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COURT OF APPEALS
STATE OF WASHINGTON
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No. 89585-6

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

In re the Personal Restraint of,

NOEL EVAN CALDELLIS,
Appellant.

No. 67090-5-1

RESPONSE TO PERSONAL RESTRAINT PETITION

I. AUTHORITY FOR RESTRAINT

The petitioner, Noel Evan Caldellis, is restrained pursuant a judgment and sentence in Snohomish County Cause no. 06-1-02485-5 entered after the petitioner's conviction for First Degree Murder while armed with a firearm. Ex. 1 – Felony Judgment and Sentence.

II. ISSUES PRESENTED

1. The trial court gave the pattern jury instruction defining all of the elements of first degree murder by extreme indifference. After trial but before the opening brief on appeal was filed the pattern instruction committee modified the instruction.

a. Did the pattern instruction given to the jury contain all of the essential elements of the crime?

b. Did the pattern instruction adequately convey that the petitioner must have acted with extreme indifference to human life in general?

c. Was trial counsel ineffective for not proposing an instruction that was consistent with the amended instruction adopted after the trial?

d. Was appellate counsel ineffective for not challenging the pattern elements instruction on appeal?

e. Did the prosecutor misstate the law regarding the elements of the crime in closing argument?

2. Defense counsel asserted two defenses at trial; (1) the petitioner did not cause the victim's death, or (2) if he did it was an accident. Defense counsel proposed an excusable homicide instruction. Is the petitioner entitled to a new trial on the basis of ineffective assistance of counsel when trial counsel did not also propose a self-defense instruction?

3. Was the petitioner's constitutional right to an open courtroom violated when the trial judge sealed juror questionnaires after jury selection?

4. The petitioner alleges that the judge and three jurors appeared to be sleeping at different points in the trial. The judge denies he was sleeping. Various courtroom observers who were watching these people did not see either the judge or any jurors sleeping. Has the petitioner failed to make a prima facie showing of prejudice entitling him to a hearing on this issue when he did not raise the issue at trial?

5. The prosecutor made a brief, indirect reference to the defendant's failure to testify in rebuttal closing argument. Defense counsel initially objected, but then withdrew the objection.

a. Is the petitioner entitled to a new trial when the prosecutor's argument was a pertinent response to an argument made by defense counsel, and the instructions given by the court were adequate to cure any potential prejudice to the petitioner?

b. Is the petitioner entitled to a new trial on the basis of ineffective assistance of trial counsel for opening the door to the prosecutor's argument, and then withdrawing the objection to the prosecutor's argument when each act was based on reasonable trial tactics?

c. Is the petitioner entitled to a new trial on the basis of ineffective assistance of appellate counsel for not raising a prosecutorial error or ineffective assistance of counsel argument in this regard?

III. STATEMENT OF DISPUTED FACTS

1. The State disputes the claim that either the judge presiding over the trial or any of the jurors were sleeping during the trial.

IV. STATEMENT OF FACTS

On September 2, 2006 Dustin Black and Amanda Black had a party at their parents home while their parents were out of town. About 40 to 50 people attended the party at its peak. Cole Huppert and Jay Clements were both at the party. 2 RP 31-32, 38-40, 138-39, 143, 145¹.

On that same night the petitioner, Noel Caldellis, attended a party at Jordan De la Cruz's home. Roddy Ayers and Jason Kimura were also at the party.

Kimura and Huppert had been feuding. Over the course of the evening numerous phone calls were made between Cole Huppert and Roddy Ayers and Jason Kimura. Ultimately the three agreed that there would be a fight. When Ayers and Kimura left to meet Cole Huppert, 8 to 10 of the other party goers went with them, including the defendant. Although they originally believed the fight was supposed to be one on one between Kimura and Huppert, the other members of the group went in order to intervene in case the fight became lopsided. 2 RP 234-38; 4 RP 424-430, 536-543; 5 RP 782-785; 6 RP 871; 8 RP 1163.

Before leaving De la Cruz's party, Hannen Kahn put a gun in the trunk of the petitioner's car. Kahn reasoned the gun was necessary to scare people if it turned out that they were outnumbered at the fight. Before arriving at the party the petitioner took the gun away from Kahn. 2 RP 245-47; 4 RP 431-35; 8 RP 1156-57; 13 RP 2172-73.

Once the petitioner's group arrived at the Blacks' house they parked their cars and walked toward the house. There were a few people outside. Members of the petitioner's group almost immediately began beating up people outside of the Blacks' home, including Huppert. 4 RP 442-43, 549-53, ; 6 RP 802, 883-86; 11 RP 1596-1600, 1676-81.

Someone ran in the Blacks' house calling out that there was a fight outside. Danny Stone, one of the Blacks' guests told Amanda there was a fight outside and asked her to break it up. Another guest, Ben Jacobsen, alerted Dustin Black to the fight. Amanda and Dustin went outside to find 15 to 20 people that they did not recognize engaged in physical fights in the street and in their yard. They attempted to break up the fights without success. 2 RP 54-56, 60-64, 149-155.

¹ The references are to the report of proceedings in the direct appeal, State v. Caldellis no. 61316-2-I.

A number of other partygoers at the Blacks came out of the house to see the fight also. Meghan Lever, Kyle Defenbach, and Jay Clements were among that group 5 RP 791; 6 RP 951; 8 RP 1036, 1113, 1240; 9 RP 1277-1278, 1345; 11 RP 1755.

When the defendant got out of his car he had put the gun that he confiscated from Khan in his waistband and covered it with his shirt. While the defendant watched the fight a young man came up to the defendant and asked "what are you doing?" The young man gestured with hands held chest high with his palms facing forward. After a few minutes of fighting someone matching the description of a member of the defendant's group indicated that the gun should be used saying "where's the burner" or "pull the strap." The defendant then pulled out the gun and shot twice in the air. He then lowered the gun and shot at least twice more toward the young man that questioned him and the crowd that had gathered outside the Black's home. The young man flinched when the defendant shot toward him. Carrie Pendleton saw a young man near the driveway fall. 4 RP 456-460; 5 RP 666-667; 8 RP 1075; 1242, 1286-1294; 11 RP 1601-1605, 1684-1688, Appendix G to petition, p. 14-15, 20-21.

As a result of the initial gunfire the Blacks and their guests became frightened. Everyone from the Black's party who had gone out to see the fight raced toward the home, pushing and shoving to get inside. One girl fell and was trampled until one of the boys picked her up and helped her inside. 2 RP 65-68, 156-158; 7 RP 977; 8 RP 104.

Once inside people began taking inventory to determine who may have been left outside. They could not see Jay Clements. Meghan Lever called 911 to report the gunfire saying "they are shooting at us." 2 RP 75, 161; 7 RP 977; 11 RP 1757.

When police arrived they noticed a young man face down in the Black's driveway. He was identified as Jay Clements. Clements had suffered two gunshot wounds, one to his chest and one to his groin. As a result of those wounds Jay Clements died. 11 RP 1775-1779, 1815-1817; 12 RP 1848, 1881, 1976.

After firing the gun the petitioner and his friends fled back to the party in Lake City. Once there the defendant admitted that he had fired the gun, saying something like "my bad." 4 RP 463, 562-567; 6 RP 898-906, 917; 8 RP 1187-1191; 13 RP 2180, Appendix G to petition, p. 24-25.

By the next day police were aware that the petitioner had been involved in the murder. They contacted him at his work and arrested him. After advice of rights the petitioner agreed to talk to the police. The petitioner admitted that he was the only one with a gun, and that he had fired first into the air, and then into the crowd. 14 RP 2446, 2448; 15 RP 2508-2509, 2570-2571, 2578-2580, Appendix G to petition.

V. ARGUMENT

A. STANDARD OF REVIEW

"Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders." In re Hagler, 97 Wn.2d 818, 824, 650 P.2d 1103 (1982). Thus a personal restraint petitioner bears the burden to prove that he was actually and substantially prejudiced by any claimed constitutional errors. In re Davis, 142 Wn.2d 165, 171, 12 P.3d 603 (2000). The petitioner bears the burden to show he was actually prejudiced even for error that would not be considered harmless on direct appeal. In re St. Pierre, 118 Wn.2d 321, 328-29, 823 P.2d 492 (1992). When raising an issue that is not of

constitutional magnitude the petitioner must show that claimed error "constitutes a fundamental defect which inherently results in a complete miscarriage of justice." In re Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990).

If the petitioner fails to meet the threshold burden of showing actual prejudice the petition must be dismissed. In re Rice, 118 Wn.2d 876, 885, 828 P.2d 1086, cert. denied, 506 U.S. 958, 113 S.Ct. 421, 121 L.Ed.2d 344 (1992). If the petitioner makes a prima facie showing of actual prejudice, but the merits of the contentions cannot be determined solely on the record, the court should remand the petition for a full hearing on the merits or for a reference hearing pursuant to RAP 16.11(a) and 16.12. Id.

Many of the petitioner's claimed errors are accompanied by the claim that either trial counsel or appellate counsel were deficient in their performance, and as a result he is entitled to a new trial. The Sixth Amendment right to counsel includes the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to obtain relief from judgment on the basis of ineffective assistance of counsel the defendant must make two showings: "(a) defense counsel's representation was deficient, i.e. it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). The defendant must make both showings or he is not entitled to relief. Strickland, 466 U.S. at 687. There is a strong presumption that defense counsel's

conduct was not deficient. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)

The right to effective state appellate counsel is derived from the Fourteenth Amendment's Due Process guarantee. Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). A claim of ineffective assistance of appellate counsel is evaluated under the same test for trial counsel. Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989).

Appellate counsel has no obligation to raise every non-frivolous issue, and the decision to selectively raise issues is not deficient performance. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Courts which have considered the issue of ineffective assistance of appellate counsel have remarked that the hallmark of effective appellate counsel is the ability to winnow out the weaker arguments from the stronger ones. Miller, 882 F.2d at 1434. Appellate counsel who raises every conceivable non-frivolous issue runs the risk of telegraphing to the appellate court a lack of confidence in any one issue. Jones, 463 U.S. at 752. That tactic is problematic where page limits are imposed because it can result in too little discussion of the better arguments raised. Id. "The effect of adding weak arguments will be to dilute the force of the stronger ones." Id. quoting R. Stern, Appellate Practice in the United States 266 (1981).

B. THE STANDARD JURY INSTRUCTION OUTLINING THE ELEMENTS OF MURDER BY EXTREME INDIFFERENCE IN EFFECT AT THE TIME OF TRIAL CONTAINED ALL OF THE ESSENTIAL ELEMENTS OF THE CRIME. A LATER AMENDMENT WAS A CLARIFICATION OF THE EARLIER INSTRUCTION. NEITHER TRIAL COUNSEL NOR APPELLATE COUNSEL WAS INEFFECTIVE FOR NOT CHALLENGING THE INSTRUCTION GIVEN AT TRIAL.

The trial court instructed the jury that to convict the defendant of first degree murder as charged it must find beyond a reasonable doubt:

- (1) that on or about the 3rd day of September, 2006, the defendant discharged a firearm;
- (2) That the conduct of the defendant created a grave risk of death to another person;
- (3) That defendant engaged in that conduct under circumstances manifesting an extreme indifference to human life;
- (4) That Jay Daniel Clements died as a result of defendant's acts; and
- (5) That the acts occurred in the State of Washington.

Ex. 2, no. 5

This version of the elements instruction is consistent with the instruction provided in the then current version of the WPIC. See Ex. 3, Washington Pattern Jury Instructions, Criminal 26.06 (West 1994). After trial the WPIC committee recommended an amendment to the standard instruction which was adopted in July 2008. The current version of the standard elements instruction for first degree murder by extreme indifference differs from the prior version in two respects; (1) it does not require the

court to describe the act charged in the first element and (2) it sets out the definition of extreme indifference by instructing the jury that the defendant must have known of and disregarded a grave risk of death. Ex. 4, Washington Pattern Jury Instructions 26.06 (West 2008).

The petitioner argues the version of the pattern instruction given by the trial court erroneously omitted an element of the offense. He argues that he is entitled to a new trial because (1) the instruction relieved the State of its burden of proof and the error was not harmless; (2) appellate defense counsel was ineffective for failing to raise the issue on direct appeal; and (3) trial counsel was ineffective for failing to propose a correct elements instruction.

1. The Version Of The Elements Instruction For First Degree Murder By Extreme Indifference In Effect At The Time Of Trial Contained All Of The Elements Of The Offense.

Whether the “to convict” instruction contained all of the elements of the offense is an issue of constitutional magnitude. State v. Fisher, 165 Wn.2d 727, 754, 202 P.3d 937 (2009). “Element of the crime” has been defined as “[t]he constituent parts of a crime – [usually] consisting of the actus reus, mens rea, and causation—that the prosecution must prove to sustain a conviction.” Id quoting Black’s Law Dictionary 559 (8th ed. 2004). An instruction setting out the elements of an offense need not include all pertinent law such as definitions of terms. State v. Jain, 151 Wn. App. 117, 125, 210 P.3d 1061 (2009). The elements of the offense of first degree murder by extreme indifference are that “the defendant acted (1) with extreme indifference, an aggravated form of recklessness, which (2) created a grave risk of death to others, and (3) cause the death

of a person.” State v. Pastrana, 94 Wn. App. 463, 470, 972 P.2d 557 review denied. 138 Wn.2d 1007, 984 P.2d 135 (1999), RCW 9A.32.030(1)(b).

In the 2008 version of the pattern instructions the WIPC committee explained that the amendment to the second element of the offense was made to reflect the Court of Appeals holding in State v. Barstad, 93 Wn. App. 553, 568, 970 P.2d 324, review denied, 137 Wn.2d 1037, 980 P.2d 1284 (1999). See Ex. 4, notes on use to WPIC 26.06. In Barstad the court instructed the jury on the elements of first degree murder by extreme indifference using the pattern instruction WPIC 26.06 -- the same instruction used in this case. Id. at 564. The defendant challenged that instruction on the basis that it failed to include an element that he intended to commit an act placing the lives of others in jeopardy. The Court rejected the argument holding the court’s instructions were a correct statement of the law of extreme indifference murder. Id. at 568.

The language which was added to the 2008 amendment to the standard instruction came from a discussion in Barstad regarding an instruction which allowed jurors to infer “the defendant had an extreme indifference to human life if you find that the evidence of the defendant’s conduct supports such an inference...” Id. at 568. There the defendant argued that the instruction impermissibly permitted the jury to find the requisite mental state from his conduct alone without any evidence of his mental state. The Court rejected the defendant’s argument on the basis that he misperceived the mens rea of the offense. It explained the defendant “need only know of and disregard the fact his conduct presents a grave risk of death to others, as evidenced by circumstances that manifest his extreme indifference to human life.” Id. at 332.

(emphasis added) The phrase “know of and disregard” explained what “manifest his extreme indifference” meant. It did not create a new element of the crime.

The petitioner cites no authority which had held otherwise. Courts which have articulated the elements of first degree murder under RCW 9A.32.030(1)(b) since Barstad was decided have reaffirmed that the elements of that crime are the defendant “(1) acted with extreme indifference, an aggravated form of recklessness, which (2) created a grave risk of death to others, and (3) caused the death of a person.” State v. Yarbrough, 151 Wn. App. 66, 82, 210 P.3d 1029 (2009). See also State v. Asaeli, 150 Wn. App. 543, 580, 208 P.3d 1136, review denied, 167 Wn.2d 1001, 220 P.3d 207 (2009), Pastrana, 94 Wn App. at 470.

The amended pattern instruction does no more than clarify the mens rea “extreme indifference to human life”. “Clarification of the standard instruction does not amount to an indictment of earlier versions.” State v. Holzkencht, 157 Wn. app. 754, 765, 238 P.3d 12333 (2010), review denied, 170 Wn.2d 1029, 249 P.3d 623 (2011). The phrase added in the second element of the amended pattern instruction does no more than clearly spell out the definition of the statutory element of “manifesting an extreme indifference to human life.” RCW 9A.32.030(1)(b).

The petitioner fails in his burden to prove an error of constitutional magnitude occurred when the trial court employed the then current version of WPIC 26.06. Even if error occurred as he has argued, he still fails to show that he was actually and substantially prejudiced. Although the petitioner argues the alleged error is not harmless that is the incorrect standard of review in a collateral attack. “[T]hose errors that are subject to a harmless error analysis on direct appeal are not considered per se

prejudicial on collateral review.” In re Delgado, 160 Wn. App. 898, 907, 251 P.3d 899 (2011). Rather the petitioner must show he is actually and substantially prejudiced by alleged constitutional error. Id. at 908.

Jury instructions are sufficient if they are supported by the evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury on the applicable law. State v. McLoyd, 87 Wn. App. 66, 71, 939 P.2d 1255 (1997), affirmed, 137 Wn.2d 533, 973 P.2d 1049 (1999). Here the instructions met these criteria.

The “to convict” instruction informed the jury of the elements of first degree murder as provided by RCW 9A.32.030(1)(b) and as articulated in case authority. In addition to the elements instruction the trial court instructed the jury on the definition of extreme indifference as “an aggravated recklessness which creates a very high degree of risk greater than that involved in recklessness. Ex. 2 no 5. That language was proposed by the defendant. Ex. 5 no. 9. The court also instructed the jury on the definition of recklessness. Ex. 2 no. 8. Recklessness was defined as knowing of and disregarding a substantial risk that a wrongful act may occur. Placement of instruction no 8 before the elements instruction for second degree manslaughter did not preclude the jury from considering the definition of recklessness in conjunction with the definition for extreme indifference because the instructions were read as a whole, and the jury was instructed that the order in which they were read had no significance. Ex. 2 no. 1. During closing argument the prosecutor suggested the jury could consider the definition of recklessness to help understand what aggravated recklessness in extreme indifference meant. 20 RP 3203. Taking instructions number 4, 5, and 8 together

the jury was instructed that extreme indifference required the jury to find the defendant knew of and disregarded a grave risk of death to another person.

2. Appellate Counsel and Trial Counsel Rendered Effective Assistance of Counsel.

Trial counsel proposed a “to convict” instruction which was a modified version of the then current pattern instruction. The modifications proposed did not include the language that the petitioner now argues was required. He argues trial counsel’s conduct was not tactical; therefore counsel’s performance was deficient and he is entitled to a new trial.

As discussed above the former version of the statute accurately set out the elements of first degree murder by extreme indifference. Because the jury was properly instructed on the elements of the offense, an alleged error on the part of trial counsel fails to establish the requisite prejudice necessary to establish grounds for relief. State v. Dow, ___ Wn. App. ___, 253 P.3d 476 (2011).

Moreover, the instruction proposed by defense counsel, and the instruction ultimately given by the court was approved in Barstad. Even if the amendments to the WPIC could be considered a change in the law the trial occurred before those amendments were adopted by the Supreme Court. Trial counsel is not ineffective for failing to anticipate a change in the law or an amendment to a standard instruction. State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

Likewise the petitioner fails to establish appellate counsel’s performance was deficient. Appellate counsel raised five issues in the petitioner’s direct appeal; (1) whether the petitioner’s statements should have been admitted at trial, (2) whether the court should have given a no duty to retreat instruction, (3) whether the first degree

murder charge was unconstitutionally vague as applied to the petitioner's conduct, (4) whether the evidence was sufficient to support the first degree murder conviction, and (5) whether the evidence was sufficient to support the second degree assault convictions. See opening brief filed October 9, 2008, case number 61316-2-I. This Court found that reversible error was committed with respect to instructional question. See State v. Caldellis, 151 Wn. App. 1012 (2009).

The argument raised here, that the "to convict" instruction omitted an element of the offense, fails in light of the Court's ruling in Barstad. While the WPIC committee relied on the holding in Barstad for the modification to that instruction, it did not thereby create a new element for the crime, but rather clarified the "extreme indifference" mens rea. Moreover, the Court's explicit approval of the same pattern instruction used here in Barstad was a clear indication that the argument made here would likely have little success. The petitioner was therefore not prejudiced when counsel did not raise that issue. Nor has petitioner shown that appellate counsel performed deficiently. While counsel may have raised this issue on direct appeal, he was not deficient for choosing to assert stronger arguments on the direct appeal.

C. THE ELEMENTS INSTRUCTION CORRECTLY STATED THE DEFENDANT MUST HAVE ACTED WITH EXTREME INDIFFERENCE TO HUMAN LIFE IN GENERAL. NEITHER TRIAL COUNSEL NOR APPELLATE COUNSEL WERE DEFICIENT FOR NOT CHALLENGING THE INSTRUCTION IN THIS REGARD. THE PROSECUTOR DID NOT MISSTATE THE LAW IN CLOSING

1. The Instruction Did Not Mislead The Jury And Properly Informed The Jury Of The Law To Be Applied.

The petitioner next argues the instruction defining the elements of first degree murder by extreme indifference failed to adequately inform the jury that the petitioner must have acted with extreme indifference to human life in general. He argues his Due

Process right to a fair trial was violated because it is reasonably likely the jury would have understood it was sufficient that the petitioner manifested extreme indifference to a single life, Jay Clements'.

Jury instructions satisfy the requirement of a fair trial when, taken as a whole, they are readily understood, are not misleading to the ordinary mind, and properly inform the jury of the applicable law. State v. O'Donnell, 142 Wn. App. 314, 324, 174 P.3d 1205(2007). To determine whether this standard is met the instructions are read in a straight forward, commonsense manner. State v. Pittman, 134 Wn. App. 376, 382-83, 166 P.3d 720 (2006).

The only difference between the language in the "to convict" instruction and the statutory language relates to the person who as a result of the actor's conduct is in grave risk of death. While the statute employs the phrase "any person" the instruction states "another person." This difference relates to the actus reus, not the mens rea element the petitioner challenges. Moreover both are general terms not specifying a particular person who is at grave risk of death. Thus it does not affect whether the jury would have reasonably likely understood the instruction to permit a conviction on less proof than required. Thus the language of instruction correctly informs the jury of the applicable law.

A commonsense approach to the instruction indicates the instruction would not mislead the jury regarding the evidence necessary to convict. This Court compared the language in RCW 9A.32.030(1)(b) with its predecessor statute in State v. Berg, 25 Wn. App. 433, 607 P.2d 1247, review denied, 94 Wn.2d 1016 (1980). Like its predecessor, this Court concluded that the Legislative intent of the current statute was to address

situation involving reckless and extreme indifference to human life in general. Id. at 437. Both the statute and the instruction refer to “human life” without the modifying indefinite article “a”. Had the jury been instructed that it could convict the defendant if it found the defendant engaged in conduct under circumstances manifesting an extreme indifference to a human life it would be more likely the jury would have misunderstood the mens rea element related to more than one person. However, the unmodified phrase “human life” denotes human life in general, not limited to a single person. “Human” is defined as “of, pertaining to, or typical of humans or humankind.” Webster’s II New Riverside University Dictionary, (1984) p. 596 “Life” is defined as “the property or quality distinguishing living organisms from dead organisms and inanimate matter, manifested in functions such as growth, metabolism, response to stimuli, and reproduction.” Id. at 691. It is not likely that a jury would have misunderstood the State’s burden of proof as outlined in the “to convict” instruction.

2. The Prosecutor Did Not Misstate The Law In Closing Argument

The petitioner primarily focuses on the prosecutor’s argument, claiming it misstated the burden of proof in this regard, and thereby led to confusion regarding the required object of the actor’s mens rea. He asserts the prosecutor’s closing argument was misconduct which entitles him to a new trial.

A defendant claiming prosecutorial misconduct in closing argument bears the burden to prove both that the conduct was improper and that he was thereby prejudiced. State v. Johnson, 158 Wn. App. 677, 683, 243 P.3d 936 (2010), review denied, 171 Wn.2d 1013, 249 P.3d 1029 (2011). A misstatement of the law which lowers the State’s burden of proof is improper. State v. Venegas, 155 Wn. App. 507,

523-24, 228 P.3d 813, review denied, 170 Wn.2d 1003, 245 P.3d 226 (2010). If the prosecutor's statements were improper and the defendant made a proper objection then the court considers whether there was a substantial likelihood that the statements affected the jury. State v. McChristian, 158 Wn. App. 392, 400, 241 P.3d 468 (2010), review denied, 171 Wn.2d 1003, 249 P.3d 182 (2011). When no objection has been made the defendant bears the burden to show that any improper comment was so flagrant or ill-intentioned that an instruction could not have cured the prejudice. Id. The prosecutor's argument is evaluated in the context of the entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

Murder by extreme indifference may apply to situations where a defendant's actions are directed at a single person, and in so acting he puts the lives of many others at grave risk of death. In Pettus the Court found the charge applied where the defendant shot at a single person, thereby killing him, where the shooting was done in a residential neighborhood with people nearby in parks, on the sidewalk, and in their homes. State v. Pettus, 89 Wn. App. 688, 694, 951 P.2d 285 (1998). The evidence was sufficient to convict under that theory in Pastrana where the defendant shot at a specific car, killing one passenger, when the shooting occurred on a busy freeway. State v. Pastrana, 94 Wn. App. 463, 472, 972 P.2d 557 (1999).

Here the petitioner takes isolated sentences from the prosecutor's closing argument to support the claim that he suggested the petitioner was guilty if he acted with extreme indifference to Jay Clements and not to people in general. When taken in the context of the prosecutor's entire discussion on that point it is clear that the

argument was that the defendant acted with extreme indifference to human life in general because he put more than one person in danger by shooting into a crowd.

The prosecutor argued:

Now, he is not charged with Intentional Murder. He is charged with First Degree Murder. We talked about that when we were selecting a jury in this case. You all agreed that despite the general perception that First Degree Murder is premeditated intentional murder, you will apply the law in this case as instructed by Judge Wynne. What we are talking about is First Degree Murder of a different kind, that not that many people are used to hearing about. Exhibiting or manifesting extreme indifference to human life, somebody dies as a result thereof. That's exactly what happened in this case.

You do have these witnesses describing an intentional murder. In fact, there is pretty good reason to think that's exactly what happened in this case. But this charge, the charge before you, makes it even easier because you don't have to make that decision whether or not he actually intended to kill. He certainly intended to fire the gun, that was no accident. His finger didn't slip.

You don't have to decide did he intend to kill Jay Clements. That's what makes your decision a lot easier in this case. In fact, if you decide that he did, it makes no difference because, in the process, he is still exhibiting extreme indifference to human life.

Remember Roddy Ayers? He said I'm yelling at him 'stop shooting.' He thinks he is going to hit one of his friends he is behind who he is shooting at. So even if it's intentional, he still putting everybody else at risk. Roddy certainly recognized that at the time.

20 RP 3177-78

Here is the quote I read to you in the opening statement: "And then, I shot the gun into the crowd, like not necessarily trying to point out exactly at this person, but I just shot it." That's extreme indifference to human life. But one of the oddest words in that sentence is "this." T-h-i-s. He says: "not necessarily trying to point out exactly at this person."

Why is he saying "this" person? Why not "a" person? He says "this" person because he knows Jay Clements was standing right in front of the muzzle of his gun when he pulled the trigger and killed him.

20 RP 3187

When arguing the specific elements of the murder charge the prosecutor stated:

No. 3, the defendant engaged in conduct that, under the circumstances manifested an extreme indifference to human life. He didn't seem to care much who he killed.

20 RP 3201

When arguing the mental state of recklessness the prosecutor said:

The way that works, that provides the reason why you get those options of lesser crimes in this case because he is accused of extreme indifference, which is an aggravated form of recklessness, according to the law, so on that spectrum, you would basically insert it above reckless. So perhaps you can use the definition of reckless to help you decide what aggravated recklessness is. Again, a good example of that might be shooting a .357 Magnum into a group of people.

20 RP 3203

In rebuttal the prosecutor argued:

It's also ridiculous to say that shooting into a crowd of people is not extreme indifference to human life. But then to give an example of a sniper pointing into a crowd of people. Now, that is a classic example of extreme indifference to human life. What does that mean? If we were looking from the house across the cul-de-sac, and the shots came out of the window with a rifle into the crowd, then he would be guilty of extreme indifference to human life, but because he is down a little bit closer and he does it with a handgun, it's no longer extreme indifference to human life? What's the difference between a sniper at a mall and the defendant in a cul-de-sac shooting into a crowd of people?

20 RP 3277-78.

When considered in their totality the prosecutor's arguments were a correct statement of the law. The prosecutor was not suggesting that if the jury found the petitioner intentionally shot at Jay Clements the State had proved the case. Rather the prosecutor was suggesting that while the evidence may support that conclusion, it did not matter in the context of this case because the petitioner was also placing an entire crowd of people in harm's way.

The prosecutor's reference to the petitioner's statement about shooting into a crowd "not necessarily trying to point out this person" referred to the aggravated sort of recklessness the petitioner engaged in. While the petitioner admitted shooting into a crowd, he also admitted that he was fully aware that there was a person standing directly in front of him. That awareness was one reason the petitioner's culpability was greater than simple recklessness; the likelihood of not hitting someone with his bullet was greatly diminished in that circumstance. However there was no suggestion in that argument that it was sufficient to show that the petitioner only placed Jay Clements in grave risk of death, particularly when considered in light of other arguments made on that point.

The petitioner's reference to the prosecutor's argument beginning "either defendant caused Jay Daniel Clements' death or he did not" does not consider the entire context of that argument. BOP at 19 (referenced at 20 RP 3202). The argument was a discussion of the lesser included offenses of Manslaughter I and Manslaughter II. The prosecutor was referencing the petitioner's first theory that there was a second shooter that killed the victim, not him. He then argued that the petitioner's conduct was not

simple recklessness or negligence. That conduct evidenced the mental state necessary for the charged crime, extreme indifference to human life. Nothing in that argument suggested that the State's burden was to prove extreme indifference to an individual as compared to people in general.

Finally in rebuttal the prosecutor made it clear that the under the circumstances the petitioner acted with extreme indifference to human life in general. Defense counsel tried to distinguish his client's conduct from that of a sniper shooting into a crowd. The latter would be an example of extreme indifference to human life. The prosecutor responded that the argument was a distinction without a difference.

Taken together the prosecutor did not urge jurors to find the petitioner guilty based on some evidence the petitioner intentionally killed the victim, but rather focused on the danger the petitioner's conduct created for many people in the area. His argument that the prosecutor misstated the law and thereby committed misconduct fails.

3. Neither Appellate Counsel Nor Trial Counsel Rendered Ineffective Assistance Of Counsel Which Entitled The Petitioner To A New Trial

The petitioner again faults his appellate counsel for not raising this alleged deficiency in the "to convict" instruction. Even under the current version of the standard instruction reads in relevant part "That the defendant engaged in that conduct under circumstances manifesting an extreme indifference to human life." WPIC 26.06 Washington Pattern Jury Instructions, Third Edition (2008). That is the same language used in RCW 9A.32.030(1)(b). As discussed, using the appropriate standard for evaluating the sufficiency of instructions, a commonsense reading informs the jury that "human life" encompasses life in general, not a single person. The prosecutor's

argument made that distinction clear when he discussed the difference between intentional murder and murder by extreme indifference to human life.

While appellate counsel could have raised this issue the petitioner now argues, it is considerably weaker than other arguments counsel pursued on direct appeal. The Court has accepted this instruction as conveying an accurate statement of the law both in past decisions, and by again adopting this language even after revising the instruction. Considering the prosecutor's argument as a whole, it did not misstate the law. Thus, appellate counsel's decision to pursue other arguments does not demonstrate deficient performance which prejudiced the petitioner.

The petitioner also faults his trial counsel for not proposing a different "to convict" instruction, and for not objecting to the prosecutor's closing arguments. For the same reasons that appellate counsel was not deficient, trial counsel was not deficient for not proposing what would have been a modified standard instruction. The instruction had been accepted by the Court as a correct statement of the law.

Counsel also did not exhibit deficient performance by not objecting to the prosecutor's argument. The decision of whether to object is a classic example of trial tactics. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002, 777 P.2d 1050 (1989). While counsel now states in his affidavit "[t]here was no tactical reason for me not to object to the prosecutor's arguments that suggested if Caldellis intended to kill Jay Clements it was conclusive proof that he acted with extreme indifference to human life" that statement is not conclusive proof that counsel was deficient for not objecting. The affidavit was written more than three years after the trial concluded. There is no indication that counsel reviewed the record before

signing that affidavit rather than simply relying on his own memory of events. The transcripts of closing do not support the statement that the prosecutor made the argument in question. Finally, trial counsel candidly states he was very disappointed in the outcome of the trial, having worked very hard for a client he personally believed was not guilty of the crime.

There was a reasonable tactical reason for not objecting to the prosecutor's argument; the argument did not misstate the law. Even if the Court were to accept trial counsel's concession that he did not have a tactical reason for not proposing a modified "to convict" instruction or for not objecting to the prosecutor's argument, the petitioner has not shown he was thereby prejudiced. If counsel had proposed the modified instruction the trial court may or may not have given it. Since the standard instruction which was given adequately conveyed that the defendant must have exhibited extreme indifference to human life in general rather than as to a single person, it made no difference in the outcome of the case. Had counsel objected to the prosecutor's argument, it likely would have been overruled since, taken in context, the prosecutor was arguing a correct statement of the law. Because the petitioner fails to establish either deficient performance or resulting prejudice on the part of either of his former attorneys, he is not entitled to a new trial on the basis of alleged instructional error.

D. THE DEFENSE ATTORNEY MADE A REASONABLE STRATEGIC DECISION TO ASSERT A DEFENSE OF EXCUSABLE HOMICIDE. COUNSEL'S DECISION TO NOT REQUEST A SELF-DEFENSE INSTRUCTION FOR THE MURDER CHARGE FELL WITHIN THE RANGE OF REASONABLE PROFESSIONAL ASSISTANCE.

The petitioner claims his trial counsel was ineffective for failing to request a self defense instruction to the murder charge where there was evidence to support that

defense. He argues that he was prejudiced by counsel's failure to request that instruction. The petitioner argues that if the court had instructed on self defense, then the murder charge, like the assault charges, would have been overturned on appeal.

The Court considers all of the circumstances when evaluating the reasonableness of counsel's performance. Strickland, 466 U.S. at 688. Thus, in addressing an ineffectiveness claim the Court will make every effort to reconstruct the circumstances of counsel challenged conduct, and to evaluate that conduct from counsel's perspective at the time. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689.

Thus generally when counsel's conduct can be characterized as a legitimate trial strategy or tactics the defendant will fail to establish ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). The defendant may rebut the presumption that counsel performance was reasonable by demonstrating that there is no conceivable legitimate tactic explaining counsel performance. State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). When he does so "the relevant question is not whether counsel's choices were strategic, but whether they were reasonable." Id. at 34 quoting Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). Here the petitioner fails to establish counsel's conduct was not the result of reasonable tactical choices.

During a discussion regarding jury instructions counsel outlined the defense theory of the case.

No. 1, our defense is that Noel Caldellis did not cause the death of Jay Clements, so that would result in a not guilty verdict to all the homicide charges the Court presents to the jury. If the jury finds the shots did cause the death of Jay Clements, it's clearly, from the evidence, our theory it was done accidentally. He did not intend to shoot Jay Clements. If he did so, he did so in an effort to disperse the crowd and protect his friends, which we would say is lawful force.

19 RP 3112-13.

There was evidence presented which supported the defendant's alternative theory that the defendant did not shoot into the crowd with the intent to kill Jay Clements, and that Clements' death was an accident. Detective Rittgarn testified that when he first questioned the petitioner he told the detective that he saw people come out of the house and start fighting so he held the gun up and shot two rounds in order to disperse the crowd. The petitioner said the crowd did not disperse so he shot into the crowd. 15 RP 2579-80.² Later during a videotaped interview the petitioner again told police that he shot into the crowd when it did not disperse as he intended it to after the first shots in the air. He said he was not aiming at anyone in particular, suggesting to police that he did not intend to shoot anyone. Appendix G to petition, page 21-22.

In addition to the petitioner's statement to police there was evidence presented which corroborated his account that he did not intend to shoot anyone. Witnesses who saw the defendant shoot into the crowd described him waiving the gun back and forth before firing. 2 RP 157. Others described the petitioner shooting toward the house and

² The petitioner at first told the detective that he shot into the crowd because the gun was so heavy and he could not hold it up in the air. After the detective challenged the defendant's explanation as implausible the petitioner admitted he shot into the crowd to disperse it.

a group of people. 11 RP 1603-05, 1686-87. Joshua Ong who was with the petitioner's group stated the petitioner fired twice in the air and then horizontally toward a group of people. 4 RP 451, 455. He did not state the defendant appeared to be shooting toward any specific individual in that group.

Defense counsel proposed jury instructions for excusable homicide which the court gave. That instruction stated:

It is a defense to a charge of murder in the first degree, manslaughter in the first degree, and manslaughter in the second degree that the homicide was excusable as defined in this instruction.

Homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent.

The State has the burden of proving the absence of excuse beyond a reasonable doubt. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

EX. 5 instruction number 18.

The defense attorney devoted a portion of his closing argument to the excusable homicide theory. Counsel pointed out the petitioner did not intend to kill anyone, and was surprised to hear that someone had been killed. He argued the force used by the petitioner was lawful; the force used was reasonable and there was no reasonably effective alternative. 20 RP 3268-70.

The petitioner supports his petition with an affidavit from his trial counsel, Mr. Raymond McFarland. See appendix B to petition. Mr. McFarland states that he did not request a self defense instruction because the evidence admitted at trial indicated that the petitioner did not intentionally shoot Jay Clements. He therefore believed that the

only available instructions that fit the evidence and the defense theory of the case were instructions related to excusable homicide. Id. paragraph 10.

Mr. McFarland's assessment of the relevant law was correct.³ Before trial in this case the Court had held that where a homicide is committed by accident, the proper defense is excusable homicide not self defense. State v. Brightman, 155 Wn.2d 506, 525, 122 P.3d 150 (2005), State v. Slaughter, 143 Wn. App. 936, 942, 186 P.3d 1084, review denied, 164 Wn.2d 1033, 197 P.3d 1184 (2008). This Court has said that when the defense is excusable homicide the defendant is not entitled to a separate self defense instruction. Slaughter, 143 Wn. App. at 944.

Given the evidence that the petitioner had said he did not intend to shoot anyone in particular, and the other evidence which corroborated that statement, Mr. McFarland's defense strategy in asserting an excusable homicide defense was reasonable. Unlike the murder charge the evidence did show that the defendant intended to assault the victims of those charges because he intended to cause the victims "reasonable apprehension of bodily harm." State v. Hall, 104 Wn. App. 56, 62, 14 P.3d 884 (2000), review denied, 143 Wn.2d 1023, 25 P.3d 1020 (2001). The defendant's intent to shoot in order to disperse the crowd was an explicit threat to harm them should they not disperse. It was therefore reasonable to request self defense instructions for the assault charges, but not for the murder charge.

³ The petitioner states that Mr. McFarland admitted there was no tactical reason for failing to seek a self defense instruction on the murder charge as well as the assault charges. Petition at 33. He said nothing of the sort. Rather his affidavit explains his assessment of the evidence and the relevant law as applied to that evidence. Mr. McFarland's assessment of both law and facts is supported by the record.

To successfully make a claim for ineffective assistance of counsel the petitioner must show both that counsel's performance was deficient and that he was thereby prejudiced. Failure to establish either prong is fatal to the claim. Strickland, 466 U.S. at 687. Although the petitioner has failed to establish the first prong, and therefore is not entitled to a new trial for this alleged error, he fails to establish the second prong as well.

Prejudice in an ineffective assistance of counsel claim is shown when there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. The petitioner's argument is that he would have secured a new trial on appeal as he did for the two assault charges. However the defendant would not have been entitled to a self defense instruction on the murder charge had it been offered. As discussed, part of the defense theory of the case was that the homicide was excusable. If the petitioner's trial counsel had proffered a self-defense instruction for the murder charge it would have been rejected in light of Brightman and Slaughter. Thus the petitioner fails to show the second prong of the test. The Court should find the petitioner has failed to meet his burden to prove ineffective assistance of counsel entitling him to a new trial because trial counsel did not request a self defense instruction in connection with the murder charge.

E. THE PETITIONER'S RIGHT TO AN OPEN PUBLIC TRIAL WAS NOT VIOLATED WHEN THE TRIAL JUDGE SEALED JUROR QUESTIONNAIRES AFTER JURY SELECTION WITHOUT HOLDING A BONE-CLUB HEARING

The petitioner argues he is entitled to a new trial because he claims juror questionnaires used during jury selection were confidential, and therefore constituted a

closure of a portion of jury selection without conducting a Bone-Club⁴ hearing preceding that closure. The petitioner's right to open public trial was not violated in this case. Because he has no right to assert the public's right to open trials, and because he has not shown that he was prejudiced when the court sealed the questionnaires after jury selection concluded, he is not entitled to a new trial.

Prior to jury selection the court and the parties discussed how that portion of the trial was to be conducted. 11-5-07 RP 97-121. Although the parties originally decided not to use a questionnaire in voir dire, defense counsel ultimately requested one. The court then directed the prosecutor and defense counsel to draft a mutually agreeable questionnaire. 11-5-07 RP 114.

Defense counsel proposed a questionnaire which was captioned "confidential questionnaire." The prosecutor suggested minor changes to the introduction and the addition of a perjury clause. The judge accepted the questionnaire as drafted by defense counsel and modified by the prosecutor. Ex. 6, 11.

Jury selection was conducted in an open courtroom. The questionnaires were available to the defendant and his attorneys. Appendix B to petition. No member of the public requested to see the questionnaires. The questionnaires, which are still available for inspection, were not sealed until after jury selection was concluded. Ex. 7. The State concedes that no Bone-Club hearing preceded that sealing.

Since the petitioner's trial in this matter the Court has considered whether sealing juror questionnaires after jury selection constituted a violation of either the defendant or the public's State constitutional right to open courtrooms, and if so what the remedy should be in five cases. State v. Coleman, 151 Wn. App. 614, 623-34, 214 P.3d 158

⁴ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

(2009), State v. Lee, 159 Wn. App. 795, 247 P.3d 470, State v. Tarhan, 159 Wn. App. 819, 246 P.3d 580 (2011), In re Stockwell, 160 Wn. App. 172, 248 P.3d 576 (2011), State v. Smith, ___ Wn. App. ___, 256 P.3d 449 (2011). In none of the cases did the Court find the defendant's constitutional rights were violated.

In Coleman this Court found sealing juror questionnaires after jury selection violated the public's right to open court records. The remedy was remand for reconsideration of the order sealing those questionnaires. Coleman, 151 Wn. App. at 623. However the defendant's public trial right was not violated. The Court reasoned that the questionnaires were only used for jury selection, which was conducted in open court. Further, the questionnaires were not sealed until after jury selection had been completed. And there was no indication the questionnaires were not available for public inspection during the course of the jury selection. Id. at 624.

This Court similarly found no violation of the defendant's public trial right in Lee and Tarhan. In each of those cases the defense proposed the juror questionnaires. In Tarhan all the parties stipulated that jurors would complete a "confidential questionnaire" before jury selection. In both cases the trial court conducted a colloquy with counsel regarding removing the questionnaires from the courtroom during an evening recess. During the colloquy the trial judge in each case expressed a concern regarding copying of the questionnaires. Neither judge ruled the questionnaires should be kept from any person's view. Like Coleman the questionnaires were only used during voir dire, and were sealed only after the jury had been selected. The defendants each had full access to the questionnaires during jury selection. There was no record in either case that any member of the public requested to see those questionnaires. On

those records this Court refused to speculate what the trial court would have ruled had such a request been made. In each case this Court found no violation of the defendant's right to public trial. Like Coleman, the public's right had been implicated, but the remedy was remand for reconsideration of the sealing orders. Lee, 159 Wn. App. at 801, 806-08, Tarhan, 159 Wn. App. at 824, 829-31.

In Stockwell the State proposed a questionnaire which told jurors specifically that their answers to questions on the form would be sealed and would not be available for public inspection. The defendant stipulated to using the questionnaire, and did not object to sealing it. Thereafter jury selection occurred in open court. The defendant actively participated in jury selection, using the answers on the questionnaires to aid in that process. On these facts the Court rejected the defendant's argument that his right to a public trial had been violated. The Court recognized that the defendant benefitted from the promise that answers on the questionnaire would remain confidential because it was more likely jurors would candidly reveal relevant information which provided critical information for the defendant to use in challenging jurors for cause. The court further recognized that the Supreme Court has been unwilling to allow a defendant to assert the public's open justice rights. Because the defendant had failed to show he had been prejudiced, and at most the public's right had been affected, the petition was denied. Stockwell, 160 Wn. App. at 180-181.

Most recently the Court has considered this issue in Smith. There the parties stipulated to a questionnaire which promised jurors that their answers would only be used for jury selection, and would be sealed in a court file. Jury voir dire was conducted in open court. The questionnaires were sealed only after the jury had been selected.

Following the reasoning in Stockwell, the Court found under the circumstances no courtroom closure occurred which resulted in a violation of the defendant's open courtroom rights. Id. at 13-14.

The circumstances of this case are much like those in the preceding cases. There is no question the jury selection occurred in an open courtroom. The defendant and his attorneys had full access to the answers to the questionnaires during jury selection, and the order sealing those questionnaires occurred only after that process had been completed. The court was not given the opportunity to rule on a motion to seal or even restrict access to those questionnaires beforehand because no one requested access to them. On this record, consistent with the Court's earlier decisions, the Court should find that no violation of the petitioner's right to open public trials and records has been violated.

Despite these authorities⁵ the petitioner argues there was a courtroom closure entitling him to a new trial because the written responses were "secret" and although some of the responses were discussed in open court, not all of them were. Since the Court has refused to speculate about what a trial judge would have done in the absence of an actual request to see juror questionnaires, the written form of those answers should make no difference in the analysis. Counsel's decision to discuss some but not all of the answers does not constitute an impermissible closure. A courtroom (or court record) closure only occurs when the trial judge enters that order. State v. Price, 154 Wn. App. 480, 489, 228 P.3d 1276 (2009), review denied, 169 Wn.2d 1021, 238 P.3d 504 (2010), cert. denied, ___ U.S. ___, 131 S.Ct. 1818, 179 L.Ed.2d 776 (2011) (where

the prosecutor, and not the judge, asked a spectator to leave the courtroom during voir dire the courtroom was not closed in the constitutional sense.)

Additionally the petitioner has failed to establish the requisite prejudice necessary to entitle him to relief on the basis of a claimed constitutional violation. The petitioner makes two arguments in this regard. First he claims counsel was ineffective for failing to inform him that the written questionnaires were confidential. He states that had he known that his right to public trial included the questionnaires he would have asserted that right. Second, he argues that prejudice is simply presumed, relying on State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006).

The petitioner does not state how he would have asserted his open courtrooms right. As to him, the right was preserved since he had access to those questionnaires. Under the circumstances presented here the Court has only held the public's right to open court files has been affected. Coleman, 151 Wn. App. at 806, Lee, 159 Wn. App. at 807-08, Tarhan, 159 Wn. App. 829-31. Since the Court recognizes that a majority of the Supreme Court is not willing to allow a defendant to assert the public's open justice rights, the petitioner cannot have possibly have been prejudiced, even if had known then what he knows now. Stockwell, 160 Wn. App. at 181, citing State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009), cert. denied, ___ U.S. ___, 131 S.Ct. 160, 178 L.Ed.2d 40 (2010) and State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009).

Easterling does not support the petitioner's position because it involves a different type of closure. There the question involved an actual courtroom closure where the defendant and the public were excluded from a pre-trial hearing involving a

⁵ All but one of these cases was decided before the petitioner filed his petition. Smith decided after the petition was filed does not change the State's analysis because involved similar facts, reasoning, and

co-defendant whose case had been joined with the defendant's for trial. The Court remarked that the "presumptive remedy for a public trial right violation is reversal and remand for new trial." Easterling, 157 Wn.2d at 174, citing In re Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). That is no longer the case in the wake of Momah, and the cases addressing the issue in the context of sealed juror questionnaires.

Although the caption to the questionnaire suggested jurors answers would be kept confidential, this was not enough to establish an actual courtroom, or court record closure. As the Court has recognized, this kind of implication actually benefits the defendant in that jurors may be more forthcoming with information, which in turn aids the defendant in assessing whether to challenge a prospective juror. Under the circumstances of this case a new trial would constitute a windfall for the petitioner, a result this Court has found he is not entitled to. Lee, 159 Wn. App. at 810-11.

F. THE JUDGE AND JURORS DID NOT SLEEP THROUGH PORTIONS OF THE TRIAL. EVEN IF THEY HAD IT IS NOT AN ERROR WHICH ENTITLES THE PETITIONER TO A NEW TRIAL

1. The Trial Judge Did Not Fall Asleep During Any Portion Of The Trial. Even If He Did, It Is Not A Structural Error Entitling The Petitioner To A New Trial.

The petitioner argues he is entitled to a new trial because the trial judge, Judge Wynne, fell asleep during a portion of the trial. He supports this claim with affidavits from his parents stating they observed Judge Wynne dozing off briefly once or twice during the trial. Appendix J and K to petition.

The petitioner argues without citation to relevant authority that the judge sleeping, even briefly, during the course of the trial is a structural error which entitled him to a new trial. A structural error is one which "necessarily render[s] a criminal trial

result.

fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” Washington v. Recuenco, 548 U.S. 212, 218-19, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) quoting Neder v. United States, 527 U.S. 1, 9, 119 S.Ct. 1872, 144 L.Ed.2d 35 (1999). No case which has considered the ramifications of a claim that the trial judge fell asleep during portions of the trial have held that circumstance was a structural error.

The authority cited by the petitioner suggests that the claimed error was the judge was in effect absent from the proceeding. Cases which have considered a challenge to a verdict on the basis that the trial judge slept during a portion of the trial required the appellant to establish the facts supporting the claim and then show how it prejudiced him.

The defendant in a civil case supported his factual burden with an affidavit from a juror who said she thought the judge had fallen asleep at one point. Ettus v. Orkin Exterminating co., Inc. 665 P.2d 730 (Kan. 1983). At the hearing on the motion for new trial the judge said he did not remember falling asleep, and had the reporters read-back available if he had missed the tenor of an objection. The reviewing Court held that even assuming the defendant had made a credible showing of misconduct, no prejudice had been shown and the mere possibility of prejudice was insufficient to overturn a verdict. Ettus, 655 P.2d at 739.

The Court relied on Ettus to state that if proven, a claim that the trial judge fell asleep during the defendant’s cross-examination might be an independent ground for reversing a conviction in People v. Thrumond, 175 Cal. App.3d 865, 874, 221 Cal. Rptr. 292 (1985). Since the record did not support the claim the judge had slept during the proceeding, the Court refused to reverse the conviction on that basis. id.

The petitioner alleged his trial counsel, who also acted as his counsel on direct appeal, was ineffective because he failed to object to the trial judge sleeping during a portion of the trial when the petitioner brought it to his attention in Hummell v. State, 617 N.W. 2d 561 (Minn. 2000). The Court assumed the trial judge had slept during a portion of the trial. However, it noted the petitioner failed to point to any specific errors that occurred as a result of his attorney's lack of objection. As a result he failed to establish the prejudice necessary to sustain an ineffective assistance of counsel claim. Hummell, 617 N.W. 2d at 564.

Here Judge Wynne denies that he fell asleep during any portion of the trial. Judge Wynne admits he may have closed his eyes at some point during the trial. He explains that if he closed his eyes it was in order to concentrate on the evidence. Ex. 7. In addition, Mr. and Mrs. Clements, the lead detective, and the prosecutor never once observed the judge sleeping. Ex. 8, 9, 10, and 11.

The petitioner fails in his burden to show either the judge actually slept during trial or that he was prejudiced thereby. Although it may have appeared to Mr. and Mrs. Caldellis that the judge was sleeping, they apparently were not sure enough of that belief to bring it to counsel's attention at the time of trial. Since their son was on trial for first degree murder and two counts of second degree assault, and faced a very lengthy prison term if conviction, one would expect them to have expressed their concerns at the time, rather than three and one half years after the verdict. The Court in Hummell noted the difficulty in addressing this type of claim when it is raised years after the fact. "As each year passes, it becomes more difficult to address a claim like appellant's. Witnesses, if they are still available, have fading memories. In this case, the judge that

appellant complains of has since retired.” Hummell, 617 N.W.2d at 564-65. Here Judge Wynne has stated under oath that he did not fall asleep during trial. Although several years have passed, he above anyone else would know whether he had dozed off during any portion of the trial.

Moreover the petitioner fails to show that he was prejudiced. He points to no place in the record where the court failed to appreciate the nature of any motion or objection he made. He does not argue any ruling made by the court was affected by the court’s alleged inattention. The judge had at its disposal a daily transcript which he could consult in order to refresh his recollection if necessary prior to any ruling. Because he does not meet his burden to establish prejudice, he cannot sustain his burden to prove ineffective assistance of counsel for failing to notice and act on the judge’s alleged somnolence during trial. Strickland, 466 U.S. at 687.

2. The Petitioner Waived Any Argument Regarding Juror Misconduct. Alternatively He Failed To Show That A Juror Slept Through A Material Portion Of The Trial. In Addition He failed To show Any Prejudice From That Alleged Misconduct.

More than three years after the fact the petitioner alleges two of the jurors slept during what he contends was a material portion of the trial. In support of that claim he supplies the affidavit from his aunt. Ms. Merranto states in her affidavit that she saw three named jurors sleeping on two specific days while the prosecutor presented testimony relating to maps of the crime scene. Appendix L to petition, ¶ 7, 8, 9. She did not raise that issue with anyone because she says she did not understand the implication of jurors and others sleeping during testimony. ¶ 8.

A party who is aware that a juror is sleeping during testimony waives any error for juror misconduct when the party does not seek relief at the time of trial. Casey v.

Williams, 47 Wn.2d 255, 287 P.2d 343 (1955), State v. Hughes, 106 Wn.2d 176, 204, 721 P.2d 901 (1986). The petitioner never raised a claim at trial that a juror was sleeping during testimony. While the petitioner does not state that he observed the juror, a person who was present at trial on his behalf was. She states that she told the defense investigator what she saw a few days after the trial concluded. Appendix L to petition.

The petitioner did raise an issue of potential juror misconduct post trial. Defense counsel noted that there was some information that a juror had accessed an internet blog which related to the case. 12-28-07 RP 8. The court agreed to call in the jurors to question them about accessing the blog during trial. While the court said that other issues relating to juror misconduct could be addressed, the defense did not raise a question regarding sleeping jurors. 12-28-07 RP 8-30. Counsel filed a motion for arrest of judgment and new trial and a proposed juror questionnaire before the post verdict hearing. Ex. 12, 13. In neither document did the defense raise any issue regarding sleeping jurors. Jurors were questioned about the blog but not about sleeping during testimony. 1-9-08 RP 53-91. Where the petitioner's aunt put the defense on notice that three of the jurors had been sleeping during portions of the trial, and the defense did not raise the issue even post verdict, the issue has been waived.

If the defendant is entitled to raise the issue more than three years after trial he is not entitled to a new trial on that basis. Whether a defendant is entitled to a new trial on the basis of juror misconduct rests on whether he was deprived of his Fifth Amendment due process right or Sixth Amendment right to an impartial jury, and fair trial. United

States v. Springfield, 829 F.2d 860, 864 (9th Cir. 1987). Thus in order to obtain relief the petitioner must show that he was actually prejudiced by juror misconduct.

A conclusory affidavit from a courtroom spectator post trial was held insufficient to establish actual juror misconduct entitling the defendant to a new trial. Chubb v. State 640 N.E.2d 44, 48 (Ind. 1994), State v. Webb, 680 A.2d 147, 190 (Conn. 1996). Even if sufficient evidence was presented to show a juror actually slept during a portion of the trial where there is no evidence the jurors actually missed any important testimony a defendant fails to show he was prejudiced from a sleeping juror. State v. Lyons, 466 A.2d 868, 971 (Me. 1983).

The only person who claims to have observed any jurors sleeping was the petitioner's aunt, Jennifer Merranto. Appendix L. She specifically identifies two dates on which she observed three specific jurors sleeping; November 21 and November 26 in the afternoon. She does not state how long those three jurors slept, or what testimony they allegedly slept through. Nor does she explain how she knew the jurors were sleeping rather than just closing their eyes to listen to the testimony. All other courtroom observers and the judge stated that no juror slept through any of the proceedings. See Appendix J to petition, Ex. 7, 8, 9, 10. The petitioner fails to produce sufficient evidence to make a prima facie showing that he was actually prejudiced by the conduct of any juror.

G. THE PROSECUTOR'S ARGUMENTS IN REBUTTAL CLOSING WERE PERMISSIBLE UNDER THE CIRCUMSTANCES. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR WITHDRAWING AN OBJECTION TO THAT REMARK. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR NOT RAISING THE PROSECUTOR'S ARGUMENT AS AN ISSUE ON DIRECT APPEAL.

During closing argument defense counsel discussed instruction number 25 which told jurors "the defendant is not compelled to testify, and the fact that the defendant has not testified cannot be used to infer guilt or prejudice him in any way." Ex. 2. Defense counsel acknowledged that the natural inclination may be to question why the defendant chose not to testify. He thereafter gave five potential reasons for that choice. (1) Due to his youth the defendant could not sufficiently articulate what happened, (2) the defendant may be scared, (3) the prosecutor was a bully, (4) his attorney advised him not to testify, (5) the jury had already heard from the defendant from other sources. 20 RP 3221-24.

The prosecutor responded by stating "He listed a bunch of reasons for Noel Caldellis not testifying. He forgot a big one, didn't he? I can think of one more, can you?" At that point Mr. McFarland stood and posed a general objection. His co-counsel spoke to him and he thereafter sat down and withdrew the objection. The prosecutor then moved on to other topics. 20 RP 3275-76, Ex. 11.

The petitioner argues the prosecutor's response was an impermissible comment on the petitioner's right to remain silent. He argues his trial attorney's performance was deficient for withdrawing the objection. In addition his appellate attorney's performance was deficient for failing to raise the issue on appeal.

A prosecutor may not comment on the defendant's failure to testify. State v. French, 101 Wn. App. 380, 386, 4 P.3d 857 (2000), review denied, 142 Wn.2d 1022, 20 P.3d 945 (2001). The prosecutor is entitled to make a fair response to the defense attorney's arguments. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995). Thus, even if the prosecutor's remarks are improper, they do not constitute a basis for reversal if they were invited or provoked by the defense attorney and are in reply to his statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective. Id. at 85, State v. Dennison, 72 Wn.2d 842, 849, 435 P.2d 526 (1967).

The Court found reversal was not required where the prosecutor's arguments were brief, and was accompanied by relevant jury instructions. State v. Gentry, 125 Wn.2d 570, 595-96, 888 P.2d 1105, cert. denied, 516 U.S. 843, 116 S.Ct. 131, 133 L.Ed.2d 79 (1995). Likewise, where a prosecutor's improper remark is brief, and is not a big part of the overall argument, it does not meet the enduring prejudice standard necessary to justify a new trial. State v. Barajas, 143 Wn. App. 24, 38, 177 P.3d 106 (2007), review denied, 164 Wn.2d 1022, 195 P.3d 957 (2008).

The most obvious answer to the prosecutor's rhetorical question was the defendant did not testify because he had nothing to say that would help him. It was an indirect comment on the defendant's failure to testify, and thus improper. However, it was not grounds for a new trial because it was invited by defense counsel's lengthy discussion explaining possible reasons why the petitioner did not testify. It was thus a pertinent response. It was brief, consisting of two and one half lines of an argument that

took up 50 pages of transcript between opening and rebuttal argument. The court's instructions neutralized any possible prejudice that could have resulted from the comment. The court instructed the jury that "[t]he defendant is not compelled to testify, and the fact that the defendant has not testified cannot be used to infer guilt or prejudice him in any way." Ex. 2 no. 25. The jury was also instructed "The lawyer's remarks, statements, and arguments are intended to help you understand the evidence and apply the law...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." Ex. 2 no. 1. The jury is presumed to follow the court's instructions. State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982), cert denied, 459 U.S. 1211, 103 S.Ct. 1205, 75 L.Ed.2d 446 (1983). Thus the petitioner fails to show that the prosecutor's reply was not so prejudicial that the instructions given by the court did not cure it.

Just as the prosecutor's argument does not justify a new trial, the petitioner's trial attorney's decision to withdraw his objection is not grounds for reversal. Whether to object during closing argument is a tactical decision. Madison, 53 Wn. App. at 763. Under the circumstances it was reasonable for counsel to withdraw the objection. If counsel had not withdrawn the argument the trial court could have either sustained or overruled the objection. In either case it would have the potential to negatively impact the defense. Defense counsel had already had one objection to the prosecutor's argument overruled. 20 RP 3189. Had another objection been overruled the jury may have thought that the defense was being obstructionist, or was trying to hide something from the jury. If the trial court had sustained the objection the court's ruling would have

signaled to the jury that the argument was improper. Since defense counsel made a much more elaborate argument on the same subject, the message to jurors could be that the defense argument was equally improper. That in turn could lead to the conclusion that much of what the defense argued was unpersuasive.

Trial counsel's decision to address the reasons why his client chose not to testify was also tactical. The argument immediately preceded a discussion regarding the petitioner's character. Counsel stressed that the petitioner came from a respectable family, attended church, was involved in community service activities, had a solid education and a supportive group of family and friends. 12-10-07 RP 3224-3227. The discussion regarding why the petitioner chose not to testify characterized the petitioner as vulnerable and inexperienced in facing the criminal justice system, a theme he continued by referencing the petitioner's lack of criminal history. These arguments related to the defense position that the petitioner was not the kind of person who would have behaved in a manner consistent with someone who acted with extreme indifference to human life. Counsel summed up the argument saying:

Through all of these people, you get the picture of a young man who cares about people, who is concerned about peoples' well-being...this is a guy who has compassion for people, a regard for human life, and this is particularly important in this case, not just because this is a homicide case in which he is accused of taking another person's life, but the manner in which the prosecutor has accused it here by alleging that Noel acted with extreme indifference to human life and crated a grave risk of death.

...When you're considering this issue of extreme indifference, I believe the character evidence that we've heard in this case becomes particularly important.

20 RP 3226.

Since both the argument and the decision to withdraw the objection to the prosecutor's brief response was a reasonable tactical decision the petitioner fails to establish either deficient performance or resulting prejudice necessary to sustain his ineffective assistance of counsel claim. For that reason too the petitioner fails to establish ineffective assistance of counsel on his appellate counsel's part.

The petitioner argues that a constitutional harmless error standard applies because the prosecutor's argument directly violated his constitutional right, citing State v. Traweek, 43 Wn. App. 99, 108, 715 P.2d 1148, review denied, 106 Wn.2d 1007 (1986), and State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). See also State v. Ramirez, 49 Wn. App. 332, 742 P.2d 726 (1987) (The defense attorney suggested reasons why his client chose not to testify. The prosecutor's rebuttal argument that one reason he may not have testified was that he was guilty was improper). In each of these cases the defendant had lodged an objection to the argument, thus preserving the issue for appeal. When the issue had been preserved for appeal the Court did consider whether the argument was constitutional harmless error. Traweek, 43 Wn. App. at 108, Easter, 130 Wn.2d at 242, Ramirez, 49 Wn. App. at 339-40. Whereas here, no objection was raised to the argument, the standard is whether the response was so flagrant and ill-intentioned that no instruction could cure the resulting prejudice. As discussed above, the prosecutor's argument did not meet this standard.

However, even if the constitutional harmless error analysis applied the appellate attorney acted reasonably in not raising this issue on direct appeal. A constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that any

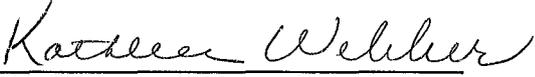
reasonable jury would have reached the same result in the absence of the error. State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). Where it is clear beyond a reasonable doubt that the jury verdict is unattributable to the error the constitutional error is not grounds for reversal. Id. One of the reasons trial counsel gave for not calling his client to testify was that the jury had already heard the petitioner side of the story. 20 RP 3223-24. The jury was already aware that the petitioner had essentially confessed to acts constituting the murder. The petitioner's testimony would have added little to that, a fact which counsel acknowledged. A reasonable assessment of the record leads to the conclusion that it is unlikely the prosecutor's brief comment had much to do with the jury's verdict.

Thus, appellate counsel was not deficient when he chose to forgo arguments that the prosecutor committed misconduct and the trial attorney rendered ineffective assistance of counsel. Each of these arguments was considerably weaker than arguments appellate counsel chose to pursue. Appellate counsel made a reasonable tactical decision when he decided not to argue these points.

V. CONCLUSION

For the foregoing reasons the State requests that the Court dismiss the petition.

Respectfully submitted on August 16, 2011.


KATHLEEN WEBBER 16040
Deputy Prosecuting Attorney
Attorney for Respondent



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SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v.

CALDELLIS, NOEL EVAN

Defendant.

SID: WA23130017
If no SID, use DOB:

No. 06-1-02485-5

JUDGMENT AND SENTENCE
 Prison
 Jail One Year or Less
 First Time Offender
 Special Drug Offender Sentencing Alternative
 Clerk's action required, firearm rights
revoked, ¶ 5.5
 Clerk's action required, ¶¶ 2.1, 4.1, 4.3, 5.2, 5.3
 Clerk's action required, ¶ 5.6 (use of motor vehicle)
 Restitution Hearing set, ¶ 4.3

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

2.1 CURRENT OFFENSE(S). The defendant was found guilty on December 11, 2007, by jury-verdict of:

COUNT	CRIME	RCW	CLASS	INCIDENT #	DATE OF CRIME
1	First Degree Murder (While Armed With A Firearm)	9A.32.030(1)(b), 9.94A.533(3), 9.41.010, 9.94A.602	A	BRI 0600716 LYN 0608576	9/3/06

as charged in the Amended Information.

The jury returned a special verdict or the court made a special finding with regard to the following:

- See ¶ 4.1 regarding findings in relation to Drug Offender Sentencing Alternative.
- The defendant used a **firearm** in the commission of the offense in Count 1. RCW 9.94A.602, 9.41.010, 9.94A.533.
- The defendant used a **deadly weapon other than a firearm** in the commission of the offense(s) in Count(s) _____ RCW 9.94A.602, 9.94A.533.
- The defendant committed the offense in Count(s) _____ with **sexual motivation**. RCW 9.94A.835.
- Count(s) _____ **Violation of the Uniform Controlled Substances Act (VUCSA)**, RCW 69.50.401 and RCW 69.50.435, took place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated

ORIGINAL

EXHIBIT 1

262

4-26-10 F.O. SCSO

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by the school district; or in a public park, in a public transit vehicle, or in a public transit stop shelter; or in or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.

- The defendant committed a crime involving the manufacture of methamphetamine including its salts, isomers, and salts of isomers, when a juvenile was present in or upon the premises of manufacture in Count(s) _____, RCW 9.94A.605, 69.50.401, 69.50.440.
- Count(s) _____ is (are) a criminal street gang-related felony offense in which the defendant compensated, threatened, or solicited a minor in order to involve that minor in the commission of the offense. RCW 9.94A.833.
- Count(s) _____ is (are) the crime of unlawful possession of a firearm and the defendant was a criminal street gang member or associate when the defendant committed the crime. RCW 9.94A.702, 9.94A.____.
- The defendant committed vehicular assault proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030.
- Count(s) _____ involve(s) attempting to elude a police vehicle and during the commission of the crime the defendant endangered one or more persons other than the defendant or the pursuing law enforcement officer. RCW 9.94A.834.
- Count(s) _____ is (are) a felony in the commission of which the defendant used a motor vehicle. RCW 46.20.285.
- The defendant has a chemical dependency that has contributed to the offense(s) in Count(s) _____. RCW 9.94A.607.
- The crime charged in Count(s) _____ involve(s) domestic violence. RCW 10.99.020.
- The offense in Count(s) _____ was (were) committed in a county jail or state correctional facility. RCW 9.94A.533(5).
- Count(s) _____ involve(s) kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in Chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.
- Count(s) _____ and _____ merge. (See ¶ 3.2 for dismissal of specific count.)
- Counts _____ encompass the same criminal conduct and count as one crime in determining the offender score. RCW 9.94A.589.
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): (INPUT)

2.2 CRIMINAL HISTORY. Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.525):

<u>CRIME</u>	<u>DATE OF SENTENCE</u>	<u>SENTENCING COURT (County & State)</u>	<u>A or J (Adult or Juvenile)</u>	<u>TYPE OF CRIME</u>
NONE				

- The defendant committed Count(s) _____ while on community custody (adds one point to score). RCW 9.94A.525.
- The court finds the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525): (INPUT)

The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520: (INPUT)

2.3 SENTENCING DATA.

COUNT NO.	OFFENDER SCORE	SRA LEVEL	STANDARD RANGE (not including enhancements)	*PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	0	XV	240-320 MONTHS	60 MONTHS (F)	300-380 MONTHS	LIFE

*(F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Vehicular Homicide, See RCW 46.61.520, (JP) Juvenile Present, (CSG) Criminal Street Gang Involving Minor, (AE) Endangerment While Attempting to Elude.

2.4 **EXCEPTIONAL SENTENCE.** Substantial and compelling reasons exist which justify an exceptional sentence above below the standard range for Count(s) _____ or within the standard range for Count(s) _____ but served consecutively to Count(s) _____.

The defendant and State stipulate that justice is best served by imposition of an exceptional sentence above the standard range and the court finds that exceptional sentence furthers and is consistent with the interests of justice and the purpose of the Sentencing Reform Act.

Aggravating factors were stipulated by the defendant, found by the court after the defendant waived jury trial, found by jury by special interrogatory. Findings of fact and conclusions of law are attached in Appendix 2.4. The jury's interrogatory is attached. The prosecuting attorney did did not recommend a similar sentence.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753(5)):

The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

2.6 PROSECUTOR'S RECOMMENDATION. The prosecutor's recommendation was as follows:

380 months on Count I _____ months on Count IV
_____ months on Count II _____ months on Count V
_____ months on Count III _____ months on Count VI

Terms on each count to run:
 concurrently with or consecutively to each other
 concurrently with or consecutively to the terms imposed in Cause No(s). _____

III. JUDGMENT

- 3.1 The defendant is **GUILTY** of the counts and charges listed in Paragraph 2.1.
- 3.2 The court **DISMISSES** Count(s) II, III, & IV
- 3.3 The defendant was found **NOT GUILTY** of Count(s) _____

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 **CONFINEMENT OVER ONE YEAR.** The court sentences the defendant to total confinement as follows:

CONFINEMENT. RCW 9.94A.589. A term of total confinement in the custody of the Department of Corrections (DOC):

<u>300</u> months on Count I	_____ months on Count IV
_____ months on Count II	_____ months on Count V
_____ months on Count III	_____ months on Count VI

[XXX] The confinement time on Count(s) [] includes 60 months as enhancement for [XXX] Firearm [] Deadly Weapon [] VUCSA in a Protected Zone [] Manufacture of Methamphetamine with Juvenile Present [] other _____.

Actual term of total confinement ordered is Three hundred months.

All counts shall be served concurrently, except for the portion of those counts for which there is an enhancement as set forth above at ¶ 2.3, and the following counts which shall be served consecutively:

_____ The sentence herein shall run consecutively with the sentence in cause number(s) _____

but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589

Confinement shall commence immediately unless otherwise set forth here: _____

CREDIT FOR TIME SERVED. The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505(6). The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court:

_____ Since 9/4/06

[] **WORK ETHIC PROGRAM.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic program. The court recommends that the defendant serve the sentence at a work ethic program. Upon completion of work ethic program, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions in ¶ 4.2. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement.

4.2

[XXX] **COMMUNITY CUSTODY.** RCW 9.94A.701. The defendant shall serve the following term of community custody (12 months for crimes against a person, drug offenses, or offenses involving the unlawful possession of a firearm by a street gang member or associate; 18 months for violent offenses; and 36 months for serious violent offenses):

Count I for a period of <u>36</u> months	Count IV for a period of _____ months
Count II for a period of _____ months	Count V for a period of _____ months
Count III for a period of _____ months	Count VI for a period of _____ months

and the conditions ordered are set forth below. The combined term of community custody and confinement shall not exceed the statutory maximum.

The defendant shall report to DOC, 8625 Evergreen Way, Suite 100, Everett, Washington 98208 not later than 72 hours after release from custody.

While on community custody, the defendant shall (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution; (3) notify DOC of any change in the defendant's address or employment; (4) not consume or possess controlled substances except pursuant to lawfully issued prescriptions; (5) not own, use, or possess firearms or ammunition; (6) pay supervision fees as determined by DOC; (7) perform affirmative acts necessary to monitor compliance with orders of the court as required by DOC; and (8) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706. The residence location and living arrangements are subject to the prior approval of DOC while on community custody.

- The defendant shall not consume any alcohol.
- The defendant shall have no contact with the family of Jay Daniel Clements. [xxx] See ¶ 4.5. *unless initiated by the Clements family.*
- The defendant shall remain within outside of a specific geographical boundary, to wit:

- The defendant shall participate in the following crime-related treatment or counseling services:

- The defendant shall participate in the following: State certified domestic violence batterer's treatment program chemical dependency evaluation mental health evaluation anger management program, and fully comply with all recommended treatment.
- The defendant shall comply with the following crime-related prohibitions: _____

4.3 LEGAL FINANCIAL OBLIGATIONS. Defendant shall pay to the clerk of the court:

PVC	<input checked="" type="checkbox"/> \$500	Victim assessment	RCW 7.68.035
CRC	\$ _____ <input type="checkbox"/> waived	Court costs, including	RCW 9.94A.030, .505; 10.01.160
		Criminal filing fee \$ _____	FRC
		Witness costs \$ _____	WFR
		Sheriff service fees \$ _____	SFR/SFS/SPW/SRF
		Jury demand fee \$ _____	JFR
		Other \$ _____	RCW 10.46.190
PUB	<input type="checkbox"/> \$962 <input type="checkbox"/> waived	Fees for court appointed attorney	RCW 9.94A.760
WFR	\$ _____	Court appointed defense expert and other costs	RCW 9.94A.760
FCM	<input type="checkbox"/> \$1,000 <input type="checkbox"/> \$2,000	Fine RCW 9A.20.021; <input type="checkbox"/> VUCSA additional fine deferred due to indigency	RCW 69.50.430
CDF/ADV	\$ _____	Drug enforcement fund of \$ _____	RCW 9.94A.760
FCD/NTF/ISAD/SDI	\$ _____	Crime lab fee <input type="checkbox"/> suspended due to indigency	RCW 43.43.690
CLF	<input type="checkbox"/> \$100	Extradition costs	RCW 9.94A.505
EXT	\$ _____	Emergency response costs (Vehicular Assault, Vehicular Homicide, DUI only, \$1000 maximum)	RCW 38.52.430
RTN/RJN	\$ _____	Biological Sample Fee	RCW 43.43.7541
	<input checked="" type="checkbox"/> \$100	(for offenses committed after 07-01-2002)	
PDV	<input type="checkbox"/> \$100	Domestic Violence Penalty (for offenses committed after 06-04-2004 – maximum \$100)	RCW 10.99.080
	\$ _____	Other costs for: _____	
	\$ <u>600⁰⁰</u>	TOTAL	RCW 9.94A.760

RESTITUTION. The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753.

- A restitution hearing shall be set for _____
- Defendant waives any right to be present at any restitution hearing (*sign initials*): _____
- Defendant waives any right to a restitution hearing within 6 months. RCW 9.94A.750.

A separate Restitution Order was entered on August 7, 2008. * 18,356⁸⁶

The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

All payments shall be made in accordance with the policies of the clerk and on a schedule established by the Department of Corrections, commencing immediately, unless the court specifically sets forth the rate here of not less than:

\$ _____ per month commencing _____, RCW 9.94A.760.

All payments shall be made within 120 months of release of confinement; entry of judgment; other _____

The defendant shall report to the clerk of the court or as directed by the clerk to provide financial and other information requested. RCW 9.94A.760(7)(b).

- In addition to the other costs imposed herein the Court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at \$100.00 per day (not to exceed \$100 per day) unless another rate is specified here _____, RCW 9.94A.760(2).
- The defendant shall pay the costs of services to collect unpaid legal financial obligations. RCW 36.18.190.
- The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.

- 4.4 [X] **DNA TESTING.** The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.
- [] **HIV TESTING.** The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. The defendant, if out of custody, shall report to the HIV/AIDS Program Office at 3020 Rucker, Suite 206, Everett, Washington 98201 within one (1) business day of entry of this order to arrange for the test. RCW 70.24.340.

4.5 **NO CONTACT.**

- [XXX] The defendant shall not have contact with the family of Jay Daniel Clements (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party until for life (date) (not to exceed the maximum statutory sentence). *EVEN IF THE PERSON WHO THIS ORDER PROTECTS INVITES OR ALLOWS CONTACT, YOU CAN BE ARRESTED AND PROSECUTED. ONLY THE COURT CAN CHANGE THIS ORDER. YOU HAVE THE SOLE RESPONSIBILITY TO AVOID OR REFRAIN FROM VIOLATING THIS ORDER.
- [] *Unless initiated by the Clements family.
A separate Domestic Violence No Contact Order, Anti-Harassment Order, or Sexual Assault Protection Order is filed contemporaneously with this Judgment and Sentence. (Entry of a separate order makes a violation of this no contact sentencing provision a criminal offense, and the order will be entered into the law enforcement database.)

4.6 **OTHER.** _____

4.7 **OFF-LIMITS ORDER.** (Known drug trafficker). RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections: _____

4.8 Unless otherwise ordered, all conditions of this sentence shall remain in effect notwithstanding any appeal.

V. NOTICES AND SIGNATURES

- 5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.
- 5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender for the purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.753(4); RCW 9.94.A.760 and RCW 9.94A.505(5).
- 5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in paragraph 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.7606.
- 5.4 **VIOLATION OF JUDGMENT AND SENTENCE/COMMUNITY CUSTODY VIOLATION.**
 - (a) Any violation of a condition or requirement of sentence is punishable by up to 60 days confinement for each violation. RCW 9.94A.633.
 - (b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.714.

5.5 **FIREARMS.** You may not own, use or possess any firearm unless your right to do so is restored by a superior court in Washington State, and by a federal court if required. You must immediately surrender any concealed pistol license. *(The clerk of the court shall forward a copy of the defendant's driver's license, Identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.)* RCW 9.41.040, 9.41.047.

(Pursuant to RCW 9.41.047(1), the Judge shall read this section to the defendant in open court.)

The defendant is ordered to forfeit any firearm he/she owns or possesses no later than _____ to _____ *(name of law enforcement agency)*. RCW 9.41.098

- 5.6 **MOTOR VEHICLE.** If the court found that you used a motor vehicle in the commission of the offense, then the Department of Licensing will revoke your driver's license. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke your driver's license. RCW 46.20.285.
- 5.7 **CERTIFICATE OF DISCHARGE.**
 - (a) If you are under the custody and supervision of the Department of Corrections, the court will not issue a Certificate of Discharge until it has received notice from Department of Corrections and clerk's office that you have completed all requirements of the sentence and satisfied all legal financial obligations. RCW 9.94A.637.
 - (b) If you are not under the custody and supervision of the Department of Corrections, the court will not issue a Certificate of Discharge until it has received verification from you that you have completed all sentence conditions other than payment of legal financial obligations and the clerk's office that you have satisfied all legal financial obligations.

5.8 **RIGHT TO APPEAL.** If you plead not guilty, you have a right to appeal this conviction. If the sentence imposed was outside of the standard sentencing range, you also have a right to appeal the sentence. You may also have the right to appeal in other circumstances.

This right must be exercised by filing a notice of appeal with the clerk of this court within 30 days from today. If a notice of appeal is not filed within this time, the right to appeal is IRREVOCABLY WAIVED.

If you are without counsel, the clerk will supply you with an appeal form on your request, and will file the form when you complete it.

If you are unable to pay the costs of the appeal, the court will appoint counsel to represent you, and the portions of the record necessary for the appeal will be prepared at public expense.

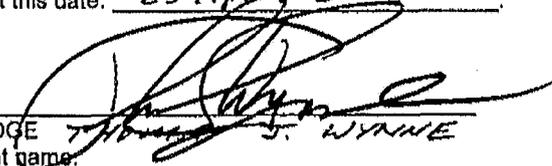
5.9 **VOTING RIGHTS STATEMENT.** I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

My right to vote is provisionally restored as long as I am not under the authority of DOC (not serving a sentence of confinement in the custody of DOC and not subject to community custody as defined in RCW 9.94A.030). I must re-register before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal financial obligations or an agreement for the payment of legal financial obligations.

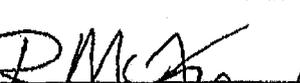
My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

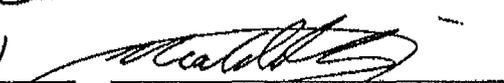
5.10 **OTHER.** _____

DONE in Open Court and in the presence of the defendant this date: 23 April 2010

JUDGE 
Print name: J. WYNNE


MATT HUNTER
WSBA 24021
Deputy Prosecuting Attorney


Raymond McFarland #12257
WSBA 12257
Attorney for Defendant


NOEL-EVAN CALDELLIS
Defendant

Interpreter signature/Print name: _____

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language. Cause No. of this case: 06-1-02485-5.

I, Sonya Kraski, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action, now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: _____

Clerk of said County and State, _____, Deputy Clerk

IDENTIFICATION OF DEFENDANT

SID Number: WA23130017
(If no SID, take fingerprint card for State Patrol)

Date of Birth: 11/22/1987

FBI Number: 887694KC2

Local ID Number: _____

PCN Number: _____

DOC Number: 315488

Alias name, SSN, DOB:

Race: White

Ethnicity:

Sex: M

Hispanic

Non-Hispanic

Height: 506

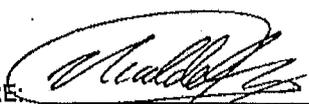
Weight: 170

Hair: Brown

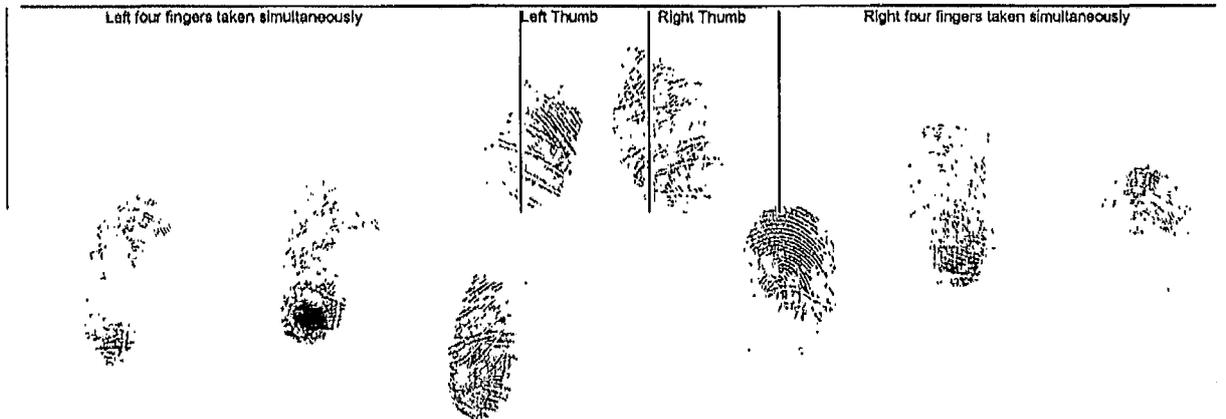
Eyes: Brown

FINGERPRINTS: I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto. Clerk of the Court: S. Belon, Deputy Clerk.

Dated: 23 APR 2010

DEFENDANT'S SIGNATURE: 

ADDRESS: DOC - MCC



ORDER OF COMMITMENT

THE STATE OF WASHINGTON to the Sheriff of the County of Snohomish; State of Washington, and to the Secretary of the Department of Corrections, and the Superintendent of the Washington Corrections Center of the State of Washington:

WHEREAS, NOEL EVAN CALDELLIS has been duly convicted of the crime of First Degree Murder (While Armed With a Firearm) as charged in the Amended Information filed in the Superior Court of the State of Washington, in and for the County of Snohomish, and judgment has been pronounced against him/her that he/she be punished therefore by imprisonment in such correctional institution under the supervision of the Department of Corrections, Division of Prisons, as shall be designated by the Secretary of the Department of Corrections pursuant to RCW 72.02.210, for the term(s) as provided in the judgment which is incorporated by reference, all of which appears of record in this court; a certified copy of said judgment being endorsed hereon and made a part thereof; Now, Therefore,

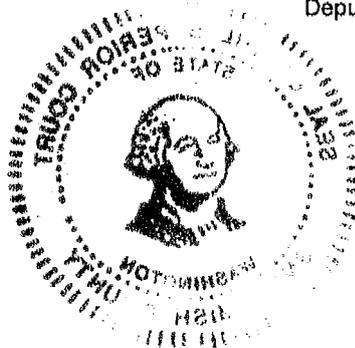
THIS IS TO COMMAND YOU, the said Sheriff, to detain the said defendant until called for by the officer authorized to conduct him to the Washington Corrections Center at Shelton, Washington, in Mason County, and this is to command you, the said Superintendent and Officers in charge of said Washington Corrections Center to receive from the said officers the said defendant for confinement, classification, and placement in such corrections facilities under the supervision of the Department of Corrections, Division of Prisons, as shall be designated by the Secretary of the Department of Corrections.

And these presence shall be authority for the same. HEREIN FAIL NOT.

WITNESS the HONORABLE THOMAS J. WYNNE, Judge of the said Superior Court and the seal thereof, this 23rd day of April, 2010.

Sonya Kraski
CLERK OF THE SUPERIOR COURT

By: 
Deputy Clerk



Filed in Open Court
Dec 11 2007
PAM L. DANIELS
COUNTY CLERK
By [Signature]
Deputy Clerk



**CERTIFIED
COPY**

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF SNOHOMISH**

STATE OF WASHINGTON,)	CASE NO. 06-1-02485-5
)	
Plaintiff,)	
)	
v.)	
)	
NOEL EVAN CALDELLIS,)	
)	
Defendant.)	

**COURT'S INSTRUCTIONS
TO THE JURY**

JUDGE [Signature]

Dec 10, 2007
Date given to Jury

ORIGINAL

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INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. 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 that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

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, during the trial. 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 in reaching your verdict.

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 of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also 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.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

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 this court. You must not let your emotions overcome your rational thought process. 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. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

INSTRUCTION NO. 3

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find 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 in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 14

To convict the defendant of the crime of Murder in the First Degree, as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 3rd day of September, 2006, the defendant discharged a firearm;
- (2) That the conduct of the defendant created a grave risk of death to another person;
- (3) That the defendant engaged in that conduct under circumstances manifesting an extreme indifference to human life;
- (4) That Jay Daniel Clements died as a result of defendant's acts; and
- (5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to anyone of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO 5

Conduct which creates a grave risk of death under circumstances manifesting an extreme indifference to human life means an aggravated recklessness which creates a very high degree of risk greater than that involved in recklessness.

INSTRUCTION NO. 6

The defendant is charged in Count I with murder in the first degree. If, after full and careful deliberation on these charges, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crimes of manslaughter in the first degree and manslaughter in the second degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more crimes or degrees of crime that person is guilty, he or she shall be convicted only of the lowest crime or lowest degree of crime.

INSTRUCTION NO. 7

To convict the defendant of the crime of manslaughter in the first degree as a lesser-included offense in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 3rd day of September, 2006, Noel Caldellis discharged a firearm.
- (2) That the defendant's conduct was reckless.
- (3) That Jay Daniel Clements died as a result of defendant's acts;
and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 8

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

Recklessness also is established if a person acts intentionally or knowingly.

INSTRUCTION NO. 9

To convict the defendant of the crime of manslaughter in the second degree as a lesser-included offense in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 3rd day of September, 2006, Noel Caldellis discharged a firearm;
 - (2) That the defendant's conduct was criminal negligence;
 - (3) That Jay Daniel Clements died as a result of defendant's acts;
- and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 10

A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and the failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

Criminal negligence is also established if a person acts intentionally or knowingly or recklessly.

INSTRUCTION NO. 11

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

INSTRUCTION NO. 12

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

INSTRUCTION NO. 13

To convict the defendant of the crime of Assault in the Second Degree, as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 3rd day of September, 2006, the defendant assaulted Meghan E. Lever with a deadly weapon; and

(2) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 124

To convict the defendant of the crime of Assault in the Second Degree, as charged in Count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 3rd day of September, 2006, the defendant assaulted Kyle J. Defenbach with a deadly weapon; and
- (2) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 15

A firearm, whether loaded or unloaded, is a deadly weapon.

INSTRUCTION NO. 16

An assault is an intentional touching or striking or cutting or shooting of another person, with unlawful force, that is harmful or offensive.

An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

INSTRUCTION NO. 17

Bodily injury means physical pain or injury, illness, or an impairment of physical condition.

INSTRUCTION NO. 18

It is a defense to a charge of murder in the first degree, manslaughter in the first degree, and manslaughter in the second degree that the homicide was excusable as defined in this instruction.

Homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent.

The State has the burden of proving the absence of excuse beyond a reasonable doubt. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 19

Homicide is the killing of a human being by the voluntary act of another and is either murder, manslaughter, or excusable homicide.

INSTRUCTION NO. 20

It is a defense to the charges of assault in the second degree in counts III and IV that the force used, attempted, or offered to be used was lawful as defined in this instruction.

The use of, attempt to use, or offer to use force upon or toward another person or persons acting in concert with him is lawful when used, attempted, or offered by a person who reasonably believes that he is about to be injured or by someone lawfully aiding a person who he reasonably believes is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.

The person using or offering to use the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used, attempted, or offered to be used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 21

Necessary means that, under the circumstances as they reasonably appeared to the actor prior to and at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

INSTRUCTION NO. 22

A person is entitled to act on appearances in defending himself or another, if that person believes in good faith and on reasonable grounds that he or another is in actual danger, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

INSTRUCTION NO. 23

Any evidence that bears upon good character and good reputation of the defendant should be considered by you, along with all other evidence, in determining your verdict. However, even if you find that the defendant is a person of good character or reputation, you should not acquit if you are convinced beyond a reasonable doubt of the defendant's guilt.

INSTRUCTION NO. 24

You may give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, taking into consideration the surrounding circumstances.

INSTRUCTION NO. 25

The defendant is not compelled to testify, and the fact that the defendant has not testified cannot be used to infer guilt or prejudice him in any way.

INSTRUCTION NO. 26

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION NO. 27

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts which he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 28

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous 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. 29

You will also be given special verdict forms for the crimes charged in Counts I, III, and IV. If you find the defendant not guilty of a crime, do not use the special verdict form relating to that count. If you find the defendant guilty of a crime, you will then use the special verdict form relating to that count and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer a special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If any one of you has a reasonable doubt as to the question, you must answer "no". If you unanimously have a reasonable doubt as to this question, you must answer "no".

INSTRUCTION NO. 30

For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime.

A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant. The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime. In determining whether this connection existed, you should consider the nature of the crime, the type of firearm, and the circumstances under which the firearm was found.

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

INSTRUCTION NO. 31

When you begin deliberating, you should first select a presiding juror. 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, five verdict forms (1a, 1b, 1c, 3 and 4), and three special verdict forms (S1-a/b/c, S3 and S4). Some exhibits and visual aids may have been used in court but will not go with you to the jury

room. The exhibits that have been admitted into evidence will be available to you in the jury room.

When completing Verdict Form 1a, you will first consider the crime of Murder in the First Degree, as charged in Count I. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form 1a the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form 1a.

If you find the defendant guilty on Verdict Form 1a, do not use verdict forms 1b or 1c. If you find the defendant not guilty of the crime of Murder in the First Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Manslaughter in the First Degree. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form 1b the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form 1b.

If you find the defendant guilty on Verdict Form 1b, do not use Verdict Form 1c. If you find the defendant not guilty of the crime of Manslaughter in the First Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Manslaughter in the Second Degree. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form 1c the words "not guilty" or the word "guilty," according to the decision you reach.

When completing verdict forms 3 and 4, you must fill in the blank provided in each

verdict form the words "not guilty" or the word "guilty," according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror must sign the verdict form(s) and notify the bailiff. The bailiff will bring you into court to declare your verdict.



**WASHINGTON
PATTERN
JURY
INSTRUCTIONS**
—
CRIMINAL

WPIC

**WASHINGTON
SUPREME COURT COMMITTEE
ON JURY INSTRUCTIONS**

EXHIBIT 3

WASHINGTON
PATTERN
JURY INSTRUCTIONS

CRIMINAL
SECOND EDITION

Volume 11

SUPERSEDED

WPIC

1.00-55.06

Prepared by the
WASHINGTON SUPREME COURT COMMITTEE
ON
JURY INSTRUCTIONS

HON. PATRICIA H. AITKEN
Chair

ST. PAUL, MINN.
WEST PUBLISHING CO.
1994

WPIC 26.06

MURDER—FIRST DEGREE—INDIFFERENCE TO HUMAN LIFE—ELEMENTS

To convict the defendant of the crime of murder in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the _____ day of _____, 19____, the defendant _____; (briefly describe the act charged)

(2) That the conduct of the defendant created a grave risk of death to another person;

(3) That the defendant engaged in that conduct under circumstances manifesting an extreme indifference to human life;

(4) That _____ (name of decedent) died as a result of defendant's acts; and

(5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

NOTE ON USE

This instruction is intended to cover only RCW 9A.32.030(1)(b). If there is an issue of causal connection, use WPIC 25.02, Homicide, Proximate Cause—Definition.

In the first element, the event, act, weapon, etc., should be briefly described by summarization rather than a detailed restatement of the information.

MURDER, FIRST DEGREE

WPIC 26.06

If the facts on which jurisdiction is based are in dispute, a special verdict form may need to be submitted to the jury. See the introductory comment to WPIC 4.20.

COMMENT

RCW 9A.32.030(1)(b).

If a defense of excuse or justification is raised, then the question arises whether the defense tends to negate an element of the crime. If it does, then the concerns discussed in the Introduction to Part IV apply and the State may have the burden of proving the absence of excuse or justification.

It is not entirely clear whether a defense of excuse or justification tends to negate an element under WPIC 26.06. Since neither premeditation nor intent is an element under WPIC 26.06, the burden may not be shifted to the State. The question becomes one of whether accident, misfortune, self-defense, or the like tends to negate the element of "extreme indifference" contemplated by WPIC 26.06.

The committee is unaware of a case resolving the issue. A case that might be helpful by analogy is *State v. Hanton*, 94 Wn.2d 129, 614 P.2d 1280 (1980), *cert. denied* 449 U.S. 1035, 101 S.Ct. 611, 66 L.Ed.2d 497 (1980). In *Hanton*, the court held that a claim of self-defense did tend to negate the element of recklessness in a manslaughter case, and that the State thus had the burden of proving the absence of self-defense.

If the court were to equate "extreme indifference" under WPIC 26.06 with "recklessness" under the manslaughter statutes, then the State would have the burden of proving the absence of excuse or justification. A contrary result could be reached, however, on the basis of differing language in the statutory definitions.

The requirement in RCW 9A.32.030(1)(b) that the defendant engage in conduct manifesting an extreme indifference to human life is similar to the language used in RCW 46.61.024, the attempting to elude a pursuing police vehicle statute, that the defendant drove in a manner indicating a wanton or willful disregard for the lives or property of others. See WPIC 94.02, Attempting to Elude a Pursuing Police Vehicle—Elements. *State v. Sherman*, 98 Wn.2d 53, 653 P.2d 612 (1982) holds that RCW 46.61.024 contains both an objective and subjective component that requires proof not only that the defendant drove in a manner indicating a disregard for the lives or property of others but also that the defendant had

WPIC 26.06

CRIMES AGAINST LIFE

a wanton or willful disregard for the lives or property of others. See WPIC 94.03, Attempt to Elude—Inference. If *Sherman* is applicable to RCW 9A.32.030(1)(b), it would follow that the State must not only prove that the defendant's conduct manifested an extreme indifference to human life, but also that the defendant in fact had such an indifference.

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WASHINGTON
SUPREME COURT COMMITTEE
ON JURY INSTRUCTIONS

EXHIBIT 4

WASHINGTON
PRACTICE SERIES™

Volume 11

PATTERN JURY
INSTRUCTIONS
CRIMINAL
THIRD EDITION

WPIC
1.00-55.06

Prepared by the
WASHINGTON SUPREME COURT COMMITTEE
ON
JURY INSTRUCTIONS

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Co-Chair
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Co-Chair

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ISBN # 978-0-314-99634-3

WPIC 26.06

MURDER—FIRST DEGREE—INDIFFERENCE TO
HUMAN LIFE—ELEMENTS

To convict the defendant of the crime of murder in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about (date), the defendant created a grave risk of death to another person;
- (2) That the defendant knew of and disregarded the grave risk of death;
- (3) That the defendant engaged in that conduct under circumstances manifesting an extreme indifference to human life;
- (4) That (name of decedent) died as a result of defendant's acts; and
- (5) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

NOTE ON USE

This instruction is intended to cover only RCW 9A.32.030(1)(b). If there is an issue of causal connection, use WPIC 25.02, Homicide, proximate Cause—Definition.

For a discussion of the phrase "any of these acts" in element (5), see the Introduction to WPIC 4.20 and the Note on Use to WPIC 4.21, Elements of the Crime—Form.

COMMENT

RCW 9A.32.030(1)(b).

WPIC 26.06

CRIMES AGAINST LIFE

Several changes have been made for the 2008 edition. First, the instruction's second element now includes a requirement that the defendant knew of and disregarded the grave risk of death. This change reflects the Court of Appeals' holding in *State v. Barstad*, 93 Wn.App. 553, 568, 970 P.2d 324 (1999), where the court held that RCW 9A.32.030(1)(b)'s phrase "under circumstances manifesting an extreme indifference to human life" requires a subjective mental state: that the defendant must "know of and disregard the fact his conduct presents a grave risk of death to others." Also, the wording of the instruction's elements has been revised in order to remove redundant language and to clarify that the date specified in element (1) refers to the date of the events that caused the death, not necessarily the date of the death itself.

If a defense of excuse or justification is raised, then the question arises whether the defense tends to negate an element of the crime. If it does, then the concerns discussed in the Introduction to Part IV apply and the State may have the burden of proving the absence of excuse or justification. See, e.g., *State v. Gregory*, 158 Wn.2d 759, 803-04, 147 P.3d 1201 (2006) (the defendant may be given the burden of proving a defense that overlaps with an element of the crime, but not one that negates an element). For further discussion of defenses, see the Comment to WPIC 26.04, Murder—First Degree—Felony—Elements.

For murders committed in 1997 or earlier, the State would be required to prove that death occurred within three years and a day of the defendant's act (or, for murders committed in 1983 or earlier, within one year and a day). See the Comment to WPIC 25.01, Homicide—Definition.

[Current as of July 2008.]

Filed in Open Court

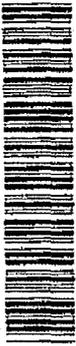
Nov 5 2007

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SUPERIOR COURT OF THE STATE OF WASHINGTON
SNOHOMISH COUNTY



CL12014365

STATE OF WASHINGTON,

Plaintiff,

v.

NOEL EVAN CALDELLIS,

Defendant.

No. 06-1-02485-5

**DEFENDANT'S PROPOSED JURY INSTRUCTIONS
(With Citations)**

Respectfully submitted this

5th day of November, 2007

LAW OFFICE OF RAYMOND C. MCFARLAND

RMCF
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WSBA No. 22077
Attorneys for Defendant

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EXHIBIT 5

SUPERIOR COURT OF THE STATE OF WASHINGTON
SNOHOMISH COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

NOEL EVAN CALDELLIS,

Defendant.

No. 06-1-02485-5

COURT'S INSTRUCTIONS TO THE JURY

DATED this ____ day of _____, 2007.

JUDGE

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. 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 that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial. 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 in reaching your verdict.

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 of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also 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.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

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 this court. You must not let your emotions overcome your rational thought process. 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. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find 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.

INSTRUCTION NO. 3

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 4

Any evidence that bears upon good character and good reputation of the defendant should be considered by you, along with all other evidence, in determining your verdict. However, even if you find that the defendant is a person of good character or reputation, you should not acquit if you are convinced beyond a reasonable doubt of the defendant's guilt.

INSTRUCTION NO. 5

You may give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, taking into consideration the surrounding circumstances.

INSTRUCTION NO. 6

The defendant is not compelled to testify, and the fact that the defendant has not testified cannot be used to infer guilt or prejudice him in any way.

WPIC 6.31

INSTRUCTION NO. 7

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION NO. 8

A person commits the crime of murder in the first degree when, under circumstances manifesting an extreme indifference to human life, he or she engages in conduct which creates a grave risk of death to any person and thereby causes the death of a person unless the killing is excusable.

INSTRUCTION NO. 9

Conduct which creates a grave risk of death under circumstances manifesting an extreme indifference to human life means an aggravated recklessness evincing a depraved mind and which creates a very high degree of risk greater than that involved in recklessness. The actor must knowingly disregard a grave risk of death to others and engage in conduct that endangers human life generally. Any motive for the actor's conduct is a factor to be considered in determining whether conduct manifests extreme indifference to human life.

State v. Barstad, 93 Wash. App. 533, 567-68, 970 P.2d 324 (1999)
State v. Dunbar, 117 Wn.2d 587, 594, 817 P.2d 1360 (1991)
State v. Guzman, 98 Wash. App. 638, 646, 990 P.2d 464 (1999)
State v. Anderson, 94 Wn.2d 176, 189, 616 P.2d 612 (1980)
LaFave & Scott, *Criminal Law*, 4th Ed. (2003), Sec. 14.4

INSTRUCTION NO. 10

A person commits the crime of murder in the second degree when he or she commits the crime of felony riot and in the course of and in furtherance of such crime or in immediate flight from such crime he or she or an accomplice causes the death of a person other than one of the participants, unless the killing is excusable.

INSTRUCTION NO. 11

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

INSTRUCTION NO. 12

A person commits the crime of felony riot when, acting with three or more persons, he or she knowingly and unlawfully uses or threatens to use force, or in any way participates in the use of such force, against any other person or against property and is armed with a deadly weapon.

WPIC 126.01 (modified by adding "felony" before "riot")

INSTRUCTION NO. 13

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

INSTRUCTION NO. 14

A firearm, whether loaded or unloaded, is a deadly weapon.

WPIC 2.06

INSTRUCTION NO. 15

A person commits the crime of assault in the first degree when, with intent to inflict great bodily harm, he or she assaults another with a firearm.

WPIC 35.01

INSTRUCTION NO. 16

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

WPIC 10.01

INSTRUCTION NO. 17

Great bodily harm means bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

INSTRUCTION NO. 18

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

WPIC 2.10

INSTRUCTION NO. 19

An assault is an intentional touching or striking or cutting or shooting of another person, with unlawful force, that is harmful or offensive.

An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

INSTRUCTION NO. 20

Bodily injury means physical pain or injury, illness, or an impairment of physical condition.

INSTRUCTION NO. 21

To convict the defendant of the crime of murder in the first degree as alleged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 3rd day of September, 2006, Noel Caldellis engaged in conduct that created a grave risk of death to another person;
- (2) That Noel Caldellis engaged in that conduct under circumstances manifesting an extreme indifference to human life;
- (3) That Jay Daniel Clements died as a result of defendant's acts;
- (4) That the homicide was not excusable as defined in these instructions;
and
- (5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

WPIC 26.06 (modified: specific description of defendant's conduct omitted and element of excusable homicide added)

INSTRUCTION NO. 22

To convict the defendant of the crime of murder in the second degree as alleged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 3rd day of September, 2006, Jay Daniel Clements was killed;
- (2) That the defendant was committing the crime of felony riot;
- (3) That the defendant or an accomplice caused the death of Jay Daniel Clements in the course of and in furtherance of such crime or in immediate flight from such crime;
- (4) That Jay Daniel Clements was not a participant in the crime of riot;
- (5) That the homicide was not excusable as defined in these instructions;
and
- (6) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 23

To convict the defendant of the crime of assault in the first degree as alleged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 3rd day of September, 2006, Noel Caldellis assaulted Meghan Lever;
- (2) That the assault was committed with a firearm;
- (3) That Noel Caldellis acted with intent to inflict great bodily harm;
- (4) That the force used by Noel Caldellis was not lawful as defined in these instructions; and
- (5) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 24

To convict the defendant of the crime of assault in the first degree as alleged in Count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 3rd day of September, 2006, Noel Caldellis assaulted Kyle Defenbach;
- (2) That the assault was committed with a firearm;
- (3) That Noel Caldellis acted with intent to inflict great bodily harm;
- (4) That the force used by Noel Caldellis was not lawful as defined in these instructions; and
- (5) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 25

The defendant is charged in Count I with murder in the first degree. If, after full and careful deliberation on these charges, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crimes of manslaughter in the first degree and manslaughter in the second degree.

The defendant is charged in Count III and Count IV with assault in the first degree. If, after full and careful deliberation on these charges, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime of assault in the second degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more crimes or degrees of crime that person is guilty, he or she shall be convicted only of the lowest crime or lowest degree of crime.

INSTRUCTION NO. 26

A person commits the crime of manslaughter in the first degree when he or she recklessly causes the death of another person, unless the killing is excusable.

WPIC 28.01

INSTRUCTION NO. 27

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

Recklessness also is established if a person acts intentionally or knowingly.

INSTRUCTION NO. 28

A person commits the crime of manslaughter in the second degree when, with criminal negligence, he or she causes the death of another person, unless the killing is excusable.

WPIC 28.05

INSTRUCTION NO. 29

A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and the failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

Criminal negligence is also established if a person acts intentionally or knowingly or recklessly.

INSTRUCTION NO. 30

To convict the defendant of the crime of manslaughter in the first degree as a lesser-included offense in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 3rd day of September, 2006, Noel Caldellis engaged in conduct that was reckless;
- (2) That Jay Daniel Clements died as a result of defendant's acts;
- (3) That the homicide was not excusable as defined in these instructions;
and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 31

To convict the defendant of the crime of manslaughter in the second degree as a lesser-included offense in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 3rd day of September, 2006, Noel Caldellis engaged in conduct that was criminally negligent;
- (2) That Jay Daniel Clements died as a result of defendant's acts;
- (3) That the homicide was not excusable as defined in these instructions;
and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 32

A person commits the crime of assault in the second degree when he or she assaults another with a deadly weapon.

WPIC 35.10

INSTRUCTION NO. 33

To convict the defendant of the crime of assault in the second degree as a lesser-degree offense in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 3rd day of September, 2006, Noel Caldellis assaulted Meghan Lever with a deadly weapon;
- (2) That the force used by Noel Caldellis was not lawful as defined in these instructions; and
- (3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 34

To convict the defendant of the crime of assault in the second degree as a lesser-degree offense in Count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 3rd day of September, 2006, Noel Caldellis assaulted Kyle Defenbach with a deadly weapon;
- (2) That the force used by Noel Caldellis was not lawful as defined in these instructions; and
- (3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 35

It is a defense to a charge of murder in the first degree, murder in the second degree, manslaughter in the first degree, and manslaughter in the second dedgree that the homicide was excusable as defined in this instruction.

Homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent.

The State has the burden of proving the absence of excuse beyond a reasonable doubt. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 36

Homicide is the killing of a human being by the voluntary act of another and is either murder, manslaughter, or excusable homicide.

WPIC 25.01 (modified: omitting "homicide by abuse" and "justifiable homicide")

INSTRUCTION NO. 37

It is a defense to a charge of assault in the first degree and assault in the second degree that the force used, attempted, or offered to be used was lawful as defined in this instruction.

The use of, attempt to use, or offer to use force upon or toward another person or persons acting in concert with him is lawful when used, attempted, or offered by a person who reasonably believes that he is about to be injured or by someone lawfully aiding a person who he reasonably believes is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.

The person using or offering to use the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used, attempted, or offered to be used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 38

Necessary means that, under the circumstances as they reasonably appeared to the actor prior to and at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

INSTRUCTION NO. 39

One who acts in defense of another, reasonably believing the other to be the innocent party and in danger, is justified in using force necessary to protect that person even if, in fact, the person whom the actor is defending is the aggressor.

WPIC 16.04.01

INSTRUCTION NO. 40

A person is entitled to act on appearances in defending himself or another, if that person believes in good faith and on reasonable grounds that he or another is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

INSTRUCTION NO. 41

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

INSTRUCTION NO. 42

For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime charged in each count.

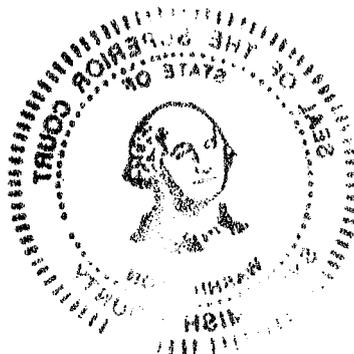
A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant. The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime. In determining whether this connection existed, you should consider the nature of the crime, the type of firearm, and the circumstances under which the firearm was found.

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

INSTRUCTION NO. 43

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous 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.

WPIC 1.04



Hunter, Matt

From: Klein, Daniel
Sent: Tuesday, November 06, 2007 9:11 AM
To: Hunter, Matt; 'Ray McFarland'
Subject: RE: Caldellis - Confidential Juror Questionnaire - 2nd Try

Judge Wynne is going to use Mr. Hunter's modified questionnaire

Daniel H. Klein
Law Clerk to the Honorable Thomas J. Wynne
 425-388-3418
daniel.klein@co.snohomish.wa.us

-----Original Message-----

From: Hunter, Matt
Sent: Tuesday, November 06, 2007 8:30 AM
To: 'Ray McFarland'; Klein, Daniel
Subject: RE: Caldellis - Confidential Juror Questionnaire - 2nd Try

My proposal is attached with the indicated changes. I did also alter "occurred" to "was occurring" and "town" to "city."

Matt Hunter
 Deputy Prosecuting Attorney
 Snohomish County Prosecuting Attorney - Criminal Division
 3000 Rockefeller Avenue, M/S 504
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mhunter@co.snohomish.wa.us

CONFIDENTIALITY STATEMENT

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-----Original Message-----

From: Ray McFarland [<mailto:rmcfarland@seanet.com>]
Sent: Tuesday, November 06, 2007 6:01 AM
To: Hunter, Matt; Klein, Daniel
Subject: Caldellis - Confidential Juror Questionnaire - 2nd Try

I discovered the first version I sent had some formatting problems when I printed it. Try this – content is the same.

Ray

Law Office of Raymond C. McFarland
 320 Maynard Building
 119 First Avenue South, Suite 320
 Seattle WA 98104-2533
 (206) 467-6690
 Fax: (206) 622-6636
RMcFarland@seanet.com

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Juror No. _____

CONFIDENTIAL JUROR QUESTIONNAIRE

State v. Noel Evan Caldellis

Snohomish County Superior Court Cause No. 06-1-02485-5

You have been selected as a prospective juror in the above-referenced case. This is a criminal case involving a charge of murder. The case involves a 21-year-old man, Jay Clements, who was shot and killed as a fight was occurring outside a party involving teenagers and young adults at a home in the city of Brier. The incident occurred on September 3, 2006. Please answer the following questions truthfully.

1. Have you heard of this case? Yes _____ No _____
2. Do you recall seeing, hearing, or reading anything about this case in newspapers, television, radio, or the internet? Yes _____ No _____

If your answer to either question above is "Yes," please explain: _____

3. Do you feel there is anything about your knowledge or memory of this case that would affect your ability to be a fair and impartial juror if selected to sit as a juror in this case?
Yes _____ No _____
4. Given the nature of this case, is there anything about your own personal experience or feelings, or that of a close friend or relative, that might affect your ability to serve as a fair and impartial juror if selected to sit as a juror in this case? Yes _____ No _____

If your answer to this last question is "Yes," please explain: _____

I CERTIFY (OR DECLARE) UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed this _____ day of _____, 2007, at _____, WA.
(City)

(Signature)

Juror No. _____

CONFIDENTIAL JUROR QUESTIONNAIRE

State v. Noel Evan Caldellis

Snohomish County Superior Court Cause No. 06-1-02485-5

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If your answer to this last question is "Yes," please explain: _____

I CERTIFY (OR DECLARE) UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed this _____ day of _____, 2007, at _____, WA.
(City)

(Signature)

Hunter, Matt

From: Hunter, Matt
Sent: Tuesday, November 06, 2007 8:30 AM
To: 'Ray McFarland'; Klein, Daniel
Subject: RE: Caldellis - Confidential Juror Questionnaire - 2nd Try

My proposal is attached with the indicated changes. I did also alter "occurred" to "was occurring" and "town" to "city."

Matt Hunter

Deputy Prosecuting Attorney
Snohomish County Prosecuting Attorney - Criminal Division
3000 Rockefeller Avenue, M/S 504
Everett, WA 98201
(425) 388-3021
mhunter@co.snohomish.wa.us

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Hunter, Matt

From: Hunter, Matt
Sent: Tuesday, November 06, 2007 8:26 AM
To: 'Ray McFarland'; Klein, Daniel
Subject: RE: Caldellis - Confidential Juror Questionnaire - 2nd Try

I propose replacing "...who was shot and killed during a fight outside a party involving teenagers..." with "who was shot and killed as a fight occurred outside a party involving teenagers..."

I believe the original version sounds too much as if Jay Clements was fighting.

I would propose adding perjury language to the bottom:

I CERTIFY (OR DECLARE) UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed this ____ day of _____, 2007, at _____, WA.
 (City)

 (Signature)

I will edit Mr. the form and send a proposal.

Matt Hunter

Deputy Prosecuting Attorney
 Snohomish County Prosecuting Attorney - Criminal Division
 3000 Rockefeller Avenue, M/S 504
 Everett, WA 98201
 (425) 388-3021
mhunter@co.snohomish.wa.us

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11/6/2007

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Hunter, Matt

From: Ray McFarland [rmcfarland@seanet.com]
Sent: Tuesday, November 06, 2007 6:01 AM
To: Hunter, Matt; Klein, Daniel
Subject: Caldellis - Confidential Juror Questionnaire - 2nd Try

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11/6/2007

Juror No. _____

CONFIDENTIAL JUROR QUESTIONNAIRE

State v. Noel Evan Caldellis

Snohomish County Superior Court Cause No. 06-1-02485-5

You have been selected as a prospective juror in the above-referenced case. This is a criminal case involving a charge of murder. The case involves a 21-year-old man, Jay Clements, who was shot and killed during a fight outside a party involving teenagers and young adults at a home in the town of Brier. The incident occurred on September 3, 2006. Please answer the following questions truthfully.

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Yes _____ No _____

If your answer to either question above is "Yes," please explain: _____

3. Do you feel there is anything about your knowledge or memory of this case that would affect your ability to be a fair and impartial juror if selected to sit as a juror in this case?

Yes _____ No _____

4. Given the nature of this case, is there anything about your own personal experience or feelings, or that of a close friend or relative, that might affect your ability to serve as a fair and impartial juror if selected to sit as a juror in this case?

Yes _____ No _____

If your answer to this last question is "Yes," please explain: _____

Hunter, Matt

From: Ray McFarland [rmcfarland@seanet.com]
Sent: Tuesday, November 06, 2007 5:47 AM
To: Hunter, Matt; Klein, Daniel
Subject: Caldellis - Confidential Juror Questionnaire

Attached is a proposed juror questionnaire I have drafted in light of our discussion yesterday with Judge Wynne. I am sending it to both of you but Matt needs to approve it (or we need to make agreed changes) before it is ready to go.

Ray

*Law Office of Raymond C. McFarland
320 Maynard Building
119 First Avenue South, Suite 320
Seattle WA 98104-2533
(206) 467-6690
Fax: (206) 622-6636
RMcFarland@seanet.com*

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION NO. I

In re Personal Restraint Petition of

CALDELLIS, NOEL EVAN,

Petitioner.

NO. 67090-5-I

AFFIDAVIT OF
JUDGE THOMAS J. WYNNE

AFFIDAVIT BY CERTIFICATION

The undersigned certifies that I am a duly elected judge of the Snohomish County Superior Court, and am familiar the facts set forth below.

I presided over the trial of State of Washington vs. Noel Evan Caldellis, cause number 06-1-02485-5. Trial in that matter commenced on November 5, 2007 and concluded on December 11, 2007.

The trial was conducted in court room C201. That room is a large courtroom designed to accommodate high publicity trials in which a number of spectators are expected to attend. A number of spectators did attend the trial, including both from the

EXHIBIT 7

defendant's family and from the victim's family. No member of the public was excluded from any portion of the trial, including jury selection.

Prior to jury selection jurors were asked to fill out a questionnaire. I reviewed those questionnaires before signing this affidavit to refresh my recollection. The purpose of the questionnaire was to determine which jurors were to be brought to the court room for individual voir dire due to seeing, reading, or hearing pretrial publicity about the case or due to issues with their own life experiences. 49 jurors answered "no" to each of the 4 questions in the questionnaire. Individual voir dire was not conducted for these jurors. The questionnaires of 31 jurors indicated pretrial publicity issues or a personal experience or feeling or that of a close friend or relative which might have affected their ability to serve as a fair and impartial juror. The attorneys used that questionnaire during the publically conducted individual voir dire of those jurors in open court. No member of the public, including any member of the defendant's family or the victim's family, requested access to those questionnaires during jury selection. On November 7, after jury selection concluded, I entered an order pursuant to GR 31(j) sealing both the 31 questionnaires used in individual voir dire and the 49 questionnaires in which the jurors answered "no" to the 4 questions asked in the questionnaire, together with a cover sheet. Juror biographical forms were also filled out by all jurors and used by both counsel during voir dire. After jury selection was concluded, I entered an order pursuant to GR 31 (j) sealing the juror biographical forms.

I am aware that some members of the defendant's family have now come forward alleging that I was sleeping during portions of the jury trial. I was not sleeping during any portion of the trial. Although I may have closed my eyes at some point, I

sometimes do that in order to concentrate on the evidence that is being presented.

While it may appear to someone that I might be sleeping because my eyes are closed, in fact I am not.

I was fully aware of all of the evidence presented, motions, objections, and arguments made during the course of the trial. There were many objections made and issues raised by counsel during trial. Some I ruled on immediately. Others required that the jury be excused to take further argument. I was fully aware of all relevant information necessary to make rulings during the course of the trial. In addition I had a real time transcript on my lap top computer on the bench that was created simultaneously with the court reporter's transcription. I saved a copy of that daily transcription every day. Had I needed to go back and refresh my memory in order to make a reasoned ruling on any motion or objection I was able to review the daily transcripts of the trial.

During trial I ensured that the jury had regular breaks. I do not recall the courtroom being overly warm during any day of the trial. No one complained that the courtroom was too warm or too cold. I watched the jury regularly during the course of the trial. I never saw any of the jurors appear to doze off or sleep during any of the testimony presented. No one raised any concern to me that jurors may not be fully attentive to the testimony presented at trial.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.


Thomas J. Wynne
Snohomish County Superior Court Judge

Dated this 30th day of June, 2011, at the Snohomish County Courthouse in Everett, Snohomish County, Washington.

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION NO. I

In re Personal Restraint Petition of

CALDELLIS, NOEL EVAN,

Petitioner.

NO. 67090-5-1

AFFIDAVIT OF DAN CLEMENTS

AFFIDAVIT BY CERTIFICATION

The undersigned certifies that I am over the age of 18 and competent to make this affidavit.

I am the father of Jay Clements, the victim in the murder charge filed against Noel Caldellis. As Jay's father I was very interested in the progression of the case. I made a point to attend every day of trial. I watched the entire trial with the exception of the testimony of Dr. Norman Thiersch, who testified regarding the autopsy. I sat in the front row of the audience, and had an unobstructed view of the jury, the judge, the

EXHIBIT 8

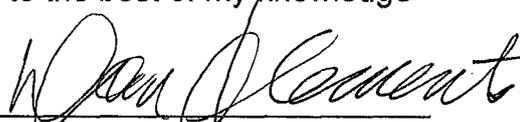
people sitting at counsel table and the witnesses. I took copious notes during the course of trial.

I am aware that there is a claim that the judge and several of the jurors were observed sleeping during the course of portions of the trial. I have no recollection of seeing either the judge or any juror sleeping, or appearing to sleep during trial. What I saw were jurors who appeared attentive to the evidence as it was presented. Likewise, Judge Wynne appeared attentive to the proceedings. On a few occasions I did observe Judge Wynne cradle his head in his hands as he peered at the laptop computer on his bench. I have reviewed my notes from the trial and they are consistent with my memory of events. I believe if I had observed the judge or any juror sleeping I would have put it in my notes and brought it to the attention of the prosecuting attorney.

I was sitting behind Detective Rittgarn, who was seated at counsel table next to the prosecutor. I never saw Detective Rittgarn sleeping during any of the proceedings.

When I attended trial I frequently wore a business suit. When I came inside the courtroom I did not notice the courtroom being either unusually cold or warm.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge


Dan Clements

Dated this 21ST day of JULY, 2011, at the Snohomish County Prosecutor's Office, in Everett, Snohomish County, Washington

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION NO. I

In re Personal Restraint Petition of

CALDELLIS, NOEL EVAN,

Petitioner.

NO. 67090-5-I

AFFIDAVIT OF KAREN CLEMENTS

AFFIDAVIT BY CERTIFICATION

The undersigned certifies that I am over the age of 18 and competent to make this affidavit

I am the mother of Jay Clements, the victim in the murder charge filed against Noel Caldellis. As the victim's mother I was very interest in the progress of the case. I made a point to attend every day of trial. The only part of trial that I did not attend was a portion of the first day of trial before I testified, and the testimony regarding the autopsy.

I sat with my husband, sister, and niece in the front row of the audience section of the courtroom. I had an unobstructed view of the jury, the judge, and the parties sitting at counsel table. I made a point to watch all of the participants in the trial,

including the jury and the judge. I do not remember ever seeing the judge or any juror sleeping during the course of trial. I do not remember seeing the judge or juror engage in any conduct which would even suggest that either was sleeping. I also do not recall seeing Detective Rittgarn sleeping during trial.

During the time that I was watching the trial I took copious notes. If I had seen either the judge or a juror sleeping I would have made sure that the prosecutor was aware of that and I would have made a note of that. I have reviewed my notes and there is no notation that anyone was sleeping during the course of trial.

I do not recall the courtroom being either uncomfortably cold or warm during the course of trial.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.


Karen Clements

Dated this 21st day of July, 2011, at the Snohomish County Prosecutor's Office, in Everett, Snohomish County, Washington

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION NO. I

In re Personal Restraint Petition of

CALDELLIS NOEL EVAN,

Petitioner.

NO. 67090-5-1

AFFIDAVIT OF JERRY RITTGARN

AFFIDAVIT BY CERTIFICATION

The undersigned certifies that I am over the age of 18 and am competent to make this affidavit:

I am currently employed by MSM Security Services based out of Maryland and under contract in San Diego, California. My duties with that company include performing background investigations for Top Secret security clearances for several federal agencies including Immigration and Customs Enforcement, Customs and Border Protection, and the Department of Defense.

Before my employment with MSM Security Services I was employed as a police officer with the City of Lynnwood, Washington for 12 ½ years. I left my employment

with the City of Lynnwood in November 2009. As part of my employment I served as a detective in that department.

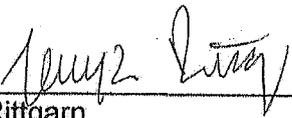
I was the lead detective assigned to investigate a homicide which resulted in charges in State of Washington v. Noel Caldellis, Snohomish County cause no. 06-1-02485-5. As the lead detective I served as the case agent during the course of the trial. I was present every day during trial.

As case agent it was my job to help the prosecutor during the course of trial. Foremost, my duty as the case agent was to pay attention to the proceedings and the participants, including the jury, the judge, the defendant, and the attorneys. I was required to report to the prosecutor any unusual circumstances I observed, as well as provide my insight after each court day regarding the presentation of evidence.

In order to fulfill my duty as case agent it was obviously necessary for me to stay awake. I fulfilled that duty; I never fell asleep during the course of trial. I would have found it difficult to do so because the evidence was emotionally intense and the defense attorney was very animated in the presentation of the defense. In addition, because the trial took place in November and December the courtroom was not particularly warm at any time during the each day of the trial.

I made a point to keep an eye on the jurors in order to gauge their attention and any potential reactions to the evidence presented. At no time did I notice any juror appear to be dozing during trial. I also was sure to notice Judge Wynne during the presentation of evidence. I never saw Judge Wynne sleep, or even appear to be dozing during the course of the trial. I do not recall Judge Wynne ever having trouble understanding any motion or objection brought by either party.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.



Jerry Rittgarn

Dated this 25th day of July, 2011, at San Diego, San Diego County California.

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION NO. I

In re Personal Restraint Petition of

NOEL CALDELLIS,

Petitioner.

NO. 67090-5-I

AFFIDAVIT OF
C. MATTHEW HUNTER

AFFIDAVIT BY CERTIFICATION

The undersigned certifies that I am a Deputy Prosecuting Attorney for Snohomish County, Washington, and make this affidavit in that capacity.

I have been employed with the Snohomish County Prosecutor's Office since 1994. In that time I have tried more than 100 jury trials. I was assigned to prosecute the petitioner, Noel Caldellis for the murder of Jay Daniel Clements, and the assaults on Meghan E. Lever and Kyle J. Defenbach. I handled that case from the date it was referred to the prosecutor's office in September 2006 until the defendant was sentenced in February 2008.

EXHIBIT 11

Regarding the juror questionnaire used in this case, Mr. McFarland proposed the first draft which contained the label "confidential" near the top. I did not request or recommend that language; I did not oppose it either. I proposed some relatively minor changes in the body of the questionnaire and that edited version was used by Judge Wynne. Despite the title, I do not recall any court order that the questionnaires remain confidential. No non-party, to my knowledge, asked the court for permission to review any questionnaire(s) during the trial. Likewise, to my knowledge no one was ever refused the opportunity to look at those questionnaires if a request was made. Defense counsel and I used those questionnaires and juror biographical forms to question jurors during voir dire. The courtroom was open to the public during jury selection. Many members of both the petitioner's family and the victim's family were present during that portion of the trial.

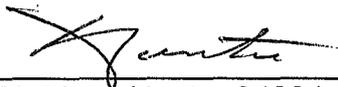
During trial I generally focused my attention on the witnesses and the judge. I never observed Judge Wynne sleeping. I generally do not watch the jurors during trial and did not generally do so during this trial. I did rely on Detective Rittgarn, my case agent, to occasionally observe the jurors. He never advised me of any sleeping juror and I am confident he would have done so if he observed any. Although I was not deliberately watching jurors during trial I did regularly see them. I never saw any juror nodding off or sleeping.

I deliberately choose to not look at jurors during the evidentiary stage of trials, beyond a momentary glance, for several reasons. First, it is too difficult to watch jurors regularly and still give the witnesses the attention that is necessary to put on a persuasive case. Similarly, it is too difficult to watch jurors while addressing the trial

judge. I also do not deliberately watch jurors because I think that it could make jurors uncomfortable. I also believe that watching jurors during the presentation of evidence could imply to jurors that the evidence I am presenting is not important. I do not want to do anything that would detract from the importance of the evidence supporting my case. My experience has been that attorneys, both prosecutors and defense attorneys, who are trying jury trials generally do not watch jurors for many of these same reasons.

During closing argument I noted that the defense attorney argued multiple reasons why the defendant would not testify at trial. While I am aware that as a prosecutor I may not remark on the defendant's right to remain silent, I am also aware that the Court has said that I may make a fair response to any arguments made by the defense attorney in closing argument, even if the response would be improper had it not been provoked by defense closing. For that reason I made a very limited argument in response to Mr. McFarland's argument regarding the reasons the petitioner did not testify at trial. When I made that argument, Mr. McFarland stood up and lodged an objection. When the court inquired regarding his grounds, I noticed his co-counsel whisper in his ear. Mr. McFarland then withdrew the objection and sat down.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.



C. Matthew Hunter 24021
Deputy Prosecuting Attorney

DATED this 4th day of Aug, 2011, at the Snohomish County Prosecutor's Office, Everett, Washington.



CL12469372

FILED
DEC 28 AM 10:57
PAUL DANIELS
COUNTY CLERK
SNOHOMISH CO. WASH.

**CERTIFIED
COPY**

SUPERIOR COURT OF THE STATE OF WASHINGTON
SNOHOMISH COUNTY

STATE OF WASHINGTON,

Plaintiff,

No. 06-1-02485-5

v.

MOTION FOR ARREST OF
JUDGMENT AND FOR NEW TRIAL

NOEL EVAN CALDELLIS,

Defendant.

I. MOTIONS

Noel Caldellis, defendant, by and through his counsel of record, Raymond C. McFarland and Kristina L. Selset, hereby moves to arrest judgment on Count I due to insufficient evidence and for a new trial on all counts because of an error of law, insufficient evidence and because substantial justice has not been done. CrR 7.4 (a)(3); CrR 7.5(a)(6)(7) and (8).

II. FACTS RELEVANT TO MOTIONS

This Court heard the evidence in this matter. The following brief summary addresses those facts relevant to these motions.

MOTION FOR ARREST OF JUDGMENT AND FOR
NEW TRIAL - I

ORIGINAL

LAW OFFICE OF
RAYMOND C. MCFARLAND
119 FIRST AVENUE SOUTH, SUITE 320
SEATTLE, WA 98104-3424
TEL (206) 467-6690 FAX (206) 622-6636
E-MAIL RAY@MCFARLANDLEGAL.COM

AB
174

1 The evidence at trial established that Caldellis knew little about the planned fight, was
2 not involved in the planning, and believed it would just be a one-on-one fight between
3 Jason Kimura and Cole Huppert. Caldellis came into possession of the gun only because he
4 took it from Hannan Khan in the Albertson's parking lot in order to defuse the argument
5 between Khan and "Miguel."

6 When the group from the Shoreline party arrived at the Black residence in Brier, they
7 got out of their cars and started toward the residence, and they were immediately beset by
8 several people who seemed to be waiting for them. Notably, several State's witnesses
9 describe Caldellis as being among the smaller subset of the group who hung back. Every
10 State's witness who was outside at that point testified that fighting immediately ensued.
11 Shortly after the fighting started, more people poured out of the Black residence. At its
12 peak, the number of people outside swelled to as many as 40 to 50 people, witnesses
13 estimated. Only about 12 of this mass of people were in the group that included Kimura.
14 Kimura estimated that as more people joined in the fighting, his group was outnumbered 3
15 or 4 to 1.

16 The jury's verdict indicates that it found from the evidence that, at this point,
17 Caldellis took out the gun and fired. The evidence taken in a light most favorable to the
18 State is that there were four shots: first, two warning shots into the air and then two other
19 shots that struck and killed Jay Clements

20 Only one of the "assault" victims, Meghan Lever, testified that she saw the shooter
21 in the middle of cul-de-sac fire two shots into the air. Although she said she was frightened
22 when this occurred, she said she realized the shots were clearly not aimed at her and
23 acknowledged she was not placed in reasonable fear of death or serious bodily injury.

MOTION FOR ARREST OF JUDGMENT AND FOR
NEW TRIAL - 2

LAW OFFICE OF
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E-MAIL: RAY@MCFARLANDLEGAL.COM

1 She testified that she then ran back into the house, hearing two more shots as she ran. She
2 said she did not see either of those shots being fired and had no idea what the direction of
3 fire was.

4 The other "assault" victim, Kyle Defenbach, testified that he came out the front door
5 of the house and was walking down the driveway when his attention was attracted by the
6 startling sound of a gunshot and a flash he saw from "the corner of [my] eye." He said he
7 saw another flash and that both flashes he saw came from the middle of the cul-de-sac. He
8 said he could only see a silhouette of the shooter. At that point, he said he turned and ran
9 back into the house, hearing at least two more shots as he ran. He had no idea whether any
10 of the shots were aimed in his direction.

11 There was no evidence to establish that Caldellis was intentionally firing at Meghan
12 Lever or Kyle Defenbach or that he was specifically aware of their presence. The
13 prosecutor argued in closing that either of the two warning shots into the air could
14 constitute second degree assault. Defense counsel objected. This Court overruled the
15 objection and reminded the jury that they had been provided the law in the case.

16 Caldellis told detectives during the recorded interview that was played for the jury
17 that he fired the shots in an attempt to "disperse the crowd" and that he wasn't aiming at
18 anyone. During the recorded interview, Detective Rittgarn also asked Caldellis, "How
19 come you didn't take off running . . . ?" The prosecutor also asked a similar question to
20 Hannan Khan during his testimony. The prosecutor admitted to the Court at one point
21 during the proceedings that he did not feel the State could prove that Caldellis acted with
22 intent to kill, which is why Caldellis was not charged with intentional murder.

1 Caldellis's attempt to disperse the crowd was for the purpose of ending the fighting
2 and thus save his friends from injury. Ultimately the gunshots had that effect, as several
3 witnesses testified. In that respect Caldellis was acting in defense of others, which the law
4 recognizes as lawful force. The Court gave the defendant's proposed instruction, based on
5 WPIC 17.02, regarding the lawful use of force.¹ The Court provided the jury a definition of
6 the term "necessity," based on WPIC 16.05.² Even though the defense pointed out that
7 Detective Rittgarn's question to Caldellis during the recorded interview and the
8
9
10

11 ¹ Instruction No. 20 reads as follows:

12 It is a defense to a charges of assault in the second degree in counts III and IV
13 that the force used, attempted, or offered to be used was lawful as defined in this
14 instruction.

15 The use of, attempt to use, or offer to use force upon or toward another person or
16 persons acting in concert with him is lawful when used, attempted, or offered by a
17 person who reasonably believes that he is about to be injured or by someone lawfully
18 aiding a person who he reasonably believes is about to be injured in preventing or
19 attempting to prevent an offense against the person, and when the force is not more
20 than is necessary.

21 The person using or offering to use the force may employ such force and means
22 as a reasonably prudent person would use under the same or similar conditions as they
23 appeared to the person, taking into consideration all of the facts and circumstances
known to the person at the time of and prior to the incident.

 The State has the burden of proving beyond a reasonable doubt that the force
used, attempted, or offered to be used by the defendant was not lawful. If you find that
the State has not proved the absence of this defense beyond a reasonable doubt, it will
be your duty to return a verdict of not guilty.

² Instruction No. 21 reads as follows:

 Necessary means that, under the circumstances as they reasonably appeared to
the actor prior to and at the time, (1) no reasonably effective alternative to the use of
force appeared to exist and (2) the amount of force used was reasonable to effect the
lawful purpose intended.

1 prosecutor's question to Hannan Khan implied a legal duty to retreat, the Court refused to
2 give a "no duty to retreat" instruction, which was proposed by the defendant.³

3 4 III. MEMORANDUM IN SUPPORT OF MOTION

5 A. The Court's failure to instruct the jury that Caldellis had no duty to retreat was 6 erroneous and requires a new trial.

7 When the evidence supports a finding that the defendant was acting in defense of
8 another and they are in a place where they had a right to be, the defendant is entitled to a
9 "no duty to retreat" instruction. See *State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001
10 (2003), *State v. Williams*, 81 Wn. App. 738, 742, 916 P.2d 445 (1996). When a reasonable
11 juror could have interpreted the court's instructions to require retreat, refusal to instruct the
12 jury that the defendant has no duty to retreat is reversible error. *Williams*, 81 Wn. App. at
13 744. "Parties are entitled to instructions that, when taken as a whole, properly instruct the
14 jury on the applicable law, are not misleading, and allow each party the opportunity to
15 argue their theory of the case." *Redmond*, 150 Wn.2d at 493.

16 The defendant in *Redmond* exchanged heated words with another fellow, Johnson, in
17 a high school parking lot. Redmond punched Johnson in the face, fracturing his jaw.
18 Redmond testified that he punched Johnson in self-defense only after he saw Johnson step
19 toward him with fists clenched. The trial court refused to instruct the jury that Redmond
20 had no duty to retreat, stating that this was "barely a case . . . even entitled to a self-defense

21 ³ The defendant proposed WPIC 16.08, which provides as follows:

22 It is lawful for a person who is in a place where that person has a right to be and
23 who has reasonable grounds for believing that he is being attacked to stand his
ground and defend against such attack by the use of lawful force. The law does not
impose a duty to retreat.

1 instruction” and did not legitimately raise the issue of retreat. The Washington Supreme
2 Court reversed Redmond’s conviction for second-degree assault, explaining that where the
3 objective facts suggest that retreat would be a reasonable alternative to the use of force, the
4 jury should be instructed that the law does not require a person to retreat when he is
5 assaulted in a place where he has a right to be. The court held that the failure to provide a
6 no duty to retreat instruction to the jury is reversible error. *Redmond*, 150 Wn.2d at 495.

7 In *Williams*, two brothers, Charles and Nalen, were tried together for the death of a
8 man who came knocking on Charles’s door. The man, who was clearly intoxicated, asked
9 for someone who didn’t live there and was sent away. Charles testified that he followed the
10 man out in to the street and asked him if he wanted to buy any drugs. There was evidence
11 that the man drew a combat-style knife. Charles’s brother Nalen joined in the altercation.
12 One brother armed himself with a shovel, the other with a pitchfork. The man was struck
13 and killed by a blow to the head, probably from the pitchfork. The trial court refused to
14 give a “no duty to retreat” instruction, which the appellate court held was reversible error.

15 From the record, it appears that both defendants could have safely fled, given
16 [the victim’s] intoxication. In some states, retreat would be required in
17 preference to deadly force. However, in the majority of states, the law imposes
18 no duty to retreat on one who acts in self-defense and who was not the original
19 aggressor. . . . In Washington, one who is assaulted in a place he has a right to
20 be has no duty to retreat. . . . Flight, however reasonable an alternative to
21 violence, is not required. While the wisdom of such a policy may be open to
22 debate, the policy is one of long standing and reflects the notion that one
23 lawfully where he is entitled to be should not be made to yield and flee by a
show of unlawful force against him.

Williams, 81 Wn. App. at 743-44 (citations omitted).

In *State v. Wooten*, 87 Wn. App. 821, 945 P.2d 1144 (1997), Wooten engaged in a
fight with Hansen outside someone’s house. During the fight, Hansen threatened to kill

1 Wooten. The fight ended, Wooten went into the house, and Hansen got back into her car
2 with her cousin. Wooten returned with a gun and fired through the driver's side window of
3 Hansen's car. The shot killed Hansen's cousin. Wooten claimed that she was acting in self
4 defense, because she knew Hansen was involved in gangs, was known to carry a gun, and
5 she thought she saw Hansen pull a gun while sitting in the car. Although the trial court
6 instructed the jury on self defense, it refused to give a "no duty to retreat" instruction, ruling
7 that such an instruction was not supported by the evidence. The appellate court agreed with
8 Wooten's argument that without the instruction, the jury could infer from the other
9 instructions that self-defense was inapplicable because it could conclude that leaving the
10 area where the vehicle was parked would have been more reasonable than her use of force.
11 Because such a conclusion was possible, the court held, the failure to give the "no duty to
12 retreat" instruction was error requiring reversal. *Id.* at 826.

13 Caldellis was acting in defense of people who were being assaulted in a place where
14 they had a right to be, namely in the street outside a house to which they had been invited.
15 He and his friends had no duty to retreat. Although retreating from the brawl may have
16 been the wiser course, Caldellis had a lawful right to stand his ground and use force in
17 defense of those being assaulted. Without so being instructed, the jury could have inferred
18 from the instructions that defense of others was inapplicable because it could conclude that
19 retreating from the fighting would have been more reasonable than firing the gun in an
20 attempt to break up the fighting. Moreover, Detective Rittgarn's question to Caldellis
21 during the recorded interview and the prosecutor's question to Hannan Khan implied a legal
22 duty to retreat as an alternative to using force. Because the Court's failure to give a "no
23

MOTION FOR ARREST OF JUDGMENT AND FOR
NEW TRIAL - 7

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1 duty to retreat" instruction prevented Caldellis from arguing his theory of self defense and
2 was therefore erroneous, Caldellis is entitled to a new trial.

3 **B. There was insufficient evidence for the jury to find that Caldellis acted with**
4 **"extreme indifference."**

5 Due process requires the State to prove every element of its case beyond a reasonable
6 doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970); *State v.*
7 *Baeza*, 100 Wn.2d 487, 490, 670 P.2d 646 (1983) (citing *Jackson v. Virginia*, 443 U.S. 307,
8 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). A claim of insufficiency admits the truth of
9 the State's evidence and all reasonable inferences that can be drawn therefrom. *State v.*
10 *Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). The reviewing
11 court then considers the evidence to determine if any rational trier of fact could have found
12 all of the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119
13 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628
14 (1980) (citing *Jackson v. Virginia*, 443 U.S. at 319).

15 In *State v. Dunbar*, 117 Wn.2d 587, 817 P.2d 1360 (1991), the Washington Supreme
16 Court noted that RCW 9A.32.030(1)(b) was enacted in 1975 to replace the former RCW
17 9.48.030(2), which provided:

18 The killing of a human being, unless it is excusable or justifiable, is murder
19 in the first degree when committed either-

20

21 (2) By an act imminently dangerous to others and evincing a depraved mind,
22 regardless of human life, without a premeditated design to effect the death of
23 any individual ...:

That case quotes a portion of the legislative debate which sheds light on the level of
"depravity" that the State must show in order to convict. The Court stated that

MOTION FOR ARREST OF JUDGMENT AND FOR
NEW TRIAL - 8

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1 the revision was intended simply to modernize the antiquated “evincing a
2 depraved mind” language by changing it to “manifesting an extreme
3 indifference”. Partial Transcript of Senate Judiciary Committee Meeting
4 (Jan. 16, 1975), at 1 (Jud.Comm.Trans.). As envisioned by the Legislature,
the modernized statute did not require a specific intent to kill. Pat Aitken of
the Washington State Bar Association Task Force on the Criminal Code
testified before the Senate Judiciary Committee:

5 We are talking about situations such as the Bellevue
6 sniper firing at people indiscriminately, hitting a
7 couple of them; tossing a bomb into a room with
complete indifference as to whether it goes off ...

8 Jud.Comm.Trans., at 9. We do not equate “manifesting an extreme
9 indifference” with a specific intent to kill. Rather, we construe RCW
9A.32.030(1)(b) to require an aggravated form of recklessness which falls
below a specific intent to kill.

10 *Id.* at 593.

11 The three published cases discussing this element offer some guidance. In *State v.*
12 *Pettus*, 89 Wash. App. 688, 951 P. 2d 284 (1998), the evidence was that Pettus and another
13 man, Henderson, began pursuing the victim in his vehicle because he believed the victim
14 had “ripped him off” in a drug deal. As Henderson drove, Pettus stated: “I should bust on
15 dude.” *Id.* at 692. Pettus instructed Henderson to drive up along side of the victim’s car and
16 then he began shooting. Pettus’s multiple shots hit the victim’s tire, his car and the victim
17 himself – resulting in the victim’s death. At trial Pettus testified that he was a poor shot and
18 admitted putting persons in the vicinity at risk when he fired the gun.

19 In *State v. Pastrana*, 94 Wash. App. 463, 972 P.2d 557 (1999), the defendant believed
20 that the driver of the victim’s car had cut him off in traffic. In response, Pastrana flashed
21 his light and honked his horn. When the other driver did not respond, Pastrana got upset
22 and took his gun from the backseat. He rolled down the window and fired one shot out the
23 window. The shot hit and a killed someone in the other vehicle. The court found that the

MOTION FOR ARREST OF JUDGMENT AND FOR
NEW TRIAL - 9

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1 evidence to convict Pastrana was sufficient because he disregarded the grave risk inherent
2 in shooting a gun at a moving car on a crowded freeway, even if the shot was aimed at the
3 tire” *Id.* at 562. The court found that even if Pastrana was shooting at a particular vehicle,
4 his actions caused a grave risk to everyone else on the “crowded freeway.”

5 In *Guzman*, the defendant was convicted as an accomplice to an “extreme
6 indifference murder.” *State v. Guzman*, 98 Wash. App. 638, 990 P.2d 464 (2000). In that
7 case two groups of men had an continuing altercation. During the initial confrontation,
8 Guzman asked one of the men from the opposing group if he “wanted to play with guns?”
9 *Id.* at 640. The shooter then retrieved rifle and Guzman drove him back to the second
10 confrontation with the other group of men. Guzman’s passenger then shot into the group
11 and killed another man. The Court of Appeal said:

12 As indicated above, Mr. Guzman concedes the evidence, if believed,
13 supports accomplice liability. He is correct. Mr. Guzman leaned out the
14 passenger window and shouted, “Do you want to play with guns?”
15 Immediately thereafter, Mr. Madera pulled a rifle from the trunk and slipped
16 into the front passenger seat with it in plain view of Mr. Guzman as Mr.
17 Guzman moved to the driver's seat. The rifle was clearly visible to Mr.
18 Valencia in the back seat, and from this the jury could infer Mr. Guzman
19 saw the rifle as well. Mr. Guzman drove back to the scene. Mr. Madera
20 turned around backwards in the passenger seat, held the rifle out the window
21 and began shooting. Mr. Guzman then sped away, aiding Mr. Madera's
22 escape and accomplishing his own.

18 *Id.* at 646-47.

19 Without judging the credibility of the witnesses or weighing the evidence, this Court
20 can find that the evidence in this case was insufficient to meet the level of evidence the
21 Legislature and the appellate courts have deemed necessary to prove “extreme
22 indifference.” Unlike the three defendants in the cases discussed above, Caldellis did not
23 act irrationally out of anger under circumstances that demonstrated “extreme indifference to

1 human life.” The evidence is undisputed that his purpose in firing the shots was to
2 “disperse the crowd” because he feared his friends were in danger. His “warning shots”
3 into the air demonstrate this purpose. Caldellis acted in an effort to quell the violence rather
4 than out of anger. This conduct is clearly distinguishable from the more extreme conduct
5 described in *Pettus, Pastrana, and Guzman*.

6 On these facts, Caldellis’s actions may be reckless, but they are not sufficient to
7 evince a “depraved mind” or “extreme indifference to human life.” For this reason,
8 judgment should be arrested on Caldellis’s conviction for murder in the first degree.

9 **C. The State’s argument that the two counts of assault in the second degree could**
10 **be based on Caldellis’s two warning shots into the air was improper and denied**
11 **Caldellis a fair trial.**

12 A prosecutor’s erroneous statement of law violates the defendant’s due process right
13 to a fair trial if there is a substantial likelihood that the statement affected the verdict. *State*
14 *v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984). The trial court’s failure to cure the
15 misstatement by overruling defense counsel’s objection and by not clarifying the law to the
16 jury is error sufficient to require a new trial. *State v. Gotcher*, 52 Wn. App. 350, 355-56,
17 759 P.2d 1216 (1988).

18 When there is no evidence that the victims had a reasonable apprehension and
19 imminent fear of bodily injury, it is error for the prosecutor to argue that the two counts of
20 assault in the second degree could be based on Caldellis’s two warning shots into the air.

21 The only evidence is that the victims were in the vicinity of the area where the shots
22 were fired. Meghan Lever testified that she saw the first two shots fired in the air. Kyle
23 Defenbach testified that he saw only the muzzle flash. He could not say that the gun was

1 pointed in his direction when the first two shots were fired. This evidence is insufficient as
2 a matter law to establish that Lever and Defenbach had *reasonable* apprehension and
3 *imminent* fear of bodily injury.

4 The evidence established that there were as many as 30 to 40 people in front of the
5 Brier house when the shots were fired. Lever and Defenbach were just two of those people.
6 It may be true that every time a person is in the vicinity of a gun being fired he or she
7 experiences fear. It cannot be said, however, that every time a person is in the vicinity of a
8 gun being fired he or she has a *reasonable* apprehension and *imminent* fear of bodily injury
9 – in other words, that the person witnessing the gun being shot is the victim of assault. If it
10 were otherwise, the statute proscribing unlawful discharge of a firearm, RCW
11 9.41.230(1)(b),⁴ violation of which is a gross misdemeanor, would have no purpose or
12 meaning.

13 Although there are no Washington cases on point, Washington case law is consistent
14 with this interpretation. In *State v. Rai*, 97 Wn. App. 307, 983 P.2d 712 (1999), the
15 defendant owned and operated a motel that was experiencing financial difficulties. When
16 the electricity was shut off, several angry motel patrons congregated outside the motel
17

18 ⁴ RCW 9.41.230(1)(b) provides in relevant part:

19 For conduct not amounting to a violation of chapter 9A.36 RCW, any person who

20 ...

21 (b) Willfully discharges any firearm, air gun, or other weapon, or throws any deadly
22 missile in a public place, or in any place where any person might be endangered
23 thereby. A public place shall not include any location at which firearms are authorized
to be lawfully discharged;

...

although no injury results, is guilty of a gross misdemeanor punishable under chapter
9A.20 RCW.

1 office. Rai fired a shotgun from the second floor. He testified that he fired in the air, but
2 the wife of the victim testified that she saw Rai point the shotgun "down towards" her
3 husband seconds before Rai fired. The shots Rai fired, which the husband *hoped* were in
4 the air, were in fact fired in the husband's direction. The court held that a rational trier of
5 fact could find that the husband's fear was reasonable, thus supporting Rai's conviction for
6 assault, citing the husband's testimony that hearing his wife scream followed by hearing the
7 shot caused him to fear for his life and the lives of the members of his family. In contrast,
8 none of the partygoers in this case testified they even noticed Caldellis prior to his firing
9 two shots in the air. The evidence was uncontroverted that the first two shots Caldellis
10 fired – the shots the State argued were sufficient to prove assault – were in the air. Unlike
11 the shots fired by the defendant in *Rai*, these shots into the air do not constitute "assault."

12 In *State v. Stockmyer*, 83 Wn. App. 77, 920 P.2d 1201 (1996), the court rejected the
13 defendant's argument that the State was required to elect which of several acts of similar
14 misconduct it was relying upon for an assault conviction. Stockmyer had struck Victim 1
15 on the head with his gun (the first incident), turned and shot Victim 2, dropped the gun
16 during the ensuing scuffle, and seconds later again grabbed the gun and either waved it in
17 the air or pointed it at Victim 1 (the second incident). Meanwhile, Victim 2 was dying of
18 the gunshot wound Stockmyer inflicted. The court concluded that there was overwhelming
19 evidence to support Stockmyer's conviction for second-degree assault regardless on which
20 of several related acts the jury based its verdict. "A rational juror would logically conclude
21 beyond a reasonable doubt that Stockmyer's action induced in [Victim 1] a reasonable
22 apprehension and fear of imminent bodily injury." *Id.* at 88. Conversely, in Caldellis's
23 case there is no evidence that Caldellis committed any misconduct prior to firing the two

MOTION FOR ARREST OF JUDGMENT AND FOR
NEW TRIAL - 13

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1 shots in the air. Caldellis had not fired the gun, he hadn't pointed it at anyone, and he had
2 not engaged in any menacing behavior or fighting. No rational juror could find beyond a
3 reasonable doubt that merely firing a gun twice in the air induced in Meghan Lever and
4 Kyle Defenbach a reasonable apprehension and fear of imminent bodily injury.

5 The State's argument that firing the shots in the air was sufficient evidence of assault,
6 and the Court's failure to sustain defendant's objection to that argument or offer a clarifying
7 instruction, were errors of law sufficient to require a new trial.

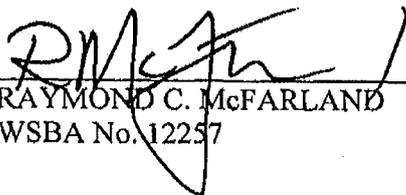
8
9 **IV. CONCLUSION**

10 The court's failure to give the defendant's proposed jury instruction on "no duty to
11 retreat" entitles the defendant to a new trial on all charges. Because there was insufficient
12 evidence to establish that Caldellis acted with "extreme indifference to human life," this
13 Court should arrest judgment on Count I pursuant to CrR 7.4 (a) and dismiss the charge.
14 Lastly, the Court's failure to correct the prosecutor's erroneous statement of law during
15 closing argument regarding shots in the air constituting an "assault" entitles the defendant
16 to a new trial on Counts III and IV. Defendant's motions should be granted.

17 DATED this 27th day of December, 2007.

18 Respectfully Submitted,

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20
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MOTION FOR ARREST OF JUDGMENT AND FOR
NEW TRIAL - 14

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Dyer; Melinda Miller; Melissa Walker Sullivan; Russell Brown; Rosemary Kaholokula; Sloan Johnson; Trisha Johnson; Woori Cheh; Dave Brown; Adam Kick; Montgomery, Toni; Casey, Bridget; Blackman, Charlie; Crawley, Constance; Larsen, Cindy; Deschenes, Elise; Hupp, Hal; Evans, Hillary; Albert, Janice; Goodkin, Jarett; Cummings, Jason; Mohr, Julie; Walters, Julie; Blake, Kathy Jo; Webber, Kathy; Twitchell, Laura; Downs, Lyndsey; Held, Michael; Bladek, Steven; Reay, Sean; Bayard, Tammy; Curtis, Thomas; Cox, Teresa; Seder, Tad; Sowa, Walt; Deric Martin; Eric Byrd; Gina Tveit; Lech Radzimski; menzler@co.stevens.wa.us; Scot Stuart; Olivia Zhou; Brandi Archer; Wayne Graham; Karen

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Subject: suppression hearings

Seizures. The officer seized a van by pulling behind the van, which was stopped in front of a driveway, and activating the patrol car's emergency lights. The activation of a patrol car's emergency lights constitutes a display of authority. State v. Gantt, COA No. 28777-7-III (Aug. 16, 2011). Judge Korsmo dissented. [Editor's note: Police officers typically have several combinations of lights that can be displayed. The use of yellow "wig-wag" lights to alert traffic to the officer's presence may not constitute a seizure. The use of blue or red lights that are visible from the front of the patrol car will be deemed a show of authority. Questions should be asked during suppression hearings to clarify which lights or combinations of lights the officer used. Officers should specify which lights were used in their police reports.]

<http://www.courts.wa.gov/opinions/index.cfm?fa=opinions.showOpinion&filename=287777DIS>

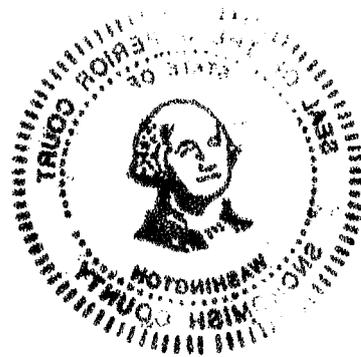
<http://www.courts.wa.gov/opinions/index.cfm?fa=opinions.showOpinion&filename=287777MAJ>

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SNOHOMISH COUNTY

STATE OF WASHINGTON
Plaintiff/Petitioner,

VS.

NOEL EVAN CALDELLIS
Defendant/Respondent.

CAUSE NO.: 06-1-02485-5

COVER SHEET

not confidential per S. Barta

ATTACHED HERETO IS: THE DEFENDANT'S CONFIDENTIAL JUROR POST-
VERDICT QUESTIONNAIRE TAKEN INTO CONSIDERATION
AT THE MOTION HEARING BY JUDGE THOMAS J. WYNNE

*AB
187*

EXHIBIT 13

Juror No. _____

CONFIDENTIAL JUROR POST-VERDICT QUESTIONNAIRE
State v. Noel E. Caldells, Snohomish County Cause No. 06-1-02485-5

Please read each question carefully and answer truthfully:

1. Did you see, hear or read anything (television, radio, newspaper, internet, etc.) about this case during the trial and/or deliberations other than what was presented to you in court?

Yes _____ No _____

2. If you accessed the internet at all during the trial and/or deliberations, did you see or read anything related to this case, either inadvertently or otherwise?

Yes _____ No _____

3. Do you have any reason to believe that any other juror saw, heard or read anything (television, radio, newspaper, internet, etc.) about this case during the trial and/or deliberations other than what was presented to you in court?

Yes _____ No _____

4. Did you have any contact with any participants in this case (lawyers, judge, witnesses, family members, police officers, defendant, etc.), either inadvertently or otherwise, during the trial and/or deliberations?

Yes _____ No _____

5. Do you have any reason to believe that any other juror had any contact with any participants in this case (lawyers, judge, witnesses, family members, police officers, defendant, etc.) during the trial and/or deliberations?

Yes _____ No _____

6. Did you have any contact with any trial spectators, either inadvertently or otherwise, during the trial and/or deliberations?

Yes _____ No _____

7. Do you have any reason to believe that any other juror had any contact with any trial spectators during the trial and/or deliberations?

Yes _____ No _____

8. Did you do any research or investigation about issues or facts in the case during trial and/or deliberations?

Yes _____ No _____

9. Do you have any reason to believe that any other juror did any research or investigation about issues or facts in the case during trial and/or deliberations?

Yes _____ No _____

10. Did you overhear any conversations involving any participants in the case (lawyers, judge, witnesses, family members, police officers, defendant, etc.) or by any trial spectators during the trial and/or deliberations other than what occurred in open court?

Yes _____ No _____

11. Do you have any reason to believe that any other juror overheard any conversations involving any participants in the case (lawyers, judge, witnesses, family members, police officers, defendant, etc.) or any trial spectators during the trial and/or deliberations other than what occurred in open court?

Yes _____ No _____

12. Do you have any reason to believe that any juror may have used any information, speculation or belief not obtained from the evidence at trial that may have contributed to their final decision in the case?

Yes _____ No _____

13. Do you have any reason to believe that any juror may have used any particular personal knowledge or experience (or knowledge or experience of a close friend or family member) that you believe may have contributed to their final decision in the case?

Yes _____ No _____

14. Do you have any reason to believe that any juror did not understand and/or follow any of the written or oral instructions given by the court?

Yes _____ No _____

15. Are you aware of a "blog" on the internet related to this case?

Yes _____ No _____

16. If you answered "Yes" to No. 15, did you see or read any part of this "blog"?

Yes _____ No _____

17. If you answered "Yes" to No. 15, did you contribute to this "blog" in any way, such as by posting a comment?

Yes _____ No _____

I CERTIFY (OR DECLARE) UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed this _____ day of January, 2008 at Everett, WA.



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STATE OF WASHINGTON
2011 AUG 18 AM 10:36

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

In re Personal Restraint of

NOEL EVEN CALDELLIS,

Petitioner

No. 67090-5-1

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 17th day of August, 2011, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS
ONE UNION SQUARE
600 UNIVERSITY STREET
SEATTLE, WA 98101

JEFF ERWIN ELLIS
OREGON CAPITAL RESOURCE CENTER
621 SW MORRISON STREET, SUITE 1025
PORTLAND, OR 97205-3813

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the petitioner of the following document(s) in the above-referenced cause:

RESPONSE TO PERSONAL RESTRAINT PETITION

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 17th day of August, 2011.



Diane K. Kremenich
Legal Assistant/Appeals Unit