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NO. 88906-6

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BYRON EUGENE SCHERF,

Appellant.

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

Honorable Thomas J. Wynne and Honorable George F.B. Appel, Judges

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

A.	ASSIGNMENTS OF ERROR.....	1
B.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	9
C.	STATEMENT OF THE CASE.....	18
1.	OVERVIEW	18
2.	ARRAIGNMENT	24
3.	PRETRIAL MOTIONS CONCERNING SEEKING THE DEATH PENALTY	24
4.	MOTION TO SUPPRESS RECORDS SEIZED AT WSR.....	25
5.	MOTION TO SUPPRESS STATEMENTS	29
6.	REDACTIONS OF VIDEOTAPED STATEMENTS.....	40
7.	VOIR DIRE	41
a.	Scope of voir dire and the death qualification	42
b.	Informing the jurors that Mr. Scherf was serving life without parole at the time of the crime	44
c.	Voir dire process	45
d.	Denial of defense challenges for cause.....	45
e.	Granting state’s challenges of qualified jurors	51
f.	The jury.....	53
g.	Prosecutor’s ingratiating himself with the jurors.....	57
8.	TRIAL FACTS	58
a.	Prosecutor’s opening statement	58
b.	Trial facts	58

c.	Objection to jury instruction	68
d.	The prosecutor’s closing	69
9.	PENALTY PHASE FACTS	70
a.	Pretrial rulings.....	70
b.	Penalty phase facts	71
c.	Objection to jury instruction	76
d.	Closing penalty phase argument	76
D.	ARGUMENT	77
1.	TRIAL COURT ERRED IN NOT DISMISSING THE DEATH NOTICE WHEN THE PROSECUTION FAILED TO STRICTLY COMPLY WITH RCW 10.95.040(2).....	77
a.	Factual overview	77
b.	The prosecutor must strictly comply with the death notice requirements.....	82
c.	Statutory Construction of RCW 10.95.040(2) demonstrates that to be valid, a death notice must be filed and served after a defendant is arraigned on aggravated first degree murder.....	83
i.	The plain language	85
ii.	Legislative intent and history	90
iii.	Rule of lenity	96
d.	Conclusion	97
2.	THE PROSECUTOR’S DELAY IN CHARGING AND FILING OF THE DEATH NOTICE BEFORE ARRAIGNMENT DENIED MR. SCHERF HIS RIGHT TO QUALIFIED COUNSEL AT A CRITICAL STAGE OF THE LITIGATION	98
3.	THE PROSECUTOR’S FILING ITS NOTICE OF INTENT TO	

	SEEK THE DEATH PENALTY BEFORE MR. SCHERF WAS ARRAIGNED AND WITHOUT PROVIDING MR. SCHERF THE OPPORTUNITY TO INVESTIGATE AND PRESENT MITIGATION EVIDENCE DENIED HIM DUE PROCESS AND FUNDAMENTAL FAIRNESS	102
4.	IF, AS THE TRIAL COURT FOUND, A PROSECUTOR’S DISCRETION UNDER RCW 10.95.040(1) IS UNREVIEWABLE, A DEATH SENTENCE SOUGHT UNDER THE STATUTE IS UNCONSTITUTIONALLY ARBITRARY AND CAPRICIOUS	110
5.	THE CHARGING DOCUMENTS LACKED ESSENTIAL ELEMENTS OF THE CRIME OF CAPITAL FIRST DEGREE MURDER; THE ALLEYNE DECISION DEMONSTRATES THE UNCONSTITUTIONALITY OF THE WASHINGTON DEATH PENALTY STATUTE.....	115
6.	THE STANDARD EMPLOYED IN RCW 10.95.030 IS UNCONSTITUTIONAL UNDER HALL V. FLORIDA	124
7.	THE TRIAL COURT ERRED IN DENYING MR. SCHERF’S MOTION TO SUPPRESS PHYSICAL EVIDENCE PURSUANT TO CrR 3.6; THE SEIZURE OF HIS MEDICAL RECORDS FROM HIS STORED PROPERTY VIOLATED CHAPTER RCW 70.02, WHICH CREATES A PRIVACY RIGHT IN HEALTH RECORDS; AND THE WARRANT AUTHORIZING THE SEIZURE OF HEALTH AND OTHER RECORDS FROM HIS PROPERTY, CENTRAL FILE AND MEDICAL RECORDS WAS NOT BASED ON PROBABLE CAUSE AND DID NOT MEET THE PARTICULARITY REQUIREMENTS OF THE FOURTH AMENDMENT OR ARTICLE 1 SECTION 7	128
	a. Failure to establish probable cause	131
	b. Failure to describe the items to be seized with particularity....	135
	c. Failure to describe the place to be searched with particularity.	138
	d. Conclusion	139
8.	TRIAL COURT ERRED IN NOT SUPPRESSING	

VIDEOTAPED STATEMENTS OBTAINED IN VIOLATION OF THE FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9 AND 22 OF THE WASHINGTON STATE CONSTITUTION; CRIMINAL RULE 3.1 AND 3.2.1, AND RCW 72.68.040-.050.....	141
a. Mr. Scherf’s rights under Criminal Rule (CrR) 3.1 were violated	142
b. Mr. Scherf was detained illegally at the Snohomish County Jail	147
c. Mr. Scherf’s statements should be suppressed under CrR 3.2.1	150
d. Under the totality of the circumstances, Mr. Scherf’s statements were involuntary and constituted a denial of due process under Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 9 and 22 of the Washington State Constitution	156
i. Conditions of confinement	159
ii. Unreasonable delay – violation of CrR 3.2.1(d)(1).....	164
iii. Interference with right to counsel.....	167
iv. Improper confinement at Snohomish County Jail	171
b. Conclusion	171
9. THE TRIAL COURT ERRED IN NOT REDACTING FURTHER PORTIONS OF MR. SCHERF’S VIDEOTAPED STATEMENTS AND ADMITTING HIS KITE ASKING FOR THE DEATH PENALTY TO AND PROMISING TO PLEAD GUILTY. THIS EVIDENCE WAS UNFAIRLY PREJUDICIAL, IMPROPER COMMENT ON THE EXERCISE OF CONSTITUTIONAL RIGHTS AND IMPROPER COMMENT ON THE PENALTY THAT SHOULD BE IMPOSED	173
a. Unfairly prejudicial and apt to confuse or mislead.....	173

b.	Opinion as to guilt and questions aimed at putting Mr. Scherf in a bad light	175
c.	Statements inferring guilt from the exercise of state and federal constitutional trial rights	176
d.	Improper comment on penalty	180
e.	Statements about meeting with an attorney	180
f.	Conclusion	183
10.	THE TRIAL COURT IMPROPERLY RESTRICTED THE SCOPE OF VOIR DIRE, IMPROPERLY GRANTED STATE CHALLENGES FOR CAUSE AND IMPROPERLY DENIED DEFENSE CHALLENGES FOR CAUSE AND IMPROPERLY DENIED DEFENSE CHALLENGES IN VIOLATION OF MR. SCHERF’S RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE 1, SECTIONS 3, 14, AND 22.....	183
a.	The unconstitutionally narrow scope of voir dire	183
b.	Improper denial of challenges for cause	190
c.	Improper granting of challenges for cause.....	196
d.	Conclusion	201
11.	THE PROSECUTOR’S MISCONDUCT IN INGRATIATING HIMSELF WITH THE JURORS, IN DESCRIBING OFFICER BIENDL AS LYING “UNDER THE CROSS” IN OPENING ARGUMENT, IN MISSTATING THE LAW ON PREMEDITATION IN CLOSING ARGUMENT AND IN ARGUING TO THE JURORS IN THE PENALTY PHASE CLOSING ARGUMENT THAT IT WAS THEIR JOB TO IMPOSE THE DEATH PENALTY AND THAT THEY HAD REPEATEDLY PROMISED UNDER OATH TO DO SO IF THE LAW AND FACTS SUPPORTED IT DEPRIVED MR. SCHERF OF A FAIR TRIAL.....	202
a.	The prosecutor ingratiating himself with jurors.....	203

b.	Telling jurors they swore, under oath, to impose the death penalty and it was their job to return a guilty verdict and a death sentence.....	207
c.	Statement that Officer Biendl was found lying under the cross	211
d.	Misstatement of the law on premeditation.....	212
e.	Conclusion	214
12.	THE TRIAL COURT ERRED IN REFUSING TO GIVE THE DEFENSE PROPOSED PREMEDITATION INSTRUCTION AND GIVING THE PREMEDITATION INSTRUCTION PROPOSED BY THE PROSECUTION INSTEAD, AND IN REFUSING TO REMOVE THE WORDS “OR NO” FROM THE PENALTY PHASE INSTRUCTION NO. 6, TELLING THE JURY HOW TO FILL OUT ITS VERDICT FORM	215
a.	The premeditation instruction	216
b.	Penalty phase instruction No. 6	219
13.	THE TRIAL COURT’S PENALTY PHASE RULINGS ALLOWING THE STATE TO INFORM THE JUROR THAT MR. SCHERF WAS ALREADY SERVING A SENTENCE OF LIFE WITHOUT PAROLE, NOT ALLOWING THE DEFENSE TO INTRODUCE EVIDENCE THAT MR. SCHERF REQUESTED SEX OFFENDER TREATMENT, AND PROHIBITING THE DEFENSE FROM ARGUING THAT THE BIBLE SAID THINGS OTHER THAN “AN EYE FOR AN EYE” DENIED HIM A FAIR TRIAL AND THE RIGHT TO APPEAR, DEFEND, CONFRONT WITNESSES AND PRESENT ARGUMENT AT TRIAL.....	223
a.	Informing the jury that Mr. Scherf was already serving life without parole	223
b.	Exclusion of argument based on the Bible	225
c.	Not allowing evidence that Mr. Scherf asked for sex offender treatment	228

14. CUMULATIVE ERROR DENIED MR. SCHERF A FAIR TRIAL	231
15. PROPORTIONALITY REVIEW UNDER RCW 10.95.130(2)(b) DEMONSTRATES THAT THE DEATH PENALTY IN WASHINGTON IS ADMINISTERED IN VIOLATION OF FURMAN V. GEORGIA.....	232
a. RCW 10.95, enacted to overcome the problems identified in Furman, has failed to do so	232
b. Evolving standards of decency inherent in proportionality review demonstrate that Washington’s capital sentencing scheme is no longer constitutional.....	240
c. Proportionality review fails to fulfill both the requirements of consistency and individualized sentencing	247
i. Geographical arbitrariness.....	255
ii. Geographical disparity denies equal protection	259
iii. Racism in capital sentencing	261
iv. Absence of valid case characteristics associated with seeking death sentences	265
v. Absence of valid case reports and a complete record for proportionality review	267
d. Conclusion: deficiencies identified in Furman remain forty years after Washington’s death penalty statute was enacted.....	275
16. MR. SCHERF’S DEATH SENTENCE IS INVALID UNDER THE MANDATORY REVIEW PROVISIONS OF RCW 10.95.130.....	278
a. Insufficient evidence to justify a death sentence	278
b. Mr. Scherf’s death sentence was brought about through passion and prejudice	282
c. Mr. Scherf’s death sentence is disproportionate to the sentences	

imposed in other cases	287
i. Mr. Scherf’s death sentence is excessive under the plain language of the statute.....	287
ii. The “freakish, wanton and random” standard conflicts with the plain language of the statute and provides no review at all	290
iii. The strength of the state’s case, the wishes of the family, and other non-case characteristic factors as reasons for seeking the death penalty result in disproportionality	293
E. CONCLUSION.....	294

TABLE OF AUTHORITIES

CASES

<u>Abdul-Kabir v. Quarterman</u> , 550 U.S. 233, 127 S.Ct. 1654, 167 L.Ed.2d 585 (2007).....	210
<u>Adams v. Texas</u> , 469 U.S. 38, 100 S.Ct. 2251, 65 L.Ed.2d 581 (1980).....	187
<u>Agnew v. Leibach</u> , 250 F.3d 1123 (7 th Cir. 2001), <u>superseded by AEDPA</u>	205
<u>Ake v. Oklahoma</u> , 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).	227
<u>Alleyne v. United States</u> , -- U.S. --, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013).....	passim
<u>Andresen v. Maryland</u> , 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976).....	136
<u>Arsenault v. Massachusetts</u> , 393 U.S. 5, 89 S.Ct. 35, 21 L.Ed.2d 5 (1968).....	100
<u>Atkins v. Virginia</u> , 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).....	124, 241, 242, 247
<u>Beck v. Ohio</u> , 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964).....	133
<u>Benn v. Lambert</u> , 283 F.3d 1040 (2002).....	276
<u>Bennett v. Seattle Mental Health</u> , 150 Wn. App. 455, 208 P.3d 578 (2009).....	82
<u>Berger v. United States</u> , 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935).....	203
<u>Betts v. Brady</u> , 316 U.S. 455, 62 S.Ct. 1253, 86 L.Ed. 1595 (1942), overruled on other grounds by <u>Gideon v. Wainwright</u> , 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).....	104, 105
<u>Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics</u> , 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).....	139

<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, reh'g denied, 542 U.S. 961, 125 S.Ct. 21, 159 L.Ed.2d 851 (2004).....	134, 135, 137, 241
<u>Booma v. Bigelow-Sanford Carpet Co.</u> , 330 Mass. 79, 111 N.E.2d 742 (1953).....	90
<u>Brewer v. Williams</u> , 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977)	167
<u>Brinegar v. United States</u> , 388 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 879 (1949).....	133
<u>Bush v. Gore</u> , 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000).....	259, 260, 261
<u>Caliendo v. Warden of California Men's Colony</u> , 365 F.3d 691 (9 th Cir. 2004)	204, 205, 206
<u>California v. Trombetta</u> , 467 U.S. 479, 104 S Ct. 2528, 81 L.Ed.2d 413 (1984).....	230
<u>Carroll v. United States</u> , 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed.2d 543 (1925).....	133
<u>Chambers v. Mississippi</u> , 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).....	228
<u>City of Bellevue v. Ohlson</u> , 60 Wn. App. 485, 803 P.2d 1346 (1991)...	145
<u>City of Seattle v. Carpenito</u> , 32 Wn. App. 809, 649 P.2d 861 (1982)	145
<u>City of Seattle v. Fuller</u> , 177 Wn.2d 263, 300 P.3d 342 (2013)	85
<u>City of Seattle v. Wakenight</u> , 24 Wn. App. 48, 599 P.2d 5 (1979)	145
<u>City of Seattle v. Winebrenner</u> , 167 Wn.2d 451, 219 P.3d 686 (2009).....	91, 96
<u>Collins v. City of Harker Heights</u> , 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992).....	106
<u>Colorado v. Connelly</u> , 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473	

(1986).....	158
<u>Corley v. United States</u> , 556 U.S. 303, 129 S.Ct. 1558, 173 L.Ed.2d 443 (2009).....	153, 154
<u>Cowles Publ'g Co. v. State Patrol</u> , 109 Wn.2d 712, 748 P.2d 597 (1988)90	
<u>Crane v. Kentucky</u> , 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 638 (1998)	230
<u>Culombe v. Connecticut</u> , 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961).....	152
<u>Davis v. Dep't of Licensing</u> , 137 Wn.2d 957, 977 P.2d 554 (1999)	86, 271
<u>Dickerson v. United States</u> , 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000).....	158, 159
<u>Douglas v. California</u> , 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963)	100
<u>Duke Power Co. v. Carolina Env'tl. Study Group, Inc.</u> , 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978).....	106
<u>Eddings v. Oklahoma</u> , 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)	112
<u>Estelle v. Smith</u> , 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981)	100
<u>Evitts v. Lucey</u> , 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985)...	268
<u>Fare v. Michael C.</u> , 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979)	158
<u>Fellers v. United States</u> , 540 U.S. 519, 124 S.Ct. 1019, 157 L.Ed.2d 1016 (2004).....	168
<u>Furman v. Georgia</u> , 408 U.S. 238, 92 S.Ct. 2726, 333 L.Ed.2d 346 (1972)	passim
<u>Gardner v. Florida</u> , 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977)	227

<u>Gideon v. Wainwright</u> , 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)	143
<u>Gonzales v. Beto</u> , 408 U.S. 1052, 92 S.Ct. 1503, 31 L.Ed.2d 787 (1972)	206
<u>Gorman v. Pierce County</u> , 176 Wn. App. 63, 307 P.3d 795 (2013).....	271
<u>Gray v. Mississippi</u> , 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987)	188
<u>Greenwood v. Dep't of Motor Vehicles</u> , 13 Wn.App. 624, 536 P.2d 644 (1975).....	93
<u>Gregg v. Georgia</u> , 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1974)	passim
<u>Grenning v. Miller-Stout</u> , 739 F.3d 1235 (9 th Cir. 2014).....	163
<u>Griffin v. California</u> , 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, <u>reh'g denied</u> , 381 U.S. 957, 85 S.Ct. 1797, 14 L.Ed.2d 730 (1965).....	178
<u>Hall v. Florida</u> , 134 S.Ct. 1986, 2014 WL 2178332 (U.S.Fla.), 14 Cal. Daily Op. Serv. 5686 (2014).....	12, 125
<u>Hamilton v. Alabama</u> , 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961)	100
<u>Harmon v. Brucker</u> , 355 U.S. 579, 78 S.Ct. 433, 2 L.Ed.2d 503 (1958)	112
<u>Harris v. United States</u> , 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002).....	117
<u>Hicks v. Oklahoma</u> , 447 U.S. 343, 100 S.Ct. 227, 65 L.3d.2d 175 (1980)	268
<u>Holmes v. South Carolina</u> , 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006).....	230
<u>Hoptowit v. Ray</u> , 682 F.2d 1237 (9 th Cir. 1982).....	163
<u>Hoptowit v. Spellman</u> , 753 F.2d 779 (9 th Cir. 1985), abrogated on other grounds <u>Sadin v. O'Conner</u> , 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d	

418 (1995).....	162, 163
<u>Hudson v. Palmer</u> , 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984)	129
<u>Illinois v. Gates</u> , 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed 2d 527 (1983)	133
<u>In Re Brett</u> , 142 Wn.2d 868, 16 P.3d 601 (2001).....	276
<u>In re Davis</u> , 152 Wn.2d 647, 101 P.3d 1 (2004).....	224, 286
<u>In re Pers. Restraint of Benn</u> , 134 Wn.2d 868, 952 P.2d 116 (1998)	168, 220
<u>In re Pers. Restraint of Harris</u> , 111 Wn.2d 691, 763 P.2d 823 (1988), <u>cert. denied</u> , 490 U.S. 1075, 109 S.Ct. 2088, 104 L.Ed.2d 651 (1989)	113
<u>In re Personal Restraint of Jeffries</u> , 114 Wn.2d 485, 789 P.2d 731 (1990)	253
<u>In re Post Sentencing Review of Charles</u> , 135 Wn.2d 239, 955 P.2d 798 (1998).....	97
<u>In re Recall of Pearsall-Stipek</u> , 141 Wn.2d 756, 10 P.3d 1034 (2000).....	93
<u>In Re Stenson</u> , 174 Wn.2d 474, 276 P.3d 286, <u>cert. denied</u> , 133 S.Ct. 444, 184 L.Ed.2d 288 (2012).....	277
<u>Jeffries v. Wood</u> , 75 F.3d 491 (1996).....	276
<u>Johnson v. Zerbst</u> , 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) ..	99
<u>Keenan v. Hall</u> , 83 F.3d 1083 (9 th Cir. 1996)	163, 164
<u>Kent v. United States</u> , 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966)	102
<u>Kilgore v. Bowersox</u> , 124 F.3d 985 (8th Cir. 1997).....	268
<u>Kubat v. Thierat</u> , 867 F.2d 351 (1989)	221
<u>Lafond v. State</u> , 89 P.3d 324 (Wyo. 2004)	209
<u>LeMaire v. Maass</u> , 745 F.Supp. 623 (D.Or. 1990), <u>vacated on other</u>	

<u>grounds</u> , 12 F.3d 1444 (9 th Cir. 1993).....	163
<u>Lockett v. Ohio</u> , 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)	passim
<u>Lockhart v. McCree</u> , 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986)	187
<u>Lord v. Wood</u> , 184 F.3d 1083 (1999)	276
<u>Maine v. Moulton</u> , 474 U.S. 159, 106 S.Ct 477, 88 L.Ed.2d 481 (1985)	168, 169, 171
<u>Mak v. Blodgett</u> , 970 F.2d 614 (9 th Cir. 1992), <u>cert. denied</u> , 507 U.S. 951, 113 S.Ct. 1363, 122 L.Ed.2d 742 (1993).....	220, 221
<u>Mallory v. United States</u> , 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957).....	152, 154, 157
<u>Marbury v. Madison</u> , 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).....	112
<u>Marron v. United States</u> , 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927)	136
<u>Massiah v. United States</u> , 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).....	99, 143, 169
<u>Mathews v. Eldridge</u> , 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)	104
<u>Mattox v. United States</u> , 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892)	204
<u>McConnell v. Rhay</u> , 393 U.S. 2, 89 S.Ct. 32, 21 L.Ed.2d 2 (1968)	100
<u>McKoy v. North Carolina</u> , 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990).....	210
<u>McNabb v. United States</u> , 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed.819 (1943)	passim
<u>Mempa v. Rhay</u> , 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967)	99

<u>Michigan v. Tucker</u> , 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974)	157
<u>Mickey v. Ayers</u> , 606 F.3d 1223 (9 th Cir. 2010).....	159
<u>Mills v. Maryland</u> , 486 U.S. 367, 105 S.Ct. 1860, 100 L.Ed.2d 384 (1988)	221
<u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)	6, 33, 143, 146
<u>Mitchell v. United States</u> , 526 U.S. 314, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999).....	178
<u>Morgan v. Illinois</u> , 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992)	42, 185, 194, 201
<u>Napue v. Illinois</u> , 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)	182
<u>Palmer v. Clarke</u> , 293 F.Supp.2d 1011 (D.Neb. 2003).....	268
<u>Parle v. Runnels</u> , 505 F.3d 922 (9 th Cir. 2007).....	231
<u>Penry v. Lynaugh</u> , 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989)	242
<u>Pirtle v. Morgan</u> , 313 F.3d 1160 (2002).....	276
<u>Powell v. Alabama</u> , 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932).....	99
<u>Pulley v. Harris</u> , 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984).....	267
<u>Remmer v. United States</u> , 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 54 (1954)	205
<u>Rhodes v. Chapman</u> , 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981)	162
<u>Rice v. Wood</u> , 44 F.3d 1396 (1995).....	276
<u>Roberts v. Louisiana</u> , 431 U.S. 633, 97 S.Ct. 1993, 52 L.Ed.2d 637 (1977)	282

<u>Roper v. Simmons</u> , 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005)	242
<u>Rummel v. Estelle</u> , 455 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980)	241
<u>Rupe v. Wood</u> , 93 F.3d 1434 (1996)	276
<u>Scannell v. City of Seattle</u> , 97 Wn.2d 701, 648 P.2d 435 (1982).....	271
<u>Schneckloth v. Bustamonte</u> , 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).....	158
<u>Simmons v. South Carolina</u> , 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994).....	227
<u>Simpson Inv. Co. v. Dep’t of Revenue</u> , 141 Wn.2d 139, 3 P.3d 741 (2000)	94
<u>State ex rel. Schillberg v. Barnett</u> , 79 Wn.2d 578, 488 P.2d 255 (1971)..	93
<u>State v. Acker</u> , 265 N.J. Super. 351, 627 A.2d 170, 173 (1993)	209
<u>State v. Agtuca</u> , 12 Wn. App. 402, 529 P.2d 1159 (1974)	99, 168
<u>State v. Alvin</u> , 109 Wn.2d 602, 746 P.2d 807 (1987).....	104
<u>State v. Anderson</u> , 153 Wn. App. 417, 220 P.3d 1273 (2009)	208
<u>State v. Baker</u> , 81 Wn.2d 281, 501 P.2d 284 (1972)	91
<u>State v. Bartholomew</u> , 101 Wn.2d 631, 683 P.2d 107 (1984).....	107, 287
<u>State v. Bartholomew</u> , 98 Wn.2d 173, 654 P.2d 1170 (1982), <u>reversed on other grounds</u> , 363 U.S. 1203, 103 S.Ct. 3530, 77 L.Ed.2d 1383 (1983)	236, 275, 276
<u>State v. Beaver</u> , 148 Wn.2d 338, 60 P.3d 586 (2002).....	94
<u>State v. Belgarde</u> , 110 Wn.2d 504, 755 P.2d 174 (1988).....	203, 211, 283
<u>State v. Benn</u> , 120 Wn.2d 631, 845 P.2d 289, <u>cert. denied</u> , 510 U.S. 944, 114 S.Ct. 382, 126 L.Ed.2d 331 (1993)	218

<u>State v. Berg</u> , 137 Wn. App. 923, 198 P.3d 529 (2008), abrogated on other grounds in <u>State v. Mutch</u> , 171 Wn.2d 646, 254 P.3d 803 (2011)	227
<u>State v. Bingham</u> , 105 Wn.2d 820, 719 P.2d 109 (1986)	213, 217, 289
<u>State v. Black</u> , 109 Wn.2d 336, 745 P.2d 12 (1987).....	175
<u>State v. Bradford</u> , 95 Wn. App. 935, 978 P.2d 534 (1999), <u>rev. denied</u> , 139 Wn.2d 1022, 994 P.2d 850 (2000).....	155, 164
<u>State v. Bradshaw</u> , 152 Wn.2d 528, 98 P.3d 1190 (2004).....	83
<u>State v. Broadaway</u> , 133 Wn.2d 118, 942 P.2d 363 (1997).....	159
<u>State v. Brooks</u> , 97 Wn.2d 873, 651 P.2d 217 (1982)	213, 216
<u>State v. Brown</u> , 132 Wn.2d 529, 940 P.2d 546 (1997).....	passim
<u>State v. Bryant</u> , 146 Wn.2d 90, 42 P.3d 1278 (2002).....	107
<u>State v. Bushey</u> , 46 Wn. App. 579, 731 P.2d 553 (1987).....	289
<u>State v. Campbell</u> , 103 Wn.2d 1, 691 P.2d 929 (1984), <u>cert. denied</u> , 471 U.S. 1094, 105 S.Ct. 2169, 85 L.Ed.2d 526 (1985).....	107, 119
<u>State v. Case</u> , 49 Wn.2d 66, 298 P.2d 500 (1956)	203
<u>State v. Charlton</u> , 90 Wn.2d 657, 585 P.2d 142 (1978).....	209, 211
<u>State v. Claflin</u> , 38 Wn. App. 847, 690 P.2d 1186 (1984).....	284
<u>State v. Clark</u> , 143 Wn.2d 731, 24 P.3d 1006 (2001).....	107, 276
<u>State v. Coe</u> , 101 Wn.2d 772, 684 P.2d 668 (1984)	231
<u>State v. Coleman</u> , 74 Wn. App. 835, 876 P.2d 458 (1994).....	210
<u>State v. Commodore</u> , 38 Wn. App. 244, 684 P.2d 1364, <u>rev. denied</u> , 103 Wn.2d 1005 (1984)	213
<u>State v. Contreras</u> , 57 Wn. App. 471, 788 P.2d 1114, <u>rev. denied</u> , 115 Wn.2d 1014, 797 P.2d 514 (1990).....	179
<u>State v. Cross</u> , 156 Wn.2d 580, 132 P.3d 80, <u>cert. denied</u> , 549 U.S. 1022,	

127 S.Ct. 559, 166 L.Ed.2d 415 (2006)	passim
<u>State v. Davenport</u> , 100 Wn.2d 757, 675 P.2d 1213 (1984).....	203
<u>State v. Davis</u> , 175 Wn.2d 287, 290 P.3d 43 (2012).....	passim
<u>State v. Dearbone</u> , 125 Wn.2d 173, 883 P.2d 303 (1994)	82
<u>State v. Delgado</u> , 148 Wn.2d 723, 63 P.3d 792 (2003)	86, 271
<u>State v. Easter</u> , 130 Wn.2d 228, 922 P.2d 1285 (1996).....	179
<u>State v. Echevarria</u> , 71 Wn. App. 595, 860 P.2d 420 (1993)..	211, 284, 285
<u>State v. Eisfeldt</u> , 163 Wn.2d 628, 185 P.3d 580 (2008)	130, 142
<u>State v. Elledge</u> , 144 Wn.2d 62, 26 P.3d 271 (2001).....	127, 283
<u>State v. Ervin</u> , 169 Wn.2d 815, 239 P.3d 354 (2010).....	84, 91
<u>State v. Evans</u> , 163 Wn. App. 635, 260 P.3d 934 (2011)	209
<u>State v. Evans</u> , 177 Wn.2d 186, 298 P.3d 724 (2013).....	85
<u>State v. Fain</u> , 94 Wn.2d 387, 617 P.2d 720 (1980).....	240, 241, 247
<u>State v. Fernandez-Medina</u> , 141 Wn.2d 448, 6 P.3d 1150 (2000).....	216
<u>State v. Finch</u> , 137 Wn.2d 792, 975 P.2d 967, <u>cert. denied</u> , 528 U.S. 922, 120 S.Ct. 285, 145 L.Ed.2d 239 (1999)	276
<u>State v. Fleming</u> , 83 Wn. App. 209, 921 P.2d 1076 (1996)	209
<u>State v. Frampton</u> , 95 Wn.2d 469, 627 P.2d 922 (1981)	92, 124
<u>State v. Furman</u> , 122 Wn.2d 440, 858 P.2d 1092 (1993)	242
<u>State v. Gaddy</u> , 152 Wn.2d 64, 93 P.3d 872 (2004)	133
<u>State v. Galbreath</u> , 69 Wn.2d 664, 419 P.2d 800 (1966).....	104
<u>State v. Gefeller</u> , 76 Wn.2d 449, 458 P.2d 17 (1969).....	226
<u>State v. Gentry</u> , 125 Wn.2d 570, 888 P.2d 1105, <u>cert. denied</u> , 516 U.S.	

843, 116 S.Ct. 131, 133 L.Ed.2d 79 (1995)	224
<u>State v. Gibson</u> , 47 Wn. App. 309, 734 P.2d 32 (1987)	288
<u>State v. Green</u> , 91 Wn.2d 431, 598 P.2d 1370 (1979), <u>adhered to in part on reconsideration</u> , 94 Wn.2d 216, 616 P.2d 628 (1980)	92, 282
<u>State v. Gregory</u> , 158 Wn.2d 759, 147 P.3d 1201 (2006)	178, 180, 185
<u>State v. Heddrick</u> , 166 Wn.2d 898, 215 P.3d 201 (2009). 99, 100, 143, 168	
<u>State v. Henderson</u> , 100 Wn. App. 794, 998 P.2d 907 (2000).....	203
<u>State v. Hoffman</u> , 116 Wn.2d 51, 804 P.2d 577 (1991)	213, 216
<u>State v. Hoffman</u> , 64 Wn.2d 445, 392 P.2d 237 (1964)	156, 165, 167
<u>State v. Hornaday</u> , 105 Wn.2d 120, 713 P.2d 71 (1986)	96
<u>State v. Huff</u> , 64 Wn. App. 641, 826 P.2d 698 (1992)	133
<u>State v. J.P.</u> , 149 Wn.2d 444, 69 P.3d 318 (2003)	84
<u>State v. Jackson</u> , 111 Wn. App. 660, 46 P.3d 257 (2002)	133
<u>State v. Jacobs</u> , 154 Wn.2d 596, 115 P.3d 281 (2005)	91, 96
<u>State v. Jaquez</u> , 105 Wn. App. 699, 20 P.3d 1035 (2001)	147
<u>State v. Johnson</u> , 179 Wn.2d 534, 375 P.3d 1090 (2014).....	85, 88
<u>State v. Jones</u> , 117 Wn.2d 89, 68 P.3d 1153 (2003)	176
<u>State v. Jones</u> , 71 Wn. App. 798, 863 P.2d 85 (1993)	179
<u>State v. Kern</u> , 81 Wn. App. 308, 914 P.2d 114 (1996)	138
<u>State v. Kincaid</u> , 103 Wn.2d 304, 692 P.2d 823 (1985)	117, 135
<u>State v. Kirkpatrick</u> , 89 Wn. App. 407, 948 P.2d 882 (1997). 144, 146, 147	
<u>State v. Kjorsvik</u> , 117 Wn.2d 93, 812 P.2d 86 (1991).....	120
<u>State v. Knapstad</u> , 41 Wn. App. 781, 706 P.2d 238 (1985).....	114

<u>State v. Lackey</u> , 153 Wn. App. 791, 223 P.3d 1215 (2009)	95
<u>State v. Lively</u> , 117 Wn.2d 263, 814 P.2d 652 (1991)	104
<u>State v. Lui</u> , 153 Wn. App. 304, 221 P.3d 988 (2009)	289
<u>State v. Luvене</u> , 127 Wn.2d 690, 903 P.2d 960 (1995).....	82, 96, 276
<u>State v. Maddox</u> , 152 Wn.2d 499, 98 P.3d 1199 (2004).....	132
<u>State v. Mark</u> , 94 Wn.2d 520, 618 P.2d 173 (1980)	215
<u>State v. Marshall</u> , 144 Wn.2d 266, 27 P.3d 192 (2001).....	276
<u>State v. Martin</u> , 94 Wn.2d 1, 614 P.2d 164 (1980).....	92, 124
<u>State v. Maupin</u> , 128 Wn.2d 918, 913 P.2d 808 (1996)	227
<u>State v. McCarty</u> , 140 Wn.2d 420, 998 P.2d 296 (2000).....	121
<u>State v. McEnroe</u> , 179 Wn.2d 32, 309 P.3d 428 (2013)	103
<u>State v. Mendez</u> , 137 Wn.2d 208, 970 P.2d 722 (1999), overruled on other grounds by <u>Brendlin v. California</u> , 551 U.S. 249, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007)	142
<u>State v. Mezquia</u> , 120 Wn. App. 118, 118 P.3d 378 (2005).....	288
<u>State v. Monfort</u> , 179 Wn.2d 122, 312 P.3d 637 (2013).....	passim
<u>State v. Mullins</u> , 158 Wn. App. 360, 241 P.3d 456 (2010), <u>rev. denied</u> , 171 Wn.2d 1006, 249 P.3d 183 (2011).....	143
<u>State v. Niedergang</u> , 43 Wn. App. 656, 719 P.2d 576 (1986)	139
<u>State v. Nonog</u> , 169 Wn.2d 220, 237 P.3d 250 (2010)	120
<u>State v. Nordlund</u> , 113 Wn. App. 171, 53 P.3d 520 (2002).....	133
<u>State v. O’Neal</u> , 126 Wn. App. 395, 109 P.3d 429 (2005), <u>aff’d</u> , 159 Wn.2d 500, 150 P.3d 1121 (2007).....	176
<u>State v. Perrone</u> , 119 Wn.2d 538, 834 P.2d 611 (1992)	136, 138

<u>State v. Pettitt</u> , 93 Wn.2d 288, 609 P.2d 1364 (1980)	97
<u>State v. Pierce</u> , 169 Wn. App. 533, 280 P.3d 1158, <u>cert. denied</u> , 175 Wn.2d 1025, 291 P.3d 253 (2012).....	144, 210
<u>State v. Pirtle</u> , 127 Wn.2d 628, 904 P.2d 245 (1995), <u>cert. denied</u> , 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996).....	107, 109, 180
<u>State v. Ponce</u> , 166 Wn. App. 409, 269 P.3d 408 (2012)	215
<u>State v. Price</u> , 126 Wn. App. 617, 109 P.3d 27 (2007).....	227
<u>State v. Ramirez</u> , 49 Wn. App. 332, 742 P.2d 726 (1987)	178
<u>State v. Rankin</u> , 151 Wn.2d 689, 92 P.3d 202 (2004)	132
<u>State v. Redmond</u> , 150 Wn.2d 489, 78 P.3d 1001 (2005)	215
<u>State v. Reed</u> , 103 Wn.2d 140, 684 P.2d 699 (1984).....	284
<u>State v. Rice</u> , 110 Wn.2d 577, 757 P.2d 889 (1988), <u>cert. denied</u> , 491 U.S. 910, 109 S.Ct. 3200, 105 L.Ed.2d 707 (1989)	218
<u>State v. Rice</u> , 174 Wn.2d 884, 279 P.3d 849 (2012).....	97
<u>State v. Riley</u> , 121 Wn.3d 22, 846 P.2d 1365 (1993)	136
<u>State v. Roberts</u> , 142 Wn.2d 471, 14 P.3d 713 (2001)	276
<u>State v. Roggenkamp</u> , 153 Wn.2d 614, 106 P.3d 196 (2005).....	125
<u>State v. Rupe</u> , 101 Wn.2d 664, 683 P.2d 571 (1984)	159
<u>State v. Sanders</u> , 66 Wn. App. 380, 832 P.2d 1326 (1992)	175
<u>State v. Schimelpfenig</u> , 128 Wn. App. 224, 115 P.3d 338 (2005).....	289
<u>State v. Scott</u> , 72 Wn. App. 207, 866 P.2d 1258 (1993).....	288
<u>State v. Silva</u> , 106 Wn. App. 586, 24 P.3d 477 (2001).....	86
<u>State v. Spitsyn</u> , 95 Wn. App. 1012, 1999 WL 221642, <u>rev. denied</u> , 139 Wn.2d 1007, 989 P.2d 1143 (1999).....	289

<u>State v. Standifer</u> , 110 Wn.2d 90, 750 P.2d 258 (1988)	86
<u>State v. Stenson</u> , 132 Wn.2d 668, 759 P.3d 1239 (1997), <u>cert. denied</u> , 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998).....	248
<u>State v. Sutherby</u> , 144 Wn.2d 755, 30 P.3d 1278 (2001)	175
<u>State v. Sweany</u> , 174 Wn.2d 909, 281 P.3d 305 (2012)	84
<u>State v. Sweat</u> , 180 Wn.2d 156, 322 P.3d 1213 (2014)	90
<u>State v. Tang</u> , 75 Wn. App. 473, 878 P.2d 487 (1994).....	104
<u>State v. Thach</u> , 126 Wn. App. 297, 106 P.3d 752 (2005)	176
<u>State v. Thein</u> , 138 Wn.2d 133, 977 P.2d 582 (1999).....	132
<u>State v. Thomas</u> , 150 Wn.2d 821, 83 P.3d 970 (2004).....	116, 276
<u>State v. Thomas</u> , 166 Wn.2d 380, 208 P.3d 1107 (2009).....	135
<u>State v. Thorne</u> , 129 Wn.2d 736, 921 P.2d 514 (1996), <u>overruled on other grounds in Blakely v. Washington</u> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)	241
<u>State v. Unga</u> , 165 Wn.2d 95, 196 P.3d 645 (2008)	158
<u>State v. Vangerpen</u> , 125 Wn.2d 782, 888 P.2d 1177 (1995)	119, 121
<u>State v. Williams</u> , 132 Wn.2d 248, 937 P.2d 1052 (1997)	215
<u>State v. Wilson</u> , 125 Wn.2d 212, 883 P.2d 320 (1994)	86, 96
<u>State v. Winters</u> , 39 Wn.2d 545, 236 P.2d 1038 (1951)	165
<u>State v. Yates</u> , 161 Wn.2d 714, 168 P.3d 359 (2007).....	117, 188, 237, 248
<u>State v. Zillyette</u> , 178 Wn.2d 153, 307 P.3d 712 (2013)	120, 122
<u>Strandberg v. City of Helena</u> , 791 F.2d 744 (9th Cir. 1986)	164
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	99

<u>Taylor v. Louisiana</u> , 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975)	185
<u>Toussaint v. Yockey</u> , 597 F.Supp 1388 (D.C. Cal. 1984), overruled on other grounds, 801 F.2d 1080 (9 th Cir. 1986)	163
<u>Townsend v. Burke</u> , 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948)	100
<u>Trop v. Dulles</u> , 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958)..	240, 247
<u>Troxell v. Rainier Public School Dist. No. 307</u> , 154 Wn.2d 345, 111 P.3d 1173 (2005).....	83
<u>United States v. Alvarez-Sanchez</u> , 511 U.S. 350, 114 S.Ct. 1599, 128 L.Ed.2d 319 (1994)	153
<u>United States v. Bass</u> , 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971)	97
<u>United States v. Betner</u> , 489 F.2d 116 (5 th Cir. 1974)	205
<u>United States v. Brave Heart</u> , 397 F.3d 1035 (8th Cir. 2005).....	158
<u>United States v. Carter</u> , 454 F.2d 426 (4 th Cir. 1972)	107
<u>United States v. Cronic</u> , 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).....	100
<u>United States v. Day</u> , 830 F.2d 1099 (10 th Cir. 1987)	206
<u>United States v. Edwards</u> , 415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974).....	129
<u>United States v. Felix-Jerez</u> , 667 F.2d 1297 (9 th Cir. 1982)	175
<u>United States v. Frederick</u> , 78 F.3d 1370 (9 th Cir. 1996).....	231
<u>United States v. Gouveia</u> , 467 U.S. 180, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984).....	168
<u>United States v. Harry Barfield Co.</u> , 359 F.2d 120 (5 th Cir. 1966).....	205

<u>United States v. Haswood</u> , 350 F.3d 1024 (9th Cir. 2003).....	159
<u>United States v. Hayes</u> , 794 F.2d 1348 (9 th Cir. 1986).....	137
<u>United States v. Henry</u> , 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d (1980)	169
<u>United States v. Hillyard</u> , 677 F.2d 1336 (9 th Cir. 1982).....	136
<u>United States v. Mandelbaum</u> , 803 F.2d 42 (1 st Cir. 1986)	209
<u>United States v. O'Brien</u> , 972 F.2d 12 (1 st Cir. 1992)	206
<u>United States v. Pimental</u> , -- F.3d --, 2014 WL 2855009 (9 th Cir. 2014)	153, 156
<u>United States v. Salerno</u> , 481 U.S. 739, 1075 S. Ct. 2095, 95 L.Ed.2d 697 (1987).....	104, 106
<u>United States v. Sanchez</u> , 176 F.3d 1214 (9 th Cir. 1998).....	209
<u>United States v. Shi</u> , 525 F.3d 709 (9th Cir.2008).....	159
<u>United States v. Spilotro</u> , 800 F.2d 959 (9 th Cir. 1986)	137
<u>United States v. Stanley</u> , 597 F.2d 866 (4 th Cir. 1979)	139
<u>United States v. Valenzuela-Espinoza</u> , 697 F.3d 742 (9th Cir. 2012).....	153, 156
<u>United States v. Wade</u> , 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967).....	95, 168
<u>United States v. Williams</u> , 822 F.2d 1174 (D.C.Cir. 1987), <u>superseded on other grounds, United States v. Caballero</u> , 936 F.2d 1292 (D.C.Cir. 1991)	205
<u>United States v. Wiltberger</u> , 18 U.S. (5 Wheat) 76, 5 L.Ed. 37 (1820)....	97
<u>United States v. Young</u> , 420 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985)	208
<u>Uttecht v. Brown</u> , 551 U.S. 1, 127 S.Ct. 2218, 167 L.Ed.2d 1014 (2007)	

.....	187
<u>Wainwright v. Witt</u> , 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)	
.....	42, 185, 186
<u>Washington v. Texas</u> , 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)	
.....	227
<u>Watts v. Indiana</u> , 338 U.S. 49, 69 S.Ct. 1357, 1358, 93 L.Ed. 1801 (1949)	
.....	146
<u>Welch v. Southland Corp.</u> , 134 Wn.2d 629, 952 P.2d 162 (1998)	90
<u>Whatcom County v. City of Bellingham</u> , 128 Wn.2d 537, 909 P.2d 1303 (1996).....	87
<u>Wiggins v. Smith</u> , 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)	
.....	103
<u>Williams v. State</u> , 789 P.2d 365 (Alaska Ct.App. 1990)	209
<u>Witherspoon v. Illinois</u> , 391 U.S. 570, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).....	186, 188
<u>Woodson v. North Carolina</u> , 428 U.S. 280, 96 S.Ct. 1978, 49 L.Ed.2d 944 (1976).....	passim

STATUTES

18 U.S.C. § 3501.....	153
1975-1976 Wash. Laws 2d Ex. Sess. 17 (codified at Wash. Rev. Code Ann. Sec. 9A.32.045-.047 (1977) (repealed 1981).....	91
RCW 10.16.030	243
RCW 10.40.060	95
RCW 10.94.010	92, 93
RCW 10.95.020	83, 116, 119, 121
RCW 10.95.030	passim

RCW 10.95.040	passim
RCW 10.95.060	passim
RCW 10.95.070	286
RCW 10.95.080	221
RCW 10.95.110	88
RCW 10.95.120	passim
RCW 10.95.130	passim
RCW 10.95.160	89
RCW 10.95.170	89
RCW 4.96.020	83
RCW 43.330.190	255
RCW 43.330.200	255
RCW 7.70.100	83
RCW 70.02	passim
RCW 70.02.005	2, 129
RCW 70.02.050	130
RCW 72.68.040	passim
RCW 72.68.050	30, 40, 149, 150
RCW 72.68.505	2
RCW 9.48	91
RCW 9.94A.535.....	90
RCW 9.94A.570.....	282

RCW 9A.20.020.....	30, 141
--------------------	---------

OTHER AUTHORITIES

“The Role of Race in Washington State Capital Sentencing, 1981-2012” (January 27, 2014) (Beckett Report).....	passim
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---	-----

BENNETT L. GERSHMAN, TRIAL AND ERROR AND MISCONDUCT section 2-6(b)(2) at 171-72 (1997)	283
---	-----

<u>Criminal Procedure</u> , Part 1, Chapter 2, section 2.4, LaFave, Israel and King.....	104
---	-----

D. McCord, “Lightning Still Strikes: Evidence From the Popular Press that Death Sentencing Continues to be Unconstitutionally Arbitrary More Than Three Decades After <u>Furman</u> ,” 71 BROOKLYN L.REV. 797 (2005)	277
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Romualdo P. Eclavea, Annotation, <u>Admissibility of Confession or Other Statement made by Defendant as Affected by Delay in Arraignment</u> , 28 A.L.R.4th 1121 (1984).....	165
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--	-----

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--	----

The Random House Dictionary, Unabridged (2 nd ed. 1987)	291
--	-----

WPIC 31.06.....	220
-----------------	-----

RULES

CrR 2.1	95
---------------	----

CrR 2.3	2
---------------	---

CrR 3.1	passim
---------------	--------

CrR 3.2.....	passim
CrR 3.2.1.....	passim
CrR 3.3.....	87, 95
CrR 3.5.....	passim
CrR 3.6.....	2, 28, 128
CrR 4.1.....	80, 87, 95
CrRLJ 3.2.1.....	30, 141
ER 403.....	passim
ER 608.....	175
ER 801.....	173
Federal Rules of Criminal Procedure 5.....	153
RAP 5.1.....	88
RAP 5.3.....	88
RAP 9.2.....	88
SPRC Rule 1.....	101
SPRC Rule 2.....	77, 100, 166
SPRC Rule 5.....	134
SPRC Rule 6.....	269, 272, 276
CONSTITUTIONAL PROVISIONS	
Const., art. I, § 12.....	268
Const., art. I, § 14.....	104, 241
Const., art. I, § 21.....	140

Const., art. I, § 22.....	12, 13, 143, 177
Const., art. I, § 3.....	140
Const., art. I, § 33.....	140
Const., art. I, § 7.....	2
Const., art. I, § 9.....	2
U.S. Const., amend. IV	passim
U.S. Const., amend. V.....	passim
U.S. Const., amend. VI	passim
U.S. Const., amend. VIII.....	passim
U.S. Const., amend. XIV	passim

A. ASSIGNMENTS OF ERROR

Pretrial Issues

1. The trial court erred in not dismissing the Notice of Intent to Seek Special Sentencing Hearing [death notice], and this violated Mr. Scherf's rights under the due process, equal protection and cruel and unusual punishment provisions of the state and federal constitutions and his rights under RCW 10.95.040.¹

2. The trial court erred in ruling that the prosecutor's failure to provide Mr. Scherf's counsel time to present mitigation evidence prior to the filing of the death notice could be cured by an offer to consider mitigation presented by the defense after filing of the notice.

3. The trial court erred in denying the Motion to Compel [discovery of] Mitigating Circumstance considered by the prosecutor in deciding to seek the death penalty against Mr. Scherf. CP 2577.

4. The Washington death penalty statute is unconstitutional under the state and federal constitutions.

5. The trial court erred in denying Mr. Scherf's Motion to Suppress documents from his central prison file and medical records and this violated his rights under the Fourth and Fourteenth Amendments,

¹ Both Judge Wynne, before he granted recusal, and Judge Appel denied motions to dismiss the death notice. RP 169; 1960.

Article 1 section 7 of the Washington Constitution, RCW 70.02.005, CrR 3.6 and CrR 2.3.

6. The trial court erred in concluding, CP 2286-93, (a) that all items stored in a prisoner's cell may be searched without a warrant, (b) that a claimed search for mitigation evidence is equivalent to a search for evidence of a crime, (c) that a seizure of all of a prisoner's medical records and central file meets the particularity requirement of the Fourth Amendment, (d) that the Fourth Amendment requirement that the place to be searched be described with particularity can be met by having another governmental agent obtain the items and bring them to the authorized place to be searched or that the warrant's authorization of the place to be searched can be supplemented by the affidavit supporting the warrant.

7. The trial court erred in denying Mr. Scherf's Motion to Suppress his custodial statements pursuant to CrR 3.5, CrR 3.1, CrR 3.2.1, RCW 72.68.505, the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, section 9 of the Washington Constitution.

8. The trial court erred in entering the following Findings of Fact and portions of Findings of Fact in denying Mr. Scherf's CrR 3.5 motion:

(a) Undisputed Findings of Facts:²

--Number 1 (that Mr. Scherf had no prior diagnosis of temporal lobe dysfunction or bipolar disorder);

--Number 6 (that the shift lieutenant stopped asking questions after Mr. Scherf invoked his right to counsel)³;

--Number 19 (that previously Mr. Scherf attempted to manipulate people into relaxing his conditions of confinement);

--Number 26 (that the meeting between Mr. Scherf and Mr. Schwarz was private);

--Number 28(the transfer from DOC to Snohomish County Jail was done, in part, for Mr. Scherf's safety)⁴;

--Numbers 39 and 40 (that all Mr. Scherf had to do was request an attorney by a kite or through his module deputy and one would be available in 20 minutes);

--Number 42 (to set up an attorney-client meeting would have only taken a few hours to set up);

--Number 46 ("Mr. Scherf was functioning within normal limits")⁵;

² The 47-page Findings of Fact and Conclusion of Law Following CrR 3.5 and 3.6 Hearing are found in the Clerk's Papers at 1209-1255, and attached as Appendix A to this brief. The challenged findings and conclusions are summarized here.

³ This finding is contradicted by Finding of Fact 7, that the lieutenant asked Mr. Scherf about the blood on his jacket after he said he was planning on escaping. CP 1211.

⁴ This finding is contradicted by Superintendent's media release indicating that the transfer was to help with the police with the investigation. CP 1689.

⁵ See e.g., Number 52, where he asked a jail sergeant to contact his attorney and there was no evidence that the sergeant did more than tell

--Number 58 (no one “enlisted MHP DaPra to do anything to aid Mr. Scherf”);

--Number 69(to set up an attorney-client meeting would have only taken a few hours to set up);

--Number 70 (“During the time Mr. Scherf was housed in the Snohomish County Jail, he showed no signs that he was suffering any distress”); and

--Number 74 (during the February 9, 2011 interview Mr. Scherf “was of sound mind”).

b. Resolution of Disputed Facts:

--Number 2 (“there was an oral agreement between Washington State DOC and Snohomish County Jail to house the defendant”);

--Number 3 (Neither Mr. Scherf’s segregation nor the conditions of his confinement contributed “to his free will being overborne to any significant degree”);

--Number 4 (“Mr. Scherf was furnished with the means necessary to contact his lawyer whenever he wanted to and he knew it”);

--Number 5 (“Mr. Scherf was not suffering under his conditions of confinement to the point that he was so desperate that he felt he had to confess to a murder in order to gain relief from them. He was not suffering from any mental illness or defect or any other condition that overcame his free will. To the extent he was motivated by feelings of guilt, this was not a condition that overcame his free will but something that he considered in exercising his free will. Mr. Scherf’s expression that he should be executed in order to atone for the crime he said he committed is not per se irrational, notwithstanding the fact it contemplated his own condemnation under the law. Mr. Scherf was not irrational when he spoke with police. His decision to do so was informed, free and voluntary”);

Detective Walvatne of the request; see also Numbers 55 and 56, which find an attorney was requested.

--Number 6 (“At no time did police or jail staff make any threats to Mr. Scherf. At no time did police or jail staff make any promises to Mr. Scherf apart from a promise to pass on his concerns to others so that his conditions of confinement might improve and so that he might have access to some of the things he wished to have in his cell. Although Mr. Scherf may have expected some form of consideration in return for his cooperation with police, none of these promises overcame his free will”);

--Number 7 (“Mr. Scherf was not irrational simply because he confessed to a murder or expressed a belief in the death penalty and furthermore expressed a belief that the penalty applied to him”)

9. The trial court erred in entering the following Conclusions of Law in denying Mr. Scherf’s Motion to Suppress Pursuant to CrR 3.5:

--Numbers 4, 7, 8, 10, 11, 12, 13, 14 (that custodial statements “volunteered” by Mr. Scherf while being escorted to the shift lieutenant’s office, at the shift office and in IMU as well as statements in response to questions about blood on his jacket or his emotional and physical condition were not rendered inadmissible by failure to Mirandize him; they were voluntary and admissible or related to health concerns);

--Numbers 13, 14, 15 (that custodial statements by Mr. Scherf to custody officers about his wants or his desire to speak to detectives were not “the result of any kind of coercion”);

--Number 16 (that CrR 3.1 was not violated because Detective Robinson did not have to delay serving a warrant before Mr. Scherf received an attorney);

--Number 17 (that Mr. Scherf was transferred to Snohomish County Jail for his own protection and to serve his DOC sentence rather than as a result of a new crime and therefore the failure to bring him before a judge “as soon as practical” did not violate CrR 3.2(d)(1), and even if it did the failure did not trigger the exclusionary rule);

--Number 18 (that Mr. Scherf’s right to counsel was satisfied after he met with his assigned attorney and it did not matter that he was not assigned SPCR 2 counsel because he had not been charged with a crime):

--Number 19 (that between January 30, 2011 and February 4, 2011, Mr. Scherf did not desire an attorney so there was no violation of CrR 3.1(c)(2) even if he did not have access to a phone);

--Numbers 20, 21, 22 (that statements made to the police on February 2 and 3, were made after Miranda and voluntary; statements to MHP on February 3 were for Mr. Scherf's health and safety);

--Number 23 (that even though Mr. Scherf wanted an attorney on February 4, 2011, he had access to a phone and the public defender number and even if he didn't have access this violation of CrR 3.1(c)(1) did not extend to subsequent waivers);

--Numbers 25, 27, 28, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42 (that questioning on February 5, 2011 through February 14, 2011, followed valid advisements to Mr. Scherf of his Miranda rights and his hope that the police could help him with his conditions of confinement did not overcome his free will and even if he did believe he had to talk with them because they helped improve his conditions there was no coercion and his statements were a product of his own free will);

--Numbers 26, 29 (that adjustments to conditions of confinement by Mr. DaPra and Captain Parker were not at the behest of the police; they were not agents of the police); and

--Number 43 (that Mr. Scherf did not desire to speak with his attorney between February 4, 2011, and February 9, 2011, and there was not violation of CrR 3.1(c)(2).

10. The trial court erred in not redacting Mr. Scherf's videotaped statements to exclude: (a) questioning about shoelaces and A & D ointment found in the sanctuary; (b) questioning about a cartoon given to Officer Biendl; (c) questioning about whether Mr. Scherf was sorry Officer Biendl was dead; (d) quotations from the Bible about if you take a life then you have to give a life; (e) statements about Officer

Biendl's family deserving a quick resolution to the case; (f) and statements about meeting with an attorney and speaking to the detectives over the attorney's advice.

11. The trial court erred in admitting Mr. Scherf's kite sent to the prosecutor requesting to be charged with aggravated murder and given the death penalty and offering his opinion why the death penalty was appropriate; this error denied him his state and federal constitutional rights to a jury trial.

Voir dire issues

12. The trial court erred in limiting the scope of voir dire during the death-qualification process in violation of the state and federal constitutions.

13. The trial court erred in denying defense challenges for cause for prospective Jurors 10, 11, 16, 32, 53, and 80.

14. The trial court erred in granting prosecution challenges for cause of Jurors 37 and 75.

Trial issues

15. The trial court erred in allowing the prosecution to introduce evidence that Mr. Scherf was serving a sentence of life without the possibility of parole at the time of the crime.

16. The trial court erred in giving its instruction on

premeditation and for not giving the defense proposed instruction on premeditation, Instruction 8.⁶

Penalty phase issues

17. The trial court erred in ruling that evidence that Mr. Scherf requested sex offender treatment opened the door to evidence of his unsuccessful treatment in the past and opinion testimony that no treatment could have prevented the crime.

18. The trial court erred in ruling that the defense could not respond to the “eye for an eye” statement with other quotations from the Bible representing more merciful sentiments.

19. The trial court erred in refusing to edit Court’s Instruction No. 6, as proposed by the defense.

The prosecutorial misconduct issue

20. The prosecutor’s misconduct throughout trial – in trying to ingratiate himself with jurors during voir dire, in misstating the law on premeditation in argument, in telling the jurors that it was their “job” to impose the death penalty and that they had promised to do so “repeatedly” – denied Mr. Scherf his rights under the state and federal constitutions to a fair trial.

21. Cumulative error denied Mr. Scherf a fair trial and

⁶ All instructions at issue are in Appendix B to this brief.

sentencing proceeding.

Mandatory review issues

22. The Washington proportionality review under RCW 10.95.130 demonstrates that the death penalty in Washington is administered in violation of the state and federal constitutions.

23. The Washington proportionality review under RCW 10.95.130 demonstrates that the capital sentencing scheme violates the evolving standards of decency; fails to fulfill the requirements of consistency and individualized sentencing; is geographically arbitrary; and is racially disproportionate.

24. The death sentence in this case was disproportionate in light of the dispositions in other aggravated murder cases in Washington.

25. The death sentence in Mr. Scherf's case was a result of unfair passion and prejudice.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in denying Mr. Scherf's motion to dismiss the death notice where the notice was not filed "within 30 days after the defendant's arraignment," as required by RCW 10.95.040(2)?
Assignment of Error 1.

2. Did the prosecutor's intentional delay in charging and filing the death notice before arraignment deny Mr. Scherf his right to qualified

counsel at a critical stage under both the Washington and United States Constitutions? Assignments of Error 1, 2, 3.

3. Did the prosecutor's filing the death notice before Mr. Scherf was arraigned and without providing Mr. Scherf the opportunity to investigate and present mitigation evidence violate due process and fundamental fairness under the Washington State and United States Constitutions? Assignments of Error 2, 3, 4.

4. Did the trial court err in ruling that the prosecutor's offer to consider mitigation after the death notice was filed cured the filing of the notice before the defense had any opportunity to present mitigation evidence, a circumstance which placed the burden on Mr. Scherf to establish the sufficiency of the mitigation evidence to warrant leniency and denied him his state and federal due process rights to the presumption of leniency? Assignments of Error 1, 2, 3, 4.

5. Did the trial court's ruling that the prosecutor's offer to consider mitigation after the death notice was filed cured the absence of an opportunity to file a mitigation package before filing violate the constitutional requirement of Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 1978, 49 L.Ed.2d 944 (1976), that the individual defendant's character and circumstances must be considered before imposition of the death penalty? Assignments of Error 2, 3, 4.

6. Did the trial court err in denying Mr. Scherf's Motion to Compel Discovery of what mitigation the prosecutor considered before filing the death notice, and thereby violate RCW 10.95.040(1) and the controlling authority that the prosecutor's discretion in seeking the death penalty is not unfettered? Assignments of Error 2, 3, 4.

7. Did the trial court err in denying Mr. Scherf's motion to dismiss the death notice because filing the notice before arraignment, without disclosure of what mitigation was considered by the prosecutor and without providing Mr. Scherf any opportunity to present mitigation, constituted an abuse of discretion and a denial of equal protection and rendered the statute void for vagueness as applied to him? Assignments of Error 1, 2, 3, 4.

8. Would the trial court's conclusion that a prosecutor's discretion to file a death notice under RCW 19.95.040 is unreviewable, if correct, result in death sentences that are arbitrary and capricious under both the state and federal constitutions? Assignments of Error 1, 2, 3, 4.

9. Is the Washington death penalty unconstitutional under Alleyne v. United States, -- U.S. --, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). Assignment of Error 4.

10. Is the Washington death penalty unconstitutional under Hall v. Florida, 134 S.Ct. 1986, 2014 WL 2178332 (U.S.Fla.), 14 Cal.

Daily Op. Serv. 5686 (2014)? Assignment of Error 4.

11. Did the trial court err in denying Mr. Scherf's motion to suppress documents seized from his central file and medical records where medical records cannot be seized without a warrant under chapter RCW 70.02, the items in the central file and medical records were not located in cell at the time of the search, there was no probable cause to believe that the places to be searched would reveal evidence of a crime, there was no attempt to specify with particularity the documents to be seized and there was a search beyond the places authorized by the warrant to be searched? Assignments of Error 5.

12. Did the trial court err in denying Mr. Scherf's motion to suppress his custodial statements under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution; Article 1, sections 9 and 22 of the Washington Constitution; Criminal Rules 3.1 and 3.2.1; and RCW 72.68.040-.050; where he was not taken promptly before a magistrate; where he was denied access to counsel; where he was transferred improperly to jail without being charged; and where his statements were the involuntary product of his isolation from everyone but the investigating detectives, his deprivation severe enough to violate the Eighth Amendment and his mental distress? Assignments of Error 7, 8, 9.

13. Did the trial court err in refusing to redact irrelevant and

unfairly prejudicial portions from the videotaped statements where the presence of shoelaces and ointment were not involved in the commission of the crime, where the cartoon was something circulating around the prison which Officer Biendl requested a copy of, where the statements about counsel unfairly reflected on Mr. Scherf's right to counsel and where the statements about the Bible and Office Biendl's family deserving a quick resolution were improper comments on what verdicts should be imposed and inflammatory? Assignment of Error 10.

14. Did the trial court err in admitting Exhibit 123, Mr. Scherf's kite to the prosecutor requesting death and offering his opinion why death would be appropriate, because his opinion was not relevant, unfairly prejudicial and a denial of his right to a jury trial under the Sixth Amendment and Article 1, section 22 of the Washington Constitution? Assignment of Error 11.

15. Did the trial court err in construing the scope of the death qualification process to include only the issue of whether the juror said he or she could follow the law and not whether the juror would consider all mitigation and be willing to make an individual moral judgment as to the appropriateness of mercy in sentencing? Assignments of Error 12.

16. Did the trial court err in denying defense challenges for cause for jurors who indicated that if the defendant were already serving a

sentence of life without parole or the crime was premeditated then death would be the only appropriate sentence; that they would not consider things such as a bad childhood, remorse, being a model prisoner or a confession as mitigation or that they did not know what they would consider as mitigation; that they would be starting with animosity towards the defendant and leaned towards the death penalty or that they had relatives or friends who worked at the Washington State Reformatory? Assignment of Error 13.

17. Did the trial court's error in denying challenges for cause require reversal of Mr. Scherf's death sentence where his counsel used all peremptory challenges to remove the jurors who should have been excused and there were remaining jurors who sat on the jury who counsel likely would have excused if there had been peremptory challenges remaining. Assignment of Error 13, 14.

18. Did the trial court commit error which requires reversal of Mr. Scherf's death sentence by granting state's challenges for cause for jurors who could have sat and fairly deliberated in spite of some conscientious scruples against the death penalty? Assignment of Error 14.

19. Did the trial court err in allowing the state to introduce evidence that Mr. Scherf was serving a sentence of life without parole at the time of the crime where this was overwhelmingly and unfairly

prejudicial and was not relevant to the issue of whether there was insufficient evidence of mitigation to merit leniency? Assignment of Error 15.

20. Did the trial court err in giving its instruction on premeditation and for declining to give the defense proposed instruction on premeditation [CP 339] where the instruction given was insufficient to distinguish premeditation from intent and insufficient to convey the need for proof of actual weighing and deliberation before making the decision to take a life? Assignment of Error 16.

21. Did the trial court err in ruling that evidence that Mr. Scherf requested sex offender treatment opened the door to rebuttal evidence that he was untreatable where the evidence was introduced solely to show his willingness to try to change and the state could have sought a limiting instruction that the evidence was not to be considered as evidence of the state's failure to provide treatment? Assignment of Error 17.

22. Did the trial court err in ruling that counsel for Mr. Scherf could not argue that the Bible said things other than "an eye for an eye" when this limitation denied Mr. Scherf his state and federal constitutional rights under the Fifth, Sixth And Fourteenth Amendments to appear and defend at trial? Assignment of Error 18.

23. Did the trial court err in refusing to remove "or no" in

Instruction 6; and did Instruction 6 incorrectly, as given, convey to the jury that they had to be unanimous in deciding not to impose the death penalty? Assignment of Error 19.

24. Did the prosecutor's misconduct -- in trying to ingratiate himself to the jurors, even after being instructed by the trial court to stop; in misstating the law on premeditation; in arguing an incorrect definition of premeditation, and in telling the jurors that it was their job to impose the death penalty and that they had "repeatedly" promised to do so -- deny Mr. Scherf a fair trial? Assignment of Error 20.

25. Did the prosecutor's misconduct cumulatively deny Mr. Scherf a fair trial and was it so flagrant and ill-intentioned as to obviate the need for an objection? Assignments of Error 20, 21.

26. Did the errors at trial and sentencing, cumulatively as well as individually, deny Mr. Scherf a fair trial and sentencing proceeding? Assignment of Error 21.

27. Does Washington's proportionality review under RCW 10.95.130 demonstrate that the death penalty in Washington is administered in violation of Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 333 L.Ed.2d 346 (1972), and state and federal constitution prohibition against cruel and unusual punishment? Assignments of Error 4, 22.

28. Does Washington's proportionality review under RCW 10.95.130 demonstrate that capital punishment violates evolving standards of decency and is unconstitutional under the state and federal constitutions? Assignment of Error 23.

29. Does Washington's proportionality review under RCW 10.95.130 demonstrate that Washington's death penalty scheme fails to fulfill the requirements of consistent and individualized sentencing as required by the state and federal constitutions? Assignment of Error 23.

30. Is Washington's death penalty system unconstitutionally flawed because it is applied in a manner that is geographically and racially arbitrary in violation of the equal protection and the cruel and unusual punishment provisions of the state and federal constitutions? Assignment of Error 23.

31. Does the failure to adhere to the specific requirements of RCW 10.95.120 and RCW 10.95.130, resulting in invalid and incomplete set of case reports and record, render Washington's proportionality review unconstitutional under the state and federal constitutions? Assignment of Error 23.

32. Was the death sentence in this case disproportionate to the sentences imposed in other aggravated murder cases where (a) there was one victim, (b) there are no other cases involving either the prison inmate

or corrections officer victim aggravating factors, (c) there are no other police officer murder cases (the closest to the corrections officer aggravator) which ultimately resulted in a death penalty, (d) there are no other murder convictions for murder by strangulation alone which resulted in even an aggravated murder conviction, and (e) where Mr. Scherf lead a productive life in prison before the crime, expressed remorse and accepted responsibility for the murder? Assignment of Error 24.

33. Was the death sentence a product of unfair passion and prejudice where the jury was improperly told that Mr. Scherf was serving a sentence of life without parole at the time of the offense, where the jury heard Mr. Scherf say he deserved the death penalty and that Officer Biendl's family deserved a quick result and where the jury heard that it was their job to return a death sentence? Assignment of Error 25.

C. STATEMENT OF THE CASE

1. OVERVIEW

On January 29, 2011, at the Washington State Reformatory (WSR) in Monroe, Washington, corrections officers discovered at evening count that a prisoner, Byron Scherf, was missing from his cell. RP 6032, 6057.⁷ During the search that ensued, officers found Mr. Scherf sitting outside the doors of the sanctuary in the chapel at WSR; he told them he had fallen

⁷ The verbatim report of proceedings is in consecutively-numbered volumes designated as RP.

asleep and missed the last movement back to his housing unit. RP 6059-60, 6088, 6113. After being questioned briefly, he was taken to a cell in the Intensive Management Unit (IMU). RP 6167-68. A short time later, officers noticed that Corrections Officer Jayme Biendl, who worked alone in the chapel, had not turned in her equipment at the end of her shift. RP 6159. Her body was discovered at the area of the sanctuary near the stage; she had been strangled with a cable used for the electric instruments sometimes played there. RP 6159, 6274, 6283, 6299.

Once Officer Biendl's body was discovered, Mr. Scherf was isolated in a cell on the fourth floor of the hospital area of the prison and put on suicide watch. RP 6383-84.

Because Mr. Scherf was already serving a sentence, authorities detained him for "investigation" for nearly a month without taking him before a judge or charging him with any crime. RP 6386, 6394-85. On February 1, 2011, police officers transferred him to the Snohomish County Jail, where the same conditions of extreme deprivation used in the hospital cell at WSR continued. Initially, Mr. Scherf was in a "suicide smock," with a hole in the floor of the cell for a toilet, the lights on twenty-four hours a day, no running water, no hygiene products, no eye glasses, nothing to read or write with, and no adequate blanket – isolated from others and his family. RP 606-609. The only people he talked to regularly

were Snohomish County Sheriff detectives who saw him for an hour or two virtually every day, under the guise of taking pictures of his injuries as they developed over time. RP 625, 629, 767.

On February 7, Mr. Scherf agreed to provide a videotaped confession to the detectives in exchange for the items and contact he had been deprived of in his cell (“I was willing to offer you a full confession provided that the stipulation of things that I’ve listed on the sheet of paper were taken care of prior to that”). CrR 3.5 Ex. 10 at 2. His first videotaped statement memorialized the agreement, and he was asked to affirm that, when the items he sought were provided, he would not seek other concessions (Detective Bilyeu: “you’re telling us that you’re ready to talk to us, you’re ready to give us a confession in your words as long as some of these things are taken care of . . . I know our bosses are gonna ask, hey if we do all this for Mr. Scherf what’s the next list gonna say. Byron Scherf: “there’s not gonna be a next list . . . if this doesn’t happen, then I, then everything is off the table”). *Id.* at 12. On February 8, 2011, Mr. Scherf agreed to “complete his agreement” and gave a videotaped confession. RP 649-652, 788-796.

From the time authorities first transferred him to the Snohomish County Jail on February 1, 2011, until after he provided a confession, Mr. Scherf met only briefly, on one occasion, with his appointed attorney, who

was not qualified to represent persons who faced a possible capital charge. CP 898. On February 14, 2011, after one further brief meeting with this appointed counsel, Mr. Scherf wrote to the Snohomish County Prosecutor indicating that he would plead guilty at arraignment to aggravated murder with the death penalty. CP 898. It wasn't until he sent this note to the prosecutor that Mr. Scherf was finally appointed Superior Court Special Proceeding Rules (SPRC) 2 qualified counsel.

The state finally filed charges against Mr. Scherf on February 24, 2011, in Everett District Court. CP 1679. On March 11, 2011, charges were filed in Snohomish County Superior Court. CP 3133-34. On March 16, 2011, the prosecution filed a Notice of Special Sentencing Proceeding to Determine Whether the Death Penalty Should be Imposed [death notice], before he was arraigned. CP 3109, 3155-3117.

The day before charges were filed in District Court, the prosecutor had asked the defense to provide mitigation by March 7, 2011. CP 899. At that time, the state had provided no discovery to defense counsel; and, because of the lack of a case number, counsel had no access to funds to conduct an investigation into mitigating circumstances -- a civil law suit to authorize filing a case number, filed by the newly appointed SCRC 2 qualified counsel, had been unsuccessful. CP 900, 1667-68, 1679-80. When the defense responded that this mitigation deadline did not allow the

defense time to conduct a reasonable investigation or retain a mitigation specialist, the prosecutor indicated that he believed that the defense “already possess[ed]” the evidence it needed, and that he would “review any mitigating material [which the defense presented] and would re-examine [his] decision.” CP 2566, 2568. Counsel received the first discovery (pages 1-3470) on March 2, 2011, five days before the mitigation deadline, and further discovery (pages 3471-6454) on March 11, 2011, after the prosecutor’s mitigation deadline. CP 899.

PRE-ARRAIGNMENT DATES SUMMARY

January 29, 2011	Officer Biendl’s body discovered at Washington State Reformatory; Byron Scherf isolated on the hospital floor of the Reformatory.
February 1, 2011	Byron Scherf transferred to Snohomish County Jail.
February 7, 2011	Byron Scherf agreed to give a confession in exchange for livable conditions.
February 14, 2011	Byron Scherf wrote to Snohomish County Prosecutor saying he would plead guilty at arraignment to the death penalty.
February 23, 2011	Byron Scherf was finally appointed SPCR 2 qualified counsel. The Snohomish County Prosecutor wrote to counsel giving counsel until March 7, 2011 to provide any mitigation it wished to have reviewed.
February 24, 2011	Byron Scherf was arraigned in Evergreen District Court.

March 2, 2011	First discovery (1-3470) provided to defense counsel.
March 7, 2011	The prosecutor's mitigation deadline.
March 11, 2011	Further discovery provided (3471-6454). Charges filed in Superior Court.
March 15, 2011	Prosecutor publicly announces intent to seek the death penalty.
March 16, 2011	Notice of Intent to Seek the Death Penalty filed Arraignment

Before trial, the court denied defense motions to dismiss the death notice and motions to suppress both Mr. Scherf's custodial statements given to the detectives in exchange for items to relieve the deprivations of his living conditions and the medical and other records seized from his prison files at WSR. CP 1209-55; RP 1357-68, 1419-30, 1560.

The case then proceeded to trial before the Honorable George Appel; Mr. Scherf was convicted of first-degree aggravated murder and sentenced to death after a penalty phase trial.⁸ The aggravating factors were that Officer Biendl was acting as a corrections officer and that Mr. Scherf was serving a sentence at the time, factors reflecting the status of the victim and the defendant. CP 3134-36. A timely notice of appeal and of mandatory review was filed in this Court. SupCP 29-31, 32, 35-36.

⁸ The Honorable Thomas Wynne granted a defense motion to recuse prior to trial. CP 1864-68.

2. ARRAIGNMENT

On March 16, 2011, the prosecutor served the Notice of a Special Sentencing Proceeding to determine whether the Death Penalty should be imposed prior to arraignment and made a clear oral and written record that he was intentionally doing so to avoid the restriction in RCW 10.95.040, on entering a guilty plea at arraignment. RP 2; CP 3115-17.

3. PRETRIAL MOTIONS CONCERNING SEEKING THE DEATH PENALTY

On March 12, 2013, defense counsel moved to strike the death penalty because the prosecutor abused its discretion (a) in filing the death notice without giving the defense 30 days after arraignment, or any sufficient time, to present mitigation or other input into the decision, (b) by considering only Mr. Scherf's prison record and (c) by basing its decision on considerations other than whether the mitigating circumstances were insufficient to merit leniency. CP 897-932; RP 1929-41, 1960.

On July 11, 2011, the trial court again denied the defense motion to strike the death penalty based on the argument that RCW 10.95.040(2) unambiguously requires that the notice of intent to seek the death penalty to be filed "within 30 days after" arraignment. RP 152-163, 169; CP 2538.

On August 3, 2011, the trial court denied the defense motion to compel the state to identify specific evidence it considered as mitigation in

deciding to file the death notice. CP 2577-81, 2398-299; RP 182. The prosecutor indicated he considered everything in the first 6,454 pages of discovery as well as photographs and statements of Mr. Scherf. RP 173.

A further defense challenge to the capital charging statute, as unconstitutionally vague as applied in Mr. Scherf's case, was denied by the court on the merits, as well as for being filed too late. CP 402-403; RP 2071-85. This motion was based on (a) the prosecutor's refusal to provide the standard his office used for measuring the sufficiency of mitigation or the definition of mitigation it used, (b) specific statements by the prosecutor at a lecture for the King County Bar Association in January 2013, that he considered the "strength of evidence" to be "huge" in deciding to file the death notice against Mr. Scherf and (c) that he considered the wishes of the victim's family. CP 719-720.

4. MOTION TO SUPPRESS RECORDS SEIZED AT WSR

Counsel for Mr. Scherf moved to suppress documents that had been boxed up with other property from his cell and taken to storage when he was moved to the Snohomish County Jail and documents which comprised his central prison and medical record files. These documents were seized at WSR pursuant to warrant 11-32. Warrant 11-32 was challenged on the grounds that it was not supported by probable cause as

required by the Fourth Amendment and Art. 1, sec. 7 of the Washington Constitution, was constitutionally overbroad, and failed to state with particularity the items to be seized. CP 2402; RP 243-250. Counsel moved to suppress the medical records on the added grounds that the search of the medical records section of WSR was not authorized by the warrant and that the medical records were seized in violation of RCW 70.02. CP 2322-24; 2402; RP 243-244.

After Mr. Scherf was transferred to the Snohomish County Jail, corrections officers collected all of his belongings from his cell at WSR and put them into storage. CP 2416; RP 243-250. Members of the Monroe Police Department obtained a warrant to search this stored property for Mr. Scherf's guitar, guitar strings, wire or metal, newspapers or other documents related to a cartoon found in Officer Biendl's office, any hat, and any personal papers or journals "referencing the crime." CP 2416. In searching the eleven boxes containing Mr. Scherf's property, Snohomish County Deputy Sheriff Brian Wells, who was assisting the Monroe Police, found and looked at a number of documents not authorized by the warrant. CP 2416-18; RP 235-236, 239.

Detective Wells sought and obtained a second warrant, warrant 11-32, based in part on the documents he had seen in the search of the stored property, and in part on his opinion that a further search of the stored

property and Mr. Scherf's central file would produce documents to refute possible trial defenses based on a physical handicap, mental defect or handicap, a claim of mental retardation, or to provide a basis for leniency at sentencing. CP 2406, 2418-19. Detective Wells further asserted that "mitigating factors to not pursue the death penalty includes an exhaustive amount of historical information to include, schooling and educational background, childhood experiences, child rearing, family background data, life history to include work history and the use and/or abuse of drugs and alcohol, criminal records to include arrest history, medical records, psychological evaluation records, and various other forms of historical and background data" – virtually anything about the accused. CP 2406-07. He swore that he had been informed that the central file for Mr. Scherf would contain all of this information. CP 2409. Based on this representation, the warrant authorized the seizure of:

Any and all records, documents, papers, writing both typed and handwritten, books or any other personal records for Inmate Byron Scherf 08-13-1958, DOC#287281. Such records and papers are to include; Schooling and educational documents and records, certificates of educational achievement, military records, psychological evaluations and assessments, psychological records, medical records to include medication information, prison records to include work history, housing history, and disciplinary issues, books, books with specific selections highlighted, underlined or bookmarked and writings in the margins of such books.

CP 2423.

The warrant authorized the search of two “specific areas” at WSR: the inmate property and storage room, and the “WSR Administrative Building.” The Affidavit for the warrant was “attached to the court’s copy, and incorporated by reference.” CP 2423. Although the warrant also incorporated the prior search warrant for the stored property by reference, it was not attached to warrant 11-32.

The section for Hospital and Medical Records is not located in the Administration Building. CP 2437. At the CrR 3.6 hearing, Karen Mandella, nursing supervisor at WSR, testified that medical records are kept in the Medical Records Room on the third floor outpatient clinic and that the inmate property room is on the first floor. RP 217, 220. A warrant was served on Ms. Mandella and she turned over the medical records, which had previously been copied from the Medical Records room. RP 218.

Ellen Winter, records management supervisor, explained that the central file is a six-section file: legal, movement, classification and infraction, miscellaneous, evaluations and reports, and admissions. RP 224. Reports in section five are separated by a red divider sheet and only available to someone such as a counselor and not the general public. RP 225. Deputy Wells confirmed that he first retrieved Mr. Scherf’s property

from the Property Storage Unit, then the medical records from the third floor, and finally the central file from administration. RP 240.

At the end of the hearing, the court took the matter under advisement and later denied the motion. RP 262; CP 2286-2293.

In the Memorandum decision, the court concluded that (a) a search of a prisoner's stored property is equivalent to a cell search; (b) all items stored in a prisoner's cell may be searched without a warrant; (c) a claimed search for mitigation evidence is equivalent to a search for evidence of a crime; (d) a seizure of all of a prisoner's medical records and central file meets the particularity requirement of the Fourth Amendment; (e) the Fourth Amendment requirement that the place to be searched be described with particularity can be met by having another governmental agent obtain the items and bring them to the authorized place to be searched; (f) the warrant's authorization of the place to be searched can be supplemented by the affidavit supporting the warrant. CP 2286-93.

5. MOTION TO SUPPRESS STATEMENTS

Counsel for Mr. Scherf moved to suppress his videotaped statements to the police on the grounds that they were not voluntary under the totality of the circumstances and therefore constituted a denial of due process under the state and federal constitutions – his conditions of confinement were so harsh and detrimental to his mental health that he

expressly bargained for concessions to alleviate these conditions with his confession. CP 1730-45; RP 1314-18, 1321-27, 1335-39, 1341. Counsel moved to suppress on added grounds, which factored both into the determination that the statements were involuntary, and as independent bases for suppression: that Mr. Scherf was denied access to counsel, held unlawfully in the Snohomish County Jail in violation of RCW 9A.20.020(1)(a), RCW 72.68.040 and .050, and denied due process by the prosecutor's failure to bring him promptly before the court as required by CrR 3.2(1)(d)(1) and CrRLJ 3.2.1(d)(1). CP 1730-31, 1739-41, 1653-89, 1584-88; RP 1318-20; 1325-35, 1369-89; RP 1369-99.

At the CrR 3.5 hearing, the evidence established that on January 29, 2011, three correctional officers found Byron Scherf sitting on a chair in the foyer outside the sanctuary in the prison chapel building at 9:14 p.m., minutes after he had been reported missing at evening count. RP 389-391, 394, 427, 476, 495. He told the officers that he had fallen asleep. RP 393, 439. These officers, joined by other officers, escorted Mr. Scherf to the WSR shift office in handcuffs.⁹ RP 394, 446, 450, 525. Mr. Scherf told the shift lieutenants that he was trying to escape. RP 480, 499-500.

⁹ One of the officers, who stayed behind to check the chapel, was terminated from his job at WSR because he did not search well, which delayed the discovery of Officer Biendl, and later falsified his report. RP 399.

Mr. Scherf said at that time – 9:30 p.m. – he did not want to make any further statements without an attorney present. RP 499-500, 525.

At the time he first requested an attorney, Mr. Scherf had been asked by a number of officers about blood on his coat and an injury to his middle finger. RP 423, 449, 480. He initially explained that he had fallen while running in the yard; when questioned next in the shift office, he said that he had been assaulted earlier in the day, and later that he had been injured playing handball. RP 449, 453, 501, 505, 526, 551-552. The shift lieutenant decided to secure Mr. Scherf's clothing as evidence and photograph his injuries. RP 503.

At approximately 10:00 p.m., a second "picture" count of prisoners was completed and only Mr. Scherf was found missing. RP 506. Other corrections officers then discovered that Officer Jayme Biendl's equipment had not been turned in after her shift, which ended at 9:00 p.m.; she did not answer the telephone at her home. RP 506-507. At 10:25 p.m., her body was found in the sanctuary of the chapel. RP 507-508.

Before Officer Biendl was discovered, Mr. Scherf had been taken from the shift office, strip-searched and placed in a holding cell in the Intensive Management Unit (IMU), and then transferred to a regular cell in IMU. After Officer Biendl's death was discovered, he was transferred back to the holding cell and placed on close watch. RP 530-531. At one

point he indicated that he felt like hurting himself. RP 531. Mr. Scherf was next taken to an observation cell at the Special Offender Center (SOC), and at 11:30 p.m. escorted back to WSR where he was secluded in a mental health cell in in-patient care on the Fourth Floor of the main building. RP 508-509. He was placed on suicide watch there. RP 568. Watch officers reported that Mr. Scherf asked for a tetanus shot, his medications, a Bible, food, and access to a telephone. RP 573, 584. Mr. Scherf had no food, water,¹⁰ medications, or blankets; he was in a cell with a solid door and slot for a food tray, and a window, three feet by six to nine inches; he had only a “suicide smock” to wear. These conditions lasted from the time he was taken there in the early morning January 29, 2011 until 1:30 in the afternoon of January 30, 2011.¹¹ RP 606-609.

Detective Spencer Robinson from the Monroe Police Department came to WSR and spoke to Mr. Scherf in his cell at 3:40 a.m. RP 618. Mr. Scherf clearly and unequivocally asked to speak to an attorney in response to being read his Miranda rights by Robinson. RP 619, 611-613.

¹⁰ There was not even water to flush after urinating. RP 606.

¹¹ A psychologist at WSR testified that she would not ask for a dry cell for a suicide watch, nor deny food; and that hygiene items ordinarily would be restricted but not denied. RP 955. She testified that she was going to see that he be given a mattress and maybe blankets before learning that he would be transferred to the Snohomish County Jail. RP 959.

Det. Robinson took pictures of Mr. Scherf, left and then returned to the cell. RP 614. Mr. Scherf indicated that if he could talk to an attorney quickly he would then talk to Robinson. RP 615. After this second request, Robinson arranged to have a public defender come and speak briefly to Mr. Scherf through the cuff port of the solid cell door. RP 615-616. Counsel told Det. Robinson that Mr. Scherf was afraid he was going to “get his ass kicked” and that he would be willing to talk when the prosecutor made his charging decision. RP 616.

At 9:32 a.m., Mr. Scherf told one of the watch officers that he was sorry for what he had done and that he “shouldn’t have done this.” RP 574, 582-583, 597.

The state moved Mr. Scherf from WSR to the Snohomish County Jail on February 1, 2011, where he was kept in continuing conditions of deprivation. He was transported by police officers, not by DOC employees. RP 861-969.

Starting on February 1, 2011, Detectives Walvatne and Bilyeu of the Snohomish County Sheriff’s Department visited Mr. Scherf, along with a photographer from the Washington State Patrol, for the purported purpose of photographing his injuries over a period of days.¹² RP 625,

¹² The state did not use pictures showing the progress of injuries over time at trial in prosecuting Mr. Scherf.

629; 767. For the first two sessions, on February 1 and 2, Mr. Scherf was in a “rubber” room in the booking area of the jail; he had to be taken to a larger room to be photographed.¹³ RP 625, 768, 771. Mr. Scherf indicated during those initial sessions that he would only speak to the detectives about things necessary for the photographs; during the sessions he further indicated that he was not suicidal and wanted to know if the detectives could do anything about getting him a larger cell. RP 631, 772-773. When the detectives returned on February 3, 2011, he had been moved; at the close of the session, Mr. Scherf asked for the detectives’ business cards. RP 632-633. Once moved, Mr. Scherf continued to be transported wearing waist chains, leg irons and handcuffs. RP 1057. He was eligible to be out of his cell for an hour a day, but that might be broken into two half-hour sessions, which might fall in the middle of the night. RP 1059. In Mr. Scherf’s case, jail staff had to contact the detectives before he was allowed to have anything in his cell – including a Bible. RP 1060, 1080, 1119.

Later in the day on February 3, 2011, the detectives learned that Mr. Scherf asked to speak to either them or his then-attorney. RP 634. Mr.

¹³ Rubber room meant no toilet or sink, only a grate with a hole that went into the sewer system. RP 1185. When Mr. Scherf was taken from the rubber cell, he told the officers that he really wanted a shower. RP 1187.

Scherf confirmed in person that he wished to speak to the investigator or his attorney, but the detectives did nothing to arrange for this. RP 635, 777. When the detectives returned for yet another photographing session on February 5, 2011, Mr. Scherf said he was angry and might talk to them if things did not change; he was cold and wanted bed sheets, access to a phone, and his glasses. RP 636-637. The detectives agreed to pass along his requests and spoke to two members of the jail administration. They waited until they heard that Mr. Scherf had been given his glasses, an extra security blanket and pencil and paper before leaving the jail. RP 637-639.

On February 7, 2011, the detectives responded to a request from Mr. Scherf, and videotaped his statement agreeing to give a confession in exchange for a list of demands to improve his living conditions. This list included: hot water in his cell, the ability to turn off the overhead light, bed linens and hygiene items. The detectives spoke with Captain Parker, a high ranking jail administrator, about Mr. Scherf's conditions before they left. RP 640-649; 781-785. A short time later, Mr. Scherf "completed" his agreement by giving a taped statement. RP 649-652; 788-790. Mr. Scherf subsequently gave two further taped interviews. RP 659-674; CrR 3.5 Exhs. 13, 17. After giving those statements, he wrote a kite to the prosecutor saying he should be charged with aggravated murder and given

the death penalty, and that he would plead guilty at arraignment. He gave the detectives a taped statement indicating his wish to have them deliver the kite to the prosecutor. RP 687-689; 806; CrR 3.5 hearing exhibit 21. The detectives present during the taped interviews indicated their belief that Mr. Scherf was focused and not in a stupor. RP 730, 808-809.

Mr. Scherf was unable to successfully complete any phone calls from jail until February 14. RP 692-693. The phone outside Mr. Scherf's cell was not working. RP 1117-18. Only once did the police notify Mr. Scherf's attorney that they were serving a warrant on him to be able to photograph his injuries. RP 701.

Public defender Jason Schwarz testified that he went to WSR and spoke with Mr. Scherf through a slot in a thick door on January 30, 2011, and that Detective Robinson refused to give him a pen to write down Mr. Scherf's wife's telephone number unless he provided the number to the police. RP 854-855. After speaking with Mr. Scherf, Mr. Schwarz asked that a nurse be sent to see him and told the officers that Mr. Scherf wanted to have an attorney present any time he was moved within the prison or elsewhere. RP 855. He indicated a willingness to return if requested, but did not receive any further phone calls. RP 856.

Attorney Neil Friedman, who represented Mr. Scherf prior to death penalty qualified counsel being appointed, testified that when he met with

Mr. Scherf on February 2, 2011, Mr. Scherf was shackled and had to be moved by five or six officers. RP 880-881, 906-907. He was told that it would take two or three days advance notice to set up a meeting with Mr. Scherf.¹⁴ RP 885. Mr. Friedman had been out of town from February 8 through February 10. RP 885. From January 30 through February 10, 2011, Mr. Friedman never received a call from the detectives or jail staff, but would have gone immediately to see Mr. Scherf if requested to do so. RP 891. Members of the jail staff testified that ordinarily inmates who have no access to a phone, ask their module deputy to speak with an attorney and this goes up the chain of command. RP 1104. When the public defender's office was closed, there was no way to leave a voice message. RP 1181.

Dr. Stuart Grassian, a psychiatrist who graduated cum laude from Harvard University, specialized in the effects of solitary confinement on prisoners and testified many times in court on that issue, explained that harsh conditions and the isolation of solitary confinement make people ill. RP 982. Dr. Grassian spoke with Mr. Scherf in a three-hour contact visit in jail, and spoke with Mr. Scherf's wife. RP 986-988. Mr. Scherf described the conditions in which he was kept from January 30, 201,

¹⁴ Captain Parker denied that it would take this long to set up an appointment. RP 1140.

through February 9, 2011. RP 996. He was walked to the suicide cell in the late evening of January 29, 2011, in the rain and cold in a smock and had nothing to dry himself with once in the cell. RP 996. He wasn't fed for a significant period of time and was without any amenities; after a few days he was taken to another "rubber" hospital cell where there was no toilet, only a hole in the floor, and water was available only sporadically. RP 996-997. He received an inadequate amount of food, was very cold and unable to brush his teeth or shower. RP 997. He wanted his glasses, a Bible, and to be able to call his mother and wife. RP 997. Lights were blazing 24 hours a day and the guards woke him every 15 minutes. RP 998. He had nothing to distract himself with except increasingly morbid thoughts. RP 998. He began hyperventilating, sweating, torturing himself about what he had done. RP 999. He felt at times that he could not continue another minute, and ultimately tried to negotiate better conditions. RP 999. He was suicidal and the confession was a way to get governmental suicide. RP 1000. If he appeared calm, cooperative and respectful on the video, it was because he was feeling that he might at last have some control over his living situation—he would finally have some dignity and control. RP 1000. In Dr. Grassian's experience, once a person decides to let go and die, they may become very calm. RP 1001. In his professional opinion, Mr. Scherf's confession was not voluntary; the

conditions were so severe that he could not continue. RP 1002. The confession was a result of tortured anxiety and morbid, negative thoughts. RP 1004-1005. He needed some time in conditions that were bearable to be able to consider and weigh alternatives.¹⁵ RP 1006.

The defense also moved to suppress Mr. Scherf's custodial statements on the grounds that there was no contract authorizing DOC to transfer Mr. Scherf to the Snohomish County Jail and no notice of the transfer, two requirements of RCW 72.68.040. The state relied only on a statement by Scott Frakes, Warden at WSR at the time of the incident, reported in the newspaper, that the DOC administration had made

¹⁵ Dr. Grassian also reviewed all of Mr. Scherf's prison and medical records and the videotapes of his confessions. RP 988. He determined that Mr. Scherf was strikingly different from the typical callous sexual offender. RP 988-989. Mr. Scherf was distraught after committing his crimes, attempted suicide, turned himself in in one instance, and was completely overwrought with guilt and depression. RP 989. He had a long-term kind and loving relationship with his wife. RP 989-900. Dr. Grassian concluded that Mr. Scherf had either a bipolar mood disorder or some organic damage or dysfunction of the temporal lobe. RP 991-992. Dr. Grassian compared Mr. Scherf to Raskolnikov in Crime and Punishment. RP 993. Dr. Grassian concluded that Mr. Scherf had been diagnosed as bipolar based on the medications he was placed on and the evaluation of a former treating psychiatrist, Dr. Berner. RP 994-99, 1010-1012, 115-118. In rebuttal, psychologist Cynthia Goins testified that she had reviewed prior evaluations and no one else had diagnosed Mr. Scherf as bipolar or with a temporal lobe dysfunction, RP 1268-70, 1273. The prosecutor later agreed, however, that Dr. Berner's evaluation was not included in the evaluations Ms. Goins reviewed. RP 1282.

arrangement to house Byron Scherf in the jail.¹⁶ RP 1381. Based on this reference, the trial court found orally that if Mr. Frakes felt there was an agreement, there was an agreement under RCW 72.68.050, although perhaps never reduced to writing. RP 1390-1391.

The trial court denied the motions to suppress on all grounds and entered written findings of fact and conclusions of law. CP 1209-255; RP 1357-68; 1419-30; 1560.

6. REDACTIONS OF VIDEOTAPED STATEMENTS

Over defense objections, the court declined to redact portions of Mr. Scherf's videotaped statements:

--His statement that the A&D ointment and shoelaces found in a potted plant were used for his running shoes and to prevent his nipples from bleeding, not for the crime, RP 1601-07, 1655. The prosecutor argued that these items were possible evidence of premeditation and relevant to the investigation. RP 1610. The court ruled that the evidence had some tendency to prove a fact at issue, even if it was not relevant to premeditation. RP 1610.

-- References to a cartoon about a sheep in wolf's clothing that had been circulating in the institution. The court noted that Mr. Scherf had

¹⁶ Interestingly, Judge Wynne, before he recused himself, stated at an early hearing that he did not know the basis for holding Mr. Scherf in Snohomish County before bail was set, but that setting bail did not provide such a basis. RP 19-20.

given a copy to Officer Biendl a few days earlier. RP 1613-14.

--The detectives' question of what Officer Biendl would hear if she could hear what he had to say about her death now, and his response, "I don't wanna go into that right now," and the detectives' question, "You weren't sorry she was dead?" and his response. RP 1615-18, 1620.

-- His statement that the Bible requires giving a life if you take a life. RP 1631, 1635.

-- His reference to Officer Biendl's family who lost their loved one and should have the matter dealt with quickly, and the "horror" for her family. RP 1646, 1658, 1666.

--Detective Walvatne's statement "I need your help with a speedy resolution." RP 1650.

--A reference by the detectives to clothing Mr. Scherf was wearing at the time of the murder. RP 1653.

-- Mr. Scherf's statements that he killed an innocent person, had blood on his hands, and if you take a life your life should be taken, RP 1669, and his statements about meeting with an attorney, not listening to advice of counsel, and not wanting counsel present while his statement was taped. RP 1632-33, 1652-53, 1695.

7. VOIR DIRE

a. Scope of voir dire and the death qualification.

Prior to voir dire, the defense set out its understanding of the scope and purpose of the death qualification process under Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), and Morgan v. Illinois, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992): to determine whether a juror's views would prevent or substantially impair the performance of his or her duties in accordance with the court's instruction and the juror's oath, and to determine whether that juror would consider mitigation. RP 3011. Defense counsel stated, under this authority, general "follow the law" questions are insufficient to allow defense counsel to determine whether a prospective juror has a propensity to impose a death sentence in the particular case; it was important to learn the jurors' opinions about the death penalty. RP 3009, 3013. The trial court ruled, however, "I will sustain an objection that invites the jurors to simply, without any framework, say what they think the law is." RP 3012, 3014. "So you will be permitted to ask what their opinions are around that question [the death penalty] provided it is clear that what you are asking about is with regard to the law." RP 3013-14.

The trial court sustained the state's objection when defense counsel began asking prospective Juror 3 "[a]t the penalty phase you're asked to make an individual moral judgment about whether there are sufficient

mitigating circumstances to merit leniency.” RP 3071, 3073. The trial court later reaffirmed that the defense could not ask questions which assumed that jurors were making an individualized “moral judgment” in deciding whether to impose a death sentence because, the judge ruled, that term was not defined in any instruction. RP 3163-68, 3073. The court allowed the defense to ask only “how moral judgments might fit into their thought processes.” RP 3075-77.

You’re asking me to inject into my instructions, via your question, the matter of morality. There is no instruction provided for me by you, or anybody that defines that for me so I can tell them what is meant by morality. . . .I am reluctant to employ any words that are not defined.

RP 3067. The court concluded that the defense could inquire about the juror’s thought processes, but could not ask a question which assumed that they would be doing what is “not the same as the instructions.” RP 3169.

During the individual voir dire, the court indicated that even if a juror decides certain things are not mitigating, that doesn’t disqualify the juror. RP 3714. The juror being questioned had said he would not consider a bad childhood as mitigation; he wanted mitigation to show that the defendant couldn’t control himself. RP 3710-12.

The court indicated later, as voir dire continued, that prospective jurors could be asked whether they will give meaningful consideration to mitigation, but that it was “hard to see” how it would be helpful to know

what they considered mitigation. RP 4289. The court ruled as well that hypotheticals asking the prospective juror to assume the jury had found the defendant guilty of premeditated murder with no reason for the crime and no mental illness or excuse, RP 3271-72, “untethered to instructions” could not provide a basis for a challenge for cause. RP 3274-75. The court made clear his opinion that at the death qualification stage, the parties should be asking about:

Anything at all that goes to whether or not the juror is likely to follow his or her oath and instructions, or if there is any sort of impediment to following that juror’s oath or instruction, and any tendency that a juror may have to do or not do anything that is tied to that juror’s job as a juror.

RCW 3732-34.

b. Informing the jurors that Mr. Scherf was serving life without parole at the time of the crime.

On the question of whether the jurors should hear that Mr. Scherf was serving a sentence of life without the possibility of parole at the time of the crime, defense counsel indicated that the defense could question prospective jurors about this hypothetically and that it was unnecessary to decide before voir dire if they should be informed of the sentence at trial. RP 3004-07. At the close of individual voir dire, however, the court ruled that the sentence was relevant and would be admissible at sentencing. RP 5859.

c. Voir dire process.

The jurors were numbered from 1 to 275, and questioned by their numbers rather than by name. RP 2046. They were death qualified in numerical order; and, at the end of voir dire, the first twelve of those who were not excused were seated in the jury box and replaced by the next sequentially-numbered prospective juror after a peremptory challenge. RP 5951-60.¹⁷ The defense used all of its peremptory challenges, using six of those peremptories on jurors who remained after defense challenges for cause were denied.¹⁸ RP 5951-60. The court granted two prosecution challenges for cause over defense objection. RP 3645, 4577.

d. Denial of defense challenges for cause.

The court denied the defense challenge of Juror 10, RP 3155, and the defense used a peremptory challenge to excuse this juror. RP 5953. When asked by the prosecutor, Juror 10 agreed he “could make a decision without emotion and without debating the merits of the death penalty.” RP 3138. When questioned by the defense, however, Juror 10 said that if the defendant were already serving a sentence of life without the possibility of parole, the only way to hold him accountable would be a

¹⁷ Thus, counsel knew who would next be in the jury box as a result of each peremptory challenge.

¹⁸ Each side exercised a peremptory challenge available only for excusing alternates. RP 5960-5962

death sentence, and that death would be the only appropriate sentence in that circumstance. RP 3142. He stated that he would consider all of the facts including whether the defendant had a tough childhood, but that this would not be an overriding fact. RP 3142. Juror 10 stated that if the defense did not present any mitigation, he would believe that there was no mitigation or would not be able to find that there was any. RP 3146. The prosecutor argued that the juror was qualified because he said he would consider everything presented. RP 3154. When Juror 10 described the kinds of things that would help him determine whether life without parole was an adequate punishment, he referred to the defendant's background, but otherwise listed "the mental state of the person, the situation that they were in, whether it was an act of aggression, whether it was an opportunity, or what other circumstances led up to the event," issues going to guilt. RP 3144. When Juror 10 was told there was no excuse or provocation for the crime, he concluded that life without parole would be too lenient. RP 3144. During general voir dire, Juror 10 said that he knew a few prison guards but would not view their testimony differently than the testimony of other witnesses. RP 5892. On his questionnaire, Juror 10 listed "Monroe guards" as friends; and indicated that he supported the death penalty to hold a person accountable for his actions.

The court denied the defense challenge for cause to Juror 11. RP 3201. The defense used a peremptory challenge to remove this juror. RP 5952. Juror 11 was adamant that he wanted no part of being on the jury and that it was “not my thing.” RP 3170-3171. Juror 11, while stating that he could see both sides of the death penalty, was clear about not wanting to see the violent aspects of the case, about having difficulty walking in to the case with an open mind and already having “a certain level of animosity” towards the accused. RP 3173, 3180. Juror 11 expressed an opinion that if the defendant were already serving life without parole, there would be no point in a second life without sentence and the death penalty might be the only appropriate sentence. RP 3189. When read the instruction about keeping an open mind, Juror 11 indicated that given that instruction, he could consider life without parole as an option. RP 3197-3198. Juror 11 also indicated that he would consider mitigation. RP 3194. He answered “I don’t know,” however, when asked if his level of disgust with the gruesome parts of trial would rise to the level of his not being able to be a fair juror and that this was a “possibility” if not necessarily a “probability.” RP 3183, 3185. He stated that it was fair to say that he would not be able to give meaningful consideration to life without parole if the defendant were already sentenced to life without and there was no excuse for the murder itself.

RP 3187-89. During general voir dire, Juror 11 expressed his opinion that prison life should be harsher with fewer amenities; and again expressed a desire not to see the autopsy photographs. RP 5909-10. He expressed the opinion that if the defense did not respond to the state's case either the state put on a lousy case or "I don't know." RP 5944. In his juror questionnaire, Juror 11 indicated that he was concerned about people who do not respect authority and law enforcement.

The court denied a defense challenge for cause for juror 16. RP 3274-75, 3283. The defense used a peremptory challenge to excuse her. RP 5955. Juror 16 said she would follow the court's instructions and would consider background and other factors in answering the statutory question in the penalty phase, but if the murder were unprovoked, she would impose the death penalty if the defendant was already serving life without parole. RP 3269, 3271-72. The circumstances that would be important to her were "what led up to the killing, for example." RP 4271. The court ruled, however, that hypotheticals (e.g., the jury had found the defendant guilty of premeditated murder with no reason for the crime and no mental illness or excuse . . . 3271-3272) "untethered to instructions" could not provide a basis for a challenge for cause. RP 3274-75.

The court denied a defense challenge for cause for Juror 32, RP 3546; and the defense had to excuse this juror with a peremptory

challenge. RP 5952. Juror 32 indicated that if the crime were premeditated, it would warrant the death penalty, RP 3533, and that if the facts did not show mitigation, there was no mitigation. RP 3534. Juror 32 said he would not consider a bad childhood as mitigation because it would not negate the wrong done. RP 3535-36. This juror indicated that he would not show mercy and if there were no extenuating circumstances, the answer would be cut and dried. RP 3537-38. Because Juror 32 hadn't said he could not follow the law, the defense challenge for cause was denied. RP 3546. Juror 32 wrote in his questionnaire that the death penalty was warranted for premeditated murder.

The court denied the defense challenge for cause for Juror 53, RP 3928, and the defense used a peremptory challenge to remove this juror. RP 5954. When asked if he believed in the death penalty, Juror 53 responded "Some heinous crimes deserve the death penalty; they don't deserve to be on earth anymore. And that's what I believe." RP 3901. Juror 53 indicated that his sister-in-law worked at the prison and that if the crime were premeditated and the defendant not drunk or such, the death penalty would be the only appropriate sentence. RP 3904-05. Juror 53 repeatedly answered that if the murder was premeditated, there were aggravating circumstances and no excuse or diminished capacity, the death penalty would be the only appropriate sentence. RP 3910-13, 3916.

Juror 53 responded that the death sentence would be appropriate even if the defendant had been a model prisoner or had exhibited good behavior up to the crime. RP 3910, 3915. Juror 53 did say he could follow the court's instructions and would listen to all of the mitigation before deciding. RP 3916, 3924-25. Juror 53, however, then reiterated that if the crime were premeditated, the death penalty is probably the most appropriate sentence. RP 3925. In denying the challenge for cause, the court stated:

And then, in the end, he really didn't say that he would vote for the death penalty without regard to what instructions I gave. He answered, perhaps perfectly honestly – I don't know, I assume so – that he would think the death penalty is probably the most appropriate penalty. And if he acted on that feeling, then I think he should be excused; but he didn't say he would act on that feeling, and he didn't say he had any problems with the Court's instructions, and I don't know that he doesn't understand the instructions.

RP 3928.

The court denied a defense challenge for cause to Juror 80 and the defense used a peremptory challenge to excuse this juror. RP 4512; 5958. Juror 80 had read about the case and that Mr. Scherf was already serving a sentence of life without parole and had given a videotaped confession. RP 4484-86. Juror 80 indicated that if there were no mitigation to explain the defendant's actions or provide a source of doubt, there was no way to rehabilitate someone; they were a threat to the community and corrections

officers. RP 4484. Juror 80 did not believe that either confessing or showing remorse constituted mitigation. RP 4488-89. Juror 80 reiterated that unless mitigation changed her view, she would be for the death penalty. RP 4493. Juror 80 indicated that she would be harsher in judging mitigation than most. RP 4494-95. She estimated that she would lean more towards the death penalty, more of a 6 or 7 on a scale of 10 at the start of sentencing, but on further questioning agreed that she could presume leniency. RP 4495-96, 4502. Defense counsel argued that it was insufficient rehabilitation to ask if she would follow the law. RP 4508. The court ruled that “the fact that her personal beliefs differ from the law makes no difference, provided she can set aside her personal beliefs; and she has indicated she could.” RP 4511. Defense counsel objected that a prospective juror only had to be substantially impaired and did not have to categorically say he could not follow the law. RP 4512

e. Granting state’s challenges of qualified jurors.

The court granted the state’s challenge of Juror 37, over defense objection. RP 3645. Juror 37 indicated “I am not a person that would be able to say I’m against the death penalty. I’m really sort of in the middle.” RP 3610. She indicated some concern about innocent people who have been put to death and this made her a “little beyond straight-up neutral.”

RP 3611. She stated that she was neither for nor against the death penalty, and could do what she needed to do:

You know, you don't like to be in charge of life and death decisions. I think that's how I feel. But I know that I could do what I need to do. And I would – you know, again, I can't say I'm against it or for it, but of course I think I would be most comfortable if somebody had life in prison.

RP 3615 (emphasis added). When questioned by the prosecutor about whether she would prejudge the case based on her being more comfortable with life, Juror 37 said unequivocally, "I would feel that I would make the decision based on the evidence." RP 3616. When told that one person could vote for a life sentence, Juror 37 hesitated and then agreed that maybe this was not the right case for her. RP 3617. But when asked if she could follow the law and answer the statutory question, she answered "Yes, I think I could answer that." RP 3618. She indicated that she would be trying to follow the law rather than going out of bounds on her own views. RP 3620. Although Juror 37 reiterated that she was more comfortable with a life sentence, RP 3626-3627, she concluded that she could consider whether the prosecutor had actually proven that there were not sufficient mitigating circumstances. RP 3628. The court found Juror 37 to be "more thoughtful than most" and found that she "did not say that she could not do it, although she was clear that she – I think she was reasonably clear she didn't really want to do it." RP 3630. At that point

the court concluded that there was no basis for excusing. RP 3632. After further questioning by the prosecutor in which Juror 37 expressed discomfort, she expressly declined to say she couldn't vote for the death penalty: "I know you want me to say no, I couldn't do it. . . . Maybe I could do it, but I kind of feel that I wouldn't want to be in the circumstances to have to do it." RP 3636. She affirmed that she could follow the law and fairly consider the evidence and answer the question, and that it was not following the law that was the issue; it was that she would have a hard time dealing with the consequences. RP 3639-40. On further questioning by the court, Juror 37 finally indicated that she could not answer the statutory question. RP 3642.

The court excused Juror 75 over defense objection. RP 4577. Juror 75 said that he opposes the death penalty and initially said he could not impose the death penalty regardless of instructions. RP 4572-73. Juror 75, however, then concluded he would have to consider and follow the law even if this would be hard and he would have a really hard time doing so. RP 4574-75.

f. The jury.

Out of all of the jurors who sat and deliberated in the case, only Jurors 5 and 69 expressed opinions that were close to neutral with regard to the death penalty. And even Juror 5 was clear that he could impose the

death penalty, RP 3101-3192, and that if all he knew was that the defendant committed a first degree premeditated murder and was already serving life without parole, it would seem appropriate that he receive the death penalty. RP 3103. Still he concluded that even though serving life without, he was “still a member of society” with rights and this prior sentence would not necessarily predetermine a need for increased punishment. RP 3105. Juror 5 agreed that the law never required that the death penalty be imposed and that each juror had to weigh the evidence and make a determination. RP 3107. Juror 69 indicated that he was more against than for the death penalty. RP 4184-85.

All of the others on the jury gave answers which could provide a basis for a peremptory challenge. Juror 40’s husband, for example, was a police officer who had been part of the crisis team that went to WSR to support the corrections officers there. RP 3750. Juror 40 described herself as a Christian who would have to think what “an eye for an eye” meant to her personally. RP 3751. She said further on the topic, “Philosophically, I believe that a wrong act needs to be punished.” RP 3751. She indicated that mental illness was about the only thing that she could think of that would justify a sentence of less than death, although Juror 40 agreed that the state had the burden of proof at sentencing. RP 3756-57.

Although Juror 14 said she would have to consider all of the evidence before reaching a penalty-phase decision, she also stated “Honestly, I mean, if there’s someone out there who has not learned from their experiences and commits the same crime over and over, I mean, I feel like there’s no other choice” than the death penalty. RP 3238, 3234. .

Although Juror 17 agreed that he would follow the law, he said that he did not think it was fair that one person voting for life would result in a life sentence rather than the death penalty. RP 3303.

Juror 21 said that if the crime were premeditated and there were no excuses, then he “would assume that the death penalty would be appropriate“ and that under those circumstances a second life sentence would not be appropriate. RP 3354-55. He agreed, however, that he could give meaningful consideration to life without parole. RP 3355.

Juror 42 indicated that she would consider any mitigation that was presented, but the only mitigation she could think of was mental illness. RP 3778. She also indicated that she would not try to change anyone else’s view on the sentencing decision. RP 3779. She said she did not know how she felt about a person getting a life sentence when they were already serving a life sentence. RP 3775.

Juror 44 wrote in his questionnaire that the death penalty should be used not only to influence the individual, but society as a whole; and that

sometimes an evil cannot be stopped any other way and so the death penalty should be used as a last resort. RP 3792. He also gave his view that if someone plans and commits a murder, he should get the death penalty because if they could do this once, they could do it again. RP 3793. After being read the penalty-phase instructions, Juror 44 indicated he would be need to consider mitigation before deciding whether to vote for a death sentence. RP 3795. However, Juror 44 further stated that the important factors would be what events brought the victim and accused together and if they had a relationship. RP 3795.

Juror 60 consistently indicated a willingness to consider evidence of mitigation and follow the law. RP 3503-05. He also indicated he:

believe[s] in a God of mercy . . . and that anybody sentenced to that death penalty would then be in the presence of God almighty and would then be truly judged; and being merciful, they would see love beyond anything they've seen and totally eliminating anything that was in them that caused them to do that, and be in grace. So I have no problem in my mind, you know, presenting a person in this finite situation to an infinite God that can love them and forgive them.

RP 3501. Juror 60 concluded that “by taking them from this life and putting them into the next life, that they see mercy.” RP 3501.

Juror 68, while seeing the death penalty as a complex issue which was not “black and white,” RP 4018, felt it was appropriate where society might not be safe if the defendant were not “reformable.” RP 4025. In

that vein, Juror 68 felt that a second sentence of life without parole would not be adequate because it might happen again. RP 4030.

Juror 57 stated that he did not know why a state would choose not to have a death penalty since it is “a very good deterrent, or it should be.” RP 5505. He elaborated that the death penalty should be there so “if they’re not afraid to spend the rest of their life in prison . . . the death penalty is there; I mean, that’s – you lose your life.” RP 5513. Juror 57 continued that if life in prison were the only punishment, “they can do whatever they want, because they don’t fear anything.” RP 5519.

g. Prosecutor’s ingratiating himself with the jurors.

After a number of jurors had been questioned (1 through 17), defense counsel noted for the record that prosecutor Paul Stern smiled at and thanked each juror, something she had no opportunity to do because of the seating arrangement in the courtroom. RP 3307. The court asked that such things be kept to a minimum. RP 3307. After 95 jurors had been questioned, defense counsel again asked that the prosecutor be reminded not to smile, make eye contact and say goodbye to each prospective juror. RP 4455. Thus, eleven of the twelve sitting jurors, all but Juror 97, received this treatment from the prosecutor.¹⁹ RP 5951-

¹⁹ Although the prosecutor stated that he believed he only “said anything” to people who had been excused, RP 3307, defense counsel objected after the voir dire of Juror 17, who was not challenged and who

5961. The court noted that it was unfair for counsel to ingratiate himself with jurors because of his location. RP 4455.

Defense counsel once again noted that Paul Stern said to a prospective juror when she said she could impose the death penalty, “Thank you and I hope you will.” RP 4996. Mr. Stern acknowledged that it “came out wrong,” and the court admonished him. RP 4997.

8. TRIAL FACTS

a. Prosecutor’s opening statement.

In describing DOC officers finding Officer Biendl, the prosecutor said “And up on the stage, under the cross, they find Jayme Biendl, on her back, blood coming out of her mouth, dead.” RP 6004 (emphasis added). Over defense counsel’s renewed objection, RP 5978, the prosecutor read Mr. Scherf’s statement asking the state to charge him with aggravated first degree murder with the death penalty and saying that he would plead guilty at arraignment. RP 6006. The prosecutor then concluded, “His words. Our evidence. Your job.” RP 6006.

b. Trial facts.

On January 29, 2011, Byron Scherf left his cell and living unit at WSR at 2:30 p.m. and returned at 4:45 p.m., after a visit with his wife. RP 6028, 6030. He explained to the floor officer in his unit that his wife did

sat on the jury, RP 3305, 5951-61, and Juror 83, who was not excused. RP 4455.

not like to drive after dark. RP 6030. He left his cell again at 6:30 p.m.; he was on “call out” to go to the chapel.²⁰ RP 6031.

According to visiting room officers, Mr. Scherf’s visit with his wife that afternoon was shorter than usual, RP 6241, and Mr. Scherf and his wife were not embracing and holding hands as they usually did. RP 6235-36, 6245, 6255-56. They described the behavior of Mr. Scherf and his wife as having been “off” that day and for perhaps the previous week. RP 6236. A video tape of the visiting room that afternoon, however, showed Mr. Scherf and his wife embracing. RP 6892. Mr. Scherf had also sent his wife loving e-mails in the weeks prior to January 29, 2011. RP 6892-93.

That evening his cell was empty at 8:45 p.m. at evening count. RP 6033, 6040. Officers at WSR searched the unit and began searching the grounds for him when he was not located in the unit. RP 6034. Three officers found him a short time later sitting on a chair in the foyer outside the sanctuary of the chapel. RP 6059, 6084, 6087-88, 6110-11, 6124. Mr. Scherf told the officers that he had fallen asleep and the chapel officer,

²⁰ One has to be on “call out” to be able to go to the chapel. RP 6216. The corrections officer who worked in the chapel before Officer Biendl testified that he had a roster every night of those authorized to attend and used this roster to check people off as they left for the evening. RP 6217-18. The last movement from the chapel back to the cell blocks was 8:30 p.m. RP 6218.

Jayne Biendl, must have missed him. RP 6088, 6113, 6127. The officers handcuffed and escorted him to the shift office; one of them stayed behind to turn off a light and check the chapel, but did not go into the sanctuary. RP 6059, 6089-90, 6097, 6127. The officers who escorted him noticed blood on the collar of Mr. Scherf's jacket. RP 6127. When asked about it, Mr. Scherf explained that he had fallen and hurt himself running in the yard. RP 6137. Another of the escorting officers later, after Officer Biendl's body was found, recalled hearing a noise about 8:34 p.m. which sounded like someone had "keyed" on a microphone for a second. RP 6130, 6132. The radio traffic recordings for the evening recorded this sound from the microphone and what was characterized at trial as a scream over the radio. RP 6559-64.

When questioned in the shift lieutenant's office, Mr. Scherf said that he was trying to escape. RP 6148, 6150. The shift lieutenant noticed the blood on Mr. Scherf's jacket and had it taken into evidence. RP 6151, 6154, 6168.

After being questioned by the shift lieutenants, Mr. Scherf was escorted to a holding cell in IMU. RP 6137. During the intake process there Mr. Scherf said he had been in a fight earlier and asked for a tetanus shot because he had been bitten. RP 6189-90. He told one of the officers that he was jumped by three inmates earlier in the day. RP 6138. A short

time later, Mr. Scherf called the officer over and told him that he was feeling suicidal. RP 6139. He made two requests for a Bible during this time. RP 6183. A short time later, Mr. Scherf was placed on direct watch, which required two officers to observe him at all times and keep a log of his actions. RP 6191.

Shortly after 10:00 p.m. other officers noticed that Officer Biendl's equipment had not been turned in at 9:00 p.m., the end of her shift. RP 6266. Her body was soon discovered in the sanctuary of the chapel building. RP 6269-73. She was fully clothed, but had none of her gear on; she had been strangled with a microphone cord wrapped around her neck. RP 6274, 6283, 6300. Efforts to revive her, both by corrections officers and emergency medical personnel proved futile. RP 6282-85; 6299-6300, 6349-51, 6357-6357. She never showed signs of life and appeared to have been dead for from 20 minutes to an hour at the time she was discovered. RP 6300, 6309, 6339-42. The cause of her death was strangulation. RP 6758. Although, according to the medical examiner it takes four to five minutes of pressure for the brain to die, a person being strangled can lapse rapidly into unconsciousness. RP 6765, 6772. Officer Biendl had defensive wounds on her arms and hands. RP 6750-51.

After Officer Biendl was discovered in the chapel, Mr. Scherf was moved from IMU to the fourth floor medical holding cell with two officers

watching him at all times. RP 6382-83; 6404. He was wearing only a suicide smock – a nylon robe secured at the sides by Velcro during and after the move. RP 6367. While in the fourth floor holding cell, under constant observation, Mr. Scherf told one of the men watching him that he was sorry “for what happened out there.” RP 6405-06, 6417. He was visited by detectives from the Monroe Police Department, mental health professionals and nurses while held there. RP 6397-6400. His injuries were documented and DNA samples taken. RP 6577-87. The DNA from some of the blood stains on Mr. Scherf’s sweatshirt was shown to match Officer Biendl’s DNA. RP 6790, 6791. DNA on her jacket matched Mr. Scherf’s DNA. RP 6792.

On February 1, 2011, he was moved to the Snohomish County Jail. RP 6386. En route, Mr. Scherf stated that he wanted to reflect on scripture and it would assist him in determining whether he should give a statement to the detectives. RP 6602. He asked for a Bible while being transported. RP 6603. He had asked for his glasses and his medications before the transport. RP 6604. Once in Snohomish County Jail, Detectives Walvatne and Bilyeu, and a photographer from the Washington State Patrol immediately began visiting Mr. Scherf to photograph his injuries.²¹

²¹ Mr. Scherf had an injury to the middle finger of his left hand, a bruise under the nail, a small tear at the base of the nail that had bled, a

RP 6608-09; 6708. Over the next two weeks, Mr. Scherf provided four videotaped statements to Detectives Walvatne and Bilyeu in exchange for relief from the intolerable conditions for his confinement at the Jail.²² RP 6649. The redacted versions of these taped statements were played for the jury.²³ RP 6608-21, 6647-64, 6671-87.

In his February 7, 2011 statement, Mr. Scherf explained that he would give a “full confession” in exchange for “things that I’ve listed on the sheet of paper were taken care of” first. Ex. 109, page 2-3. Those things included having a razor and hygiene items available in his cell; being free of daily searches and restricted visiting; having phone privileges; removing mail restrictions and allowing a newspaper, providing hot water in his cell, fixing the overhead light so it could be switched off, providing clean sheets and adequate blankets, and being

small scratch on the webbing between his thumb and forefinger, a faint reddish line across top of the left palm and wrist, as well as a scratch on the back of the hand; this was documented in the early morning hours of January 30, 2011, at WSR. RP 5703. Later in the morning, these injuries were photographed again. RP 6704. The detectives documented injuries on Mr. Scherf’s hands, torso, legs and arms. RP 6708, 6713-16. Ten photographs of the injuries (Exhibits 97-107) were introduced at trial. RP 6713-17. But no point was made of showing how these injuries changed over time. Id.

²² The conditions of his confinement are set out in detail in Sections C 1 and 5 above.

²³ The defense objected to the court’s instructing the jurors that the statements had been edited. RP 6648.

allowed to order food items from commissary. Ex. 112. During this interview, the detectives noted that they had already helped Mr. Scherf with blankets, glasses and a Bible, and required him to assure them that he would not be coming back with more demands. Ex. 109, at 10-11.

In the interview that followed he stated that he was responsible for the death of Jayme Biendl and that he strangled her. Exhibit 115, at 4. He indicated that she was a very kind person, but sometimes could be disrespectful. Exhibit 15, at 5-6. Mr. Scherf, who had an AA degree and was working towards a Bachelor's Degree in Computer Science, did volunteer work at the chapel with the computer database there. Id. at 6. Shortly before time to leave the chapel on January 29, 2011, Officer Biendl said some things which he described as "pretty foul" to him and he was irritated, but he declined to discuss what those things were.²⁴ Id. at 13-14. He became very angry, as if all of the insults over the years came back to him, and he got madder and madder. He stewed over them. Id. at 15. He decided to wait until everyone left and then beat Office Biendl up, but then as it got "real close" to 8:30 he decided he was going to kill her. Id. at 16.

²⁴ The statements were about Mr. Scherf's wife, but he declined to repeat what they were or to discuss them. Exhibit 115, at 47.

Mr. Scherf denied that he was thinking about how he would do it; “it just kept escalating.” Id. at 17-18. When Officer Biendl told him it was time to go, he told her he needed another second, ran out and shut the gate and then came up behind her. Id. at 19. He described “tussling around” for the microphone, fighting with her, her trying to yell for help over the radio, his ripping the radio away, and after three or four minutes, his grabbing an instrument cable and wrapping it around her neck. Id. at 19-26. At that point, Mr. Scherf said he blacked out and could not remember anything further until he found himself sitting down in a chair; he then walked back up to the front of the sanctuary and saw that Officer Biendl was dead. Id. at 26-27. He sat wondering what had happened, how it had happened and why it happened. Id. at 28. He noticed then that his finger was bleeding where he had been bitten. Id.

Mr. Scherf denied that he thought about how he would do it other than, at the very last moment, he thought he would choke her. Id. at 32. He denied that there was anything sexual about the incident. Id. at 36. He said he was sorry. Id. at 42. He expressed remorse, cried and acknowledged that Officer Biendl did not deserve to die. Id. at 55.

On February 10, 2011, Mr. Scherf again sent a kite to the detectives and again gave a videotaped statement to them. Exhibits 116, 118. In that statement, Mr. Scherf indicated that he had met with his

attorney Neal Friedman and had been advised not to give a statement. Exhibit 118, at 4. During that interview, Mr. Scherf answered questions put by the detectives about Officer Biendl's rejecting some inmates from a baptism, at p. 5-6; his not having put his coat over Officer Biendl, at 6-7; the location of the gate in front of the chapel on a map, at p. 7-8; his looking down the walkway outside the chapel and seeing that there were no officer there, at p. 8-9; and the medications he took, at p. 20-21. He was also asked to mark areas where he had been on the evening of January 29, and his positioning during the attack. Exhibit 118, at 10. He agreed that he had thought in advance that he would have to get the radio from Officer Biendl. Exhibit 118, at 31. He estimated, at the request of the detectives, that he was exerting about 75% of his strength at the time he blacked out. Id. at 34.

On February 12, 2011, Mr. Scherf had a further videotaped conversation with the detectives. Exhibit 121. They elicited from him that he was engaging in the conversation against the wishes of counsel. Exhibit 121, at 3-4. In this conversation, Mr. Scherf expressed his concern about information the media gathered from search warrant affidavits which indicated an intent to rape, which he denied. Id., at 5-9. Mr. Scherf talked about his making plans at the service that night to go running with

other prisoners early the next morning and to have a burrito feed with others on Sunday night. Id., at 9.

Finally, Mr. Scherf provided a statement on February 14, 2011. Exhibits 122-124. He expressed in the statement and kites to detectives his wish for them to take one of his kites to the prosecutor. This kite said that he would like the state to charge him with first degree aggravated murder with the death penalty and he would plead guilty at arraignment. Id. He indicated that he would not put the Biendl family through further suffering, that he was already serving life without parole and a second sentence would add no more time, and that he should be made an example of so others would not think they could get away with killing corrections officers. Exhibits 123.

One of Officer Biendl's fellow officers had called her and chatted with her at 8:27 p.m., right before the final movement of prisoners back to their cells for the night. RP 6211. A fellow inmate who had been at the chapel on January 29, 2011, left several minutes later, leaving Mr. Scherf as the last inmate in the chapel. RP 6505-06, 6806. The other inmate had seen Mr. Scherf's coat hanging on a chair on the last row and took it to him. RP 6508-09. As they were leaving, Mr. Scherf said he needed to go back for his hat. RP 6510. The inmate waited, but Mr. Scherf did not reappear and the inmate left without him; the officer at the gate yelled at

him to come through. RP 6507, 6510-11, 6517. The video cameras which were in all parts of the chapel but the sanctuary captured the actions and interactions of Officer Biendl and Mr. Scherf in the latter part of the evening before final movement at 8:30 p.m. RP 6528-31, 6540-51.

Inmate Robert Lindamood had worked in a paid clerical position at the chapel at WSR for ten years in January 2011. RP 6877. Mr. Scherf was a volunteer at the chapel; at Mr. Lindamood's request, Mr. Scherf regularly helped with the computer databases to make things run more smoothly. RP 6878-6879. Mr. Lindamood had asked Mr. Scherf for his help on the evening of January 29, 2011. RP 6880. He had asked Officer Biendl for approval of Mr. Scherf working in the office on the database when he was not present, and she agreed. RP6883. He left at 8:00 p.m. on January 29, 2011. RP 6885.

c. Objection to jury instruction.

The defense objected to not giving the defense proposed premeditation instruction:

Premeditation means thought over beforehand. Premeditation is the deliberate formation of and reflection upon the intent to take a human life. It is the mental process of thinking beforehand, deliberation, reflection, and weighing or reasoning for a period of time, however short. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditation. Premeditation must involve more than a

moment in point of time. The law requires some time, however, long or short, in which a design to kill is deliberately formed.

RP 6896; CP 339.

Instead the court gave the following instruction:

Premeditation means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditation. Premeditation must involve more than a moment in point of time. The law requires some time, however, long or short, in which a design to kill is deliberately formed.

CP 317.

d. The prosecutor's closing.

The prosecutor argued throughout closing that premeditation required nothing more than the deliberate formation of the intent to kill “All the law requires is ‘. . . some time, however long or short, in which a design to kill is deliberately formed.’” RP 6898.

The prosecution prefaced a reading of the court's definition of premeditation with the statement that defense counsel was wrong when he argued that premeditation means a step-by-step plan, “It doesn't. It requires . . . more than a moment in point of time.” RP 6935. He argued that you did not have to buy an insurance policy or dig a grave; “once you formed the intent, ‘the killing may follow immediately after formation of

the settled purpose.’ The purpose was settled. At that point it was a done deal.” RP 6937. “Maybe I’ll beat her up. No, not good enough. I’m going to kill her. The decision is when it was.” RP 6937.

He argued to the jurors that they did not have to agree on the moment when the crime became premeditated as long as they agreed that at the time Mr. Scherf “stormed through that sanctuary door, you know what he was going to do. . . . going to strangle her with his own hands.” RP 4940. “And if you have an abiding belief that when he walked through that sanctuary door he was going to kill her, you are satisfied beyond a reasonable doubt that he had premeditated his design to kill her.” RP 6941.

9. PENALTY PHASE FACTS

a. Pretrial rulings.

Over defense objection, the court granted a state’s motion in limine to exclude argument based on the Bible. RP 6971-6974. The defense noted that the state introduced Mr. Scherf’s kite to the prosecutor which quoted “an eye for an eye” from Leviticus, and that it was appropriate to point out that there are other contrary views in the Bible which Mr. Scherf could have quoted. RP 6972.

Over defense objection, the court ruled that absent a stipulation that sex offender treatment would have had absolutely no impact on

preventing the crime, if counsel for Mr. Scherf presented evidence that he asked for sex offender treatment in 2001, the state could introduce: (a) the opinion of the head of the DOC sex offender treatment program that treatment would not have prevented the crime, (b) testimony that Mr. Scherf was in sex offender treatment until two days before he committed a rape and that this treatment included relapse prevention and (c) Mr. Scherf's declaration from a civil suit in 1999 that nothing could have prevented his relapse even though he had thought his relapse plan would be effective. RP 6981-86. Defense counsel argued that the purpose of the evidence it proposed was to show Mr. Scherf's willingness to participate in programs available in prison and that DOC knew that they were dealing with an untreated sex offender with two prior rape convictions. RP 6988-89, 6995. The court ruled that this evidence would raise an inference that the DOC failed to prevent the crime which the state should be able to rebut. RP 6989-90. Similarly, the court ruled that evidence that the state did not treat people who were not going to be released would also open the door to opinion that Mr. Scherf was not treatable. RP 6990-96.

b. Penalty phase facts.

James Hamm, Jayme Biendl's father, poignantly described his heart break and how her death left a hole in his life which could never be

filled. RP 7016. He described how she was the oldest child who took care of her younger five siblings whenever they were in need. RP 7016-20.

Ellen Winters, records management supervisor at WSR, identified items from Mr. Scherf's central DOC file, including: (a) requests to take part in a university course of study through correspondence courses; (b) his record with only two serious infractions over his more than thirty years in prison; (c) his certificates of completion for a prison fellowship seminar, a substance abuse program, a self-help packet, Moral Recognition Therapy, forklift safety, and a twenty-hour anger/stress management course; (d) a certificate indicating his proficiency in the print shop; (e) an associate of arts degree from Walla Walla Community College where he was on the president's list; (f) a memo from the Superintendent of Washington State Penitentiary thanking him for signs he made for the City of Medical Lake; and (g) a letter from the Chaplain at Clallam Bay Corrections Center commending him for his performance as a chaplain worker. RP 7021-34. Other records demonstrated Mr. Scherf's academic success in school. RP 7108; Exhibit 197. On cross-examination, Ms. Winters agreed that Mr. Scherf had taken the anger management course before the date of his rape conviction, and the self-help program before his last two convictions. RP 7037-38. She also confirmed that Mr. Scherf had convictions in 1978, was released in 1980,

returned to prison in 1981, was released again in 1993, and returned to prison again in 1995. RP 7035-39.

Eric Morgensen, supervisor at the WSR print shop correctional industry described Mr. Scherf as a good, productive worker who had a skilled job and who helped train others in addition to attaining proficiency for himself. RP 7040-48.

Scott Frakes, Deputy Director of Prisons for Command A, described the different levels of custody in the Washington Department of Corrections, and explained that a person who has been sentenced to life without the possibility of parole serves at least four years of close custody in which they cannot leave their cell without being released by someone on the prison staff and who would be in classes only where there was a high ratio of officers to prisoners. RP 7051-60. At the highest level of security in IMU no physical contact among prisoners is permitted; prisoners in IMU are cuffed when in the presence of others, usually in restraints any time outside of a cell, hobbled by leg restraints outside a building, searched each time he is moved or leaves his cell, and allowed few items of property. RP 7066-72.

Mr. Frakes described Mr. Scherf as having a very good record over the more than thirty years he spent in prison. RP 7066.

Mr. Frakes explained that on the evening of January 29, 2011, the officer whose job it was to oversee the movement from the chapel that night had not made contact with the staff and program areas as he should have, had not paid attention to people's comings and goings and had made log entries based on what he thought should have happened rather than what really happened. RP 7075. This officer who had not been there when Mr. Scherf looked had since been terminated from his job. RP 7075. The officer who should have checked the sanctuary after finding Mr. Scherf sitting in the foyer outside it had also been terminated, and the other two officers had received discipline. RP 7077. Afterwards, a team of well-known and respected correctional professionals from the National Institute of Corrections investigated and made recommendations for improvement of security in the Washington prison system; DOC adopted most of them. RP 7078. Now officers carry pepper spray, carry microphones with an alarm system and a microphone which is easier to operate. RP 7078-79. There is a pilot program for a body alarm system and a proxy card is used for doors which records information. RP 7079-80. Procedures for closing single-person posts have been changed to require that a second person help; volunteers are no longer used. RP 7081-83. Procedures for taking breaks and coming together at muster had also changed; cameras are now set up better. RP 7090-91.

Mr. Frakes explained that some people spend their entire time in prison in IMU. RP 7085-86.

The jury was given a letter Mr. Scherf wrote to his father after his second rape conviction. RP 7123. In this letter Mr. Scherf wrote:

Dear Dad

I am so sorry. I am forever regretful that things turned out the way they did. For the first time in my life I was actually serious about making it. Only God knows how I tried. I was doing great in school. I was doing so well, in fact, the University had offered me an assistanceship. They were going to waive my tuition for graduate school, and, plus, pay me a quarterly allowance if I would teach two classes per quarter. I would have graduated in June of 1996 with a Bachelor of Science in Computer Science, Master's in 1998.

I was proud of the way many things were going in my life. And so were those who interacted with me day in and day out. And I wanted to do well so you and mom could be proud of me too. And here I sit, having delivered nothing more to you than another load of grief. And my heart aches from sorrow as a result of it.

I thought I had it whipped. I really did. But the old ball and chain which I've carried for most of my life (or so it seems) came back to haunt me. I wish I would have never opened that door. I can't explain why I did. I like what the Apostle Paul said, because I feel this way. "I do not understand what I do. For what I want to do I do not do, but what I hate I do. For I have the desire to do what is good, but I cannot carry it out. For what I do is not the good I want to do, no. The evil I do not want to do. This I keep on doing.

Exhibit 198. RP 7158-7159.

c. Objection to jury instruction.

The concluding paragraph of the Court's Jury Instruction number 6 stated:

You must answer one question ["Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"]. All twelve of you must agree before you answer the question "yes" or "no." If you do not unanimously agree then answer "no unanimous agreement."

CP 121. Defense counsel objected to including the words "or 'no,'" in this instruction. RP 7132.

The verdict form had three options only, "Yes (in which case the defendant shall be sentenced to death)," "No (in which case the defendant shall be sentenced to life imprisonment without the possibility of parole)" and "NO UNANIMOUS AGREEMENT (in which case the defendant shall be sentenced to life imprisonment without the possibility of parole). CP 111-112.

d. Closing penalty phase argument.

In closing argument the prosecutor began by thanking the jury for their guilt-phase verdict and then told them "But you have one more job to do." RP 7134. He told them that they were there because they "repeatedly, under oath," said that "if the facts were there, if the law was there, that, Yes, you would vote for the death penalty. You have told us

repeatedly that if the facts were warranted, if the law supported it, this is something you would do.” RP 7134. At the end of closing the prosecutor quoted Mr. Scherf’s statement “if you take a life, you give a life.” RP 7143. Then concluded, “You have one more job to do. You know what we are asking you to do: To write ‘yes’ on that verdict form.” RP 7143.

D. ARGUMENT

1. TRIAL COURT ERRED IN NOT DISMISSING THE DEATH NOTICE WHEN THE PROSECUTION FAILED TO STRICTLY COMPLY WITH RCW 10.95.040(2)

a. Factual overview.

On February 1, 2011, two days after the incident, Mr. Scherf was transported from WSR to the Snohomish County Jail. RP 862-863; CP 898. Although he was assigned an attorney from the public defender’s office the following day, the assigned public defender was not qualified to represent someone facing a capital charge. CP 898. Karen Halverson, an attorney listed on SPRC Rule 2 list of qualified counsel,²⁵ was not appointed to represent Mr. Scherf until nearly two weeks later on February 14, 2011. CP 898. Ms. Halverson was appointed only after Mr. Scherf

²⁵ Superior Court Special Proceedings – Rule 2 (SPRC) reads, in part: “All counsel for trial and appeal must have demonstrated the proficiency and commitment to quality representation which is appropriate to a capital case.”

sent a note to the Snohomish County Prosecutor, on February 14, 2011, indicating a willingness to plead guilty at arraignment. CP 898.

On February 23, 2011, the day before charges were finally filed, Snohomish County Prosecutor Mark Roe sent a letter to Ms. Halverson, giving her a deadline for filing any mitigation she would like him to consider in deciding whether to file a death notice:

I am writing to let you know our anticipated timeline for your client's case. We intend to file into District Court this week, and have a March 11, 2011, felony dismissal date set. At this point, we anticipate filing Aggravated Murder into Superior Court on that day, March 11, 2011. I will tell you candidly that I am strongly considering filing our intent to seek the death penalty at the same time we file into Superior Court. That is why I would like to receive any mitigation you would like me to consider by March 7, 2011. That is a short time frame, but I believe realistic. We would like to set arraignment for Tuesday, March 15, 2011.

Your client has been in custody for much of his adult life. There is information about his behavior and mental health status far beyond what we would normally have access to for any defendant. We have already been reviewing that information. I have already met with Jayme Biendl's family as well, and they are very much in favor of us seeking the death penalty.

CP 899-900, 2565. Ms. Halverson did not receive the letter until the following day, February 24, 2011. CP 900. That same day, the Snohomish County Prosecutor filed murder charges in Snohomish County District

Court.²⁶ CP 901. The prosecutor did not, however, provide the first set of discovery (pages 1-3470) to defense counsel until March 2, 2011, six days later. CP 898. On receipt of the letter, Ms. Halverson immediately notified the prosecution it was impossible to provide mitigation evidence by March 7, 2011. CP 900.

On March 8, 2011, the day after the prosecutor's stated deadline for the defense to provide mitigation information, defense counsel received another letter from the Snohomish County Prosecutor, which stated:

I am responding to your letter of February 25, 2011, in which you said the mitigation deadline of March 7th does not give you "... time to obtain the necessary psychological, medical, education, and any other relevant records...". I believe both parties already possess the information you are referencing.

Your client has spent much of his adult life "in a fishbowl", so to speak. Owing to his long incarceration, we already have medical, psychological, and many other "relevant records."

CP 901, 2567. Three days later, the defense received another batch of discovery (pages 3471-6454). CP 899.

²⁶ To obtain time to conduct an investigation into potential mitigation evidence, counsel offered to waive the requirement under CrRLJ 3.2.1(g)(2) that the State must file felony charges in Superior Court within 30 days of the filing of a felony complaint in district court. CP 900-901. The prosecution ignored the request.

In sum, the three-week delay in filing charges allowed the prosecutor to withhold discovery from defense counsel and denied the defense a meaningful opportunity to review the discovery prior to the decision to file the death notice. The state gave qualified counsel only eleven days total to provide mitigation, and only five of those days were after the state provided the first batch of discovery. Approximately 3000 pages of discovery were not provided until well after the March 7, 2011 deadline. And, as a result of the three-week delay in charging, there was no criminal case number before February 24, 2011, and no avenue for the defense to seek funds to retain experts or a mitigation investigator.

On March 11, 2011, the same day as the second batch of discovery was provided, the Snohomish County Prosecutor filed an information charging Mr. Scherf with aggravated first degree murder. CP 1. Per CrR 4.1²⁷, an arraignment was scheduled for March 16, 2011.²⁸ CP 901. At the outset of the hearing, and before Mr. Scherf was arraigned on the charge of aggravated first degree murder, the prosecutor stated:

²⁷ CrR 4.1 indicates that an “arraignment” is to occur no later than 14 days after the date or indictment is filed in superior court, and at which the defendant shall be asked his name, indictment or information shall be read, and copy give to the defendant. CrR 4.1(a)(1) – (f).

²⁸ Prior to the arraignment, on March 15, 2011, the prosecutor publicly announced its intent to seek the death penalty. CP 2586.

This matter comes on for arraignment. Preliminarily, though, however, Your Honor, the State will be serving a Notice of a Special Sentencing Proceeding to determine whether the Death Penalty should be imposed.

RP 2. After the clerk filed the notice, the prosecution proceeded with officially arraigning Mr. Scherf on the charge of aggravated first degree murder: "I believe we are ready to proceed to arraignment." RP 2, pg. 2-6.

As explained in an "Arrestment Memorandum," the prosecutor filed the death notice prior to arraignment deliberately, in hopes that Mr. Scherf would plead guilty at arraignment as he had indicated he would. CP 898, 934-935. The pre-arrestment filing was an attempt to circumvent that 30-day period after arraignment in which a defendant charged with aggravated murder may not enter a plea of guilty: "Since the Notice of Special Sentencing Proceedings will have already been filed and served, the restrictions on entry of a plea under RCW 10.95.040 will not apply." CP 935.

The defense moved to strike the special sentencing proceeding notice, arguing that the state failed to comply with direct provisions of RCW 10.95.040(2) when it filed the notice before Mr. Scherf was arraigned. CP 2874 -3000; 2641-50; RP 154-164; 166-168. The trial court acknowledged that the state, in fact, filed the death notice prior to Mr. Scherf's arraignment, but concluded, without elaboration, that RCW

10.95.040(2) does not set a start point. CP 2604; RP 168-170. The trial court erred.

b. The prosecutor must strictly comply with the death notice requirements.

A sentence of death is qualitatively different from any other sentence. Woodson v. North Carolina, 428 U.S. at 305. Because of this difference, this Court has held:

[w]e should strive to ensure that the procedures and safeguards enacted by the Legislature are properly followed by the State. The determination of whether a defendant will live or die must be made in a particularly careful and reliable manner and in accordance with the procedures established by the Legislature.

State v. Luvene, 127 Wn.2d 690, 719, 903 P.2d 960, 976, fn. 8 (1995).

Given the unique qualities of the death penalty, the legislature has tailored pretrial procedures to govern the use of a special sentencing proceeding. State v. Dearbone, 125 Wn.2d 173, 177, 883 P.2d 303 (1994). These procedures, set forth in RCW 10.95.040(2), are so important that strict compliance is required. Id., at 182 (“We decline to graft the doctrine of substantial compliance onto RCW 10.95.040. . . Substantial compliance is neither proof of good cause under RCW 10.95.040(2), nor is it an exception to the time limit established by the statute”).²⁹

²⁹ See e.g., Bennett v. Seattle Mental Health, 150 Wn. App. 455, 208 P.3d 578 (2009) (interpreting the 90-day notice requirement under RCW 7.70.100(1) before a suit may be filed is subject to strict compliance); and

RCW 10.95.040(2) specifically mandates that if the prosecution elects to seek the punishment of death, then such notice “shall be filed and served on the defendant’s attorney within thirty days after the defendant’s arraignment upon the charge of aggravated first degree murder.” (emphasis added). The specific directive of RCW 10.95.040(2) was not complied with since the prosecution filed and served the notice to seek the death penalty prior to arraignment, not within thirty days after the defendant’s arraignment. As such, the death sentence must be dismissed.

c. Statutory Construction of RCW 10.95.040(2) demonstrates that to be valid, a death notice must be filed and served after a defendant is arraigned on aggravated first degree murder.

Issues of statutory construction and constitutionality are questions of law subject to de novo review. State v. Monfort, 179 Wn.2d 122, 312 P.3d 637, 641 (2013); State v. Bradshaw, 152 Wn.2d 528, 531, 98 P.3d 1190 (2004).

In its entirety, RCW 10.95.040 reads:

(1) If a person is charged with aggravated first degree murder as defined by RCW 10.95.020, the prosecuting attorney shall file written notice of a special sentencing proceeding to determine whether or not the

Troxell v. Rainier Public School Dist. No. 307, 154 Wn.2d 345, 111 P.3d 1173 (2005) (Washington Supreme Court strictly interpreting the mandatory 60-day waiting period under RCW 4.96.020(4), which requires a plaintiff to provide a governmental agency with 60 days notice before commencing a suit for damages.).

death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.

(2) The notice of special sentencing proceeding shall be filed and served on the defendant or the defendant's attorney within thirty days after the defendant's arraignment upon the charge of aggravated first degree murder unless the court, for good cause shown, extends or reopens the period for filing and service of the notice. Except with the consent of the prosecuting attorney, during the period in which the prosecuting attorney may file the notice of special sentencing proceeding, the defendant may not tender a plea of guilty to the charge of aggravated first degree murder nor may the court accept a plea of guilty to the charge of aggravated first degree murder or any lesser included offense.

(3) If a notice of special sentencing proceeding is not filed and served as provided in this section, the prosecuting attorney may not request the death penalty.

(emphasis added).

The purpose of statutory interpretation is “to determine and give effect to the intent of the legislature.” State v. Sweany, 174 Wn.2d 909, 914, 281 P.3d 305 (2012); State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). When possible, the Court seeks to derive legislative intent solely from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole. State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). The language of the statute should not be interpreted “in a way that would render any statutory

language superfluous, or nonsensical.” State v. Johnson, 179 Wn.2d 534, 546-547, 375 P.3d 1090 (2014). “Constructions that yield unlikely, absurd, or strained consequences must be avoided.” City of Seattle v. Fuller, 177 Wn.2d 263, 270, 300 P.3d 342 (2013).

Only if there is ambiguity does the court resort to statutory construction; and, if statutory construction fails to yield a clear interpretation, the rule of lenity requires an interpretation which favors the defendant:

In sum, our interpretation of a penal statute will be either the only reasonable interpretation of the plain language; or, if there is no single reasonable interpretation of the plain language, then whichever interpretation is clearly established by statutory construction; or, if there is no such clearly established interpretation, then whichever reasonable and justifiable interpretation is most favorable to the defendant.

State v. Evans, 177 Wn.2d 186, 192-194, 298 P.3d 724, 727-728 (2013).

Here, the plain language, legislative intent, and the rule of lenity all establish that RCW 10.95.040 requires that the death notice be filed after arraignment and that filing before arraignment requires dismissal of the death notice.

i. The plain language.

Proper statutory interpretation must begin with the language of the statute. Monfort, 312 P.3d at 646 (Gordon McCloud, J., concurring). A

statute's plain language does not require construction. State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320 (1994); State v. Silva, 106 Wn. App. 586, 591, 24 P.3d 477, 480 (2001) (when reading a statute, courts will not construe language that is clear and unambiguous, but will instead give effect to the plain language). Courts, when interpreting a criminal statute, will give it a literal and strict interpretation, and cannot add words or clauses to an unambiguous statute; courts assume the legislature "means exactly what it says." State v. Delgado, 148 Wn.2d 723, 727-728, 63 P.3d 792, 795 (2003), quoting Davis v. Dep't of Licensing, 137 Wn.2d 957, 964, 977 P.2d 554 (1999).

The plain language of RCW 10.95.040(2) is clear and unambiguous. It mandates that if the prosecution elects to seek a punishment of death, a notice must be filed and served "within thirty days after the arraignment." In the absence of a specific statutory definition, this Court will give words their ordinary meaning, which it may determine by referring to a dictionary definition. State v. Standifer, 110 Wn.2d 90, 92, 750 P.2d 258 (1988). "Within" is defined as "inside the range or bounds of", and "occurring inside a particular period of time". The Oxford English Dictionary, Sixth Edition (2006). "After" is defined as "in the time following an event or another period of time," and "next to and following in order or importance." Id. RCW 10.95.040(2), therefore,

requires that if a death notice is to be filed, it must be done so within or inside two particular events, with the arraignment as the beginning period and 30 days later as the termination period.³⁰

The trial court concluded that RCW 10.95.040(2) specifies only an end date of 30 days after arraignment, but no beginning date. RP 169-170. Such an interpretation renders the word “within” meaningless and unnecessary. If the legislature intended to limit RCW 10.95.040(2) to mean not later than 30 days after arraignment it would have said that. Finding “within” to be meaningless and unnecessary violates the well-established canon of statutory construction that a court should avoid interpretations of a statute that render certain provisions superfluous. See Whatcom County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) (“Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.”).

Looking at other provisions of RCW 10.95 further demonstrates that when the legislature mandated that an action take place “within” a certain number of days “after” an event, it meant the event marks the

³⁰ This is also consistent with CrR 3.3(b)(c) which sets out the date of the initial commencement as defined under CrR 4.1, which requires an “arraignment” occur no later than 14 days after the date or indictment is filed in superior court. CrR 4.1(a)(1)-(f).

beginning of the period of days during which the mandated action must take place, and not that the mandated action can take place entirely before that triggering event. In each case, the mandated actions would be “absurd” if completed before the triggering event and any argument that these provisions set only a terminal date would be “unlikely” or “strained.” See State v. Johnson, 179 Wn.2d at 546-547.

In RCW 10.95.110, for example, the legislature provided that “the clerk of the trial court” shall cause the preparation of a verbatim report of proceedings to commence “within ten days after the entry of a judgment and sentence imposing the death penalty.” It would be “unlikely” or “absurd” to interpret this as authorizing the clerk of the court to commence the preparation of the verbatim report of proceedings before entry of a death sentence since, absent a judgment and sentence of death, the clerk would not be responsible for preparation of the verbatim report of proceedings at all. In a non-death criminal case, the appellant must file a notice of appeal and must arrange with court reporters to prepare the verbatim report of proceedings. RAP 5.1, 5.3, 9.2. And obviously the record of proceedings could not be completed before entry of judgment and sentence in any case, since that is part of the proceedings.

Similarly, RCW 10.95.120 requires that the information report on which mandatory proportionality review is based to be filed by the trial

court “within thirty days after the entry of judgment and sentence.” Obviously again, it would defeat the purpose of the report for it to be filed before the information requested – some of it about the judgment and sentence – had become available.

RCW 10.95.170 provides that the defendant is to be imprisoned at the Washington State Penitentiary “within ten days after the trial court enters a judgment and sentence imposing the death penalty,” and RCW 10.95.160(2) provides that the death warrant shall be returned to the clerk of the trial court “within twenty days after each execution of a sentence of death.” It would be absurd to argue that the legislature intended the defendant to be transferred to death row or the death warrant filed before death was imposed or execution carried out.

These statutory provisions show that throughout RCW 10.95, the legislature used the form “within ___ days after a specified event” as the period in which the mandated action of the provision is to take place, not that the action could take place before the triggering event. It did not mean that preparation of the verbatim report of proceedings should begin before the clerk’s duty to prepare it arose, that the trial report should be filed before the judgment and sentence was entered, that the defendant should be transported to death row before he was sentenced to death or that a death warrant should be filed before execution.

Here, the use of “within ___ days after _____,” is consistent throughout RCW 10.95 and shows a legislative intent to establish a specified number of days after a specified event, not an intent to establish a terminal date. “[W]hen similar words are used in different parts of a statute, ‘the meaning is presumed to be the same throughout.’” Welch v. Southland Corp., 134 Wn.2d 629, 636, 952 P.2d 162 (1998) (emphasis added) (quoting Cowles Publ’g Co. v. State Patrol, 109 Wn.2d 712, 722, 748 P.2d 597 (1988) (quoting Booma v. Bigelow-Sanford Carpet Co., 330 Mass. 79, 82, 111 N.E.2d 742, 743 (1953))).³¹

The plain language of the statute dictates that the beginning date for the period of time when the death notice may be filed begins with an arraignment and ends 30 days later.

ii Legislative intent and history.

Although this Court need not go beyond the plain language of RCW 10.95.040(2) to conclude that the trial court erred in denying the

³¹ In State v. Sweat, 180 Wn.2d 156, 322 P.3d 1213 (2014), this Court noted that the word “victim,” the term being construed as either limited to the victim of the charged crime or the victim of any other criminal activity, appeared twenty-eight times in the provision at issue, RCW 9.94A.535. Because each time the legislature meant the victim of the charged crime it made explicit reference to “the offense” or “currently charged offense,” or “uses the definite article before ‘victim, or does both,” the use of victim in the aggravating factor “[t]he offense was part of an ongoing pattern of . . . abuse of a victim or multiple victims,” had to be given a broader interpretation. Sweat, 180 Wn.2d at 162.

motion to strike a death notice that was served and filed before arraignment, legislative history leads to the same conclusion

If more than one interpretation of the plain language is reasonable, the statute is ambiguous, and the Court may engage in statutory construction. City of Seattle v. Winebrenner, 167 Wn.2d 451, 456, 219 P.3d 686 (2009); State v. Jacobs, 154 Wn.2d 596, 600-01, 115 P.3d 281 (2005). The Court may then look to legislative history for assistance in discerning legislative intent. Ervin, 169 Wn.2d at 820.

The history of the Washington death penalty statute supports the interpretation that a death notice may not validly be filed prior to arraignment.

In 1972, the United States Supreme Court declared all state death penalty schemes unconstitutional under the Eighth Amendment. Furman v. Georgia, *supra*. Washington's death penalty statute, RCW 9.48, was deemed invalid under Furman. State v. Baker, 81 Wn.2d 281, 284, 501 P.2d 284 (1972). In November 1975, through the initiative process, another death penalty statute was enacted, which made death the mandatory, automatic sentence for aggravated murder.³² Because mandatory death sentences were unconstitutional, the statute was struck

³² 1975-1976 Wash. Laws 2d Ex. Sess. 17 (codified at Wash. Rev. Code Ann. Sec. 9A.32.045-.047 (1977) (repealed 1981).

down. Woodson, 428 U.S. 280; State v. Green, 91 Wn.2d 431, 445, 598 P.2d 1370 (1979), adhered to in part on reconsideration, 94 Wn.2d 216, 616 P.2d 628 (1980).

The legislature then enacted RCW 10.94 in 1997. RCW 10.94.010 read, in part:

The notice of intention to request the death penalty must be served on the defendant or the defendant's attorney and filed with the court within thirty days of the defendant's arraignment in superior court on the charge of murder in the first degree under RCW 9A.32.030(1)(a).

RCW 10.94.010 (emphasis added). In 1981, RCW 10.94 was held to be unconstitutional since it created an inequitable sentencing scheme. See State v. Frampton, 95 Wn.2d 469, 627 P.2d 922 (1981), and State v. Martin, 94 Wn.2d 1, 614 P.2d 164 (1980).³³

To cure the constitutional infirmity found in RCW 10.94, the Legislature enacted RCW 10.95.040(2). Although RCW 10.95 adopted many of the provisions of its predecessor RCW 10.94, one significant alteration was to the timing of filing and serving the death notice. RCW 10.95.040(2) reads:

The notice of special sentencing proceeding shall be filed

³³ See Martin, 94 Wn.2d at 8 (“Clearly the legislature did not anticipate the possibility that an accused might plead guilty to a charge of first degree murder. Thus, it simply failed to provide for that eventuality.”) and Appendix C (Legislative History).

and served on the defendant or the defendant's attorney within thirty days after the defendant's arraignment upon the charge of aggravated first degree murder unless the court, for good cause shown, extends or reopens the period for filing and service of the notice. Except with the consent of the prosecuting attorney, during the period in which the prosecuting attorney may file the notice of special sentencing proceeding, the defendant may not tender a plea of guilty to the charge of aggravated first degree murder nor may the court accept a plea of guilty to the charge of aggravated first degree murder or any lesser included offense.

RCW 10.95.040(2) (emphasis added). Thus, under RCW 10.94.010, the notice shall be filed and served “within thirty days of the defendant’s arraignment,” which was changed in RCW 10.95.040(2) to require the filing and service occur within thirty days after the defendant’s arraignment.

It is a well-settled principle of statutory construction that “each word of a statute is to be accorded meaning.” State ex rel. Schillberg v. Barnett, 79 Wn.2d 578, 584, 488 P.2d 255 (1971). “[T]he drafters of legislation ... are presumed to have used no superfluous words and we must accord meaning, if possible, to every word in a statute.” In re Recall of Pearsall-Stipek, 141 Wn.2d 756, 767, 10 P.3d 1034 (2000) (quoting Greenwood v. Dep’t of Motor Vehicles, 13 Wn.App. 624, 628, 536 P.2d 644 (1975)). Further, (“[w]hen the legislature uses different words within the same statute, we recognize that a different meaning is intended.” State

v. Beaver, 148 Wn.2d 338, 343, 60 P.3d 586 (2002)); Simpson Inv. Co. v. Dep't of Revenue, 141 Wn.2d 139, 160, 3 P.3d 741 (2000) (same).

The legislature, in enacting RCW 10.95, intentionally changed the statute from “of” to “after” the defendant’s arraignment, thus eliminating any argument that as long as a notice was filed within 30-days of the defendant’s arraignment, it could be filed before or after the arraignment. The legislature’s enactment of a different term in RCW 10.95.040(2) must be given its intended meaning: that a notice must be filed and served after the arraignment.³⁴

Reading the two sentences encompassed in RCW 10.95.040(2) together clearly establishes that filing a notice of a special sentencing

³⁴ Undersigned counsel have found no published case with a fact pattern that includes the filing of a death notice before a defendant is arraigned on aggravated first degree murder. A recent decision by this Court set out the factual and procedural history of the case, illustrates that a death notice filed per RCW 10.95.040(2) is done after, not before, arraignment:

In November 2009, the King County prosecuting attorney charged Monfort with one count of aggravated first degree murder for the death of a law enforcement officer . . . In December 2009, the superior court arraigned Monfort. Absent a showing of good cause, Washington statutory law requires a county prosecutor to file and serve a death penalty notice within 30 days after arraignment (here, January 13, 2010).

Monfort, 312 P.3d at 639 (emphasis added).

proceeding can only be done after – not before – a person is arraigned. Assuming, arguendo, the phrase “within thirty days after” is ambiguous and only fixes the terminus ad quem (latest possible date) and not the terminus a quo (first point of time), the sentence immediate following clarifies any such ambiguity. The second sentence defines the time when the defendant may not tender a plea of guilty as “the period in which the prosecuting attorney may file the notice of special sentencing proceeding.” And a person cannot legally or practically tender until he is arraigned. See e.g., CrR 4.1, 4.2, and RCW 10.40.060 (“In answer to the arraignment, the defendant may move to set aside the indictment or information, or he or she may demur or plead to it, and is entitled to one day after arraignment in which to answer thereto if he or she demands it”).³⁵

RCW 10.95.040(2), read in its entirety, restricts the period in which a death notice shall be filed and served to after the time when the

³⁵ This is consistent with other significant rights that attach upon an arraignment. For example, the filing of an information or indictment is an initial pleading by the prosecuting attorney setting out allegations of facts of an offense. CrR 2.1. “The period from arraignment to trial [is] perhaps the most critical period of the proceedings, during which the accused requires the guiding hand of counsel.” State v. Lackey, 153 Wn. App. 791, 802, 223 P.3d 1215 (2009); United States v. Wade, 388 U.S. 218, 225, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) (internal quotation marks and citations omitted). An arraignment also triggers the constitutional right to a speedy trial. U.S. Const. amend VI; Const. art. I, §22; see also CrR 3.3(b), (c)(1), CrR 4.1.

defendant could first enter a plea or the court could accept a plea, to wit, the arraignment. Or stated another way, RCW 10.95.040(2) does not allow for a death notice to be filed before a person is arraigned on the charge of aggravated first degree murder.

The failure to file and serve the notice of special sentencing proceeding as mandated by RCW 10.95.040 bars the state from seeking the death penalty. RCW 10.95.040(3). Strict compliance with the statute is required. Luvene, 127 Wn.2d at 719 n.3. The specific requirements of RCW 10.95.040 were not adhered to here; and, as result, the death notice filed is invalid necessitating a reversal of the death sentence.

iii. Rule of lenity.

Finally, if this Court finds that the plain language of RCW 10.95.040(2) is ambiguous and thus subject to statutory construction, it must be “strictly construed” in the petitioner’s favor. State v. Hornaday, 105 Wn.2d 120, 127, 713 P.2d 71 (1986), (superseded by statute); Wilson, 125 Wn.2d at 216-17; Jacobs, 154 Wn.2d 596 at 601. The Court will interpret an ambiguous penal statute adversely to the defendant only if statutory construction “clearly establishes” that the legislature intended such an interpretation. Winebrenner, 167 Wn.2d at 462. Otherwise, if the indications of legislative intent are “insufficient to clarify the ambiguity,” the Court will then interpret the statute in favor of the defendant. In re

Post Sentencing Review of Charles, 135 Wn.2d 239, 250 & n. 4, 252-53, 955 P.2d 798 (1998). This is “the rule of lenity.” Id. at 250 n. 4; Jacobs, 154 Wn.2d at 601.

Requiring a relatively greater degree of confidence when resolving ambiguities within penal statutes against criminal defendants helps further the separation of powers doctrine and guarantees that the legislature has independently prohibited particular conduct prior to any criminal law enforcement. See United States v. Bass, 404 U.S. 336, 348-49, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971); United States v. Wiltberger, 18 U.S. (5 Wheat) 76, 95, 5 L.Ed. 37 (1820); cf. State v. Rice, 174 Wn.2d 884, 901, 279 P.3d 849 (2012) (noting “the substantial liberty interests at stake” within the criminal justice system, the “awesome consequences” of criminal prosecution, and thus “the need for numerous checks against corruption, abuses of power, and other injustices” (internal quotation marks omitted) (quoting State v. Pettitt, 93 Wn.2d 288, 294-95, 609 P.2d 1364 (1980))). The rule of lenity is even more pronounced since the penalty of death is qualitatively different from any other sentence. Woodson, 428 U.S. at 305.

d. Conclusion.

RCW 10.95.040(2) specifically requires that if the prosecution elects to seek the punishment of death, then such notice “shall be filed and

served on the defendant's attorney within thirty days after the defendant's arraignment upon the charge of aggravated first degree murder." (emphasis added). Under the rule of lenity, as well as a plain reading of the statute and a reading dictated by statutory construction of legislative history, the death notice may only be properly filed after arraignment. RCW 10.95.040(2) was not strictly complied with thus rendering the death notice and sentence invalid.

2. THE PROSECUTOR'S DELAY IN CHARGING AND FILING OF THE DEATH NOTICE BEFORE ARRAIGNMENT DENIED MR. SCHERF HIS RIGHT TO QUALIFIED COUNSEL AT A CRITICAL STAGE OF THE LITIGATION

The prosecutor publicly announced its intent to seek the death penalty on March 15, 2011 (CP 2586), and filed the notice on March 16, 2011. RP 2; CP 3098. As a direct result of the prosecutor's intentional, lengthy delay in charging and filing of the death notice prior to arraignment, defense counsel was denied the ability to obtain funds to retain experts or seek assistance with investigating mitigation, and the time to adequately review and analyze the discovery before the prosecutor decided to seek the death penalty. This prevented counsel from carrying out her legal obligations at a critical stage of representation.

Under both the Washington and United States Constitutions, a criminal defendant is entitled to the assistance of counsel at all critical

stages in the litigation. U.S. CONST. amend. VI; Wash. Const. Art. 1, § 22; Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); State v. Heddrick, 166 Wn.2d 898, 909-910, 215 P.3d 201 (2009). The right to counsel derives from notions of due process and the state's obligation to provide a fair hearing. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (“effective assistance of counsel” necessarily incorporates the “purpose [of the constitutional requirement]—to ensure a fair trial”). This right to counsel attaches the moment an individual becomes “accused” within the meaning of the Constitution. Massiah v. United States, 377 U.S. 201, 206, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).

The right to counsel may extend beyond the criminal prosecution itself where the procedure was a “logical corollary” of the right to counsel. Powell v. Alabama, 287 U.S. 45, 71, 53 S.Ct. 55, 77 L.Ed. 158 (1932). In Mempa v. Rhay, 389 U.S. 128, 134, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967), the Court extended the right to counsel by holding that “appointment of counsel for an indigent is required at every stage of a criminal proceeding where the substantial rights of a criminal accused may be affected.” See also State v. Agtuca, 12 Wn. App. 402, 404, 529 P.2d 1159 (1974) (a critical stage is one “in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case

is otherwise substantially affected.”).³⁶ A complete denial of counsel at a critical stage of the proceedings is presumptively prejudicial and calls for automatic reversal. Heddrick, 166 Wn.2d at 910; United States v. Cronin, 466 U.S. 648, 658-59, 659 n. 25, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

The appointment of specially-qualified counsel constitutes a critical component of protecting the rights of persons facing a potential death sentence. This Court acknowledged as much when it adopted Superior Court Special Proceedings Rules (SPRC) 2, which requires at least two attorneys be appointed and one of whom must be qualified to be appointed lead counsel in a potential capital case.³⁷ This Court also adopted SPRC Rule 1, which mandates that SPRC rules apply to “all

³⁶ As a result, the right to counsel has been extended to many pre- and post-trial situations. See, e.g., Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) (right to counsel at court-ordered psychiatric examinations); McConnell v. Rhay, 393 U.S. 2, 89 S.Ct. 32, 21 L.Ed.2d 2 (1968) (right to counsel at revocation of probation proceedings); Arsenault v. Massachusetts, 393 U.S. 5, 89 S.Ct. 35, 21 L.Ed.2d 5 (1968) (right to counsel at preliminary hearings); Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) (right to counsel on appeal); Hamilton v. Alabama, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961) (right to counsel at some arraignments); Townsend v. Burke, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948) (right to counsel at sentencing).

³⁷ Prior to the amendment to SPRC Rule 2, the appointment of capital-qualified counsel was permissive: “A list of attorneys qualified for appointment in death penalty trials and for appeals will be recruited and maintained by a panel created by the Supreme Court. In appointing counsel for trial and on appeal, the trial court and the Supreme Court will consider this list. However, the courts will have the final discretion in the appointment of counsel in capital cases.” SPRC 2 (emphasis added).

stages of proceedings in criminal cases in which the death penalty has been or may be decreed.” (emphasis added). In any case where the prosecutor may seek the imposition of the death penalty, SPRC applies.

Here, the prosecutor knew immediately that the death penalty was likely to be sought. This is evident by a detective’s sworn statement drafted and filed on February 7, 2011, two weeks before Mr. Scherf was charged with aggravated murder and a week before capitally qualified counsel:

I believe that all of the aforementioned documentation is relevant to the crime of Aggravated First Degree Murder as well as to any form of mental defense of mental retardation that I believe would likely be proposed by the suspect at trial or for mitigation for leniency during or prior to sentencing. I know and have experienced an unrelated murder case in which, initially, the defendant faced a potential sentence of death. In that case the defendant pled guilty prior to trial. However, from that experience I know that a defendant’s defense and/or mitigation package for leniency or mitigating factors to not pursue the death penalty includes an exhaustive amount of historical information to include: schooling and educational background, childhood experiences, child rearing, family background data, life history to include work history and the use and/or abuse of drugs and alcohol, criminal records to include arrest history, medical records, psychological evaluation records, and various other forms of historical and background data.

CP 2418.

The period in which the death penalty may be decreed is a critical stage in the proceedings since the filing of a death notice undisputedly

involves the most fundamental of the rights – the right to life. As the Supreme Court has stated:

The right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice. Appointment of counsel without affording an opportunity for hearing on a ‘critically important’ decision is tantamount to denial of counsel.

Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966).

Here, Mr. Scherf’s constitutional right to have meaningful representation at a critical stage was denied. As a direct result of the prosecutor’s intentional delay in charging, defense counsel was unable to obtain funds to retain experts, seek assistance with investigating mitigation, and time to adequately review and analyze the discovery before the prosecutor’s decision to seek the death penalty. As such, Mr. Scherf was denied the right to qualified counsel at a critical stage of the proceedings, a stage in which the “outcome of the case is [was] . . . substantially affected”; therefore, his death sentence must be reversed.

3. THE PROSECUTOR’S FILING ITS NOTICE OF INTENT TO SEEK THE DEATH PENALTY BEFORE MR. SCHERF WAS ARRAIGNED AND WITHOUT PROVIDING MR. SCHERF THE OPPORTUNITY TO INVESTIGATE AND PRESENT MITIGATION EVIDENCE DENIED HIM DUE PROCESS AND FUNDAMENTAL FAIRNESS

The determination whether to seek the death penalty should require an elected prosecutor to become as informed as thoroughly and completely

as possible. State v. McEnroe, 179 Wn.2d 32, 43, 309 P.3d 428 (2013). In exercising their executive function, prosecutors better serve the public by taking a holistic approach in considering whether to seek the death penalty. Id., at 38, 43. Although receiving mitigation evidence from the defense is not required by the plain language of the statute, it is “normally desirable.” Monfort, 312 P.3d at 644 (2013).

Here, the prosecutor felt a “holistic approach” was unnecessary because, according to him, Mr. Scherf had been in custody most of his adult life and thus had “spent much of his adult life ‘in a fishbowl.’” CP 899-900; 901. However, mitigation evidence incorporates much more than one’s adult life. See, e.g., Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (mitigating factor is any aspect of a defendant’s character or record and any of the circumstances of the offense); Wiggins v. Smith, 539 U.S. 510, 523-526, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (mitigation encompasses not only the defendant’s adult life, but aspects of his childhood). Instead, the prosecutor filed a death notice without providing Mr. Scherf’s counsel a reasonable opportunity to present potential mitigation evidence or participate in the process of deciding whether to seek death. Such a procedure violates the concepts of fundamental fairness and due process.

When the government deprives a person of life, liberty, or

property, it must act in a fair manner. United States v. Salerno, 481 U.S. 739, 746, 1075 S. Ct. 2095, 95 L.Ed.2d 697 (1987) (citing Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). Due process, in fact, requires that the state may not invoke the judicial process unless it acts with fundamental fairness. State v. Lively, 117 Wn.2d 263, 814 P.2d 652 (1991); State v. Alvin, 109 Wn.2d 602, 746 P.2d 807 (1987). Fundamental fairness is therefore at the heart of the due process of law guaranteed by the 5th and 14th Amendments to the United States Constitution and Const. art. 1, section 14. See State v. Galbreath, 69 Wn.2d 664, 667, 419 P.2d 800 (1966) (the concept of fundamental fairness is inherent in the due process clause of U.S. Const. amend. 14); State v. Tang, 75 Wn. App. 473, 478, 878 P.2d 487 (1994).³⁸

³⁸ See, e.g., Criminal Procedure, Part 1, Chapter 2, section 2.4, LaFave, Israel and King quoting Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1253, 86 L.Ed. 1595 (1942), overruled on other grounds by Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

Fundamental fairness doctrine proceeds from the premise that the Fourteenth Amendment's due process clause was designed to make applicable to the states the same basic limitation that had been imposed upon the federal government under the Fifth Amendment's due process clause. That limitation, however, is viewed as broader in range and more flexible in content than other Bill of Rights limitations. Due process, the [Supreme] Court has noted is a "concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights."

If fundamental fairness is a prerequisite to invoking the judicial process to convict a person accused of any crime, it is surely a prerequisite to seeking the ultimate penalty against him. See, e.g. Woodson, 428 U.S. at 305 (death penalty is qualitatively different from any other sentence).

Due process, under the doctrine of fundamental fairness, is decided on a case-by-case basis by considering the totality of the circumstances and with reference to the universal sense of justice:

A key element of the fundamental fairness doctrine is its focus on the factual setting of the individual case. . . . The asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.

LaFave, Israel and King, Criminal Procedure, Part 1, Chapter 2, section 2.4 (quoting Betts, 316 U.S. at 462).

Courts may find a due process violation – not only when the government’s conduct unreasonably hinders a fundamental right – but when the government’s action is “arbitrary,” “irrational,” “arbitrary and irrational” or “fundamentally unfair or unjust.” Collins v. City of Harker Heights, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992); Duke

Power Co. v. Carolina Env'tl. Study Group, Inc., 438 U.S. 59, 84, 98 S.Ct.

2620, 57 L.Ed.2d 595 (1978). The United Supreme Court has concluded:

The Due Process Clause of the Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law" This Court has held that the Due Process Clause protects individuals against two types of government action. So-called "substantive due process" prevents the government from engaging in conduct that "shocks the conscience," Rochin v. California, 342 U.S. 165, 172 (1952), or interferes with rights "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325-326 (1937). When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. Mathews v. Eldridge, 424 U.S. 319, 335 (1976). This requirement has traditionally been referred to as "procedural" due process.

Salerno, 481 U.S. at 746.

The state of Washington also adheres to these principles. For instance, this Court, when considering whether an immunity agreement promised in one county could be binding on another, acknowledged:

Constitutional concerns relevant to this case focus on the integrity of the criminal justice system and fundamental fairness. There is more at stake than just the liberty of this defendant. At stake is the honor of the government[,] public confidence in fair administration of justice, and the efficient administration of justice in a federal scheme of government.

State v. Bryant, 146 Wn.2d 90, 104, 42 P.3d 1278 (2002), (quoting United

States v. Carter, 454 F.2d 426, 428 (4th Cir. 1972)). Similarly, this Court

echoed the concern for fundamental fairness:

Since the death penalty is the ultimate punishment, due process under this state's constitution requires stringent procedural safeguards so that a fundamentally fair proceeding is provided. Where the trial which results in imposition of the death penalty lacks fundamental fairness, the punishment violates article 1, section 14 of the state constitution.

State v. Clark, 143 Wn.2d 731, 779, 24 P.3d 1006 (2001) (quoting State v. Bartholomew, 101 Wn.2d 631, 640, 683 P.2d 107 (1984)).

A prosecutor's discretion to seek the death penalty is not unfettered. See State v. Campbell, 103 Wn.2d 1, 24-25, 691 P.2d 929 (1984), cert. denied, 471 U.S. 1094, 105 S.Ct. 2169, 85 L.Ed.2d 526 (1985). Before the death penalty can be sought, there must be "reason to believe that there are not sufficient mitigating circumstances to merit leniency." Id. at 25 (quoting RCW 10.95.040(1)). The prosecutor must actually perform individualized weighing of the mitigating factors—an inflexible policy is not permitted. State v. Pirtle, 127 Wn.2d 628, 642, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996).

Receiving mitigation evidence from the defense is not statutorily required, but it's desirable. Monfort, 179 Wn.2d at 122. The facts in Monfort are a far cry from those presented here. On the day of Mr. Monfort's arraignment, the county prosecutor sent the defense an offer to extend the 30-day filing period to six months, and allow defense counsel

to submit mitigation materials in five months for review. Id. at 126. Just prior to the conclusion of the six-month period, the defense met with the prosecutor and reaffirmed its position not to share mitigation evidence until its investigation was complete. Id. at 127. The county prosecutor acknowledged the defense's challenges and agreed to extend the deadline by three months and offered to meet with the defense again before making his decision. Id. Subsequently, the defense informed the prosecution that it would not meet the deadline and requested an extension. Id. The prosecution acknowledged that the defense was refusing to provide any mitigation evidence by the deadline, declined to agree to an extension, and ultimately filed a death penalty notice. Id.

Under the totality of the facts in Monfort, this Court concluded that the county prosecutor was as flexible and individualized as constitutionally required. Moreover, the defense chose not to share its mitigation evidence within the nine-month period provided because it did not want to show the prosecution its evidence before trial. Id. at 644

Less recently, in State v. Pirtle, this Court was asked whether the prosecutor improperly failed to consider mitigation evidence when the prosecutor, on the day he brought charges against the defendant, announced his intent to file a death penalty notice. Pirtle, 127 Wn.2d at 641-642. However, the prosecutor also offered to wait 30 days to file and

specifically advised that he would consider the defense's mitigating evidence during that time. Id. And in fact, the county prosecutor adhered to the deadline and filed the notice without the benefit of the defense's evidence. Id. at 642. This Court held that the county prosecutor's willingness to wait 30 days and consider any mitigating evidence during that time demonstrated an individualized approach. Id.³⁹

The facts here are substantially different than those found in McEnroe, Monfort and even Pirtle. Here, the prosecution deliberately filed a death notice prior to Mr. Scherf being arraigned on aggravated first degree murder and without providing defense counsel all of the discovery or with an opportunity to present mitigation evidence. Petitioner has not found a single case over the four decades of Washington's death penalty statute where such a fundamentally unfair procedure has been employed or approved. Mr. Scherf's death sentence should be reversed since it arose out of a fundamentally unfair procedure. Circumstances were exploited to prevent the appointment of qualified counsel for more than three weeks;

³⁹ The Pirtle court also found that even without input from the defense, the prosecutor had a substantial amount of information about the defendant. Pirtle, 127 Wn.2d at 642. Here, the elected prosecutor made a similar assertion, stating that because Mr. Scherf had been incarcerated he had spent his adult life in a "fish bowl" and the prosecutor had obtained from the Department of Corrections medical, psychological and many other "relevant records." CP 901. However, as discussed in Claim 7, infra, these materials were unconstitutionally obtained and did not include any mitigation from his earlier life or family and personal life.

discovery was not provided during this time. As a result, even when qualified counsel were appointed, they had no time or ability to review discovery and mount the type of mitigation investigation that would allow counsel to participate in the death decision making process.

4. IF, AS THE TRIAL COURT FOUND, A PROSECUTOR'S DISCRETION UNDER RCW 10.95.040(1) IS UNREVIEWABLE, A DEATH SENTENCE SOUGHT UNDER THE STATUTE IS UNCONSTITUTIONALLY ARBITRARY AND CAPRICIOUS

On July 18, 2011, after being excluded from any meaningful participation before the death notice was filed, the defense filed a Motion to Compel the discovery of the evidence of mitigating circumstances the prosecuting attorney did consider before filing the notice. CP 2577-86. In response, the prosecuting attorney represented that it had provided the defense "all of the discovery materials reviewed by" the elected prosecutor when it provided the defense with 6,454 pages of discovery and three CD's. CP 2559-68. On August 3, 2011, the trial court denied the defense motion. RP 172-183; CP 2398-99.

Then on March 12, 2013, defense counsel moved again to strike the death penalty because the prosecutor abused its discretion in filing the death notice when he: (a) failed to allow the defense an opportunity to investigate and provide input on potential mitigating circumstances for

consideration prior to filing the death notice; (b) arbitrarily limited his consideration to only Mr. Scherf's prison record; (c) based his decision on considerations other than whether there were sufficient mitigating circumstances to merit leniency; and (d) used disparate processes for considering "mitigation circumstances" under RCW 10.95.040(1). CP 896-998, 850-856; RP 1929-54.

In denying the renewed Motion to Strike, the trial court found that "the prosecutor only has discretion to determine what a reasonable jury could do; and then, of course, the jury answers the question." RP 1957. The only way to review the prosecutor's discretion to seek the death penalty, the court reasoned, is by a jury deciding unanimously that there are not sufficient mitigating circumstances. RP 1955-1960. The trial court ultimately acknowledged the irrationality of this interpretation of RCW 10.95.040, since the jury's decision is not "something we are ever likely to know, in any event" and "[i]t may be that the statute doesn't provide much insight, therefore, as to the thought processes of the prosecutor; but that is the statute we have here." RP 1957-1958. Concluding that the prosecutor's discretion under RCW 10.95.040 is in essence unreviewable, the trial court denied the defense motions. CP 843-844; RP 1955-60.

Undoubtedly, this Court does have the power to review whether a prosecutor's decision to file a notice of special sentencing proceeding

complies with RCW 10.95.040 and constitutional requirements. Monfort, 179 Wn.2d at 138, fn.1 (Gordon McCloud, J., concurring) citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803), and Harmon v. Brucker, 355 U.S. 579, 581-82, 78 S.Ct. 433, 2 L.Ed.2d 503 (1958). Absent such a power of review, this Court could not guarantee that the death penalty is applied in a constitutional manner in Washington rather than arbitrarily or capriciously.

The United States Supreme Court held in Eddings v. Oklahoma, 455 U.S. 104, 112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), “capital punishment must be imposed fairly, and with reasonable consistency, or not at all.” (emphasis added) Reasonable consistency requires that the death penalty be imposed only in accordance with rational and objective standards, not by whim, caprice, or prejudice: “Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.” Gregg v. Georgia, 428 U.S. 153, 189, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1974) (opinion of Stewart, Powell, and Stevens, JJ.). Fairness requires more than that the death penalty not be inflicted randomly, but also that each person charged with a capital crime be treated with the “degree of respect due the uniqueness of

the individual.” Lockett, 438 U.S. at 605 (plurality opinion).

Even in Monfort, where the majority of this Court concluded that a county’s prosecutor’s death penalty notice decision is a “subjective determination,” 179 Wn.2d at 136, quoting In re Pers. Restraint of Harris, 111 Wn.2d 691, 694, 763 P.2d 823 (1988), cert. denied, 490 U.S. 1075, 109 S.Ct. 2088, 104 L.Ed.2d 651 (1989), the Court limited upholding of the filing of a death notice to instances where “the prosecutor states that he or she subjectively believes there are not sufficient mitigating circumstances.” Monfort, 179 Wn.2d at 138. (Gordon McCloud, J., concurring) (emphasis in the original). As the concurrence points out, RCW 10.95.040 provides an objective standard “the prosecuting attorney shall file when there is reason to believe” not when “when he or she believes:

It requires not just that the prosecutor subjectively believe that there are not sufficient mitigating circumstances to merit leniency before seeking the death penalty but also that the prosecutor’s subjective decision on that point be objectively reasonable.

Id. The concurrence then suggests a procedure analogous to a Knapstad⁴⁰ challenge for reviewing the prosecutor’s decision, including an affidavit which “must, however, show that the prosecutor’s filing decision was objectively reasonable—that the prosecutor fulfilled the statutory duty to

⁴⁰ State v. Knapstad, 41 Wn. App. 781, 706 P.2d 238 (1985).

“reasonabl[y]” decide whether there are “not sufficient mitigating circumstances to merit leniency.” RCW 10.95.040(1). Monfort, 179 Wn.2d at 142-143 (footnote omitted).

What is clear is that the prosecutor’s decision must be subject to meaningful review. To be meaningful, this review should include, as a minimum, the prosecutor’s providing, on request, the mitigating evidence considered and any other significant factor weighed in the decision – including financial considerations, the wishes of the family, the amount of publicity generated, criminal history, and number of aggravators or victims.

The recent study by Kathleen Beckett of the University of Washington, which reviews all of the judicial reports filed in aggravated murder cases, demonstrates that there are unknown – and possibly impermissible – factors which enter into the prosecutor’s decision to file the death notice. “The Role of Race in Washington State Capital Sentencing, 1981-2012” (January 27, 2014) (Beckett Report).⁴¹ The study shows that case characteristics such as number of aggravating circumstances and victims explain only 6% of the variation in decisions to seek the death penalty; something else must make up the other 94% of the

⁴¹ The Beckett Report can be viewed at:
<http://www.deathpenaltyinfo.org/documents/WashRaceStudy2014.pdf>

decision, The study also shows that for prosecutors, prior criminal history and number of aggravators are more important than number of victims or prolonged suffering of the victims. Further, prosecutors are three times more likely to charge in cases with extensive publicity. Id. While not exhaustive on the reasons why the death penalty is sought, this study documents not only the wide-spread disparity among Washington counties in filing death notices, but also that the prosecutor's reasons for seeking death may have little to do with the amount of mitigation evidence.

Here, the trial court erred in denying the defense motion for disclosure of mitigating evidence and in finding that the decision of the prosecutor was unreviewable. This Court should reconsider its holding in Monfort and hold instead that the prosecutor's decision must be objectively reasonable. If the prosecutor's decision was based on relevant mitigation evidence and other legitimate considerations, it can be upheld. If, however, the decision is made on legally irrelevant factors, the decision in the particular case should be overturned or the administration of the death sentence in Washington declared unconstitutional.

5. THE CHARGING DOCUMENTS LACKED ESSENTIAL ELEMENTS OF THE CRIME OF CAPITAL FIRST DEGREE MURDER; THE ALLEYNE DECISION DEMONSTRATES THE UNCONSTITUTIONALITY OF THE WASHINGTON DEATH PENALTY STATUTE

On March 11, 2011, Mr. Scherf was charged by information with one count of Aggravated First Degree Murder. CP 3135. He was arraigned on the charge on March 15, 2011. RP (3/15/11) 2-4. The information charged that Mr. Scherf with premeditated intent caused the death of Jayme Biendl, and further alleged as aggravating factors under RCW 10.95.020(1) and (2) that the victim was a corrections officer who was performing her official duties at the time of the killing and that the defendant was serving a term of imprisonment in a state facility. CP 3135. It did not charge the absence of sufficient mitigation to merit leniency.

This Court has held that under the capital statutory scheme in Washington the aggravating factors for first degree murder are not elements of that crime but are sentence enhancers that increase the statutory maximum sentence from life with the possibility of parole to life without the possibility of parole or the death penalty. State v. Thomas, 150 Wn.2d 821, 848, 83 P.3d 970 (2004); State v. Kincaid, 103 Wn.2d 304, 312, 692 P.2d 823 (1985). Additionally, the Court has held that an information charging aggravated murder need not allege the absence of mitigating circumstances. State v. Yates, 161 Wn.2d 714, 759, 168 P.3d 359 (2007).

However, the United States Supreme Court's decision in Alleyne v. United States, supra, undermines the validity of these decisions and the

Washington death penalty scheme.⁴² Harris v. United States, 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002), which pre-dated Alleyne, upheld judicial fact-finding that increased a mandatory minimum sentence for a crime because the jury’s verdict “authorized the judge to impose the minimum with or without the finding” and thus was not “essential” to the defendant’s punishment – the mandatory minimum “merely limited the judges ‘choices within the authorized range.’” Alleyne, 133 S.Ct. at 2157-2158; Harris, 536 U.S. at 557, 560-561, 567. In Alleyne, however, the Court held that Harris was inconsistent with the Sixth Amendment principles that any facts necessary to imposing a statutory minimum must

⁴² Counsel for Mr. Scherf are aware of State v. McEnroe and Anderson, No. 89881-2, which was argued on June 26, 2014, and that this Court issued an order, on July 11, 2014, reversing the trial court’s ruling that the prosecution has to plead the absence of mitigation in the information to charge capital murder. This Court’s opinion in McEnroe, however, has not been filed. At oral argument in McEnroe, the prosecutor argued that the jury’s decision on whether the state proved insufficient evidence of mitigation was not a factual decision at all, but a moral decision which could be based on anything an individual juror thought fit. See McEnroe, No. 89881-2, (June 26, 2014) at 9 min., 50 sec. audio recording by TVW, Washington State’s Public Affairs Network, available at <http://www.tvw.org>. In the absence of the Court’s opinion, it is impossible to know if that position has been adopted. Therefore, counsel would ask for the opportunity to submit supplemental briefing after the McEnroe decision is filed.

In the meantime, Mr. Scherf submits this argument so that it can be considered in this appeal and to preserve it for federal court and for consideration by the United States Supreme Court in this or another case.

be found by a jury. Alleyne, 133 S.Ct. at 2161-2163. Consequently, Alleyne overruled Harris. Id. at 2164.

The Alleyne Court concluded that the core crime and the fact triggering the mandatory minimum sentence together constitute a “new, aggravated crime” requiring each element to be submitted to the jury. Alleyne, 133 S.Ct. at 2161. Thus applying Alleyne to Washington’s murder statutes demonstrates that Washington has four distinct degrees and punishments for murder:

- Murder in the second degree, RCW 9A.32.050, when "with intent to cause the death of another person but without premeditation, he or she causes the death of such person ..."
Murder in the second degree is a class A felony with a standard sentencing range, depending on the offender score, of 120 months to life with the possibility of parole.
- Murder in the first degree, RCW 9A.32.030(a), when "with a premeditated intent to cause the death of another person, he or she causes the death of such person ..."
Murder in the first degree is a class A felony with a standard sentencing range, depending on the offender score, of 240 months to life with the possibility of parole.
- Aggravated murder in the first degree, RCW 10.95.020, when a person commits first degree premeditated murder, and the state also proves beyond a reasonable doubt at least one of 14 aggravating circumstances. The sentence for aggravated murder is life in prison without possibility of release. RCW 10.95.030 (1).
- Capital murder, RCW 10.95.040(1) and RCW 10.95.060(4), when a person commits aggravated murder in the first degree and the state proves beyond a reasonable doubt that "there are not sufficient mitigating circumstances

to merit leniency." The sentence for capital murder is death. RCW 10.95.030(2).

Under the analysis set out in Alleyne, insufficiency of mitigation is a fact, which if proven, raises the minimum and maximum sentence for aggravated first degree murder from life without the possibility of parole to a sentence of death.⁴³ Because the core crime of aggravated first degree murder and the fact triggering the minimum and mandatory sentence – insufficiency of mitigating circumstances – together constitute a new, aggravated crime under Alleyne, capital murder, the information must allege every element of the charged offense. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995).

Washington requires “all essential elements of a crime ... must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him.” State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). The essential elements rule is grounded in the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution. U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall ... be informed of the nature and cause of the accusation.”); Wash. Const. art. I, § 22 (“In

⁴³ See also State v. Campbell, 103 Wn.2d at 25, where the Court concluded that “a sentence of death requires consideration of an additional factor beyond that for a sentence of life imprisonment – namely an absence of mitigating circumstances.”

criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation against him.”); State v. Zillyette, 178 Wn.2d 153, 158, 307 P.3d 712, 714 (2013). Essential elements include statutory and nonstatutory elements. Kjorsvik, 117 Wn.2d at 101-102. Most importantly, alleging essential elements of the charge requires more than just citing to the statute; listing the particular facts supporting the elements is required. Zillyette, 178 Wn.2d at 162. Failure to allege each element means the charging document “is insufficient to charge a crime and so must be dismissed.” State v. Nonog, 169 Wn.2d 220, 226, 237 P.3d 250 (2010).

When a defendant challenges the sufficiency of a charging document for the first time on appeal, an appellate court will liberally construe the language of the charging document in favor of validity. Kjorsvik, 117 Wn.2d at 105. In liberally construing the charging document, the court employs the two-pronged Kjorsvik test: (1) do the necessary elements appear in any form, or by fair construction, on the face of the document and, if so, (2) can the defendant show he or she was actually prejudiced by the unartful language. Id. at 105-106. If the court finds that the first prong is not satisfied, “we presume prejudice and reverse without reaching the question of prejudice.” State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000) (citing Kjorsvik, 117 Wn.2d at 105-

106).⁴⁴

The state charged Mr. Scherf with aggravated murder under RCW 10.95.020(1) & (2), but failed to allege in the information the additional essential element necessary to support a charge of capital murder. CP 3135. Even under the liberal standards of construction used for challenges to charging documents for the first time on appeal, the information is defective. There is no mention, for instance, of the death penalty and no reference to the lack of mitigating circumstances. As such, the general remedy is to vacate the conviction and remand for dismissal without prejudice, not a remand to a lesser included offense. Vangerpen, 125 Wn.2d at 792-295.

The Respondent may take the position that the Notice of Special Sentencing Proceeding (CP 3098) is a charging document and cures the defective information. However, even assuming the notice of intent can be construed as an acceptable charging document for capital murder, the notice filed in Mr. Scherf's case failed to set forth facts supporting the insufficient mitigation element; it merely recites the statutory language of RCW 10.95.040. See, e.g., Zillyette, 178 Wn.2d at 162 (alleging essential elements of the charge requires more than just citing to the statute, listing

⁴⁴ The Alleyne Court cited approvingly the century-long historical context that all facts that led to the enhancement of the punishment must be included in the charging document. Alleyne, 133 S.Ct. at 2158-2161.

the particular facts supporting the elements is required.).⁴⁵

Most importantly, under the Washington death penalty statute as interpreted by this Court, the prosecutor cannot allege the facts necessary to charge the absence of sufficient mitigation to merit leniency, the element which Alleyene makes essential to the crime of capital murder. This is because the prosecutor's discretion in filing the death notice has been upheld on mere proof that the prosecutor showed some inclination to consider mitigation presented by the defense, Pirtle, supra, or had a subjective belief that there was insufficient mitigation in the particular case. Monfort, supra. The prosecutor's discretion has also been upheld

⁴⁵ Moreover, when the defense filed its motion to compel the evidence of mitigating circumstances considered by the prosecuting attorney to file a death notice (CP 2577-86), which in essence equated to a bill of particulars, the state refused and stated:

Mr. Roe [elected prosecutor] is an experienced career prosecutor who had previously reviewed defense mitigation packages in other cases and concluded that the 'breadth and depth of information he reviewed in this case' more than adequately allowed him to consider whether there were sufficient mitigating circumstances. . . He concluded that he had reason to believe there were not sufficient mitigation circumstances to deny the jury an opportunity to determine whether to impose the death penalty.

CP 2559-64.

when it is based on factors other than facts about the crime or defendant, such as the strength of the state's case. Id. Moreover, constitutionally, a juror may find sufficient mitigation based on an act of mercy alone and virtually anything about the defendant that might call for a sentence of less than death. Lockett, 438 U.S. at 605. Such relevant mitigating evidence, in the later instance, may not even be available to the prosecution if, as in Monfort, the defense elects not to disclose it. And the factual allegation might invade the province of the jury in the former instance. Unlike other elements, which the prosecutor establishes through investigation, a prosecutor's subjective belief that there is insufficient mitigation may be best supported by refusing to carry out an investigation that might reveal mitigation. Court rules and statutes likely also prevent a prosecutor from having access to relevant mitigation evidence.

If on the other hand, for reasons dictated by the Washington death penalty statute and court rules, this Court holds, in spite of Alleyne, that the absence of mitigation is not a factual determination or an element of the crime which must be pled in the information, then this would be an admission that both the prosecutor's and jury's decisions in seeking a death sentence are standardless and violate the Eighth Amendment and due process of law.

Here the information did not allege lack of mitigation and the

notice of intent to seek the death penalty does not cure any constitutional deficiencies of the information. The requirement that the particular facts supporting the element must be included demonstrates that following the dictates of Alleyne under RCW 10.95 is at odds with the statute as it has been interpreted and can only be rectified by legislative action. See e.g., Frampton, 95 Wn.2d at 476-79; and State v. Martin, *supra*. For these reasons, Mr. Scherf's death sentence should be reversed whether or not this Court follows Alleyne in holding that the absence of mitigation is an element of capital murder which must be alleged in the information.

6. THE STANDARD EMPLOYED IN RCW 10.95.030 IS UNCONSTITUTIONAL UNDER HALL V. FLORIDA

The United States Supreme Court, in Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), concluded that the cruel and unusual punishment clause of the Eighth Amendment, applicable to the State by the Fourteenth Amendment, forbids the execution of persons with intellectual disabilities. In Hall v. Florida, *supra*, the United States Supreme Court was asked how intellectual disability must be defined in order to implement the principles and holdings of Atkins. The Florida law in question defined intellectual disability to require an intellectual quotient (IQ) test score of 70 or less; and if a prisoner is deemed to have an IQ above 70, all further exploration of intellectual disability is foreclosed.

Hall, 2014 WL 2178332 at *3. The Supreme Court concluded such a rigid rule is unconstitutional. Id.

Washington's statute is unconstitutional for the same reason. Under RCW 10.95.030, intellectual disability requires a showing of significantly subaverage general intellectual functioning; existing concurrently with deficits in adaptive behavior; and both significantly subaverage general intellectual functioning and deficits in adaptive behavior which were manifested during the developmental period. RCW 10.95.030(2)(a) (emphasis added). The statute then restricts the definition of "significantly subaverage general intellectual functioning" to intelligence quotient of seventy or below. RCW 10.95.030(2)(c). Thus, the statute unambiguously requires that a person must satisfy all of these requirements, including an IQ score of 70 or below. See, e.g., State v. Roggenkamp, 153 Wn.2d 614, 106 P.3d 196 (2005) (when interpreting a statute, a court is required to assume the Legislature meant exactly what it said and apply the statute as written.). As such, the rigid definition of intellectual disability under RCW 10.95.030, like the Florida statute in Hall, is unconstitutional.⁴⁶

⁴⁶ There are other potential problems with RCW 10.95.030. For example, the statute may unconstitutionally place the burden on the defense to establish intellectual disability by preponderance of evidence. RCW 10.95.030(2).

The unconstitutional standard of RCW 10.95.030 is applied twice in Mr. Scherf's case. First, the State's Notice of Special Sentencing Proceeding alleged that the defendant did not have an intellectual disability as defined in RCW 10.95.030(2).⁴⁷ Thus, in making its determination whether to file a death notice or not, the State relied on an unconstitutionally restrictive statute.

The unconstitutionally restrictive standard of RCW 10.95.030(2) also calls into question the validity of RCW 10.95.130, which statutorily requires that "the supreme court of Washington shall determine . . . whether the defendant had an intellectual disability within the meaning of RCW 10.95.030(2)." RCW 10.95.130(2)(d). The four questions for

⁴⁷ The Notice of Special Sentencing Proceeding reads:

COMES NOW, Mark K. Roe, Prosecuting Attorney for Snohomish County, Washington, and gives notice pursuant to RCW 10.95.040 of a special sentencing proceeding to determine whether or not the death penalty should be imposed.

By this notice, the State alleges that there are not sufficient mitigating circumstances to merit leniency and that, at the time the crime was committed, the defendant did not have an intellectual disability as defined in RCW 10.95.030(2).

CP3098 (emphasis added).

review under RCW 10.95.030 are mandatory and must be addressed. State v. Elledge, 144 Wn.2d 62, 26 P.3d 271 (2001). As such, in order for the Court to comply with its obligation under RCW 10.95.130, it must do so by employing the unconstitutional standard of RCW 10.95.30. Moreover, as set out in Section Five, supra, the Sixth Amendment mandates that any facts necessary to impose a statutory minimum are elements of a crime and must be found by a jury. Alleyne, 133 S.Ct. at 2161-63. Washington's death penalty statute is unconstitutional under Alleyne to the extent that it places responsibility with either the trial court or this Court rather than a jury for deciding whether the defendant had an intellectual disability. RCW 10.95.030(2) ("The defense must establish an intellectual disability by a preponderance of the evidence and the court must make a finding as to the existence of an intellectual disability"); RCW 10.95.130 (this Court must find that the defendant did not have an intellectual disability in every case on mandatory review).

7. **THE TRIAL COURT ERRED IN DENYING MR. SCHERF'S MOTION TO SUPPRESS PHYSICAL EVIDENCE PURSUANT TO CrR 3.6; THE SEIZURE OF HIS MEDICAL RECORDS FROM HIS STORED PROPERTY VIOLATED CHAPTER RCW 70.02, WHICH CREATES A PRIVACY RIGHT IN HEALTH RECORDS; AND THE WARRANT AUTHORIZING THE SEIZURE OF HEALTH AND OTHER RECORDS FROM HIS PROPERTY, CENTRAL FILE AND MEDICAL RECORDS WAS NOT BASED ON PROBABLE CAUSE AND DID NOT MEET THE PARTICULARITY REQUIREMENTS OF THE FOURTH AMENDMENT OR ARTICLE 1 SECTION 7**

The trial court erred in denying Mr. Scherf's Motion to Suppress documents seized from his stored property, central file and medical records at WSR.

The affidavit in support of the warrant authorizing the search and seizure of his central file and medical records, warrant 11-32, relied on a prior search of the property found in Mr. Scherf's cell which had been placed in boxes and removed when he was taken to IMU after being found in the chapel on January 29, 2011. RP 235-236; CP 2415-18. Although this prior search was pursuant to a warrant, the documents affiant Brian Wells of the Snohomish County Sheriff's Office relied on to establish probable cause for warrant 11-32 from that prior search were not authorized to be sought under the prior warrant. RP 239; CP 2286. The prior warrant authorized only search and seizure of documents described

as “personal journals or papers regarding journaling referencing the crime.” CP 2416 (emphasis added).

The fact that Deputy Wells relied on documents not authorized to be searched under the prior warrant in his affidavit was immaterial for a Fourth Amendment analysis because, as the trial court ruled, Mr. Scherf had no Fourth Amendment rights to privacy in documents found in his cell, Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), or taken from his cell and stored, United States v. Edwards, 415 U.S. 800, 808, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974). CP 2288. Mr. Scherf did have, however, a statutory right to privacy in the medical records found in his cell, and the medical records viewed during the prior search were outside the scope of the earlier warrant and improperly used to try to establish probable cause for the issuance of warrant 11-32.

By statute, Chapter RCW 70.02, Mr. Scherf had a state-created privacy interest in his medical and health records,⁴⁸ and that statute does

⁴⁸ RCW 70.02.005(1) provides: “Health care information is personal and sensitive information that improperly used or released may do significant harm to a patient’s interests.” RCW 70.02.005(4) recognizes that “[p]ersons other than health care providers obtain, use and disclose health record information in many different contexts and for many different purposes.” It provides that “[i]t is the public policy of this state that a patient’s interest in the proper use and disclosure of the patient’s health care information survives even when the information is held by persons other than health care providers.” (emphasis added). Thus, Mr. Scherf expressly had an interest in the proper use and disclosure of his

not allow the DOC to disclose these records to law enforcement without a warrant except in specific circumstances which did not apply to the initial search of his cell.⁴⁹ Therefore, the portions of the affidavit in support of warrant 11-32 which describe these medical health records found during the earlier search should have been stricken from the affidavit as fruits of the illegal search. State v. Eisfeldt, 163 Wn.2d 628, 646-649, 185 P.3d 580 (2008). Specifically, the portions to be excised include a medical psychological record containing an opinion that Mr. Scherf would not do well with female prison guards, a psychological record with marginalia in which Mr. Scherf appeared to be questioning the veracity of a family member and a mental health history which states that Mr. Scherf received

health care information held by the DOC.

⁴⁹ Under the current statute, medical health records may only be disclosed to law enforcement officers: (a) who brought the patient to the health care facility; (b) who have reason to believe, along with the health care provider, that the information disclosed is evidence of criminal conduct “that occurred on the premises of the health care provider or facility”; (3) to the extent required by law; and (4) where the information is about a patient being treated for an injury caused by a firearm, stab wound or blunt-force trauma reasonably believed to be a result of a criminal act. RCW 70.02.050(k), (l), (2) (b) and (c). In the latter instance, the information is limited to the patient’s name, residence, sex, age, condition, diagnosis and location of injuries, state of consciousness, and discharge time and date, as well as the name of the health care provider and where the patient has been transferred.⁴⁹ RCW 70.02.050(c)(i)-(x).

an honorable discharge from the Army through a “psychological scam” and that he had problems with authority figures. CP 2417-18.

Thus, while the documents other than the medical records seized from the stored property were not subject to suppression – because no warrant was needed to seize them – the medical records seized from the property, as well as all documents seized from the central file and medical records room should be suppressed because warrant 11-32 was insufficient to establish probable cause, particularly without the medical records seized from the stored property, and it failed to describe the items to be seized with particularity. Further the documents seized from the medical records room were not found in a place described with particularity in the warrant.

a. Failure to establish probable cause.

The affidavit in support of the warrant 11-32 failed to establish probable cause to believe that evidence of a crime would be found in the documents stored in Mr. Scherf’s central file and medical records, as required by the Fourth Amendment and Article 1, section 7 of the Washington Constitution. The affiant Deputy Wells provided no underlying facts, but only his speculation that documents in WSR files might contain information to refute a mental or physical defense, which Wells asserted is fairly common, and his conclusory statement that virtually anything about a person might be relevant to mitigation in a

capital case. CP 2418-2419. Such speculation in the affidavit is insufficient to establish probable cause. And once information from the mental health records are excised from the affidavit there is literally nothing to establish probable cause – academic records, religious books, a Bible, a statutory definition of assault, a college transcript and copies of grievance forms do not show criminal intent or behavior. CP 2417.

The Fourth Amendment to the United States Constitution provides that to protect the “right of the people to be secure in their . . . papers and effect. . . no warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.” Article 1, Section 7 provides that no person shall be disturbed in his private affairs without authority of law. Article 1, section 7 has been held to be more protective of individual rights than the Fourth Amendment. State v. Rankin, 151 Wn.2d 689, 694, 92 P.3d 202 (2004) (generalizations about the habits of drug dealers do not establish probable cause).

Probable cause to search “requires a nexus between criminal activity and the item to be seized and also a nexus between the item to be seized and the place to be searched.” State v. Maddox, 152 Wn.2d 499, 98 P.3d 1199 (2004); State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). The officer must have probable cause to believe that the items to

be seized are connected to criminal activity and will be found at the place to be searched. Thein, at 147, 151.

Whether probable cause has been established is an objective test. Beck v. Ohio, 379 U.S. 89, 96, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964) (probable cause is not established by a prior record for the same crime); State v. Gaddy, 152 Wn.2d 64, 70, 93 P.3d 872 (2004). An officer's subjective belief is not enough. State v. Huff, 64 Wn. App. 641, 645, 826 P.2d 698 (1992) (citing Carroll v. United States, 267 U.S. 132, 161-162, 45 S.Ct. 280, 69 L.Ed.2d 543 (1925)). Nor are generalizations about criminal behavior sufficient. State v. Jackson, 111 Wn. App. 660, 688, 46 P.3d 257 (2002) (the generalization that criminals return to the scene of the crime is insufficient to establish probable cause); State v. Nordlund, 113 Wn. App. 171, 182-184, 53 P.3d 520 (2002) (generalization about computer habits of sex offenders is insufficient to establish probable cause to search personal computer).

Probable cause is "less than would justify conviction," but "more than mere suspicion." Brinegar v. United States, 388 U.S. 160, 175, 69 S.Ct. 1302, 93 L.Ed. 879 (1949). The affidavit must present the underlying facts, conclusory statements are not sufficient. Illinois v. Gates, 462 U.S. 213, 234, 103 S.Ct. 2317, 76 L.Ed 2d 527 (1983).

Here, the warrant affidavit failed to provide probable cause to

believe that evidence of a crime Mr. Scherf was suspected of committing would be found in his central prison file records or medical records. Nothing, grounded in fact, linked these records to the death of Officer Biendl or Mr. Scherf's involvement in it; all of these records pre-dated the crime. Deputy Wells merely speculated that there might be records which a prosecutor could use to defeat defenses which Wells imagined a defendant might assert or had asserted in another case. RP 2418-19.

Moreover, even though the court in Mr. Scherf's case found mitigation evidence to be equivalent to evidence of a crime, this ruling conflicts with this Court's rules. The Special Proceedings Rules for capital cases provide for non-disclosure of defense or prosecution expert witness reports concerning the defendant's mental condition and data relied upon by the experts in making that report until after a guilty verdict for aggravated murder and then only if the defendant elects to present expert testimony on his mental condition at the special sentencing proceedings. SPRC 5(g). SPRC 5 preserves the privacy interest which the court found here provided probable cause for seizing the documents related to Mr. Scherf's medical and mental health records.

Further, the trial court's reliance on Blakely v. Washington, 542 U.S. 296, 301-392, 124 S.Ct. 2531, 159 L.Ed.2d 403, reh'g denied, 542 U.S. 961, 125 S.Ct. 21, 159 L.Ed.2d 851 (2004) (quoting 1 Bishop,

Criminal Procedure Sec. 87, p. 55 (2d ed. 1872)) that “an accusation which lacks any particular which the law makes essential to the punishment is . . . no accusation at all,” establishes that mitigation is evidence of a crime is contrary to settled law, as it now stands, in Washington. This Court has consistently held that aggravated murder is not a crime separate with elements separate from the crime of first degree premeditated murder. State v. Thomas, 166 Wn.2d 380, 387-386, 208 P.3d 1107 (2009); State v. Kincaid, supra. If this Court holds, as argued in Section 5, supra, that Alleyne v. United States requires that absence of mitigation be charged as an element of capital murder, then Mr. Scherf was not properly charged and his death sentence cannot stand.

No authority other than Blakely is cited to support the court’s conclusion that mitigation evidence is evidence of a crime for purposes of the Fourth Amendment or article 1, section 7. If it were the case that every record about the defendant can be seized because it is either potentially mitigation or rebuttal to mitigation, then such a result is contrary to the protections of the Fourth Amendment and article 1, section 7, RCW 70.02, and the special court rules protecting the privacy of capital defendants.

b. Failure to describe the items to be seized with particularity.

By its plain terms, the warrant authorized seizure of every

document held by WSR pertaining to Mr. Scherf, including his medical health records, without any attempt to describe with particularity those documents authorized to be seized.

The particularity requirement of the Fourth Amendment requires that nothing be left to the discretion of the officer executing the warrant. Marron v. United States, 275 U.S. 192, 196, 48 S.Ct. 74, 72 L.Ed. 231 (1927); State v. Perrone, 119 Wn.2d 538, 545, 834 P.2d 611 (1992); United States v. Hillyard, 677 F.2d 1336, 1339 (9th Cir. 1982). This requirement is to (a) prevent general exploratory searches; and (b) prevent seizure of objects on the mistaken notion that they fit within the warrant. Id. at 545; Marron, at 375. To assure that the items to be seized can be determined accurately by the officers executing the warrant, the items must be circumscribed by the crime under investigation. State v. Riley, 121 Wn.3d 22, 29, 846 P.2d 1365 (1993) (broadly authorized search warrant was not limited to evidence related to the crime of computer trespass). Where the items to be seized are documents, even greater scrutiny is required. Andresen v. Maryland, 427 U.S. 463, 482 n.11, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976).

Here the warrant authorized seizure of “any and all records, documents, papers, writings both typed and handwritten, books or any other personal records for” Mr. Scherf. CP 2422. From the returns of the

warrant and testimony, it is clear that all documents in the central file and medical records were seized and three boxes from property, presumably all those with documents. CP 2425-27. The warrant provided no limitation or guideline and none was applied. This is akin to United States v. Spilotro, 800 F.2d 959 (9th Cir. 1986), where the appellate court held that a warrant in a suspected organized crime case was overbroad where it authorized seizure of “notebooks, notes, documents, address books, and other records, etc.” See also, State v. Riley, *supra*, and United States v. Hayes, 794 F.2d 1348 (9th Cir. 1986).

The trial court distinguished Spilotro and Riley on the grounds that they are not capital cases, again relying on Blakely to support the conclusion that the particularity requirement was met because everything about a defendant is relevant to mitigation: “The evidence which may be considered in a capital case is unique and cannot be compared to the more limited evidentiary requirements of other non-capital cases.” CP 2292. Again, not a single case was cited where a reviewing court upheld a warrant in a capital case because everything about the accused was evidence of a crime, nor has any been located. The SPRC, in particular, provides to the contrary.

c. Failure to describe the place to be searched with particularity.

The warrant is invalid also if it fails to specifically describe the place to be searched. Perrone, 119 Wn.2d at 547. Here the warrant described the places to be searched as “WSR inmate property and storage room” and “WSR Administration Building.” CP 2422. The medical records room was not in either place. CP 2437. And while the Affidavit for Search Warrant was expressly attached to the warrant and incorporated by reference, the affiant’s reference to “WSR Records Retention” did not, as the trial court ruled, identify the “medical records room” as a place to be searched. CP 2422-23. Indeed, if this phrase did authorize a search for records anywhere in WSR, it was overbroad for this reason as well. Records are likely contained on computers, in counselor’s offices, at work sites and many other places throughout the prison. Nor does the fact that the records were already copied by DOC employees justify the seizure of documents held in a place not authorized to be searched by the warrant, as the trial court found. CP 2293. Again, no authority is cited for the proposition that police can command another state official to obtain records and bring them to the place authorized to be searched as a way of avoiding particularly describing the place to be searched. The court cited State v. Kern, 81 Wn. App. 308, 914 P.2d 114 (1996). But in Kern the

warrant described with particularity the place to be searched, the bank “premises,” and the only issue was whether bank employees could copy the records the bank officials were to provide.

Under the plain language of the Fourth Amendment, an officer must execute the warrant strictly within the bounds set by the warrant. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 394, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). Since the medical records room was not authorized under the warrant, the fruits of the search of documents taken from there pursuant to the warrant should be suppressed. United States v. Stanley, 597 F.2d 866 (4th Cir. 1979); State v. Niedergang, 43 Wn. App. 656, 719 P.2d 576 (1986).

Here, the warrant did not authorize a search of the medical records room on the third floor, nor did the affidavit identify the “medical records room” as a place to be searched.

d. Conclusion.

The trial court erred in denying the suppression of all medical records and all other documents except those non-medical records which were seized from Mr. Scherf’s stored property. The prejudice to Mr. Scherf was substantial. The prosecution used the knowledge it gained from these records – especially the medical records – to deny him his full right to present mitigation prior to the filing of the death notice and at

sentencing. CP 899-900, 1667-68, 1679-80, 2566, 2568, 3568. Even though Mr. Scherf did not seek to present mental health experts at sentencing, he was prevented from presenting evidence of his continuing wish to be treated and willingness to try to change by the prosecutor's threatened use of all of his mental health records to prove that he was not treatable.⁵⁰ RP 6988-89, 6990-96.

As set out in Section 8, infra, Mr. Scherf was denied his federal and state constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments and Article 1, sections 3, 7, 9, 14, 21, and 33 of the Washington Constitution to appear and defend at trial with counsel, to confront the witnesses against him, to due process, and to be free from cruel and unusual punishment. Evidence of his willingness and desire to be treated were facts about Mr. Scherf which should have been before the jurors to consider in deciding whether there was insufficient mitigating evidence to warrant leniency.

⁵⁰ The fact that Mr. Scherf presented the testimony of Dr. Grassian, RP 988-993, at the CrR 3.5 hearing on his mental state did not waive this issue since that decision was made after the trial court denied suppression of Mr. Scherf's medical records. CP 2293. At that point the state already had the records and calling Dr. Grassian as a witness did not result in any further disclosures of privileged information.

8. TRIAL COURT ERRED IN NOT SUPPRESSING VIDEOTAPED STATEMENTS OBTAINED IN VIOLATION OF THE FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9 AND 22 OF THE WASHINGTON STATE CONSTITUTION; CRIMINAL RULE 3.1 AND 3.2.1, AND RCW 72.68.040-.050

At trial, counsel for Mr. Scherf moved to suppress his videotaped statements to the police as involuntary under the totality of the circumstances; and because he was denied access to counsel, held unlawfully in the Snohomish County Jail in violation of RCW 9A.20.020(1)(a), RCW 72.68.040 and .050, and denied due process by the prosecutor's failure to bring him promptly before the court as required by CrR 3.2(1)(d)(1) and CrRLJ 3.2.1(d)(1). CP 1584-88, 1653-89, 1730-45; RP 1314-27; 1335-39, 1341, 1369-99. The court denied all of the motions, and this was error. CP 1209.

Had the state and federal constitution, Washington statutes and criminal rules been followed, Mr. Scherf would have been promptly taken before a court and provided a capitally-qualified counsel from the outset. With the assistance of qualified counsel, he would have had an advocate and would not have provided videotaped statements to the police. His videotaped statements and the transcripts of the statements taken on February 7, 2011; February 9, 2011; February 10, 2011; February 11,

2011; and February 14, 2011 should, therefore, have been suppressed. State's Pre-Trial Exhs. 5, 6, 9, 10, 12, 13, 16, 17, 20, 21; State's Trial Exhs. 110; 111; 114; 115; 118; 121; 126.

This Court reviews a trial court's denial of a suppression motion to determine whether substantial evidence supports the challenged findings of fact and whether those findings support the trial court's conclusions of law. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), overruled on other grounds by Brendlin v. California, 551 U.S. 249, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007). This Court reviews the court's suppression hearing conclusions de novo. Eisfeldt, 163 Wn.2d at 634.

a. Mr. Scherf's rights under Criminal Rule (CrR) 3.1 were violated.

Although Mr. Scherf was in custody and requested an attorney, the trial court found it permissible for the state not to provide access to an attorney until twelve hours later and after three requests. This is error.

The Sixth Amendment to the United States Constitution guarantees that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." Since the right of the accused in a criminal prosecution to assistance of counsel under the Sixth Amendment to the United States Constitution is a fundamental right, it is mandatory for the states by the Fourteenth Amendment. Gideon v.

Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Article 1, section 22 of the Washington Constitution provides that “in all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel.” Thus, under both the Washington and United States Constitutions, a criminal defendant is entitled to the assistance of counsel at all critical stages in the litigation. Johnson v. Zerbst, *supra*; State v. Heddrick, 166 Wn.2d at 909-910. The right to counsel attaches the moment an individual becomes “accused” within the meaning of the Constitution. Massiah, 377 U.S. at 206.

Washington State also mandates that an accused not only has a right to an attorney but also immediate access to one. *See e.g.*, Criminal Rule (CrR) 3.1. The purposes of CrR 3.1 are different from the reasons for Miranda⁵¹ warnings since Miranda is designed to prevent the State from using presumptively coerced and involuntary statements against criminal defendants; CrR 3.1 is designed to give a defendant a meaningful opportunity to contact an attorney. State v. Mullins, 158 Wn. App. 360, 241 P.3d 456 (2010), *rev. denied*, 171 Wn.2d 1006, 249 P.3d 183 (2011). Criminal Rule 3.1(b)(1) reads:

The right to a lawyer shall accrue as soon as feasible after the defendant is taken into custody, appears before a

⁵¹ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

committing magistrate, or is formally charged, whichever occurs earliest. (Emphasis added).

CrR 3.1(c)(1) states:

At the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place the person in communication with a lawyer.

It is undisputed that Mr. Scherf was taken into custody the moment he was placed in handcuffs on January 29, 2011. CP 1245, ¶3. It is also undisputed that Mr. Scherf's request for an attorney was on January 29, 2011, around 9:00 p.m. when he said he would not answer any more questions without a lawyer. CP 1245, ¶6. As such, the requirements of CrR 3.1 were triggered at that time

CrR 3.1 requires the state to provide an accused with an attorney and the immediate means to communicate with one. "Although the rule does not require the officers to actually connect the accused with an attorney, it does require reasonable efforts to do so." State v. Kirkpatrick, 89 Wn. App. 407, 414, 948 P.2d 882 (1997); State v. Pierce, 169 Wn. App. 533, 548, 280 P.3d 1158, 1167, cert. denied, 175 Wn.2d 1025, 291 P.3d 253 (2012). No such efforts were made here. For instance, Mr. Scherf was not immediately provided access to a telephone book with the phone numbers of private attorneys and the public defender. City of

Seattle v. Carpenito, 32 Wn. App. 809, 649 P.2d 861 (1982). There were no attempts made to telephone an attorney. City of Bellevue v. Ohlson, 60 Wn. App. 485, 487, 803 P.2d 1346 (1991) . Nor were any efforts made to provide Mr. Scherf a phone book and access to a telephone. City of Seattle v. Wakenight, 24 Wn. App. 48, 49-50, 599 P.2d 5 (1979). Indeed, there were no efforts made between 9:00 p.m. on January 29th, when Mr. Scherf was placed in custody and first requested an attorney and 9:00 a.m. January 30th, when he was finally given access to an attorney.⁵² Had they done so shortly after Mr. Scherf was placed in custody when he first requested counsel, the appointed attorney would have told him not to make any statements to law enforcement. See e.g., Kirkpatrick, 89 Wn.App. at 414 (“the officers made no effort to contact an attorney when Kirkpatrick first requested one . . . Had they done so, we presume a lawyer would have told Kirkpatrick to remain silent: ‘[A]ny lawyer worth his salt

⁵² By the time an attorney finally arrived at the Reformatory, Mr. Scherf had already agreed to talk to the police and had already endured twelve hours in extreme condition. Even then, Mr. Scherf did not have reasonable access to counsel; his contact was limited to a conversation through the cuff port of the isolation cell. Nor was Mr. Scherf provided any means of renewing contact with this attorney; he was held incommunicado before and after this brief and awkward exchange with a public defender summoned by the officers. This attorney told the officers that Mr. Scherf did not wish to communicate further with them or to be moved without counsel present, but his statements were entirely ignored. This was not reasonable access to counsel; nor was this attorney appointed then or later to represent Mr. Scherf.

will tell the suspect in no uncertain terms to make no statement to police under any circumstances.’ Watts v. Indiana, 338 U.S. 49, 59, 69 S.Ct. 1357, 1358, 93 L.Ed. 1801 (1949) (Jackson, J., concurring”))

Whether Mr. Scherf initiated conversations after Miranda rights does not cure the state’s failure to comply with CrR 3.1. Kirkpatrick, 89 Wn.App. 407 at 414. And although it is true a person can waive his CrR 3.1 rights by voluntarily initiating communication with the police, such a waiver may be involuntary when the rights under CrR 3.1 had already been violated. Kirkpatrick, 89 Wn.App. at 407 (“A defendant does not waive a CrR 3.1(c)(2) violation by reinitiating contact with the police unless the reinitiation occurs before the earliest opportunity to place the defendant in contact with an attorney.”); Pierce, 169 Wn. App. at 550, fn.5 (“The earliest opportunity to place Pierce in contact with an attorney was when he was booked into jail. His reinitiating contact with the police five hours later therefore does not cure this violation of CrR 3.1(c)(2).”)

The “earliest opportunity” to put Mr. Scherf in touch with an attorney was immediately after his request, not twelve hours later and upon his third request. There is nothing in the record, or argued below, that the earliest opportunity was twelve hours later.⁵³ Thus, his reinitiating

⁵³ In fact, after Mr. Scherf’s second request for an attorney, the detective left the location to obtain a search warrant. Clearly, there was

contact with the police hours later does not cure the violation of CrR 3.1. To hold otherwise would allow the State to benefit by its own failure to perform its duty under CrR 3.1(c)(2). Kirkpatrick, 89 Wn.App. at 416.

The failure to comply with CrR 3.1(c)(2) does not necessarily mean automatic suppression of evidence. The courts review the violation under a harmless error analysis. State v. Jaquez, 105 Wn. App. 699, 716, 20 P.3d 1035, 1043 (2001). Here, it cannot be argued that the error was harmless. Mr. Scherf requested an attorney without success at least three different times over the course of twelve hours. After his request for counsel were ignored, Mr. Scherf bargained with the officers that if he could talk to an attorney he would then talk to law enforcement. RP 615. It was only then did the officers make attempts to connect Mr. Scherf with an attorney and this contact was not the kind of contact with counsel contemplated by the Sixth Amendment. The violation of CrR 3.1 is undeniable and it was error for the trial court not to suppress the video-taped statements as a result.

b. Mr. Scherf was detained illegally at the Snohomish County Jail.

At trial, the defense moved to suppress Mr. Scherf's statements because he was illegally detained at the Snohomish County Jail under RCW 72.68.040 and .050. CP 244; RP 1374. The trial court denied the

nothing preventing the detective to comply with CrR 3.1. RP 613-614.

motion. RP 1390-92. The trial court erred.

Mr. Scherf was serving a sentence at the Department of Corrections (DOC) when, on February 1, 2011, he was transferred from the Department of Correction at the Monroe Correctional Complex (MCC) to the custody of the Snohomish County Jail. He was transferred by local law enforcement rather than DOC corrections officers. According to the Superintendent of MCC, the sole purpose for the transfer was to “help police investigate.” CP 1689. The Superintendent presented an order to detain Mr. Scherf to the Snohomish County Jail, which read:

Please detain [Byron Scherf] for the Department of Corrections per an agreement between DOC/Snohomish County Jail staff. Offenders shall not be released from custody on bail or personal recognizance but should be held pending further direction from the Department of Corrections.

CP 1739.

RCW 72.68.040 creates procedures for an inmate sentenced to DOC custody to be transferred or housed at a county facility:

The secretary may contract with the authorities of the federal government, or the authorities of any state of the United States, private companies in other states, or any county or city in this state providing for the detention in an institution or jail operated by such entity, for prisoners convicted of a felony in the courts of this state and sentenced to a term of imprisonment therefor in a state correctional institution for convicted felons under the jurisdiction of the department. After the making of a contract under this section, prisoners sentenced to a term of

imprisonment in a state correctional institution for convicted felons may be conveyed by the superintendent or his or her assistants to the institution or jail named in the contract. The prisoners shall be delivered to the authorities of the institution or jail, there to be confined until their sentences have expired or they are otherwise discharged by law, paroled, or until they are returned to a state correctional institution for convicted felons for further confinement.

When such a contract is made, notice of the contract is required by RCW 72.68.050 to be recorded by the Clerk of the Court from which the sentence originated⁵⁴:

Whenever a prisoner who is serving a sentence imposed by a court of this state is transferred from a state correctional institution for convicted felons under RCW 72.68.040 through 72.68.070, the superintendent shall send to the clerk of the court pursuant to whose order or judgment the prisoner was committed to a state correctional institution for convicted felons a notice of transfer, disclosing the name of the prisoner transferred and giving the name and location of the institution to which the prisoner was transferred. The superintendent shall keep a copy of all notices of transfer on file as a public record open to inspection; and the clerk of the court shall file with the judgment roll in the appropriate case a copy of each notice of transfer which he or she receives from the superintendent.

The requirements set forth in RCW 72.68.040 and .050 were not met. There was no contract between the DOC and Snohomish County Jail. Nor was there any notification of the transfer on any public record

⁵⁴ Here, the Clerk of the Court from which the sentence originated would have been Spokane County Superior Court.

kept by the Superintendent or the Spokane County Superior Court, as required by RCW 72.68.050. As such, Mr. Scherf's detention at the Snohomish County Jail was illegal and the statements obtained while he was unlawfully detained should be suppressed.

c. Mr. Scherf's statements should be suppressed under CrR 3.2.1.

CrR 3.2.1 requires that any defendant whether detained in jail or subjected to court-authorized conditions of release shall be brought before the superior court as soon as practicable after the detention is commenced. The trial court concluded that CrR 3.2.1(d)(1) was not violated because Mr. Scherf was not transferred to Snohomish County Jail because he was detained as result of a new crime, and thus was not required to be brought before a judge "as soon as practicable" as required under CrR 3.2.1(d)(1). CP 1248, ¶17. Alternatively, the trial court concluded that even if CrR 3.2.1(d)(1) was violated, statements are not suppressed as a result. Id. Both of these conclusions are erroneous.

The trial court concluded that Mr. Scherf was not detained for purposes of CrR 3.2.1 because his transfer from DOC to the Snohomish County Jail "was for his own protection, to serve his DOC sentence in the jail, a place that was also more convenient to his attorney, and more conducive to his safety, rather than being detained as a result of the new

crime. . .” CP 1248, ¶17 (emphasis added). As a result, the court found no violation of CrR 3.2.1(d)(1)’s “prompt presentment” obligation even though Mr. Scherf was not brought before the court for over two weeks.

The court’s premise for not finding a CrR 3.2.1 violation is flawed. First, the court had concluded that Mr. Scherf was detained the moment he was placed in handcuffs on January 30, 2011. CP 1245, ¶3. Second, the record leaves little doubt that the reason Mr. Scherf was detained at the Snohomish County Jail was the result of a new crime. The Superintendent acknowledged as much in a press release:

Offender Byron Scherf Transferred to Snohomish County Jail

MONROE – Offender Byron Scherf was transferred this evening from Monroe Correction Complex to Snohomish County Jail where he will be incarcerated while the Monroe Police Department investigates the Death of Correctional Officer Jayme Biendle.

Scott Frakes, Superintendent of Monroe Correctional Complex, decided to transfer Scherf in order to help police investigators.

CP 1689 (Emphasis added).⁵⁵

Because Mr. Scherf was detained, CrR 3.2.1 required that he be brought before a judge as soon as practicable, not nearly three weeks later.

⁵⁵ Judge Wynne, before he recused himself, stated at an early hearing that he did not know the basis for holding Mr. Scherf in Snohomish County before bail was set, but that setting bail did not provide such a basis. RP 19-20.

Rules like CrR 3.2.1 serve two primary objectives: (1) judicial determination of probable cause and judicial review of conditions of release and (2) to prevent unlawful detention and to eliminate the opportunity and incentive for application of improper police pressure.

Recognizing the need to protect criminal suspects from all of the dangers which are to be feared when the process of police interrogation is entirely unleashed, legislatures have enacted several kinds of laws designed to curb the worst excesses of the investigative activity of the police. The most widespread of these are the ubiquitous statutes requiring the prompt taking of persons arrested before a judicial officer; these are responsive both to the fear of administrative detention without probable cause and to the known risk of opportunity for third-degree practices which is allowed by delayed judicial examination.

Culombe v. Connecticut, 367 U.S. 568, 584-585, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961).

Rules like CrR 3.2.1 find their roots in McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed.819 (1943), and Mallory v. United States, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957). Under the McNabb-Mallory rule, an arrested person must be brought “before a judicial officer as quickly as possible so that he may be advised of his rights and so that the issue of probable cause may be promptly determined.” Mallory, 354 U.S. at 454. The rule thus requires an arrested person be brought before a magistrate judge without unreasonable delay; and violations will “generally render inadmissible confessions made

during periods of detention that violate the prompt presentment requirement of Rule 5(a).”⁵⁶ United States v. Pimental, -- F.3d --, 2014 WL 2855009 (9th Cir. 2014), quoting Corley v. United States, 556 U.S. 303, 309, 129 S.Ct. 1558, 173 L.Ed.2d 443 (2009) (quoting United States v. Alvarez-Sanchez, 511 U.S. 350, 354, 114 S.Ct. 1599, 128 L.Ed.2d 319 (1994)) (alterations omitted).

In response to the McNabb-Mallory rule, Congress enacted 18 U.S.C. § 3501(c). See United States v. Valenzuela-Espinoza, 697 F.3d 742, 748 (9th Cir. 2012). Section 3501(c) “provides a six-hour ‘safe harbor’ period during which a confession will not be deemed inadmissible solely because of a delay in presentment to a magistrate.” Id. The six-hour limitation under § 3501(c) does not apply, however, where “the delay in bringing [the defendant] before [a] magistrate judge ... beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate judge.” 18 U.S.C. § 3501(c). Following the enactment of § 3501, the Supreme Court “reaffirmed the applicability of the McNabb-Mallory Rule” in Corley v. United States, supra. The Court held that § 3501(c) “modified McNabb-Mallory without supplanting it.”

⁵⁶ Under Rule 5(a) of the Federal Rules of Criminal Procedure, “[a] person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge . . .”

Corley, 556 U.S. at 322.

The Court established a two-part test for applying the McNabb-Mallory rule in light of the § 3501(c) six-hour safe harbor period. First, “a district court ... must find whether the defendant confessed within six hours of arrest (unless a longer delay was reasonable considering the means of transportation and the distance to be traveled to the nearest available magistrate judge).” Id. (internal quotation marks and alterations omitted). “If the confession came within that period, it is admissible ... so long as it was made voluntarily.” Id. (internal quotation marks omitted). If, however, “the confession occurred before presentment and beyond six hours, ... the court must decide whether delaying that long was unreasonable or unnecessary under the McNabb-Mallory cases, and if it was, the confession is to be suppressed.” Id. This is true even if the confession was made voluntarily. Id. at 308.

“Prompt presentment” type rules are not limited to federal jurisdiction. In fact “similar legislation, requiring that arrested persons be promptly taken before a committing authority, appears on the statute books of nearly all the states. McNabb, 318 U.S. at 342. Indeed, Washington State’s Criminal Rule (CrR) 3.2.1(d)(1) serves the same purpose as its federal counterpart, Rule 5(a) of the Federal Rules of Criminal Procedure (Fed.R.Crim.P). The primary purposes behind CrR

3.2.1(d)(1) is the same as its Fed.R.Crim.P. 5 counterpart: to ensure prompt judicial determination of probable cause and judicial review of the conditions for release and to prevent unlawful detention and to eliminate the opportunity and incentive for application of improper police pressure. State v. Bradford, 95 Wn. App. 935, 948-949, 978 P.2d 534 (1999), rev. denied, 139 Wn.2d 1022, 994 P.2d 850 (2000).

Here, Mr. Scherf was detained in the Snohomish County Jail for twenty-four days before he was brought before a court. He was not merely housed at the Snohomish County Jail while serving his DOC sentence; he was actively being investigated for a new crime. He was, for example, repeatedly interrogated, subject to invasive search warrants, photographed, and contacted by law enforcement for the sole purpose of investigating a new crime. In fact, law enforcement sought and obtained numerous search warrants to seize a wide range of items before he was brought before the court. See, e.g., RP 680, 694, 695, 698, 702, 725, 727. During the same period, law enforcement also made specific requests to the Washington State Patrol Lab.⁵⁷

The delay was unreasonable and unnecessary since during the period he was held without seeing a judge, the state had obtained enough

⁵⁷ Law enforcement also submitted lab requests to Washington State Patrol Lab on 2/1/11, 2/4/11, and 2/10/11.

evidence to determine to charge him. See e.g., Pimental, *supra*; Valenzuela-Espinoza, 697 F.3d at 752-53 (federal courts have rejected the idea that a delay is reasonable to fully investigate a crime when it is unnecessary to conduct further investigation to determine whether a suspect should be charged).

It was also error for the trial court to conclude that a violation of CrR 3.2.1(d)(1) does not permit suppression of statements. CP 1248, ¶17. Fifty years ago, the Washington State Supreme Court, in State v. Hoffman, 64 Wn.2d 445, 392 P.2d 237 (1964), stated that “[a]lthough we do not and will not abide the practice of holding persons for unreasonable times without charge and arraignment, we have heretofore refrained from adopting the McNabb rule of exclusion.” However, the court went on to suggest that reconsideration of that position may be warranted. *Id.* The Appellant requests this court, as trial counsel did below, to adopt the sound reasoning of the McNabb-Mallory rule and make it, under the facts of this case, applicable to the violation of CrR 3.2.1(d)(1).

- d. Under the totality of the circumstances, Mr. Scherf’s statements were involuntary and constituted a denial of due process under Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 9 and 22 of the Washington State Constitution.**

The Fifth Amendment to the United States Constitution states that

“[n]o person ... shall be compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V. Article 1, section 9 of the Washington State Constitution states that “[n]o person shall be compelled in any criminal case to give evidence against himself.” The rule against compulsory self-incrimination is “the mainstay of our adversary system of criminal justice, and ... one of the great landmarks in man's struggle to make himself civilized.” Michigan v. Tucker, 417 U.S. 433, 439, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974) (internal quotation marks and citations omitted).

The protection provided by the state provision is coextensive with that provided by the Fifth Amendment.

[T]he determination whether statements obtained during custodial interrogation are admissible against the accused is to be made upon an inquiry into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel.

State v. Unga, 165 Wn.2d 95, 100-101, 196 P.3d 645, 648 (2008); Fare v. Michael C., 442 U.S. 707, 724-25, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979); Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)). Because the Fifth Amendment protects a person from being compelled to give evidence against himself or herself, the question of whether admission of a confession constituted a violation of the Fifth

Amendment does not depend solely on whether the confession was voluntary; rather, “coercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary.’” Colorado v. Connelly, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). Thus, both the conduct of law enforcement officers in exerting pressure on the defendant to confess and the defendant’s ability to resist the pressure are important. United States v. Brave Heart, 397 F.3d 1035, 1040 (8th Cir. 2005); Dickerson v. United States, 530 U.S. 428, 434, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000) (quoting Schneckloth v. Bustamonte, 412 U.S. at 226,) (internal quotation marks omitted)(In implementing this bedrock constitutional value, the focus is on “whether [the] defendant’s will was overborne by the circumstances surrounding the giving of [the] confession,” an inquiry that “takes into consideration the totality of all the surrounding circumstances — both the characteristics of the accused and the details of the interrogation.”).

Washington State employs a similar inquiry into the voluntariness of statements. State v. Broadaway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997) (A trial court determines whether a statement is voluntary by inquiring whether, under the totality of the circumstances, the statement was coerced). Relevant circumstances include the condition of the defendant, the defendant's mental abilities, and the conduct of the police.

State v. Rupe, 101 Wn.2d 664, 678-79, 683 P.2d 571 (1984).

A review of the totality of the circumstances demonstrates that the statements were not voluntary.

i. Conditions of confinement.

An admission “is involuntary if coerced either by physical intimidation or psychological pressure.” United States v. Shi, 525 F.3d 709, 730 (9th Cir.2008) (quoting United States v. Haswood, 350 F.3d 1024, 1027 (9th Cir. 2003)). Courts look to see “whether a defendant’s will was overborne by the circumstances surrounding the giving of a confession.” Dickerson, 530 U.S. at 434 (internal quotation marks omitted); Mickey v. Ayers, 606 F.3d 1223, 1233 (9th Cir. 2010). As described more fully in Section C, 5 above, the physically and psychologically deplorable conditions of confinement at WSR and the Snohomish County Jail rendered Mr. Scherf’s videotaped statements involuntary.

In the early morning of January 30, 2011, Mr. Scherf was walked to the suicide cell in the rain and cold in a smock and was given nothing to dry himself with once in the cell. RP 996. He was placed under orders that he not be provided food, water, medicine, a mattress, or blankets and that water in his sink and toilet be shut off. RP 921. He wasn’t given food for a significant period of time. RP 996-997. He was not allowed any

phone calls, books or writing materials; nor was he allowed to shower or perform any other basic hygiene. RP 998. He was kept in the observation room under these oppressive conditions until he was transported to the Snohomish County Jail. RP 998.

He was transported to the Snohomish County Jail the following day, on February 1, 2011, where he was placed in the extremely confining “rubber” room there. RP 998. The cell was approximately 6 feet wide, with only a hole in the floor to serve as a toilet and with water available only sporadically. RP 996-997. Mr. Scherf received an inadequate amount of food, was very cold and was unable to brush his teeth or shower. RP 997. He requested, but was denied, his glasses, a Bible, and the chance to call his mother and wife. RP 997. Lights were blazing 24 hours a day and the guards woke him every 15 minutes by slamming a steel door outside the door to his cell. RP 998. He got no meaningful sleep. During the two days he was in this cell, he was not allowed out except at the direction of the detectives serving search warrants to photograph his naked body. He had nothing to distract himself from increasingly morbid thoughts. RP 998. He began hyperventilating and sweating, and complained of headaches from not having his glasses and the overwhelming effect of the lights being constantly on in his cell. RP 999; RP 1226-27.

On February 3, 2011, Mr. Scherf was moved from the small cell in booking to a segregation cell. Captain Harry Parker issued a directive via email that Mr. Scherf was to be in this cell with significant restrictions. RP 1105-1112; Pretrial, Exh. 74. After the move, he was allowed one hour per day out of his cell into a “day room” that was just outside his cell door. RP 1186. He was still denied writing and reading materials, however, and outside communication. His cell did not have hot water and he was not allowed to keep any hygiene items in his cell. He described feeling that he could not continue another minute, and ultimately tried to negotiate better conditions. RP 999. These conditions barely changed until Mr. Scherf agreed to confess in exchange for modest improvements, and agreed not to return requesting more.

At the pre-trial hearing, Dr. Stuart Grassian, the defense psychiatrist, explained that harsh conditions and the isolation of solitary confinement make people ill. RP 982. In his professional opinion, Mr. Scherf’s confession was not voluntary; the conditions were so severe that he felt he could not continue without some relief. RP 1002.

The conditions of confinement Mr. Scherf was forced to endure until he agreed to confess were oppressive, deplorable and intolerable. He was denied “the minimal civilized measure of life’s necessities.” Rhodes v. Chapman, 452 U.S. 337, 347, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981).

-- Lights blazing for 24 hours a day. RP 998. See e.g., Hoptowit v. Spellman, 753 F.2d 779, 783 (9th Cir. 1985), abrogated on other grounds Sadin v. O’Conner, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995), (“Adequate lighting is one of the fundamental attributes of ‘adequate shelter’ required by the Eighth Amendment.”).⁵⁸ Moreover, “[t]here is no legitimate penological justification for requiring [inmates] to suffer physical and psychological harm by living in constant illumination. This practice is unconstitutional.” Grenning v. Miller-Stout, 739 F.3d 1235, 1238-39 (9th Cir. 2014) quoting Keenan v. Hall, 83 F.3d 1083, 1091 (9th Cir. 1996), quoting LeMaire v. Maass, 745 F.Supp. 623, 636 (D.Or. 1990), vacated on other grounds, 12 F.3d 1444, 1458-59 (9th Cir. 1993).

--- Poor ventilation and no relief from the stench of his own waste. See e.g., Keenan v. Hall, 83 F.3d at 1090 quoting Hoptowit v. Spellman, 753 F.2d at 784 (Inadequate ventilation and air flow

⁵⁸ Although Mr. Scherf is raising the conditions of confinement as part of the totality of the circumstances surrounding the voluntariness of statements under the Fifth Amendment, cases addressing conditions of confinement under the “cruel and unusual punishment” clause of the Eighth Amendment illustrate the psychological and physical impact that such conditions have on an individual.

violates the Eighth Amendment if it “undermines the health of inmates and the sanitation of the penitentiary”).

--- Denial of personal hygiene. See e.g., Keenan, 83 F.3d at 1091 (Indigent inmates have the right to personal hygiene supplies such as toothbrushes and soap); Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982) (the Eighth Amendment guarantees sanitation); Toussaint v. Yockey, 597 F.Supp 1388, 1411 (D.C. Cal. 1984), overruled on other grounds, 801 F.2d 1080 (9th Cir. 1986) (the Eighth Amendment guarantees personal hygiene).

--- Inadequate food. See e.g., Hoptowit v. Ray, 682 F.2d at 1246 (Adequate food is a basic human need protected by the Eighth Amendment. While prison food need not be “tasty or aesthetically pleasing,” it must be “adequate to maintain health.”); Keenan v. Hall, 83 F.3d at 1091.

--- Denial of meaningful contact with anyone the outside. Strandberg v. City of Helena, 791 F.2d 744, 747 (9th Cir. 1986) (Prisoners have a First Amendment right to telephone access, subject to reasonable security limitations).

--- Denial of glasses, Bible and other reading material.

Mr. Scherf's taped statements were by-product coercive, unbearable and unconstitutional conditions of confinement and should have been suppressed.

ii. **Unreasonable delay – violation of CrR 3.2.1(d)(1).**

CrR 3.2.1(d)(1) requires that a defendant detained in jail be brought before superior court as soon as practicable; Mr. Scherf wasn't presented before a court for twenty-two days. The trial court concluded that even if CrR 3.2.1 was violated, suppression was not a remedy. CP 1248, ¶17. This was error.

The primary purposes behind CrR 3.2.1(d)(1) is, in part, to prevent unlawful detention and to eliminate the opportunity and incentive for application of improper police pressure. Bradford, 95 Wn. App. at 948-949. If an unnecessary delay in the preliminary appearance occurs, statements given by the accused are not automatically excluded; rather, the court considers the delay as one of the factors to be taken into consideration in determining whether the confession was involuntary. Hoffman, 64 Wn.2d at 450; State v. Winters, 39 Wn.2d 545, 549, 236 P.2d 1038 (1951); Romualdo P. Eclavea, Annotation, Admissibility of Confession or Other Statement made by Defendant as Affected by Delay in Arraignment, 28 A.L.R.4th 1121 (1984).

In Hoffman, the defendant confessed within hours of his arrest and before the final deadline articulated in the rule for presenting a defendant before a court (close of business on the next judicial day following arrest). Further, the court concluded the evidence established that the defendant (a) was not held incommunicado; (b) did not request an attorney; (c) was not required to give statements as a condition for being allowed to contact an attorney; and (d) was not promised any favors as an inducement to giving the statement. Hoffman, 64 Wn.2d at 451. As such, the delay factor, which was minimal in duration, did not result in the confession's being involuntary. Id. at 452.

The evidence here establishes a far different scenario. First, unlike in Hoffman, Mr. Scherf requested an attorney early and repeatedly. CP 1211, ¶6; CP 1216, ¶21; and CP 1217, ¶22. Although one was eventually appointed, the conditions prevented any meaningful attorney-client consultation. Counsel was told it would take two days for him to arrange to see Mr. Scherf and he was on vacation at a critical time; most importantly, counsel was unqualified to represent people potentially facing a death sentence. It was not until two weeks later that Karen Halverson, an attorney listed on SPRC Rule 2 list of capitally qualified counsel, was appointed. CP 898. The case changed dramatically at that point. Had Ms. Halverson or other qualified counsel been timely appointed, Mr. Scherf

would not have been talking with police detectives without counsel present or giving taped statements.

Second, Mr. Scherf was held incommunicado. He was not provided any reading or writing materials, prevented from receiving visitors and not allowed to make phone calls from the Snohomish County Jail to his family or his attorney until approximately February 14, 2011, two weeks after being detained. RP 1117-18.

Third, Mr. Scherf was required to give statements as a condition for being allowed to contact an attorney. As noted, Mr. Scherf requested access to an attorney on three separate occasions. The first two were ignored. It was not until his third request, and only after he pleaded that he would talk to the officers that he was permitted to talk to an attorney. RP 615.

Finally, Mr. Scherf was granted favors as an inducement to give a statement. RP 636-637. He was induced to give a statement in exchange for bed sheets, access to a phone, his glasses, and basic necessities, such as warm water, the ability to turn off the overhead light, bed linens and hygiene items. When those items were provided, Mr. Scherf gave taped statements. RP 659-674.

The unnecessary and unjustified twenty-two-day delay in the preliminary appearance, and the fact that Mr. Scherf repeatedly asked for

counsel; that he was held incommunicado; that he was required to give statements as a condition to being allowed to contact an attorney; and that he was induced to give statements in return for basic living necessities establish that the statements were not voluntarily obtained and should have been suppressed. Hoffman, 64 Wn.2d at 450.

iii. Interference with right to counsel.

The Sixth Amendment guarantee of assistance of counsel attaches when the State initiates adversarial proceedings against a defendant. Brewer v. Williams, 430 U.S. 387, 401, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977). Recognizing that the right to counsel is shaped by the need for the assistance of counsel, the courts have found that the right attaches at earlier, “critical” stages in the criminal justice process “where the results might well settle the accused’s fate and reduce the trial itself to a mere formality.” Maine v. Moulton, 474 U.S. 159, 170, 106 S.Ct 477, 484, 88 L.Ed.2d 481 (1985); United States v. Wade, 388 U.S. at 224 (quoted in United States v. Gouveia, 467 U.S. 180, 189, 104 S.Ct. 2292, 2298, 81 L.Ed.2d 146 (1984)). A “critical stage” in the right to counsel context is when “a defendant's rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected.” Heddrick, 166 Wn.2d at 909-910 (quoting Agtuca, 12 Wn. App. at 404).

Once the right has attached, a government agent may not interrogate a defendant and use incriminating statements the defendant made in the absence of or without waiver of counsel. Brewer, 430 U.S. at 401-404. Courts apply the “deliberately elicited” standard in determining whether a government agent has violated a defendant's Sixth Amendment right to assistance of counsel. Fellers v. United States, 540 U.S. 519, 524, 124 S.Ct. 1019, 157 L.Ed.2d 1016 (2004); In re Pers. Restraint of Benn, 134 Wn.2d 868, 911, 952 P.2d 116 (1998).⁵⁹ The deliberate elicitation standard does not require formal interrogation by an employee of the government, does not require that the information be secretly elicited, and does not turn on whether the defendant initiated the conversation in which the contested statements were made. Massiah, 377 U.S. at 206; United States v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d (1980); and Moulton, 474 U.S. at 176-177. The standard therefore protects against direct and indirect violations of the right to counsel.

The government has an affirmative obligation to use counsel as a medium and the government fails that obligation, not only by setting up an opportunity to confront an accused in the absence of counsel, but also by knowingly exploiting such an opportunity:

⁵⁹ The Sixth Amendment “deliberately elicited” standard has been expressly distinguished from the Fifth Amendment “custodial-interrogation” standard. Fellers, 540 U.S. at 524.

As noted above, this guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right. The determination whether particular action by state agents violates the accused's right to the assistance of counsel must be made in light of this obligation. Thus, the Sixth Amendment is not violated whenever by luck or happenstance the State obtains incriminating statements from the accused after the right to counsel has attached.

However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity.

Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent.

Moulton, 474 U.S. at 176 (internal citations omitted, paragraph breaks added).

Here, the state exploited the circumstances of Mr. Scherf's confinement to circumvent his right to counsel. His repeated requests for counsel were ignored. RP 499-500, 525; 619, 611-613. Only after he said he would give a statement if he could talk to an attorney, did the detective take steps to get him in contact with one. RP 615; CP 1217, ¶22. .

Mr. Schwarz, an attorney with the public defenders' office, was escorted to where Mr. Scherf was confined in the small holding cell; RP 853-854. Mr. Schwarz was forced to bend down and communicate with

through a little slot in the otherwise solid, closed door. RP 853. At one point, Mr. Scherf wanted to give his wife's phone number to his attorney, but the officer refused to give Mr. Schwarz a pen unless he disclosed the communication. RP 855. The encounter between Mr. Schwarz and Mr. Scherf was only about ten minutes. CP 1218, ¶26. Upon leaving, though, Mr. Schwarz told the detective that Mr. Scherf wanted an attorney to be present when he was transported and would not be answering any additional questions. CP 1218, ¶26. These requests were never honored.

On February 4, 2011, at the Snohomish County Jail, Mr. Scherf asked to speak with his attorney that same day. RP 634. Although he confirmed in person that he wanted to speak to the investigator for this attorney, the jail did nothing to facilitate his request. RP 635, 777. Instead, the jail staff called the detectives and arranged for Mr. Scherf to be transported to the courthouse to speak with the detectives. RP 635. Mr. Scherf told the detectives he did not want to talk and he returned to the Snohomish County Jail. RP 635. Mr. Scherf's attorney was never notified of his request or of this encounter.

During the period from January 30 to February 12, 2011, the detectives sought and obtained eight warrants to photograph or inspect Mr. Scherf's body. RP 701-704. As a result, the detectives used the warrants and unannounced intrusions to circumvent Mr. Scherf's right to counsel;

they had direct access and contact with him without counsel's knowledge or presence. Mr. Scherf's attorney was never told about the warrants or contacts with his client. RP 701-704.

This practice of seeking search warrants and direct contact with Mr. Scherf ceased once qualified counsel was appointed. But at that point, the detectives had already obtained the videotaped statements. Thus, the state obtained the statements in violation of Mr. Scherf's right to counsel under the Sixth Amendment. Moulton, 474 U.S. at 176.

iv. Improper confinement at Snohomish County Jail.

As previously noted, Mr. Scherf was detained at the Snohomish County Jail in violation of RCW 72.68.040 and .050. He was transferred from the DOC to the Snohomish County Jail without the specific requirements of RCW 72.68.040 and .050 being followed and without notice to counsel, as he had requested. He was transferred to "help police investigators." CP 1689. This demonstrates the depths the state went to isolate and coerce Mr. Scherf to the point of submission – just one more factor in the totality of the circumstances illustrating that the videotaped statements were involuntary.

b. Conclusion.

The prosecution introduced the Mr. Scherf's videotaped statements at trial and repeatedly referred to them. RP 6610-23; 6646-74; State Trial

Exhs. 110; 111; 114; 115; 118; 121; 124. The statements were a predominant theme throughout the prosecutor's closing remarks to the jury as well. See, e.g., RP 6898; 6899; 6909; 6936; 6937; 6943-44.

The trial court erred in denying the suppression of the videotaped statements which were obtained in violation of the federal and state constitutions, Criminal Rules 3.1 and 3.2.1, and RCW 72.68.040-.050. These statements were the results of coercive, unbearable and unconstitutional tactics and should have been suppressed.

9. THE TRIAL COURT ERRED IN NOT REDACTING FURTHER PORTIONS OF MR. SCHERF'S VIDEOTAPED STATEMENTS AND ADMITTING HIS KITE ASKING FOR THE DEATH PENALTY TO AND PROMISING TO PLEAD GUILTY. THIS EVIDENCE WAS UNFAIRLY PREJUDICIAL, IMPROPER COMMENT ON THE EXERCISE OF CONSTITUTIONAL RIGHTS AND IMPROPER COMMENT ON THE PENALTY THAT SHOULD BE IMPOSED

The trial court erred in denying the defense requests for redactions of the videotaped statements which were, at best, of little or no relevance; and, at worst, unfairly prejudicial and apt to confuse or mislead the jurors. Other statements included improper comments on guilt and the exercise of constitutional trial rights and improper testimony as to the appropriate penalty. The failure to redact the videotaped statements and the admission of Mr. Scherf's kite to the prosecutors requesting the death penalty denied Mr. Scherf a fair trial and sentencing.

a. Unfairly prejudicial and apt to confuse or mislead.

While ER 801(2)(i) places a statement by a party offered against him at trial outside the definition of hearsay, ER 801(2)(i) is not an independent basis of admissibility. Such statements are limited by ER 403, which excludes even relevant evidence "if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ." See Robert H. Aronson, The Law

of Evidence in Washington, 2d ed. 1995 at 403-3 (citing FRE Advisory Committee Note “The rules which follow [403] in the Article are concrete applications evolved for particular situations. However, they reflect the policies underlying the present rule, which is designed as a guide for the handling of situations for which no specific rules have been formulated.”)

Here, the court refused to redact portions of Mr. Scherf’s videotaped statements which were unfairly prejudicial and apt to confuse or mislead the jury and should have been excluded under ER 403. The court refused to redact Mr. Scherf’s statements answering questions about the A&D ointment and shoelaces found in a potted plant and the cartoon that he provided Officer Biendl. RP 1601-07, 1613-14, 1655. Early in the police investigation, these items were thought to be relevant to Officer Biendl’s death. They were, however, never linked to the crime and were satisfactorily explained by Mr. Scherf. He explained that he used the ointment and laces because of his running and hid them because he knew he would be searched when he was discovered at the chapel; these were not items he was allowed to have with him. He explained that the cartoon had been circulating around the prison for some time and Officer Biendl asked him for a copy of it.

The state never otherwise made these items part of the case against Mr. Scherf at trial. They were red herrings and their admission through

Mr. Scherf's videotaped statement was contrary to ER 403. Any relevance was vastly outweighed by the possibility of prejudice and misleading or confusing the jury about what inferences should or could be drawn from these items.

b. Opinion as to guilt and questions aimed at putting Mr. Scherf in a bad light.

Other statements by detectives – a reference to “the murder,” RP 1653, and questions of what Officer Biendl would hear if she could hear what Mr. Scherf had to say about her death then and whether he wasn't sorry she was dead, RP 1615-18, 1620, were not Mr. Scherf's statements. They were statements by the police which conveyed their view of his guilt and put him in a bad light. These were the officers' purposes in asking the questions.

The questions were “when-did-you-stop-beating-your-wife questions” and should have been excluded. See United States v. Felix-Jerez, 667 F.2d 1297, 1303 (9th Cir. 1982) (noting that such questions assume guilt).

It is well-settled law that opinions as to the guilt or innocence of the accused are improper. ER 608(a); State v. Sanders, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992); State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); State v. Sutherby, 144 Wn.2d 755, 759, 30 P.3d 1278 (2001);

State v. Jones, 117 Wn.2d 89, 91, 68 P.3d 1153 (2003); State v. O'Neal, 126 Wn. App. 395, 409, 109 P.3d 429 (2005), aff'd, 159 Wn.2d 500, 150 P.3d 1121 (2007). Such testimony invades the province of the jury and denies the accused his or her right to a jury trial. State v. Thach, 126 Wn. App. 297, 312, 106 P.3d 752 (2005); Sutherby, 144 Wn.2d at 617.

The court erred in not excluding these portions of the videotaped statements. They not only improperly conveyed the officers' opinion that Mr. Scherf was guilty of murdering Officer Biendl, they were calculated to force him to respond to questions which assumed he was callous and unremorseful. For this reason, as well, they should have been excluded under ER 403 as substantially more unfairly prejudicial than probative.

c. Statements inferring guilt from the exercise of state and federal constitutional trial rights.

Some of the statements which the trial court refused to redact improperly invited the jury to infer guilt and lack of mitigation from Mr. Scherf's exercise of his constitutional rights and commented on the sentence which should be imposed. These statements include Detective Walvantne's statement "I need you help with a speedy resolution," RP 1650; Mr. Scherf's statements that the Bible requires giving a life if you take a life, RP 1631, 1635; his reference to Officer Biendl's family who lost their loved one and should have the matter dealt with quickly, and the

“horror” for her family, RP 1646, 1658, 1666; and his statement that he killed an innocent person and had blood on his hands and if you take a life your life should be taken. RP 1669. His kite to the prosecutor asking that he be charged with aggravated murder and given the death penalty and saying that he would plead guilty at arraignment falls within this category as well. RP 687-689; 806, 5978; CrR 3.5 hearing exhibit 21; trial exhibit 123.

Because Mr. Scherf did not plead guilty, did not help the police or prosecutor reach a quick or early resolution to the case, did not plead guilty at arraignment to make things easier for Officer Biendl’s family, his comments that he should do these things and forfeit his life improperly asked the jury to convict and sentence him to death for exercise of his right to go to trial and put the state to its burden of proof on his guilt or innocence and the sufficiency of mitigation in his case.

Article 1, section 22 explicitly guarantees to persons accused of crimes the exercise of their right to a fair trial. These trial rights are guaranteed by the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution as well. Asking the jury to find a defendant guilty for exercise of these trial rights is constitutional error.

The rule against adverse inferences is a vital instrument for teaching that the question in a criminal case is not whether the defendant committed the acts of which he is

accused. The question is whether the Government has carried its burden to prove its allegations while respecting the defendant's individual rights.

Mitchell v. United States, 526 U.S. 314, 330, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999) (applying the rule against negative inference from exercise of constitutional rights to sentencing); Griffin v. California, 380 U.S. 609, 611, 85 S.Ct. 1229, 14 L.Ed.2d 106, reh'g denied, 381 U.S. 957, 85 S.Ct. 1797, 14 L.Ed.2d 730 (1965) (improper argument that guilt could be inferred from not taking the stand and testifying); State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006).

In Gregory, the court held that a comment is an improper comment on the exercise of a constitutional right when the prosecutor "manifestly intends the remark to be a comment" and the exercise of the right is the "focus of the argument." Gregory, 158 Wn.2d at 806-807. A comment is improper comment where it "naturally and necessarily" causes the jury to focus on the defendant's exercise of a constitutional right. State v. Ramirez, 49 Wn. App. 332, 336, 742 P.2d 726 (1987). Comments "naturally and necessarily" focus on the exercise of a constitutional right "when they either explicitly or implicitly direct the jury's attention to the defendant's acts which are the result" of the exercise of the right. Id.

An example of such comments include comments on the right of confrontation in State v. Jones, 71 Wn. App. 798, 805-806, 863 P.2d 85

(1993), where the prosecutor commented on the effect of the defendant's courtroom behavior on the victim. A constitutional harmless error test applies to such comments. State v. Contreras, 57 Wn. App. 471, 473, 788 P.2d 1114, rev. denied, 115 Wn.2d 1014, 797 P.2d 514 (1990). The error is not harmless unless the court is convinced beyond a reasonable doubt that the evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996) (improper comment on the right to remain silent).

Here, the statements indicating that Mr. Scherf believed he deserved a death sentence and his statements and that of Detective Walvatne that it should be done quickly to alleviate the suffering of Officer Biendl's family were manifestly intended to focus on Mr. Scherf's failure to honor those words and requests by exercising his trial rights. He was present in the courtroom, not having entered a guilty plea, because it was his constitutional right to do so. The statements "naturally and necessarily" focused on Mr. Scherf's exercise of his trial rights.

This was the purpose for introducing those portions of his videotaped statements and for introducing the kite Mr. Scherf had written to the prosecutor. The effect of the admission of this evidence was certainly not harmless beyond a reasonable doubt, especially when applied to the capital sentencing proceedings.

d. Improper comment on penalty.

The introduction of Mr. Scherf's statements and kite to the prosecutor asking for death was meant to tell the jurors what sentence should be imposed; it was meant to show that because the Bible says an "eye for an eye," because you have to give a life if you take a life and because of all of the suffering caused to the family of an innocent woman, the death penalty is the appropriate sentence.

Such opinions about the appropriateness of the death penalty violate the Eighth Amendment. State v. Pirtle, 127 Wn.2d at 672; State v. Gregory, 158 Wn.2d at 853.

The admission of the evidence of Detective Walvatne's opinion and the opinion of Mr. Scherf, at that time, about the need to resolve the case quickly and impose the death penalty for aggravated murder was constitutional error and very likely influenced the jury's verdict. Certainly the error is not harmless beyond a reasonable doubt and should lead to the reversal of Mr. Scherf's conviction and death sentence.

e. Statements about meeting with an attorney.

The trial court refused to redact Mr. Scherf's statements that he had met with an attorney, that he was not listening to advice of counsel, and that he did not want counsel present during the taping session. RP 1632-33, 1652-53, 1695. Given that the tape included Mr. Scherf's

express waiver of his right to counsel, this portion of the tape was unnecessary, misleading and unfairly prejudicial and should have been excluded. ER 403.

The statements about counsel were misleading because the detectives, other officers and DOC staff had done little or nothing to timely provide Mr. Scherf with counsel when he requested to speak to an attorney or have an attorney present. He was not provided with an attorney when he asked not to be interviewed without counsel in the shift lieutenant's office, RP 499-500, 525, or when the police first interviewed him, RP 611-613, 619, or when he asked to speak to an attorney in the Snohomish County Jail. RP 634, 777. The detective who first interviewed Mr. Scherf at WSR arranged for public defender Jason Schwarz to come talk to him through the cuff port in his cell, only after Mr. Scherf said he would speak to the detective if he did. RP 615-616. And Mr. Scherf's request through Mr. Schwarz that an attorney be present whenever he was moved, either within the prison or outside, was never honored. RP 855. During the entire time when the statements were being taped, police detectives were serving warrants on Mr. Scherf, and only one of those times did they give counsel notice. RP 701.

Most importantly, when Mr. Scherf was appointed counsel, he was not appointed the SPRC 2 qualified counsel to which Mr. Scherf was

entitled.⁶⁰ Had qualified counsel been appointed, Mr. Scherf would have had an advocate and would not have been giving interviews to the police at all.

Under these circumstances, it was false and misleading to leave the jury with the impression that Mr. Scherf's right to counsel had been respected, facilitated or preserved. And due process requires that the state correct false impressions even where the prosecutor does not solicit the false information and even where the false impression goes to the credibility of the witness or evidence rather than to the defendant's guilt or innocence. Napue v. Illinois, 360 U.S. 264, 268-269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). The state could not, consistent with due process, offer the testimony about consulting with counsel without clarifying the false impression the testimony created. The court should not have facilitated that constitutional violation.

Mr. Scherf's videotaped statements no doubt had a powerful impact on the jurors at both phases of trial, and the misleading statement

⁶⁰ Attorney Neil Friedman, who was appointed, did little to assist Mr. Scherf. He testified that he met with him once, RP 880-881, 906-907, and that he was told it would take two or three days advance notice to set up a meeting with Mr. Scherf. RP 885. Additionally, he had been out of town from February 8 through February 10. RP 885. In any event, during the period when the detectives were regularly meeting with Mr. Scherf to take pictures of him through the time of the video interviews, Mr. Friedman never received a call from the detectives or jail staff and would have gone immediately if requested to do so. RP 891.

that Mr. Scherf made the statements after effective representation no doubt added credibility to the statements which was misleading at best. It was error to not redact these statements about counsel.

f. Conclusion.

The errors in not redacting the portions of Mr. Scherf's videotaped statements and in admitting his kite to the prosecutors, when considered by type of statement and cumulatively, should require reversal of his convictions. They were unfairly prejudicial, apt to confuse or mislead the jurors, false and misleading, opinion testimony as to guilt, improper comment on the exercise of the constitutional rights and improper comment on what punishment should be imposed. It did not matter that these were Mr. Scherf's statements. Their introduction violated ER 403 and other established law and should require reversal of his conviction and death sentence.

10. THE TRIAL COURT IMPROPERLY RESTRICTED THE SCOPE OF VOIR DIRE, IMPROPERLY GRANTED STATE CHALLENGES FOR CAUSE AND IMPROPERLY DENIED DEFENSE CHALLENGES FOR CAUSE AND IMPROPERLY DENIED DEFENSE CHALLENGES IN VIOLATION OF MR. SCHERF'S RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE 1, SECTIONS 3, 14, AND 22

a. The unconstitutionally narrow scope of voir dire.

The trial court's decisions on the scope of voir dire for death

qualification were constitutionally inadequate to assure either a fair and impartial jury or a jury open to full consideration of mitigation. The trial court considered voir dire to be limited to things generally “that [go] to whether or not the juror is likely to follow his or her oath or instruction” or whether there was any “impediment” or “tendency” which would make the juror unable to follow his or her oath or instruction. RP 3732-33. To keep the focus on this purpose, the court prohibited defense counsel from asking questions which used words not defined in the instructions or that assumed the jurors would be making an individual moral judgment in deciding whether to impose the death penalty. RP 3013-14, 3067, 3070, 3072. The court ruled that hypothetical questions asking jurors to assume the defendant had been found guilty of aggravated murder with no reason for the crime could not provide a basis for a challenge for cause, RP 3274-75, and disapproved of questions asking the jurors’ views on what constituted mitigation. RP 3274-75, 3714, 4289. A juror’s view that certain things were not mitigation would not, in the trial court’s opinion disqualify the prospective juror. RP 3714. The court’s limitation, essentially to whether a juror said he or she could follow the oath and the instructions, was inadequate to assure that the juror’s views were revealed sufficiently to make rulings on challenges for cause consistent with constitutional requirements.

The scope of voir dire in capital trial is circumscribed by the right to have a fair and impartial jury make the death penalty decision and the right to have the jury consider relevant mitigating aspects of the character and record of each defendant. Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution; Taylor v. Louisiana, 419 U.S. 522, 526, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); Gregory, 158 Wn.2d at 814; Lockett v. Ohio, supra. Every person facing a capital charge has the right to be tried before jurors who may have objections to or conscientious scruples against the death penalty as long as the jurors' views do not "prevent or substantially impair the performance" of their duties as jurors. Wainwright v. Witt, 469 U.S. at 424. Additionally, defense counsel must be permitted to examine jurors in voir dire to determine not only whether they will say they can follow the law, but whether they will fully consider evidence offered in mitigation. Morgan v. Illinois, 504 U.S. at 722-723. The constitution requires jurors who will consider mitigation as well jurors who may have scruples against the death penalty. Id.

One of the hallmarks of post-Furman capital jurisprudence is the requirement of individualized sentencing. In Woodson v. North Carolina, supra, the United States Supreme Court held that mandatory death penalty statutes violate the Eighth Amendment requirement of individualized consideration of the character and record of each defendant in reaching the

decision of life or death. Woodson, 428 U.S. at 303-304. Similarly, in Lockett v. Ohio, supra, the Court held that, to be constitutional, death penalty statutes must provide for individualized consideration of mitigating factors. The court in Lockett concluded that the sentencing jury must retain unbridled discretion to afford mercy and consider as mitigation any relevant basis for a sentence of less than death:

[A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the [unacceptable] risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.

Lockett, 438 U.S. at 605.

The other hallmark noted above is the requirement that potential jurors may not be excused solely because of scruples against the death penalty. In Witherspoon v. Illinois, 391 U.S. 570, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), the Court held that no one could be constitutionally put to death where members of the venire were excluded for cause because they had general objections to the death penalty and conscientious or religious scruples against it. In Wainwright v. Witt, 469 U.S. at 424, the Court determined that "the proper standard for determining when a prospective juror may be excluded because of his or her views on capital punishment. . . is whether the juror's view would 'prevent or substantially

impair the performance of his duties as a juror in accordance with his instructions and his oath.” (quoting Adams v. Texas, 469 U.S. 38, 45, 100 S.Ct. 2251, 65 L.Ed.2d 581 (1980)). See also Uttecht v. Brown, 551 U.S. 1, 22, 127 S.Ct. 2218, 167 L.Ed.2d 1014 (2007) (“Capital defendants have a right to be sentenced by a fair jury. The State may not infringe on this right by eliminating from the venire those whose scruples against the death penalty would not substantially impair the performance of their duties”). Even those who “firmly believe that the death penalty is unjust” may be jurors in a capital case if they can set aside those beliefs and follow the law. Lockhart v. McCree, 476 U.S. 162, 176, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986).

In Morgan, 504 U.S. at 722-723, the Court tied these two threads together and held that “general fairness” and “follow the law” type questions are insufficient to determine who will or will not automatically impose the death penalty. A prospective juror’s general views on the death penalty “play an inevitable role” in that juror’s decision. Id. at 519. The Court concluded that it is essential for counsel to inquire about views on mitigation as well since any juror who felt mitigating evidence is irrelevant should be disqualified as a juror. Morgan, 504 U.S. at 736-738.

As the Supreme Court held in Witherspoon:

A man who opposes the death penalty, no less than one

who favors it, can make the discretionary judgment entrusted to him by the state and can obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it.

Witherspoon, 391 U.S. at 519. It is impermissible to “cull all who harbor doubts about the wisdom of capital punishment or all who would be reluctant to pronounce the extreme penalty” from the jury panel. Id. at 519-520. Indeed, excusing a juror for cause who is not “irrevocably committed to vote against the death penalty” constitutes reversible error not subject to harmless error analysis. Gray v. Mississippi, 481 U.S. 648, 668, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987). To excuse a juror for cause based on his or her doubts about the death penalty, the trial court must be “left with [a] definite impression” of the juror’s inability to apply the law impartially. Yates, 161 Wn.2d at 742 (quoting Witt, at 434-426).

Here, the trial court’s belief that the only relevant consideration for challenges for cause during the death qualification process was whether the juror would say he or she could follow the law and oath was unconstitutionally limited. A prospective juror’s views on the death penalty, whether or not tied to a particular instruction, were essential to determine his or her ability to be fair. The specifics of what a prospective juror would or would not consider as mitigation were equally, if not more, essential. As the limited voir dire in this case shows, a juror who says he

will consider mitigation may on further questioning indicate that he does not consider a bad childhood, remorse, good behavior in prison or mercy itself as mitigation. RP 3504, 3537-38, 3542. A juror on further examination may identify things as mitigation which are actually facts that negate guilt. RP 3538. The voir dire of Juror 10 is a perfect example. Juror 10 said that he would consider all of the facts presented; but, when asked what facts would help him determine that life without parole was an adequate punishment, Juror 10 enumerated the defendant's background⁶¹ and then facts going to guilt or innocence such as the defendant's mental state and whether there was an act of aggression. RP 3144. And when Juror 10 was told that there was no excuse or justification for the crime, he concluded that life without parole would be too lenient of a sentence. RP 3144. Based on the prosecutor's argument that Juror 10 did not "foreclose" the possibility of considering evidence, the court found that he was not subject to disqualification under Witt. RP 3150, 3155.

In Mr. Scherf's case, the trial court's narrow reading of Witt was particularly prejudicial. He was entitled to jurors who would consider mitigation broadly and consider mercy itself as mitigation. He was entitled to jurors who would exercise independent moral judgment on his

⁶¹ Juror 10 had already said a difficult childhood would be mitigation, but not an "overriding" fact. RP 2142.

behalf and presume leniency even though he was already serving a sentence of life without parole.

Because the voir dire and the court's view of who could serve was too limited, the defense was unable to uncover relevant views of prospective jurors and Mr. Scherf did not receive a trial before a fair and impartial jury willing to fully consider mitigation.

b. Improper denial of challenges for cause.

The trial court's unconstitutionally narrow view of the scope of challenges for cause during voir dire for the death qualification process resulted in the improper denial of six challenges for cause. As a result, the defense had to use half of its peremptory challenges to excuse the jurors who should have been excused for cause. After using all of its peremptory challenges, the defense had to accept jurors who would not likely be able to fairly consider a sentence of less than death or fully consider mitigation.

Specifically, the trial court improperly denied challenges for cause for Jurors 10, 11, 16, 32, 53 and 80. Juror 10, even though he said he could consider the facts presented to him, was clear that if there were no excuse or provocation for the crime, life without parole would be too lenient. RP 3144. Juror 10 was also clear that if the defendant were already serving a sentence of life without parole, then death would be the only appropriate option. RP 3142. Similarly, Juror 11 agreed that if the

defendant were already serving life without, that another life without parole sentence would not be an option. RP 3189. Although Juror 11 agreed, after being read an instruction about keeping an open mind, that he would consider mitigation, he agreed that it was “fair to say” that he would not give meaningful consideration to anything less than death if the defendant were already serving life without and there was no excuse for the murder. RP 3187-89, 3197-98. Juror 11 candidly indicated that there was a “possibility” that he could not be a fair juror. RP 3183, 3185. He indicated that he had difficulty going into the case with an open mind and already had “a certain level of animosity” toward Mr. Scherf. RP 3173, 3180.

Juror 16 said she would follow the court’s instructions and consider mitigation, but that if the murder were unprovoked and the defendant already serving life without parole, she would vote to impose the death penalty. RP 3269, 3271-72. The trial court found, however, that a hypothetical question – that the jury had found the defendant guilty of premeditated murder with no reason for the crime and no mental illness or excuse – “untethered to instructions” could not form the basis for a challenge for cause. RP 3274-75. In other words, the court determined that it was sufficient that Juror 16 said she would follow instructions, even though she admitted that she would not do so if there were no excuse for

the crime and the defendant was already serving life without parole. RP 3269, 3271-72.

Juror 32 indicated that if the crime were premeditated and there were no extenuating circumstances, it would warrant the death penalty; that he would not consider a bad childhood as mitigation; and that he would not show mercy. RP 3533-38. But, because the juror had not said he could not follow the law, the trial court denied the defense challenge for cause. RP 3546.

Juror 53 said that his sister-in-law worked at the prison and said repeatedly that, if the crime were premeditated and the defendant not drunk or such, death would be the only appropriate sentence – even if he had been a model prisoner or had exhibited good behavior in prison up until the crime. RP 3904-05, 3910-23, 3915-16. After saying he could follow the court’s instructions and follow the law, Juror 53 reiterated that if the crime were premeditated the death penalty would probably be the appropriate sentence. RP 3925. In denying the challenge for cause, the court said:

[I]n the end, he really didn’t say that he would vote for the death penalty without regard to what instructions I gave. He answered, perhaps perfectly honestly – I don’t know, I assume so – that he would think the death penalty is probably the most appropriate penalty. And if he acted on that feeling, then I think he should be excused; but he didn’t say he would act on that feeling, and he didn’t say he

had any problems with the court's instructions, and I don't know the he doesn't understand the instructions.

RP 3928. Again, the court relied entirely on whether the juror said he would follow instructions.

Juror 80 indicated that she knew Mr. Scherf was already serving life without parole and that if there were no mitigation to explain his actions or provide a doubt, then he was a threat to the community and corrections officers and could not be rehabilitated. RP 4484-86, 4512. She did not believe that confessing or showing remorse was mitigation. RP 4488-89. She indicated, contrary to the court's instructions and the law, that unless mitigation changed her views, she would be for the death penalty. RP 4493. She indicated that she would be more harsh in judging mitigation than most and lean towards the death penalty, more of a 6 or 7 on a scale of 10 at the start of sentencing. RP 4494-95. She agreed on further questioning that she could presume leniency. RP 4502. Defense counsel argued that it was insufficient rehabilitation to simply ask Juror 80 if she could follow the law and that a prospective juror only had to be substantially impaired and did not have to categorically say he or she could not follow the law. RP 4508, 4512. The trial court disagreed and ruled that "the fact that her personal beliefs differ from the law makes no difference, provided she can set aside her personal beliefs; and she had

indicated she could.” RP 4511.

Thus, it is clear that the trial court viewed a statement by a prospective juror that he or she would follow either the law or the instruction as a magic talisman allowing them to remain as potential jurors. They were allowed to remain even if they clearly showed that they would not consider what is commonly defined as mitigation, even though they thought mitigation was an excuse or justification for the crime, even though they indicated they would not consider mercy as mitigation, and even though they said repeatedly that they would have to be convinced that death was not the right sentence. None of these six jurors showed any understanding of mitigation or any willingness to consider it when it was specifically identified.

The denial of challenges for cause violated the principles of Woodson, Lockett, and Morgan v. Illinois. And as a result, the defense had to use half of its peremptory challenges to excuse those who should have been excused for cause. RP 5952- 55, 5958. This left many on the jury who might well have been excused with a peremptory challenge. For example, Juror 40’s husband was a police officer who had actually been part of the crisis team that went to Monroe to support the corrections officers there, RP 3750, and she indicated that mental illness was about the only thing she could think of that would justify a sentence of less than

death. RP 3756-56. Jurors 21, 42, and 44 all expressed opinions that if the crime were premeditated and there were no excuses or mental illness, the sentence should be death. RP 3354-55, 3778, 3793, 3795.

Juror 14 who stated that “if there’s someone out there who has not learned from their experiences and commits the same crime over and over, I mean, I feel like there’s no choice” but the death penalty. RP 3238, 3234. Jurors 5, 57 and 68 expressed similar opinions and indicated concern that society would not be safe if the defendant could not be reformed. RP 3103, 4025, 4030, 5505, 5513, 5519. Juror 17 thought it was unfair that one person voting for life would save a person from the death penalty. RP 3303. Juror 60 indicated that a “by taking them from this life and putting them into the next life, that they see mercy.” RP 3501. Only Juror 69, of all of the jurors who actually deliberated stated that he was more against the death penalty than for it. RP 4184-85.

The trial court’s denial of challenges for cause for six jurors who should have been excused because their views on the death penalty prevented them from participating as fair and unbiased jurors and from fully considering mitigation as the law and their instructions required. Because the defense had to use half of its challenges to exclude these jurors it was unable to use these challenges to excuse other on the panel who were also prone to impose the death penalty and give less than full

consideration to mitigation. This denied Mr. Scherf his state and federal constitutional rights to trial and capital sentencing before a fair and impartial jury. Mr. Scherf's death sentence should be reversed.

c. Improper granting of challenges for cause.

This trial court applied the wrong standard of review in improperly granting the state's challenges for cause. In doing so, the court intervened in the voir dire of Juror 37, as it had not done in any other instance, and effectively prodded this juror into saying that she could not answer the penalty-phase question.

The trial court granted the state's challenge of Juror 37, over defense objection, RP 3645, even though Juror 37 repeatedly assured the court that she could impose a death sentence and follow the law and that her concern was how she would feel in the aftermath of voting for a death sentence. Juror 37 was intelligent and clearly understood that she was affirming her ability to deliberate and follow the law and instructions in deciding whether to impose the death penalty. RP 3610-14. She described herself as being "in the middle" on the death penalty although reading about innocent people who have been put to death made her a "little beyond straight-up neutral." RP 3610-11. She stated she could do as instructed even if that would not be a comfortable decision:

You know, you don't like to be in charge of life and death decisions. I think that's how I feel. But I know that I could do what I need to do. And I would – you know, again, I can't say I'm against it or for it, but of course I think I would be most comfortable if somebody had life in prison.

RP 3615 (emphasis added). When questioned by the prosecutor about whether this meant she would prejudge the case based on her being more comfortable with life, Juror 37 said unequivocally, "I would feel that I would make the decision based on the evidence." RP 3616. When told that one person could vote for a life sentence, Juror 37 did hesitate and then agreed, "maybe not," that this might not be the right case for her. RP 3617. But when asked if she could follow the law and answer the statutory question, she again assured the court and counsel "Yes, I think I could answer that." RP 3618. She indicated that she would be trying to follow the law rather than going out of bounds on her own views. RP 3620. Although Juror 37 reiterated that she was more comfortable with a life sentence, RP 3626-27, she concluded once again, for the fifth time, that she could consider whether the prosecutor had actually proven that there were not sufficient mitigating circumstances. RP 3628. The court found that Juror 37 was "more thoughtful than most" and found that she "did not say that she could not do it, although she was clear that she – I think she was reasonably clear she didn't really want to do it." RP 3630. At that point the court concluded that there was no basis for excusing. RP

3632. After further questioning by the state, Juror 37 expressly declined to say she couldn't vote for the death penalty: "I probably would find that to bother my conscience, and so – I know you want me to say no, I couldn't do it. . . . Maybe I could do it, but I kind of feel that I wouldn't want to be in the circumstances to have to do it." RP 3636. After indicating that she had "come to feeling pretty much like I don't want to live with the fact that I said 'yes' to the death penalty," she then reaffirmed that she could follow the law and fairly consider the evidence and answer the question, and that it was not following the law that was the issue; it was that she would have a hard time dealing with the consequences. RP 3639-40.

MR. SCOTT: So it is not the process of following the law and being able to answer the question; it's the possibility that you would have a hard time dealing with the consequence of answering that question?

JUROR 37: I think that's the truth. Yeah. I think I would.

MR. SCOTT: But regardless ultimately of how uncomfortable those consequences might be, you do believe you would fairly be able to consider the evidence and answer that question.

JUROR 37: Yes, I do.

RP 3639-40.

Even after this clarification and even though Juror 37 never said she could or would not follow the law, the court continued to question

Juror 37 until she said that she would rather “not do it”; and finally, after the court continued, agreed that she could not do it [decide the statutory question at the penalty phase]. RP 3642. The court had not intervened to question any other prospective juror who had been challenged for cause. RP 3155, 3197-3200, 3282-83, 3546-47, 3925-29, 4505-11, 4574-78. In fact, when the court felt that a further question was appropriate, in an earlier instance, the court asked the attorneys if they would prefer an attorney or the court to ask the question, and defense counsel clearly elected to have an attorney ask and did the further questioning himself. RP 3197-98. Moreover, defense counsel had just finished asking very clear questions and received unambiguously clear answers that Juror 37 could sit as a juror and follow the law and her oath. There was nothing that needed clarifying further.

The court erred in excusing Juror 37 because she clearly understood her obligation and clearly and repeatedly said she could follow the law and impose the death penalty even though she would not be comfortable doing so. The court erred in continuing to question Juror 37 after she clarified her concern and affirmed it would not keep her from doing her duty as a juror. RP 3639-40. By continuing to question her, the court essentially communicated to Juror 37 that the court was unwilling to accept her answers that she could fairly be a juror and she capitulated; she

had affirmed she could deliberate and reach a verdict at the penalty phase many times and yet the court would not accept these assurances. In this way, the court removed a juror who could have fairly deliberated in spite of concern about imposing the death penalty.

The trial court also erred in excusing Juror 75 over defense objection. RP 4577. Juror 75 said that he opposes the death penalty and initially said he could not impose the death penalty regardless of instructions. RP 4572-73. Juror 75, however, concluded he supposed that he would have to consider and follow the law even if he would have a really hard time doing so. RP 4574-75. Because Juror 75 agreed that he would have to follow the law, however hard it might be and however much he disagreed with it, he should not have been excused for cause. That was the standard the court applied to defense challenges. See e.g. RP 3925.

As a result of the improper granting of the state's for-cause challenges, only one of the jurors who actually sat and deliberated, Juror 69, leaned more against the death penalty than for it. RP 4184-85. All but one other seated juror said at one point in their individual voir dire that if the defendant was guilty of premeditated murder and either was already serving life without parole or had no legal excuse or justification, he

deserved the death penalty. RP 3103, 3303, 3756-57, 3234, 3354-55, 3778, 3793, 4030, 5513, 5519.

Under Gray, 481 U.S. at 668, the wrongful excusing of jurors 37 or 75, who could have sat and fairly deliberated on the jury, requires reversal of Mr. Scherf's death sentence.

d. Conclusion.

Mr. Scherf's death sentence should be reversed because the trial court's limitation on the scope of voir dire and the permissible bases for challenges for cause denied him his state and federal constitutional rights to a fair and impartial jury with jurors who were willing to fully consider all mitigation and to consider mercy itself as mitigation. The court denied the defense challenges for cause to jurors who agreed that they would follow the law but were not willing to say that they would seriously consider mitigation that did not lessen guilt. The court granted the state's challenges for cause to jurors who were not substantially impaired in their ability to follow the law and their oaths as jurors in spite of concerns about the death penalty. Moreover, the court went out of its way to participate in disqualifying one of the jurors who was wrongfully excused.

Because his rights under Witt and Morgan v. Illinois were violated, Mr. Scherf should be entitled to a penalty-phase trial before a new and impartial jury.

11. THE PROSECUTOR'S MISCONDUCT IN INGRATIATING HIMSELF WITH THE JURORS, IN DESCRIBING OFFICER BIENDL AS LYING "UNDER THE CROSS" IN OPENING ARGUMENT, IN MISSTATING THE LAW ON PREMEDITATION IN CLOSING ARGUMENT AND IN ARGUING TO THE JURORS IN THE PENALTY PHASE CLOSING ARGUMENT THAT IT WAS THEIR JOB TO IMPOSE THE DEATH PENALTY AND THAT THEY HAD REPEATEDLY PROMISED UNDER OATH TO DO SO IF THE LAW AND FACTS SUPPORTED IT DEPRIVED MR. SCHERF OF A FAIR TRIAL

The prosecutor committed misconduct during trial: (a) in ingratiating himself with jurors during the individual voir dire by smiling and thanking them as they walked by him, and by continuing to engage in this conduct after being instructed not to do so by the trial court; (2) by describing the discovery of Officer Biendl as a Christ or Christian religious figure, "up on the stage under the cross"; (3) by misstating the law on premeditation, as requiring only a moment in time after forming the intent to kill; (4) by arguing to the jurors in the closing argument at the guilt and penalty phases of trial that it was their "job" to convict and impose a death sentence; and (5) by arguing to the jury that they had to return a death verdict because they had repeatedly promised under oath to do so if the facts and law supported it.

When a prosecutor fails to act in the interest of justice, he or she commits misconduct. This denies the accused a fair trial. State v.

Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935) (the remarks of the prosecutor are reversible error if they impermissibly prejudice the defendant). Where there is a "substantial likelihood" that a prosecutor's misconduct affected the jury's verdict, the defendant is deprived of the fair trial he is guaranteed by the Fourteenth Amendment. See State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Moreover, multiple incidents of a prosecutor's misconduct that, when combined, materially affect the verdict, deny the accused a fair trial and require a new trial. State v. Case, 49 Wn.2d 66, 73-74, 298 P.2d 500 (1956); State v. Henderson, 100 Wn. App. 794, 805, 998 P.2d 907 (2000).

a. The prosecutor ingratiating himself with jurors.

The prosecutor took advantage of the seating arrangements in the courtroom to smile and personally thank the prospective jurors after the completion of their individual voir dire. RP 3307. The prosecutor continued to do this after being admonished by the court; and, although he said he tried to do this only to jurors who had been excused, the record shows that this was not true and he very likely extended this treatment to all but one of the members of the actual jury. RP 3305, 3307, 5951-61.

When defense counsel first objected to the prosecutor's conduct, she

noted that prosecutor Paul Stern smiled at and thanked each juror and that she had no opportunity to do this because of the seating arrangement in the courtroom. RP 3307. Mr. Stern did not deny that he had done this at that time. The objection came after the voir dire of Juror 17, who was not excused and who actually sat on the jury. RP 3305, 5951-61. Defense counsel objected to Mr. Stern's smiling, making eye contact and saying goodbye to the jurors again after 95 jurors had been questioned. RP 4455. This occurred after the voir dire of Juror 83, who was not excused. RP 4455. Thus, it is likely that all but one of the jurors who actually sat on the jury received this treatment from the prosecutor. RP 851-5961. The court noted that this was unfair. RP 4455.

Even after this, defense counsel noted that Paul Stern said to a prospective juror when she said she could impose the death penalty, "Thank you and I hope you will." RP 4996. He acknowledged that it "came out wrong," and the court admonished him once again. RP 4997.

In Mattox v. United States, 146 U.S. 140, 150, 13 S.Ct. 50, 36 L.Ed. 917 (1892), the Supreme Court held that "[p]rivate communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." Caliendo v. Warden of California Men's Colony, 365 F.3d 691, 695 (9th Cir. 2004). While the

Mattox presumption is not conclusive, the burden is on the government to establish harmlessness. Remmer v. United States, 347 U.S. 227, 228, 74 S.Ct. 450, 98 L.Ed. 54 (1954). The Mattox presumption protects constitutional rights under the Sixth Amendment to a fair trial and confrontation of witnesses. Caliendo, 365 F.3d at 696.

Since Mattox and Remmer, the Ninth Circuit and most other circuits have followed a “bright-line rule” that “any unauthorized communication between a juror and witness or interested party is presumptively prejudicial and can only be overcome by a strong showing.” Caliendo, 365 F.3d at 696. Caliendo cited: United States v. Williams, 822 F.2d 1174, 1188 (D.C.Cir. 1987), superseded on other grounds, United States v. Caballero, 936 F.2d 1292, 1298-99 (D.C.Cir. 1991) (Mattox presumption extends to banter not directed at influencing verdict); United States v. Betner, 489 F.2d 116, 117-119 (5th Cir. 1974) (a new trial was ordered because the prosecutor conversed with the jury panel during recess and the trial court failed to conduct an adequate hearing); Agnew v. Leibach, 250 F.3d 1123, 1133 (7th Cir. 2001), superseded by AEDPA (error where extrinsic contact gave the jury an opportunity to feel confident about the witness’s testimony that was not subject to cross-examination); United States v. Harry Barfield Co., 359 F.2d 120, 124 (5th Cir. 1966) (“Our system of trial by jury presupposes

that the jurors be accorded a virtual vacuum wherein they are exposed only to those matters which the presiding judge deems proper for their consideration. This protection and safeguard must remain inviolate if trial by jury is to remain a viable aspect of our system of jurisprudence”).

Even recognizing that accidental contact is inevitable, Gonzales v. Beto, 408 U.S. 1052, 1058, 92 S.Ct. 1503, 31 L.Ed.2d 787 (1972), if the contact appears de minimus, the defendant can still trigger the presumption by showing that the contact could have influenced the jury. Caliendo, 365 F.3d at 696-967 (citing United States v. Day, 830 F.2d 1099, 1103-1104 (10th Cir. 1987)). “The Mattox rule applies when an unauthorized communication with a juror crosses a low threshold to create the potential for prejudice. A communication is possibly prejudicial, not de minimis, if it raises a risk of influencing the verdict. Prejudice is presumed under these circumstances, and . . . a new trial must be granted unless the prosecution shows that there is no reasonable possibility that the communication will influence the verdict. Caliendo, at 697 (citing United States v. O’Brien, 972 F.2d 12, 14 (1st Cir. 1992)).

Here, the prosecutor took advantage of the fact that each juror had to pass by him after his or her individual voir dire; he ingratiated himself by deliberately making eye contact and smiling and personally thanking the prospective jurors. This was not inadvertent or accidental contact and it

continued even after the judge and defense counsel ask that it not. It was not de minimus and presumptively prejudicial.⁶² It allowed the prosecutor to make contact in a personal way that was inappropriate and not available to defense counsel; it was intended to forge a bond between the state and the jurors. There is no strong showing to overcome the presumption, particularly in light of the prosecutor's later argument to the jurors in closing penalty phase argument, harkening back to individual voir dire, that they were sitting on the jury because they had "repeatedly, under oath," said that "if the facts were there, if the law was there, that, Yes, you would vote for the death penalty. You have told us repeatedly that if the facts were warranted, if the law supported it, this is something you would do." RP 7134.

b. Telling jurors they swore, under oath, to impose the death penalty and it was their job to return a guilty verdict and a death sentence.

In opening statement at trial, the prosecutor read Mr. Scherf's statement asking the state to charge him with aggravated first degree murder with the death penalty and saying that he would plead guilty at arraignment. RP 6006. The prosecutor then concluded, "His words. Our evidence. Your job." RP 6006 (emphasis added). In closing argument in

⁶² Even if deemed de minimus, the prosecutor's direct and specific contact with all but one of the jurors who sat on the jury clearly raises the risk of influencing them. Caliendo, at 697.

the penalty phase the prosecutor thanked the jury for its guilty verdict and then told them “But you have one more job to do.” RP 7134 (emphasis added). At the end of closing the prosecutor quoted Mr. Scherf’s statement “if you take a life, you give a life.” RP 7143. Then concluded, “You have one more job to do. You know what we are asking you to do: To write ‘yes’ on that verdict form.” RP 7143 (emphasis added).

This was all error; it was not the jury’s job to convict.

The prosecutor also told the jurors in the penalty-phase closing that they were there because they “repeatedly, under oath,” said that “if the facts were there, if the law was there, that, Yes, you would vote for the death penalty. You have told us repeatedly that if the facts were warranted, if the law supported it, this is something you would do.” RP 7134. This was error; the jurors never swore under oath to return a death verdict nor does the law require a death verdict to be imposed any time it could be in a capital case.

It is not the jury’s job to decide the facts, solve the crime, determine the truth or return a guilty verdict; it is the jury’s job to determine whether the state has proved its allegations beyond a reasonable doubt. State v. Anderson, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009); United States v. Young, 420 U.S. 1, 9, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) (a prosecutor’s exhortation to the jury to “do its job” “has no place in the administration

of justice”); United States v. Mandelbaum, 803 F.2d 42, 43-44 (1st Cir. 1986); Williams v. State, 789 P.2d 365 (Alaska Ct.App. 1990). Where the prosecutor tells the jury it is their job to convict, this robs the defendant of his or her state and federal constitutional rights to the presumption of innocence. State v. Evans, 163 Wn. App. 635, 260 P.3d 934 (2011). “Warnings to a jury about not doing its job [are] considered among the most egregious forms of prosecutorial misconduct.” State v. Acker, 265 N.J. Super. 351, 627 A.2d 170, 173 (1993).

Absent qualifying language clearly setting the argument in the context of the duty to find every element of the crime beyond a reasonable doubt, telling the jury its “job” is to convict is misconduct by the prosecutor. United States v. Sanchez, 176 F.3d 1214, 1224-1225 (9th Cir. 1998); Lafond v. State, 89 P.3d 324, 332 (Wyo. 2004).

Here, the prosecutor told the jury its job was to convict without any content referring to proof of every element of the crime charged. This was misconduct. Given that this was an argument which has clearly been deemed misconduct in published decisions and controlling authority of the United States Supreme Court, the prosecutor’s continuing to engage in it was flagrant and ill-intentioned and can be raised for the first time on appeal. State v. Charlton, 90 Wn.2d 657, 663-664, 585 P.2d 142 (1978); State v. Fleming, 83 Wn. App. 209, 213-214, 921 P.2d 1076 (1996). There is

a substantial likelihood that it could have affected the jury's verdicts. Similarly it is misconduct for the prosecutor to tell jurors that they would be violating their oath if they disagreed with the state's theory. State v. Coleman, 74 Wn. App. 835, 876 P.2d 458 (1994); State v. Pierce, 169 Wn. App. at 557. Here, the prosecutor's misconduct in telling the jury it was under oath to convict was particularly egregious because of the additional untruth that they had repeatedly sworn to convict if the facts and law would support a conviction.

In fact, a jury in a capital case never has to impose a death sentence. Under the Eighth and Fourteenth Amendments, a jury in a capital case must be "permitted to give meaningful effect or a 'reasoned moral response' to a defendant's mitigating evidence." Abdul-Kabir v. Quarterman, 550 U.S. 233, 244, 127 S.Ct. 1654, 167 L.Ed.2d 585 (2007). Such mitigating evidence can include any evidence that "the sentencer could reasonably find . . . warrants a sentence of less than death." McKoy v. North Carolina, 494 U.S. 433, 441, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). The right to have a jury give a "reasoned moral response" to mitigation can be abrogated by prosecutorial misconduct. Abdul-Kabir, 550 U.S. at 259 n. 21.

Prosecutors in some cases . . . have taken pains to convince jurors that the law compels them to disregard the force of evidence offered in mitigation.

Id. at 261.

The prosecutor's arguments to the jury that it was their job to convict, that they had sworn to do so "repeatedly" so that their oath required them to impose the death penalty were, particularly taken together, flagrant and ill-intentioned and denied Mr. Scherf a fair trial.

c. Statement that Officer Biendl was found lying under the cross.

In his opening statement the prosecutor said "And up on the stage, under the cross, they find Jayme Biendl, on her back, blood coming out of her mouth, dead." RP 6004 (emphasis added).

This was clearly a religious reference likening Officer Biendl to a Christ figure. It improperly interjected Christian religion into the case and was offered to stir the passion and prejudices of the jury. This violated the prosecutor's obligation to seek verdicts free from appeals to passion and prejudice. State v. Belgarde, 110 Wn.2d at 507; State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993); State v. Charlton, 90 Wn.2d at 664-665.

The state successfully persuaded the court, over defense objection, to exclude argument by defense counsel based on the Bible at the penalty phase – forbidding the defense even from pointing out the Bible says other things than "an eye for an eye," the Biblical phrase used by Mr. Scherf and

quoted by the state. RP 6971-74. Having taken that position, the state indicated its view that religious arguments to the jury were inappropriate. Thus, it is clear that the use of the Christ reference was deliberate, intended to stir passion and prejudice and flagrant and ill-intentioned.

d. Misstatement of the law on premeditation.

The prosecutor told the jury throughout closing argument that premeditation required nothing more than the deliberate formation of the intent to kill: “All the law requires is ‘. . . some time, however long or short, in which a design to kill is deliberately formed.’” RP 6898.

The prosecution prefaced a reading of the court’s definition of premeditation with the statement that defense counsel was wrong when he argued that premeditation means a step-by-step plan, “It doesn’t. It requires . . . more than a moment in point of time.” RP 6935. The prosecutor argued that you did not have to buy an insurance policy or dig a grave; “once you formed the intent, ‘the killing may follow immediately after formation of the settled purpose.’ The purpose was settled. At that point it was a done deal.” RP 6937. “Maybe I’ll beat her up. No, not good enough. I’m going to kill her. The decision is when it was.” RP 6937.

He argued to the jurors that the crime became premeditated when Mr. Scherf “stormed through that sanctuary door, you know what he was going to do. . . going to strangle her with his own hands.” RP 4940. “And

if you have an abiding belief that when he walked through that sanctuary door he was going to kill her, you are satisfied beyond a reasonable doubt that he had premeditated his design to kill her.” RP 6941.

Premeditation, as distinct from intent to kill, requires “the deliberate formation of and reflection upon the intent to take a human life,” and must involve the “mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.” State v. Brown, 132 Wn.2d 529, 585-586, 940 P.2d 546 (1997); State v. Hoffman, 116 Wn.2d 51, 82, 804 P.2d 577 (1991).

To be premeditated, the intent to kill “must have been formed after some period of deliberation, reflection or weighing in the mind.” State v. Brooks, 97 Wn.2d 873, 876, 651 P.2d 217 (1982). “[P]remeditation cannot be inferred from the intent to kill.” Brown, 132 Wn.2d at 586. State v. Commodore, 38 Wn. App. 244, 247, 684 P.2d 1364, rev. denied, 103 Wn.2d 1005 (1984). “Intent” and “premeditation: are different elements; “intent: involves only “acting with the objective or purpose to accomplish a result which constitutes a crime,” while “premeditation” requires “the mental process of thinking beforehand,” deliberating and reflecting. Commodore, 38 Wn. App. at 247. Nor can premeditation be inferred from the fact that the defendant had the opportunity to deliberate. State v. Bingham, 105 Wn.2d 820, 827, 719 P.2d 109 (1986).

The prosecutor's argument focused improperly on the intent to kill and the shortness of time after the intent to kill was formed. RP 6898, 6935, 6937. This excluded entirely the requirement that the defendant actually deliberated, reflected and weighed before making the decision. Brown, Hoffman, Commodore, Bingham. "And if you have an abiding belief that when he walked through that sanctuary door he was going to kill her, you are satisfied beyond a reasonable doubt that he had premeditated his design to kill her," RP 6941, is clearly an improper argument that the intent to kill proves premeditation. This misconduct in misstating the burden of proof denied Mr. Scherf a fair trial.

e. Conclusion.

The prosecutorial misconduct in this case, in each instance and cumulatively, should require reversal of Mr. Scherf's conviction. The misconduct had the same goal and intent in each instance — to convince the jury that it was its job to convict without holding the state to its burden of proving all of the elements of the crime and the insufficiency of mitigation. Mr. Scherf's conviction and death sentence should be reversed.

12. THE TRIAL COURT ERRED IN REFUSING TO GIVE THE DEFENSE PROPOSED PREMEDITATION INSTRUCTION AND GIVING THE PREMEDITATION INSTRUCTION PROPOSED BY THE PROSECUTION INSTEAD, AND IN REFUSING TO REMOVE THE WORDS “OR NO” FROM THE PENALTY PHASE INSTRUCTION NO. 6, TELLING THE JURY HOW TO FILL OUT ITS VERDICT FORM

The trial court erred in (a) not giving the defense’s proposed instruction on premeditation even though it was a correct statement of the law, not misleading in any way and important to the defense theory of the case; and (b) not removing the words “or no” from the penalty phase instruction on how to fill out the verdict form. With the words “or no,” the instruction was misleading; it improperly suggested that the jurors had to be unanimous in voting for a life sentence.

Parties are entitled to instructions that correctly state applicable law, are not misleading and allow each party to argue its theory of the case. State v. Redmond, 150 Wn.2d 489, 483, 78 P.3d 1001 (2005); State v. Mark, 94 Wn.2d 520, 526, 618 P.2d 173 (1980). Each party, in fact, is entitled to have the jury instructed on its theory of the case if there is evidence to support it. State v. Ponce, 166 Wn. App. 409, 416, 269 P.3d 408 (2012); State v. Williams, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997). The supporting evidence must be viewed in the light most

favorable to the party proposing the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455, 456, 6 P.3d 1150 (2000).

a. The premeditation instruction.

The defense objected to not giving its proposed premeditation instruction, which added the underlined language to the standard WPIC, as proposed by the state and given to the jury by the court:

Premeditation means thought over beforehand. Premeditation is the deliberate formation of and reflection upon the intent to take a human life. It is the mental process of thinking beforehand, deliberation, reflection, and weighing or reasoning for a period of time, however short. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditation. Premeditation must involve more than a moment in point of time. The law requires some time, however, long or short, in which a design to kill is deliberately formed.

RP 6896; CP 317, 339.

It was error not to give it and to give the prosecutor's proposed instruction which followed the language of the WPIC. It is beyond dispute that the language the defense requested is a correct statement of well-established law. It is a direct quote from decisions by this Court. Brown, 132 Wn.2d at 585-586; Hoffman, 116 Wn.2d at 82. It is supported by similar language in many other cases. See, e.g., Brooks, 97 Wn.2d at 876.

It was not in any way misleading; it summarizes the law on premeditation in Washington. And, most importantly, the instruction was necessary for the defense to argue its theory of the case – that Mr. Scherf formed the intent to kill, but did not premeditate. It was critical for this theory to inform the jury in clear terms how premeditation differs from intent and cannot be inferred from intent alone, both well-established statements of law. Brown, 132 Wn.2d at 586; Commodore, 38 Wn. App. at 247; Bingham, 105 Wn.2d at 827.

Here the state argued in closing that premeditation could be inferred from intent: “once you formed the intent, ‘the killing may follow immediately after formation of the settled purpose.’” RP 6937. “And if you have an abiding belief that when he walked through that sanctuary door he was going to kill her, you are satisfied beyond a reasonable doubt that he had premeditated his design to kill her.” RP 6941.

Mr. Scherf was denied his right to have a premeditation instruction which clearly states the law, was not subject to being misconstrued, and supported his theory of defense. Even though this Court has upheld the giving of the WPIC premeditation instruction in other capital cases, see Brown, 132 Wn.2d at 604-605, it was reversible error not to give the defense’s proposed instruction on premeditation.

In Brown, appellant challenged the failure of the trial court to give a premeditation instruction that told the jurors that intent and premeditation were separate elements and that also included the language sought here. The Court held that together with the instruction defining intent and the to-convict instruction, the premeditation instruction was sufficient. Brown, 132 Wn.2d at 604-605. This Court reached a similar conclusion in State v. Rice, 110 Wn.2d 577, 604, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910, 109 S.Ct. 3200, 105 L.Ed.2d 707 (1989), that an instruction specifically stating that intent and premeditation are separate elements is unnecessary and that the standard premeditation instruction is adequate. In State v. Benn, 120 Wn.2d 631, 657-658, 845 P.2d 289, cert. denied, 510 U.S. 944, 114 S.Ct. 382, 126 L.Ed.2d 331 (1993), the Court held that instructions seeking to differentiate intent from premeditation were redundant.

What is not clear from these decisions is why the language premeditation “is the mental process of thinking beforehand, deliberation, reflection, and weighing or reasoning for a period of time, however short,” which has been used repeatedly and consistently to define premeditation in reported decisions and which is not redundant of any other standard instruction, should not be given when requested by the defense. Absent that language, prosecutors will argue that the formation of intent alone is

sufficient to find premeditation and ignore the requirements of weighing, reflecting and deliberating – as the prosecutor in this case did. The phrases “thought over,” “any deliberation,” “forms an intent” and “settled purpose,” along with four references to how quickly the process of premeditation are insufficient to convey the need for weighing and reflecting and virtually invite argument that intent is the same as premeditation. When a person, such as Mr. Scherf, faces conviction for aggravated murder as a preliminary to the state’s seeking to put him to death, he should be able to use the correct statement of the law of premeditation to defend himself.

b. Penalty phase instruction No. 6.

Defense counsel objected to including the words “or ‘no,’” in the concluding paragraph of the Court’s Jury Instruction number 6. RP 7132 Instruction number 6 stated:

You must answer one question [“Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?”]. All twelve of you must agree before you answer the question “yes” or “no.” If you do not unanimously agree then answer “no unanimous agreement.”

CP 121. In instruction 4 the jury was told that “if they unanimously answer “no,” or are unable to agree on an unanimous answer, the sentence will be life imprisonment without the possibility of parole.” RP 119.The

sentencing verdict provided three alternatives “YES (in which case the defendant shall be sentenced to death),” “NO (in which case the defendant shall be sentenced to life imprisonment without the possibility of parole)” and “NO UNANIMOUS AGREEMENT (in which case the defendant shall be sentenced to life without the possibility of parole).⁶³ CP 111-112

Instruction 6 together with the verdict form created an “unreasonable likelihood . . . [the jury] would have been confused either as to the consequences of a nonunanimous verdict or its ability to report such a verdict.” In re Benn, *supra*.

In Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992), cert. denied, 507 U.S. 951, 113 S.Ct. 1363, 122 L.Ed.2d 742 (1993), the Ninth Circuit Court of Appeals considered these instructions and verdict form:

Instruction 3:

If you unanimously answer “yes,” [that you are convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency] the sentence will be death. If you unanimously answer “no,” or if you are unable to agree on a unanimous answer, the sentence will be life imprisonment without parole . . .

Instruction 6:

You must answer one question. All twelve of you must agree before you answer “yes” or “no”. When all of you

⁶³ WPIC 31.06 provides for two alternatives, if you unanimously answer yes, or if you unanimously answer no or are unable to agree on a unanimous answer.

have agreed, fill in the answer to the question in the verdict form to express your decision. . .

Mak, 970 F.2d at 624. The verdict form then provided three options: Yes, no, and unable to unanimously agree. Id. The Court concluded, relying on Mills v. Maryland, 486 U.S. 367, 105 S.Ct. 1860, 100 L.Ed.2d 384 (1988), and Kubat v. Thierat, 867 F.2d 351 (1989), that “[t]here is no question but that challenged instruction number 6 was an erroneous statement of the law.” Id. Mills held that “where the underlying statute does not require unanimity, due process will not tolerate instructions that could reasonably be interpreted by a jury to preclude consideration of any mitigating factor unless such factor was unanimously found to exist.”⁶⁴ Id. Kubat held that the defendant was prejudiced whether the jury was completely misled or merely confused about whether unanimity was required not to impose the death penalty. Kubat, 867 F.2d at 371.

In In re Benn, this Court disapproved of the holding in Mak on this issue, holding that these instructions did not require jurors to answer yes

⁶⁴ RCW 10.95.060(4) requires the penalty phase jury to answer the question “Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?” and provides that “[i]n order to return an affirmative answer . . . the jury must find unanimously.” If the jury answers “yes” the defendant will be sentenced to life without parole. RCW 10.95.080(1). If the “jury does not return an affirmative answer,” the sentence will be life without the possibility of parole. RCW 10.95.080(2).

or no to an individual mitigating circumstance and informed jurors that the death penalty would be imposed only if they unanimously found insufficient mitigation. 134 Wn.2d at 928-932. The Court agreed, however, that there was no need to “ask if jurors reached a unanimous verdict of ‘no’ if one ‘no’ vote results in the same sentence as 12,” and noted that “[t]his issue could be avoided in future cases by offering the jury only two possible responses – “Yes” and “no or unable to agree.” Id. at 931 and n. 18.

Here the instructions failed to respond to the dictates of Benn. Under these circumstances it was error to not remove the “or no” from Instruction 6.

Nearly all jurors are familiar with the requirement that guilty verdicts must be unanimous and that failure to reach unanimity results in a hung jury and a likely retrial. By emphasizing the need to be unanimous to say “no” to the statutory question and by providing a third option for non-unanimous verdicts is confusing; some jurors might reasonably infer that, although no death sentence would be imposed, a nonunanimous answer might result in a retrial of the penalty phase. It is confusing and potentially misleading to suggest a greater complication and intricacy than the law requires. There is no possible reason to risk a misunderstanding and the persistence of instructions which obscure the fact that unanimity is

not required to reject the death penalty is improper. Moreover, this detracts from the right of jurors to give consideration to any mitigating factor in a degree that is entirely up to each juror.

The error in not removing the “or no” from Instruction 6, at least in combination with other errors, should require reversal of Mr. Scherf’s death sentence.

13. THE TRIAL COURT’S PENALTY PHASE RULINGS ALLOWING THE STATE TO INFORM THE JUROR THAT MR. SCHERF WAS ALREADY SERVING A SENTENCE OF LIFE WITHOUT PAROLE, NOT ALLOWING THE DEFENSE TO INTRODUCE EVIDENCE THAT MR. SCHERF REQUESTED SEX OFFENDER TREATMENT, AND PROHIBITING THE DEFENSE FROM ARGUING THAT THE BIBLE SAID THINGS OTHER THAN “AN EYE FOR AN EYE” DENIED HIM A FAIR TRIAL AND THE RIGHT TO APPEAR, DEFEND, CONFRONT WITNESSES AND PRESENT ARGUMENT AT TRIAL

a. Informing the jury that Mr. Scherf was already serving life without parole.

The trial court permitted the state to introduce evidence that Mr. Scherf was serving a sentence of life without the possibility of parole at the time of Officer Biendl’s death. RP 5859. From the responses of jurors during individual voir dire, it is clear that this information had a tremendous impact on the potential jurors and their ability to consider mitigation. Prospective juror after prospective juror, when asked whether

knowing the defendant was already serving a sentence of life without the possibility of parole would affect their life and death decision, said that it would. RP 3142, 3188-89, 3256, 3409, 3701, 4484-86, 4848, 5622.

In spite of cases upholding the admission of evidence at a capital sentencing proceeding of the defendant's prior sentences and the fact that the defendant received an exceptional sentence in the past, the sentence of life without parole is different and raises different issues. See, e.g., In re Davis, 152 Wn.2d 647, 747, 101 P.3d 1 (2004) (counsel was not ineffective for failing to request redaction of an exceptional imposed for "excessive force"); State v. Gentry, 125 Wn.2d 570, 637, 888 P.2d 1105, cert. denied, 516 U.S. 843, 116 S.Ct. 131, 133 L.Ed.2d 79 (1995) (an unredacted judgment and sentence which included an exceptional sentence was relevant to penalty phase issues).

Again, as shown by responses from prospective jurors, knowing that the defendant is already serving a sentence of life without parole focuses the jurors' attention on whether another sentence of life without parole can adequately punish and whether the fact of the prior sentence means that defendant has escaped punishment. RP 3142, 3188-89, 3256, 3409, 3701, 4484-86, 4848, 5622. This is in conflict with the presumption of leniency and the statutory question the jurors are charged with answering: "Having in mind the crime of which the defendant has been

found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" RCW 10.95.060(4).

For these reasons, evidence that a defendant in a capital case is already serving a sentence of life without parole and will have no additional punishment for having committed a subsequent murder, deprives that defendant of the presumption of leniency and invites the type of mandatory death sentence rejected in Woodson v. North Carolina, supra.

The jury had the judgments and sentences from Mr. Scherf's prior convictions and was aware that he had been in prison for a substantial amount of his life and that he was serving a very long sentence. Whatever additional probative value might have come from knowing that he was serving life without parole could not outweigh the unfair prejudice and constitutional infirmities of admitting the evidence. It is likely that the information infected the jury, deprived Mr. Scherf of his due process rights and violated the Eighth and Fourteenth Amendments. The introduction of the evidence requires that his death sentence be reversed.

b. Exclusion of argument based on the Bible.

Over defense objection, the state was permitted to introduce the portion of Mr. Scherf's video statement where he said that the Bible

required him to give his life, RP 1631, 1635, and his kite to the prosecutors which quoted an “eye for an eye” from the Bible as a reason why he should receive the death penalty. RP 687-806; 1669. Then at the penalty phase the state asked for and was granted an in limine ruling to exclude argument based on the Bible. RP 6971-6974. In opposing the exclusion, defense counsel reminded the court that the state introduced the kite which quoted from Leviticus, and that it was appropriate to point out that there are other contrary views in the Bible which Mr. Scherf could have quoted. RP 6972.

The trial court should not have granted the motion in limine. First, if reference to or argument based on the Bible was improper, then Mr. Scherf’s statements should have been excluded. Since they were not, the defense should have been able to point out that the Bible did not compel the conclusion that death should be imposed.

One of the most basic and long-standing rules of the conduct of trials is that a party may examine a witness and present evidence on a subject introduced by the opposing party. In State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969), the court said:

It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door

after only part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths.

Simply put, the state clearly opened the door to rebutting the inference that the Bible required that Mr. Scherf be sentenced to death. Under the “open the door” rule, if one party raised an issue, the opposing party is permitted “to explain, clarify or contradict” the evidence, even with evidence that would otherwise be inadmissible. State v. Berg, 137 Wn. App. 923, 939, 198 P.3d 529 (2008), abrogated on other grounds in State v. Mutch, 171 Wn.2d 646, 254 P.3d 803 (2011); State v. Price, 126 Wn. App. 617, 109 P.3d 27 (2007).

The right to rebut arguments presented by the prosecution is not only an evidentiary rule, it is a right that exists as a matter of due process of law. Simmons v. South Carolina, 512 U.S. 154, 164-165, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994); Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); Ake v. Oklahoma, 470 U.S. 68, 83-87, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). It is a component of the fundamental right to present evidence in one’s behalf which can override a state’s evidentiary rules. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996); Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35

L.Ed.2d 297 (1973).

The trial court's lack of evenhandedness in admitting and refusing evidence related to the Bible's pronouncements was error under the rules of evidence and under the state and federal constitutions. Quotations from the Bible can have a powerful influence on people who are seriously considering a moral decision of whether to vote for life or death of another person. This was obvious from the voir dire in Mr. Scherf's case (e.g., juror quotes "an eye for an eye," RP 3751; believes in "scripture not psychology," RP 4756; is a church goer, RP 4766). This limitation alone should require reversal of his death sentence.

c. Not allowing evidence that Mr. Scherf asked for sex offender treatment.

The court ruled that unless the defense stipulated that sex offender treatment would have had absolutely no impact on preventing the crime, if counsel presented evidence that Mr. Scherf asked for sex offender treatment ten years earlier, the state could introduce: the opinion of the head of the DOC sex offender treatment program that treatment would not have prevented the crime, testimony that Mr. Scherf was in sex offender treatment until two days before he committed a rape; that his prior treatment including relapse prevention and that Mr. Scherf declared in a civil suit in 1999 that nothing could have prevented his relapse even

though he had thought his relapse plan would be effective. RP 6981-86, 6989-90. Similarly, the court ruled that evidence that the state did not treat people who were not going to be released would also open the door to opinion that Mr. Scherf was not treatable. RP 6990-96.

These rulings were constitutional error because they deprived Mr. Scherf of his right to present a defense at the penalty phase of his capital case. As defense counsel argued, the purpose of the evidence was to show Mr. Scherf's willingness to participate in programs while in prison. RP 6988-89, 6995.

The important fact about Mr. Scherf that was relevant to the question that the jury had to answer at the penalty phase was that he wanted to have treatment even knowing that he was facing the rest of his life in prison. This fact had relevance independent of whether his treatment had been effective in the past or whether it was likely to be effective in the future. Mr. Scherf asked for sex offender treatment long before the death of Officer Biendl when he had no motivation to make this request other than a desire for treatment.

The state's evidence did not rebut his desire for improvement, nor was it the reason that he did not receive the requested treatment; the DOC does not provide sex offender treatment for people serving life without parole. RP 6990-96. If the state and court were concerned that the jury

might consider this as evidence that sex offender treatment would have been successful, the state should have requested and the court could have given a limiting instruction that the evidence could be considered only for the purpose of assessing Mr. Scherf's state of mind or willingness to participate in treatment.

In Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006), the United States Supreme Court reiterated that:

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'

Holmes, 547 U.S. at 320 (quoting Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 638 (1998), and California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)).

Where the issue is the introduction of mitigation evidence at the penalty phase of a capital trial, the rule is clear: anything that prevents the jury from considering "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" creates the constitutionally intolerable risk that "the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett, 438 U.S. at 604-605.

The exclusion of the evidence that Mr. Scherf requested sex offender treatment long before January 29, 2011, denied him the right to present mitigating evidence at his capital sentencing proceeding and should require reversal of his death sentence.

14. CUMULATIVE ERROR DENIED MR. SCHERF A FAIR TRIAL

Mr. Scherf's trial and sentencing were fundamentally unfair for the numerous reasons set forth above. The cumulative effect of multiple errors, however, can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal. Chambers v. Mississippi, *supra*; Parle v. Runnels, 505 F.3d 922 (9th Cir. 2007). The combined effects of error may require a new trial even when those errors individually might not require reversal. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a constitutionally fair trial under the federal and state constitutions. Mak v. Blodgett, *supra*; United States v. Frederick, 78 F.3d 1370, 1381 (9th Cir. 1996).

Although here each error challenged on appeal – the denial of dismissal of the death notice and pretrial suppression motions, the restriction of the scope of voir dire and the rulings on challenges for cause,

the prosecutor's misconduct, the improper admission and exclusion of evidence and the instructional errors – should individually result in a new trial or the reversal and vacation of the death sentence; the combined and overwhelming prejudice of all the errors should require a new trial and the dismissal of the death sentence even if the individual errors do not.

15. PROPORTIONALITY REVIEW UNDER RCW 10.95.130(2)(b) DEMONSTRATES THAT THE DEATH PENALTY IN WASHINGTON IS ADMINISTERED IN VIOLATION OF FURMAN V. GEORGIA

a. RCW 10.95, enacted to overcome the problems identified in Furman, has failed to do so.

In 1972, unwilling to tolerate arbitrary and random imposition of capital punishment, the United States Supreme Court struck down all existing death penalty schemes as violating the Eighth Amendment's prohibition against cruel and unusual punishment. Furman v. Georgia, *supra*. Justices Stewart, Douglas, and White concluded capital punishment was unconstitutional based on the manner in which it was administered. Justice Stewart wrote that capital punishment was unconstitutional because it was applied “wantonly and freakishly” on a capriciously selected handful of defendants:

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders . . . many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom

the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

Furman, 408 U.S. at 309-10 (Stewart, J., concurring; citations and footnotes omitted; emphasis added). Justice White cited the infrequent and arbitrary utilization of the death penalty as important factors contributing to his vote to strike down capital punishment:

That conclusion, as I have said, is that the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.

Furman, 408 U.S., at 313 (White, J., concurring). Justice Douglas noted that the death penalty, to the degree that it was not random, was administered “against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority...”

Id. at 255 (Douglas, J., concurring).

In 1981, the Washington Legislature enacted RCW 10.95 to cure the problems identified in Furman. The statute directs this Court to independently review in every case, whether or not the defendant otherwise appealed, the evidence supporting a death sentence and to

determine whether the sentence is disproportionate in light of other aggravated murder cases. Because of RCW 10.95, this Court has concluded that “should a death penalty be the result of arbitrary and capricious conduct, a defendant will have a meaningful opportunity to get relief from the highest court in the state.” State v. Cross, 156 Wn.2d 580, 624, 132 P.3d 80, cert. denied, 549 U.S. 1022, 127 S.Ct. 559, 166 L.Ed.2d 415 (2006).

Specifically, under RCW 10.95.130(2)(b), this Court is mandated to decide “whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.” RCW 10.95.130(2)(b). Although the approach to review under RCW 10.95.130(2)(b) has embodied various analytical forms since its enactment, the goal has been the same, to assure that the flaws identified in Furman are not present in Washington’s capital punishment scheme:

[T]he goal has remained the same, and the evolution of the analysis has not undermined the purpose of the review. The goal is to ensure that the sentence, in a particular case, is proportional to sentences given in similar cases, is not freakish, wanton or random; and is not based on race or other suspect classifications. See generally Furman, 408 U.S. 238, 92 S. Ct. 2726; Stenson, 132 Wash.2d at 758, 940 P.2d 1239.

Cross, 156 Wn.2d at 630.

More recently, Justice Wiggins provided a concise historical overview of Washington death penalty statutes as a response to Furman and Gregg v. Georgia, *supra*:

The legislative history regarding the enactment of comparative proportionality review in Washington also demonstrates that the legislature was responding to Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L.Ed.2d 859 (1976), Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976)], and Furman v. Georgia, 408 U.S. 238, 92S.Ct. 2726, 33 L.Ed.2d 346 (1972)] and believed the new statutory scheme would ensure that the death penalty in Washington would not be applied arbitrarily or discriminatorily. *See, e.g.*, Memorandum from David D. Cheal, Counsel, House Judiciary Comm., to Representative Pearsall, Constitutional Requirements of Death Penalty Legislation 1 (May 12, 1977) (“[Comparative proportionality review] is a further protection against arbitrariness and wide discrepancies in the application of the death penalty.”) (on file with House File on Substitute H.B. 615, 45th Leg., 1st Ex.Sess. (1977)); Transcript of Proceedings of H.R., Substitute H.B. 615, 45th Leg., 1st Ex.Sess. (Apr. 29, 1977) (arguments during floor debate regarding the disproportionate imposition of the death penalty on racial minorities) (on file with House File on Substitute H.B. 615, *supra*).

To summarize, the timing, language, and history of our death penalty statutes indicate that the legislature was primarily concerned with maintaining the constitutional availability of capital punishment in Washington by enacting laws that, according to the United States Supreme Court, remedied the problems identified in Furman.

State v. Davis, 175 Wn.2d 287, 397, 290 P.3d 43 (2012) (Wiggins, J., dissenting).⁶⁵ Thus, this Court is statutorily obligated to determine not merely that the imposition of the death penalty is not disproportionate to similar cases, but also that it is not administered in a “freakish, wanton or random” manner and not based on “race or other suspect classification.” Furman requires no less.

Over the years since RCW 10.95 was enacted, this Court has specifically considered whether the statute has fulfilled its goal. In State v. Bartholomew, 98 Wn.2d 173, 654 P.2d 1170 (1982), reversed on other grounds, 363 U.S. 1203, 103 S.Ct. 3530, 77 L.Ed.2d 1383 (1983), this Court was asked for the first time whether RCW 10.95 adequately protected against the dangers of arbitrary death verdicts. This Court found that it did and took solace in the statute’s prophylactic features. Id. at 192. Only one justice dissented on this issue.

Seventeen years later in State v. Cross, supra, a bare majority concluded the procedures in RCW 10.95 provided sufficient protection

⁶⁵ To conduct this analysis, the Court is directed to consider “cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965, in which the judge or jury considered the imposition of capital punishment regardless of whether it was imposed or executed, and cases in which reports have been filed with the supreme court under RCW 10.95.120.” RCW 10.95.130(2)(b).

against arbitrary and unfair death verdicts. Four Justices, however, reached a different conclusion:

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

Cross, 156 Wn.2d at 641(C. Johnson, J., dissenting joined by Justices Sanders, Owens and Madsen). The dissent echoed Justice Stewart's sentiment over three decades earlier: that Washington's "death penalty is like lightning, randomly striking some defendants and not others." Cross, 156 Wn.2d at 170 (C. Johnson, J., dissenting). A year later, the Washington State Supreme Court considered Yates, *supra*. Although nothing had changed in the interim period between the Cross and Yates opinions, the dissenters who found the administration of Washington's death penalty system random and arbitrary in Cross, had become satisfied that it did not.

More recently, Justice Fairhurst, with two justices joining, returned to the question of the arbitrary application of Washington's death penalty, and concluded:

When I look at the true statutory pool, I cannot escape the truth about Washington's death penalty. One could better predict whether the death penalty will be imposed on Washington's most brutal murderers by flipping a coin than by evaluating the crime and the defendant. Our system of imposing the death penalty defies rationality, and our proportionality review has become an “empty ritual.” Benn, 120 Wash.2d at 709, 845 P.2d 289 (Utter, J., dissenting).

Davis, 175 Wn.2d at 388 (Fairhurst, J., dissenting) (emphasis added).⁶⁶

Thus, although never constituting a majority in a case, since 2006 there have been seven different justices who have concluded that the administration of Washington’s death penalty scheme has “failed to remedy the problems identified in Furman.”⁶⁷ As demonstrated below, those seven justices were correct.

In the years since the enactment of RCW 10.95, besides the dissenting justices in Bartholomew, Cross and Davis, there has also been a growing awareness in other states across the United States of the failure of legislatures and courts to remedy the problems identified in Furman.

⁶⁶ Justice Wiggins, who joined the dissent, also expressed “deep concern” that the administration of Washington’s death penalty is disproportionately applied based on race. Davis, 175 Wn.2d at 388-401 (Wiggins, J., dissent).

⁶⁷ See, e.g., Cross, 156 Wn.2d at 170 (Justices C. Johnson, Sanders, Owens and Madsen conclude “the death penalty is like lightning, randomly striking some defendants and not others.”); and Davis, 175 Wn.2d at 375-401 (Justices Fairhurst, Stephens and Wiggins conclude Washington’s death penalty is imposed randomly and arbitrarily).

Since 2006, the same year Cross was decided, no state has reinstated capital punishment after having its statute declared unconstitutional, while six states have abolished it: New Jersey (2007); New York (2009)⁶⁸; New Mexico (2009); Illinois (2011); Connecticut (2012); and Maryland (2013).⁶⁹

In November 2011, Oregon Governor John Kitzhaber announced a moratorium on executions in Oregon, canceled a planned execution and ordered a review of the death penalty system in the state. And just this year, Washington State Governor Inslee, expressing concern over the administration of Washington's death penalty, has placed a moratorium on its use. His statements announcing the moratorium cited the same concerns identified by Justices Stewart, White and Douglas in Furman:

The use of the death penalty in this state is unequally applied, sometimes dependent on the budget of the county where the crime occurred. . . [T]here have been too many doubts raised about capital punishment. There are too many flaws in the system. And when the ultimate decision is death there is too much at stake to accept an imperfect system. . . . In 2006, state Supreme Court Justice Charles Johnson wrote that in our state, "the death penalty is like

⁶⁸ The New York Court of Appeals held that a portion of the state's death penalty was unconstitutional. The legislature has voted down attempts to restore the statute.

⁶⁹ See Death Penalty Information Center (last July 28, 2014): <http://www.deathpenaltyinfo.org/states-and-without-death-penalty>

lightning, randomly striking some defendants and not others. . . . I believe that's too much uncertainty.

Governor Inslee's' remarks announcing a capital punishment moratorium Feb. 11, 2014.⁷⁰

As the seven justices, six states, and the governors of Oregon and Washington, among others, have recognized, the hope that the arbitrariness, randomness and racial and economic biases identified in Furman could be remedied through procedures such as proportionality review, has failed.

b. Evolving standards of decency inherent in proportionality review demonstrate that Washington's capital sentencing scheme is no longer constitutional.

Proportionality is a concept "which develops gradually in response to society's changes." State v. Fain, 94 Wn.2d 387, 396, 617 P.2d 720 (1980). "As the United States Supreme Court has said in reference to the Eighth Amendment, its scope is not static; rather, it 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'" Fain, 94 Wn.2d at 396-397, citing Trop v. Dulles, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958). Moreover,

⁷⁰ See Governor Inslee's comments at: <http://www.deathpenaltyinfo.org/documents/InsleeMoratoriumRemarks.pdf>.

proportionality review under those evolving standards should be informed by “‘objective factors to the maximum possible extent.’ ” Atkins v. Virginia, 536 U.S. at 312 (quoting Rummel v. Estelle, 455 U.S. 263, 274-275, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980)).

From the earliest times, Washington has been at the forefront of the evolution of standards for capital jurisprudence. The state framers in choosing to prohibit “cruel punishment” considered and rejected the language of the Eighth Amendment to the United States Constitution, which prohibits only punishment that is both “cruel” and “unusual.” U.S. Const. amend. VIII; Fain, 94 Wn.2d at 393 (citing The Journal of the Washington State Constitutional Convention: 1889, 501-02 (B. Rosenow ed. 1962)). Because of this difference in text and history, this Court has long held that article 1, section 14 of Washington’s constitution provides greater protection than its earlier federal counterpart. State v. Thorne, 129 Wn.2d 736, 772, 921 P.2d 514 (1996), overruled on other grounds in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Fain, 94 Wn.2d at 393.⁷¹

With the enactment of RCW 10.95.030, the legislature acknowledged that Washington’s evolving standards would no longer

⁷¹ Article 1, section 14 of the Washington Constitution provides, “Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.” Const. art. 1, § 14.

tolerate the execution of individuals with intellectual disabilities. Nearly 10 years later, citing “objective factors” that included Washington State’s prohibiting the execution of defendants with intellectual deficit disorder, the United States Supreme Court concurred. Atkins, 536 U.S. at 314. According to the United States Supreme Court in Atkins, the “clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.” Id. at 312, (quoting Penry v. Lynaugh, 492 U.S. 302, 331, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989)). Similarly, Washington’s judicial branch incorporated evolving standards in capital jurisprudence when it prohibited the execution of juveniles. State v. Furman, 122 Wn.2d 440, 858 P.2d 1092 (1993). A decade later, and again citing to the “evolving standards” of states such as Washington that already barred the executions of juveniles, the United States Supreme Court concluded that executing juveniles violated the federal constitution. Roper v. Simmons, 543 U.S. 551, 564, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (“a majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment”).

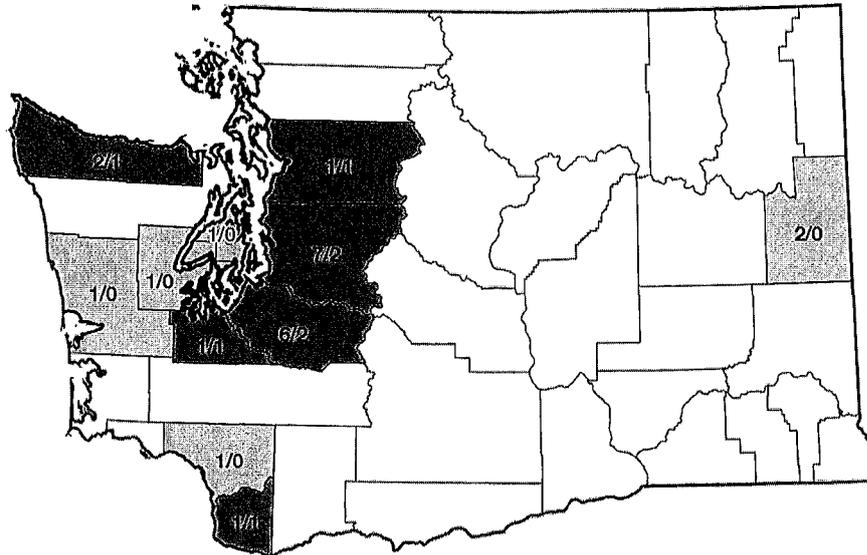
As the United States Supreme Court has looked to the various states, Washington in particular, to find the “objective factors” to demonstrate the evolving standards of decency which has informed their

capital jurisprudence, this Court should look to the thirty-nine counties in the state where the authority to seek capital punishment lies with the elected prosecutors.⁷² The trial courts in Washington counties are limiting the scope of the death penalty and county prosecutors are finding, in overwhelming numbers, that the costs – financial and other – of pursuing the death penalty outweigh any benefits. A review of eligible capital cases over the last four decades unquestionably demonstrates that nearly every county in Washington has discontinued its use.

⁷² RCW 10.16.030 reads, in part: “Except as provided elsewhere in this section, in every county there shall be elected from among the qualified voters of the county . . . a county prosecuting attorney . . .”

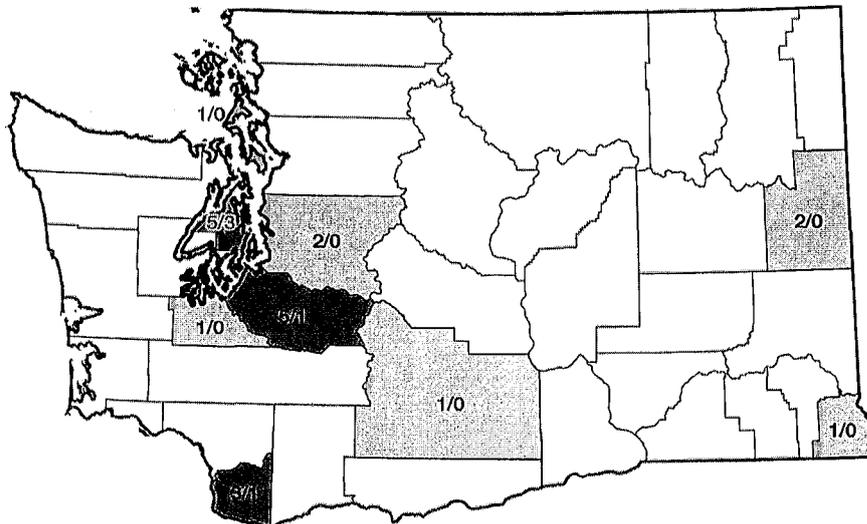
RCW 10.95.040; CrR 5.1(a) (all actions shall be commenced in the county where the officer was committed).

1981 - 1985
 Death Penalty Sought - 24 / Death Penalty Imposed - 8



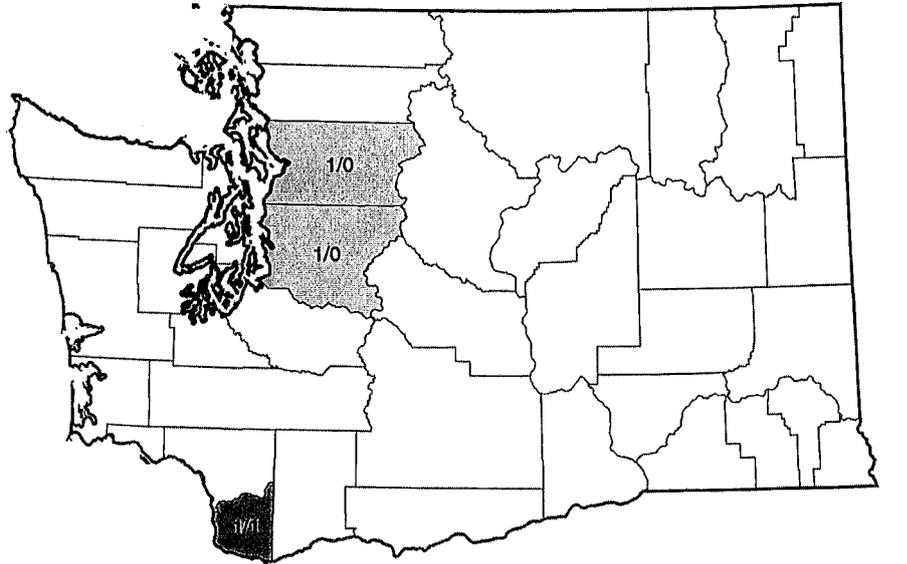
☐ DEATH PENALTY SOUGHT - NOT IMPOSED ■ DEATH PENALTY SOUGHT - IMPOSED

1986 - 1990
 Death Penalty Sought - 21 / Death Penalty Imposed - 5



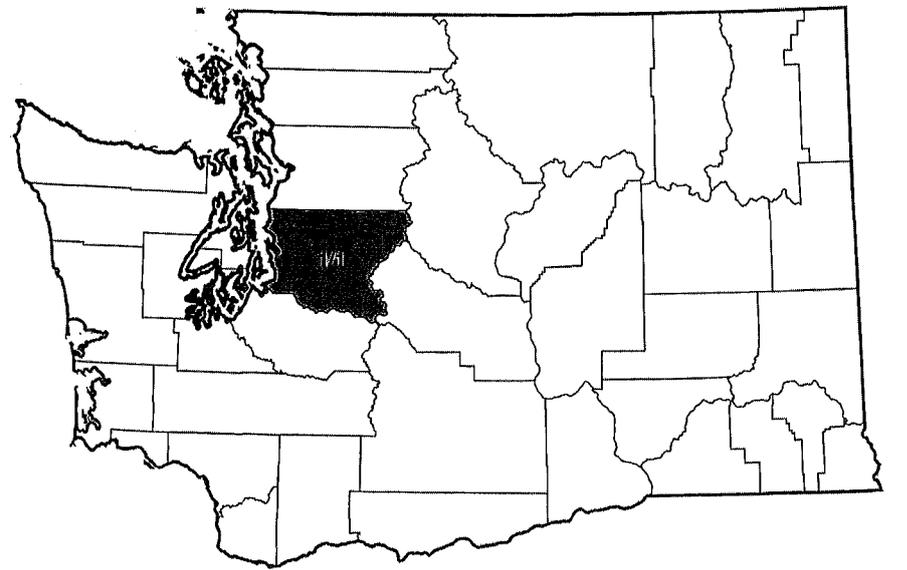
☐ DEATH PENALTY SOUGHT - NOT IMPOSED ■ DEATH PENALTY SOUGHT - IMPOSED

2001 - 2005
Death Penalty Sought - 3 / Death Penalty Imposed - 1

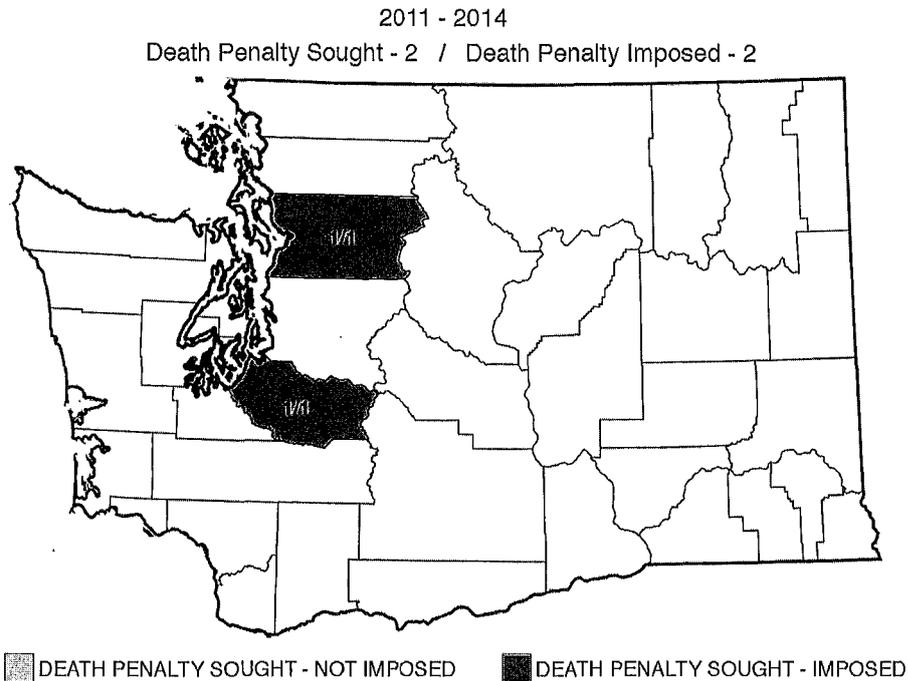


DEATH PENALTY SOUGHT - NOT IMPOSED DEATH PENALTY SOUGHT - IMPOSED

2006 - 2010
Death Penalty Sought - 1 / Death Penalty Imposed - 1



DEATH PENALTY SOUGHT - NOT IMPOSED DEATH PENALTY SOUGHT - IMPOSED



Not only the number of the counties, but also the consistency of the direction of change, is significant. *Atkins*, 536 U.S. at 315. It is unquestionably clear that an overwhelming number of Washington’s counties have consistently moved toward never seeking capital punishment. This trend is a reflection of the “evolving standards of decency that mark the progress of a maturing society.” *Fain*, 94 Wn.2d at 396-397, citing *Trop v. Dulles*, 356 U.S. at 101.

c. Proportionality review fails to fulfill both the requirements of consistency and individualized sentencing.

Proportionality review has not been able to fulfill both constitutional requirements of consistency in application of the death

penalty and individualized sentencing. The decisions finding the proportionality review adequate, over strong dissent, have ignored the consistency portion of the constitutional equation, finding it sufficient if a difference between a case in which the death penalty has been imposed and one in which it has not been can be rationalized as exemplifying individualized consideration.

Under RCW 10.95.130(2)(b), this Court is statutorily mandated to decide “[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.” In conducting the proportionality review, this Court considers the nature of the crime, the number and type of aggravating factors, the defendant’s criminal history and the mitigation presented on behalf of the defendant; but then has upheld the death sentence if the crime can be described as cruel; involving conscious suffering, excessive planning and premeditation; motivated by greed; or in other ways which characterize premeditated murders with aggravating circumstances. See e.g., Davis, 175 Wn.2d at 350; Cross, 156 Wn.2d at 632; Yates, 161 Wn.2d at 789; State v. Stenson, 132 Wn.2d 668, 759 P.3d 1239 (1997), cert. denied, 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998).

Death sentences are upheld in capital cases in Washington even though the same adjectives, numbers of victims, types of mitigation apply

with equal force to a far greater number of aggravated murder cases where the death penalty was either not sought or not imposed. Death sentences are upheld as not disproportionate notwithstanding the fact that a person looking at the trial reports who did not know the outcomes would not be able to predict which or how many received a capital sentence. See e.g., Cross, 156 Wn.2d at 170 (C. Johnson, dissenting, joined by four other justices) (“The death penalty is like lightning, randomly striking some defendants and not others.”); and Davis, 175 Wn.2d at 388 (Fairhurst, J., dissenting, joined by three other justices) (“One could better predict whether the death penalty will be imposed on Washington’s most brutal murders by flipping a coin than by evaluating the crime and the defendant.”)

In upholding these sentences on mandatory review, the Court is ignoring the mandate of RCW 10.95.130(2)(b) and the constitutional requirement that death sentencing schemes must not only allow for individualized sentencing, but must also result in consistent application and not merely random or arbitrary results.

The proportionality review mandated by RCW 10.95.130 was enacted to ensure that the Washington death penalty scheme accurately and consistently determines who, among all of the defendants charged

with aggravated murder, deserves a death sentence.⁷³ As the United States Supreme Court has held “capital punishment must be imposed fairly, and with reasonable consistency, or not at all.” Eddings, 455 U.S. at 112 (emphasis added). The constitution requires “a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual.” Id. at 110. This is an exacting standard with dual requirements.

Reasonable consistency requires that the death penalty be imposed only in accordance with rational and objective standards, not by whim, caprice, or prejudice: “Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a

⁷³ RCW 10.95 et seq., Washington’s current death penalty statute, was introduced in the 1981 legislative session as House Bill 76. When HB 76 was initially proposed, the Trial Judge Reports were not included as “similar cases” to be reviewed by this Court in performing a proportionality analysis. The bill was changed as a result of compromise to add language requested by the Senate, SHB at section 13(b) to specifically require the Court to review Trial Judge Reports as a part of the proportionality review. The Explanatory Material memo indicated that this subsection was included in the Senate Bill to “specif[y] precisely what the Supreme Court is to do as a consequence of its review of a sentence of death. If the court finds a deficiency as a consequence of its sentence review, it must invalidate the sentence and remand for re-sentencing. At the re-sentencing the defendant would get life without parole.” Appendix 5, Memo at p. 20. The bill became law on May 14, 1981. See 1981 Wash. Laws ch. 138, 535-547 (1981).

human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.” Gregg, 428 U.S. at 189 (opinion of Stewart, Powell, and Stevens, JJ.).

In Davis, a majority of this Court rejected the analysis of the dissenting justices which focused on the consistency requirement and demonstrated the unpredictability of death sentencing when a capital sentence on review is compared to the other aggravated murder cases for which trial reports have been submitted; the dissent demonstrated that “dozens of life sentences [have been] imposed for aggravated murders similarly brutal to the one Cecil Emile Davis committed.” Davis, 175 Wn.2d at 375.

To summarize, over three times as many defendants received life sentences for aggravated murders involving sexual assault as were sentenced to death. The disparity in favor of life sentences increases to more than four-to-one when we consider cases where rape was found to be an aggravating factor. If we eliminate defendants with no criminal history, persons convicted of aggravated murder involving sexual assault were still almost two and one-half times more likely to be sentenced to life in prison than sentenced to death.

Id. at 386.

From this, the dissent concluded that “it is impossible to predict whether a defendant convicted of a brutal aggravated murder will be

sentenced to life in prison or death.” Id. at 376-377. Then, while recognizing that the trial reports do not include mitigation if the case did not go to trial or if the defendant did not seek to present mitigation, the dissent concluded that “to the limited extent we can meaningfully compare mitigating factors, we can again conclude that even where aggravated murder defendants present little mitigating evidence, they are more likely to be sentenced to life than to death.” Id. at 386.

The Davis majority rejected this analysis and focused instead on the narrower goal of ensuring that the death penalty’s imposition is not “freakish, wanton or random and is not based on race or other suspect classification,” without comparison to other cases. Id., at 348, quoting Cross, 156 Wn.2d at 630. Because of the “brutal manner involving conscious suffering” of the crime, the number of aggravating factors and the extensive criminal history, the court concluded that the death sentence in Mr. Davis’s case was not freakish or wanton. Id. at 349-352.

Most importantly, the majority in Davis held that the fact that there were more life sentences than death sentences does not prove disproportionality. Id. at 361. The majority concluded that this means the system is working and that this is the result of the jurors making individualized determinations based on mitigation:

Contrary to the dissent's assertion, these “dozens of life

sentences” do not prove that Davis's death sentence is disproportionate . . . RCW 10.95.130(2)(b) directs courts to consider “both the crime and the defendant.” . . . it appears to us that the [dissenting] opinion does not give adequate consideration to the defendants and other relevant factors. This is a significant flaw in the dissent's reasoning because we have said in prior cases that “[s]imply comparing numbers of victims or other aggravating factors may superficially make two cases appear similar, where in fact there are mitigating circumstances in one case to explain either a jury's verdict not to impose the death penalty or a prosecutor's decision not to seek it.’ ”

Id., at 355 (quoting In re Personal Restraint of Jeffries, 114 Wn.2d 485, 490, 789 P.2d 731 (1990)). In addition to mitigation, the majority cited the strength of the state’s case, the wishes of the family of the victims and other such factors as reasons for differing results. Id. at 357-358. The majority then compared the results in Mr. Davis’s case with the life sentence in Gerald Davis’s case and concluded that this demonstrates that small differences, likely the vote of two jurors, may explain the differences in results. Id. at 359.

The majority concluded by setting out their constitutional basis for its decision: the requirement that the capital sentencing decision allow for consideration of mitigation. Id. at 360.

The fact that more life sentences are imposed than death sentences does not prove that the system “defies rationality.” Dissent at 92. In our view, it shows that the system is working as intended and that the different actors in the system are performing their assigned roles conscientiously—prosecutors in the exercise of discretion,

jurors in considering mitigating evidence, and defense attorneys endeavoring to humanize defendants guilty of the most inhuman acts. While it is easy to imagine a system in which the death penalty is routinely sought and routinely imposed, that would not be a system superior to that extant in Washington and it would be inconsistent with the present values of our citizenry.

Id. at 362.

This basis for the decision of the Davis majority does not include or acknowledge the constitutional requirement of consistency and lack of arbitrariness in the decision. Just as mandatory sentences, which would ensure such consistency, are unconstitutional; random and unpredictable and unguided differences – for whatever reason – are equally unconstitutional. If unexplained prosecutorial discretion, the wishes of family members, the strength of the state’s case and the hard work of defense counsel can determine the result of life or death, where there may be no significant difference among crimes or defendants, numbers of aggravating factors or personal and criminal histories, then the capital sentencing scheme is invalid. Furman, *supra*. It is arbitrary, capricious and random.

This is particularly true where the differences in charging, such as geographical location of the crime, specifically demonstrate their arbitrariness.

i. Geographical arbitrariness.

One undisputable fact is that prosecutors in different counties in Washington have different charging standards. These geographical differences - particularly with regard to financial considerations - do not provide a valid reason for choosing whether to seek death or not and violate equal protection of law.

In Cross, the Court sidestepped the issue of whether the death penalty is flawed because of geographic arbitrariness, claiming that sufficient evidence was not presented in support of these claims for the court to analyze. Cross, 156 Wn.2d at 639. The Court also noted that funds are available under the Extraordinary Criminal Justice Act (RCW 43.330.190, .200) to reimburse counties prosecuting such cases. Id.

Shortly after the Cross decision, the Washington State Bar Association published “The Final Report of Death Penalty Subcommittee of Public Defense,” which links the unequal application to the extraordinary expense of capital litigation.

At the trial level, death penalty cases are estimated to generate roughly \$470,000 in additional costs to the prosecution and defense over the costs of trying the same case as an aggravated murder without the death penalty and costs of \$47,000 to \$70,000 for court personnel.

WSBA Report at pg. 32.⁷⁴

⁷⁴ The Washington State Bar Association Report can be found at:

The report also found that these huge increases in cost can and do affect prosecutorial discretion despite the state funds available to smaller counties under the ECJA:

The high costs of death penalty cases and the lack of state assistance could cause a prosecutor in a county with financial constraints to elect not to pursue the death penalty. Such financial pressures could result in the uneven application of the death penalty across the state.

Id. at pg. 33. Comments from elected prosecutors, reported in the press, further support this conclusion:

Prosecutors face a varying degree of pressure to plea-bargain capital cases rather than endure costly trials followed by a decade or more of appeals. A few flatly concede they couldn't afford to go to trial. In 2001, John R. Henry, prosecutor since 1989 in tiny Garfield County, had never had a death penalty case – and vows he never will. “We’re so small, I could never afford a death-penalty case.”⁷⁵

Franklin County Prosecutor Steve Lowe also echoed this “financial decision standard” while disputing the defense’s claim that Franklin County had a substantial financial incentive to pursue the death penalty due to budget shortages, he stated:

http://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/~media/Files/Legal%20Community/Committees_Boards_Panels/Council%20on%20Public%20Defense/Standards%20for%20Indigent%20Defense%20Services%20Approved%20by%20BOG%20as%20of%209%2022%2011.ashx

⁷⁵ “One Killer, Two Standards,” Seattle Post-Intelligencer (August 7, 2001), Lise Olson. www.seattlepi.nwsourc.com.

Death penalty cases aren't moneymakers for small counties. If there is any financial reason behind filing a death penalty case, it would be not to do so. Substantially more is spent by the county than is ever reimbursed.⁷⁶

Past Pierce County Prosecutor Gerry Horne indicated in 2003 that financial costs associated with capital punishment would play a factor in his decision whether to file death notices.⁷⁷

The WSBA Report demonstrates the geographic arbitrariness of the administration of Washington's death penalty:

This data shows that most of the death penalty cases occur in a small number of counties. There are 14 counties in which there has not been an aggravated murder case during the last 25 years. There are 8 counties where there have been aggravated murders cases, but the prosecutor has not sought the death penalty. Thus, death penalty cases have been brought in 17 of the 39 counties during the last 25 years and the death sentence has been imposed in 10 of those counties.

WSBA Report, pg. 12.

As noted, this year, University of Washington Professor Katherine Beckett issued a report entitled, "The Role of Race in Washington State Capital Sentencing, 1981-2012 (January 27, 2014) (Beckett Report),

⁷⁶ "Vasquez Attorneys' Claims Disputed," Tri-City Herald (July 11, 2001), Janine Jobe. www.tricityherald.com.

⁷⁷ "High costs force prosecutor to be selective in capital cases. Expensive process rarely results in execution," Karen Hucks, The News Tribune (South Sound Edition) Tacoma, Wash.: July 4, 2003 at pg. A.01.

which further corroborates that Washington's death penalty is flawed because of geographic arbitrariness. Of the fourteen counties in Washington which have prosecuted five or more aggravated murder cases, two of those counties had never sought a death sentence, and the percentages of death sentences sought in the other twelve counties vary from 67% in Thurston County, to 60 % in Clallam County, to 47 to 48 % in Kitsap, Pierce and Spokane Counties, to 22 % in King County and less than 20% in three counties. Professor Beckett concluded:

The figures above provide evidence that the likelihood that prosecutors will seek and juries will impose death for a given defendant in an aggravated murder case depends in part on the place in which the case is adjudicated.

Beckett Report, pg. 8. Thus, it is clear that the county in which a crime is committed is a significant determinant of whether death will be sought. See Governor Inslee Remarks, "The use of the death penalty in this state is unequally applied, sometimes dependent on the budget of the county where the crime occurred." As noted by the maps, supra, since 2006 only two counties (King, Snohomish) have sought to implement the death penalty, while the remaining thirty-seven counties have discontinued its use.

These geographical and financial factors alone, as factors unrelated to the issue of "when there is reason to believe that there are not sufficient

mitigating circumstances to merit leniency,” RCW 10.95.040(1), necessarily build an arbitrariness into the proceedings, in violation of Furman, and constitute a denial of equal protection.⁷⁸

ii. Geographical disparity denies equal protection.

Because it is self-evident that the right to life is fundamental in this state and in this country, under the principles of equal protection set out in Bush v. Gore, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000), the lack of consistent standards among counties for determining who should face the possibility of being executed by the state, denies Byron Scherf and all other capital defendants their right to equal protection of law.

The Supreme Court, in Bush v. Gore, 531 U.S. at 109, held that the right to vote is fundamental and that Equal Protection Clause assures that no person's vote is valued over another's:

The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.

Bush v. Gore, 531 U.S. at 104-105.

The Court accepted as a sufficient starting principle that “Florida's basic command for the count of legally cast votes is to consider the ‘intent of

⁷⁸ In Mr. Scherf's case, because the crime was committed at WSR, the state paid all of the cost of his prosecution. RCW 72.72.030.

the voter.” Id. at 105-106. The equal protection violation found by the Court was not in that “abstract proposition,” but “in the absence of specific standards [set by the Florida Supreme Court] to ensure its equal application” from county to county. Id. at 106.

The Court acknowledged that local entities may develop different systems for implementing elections. Id. at 109. The equal protection violation was the failure of the Florida Court “with power to assure uniformity” to meet the requirements of equal treatment and fundamental fairness as systems were implemented. Id.

In Washington, the death penalty statute sets out the abstract proposition and starting principles that a death sentence is appropriate only where there are specified aggravating factors and where there is insufficient mitigation to outweigh the aggravating factors present in the case. RCW 10.95 et seq. The equal protection violation is in the absence of any specific, statewide standards to ensure the equal application of the statute. Each county is left to determine whether to seek the death penalty and value one person's life over another's. As in Bush v. Gore, this Court not only has "the power to assure uniformity," it is specially charged with assuring proportionality among those convicted of capital crimes. RCW 10.95.130; RCW 10.95.140.

That there are no specific, statewide standards required by this Court

to assure equal protection in seeking the death penalty should be undisputed. No standards for choosing when the death penalty should be sought have ever been promulgated by this Court or developed through a common law process. Nor has any county prosecutor ever been required to prepare or publish such standards; in this case, the defense was denied the right even to know what the prosecutor considered as mitigation in deciding to seek a death sentence. As set out above, the percentage of notices filed in aggravated murder cases, by counties, varies from 69% to 0% in counties with five or more aggravated murder cases.

Under Bush v. Gore, this absence of specific, statewide standards to assure equal protection of the fundamental right to life, the application of the death penalty statute is unconstitutional under the Equal Protection Clause. A by-product of the lack of such standards is a death penalty statute that has resulted in discriminatory and disparate results. The lack of uniform charging standards must contribute to the disparate results and violates the right to equal protection.

iii. Racism in capital sentencing.

In State v. Davis, Justice Wiggins observed of Washington's death penalty scheme the same sentiment expressed forty years ago by Justice Douglas in Furman: the disturbing truth that race is a significant factor on who gets the death penalty. Justice Wiggins, after reviewing the trial reports

filed and used to determine whether Washington's death penalty is administered constitutionally, concluded:

I write separately to add my deep concern that the death penalty might be much more predictable than we have recognized. I refer, of course, to the race of the defendant. A review of the reports of prosecutions for aggravated first degree murder quickly discloses that African-American defendants are more likely to receive the death penalty than Caucasian defendants.

I find it problematic and unworkable that we have endorsed the view of the United States Supreme Court in rejecting statistics on the impact of race on the imposition of the death penalty. I do not believe that we can address discrimination based on race or other factors in our death penalty cases if we do not consider the statistical trends that present themselves upon examination of trial reports in aggravated murder cases. If we refuse to engage in some form of statistical analysis, we render a nullity the entire statutory scheme we are charged with enforcing. I am not alone in my confusion. Numerous commentators have expressed dismay over the failure of comparative proportionality review to address the issue of racial discrimination in capital punishment. Most of their criticisms attack McCleskey [v. Kemp, 481 U.S. 279 (1987)] for presenting the judiciary with a convenient way to sidestep the issue of racial disparities in the imposition of capital punishment. In light of this history of our death penalty statutory scheme, the conclusion is inescapable that we must examine the impact of the defendant's race upon the administration of the death penalty in Washington.

Davis, 175 Wn.2d at 389-390 (Wiggins, J. Dissenting) (citations omitted).

Ultimately, Justice Wiggins acknowledged what the court needed was the assistance of competent experts to evaluate the significance of race in the administration of Washington's death penalty. *Id.*⁷⁹

As noted, this year University of Washington Professor Katherine Beckett studied the role of race in Washington's death penalty. Her report established that death sentences in Washington reflect racial bias: “the results of regression analyses indicate that juries were three times more likely to impose a sentence of death when the defendant was black than in cases involving similarly situated white defendants.” Beckett Report at 2 (emphasis in original).

Descriptively, Beckett found that “a comparatively large proportion of black defendants were sentenced to death” and had that sentence still in place in December 2013. *Id.* at 5. To determine whether other factors might

⁷⁹ Justice Wiggins observed: “Our analysis of the death penalty cases begins with the 73 aggravated first degree murder cases in which the prosecution sought the death penalty against African–Americans or Caucasians. Thirteen of the 73 cases were against African–American defendants, including defendant Davis. Of these 13, 8 received death sentences. Thus, of the 13 cases in which the prosecution sought the death penalty against African–American defendants, 62 percent resulted in the death penalty. This means that of all African–American and Caucasian defendants for whom the prosecution sought the death penalty, African–Americans were much more likely than Caucasians to be sentenced to death (62 percent versus 40 percent). The trial reports are evidence that once the prosecution seeks the death penalty against African–American defendants, those defendants are much more likely to be sentenced to death than their Caucasian counterparts.” *Davis*, 175 Wn.2d at 389-390, 399-401 (2012) (Wiggins, J. Dissenting).

explain the high number of black defendants sentenced to death, Beckett used a regression analysis, “a statistical technique used to estimate the degree of correlation among variables included in a given model.” Id. at 6. “Regression analysis allows researchers to identify the unique impact of each independent variable, including the race of the defendant and victim – on a particular outcome over and above any differences in case characteristics.” Id. These variable included: number of aggravators, number of prior convictions, number of victims, whether the suffering of victims was prolonged, nature of plea, whether the victim was held hostage, race of defendant and victim, victim gender, population density of the county where the crime was committed, amount of publicity. Id. at 6. Additional extra-legal factors were considered in analyzing the prosecutor’s discretionary decision. Id.

The results showed that, while prosecutors sought the death penalty in a higher proportion of aggravated murder cases against white defendants, juries imposed death more often against black defendants: “we can calculate that juries imposed death in 36.6% of the cases involving white defendants, but 60% of the cases involving black defendants.” Id. at 9. “Although these results are based on analysis of a relatively small sample, they nonetheless indicate that the race of the defendant has had a marked impact on sentencing in aggravated murder cases in Washington State since the

adoption of the existing statutory framework.” Id. at 17.

The Beckett Report establishes that the current Washington death penalty scheme is unconstitutionally skewed against black defendants and is therefore unconstitutional. This violates due process of law.

iv. Absence of valid case characteristics associated with seeking death sentences.

The Beckett Report further demonstrates that prosecutors are not exercising discretion on characteristics related to the case at hand in determining whether to seek a death sentence. Beckett and her researchers tested to determine which factors influenced the prosecutor’s decision to seek the death penalty – number of prior convictions, victims or aggravators and the presence of prolonged suffering. These factors overall explained just 6% of the variation in the decision to seek a death sentence. Beckett Report at 12. “That is, most of the variation in prosecutorial decisions regarding whether to seek the death penalty is not a function of the case characteristics included in the model.” Id. Adding social factors –race of defendant and victim, gender of the victim and the amount of publicity generated by the case– explained 12% of the variation. Id.

Overall, these results indicate that case characteristics explain a very small proportion of the variation that characterizes prosecutorial decisions about whether to seek death, although two case characteristics – the number of alleged aggravators and the number of defendant’s prior convictions – were found to be significant predictors of these decisions. The

results also indicate that neither the race of the victim nor the race of the defendant had a significant impact on prosecutorial decision-making, although one extra-legal factor – publicity – does influence this process.

Id. at 13. Prosecutors were 2.8 times more likely to seek death in cases characterized by extensive publicity. Id. at 12.

For juries, case characteristics explained 17 % of the variation between life and death sentences. Id. at 14. Significant predictors for the juries' determination included additional aggravators and holding a victim hostage. Further, each defense mounted on behalf of the defendant significantly decreased odds of his or her receiving a death sentence. Id. But that said, overall, case characteristics explained only a small proportion of the variation in outcome. Id. at 16. For this reason, Beckett concluded that the “large proportion of remaining unexplained variation in these models suggest that other extra-legal and social factors – not captured by our statistical models – are likely playing important roles in death penalty case dynamics.” Id. at 16.

Thus, the assumption that variations in death sentences as compared to life sentences can be explained by valid case characteristics is not shown to be the case by the analysis Beckett and her fellow researcher undertook. Instead, the Report concludes that case characteristics explain very little about why a prosecutor seeks the death penalty in one case and not in

another, while improper factors such as pretrial publicity does play a significant role in the decision. In the absence of any apparent correlation between valid case characteristics and sentences, any presumption that such a correlation exists and proves that the system is working is unwarranted. The lack of predictability of results, as established by review and comparison of trial reports demonstrates the lack of proportionality of sentences and of a consistent, rational basis for imposing the death penalty in Washington.

v. Absence of valid case reports and a complete record for proportionality review.

Although the federal Constitution does not require proportionality review of a death sentence, such as that set out in RCW 10.95.130(2)(b), such reviews are applauded as “an additional safeguard against arbitrary or capricious sentencing” and as “a means to promote the evenhanded, rational and consistent imposition of death sentences under law.” Pulley v. Harris, 465 U.S. 37, 45, 49, 104 S.Ct. 871, 878, 79 L.Ed.2d 29 (1984) (citations omitted). In fact, Washington’s proportionality review requirement was enacted as the significant safeguard to ensure that the administration of Washington’s death penalty does not contain the problems found in Furman, Bartholomew, supra; Davis, 175 Wn.2d at 397 (Wiggins, J., dissenting).

Once enacted, this proportionality requirement must comply with

the Due Process Clause of the Fourteenth Amendment. See, e.g., Evitts v. Lucey, 469 U.S. 387, 401, 105 S.Ct. 830, 838-39, 83 L.Ed.2d 821 (1985) (and cases cited therein); Hicks v. Oklahoma, 447 U.S. 343, 346, 100 S.Ct. 227, 65 L.3d.2d 175 (1980) (when a state enacts a criminal statute that set out a procedure for the imposition of such statute, a defendant has a “substantial and legitimate expectation” that he will be deprived of his liberty only if the state complies with the procedural requirements); Cross, 156 Wn.2d at 636, citing Palmer v. Clarke, 293 F.Supp.2d 1011, 1040 (D.Neb. 2003) (citing Kilgore v. Bowersox, 124 F.3d 985, 995 (8th Cir. 1997)) (federal courts have consistently emphasized that any proportionality review must be conducted consistent with the due process clause.). The Legislature enacted the proportionality review in RCW 10.95.120 to satisfy the Eighth and Fourteenth Amendments to the United States Constitution and article 1, sections 12 and 14 of the Washington Constitution. Once enacted, that review must be conducted consistently with due process. Notwithstanding these constitutional requirements, RCW 10.95.130 has been repeatedly and consistently violated; as a result Washington’s proportionality review fails to meet the requirements of the Due Process Clause and fails to solve the problems identified in Furman. To ensure a meaningful proportionality review, the legislature created a mechanism to identify the cases for review:

cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965, in which the judge or jury considered the imposition of capital punishment regardless of whether it was imposed or executed, and cases in which reports have been filed with the supreme court under RCW 10.95.120.

RCW 10.95.130(2).⁸⁰

In order to develop the pool of cases for review, both the legislature and judicial branches have enacted specific directives that ensure the prompt collection of the pool of cases:

In all cases in which a person is convicted of aggravated first degree murder, the trial court shall, within thirty days after the entry of the judgment and sentence, submit a report to the clerk of the supreme court of Washington, to the defendant or his or her attorney, and to the prosecuting attorney which provides the information specified under subsections (1) through (8) of this section. . .

RCW 10.95.120 (emphasis added). Superior Court Special Proceeding Rule 6 (SPCR), Proportionality Questionnaire, which governs aggravated first degree murder cases, requires, after input from the parties, the trial court to file with the clerk of the Supreme Court the questionnaire within 30 days after the entry of the judgment and sentence.

Moreover, the legislature, in order for the proportionality review to

⁸⁰ Most modern proportionality review analysis conducted under RCW 10.95.120 has been limited to the trial reports filed under RCW 10.95.120, with little to no consideration of “cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965.”

be meaningful, specifically mandated what type of information was needed. RCW 10.95.120 requires the “report shall be in the form of a standard questionnaire prepared and supplied by the supreme court of Washington and shall include:” information about the defendant (e.g., race, gender, ethnic origin); information about the trial (e.g., what aggravating circumstances were alleged and found applicable); information concerning the special sentencing proceeding (e.g., evidence of mitigating circumstances, sentence imposed); information about the victim (e.g., race, gender, ethnic origin, held hostage, extent of physical harm); information about the representation of the defendant (e.g., counsels’ background and experience); general considerations (e.g., whether race or ethnic origin played a factor in the trial; race and/or ethnic percentage of the county population; systemic exclusion of jurors based on race and/or ethnic origin); and information about the chronology of the case (e.g., date trial began, verdict returned, special sentencing proceeding, trial judges report completed and filed. Finally, RCW 10.95.120 directs that the trial judge shall sign and date the questionnaire when it is completed.⁸¹

These statutory requirements as to when the trial reports must be

⁸¹ A blank trial report questionnaire RCW 10.95.120 may be retrieved off the Washington State Supreme Court webpage: http://www.courts.wa.gov/appellate_trial_courts/supreme/clerks/

completed and filed and the specific information that must be included are mandatory,⁸² but they have historically not been followed. In 2006, this Court acknowledged that the requirements under RCW 10.95.120 were not being followed:

We recognize that our database of comparable cases has not been timely and faithfully updated by trial courts as required by the statute, and contain many omissions. Many reports were filed years late and are missing data on everything from ethnicity to the mental health of the defendant. See State v. Mason, No. 01-1-03569-6 SEA (King County Super. Ct. July 28, 2003); Chea, 98-1-03157-5; State v. Sayasack, 94-1-02000-7 (Pierce County Super. Ct. May 22, 1995); State v. Allison, 94-1-01999-8 (Pierce County Super. Ct. Apr. 10, 1995); State v. Carter, 97-1-02261-6 (Pierce County Super. Ct. Sept. 21, 1998); State v. Roberts, 00-1-00259-8 (Clallam County Super. Ct. Nov. 14, 2002); Garrett, 02-1-00264-2; Hacheney, 01-1-01311-2. At least one trial judge expressed palatable [sic] anguish in his inability to provide this court with a completed report, based on counsel's failure to assist the judge in gathering the data. See State v. Lambert, 97-8-00224-7 (Grant County Super. Ct. Dec. 10, 1997).

Cross, 156 Wn.2d at 637. This Court “recogniz[ed] the gravity of the charge” but ultimately concluded no harm since injury could not be

⁸² See, e.g., Delgado, 148 Wn.2d at 727-728, quoting Davis v. Dep’t of Licensing, 137 Wn.2d at 964 (Courts, when interpreting a criminal statute, will give it a literal and strict interpretation, and cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language since it is assumed the legislature “means exactly what it says.”); and Scannell v. City of Seattle, 97 Wn.2d 701, 704, 648 P.2d 435 (1982); Gorman v. Pierce County, 176 Wn. App. 63, 79, 307 P.3d 795, 803 (2013) (where a statute uses both “shall” and “may,” we presume that the clause using “shall” is mandatory and the clause using “may” is permissive.).

shown. Cross, at 638.

This Court took solace in its belief that “the database is now overwhelmingly complete.” Id. at 638. Nearly a decade later, however, it is clear that this Court’s belief was mistaken. On November 26, 2013, attorneys for Allen Gregory filed with this Court a Motion to Complete the Process of Compiling a Full Set of Aggravated Murder Reports (Motion to Complete). State v. Gregory, No. 88086-7.⁸³ In addition to revealing that the trial reports mistakenly list certain cases as death cases – cases where defendants listed are not currently on death row and have been resentenced to sentences less than death – counsel for Gregory have identified other mistaken information in other trial reports. Counsel for Gregory also identified aggravated murder cases, with life sentences, for which no trial report had ever been filed pursuant to RCW 10.95.120 or SPRC Rule 6. Motion to Complete, pgs. 3-5.

Although the Gregory motion was denied, presumably in response to the Motion to Complete, there have been nineteen trial reports filed with the Washington State Supreme Court since January 27, 2014.⁸⁴

⁸³ On December 9, 2013, this Court granted Mr. Scherf’s motion to join Mr. Gregory’s motion to complete.

⁸⁴ Trial Report (TR) 317: Brewezyynksi, Spokane, filed 1/27/14; TR318: Kosewicz, Spokane, 2/3/14); TR 319: Ruiz, Franklin, 2/11/14; TR 320: Mathis, Okanogan, 2/13/14; TR 321: Ballard, Grant, 2/13/14; TR 322: Pavek, Okanogan, 2/30/14; TR 323: Backstrom, Snohomish,

These newly-filed trial reports fail to comply with the mandatory language of Washington's death penalty statute. None of the trial reports were filed within the 30 days after entry of the judgment as required by RCW 10.95.120. Instead, trial reports are filed years, and in some cases decades, after the entry of the judgment⁸⁵, and many were filled out by a judge who did not preside over the matter.⁸⁶

Moreover, some of the newly filed trial reports fail to provide the necessary information mandated by RCW 10.95.120, like the reports of concern in Cross. Cross, 156 Wn.2d at 637 ("Many reports were filed

2/24/14; TR 324: Pedersen, Snohomish, 2/27/14; TR 325: Saintcalle, King, 2/28/14; TR 326: Sisouvanh, Benton, 3/5/14; TR 327: Wolter, Clark, 3/10/14; TR 328: Davis, Snohomish, 4/29/14; TR 329: Walton, Snohomish, 5/13/14; TR 330: McBride, Spokane, 5/22/14; TR 331: Miller, Lewis, 5/29/14; TR 332: Zamora, Skagit, 6/26/14; TR 333: Sanchez, Yakima, 6/30/14; TR 334: Stafford, Yakima, 6/30/14; TR 335: Crenshaw, Spokane, 7/2/14.

⁸⁵ See, e.g., TR 321: Ballard, Grant County, date of entry (DOE) 7/5/91 filed 2/13/14; TR 323: Backstrom, Snohomish County, date of entry 1/6/99, filed 2/24/14 ; TR 325: Saintcalle, King County, date of entry 12/24/03, filed 2/28/14; TR 328: Davis, Snohomish County, date of entry 11/7/97, filed 4/29/14; TR 329: Walton, Snohomish County, date of entry 7/2/98, filed 5/13/14; TR 330: McBride, Spokane County, date of entry 8/17/86, filed 5/22/14; TR 331: Miller, Lewis County, date of entry 4/3/02, filed 5/29/14.

⁸⁶ See, e.g., TR 321: Ballard, Grant County; TR 323: Backstrom, Snohomish County; TR 328: Davis, Snohomish County; TR 329: Walton, Snohomish County; TR 330: McBride, Spokane County; TR 333: Sanchez, Yakima County; TR 334: Stafford, Yakima County.

years late and are missing data on everything from ethnicity to the mental health of the defendant.") (emphasis added). See, e.g., TR 319 (missing data on mental health of defendant); TR 320 (missing data on mental health of defendant)⁸⁷; TR 321(missing data on mental health of defendant and what aggravating factors were charged and found applicable); TR 322(missing data on mental health of the defendant); TR 329 (missing data on mental health of defendant); TR 330 (missing data on mental health of defendant); TR 331 (missing data on race and ethnicity of defendant; missing data on mental health of defendant; TR 333 (missing data on mental health of defendant; missing data on racial and ethnic relationship between the jury and the defendant and victim)⁸⁸; and TR 334 (missing data on mental health of defendant; missing data on aggravating circumstances alleged and found applicable; missing data on race and ethnic origin of jury).

Including the trial reports referenced in Cross, 156 Wn.2d at 637,

⁸⁷ TR 320 includes a notation from the judge who filled out the trial report, who was not the trial judge, that reads: "We were unable to determine many of the facts because of the age of the case and entry of a guilty plea in 1991. We noted 'N/A' for those facts we couldn't determine."

⁸⁸ This is even more problematic given the fact that TR 333 notes that the defendant's race is "Hispanic." TR 333, pg. 2. See, e.g., "The Role of Race in Washington State Capital Sentencing, 1981-2012" (January 27, 2014) (Beckett Report).

plus the nineteen recently filed with this Court, means approximately 10% of the entire proportionality database “were filed years late and are missing data on everything from ethnicity to the mental health of the defendant.” Cross, 156 Wn.2d at 637. This should be unacceptable to this Court. This Court is tasked with reviewing the trial reports to ensure that Washington’s death penalty does not contain the problems found in Furman. Bartholomew, 98 Wn.2d 173, (1982); Davis, 175 Wn.2d at 397 (Wiggins, J., dissenting). And when a significant portion of the trial reports fail to comply with the mandatory procedures enacted by the Legislature, this Court cannot properly and adequately do what it is statutorily obligated to do. As a result, this Court’s review fails to satisfy due process and fails to address the problems it was designed to address.

d. Conclusion: deficiencies identified in Furman remain forty years after Washington’s death penalty statute was enacted.

A death sentence is imposed in Washington in fewer than 1% of the cases for which the punishment is available, a full 19% less than the 20% figure found unconstitutional in Furman. In the last 45 years, Washington State has, on average, executed approximately one person every ten years. Since 1975, there have been five executions. There have been in excess of 7,000 homicide cases filed in Washington State during this time. Of those, there have been nearly 313 convictions for aggravated

first-degree murder. Beckett Report, pg. 1.⁸⁹ Of these aggravated murder convictions, the punishment of death was sought in just under one-third (30.9%) of the cases involving adults, and juries imposed it in about one eighth (12.3%) of them. Beckett Report, pg. 2. The majority of death sentences in Washington have been reversed and never reinstated, suggesting that not only is the death penalty being arbitrarily sought but also imposed after illegal or unfair trials.⁹⁰ Arbitrariness and caprice are the inevitable side effects of such a rarely-imposed punishment of death.

Nothing prevents this Court from finding that, despite the best intentions of the legislature, forty years with Washington's death penalty scheme demonstrates that it is not implemented fairly or justly. Instead the scheme is thoroughly flawed and even more arbitrary than those considered in Furman. Being sentenced to death in Washington is truly

⁸⁹ Since the Beckett Report was published, approximately nineteen (19) trial reports that were not timely filed per RCW 10.95.120 and SPRC Rule 6 have been filed.

⁹⁰ See, e.g., Bartholomew, 98 Wn.2d at 176; Mak v. Blodgett, *supra*; Harris v. Woods, 64 F.3d 1432 (1995); State v. Luvane, *supra*; Rice v. Wood, 44 F.3d 1396 (1995); Jeffries v. Wood, 75 F.3d 491 (1996); Rupe v. Wood, 93 F.3d 1434 (1996); Lord v. Wood, 184 F.3d 1083 (1999); State v. Finch, 137 Wn.2d 792, 975 P.2d 967, *cert. denied*, 528 U.S. 922, 120 S.Ct. 285, 145 L.Ed.2d 239 (1999); State v. Marshall, 144 Wn.2d 266, 27 P.3d 192 (2001); State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2001); State v. Clark, *supra*; In Re Brett, 142 Wn.2d 868, 16 P.3d 601 (2001); Benn v. Lambert, 283 F.3d 1040 (2002); Pirtle v. Morgan, 313 F.3d 1160 (2002); State v. Thomas, *supra*; In Re Stenson, 174 Wn.2d 474, 276 P.3d 286, *cert. denied*, 133 S.Ct. 444, 184 L.Ed.2d 288 (2012).

akin to being struck by lightning. No meaningful basis can be discerned to distinguish the cases – even among the most extreme – where death is imposed from those in which it is not. See, D. McCord, “Lightning Still Strikes: Evidence From the Popular Press that Death Sentencing Continues to be Unconstitutionally Arbitrary More Than Three Decades After Furman,” 71 BROOKLYN L.REV. 797 (2005). See also, State v. Cross, supra (J. Johnson, C., dissenting with three justices joining).

The Eighth Amendment (and Const. art. 1, §14) must be applied with an “awareness of the limited role to be played by the courts.” Gregg, 428 U.S. at 174. Judicial restraint, however, is not equivalent to inaction. Judges have a role to play, for the Eighth Amendment and Article 1, § 14 are in fact restraints upon the exercise of legislative power:

Although legislative measures adopted by the people’s chosen representatives provide one important means of ascertaining contemporary values, it is evident that legislative judgments alone cannot be determinative of Eighth Amendment standards since that Amendment was intended to safeguard individuals from the abuse of legislative power.

Gregg, 428 U.S. at 174, fn. 19 (citations omitted).

It is therefore incumbent upon this Court to carefully address whether constitutional bounds are overreached. And as seven different justices of this Court, the Governor of the state, and numerous others have concluded, the problems and concerns found unconstitutional in Furman

continue to exist under Washington's death penalty scheme.

16. MR. SCHERF'S DEATH SENTENCE IS INVALID UNDER THE MANDATORY REVIEW PROVISIONS OF RCW 10.95.130

Under RCW 10.95.130, this Court is tasked with conducting a mandatory review to determine (a) whether there was sufficient evidence to justify the death sentence; (b) whether the sentence was brought on by passion and prejudice; (c) whether the sentence is excessive or disproportionate; and (d) whether the defendant had an intellectual disability within the meaning of RCW 10.95.030(2).⁹¹ Mr. Scherf's death sentence should be invalidated under these mandatory review provisions.

a. Insufficient evidence to justify a death sentence.

RCW 10.95.130(2)(a) and RCW 10.95.060(b) require this Court to determine "whether sufficient evidence justifies the jury's finding that considering [the defendant's] crime, there were not sufficient mitigating circumstances to warrant leniency." Davis, 175 Wn.2d at 346. If not, the Court must invalidate the death sentence. Id. The test to be applied by the Court in making this determination is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found sufficient evidence to justify that conclusion beyond a reasonable doubt." Id. (quoting State v. Brown, 132 Wn.2d at 555).

⁹¹ For the argument regarding intellectual disability review, see Section 6, supra.

The evidence, in Mr. Scherf's case, even viewing it in the light most favorable to the prosecution, is insufficient to support an affirmative answer to the statutory question beyond a reasonable doubt, and his death sentence should be invalidated for that reason.

First, the crime was an intentional and unjustified murder – but factually less egregious than virtually all of the other reported aggravated murder cases. It was not committed in the course or furtherance of another crime, not committed for monetary gain or other advantage or against a particularly vulnerable victim.⁹² Mr. Scherf became angry with Officer Biendl; he stewed over things that she said; decided to beat her up; and then, at the last minute before time for inmates to leave the chapel, he decided to kill her. He fought with her to keep her from using her microphone or radio to call for help, grabbed an instrument cable that happened to be nearby and began strangling her. Exhibit 115, at 15-26. Mr. Scherf blacked out and could not remember her actual death. Id. at 26-27. It is very likely that if the DOC officer at the gate outside the chapel had been in his position, as he should have been, the crime would never have occurred. Id. at 20-21; RP 7075.

⁹² This argument is not meant to diminish the tragedy of the death of Officer Biendl nor the magnitude of the loss to her family, friends and co-workers.

Mr. Scherf did not deny that he committed the crime, nor attempt to excuse it; he expressed remorse and acknowledged that Officer Biendl did not deserve to die or her family to suffer. *Id.* at 55. Exhibit 198. He acknowledged the wrongfulness of his behavior in the past and acknowledged his bewilderment that he had engaged in it. Exhibit 198. RP 7158-59.

Further, it was clear from the testimony at the sentencing hearing from DOC witnesses that Mr. Scherf had the capacity to do good and productive things with his life while in prison. He was a good inmate throughout his 30 long years of incarceration up until the time of the crime, and he used his time when incarcerated well. RP 7066. Evidence from his central file included: his record with only two serious infractions over his more than thirty years in prison; his certificates of completion for a prison fellowship seminar, a substance abuse program, a twenty-hour anger/stress management course; a certificate indicating his proficiency in the print shop and forklift safety; an associate of arts degree from Walla Walla Community College where he was on the president's list; a memo from the Superintendent of Washington State Penitentiary thanking him for signs he made for the City of Medical Lake; and a letter from the Chaplain at Clallam Bay Corrections Center commending him for his performance as a chaplain worker. RP 7021-34. His supervisor at the

WSR print shop correctional industry described Mr. Scherf as a good, productive worker who had a skilled job and who helped train others in addition to attaining proficiency in the print shop. RP 7021-34.

Although there were two aggravating factors, both reflected the same reality; that Mr. Scherf was serving a sentence at the time the crime was committed and the crime was committed against a corrections officer. The nature of these aggravating factors, important considerations on mandatory review, Davis, 175 Wn.2d at 351, is to deter crimes against corrections officers and murders committed in prison. To justify a death sentence entirely on the basis of these static aggravating factors which reflect only the status of the defendant and the victim would violate the United States Supreme Court's holding in Woodson, supra, that mandatory imposition of the death penalty violated the Eighth Amendment to the United States Constitution and this Court's decision in State v. Green, 91 Wn.2d at 445, that it was ““essential that the capital-sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense.”” (quoting Roberts v. Louisiana, 431 U.S. 633, 637, 97 S.Ct. 1993, 52 L.Ed.2d 637 (1977)).

While Mr. Scherf's criminal history was extensive and serious, again, an extensive criminal history alone should not be sufficient

aggravation to justify a sentence of death beyond a reasonable doubt. The maximum penalty based solely on criminal history is life without the possibility of parole under the three-strike law. RCW 9.94A.570.

Here, the mitigation was substantial, even though Mr. Scherf was in prison. The crime itself was not more depraved, gratuitously cruel or inhumane than necessary to support a first degree murder conviction. Under these facts, no reasonable trier of fact should have found beyond a reasonable doubt that there was insufficient mitigation to warrant leniency, even given an extensive criminal history.

As noted below, the jury was most like swayed by improper evidence and argument to impose a death sentence out of passion and prejudice.

b. Mr. Scherf's death sentence was brought about through passion and prejudice.

RCW 10.95.130(2) (c) requires this Court to determine, in every capital case, "whether the sentence of death was brought about through passion and prejudice." The standard for review under RCW 10.95.130(2) (c) is most-often articulated:

We will vacate sentences that were the product of appeals to the passion or prejudice of the jury, such as "arguments intended to 'incite feelings of fear, anger, and a desire for revenge' and arguments that are 'irrelevant, irrational, and inflammatory . . . that prevent calm and dispassionate appraisal of the evidence.'"

State v. Davis, *supra* (citing Cross, 156 Wn.2d at 634-635 (quoting Elledge, 144 Wn.2d at 85 (quoting BENNETT L. GERSHMAN, TRIAL AND ERROR AND MISCONDUCT section 2-6(b)(2) at 171-72 (1997))).

In a number of non-capital cases, this Court has found arguments by counsel which referred to matters other than those related to the crime and which were calculated to elicit a negative emotional response to be reversible error. *See, e.g., State v. Belgarde*, 110 Wn.2d at 508 (prosecutor's comments that defendant was a member of the American Indian Movement, "a deadly group of madmen," encouraged the jury to render a verdict based on the defendant's association with that group rather than properly-admitted evidence); *State v. Reed*, 103 Wn.2d 140, 145, 684 P.2d 699 (1984) (prosecutor improperly admonished jury not to let "city lawyers" tell it how to do its job and questioned the credibility of "city doctors" who drove "down here in their Mercedes-Benz"); *State v. Echevarria*, 71 Wn. App. at 599 (prosecutor appealed to jury's passion and prejudice by repeatedly referring to the war on drugs, the Gulf War and Viet Nam); *State v. Clafin*, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984) (prosecutor read an anonymous poem during closing argument written by a rape victim).

Here, the state was permitted to introduce a kite written by Mr. Scherf and other taped statements by him which said (a) that he would like the state to charge him with first degree aggravated murder with the death penalty and he would plead guilty at arraignment, (b) that he would not put the Biendl family through further suffering, (c) that he was already serving life without parole and a second sentence would add no more time, (d) that he should be made an example of so others would not think they could get away with killing corrections officers, and (e) that the Bible says if you take a life you must give a life and “an eye for an eye.” Exhibits 122-124; RP 1631, 1625, 1646, 1658, 1666 (tapes played at RP 6608-6621, 6647-6664, 6671-6687).

The prosecutor read Mr. Scherf’s kite in his opening statement to the jury and said: “His words. Our evidence. Your job [to convict].” RP 6006. The prosecutor also described, in his opening statement to the jury, DOC officers finding Officer Biendl: “And up on the stage, under the cross, they find Jayme Biendl, on her back, blood coming out of her mouth, dead.” RP 6004 (emphasis added). This, as noted above, clearly was intended to be a Christ or Christian reference and just as clearly invited an emotional and irrational response. At the end of closing the prosecutor quoted Mr. Scherf’s statement “if you take a life, you give a life.” RP 7143. The prosecutor then concluded, “You have one more job

to do. You know what we are asking you to do: To write ‘yes’ on that verdict form.” RP 7143. This evidence and argument resulted in a death verdict “brought about through passion and prejudice.”

The erroneous admission of the evidence together with the arguments of the prosecutor, no less than the arguments of the state in Belgarde, Reed, Echevarria, and Clafin, invited an emotional rather than rational decision. They invited a decision on “life or death based on feelings of fear, anger, and a desire for revenge” – fear that if Mr. Scherf did not receive the death penalty other prison guards would be murdered by other inmates, anger that Mr. Scherf might receive no further punishment if death were not imposed, anger that by going to trial he was increasing the suffering and “horror” of Officer Biendl’s family, and a desire for revenge because the Bible says “an eye-for-an-eye.” The introduction of this evidence and the prosecutor’s argument invited a decision based on irrelevant and inflammatory matters rather than a calm and dispassionate appraisal of the evidence

Mr. Scherf’s opinion at a particular point in time was not relevant to the jury’s determination of the insufficiency of the evidence to warrant leniency, except perhaps insofar as it showed his remorse. The broad language in RCW 10.95.060(3) and RCW 10.95.070(1) requiring admission and consideration of “any relevant” evidence or factor applies

only to mitigation evidence.⁹³ In re Davis, 152 Wn.2d at 747. The admission and consideration of aggravating factors is restricted to “the defendant’s criminal record [record of convictions], evidence that would have been admissible at the guilt phase, and evidence to rebut matters raised in mitigation by the defense.” Id. (quoting Bartholomew, 101 Wn.2d at 642 (emphasis in original)). The jury’s duty was not to “take” Mr. Scherf’s life because either he or some passage of scripture seemed to

⁹³ RCW 10.95.070 provides:

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

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

say so; it was to sentence him to life without parole until and unless it was convinced beyond a reasonable doubt that “[h]aving in mind the crime of which the defendant has been found guilty, there were not sufficient mitigating circumstances to merit leniency.” RCW 10.95.060(4).

Because the death sentence was brought about by passion and prejudice, it should be reversed.

c. Mr. Scherf’s death sentence is disproportionate to the sentences imposed in other cases.

Mr. Scherf’s death sentence should be reversed under RCW 10.95.130(b) because it is excessive and disproportionate when compared to other similar cases and because the “freakish, wanton and random” standard, as applied by this Court, provides no review at all and is contrary to the plain language of the statute. See Davis, 175 Wn.2d at 346. Under this analysis, no death sentence could be disproportionate.

i. Mr. Scherf’s death sentence is excessive under the plain language of the statute.

RCW 10.95.130(b) provides that a sentence of death must be reversed and dismissed if it is excessive and disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Under the plain language of the statute, Mr. Scherf’s death sentence is disproportionate and excessive.

The crime was not more depraved, deliberately cruel, planned or

sophisticated than required for a first degree murder conviction. There are few, if any crimes, set forth in the judicial reports or relevant reported cases in which death was sought that are comparable to Mr. Scherf's case in this regards. With one arguable exception, there are no reported first degree murder cases – felony murder, premeditated murder or aggravated murder -- involving death by strangulation in which there was not a sexual assault or separate beating in addition to the strangulation death. See State v. Mezquia, 120 Wn. App. 118, 118 P.3d 378 (2005) (first degree felony murder involving rape and strangulation); State v. Scott, 72 Wn. App. 207, 866 P.2d 1258 (1993) (sexual and physical assault in addition to strangulation); State v. Gibson, 47 Wn. App. 309, 734 P.2d 32 (1987) (sufficient time between beating and strangulation to establish premeditation); State v. Bushey, 46 Wn. App. 579, 731 P.2d 553 (1987) (rape and strangulation); State v. Bingham, *supra* (strangulation and rape, but insufficient evidence of premeditation); see also State v. Spitsyn, 95 Wn. App. 1012, 1999 WL 221642, rev. denied, 139 Wn.2d 1007, 989 P.2d 1143 (1999) (second degree murder based on strangulation where there was evidence of semen). The arguable exception is State v. Schimelpfenig, 128 Wn. App. 224, 115 P.3d 338 (2005), in which a non-aggravated first degree murder conviction was affirmed based on a ligature strangulation, with evidence of bruises and cuts on the victim's face. In State v. Lui, 153

Wn. App. 304, 221 P.3d 988 (2009), the second degree murder conviction was based on strangulation of his fiancée alone.

Although there are two aggravating factors: “[a]t the time of the act resulting in death, the person was serving a term of imprisonment” and that the victim was a corrections officer, they each reflect the status of the defendant and victim rather than an additional crime or motive other than the death of the victim. Only Mr. Scherf, of all of the cases for which judicial reports have been filed, has been convicted of aggravated murder or sentenced to death for these aggravating factors.

There are fifteen trial reports where the aggravating factor was a police officer victim, the most analogous aggravating factor to the corrections officer aggravator. Of these, only Mr. Scherf has received a death sentence. Nedley Norman (trial report 16A) was convicted under the prior statute, but his death sentence was reversed by State v. Frampton, supra, which found the prior statute unconstitutional. Charles Finch (trial report 154), received a new sentencing proceeding after a death sentence was initially imposed; at the new penalty phase trial the jury voted against the death penalty. Mr. Finch’s case also involved a second murder and was committed in the course of a burglary. Only four of the remaining cases went to a penalty phase, and the jury did not impose death sentences in any of them – Lonnie Link (trial report 27); Robert Hughes (trial report

24); Kenneth Schrader (trial report 95). Death was not submitted to the jury in the other ten police officer death cases – Darrin Hutchinson (trial report 68); Patrick Hoffman (trial report 71); Elmer McGinnis (trial report 72); Kenneth Schrader (trial report 95); Juan Gonzales (trial report 188); Sap Kray (trial report 212); Nicholas Vasquez (trial report 224); Thomas Roberts (trial report 257); Jose Guillen (trial report 274); Ronald Matthews (trial report 271).

Finally, while Mr. Scherf has a significant criminal history, there are no comparable cases where death was imposed for criminal history alone and in the absence of some fact about the crime that was egregious. And for one example among the police officer victim cases, Robert Hughes had a prior assault, escape, and murder conviction and a second count of assault in the second degree in addition to his aggravated murder charge where no mitigation was listed (report 24), and he did not receive a death sentence,

Mr. Scherf's case is markedly different and his death sentence stands out as excessive in light of other cases.

- ii. **The “freakish, wanton and random” standard conflicts with the plain language of the statute and provides no review at all.**

The plain language of the statute asks this Court to look at the case

on review in comparison with a specific set of other cases to see if the sentence of death is excessive or disproportionate. The “freakish, wanton and random” standard, as applied by this Court, cannot fulfill the mandate of RCW 10.95.130(b). This standard looks only to whether the sentence is “grotesque,” “without reason,” “completely unjustified,” and “haphazard” rather than to whether it is simply beyond the usual or different in magnitude or scale compared to the cases in the trial reports.⁹⁴ In fact, the “freakish, wanton and random” standard, in light of the other provisions of RCW 10.95, provides no review.

To be eligible for a death sentence, there must be a premeditated first degree murder and aggravating circumstances enacted to make potential death cases more egregious than other first degree premeditated murder cases. Given this and because individual prosecutors presumably do not seek the death penalty by rolling dice or drawing lots, it is virtually certain that any case can be rationalized as death-worthy under the “freakish, wanton or random” standard. In contrast, by considering Mr. Scherf’s case in light of the other reported cases, as set out in section i above, it can be shown that his sentence stands out as unusual and the punishment larger or more severe than comparable cases.

⁹⁴ These are the words used to define freakish, wanton, random, excessive and disproportionate. The Random House Dictionary, Unabridged (2nd ed. 1987).

Further, the recent Beckett Report, which reviews all of the judicial reports filed in aggravated murder cases, shows that there is a demonstrable randomness, arbitrariness, lack of standards and racism in the implementation of RCW 10.95. See Section 15, supra.

The basic known predictors of whether the death penalty will be sought in Washington do not show that the death penalty is sought for the worst of the worst, as anticipated at the time Washington responded to Furman and Woodson; instead, they are (a) the county where the crime occurred and (b) whether there was extensive publicity in the case. Thurston County, for example, has sought the death penalty in 67% of its aggravated murder cases while Okanogan County has sought the death penalty in none of its cases. In the more populous counties, Kitsap has sought death 48% of the time and Yakima zero percent of the time. Snohomish County has sought the death penalty 25% of the time for the 6th highest percentage of all Washington counties.

Case characteristics such as numbers of aggravating circumstances and victims explain only 6% variation in decisions to seek the death penalty and 18% in decisions to impose it, while prosecutors are three times more likely to charge in cases with extensive publicity. Moreover, the system IS racist; juries are three times more likely to impose the death sentence when the defendant is black.

There is simply no way to predict which case will become a capital case based on mitigation or lack of mitigation. What we know is that the same case is greatly more likely to become a capital case if it occurs in Kitsap or Thurston County rather than Okanogan or Yakima counties and if it attracted pretrial publicity. The “freakish” and “wanton” standard, as currently applied, does not address or correct this actual randomness and arbitrariness. Nor does it correct the racism in the capital sentencing scheme. The “freakish, random and wanton” standard is insufficient to protect against disproportionate imposition of the death penalty. It is contrary to the plain and specific language of the statute and provides no real review.

iii. The strength of the state’s case, the wishes of the family, and other non-case characteristic factors as reasons for seeking the death penalty result in disproportionality.

The majority of the Court, in Davis, rejected the dissent’s analysis of similar cases, in part, because the dissent did not note reasons for charging decisions which were based on factors such as the strength of the state’s case or the wishes of the victim’s family. Davis, at 355-356. Such factors, however, do not necessarily make cases dissimilar.

The strength of the case, or the prosecutor’s concern that he or she might not be able to get a conviction, may explain the decision not to seek

the death penalty in an individual case. But the ability to obtain a conviction or the difficulty in doing so does not mean that the crimes committed by Gary Ridgeway, Martin Sanders or Jack Spillman, for examples used in Davis, are not comparable to or more heinous than those committed by persons currently on death row. Explaining decisions not to seek the death penalty for reasons other than the sufficiency of the mitigation merely highlights the arbitrariness of the current death penalty scheme in Washington. Proportionality review under this standard does not protect against the problem of arbitrary imposition of the death penalty identified in Furman. That problem still exists and the statutory scheme set out in RCW 10.95 is unconstitutional.

E. CONCLUSION

Appellant respectfully submits that his conviction and death sentence should be reversed and remanded for retrial on the aggravated murder charge and dismissal of the death sentence.

Respectfully submitted,

DATED this 6th day of August, 2014

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CERTIFICATE OF SERVICE

I certify that on the 6th day of August, 2014, I caused a true and correct copy of the Opening Brief of Appellant to be served on the following via e-mail and first class mail:

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APPENDIX A

FINDINGS OF FACT AND CONCLUSION OF LAW
(FILED NOVEMBER 5, 2012)

1 several (more than a dozen) psychological and psychiatric reports in the past. No
2 psychologist or psychiatrist has ever diagnosed him with temporal lobe dysfunction or
3 with bipolar disorder. He had, on one occasion, written a confession to a previous crime
4 in documents he had in his possession when he was arrested.

5
6 2. On January 29, 2011, following the nine o'clock evening count, inmate Byron Scherf,
7 identified as the defendant, came up missing. Corrections officers at the Department of
8 Corrections started a search for Scherf.

9
10 3. A corrections officer discovered Mr. Scherf in the chapel foyer, located toward the
11 middle of the institution. The defendant was sitting with his back against the wall and his
12 eyes closed. He was not in any form of restraint. He called to the officer by name and
13 remarked that he must have fallen asleep. He also said that Biendl must not have found
14 him. He asked if he was in trouble. The officer said that he was and directed him to
15 stand for handcuffing. At this stage, officers were not yet aware that fellow custody
16 officer Jayme Biendl had been killed. Mr. Scherf was suspected of nothing more than
17 missing count. Officers had no reason to believe he had not fallen asleep.

18
19 4. Officers escorted Mr. Scherf to the shift office in handcuffs. As they walked, Mr. Scherf
20 said that he just wanted to go to his house, meaning his cell. He said he did not want to
21 be in trouble. He asked where they were going. Officers responded that they were going
22 to see the shift lieutenant. He asked if he was in trouble. An officer responded that he
23 had no idea and that it was up to the shift lieutenant. Officers asked him no questions.
24 Mr. Scherf told one of the officers that he had fallen asleep. She responded that
25 sometimes that happens.

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5. At the shift office, one of the escorting officers noted blood on Mr. Scherf's jacket collar. Asked about it, Mr. Scherf said that he was running in the big yard and had fallen and cut himself. This seemed plausible to the officers because Mr. Scherf is known to be a runner.

6. At the shift office, a shift lieutenant asked Mr. Scherf what was going on. Mr. Scherf responded that he was not going to lie, that he was going to attempt to escape. He said he was tired of prison and was going to go over the wall. He told a lieutenant he had hidden from staff by lying on the floor behind a pew in the chapel and that he was going to go over the wall. Mr. Scherf then said he would make no more statements without an attorney present. At that point, the shift lieutenant ceased all questioning and ordered that Mr. Scherf be transferred to the segregation unit at the intensive management unit (IMU). Mr. Scherf was then placed in handcuffs and leg restraints prior to being transferred. Officers began the paperwork for an escape attempt. He was suspected of interfering with count and attempting to escape. Prison staff still knew nothing about Officer Biendl's death.

7. Prior to being transported, but after Mr. Scherf requested an attorney, the lieutenant noticed what looked like several drops of blood on Mr. Scherf's jacket, around the collar and shoulder area. The lieutenant asked him what it was all about. Specifically, the lieutenant asked him if he had been involved in an altercation. Mr. Scherf said he was struck in the face playing handball. The lieutenant asked if he had reported it to anybody. Mr. Scherf said no. The shift lieutenant did not believe Mr. Scherf was truly trying to escape but suspected he was saying so in order to be placed in segregation (the intensive

1 management unit, IMU) because he had been the victim of an assault and was seeking the
2 relative safety of segregation. The lieutenant ordered a strip search of Mr. Scherf in case
3 there were other injuries from a fight. A strip search is the standard protocol at the DOC
4 for processing an inmate into the IMU.

5
6 8. During this contact with the lieutenants, Mr. Scherf was calm. He even smiled a little bit
7 at times.

8
9 9. Officers escorted Mr. Scherf to the IMU in restraints. On the way, one of the officers
10 asked Mr. Scherf how he was going to escape, given that the chapel was in the middle of
11 the institution. He jokingly asked Mr. Scherf if he was going to use a helicopter. Mr.
12 Scherf did not respond except to tell the officers, "I can't really talk about it."

13
14 10. At the IMU, following removal of his handcuffs, Mr. Scherf told an officer he had been
15 jumped by three Mexicans earlier that day. This was not in response to any questioning.
16 He also said that one of them had bit him and that it took place under the third tier in the
17 A unit. Mr. Scherf was processed for intake at IMU.

18
19 11. A medical examination is part of the IMU intake process. Intake Staff at IMU was
20 required to note any injuries or medical needs. While being processed for intake at IMU,
21 an officer asked him, pursuant to procedures, about dentures and partial plates. He also
22 noticed that Mr. Scherf had a bloody finger. He asked how it had happened. Mr. Scherf
23 said that it must have been from an altercation with another offender. He said he was not
24 on the losing end of it. He said he must have been bitten. The officer who noticed Mr.
25 Scherf's bloody finger also noticed his hands were shaking. He asked if Mr. Scherf was

1 okay. Mr. Scherf responded with something to the effect that he supposed so, or that he
2 was okay under the circumstances. On two occasions during the intake procedure, Mr.
3 Scherf asked for a bible. His demeanor was calm and quiet, compliant and
4 nonaggressive. He did not appear nervous. Mr. Scherf also asked for a tetanus shot,
5 adding, "You never know what you can catch from someone." He asked when the nurse
6 was coming.

7
8 12. In his segregation cell at IMU, Mr. Scherf told officers he thought he was going to hurt
9 himself and that he felt suicidal. This may have been in response to a question about the
10 fight. An officer asked if he was going to hurt himself at that point. Mr. Scherf said he
11 wasn't sure, given what had just gone on. This information was relayed to the IMU
12 Sergeant. While he was in his cell, he paced around, sat here and there, and was heard to
13 mutter to himself, "I shouldn't have done this."

14
15 13. A nurse responded and met with Mr. Schorf. She asked if he was injured and he said he
16 had a bite mark on his left middle finger. She observed fresh blood from the injury. She
17 asked if he had any ideation of self harm. He said "somewhat." When asked if he had a
18 self harm plan, he stated, "Not at this time." She asked how he got the injury on his finger
19 and he said that he was bitten. The injury was not life threatening so it was possible to
20 document the injuries with photographs before having it bandaged. An inspection of his
21 upper torso revealed no other injuries. The nurse contacted a psychologist because Mr.
22 Scherf said he was somewhat disposed to self harm. The psychologist ordered that Mr.
23 Scherf be placed on suicide watch.
24
25

- 1 14. When an inmate is placed on suicide watch, special conditions of confinement apply.
2 The inmate is dressed in a "suicide smock," a one-piece article of clothing, constructed of
3 special material designed to thwart strangulation or hanging, covering the inmates back
4 and front, with straps in the front to join them. Mr. Scherf was not given a blanket. No
5 underclothes are permitted. No sharp items, including bones, utensils or ordinary eating
6 and drinking implements were permitted.
7
- 8 15. Mr. Scherf was placed into administrative segregation. This differs from pre-hearing
9 segregation only in that the latter contemplates an imminent hearing whereas the former
10 contemplates more investigation. The level of restriction is the same in both and it
11 involves considerably more restrictions than ordinary cell housing. The inmate in
12 segregation has no personal belongings. His movement is limited and always involves an
13 escort. He has limited time in the yard and limited access to a telephone. The
14 segregation cell itself is about eight feet by eight feet, constructed of cement with a
15 block-type bunk, a four-inch mattress, a cement stool, cement desk top, and a stainless
16 steel toilet and sink. The doors are solid, opened by electric motors and controlled by
17 staff. The door features a three-inch by four-inch window in the door and cuff port, two
18 windows high in the back of the cell. Mr. Scherf was also placed on direct watch,
19 meaning that officers were watching him at every moment. These were the
20 circumstances of Mr. Scherf while in administrative segregation. However, he was not
21 there for long.
22
- 23 16. Officers meanwhile looked at the recordings of events made by any cameras that might
24 have seen a fight involving Mr. Scherf. They could not find a recording of such an
25 incident. Officers also discovered that Officer Biendl, whose shift was over, had not left

1 the building according to standard procedures. Officers could not reach her at home by
2 telephone. By ten o'clock, officers were also aware that Mr. Scherf was the only inmate
3 missing from the count.

4
5 17. Between 10:20 and 10:25 that evening, officers discovered Jayme Biendl's lifeless body
6 in the sanctuary. Resuscitation failed. The shift lieutenant ordered Mr. Scherf, who had
7 only been in segregation for a short time, to be taken out, photographed, and transferred
8 to an observation cell for direct watch. Here, he remained until shortly before midnight
9 when he was escorted back to the reformatory in order to be placed in a mental health cell
10 on the fourth floor. The fourth floor "hospital" cell was about twelve-feet by twelve-
11 feet.

12
13 18. Prison officials placed the facility on lock down. This is something that is inconvenient
14 and disruptive to inmates. Prison officials were concerned that inconvenienced inmates
15 would identify Mr. Scherf as the cause of the lockdown and possibly take out their
16 annoyance on him. Lt. Briones believed that such annoyance would lead to Mr. Scherf
17 being assaulted and/or harassed by other inmates. To avoid this and to keep Mr. Scherf
18 safe, officials wished to keep him separate from all other inmates. The cells at IMU
19 permit offenders to talk. Therefore, Mr. Scherf was transferred back to WSR, to be
20 placed in one of the four "hospital" cells on the fourth floor. In this way, he would not
21 disrupt operations and he would also be safe from inmates and safe from himself.

22
23 19. Mr. Scherf was restricted while in the hospital cell as a result of mentioning suicide. He
24 was not permitted to have a pen or paper and staff turned off the water to his toilet and
25 sink. He was permitted a mattress-like pad but no blankets. The restrictions were, with

1 one exception, related to safety concerns: After learning that Mr. Scherf was suicidal, a
2 DOC psychologist ordered "full precautions." This meant that he could not have
3 anything with him in his cell that could be used to hurt himself. The psychologist had
4 known inmates to break apart their eyeglasses and use the lenses or frames to cut
5 themselves, to use pencils or pens to injure themselves or others, and to rip apart
6 mattresses and use the parts to attempt to strangle themselves. Accordingly, standard full
7 precautions meant that he could have no pens, pencils, eyeglasses, or a mattress. The
8 psychologist had particular concerns related to Mr. Scherf because she had evaluated him
9 after he attempted suicide ten years earlier. She also recalled, from that incident, that he
10 had attempted to manipulate people into relaxing his conditions of confinement.

11
12 20. WSR imposed an additional condition that was not related to his safety. Upon directive
13 by Lt. Briones, Mr. Scherf was not allowed running water in his cell until 4 pm. The
14 reason for this request was the concern that he would wash off any evidence from his
15 hands before police could document it. This was entirely related to the investigation and
16 not related to any safety concerns. The toilet in his cell could only be (and was) flushed
17 from the outside by the corrections officers.

18
19 21. Early the next morning, January 30, 2011, at 3:40, Detective Robinson and Officer
20 Erdman of the Monroe Police Department arrived to take photographs of Mr. Scherf.
21 Detective Robinson correctly advised Mr. Scherf of his rights per the Miranda decision
22 and asked Mr. Scherf if he wanted to make a statement or answer any questions. Mr.
23 Scherf said nothing except to request an attorney. Detective Robinson took his
24 photographs and departed without asking any questions. Detective Robinson also
25 obtained a search warrant from a judge for purposes of collecting such evidence from Mr.

1 Scherf's body as nail clippings and hair combings. The detective did not call the public
2 defender at that time.

3
4 22. Detective Robinson returned about 9:00 a.m. in order to serve the warrant on Mr.
5 Scherf's body. While waiting for a forensic nurse examiner to help the detective serve
6 the warrant, Mr. Scherf called the detective over and told Detective Robinson that he
7 would talk to him if he got an attorney quickly. Detective Robinson immediately called
8 the Public Defender's Association and spoke to attorney Jason Schwarz who agreed to
9 come up to the prison.

10
11 23. One of the officers conducting the watch that morning had worked with Mr. Scherf in the
12 past and had a good relationship with him. His name was Troy Hansen. At around nine-
13 thirty in the morning, Mr. Scherf, who had been lying on his bunk, moved to the door and
14 knocked on the window. Communication could be had through the solid door's cuff port.
15 The other officer asked what he wanted and Mr. Scherf indicated he did not want to talk
16 to that officer, but to Hansen. Hansen gave him his attention. Mr. Scherf then told him
17 he was sorry. He said, "I'm just sorry for what happened." On his face was a depressed,
18 sad expression. He was quiet but appeared emotional. Then, he simply went back and
19 sat down. Nobody had said anything to elicit this statement. Based upon a February 10,
20 2011 interview between Mr. Scherf and police, the Court finds this statement was a
21 reference to the murder of Jayme Biendl.

22
23 24. At 10:07 a.m., Mr. Scherf asked if detectives were still around. He said he wanted to talk
24 to them. This was not in response to any questions.

25

1 25. During this time, Mr. Scherf made specific requests for food and his medication. He also
2 asked for a tetanus shot because he had been bitten. The water remained turned off until
3 4 pm. Although the toilet would not flush in response to anything done on the inside of
4 the cell, when Mr. Scherf used the toilet, staff were able to – and did - turn the water on
5 by means of a key in order that the toilet would flush. Except when staff turned it on for
6 this purpose and for five minutes in the middle of the day, the water stayed off, until 4 pm
7 that afternoon when it was turned back on. During the same five minutes, Mr. Scherf's
8 food and medicine was also restored briefly. Even with the water off, if and when Mr.
9 Scherf requested water, it would be provided.

10

11 26. At 10:15 in the morning, Mr. Schwarz of the Snohomish County Public Defenders
12 Association (PDA) arrived. He met with Mr. Scherf privately for about ten minutes.
13 Though officers could see through the window, they could not hear what was said
14 between attorney and client in the cell. After the meeting, Mr. Schwarz informed
15 Detective Robinson that Mr. Scherf would not be answering questions and wanted a
16 nurse. Mr. Schwarz also said Mr. Scherf wanted an attorney present when he was
17 transported around the prison.

18

19 27. Though the prosecutor had not yet charged him with anything, Mr. Scherf was assigned a
20 lawyer by the Office of Public Defense. His lawyer was Neal Friedman of the Public
21 Defenders Association (PDA). Mr. Friedman has been a criminal defense attorney with
22 the PDA for 24 years. Mr. Scherf did not request to speak with or meet with an attorney
23 following his meeting with Mr. Schwarz. Mr. Friedman did not visit him at WSR.

24

25

1 28. On January 31, 2011 Department of Corrections (DOC) decided to transfer Mr. Scherf to
2 the Snohomish County jail in Everett, less than twenty miles away. This was done partly
3 for Mr. Scherf's safety. DOC did not maintain a copy of the notice of transfer in its
4 records. However, there was nothing secret about the transfer; there was a press release
5 about it. The purpose of the transfer was to place Mr. Scherf closer to his lawyer and
6 further from other inmates and corrections staff at the prison.. The move also had the
7 impact of placing him further away from the agency charged with investigating the crime,
8 which was the Monroe Police Department.

9
10 29. Although the county jail is approximately 17 miles away from the Monroe Police
11 Department, it is across the street from and connected by a tunnel to the Snohomish
12 County Sheriff's Office. (Sheriff's Office.) The Sheriff's Office agreed, once Mr. Scherf
13 was transferred, to take over photographing Mr. Scherf's body for injuries over a period
14 of several days. Sheriff's detectives Brad Walvatne and Dave Bilyeu were assigned this
15 duty. This began a procedure in which detectives would obtain search warrants, one for
16 each photography session, to take pictures of Mr. Scherf's body. The idea was to
17 photograph any injuries as they appeared or disappeared over the course of days,
18 documenting the progression of any healing of injuries to Mr. Scherf.

19
20 30. Mr. Scherf was booked into the jail in the early afternoon of February 1, 2011. Because
21 of concerns about Mr. Scherf's safety and previously articulated thoughts of suicide,
22 together with the knowledge that he had twice previously attempted suicide, Mr. Scherf
23 was initially housed in a small, rubberized cell in the booking area. The cell had neither a
24 sink nor a toilet nor any other hard object upon which an inmate might hurt himself if he
25 was so inclined. Instead of a toilet, there was simply a grate in the floor which flushed

1 when a button outside the cell was pushed. The cell was intended for inmates who may
2 be suicidal. DOC had relayed to the jail the concern that Mr. Scherf may be suicidal.
3 The lights were on in his cell all night.
4

5 31. At the jail, Mr. Scherf was subject to conditions of confinement due to concerns
6 regarding self harm or suicide. Responsibility for the conditions transferred from DOC
7 psychologists/mental health staff County Mental Health Professionals. (CMHPs)
8

9 32. On February 1, having conferred with a DOC psychiatrist, a CMHP met with Mr. Scherf
10 and assessed him. She found he could function, focus, and follow directions. He was
11 attentive and not in a deteriorated condition. He told her that he had attempted suicide
12 years before. She opined he was not suicidal at that time, but believed it would be
13 appropriate to place some restrictions on him out of safety concerns. Accordingly, Mr.
14 Scherf was placed on continuous observation. He was permitted nothing in his cell, save
15 for a suicide prevention smock to wear and a suicide prevention blanket. Specifically, he
16 was not allowed hygiene items in his cell nor was he permitted a mattress. He was only
17 permitted to have custody of hygiene items when he showered, and only permitted a
18 shower if his behavior was deemed appropriate by the jail. His meals were served in a
19 sack with no utensils or "sharps." Significant to Mr. Scherf, he was not permitted a
20 writing implement, a razor, a bible, or his eyeglasses.
21

22 33. Also on February 1, 2011, pursuant to their assignment, Detectives Walvatne and Bilyeu
23 met with Mr. Scherf in his rubberized cell in the booking area. The cell was known as
24 the "rubber room," being intended to make it difficult for the inmate to harm himself.
25 Detective Walvatne contacted Mr. Scherf through a cell door window and correctly

1 advised him of his rights per the Miranda decision. He explained that they would be
2 taking photographs. Detective Walvatne knew he had requested an attorney and did not
3 want to speak to police. Therefore, he did not ask Mr. Scherf if Mr. Scherf wanted to
4 speak to them. The photography session took place in a different, bigger cell. Detectives
5 asked no questions and Mr. Scherf made no statements.
6

7 34. On February 2, 2011 Mr. Scherf met with Mr. Friedman and Mr. Friedman's
8 investigator. They met for up to forty-five minutes. Afterwards, Mr. Friedman met with
9 the jail lieutenant and spoke to him about the lights always being on in his client's cell
10 and about furnishing him with a proper blanket. Mr. Friedman was essentially trying to
11 find out when Mr. Scherf would be transferred "upstairs" where his conditions would be
12 improved. Friedman was advised that Mr. Scherf would be moved either the next day or
13 by the weekend. In fact the defendant was moved to a different cell ("upstairs") the very
14 next day (February 3, 2011.)
15

16 35. Mr. Friedman met with Mr. Scherf on February 2, 2011. Later that week Mr. Friedman
17 took vacation and left town for a three day weekend (Saturday, Sunday and Monday),
18 returning to the office on Tuesday, February 8, 2011. He did not ask anybody from his
19 office to take responsibility for Mr. Scherf in his absence. Through February 10, 2011
20 nobody told him that Mr. Scherf wanted to speak with him or any other lawyer. Nobody
21 told him there were search warrants being executed. Mr. Friedman did not contact the
22 Prosecutors Office.
23
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1 36. Among his conditions of confinement were certain conditions which were related to the
2 on-going murder investigation and not directly related to being on behavioral watch.
3 Among them, and at the request of Monroe police, were restrictions on reading and
4 writing materials requiring that any such items be screened before being given to Mr.
5 Scherf. No items were denied, they were delayed only to permit review prior to being
6 provided. This was not a condition of confinement related to his health and safety. Police
7 wanted to inspect any bible or other writing prior to giving it to Mr. Scherf in order that
8 they would know that, if any new writing appeared, Mr. Scherf must have written it. The
9 reason for this restriction was that in one of Mr. Scherf's previous cases, he wrote some
10 sort of confession in published materials in his possession.

11
12 37. Upon being placed in the jail, Mr. Scherf was given an inmate handbook. The handbook
13 told him how an inmate who desires to talk to a lawyer may do so. It explained, further,
14 that he may simply dial a two-digit speed-dial code on a jail telephone and be connected
15 with the public defender's office, cost free. It also told him that a conversation with the
16 public defender would not be monitored or recorded. All of this information is true.
17 However, while he was housed in the rubberized cell in the booking area, he did not have
18 telephone privileges because of his conditions of confinement.

19
20 38. The inmate handbook also instructed Mr. Scherf that he could write a "kite" in the event
21 he needed anything. In particular, it instructed him what a kite was as he had written
22 them at WSR. He already knew what a kite was in any case, as he had sent numerous
23 kites during his time in the Department of Corrections. The handbook further instructed
24 him that kites were available from the module deputy. The kite that was available
25 contained a convenient check-box whereby he could simply request to speak with a

1 lawyer by checking the appropriate box with a pencil, but Mr. Scherf did not have a
2 pencil. He had to request the kite from and a pencil every time he wanted to fill one out.

3
4 39. Even when Mr. Scherf was not permitted to keep a pencil or pen in his cell, "stubby"
5 pencils were available for this purpose. Notwithstanding the conditions of confinement,
6 if he had requested a pencil to check the box on a kite so to request the public defender,
7 he would have been provided one, watched while he used it, and then the pencil would
8 have been collected together with the kite once he was done. Had he done so, he would
9 have been put in touch with his lawyer.

10
11 40. Even without a pen or pencil or access to a telephone, if Mr. Scherf had desired to be in
12 contact with his attorney, he needed only tell the module deputy. The module deputy
13 would have told the sergeant in the jail and then he would be moved to the phones and
14 given some privacy. It is estimated it would take about 20 minutes from the time Mr.
15 Scherf made the request to having hands-on access to the phone.

16
17 41. Mr. Scherf did not avail himself of any of these means to contact a lawyer. He spoke
18 with Mr. Friedman anyway, as noted above. This was his second meeting with an
19 attorney since the incident.

20
21 42. If Mr. Scherf's lawyer had called and asked to see Mr. Scherf, jail staff would have
22 arranged it through the lieutenant. Though the meeting would likely not have been
23 immediately upon request, it would likely have taken place in the very next shift, after
24 only a matter of hours. However, Mr. Scherf's lawyer believed there would have been a
25 two or three day delay.

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43. On February 2, 2011 Walvatne and Bilyeu returned to the jail to take more photographs. This time, they brought Washington State Patrol photographer James Luthy because he was trained in the use of Alternative Light Source (ALS) equipment. On this occasion, Walvatne again correctly advised Mr. Scherf of his rights per the Miranda decision. However, he inadvertently read the last part, asking whether Mr. Scherf wished to waive his rights and talk to him. Realizing his error, he told Mr. Scherf to disregard that part. Mr. Scherf smiled and said he would only speak with detectives about the photography. The detectives took photographs and asked no questions.

44. During this photography session, Mr. Scherf told Detective Walvatne he wanted to move to a different cell. He said he was not suicidal. At the end of the session, Mr. Scherf asked if Detective Walvatne could have him moved to a different cell. Detective Walvatne said no, that he had no control over that.

45. On February 3, 2011, a County Mental Health professional (CMHP) met with Mr. Scherf in the rubberized cell. Mr. Scherf expressed a wish to be taken out of the booking area, for a shower and for an ordinary toilet and sink. Mr. Scherf did not appear suicidal and he appeared stable enough for an ordinary cell. He had also been in the jail by this time for 72 hours and had remained stable.

46. In addition to not being suicidal, Mr. Scherf appeared organized, reality-based, not disturbed, and generally functioning within normal limits. He was calm and cooperative.

1 47. On February 3, 2011, Mr. Scherf was transferred from the booking area to a cell on the
2 fifth floor segregation area (5 North). His conditions of confinement were relaxed,
3 though certain of them remained in effect. Among them was a prohibition against any
4 items in his cell other than bedding and certain hygiene items. However, he was no
5 longer forbidden any books, bibles, or writing materials.
6

7 48. Notwithstanding the relaxing of his conditions of confinement, Mr. Scherf was still in a
8 segregation cell which was a different, more restrictive circumstance than his housing
9 situation before being arrested in the chapel at WSR.
10

11 49. As a result of his conditions of confinement being relaxed, Mr. Scherf was granted
12 telephone privileges. There was no telephone or telephone jack outside Mr. Scherf's fifth
13 floor segregation cell, though there were telephones in an area nearby outside his module.
14 The telephones provided toll-free access to the public defender's office according to a
15 speed-dial number from 9 am to noon and from 1 pm to 5 pm only. The two-digit speed
16 dial number for the public defender's office was indicated clearly upon a blue-and-white
17 sign posted above the telephones. The telephones are mounted to the wall low enough
18 that one can reach them while shackled. Mr. Scherf could and did use at least one of the
19 telephones on February 4, 2011, during the time when the public defender's office was
20 open.
21

22 50. Mr. Scherf could only use the aforementioned telephones when he was on his one-hour
23 per day recreation time. His recreation hours only rarely coincided with the hours of the
24 public defender's office, which were nine o'clock in the morning until five o'clock in the
25 evening. There was no way he could reach the public defender's office after hours. He

1 had recreation time after nine o'clock on the morning of February 4 and he did indeed use
2 the telephone at least twice then. There is no evidence that he ever sought to contact the
3 public defender's office before February 4 and the Court does not find that he did. From
4 February 1 to February 3 Mr. Scherf had no immediate telephone access as he was
5 housed in the "rubber room" in the booking area of the jail. There is no public defender
6 phone in the booking area nor did he have an hour out of his cell each day during this
7 time period.

8
9 51. On February 3, 2011 detectives arrived again. This time, Mr. Scherf was in the new cell
10 on the fifth floor segregation unit. Detectives had done nothing to bring this about.
11 Again, Detective Walvatne correctly advised Mr. Scherf of his rights per the Miranda
12 decision. This time, he did not read the question asking whether Mr. Scherf wished to
13 waive his rights and speak to detectives. At the end of the photo session, Mr. Scherf
14 asked for the detectives' business cards in case he needed to contact them. They asked
15 no questions of him. During this time, the defendant was professional, courteous,
16 laughed appropriately, and acted normal.

17
18 52. After the February 3, 2011 visit, possibly on February 4, Mr. Scherf contacted Sergeant
19 Simonson at the Snohomish County jail. He asked if the sergeant could contact the
20 detectives or investigators. He may also have asked if the sergeant could contact his
21 attorney at one point. It is unclear what, if anything, Sergeant Simonson did with the
22 attorney request if it was made to him. As to the investigator request, Sergeant Simonson
23 did speak with Detective Walvatne over the telephone the following day and told him of
24 the request to talk to investigators. He also told Walvatne that Mr. Scherf had also
25 requested to speak with his lawyer.

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53. On February 4, Mr. Scherf told a CMHP that he wanted to talk to his attorney's investigator. He also asked to talk to his family members and for a Bible.

54. On February 4, 2011, shortly after nine o'clock in the morning and during his recreation time, Mr. Scherf used the telephone in his area twice. Each call was less than a minute. Neither went through. He later complained to a CMHP that the phone didn't work like the one in prison. He never explained this statement. He also commented in a kite that using the phone while wearing handcuffs and a belly-chain was difficult. There is no evidence that the phone did not work and the Court does not find that it did not work.

55. On February 4, in response to what he believed was an invitation from the defendant, Detective Walvatne arranged with jail staff to have Mr. Scherf transported over to the Sheriff's Office on the Fourth Floor of the Courthouse. Walvatne and Bilyeu met Mr. Scherf in the basement of the courthouse and asked if he wanted to talk to them. He said no, not today. He also said that he had wanted an investigator from his attorney's office. Detectives apologized and sent him back without asking any questions.

56. On February 5, detectives were scheduled to take photographs at the jail. They met Mr. Scherf in visitation. Detective Walvatne again correctly advised Mr. Scherf of his rights per the Miranda decision. They proceeded as before, with detectives asking no questions except as necessary to effect the photography. At the end of the session, Mr. Scherf announced, unsolicited, that he was cut off and that his conditions of confinement had to change. He also said that if they did change, he might talk to detectives. He explained further that he wanted sheets, that he was cold, that he wanted access to a telephone,

1 glasses, toiletries, writing materials, and that the jail stop slamming doors and disturbing
2 him. Detective Walvatne explained he had no control over Mr. Scherf's conditions of
3 confinement. He made no promises except to pass on Mr. Scherf's concerns to jail staff.
4

5 57. After leaving Mr. Scherf, the detectives then met with a lieutenant in the hallway. They
6 told him what Mr. Scherf said. The lieutenant said the restrictions were for safety
7 reasons and that the mental health professionals were in control of them. The lieutenant
8 requested an MHP to come down and explain. MHP Ed DaPra came down and the
9 detective explained Mr. Scherf's concerns to him, as well. Mr. DaPra said he would look
10 into it because he felt that Mr. Scherf was not likely to harm himself.
11

12 58. Mr. DaPra was scheduled to meet with Mr. Scherf again, anyway. Nobody enlisted Mr.
13 DaPra to do anything for Mr. Scherf. By February 5, Mr. Scherf had been watched at the
14 Snohomish County Jail since February 1, without any indication he was still suicidal.
15 Therefore, Mr. DaPra agreed to adjust Mr. Scherf's conditions of confinement, permitting
16 eyeglasses, pencil and paper and blankets. Nothing else was provided. Detective
17 Walvatne did nothing to address any of the other concerns. Mr. Scherf was provided a
18 memo setting out what he could and could not have. Mr. DaPra furnished Mr. Scherf his
19 glasses, blankets, pencil and envelopes. Mr. DaPra then contacted Detective Walvatne to
20 let him know Mr. Scherf was satisfied and was cooperative. Detective Bilyeu examined
21 the bible Mr. Scherf had requested and Mr. Scherf received that the next day.
22

23 59. On February 7, the defendant sent a written kite requesting the presence of detectives. In
24 the space indicating what he needed, it listed Detective Walvatne and/or Detective
25 Bilyeu. Specifically, the kite said, "I request that these detectives, 1 or both, stop by my

1 cell today for 5 minutes (approximately) so I can discuss with them something very
2 important to their case. Thank you Byron Scherf.”
3

4 60. Detectives were at the prison in Monroe when staff at the county jail called them and told
5 them of Mr. Scherf's request. They went back to Everett and visited Mr. Scherf in his
6 cell, located on the fifth floor of the County jail. Detective Walvatne properly advised
7 him of his rights per the Miranda decision. On this occasion, he also read the last portion,
8 inquiring whether Mr. Scherf wished to waive his rights and speak to detectives. Mr.
9 Scherf said that he wanted to discuss things – the same subject as on February 5. He
10 raised his hand in which he held a piece of paper on which he'd written a number of
11 items. He said if the items on his list were taken care of, he'd provide a video confession.
12 He also said he wanted the case disposed of quickly, in the best interests of justice, and
13 for the family involved. He said he did not want to drag the family through anything. He
14 said these things after his rights were read to him and upon being asked whether he
15 wanted to talk to the detectives about his case.
16

17 61. Detectives then met with Mr. Scherf for an audio recorded interview. Initially, Mr.
18 Scherf consented to the recording of the interview and also waived his rights per the
19 Miranda decision. He indicated his waiver by signing that he understood his rights and
20 wished to talk to detectives. Exhibit 6 contains a true and accurate copy of the form.
21 Exhibit 5 is a true and correct recording of the interview that ensued. Exhibit 6 also
22 contains an accurate transcript of the interview. In the interview, Detective Walvatne
23 again correctly advised Mr. Scherf of his rights per the Miranda decision, and Mr. Scherf
24 agreed to talk to them. During this recorded interview, Mr. Scherf said that he would
25 offer a full confession provided that the items on his list were taken care of first. Neither

1 jail staff nor police detectives raised the prospect of a confession with him before he
2 made this offer. Mr. Scherf then went over the items with detectives, explaining each of
3 them. They related to items he wished to have with him and his conditions of
4 confinement in his cell. He explained that he understood that the jail wanted to isolate
5 him, but he did not want to be punished for being isolated. He said he did not have a
6 problem being "in here." Mr. Scherf gave his list to detectives. Exhibit 7 is a true and
7 accurate copy of it.
8

9 62. The list included hot water, a razor and other hygiene-related items, three visits per week,
10 a subscription to the Seattle Times, two sets of bed linens and three security blankets,
11 food from the commissary, the ability to turn off his fluorescent light and a telephone
12 extension to his day room outside his cell so that he would not need to be shackled and
13 escorted to a different area every time he wanted to use the phone and then have to use
14 the phone wearing a belly chain.
15

16 63. Detectives did not make any threats. They also made no promises to do anything except
17 that Detective Bilyeu made reference to his efforts on behalf of Mr. Scherf earlier,
18 resulting in Mr. Scherf getting a bible, blankets and his glasses. This reference was in the
19 context of police expecting Mr. Scherf to reciprocate by showing some good faith on his
20 part. Mr. Scherf never requested an attorney during this interview. He also wrapped up
21 the interview on his own terms when he indicated he had nothing else he wanted to add to
22 the statement. The interview was politely and professionally conducted by all parties.
23

24 64. Captain Parker was the ranking officer at the jail. Detectives brought Mr. Scherf's list to
25 Captain Parker and gave it to him. Captain Parker outranks both detectives and is also in

1 a different line of command within the sheriff's office. Detectives were not in a position
2 to direct Captain Parker to do or not do anything and they did not direct him to do or not
3 do anything. They also said that they were not asking the jail to make any exceptions for
4 Mr. Scherf and furthermore did not try to persuade him to do so. Detectives also did not
5 tell Captain Parker that the defendant had offered to confess in exchange for the items on
6 the list being taken care of. They simply asked him to look at the list and see if he could
7 accommodate the requests. This is exactly what Captain Parker would have done anyway
8 if the list had been provided directly to him by Mr. Scherf. Captain Parker examined the
9 list and immediately identified some things to which he believed Mr. Scherf was already
10 entitled.

11
12 65. Captain Parker then visited Mr. Scherf and told him which of the items on the list he
13 could provide and which he could not. The hygiene items were approved, as was
14 visitation.

15
16 66. Upon learning that the hot water service was broken, Captain Parker ordered it be fixed
17 and it was. The Everett Herald newspaper was made available to Mr. Scherf, just as it is
18 available to other inmates.

19
20 67. Captain Parker did not provide a telephone, per Mr. Scherf's request. There was no
21 telephone in the day room outside his cell door and nor was there a jack. This is not
22 unusual; no inmates have their own telephones in their day rooms. Mr. Scherf had no
23 phone jack in his cell or the day room.

24
25

1 68. Though Mr. Scherf could have written a kite with a pencil stub supplied by staff, even
2 before receiving one to keep, and in that way requested his lawyer, he never did so. He
3 did, however, write several kites in an effort to contact the detectives.
4

5 69. If a public defender had called and asked that the jail arrange for a meeting with Mr.
6 Scherf, it would have been done; the meeting could have taken place as early as the next
7 shift, possibly within a matter of hours. His then attorney, Mr. Friedman, did not know
8 this but it is unclear why he did not know this. In any case, there was no effort made by
9 Mr. Friedman or his office to meet with Mr. Scherf. Neither police nor custody officials
10 prevented Mr. Scherf from requesting a lawyer. Neither police nor custody officials
11 prevented a lawyer from meeting with Mr. Scherf.
12

13 70. During the time Mr. Scherf was housed in the jail, he showed no signs that he was
14 suffering any distress.
15

16 71. On February 9, Detectives Walvatne and Bilyeu returned to the jail to take photographs
17 of Mr. Scherf, once again, according to the same process. Again, Detective Walvatne
18 correctly advised him of his rights per the Miranda decision and again Mr. Scherf said he
19 understood. Just as on February 2nd, 3rd, 5th and 7th, during the previous photo sessions,
20 Mr. Scherf's demeanor was the same. They told him that February 12 would be their
21 last photography session. The detectives expected no more contact once the photo
22 sessions were over.
23

24 72. Following the session, Mr. Scherf sent a kite. The kite requested that he be taken over to
25 talk with detectives. He referred to them as "my detectives." He also identified them by

1 correctly spelled names. He asked that this be done as soon as possible, and said that it
2 was to fulfill his agreement. Exhibit 11 is a true and correct copy of the kite.
3

4 73. Detectives arranged with jail staff to have Mr. Scherf brought to a conference room in the
5 Sheriff's Office, located on the fourth floor of the Snohomish County Courthouse. In the
6 early afternoon, detectives met Mr. Scherf in the basement of the courthouse, where jail
7 staff had brought him. There, Detective Walvatne correctly advised him of his rights per
8 the Miranda decision. Mr. Scherf confirmed he wanted to talk to detectives. He said that
9 he was willing to provide an audio and video recorded statement. In the presence of
10 Monroe police detectives and Snohomish County sheriff's detectives, this was done.
11 Exhibit 9 is a CD containing a true and accurate recording of it. It took place in two
12 parts, being fifty-six minutes and thirty-two minutes long. The entire interview was
13 reasonably friendly in its tone. Mr. Scherf was unshackled and was furnished a cup of
14 coffee. The coffee was Starbucks® brand coffee from Detective Bilyeu's personal
15 supply in his desk.
16

17 74. At the beginning of the February 9, 2011 interview was yet another correct recitation of
18 rights per the Miranda decision, including his right to an attorney "at this time," and Mr.
19 Scherf's indication he was willing to waive those rights. The recording also contains Mr.
20 Scherf's statement that he consented to the recording of the interview. Mr. Scherf opened
21 the conversation with a short but detailed statement tending to implicate himself in the
22 murder of Jayme Biendl. After that, he told police he would not guarantee that he would
23 answer all their questions, but said he would answer most of them. Detective Walvatne
24 told him that if he did not feel comfortable answering something, just to tell him. During
25 the interview, Mr. Scherf did indeed control the parameters of the interview, indicating he

1 did not wish to discuss certain topics, such as his wife and the things Jayme Biendl said
2 to him prior to the murder. He declined to answer questions on those subjects and the
3 police did not press him on them. During the interview, police made no threats or
4 promises to him of any sort. Mr. Scherf understood what was taking place and responded
5 to questions appropriately. He was of sound mind.
6

7 75. Toward the end of the interview, Detective Bilyeu asked Mr. Scherf whether anybody in
8 the room had made any gestures toward him that were not picked up on the camera and
9 Mr. Scherf responded, "Like you mean that gun he's holdin' to my head? No, I'm just
10 kiddin'." The Court finds that Mr. Scherf intended the comment for its humorous value
11 and that in reality, nobody ever pointed a gun at his head.
12

13 76. At all points, Mr. Scherf appeared to know what he was doing. His answers appeared to
14 follow and respond appropriately to questions put to him. At no point was he in a stupor.
15 He never complained of headaches or requested any medication of police. The tone of
16 the interview, and the previous interviews, was polite and courteous. The interview, in
17 these respects, was the same as the previous interviews except that Mr. Scherf appeared
18 happier during this one. At the conclusion of the interview, Mr. Scherf was placed back
19 in restraints and taken back to the jail. Exhibit 10 is a true and accurate transcript of the
20 recorded interview.
21

22 77. On February 10, Mr. Scherf wrote another kite addressed to Detectives Walvatne and
23 Bilyeu, saying simply, "I would like to see you today at 5:00 pm (or thereabouts). Thank
24 you. Byron Scherf." The jail called detectives Walvatne and Bilyeu who dutifully
25 responded to the invitation. They appeared at Mr. Scherf's fifth floor cell and contacted

1 him through the cell window. Through the window, Detective Walvatne correctly
2 advised Mr. Scherf of his rights per the Miranda decision and Mr. Scherf said he
3 understood and wanted to talk. He then pointed a finger accusingly at Detective Bilyeu
4 and said it was all his fault. Asked what he meant, Mr. Scherf went on to say that the
5 coffee Detective Bilyeu had given him had kept him up all night. The Court finds that
6 this was not a serious accusation at all but light-hearted banter indicative of Mr. Scherf's
7 comfort with the detectives. The Court finds he was, in fact, comfortable in the company
8 of the detectives. The three then had an interview at the same table as on February 7,
9 2011.

10
11 78. In the interview, Mr. Scherf announced, unsolicited, that he wished to have a meeting
12 with the prosecutor for the resolution of the case. He also wanted to meet with Mr. Vail
13 then Secretary of the Washington State Department of Corrections and Mr. Frakes then
14 Superintendent of the Monroe Correctional Complex. Detectives made no promises
15 except that they agreed to pass on his requests and that they would have their last photo
16 shoot in the morning to accommodate a visit that Mr. Scherf had scheduled. Detectives
17 asked if he could meet later; they had follow-up questions. Mr. Scherf said yes.
18 Detectives then arranged to have him brought over at five o'clock that evening.

19
20 79. Mr. Scherf had a scheduled meeting with his attorney at three o'clock that day. Upon
21 learning this, Detective Walvatne told jail staff that, if Mr. Scherf still wanted to meet
22 with detectives, he would have to make that request on another kite. Detective Walvatne
23 also called one of the deputy prosecutors and advised him of Mr. Scherf's request to
24 meet. The deputy prosecutor said that, pursuant to RPC, the prosecutor would not meet
25

1 with Mr. Scherf without the permission of his attorney. The meeting was to be on
2 February 11.

3
4 80. Mr. Scherf met with his attorney at 3:00 p.m. on February 10 and told him of his plans to
5 talk. The attorney said he wouldn't advise it. Mr. Scherf told him that he felt he needed
6 to do it, that he needed to do what was best for him and his conscience, and so he was
7 going to do it anyway.

8
9 81. That afternoon, after speaking with his attorney, Mr. Friedman, Mr. Scherf sent another
10 kite asking to meet with Detectives Bilyeu and Walvatne. At Mr. Scherf's request, he was
11 brought over to the fourth floor of the courthouse at approximately five o'clock in the
12 evening of February 10. Again, detectives met Mr. Scherf in the tunnel prior to the
13 evening interview on February 10. Again, Detective Walvatne correctly advised him of
14 his rights per the Miranda decision, including his right to an attorney "at this time," and
15 again Mr. Scherf said he understood. Upstairs, Mr. Scherf's handcuffs and restraints
16 were removed and he spoke with detectives in a video and audio taped interview. Mr.
17 Scherf again gave his permission to record the interview. Detective Walvatne again
18 correctly advised him of his rights per the Miranda decision. Mr. Scherf again said that
19 he understood his rights and wished to talk to detectives. Mr. Scherf told detectives
20 about his conversation with his attorney. He also acknowledged that he could follow his
21 attorney's advice.

22
23 82. The recorded February 10 interview, like the recorded February 9 interview, was
24 reasonably friendly. Again, police made no threats or promises. Mr. Scherf understood
25 what was going on and answered questions appropriately. The questions asked by police

1 were more detailed on this occasion and confronted him with information they had
2 obtained elsewhere. Mr. Scherf rejected some of this information, calling it "ridiculous."
3 At the conclusion of the interview, Mr. Scherf was placed back in restraints and taken
4 back to the jail. Exhibit 12 is a true and correct DVD recording of the interview. Exhibit
5 13 is a true and correct transcript of the recorded interview.
6

7 83. On February 11, pursuant to plan, Mr. Scherf was once again brought over to the
8 courthouse, this time to meet with the prosecutor in the presence of his attorney. Again,
9 detectives met him in the basement of the courthouse before escorting him to the fourth
10 floor conference room. Again, Detective Walvatne correctly advised Mr. Scherf of his
11 rights per the Miranda decision and again Mr. Scherf said that he understood his rights
12 and wished to talk. Upstairs in the conference room, Mr. Scherf was taken out of
13 restraints and given an opportunity to speak privately with Mr. Friedman and Mr.
14 Friedman's investigator. The two deputy prosecutors were nearby but not present.
15

16 84. There followed a sort of meeting among Mr. Scherf, his attorney, and the detectives. Mr.
17 Friedman announced that he did not consent to the meeting. The deputy prosecutors then
18 departed. Detective Walvatne explained that there would be no meeting with the
19 prosecutor because his attorney would not consent. He also read RPC 4.2 to Mr. Scherf
20 by way of explaining. Mr. Scherf told his lawyer that he, Mr. Scherf, would consent. His
21 lawyer apologized and said that he would not let it occur and furthermore had concerns
22 about Mr. Scherf's competency. No issue of competency has actually presented itself
23 and, having no reason to doubt Mr. Scherf's competency, the Court does not find that he
24 was incompetent. Mr. Scherf said that competency was not the issue and wanted his
25 attorney to consent to the interview. His attorney did not relent. Mr. Scherf asked the

1 detectives what if he did not have an attorney. The detectives didn't answer. When Mr.
2 Scherf said he wanted to talk to the detectives alone, his attorney said that would not be a
3 good idea.

4
5 85. The deputy prosecutors returned to their offices without having met with Mr. Scherf. The
6 attorney and his investigator departed. In the Sheriff's Office, as Mr. Scherf was being
7 placed back in restraints, he remarked to detectives that he might fire his attorney and go
8 "pro se." He also asked detectives if he could meet with them later in the afternoon.
9 Detectives told him to fill out a kite if he wanted to talk to them. Mr. Scherf was brought
10 back to the jail.

11
12 86. That same day, February 11, Mr. Scherf completed yet another kite requesting that
13 detectives meet with him. Shortly afterward, he completed another one still, this time
14 asking to be brought back over to the Sheriff's Office. Exhibit 18 is a correct copy of the
15 kite, even though it bears the date of February 12.

16
17 87. Still on February 11, Detectives visited Mr. Scherf in his cell, confirming through the
18 door that he wanted to talk. He said he wanted to give clarification about his confession
19 and also to talk about something he had read in the newspaper. Detectives obliged him
20 and arranged for him to be brought over once again to the Fourth Floor training room of
21 the Sheriff's Office.

22
23 88. Once again in the Sheriff's Office, Mr. Scherf agreed to provide another audio and video
24 recorded interview. Again, he was recorded being correctly advised of his rights per the
25 Miranda decision before the interview. Again, he was recorded saying he consented to

1 the recording of the interview. He also acknowledged that Mr. Friedman did not want
2 him talking to detectives but that he was not following Mr. Friedman's recommendations,
3 and that he had furthermore waived his right to have his attorney present. The Exhibit 16
4 is a true, DVD recording of the interview. Exhibit 17 is a correct transcript of the
5 interview.
6

7 89. Mr. Scherf directed this interview, choosing the subjects upon which he wished to speak
8 and the subjects about which he would not speak. He also turned the interview into his
9 interview of police. He questioned the detectives about certain matters related to the way
10 in which they investigated his case. Detectives then answered his questions. At times,
11 Mr. Scherf placed police on the defensive, asking what police had done and why they had
12 done it. In particular, Mr. Scherf was concerned with the seizure of his guitar and some
13 things he had read in the newspaper about the case. Police answered his questions.
14 While Mr. Scherf remained polite and respectful, his questioning was pointed and firm.
15 He also offered cogent, reasoned explanations about other matters about which police had
16 previously asked without a question presently before him. Detectives had some questions
17 as well. Mr. Scherf answered some but steadfastly refused to answer any of their
18 questions about what Officer Biendl had said to him before she was killed. There were
19 no threats or promises made by either side during the interview. Following this
20 interview, Mr. Scherf was escorted back to the jail in the usual way.
21

22 90. On Saturday, February 12, 2011, Mr. Scherf expressed a desire to speak with Allison
23 Grand, a television journalist affiliated with KIRO, channel 7. When Detectives learned
24 of this request, they told the jail to handle the request as they ordinarily would handle this
25 under their internal policies.

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91. The next contact detectives had with Mr. Scherf was Saturday, February 12. This was to be their last photograph session. Detective Walvatne again correctly advised Mr. Scherf of his rights per the Miranda decision. However, detectives asked no questions concerning the case. Mr. Scherf asked if they had heard from Mr. Frakes or Mr. Vail of DOC. Mr. Scherf was told they had no control over that but had passed his request on to others. Mr. Scherf also asked about the status of talking to the KJRO reporter. He was told that any such a request would have to come through Mr. Scherf's attorney. To this, Mr. Scherf responded, "Well, that won't happen. I might have to get rid of that guy. I'll just write a letter." By "that guy," he was referring to Mr. Friedman.

92. On February 14, Mr. Scherf completed two kites. The first one was to detectives. Exhibit 22 is a true and correct copy of it. It summoned detectives to his cell "A.S.A.P." so that he could give them information that would, as he wrote, "hopefully result in the swift resolution of my case." Detectives appeared at his cell and contacted him through the door. Detective Walvatne again correctly advised him of his rights per the Miranda decision. This was the eighteenth time he had done so over the last eleven days. Mr. Scherf said he understood. He said he wanted them to deliver a kite to the prosecutor's office. The detectives said they weren't sure if they could, but that they'd pass on the request. They asked for another recorded interview. Mr. Scherf agreed. Prior to being recorded, Detective Walvatne again advised Mr. Scherf of his rights per the Miranda decision. When he got to the third sentence, which is the right to an attorney, Mr. Scherf said, "Screw him." Exhibit 20 is a true and accurate recording of the interview.

1 93. The second kite was addressed to the Snohomish County Prosecutor. Exhibit 23 is a true
2 and correct copy of it. It says,

3 My position is simple. The Bible says: "Whoever kills any man [woman]
4 shall surely be put to death." (Leviticus 24:17, 21) and: "Whoever sheds
5 man's blood, by man his blood shall be shed." (Genesis 9:6) I senselessly
6 took the life of an innocent person, Jayme Biendl, Monroe Correctional
7 Officer, and according to the above scriptures, my life must be taken. I
8 ACCEPT THAT! I ask you to charge Aggravated 1st Degree Murder (w/ the
9 death penalty) at my arraignment and I WILL plead guilty! I have a moral
10 obligation to do so. The Biendl Family deserves no less. I WILL NOT put
11 them through any more suffering than they are already enduring. They
12 deserve swift justice and closure. If you only give me life without parole, then
13 you let this murderer off scot free as I am already serving life without parole
14 and another one would add no more time incrementally. Furthermore, you
15 must make an example out of me or others will follow suit if they too can kill
16 a Correctional Officer and escape justice. Furthermore, I will not appeal the
17 judg[ment] or sentence.

18 94. On each of the occasions when he answered questions put to him by detectives, his
19 answers tended to track the questions and demonstrated that he was composed of mind.

20 DISPUTED FACTS

21 1. Monroe Detective Robinson testified that, after meeting with Mr. Scherf, Mr. Schwarz
22 told Detective Robinson that Mr. Scherf was willing to talk to detectives once the
23 prosecutor was involved. He also testified that Mr. Schwarz said Mr. Scherf was
24 wondering whether he was going to be transferred to the county. The detective testified
25 that he asked Mr. Schwarz why, and that Mr. Schwarz said he was concerned about
getting his "ass kicked." There was also evidence that Mr. Schwarz told detectives that
Mr. Scherf wanted a nurse to look at his finger because he had been bitten. Mr. Schwarz
himself did not remember saying such things and expressed doubt that he would have
disclosed Mr. Scherf's explanation for the injury to his finger, saying he would be

1 surprised if he had done so. Mr. Schwarz recalled only asking custody officers that they
2 get a nurse to see Mr. Scherf and also that Mr. Scherf wanted an attorney present any
3 time he was moved around the prison or moved anywhere. He also recalled an
4 unsuccessful attempt to borrow a pen from Detective Robinson to write down Mr.
5 Scherf's wife's telephone number. However, Mr. Schwarz, who never received a pen,
6 did not take any notes.

7
8 2. The defendant argues that there was no agreement to place Mr. Scherf in the County jail
9 because the agreement was not in writing and not filed, nor was the notice that should
10 have followed such an agreement. Prison officials testified there was an agreement to
11 house Mr. Scherf at the jail.

12
13 3. The State argues that the Court should find, based on inferences supplied from their
14 evidence, that the defendant was not so tortured by his conditions of confinement and or
15 overwhelmed by the prospect of relief from them that he felt he had no choice but to
16 confess. Mr. Scherf argues, through counsel, that the Court should find that, based on the
17 testimony of Dr. Grassian, together with inferences gathered from the testimony
18 regarding his conditions of confinement, that Mr. Scherf's decision to confess to a
19 murder and subsequent invitation to a death sentence were the irrational product of his
20 being so overwhelmed by the stresses he was under due to unbearable conditions of
21 confinement, due to his isolation and inability to contact his lawyer, and a grooming
22 process by detectives who appeared to be his only source of relief, that he felt he had no
23 choice in the matter. Mr. Scherf did not testify.

1 RESOLUTION OF DISPUTED FACTS

- 2 1. Neither side has furnished any reason to doubt the credibility of either Detective
3 Robinson or Lawyer Schwarz. Because Detective Robinson was generally clear and
4 unequivocal about the words used by Mr. Schwarz while Mr. Schwarz limited his
5 testimony to his ability to remember, having taken no notes, Detective Robinson's
6 version carries more weight. The Court accepts his version with one exception noted
7 below. Detective Robinson was *not* clear that Mr. Schwarz had supplied the specific
8 explanation for Mr. Scherf's wish for a nurse, being that his finger had been bitten. Mr.
9 Schwarz was clear and unequivocal that he did not. Moreover, being as this was a matter
10 going to the client's version of events as related to the lawyer in a private meeting, it
11 seems unlikely that he would. On the other hand, it is a conclusion that a detective might
12 easily draw for purposes of his own notes, based on the information already revealed by
13 his investigation. Therefore, the Court concludes that Mr. Schwarz did not say that Mr.
14 Scherf told him his finger had been bitten.
- 15
- 16 2. The Court finds there was an oral agreement between Washington State DOC and
17 Snohomish County jail to house the defendant at the jail.
- 18
- 19 3. From the time he was placed into segregation on January 29, through and including
20 February 14, Mr. Scherf was not permitted to interact with any other inmates.
21 Furthermore, his recreation time was severely limited. His segregation did not contribute
22 to his free will being overborne to any significant degree. Also, from the night of January
23 29, when he indicated to a nurse some measure of suicidal ideation or self harm, and into
24 the first week of February, he was placed on highly restricted conditions of confinement.
25 For a time, he also was subjected to a condition of no water in his cell which was

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unrelated to his mental health. The conditions were uncomfortable but did not contribute to his free will being overborne to any significant degree.

4. Mr. Scherf was furnished with the means necessary to contact his lawyer whenever he wanted to do so and he knew it. Most of the time, he did not want to do so.
5. Mr. Scherf was not suffering under his conditions of confinement to the point that he was so desperate that he felt he had to confess to a murder in order to gain relief from them. He was not suffering from any mental illness or defect or any other condition that overcame his free will. To the extent he was motivated by feelings of guilt, this was not a condition that overcame his free will but something that he considered in exercising his free will. Mr. Scherf's expression that he should be executed in order to atone for the crime he said he committed is not per se irrational, notwithstanding the fact that it contemplated his own condemnation under the law. Mr. Scherf was not irrational when he spoke with police. His decision to do so was informed, free, and voluntary.
6. At no time did police or jail staff make any threats to Mr. Scherf. At no time did police or jail staff make any promises to Mr. Scherf apart from a promise to pass on his concerns to others so that his conditions of confinement might improve and so that he might have access to some of the things he wished to have in his cell. Although Mr. Scherf may have expected some form of consideration in return for his cooperation with police, none of these promises overcame his free will.

1 7. Mr. Scherf was not irrational simply because he confessed to a murder or expressed a
2 belief in the death penalty and furthermore expressed a belief that the penalty applied to
3 him.

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5
6 CONCLUSIONS OF LAW

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8
9 1. Uniformed officials at the Department of Corrections and Snohomish County Corrections
10 are all State actors for purposes of this hearing.

11
12 2. Statements made initially by the defendant in the chapel prior to being placed in restraints
13 were not subject to the strictures of the Miranda decision. Those statements were also not
14 the result of any form of coercion and they are voluntary and admissible.

15
16 3. For purposes of the Miranda decision, Mr. Scherf was in custody from the time he was
17 placed in restraints in the chapel and escorted to the shift lieutenant's office.

18
19 4. Statements made by Mr. Scherf that were not in response to questioning as he was being
20 escorted to the shift lieutenant's office are not subject to the strictures of the Miranda
21 decision. Failure to Mirandize him did not render them inadmissible. There being no
22 coercion of any sort to bring them about, those statements are all deemed voluntary and
23 admissible.

24
25

- 1 5. At the shift lieutenant's office, Mr. Scherf was questioned generally about what was
2 going on without first being Mirandized. This question was not limited to matters
3 relating to his health and safety, but easily extended to wrongdoing. Since he was in
4 custody, his responses are inadmissible.
- 5
- 6 6. Mr. Scherf invoked his right to an attorney when he said he would not answer any more
7 questions without a lawyer. From this point forward, no State actors had the right to ask
8 him any questions related to investigating any wrongdoing on his part, except as modified
9 further in the Court's ruling.
- 10
- 11 7. Also at the shift lieutenant's office, Mr. Scherf was also questioned about blood
12 discovered on his collar. This questioning was reasonably related to the prison's duty to
13 maintain the health and safety of its inmates, out of concern that Mr. Scherf may have
14 been assaulted and may require medical aid or protection from his assailant. His
15 responses to questions on the subject of the blood stains or their cause are not rendered
16 inadmissible notwithstanding the strictures of the Miranda decision. Also, the
17 questioning on this subject was not occasioned by any form of coercion. The statements
18 are deemed voluntary and admissible.
- 19
- 20 8. Also at the shift lieutenant's office, Mr. Scherf made some statements to Custody Officer
21 Swan, which were not in response to any interrogation. These statements were not
22 coerced and, in fact, unsolicited. The statements are deemed voluntary and admissible.
- 23
- 24 9. Mr. Scherf was questioned again, now by Officer Dykstra, as he was escorted to the
25 IMU. Though the questioning was intended as light-hearted banter, it still amounted to

1 custodial interrogation following Mr. Scherf's invocation of his Sixth Amendment right
2 to an attorney during questioning. His responses are inadmissible.

3
4 10. At the IMU, Mr. Scherf made some statements that were not in response to any
5 questioning. Nobody did anything to coerce him to speak. His statements were of his
6 own free will and choosing and they are deemed voluntary and admissible.

7
8 11. At the IMU, Mr. Scherf was processed for intake. In the course of this, he was
9 questioned about various things related to his physical and emotional condition, including
10 an injury on his finger and the manner in which his finger was injured and any ideation of
11 self harm. All of these questions were reasonably related to the prison's duty to provide
12 medical care to its inmates and also to keep them safe. None of them was related to the
13 investigation of the murder of Jayme Biendl, which crime had not yet been discovered.
14 There was no coercion of any sort accompanying the questioning. Mr. Scherf's
15 responses to these questions were not inadmissible notwithstanding the strictures of the
16 Miranda decision. His responses are deemed voluntary and admissible.

17
18 12. Also at the IMU, Mr. Scherf said some things that were not in response to questioning.
19 Specifically, he asked for a bible and he asked for a tetanus shot. His requests and
20 remarks made in conjunction with them were not in responses to any questioning from
21 anybody. Also at the IMU, he made a statement utterly to himself. None of these
22 statements was made in response to questioning so none is rendered inadmissible
23 notwithstanding the Miranda decision. All of the statements so made were the product of
24 Mr. Scherf's own free will and choosing and they are all admissible.

25

- 1 13. On January 30, Mr. Scherf made some brief remarks to a custody officer whom he knew.
2 He also made specific requests to custody officers related to his wants. The remarks and
3 requests were not in response to any questioning. They were not the result of any
4 coercion. They are deemed voluntary and admissible.
5
- 6 14. Also on January 30, Mr. Scherf told a police detective that he would talk to the detective
7 if the detective got him an attorney quickly.
8
- 9 15. Mr. Scherf's request to speak to detectives, at 10:07 a.m. on January 30, was not in
10 response to questioning nor was it the result of any form of coercion. Also, it followed
11 advisement of rights by a police detective. It is voluntary and admissible.
12
- 13 16. Mr. Scherf's request for an attorney late on January 29 was satisfied when he met with
14 Mr. Schwarz the morning of January 30. Mr. Scherf also had a right to an attorney based
15 on CrR.3.1 upon being taken into custody at WSR. Detective Robinson was under no
16 obligation to delay serving the warrant on Mr. Scherf's person before Mr. Scherf received
17 an attorney. CrR 3.1(b)(1) was not violated.
18
- 19 17. Because Mr. Scherf was transferred to Snohomish County Corrections on February 1,
20 2011 for his own protection, to serve his DOC sentence in the jail, a place that was also
21 more convenient to his attorney, and more conducive to his safety, rather than being
22 detained as a result of the new crime, the fact that he was not brought before a judge "as
23 soon as practicable" was not a violation of CrR 3.2.1(d)(1). Even if it was, such a
24 violation does not trigger the exclusionary rule and nothing is suppressed as a result of it.
25

- 1 18. Any continuing right to an attorney on the part of Mr. Scherf was satisfied upon meeting
2 with his assigned counsel, Mr. Friedman, on February 2, 2011. The fact that Mr. Scherf
3 was not at that time assigned a second attorney and the fact that Mr. Friedman was not on
4 a list of attorneys approved to defend death penalty cases is not a violation of any right
5 created by SPRC 2 because Mr. Scherf was not yet charged with any crime and so there
6 were not yet any stages of proceedings within the meaning of SPRC 1.
7
- 8 19. Because Mr. Scherf was not a person desiring an attorney between January 30 and
9 February 4, with the likely exception of February 2 when he was meeting with Mr.
10 Friedman, there was no violation of CrR 3.1(c)(2) even if he did not have access to a
11 telephone. With the possible exception of February 10 when he was meeting Mr.
12 Friedman, Mr. Scherf also was not a person desiring an attorney between February 4
13 through February 14, 2011 for purposes of CrR 3.1(c)(2).
14
- 15 20. On February 2, Mr. Scherf made some comments to police who had appeared to take
16 photographs pursuant to a search warrant. He made all those comments after being
17 advised of his rights per the Miranda decision. Because he understood his rights and
18 because there was no coercion, his decision to speak followed a valid waiver of his rights
19 and his words were a product of his free will. The statements are voluntary and
20 admissible.
21
- 22 21. On February 3, after police photographed him pursuant to a search warrant, Mr. Scherf
23 spoke to them. Because these comments followed advisement of warnings per the
24 Miranda decision and also were not the product of any interrogation, the Miranda
25 decision does not render them inadmissible. Because there was no coercion and because

1 even if Mr. Scherf believed his recently improved conditions of confinement were thanks
2 to the police, his belief did not overcome his own free will; the statements are all
3 voluntary and admissible.
4

5 22. Because when he met with a County Mental Health Professional (CMHP) on February 3,
6 Mr. Scherf was speaking to a person who was responsible for conditions related to his
7 health and safety and not somebody attempting to investigate a crime on behalf of the
8 authorities, his responses to questions are not inadmissible simply because he did not
9 waive his rights per the Miranda decision. Because there was no coercion involved, the
10 statements are all deemed voluntary and admissible.
11

12 23. Although Mr. Scherf did desire a lawyer on February 4, 2011, CrR 3.1(c)(2) was not
13 violated because he had access to a telephone and the number to the public defender,
14 together with means necessary to be placed in communication with a lawyer. Even if he
15 did not have access to a telephone at this time, such that CrR 3.1(c)(2) was violated, the
16 violation could not extend beyond any subsequent valid waiver of right to an attorney.
17 Even if he did not have access to a telephone at this time, such that CrR 3.1(c)(2) was
18 violated, he made no statements to police prior to validly waiving his right to an attorney.
19 Therefore, there is nothing to suppress.
20

21 24. When on February 4, detectives had Mr. Scherf brought over to the Courthouse because
22 they believed he wanted to speak to them, police did not advise him of his Miranda rights
23 immediately before whatever it was they initially said to him by way of asking him if he
24 wished to speak to them. Therefore, his response to this question is suppressed.
25

- 1 25. When on February 5, Mr. Scherf spoke to detectives after they photographed him
2 pursuant to a search warrant, his words came after advisement of Miranda warnings,
3 unsolicited by any questioning from police and also unaccompanied by any coercion by
4 police. Moreover, if he was at the time motivated by a hope that the police could help
5 him in his conditions of confinement, that hope did not overcome his free will. His
6 words to detectives that day are all deemed voluntary and admissible.
7
- 8 26. Although Mr. DaPra adjusted Mr. Scherf's conditions of confinement after speaking with
9 detectives, and may have been motivated by a desire to help detectives, he was not acting
10 at their behest and he was not an agent of the police.
11
- 12 27. When, on February 7, Mr. Scherf sent a written kite requesting the presence of detectives,
13 he was not acting out of the belief that he had no choice but to speak with police. He
14 may have entertained some notions about how speaking to them would benefit him, but
15 ultimately his decision to write and send the kite was entirely the product of his own free
16 will. The February 7 kite (Exhibit 8) is deemed voluntary and admissible.
17
- 18 28. When, on February 7, detectives responded to Mr. Scherf's cell, they did so in response
19 to a request from him whereby he initiated the contact. Because he initiated the contact,
20 police did not violate his rights by visiting him for the purpose of talking with him.
21 Furthermore, because all written and spoken words from Mr. Scherf followed advisement
22 of his rights per the Miranda decision, the strictures of that decision were not violated.
23 Even if Mr. Scherf had been acting out of a belief that the police could help him if he
24 communicated with them, and even if Mr. Scherf had been acting out of a belief that he
25 was obligated to communicate with them because of any belief that they had helped him

1 improve his conditions, nevertheless there was no coercion upon Mr. Scherf external to
2 himself. There were no threats or promises made such that his free will was overborne.
3 Mr. Scherf's decision to provide spoken and written words to the police was the product
4 of his own free will and choosing. All spoken and written words provided by Mr. Scherf
5 to police detectives on February 7, together with the recording of some of his statements,
6 are deemed voluntary and admissible.

7
8 29. When Captain Parker made adjustments to Mr. Scherf's conditions of confinement after
9 speaking with detectives, the adjustments were according to jail policy and were a matter
10 of what conditions Mr. Scherf was entitled to enjoy anyway. Captain Parker was not
11 acting at the behest or direction of detectives. While he may have been motivated by a
12 desire to cooperate with detectives, he was not acting as their agent.

13
14 30. When, on February 9, Mr. Scherf wrote and sent a kite to detectives asking to be taken
15 over to the Courthouse to talk to them, he was not acting out of a despair or desperation
16 so deep that it had overcome his free will, even though he may have been hoping for a
17 benefit. His decision to send the kite was a product of his own free will and choosing.
18 The kite (Exhibit 11) is deemed voluntary and admissible.

19
20 31. When, on February 9, Mr. Scherf went to the Courthouse and provided a recorded
21 interview, following advisement of rights per the Miranda decision, he was not
22 responding to any threats or promises but acting according to his own free will and
23 choosing. All of his words, spoken, written and recorded, are deemed voluntary and
24 admissible.

25

1 32. When, on February 10, Mr. Scherf wrote two kites addressed to detectives requesting
2 they meet him at his cell, he did so again of his own free will and choosing. The kites
3 (Exhibits 14 and 15) are deemed voluntary and admissible.
4

5 33. When, responding to the kite, detectives met with Mr. Scherf at the jail, Mr. Scherf's
6 statements all followed advisement of Miranda warnings, were not the product of any
7 threats or promises, but were all a matter of his own free will and choosing. The
8 statements he made are all deemed voluntary and admissible.
9

10 34. When, on February 10, following his attorney advising against it, Mr. Scherf decided to
11 speak once again with detectives at the Courthouse, his decision to do so was the product
12 of his own free will and choosing. When, on that date, he then spoke to detectives
13 following advisement of Miranda warnings, his words were the product of his own free
14 will and choosing. All of his statements, whether or not recorded electronically, are
15 deemed voluntary and admissible.
16

17 35. When, on February 11, Mr. Scherf met with police once again, this time in the company
18 of his lawyer, he did so of his own free will and choosing. When he chose to speak with
19 detectives outside the presence of his lawyer, this decision, likewise, was his own. In
20 neither case was his free will overcome by anything external to Mr. Scherf. All
21 statements made by Mr. Scherf to police on this day are deemed voluntary and
22 admissible.
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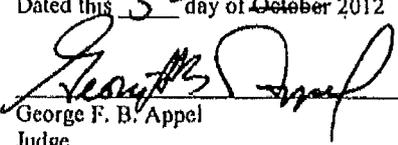
- 1 36. When, again on February 11, Mr. Scherf wrote and sent a kite requesting to meet with
2 detectives, he did so again according to his own free will and choosing. The kite (Exhibit
3 18) is deemed voluntary and admissible.
4
- 5 37. When, still on February 11, Mr. Scherf spoke to police who responded to his call in
6 response to his invitation, he did so of his own free will and choosing. His words are
7 deemed voluntary and admissible.
8
- 9 38. When, pursuant to his request, police had Mr. Scherf transported once again to the
10 Courthouse for another recorded interview, this was at Mr. Scherf's insistence and was a
11 matter of his own free will and choosing. His statements to police, including those
12 recorded electronically, were entirely the product of his own free will and choosing and
13 are all deemed voluntary and admissible.
14
- 15 39. On February 12, 2011 Mr. Scherf expressed a desire to speak with Allison Grand. This,
16 too, was a matter of his own free will and choosing. The request is deemed voluntary and
17 admissible.
18
- 19 40. When, on February 12, Mr. Scherf spoke again with detectives who were photographing
20 him pursuant to a search warrant, his statements again followed advisement of his rights
21 per the Miranda decision and were entirely the product of his own free will and choosing.
22 They are therefore deemed voluntary and admissible.
23
- 24 41. When, on February 14, 2011, Mr. Scherf wrote and delivered two kites, one summoning
25 the detectives to his cell, the other addressed to the prosecutor, he did so of his own free

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will and choosing. Therefore, the kites (Exhibits 22 and 23) are deemed voluntary and admissible.

42. When, on February 14, Mr. Scherf spoke to the police at his cell, pursuant to his request and following advisement of his Miranda rights for the eighteenth time, he did so of his own free will and choosing and his statements are therefore deemed voluntary and admissible.

43. The Court finds that Mr. Scherf met with an attorney on January 30, 2011 and again met with an attorney on February 2, 2011. The Court further finds that the defendant repeatedly and of his own initiative chose to speak with detectives without his attorney present and repeatedly indicated he was aware of his attorney's advice and was intentionally choosing to disregard it. The defendant did not desire to speak with his attorney between February 4, 2011 and February 9, 2011. The Court concludes that there was no violation of CrR 3.1(e)(2).

Dated this 5th ~~day of October~~ ^{November} 2012

George F. B. Appel
Judge

APPENDIX B

JURY INSTRUCTIONS AND VERDICT FORM

INSTRUCTION NO. 8

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

INSTRUCTION NO. _____

DEF. _____

Premeditated means thought over beforehand. Premeditation is the deliberate formation of and reflection upon the intent to take a human life. It is the mental process of thinking beforehand, deliberation, reflection, and weighing or reasoning for a period of time, however short. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

Premeditation is "the deliberate formation of and reflection upon the intent to take a human life" and involves "thinking beforehand, deliberation, reflection, weighing or reasoning *8 for a period of time, however short." * Finch, 137 Wash.2d at 831, 975 P.2d 967 (quoting *State v. Pirtle*, 127 Wash.2d 628, 644, 904 P.2d 245 (1995) (quoting *State v. Gentry*, 125 Wash.2d 570, 597-98, 888 P.2d 1105 (1995) and *State v. Ortiz*, 119 Wash.2d 294, 312, 831 P.2d 1060 (1992)))
State v. Allen, 159 Wash. 2d 1, 7-8, 147 P.3d 581, 583-84 (2006)

Premeditation has been defined as "the deliberate formation of and reflection upon the intent to take a human life", *State v. Robtoy*, 98 Wash.2d 30, 43, 653 P.2d 284 (1982), and involves "the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." *Brooks*, 97 Wash.2d at 876, 651 P.2d 217. Premeditation must involve more than a moment in point of time. RCW 9A.32.020(1).
State v. Ollens, 107 Wash. 2d 848, 850, 733 P.2d 984, 986 (1987)

See also *State v. Hoffman*, 116 Wn.2d 51, (1991) Premeditation is the deliberate formation of and reflection upon the intent to take a human life.

See also *State v. Ortiz*, 119 Wn.2d Premeditation has been defined as "the deliberate formation of and reflection upon the intent to take a human life", State v. Robtoy, 98 Wn.2d 30, 43, 653 P.2d 284 (1982), and involves "the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." Brooks, 97 Wash.2d at 876, 651 P.2d 217.

WPIC 26.01.01 (Modified)

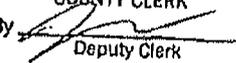


CL16063037

Filed in Open Court

May 15, 2013

SONYA KRASKI
COUNTY CLERK

By 
Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF SNOHOMISH

STATE OF WASHINGTON

Plaintiff,

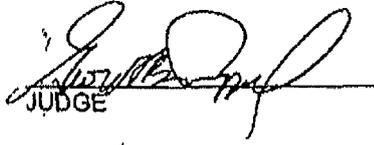
v.

BYRON EUGENE SCHERF

Defendant.

CASE NO. 11-1-00404-4

COURT'S INSTRUCTIONS
TO THE JURY


JUDGE

May 14, 2013
Date given to Jury

ORIGINAL

404

INSTRUCTION NO. 1

It is your duty to decide the facts in this case from the evidence produced in court. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted, in the first phase of this trial and during this special sentencing phase. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it during your verdict. Do not speculate whether the evidence would have favored one party or the other.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done

this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of the court. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict. You should bear in mind that your verdict must be based upon reason and not upon emotion. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference.

INSTRUCTION NO. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a just verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 3

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

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

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

INSTRUCTION NO. 4

The question you are required to answer is as follows:

Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?

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

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

INSTRUCTION NO. 5

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

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

INSTRUCTION NO. 6

The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and a sentencing verdict form.

You must answer one question. All twelve of you must agree before you answer the question "yes" or "no". If you do not unanimously agree then answer "no unanimous agreement". When you have arrived at an answer, fill in the verdict form to express your

decision. The presiding juror should then sign the verdict form and notify the bailiff who will conduct you into court to declare your verdict.


JUDGE



Filed in Open Court

May 15, 2013

SONYA KRASKI
COUNTY CLERK

By: _____
Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF SNOHOMISH

STATE OF WASHINGTON

Plaintiff,

v.

BYRON EUGENE SCHERF

Defendant.

CASE NO. 11-1-00404-4

SENTENCING
VERDICT

Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?

ANSWER:

"YES" (In which case the defendant shall be sentenced to death)

"NO" (In which case the defendant shall be sentenced to life imprisonment

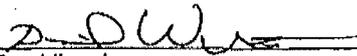
without the possibility of release or parole)

ORIGINAL

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"NO UNANIMOUS AGREEMENT" (In which case the defendant shall be sentenced to life imprisonment without the possibility of release or parole)

DATED this 15 day of MAY, 2013.



Presiding Juror

APPENDIX C

RCW 10.94 & RCW 10.95

sought shall be brought before the judicial officer without unnecessary delay upon arrest pursuant to the warrant; whereupon the judicial officer shall set a time and place for hearing, and shall advise the person of his right to have the assistance of counsel, to confront the witnesses against him, and to produce evidence in his own behalf at the hearing.

(2) The person whose removal is sought may at this time in writing waive the hearing and agree to be returned to the demanding court, judge, or magistrate. If a waiver is executed, the judicial officer shall issue an order pursuant to RCW 10.91.030.

(3) The judicial officer may impose conditions of release authorized by the laws of this state which will reasonably assure the appearance at the hearing of the person whose removal is sought. [1971 ex.s. c 17 § 3.]

10.91.030 Preliminary hearing—Investigation report—Findings—Order authorizing return. The prosecuting attorney shall appear at the hearing and report to the judicial officer the results of his investigation. If the judicial officer finds that the affiant is a designated agent of the demanding court, judge, or magistrate and that the person whose removal is sought was released from custody by the demanding court, judge, or magistrate, and that the person has violated the terms or conditions of his release, the judicial officer shall issue an order authorizing the return of the person to the custody of the demanding court, judge, or magistrate forthwith. [1971 ex.s. c 17 § 4.]

10.91.040 "Judicial officer of this state", "judicial officer" defined. For the purpose of this chapter "judicial officer of this state" and "judicial officer" mean a "judge of the superior court", or a "justice of the peace of this state". [1971 ex.s. c 17 § 5.]

10.91.050 Costs. The costs of the procedures required by this chapter shall be borne by the demanding state, except when the designated agent is not a public official. In any case when the designated agent is not a public official, he shall bear the cost of such procedures. [1971 ex.s. c 17 § 9.]

10.91.900 Severability—1971 ex.s. c 17. If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable. [1971 ex.s. c 17 § 6.]

10.91.910 Construction—1971 ex.s. c 17. This chapter shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it. [1971 ex.s. c 17 § 7.]

10.91.920 Short title. This chapter may be cited as the "Uniform Rendition of Accused Persons Act". [1971 ex.s. c 17 § 8.]

Chapter 10.94 DEATH PENALTY

Sections	
10.94.010	Notice of intention—Filing required, when—Service—Contents—Failure of as bar to request.
10.94.020	Special sentencing proceeding—Procedure.
10.94.030	Mandatory review of sentence by state supreme court—Procedures—Consolidation with appeal.
10.94.900	Severability—1977 ex.s. c 206.

10.94.010 Notice of intention—Filing required, when—Service—Contents—Failure of as bar to request. When a defendant is charged with the crime of murder in the first degree as defined in RCW 9A.32.030(1)(a), the prosecuting attorney or the prosecuting attorney's designee shall file a written notice of intention to request a proceeding to determine whether or not the death penalty should be imposed when the prosecution has reason to believe that one or more aggravating circumstances, as set forth in RCW 9A.32.045 as now or hereafter amended, was present and the prosecution intends to prove the presence of such circumstance or circumstances in a special sentencing proceeding under RCW 10.94.020.

The notice of intention to request the death penalty must be served on the defendant or the defendant's attorney and filed with the court within thirty days of the defendant's arraignment in superior court on the charge of murder in the first degree under RCW 9A.32.030(1)(a). The notice shall specify the aggravating circumstance or circumstances upon which the prosecuting attorney bases the request for the death penalty. The court may, within the thirty day period upon good cause being shown, extend the period for the service and filing of notice.

If the prosecution does not serve and file written notice of intent to request the death penalty within the specified time the prosecuting attorney may not request the death penalty. [1977 ex.s. c 206 § 1.]

10.94.020 Special sentencing proceeding—Procedure. (1) If notice of intention to request the death penalty has been served and filed by the prosecution in accordance with RCW 10.94.010, then a special sentencing proceeding shall be held in the event the defendant is found guilty of murder in the first degree under RCW 9A.32.030(1)(a).

(2) If the prosecution has filed a request for the death penalty in accordance with RCW 10.94.010, and the trial jury returns a verdict of murder in the first degree under RCW 9A.32.030(1)(a), then, at such time as the verdict is returned, the trial judge shall reconvene the same trial jury to determine in a separate special sentencing proceeding whether there are one or more aggravating circumstances and whether there are mitigating circumstances sufficient to merit leniency, as provided in RCW 9A.32.045 as now or hereafter amended, and to answer special questions pursuant to subsection (10) of this section. The special sentencing proceeding shall be held as soon as possible following the return of the jury verdict.

(3) At the commencement of the special sentencing proceeding the judge shall instruct the jury as to the nature and purpose of the proceeding and as to the consequences of its findings as provided in RCW 9A.32.040 as now or hereafter amended.

(4) In the special sentencing proceeding, evidence may be presented relating to the presence of any aggravating or mitigating circumstances as enumerated in RCW 9A.32.045 as now or hereafter amended. Evidence of aggravating circumstances shall be limited to evidence relevant to those aggravating circumstances specified in the notice required by RCW 10.94.010.

(5) Any relevant evidence which the court deems to have probative value may be received regardless of its admissibility under usual rules of evidence: *Provided*, That the defendant is accorded a fair opportunity to rebut any hearsay statements: *Provided further*, That evidence secured in violation of the Constitutions of the United States or the state of Washington shall not be admissible.

(6) Upon the conclusion of the evidence, the judge shall give the jury appropriate instructions and the prosecution and the defendant or defendant's counsel shall be permitted to present argument. The prosecution shall open and conclude the argument to the jury.

(7) The jury shall then retire to deliberate. Upon reaching a decision, the jury shall specify each aggravating circumstance that it unanimously determines to have been established beyond a reasonable doubt. In the event the jury finds no aggravating circumstances the defendant shall be sentenced pursuant to RCW 9A.32.040(3) as now or hereafter amended.

(8) If the jury finds there are one or more aggravating circumstances it must then decide whether it is also unanimously convinced beyond a reasonable doubt there are not sufficient mitigating circumstances to merit leniency. If the jury makes such a finding, it shall proceed to answer the special questions submitted pursuant to subsection (10) of this section.

(9) If the jury finds there are one or more aggravating circumstances but fails to be convinced beyond a reasonable doubt there are not sufficient mitigating circumstances to merit leniency the defendant shall be sentenced pursuant to RCW 9A.32.040(2) as now or hereafter amended.

(10) If the jury finds that there are one or more aggravating circumstances and is unanimously convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency, the jury shall answer the following questions:

(a) Did the evidence presented at trial establish the guilt of the defendant with clear certainty?

(b) Are you convinced beyond a reasonable doubt that there is a probability that the defendant would commit additional criminal acts of violence that would constitute a continuing threat to society?

The state shall have the burden of proving each question and the court shall instruct the jury that it may not answer either question in the affirmative unless it agrees unanimously.

If the jury answers both questions in the affirmative, the defendant shall be sentenced pursuant to RCW 9A.32.040(1) as now or hereafter amended.

If the jury answers either question in the negative the defendant shall be sentenced pursuant to RCW 9A.32.040(2) as now or hereafter amended. [1977 ex.s. c 206 § 2.]

10.94.030 Mandatory review of sentence by state supreme court—Procedures—Consolidation with appeal. (1) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the supreme court of Washington. The clerk of the trial court within ten days after receiving the transcript, shall transmit the entire record and transcript to the supreme court of Washington together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of the defendant's attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the supreme court of Washington.

(2) The supreme court of Washington shall consider the punishment as well as any errors enumerated by way of appeal.

(3) With regard to the sentence, the court shall determine:

(a) Whether the evidence supports the jury's findings; and

(b) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(4) Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(5) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(a) Affirm the sentence of death; or

(b) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the supreme court of Washington in its decision and the extracts prepared therefor shall be provided to the resentencing judge for the judge's consideration.

(6) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence. [1977 ex.s. c 206 § 7.]

10.94.900 Severability—1977 ex.s. c 206. If any provision of this 1977 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to

other persons or circumstances is not affected. [1977 ex.s. c 206 § 10.]

This applies to the amendments to RCW 9A.32.040, 9A.32.045, 9A.32.046, and 9A.32.047 and to RCW 9.01.200, 10.94.010, 10.94.020, 10.94.030, and 10.94.900 as enacted by 1977 ex.s. c 206.

Chapter 10.97 WASHINGTON STATE CRIMINAL RECORDS PRIVACY ACT

Sections	
10.97.010	Declaration of policy.
10.97.020	Short title.
10.97.030	Definitions.
10.97.040	Dissemination of information shall state disposition of charge—Current and complete information required—Exceptions.
10.97.045	Disposition of criminal charge data to be furnished agency initiating criminal history record and state patrol.
10.97.050	Unrestricted dissemination of certain information—Dissemination of other information to certain persons or for certain purposes—Records of dissemination, contents.
10.97.060	Deletion of certain information, conditions.
10.97.070	Discretionary disclosure of suspect's identity to victim.
10.97.080	Inspection of information by subject—Limitations—Rules governing—Challenge of records and correction of information—Dissemination of corrected information.
10.97.090	Administration of act by state patrol—Powers and duties.
10.97.100	Fees for dissemination of information.
10.97.110	Action for injunction and damages for violation of chapter—Measure of damages—Action not to affect criminal prosecution.
10.97.120	Penalty for violation of chapter—Criminal prosecution not to affect civil action.

Division of criminal justice designated as state planning agency: RCW 43.06.330.

10.97.010 Declaration of policy. The legislature declares that it is the policy of the state of Washington to provide for the completeness, accuracy, confidentiality, and security of criminal history record information and victim, witness, and complainant record information as defined in this chapter. [1977 ex.s. c 314 § 1.]

10.97.020 Short title. This chapter may be cited as the Washington State Criminal Records Privacy Act. [1977 ex.s. c 314 § 2.]

Reviser's note: The phrase "This 1977 amendatory act" has been changed to "This chapter". This 1977 amendatory act [1977 ex.s. c 314] consists of chapter 10.97 RCW and of the amendments by 1977 ex.s. c 314 of RCW 42.17.310, 43.43.705, 43.43.710, 43.43.730, and 43.43.810.

10.97.030 Definitions. For purposes of this chapter, the definitions of terms in this section shall apply.

(1) "Criminal history record information" means information contained in records collected by criminal justice agencies, other than courts, on individuals, other than juveniles, consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges, and any disposition arising therefrom, including sentences, correctional

supervision, and release. The term includes information contained in records maintained by or obtained from criminal justice agencies, other than courts, which records provide individual identification of a person together with any portion of the individual's record of involvement in the criminal justice system as an alleged or convicted offender, except:

(a) Posters, announcements, or lists for identifying or apprehending fugitives or wanted persons;

(b) Original records of entry maintained by criminal justice agencies to the extent that such records are compiled and maintained chronologically and are accessible only on a chronological basis;

(c) Court indices and records of public judicial proceedings, court decisions, and opinions, and information disclosed during public judicial proceedings;

(d) Records of traffic violations which are not punishable by a maximum term of imprisonment of more than ninety days;

(e) Records of any traffic offenses as maintained by the department of licensing for the purpose of regulating the issuance, suspension, revocation, or renewal of drivers' or other operators' licenses and pursuant to RCW 46.52.130 as now existing or hereafter amended;

(f) Records of any aviation violations or offenses as maintained by the department of transportation for the purpose of regulating pilots or other aviation operators, and pursuant to RCW 47.68.330 as now existing or hereafter amended;

(g) Announcements of executive clemency.

(2) "Nonconviction data" consists of all criminal history record information relating to an incident which has not led to a conviction or other disposition adverse to the subject, and for which proceedings are no longer actively pending. There shall be a rebuttable presumption that proceedings are no longer actively pending if more than one year has elapsed since arrest, citation, or service of warrant and no disposition has been entered.

(3) "Conviction record" means criminal history record information relating to an incident which has led to a conviction or other disposition adverse to the subject.

(4) "Conviction or other disposition adverse to the subject" means any disposition of charges, except a decision not to prosecute, a dismissal, or acquittal: *Provided, however,* That a dismissal entered after a period of probation, suspension, or deferral of sentence shall be considered a disposition adverse to the subject.

(5) "Criminal justice agency" means: (a) A court; or (b) a government agency which performs the administration of criminal justice pursuant to a statute or executive order and which allocates a substantial part of its annual budget to the administration of criminal justice.

(6) "The administration of criminal justice" means performance of any of the following activities: Detection, apprehension, detention, pretrial release, post-trial release, prosecution, adjudication, correctional supervision, or rehabilitation of accused persons or criminal offenders. The term also includes criminal identification activities and the collection, storage, dissemination of criminal history record information, and the compensation of victims of crime.

Chapter 10.95 RCW
Capital punishment — aggravated first degree murder

RCW Sections

- 10.95.010 Court rules.
- 10.95.020 Definition.
- 10.95.030 Sentences for aggravated first degree murder.
- 10.95.040 Special sentencing proceeding — Notice — Filing — Service.
- 10.95.050 Special sentencing proceeding — When held — Jury to decide matters presented — Waiver — Reconvening same jury — Impanelling new jury — Peremptory challenges.
- 10.95.060 Special sentencing proceeding — Jury instructions — Opening statements — Evidence — Arguments — Question for jury.
- 10.95.070 Special sentencing proceeding — Factors which jury may consider in deciding whether leniency merited.
- 10.95.080 When sentence to death or sentence to life imprisonment shall be imposed.
- 10.95.090 Sentence if death sentence commuted, held invalid, or if death sentence established by chapter held invalid.
- 10.95.100 Mandatory review of death sentence by supreme court — Notice — Transmittal — Contents of notice — Jurisdiction.
- 10.95.110 Verbatim report of trial proceedings — Preparation — Transmittal to supreme court — Clerk's papers — Receipt.
- 10.95.120 Information report — Form — Contents — Submission to supreme court, defendant, prosecuting attorney.
- 10.95.130 Questions posed for determination by supreme court in death sentence review — Review in addition to appeal — Consolidation of review and appeal.
- 10.95.140 Invalidation of sentence, remand for resentencing — Affirmation of sentence, remand for execution.
- 10.95.150 Time limit for appellate review of death sentence and filing opinion.
- 10.95.160 Death warrant — Issuance — Form — Time for execution of judgment and sentence.
- 10.95.170 Imprisonment of defendant.
- 10.95.180 Death penalty — How executed.
- 10.95.185 Witnesses.
- 10.95.190 Death warrant — Record — Return to trial court.
- 10.95.200 Proceedings for failure to execute on day named.
- 10.95.900 Severability — 1981 c 138.
- 10.95.901 Construction — Chapter applicable to state registered domestic partnerships — 2009 c 521.

Notes:

Homicide: Chapter 9A.32 RCW.

10.95.010
Court rules.

No rule promulgated by the supreme court of Washington pursuant to RCW 2.04.190 and 2.04.200, now or in the future, shall be construed to supersede or alter any of the provisions of this chapter.

(1981 c 138 § 1.)

10.95.020
Definition.

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

(1) The victim was a law enforcement officer, corrections officer, or firefighter who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the person to be such at the time of the killing;

(2) At the time of the act resulting in the death, the person was serving a term of imprisonment, had escaped, or was on authorized or unauthorized leave in or from a state facility or program for the incarceration or treatment of persons adjudicated guilty of crimes;

(3) At the time of the act resulting in death, the person was in custody in a county or county-city jail as a consequence of having been adjudicated guilty of a felony;

(4) The person committed the murder pursuant to an agreement that he or she would receive money or any other thing of value for committing the murder;

(5) The person solicited another person to commit the murder and had paid or had agreed to pay money or any other thing of value for committing the murder;

(6) The person committed the murder to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group;

(7) The murder was committed during the course of or as a result of a shooting where the discharge of the firearm, as defined in RCW 9.41.010, is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge;

(8) The victim was:

(a) A judge; juror or former juror; prospective, current, or former witness in an adjudicative proceeding; prosecuting attorney; deputy prosecuting attorney; defense attorney; a member of the indeterminate sentence review board; or a probation or parole officer; and

(b) The murder was related to the exercise of official duties performed or to be performed by the victim;

(9) The person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime, including, but specifically not limited to, any attempt to avoid prosecution as a persistent offender as defined in RCW 9.94A.030;

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

(11) The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes:

(a) Robbery in the first or second degree;

(b) Rape in the first or second degree;

(c) Burglary in the first or second degree or residential burglary;

(d) Kidnapping in the first degree; or

(e) Arson in the first degree;

(12) The victim was regularly employed or self-employed as a newsreporter and the murder was committed to obstruct or hinder the investigative, research, or reporting activities of the victim;

(13) At the time the person committed the murder, there existed a court order, issued in this or any other state, which prohibited the person from either contacting the victim, molesting the victim, or disturbing the peace of the victim, and the person had knowledge of the existence of that order;

(14) At the time the person committed the murder, the person and the victim were "family or household members" as that term is defined in *RCW 10.99.020(1), and the person had previously engaged in a pattern or practice of three or more of the

following crimes committed upon the victim within a five-year period, regardless of whether a conviction resulted:

- (a) Harassment as defined in RCW 9A.46.020; or
- (b) Any criminal assault.

[2003 c 53 § 96; 1998 c 305 § 1. Prior: 1995 c 129 § 17 (Initiative Measure No. 159); 1994 c 121 § 3; 1981 c 138 § 2.]

Notes:

*Reviser's note: RCW 10.99.020 was amended by 2004 c 18 § 2, changing subsection (1) to subsection (3).

Intent -- Effective date -- 2003 c 53; See notes following RCW 2.48.180.

Findings and Intent -- Short title -- Severability -- Captions not law -- 1995 c 129; See notes following RCW 9.94A.510.

10.95.030

Sentences for aggravated first degree murder.

*** CHANGE IN 2010 *** (SEE 2490.SL) ***

(1) Except as provided in subsection (2) of this section, any person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer and the indeterminate sentence review board or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation. The department of social and health services or its successor or any executive official may not permit such prisoner to participate in any sort of release or furlough program.

(2) If, pursuant to a special sentencing proceeding held under RCW 10.95.050, the trier of fact finds that there are not sufficient mitigating circumstances to merit leniency, the sentence shall be death. In no case, however, shall a person be sentenced to death if the person was mentally retarded at the time the crime was committed, under the definition of mental retardation set forth in (a) of this subsection. A diagnosis of mental retardation shall be documented by a licensed psychiatrist or licensed psychologist designated by the court, who is an expert in the diagnosis and evaluation of mental retardation. The defense must establish mental retardation by a preponderance of the evidence and the court must make a finding as to the existence of mental retardation.

(a) "Mentally retarded" means the individual has: (i) significantly subaverage general intellectual functioning; (ii) existing concurrently with deficits in adaptive behavior; and (iii) both significantly subaverage general intellectual functioning and deficits in adaptive behavior were manifested during the developmental period.

(b) "General intellectual functioning" means the results obtained by assessment with one or more of the individually administered general intelligence tests developed for the purpose of assessing intellectual functioning.

(c) "Significantly subaverage general intellectual functioning" means intelligence quotient seventy or below.

(d) "Adaptive behavior" means the effectiveness or degree with which individuals meet the standards of personal independence and social responsibility expected for his or her age.

(e) "Developmental period" means the period of time between conception and the eighteenth birthday.

[1993 c 479 § 1; 1981 c 138 § 3.]

10.95.040

Special sentencing proceeding — Notice — Filing — Service.

(1) If a person is charged with aggravated first degree murder as defined by RCW 10.95.020, the prosecuting attorney shall file

written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.

(2) The notice of special sentencing proceeding shall be filed and served on the defendant or the defendant's attorney within thirty days after the defendant's arraignment upon the charge of aggravated first degree murder unless the court, for good cause shown, extends or reopens the period for filing and service of the notice. Except with the consent of the prosecuting attorney, during the period in which the prosecuting attorney may file the notice of special sentencing proceeding, the defendant may not tender a plea of guilty to the charge of aggravated first degree murder nor may the court accept a plea of guilty to the charge of aggravated first degree murder or any lesser included offense.

(3) If a notice of special sentencing proceeding is not filed and served as provided in this section, the prosecuting attorney may not request the death penalty.

[1981 c 138 § 4.]

10.95.050

Special sentencing proceeding — When held — Jury to decide matters presented — Waiver — Reconvening same jury — Impanelling new jury — Peremptory challenges.

(1) If a defendant is adjudicated guilty of aggravated first degree murder, whether by acceptance of a plea of guilty, by verdict of a jury, or by decision of the trial court sitting without a jury, a special sentencing proceeding shall be held if a notice of special sentencing proceeding was filed and served as provided by RCW 10.95.040. No sort of plea, admission, or agreement may abrogate the requirement that a special sentencing proceeding be held.

(2) A jury shall decide the matters presented in the special sentencing proceeding unless a jury is waived in the discretion of the court and with the consent of the defendant and the prosecuting attorney.

(3) If the defendant's guilt was determined by a jury verdict, the trial court shall reconvene the same jury to hear the special sentencing proceeding. The proceeding shall commence as soon as practicable after completion of the trial at which the defendant's guilt was determined. If, however, unforeseen circumstances make it impracticable to reconvene the same jury to hear the special sentencing proceeding, the trial court may dismiss that jury and convene a jury pursuant to subsection (4) of this section.

(4) If the defendant's guilt was determined by plea of guilty or by decision of the trial court sitting without a jury, or if a retrial of the special sentencing proceeding is necessary for any reason including but not limited to a mistrial in a previous special sentencing proceeding or as a consequence of a remand from an appellate court, the trial court shall impanel a jury of twelve persons plus whatever alternate jurors the trial court deems necessary. The defense and prosecution shall each be allowed to peremptorily challenge twelve jurors. If there is more than one defendant, each defendant shall be allowed an additional peremptory challenge and the prosecution shall be allowed a like number of additional challenges. If alternate jurors are selected, the defense and prosecution shall each be allowed one peremptory challenge for each alternate juror to be selected and if there is more than one defendant each defendant shall be allowed an additional peremptory challenge for each alternate juror to be selected and the prosecution shall be allowed a like number of additional challenges.

[1981 c 138 § 5.]

10.95.060

Special sentencing proceeding — Jury Instructions — Opening statements — Evidence — Arguments — Question for jury.

(1) At the commencement of the special sentencing proceeding, the trial court shall instruct the jury as to the nature and purpose of the proceeding and as to the consequences of its decision, as provided in RCW 10.95.030.

(2) At the special sentencing proceeding both the prosecution and defense shall be allowed to make an opening statement. The prosecution shall first present evidence and then the defense may present evidence. Rebuttal evidence may be presented by each side. Upon conclusion of the evidence, the court shall instruct the jury and then the prosecution and defense shall be permitted to present argument. The prosecution shall open and conclude the argument.

(3) The court shall admit any relevant evidence which it deems to have probative value regardless of its admissibility under

the rules of evidence, including hearsay evidence and evidence of the defendant's previous criminal activity regardless of whether the defendant has been charged or convicted as a result of such activity. The defendant shall be accorded a fair opportunity to rebut or offer any hearsay evidence.

In addition to evidence of whether or not there are sufficient mitigating circumstances to merit leniency, if the jury sitting in the special sentencing proceeding has not heard evidence of the aggravated first degree murder of which the defendant stands convicted, both the defense and prosecution may introduce evidence concerning the facts and circumstances of the murder.

(4) Upon conclusion of the evidence and argument at the special sentencing proceeding, the jury shall retire to deliberate upon the following question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"

In order to return an affirmative answer to the question posed by this subsection, the jury must so find unanimously.

[1981 c 138 § 6.]

10.95.070

Special sentencing proceeding — Factors which jury may consider in deciding whether leniency merited.

*** CHANGE IN 2010 *** (SEE 2490.SL) ***

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

(1) Whether the defendant has or does not have a significant history, either as a juvenile or an adult, of prior criminal activity;

(2) Whether the murder was committed while the defendant was under the influence of extreme mental disturbance;

(3) Whether the victim consented to the act of murder;

(4) Whether the defendant was an accomplice to a murder committed by another person where the defendant's participation in the murder was relatively minor;

(5) Whether the defendant acted under duress or domination of another person;

(6) Whether, at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental disease or defect. However, a person found to be mentally retarded under RCW 10.95.030(2) may in no case be sentenced to death;

(7) Whether the age of the defendant at the time of the crime calls for leniency; and

(8) Whether there is a likelihood that the defendant will pose a danger to others in the future.

[1983 c 479 § 2; 1981 c 138 § 7.]

10.95.080.

When sentence to death or sentence to life imprisonment shall be imposed.

(1) If a jury answers affirmatively the question posed by RCW 10.95.060(4), or when a jury is waived as allowed by RCW 10.95.050(2) and the trial court answers affirmatively the question posed by RCW 10.95.060(4), the defendant shall be sentenced to death. The trial court may not suspend or defer the execution or imposition of the sentence.

(2) If the jury does not return an affirmative answer to the question posed in RCW 10.95.060(4), the defendant shall be sentenced to life imprisonment as provided in RCW 10.95.030(1).

[1981 c 138 § 8.]

10.95.090

Sentence if death sentence commuted, held invalid, or if death sentence established by chapter held invalid.

If any sentence of death imposed pursuant to this chapter is commuted by the governor, or held to be invalid by a final judgment of a court after all avenues of appeal have been exhausted by the parties to the action, or if the death penalty established by this chapter is held to be invalid by a final judgment of a court which is binding on all courts in the state, the sentence for aggravated first degree murder if there was an affirmative response to the question posed by RCW 10.95.060(4) shall be life imprisonment as provided in RCW 10.95.030(1).

[1981 c 138 § 9.]

10.95.100

Mandatory review of death sentence by supreme court — Notice — Transmittal — Contents of notice — Jurisdiction.

Whenever a defendant is sentenced to death, upon entry of the judgment and sentence in the trial court the sentence shall be reviewed on the record by the supreme court of Washington.

Within ten days of the entry of a judgment and sentence imposing the death penalty, the clerk of the trial court shall transmit notice thereof to the clerk of the supreme court of Washington and to the parties. The notice shall include the caption of the case, its cause number, the defendant's name, the crime or crimes of which the defendant was convicted, the sentence imposed, the date of entry of judgment and sentence, and the names and addresses of the attorneys for the parties. The notice shall vest with the supreme court of Washington the jurisdiction to review the sentence of death as provided by this chapter. The failure of the clerk of the trial court to transmit the notice as required shall not prevent the supreme court of Washington from conducting the sentence review as provided by chapter 138, Laws of 1981.

[1981 c 138 § 10.]

10.95.110

Verbatim report of trial proceedings — Preparation — Transmittal to supreme court — Clerk's papers — Receipt.

(1) Within ten days after the entry of a judgment and sentence imposing the death penalty, the clerk of the trial court shall cause the preparation of a verbatim report of the trial proceedings to be commenced.

(2) Within five days of the filing and approval of the verbatim report of proceedings, the clerk of the trial court shall transmit such verbatim report of proceedings together with copies of all of the clerk's papers to the clerk of the supreme court of Washington. The clerk of the supreme court of Washington shall forthwith acknowledge receipt of these documents by providing notice of receipt to the clerk of the trial court, the defendant or his or her attorney, and the prosecuting attorney.

[1981 c 138 § 11.]

10.95.120

Information report — Form — Contents — Submission to supreme court, defendant, prosecuting attorney.

In all cases in which a person is convicted of aggravated first degree murder, the trial court shall, within thirty days after the entry of the judgment and sentence, submit a report to the clerk of the supreme court of Washington, to the defendant or his or

her attorney, and to the prosecuting attorney which provides the information specified under subsections (1) through (6) of this section. The report shall be in the form of a standard questionnaire prepared and supplied by the supreme court of Washington and shall include the following:

- (1) Information about the defendant, including the following:
 - (a) Name, date of birth, gender, marital status, and race and/or ethnic origin;
 - (b) Number and ages of children;
 - (c) Whether his or her parents are living, and date of death where applicable;
 - (d) Number of children born to his or her parents;
 - (e) The defendant's educational background, intelligence level, and intelligence quotient;
 - (f) Whether a psychiatric evaluation was performed, and if so, whether it indicated that the defendant was:
 - (i) Able to distinguish right from wrong;
 - (ii) Able to perceive the nature and quality of his or her act; and
 - (iii) Able to cooperate intelligently with his or her defense;
 - (g) Any character or behavior disorders found or other pertinent psychiatric or psychological information;
 - (h) The work record of the defendant;
 - (i) A list of the defendant's prior convictions including the offense, date, and sentence imposed; and
 - (j) The length of time the defendant has resided in Washington and the county in which he or she was convicted.
- (2) Information about the trial, including:
 - (a) The defendant's plea;
 - (b) Whether defendant was represented by counsel;
 - (c) Whether there was evidence introduced or instructions given as to defenses to aggravated first degree murder, including excusable homicide, justifiable homicide, insanity, duress, entrapment, alibi, intoxication, or other specific defense;
 - (d) Any other offenses charged against the defendant and tried at the same trial and whether they resulted in conviction;
 - (e) What aggravating circumstances were alleged against the defendant and which of these circumstances was found to have been applicable; and
 - (f) Names and charges filed against other defendant(s) if tried jointly and disposition of the charges.
- (3) Information concerning the special sentencing proceeding, including:
 - (a) The date the defendant was convicted and date the special sentencing proceeding commenced;
 - (b) Whether the jury for the special sentencing proceeding was the same jury that returned the guilty verdict, providing an explanation if it was not;
 - (c) Whether there was evidence of mitigating circumstances;
 - (d) Whether there was, in the court's opinion, credible evidence of the mitigating circumstances as provided in RCW 10.95.070;
 - (e) The jury's answer to the question posed in RCW 10.95.060(4);
 - (f) The sentence imposed.
- (4) Information about the victim, including:
 - (a) Whether he or she was related to the defendant by blood or marriage;

- (b) The victim's occupation and whether he or she was an employer or employee of the defendant;
 - (c) Whether the victim was acquainted with the defendant, and if so, how well;
 - (d) The length of time the victim resided in Washington and the county;
 - (e) Whether the victim was the same race and/or ethnic origin as the defendant;
 - (f) Whether the victim was the same sex as the defendant;
 - (g) Whether the victim was held hostage during the crime and if so, how long;
 - (h) The nature and extent of any physical harm or torture inflicted upon the victim prior to death;
 - (i) The victim's age; and
 - (j) The type of weapon used in the crime, if any.
- (5) Information about the representation of the defendant, including:
- (a) Date counsel secured;
 - (b) Whether counsel was retained or appointed, including the reason for appointment;
 - (c) The length of time counsel has practiced law and nature of his or her practice; and
 - (d) Whether the same counsel served at both the trial and special sentencing proceeding, and if not, why not.
- (6) General considerations, including:
- (a) Whether the race and/or ethnic origin of the defendant, victim, or any witness was an apparent factor at trial;
 - (b) What percentage of the county population is the same race and/or ethnic origin of the defendant;
 - (c) Whether members of the defendant's or victim's race and/or ethnic origin were represented on the jury;
 - (d) Whether there was evidence that such members were systematically excluded from the jury;
 - (e) Whether the sexual orientation of the defendant, victim, or any witness was a factor in the trial;
 - (f) Whether any specific instruction was given to the jury to exclude race, ethnic origin, or sexual orientation as an issue;
 - (g) Whether there was extensive publicity concerning the case in the community;
 - (h) Whether the jury was instructed to disregard such publicity;
 - (i) Whether the jury was instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when considering its verdict or its findings in the special sentencing proceeding;
 - (j) The nature of the evidence resulting in such instruction; and
 - (k) General comments of the trial judge concerning the appropriateness of the sentence considering the crime, defendant, and other relevant factors.
- (7) Information about the chronology of the case, including the date that:
- (a) The defendant was arrested;
 - (b) Trial began;
 - (c) The verdict was returned;
 - (d) Post-trial motions were ruled on;
 - (e) Special sentencing proceeding began;
 - (f) Sentence was imposed;

- (g) Trial Judge's report was completed; and
- (h) Trial Judge's report was filed.
- (8) The trial judge shall sign and date the questionnaire when it is completed.

[1981 c 138 § 12.]

10.95.130

Questions posed for determination by supreme court in death sentence review — Review in addition to appeal — Consolidation of review and appeal.

*** CHANGE IN 2010 *** (SEE 2490.SL) ***

(1) The sentence review required by RCW 10.95.100 shall be in addition to any appeal. The sentence review and an appeal shall be consolidated for consideration. The defendant and the prosecuting attorney may submit briefs within the time prescribed by the court and present oral argument to the court.

(2) With regard to the sentence review required by chapter 138, Laws of 1981, the supreme court of Washington shall determine:

- (a) Whether there was sufficient evidence to justify the affirmative finding to the question posed by RCW 10.95.060(4); and
- (b) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. For the purposes of this subsection, "similar cases" means cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965, in which the judge or jury considered the imposition of capital punishment regardless of whether it was imposed or executed, and cases in which reports have been filed with the supreme court under RCW 10.95.120;
- (c) Whether the sentence of death was brought about through passion or prejudice; and
- (d) Whether the defendant was mentally retarded within the meaning of RCW 10.95.030(2).

[1993 c 479 § 3; 1981 c 138 § 13.]

10.95.140

Invalidation of sentence, remand for resentencing — Affirmation of sentence, remand for execution.

Upon completion of a sentence review:

(1) The supreme court of Washington shall invalidate the sentence of death and remand the case to the trial court for resentencing in accordance with RCW 10.95.090 if:

- (a) The court makes a negative determination as to the question posed by RCW 10.95.130(2)(a); or
- (b) The court makes an affirmative determination as to any of the questions posed by RCW 10.95.130(2) (b), (c), or (d).

(2) The court shall affirm the sentence of death and remand the case to the trial court for execution in accordance with RCW 10.95.160 if:

- (a) The court makes an affirmative determination as to the question posed by RCW 10.95.130(2)(a); and
- (b) The court makes a negative determination as to the questions posed by RCW 10.95.130(2) (b), (c), and (d).

[1993 c 479 § 4; 1981 c 138 § 14.]

10.95.150**Time limit for appellate review of death sentence and filing opinion.**

In all cases in which a sentence of death has been imposed, the appellate review, if any, and sentence review to or by the supreme court of Washington shall be decided and an opinion on the merits shall be filed within one year of receipt by the clerk of the supreme court of Washington of the verbatim report of proceedings and clerk's papers filed under RCW 10.95.110. If this time requirement is not met, the chief justice of the supreme court of Washington shall state on the record the extraordinary and compelling circumstances causing the delay and the facts supporting such circumstances. A failure to comply with the time requirements of this subsection shall in no way preclude the ultimate execution of a sentence of death.

[1988 c 202 § 17; 1981 c 138 § 15.]

Notes:

Severability -- 1988 c 202: See note following RCW 2.24.050.

10.95.160**Death warrant — Issuance — Form — Time for execution of judgment and sentence.**

(1) If a death sentence is affirmed and the case remanded to the trial court as provided in RCW 10.95.140(2), a death warrant shall forthwith be issued by the clerk of the trial court, which shall be signed by a judge of the trial court and attested by the clerk thereof under the seal of the court. The warrant shall be directed to the superintendent of the state penitentiary and shall state the conviction of the person named therein and the judgment and sentence of the court, and shall appoint a day on which the judgment and sentence of the court shall be executed by the superintendent, which day shall not be less than thirty nor more than ninety days from the date the trial court receives the remand from the supreme court of Washington.

(2) If the date set for execution under subsection (1) of this section is stayed by a court of competent jurisdiction for any reason, the new execution date is automatically set at thirty judicial days after the entry of an order of termination or vacation of the stay by such court unless the court invalidates the conviction, sentence, or remands for further judicial proceedings. The presence of the inmate under sentence of death shall not be required for the court to vacate or terminate the stay according to this section.

[1990 c 233 § 1; 1981 c 138 § 16.]

10.95.170**Imprisonment of defendant.**

The defendant shall be imprisoned in the state penitentiary within ten days after the trial court enters a judgment and sentence imposing the death penalty and shall be imprisoned both prior to and subsequent to the issuance of the death warrant as provided in RCW 10.95.160. During such period of imprisonment, the defendant shall be confined in the segregation unit, where the defendant may be confined with other prisoners not under sentence of death, but prisoners under sentence of death shall be assigned to single-person cells.

[1983 c 255 § 1; 1981 c 138 § 17.]

Notes:

Severability -- 1983 c 255: See RCW 72.74.900.

Convicted female persons, commitment and procedure as to death sentences: RCW 72.02.250.

10.95.180**Death penalty — How executed.**

(1) The punishment of death shall be supervised by the superintendent of the penitentiary and shall be inflicted by intravenous

injection of a substance or substances in a lethal quantity sufficient to cause death and until the defendant is dead, or, at the election of the defendant, by hanging by the neck until the defendant is dead. In any case, death shall be pronounced by a licensed physician.

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

[1996 c 251 § 1; 1986 c 194 § 1; 1981 c 138 § 18.]

Notes:

Severability -- 1996 c 251: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1996 c 251 § 2.]

10.95.185

Witnesses.

(1) Not less than twenty days prior to a scheduled execution, judicial officers, law enforcement representatives, media representatives, representatives of the families of the victims, and representatives from the family of the defendant who wish to attend and witness the execution, must submit an application to the superintendent. Such application must designate the relationship and reason for wishing to attend.

(2) Not less than fifteen days prior to the scheduled execution, the superintendent shall designate the total number of individuals who will be allowed to attend and witness the planned execution. The superintendent shall determine the number of witnesses that will be allowed in each of the following categories:

(a) No less than five media representatives with consideration to be given to news organizations serving communities affected by the crimes or by the commission of the execution of the defendant.

(b) Judicial officers.

(c) Representatives of the families of the victims.

(d) Representatives from the family of the defendant.

(e) Up to two law enforcement representatives. The chief executive officer of the agency that investigated the crime shall designate the law enforcement representatives.

After the list is composed, the superintendent shall serve this list on all parties who have submitted an application pursuant to this section. The superintendent shall develop and implement procedures to determine the persons within each of the categories listed in this subsection who will be allowed to attend and witness the execution.

(3) Not less than ten days prior to the scheduled execution, the superintendent shall file the witness list with the superior court from which the conviction and death warrant was issued with a petition asking that the court enter an order certifying this list as a final order identifying the witnesses to attend the execution. The final order of the court certifying the witness list shall not be entered less than five days after the filing of the petition.

(4) Unless a show cause petition is filed with the superior court from which the conviction and death warrant was issued within five days of the filing of the superintendent's petition, the superintendent's list, by order of the superior court, becomes final, and no other party has standing to challenge its appropriateness.

(5) In no case may the superintendent or the superior court order or allow more than seventeen individuals other than required staff to witness a planned execution.

(6) All witnesses must adhere to the search and security provisions of the department of corrections' policy regarding the witnessing of an execution.

(7) The superior court from which the conviction and death warrant was issued is the exclusive court for seeking judicial process for the privilege of attending and witnessing an execution.

(8) For purposes of this section:

(a) "Judicial officer" means: (i) The superior court judge who signed the death warrant issued pursuant to RCW 10.95.160 for the execution of the individual, (ii) the current prosecuting attorney or a deputy prosecuting attorney of the county from which the final judgment and sentence and death warrant were issued, and (iii) the most recent attorney of record representing

the individual sentenced to death.

(b) "Law enforcement representatives" means those law enforcement officers responsible for investigating the crime for which the defendant was sentenced to death.

(c) "Media representatives" means representatives from news organizations of all forms of media serving the state.

(d) "Representatives of the families of the victims" means representatives from the immediate families of the victim(s) of the individual sentenced to death, including victim advocates of the immediate family members. Victim advocates shall include any person working or volunteering for a recognized victim advocacy group or a prosecutor-based or law enforcement-based agency on behalf of victims or witnesses.

(e) "Representative from the family of the defendant" means a representative from the immediate family of the individual sentenced to death.

(f) "Superintendent" means the superintendent of the Washington state penitentiary.

[1999 c 332 § 1; 1993 c 463 § 2.]

Notes:

Policy -- 1993 c 463: "The legislature declares that, to the extent that the attendance of witnesses can be accommodated without compromising the security or the orderly operation of the Washington state penitentiary, it is the policy of the state of Washington to provide authorized individuals the opportunity to attend and witness the execution of an individual sentenced to death pursuant to chapter 10.95 RCW. Further, it is the policy of the state of Washington to provide for access to the execution to credentialed members of the media." [1993 c 463 § 1.]

Severability -- 1993 c 463: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1993 c 463 § 3.]

10.95.190

Death warrant — Record — Return to trial court.

(1) The superintendent of the state penitentiary shall keep in his or her office as part of the public records a book in which shall be kept a copy of each death warrant together with a complete statement of the superintendent's acts pursuant to such warrants.

(2) Within twenty days after each execution of a sentence of death, the superintendent of the state penitentiary shall return the death warrant to the clerk of the trial court from which it was issued with the superintendent's return thereon showing all acts and proceedings done by him or her thereunder.

[1991 c 139 § 19.]

10.95.200

Proceedings for failure to execute on day named.

Whenever the day appointed for the execution of a defendant shall have passed, from any cause, other than the issuance of a stay by a court of competent jurisdiction, without the execution of such defendant having occurred, the trial court which issued the original death warrant shall issue a new death warrant in accordance with RCW 10.95.160. The defendant's presence before the court is not required. However, nothing in this section shall be construed as restricting the defendant's right to be represented by counsel in connection with issuance of a new death warrant.

[1990 c 263 § 2; 1987 c 296 § 1; 1981 c 139 § 20.]

10.95.900

Severability — 1981 c 138.

If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

[1981 c 138 § 22.]

10.96.901

Construction — Chapter applicable to state registered domestic partnerships — 2009 c 521.

For the purposes of this chapter, the terms spouse, marriage, marital, husband, wife, widow, widower, next of kin, and family shall be interpreted as applying equally to state registered domestic partnerships or individuals in state registered domestic partnerships as well as to marital relationships and married persons, and references to dissolution of marriage shall apply equally to state registered domestic partnerships that have been terminated, dissolved, or invalidated, to the extent that such interpretation does not conflict with federal law. Where necessary to implement chapter 521, Laws of 2009, gender-specific terms such as husband and wife used in any statute, rule, or other law shall be construed to be gender neutral, and applicable to individuals in state registered domestic partnerships.

[2009 c 521 § 28.]

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Please find attached Appellant Motion To File An Over-length Brief and Appellant's Opening Brief in the above-referenced matter.

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