II. CONCLUSION

In view of the many errors in this case, this Court should reverse Conner Schierman's conviction and death sentence.

²¹ Woods is likely to remain on death row for several more years because the Ninth Circuit recently returned his habeas petition to the Eastern District of Washington for further proceedings. *Woods v. Sinclair*, -- F.3d --, 2014 WL 4179917 (Aug. 25, 2014).

²² Information on sentenced and executed offenders taken from <http://www.doc.wa.gov/offenderinfo/capitalpunishment/sentencedlist.asp> and from <http://abolishdeathpenalty.org/facts/death-row/>.

DATED this 15 day of September, 2014.

Respectfully submitted,



Suzanne Lee Elliott, WSBA #12634
Attorney for Conner M. Schierman

Respectfully submitted,



David Zuckerman, WSBA #18221
Attorney for Conner M. Schierman

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

Ms. Donna Wise
Ms. Erin Becker
King County Prosecutor's Office
516 Third Avenue, Suite W554
Seattle, WA 98104

AND VIA EMAIL:

Donna.Wise@kingcounty.gov
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Mr. Conner M. Schierman #340719
IMU-N/D-5
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

09/15/2014
Date

Peyush
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September 15, 2014

Dear Clerk:

Attached for filing in *State v. Conner Schierman*, No. 84614-6, is Appellant's Reply Brief. Please let me know if you have any questions. Thank you for your kind assistance.

Sincerely,
Christina Alburas
Certified Paralegal
(206) 538-5301
* * * *

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