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SUPREME COURT  
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No. 96777-6

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JOHN ALAN WHITAKER,

Petitioner

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On Appeal from Snohomish County Superior Court  
The Honorable Linda Krese, Presiding

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**SUPPLEMENTAL BRIEF OF PETITIONER**

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NEIL M. FOX,  
WSBA No. 15277  
Attorney for Petitioner  
2125 Western Ave. Suite 330  
Seattle WA 98121

Phone: 206-728-5440  
e-mail: [nf@neilfoxlaw.com](mailto:nf@neilfoxlaw.com)

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**A. INTRODUCTION**

Almost seventeen years ago, John Whitaker participated in the abduction of Rachel Burkheimer because he was mortally afraid of John “Diggy” Anderson. Physically much larger than Mr. Whitaker, Anderson became violent, punching Mr. Whitaker (who was at the time quite young, just 22 years old), brandishing a gun, barking orders, and threatening to kill others. With others, Mr. Whitaker helped take Ms. Burkheimer to a remote area where Anderson killed her. When the FBI arrested Mr. Whitaker in California soon afterwards, Whitaker told the agents how he participated in some of the events of September 23, 2002, but did so out of fear. Ex. 232.

Given this evidence of Mr. Whitaker’s fear of Anderson’s violence, this Court should hold that it was error to deny a requested instruction<sup>1</sup> that duress was a defense to the aggravating factor that the “murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes . . . (d) Kidnapping in the first degree.” RCW 10.95.020(11). This Court should hold that because first degree kidnapping is a separate crime, proof of which is required for a conviction of the crime of aggravated murder, RCW 9A.16.060(2)’s provision that the duress is “not

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<sup>1</sup> CP 574, App. A.

available if the crime charged is murder” did not bar the duress defense in this case. This result is compelled by this Court’s recently changed jurisprudence about how to conceptualize aggravated murder, *State v. Allen*, 192 Wn.2d 526, 431 P.3d 117 (2018), and is required under the constitutional rights to due process, to present a complete defense and a jury trial, protected by the Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 3, 21 and 22 of the Washington Constitution.

**B. ISSUES**

1. Is duress is a defense to the crime of kidnapping in the first degree even though conviction of that crime is what elevates first degree murder to aggravated murder?
2. Was the failure to instruct on duress reversible error?
3. What is the remedy?

**C. SUPPLEMENTAL ARGUMENT**

1. ***Because Duress is a Defense to Kidnapping in the First Degree, a Defendant Charged with Aggravated First Degree Murder Based on Kidnapping is Entitled to a Duress Instruction, Not for the Murder, But for the Kidnapping***

Mr. Whitaker only participated in the abduction of Ms. Burkheimer because he was afraid of Mr. Anderson. He therefore asked the trial court to

instruct the jury on the defense of duress, not to the crime of murder, but to the predicate crime of kidnapping in the first degree, a necessary element to the crime of aggravated first degree murder. CP 574, App. A.<sup>2</sup>

The trial court denied the duress instruction because it ruled that there was not sufficient evidence to support the giving of such an instruction. RP (6/24/16 p.m.) 61-62. In contrast, the Court of Appeals held:

We agree that there was evidence that Anderson threatened and used force against Whitaker and others as the events of Burkheimer’s murder evolved. But the analysis does not end there. Because duress is not a defense to first degree murder, the trial court did not err in refusing to instruct the jury on duress.

*State v. Whitaker*, 6 Wn. App.2d 1, 15, 429 P.3d 512 (2018), *rev. granted* 193 Wn.2d 1012 (2019). The Court of Appeals relied on RCW 9A.16.060(2) which provides that the duress is “not available if the crime charged is murder,” and on this language from a 1985 case:

“The statutory aggravating circumstances which, when present, raise premeditated first degree murder to aggravated first degree murder punishable by mandatory life imprisonment or death, are ‘aggravation of penalty’ factors which enhance the penalty for the offense, and *are not elements of a crime as such.*”

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<sup>2</sup> Mr. Whitaker asked for a similar instruction for the robbery aggravator, CP 573, but the jury did not find Mr. Whitaker guilty of that offense. CP 477.

*Whitaker*, 6 Wn. App. at 12 (quoting *State v. Kincaid*, 103 Wn.2d 304, 307, 692 P.2d 823 (1985)) (emphasis added).

**a. *Kincaid* No Longer is Good Authority**

After the Court of Appeals issued its decision, this Court issued its decision in *State v. Allen*, *supra*. In *Allen*, the issue was whether double jeopardy under the Fifth Amendment and article I, section 9, prevented retrial of aggravating factors if the jury had previously acquitted the defendant of those circumstances. Under *Kincaid*, if the aggravating circumstances were merely “sentencing factors,” double jeopardy would not prevent a retrial. “As a result, we have previously stated that ‘double jeopardy does not apply to aggravating circumstances outside the death penalty context.’” *State v. Allen*, 192 Wn.2d at 533-34 (quoting *State v. Guzman Nuñez*, 174 Wn.2d 707, 717, 285 P.3d 21 (2012)). However, the Court departed from *Kincaid* because “the legal underpinnings of our precedent have changed so significantly, we are compelled to revisit the issue in light of subsequent decisions of the United States Supreme Court.” *Allen*, 192 Wn.2d at 534 (internal quotes omitted).

What has changed since 1985 was the U.S. Supreme Court’s Sixth Amendment jurisprudence beginning with *Apprendi v. New Jersey*, 530 U.S.

466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and extending to *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed.2d 314 (2013), and, more recently, *Hurst v. Florida*, 577 U.S. \_\_\_\_, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016). It is now clear that, under the Sixth and Fourteenth Amendments and article I, sections 3, 21 and 22, aggravating circumstances are the functional equivalent of elements of a new crime that must be submitted to the jury and must be proved by the State beyond a reasonable doubt. *Allen*, 192 Wn.2d at 534-44.

While *Allen* addressed double jeopardy, its guiding principles apply here.<sup>3</sup> An aggravating circumstance listed in RCW 10.95.020, particularly one that is a separate criminal offense, such as kidnapping in the first degree, is functionally and legally (under the Fifth, Sixth and Fourteenth Amendments and article I, sections 3, 9, 21 and 22) a different crime that must be proven in addition to first degree premeditated murder under RCW

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<sup>3</sup> Indeed, the issue in *Allen* was whether elements were defined in the same way for purposes of the Sixth Amendment's jury trial right as for the Fifth Amendment's double jeopardy clause, a question that this Court answered unequivocally in the positive. *Allen*, 192 Wn.2d at 539-44.

9A.32.030(1)(a).<sup>4</sup> As a separately charged crime, the defendant is entitled to all statutory defenses.

For instance, the State charged Mr. Whitaker with the “crime” of “aggravated first degree murder,” alleging not only that he had “a premeditated intent to cause the death of Rachel Rose Burkheimer,” and that he “did cause the death of another person,” but also that “the murder was committed in the course of, in furtherance of, or in immediate flight from Kidnapping in the First Degree . . . .”. CP 1794 (App B). The jury instructions made it clear that separate crimes were involved. Instruction No. 8 set out the elements only of murder in the first degree. CP 490 (App. C). The trial court gave the jury a separate instruction for the aggravating circumstances: “The murder was committed in the course of, in furtherance of, or in immediate flight from kidnapping in the first degree.” Inst. No. 13A, CP 495 (App. C). The court also gave the jury a separate instruction defining this specific crime, following RCW 9A.40.020's language. Inst. No. 15, CP 498 (App. C). Finally, the court gave the jury separate verdict forms for the

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<sup>4</sup> The aggravators in *Allen* were not separate crimes – the law enforcement and common scheme or plan aggravators of RCW 10.95.020(1) & (10). The holding has even more force in a case like this where the aggravator is a separately defined crime, like kidnapping in the first degree.

two crimes, murder in the first degree and kidnapping in the first degree. Verdict Form A-1 & Special Verdict Form A-3, CP 477 & 479 (App. C).

Thus, Whitaker was charged, tried and convicted not just for premeditated first degree murder, but also for kidnapping in the first degree. This was a crime that was separate from premeditated first degree murder and what made aggravated murder a more serious crime than premeditated murder. This result is compelled by the line of cases starting with *Apprendi* and extending, in this State, to *Allen*, construing the right to a jury trial and due process, protected by the Sixth and Fourteenth Amendments and article I, sections 3, 21 and 22.

**b. The History of the Aggravated Murder Statute Supports the Conclusion that the Aggravator of Kidnapping Was a Separate Crime**

The conclusion that the Legislature intended that the kidnapping aggravator be dealt with as a separate crime is supported by the history of aggravated murder statute, which is really a capital punishment statute. In 1975, when the voters adopted Init. 316, the Washington's first post-*Furman*<sup>5</sup> capital punishment statute, Section 1 of the new statute defined aggravated murder in part as follows: "The defendant committed the murder in the

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<sup>5</sup> *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

course of or in furtherance of the crime of rape or kidnapping or in immediate flight therefrom.” Laws of 1975-76, 2<sup>nd</sup> ex. sess., ch. 9. Although since 1933 Washington has had two degrees of kidnapping (first and second degree), Laws of 1933, ex. sess., ch. 6, Init. 316 did not specify any particular degree of kidnapping as the predicate for aggravated murder.

The mandatory nature of the imposition of the death penalty in Init. 316 led this Court to declare it unconstitutional under the Eighth Amendment in *State v. Green*, 91 Wn.2d 431, 444-47, 588 P.2d 1370 (1979) (“*Green I*”), *rev’d on rehearing*, 94 Wn.2d 216, 616 P.2d 628 (1980) (“*Green II*”). While reversing Mr. Green’s death sentence in *Green I*, the Court initially upheld the aggravated murder conviction finding that there was substantial evidence to support both the kidnapping and rape allegations. In this analysis, the Court held that Init. 316 did not define separate crimes of kidnapping and rape but only alternative means of committing one crime:

By defining specific *circumstances* which specify the crime and enhance the penalty, voters without question intended to describe but one crime -- aggravated murder, which could be committed by various means.

*Green I*, 91 Wn.2d at 444 (emphasis in original).

Shortly after the *Green I* was issued, the U.S. Supreme Court decided *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979),

adopting a more protective sufficiency of the evidence test under the Fourteenth Amendment. Upon reconsideration, the Court in *Green II* reversed the aggravated murder conviction based upon insufficiency of the evidence of kidnapping. The Court relied on the fact that kidnapping was a distinct crime and, under the facts of *Green* (carrying a child around the corner of an apartment building), there was insufficient evidence to support conviction for that crime under the rigorous *Jackson* test:

Pursuant to RCW 9A.32.045(7), the charge of aggravated murder in the first degree must be established by proving beyond a reasonable doubt that appellant caused the victim's death in the course of or in the furtherance of rape (RCW 9A.44.040), or kidnapping (RCW 9A.40.020). While rape and kidnapping are elements of aggravated murder in the first degree, *each is a separate and distinct major crime having specific elements which also must be proved beyond a reasonable doubt. . . .*

. . . .

*As indicated above, kidnapping is a specific element of aggravated murder in the first degree. It is, however, a separate and distinct statutory crime having specific elements each of which must be established beyond a reasonable doubt.*

*Green II*, 94 Wn.2d at 219 & 224 (emphasis added).

Even before this Court issued *Green I*, the Legislature adopted a new capital punishment statute which eliminated the mandatory nature of the

punishment. Laws of 1977, 1<sup>st</sup> Ex. Sess., chap. 206. When this Court held the new statute unconstitutional because it allowed for people to escape the death penalty by pleading guilty,<sup>6</sup> the Legislature adopted the current aggravated murder statute. Laws of 1981, ch. 138. While Init. 316 had simply used the term “kidnaping” as the aggravating factor and the 1977 statute was a bit more specific,<sup>7</sup> the 1981 statute was very specific, defining the aggravating factor specifically by reference to the crime of “kidnaping in the first degree.” RCW 10.95.020(11)(d) (Laws of 1981, ch. 138, sec. 2(9)(d)). The Legislature was certainly aware of this Court’s recent decision in *Green II*<sup>8</sup> and its listing of a particular degree of kidnaping can only be seen as part of a legislative intent to follow what this Court had already decided in *Green II*.

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<sup>6</sup> See *State v. Frampton*, 95 Wn.2d 469, 627 P.2d 922 (1981) & *State v. Martin*, 94 Wn.2d 1, 614 P.2d 164 (1980).

<sup>7</sup> The 1977 statute did not reference any particular degree of kidnaping, instead defining aggravated murder if the murder was committed in the course or furtherance of “the crimes of either . . . (v) kidnaping in which the defendant intentionally abducted another person with intent to hold the person for ransom or reward, or as a shield or hostage, and the killing was committed with the reasonable expectation that the death of the deceased or another would result.” Laws of 1977, 1st Ex. Sess., chap. 206, sec. 4(g).

<sup>8</sup> “In construing legislation, we presume the Legislature is familiar with past judicial interpretation of its enactments.” *Glass v. Stahl Specialty Co.*, 97 Wn.2d 880, 887, 652 P.2d 948 (1982).

Moreover, the adoption of a specific type of kidnapping (“Kidnaping in the first degree”) should be seen through the lens of the Eighth Amendment and article I, section 14. In *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), the U.S. Supreme Court struck down capital punishment statutes that were not sufficiently narrow and which gave juries unfettered discretion to impose death. Subsequently, in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the Supreme Court upheld Georgia’s statute and announced that the Eighth Amendment did not ban capital punishment but “where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.” *Id.* at 189 (Stewart, J., opinion).

Thus, to comport with the Constitution, “an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.” *Zant v. Stephens*, 462 U.S. 862, 877, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983). This “narrowing”

and “guided discretion” led this Court to reject early challenges to RCW 10.95.<sup>9</sup>

The 1981 specification of the crime of kidnapping in the first in the definition of aggravated murder should be seen as an attempt to comport with *Gregg*’s command to narrow eligibility for the death penalty to very strictly defined circumstances. In other words, Init. 316’s category for eligibility -- “kidnaping” -- was not narrow or well defined enough to survive an Eighth Amendment challenge, while the 1977 version (which was more specific) was not tied directly to any particular crime which the Court in *Green II* appeared to require under the Fourteenth Amendment and *Jackson v. Virginia, supra*.

**c. By Defining Aggravated Murder By Reference to a Separate Crime, the Legislature Intended to Allow All Defenses to that Separate Crime**

When the Legislature refined the aggravated murder statute in 1981, by using the specifically defined crime of “kidnaping in the first degree,” it is apparent that the Legislature intended to uphold *Green II*’s holding that the kidnapping element of aggravated murder in the first degree is “a separate

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<sup>9</sup> See *State v. Campbell*, 103 Wn.2d 1, 27-28, 691 P.2d 929 (1984); *State v. Rupe*, 101 Wn.2d 664, 697-701, 683 P.2d 571 (1984) (both abrogated by *State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018)).

and distinct statutory crime having specific elements each of which must be established beyond a reasonable doubt.” *Green II*, 94 Wn.2d at 224. And as a “separate and distinct statutory crime” the Legislature must have been aware of the statutory defenses to kidnapping, including duress.

The existence of the statutory defense of duress means that a person cannot be guilty of kidnapping in the first degree in Washington if he or she can sustain their burden of proving the defense. While not negating an element of the crime of kidnapping in the first degree, the duress defense “pardons the conduct even though it violates the literal language of the law,” *State v. Riker*, 123 Wn.2d 351, 368, 869 P.2d 43 (1994), and “excuses” such a person “from the legal consequences of those actions.” *State v. Peters*, 47 Wn. App. 854, 859, 737 P.2d 693 (1987).<sup>10</sup> In other words, one who participates in a kidnapping in the first degree under duress (and can prove it) cannot be convicted of that crime, escaping any punishment and stigma for that specific offense.

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<sup>10</sup> “The rationale of the defense of duress is that the defendant ought to be excused when he is the victim of a threat that a person of reasonable moral strength could not fairly be expected to resist.” W. LaFave, 2 Substantive Criminal Law § 9.7, at 72 (2d ed. 2003) (internal quotes omitted) (quoted in *Dixon v. United States*, 548 U.S. 1, 14 n.9, 126 S. Ct. 2437, 165 L. Ed. 2d 299 (2006)).

There is no indication that the Legislature did not intend that those charged with aggravated murder based on a kidnapping in the first degree would not be able to avail themselves of all the statutory defenses to that specific crime.<sup>11</sup> If one cannot be legally guilty of kidnapping in the first degree if one acts under duress, the person is simply not guilty of that offense whether it is a “stand alone” crime or if it is used as a predicate for aggravated murder. And if there is any ambiguity at all, because of the penal nature of the statutes involved, the rule of lenity requires adoption of a construction in favor of the defendant. *State v. Evans*, 177 Wn.2d 186, 193, 298 P.3d 724 (2013).

Allowing for someone charged with aggravated murder based on a kidnapping in the first degree to raise the defense of duress to that specific crime is also consistent with long-standing principles of the law. If Mr. Whitaker was innocent of the kidnapping in the first degree due to duress, it makes little sense to treat him as if he had no excuse for such conduct. Mr. Whitaker’s moral culpability is certainly much different if he committed

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<sup>11</sup> That the Legislature in 1981 was concerned about duress is apparent by its inclusion in RCW 10.95.070 of the factor of duress as a statutory mitigating factor – “(5) Whether the defendant acted under duress or domination of another person. . . .” Thus, while duress under RCW 9A.16.060(2) is not a defense to murder, the Legislature did not want people who commit aggravated murder to be executed if the person was acting under someone else’s control.

kidnapping under duress than the person who was not so constrained to act. Clearly, it is consistent with the general policy of the criminal code to differentiate between those who commit murder and kidnapping without duress and those who are accomplices to murder but only are involved in kidnappings because of a threat of harm.<sup>12</sup> Thus, allowing an accused to raise the defense of duress to kidnapping in the first degree, even if that crime is a predicate for aggravated murder, follows both general principles of the law and the legislative history of RCW 10.95.

## **2. *The Trial Court Committed Reversible Error***

Mr. Whitaker had a right to present a complete defense, protected by the Sixth and Fourteenth Amendments and article I, sections 3, 21 & 22.<sup>13</sup> “As a general proposition a defendant is entitled to an instruction as to any

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<sup>12</sup> See RCW 9A.04.020(1) (b) & (d) (regarding purposes of criminal code).

Moreover, from a deterrence standpoint, it makes little sense to have a rule that cannot be obeyed – “For no threatened punishment from the law could be greater than losing his life in the first instance. . . . Hence, we must judge that, although an act of self-preservation through violence is not inculpable (*inculpabile*), it still is unpunishable (*impunibile*)” Immanuel Kant, *Appendix to the Introduction to the Elements of Justice*, in *THE METAPHYSICAL ELEMENTS OF JUSTICE* 36 (Hackett: Indianapolis, 1999) (J. Ladd trans.).

<sup>13</sup> See *State v. Lynch*, 178 Wn.2d 487, 491-92, 309 P.3d 482 (2013) (citing *Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)); *State v. Corstine*, 177 Wn.2d 370, 376, 300 P.3d 400 (2013) (citing *McKaskle v. Wiggins*, 465 U.S. 168, 176-77, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984) (noting that the Sixth Amendment right to conduct one’s own defense “exists to affirm the dignity and autonomy of the accused”).

recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.” *Mathews v. United States*, 485 U.S. 58, 63, 108 S. Ct. 883, 99 L. Ed. 2d 54 (1988). The failure to provide adequate instructions on a defense theory of the case constitutes a denial of due process under the Fourteenth Amendment and article I, section 3. *See Bradley v. Duncan*, 315 F.3d 1091, 1099 (9th Cir. 2002). This is so because “the right to present a defense would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense.” *Id.* (internal quotation marks omitted).<sup>14</sup>

In this case, the failure to give a duress instruction to the crime of kidnapping in the first degree violated Mr. Whitaker’s constitutional right to present a recognized statutory defense to that specific crime and constituted reversible error. As a constitutional error, the error is presumed prejudicial and the State has the burden of proving harmlessness beyond a reasonable doubt. *State v. Lynch*, 178 Wn.2d 487, 494, 309 P.3d 482 (2013).

The State has argued that there was insufficient evidence to give a duress instruction. *BOR* at 16-22. However, the standard for obtaining a

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<sup>14</sup> *See also Clark v. Brown*, 450 F.3d 898, 904-05 (9th Cir. 2006) (failure to give instruction recognized under state law violated federal due process); *State v. Ward*, \_\_\_ Wn. App. \_\_\_, 438 P.3d 588, 592-93 (2019) (denial of opportunity to present necessity defense violated Sixth Amendment right to present a defense).

duress instruction is quite low. A person accused of a crime is entitled to have his or her theory of the case submitted to the jury when there is substantial evidence that supports that theory. *See State v. Harvill*, 169 Wn.2d 254, 259, 234 P.3d 1166 (2010). “When determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction.” *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).<sup>15</sup>

In *Harvill*, this Court reversed a conviction for selling cocaine to an informant where the trial court denied a duress instruction. The defendant requested such an instruction based upon the size difference with the informant and based upon his knowledge that the informant had allegedly caused others physical harm at various points in the past, even though there was no evidence that the informant explicitly threatened the defendant with harm if he did not sell him drugs. *Harvill*, 169 Wn.2d at 256-58. The trial court denied a duress instruction because the informant never communicated any intent to do Harvill harm, and Harvill’s fear was just based on his general

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<sup>15</sup> *See also State v. Harvill*, 169 Wn.2d at 257 n. 1 (“For purposes of this case, we accept Harvill’s account as true: the question is whether Harvill introduced evidence that, *if believed by the jury*, would support a duress defense.”) (emphasis in original).

knowledge of the informant's past behavior. *Id.* at 259. This Court reversed holding that a "threat" can be "implicit" as well as "explicit." *Id.* at 263.

Here, there was uncontested evidence that Mr. Anderson was inexplicably violent, punching Mr. Whitaker, brandishing a gun, barking orders, and threatening to kill others. There was also testimony from many witnesses about how afraid they were of Mr. Anderson. *See BOA* at 7-8, 17-18. Given Mr. Whitaker's confession to law enforcement about his fear of Anderson,<sup>16</sup> seen in the light most favorable to Mr. Whitaker, there was sufficient evidence for a duress instruction to be given to the jury.

Below the State also argued that a duress instruction could be denied on legal grounds because Mr. Whitaker recklessly put himself in a position where he was compelled to participate in the kidnapping. *BOR* at 22. Yet, although Mr. Whitaker had been aware of Anderson's violent nature, this was the first time that Anderson was violent to Whitaker, when Anderson suddenly started punching Whitaker. At that point, Mr. Whitaker would have reasonably believed that his supposed friend was now quite willing to deal with him just as harshly as he had dealt with others. Ultimately, whether Mr.

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<sup>16</sup> Tracking *Harvill*, there was a size difference here as well. *See Ex. 232* at p.2 ("Whitaker stated that he was intimidated by Diggy [Anderson] because he was physically much bigger than him.").

Whitaker's duress defense would succeed was a question that should have been answered by the jury, not the trial court when it undercut his right to a complete defense in violation of the Sixth and Fourteenth Amendments and article I, sections 3, 21 and 22.<sup>17</sup>

### **3. *The Convictions Should Be Reversed***

In some cases, where there have been errors related to the aggravating factors, this Court has reversed only the conviction for aggravated murder, remanding for a new trial on the aggravating circumstances alone.<sup>18</sup> While retrial on the aggravating factor of kidnapping in the first degree alone, with a duress instruction being given, is one possible remedy, Mr. Whitaker seeks reversal of all convictions, not just aggravated murder.

The State profited from the lack of a duress instruction and the error tainted other aspects of the case. Even though the State successfully objected to the giving of a duress instruction, when defense counsel argued that there was no conspiracy because Whitaker and others were merely responding to Anderson's threats, the State repeatedly argued in rebuttal, "duress is not a

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<sup>17</sup> See *State v. Healy*, 157 Wn. App. 502, 515, 237 P.3d 360 (2010) ("[W]e approve of the trial court's decision to allow the jury to decide the recklessness issue as a question of fact.").

<sup>18</sup> See *State v. Thomas*, 150 Wn.2d 821, 831, 83 P.3d 970 (2004), *aff'd after remand*, 166 Wn.2d 380, 385, 208 P.3d 1107 (2009).

defense.”<sup>19</sup> The jury was confused and questioned whether the prosecutor’s argument was “indeed the ‘Law’ in WASH.” CP 512. The Court of Appeals held the prosecutor’s argument to be misconduct, but affirmed due to a lack of a contemporaneous objection. *Whitaker*, 6 Wn. App. at 20-24.

It is not clear from the order granting review whether the Court will review this misconduct issue, which is a separate violation of due process under the Fourteenth Amendment and article I, section 3. Yet, the Court should consider how the denial of the duress instruction impacted the murder and conspiracy convictions. Because of the misconduct in closing argument and its impact on the jury,<sup>20</sup> all convictions, not just aggravated murder, should be reversed.

**D. CONCLUSION**

This Court should reverse the convictions and remand for a new trial.

DATED this 18th day of June 2019.

Respectfully submitted,

s/ Neil M. Fox  
WSBA No. 15277  
Attorney for Petitioner

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<sup>19</sup> See 14 RP 2612, 2719-2741 & RP (6/24/16 a.m.) 2765.

<sup>20</sup> See *State v. Allen*, 182 Wn.2d 364, 378, 341 P.3d 268 (2015) (relying on jury question to show how jury was influenced by improper argument).

## **APPENDIX A**

DEFENDANT'S PROPOSED INSTRUCTION NO. D5

Duress is a defense to the aggravating circumstance of kidnapping in the first degree if:

(a) The defendant's conduct giving rise to the aggravating circumstance of kidnapping in the first degree resulted from compulsion by another who by threat or use of force created an apprehension in the mind of the defendant that in case of refusal the defendant would be liable to immediate death or immediate grievous bodily injury; and

(b) Such apprehension was reasonable upon the part of the defendant; and

(c) The defendant would not have participated in the conduct giving rise to the aggravating circumstance of kidnapping in the first degree except for the duress involved.

The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to answer "no" on the special verdict form for the aggravating circumstance of kidnapping in the first degree.

WPIC 18.01. *See also* Defendant's Memorandum In Support of Duress Instruction on Aggravating Circumstances.

## **APPENDIX B**



02-1-02368-6

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03 JUL 03 PM 3:27

COUNTY CLERK  
SNOHOMISH CO. WASH.

SUPERIOR COURT OF WASHINGTON  
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v.

WHITAKER, JOHN ALAN

Defendant.

No. 02-1-02368-6

AMENDED INFORMATION

Aliases: JOHN ALLEN WHITAKER September 7 1980, JOHNIE A WHITAKER September 7 1980, JON A WHITAKER September 7 1980,

Other co-defendants in this case: ANDERSON, JOHN PHILLIP, BARTH, JEFFREY SCOTT, DURHAM, MATTHEW ANDREAS, JIHAD, YUSEF \*, LOVELACE, NATHAN THOMAS, RIVAS, MAURICE CARLOS, WILLIAMS, TONY JOSEPH

Comes now JANICE E. ELLIS, Prosecuting Attorney for the County of Snohomish, State of Washington, and by this, her information, in the name and by the authority of the State of Washington, charges and accuses the above-named defendant(s) with the following crime(s) committed in the State of Washington:

COUNT I: AGGRAVATED FIRST DEGREE MURDER, committed as follows: That the defendant, on or about the 23rd day of September, 2002, with a premeditated intent to cause the death of Rachel Rose Burkheimer, did cause the death of another person, to-wit: Rachel Rose Burkheimer, and the murder was committed in the course of, in furtherance of, or in immediate flight from Kidnapping in the First Degree and Robbery in the First or Second Degree, said death occurring on or about the 23rd day of September, 2002, and that at the time of the commission of the crime, the defendant or an accomplice was armed with a firearm, as provided and defined in RCW 9.94A.510, RCW 9.41.010, and RCW 9.94A.602; proscribed by RCW 9A.32.030(1)(a) and RCW 10.95.020(11), a felony.

COUNT II: CONSPIRACY TO COMMIT FIRST DEGREE MURDER, committed as follows: That the defendant, on or about the 23rd day of September, 2002, with intent that conduct constituting the crime of First Degree Murder (to-wit: causing the death of Rachel Rose Burkheimer with premeditated intent to cause such death) be performed, did agree with one or more persons to engage in or cause the performance of that crime, and any one of such persons did take a substantial step in pursuance of such agreement, proscribed by RCW 9A.28.040 and RCW 9A.32.030(1)(a), a felony.

AB  
72

## **APPENDIX C**

INSTRUCTION NO. 8

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 23<sup>rd</sup> day of September, 2002, the defendant or a person to whom he was an accomplice acted with intent to cause the death of Rachel Rose Burkheimer;

(2) That the intent to cause the death was premeditated;

(3) That Rachel Rose Burkheimer died as a result of the defendant's acts or the acts of the person to whom he was an accomplice; and

(4) 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.

INSTRUCTION NO. 13 A

If you find the defendant guilty of premeditated murder in the first degree as defined in Instruction 8, you must then determine whether any of the following aggravating circumstances exist:

The murder was committed in the course of, in furtherance of, or in immediate flight from robbery in the second degree, or

The murder was committed in the course of, in furtherance of, or in immediate flight from kidnapping in the first degree.

The State has the burden of proving the existence of an aggravating circumstance beyond a reasonable doubt. In order for you to find that there is an aggravating circumstance in this case, you must unanimously agree that the aggravating circumstance has been proved beyond a reasonable doubt.

You should consider each of the aggravating circumstances above separately. If you unanimously agree that a specific aggravating circumstance has been proved beyond a reasonable doubt, you should answer the special verdict "yes" as to that circumstance. If you unanimously agree that the answer for a specific aggravating circumstance is "no," you must fill in the applicable blank with the answer "no." If after full and fair consideration of the evidence you are not in agreement as to an answer, then do not fill in the blank for that question.

INSTRUCTION NO. 15

A person commits the crime of kidnapping in the first degree when he or she intentionally abducts another person with intent to inflict bodily injury on the person or to inflict extreme mental distress on that person or on a third person.

02-1-02368-6  
VRD  
Verdict Form  
404586



Filed in Open Court

*June 30, 2016*  
SONYA KRASKI  
COUNTY CLERK  
By *Scott Hatten*  
Deputy Clerk

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

STATE OF WASHINGTON	)	CASE NO. 02-1-02368-6
	)	
Plaintiff,	)	
	)	VERDICT FORM A-1 (COUNT I)
v.	)	
	)	
WHITAKER, JOHN ALAN	)	
Defendant.	)	
_____	)	

We, the jury, find the defendant, John Alan Whitaker,

Guilty of the crime of Murder in the First Degree as charged  
(write in "not guilty" or "guilty")

in Count I.

DATED this 30 day of June, 2016.

Cathy Palmer  
Presiding Juror

ORIGINAL

02-1-02368-6  
SPV  
Special Verdict Form  
404588



Filed in Open Court

*June 30, 20 16*

SONYA KRASKI  
COUNTY CLERK

By

*J. Post-Bacter*  
Deputy Clerk

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

STATE OF WASHINGTON	)	CASE NO. 02-1-02368-6
	)	
Plaintiff,	)	
	)	SPECIAL VERDICT FORM A-3
v.	)	AGGRAVATING
	)	CIRCUMSTANCES
WHITAKER, JOHN ALAN	)	(COUNT I)
Defendant.	)	

We, the jury, having found the defendant guilty of premeditated murder in the first degree on verdict form A-1, return a special verdict by answering as follows:

Has the State proven the existence of the following aggravating circumstance beyond a reasonable doubt?

The murder was committed in the course of, in furtherance of, or in immediate flight from robbery in the second degree?

ANSWER: \_\_\_\_\_  
(Write "yes" or "no")

The murder was committed in the course of, in furtherance of, or in immediate flight from kidnapping in the first degree?

ANSWER: yes  
(Write "yes" or "no")

DATED this 30 day of June, 2016.

*Cathy Palmer*  
Presiding Juror

**ORIGINAL**

**CP 477**

STATUTORY APPENDIX

## **Relevant Statutory Provisions and Rules**

*Historical session laws from 1933, 1975-76, 1977 and 1981 are attached separately*

RCW 9A.04.020 provides:

(1) The general purposes of the provisions governing the definition of offenses are:

(a) To forbid and prevent conduct that inflicts or threatens substantial harm to individual or public interests;

(b) To safeguard conduct that is without culpability from condemnation as criminal;

(c) To give fair warning of the nature of the conduct declared to constitute an offense;

(d) To differentiate on reasonable grounds between serious and minor offenses, and to prescribe proportionate penalties for each.

(2) The provisions of this title shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this title.

RCW 9A.16.060 provides:

(1) In any prosecution for a crime, it is a defense that:

(a) The actor participated in the crime under compulsion by another who by threat or use of force created an apprehension in the mind of the actor that in case of

refusal he or she or another would be liable to immediate death or immediate grievous bodily injury; and

(b) That such apprehension was reasonable upon the part of the actor; and

(c) That the actor would not have participated in the crime except for the duress involved.

(2) The defense of duress is not available if the crime charged is murder, manslaughter, or homicide by abuse.

(3) The defense of duress is not available if the actor intentionally or recklessly places himself or herself in a situation in which it is probable that he or she will be subject to duress.

(4) The defense of duress is not established solely by a showing that a married person acted on the command of his or her spouse.

RCW 9A.32.030 provides in part:

(1) A person is guilty of murder in the first degree when: (a) With a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person . . . .

RCW 9A.40.020 provides:

(1) A person is guilty of kidnapping in the first degree if he or she intentionally abducts another person with intent:

(a) To hold him or her for ransom or reward, or as a shield or hostage; or

(b) To facilitate commission of any felony or flight thereafter; or

(c) To inflict bodily injury on him or her; or

(d) To inflict extreme mental distress on him, her, or a third person; or

(e) To interfere with the performance of any governmental function.

(2) Kidnapping in the first degree is a class A felony.

RCW 10.95.020 provides:

A person is guilty of aggravated first degree murder, a class A felony, if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist:

(1) The victim was a law enforcement officer, corrections officer, or firefighter who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the person to be such at the time of the killing;

(2) At the time of the act resulting in the death, the person was serving a term of imprisonment, had escaped, or was on authorized or unauthorized leave in or from a state facility or program for the incarceration or treatment of persons adjudicated guilty of crimes;

(3) At the time of the act resulting in death, the person was in custody in a county or county-city jail as a consequence of having been adjudicated guilty of a felony;

(4) The person committed the murder pursuant to an agreement that he or she would receive money or any other thing of value for committing the murder;

(5) The person solicited another person to commit the murder and had paid or had agreed to pay money or any other thing of value for committing the murder;

(6) The person committed the murder to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group;

(7) The murder was committed during the course of or as a result of a shooting where the discharge of the firearm, as defined in RCW 9.41.010, is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge;

(8) The victim was:

(a) A judge; juror or former juror; prospective, current, or former witness in an adjudicative proceeding; prosecuting attorney; deputy prosecuting attorney; defense attorney; a member of the indeterminate sentence review board; or a probation or parole officer; and

(b) The murder was related to the exercise of official duties performed or to be performed by the victim;

(9) The person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime, including, but specifically not limited to, any attempt to avoid prosecution as a persistent offender as defined in RCW 9.94A.030;

(10) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person;

(11) The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes:

(a) Robbery in the first or second degree;

(b) Rape in the first or second degree;

(c) Burglary in the first or second degree or residential burglary;

(d) Kidnapping in the first degree; or

(e) Arson in the first degree;

(12) The victim was regularly employed or self-employed as a newsreporter and the murder was committed to obstruct or hinder the investigative, research, or reporting activities of the victim;

(13) At the time the person committed the murder, there existed a court order, issued in this or any other state, which prohibited the person from either contacting the victim, molesting the victim, or disturbing the peace of the victim, and the person had knowledge of the existence of that order;

(14) At the time the person committed the murder, the person and the victim were "family or household members" as that term is defined in RCW 10.99.020(1), and the person had previously engaged in a pattern or practice of three or more of the following crimes committed upon the victim within a five-year period, regardless of whether a conviction resulted:

(a) Harassment as defined in RCW 9A.46.020; or

(b) Any criminal assault.

RCW 10.95.070 provides:

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

(1) Whether the defendant has or does not have a significant history, either as a juvenile or an adult, of prior criminal activity;

(2) Whether the murder was committed while the defendant was under the influence of extreme mental disturbance;

(3) Whether the victim consented to the act of murder;

(4) Whether the defendant was an accomplice to a murder committed by another person where the defendant's participation in the murder was relatively minor;

(5) Whether the defendant acted under duress or domination of another person;

(6) Whether, at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental disease or defect. However, a person found to have an intellectual disability under RCW 10.95.030(2) may in no case be sentenced to death;

(7) Whether the age of the defendant at the time of the crime calls for leniency; and

(8) Whether there is a likelihood that the defendant will pose a danger to others in the future.

U.S. Const. amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. VIII provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV, § 1 provides in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wash. Const. art. I, § 3 provides:

No person shall be deprived of life, liberty, or property, without due process of law.

Wash. Const. art. I, § 9 provides:

No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense

Wash. Const. art. I, § 14 provides:

Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.

Wash. Const. art. I, § 21 provides:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Wash. Const. art. I, § 22 (Amendment 10) provides:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: *Provided*, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

SESSION LAWS  
OF THE  
STATE OF WASHINGTON

Passed at the  
EXTRAORDINARY SESSION

Convened December 4, 1933  
Adjourned January 12, 1934

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Compiled in Chapters by  
SECRETARY OF STATE  
Ernest N. Hutchinson

Marginal Notes and Index  
BY  
G. W. HAMILTON  
Attorney General

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PUBLISHED BY AUTHORITY  
Chapter 2, Laws 1933, Extraordinary Session

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Effective  
immediately.

SEC. 2. This act is necessary for the immediate support of the state government and its public institutions and shall take effect immediately.

Passed the House December 21, 1933.

Passed the Senate December 28, 1933.

Approved by the Governor December 30, 1933.

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## CHAPTER 6.

[H. B. 14.]

### KIDNAPING.

AN ACT relating to the crime of kidnaping and the punishment therefor, and repealing section 158, chapter 249, Session Laws, 1909 (section 2410, Remington's Revised Statutes of Washington), and declaring that this act shall take effect immediately.

*Be it enacted by the Legislature of the State of Washington:*

SECTION 1. Every person who shall wilfully,

Kidnaping  
defined.

First degree.

Death  
penalty or  
life im-  
prisonment.

(1) Seize, confine or inveigle another with intent to cause him without authority of law to be secretly confined or imprisoned, or in any way held to service with the intent to extort or obtain money or reward for his release or disposition, shall be guilty of kidnaping in the first degree, and upon conviction thereof shall be punished by death or by imprisonment in the state penitentiary for life as the jury shall determine; and in every trial for kidnaping in the first degree, the jury shall, if it find the defendant guilty, also find a special verdict as to whether or not the death penalty shall be inflicted; and if such special verdict is in the affirmative, the penalty shall be death, otherwise, it shall be as herein provided. All executions in accordance herewith shall take place at the state penitentiary under the direction of and pursuant to arrangements made by the superintendent thereof: *Provided*, the time when

such execution shall take place shall be set by the trial judge at the time of imposing sentence and as a part thereof.

(2) Lead, take, entice away or detain a child under the age of sixteen years with intent to conceal him from his parent, parents, guardian or other lawful person having care, custody or control over him, or with intent to steal any article from his person, but without the intent to extort or obtain money or reward for his return, or shall abduct, entice, or by force or fraud unlawfully take or carry away another to or from a place without the state, and shall afterwards send, bring or keep such person, or cause him to be kept or secreted within the state without the intent to extort or obtain money or reward for his release or disposition, shall be guilty of kidnaping in the second degree and shall be punished as in the case of a felony.

Second  
degree.

Felony.

SEC. 2. That section 158, chapter 249, Session Laws, 1909 (section 2410, Remington's Revised Statutes of Washington) be and the same is hereby repealed.

Repeals  
§ 158, ch. 249,  
Laws of 1909.

SEC. 3. It shall be a felony for two or more persons to enter into an agreement, confederation or conspiracy to commit kidnaping in the first degree or kidnaping in the second degree as the same are in this act defined, and in any prosecution for a violation of the provisions of this section it shall not be necessary to prove that any overt act has been done in furtherance of such agreement, confederation or conspiracy in order to prove the commission of such crime.

Conspiracy.

SEC. 4. This act is necessary for the immediate preservation of the public peace, health and safety,

Effective  
immediately.

the support of the state government, and its existing public institutions, and shall take effect immediately.

Passed the House December 30, 1933.

Passed the Senate December 29, 1933.

Approved by the Governor January 4, 1934.

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## CHAPTER 7.

[H. B. 28.]

### LABOR DISPUTES.

AN ACT relating to labor, and labor disputes, defining and limiting the powers of the courts of this state in the granting of restraining orders and injunctions in cases involving or growing out of any labor dispute, and in the trial and punishment for contempt for violation thereof, declaring the public policy of the State of Washington with respect thereto and with respect to contracts of employment and hiring, and repealing all acts and parts of acts in conflict therewith.

*Be it enacted by the Legislature of the State of Washington:*

Court's  
jurisdiction  
in labor  
disputes.

SECTION 1. No court of the State of Washington or any judge or judges thereof shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this act.

SEC. 2. In the interpretation of this act and in determining the jurisdiction and authority of the courts of the State of Washington, as such jurisdiction and authority are herein defined and limited, the public policy of the State of Washington is hereby declared as follows:

Public  
policy  
defined.

WHEREAS, Under prevailing economic conditions, developed with the aid of governmental authority

**1975-76**  
**SESSION LAWS**  
**OF THE**  
**STATE OF WASHINGTON**

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**2nd EXTRAORDINARY SESSION**  
**FORTY-FOURTH LEGISLATURE**

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Convened July 18, 1975. Recessed July 21, 1975.  
Reconvened Aug. 9, 1975. Recessed Aug. 9, 1975.  
Reconvened Sept. 5, 1975. Recessed Sept. 6, 1975.  
Reconvened Jan. 12, 1976. Adjourned sine die March 26, 1976.



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**RICHARD O. WHITE**  
Code Reviser

calculated pursuant to this section shall be distributed as the superintendent of public instruction shall direct during the first six months of fiscal year 1977.

Those local school districts which did not submit one or more excess levies for maintenance and operations for collection in 1976 and in addition experience a net per pupil expenditure, excluding transportation costs, of less than the state-wide average per student during the 1974-75 school year, shall receive an amount equal to fifty dollars per full time equivalent pupil during the 1975-76 school year.

The superintendent of public instruction, pursuant to chapter 34.04 RCW, shall promulgate rules and regulations to effect the intent of this section.

NEW SECTION. Sec. 2. This 1975 amendatory act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

Passed the House September 6, 1975.

Passed the Senate September 6, 1975.

Approved by the Governor September 9, 1975.

Filed in Office of Secretary of State September 9, 1975.

## CHAPTER 8

[House Bill No. 1243]

### APPROPRIATION—STATE'S LIABILITY, VALENTINE V. JOHNSTON JUDGMENT

AN ACT Relating to appropriations; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Section 1. There is hereby appropriated to the department of revenue from the general fund the sum of nine hundred and fifty thousand dollars: PROVIDED, That this appropriation or so much thereof as may be necessary, shall be for the purpose of satisfying the state's liability in accordance with the judgment of the Pierce county superior court entered August 8, 1975, in the case of Valentine v. Johnston (Cause No. 197735).

NEW SECTION. Sec. 2. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

Passed the House September 6, 1975.

Passed the Senate September 6, 1975.

Approved by the Governor September 9, 1975.

Filed in Office of Secretary of State September 9, 1975.

## CHAPTER 9

[Initiative Measure No. 316]

### DEATH PENALTY—AGGRAVATED MURDER

AN ACT Relating to crimes and punishments; adding new sections to chapter 9A.32 RCW; defining crimes; and prescribing penalties.

Be it enacted by the people of the State of Washington:

NEW SECTION. Section 1. There is added to chapter 9A.32 RCW a new section to read as follows:

**AGGRAVATED MURDER IN THE FIRST DEGREE.** A person is guilty of aggravated murder in the first degree when he commits murder in the first degree as defined in RCW 9A.32.030 under or accompanied by any of the following circumstances:

(1) The victim was a law enforcement officer or fire fighter and was performing his or her official duties at the time of the killing.

(2) At the time of the act resulting in the death, the defendant was serving a term of imprisonment in a state correctional institution.

(3) The defendant committed the murder pursuant to an agreement that he receive money or other thing of value for committing the murder.

(4) The defendant had solicited another to commit the murder and had paid or agreed to pay such person money or other thing of value for committing the murder.

(5) The defendant committed the murder with intent to conceal the commission of a crime, or to protect or conceal the identity of any person committing the same, or with intent to delay, hinder or obstruct the administration of justice by preventing any person from being a witness or producing evidence in any investigation or proceeding authorized by law or by influencing any person's official action as a juror.

(6) There was more than one victim and the said murders were part of a common scheme or plan, or the result of a single act of the defendant.

(7) The defendant committed the murder in the course of or in furtherance of the crime of rape or kidnapping or in immediate flight therefrom.

NEW SECTION. Sec. 2. There is added to chapter 9A.32 RCW a new section to read as follows:

**AGGRAVATED MURDER IN THE FIRST DEGREE—PENALTY.** A person found guilty of aggravated murder in the first degree as defined in section 1 of this act, shall be punished by the mandatory sentence of death. Once a person is found guilty of aggravated murder in the first degree, as defined in section 1 of this act, neither the court nor the jury shall have the discretion to suspend or defer the imposition or execution of the sentence of death. Such sentence shall be automatic upon any conviction of aggravated first degree murder. The death sentence shall take place at the state penitentiary under the direction of and pursuant to arrangements made by the superintendent thereof: **PROVIDED,** That the time of such execution shall be set by the trial judge at the time of imposing sentence and as a part thereof.

NEW SECTION. Sec. 3. There is added to chapter 9A.32 RCW a new section to read as follows:

**AGGRAVATED MURDER IN THE FIRST DEGREE—LIFE IMPRISONMENT.** In the event that the governor commutes a death sentence or in the event that the death penalty is held to be unconstitutional by the United States supreme court or the supreme court of the state of Washington in any of the circumstances specified in section 1 of this act, the penalty for aggravated murder in the first degree in those circumstances shall be imprisonment in the state penitentiary for life. A person sentenced to life imprisonment under this section shall not

have that sentence suspended, deferred, or commuted by any judicial officer, and the board of prison terms and paroles shall never parole a prisoner or reduce the period of confinement nor release the convicted person as a result of any automatic good time calculation nor shall the department of social and health services permit the convicted person to participate in any work release or furlough program.

**NEW SECTION.** Sec. 4. There is added to chapter 9A.32 RCW a new section to read as follows:

If any provision of this act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected.

**NEW SECTION.** Sec. 5. The section captions as used in this act are for organizational purposes only and shall not be construed as part of the law.

Filed in Office of Secretary of State May 27, 1975.

Passed by the vote of the people at the November 4, 1975 state general election.

Proclamation signed by the Governor, December 4, 1975.

CHAPTER 10

[House Bill No. 1166]

PROPERTY TAX COLLECTION—DATES

AN ACT Relating to revenue and taxation; amending section 84.56.010, chapter 15, Laws of 1961 as amended by section 2, chapter 7, Laws of 1965 ex. sess. and RCW 84.56.010; amending section 84.56.070, chapter 15, Laws of 1961 and RCW 84.56.070; providing an expiration date; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

Section 1. Section 84.56.010, chapter 15, Laws of 1961 as amended by section 2, chapter 7, Laws of 1965 ex. sess. and RCW 84.56.010 are each amended to read as follows:

On or before the first Monday in January next succeeding the date of levy of taxes the county auditor shall issue to the county treasurer his warrant authorizing the collection of taxes listed on the tax rolls of his county as certified by the county assessor for such assessment year, and said rolls shall be preserved as a public record in the office of the county treasurer. The amount of said taxes levied and extended upon said rolls shall be charged to the treasurer in an account to be designated as treasurer's "Tax roll account" for . . . . . and said rolls with the warrants for collection shall be full and sufficient authority for the county treasurer to receive and collect all taxes therein levied: PROVIDED, That the county treasurer shall in no case collect such taxes or issue receipts for the same or enter payment or satisfaction of such taxes upon said assessment rolls before the (~~ffteenth~~) first day of (~~February~~) March following.

Sec. 2. Section 84.56.070, chapter 15, Laws of 1961 and RCW 84.56.070 are each amended to read as follows:

On the (~~ffteenth~~) first day of (~~February~~) March succeeding the levy of taxes, the county treasurer shall proceed to collect all personal property taxes. He

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STATE OF WASHINGTON

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REGULAR SESSION  
FORTY-FIFTH LEGISLATURE  
Convened January 10, 1977. Adjourned March 10, 1977.

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1st EXTRAORDINARY SESSION  
FORTY-FIFTH LEGISLATURE  
Convened March 11, 1977. Adjourned June 22, 1977.



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RICHARD O. WHITE  
Code Reviser



## CHAPTER 206

[Substitute House Bill No. 615]

## DEATH PENALTY

AN ACT Relating to the death penalty; amending section 9A.32.040, chapter 260, Laws of 1975 1st ex. sess. and RCW 9A.32.040; amending section 1, chapter 9, Laws of 1975-'76 2nd ex. sess. (Initiative Measure No. 316, section 1) and RCW 9A.32.045; amending section 2, chapter 9, Laws of 1975-'76 2nd ex. sess. (Initiative Measure No. 316, section 2) and RCW 9A.32.046; amending section 3, chapter 9, Laws of 1975-'76 2nd ex. sess. (Initiative Measure No. 316, section 3) and RCW 9A.32.047; adding a new chapter to Title 10 RCW; adding a new section to chapter 9.01 RCW; prescribing penalties; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

**NEW SECTION.** Section 1. When a defendant is charged with the crime of murder in the first degree as defined in RCW 9A.32.030(1)(a), the prosecuting attorney or the prosecuting attorney's designee shall file a written notice of intention to request a proceeding to determine whether or not the death penalty should be imposed when the prosecution has reason to believe that one or more aggravating circumstances, as set forth in RCW 9A.32.045 as now or hereafter amended, was present and the prosecution intends to prove the presence of such circumstance or circumstances in a special sentencing proceeding under section 2 of this 1977 amendatory act.

The notice of intention to request the death penalty must be served on the defendant or the defendant's attorney and filed with the court within thirty days of the defendant's arraignment in superior court on the charge of murder in the first degree under RCW 9A.32.030(1)(a). The notice shall specify the aggravating circumstance or circumstances upon which the prosecuting attorney bases the request for the death penalty. The court may, within the thirty day period upon good cause being shown, extend the period for the service and filing of notice.

If the prosecution does not serve and file written notice of intent to request the death penalty within the specified time the prosecuting attorney may not request the death penalty.

**NEW SECTION.** Sec. 2. (1) If notice of intention to request the death penalty has been served and filed by the prosecution in accordance with section 1 of this 1977 amendatory act, then a special sentencing proceeding shall be held in the event the defendant is found guilty of murder in the first degree under RCW 9A.32.030(1)(a).

(2) If the prosecution has filed a request for the death penalty in accordance with section 1 of this 1977 amendatory act, and the trial jury returns a verdict of murder in the first degree under RCW 9A.32.030(1)(a), then, at such time as the verdict is returned, the trial judge shall reconvene the same trial jury to determine in a separate special sentencing proceeding whether there are one or more aggravating circumstances and whether there are mitigating circumstances sufficient to merit leniency, as provided in RCW 9A.32.045 as now or hereafter amended, and to answer special questions pursuant to subsection (10) of this section. The special sentencing proceeding shall be held as soon as possible following the return of the jury verdict.

(3) At the commencement of the special sentencing proceeding the judge shall instruct the jury as to the nature and purpose of the proceeding and as to the consequences of its findings as provided in RCW 9A.32.040 as now or hereafter amended.

(4) In the special sentencing proceeding, evidence may be presented relating to the presence of any aggravating or mitigating circumstances as enumerated in RCW 9A.32.045 as now or hereafter amended. Evidence of aggravating circumstances shall be limited to evidence relevant to those aggravating circumstances specified in the notice required by section 1 of this 1977 amendatory act.

(5) Any relevant evidence which the court deems to have probative value may be received regardless of its admissibility under usual rules of evidence: PROVIDED, That the defendant is accorded a fair opportunity to rebut any hearsay statements: PROVIDED FURTHER, That evidence secured in violation of the Constitutions of the United States or the state of Washington shall not be admissible.

(6) Upon the conclusion of the evidence, the judge shall give the jury appropriate instructions and the prosecution and the defendant or defendant's counsel shall be permitted to present argument. The prosecution shall open and conclude the argument to the jury.

(7) The jury shall then retire to deliberate. Upon reaching a decision, the jury shall specify each aggravating circumstance that it unanimously determines to have been established beyond a reasonable doubt. In the event the jury finds no aggravating circumstances the defendant shall be sentenced pursuant to RCW 9A.32.040(3) as now or hereafter amended.

(8) If the jury finds there are one or more aggravating circumstances it must then decide whether it is also unanimously convinced beyond a reasonable doubt there are not sufficient mitigating circumstances to merit leniency. If the jury makes such a finding, it shall proceed to answer the special questions submitted pursuant to subsection (10) of this section.

(9) If the jury finds there are one or more aggravating circumstances but fails to be convinced beyond a reasonable doubt there are not sufficient mitigating circumstances to merit leniency the defendant shall be sentenced pursuant to RCW 9A.32.040(2) as now or hereafter amended.

(10) If the jury finds that there are one or more aggravating circumstances and is unanimously convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency, the jury shall answer the following questions:

(a) Did the evidence presented at trial establish the guilt of the defendant with clear certainty?

(b) Are you convinced beyond a reasonable doubt that there is a probability that the defendant would commit additional criminal acts of violence that would constitute a continuing threat to society?

The state shall have the burden of proving each question and the court shall instruct the jury that it may not answer either question in the affirmative unless it agrees unanimously.

If the jury answers both questions in the affirmative, the defendant shall be sentenced pursuant to RCW 9A.32.040(1) as now or hereafter amended.

If the jury answers either question in the negative the defendant shall be sentenced pursuant to RCW 9A.32.040(2) as now or hereafter amended.

Sec. 3. Section 9A.32.040, chapter 260, Laws of 1975 1st ex. sess. and RCW 9A.32.040 are each amended to read as follows:

Notwithstanding RCW 9A.32.030(2), any person convicted of the crime of murder in the first degree shall be sentenced ~~((to life imprisonment))~~ as follows:

(1) If, pursuant to a special sentencing proceeding held under section 2 of this 1977 amendatory act, the jury finds that there are one or more aggravating circumstances and that there are not sufficient mitigating circumstances to merit leniency, and makes an affirmative finding on both of the special questions submitted to the jury pursuant to section 2(10) of this 1977 amendatory act, the sentence shall be death;

(2) If, pursuant to a special sentencing proceeding held under section 2 of this 1977 amendatory act, the jury finds that there are one or more aggravating circumstances but fails to find that there are not sufficient mitigating circumstances to merit leniency, or the jury answers in the negative either of the special questions submitted pursuant to section 2(10) of this 1977 amendatory act, the sentence shall be life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under this subsection shall not have that sentence suspended, deferred, or commuted by any judicial officer, and the board of prison terms and paroles shall never parole a prisoner nor reduce the period of confinement. The convicted person shall not be released as a result of any type of good time calculation nor shall the department of social and health services permit the convicted person to participate in any temporary release or furlough program; and

(3) In all other convictions for first degree murder, the sentence shall be life imprisonment.

Sec. 4. Section 1, chapter 9, Laws of 1975-'76 2nd ex. sess. (Initiative Measure No. 316, section 1) and RCW 9A.32.045 are each amended to read as follows:

~~((A person is guilty of aggravated murder in the first degree when he commits murder in the first degree as defined in RCW 9A.32.030 under or accompanied by any of))~~ (1) In a special sentencing proceeding under section 2 of this 1977 amendatory act, the following shall constitute aggravating circumstances:

~~((1))~~ (a) The victim was a law enforcement officer or fire fighter and was performing his or her official duties at the time of the killing and the victim was known or reasonably should have been known to be such at the time of the killing.

~~((2))~~ (b) At the time of the act resulting in the death, the defendant was serving a term of imprisonment in a state correctional institution or had escaped or was on authorized or unauthorized leave from a state correctional institution, or was in custody in a local jail and subject to commitment to a state correctional institution.

~~((3))~~ (c) The defendant committed the murder pursuant to an agreement that ~~((he))~~ the defendant receive money or other thing of value for committing the murder.

~~((4))~~ (d) The defendant had solicited another to commit the murder and had paid or agreed to pay such person money or other thing of value for committing the murder.

~~((5))~~ The defendant committed the murder with intent to conceal the commission of a crime, or to protect or conceal the identity of any person committing the same, or with intent to delay, hinder or obstruct the administration of justice by preventing any person from being a witness or producing evidence in any investigation or proceeding authorized by law or by influencing any person's official action as a juror) (e) The murder was of a judge, juror, witness, prosecuting attorney, a deputy prosecuting attorney, or defense attorney because of the exercise of his or her official duty in relation to the defendant.

~~((6))~~ (f) There was more than one victim and the said murders were part of a common scheme or plan, or the result of a single act of the defendant.

~~((7))~~ (g) The defendant committed the murder in the course of ((or)), in furtherance of ((the crime of rape or kidnaping or in immediate flight therefrom)), or in immediate flight from the crimes of either (i) robbery in the first or second degree, (ii) rape in the first or second degree, (iii) burglary in the first degree, (iv) arson in the first degree, or (v) kidnaping in which the defendant intentionally abducted another person with intent to hold the person for ransom or reward, or as a shield or hostage, and the killing was committed with the reasonable expectation that the death of the deceased or another would result.

(h) The murder was committed to obstruct or hinder the investigative, research, or reporting activities of anyone regularly employed as a newsreporter, including anyone self-employed in such capacity.

(2) In deciding whether there are mitigating circumstances sufficient to merit leniency, the jury may consider any relevant factors, including, but not limited to, the following:

(a) The defendant has no significant history of prior criminal activity;

(b) The murder was committed while the defendant was under the influence of extreme mental disturbance;

(c) The victim consented to the homicidal act;

(d) The defendant was an accomplice in a murder committed by another person and the defendant's participation in the homicidal act was relatively minor;

(e) The defendant acted under duress or under the domination of another person;

(f) At the time of the murder, the capacity of the defendant to appreciate the criminality (wrongfulness) of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental disease or defect; and

(g) The age of the defendant at the time of the crime calls for leniency.

Sec. 5. Section 2, chapter 9, Laws of 1975-'76 2nd ex. sess. (Initiative Measure No. 316, section 2) and RCW 9A.32.046 are each amended to read as follows:

~~((A person found guilty of aggravated murder in the first degree as defined in RCW 9A.32.045, shall be punished by the mandatory sentence of death.))~~ Once a person is found guilty of ((aggravated)) murder in the first degree((, as defined in RCW 9A.32.045)) under RCW 9A.32.030(1)(a) with one or more aggravating circumstances and without sufficient mitigating circumstances to merit leniency and the jury has made affirmative findings on both of the special questions submitted pursuant to section 2(10) of this 1977 amendatory act, neither the court nor the jury shall have the discretion to suspend or defer the imposition or execution of the

sentence of death. (~~Such sentence shall be automatic upon any conviction of aggravated first degree murder. The death sentence shall take place at the state penitentiary under the direction of and pursuant to arrangements made by the superintendent thereof. PROVIDED, That~~) The time of such execution shall be set by the trial judge at the time of imposing sentence and as a part thereof.

Sec. 6. Section 3, chapter 9, Laws of 1975-'76 2nd ex. sess. (Initiative Measure No. 316, section 3) and RCW 9A.32.047 are each amended to read as follows:

In the event that the governor commutes a death sentence or in the event that the death penalty is held to be unconstitutional by the United States supreme court or the supreme court of the state of Washington (~~in any of the circumstances specified in RCW 9A.32.045;~~) the penalty under RCW 9A.32.046 (for aggravated murder in the first degree in those circumstances) shall be imprisonment in the state penitentiary for life without possibility of release or parole. A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer, and the board of prison terms and paroles shall never parole a prisoner (~~or~~) nor reduce the period of confinement (~~nor release the~~). The convicted person shall not be released as a result of any (~~automatic~~) type of good time calculation nor shall the department of social and health services permit the convicted person to participate in any (~~work~~) temporary release or furlough program.

NEW SECTION. Sec. 7. (1) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the supreme court of Washington. The clerk of the trial court within ten days after receiving the transcript, shall transmit the entire record and transcript to the supreme court of Washington together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of the defendant's attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the supreme court of Washington.

(2) The supreme court of Washington shall consider the punishment as well as any errors enumerated by way of appeal.

(3) With regard to the sentence, the court shall determine:

(a) Whether the evidence supports the jury's findings; and

(b) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(4) Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(5) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(a) Affirm the sentence of death; or

(b) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the supreme court of Washington in its decision and the extracts prepared therefor shall be provided to the resentencing judge for the judge's consideration.

(6) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

NEW SECTION. Sec. 8. There is added to chapter 9.01 RCW a new section to read as follows:

No person in the state shall be placed in legal jeopardy of any kind whatsoever for protecting by any reasonable means necessary, himself, his family, or his real or personal property, or for coming to the aid of another who is in imminent danger of or the victim of aggravated assault, armed robbery, holdup, rape, murder, or any other heinous crime.

When a substantial question of self defense in such a case shall exist which needs legal investigation or court action for the full determination of the facts, and the defendant's actions are subsequently found justified under the intent of this section, the state of Washington shall indemnify or reimburse such defendant for all loss of time, legal fees, or other expenses involved in his defense.

NEW SECTION. Sec. 9. Sections 1, 2, and 7 of this 1977 amendatory act shall constitute a new chapter in Title 10 RCW.

NEW SECTION. Sec. 10. If any provision of this 1977 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 11. This 1977 amendatory act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

Passed the House June 3, 1977.

Passed the Senate June 2, 1977.

Approved by the Governor June 10, 1977.

Filed in Office of Secretary of State June 10, 1977.

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## CHAPTER 207

[Substitute House Bill No. 625]

### CENTRAL CREDIT UNIONS

AN ACT Relating to central credit unions; creating new sections; and adding a new chapter to Title 31 RCW.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Section 1. A central credit union may be organized and operated under this chapter. The central credit union shall have all the rights and powers granted in and be subject to all provisions of chapter 31.12 RCW which are not inconsistent with this chapter. Such credit union shall use the term "central" in its official name. Any central credit union in existence on the effective date of this act in the state of Washington shall operate under the provisions of this chapter.

NEW SECTION. Sec. 2. Notwithstanding any other provision of law, the central credit union may adopt bylaws enabling it to exercise any of the powers, as

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**SESSION LAWS**  
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**STATE OF WASHINGTON**

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REGULAR SESSION  
FORTY-SEVENTH LEGISLATURE  
Convened January 12, 1981. Adjourned April 26, 1981.

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1st EXTRAORDINARY SESSION  
FORTY-SEVENTH LEGISLATURE  
Convened April 28, 1981. Adjourned April 28, 1981.



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DENNIS W. COOPER  
Code Reviser

(3) Section 3, chapter 17, Laws of 1967, section 275, chapter 141, Laws of 1979 and RCW 72.65.030; and

(4) Section 4, chapter 17, Laws of 1967, section 277, chapter 141, Laws of 1979 and RCW 72.65.040.

NEW SECTION. Sec. 39. The following acts or parts of acts are each repealed, effective July 1, 1988:

(1) Section 1, chapter 47, Laws of 1947, section 1, chapter 114, Laws of 1935 and RCW 9.95.001;

(2) Section 9, chapter 340, Laws of 1955, section 1, chapter 32, Laws of 1952, section 9, chapter 98, Laws of 1969, section 8, chapter 34, Laws of 1975-'76 2nd ex. sess. and RCW 9.95.003;

(3) Section 10, chapter 340, Laws of 1955, section 2, chapter 32, Laws of 1959 and RCW 9.95.005; and

(4) Section 3, chapter 32, Laws of 1959, section 1, chapter 63, Laws of 1975-'76 2nd ex. sess. and RCW 9.95.007.

NEW SECTION. Sec. 40. Sections 1 through 23 and 25 through 29 of this act shall constitute a new chapter in Title 9 RCW.

NEW SECTION. Sec. 41. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 42. There is appropriated from the state general fund to the sentencing guidelines commission for the biennium ending June 30, 1983, the sum of six hundred eighty-five thousand dollars, or so much thereof as may be necessary, to carry out the purposes of this act.

Passed the House April 23, 1981.

Passed the Senate April 20, 1981.

Approved by the Governor May 14, 1981.

Filed in Office of Secretary of State May 14, 1981.

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## CHAPTER 138

[Substitute House Bill No. 76]

MURDER, SENTENCING

AN ACT Relating to capital punishment; amending section 9A.32.040, chapter 260, Laws of 1975 1st ex. sess. as amended by section 3, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.040; adding a new chapter to Title 10 RCW; repealing section 1, chapter 9, Laws of 1975-'76 2nd ex. sess., section 4, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.045; repealing section 2, chapter 9, Laws of 1975-'76 2nd ex. sess., section 5, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.046; repealing section 3, chapter 9, Laws of 1975-'76 2nd ex. sess., section 6, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.047; repealing section 87, page 115, Laws of 1854, section 223, page 231, Laws of 1873, section 1062, Code of 1881 and RCW 10.49.010; repealing section 8, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.040; repealing section 152, page 125, Laws of 1854, section 291, page 152, Laws of 1860, section 288, page 244, Laws of 1873, section 1130, Code of 1881, section 1, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.050; repealing section

2, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.060; repealing section 6, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.070; repealing section 3, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.080; repealing section 153, page 125, Laws of 1854, section 289, page 244, Laws of 1873, section 1131, Code of 1881 and RCW 10.70.090; repealing section 4, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.100; repealing section 5, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.110; repealing section 155, page 125, Laws of 1854, section 291, page 245, Laws of 1873, section 1133, Code of 1881 and RCW 10.70.120; repealing section 154, page 125, Laws of 1854, section 1132, Code of 1881, section 7, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.130; repealing section 1, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.010; repealing section 2, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.020; repealing section 7, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.030; repealing section 10, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.900; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

**NEW SECTION.** Section 1. No rule promulgated by the supreme court of Washington pursuant to RCW 2.04.190 and 2.04.200, now or in the future, shall be construed to supersede or alter any of the provisions of this chapter.

**NEW SECTION.** Sec. 2. A person is guilty of aggravated first degree murder if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist:

(1) The victim was a law enforcement officer, corrections officer, or fire fighter who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the person to be such at the time of the killing;

(2) At the time of the act resulting in the death, the person was serving a term of imprisonment, had escaped, or was on authorized or unauthorized leave in or from a state facility or program for the incarceration or treatment of persons adjudicated guilty of crimes;

(3) At the time of the act resulting in death, the person was in custody in a county or county-city jail as a consequence of having been adjudicated guilty of a felony;

(4) The person committed the murder pursuant to an agreement that he or she would receive money or any other thing of value for committing the murder;

(5) The person solicited another person to commit the murder and had paid or had agreed to pay money or any other thing of value for committing the murder;

(6) The victim was:

(a) A judge; juror or former juror; prospective, current, or former witness in an adjudicative proceeding; prosecuting attorney; deputy prosecuting attorney; defense attorney; a member of the board of prison terms and paroles; or a probation or parole officer; and

(b) The murder was related to the exercise of official duties performed or to be performed by the victim;

(7) The person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime;

(8) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person;

(9) The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes:

(a) Robbery in the first or second degree;

(b) Rape in the first or second degree;

(c) Burglary in the first or second degree;

(d) Kidnaping in the first degree; or

(e) Arson in the first degree;

(10) The victim was regularly employed or self-employed as a newsreporter and the murder was committed to obstruct or hinder the investigative, research, or reporting activities of the victim.

**NEW SECTION.** Sec. 3. (1) Except as provided in subsection (2) of this section, any person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer and the board of prison terms and paroles or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation. The department of social and health services or its successor or any executive official may not permit such prisoner to participate in any sort of release or furlough program.

(2) If, pursuant to a special sentencing proceeding held under section 5 of this act, the trier of fact finds that there are not sufficient mitigating circumstances to merit leniency, the sentence shall be death.

**NEW SECTION.** Sec. 4. (1) If a person is charged with aggravated first degree murder as defined by section 2 of this act, the prosecuting attorney shall file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.

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

accept a plea of guilty to the charge of aggravated first degree murder or any lesser included offense.

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

**NEW SECTION.** Sec. 5. (1) If a defendant is adjudicated guilty of aggravated first degree murder, whether by acceptance of a plea of guilty, by verdict of a jury, or by decision of the trial court sitting without a jury, a special sentencing proceeding shall be held if a notice of special sentencing proceeding was filed and served as provided by section 4 of this act. No sort of plea, admission, or agreement may abrogate the requirement that a special sentencing proceeding be held.

(2) A jury shall decide the matters presented in the special sentencing proceeding unless a jury is waived in the discretion of the court and with the consent of the defendant and the prosecuting attorney.

(3) If the defendant's guilt was determined by a jury verdict, the trial court shall reconvene the same jury to hear the special sentencing proceeding. The proceeding shall commence as soon as practicable after completion of the trial at which the defendant's guilt was determined. If, however, unforeseen circumstances make it impracticable to reconvene the same jury to hear the special sentencing proceeding, the trial court may dismiss that jury and convene a jury pursuant to subsection (4) of this section.

(4) If the defendant's guilt was determined by plea of guilty or by decision of the trial court sitting without a jury, or if a retrial of the special sentencing proceeding is necessary for any reason including but not limited to a mistrial in a previous special sentencing proceeding or as a consequence of a remand from an appellate court, the trial court shall impanel a jury of twelve persons plus whatever alternate jurors the trial court deems necessary. The defense and prosecution shall each be allowed to peremptorily challenge twelve jurors. If there is more than one defendant, each defendant shall be allowed an additional peremptory challenge and the prosecution shall be allowed a like number of additional challenges. If alternate jurors are selected, the defense and prosecution shall each be allowed one peremptory challenge for each alternate juror to be selected and if there is more than one defendant each defendant shall be allowed an additional peremptory challenge for each alternate juror to be selected and the prosecution shall be allowed a like number of additional challenges.

**NEW SECTION.** Sec. 6. (1) At the commencement of the special sentencing proceeding, the trial court shall instruct the jury as to the nature and purpose of the proceeding and as to the consequences of its decision, as provided in section 3 of this act.

(2) At the special sentencing proceeding both the prosecution and defense shall be allowed to make an opening statement. The prosecution shall first present evidence and then the defense may present evidence. Rebuttal

evidence may be presented by each side. Upon conclusion of the evidence, the court shall instruct the jury and then the prosecution and defense shall be permitted to present argument. The prosecution shall open and conclude the argument.

(3) The court shall admit any relevant evidence which it deems to have probative value regardless of its admissibility under the rules of evidence, including hearsay evidence and evidence of the defendant's previous criminal activity regardless of whether the defendant has been charged or convicted as a result of such activity. The defendant shall be accorded a fair opportunity to rebut or offer any hearsay evidence.

In addition to evidence of whether or not there are sufficient mitigating circumstances to merit leniency, if the jury sitting in the special sentencing proceeding has not heard evidence of the aggravated first degree murder of which the defendant stands convicted, both the defense and prosecution may introduce evidence concerning the facts and circumstances of the murder.

(4) Upon conclusion of the evidence and argument at the special sentencing proceeding, the jury shall retire to deliberate upon the following question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"

In order to return an affirmative answer to the question posed by this subsection, the jury must so find unanimously.

NEW SECTION. Sec. 7. In deciding the question posed by section 6(4) of this act, the jury, or the court if a jury is waived, may consider any relevant factors, including but not limited to the following:

(1) Whether the defendant has or does not have a significant history, either as a juvenile or an adult, of prior criminal activity;

(2) Whether the murder was committed while the defendant was under the influence of extreme mental disturbance;

(3) Whether the victim consented to the act of murder;

(4) Whether the defendant was an accomplice to a murder committed by another person where the defendant's participation in the murder was relatively minor;

(5) Whether the defendant acted under duress or domination of another person;

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

(7) Whether the age of the defendant at the time of the crime calls for leniency; and

(8) Whether there is a likelihood that the defendant will pose a danger to others in the future.

### **Declaration of Service**

I hereby certify that on the 18th day of June 2019 I electronically filed the foregoing SUPPLEMENTAL BRIEF OF PETITIONER with the Clerk of the Court using the Appellate Courts Portal which will send notification of such filing and an electronic copy to attorneys of record for the Respondent and any other party.

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

Dated this 18th day of June 2019 at Seattle, WA.

s/ Neil M. Fox

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WSBA No. 15277  
Attorney for Petitioner

**LAW OFFICE OF NEIL FOX PLLC**

**June 18, 2019 - 9:17 AM**

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Address:  
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