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STATE OF WASHINGTON

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No. 62554-3-1

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

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JONATHAN KUHN, an individual; and  
JOAN KUHN and DAN KUHN, husband and wife  
and their marital community,  
Respondents,

v.

BILL S. SCHNALL, M.D. and JANET G. SCHNALL,  
husband and wife and their marital community; and  
RICHMOND PEDIATRIC CLINIC, INC., P.S.,  
a Washington professional service corporation,  
Appellants.

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JEFF HAWLEY, an individual; PAUL HAWLEY, an individual;  
and RICH HAWLEY and BEV HAWLEY, husband and wife,  
Respondents,

v.

BILL S. SCHNALL, M.D., and RICHMOND PEDIATRIC CLINIC,  
INC., P.S., a Washington professional service corporation,  
Appellants.

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DANIEL FEWEL, an individual; and  
KATHLEEN FEWEL and JOE FEWEL, husband and wife,  
Respondents,

v.

BILL S. SCHNALL, M.D. and JANET G. SCHNALL,  
husband and wife and their marital community; and  
RICHMOND PEDIATRIC CLINIC, INC., P.S.,  
a Washington professional service corporation,  
Appellants.

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**BRIEF OF RESPONDENTS**

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Ronald S. Bemis, WSBA #7311  
Anne M. Bremner, WSBA #13269  
Peter Mullenix, WSBA #37171  
STAFFORD FREY COOPER  
601 Union Street, Suite 3100  
Seattle, WA 98101-1374  
Tel. (206) 623-9900

ORIGINAL

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## I. Introduction

The defendants are correct that “this was no ordinary trial”.<sup>1</sup> In an ordinary medical malpractice trial, a juror who is under oath does not fail to disclose that she has been the defendant in a medical malpractice case, or that her husband has twice been such a defendant. In an ordinary sexual abuse case, a juror who is asked whether she has ever been sexually abused does not fail to disclose that fact, then remember that she *has* been abused, immediately enter psychotherapy for that abuse, fail to disclose these developments to the judge while alternates were available, and then inject her experiences into the jury’s deliberations. In an ordinary trial, defense counsel does not provide the jury with caselaw containing an instruction the trial court has already rejected. And in an ordinary trial, jurors do not review media stories with information that has been excluded by the trial court and then discuss that information during deliberations.

Because this was no ordinary trial, the trial court declared: “The Court has no confidence in the verdict rendered by the jury.”<sup>2</sup> This Court is required to give the utmost deference to that discretionary decision, and the appellants have not challenged a single finding of fact. This Court should affirm.

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<sup>1</sup> Brief of Respondent at 28.

<sup>2</sup> Conclusion of Law 2(a).

## **II. Issues Pertaining to Assignments of Error**

1. A trial court must order a new trial if a juror failed to disclose material information during jury selection and disclosure would have provided a valid basis for a challenge for cause. In a case alleging medical malpractice, could a trial court act within its discretion in excusing a juror for cause when:

- that juror's husband was had been sued at least twice for medical malpractice,
- that juror had herself been named as a defendant in one of those malpractice cases,
- that juror failed to disclose these facts in jury selection despite direct questions that should have elicited disclosure, and
- the nondisclosure prevented the trial court from having the opportunity to confirm with the juror that she would be able to set her biases aside as she heard the evidence and decided the issues?

2. A trial court must order a new trial if a juror failed to disclose material information during jury selection and disclosure would have provided a valid basis for a challenge for cause. In a case alleging sexual abuse by a trusted authority figure, could a trial court act within its discretion in excusing a juror for cause when:

- that juror had been the victim of sexual abuse by a trusted authority figure,
- that juror failed to disclose these facts in jury selection despite direct questions that should have elicited disclosure,

- the abuse of the juror was so intense that, during the trial, her memories of the abuse resurfaced and she immediately entered psychotherapy,
- that juror nonetheless again failed to inform the trial court about the abuse, at a time when alternates were available, and
- the nondisclosure prevented the trial court from having the opportunity to confirm with the juror that she would be able to set her biases aside as she heard the evidence and decided the issues?

3. When a juror injects information that she should have disclosed in jury selection into deliberations, a new trial must be granted unless there is no reasonable doubt that the extrinsic evidence did not contribute to the verdict. Must a trial court conclude beyond a reasonable doubt that a juror's injection of her experiences into deliberations did not contribute to the verdicts when:

- those experiences bore directly on the key liability and damages issues in the case, and
- the evidence conflicted as to the timing and extent of the juror's injection of her nondisclosed experience with sexual abuse?

4. Should this Court affirm the trial court's discretionary decision to order a new trial on the plaintiff's claim for attorney fees and costs when:

- the defendants' dispute about the effect of the undisputed misconduct relies on statements that inhere in the verdict, and
- the only other arguments the defendants make on appeal pertaining to this issue have been stricken from this appeal?

### **III. Statement of the Case**

The facts related the jury's misconduct are described in detail in the trial court's unchallenged findings of fact.<sup>3</sup> Although this appeal primarily concerns that misconduct, the defendants have taken the position that this Court should reverse because "there is nothing in the result about which the plaintiff can validly complain."<sup>4</sup> Because the defendants have taken that position, the plaintiffs provide a detailed description of the abuse in this case.

#### **A. Bill Schnall: respected neighborhood pediatrician.**

The Richmond Beach community is in Shoreline, Washington, just north of Seattle. Bill Schnall lived in Richmond Beach since 1976, and he began practicing medicine at the Richmond Pediatric Clinic in that same year.<sup>5</sup> Over the years, Schnall built an impressive pediatric reputation at the Clinic. That reputation brought three Richmond Beach families to the Clinic and, specifically, to Schnall.<sup>6</sup> This case concerns Schnall's abuse of his position as the pediatrician of four children in those three families, abuse that began when those children reached adolescence.

#### **B. Schnall abuses Jeff Hawley from age 13 to age 21.**

When Jeff Hawley was growing up, his father worked at Boeing, and his mother home-schooled Jeff and his younger brother Paul. Up until the time that Jeff was approximately 12

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<sup>3</sup> See Clerk's Papers at 4477-4483, attached as Appendix A.

<sup>4</sup> Brief of Appellant at 27.

<sup>5</sup> Report of Proceedings (7/1/08) at 210

<sup>6</sup> Report of Proceedings (6/19/08) at 14-15, (6/14/08) at 163.

years old, the family was very close, and very happy.<sup>7</sup> Since Jeff can remember, Schnall has been his pediatrician.

At some point when Jeff was 12 to 14 years old, his parents stopped coming into the examination room for his checkups with Schnall. Prior to that time, Schnall's examinations of Jeff's genitals had been quick and nonintrusive. Schnall would just pull the band of Jeff's underwear back and "take a quick peek."<sup>8</sup>

That changed drastically once Jeff was alone with Schnall. During that first exam, Schnall actually took Jeff's penis in his ungloved hands and moved it around.<sup>9</sup> Jeff estimates that Schnall did so for two full minutes.<sup>10</sup> Schnall also took Jeff's pulse by putting his hand near Jeff's genitals.<sup>11</sup> The examination was so intense that Jeff had to concentrate so he could avoid an erection.<sup>12</sup>

Jeff was extremely uncomfortable before his next physical exam, when he was approximately 14 years old. But Schnall again manipulated Jeff's penis for a very long time.<sup>13</sup> He then asked Jeff questions about masturbation,<sup>14</sup> what his penis looked like when erect, what his penis looked like compared to other guys, and whether he ejaculated when he masturbated.<sup>15</sup>

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<sup>7</sup> Report of Proceedings at (6/3/08) at 157-158.

<sup>8</sup> *Id.* at 162.

<sup>9</sup> Report of Proceedings (6/4/2008) at 20.

<sup>10</sup> *Id.* at 25.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 23.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

Jeff started using drugs by approximately age 15.<sup>16</sup> He had another physical near that time. Again, Schnall gave a prolonged and hands-on examination of Jeff's penis and questioned him about masturbation. He also told Jeff that he could talk to Schnall about drug use if Jeff wanted. Jeff disclosed his drug use to Schnall.<sup>17</sup> Jeff soon began using even more serious drugs (including cocaine and methamphetamine), and made suicide references to a friend.<sup>18</sup> When he was 17, his parents filed an at-risk youth petition, and he was taken to a hospital in Oregon.<sup>19</sup> From there, he was committed to the Spring Creek behavior modification facility in Montana.<sup>20</sup>

Jeff was required to stay at Spring Creek until he was 18,<sup>21</sup> and he voluntarily stayed 6 months more. But on one visit home before his 18<sup>th</sup> birthday, Jeff did not want to go back.<sup>22</sup> Jeff's mother asked Schnall to come talk Jeff into returning, and Schnall came to the family home and did so.<sup>23</sup> However, when Jeff went back to Spring Creek, Schnall wrote Jeff letters that undermined Spring Creek by sending Jeff articles that were critical of the organization that ran the facility.<sup>24</sup> Jeff eventually left Spring Creek—after turning 18 but before completing the program.

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<sup>16</sup> *Id.* at 27.

<sup>17</sup> *Id.* at 27.

<sup>18</sup> *Id.* at 28-29.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 28-31.

<sup>21</sup> *Id.* at 33.

<sup>22</sup> *Id.* at 35.

<sup>23</sup> *Id.* at 36.

<sup>24</sup> *Id.* at 64.

When Jeff came back from Spring Creek to live with his parents, Schnall began to contact Jeff by telephone and email often.<sup>25</sup> These contacts often focused on masturbation.<sup>26</sup> Schnall asked Jeff about masturbation three to four times per week.<sup>27</sup> Schnall even provided Jeff with 10 sample packets of Viagra.<sup>28</sup>

Schnall also prescribed Jeff antidepressants.<sup>29</sup> Notwithstanding Jeff's history with drugs, Schnall told Jeff that he could drink alcohol a couple times per month and smoke pot a couple times per month.<sup>30</sup> Once, Schnall convinced Jeff's brother Paul to urinate into a cup for Jeff, so Jeff could pass a drug test.<sup>31</sup>

Schnall also began buying things for Jeff. He paid for Jeff's apartment and community college tuition.<sup>32</sup> He bought Jeff clothing, and even provided Jeff with a credit card.<sup>33</sup> He bought Jeff a motorcycle.<sup>34</sup> At one point, Jeff got into a car accident and did not have insurance. Schnall recommended that Jeff file for bankruptcy, against his parents' wishes, and paid for Jeff to see a bankruptcy lawyer.<sup>35</sup> Schnall told Jeff to keep this secret from

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<sup>25</sup> *Id.* at 40, 113.

<sup>26</sup> *Id.* at 110-111.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 115.

<sup>29</sup> *Id.* at 40.

<sup>30</sup> *Id.* at 54.

<sup>31</sup> *Id.* at 119.

<sup>32</sup> *Id.* at 46.

<sup>33</sup> *Id.* at 46-47.

<sup>34</sup> *Id.* at 62.

<sup>35</sup> *Id.* at 43-45.

Schnall's wife.<sup>36</sup> When Jeff was shy about asking for money, Schnall would say: "you can tell me how often you masturbate . . . why can't you ask me for a few bucks?"<sup>37</sup>

These gifts corresponded with an increase in physical intimacy. Jeff went to Schnall's house at least once per week, and when he was there, Schnall requested shirtless backrubs on his bed. The backrubs lasted 5 to 10 minutes. Schnall would sometimes tell Jeff to lie down so he could massage Jeff.<sup>38</sup> Schnall brought up masturbation approximately 30 times during these backrubs.<sup>39</sup>

Jeff began to trust Schnall much more than his family.<sup>40</sup> Schnall told Jeff that Jeff's problems were the fault of his parents and brother.<sup>41</sup> Schnall told Jeff to stay away from his family.<sup>42</sup>

As he distanced Jeff from his family, Schnall began to ratchet up his control over Jeff's personal life. Jeff was required to give Schnall access to his email passwords.<sup>43</sup> He had to promise Schnall that he would not have sex.<sup>44</sup> He had to take care of his physique, for which Schnall bought him a gym membership.<sup>45</sup>

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 111.

<sup>38</sup> *Id.* at 75-77.

<sup>39</sup> Report of Proceedings (6/4/08) at 114.

<sup>40</sup> *Id.* at 53.

<sup>41</sup> Report of Proceedings (6/5/08) at 139.

<sup>42</sup> *Id.*

<sup>43</sup> Report of Proceedings (6/4/08) at 59.

<sup>44</sup> *Id.* at 54.

<sup>45</sup> *Id.* at 61.

Schnall made him agree, in writing, that Schnall could play several roles in his life: doctor, mentor, psychiatrist, college counselor, financial advisor, social advisor, drug and alcohol counselor, unrelenting opinion giver, kick in the pants, and Dad.<sup>46</sup>

Schnall made Jeff agree that, if he misbehaved, Schnall could punish him. One of the agreed punishments was what Schnall called “mopping.”<sup>47</sup> In a mopping, Jeff would be required to strip down to his boxers and be hosed down by Schnall.<sup>48</sup>

It was “mopping” that actually led to the end of Jeff’s relationship with Schnall. Jeff had gotten into an argument with his girlfriend, the police were called, and Jeff was arrested.<sup>49</sup> When Jeff got out of jail, Schnall ordered Jeff to come to his house. They went to Schnall’s backyard, and Schnall hugged Jeff and comforted him. Then Schnall’s wife told them she was leaving to run an errand.<sup>50</sup> Once she was gone, Schnall told Jeff: “You fucked me.”<sup>51</sup> He told Jeff he was “fucking stupid”<sup>52</sup> and then demanded: “Take off your fucking clothes.”<sup>53</sup> When Jeff protested, Schnall said: “If you don’t take your fucking clothes off right now, we are done. You are

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<sup>46</sup> *Id.* at 48; Exhibit 99.

<sup>47</sup> *Id.* at 78.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 83.

<sup>50</sup> *Id.* at 87.

<sup>51</sup> *Id.* at 88.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 89.

cut off.”<sup>54</sup> Jeff refused, and Schnall ordered him to give back the credit card and telephone. Jeff has not contacted Schnall since.

Shortly after this incident, Schnall’s similar behavior with another of his patients<sup>55</sup> was revealed to the Medical Quality Assurance Commission. That investigation eventually led Jeff to contact the Commission about Schnall. The Commission’s investigators ordered Schnall not to contact Jeff,<sup>56</sup> but Schnall repeatedly tried to do so. He once tried to surprise Jeff at home. He admitted as much in a letter: “When I go downtown to the Paramount, I get a flash of you in that apartment nearby, and once I stopped in to see if you were still in that same apartment. Obviously not, when some other dude answered your buzzer.”<sup>57</sup>

Schnall’s abuse has led to many continuing problems in Jeff’s life. He has “extreme difficulty” with his family.<sup>58</sup> He has difficulty developing intimate relationships because he feels that potential friends have “some ulterior motive.”<sup>59</sup> He has difficulty trusting any older man or person with authority.<sup>60</sup> His credit has been destroyed by the bankruptcy.<sup>61</sup> Though he has seen

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<sup>54</sup> *Id.* at 89-90.

<sup>55</sup> See Exhibit 3 (allegations related to Patient One).

<sup>56</sup> *Id.* at 128.

<sup>57</sup> *Id.* at 129.

<sup>58</sup> *Id.* at 135.

<sup>59</sup> *Id.* at 136.

<sup>60</sup> *Id.* at 25.

<sup>61</sup> *Id.*

psychiatrists and takes anxiety medication,<sup>62</sup> his difficulty trusting doctors makes resolving his issue through therapy very difficult.<sup>63</sup>

**C. Schnall abuses Paul Hawley from age 12 to age 16.**

Paul Hawley is Jeff's younger brother. Like Jeff, Paul's checkups with Schnall began to change the moment his parents stopped coming into the examination room with him. The first change was that Paul now had to pull his underwear down.<sup>64</sup> Then Schnall without gloves, started "just touching and moving things around and feeling everything."<sup>65</sup> This lasted 15 to 20 seconds.<sup>66</sup> Moreover, even though Paul's pulse had been taken by the nurse, Schnall checked Paul's pulse, again, on Paul's groin.<sup>67</sup>

The other change in the parent-excluded checkups was that Schnall began asking Paul about masturbation. The questions were many: "Do you do it, do you like it, what do you think about, do you think about men, do you think about women, do you do it in the locker room, after a shower, before a shower, how many times a day do you do it, do you think about animals, do you think about any other stuff?"<sup>68</sup> Paul went to Schnall 25-30 times after his

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<sup>62</sup> *Id.* at 18.

<sup>63</sup> *Id.*

<sup>64</sup> Report of Proceedings (6/5/08) at 152.

<sup>65</sup> *Id.* at 152-153.

<sup>66</sup> *Id.* at 153. 154.

<sup>67</sup> *Id.* at 151, 154.

<sup>68</sup> *Id.* at 163.

parents stopped coming into the room during checkups. Schnall questioned him about masturbation each time.<sup>69</sup>

In fact, Schnall's interactions with Paul were sexualized without regard to the reason for Paul's visit. When Paul went to Schnall because he was sick, Schnall asked him about masturbation.<sup>70</sup> When Paul hurt his ankle on a trampoline, Schnall did a bare hands examination of Paul's penis.<sup>71</sup>

One time, Schnall told Paul that Paul had a medical condition in his testicles.<sup>72</sup> Schnall told Paul he wanted to show him, so Schnall again grabbed Paul's penis and "started feeling around."<sup>73</sup> Schnall stared Paul right in the eyes as he was doing this.<sup>74</sup> Though he tried to avoid it, Paul got an erection.<sup>75</sup>

Paul was humiliated by these examinations, but he was too ashamed to tell anyone.<sup>76</sup> Instead, he started cutting himself.<sup>77</sup> He did this approximately 20 times over a two year period.<sup>78</sup> He also did other things to make himself feel pain. For instance, he would "scrape [his] knuckles against walls," so that his knuckles bled.<sup>79</sup>

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<sup>69</sup> Report of Proceedings (6/10/08) at 126.

<sup>70</sup> *Id.* at 167.

<sup>71</sup> Report of Proceedings (6/10/08) at 142.

<sup>72</sup> *Id.* at 156.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 157.

<sup>75</sup> *Id.* at 156.

<sup>76</sup> Report of Proceedings (6/5/08) at 158.

<sup>77</sup> *Id.* at 168.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 169.

Paul also suffered from Schnall's attempts to separate Jeff from the family. Once, after a family fight, Schnall wrote a letter to Paul and his parents. Schnall told the family that Schnall planned to protect Jeff from *them*:

Whether you like it or not and whether you approve or not, I have arbitrarily and hopefully tentatively taken on the role of protector, mediator, intermediary. . . . I at this point have a huge investment in him and plan to protect that investment . . . in any way and in every way I can.<sup>80]</sup>

In the letter, Schnall blamed Paul for the family's problems: "Paul is equally, if not more, to blame than the others."<sup>81</sup>

Schnall also had Paul keep secrets about Jeff from their parents. For instance, Schnall once convinced Paul to help Jeff fool a drug test.<sup>82</sup> Schnall had Jeff tell Paul not to let their parents find out about the money Schnall was giving Jeff.<sup>83</sup> And Schnall told Paul that "everyone in my family was crazy."<sup>84</sup>

Paul still has significant difficulty putting Schnall's abuse behind him. The primary difficulty, other than the family problems, is a difficulty in relationships with women.<sup>85</sup> He does not want to get close to anybody because he is "scared of what they might think about me if they find out anything."<sup>86</sup> The thought of sex gives

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<sup>80</sup> *Id.* at 173.

<sup>81</sup> *Id.* at 172.

<sup>82</sup> *Id.* at 180.

<sup>83</sup> *Id.* at 205.

<sup>84</sup> *Id.* at 195-196.

<sup>85</sup> Report of Proceedings (6/10/08) at 157.

<sup>86</sup> *Id.*

Paul a “disgusting feeling”.<sup>87</sup> Having sex makes him feel “the same exact things” he was feeling when Schnall examined him.<sup>88</sup>

**D. Schnall abuses Jonathan Kuhn from age 13 to age 18.**

Jonathan Kuhn is the son of a teacher and a lawyer.<sup>89</sup> As a young child, he was very involved in the arts, music, and student government.<sup>90</sup> Of these, he felt the strongest pull toward acting.<sup>91</sup> He constantly participated in theater as a child.<sup>92</sup>

Jonathan’s parents stopped coming into his checkups with Schnall when he was approximately 13 years old.<sup>93</sup> The first of those that he remembers was a physical for eighth-grade track.<sup>94</sup> Before the exam, Schnall asked him whether he wore underwear, “because some boys don’t wear underwear.”<sup>95</sup> Schnall then had him strip to his boxer shorts. After a scoliosis check, Schnall pulled Jonathan’s boxers down to examine his penis.<sup>96</sup> Schnall asked Jonathan what stage of puberty he thought he was in and commented on the shape and size of Jonathan’s pubic hair and penis, and he moved Jonathan’s penis around with his bare hands.<sup>97</sup> Jonathan estimates that he had 60 of these sexualized

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<sup>87</sup> *Id.* at 158.

<sup>88</sup> Report of Proceedings (6/5/08) at 195.

<sup>89</sup> *Id.* at 188.

<sup>90</sup> *Id.* at 195.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 194.

<sup>94</sup> *Id.* at 200.

<sup>95</sup> *Id.* at 201.

<sup>96</sup> *Id.* at 202.

<sup>97</sup> *Id.* at 203, 117; Report of Proceedings (6/11/08) at 42.

exams overall.<sup>98</sup> During approximately 12 of those, Jonathan got an erection.<sup>99</sup>

Schnall soon began asking Jonathan about masturbation during the checkups.<sup>100</sup> He asked Jonathan what he fantasized about when he masturbated, and then whether he fantasized “about guys.”<sup>101</sup> Jonathan, who is gay, resisted answering Schnall, but Schnall persisted.<sup>102</sup> Over the years, Jonathan and Schnall had 50-75 conversations about masturbation.<sup>103</sup>

Schnall began to suggest to Jonathan that Jonathan was gay, before Jonathan ever realized that fact. Schnall said: “I think you’re gay. You are a fantastic actor, so you could be lying to me, you could be lying to yourself. I know you better than your parents do.”<sup>104</sup> During these sessions, Jonathan eventually disclosed to Schnall that he was, in fact, gay.<sup>105</sup>

Doing so was like “[s]etting a wildfire” with Schnall, as it became Schnall’s primary focus.<sup>106</sup> Schnall demanded to know about Jonathan’s sex life: “Are you having sex, who are you having sex with, what are the names of these people, how often are you

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<sup>98</sup> *Id.* at 120.

<sup>99</sup> *Id.*

<sup>100</sup> Report of Proceedings (6/10/08) at 204.

<sup>101</sup> Report of Proceedings (6/11/08) at 42.

<sup>102</sup> *Id.*

<sup>103</sup> Report of Proceedings (6/10/08) at 206.

<sup>104</sup> *Id.*

<sup>105</sup> Report of Proceedings (6/10/08) at 211.

<sup>106</sup> *Id.*

having sex, how are you meeting these people?”<sup>107</sup> He told Jonathan that he did not have to tell his parents about his sexual activity, only Schnall.<sup>108</sup> Lying to his parents, and others, was acceptable so long as Jonathan was truthful to Schnall.<sup>109</sup>

Schnall continually warned Jonathan about how much worse his life would be as a gay young man. He told Jonathan that he would have “a bunch of promiscuous sex” and contract “innumerable STDs.”<sup>110</sup> He told Jonathan that just from being around his sex partners, he would contract diseases from things like touching doorknobs, sharing drinks, and shaking hands.<sup>111</sup> He told Jonathan that he would be exiled from his family, friends, peers, and community.<sup>112</sup> Because there was “no way around” these consequences, he said Jonathan “should experiment”.<sup>113</sup> Meanwhile, Schnall told Jonathan’s parents he would “bet his house” that Jonathan was not gay.<sup>114</sup>

Schnall began to take more control over Jonathan’s life. He demanded Jonathan’s cellular telephone number and sent him constant emails.<sup>115</sup> When Jonathan failed to call Schnall, Schnall threatened him over email: “Maybe you need a complete physical

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<sup>107</sup> *Id.* at 211-212.

<sup>108</sup> *Id.*

<sup>109</sup> Report of Proceedings (6/11/08) at 124.

<sup>110</sup> *Id.* at 44-45.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 48.

<sup>115</sup> Report of Proceedings (6/10/08) at 214.

to see if your dialing fingers are paralyzed."<sup>116</sup> In another email, Schnall wrote: "I am not going to pursue you like some jilted lover. . . . You call me tonight at my home anytime before 10:00 p.m. Is that clear and straightforward enough?"<sup>117</sup> Jonathan soon began coming to the Clinic for visits that Schnall did not chart. There were 15 to 20 of these uncharted visits.<sup>118</sup>

Schnall (who is not a psychiatrist) diagnosed Jonathan as having narcissism, borderline personality disorder, and depression.<sup>119</sup> For this reason, he put Jonathan on antidepressants.<sup>120</sup> But he told Jonathan that one of the side effects of the antidepressants would be decreased libido. For that reason, Schnall gave Jonathan Viagra and then other erectile dysfunction drugs.<sup>121</sup> He told Jonathan that using illegal drugs "was okay."<sup>122</sup>

Not surprisingly, Jonathan did experiment with sex and drugs as a teenager. At one point, he became concerned that he had a sexually transmitted disease, and he came to Schnall with that concern. Schnall examined Jonathan's penis, and told Jonathan that Schnall believed Jonathan had herpes. Schnall told Jonathan there were several tests that could be done to find out for

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<sup>116</sup> *Id.* at 217.

<sup>117</sup> *Id.* at 218.

<sup>118</sup> *Id.* at 207.

<sup>119</sup> Report of Proceedings (6/11/08) at 67-68.

<sup>120</sup> Report of Proceedings (6/10/08) at 214-215.

<sup>121</sup> *Id.* at 211-212.

<sup>122</sup> Report of Proceedings (6/11/08) at 124.

sure.<sup>123</sup> Schnall euphemistically called one of the tests, a test that he said Jonathan's parents would *not* find out about, "milking the cow."<sup>124</sup> Schnall described the test to Jonathan as follows:

Dr. Schnall would run his fingers up the shaft of my penis, and when he would get to the tip . . . ejaculate would come out, and that was milking the cow. And he said sometimes people get erect, and that's just a common side effect of milking the cow.[<sup>125</sup>]

Schnall told Jonathan that he had to do a rectal exam as a precursor to the "milking" exam.<sup>126</sup> For this reason, Jonathan allowed Schnall to put his finger in Jonathan's rectum.<sup>127</sup> Schnall was not wearing gloves at the time.<sup>128</sup> When Jonathan became nervous about the "milking the cow" exam, and another exam whereby Schnall proposed to put a Q-tip in Jonathan's urethra, Schnall told Jonathan that the test would be unnecessary if Jonathan promised to remain abstinent for three years.<sup>129</sup>

By Jonathan's junior year in high school, he began having serious problems at home. Based on conversations with Schnall, Jonathan believed that he was entitled to greater freedom than his parents gave him.<sup>130</sup> One argument became so heated that

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<sup>123</sup> *Id.* at 95-96.

<sup>124</sup> *Id.* at 81.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 82.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 99.

<sup>129</sup> *Id.* at 103.

<sup>130</sup> *Id.* at 116.

Jonathan struck his father, and his father struck him. Jonathan's parents asked him to leave the home.<sup>131</sup>

Jonathan became a threat to himself, and was hospitalized twice.<sup>132</sup> Once, in the hospital when he was strapped to a gurney, he broke his debit card in half and tried to slit his wrists.<sup>133</sup> Overall, he attempted suicide six times outside the hospital and twice in the hospital.<sup>134</sup>

Eventually, Jonathan's mother saw an email from Schnall and called the police, ending Jonathan's relationship with Schnall.<sup>135</sup> This helped mend Jonathan's relationship with his family, and Jonathan tried to help the police to investigate Schnall. Early in the investigation, a detective told Schnall not to contact Jonathan.<sup>136</sup> But Schnall continued to email and call him after the warning.<sup>137</sup> Although Schnall has not recently attempted contact, he lives a block from Jonathan's parents.<sup>138</sup> This is unnerving to Jonathan, and one of the reasons he decided to go to college in New York.

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<sup>131</sup> *Id.*

<sup>132</sup> Report of Proceedings (6/18/08) at 204.

<sup>133</sup> *Id.* at 204.

<sup>134</sup> *Id.*

<sup>135</sup> Report of Proceedings (6/11/08) at 115.

<sup>136</sup> Report of Proceedings (6/18/08) at 212.

<sup>137</sup> *Id.*

<sup>138</sup> Report of Proceedings (6/10/08) at 196.

Jonathan has been repeatedly told that he needs therapy, and has entered therapy, but he is nonetheless afraid of his psychiatrists and therapists.<sup>139</sup> He is afraid to play with his 12-year-old brother, because he is afraid he will do to his brother what Schnall did to him.<sup>140</sup> He has lost nearly all of his friends, and is terrified of germs.<sup>141</sup> For this reason, even though he knows it is irrational to do so, he has himself tested for sexually transmitted diseases every six weeks, regardless of sexual activity.<sup>142</sup> His psychiatrist currently has him on antidepressants, mood stabilizers, antianxiety medications, and sleep medications.<sup>143</sup>

Jonathan stopped acting during his sophomore year in high school.<sup>144</sup> He did so because Schnall repeatedly told him that “all actors are liars,” and that Schnall “knew I was a liar.”<sup>145</sup> Now, even though Jonathan attends a university that is top ranked in theater, “I can't participate in theater.”<sup>146</sup> This is because Schnall's effect on Jonathan has not lessened with time:

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<sup>139</sup> *Id.* at 212.

<sup>140</sup> Report of Proceedings (6/11/08) at 49.

<sup>141</sup> *Id.* at 56.

<sup>142</sup> Report of Proceedings (6/17/08) at 38.

<sup>143</sup> Report of Proceedings (6/11/08) at 129.

<sup>144</sup> *Id.* at 51.

<sup>145</sup> *Id.* at 51.

<sup>146</sup> *Id.* at 132.

I have so much shame about what happened, I'm really angry. I feel cheated, I feel lied to, I feel stolen from, I feel raped. When any of these thoughts come back into my head, I try and forget them, and they don't go away. I try and push them out, and they don't go away.[<sup>147</sup>]

**E. Schnall abuses Dan Fewel from age 11 to age 15.**

Dan Fewel is the son of a police officer and a teacher.<sup>148</sup>

Like the other boys, Dan grew up with his family in the Richmond Beach area. Schnall was the first doctor Dan ever saw, and Dan continued to see Schnall until he was 15 years old.<sup>149</sup>

Dan's parents came into the examination room at the Clinic with him until he was 11 years old. After that, Dan's checkups began to change. First, Schnall's tone changed. He became "shaky, really nervous."<sup>150</sup> His voice got louder, and he used profanity.<sup>151</sup> Schnall was much friendlier when the parents were around.<sup>152</sup>

Schnall began having Dan take all of his clothes off for physicals,<sup>153</sup> and he had approximately 20 physicals from the time he was 11 to the time he was 15.<sup>154</sup> During these physicals, Schnall had Dan get completely naked for 10 to 20 minutes.<sup>155</sup>

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<sup>147</sup> *Id.* at 52.

<sup>148</sup> Report of Proceedings (6/17/08) at 103.

<sup>149</sup> *Id.* at 113.

<sup>150</sup> *Id.* at 134.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 135.

<sup>153</sup> *Id.* at 115.

<sup>154</sup> *Id.* at 156.

<sup>155</sup> *Id.* at 157.

Schnall then checked Dan's groin, looked at his testicles, looked at his penis, and moved his penis around.<sup>156</sup> When he did so, he put his face about a foot away from Dan's penis, and he would never wear gloves.<sup>157</sup> He checked Dan's pulse on his groin, pushing his bare fingers into Dan's scrotum to do so.<sup>158</sup> He did leg stretches on Dan while Dan was nude—having Dan lay on his back and pushing Dan's legs to his chest.<sup>159</sup> Once, Schnall had Dan cross the Clinic's hallway from one exam room to another, wearing nothing but his boxer shorts.<sup>160</sup>

When Dan was about 15, his mom approached Schnall for a referral for a psychologist because she believed Dan might have gender identity issues.<sup>161</sup> Instead of giving a referral, Schnall told Dan's mother that she did not need a referral because Schnall could help Dan.<sup>162</sup> Schnall said he had done so with other people.

At this point, Schnall began having special sessions with Dan where he would question Dan.<sup>163</sup> He asked Dan whether he masturbated, what he thought about when he masturbated, whether he thought of men, what he "used" when he masturbated,

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<sup>156</sup> *Id.* at 115.

<sup>157</sup> *Id.* at 116-117.

<sup>158</sup> *Id.* at 119.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 130.

<sup>161</sup> *Id.* at 122, 148.

<sup>162</sup> *Id.* at 123.

<sup>163</sup> *Id.* at 124.

and how often he masturbated.<sup>164</sup> Dan had about 20 of these sessions; Schnall asked the masturbation questions each time.<sup>165</sup>

Schnall diagnosed Dan as bipolar and prescribed Dan several antidepressants.<sup>166</sup> Dan was reluctant to take the drugs because they caused him sleep deprivation and, consequently, exhaustion. He started falling behind in school, and began falling asleep both in school and while trying to do his homework.<sup>167</sup>

At around this time, Schnall began to take greater control over Dan's life. Once, when Dan was not taking his medication, Schnall came to Dan's home and met with Dan behind closed doors in the home for an hour.<sup>168</sup> Schnall made Dan agree to a "contract" that required Dan to be on "house arrest".<sup>169</sup> Dan was required to email Schnall daily, and to go and see Schnall weekly.<sup>170</sup> Dan's instructions from Schnall were clear: "You will check your email daily. . . . You will answer my emails within 24 hours."<sup>171</sup> Schnall got angry when Dan failed to do this, and threatened to cut Dan off from his help.<sup>172</sup>

Schnall also sought to have Dan make greater public experimentation with his gender identity issues. Schnall asked Dan

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<sup>164</sup> *Id.* at 124-125.

<sup>165</sup> *Id.* at 128.

<sup>166</sup> *Id.* at 140.

<sup>167</sup> *Id.* at 159-160.

<sup>168</sup> *Id.* at 141-142.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 143.

<sup>171</sup> *Id.* at 182.

<sup>172</sup> *Id.* at 179-180.

if he wanted to wear women's underwear at school.<sup>173</sup> Schnall offered to write a doctor's note for such behavior to Dan's teachers.<sup>174</sup> Dan had never suggested to Schnall that he wanted to wear women's clothing in public or to secretly wear women's underwear at all.<sup>175</sup> Even so, Schnall was frustrated when Dan refused to let Schnall write his teachers:

I want you to think again about your decision to not send the letter I wrote. It falls in the category of nothing ventured, nothing gained. . . . From my vantage point, you have nothing to lose by informing your teachers of your medical status. . . . This is a legitimate letter from a respected physician. . . . This is not a weak-assed excuse for goofing off. I will call you tomorrow and listen to what you have to say. I will always respect your decisions if, but only if, they are made after analyzing the situation and they are made with thought. Got it? Dr. Bill.<sup>[176]</sup>

During these times, Schnall demanded that Dan visit him. He had Dan come see him at the Clinic as late as 9:00 p.m.<sup>177</sup> Schnall called him in the evenings.<sup>178</sup> Schnall asked Dan to his house to do chores (while Schnall's wife was away at a conference), and berated Dan when he declined due to a migraine.<sup>179</sup>

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<sup>173</sup> *Id.* at 150.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 153-154.

<sup>177</sup> *Id.* at 171.

<sup>178</sup> *Id.* at 170.

<sup>179</sup> *Id.* at 183.

With all of these problems at once, Dan labeled the time when he was 15 years old as “the worst time I ever had.”<sup>180</sup> He tried to kill himself several times. He cut his wrists with a razor.<sup>181</sup> He said doing so “felt like it helped relieve some of the pain going through my head.”<sup>182</sup> He tried suffocating himself.<sup>183</sup> Although he was not specific as to how, Dan said he used “baths” to try to kill himself.<sup>184</sup>

Before Schnall’s unsupervised exams, Dan had a happy childhood.<sup>185</sup> Through the eighth grade, he got As and Bs<sup>186</sup> and played three sports.<sup>187</sup> After the sexualized exams, his grades declined to Fs.<sup>188</sup> When he testified, Dan was waiting to repeat his senior year in high school.<sup>189</sup>

Dan now has trouble making friends and trusting his teachers.<sup>190</sup> He is bothered when he is touched by other people, “just even a hug or a handshake.”<sup>191</sup> Asked whether he has “any friends now,” Dan answered simply: “None.”<sup>192</sup>

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<sup>180</sup> *Id.* at 160.

<sup>181</sup> Report of Proceedings (6/18/08) at 13.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 13.

<sup>184</sup> *Id.* at 14.

<sup>185</sup> Report of Proceedings (6/17/08) at 109.

<sup>186</sup> Report of Proceedings (6/18/08) at 156-157.

<sup>187</sup> *Id.* at 107-108.

<sup>188</sup> *Id.* at 104.

<sup>189</sup> Report of Proceedings (6/17/08) at 103.

<sup>190</sup> Report of Proceedings (6/18/08) at 17.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

Dan is bothered by the fact that Schnall still works at the clinic, and particularly by the fact that Schnall has access to all of the patient files.<sup>193</sup> He constantly worries about seeing Schnall in the neighborhood, and he worries a lot about Schnall sneaking into his house or waiting for him in bushes.<sup>194</sup> He worries that Schnall might have permanently affected him, and particularly his gender identity.<sup>195</sup> Dan believes his life would have been easier as a girl: “because I wouldn't have to think about how Schnall touched me, what Schnall was trying to get from me.”

**F. Schnall loses his license.**

In August 2005, Schnall was presented with a statement of charges from the Medical Quality Assurance Commission.<sup>196</sup> The statement of charges described some of Schnall's contact with Jeff Hawley and Daniel Fewel.<sup>197</sup> It also described conduct between Schnall and another of his patients, referred to as “Patient One” at the trial. Schnall eventually surrendered his license to practice medicine.<sup>198</sup> But at the time of trial, the Clinic still let him to work at the Clinic as a business manager. The Clinic even advertised on its website that patients should “come in and say hello to Dr. Bill.”<sup>199</sup>

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<sup>193</sup> *Id.* at 15.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 60.

<sup>196</sup> Report of Proceedings (7/1/08) at 211-212.

<sup>197</sup> *Id.* at 213.

<sup>198</sup> *Id.* at 217.

<sup>199</sup> Report of Proceedings (6/17/08) at 16-17.

**G. The trial and the verdicts.**

The Fewels sued Schnall first, in January 2006. By October 2006, the Kuhns and Hawleys had joined suit. The cases were consolidated in December 2007 and came for an eight-week jury trial beginning in May 2008.

At the trial, each of the plaintiff patients testified as to Schnall's abuse. Their parents each testified about the effects of Schnall's abuse on the families.<sup>200</sup> A pediatric expert explained why Schnall's conduct violated the standard of care for pediatricians in several ways.<sup>201</sup> The plaintiff patients' treatment providers provided the jury with their many diagnoses and opinions regarding psychological damages.<sup>202</sup> An economist provided the jury with an estimate of the current and future economic damages.<sup>203</sup> And a former employee testified as to the signs of abuse that should have caused the Clinic to prevent the abuse.<sup>204</sup>

After closing argument, the jury returned verdicts in favor of Jeff, Jonathan and his parents, and Dan and his parents. The jury rejected the largely similar claims of Paul and his parents. For the combined 21 years of abuse, the suicide attempts, the treatment and pharmaceutical costs incurred to date, the future treatment costs, the future wages lost, and the destruction of three families,

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<sup>200</sup> See Exhibit 230, 235-236, 248, 258, 263

<sup>201</sup> See Exhibits 220-223.

<sup>202</sup> Report of Proceedings (6/12/08) at 15-17; (6/16/08) at 38-43, 84-97, 101-123; (6/18/08) at 186-189; (6/19/08) at 14-29, 97; (7/1/08) at 83-84.

<sup>203</sup> Report of Proceedings (6/30/08) at 174-179.

<sup>204</sup> Report of Proceedings (6/23/08) at 17-19.

the jury awarded total damages of \$629,000.<sup>205</sup> But the jury found several of the patients to be *at fault* for the abuse, which reduced the final damages number to 553,030.<sup>206</sup> Thus, the actual award was just over two percent of the damages requested.<sup>207</sup>

After the jury returned this verdict, the trial court conducted a second “stage” of closing arguments and deliberations. In this second stage, the same jury was to determine whether Schnall “communicated” with any of the plaintiff patients, when they were minors, for “immoral purposes of a sexual nature.”<sup>208</sup> An affirmative finding on this issue was a precursor to an award of attorney fees under RCW 9.68A.130.

During the second closing argument, defense counsel showed the jury a Washington Supreme Court opinion with language that the trial court had rejected when the defendants had proposed the language as a jury instruction.<sup>209</sup> Though the trial court struck the argument, the jury eventually decided that Schnall had not violated the “communications” statute (RCW 9.68.090).

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<sup>205</sup> Clerk's Papers at 4112-4120 (\$105,000 to Jeff Hawley; \$80,000 to Jonathan Kuhn; \$12,400 to Joan Kuhn; \$12,400 to Dan Kuhn; \$300,000 to Daniel Fewel; \$60,000 to Kathleen Fewel; \$60,000 to Joe Fewel).

<sup>206</sup> *Id.* The jury found Jeff to be 25 percent at fault, requiring a subtraction of \$26,250. The jury found Jonathan Kuhn to be 20 percent at fault, requiring a subtraction of \$16,000. The jury found each of the Kuhn parents to be 15 percent at fault, requiring subtractions of \$1,860 each. And the jury found the Fewel parents to be 25 percent at fault, requiring subtractions of \$15,000 each.

<sup>207</sup> Report of Proceedings (7/10/08) at 95, 97, 101, 105-06.

<sup>208</sup> Clerk's Papers at 4132.

<sup>209</sup> Report of Proceedings (7/16/08) at 31-32, attached as Appendix B.

#### **H. The revelation of juror misconduct.**

In the weeks following the verdicts, several instances of juror misconduct came to light. These instances included untrue answers by two jurors during voir dire, failure inform the trial court of the surfacing of repressed memories of sexual abuse during trial, the injection of descriptions of these repressed memories into deliberations, exposure to prejudicial information contained in newspaper articles and television stories concerning the case, and the discussion of that prejudicial information during deliberations. After 141 pages of briefing, 16 declarations, and oral argument, the trial court issued 21 findings of fact and detailed conclusions of law. None of the findings is challenged on appeal, and those findings are incorporated herein by reference.<sup>210</sup> Based on these findings, the trial court concluded that the misconduct by two jurors during juror selection provided two independent bases for granting an entire new trial,<sup>211</sup> that there was more than a reasonable possibility that the deliberations in *both* phases had been influenced by extrinsic evidence (providing a third independent basis for a new trial),<sup>212</sup> and that the argument by Schnall's counsel in his second closing argument had been improper.<sup>213</sup> The trial court declined to decide whether the improper argument would alone justify a new trial on the "second phase" issues because "there are ample

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<sup>210</sup> See Clerk's Papers at 4475-4529, attached as Appendix A to this brief.

<sup>211</sup> Clerk's Papers at 4482.

<sup>212</sup> Clerk's Papers at 4484.

<sup>213</sup> Clerk's Papers at 4484-4485.

grounds for granting a new trial based on jury misconduct”.<sup>214</sup> The trial court thus ordered a new trial on all of the plaintiffs’ claims.

#### IV. Argument

A. **The trial court properly exercised its discretion in ordering a complete new trial after the discovery of misconduct by multiple jurors during jury selection, the conduct of the trial, and deliberations.**

1. This is not a case of first impression.

The defendants contend that “Washington appellate courts seem never to have been asked to decide whether a new trial may be granted to a plaintiff who has prevailed on the issue of liability and who has been awarded substantial damages in an amount the trial court has declined to find inadequate.”<sup>215</sup> But this Court need not look to the appellate reports to decide that question; the answer has been provided by court rule:

On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues . . . . Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties: . . . .  
(2) Misconduct of . . . jury[.]

CR 59(a)(1), (a)(2). The rule does not contain an exception for a party who, in the opinion of the opposing party, “has been awarded substantial damages.” The defendants do not dispute that the right to an impartial jury is a substantial one. Thus, the trial court had the authority to order a new trial so long as it properly found that the

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<sup>214</sup> Clerk’s Papers at 4485.

<sup>215</sup> Brief of Appellant at 27.

jury's misconduct materially affected that right. There is a well-worn path for this Court to follow in answering that question.

2. The trial court's decision is entitled to the highest level of deference available.

The trial court's new trial order was based both on two jurors' withholding of information and on one juror's injection of that withheld information into deliberations. These differing forms of misconduct require slightly different forms of review. With respect to a juror's withheld information, a new trial is required "when the information withheld is material and a truthful response would have provided a basis for challenge for cause." *State v. Carlson*, 61 Wn. App. 865, 878, 812 P.2d 536 (1991) (citing *State v. Briggs*, 55 Wn. App. 44, 54, 776 P.2d 1347 (1989)). With respect to the improper *injection* of extrinsic information, a new trial "must be granted unless it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict." *Briggs*, 55 Wn. App. at 56 (citations omitted). "Any doubt that the misconduct affected the verdict must be resolved against the verdict." *Id.* at 55 (citing *Halverson v. Anderson*, 82 Wn.2d 746, 752, 513 P.2d 827 (1973)); see also *Brown v. Spokane County Fire Protection Dist. No. 1*, 100 Wn.2d 188, 198, 668 P.2d 571 (1983) ("If . . . the trial court, in its discretion, has any doubt that the comments affected the outcome of the trial, the trial court must grant a new trial.").

This Court “will not reverse a trial court's discretionary ruling regarding a new trial unless there is a showing of abuse of that discretion.” *State v. Cummings*, 31 Wn. App. 427, 430, 642 P.2d 415 (1982). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The trial court’s “grounds” are set out in its unchallenged factual findings, which are verities on appeal. See *Draszt v. Naccarato*, 146 Wn. App. 536, 541, 192 P.3d 921 (2008). The trial court’s conclusions of law<sup>216</sup> are reviewed for de novo, to determine whether they are supported by the findings. *Id.* (citing *Sunnyside Valley Irrigation Dist. v. Dickie*, 111 Wn. App. 209, 214, 43 P.3d 1277 (2002)).

“[G]reat deference is due” to a trial court’s determination that no prejudice occurred as a result of juror misconduct. *Briggs*, 55 Wn. App. at 60 (citing *Cummings*, 31 Wn. App. at 430). But “greater deference is owed a decision to grant a new trial than a decision not to grant a new trial.” *Id.*

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<sup>216</sup> The Appellants do not specifically challenge any of the trial court’s conclusions of law. However, their brief suggests that they disagree with the trial court’s conclusions of law 1(a), 1(b), 2(a), 2(a), 2(b), and a portion of conclusion of law (3) (“there are ample grounds for granting a new trial based on jury misconduct”).

3. Juror One's misconduct alone justified the grant of a new trial.

The jury in this case was asked to decide whether Schnall committed medical malpractice. The jury was also asked to decide if the Clinic should have known of Schnall's misconduct given the red flags they should have noticed at the office. On her juror questionnaire, Juror One indicated that she was married to a physician, and that she had worked in his medical office.<sup>217</sup> Thus, she was already a juror of concern based on what she *did* disclose.

What Juror One did not disclose, despite being asked under oath and in a variety of ways,<sup>218</sup> was that her husband had been "a defendant in at least two medical malpractice lawsuits."<sup>219</sup> And she failed to disclose that *she* had been a defendant in "at least one medical malpractice lawsuit."<sup>220</sup> As a result of the nondisclosure, the plaintiffs did not learn of facts that would have provided the basis for a challenge for cause.

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<sup>217</sup> Clerk's Papers at 5042.

<sup>218</sup> Clerk's Papers at 5040 ("Have you, or has anyone close to you, ever had one of the following experiences: ... Been a defendant in a lawsuit, or had a claim filed against you/them?"); *Id.* ("Have you, or anyone you know well, ever been accused, in any setting ... of health care misconduct of any kind?"); Clerk's Papers at 5043 ("If you were unable to sufficiently answer any particular question in the spaces provided, please use this area to provide additional information.").

<sup>219</sup> Clerk's Papers at 4477.

<sup>220</sup> *Id.*

As the trial court found,<sup>221</sup> such a challenge could have been successful. Demonstrated bias in the responses to questions during jury selection “may result in a juror’s being excused for cause.” *Briggs*, 55 Wn. App. at 54 (quoting *McDonough*, 464 U.S. at 554). Doubts about the existence of bias “should be resolved against permitting the juror to serve,” unless the juror affirmatively shows a “purge of preconception”. *United States v. Nell*, 526 F.2d 1223, 1230 (5th Cir. 1976).

Because Juror One did not provide any answers that could have alleviated the doubts that her prior litigation experience raises, doubts remain as to whether she could simply put those experiences aside. “That men will be prone to favor that side of a cause with which they identify themselves either economically, socially, or emotionally is a fundamental fact of human character.” *Kierman v. Van Schaik*, 347 F.2d 775, 781 (3rd Cir. 1965). Thus, a juror’s undisclosed involvement in prior similar litigation has repeatedly been held to require a new trial. *See United States v. Perkins*, 748 F.2d 1519, 1533 (11th Cir. 1984) (reversing trial court’s denial of defendant’s motion for new trial because, among other things, the case involved allegations concerning misapplication of funds and it was revealed after trial that a juror had intentionally withheld information about his own involvement as a

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<sup>221</sup> Clerk’s Papers at 4478.

defendant in a prior case concerning misapplication of funds) (citing *United States v. Bynum*, 634 F.2d 768, 771 (4th Cir. 1980) (juror knew that question as to whether he had a close family relative who had been convicted of a crime required him to reveal at the very least his brother's existence as a convicted felon; juror failed to disclose because of shame and embarrassment; new trial required); *United States v. Eubanks*, 591 F.2d 513 (9th Cir. 1979) (juror who had two sons serving prison sentences for drug-related crimes indicated that he "had no children" on questionnaire and failed to respond when panel was asked whether any members of their immediate families had been party to a criminal case; new trial required); *Jackson v. United States*, 395 F.2d 615 (D.C. Cir. 1968) (trial court erred in declining to grant new trial when juror failed to disclose that he had been involved in a "love triangle" similar to the one at issue in the murder case on which the juror was to sit)).

Without addressing these cases,<sup>222</sup> which were cited to the trial court below,<sup>223</sup> the defendants instead assert that they have been unable to find any authority to show that "disclosure of the type of experience that Juror 1 . . . innocently failed to disclose in voir dire is grounds for a challenge *for cause*."<sup>224</sup> Because decisions on for cause challenges are left to the discretion of the

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<sup>222</sup> See Brief of Appellant at 32-37.

<sup>223</sup> Clerk's Papers at 4404-4406.

<sup>224</sup> Brief of Appellants at 35.

trial court,<sup>225</sup> no such authority is necessary. But regardless, *Perkins*, *Bynum*, *Eubanks*, and *Jackson* provide authority to support the commonsense notion that prior involvement in similar litigation could lead a juror to inappropriately favor one party over the other—a concern that justifies a challenge for cause unless adequately addressed by follow-up questioning. Juror One’s nondisclosure prevented any such follow-up questioning.

The case relied upon by the defendants does not show otherwise. See *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 313, 868 P.2d 835 (1994). First, the *Lord* case did not involve a trial court’s order *granting* a new trial and thus involves an entirely different standard of review. Rather, the *Lord* case involved a claim of juror misconduct made in a personal restraint petition. The *Lord* court used the “actual and substantial prejudice” standard, one deferential to the trial court, and rejected the argument.

Standards of review aside, *Lord* provides little guidance for this case. There a juror stated in voir dire that he had not heard or seen anything about the case. After the trial, Lord filed the affidavit of an investigator that contained hearsay statements from the juror. According to the affidavit, the juror had told the investigator that he

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<sup>225</sup> This Court reviews a trial court’s decision on a challenge for cause for a manifest abuse of discretion. *State v. Noltie*, 116 Wn.2d 831, 838, 809 P.2d 190 (1991). “[T]he trial court is in the best position to determine a juror’s ability to be fair and impartial.” *Id.* at 839. This is because “[t]he trial judge is able to observe the juror’s demeanor and, in light of that observation, to interpret and evaluate the juror’s answers to determine whether the juror would be fair and impartial.” *State v. Rupe*, 108 Wn.2d 734, 749, 743 P.2d 210 (1987).

had read about the crime in the newspaper before the trial. The juror said the article gave him “no in-depth background on the case—none whatsoever,” and also said he remembered telling the court about the article during jury selection. *Id.* at 312. The Supreme Court ruled that it could not consider the hearsay, then pointed out that the juror’s “limited knowledge about the case” would not have provided grounds for a challenge for cause. *Id.* *Lord* did not involve a juror who aligned herself with one of the parties based on prior experience as a party in similar litigation.

It cannot be said that the trial court abused its discretion in ruling that truthful answers by Juror One would have provided a basis for a challenge for cause. This Court should affirm for that reason alone.

4. The abused juror’s misconduct alone justified the grant of a new trial.

Another juror, who ended up serving as foreperson,<sup>226</sup> also failed to accurately disclose material information during jury selection. That juror answered “No” to the question of whether she had “ever experienced physical, emotional, or sexual abuse . . . of any kind, and at what age?”<sup>227</sup> She also answered “No” to the question of whether anyone she knew well had been “accused, in any setting, of physical, or sexual abuse . . . of any kind?”<sup>228</sup>

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<sup>226</sup> Clerk’s Papers at 4458.

<sup>227</sup> Clerk’s Papers at 4433.

<sup>228</sup> *Id.*

As it turns out, both answers were wrong. In fact, *during the trial*, that juror “had memories surface which, much to that juror’s ‘horror,’ caused that juror to remember that she had been the victim of sexual abuse at a young age.”<sup>229</sup> The abuser was apparently “a family member who was an authority figure or a trusted family figure”.<sup>230</sup> These memories were so distressing for that juror that “she immediately entered therapy, apparently during the third or fourth week of the trial.”<sup>231</sup> When this happened, the juror did not inform the trial court of her issues so that the trial court could replace her with an alternate juror. Instead, that juror went on to become the foreperson. In an unchallenged finding of fact, the trial court found that this juror’s failure to disclose her abuse “would have provided a basis for a challenge for cause.”<sup>232</sup> Although the defendants argue to the contrary, they cite no authority to show that a trial court would automatically abuse its discretion by excusing for cause a juror so disturbed by the trial testimony that she needs to immediately enter psychotherapy while the trial is ongoing.

But this Court need not even decide that question because, contrary to the assertion of the defendants, this juror *did* inject her undisclosed information into the jury’s deliberations. The juror does

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<sup>229</sup> Clerk’s Papers at 4478.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

not deny that she did so.<sup>233</sup> The appellants contend that she did not do so until the second phase of deliberations. But they concede, as they must, that another juror swore otherwise.<sup>234</sup> Thus, the trial court made the following unchallenged finding: “It is not entirely clear whether the juror who failed to disclose the sexual abuse injected that abuse into phase one of the jury’s deliberations or phase two of the jury’s deliberations.”<sup>235</sup> The trial court then applied the *Briggs* standard to that uncertainty and resolved the doubt against the verdict: “there is more than a reasonable possibility that the verdict was influenced by extrinsic evidence.”<sup>236</sup> That conclusion was within the trial court’s discretion, if not compelled as a matter of law. See *State v. Johnson*, 137 Wn. App. 862, 869, 155 P.3d 183 (2007) (reversing trial court’s denial of new trial motion; “Had juror B answered truthfully to the relevant voir dire questions, Johnson could have pursued the matter to examine whether to excuse her for cause, or at least to ask her whether she could refrain from discussing her personal experiences during deliberations.”).

Even so, the defendants would have this Court set aside the trial court’s decision by pledging faith in the notion that every victim

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<sup>233</sup> *Id.* (“The juror who failed to disclose sexual abuse candidly admits that she did inject that nondisclosed information into the second deliberation phase of the trial.”).

<sup>234</sup> Clerk’s Papers at 5001.

<sup>235</sup> Clerk’s Papers at 4478.

<sup>236</sup> Clerk’s Papers at 4484; See *Briggs*, 55 Wn. App. at 56.

of sexual abuse is a necessarily pro-plaintiff juror. But there are several reasons why a juror like the abused juror might influence a jury to return a defense verdict against Paul Hawley and his parents, or inappropriately minimize the damages awarded to the other plaintiffs. The abused juror may have learned to live with her abuse better than the plaintiffs did, and she may thus have unfairly penalized plaintiffs for failing to adapt. She may have resented the fact that she has received no financial compensation for her injuries and thus have been unfairly reluctant to compensate the plaintiffs. She may have an irrationally forgiving attitude about abusers in general. And she may believe that the abuse suffered by the plaintiffs pales in comparison to the abuse she suffered. Such a belief might cause her to unfairly minimize compensatory damages. Thus, the defendants are incorrect in suggesting that no plaintiff would ever challenge an abuse victim for cause. They are incorrect in asserting that the trial court took an unreasonable position in ruling that the abused juror might have influenced the verdict.

The abused juror's pre-deliberation misconduct – failing to provide a complete and truthful answer during jury selection and failing to report that false answer to the trial court once her repressed memories surfaced – robbed the plaintiffs of the opportunity to challenge her for cause. The abused juror's misconduct during deliberations – injecting her specialized knowledge of sexual

abuse – casts reasonable doubt on the jury’s verdicts. Thus, the trial court properly exercised its discretion in ordering a new trial.

**B. The trial court properly exercised its discretion in ordering a new “second phase.”**

If this Court accepts the trial court’s reasons for ordering a new trial based upon the misconduct of Juror One and the abused juror, that misconduct also tainted the jury’s verdicts in the second phase. Thus, a new second phase is required, as the same tainted jury decided the second phase. However, if this Court holds that the misconduct of Juror One and the abused juror does not require a new first phase, a host of additional misconduct is relevant to the question of whether a new second phase is nonetheless required.

1. The misconduct during the second phase independently requires a new trial on the Sexual Exploitation of Children Act claims.

The misconduct during the second phase took two forms: misconduct by defense counsel and misconduct by the jury.

Defense counsel’s misconduct consisted of, during the second closing argument, making an argument over repeated objection that “literally instructed the jury with a legal instruction that the Court had rejected.”<sup>237</sup> Specifically, the defendants proposed the following instruction: “In order to communicate with a minor for immoral purposes, a person in making the communication must have the predatory purpose of promoting children’s exposure to

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<sup>237</sup> Clerk’s Papers at 4483.

and involvement in sexual misconduct.”<sup>238</sup> The trial court rejected the instruction<sup>239</sup> both because it was unnecessary and because a ruling in limine had barred the plaintiffs from describing Schnall with terms like “molester” and “predator” throughout the trial.<sup>240</sup> Nonetheless, during the second closing argument, counsel for Schnall showed the jury an enlarged printout of a Washington Supreme Court opinion containing the exact language the trial court had rejected.<sup>241</sup> He then argued over repeated and sustained objections that the jury needed to find a “predatory purpose” of promoting “severe sexual misconduct”.<sup>242</sup> The defendants no longer dispute the trial court’s finding that this argument was improper.<sup>243</sup> Moreover, the Court specifically found that striking the argument “cured the irregularity given the length of the trial and the weariness of our jurors by the end of the trial.”<sup>244</sup>

The trial court ultimately declined to make a finding as to whether the improper argument alone required a new second phase because there were “ample grounds for granting a new trial based on juror misconduct”.<sup>245</sup> Aside from the misconduct

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<sup>238</sup> Clerk’s Papers at 4030.

<sup>239</sup> Report of Proceedings at 36-38; Clerk’s Papers at 4351-4353.

<sup>240</sup> Report of Proceedings (5/28/08) at 21-26.

<sup>241</sup> Report of Proceedings (7/16/08) at 31-32, attached as Appendix B.

<sup>242</sup> *Id.*

<sup>243</sup> Brief of Appellant at 48.

<sup>244</sup> Clerk’s Papers at 4483.

<sup>245</sup> Clerk’s Papers at 4485.

discussed earlier, the second phase included new jury misconduct in the form of several jurors' decision to view and discuss media articles about the case before returning their verdicts:

It is undisputed that several jurors were exposed to media coverage July 16, 2008 and July 17, 2008, either by television or newspaper. It is undisputed that several jurors mentioned this exposure to other jurors. It is undisputed that there was a newspaper in the jury room. It is undisputed that the newspaper contained extrinsic evidence that had not been admitted to the jury. It is undisputed that this extrinsic evidence was excluded by the Court precisely because it was unduly prejudicial and could impermissibly the jury's verdict. And it is undisputed that this newspaper article was read aloud to jurors, though the timing of that reading aloud is debated.<sup>[246]</sup>

The trial court found that these undisputed facts "raise significant doubts about the validity of the verdict, whether the plaintiffs were prejudiced by extrinsic evidence, and whether that evidence worked its way into the deliberations."<sup>247</sup>

The defendants do not dispute that this level of gross misconduct is sufficient to cast doubt on the validity of a jury's verdict. Rather, they assert that the timing of the misconduct in this case means only that Jonathan Kuhn gets a new second phase.<sup>248</sup> They base this argument on the declarations of some of the jurors – including Juror One and the abused juror – to the effect that the

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<sup>246</sup> Clerk's Papers at 4482.

<sup>247</sup> *Id.*

<sup>248</sup> Brief of Appellant at 47.

jurors had already cast votes on the claims of Jeff Hawley, Paul Hawley, and Dan Fewel prior to their misconduct.

One problem with that argument is that, as the trial court concluded, statements concerning the effect that the extrinsic evidence had on the jury's final verdicts inhere in those verdicts.<sup>249</sup> The relevant inquiry "is an objective inquiry into whether the extraneous evidence *could have* affected the jury's determinations and not a subjective inquiry into the actual effect of the evidence on the jury." *Briggs*, 55 Wn. App. at 55 (emphasis added). Thus, any statement by a juror to the effect that the extrinsic evidence had no effect on the verdicts may not be considered by this Court.

Another problem with the defendants' position is that, even if those statements concerning the effect of the media reports could be considered, a jury is still a deliberating jury until it returns its verdicts. "The law allows the jury all reasonable opportunity, before their verdict is put on record and they are discharged, to discover and declare the truth". *Haney v. Cheatham*, 8 Wn.2d 310, 325, 111 P.2d 1003 (1941) (quoting 27 R.C.L. 890). Thus, until the jurors "have been dismissed from their relation to the case as jurors in it, their power over their verdict remains, and their right to alter it so as to conform to their real and unanimous intention and purpose." *Id.*; see also RCW 4.44.460 ("the clerk shall file the verdict. The verdict

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<sup>249</sup> Clerk's Papers at 4484.

is then complete and the jury shall be discharged from the case.”). In the eyes of the law, every jury is a deliberating jury until discharged. So long as the jury learned of the extrinsic evidence before being discharged, that evidence had the potential to influence the verdicts.

Finally, the other misconduct in this case took place well before any of the straw polls on July 16. That misconduct, by Juror One, the abused juror, and Schnall’s counsel, tainted this jury before it ever began its second set of deliberations. The trial court did not abuse its considerable discretion in resolving its considerable doubts against these verdicts.

2. This Court should not consider the arguments made by the defendants concerning the Phase Two verdict that do not relate to the issue of jury misconduct, as those claims have been stricken from this appeal.

The defendants make several arguments concerning the “second phase” that are based on “reasons independent of juror misconduct.”<sup>250</sup> Those arguments<sup>251</sup> have already been stricken from this appeal.<sup>252</sup> The defendants moved to modify the ruling striking those claims, and a panel of this Court’s judges denied the motion to modify.<sup>253</sup> Thus, this Court should decline to consider those arguments.

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<sup>250</sup> Brief of Appellant at 41-42.

<sup>251</sup> Specifically, this Court should not consider the arguments made in §§ D(1)-D(4) of the Brief of Appellants, at 42-47.

<sup>252</sup> See Notation Ruling by Commissioner Mary Neel, dated June 30, 2009.

<sup>253</sup> See Order Denying Motion to Modify, dated September 8, 2009.

**V. Conclusion**

The defendants are attempting to preserve what they must understandably view as a fantastic result. But it was not a fair result. The trial court recognized this, applied the law, and ordered a new trial. Given the nature of the misconduct, the nature of the issues the jury decided, and the extent of the deference that must be given to the trial court's decision, this Court should affirm. No fair trial has yet been conducted in this case.

DATED this 12<sup>th</sup> day of October 2009.

STAFFORD FREY COOPER

By: 

Ronald S. Bemis, WSBA #7311

Anne M. Bremner, WSBA #13269

Peter J. Mullenix, WSBA #37171

Attorneys for Respondents

Certificate of Service

The undersigned certifies under penalty of perjury according to the laws of the United States and the State of Washington that on this date I caused to be served in the manner noted below a copy of this document entitled **BRIEF OF RESPONDENTS** on the following individuals:

**VIA EMAIL AND MESSENGER**

Timothy E. Allen  
Bennett Bigelow & Leedom, PS  
1700 7<sup>th</sup> Ave., Suite 1900  
Seattle, WA 98101  
[tallen@bblaw.com](mailto:tallen@bblaw.com)  
*Attorneys for Defendant Richmond Pediatric Clinic*

**VIA EMAIL AND MESSENGER**

John E. Gagliardi  
Fain Sheldon Anderson & VanDerhoef PLLC  
701 5<sup>th</sup> Ave., Suite 4650  
Seattle, WA 98104  
[john@fsav.com](mailto:john@fsav.com)  
*Attorneys for Bill S. Schnall and Janet G. Schnall*

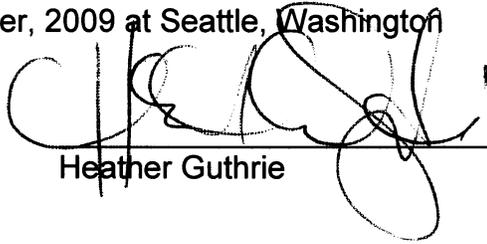
**VIA EMAIL AND MESSENGER**

Daniel W. Ferm  
Mary H. Spillane  
Williams Kastner  
601 Union Street – Suite 4100  
Seattle, WA 98101  
[dferm@williamskastner.com](mailto:dferm@williamskastner.com)  
[mspillane@williamskastner.com](mailto:mspillane@williamskastner.com)  
*Attorneys for Appellants Schnall and Richmond Pediatric Clinic*

**VIA EMAIL AND MAIL**

Karen O’Kasey  
Hoffman Hart & Wagner, LLP  
1000 SW Broadway, Suite 2000  
Portland, OR 97205  
[kkok@hhw.com](mailto:kkok@hhw.com)  
*Attorneys for:  
Richmond Pediatric Clinic, et al.*

DATED this 12<sup>th</sup> day of October, 2009 at Seattle, Washington



Heather Guthrie

# *APPENDIX A*

*Trial Court's Findings and Conclusions and  
Oral Ruling*

The Honorable Paris K. Kallas

**FILED**  
KING COUNTY, WASHINGTON

OCT 13 2008

SUPERIOR COURT CLERK  
BY JULIE WARFIELD  
DEPUTY

SUPERIOR COURT OF WASHINGTON  
IN AND FOR KING COUNTY

JONATHAN KUHN, an individual; and JOAN KUHN and DAN KUHN, husband and wife and their marital community,

Plaintiff,

v.

BILL S. SCHNALL, M.D., and JANET G. SCHNALL, husband and wife and their marital community; and RICHMOND PEDIATRIC CLINIC, INC., P.S., a Washington professional service corporation,

Defendants.

CONSOLIDATED  
NO. 06-2-33713-1 SEA

ORDER GRANTING PLAINTIFFS' MOTION FOR NEW TRIAL, AND DENYING PLAINTIFFS' MOTIONS FOR JUDGMENT/DIRECTED VERDICT, SANCTIONS, AND ADDITUR

JEFF HAWLEY, an individual; PAUL HAWLEY, an individual; and, RICH HAWLEY and BEV HAWLEY, husband and wife,

Plaintiff,

v.

BILL S. SCHNALL, M.D. and RICHMOND PEDIATRIC CLINIC, INC., P.S., a Washington Professional Service Corporation;

Defendants;

ORDER GRANTING PLAINTIFFS' MOTIONS FOR NEW TRIAL - 1  
10782-028294 281570

**STAFFORD FREY COOPER**

PROFESSIONAL CORPORATION

801 Union Street, Suite 3100

Seattle WA 98101.1374

TEL 206.623.9900 FAX 206.624.6885

**ORIGINAL**

1 DANIEL FEWEL, an Individual; KATHLEEN  
FEWEL and JOE FEWEL, husband and wife,

2 Plaintiffs,

3 v.

4 BILL S. SCHNALL, M.D., and JANET G.  
SCHNALL, husband and wife and their  
marital community; and RICHMOND  
5 PEDIATRIC CLINIC, INC., P.S., a  
Washington professional service corporation,

6 Defendants.  
7

8 THIS MATTER came before the Court on Plaintiffs' Motions for New Trial,  
9 Judgment/Directed Verdict, Sanctions, and Additur. Prior to ruling, the Court has heard  
10 oral argument and considered the submissions of the parties, including the following:

- 11 1. Plaintiffs' Motions for New Trial, Judgment/Directed Verdict, Sanctions,  
and Additur;
- 12 2. Declaration of Ronald Bemis in Support of Plaintiffs' Motions for New Trial,  
13 Judgment/Directed Verdict, Sanctions, and Additur, with exhibits;
- 14 3. Declaration of Peter Mullenix in Support of Plaintiffs' Motions for New  
Trial, Judgment/Directed Verdict, Sanctions, and Additur, with exhibits;
- 15 4. Affidavit of Stacy Carrell-Utter;
- 16 5. Affidavit of T.A. Nosal;
- 17 6. Plaintiffs' Supplemental Memorandum in Support of Motions for New Trial,  
18 Judgment/Directed Verdict, Sanctions, and Additur;
- 19 7. Declaration of Peter Mullenix in Support of Supplemental Memorandum in  
Support of Motions for New Trial, and exhibits
- 20 8. Supplemental Affidavit of T.A. Nosal;
- 21 9. Defendants' Response to Plaintiffs' Motions for New Trial,  
Judgment/Directed Verdict, Sanctions, and Additur;
- 22 10. Declaration of John E. Gagliardi in Response to Plaintiffs' Motions for New  
23 Trial, Judgment/Directed Verdict, Sanctions, and Additur, and exhibits;

ORDER GRANTING PLAINTIFFS' MOTIONS FOR NEW  
TRIAL - 2  
10782-028294 281570

**STAFFORD FREY COOPER**

PROFESSIONAL CORPORATION  
601 Union Street, Suite 3100  
Seattle WA 98101.1374

TEL 206.623.9900 FAX 206.624.6885

- 1 11. Declaration of Timothy E. Allen in Support of Defendants' Response to  
2 Plaintiffs' Motions for New Trial, Judgment/Directed Verdict, Sanctions,  
3 and Additur, and exhibits;  
4 12. Declaration of Tamra Clark;  
5 13. Declaration of Marcia Bennison;  
6 14. Declaration of Judith Wahl;  
7 15. Reply in Support of Plaintiffs' Motions for New Trial, Judgment/Directed  
8 Verdict, Sanctions, and Additur;  
9 16. Supplemental Declaration of Peter Mullenix in Support of Plaintiffs' in  
10 Support of Motions for New Trial;  
11 17. Declaration of Anne Bremner in Support of Plaintiffs' Reply in Support of  
12 Motions for New Trial;  
13 18. Defendants' Response to Plaintiffs' Supplemental Memorandum in  
14 Support of Post-Trial Motions;  
15 19. Supplemental Declaration of Judith Wahl;  
16 20. Supplemental Declaration of Tamra Clark;  
17 21. Reply in Support of Plaintiffs' Supplemental Memorandum in Support of  
18 Post-Trial Motions;  
19 22. The records and papers on file herein.

20 The Court, being now fully informed, hereby incorporates its oral ruling, a copy of  
21 which is attached, and makes the following findings of fact and conclusions of law:

#### 22 FINDINGS OF FACT

23 1. Juror One failed to disclose during jury selection that her husband had  
been a defendant in at least two medical malpractice lawsuits. Juror One also failed to  
disclose that she had been a defendant in at least one medical malpractice lawsuit.

ORDER GRANTING PLAINTIFFS' MOTIONS FOR NEW  
TRIAL - 3  
10782-028294 281570

**STAFFORD FREY COOPER**

PROFESSIONAL CORPORATION  
601 Union Street, Suite 3100  
Seattle WA 98101.1374  
TEL 206.623.9900 FAX 206.624.6885

1           2.     The Court is willing to accept that Juror One's failures were honest and  
2 inadvertent failures to disclose. However, in the context of this case, correct and  
3 accurate answers could have led to a successful challenge for cause.

4           3.     During the trial, another juror had memories surface which, much to that  
5 juror's "horror," caused that juror to remember that she had been the victim of sexual  
6 abuse at a young age. Those memories were so distressing for that juror that she  
7 immediately entered therapy, apparently during the third or fourth week of the trial.

8           4.     While the Court is willing to accept that this juror's failure to disclose the  
9 sexual abuse was an honest failure, it was a failure nonetheless.

10          5.     The juror who failed to disclose sexual abuse candidly admits that she did  
11 inject that nondisclosed information into the second deliberation phase of the trial.

12          6.     Had the juror who failed to disclose the sexual abuse disclosed the  
13 information during jury selection, that information would have provided a basis for a  
14 challenge for cause. This abuse was apparently abuse by a family member who was an  
15 authority figure or a trusted family figure and the abuse was so traumatic as to trigger  
16 the resurfacing of a repressed memory that required immediate therapy during the trial.

17          7.     It is not entirely clear whether the juror who failed to disclose the sexual  
18 abuse injected that abuse into phase one of the jury's deliberations or into phase two of  
19 the jury's deliberations. However, even if the injection was made during phase two of  
20 the jury's deliberations, the plaintiffs are still prejudiced by this nondisclosure due to the  
21 type of information that was nondisclosed, the fact it would provide a basis for challenge  
22 for cause, and the fact that it was undeniably injected into the second phase.

1           8.     Before the second phase of the jury's deliberations began, the Court  
2 reminded the jury that all of the rules that had applied to them throughout the case  
3 continued to apply for the second phase of deliberations. The Court specifically  
4 instructed the jurors that this meant the prohibitions concerning media reports still  
5 applied and that media reports about the case continued to be off-limits. The plaintiffs  
6 submitted affidavits from three jurors, Jurors Nine, Four, and 11, concerning the conduct  
7 of various jurors who viewed and discussed media reports during the second phase of  
8 deliberations.

9           9.     Juror Nine's affidavit states that on the last day of deliberations, Jurors  
10 One and Six discussed media coverage they had seen the evening before. According  
11 to Juror Nine, Juror Six said "to those of us that were favoring a vote for plaintiffs, 'if you  
12 knew what we were voting on, you would probably change your vote.'" Juror Nine's  
13 affidavit also references the Seattle Times article that is the subject of the other  
14 declarations submitted. That article indicated that if the jurors answered the questions  
15 during the second phase affirmatively, the plaintiffs would be entitled to attorney's fees  
16 that could be in the amount of \$1.8 million. Juror Nine's affidavit also candidly  
17 acknowledges that the newspaper article was in the jury room, and she acknowledges  
18 that she read the article out loud to the other jurors. She states she did so after the  
19 verdict was completed but before it was announced in the courtroom.

20           10.    Juror Four's affidavit also indicates that the newspaper was in the jury  
21 room and describes an article written about the case in detail. She stated that the  
22 article referenced the fact that Prosecutor Norm Maleng declined to file charges against  
23 Dr. Schnall because: "This wasn't a criminal charge his office could pursue." Juror Four

1 also acknowledged that the article contained information about the \$1.8 million in  
2 attorney's fees that could result as a result of the second phase. Juror Four also  
3 described the jury's discussion of the media coverage in detail: "During our final day of  
4 deliberations, there was also a generalized discussion of media coverage, including  
5 references to the two Seattle newspapers and to a media report on the case aired the  
6 evening before on KOMO TV." According to Juror Four: "One juror read The Seattle  
7 Times article aloud to the rest of the jurors. I recall that seven or eight jurors, including  
8 myself, were present at the time." Juror Four continues: "There then ensued a  
9 discussion amongst the jury that the plaintiffs were trying to get more money. We had  
10 never been advised by the court of the purpose of our deliberations on the  
11 communications issue. We, however, learned the purpose from the attached Seattle  
12 Times article, and the monetary purpose was then discussed." Juror Four says that she  
13 then, "having recalled the court's order to not review or discuss media reports about the  
14 case," told the other jurors "We can't be doing this." However: "Other jurors disagreed  
15 with me." Juror Four does not indicate the timing of when this took place.

16 11. The affidavit of Juror 11 agrees with these two descriptions. Juror 11 also  
17 indicates that the events took place before the verdict form was completed, including  
18 Juror Nine's reading the article out loud.

19 12. The defendants submitted declarations by jurors Six, Eight, and One.

20 13. The declarations of Jurors Six and Eight each contained statements to the  
21 effect that the jury had reached certain results on the afternoon of July 16, 2008 and  
22 therefore had only limited issues to resolve on July 17, 2008.

23  
ORDER GRANTING PLAINTIFFS' MOTIONS FOR NEW  
TRIAL - 6  
10782-028294 281570

**STAFFORD FREY COOPER**

PROFESSIONAL CORPORATION  
601 Union Street, Suite 3100  
Seattle WA 98101.1374

TEL 206.623.9900 FAX 206.624.6885

1           14. Juror One's declaration acknowledges that the jurors did discuss "the  
2 possible purpose for the second round of deliberations." Juror One also acknowledges  
3 that the newspaper was in the jury room when she arrived in the jury room, and all she  
4 can say for sure is it was not read in her presence. Juror One cannot say whether the  
5 newspaper was read before she arrived in the jury room.

6           15. Juror One's declaration states that she does not recall telling anyone that  
7 they would change their vote if they knew the purpose of the second hearing. Juror  
8 One does not deny making that statement, she simply indicates she does not recall.  
9 With due respect to Juror One, her recall is not credible given her failure to recall fairly  
10 significant events of having been the subject of a lawsuit and her husband having been  
11 the subject of lawsuits.

12           16. The declaration of Juror Six acknowledges that she saw a brief television  
13 snippet about the case on the night of July 16, 2008. She says she mentioned the news  
14 report in the jury room to other jurors but states she was reminded not to discuss media.  
15 She also acknowledges that the newspaper was in the jury room. To the best of her  
16 knowledge, she indicates, "No one read that newspaper during deliberations." She is  
17 not certain when the newspaper was read aloud, but says that it was read in her  
18 presence until after the verdict was completed. That statement does not rule out the  
19 reading aloud of the newspaper article outside her presence.

20           17. Juror Eight has submitted a declaration, but the declaration does not shed  
21 any light on the events. Juror Eight acknowledges the newspaper article was in the  
22 room when she arrived, and the newspaper may have been read aloud before she  
23 arrived.

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1           18.    The declarations and affidavits submitted by all of these jurors show that  
2 several facts are undisputed. It is undisputed that several jurors were exposed to media  
3 coverage July 16, 2008 and July 17, 2008, either by television or newspaper. It is  
4 undisputed that several jurors mentioned this exposure to other jurors. It is undisputed  
5 there was a newspaper in the jury room. It is undisputed that newspaper contained  
6 extrinsic evidence that had not been admitted to the jury. It is undisputed that this  
7 extrinsic evidence was excluded by the Court precisely because it was unduly  
8 prejudicial and could impermissibly sway the jury's verdict. And it is undisputed that this  
9 newspaper article was read aloud to jurors, though the timing of that reading aloud is  
10 debated. These undisputed facts raise significant doubts about the validity of the  
11 verdict, whether the plaintiffs were prejudiced by extrinsic evidence, and whether that  
12 extrinsic evidence worked its way into the deliberations.

13           19.    The assertions by Jurors One, Six, and Eight do not dispel the concerns  
14 that are raised by the juror affidavits submitted by the plaintiffs. While some of the  
15 unresolved questions could be resolved by assessing credibility, no party has asked the  
16 Court to conduct an evidentiary hearing.

17           20.    In his closing argument in the second phase of this case counsel for  
18 Defendant Schnall made an inappropriate argument when he injected into his  
19 argument an instruction that the Court had already rejected and gave weight to that  
20 instruction by attributing it to our Supreme Court. Having had the opportunity to  
21 observe Schnall's counsel for weeks and weeks in this trial, the Court has no doubt that  
22 Schnall's counsel did not intentionally violate the court's ruling regarding the jury  
23 instructions and has no doubt that he acted in good faith when he made the argument

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1 he made. That said, the argument was not appropriate. The argument literally  
2 instructed the jury with a legal instruction that the Court had rejected. Although the  
3 Court sustained an objection to the argument, struck it, and ordered the removal of a  
4 posterboard displaying it, the Court cannot be sure that doing so cured the irregularity  
5 given the length of the trial and the weariness of our jurors by the end of the trial.

6 21. The Court rejects as meritless, other challenges to the verdict raised by  
7 Juror No. 11. As for Juror No. 11's claim that unedited newspapers were in the jury  
8 room during the trial, there is no showing before this Court that the newspapers were  
9 not prescreened or that they contained any coverage about this case. As for Juror No.  
10 11's claim that Juror No. 12 inappropriately brought his personal experience with  
11 medical examinations to bear in the deliberations, that is exactly the type of personal  
12 experience we expect jurors to bring to bear in the course of deliberations and thus  
13 does not cause the Court any concern about the validity of the verdict.

#### 14 CONCLUSIONS OF LAW

15 1. A juror's material nondisclosure during jury selection requires a new trial if  
16 an accurate or honest response would have provided a valid basis for a challenge for  
17 cause.

- 18 a. The nondisclosure during jury selection by Juror One independently  
19 requires a complete new trial because the information she failed to  
20 disclose would have provided a basis for a challenge for cause.  
21 b. The nondisclosure during jury selection by the juror who failed to  
22 disclose sexual abuse independently requires a complete new trial  
23

1 because the information she failed to disclose would have provided a  
2 basis for a challenge for cause.

3 2. The injection of information by a juror to fellow jurors which is outside the  
4 recorded evidence of the trial and not subject to the protections and limitations of open  
5 court proceedings constitutes juror misconduct. Any doubt that the misconduct affected  
6 the verdict must be resolved against the verdict. A party is entitled to a new trial unless  
7 there is no reasonable possibility that the jury's verdict was influenced by the material  
8 that improperly came before it. The question the Court must answer is not whether the  
9 jury's misconduct did actually affect the verdict but whether that misconduct could have  
10 affected the verdict.

11 a. Based on the declarations and affidavits submitted to the Court, there  
12 is more than a reasonable possibility that the verdict was influenced by  
13 extrinsic evidence. This extrinsic evidence includes the media reports  
14 concerning the case and one of the jurors' experiences as a victim of  
15 childhood sexual abuse. The Court has no confidence in the verdict  
16 rendered by the jury.

17 b. The statements by Jurors Six and Eight to the effect that they had  
18 reached certain results on the afternoon of July 16, 2008 and therefore  
19 had only limited issues to resolve on July 17, 2008 are subjective  
20 statements concerning the effect of misconduct on the jury's verdict.

21 Those subjective statements inhere in the verdict and are irrelevant.

22 3. Counsel for Schnall made an inappropriate argument during his closing  
23 argument in the second phase of the case. The court makes no finding as to whether

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1 that misconduct, alone, would have been sufficient to require a new trial on the Sexual  
2 Exploitation of Children Act question. Because there are ample grounds for granting a  
3 new trial based on jury misconduct, the Court is folding Schnall's counsel's  
4 inappropriate argument in with the jury misconduct in granting plaintiffs' motion for new  
5 trial.

6 ORDER

7 Accordingly, the Court hereby ORDERS that the Plaintiffs' Motion for New Trial is  
8 hereby GRANTED as follows: The plaintiffs are entitled to a new trial on all of their  
9 original claims, including their claims for attorney fees under the Sexual Exploitation of  
10 Children Act. *No ruling was issued as to plaintiffs' remaining challenges.*  
11 ~~Plaintiffs' Motions for Judgment/Directed Verdict, Sanctions, and Additur~~  
are hereby DENIED.

12 DATED this 13 day of October, 2008.

13  
14 *Paris K. Kallas*  
The Honorable Paris K. Kallas

15 Presented by/Approved as to Form:

16 STAFFORD FREY COOPER

17  
18 By: *Ronald S. Bemis*  
19 Ronald S. Bemis, WSBA #7311  
Anne M. Bremner, WSBA #13269  
20 Peter J. Mullenix, WSBA #37171  
Attorneys for Plaintiffs

21  
22  
23 ORDER GRANTING PLAINTIFFS' MOTIONS FOR NEW TRIAL - 11  
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PROFESSIONAL CORPORATION  
801 Union Street, Suite 3100  
Seattle WA 98101.1374  
TEL 206.623.9900 FAX 206.624.6885

1 Approved as to Form:

2 FAIN SHELDON ANDERSON & VANDERHOEF, PLLC

3

4 By: *John E. Gagliardi*  
5 John E. Gagliardi, WSBA #24321  
6 Attorneys for Defendants Bill S. Schnall and Janet G. Schnall

6

7 HOFFMAN HART & WAGNER, LLP

7

8 By: *John E. Gagliardi for*  
9 Karen O'Kasey, WSBA #37275  
10 Attorneys for Defendant Richmond Pediatric Clinic

10

11

12 BENNETT, BIGELOW & LEEDOM, P.S.

12

13 By: *John E. Gagliardi for*  
14 Timothy Allen, WSBA #35337  
15 Attorneys for Defendant Richmond Pediatric Clinic

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601 Union Street, Suite 3100  
Seattle WA 98101.1374  
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

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JOHN DOE, an individual (JK); et al., )  
Plaintiff, )  
vs. )  
BILL S. SCHNALL, M.D., and JANET G. )  
SCHNALL, husband and wife and their ) No. 06-2-33713-1 SEA  
marital community; et al., )  
Defendants. )

JOHN DOE NO. 1, an individual (JH); )  
et al., )  
Plaintiff, )  
vs. )  
BILL S. SCHNALL, M.D., and JANET G. )  
SCHNALL, husband and wife and their )  
marital community; et al., )  
Defendants. )

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TRANSCRIPT OF PROCEEDINGS

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Heard before the Honorable Judge Paris K. Kallas, at King County  
Courthouse, 516 Third Avenue, Room E-863, Seattle, Washington

APPEARANCES:

ANNE BREMNER, RONALD BEMIS and PETER MULLENIX,  
representing the Plaintiffs;  
JOHN GAGLIARDI, representing the Defendants Schnall;  
TIMOTHY E. ALLEN and KAREN O'KASEY, representing the  
Defendant Richmond Pediatric Clinic.

DATE: September 12, 2008

REPORTED BY: Joanne Leatiota, RPR, CRR, CCP

Joanne Leatiota, Certified Realtime Reporter  
King County Courthouse, Rm. C-912, (206) 296-9167  
Seattle, WA 98104

1 Seattle, Washington; Friday, September 12, 2008

2 AFTERNOON SESSION - 3:43 P.M.

3 --oOo--

4 THE COURT: Good afternoon. Counsel, we are  
5 here on plaintiffs' motion for a new trial. I have  
6 received numerous pleadings. I believe I have  
7 everything, though, in front of me. What I wasn't  
8 clear is if the clinic intended to present argument  
9 this afternoon or not or simply defer to  
10 Mr. Gagliardi.

11 MS. O'KASEY: Defendant clinic will not have  
12 any argument. However, I am here to address issues  
13 if they come up; otherwise it would probably be  
14 Mr. Gagliardi primarily responding to questions.

15 MR. GAGLIARDI: But we were going to split  
16 time a little bit, I think.

17 THE COURT: What's that?

18 MR. GAGLIARDI: We were going to split time.

19 THE COURT: That's fine.

20 Counsel, what I contemplated was that each side  
21 would have ten minutes for argument. That's what you  
22 would get if this were the Court of Appeals. We'll  
23 limit ourselves to that. I am ready to hear  
24 argument. I assure you I have read the pleadings,  
25 the case law, the declarations submitted, and I am

1 ready to hear the high points of your argument.

2 MS. BREMNER: If I may approach, your Honor?

3 THE COURT: You may, thank you.

4 MS. BREMNER: May it please the court, I am  
5 Anne Bremner on behalf of the plaintiffs in this  
6 case. We appreciate the court reading everything  
7 that we have submitted.

8 I want to first say that the Briggs case upon  
9 which we are rely extensively was mine in the  
10 underlying trial of the matter. And I found it  
11 interesting, to say the least, that that case that in  
12 many ways slayed my victims is the one that saves  
13 them here, my victims in this case, because this  
14 verdict only resulted from misconduct, especially in  
15 the hearing phase on SECA.

16 And it's a sad commentary to stand before you when  
17 as you see in the cases and you know that the jury  
18 once empaneled becomes almost like the court. And in  
19 this case, this jury decided to read the newspaper  
20 out loud about this case, containing inadmissible  
21 items of evidence, items that this court had ruled  
22 on, discuss it, talk about what was on television,  
23 and then render a verdict against the victims in this  
24 case.

25 In this case, we have the following: One juror

1 was asked during voir dire under oath in three  
2 different ways whether anyone close to her or she had  
3 been involved in a lawsuit. She said no. Her  
4 husband had been sued at least twice. She had been  
5 sued at least once and had been personally served,  
6 and she denied any involvement whatsoever in prior  
7 litigation.

8 Another juror was asked under oath whether she'd  
9 ever been a victim of abuse. That, of course, was in  
10 the jury questionnaire as well under oath. She had  
11 been the victim of childhood sexual abuse for five  
12 years at the hands of relative, and she denied ever  
13 being abused. She described the abuse in affidavits  
14 to the defense -- or not affidavits; declarations,  
15 which, I would submit, are not appropriate here. The  
16 rule requires affidavits on a new trial motion based  
17 on juror misconduct. She said it was horrific, and  
18 she said it came to her during the course of the  
19 trial, these memories, where she truly and clearly  
20 was duty bound to disclose that information.

21 And both these jurors voted for the defense.

22 During the trial, the juror who had been abused  
23 remembered the abuse almost immediately. She entered  
24 counseling, undoubtedly discussing these issues with  
25 the therapist and receiving feedback from the

1 therapist on the issues germane to the case. She  
2 chose not to tell you, the court, or any of us about  
3 these memories.

4 And then during the first phase of deliberations,  
5 the juror who didn't disclose her memories disclosed  
6 them to the other jurors, and she was the foreperson,  
7 juror number six, Tamra Clark.

8 Both of the jurors have committed misconduct, of  
9 course, sided with the defense.

10 And then during the second phase of -- the second  
11 closing argument, counsel for Dr. Schnall invoked the  
12 Washington Supreme Court to argue for a higher  
13 standard on SECA by telling the jury it was the  
14 highest court in the land, contrary to what you had  
15 ruled, your Honor, with respect to what was an  
16 appropriate legal instruction to the jury.

17 When the objection was sustained, and there were  
18 numerous objections properly sustained, he made the  
19 argument again. He also had a visual to show to the  
20 jury to invoke this higher standard. And when the  
21 objections were sustained, he told the jury to decide  
22 for themselves what they think the standard should  
23 be. And then finally, in violation of a motion and  
24 order in limine -- subsequent order in limine, talked  
25 about predatory conduct and told the jury it had to

1 be predatory for them to return a verdict in favor of  
2 the plaintiffs on the SECA claims.

3 The night before their final deliberations, of  
4 course, this court instructed the jurors that they  
5 were still under the same orders of the court, and  
6 you repeatedly did, and did absolutely appropriately.  
7 There were stories published, the jurors read them,  
8 and they read them before court. They said so.

9 And they watched KOMO 4 News, at least two jurors  
10 did, one of whom was the foreman -- the forewoman,  
11 and the other, of course, was another misconducting  
12 juror, Judith Wahl, juror number one, and said if you  
13 had seen what was on KOMO, you would not vote for the  
14 plaintiffs.

15 The news stories we provided to you, the actual  
16 originals of what appeared in the front page of the  
17 P-I and The Times, but this is so important, your  
18 Honor, to our motion. The jurors -- or the stories  
19 contained this, if the jury voted "yes" on the second  
20 verdict that there would be additional money, \$1.8  
21 million, that the local prosecuting authorities had  
22 already answered "no" to the question the jury had.  
23 Norm Maleng, of course, that beloved prosecutor and  
24 very well regarded, was the one cited in the article  
25 as to someone that voted "no" in terms of this

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King County Courthouse, Rm. C-912, (206) 296-9167  
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1 particular claim. And the jurors had all of that in  
 2 a newspaper report, and we have a juror, Stacy  
 3 Carrell, that read it aloud. She admits it that she  
 4 read it aloud to the jury.

5 During the final day of deliberations, the jurors  
 6 discussed the media reports in the jury room. The  
 7 jury foreperson was one of the people leading this  
 8 discussion and talking about media.

9 The juror who withheld her litigation experience  
 10 during voir dire was the one that said if you knew  
 11 what was in the paper, you wouldn't vote for them.  
 12 Her husband is a doctor in a small clinic, and she  
 13 was the one saying if you knew what was in there, you  
 14 would change your vote, and you would vote against  
 15 the plaintiffs. And then the jury returned verdicts  
 16 of no.

17 We are asking for a new hearing and a new trial,  
 18 but let me start with the new hearing and the juror  
 19 misconduct in more detail.

20 THE COURT: You may want to save some time  
 21 for rebuttal.

22 MS. BREMNER: I will, your Honor. Let me  
 23 just say I -- the Briggs case is right on point, and  
 24 what it says, it cites Smith versus Kent, that when  
 25 you have withheld or when you have a juror --

1 extrinsic information in a jury room, the defense has  
2 to show beyond a reasonable doubt that the evidence  
3 didn't affect the verdict. And it's just a  
4 three-part test. Is it extrinsic, was it injected,  
5 could it have affected the verdict. Yes, it was  
6 clearly extrinsic. Yes, it was injected. And yes,  
7 it could have infected the verdict.

8 There is no question, it's probably the most  
9 egregious juror misconduct of any reported case, as  
10 we said in our brief. The Briggs case was simply a  
11 juror. His name was Carroll White, who said that he  
12 had a speech issue. He really called it a thought  
13 issue at the trial level. It was a case where  
14 stuttering was at issue in a serial rape case. He  
15 didn't stutter when he raped. The question was,  
16 could he control it.

17 His issue was injected in the jury room, and it  
18 was considered to be extrinsic and not personal  
19 experience.

20 Likewise, Smith versus Kent dealt with personal  
21 experience not disclosed and injected into the jury  
22 deliberations.

23 To take a newspaper article about the case with  
24 inadmissible evidence, it is so prejudicial, and  
25 clearly admitted by the juror who did it and other

1 jurors, I think that there is no question that there  
2 has to be a new hearing on this.

3 We would submit that given that, that this court  
4 should decide the issue as a matter of law. The  
5 defendants in their own motions in limine argued that  
6 the SECA issue was one of law, not one of fact. And  
7 given the huge expense of this trial -- and you  
8 should know also, your Honor, with respect to the fee  
9 issue, their sharing of that with plaintiffs  
10 themselves. And that was not put in front of the  
11 jury when they had the extrinsic evidence. They may  
12 well have thought it was just all going to lawyers.

13 But the huge expense of this trial and the  
14 emotional burden on all of these families, to have  
15 that taken away, the verdict by virtue of misconduct  
16 I think is just extraordinary. And to have yet  
17 another hearing, I think that this court should  
18 consider -- given the defendant's own arguments from  
19 the get-go to consider deciding this as a matter of  
20 law as they have argued. I don't think they can  
21 change that position now. It's simply a question of  
22 violation of the statute and whether or not this was  
23 arising out of the SECA statute, and I think that  
24 that can be determined by this court, and I'd urge  
25 you to do so.

Joanne Leatiota, Certified Realtime Reporter  
King County Courthouse, Rm. C-912, (206) 296-9167  
Seattle, Washington 98104

1 THE COURT: As I read your brief and the  
2 supplemental memo, my understanding was that the  
3 plaintiffs are seeking a new trial on both phases.

4 MS. BREMNER: We are. That's right. Let me  
5 turn, your Honor, to the new trial motion.

6 THE COURT: Actually, if we stick to the ten  
7 minutes, you have about a minute left, if you want to  
8 save that for rebuttal.

9 MS. BREMNER: Let me just say this on the  
10 new trial motion, that we have nondisclosure in voir  
11 dire that was extraordinary, and we have, as we have  
12 cited to you with respect to the cases in our brief  
13 that -- I just have one quote here that I wanted to  
14 submit to the court. "That men will be prone to  
15 favor that side of a cause with which they identify  
16 themselves either economically, socially or  
17 emotionally is a fundamental fact of human character.  
18 And where a juror fails to disclose some fact on voir  
19 dire which might affect his or her qualifications as  
20 a juror, in failure to disclose amounts to deception,  
21 the usual remedy is to award a new trial."

22 That's cited in our brief.

23 When you have the nondisclosure that we had here  
24 on the issues in the case, especially from Mrs. Wahl,  
25 and she didn't tell anything about all these other

1           lawsuits involving herself and her husband, we  
2           request that there -- we think it is required there  
3           be a new trial.

4           But then you have got with the juror Tamra Clark  
5           who failed to disclose and then talked about in the  
6           jury room, you have got Briggs, and you have got  
7           Smith versus Kent.

8           And when you combine misconduct, as you know, your  
9           Honor, nondisclosure and injection of extrinsic  
10          evidence in the jury room, prejudice is presumed and  
11          a new trial is required.

12          We have also addressed the issues of additur, and  
13          I think that those are so clear, just so clear.  
14          Again, I think when you have a jury that misconducts  
15          themselves to this extent, that you know that this  
16          verdict is resulted by virtue of their misconduct.

17          Given that, and given what the evidence was that  
18          was given to you -- I won't repeat all of our figures  
19          here, your Honor, but they were in the millions in  
20          terms of what the economic non-economic damages were  
21          to these families. A \$600,000 combined verdict was  
22          clearly inadequate. And I know that additur is  
23          unusual, but I think if there is any case where there  
24          should be additur, it's this one.

25                   THE COURT: Thank you.

1 Mr. Gagliardi.

2 MR. GAGLIARDI: Good afternoon, your Honor.

3 THE COURT: Will you be using the full ten  
4 minutes, or are you sharing it?

5 MR. GAGLIARDI: I'd like to leave a minute  
6 for the clinic in case I leave something.

7 MS. BREMNER: I would just object to the  
8 clinic, your Honor, as they have taken the position  
9 that they weren't part of the verdict -- adverse  
10 verdict.

11 THE COURT: If the clinic wants a brief  
12 hearing, I will allow it.

13 MS. BREMNER: Is it all right if I remain  
14 here, your Honor?

15 THE COURT: Yes.

16 MS. BREMNER: Thank you.

17 MR. GAGLIARDI: Your Honor, it's interesting  
18 that the plaintiffs keep saying that there was a  
19 verdict against their clients. There wasn't. We had  
20 a six-and-a-half-week trial that resulted in a  
21 plaintiffs' verdict for six figures, your Honor.

22 So what we have here is not a case where the  
23 plaintiffs did not prevail. It's not a case where  
24 there was no damage awarded. It's a case where the  
25 plaintiffs won, they got six figures as damages, and

1 now they are unhappy because they think they should  
2 have gotten millions of dollars in damages.

3 So it's a very different case, and I am not aware  
4 of any case in Washington where a court has offered a  
5 new trial or given additur where the plaintiffs have  
6 prevailed and won six figures in damages. So I think  
7 we need to start at that point at any analysis as to  
8 whether a new trial is warranted or not, because  
9 there was a lot of effort and a lot of time that went  
10 into this trial.

11 I am going to break my argument down into three  
12 basic points. Our briefing is very extensive, and I  
13 appreciate your reading that.

14 I want to talk first about the underlying trial  
15 before the second phase. It's the defense position  
16 that there is absolutely no proof of juror misconduct  
17 or any sort of irregularities in the verdict form  
18 that would merit a new trial with respect to the  
19 underlying verdict. That verdict is good, and here's  
20 why.

21 First of all, to the extent Juror Nosal offers  
22 opinions or statements about what occurred during the  
23 jury room, what others said, those things inhere in  
24 the verdict because they go to the jurors' thought  
25 processes.

1           The jurors' personal experiences, it's clear from  
2 the case law those are things that jurors are  
3 supposed to bring to the table. So to the extent  
4 she's talking about things that others said or did,  
5 those statements inhere in the verdict and should not  
6 be considered.

7           On the supplemental briefing issue -- and I  
8 apologize for going quickly, but I have limited time.  
9 The supplemental briefing issue --

10           THE COURT: You do know, though, that  
11 doesn't help. That makes it worse.

12           MR. GAGLIARDI: I know. And I am trying to  
13 go slow, but I have a lot to cover.

14           The supplemental briefing issue, your Honor, the  
15 defendants submitted supplemental declarations from  
16 both Ms. Wahl and Ms. Clark. Actually, declarations  
17 are sufficient under GR 13. You can use declarations  
18 in lieu of affidavits, just to address that point.

19           But they're very clear that, you know, in order to  
20 consider a new trial based on juror misconduct for  
21 concealing something, you have got to prove that the  
22 answers were dishonest, one; and two, that had the  
23 true answers been given, it would have been a basis  
24 for a challenge for cause.

25           The plaintiffs have failed on both of those. For

1 Ms. Clark, she testified in her declaration very  
2 clearly that these were things that came up during  
3 the course of trial. She was never told she had an  
4 obligation or duty to, you know, disclose that at  
5 some point later on. And frankly, I am sure she  
6 didn't even remember, as she stated in her  
7 declaration, that there was such a question asked of  
8 her.

9 THE COURT: Does dishonest, though, in the  
10 case law mean intending to lie as opposed to  
11 inaccurate? When we look at Briggs, and I can't  
12 recall the other case, I have it in here in my notes,  
13 but the trial court specifically did not make  
14 findings in those cases of an intent to lie, but  
15 instead, inaccurate information provided in voir  
16 dire.

17 MR. GAGLIARDI: Right, and I think if you  
18 look at the cases we cited, Elmore and Broten where  
19 there was an inaccurate answer, and they said no,  
20 that doesn't necessarily matter. The proof is were  
21 they dishonest, and would that have provided a basis  
22 for a challenge for cause. I think that's the test  
23 that was set out in that In Re Elmore case from 2007.  
24 And that's the case I think controls, because it's  
25 most analogous to what you have to deal with here in

1           this case.

2           Regardless, your Honor, to the issue of the second  
3 point about challenge for cause, you know, the  
4 plaintiffs fought tooth and nail to keep the two  
5 jurors that had experience with sexual abuse on the  
6 jury, so there is no way, had they known of this  
7 sexual abuse history of one of the jurors, that they  
8 would have challenged her for cause. No way. It's a  
9 specious argument at this point.

10           For Ms. Wahl, your Honor, there is no evidence  
11 that she remembered litigation from ten to 25 years  
12 ago. She didn't remember it, and that's not --  
13 that's very believable. She didn't have any  
14 involvement. The case was against her husband. And  
15 she certainly said, "I didn't inject any experiences  
16 about litigation into the jury room," nor is there  
17 any evidence of that from any of the jurors. So  
18 obviously that would not provide a basis for a  
19 challenge for cause.

20           So for these reasons, your Honor, I think there  
21 has been insufficient evidence by the plaintiffs to  
22 attack the underlying verdict, and the underlying  
23 verdict has to stand.

24           I am going to talk about the second phase now. I  
25 am going to first address the alleged allegation of

1 attorney misconduct. First of all, your Honor, the  
2 plaintiffs are creating out of thin air a motion in  
3 limine about use of the word "predatory." Please  
4 review the record, because there is no such motion in  
5 limine on the use of the word "predatory." There was  
6 no order from you about the use of the word  
7 "predatory."

8 So that's made up in whole cloth, and there is  
9 nothing in their evidence that says otherwise. And  
10 feel free to review the record on that issue, your  
11 Honor, but there was no motion in limine on the use  
12 of the word "predator."

13 We submitted our declarations on this case. You  
14 know, we talked about these jury instructions. And  
15 it was my understanding and Mr. Allen's understanding  
16 that, you know, you had kind of said, you know, I  
17 think this is a correct statement of the law, and I  
18 think it's kind of implicit in the instruction that I  
19 am giving.

20 Based on that discussion, it was my understanding  
21 that I could explain to the jury what the definition  
22 of immoral purposes for a sexual nature was. That's  
23 what I thought to be true. It is a correct statement  
24 of the law based on the McNally and Hosier cases, so  
25 I don't think that was misconduct, your Honor. And

1           regardless, if you believe that there was some error  
2           in making that argument, an objection was made, it  
3           was sustained, the argument was stricken.

4           Now, the Supreme Court in the Aluminum Company  
5           versus Aetna case sets out kind of a four-part test.  
6           There was actually misconduct, which I say was not  
7           proven, there was no misconduct in this case.

8           That the misconduct is prejudicial in the context  
9           of the entire record. Again, I don't think that has  
10          been proven in this case.

11          That the movant has objected to the misconduct. I  
12          will agree, they did do that.

13          And that the court must not have cured the  
14          misconduct by instruction. Well, you did do that.  
15          To the extent you thought there was any problem with  
16          my argument, you sustained the objection and you  
17          instructed the jury to disregard.

18          So with respect to the misconduct by me, the  
19          allegations of that, they failed on three of the four  
20          elements, so there is no basis for a sanction and no  
21          basis for a new trial.

22          Now, the third issue, your Honor, is the jury  
23          misconduct in the second phase. Now, it is a little  
24          frustrating to be standing here before you to talk  
25          about that, because the very reason there was this

1 press was because of the plaintiffs. The very reason  
2 there was this press information about 1.8 million in  
3 attorney's fees for the plaintiffs, where did that  
4 information come from, your Honor? It came from the  
5 plaintiffs attorneys talking to the press.

6 So now they are sitting here before you saying the  
7 jury committed misconduct based on information they  
8 provided to the press. So in a way it's kind of  
9 invited error on their part, and it's a little  
10 frustrating at this point that that's one of their  
11 arguments.

12 But I think if we look at the verdicts, it is  
13 beyond a reasonable doubt that what was said in that  
14 second round didn't affect the verdict. And I say  
15 that for this reason. The jury found that the clinic  
16 was vicariously liable, that Dr. Schnall was acting  
17 within the course of his employment in answering  
18 question number three.

19 Jury instruction number 16 said that -- and I  
20 don't have it here, but that basically defendant  
21 Schnall was not acting within the scope of employment  
22 if his acts issued from wholly personal motives for  
23 sexual gratification. If that's true, and we have to  
24 presume the jury followed that instruction, the fact  
25 that they found the clinic vicariously liable on the

Joanne Leatiota, Certified Realtime Reporter  
King County Courthouse, Rm. C-912, (206) 296-9167  
Seattle, Washington 98104

1 negligence claim means that they found that there was  
2 no wholly personal motives for sexual gratification.

3 I think that answers your question, your Honor,  
4 beyond a reasonable doubt that there was no  
5 communication with a minor for immoral purposes based  
6 on the juxtaposition of those two things.

7 THE COURT: But doesn't that ignore the fact  
8 that the jury was required to deliberate on that  
9 second phase. They were required to answer we have  
10 to apply an objective test, not a test of what  
11 actually happened and what actually occurred, that  
12 would inhere in the verdict.

13 I understand both parties in these motions raised  
14 various challenges to various legal rulings. I think  
15 the defense in its responses has raised again  
16 challenges to the way the second phase proceeded to  
17 my legal rulings. I see that as a motion to  
18 reconsider as opposed to an argument that we can look  
19 on to see how the jury actually reacted. I don't  
20 think that would be an appropriate use of the jury  
21 instructions, and I think it would be misapplying the  
22 law. That would be what inhere in the verdict.

23 MR. GAGLIARDI: Okay. And that's fine. And  
24 then, your Honor, I think that there is also this  
25 issue about we do have uncontroverted evidence that

1 at least as to three of the four, there was a vote  
2 taken, and the vote was "no" as to three of the four  
3 plaintiffs before there was any alleged misconduct on  
4 the evening of the 16th or the 17th.

5 THE COURT: You have got about a minute or  
6 two left.

7 MR. GAGLIARDI: Fair enough, your Honor.  
8 Essentially, your Honor, on the additur, I think, you  
9 know, it's got to be within the range of the  
10 evidence. I think it's very clear that it was within  
11 the range of the evidence. And it doesn't shock the  
12 contents, and it was -- the award was more than the  
13 defendant suggested and less than the plaintiffs, so  
14 additur is clearly inappropriate.

15 But I think it's very important, your Honor -- I  
16 do want to make the point that the first verdict and  
17 the second verdict are two different things. I think  
18 even if you were concerned about the second verdict,  
19 that doesn't invalidate the first verdict. If there  
20 was no misconduct with respect to that first verdict,  
21 that verdict needs to stand.

22 So I will leave another minute for Ms. O'Kasey.

23 THE COURT: Thank you.

24 MR. GAGLIARDI: Or not.

25 MS. O'KASEY: I think Mr. Gagliardi covered

1 everything.

2 THE COURT: Thank you.

3 Ms. Bremner.

4 MS. BREMNER: Let me say first, your  
5 Honor -- thank you -- GR 13 aside, the rule requires  
6 affidavits from jurors. I'd like to know why they  
7 weren't done by affidavit, and they had so many  
8 qualifications about their memory, about "the best I  
9 recall" and everything else.

10 Nothing in the response from the defense in any  
11 way controverts what we have put forward on clear  
12 misconduct and nondisclosure and also injection of  
13 extrinsic evidence after the fact in the jury room in  
14 both phases.

15 Now, he just brought up the question of whether or  
16 not there has to be dishonesty, and the court is  
17 absolutely correct, you don't have to have an  
18 intentional lying. I mean, that's been the law for  
19 as long as I have practiced, and I'd cite to the  
20 court State versus Rempel at 53 Washington Appellate.  
21 Failing to disclose some fact on voir dire which  
22 might affect qualification of the juror and failure  
23 to disclose amounts to some deception, the usual  
24 remedy's to award a new trial.

25 And then the other case is Briggs and Kent, talks

1 about it doesn't have to be dishonest. And I did  
2 handle that hearing, and that juror was found to not  
3 have been dishonest, and it still resulted in a new  
4 trial in a case involving serial rape when he  
5 honestly thought he was answering the question.

6 Going on to the issues raised on additur, we have  
7 given you detailed numbers in terms of what was  
8 presented in the evidence. It doesn't matter if it's  
9 a case that dealt with six figures or one that deals  
10 with 120 bucks. The question is whether or not the  
11 jury gave an adequate award under the facts  
12 presented.

13 And as we have cited to you, when you have an  
14 issue about whether passion or prejudice affected a  
15 verdict, as we squarely have here, and made it so low  
16 in light of what the evidence clearly showed, additur  
17 is appropriate. It's the perfect storm of a horrific  
18 jury verdict with the nondisclosure.

19 And keep in mind also, your Honor, I have to say  
20 one more time -- I know I have only a minute, but  
21 Tamra Clark nondisclosed and injected in the jury  
22 room. And that is Smith versus Kent, that is State  
23 versus Briggs. And I tried that case back in 1987,  
24 and it is still good law today, and it is exactly on  
25 point and controls that there should be a new trial

Joanne Leatiota, Certified Realtime Reporter  
King County Courthouse, Rm. C-912, (206) 296-9167  
Seattle, Washington 98104

1 and a new hearing.

2 Thank you.

3 THE COURT: Thank you.

4 We are here on plaintiffs' motion for a new trial,  
5 not only in the first phase but the second phase.  
6 Plaintiffs have raised several grounds.

7 Let me first address whether this was, in fact, a  
8 pro plaintiff verdict or not. I am not going to make  
9 that assessment. The plaintiffs have brought this  
10 motion for a new trial. I assume that they have made  
11 whatever decision they need to about whether they  
12 were satisfied with the verdicts or not.

13 We are here on plaintiffs' motion for new trial.  
14 Whether it was "a defense verdict" is something I am  
15 not going to resolve. There are numerous grounds  
16 that have been raised. I am going to address first  
17 the alleged juror misconduct. I will begin with the  
18 nondisclosure of jurors number one and number six.

19 Washington courts have adopted the cause-based  
20 standard set forth in McDonough Power Equipment v.  
21 Greenwood, 464 U.S. 548 (1984). Under that test, a  
22 juror's material nondisclosure calls for a new trial  
23 only if an accurate/honest response would have  
24 provided a valid basis for a challenge for cause.  
25 Our courts have adopted that in State v. Cho, 108 Wn.

1 App., and State v. Briggs, 55 Wn. App.

2 In other words, a simple failure to disclose is  
3 not grounds for a new trial, nor is a missed  
4 opportunity to exercise a peremptory challenge. We  
5 have several cases that illustrate these principles,  
6 and I am guided by the application of them.

7 In State v. Johnson, 137 Wn. App. 862 (2007), the  
8 Court of Appeals reversed the defendant's burglary  
9 and attempted first-degree rape convictions. The  
10 court held the defendant was denied a fair trial by a  
11 juror's failure to disclose that her daughter had  
12 been the victim of a date rape. The trial court  
13 found the disclosure was not intentional.

14 The juror later explained she did not even think  
15 of it at the time of voir dire, because it had  
16 happened 14 to 15 years before the trial. Rather,  
17 the juror recalled it during the trial and revealed  
18 it to her fellow jurors, she believed, after the  
19 deliberations were complete. Other jurors, however,  
20 indicated that they believed she had announced it  
21 during the course of deliberating.

22 The Court of Appeals held that this nondisclosure  
23 deprived the defendant of an opportunity to explore  
24 potential bias that could have provided a basis for a  
25 challenge for cause. The court acknowledged, and I

1 find this is significant in our case, that other  
2 jurors had disclosed personal instances of sexual  
3 assault. The defense attorneys had an opportunity to  
4 explore that and did not seek cause dismissals of  
5 those jurors. In other words, the fact that it has  
6 been explored as to other jurors is not definitive as  
7 to what would have happened had the juror at issue  
8 actually made the disclosure.

9 The Court of Appeals held the defendant was  
10 deprived of a fair trial and reversed the trial  
11 court's denial of the motion for a new trial.

12 State v. Briggs, decided awhile ago, remains a  
13 definitive authority in this area. In that case, the  
14 juror failed to disclose a speech production  
15 disorder, despite being asked about such a condition.  
16 The juror later explained that he did not consider  
17 his disorder to be a stutter.

18 The trial court did not make a finding that the  
19 juror intended to deceive. Nonetheless, it was held  
20 that the nondisclosure deprived the defendant of an  
21 opportunity to explore potential bias that would  
22 provide a basis for a challenge for cause.

23 As in Johnson, the attorneys in Briggs addressed  
24 similar issues with other jurors who had speech  
25 disorders. They pursued those, and they did not

1 exercise challenges for cause. Again, I find that  
2 important, because we do not have to have a showing  
3 that a challenge for cause would actually be  
4 exercised.

5 Here, juror number one failed to disclose that her  
6 husband has been a defendant in medical malpractice  
7 lawsuits, in at least two, and that she herself was a  
8 defendant in at least one. In her declaration, she  
9 explains this was inadvertent and that her answers  
10 were honest at the time she completed the  
11 questionnaire. She explained that these lawsuits  
12 took place quite a long time ago and that she was not  
13 actively or directly involved.

14 I believe her. I am willing to accept it was an  
15 honest failure to disclose. That does not change the  
16 fact, however, that in this medical malpractice case  
17 where standard of care was a pivotal issue, her  
18 nondisclosure was prejudicial to the plaintiffs.

19 Had she answered correctly and accurately,  
20 plaintiffs would have had an opportunity to explore  
21 whether her personal experience and her husband's  
22 personal experience resulted in bias. If it did  
23 result in a bias, that would clearly be a basis to  
24 exercise a challenge for cause.

25 This was not simply a lost opportunity for a

1 peremptory challenge. This is no different than the  
2 juror in Cho who failed to disclose he was a retired  
3 police officer. This is no different than the  
4 juror's nondisclosures in Briggs and Johnson.

5 Regarding juror number six, she explained that her  
6 nondisclosure was honest at the time she filled out  
7 the confidential questionnaire and that she did not  
8 remember having been a victim of sexual abuse. It  
9 was only during the course of the trial that these  
10 memories "surfaced," as she described, "much to my  
11 horror."

12 She further explained that the memories were so  
13 distressing that she immediately entered into  
14 therapy, presumably in the middle of trial. She  
15 explained that these memories surfaced in the third  
16 or fourth week. So I assume that "immediately  
17 entering into" meant she entered into therapy during  
18 the course of the trial.

19 Again, I believe her. I think this was an honest  
20 nondisclosure. But it does not change the fact that  
21 she failed to disclose this information.

22 In addition, juror number six candidly indicates  
23 that she shared this information with other jurors.  
24 She believes it was only in deliberations on the  
25 second phase, but she acknowledges she injected this

1 nondisclosed information into the deliberation phase.

2 Had juror number six disclosed this information  
3 during voir dire, it would have provided a basis for  
4 a challenge for cause. Sexual abuse by a family  
5 member, presumably either someone who was an  
6 authority figure or a trusted family figure, that was  
7 so traumatic as to cause a repressed memory requiring  
8 immediate therapy. In this case, with the facts that  
9 were at issue, that would certainly provide the basis  
10 for a challenge for cause.

11 Both Briggs and Johnson involved nondisclosure and  
12 subsequent injection of the nondisclosed information  
13 into deliberations. We do not have that with juror  
14 number one. With juror number six, it is not  
15 entirely clear to me if she injected her experience  
16 into phase one or only phase two. But she  
17 acknowledges she injected it into phase two.

18 Even if she did not inject it into phase one, the  
19 plaintiffs are still prejudiced by this nondisclosure  
20 due to the type of information that was nondisclosed  
21 and the fact it would provide a basis for challenge  
22 for cause and that it was undeniably injected into  
23 the second phase.

24 As to both of these jurors, then, I find that we  
25 have the type of nondisclosure that satisfies the

1 McDonough cause-based challenge. This nondisclosed  
2 information would have provided a basis for a  
3 challenge for cause for both juror number one and  
4 juror number six.

5 Turning, then, to the alleged juror misconduct  
6 regarding exposure to media coverage on the night of  
7 July 16th, which would be the TV reports, and the  
8 morning of July 17th, the newspaper reports.  
9 Ordinarily, a court does not examine how a jury  
10 either collectively or individually arrives at its  
11 verdict. But an exception exists when a jury injects  
12 extrinsic evidence into the deliberations.

13 In *Richards v. Overland Medical*, the court  
14 explained as follows: "The injection of information  
15 by a juror to fellow jurors which is outside the  
16 recorded evidence of the trial and not subject to the  
17 protections and limitations of open court proceedings  
18 constitutes juror misconduct."

19 In *State v. Briggs*, the court explained that juror  
20 misconduct involving the use of extraneous evidence  
21 entitles a party to a new trial if there are  
22 reasonable grounds to believe the party was  
23 prejudiced. Any doubt that the misconduct affected  
24 the verdict must be resolved against the verdict.  
25 *Briggs* further indicates this is an objective inquiry

Joanne Leatiota, Certified Realtime Reporter  
King County Courthouse, Rm. C-912, (206) 296-9167  
Seattle, Washington 98104

1           into whether the extraneous evidence could have  
2           affected the verdict, not a subjective inquiry into  
3           the actual effect, because to do so would be looking  
4           at evidence that inheres in the verdict.

5           Finally, Briggs indicates a party is entitled to a  
6           new trial unless there is no reasonable possibility  
7           that the jury's verdict was influenced by the  
8           material that improperly came before it.

9           Again, several cases illustrate these principles.  
10          In State v. Pete, 152 Wn. 2d 546 (2004), two  
11          documents were inadvertently sent into the jury room  
12          during deliberations. Both documents included the  
13          defendant's statements. Those statements had not  
14          been admitted in trial, and they included evidence  
15          that could be construed to indicate the defendant was  
16          lying. The court reversed, holding the defendant had  
17          been denied a fair trial due to this extrinsic  
18          evidence.

19          In Briggs, the juror injected his personal  
20          experience with a speech disorder and used it during  
21          deliberations to challenge the evidence introduced.  
22          The court held that this specialized knowledge was  
23          outside the realm of everyday experiences we expect  
24          jurors to bring to bear in deliberations.

25          By contrast, in Richard v. Overlake, a juror's

1 personal theory about the cause of the baby's birth  
2 defects was not extrinsic evidence. Instead, the  
3 court found it was based on information contained in  
4 medical records admitted into evidence and based on  
5 the juror's quasi-medical experience that she  
6 disclosed in voir dire.

7 Turning to this case, we have numerous jurors who  
8 have submitted declarations about exposure to media  
9 coverage. Juror number nine states that on the last  
10 day of deliberations, jurors number one and six  
11 discussed media coverage they had seen the evening  
12 before. And according to juror number nine, juror  
13 number six said "to those of us that were favoring a  
14 vote for plaintiffs, 'If you knew what we were voting  
15 on, you would probably change your vote.'"

16 Juror number nine also references The Seattle  
17 Times article that is the subject of the other  
18 declarations submitted, in which the article  
19 indicated that if the jurors answered the question  
20 affirmatively, the plaintiffs would be entitled to  
21 attorney's fees that could be in the amount of \$1.8  
22 million.

23 Juror number nine also candidly acknowledges that  
24 that newspaper article was in the jury room, and she  
25 acknowledges that she read the article out loud to

1 the other jurors. She states she did so after the  
2 verdict was completed but before it was announced in  
3 the courtroom.

4 Juror number four also indicates that the  
5 newspaper was in the jury room. She describes it in  
6 detail. She mentions in detail that it referenced  
7 that Prosecutor Norm Maleng declined to file charges  
8 against Dr. Schnall. "This wasn't a criminal charge  
9 his office could pursue." She also acknowledged that  
10 the article contained information about the \$1.8  
11 million in attorney's fees that could result as a  
12 result of the second phase.

13 I am going to read the next two paragraphs from  
14 juror number four's affidavit.

15 Paragraph eight. "During our final day of  
16 deliberations, there was also a generalized  
17 discussion of media coverage, including references to  
18 the two Seattle newspapers and to a media report on  
19 the case aired the evening before on KOMO TV."

20 Paragraph nine. "One juror read The Seattle Times  
21 article aloud to the rest of the jurors. I recall  
22 that seven or eight jurors, including myself, were  
23 present at the time."

24 Paragraph ten. "There then ensued a discussion  
25 amongst the jury that the plaintiffs were trying to

1 get more money. We had never been advised by the  
2 court the purpose of our deliberations on the  
3 communications issue. We, however, learned the  
4 purpose from the attached Seattle Times article, and  
5 the monetary purpose was then discussed."

6 Paragraph 11. "I, having recalled the court's  
7 order to not review or discuss media reports about  
8 the case, said, 'We can't be doing this.' Other  
9 jurors disagreed with me."

10 Juror number four does not indicate the timing of  
11 when this took place.

12 Juror number 11 agrees with these two  
13 descriptions, and she indicates that the events took  
14 place before the verdict form was completed,  
15 including juror number nine's reading the article out  
16 loud.

17 I want to take a tangent here and address some  
18 other matters raised by juror number 11 in her  
19 declaration. She describes other events such as  
20 newspapers in the jury room during the course of the  
21 trial. She contends that they were unedited. I  
22 reject that challenge to the verdict as meritless.  
23 There is no showing before this court that the  
24 newspapers had not been prescreened. For all I know,  
25 they were the sports page and had absolutely no

1 coverage about this particular case.

2 She also contends that juror number 12  
3 inappropriately brought his personal opinion to bear  
4 in terms of medical examinations. Again, I find that  
5 is meritless. That is exactly the type of personal  
6 experience we expect jurors to bring to bear in the  
7 course of deliberations, and that does not form any  
8 concern in my mind about the validity of the verdict.

9 But the declarations I have just addressed raise  
10 significant concerns about extrinsic evidence being  
11 injected into deliberations. Unfortunately, these  
12 concerns are not dispelled by the declarations from  
13 jurors one, six and eight.

14 Their declarations mention that they had reached  
15 certain results on the afternoon of the 16th and then  
16 had only limited issues to resolve on the 17th. I  
17 find that that is irrelevant under the case law.  
18 That would be the type of subjective analysis that is  
19 barred under Briggs.

20 This court cannot look at how it actually affected  
21 juror deliberations. That inheres in the verdict.  
22 Instead, I have to look and apply the objective  
23 tests. So I do not think that that information sheds  
24 any light on the issues before me.

25 Juror number one acknowledges, "There was

1 discussion among the jurors about the possible  
2 purpose for the second round of deliberations."

3 Juror number one also acknowledges that the newspaper  
4 was in the jury room when she arrived in the jury  
5 room, and all she can say for sure is it was not read  
6 in her presence. We do not know if it was read  
7 before she arrived in the jury room.

8 She also does not recall telling anyone that they  
9 would change their vote if they knew the purpose of  
10 the second hearing. She does not deny saying that.  
11 She simply indicates she does not recall.

12 And with all due respect to juror number one, her  
13 recall is not at all credible, given her failure to  
14 recall fairly significant events of having been the  
15 subject of a lawsuit and her husband having been the  
16 subject of lawsuits.

17 Juror number six also acknowledges that she saw a  
18 brief TV snippet. She characterizes it on the night  
19 of July 16th. She mentioned it in the jury room to  
20 other jurors, but states she was reminded not to  
21 discuss media. She also acknowledges that the  
22 newspaper was in the jury room. But to the best of  
23 her knowledge, she indicates, "No one read that  
24 newspaper during deliberations." She is not certain  
25 when the newspaper was read aloud, but it certainly

Joanne Leatiota, Certified Realtime Reporter  
King County Courthouse, Rm. C-912, (206) 296-9167  
Seattle, Washington 98104

1 was not in her presence until after the verdict was  
2 completed. Again, we do not know if it was read  
3 outside her presence.

4 Juror number eight has submitted a declaration,  
5 but it does not shed any light, because she  
6 acknowledges the newspaper article was in the room  
7 when she arrived, and again, we do not know what  
8 happened before she arrived.

9 Jurors one, six and eight do not dispel the  
10 concern that is raised by the jurors' declarations  
11 submitted by the plaintiffs. And, in fact, all the  
12 jurors' declarations reveal that there are several  
13 key facts that are undisputed.

14 It is undisputed that several jurors were exposed  
15 to media coverage July 16th and 17th either by TV or  
16 newspaper.

17 It is undisputed that several jurors mentioned  
18 this exposure to other jurors.

19 It is undisputed there was a newspaper in the jury  
20 room.

21 It is undisputed that newspaper contained  
22 extrinsic evidence that had not been admitted to the  
23 jury.

24 It is undisputed that this extrinsic evidence was  
25 excluded by me precisely because it was unduly

1 prejudicial and could impermissibly sway the jury's  
2 verdict.

3 And it is undisputed that this newspaper article  
4 was read aloud to jurors, albeit the timing of that  
5 reading aloud is debated.

6 These undisputed facts raise significant doubts  
7 about the validity of the verdict and whether the  
8 plaintiffs were prejudiced by extrinsic evidence and  
9 whether that extrinsic evidence worked its way into  
10 the deliberations.

11 While some of the unresolved questions could be  
12 resolved by assessing credibility, no party has asked  
13 this court to conduct an evidentiary hearing. I am  
14 resolving the matter on the declarations as they have  
15 been submitted to the court. And under well-settled  
16 case law, doubts against the verdict must be resolved  
17 against the verdict.

18 Plaintiffs are entitled to a new trial unless it  
19 can be said that no reasonable possibility the  
20 verdict was influenced by extrinsic evidence. And I  
21 cannot make such a finding. Instead, there is more  
22 than a reasonable possibility that the verdict was  
23 influenced by extrinsic evidence.

24 I recognize that a strong showing of juror  
25 misconduct is required to overturn a verdict. This

1 is an appropriate hurdle. The parties are entitled  
2 to a fair trial, not a perfect trial.

3 The McDonough court explained it best. "A trial  
4 represents an important investment of private and  
5 social resources." That is certainly the case here.  
6 The parties, the attorneys and the jurors devoted  
7 weeks to this case. Nonetheless, an impartial  
8 fact-finder is a basic element to a fair trial. Here  
9 the plaintiffs have established prejudicial  
10 nondisclosure in voir dire that satisfies the  
11 cause-based standard of the McDonough case. This  
12 alone would justify a new trial.

13 But when this is combined with significant doubts  
14 about whether prejudicial extrinsic evidence was  
15 injected into the deliberations, I have to say I have  
16 no confidence in the verdict. For these reasons, I  
17 grant the plaintiffs' motion for a new trial on the  
18 juror misconduct grounds.

19 The briefing has raised other issues. Most of  
20 them I am not going to address, because again I think  
21 they are essentially motions to reconsider various  
22 legal rulings. I do, however, want to address the  
23 challenge to Mr. Gagliardi's closing argument in the  
24 second phase. The facts are set forth in the briefs,  
25 and I will not repeat them.

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1           But having had the opportunity to observe  
2 Mr. Gagliardi for weeks and weeks in trial, I have no  
3 doubt that he did not intentionally violate the  
4 court's ruling regarding the jury instructions. And  
5 I have no doubt that he acted in good faith when he  
6 made the argument he made.

7           That said, his argument was not appropriate.  
8 Mr. Gagliardi did not simply argue the concepts, he  
9 injected the law into the argument and gave weight to  
10 it by attributing it to our Supreme Court. His  
11 argument literally instructed the jury with a legal  
12 instruction that I had rejected.

13           Does this conduct call for a new trial? If this  
14 were the only issue raised, it would be a close call.  
15 The comment was objected to, the objection was  
16 sustained, the comment was stricken, and the poster  
17 board was removed.

18           Nonetheless, given the length of the trial and the  
19 weariness of our jurors by the end of the trial, I am  
20 not sure that my instruction cured the irregularity.  
21 However, there are ample grounds for granting a new  
22 trial based on jury misconduct, and therefore, I need  
23 not and, in fact, will not resolve whether  
24 Mr. Gagliardi's misconduct, in fact, justified a new  
25 trial. Instead, I am folding it in with the jury

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1 misconduct as another grounds and another basis for  
2 granting plaintiffs' motion for a new trial.

3 Plaintiffs have prevailed on this. I am going to  
4 ask plaintiffs to present a written order summarizing  
5 my findings. We can incorporate the court's oral  
6 ruling as well.

7 We need to set a new trial date, and we need to  
8 address the sealing issue. The parties have  
9 submitted a motion to seal. I think it is  
10 appropriate, but I am going to ask that you go back  
11 and reread the rules and the case law and ask that  
12 you simply submit redactions. There is no need to  
13 seal the entire pleadings. Redactions are sufficient  
14 to protect the confidentiality of the jurors.

15 And please reread the court rule. It requires  
16 that an original unredacted be provided and that the  
17 parties complete the redactions and submit that to  
18 the court, along with the motion to seal.

19 Counsel, I don't know if the parties want to set a  
20 new trial date now or if you want to meet and confer  
21 and set one. I do need to tell you it's not clear  
22 where the trial will remain due to new assignments  
23 for the courts. I am not sure whether it will remain  
24 in this department or not. That's something that  
25 will have to be decided by our presiding judge when

1 assignments are made.

2 MS. BREMNER: Your Honor, we are ready to  
3 set a trial date.

4 MR. GAGLIARDI: We are not ready to set a  
5 trial, your Honor.

6 THE COURT: Why don't we agree that the  
7 parties will meet and confer and address it by the  
8 end of next week, and if the parties can agree, we  
9 can have a phone conference, I will discuss it with  
10 you, and we'll set a trial date at that point.

11 MS. BREMNER: Thank you very much, your  
12 Honor.

13 THE COURT: Do we need to set a deadline in  
14 presenting a written order?

15 MS. BREMNER: No, your Honor, I am going to  
16 order the transcript now. I can submit it to counsel  
17 and present it. Do you want to have open  
18 presentation in court or have it --

19 THE COURT: We can note a presentation. If  
20 the parties want to be heard and appear for  
21 presentation, that's fine. If not, you can simply  
22 present it and I will sign off. But we can certainly  
23 note it, and if the parties are satisfied, we can  
24 strike the presentation hearing.

25 MS. BREMNER: That's fine, your Honor.

1 THE COURT: Any questions about the court's  
2 ruling?

3 MS. BREMNER: No. Thank you so much, your  
4 Honor.

5 THE COURT: Thank you. We are at recess.  
6 (Proceedings adjourned at 4:38 p.m.)

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Joanne Leatiota, Certified Realtime Reporter  
King County Courthouse, Rm. C-912, (206) 296-9167  
Seattle, Washington 98104

# *APPENDIX B*

*Transcript of Closing Argument  
in Second Phase*

1           IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
2                           IN AND FOR THE COUNTY OF KING

3

4   JONATHAN KUHN, et al,            )  
5                                    plaintiffs, )  
6                            vs.                            )   No. 06-2-33713-1 SEA  
7   BILL S. SCHNALL, M.D.,         )   COA No. 62554-3-I  
8   et al,                            )  
9                                    Defendants.)

10                            VERBATIM REPORT OF PROCEEDINGS

11

12                            Heard before the Honorable Paris Kallas  
13           King County Courthouse, 516 Third Avenue, Room E-863  
14                                    Seattle, Washington

15

16

17   APPEARANCES FOR THE PLAINTIFFS:

18                            ANNE BREMNER and RON BEMIS

19   APPEARANCES FOR THE DEFENDANTS:

20                            JOHN GAGLIARDI and TIM ALLEN

21

22

23

24   DATE REPORTED: JULY 16, 2008

25   REPORTED BY:   JOANN BOWEN, RPR, CRR, CCP, CCR# 2695

11 attributed to Defendant Schnall and 25 percent being  
12 attributed to Joe Fewel for a total of 100 percent, is  
13 this your individual verdict? Is this the verdict of the  
14 jury?

15 THE COURT: Thank you. I direct the clerk  
16 to file the verdict form.

17 Ladies and gentlemen, based on your answers in  
18 the verdict form, there is a follow-up three questions  
19 that the jury needs to answer. I'm going to have the  
20 bailiff distribute additional jury instructions. They  
21 are brief. I will read them out loud to you. Then the  
22 parties have an opportunity for a very brief closing  
23 argument this afternoon on these additional three  
24 questions. Do the jurors have the instructions?

25 (The Court reads the instructions to the

21

1 jury.)

2 THE COURT: As I indicated, each side has  
3 an opportunity for a brief argument on this limited  
4 question. We will have the bailiff distribute the  
5 working copies of the supplemental questions. Actually,  
6 the clerk will do that. Please give your attention to  
7 Mr. Bemis.

8 MR. BEMIS: Ladies and gentlemen of the  
9 jury, with regard to the two remaining questions in

10 the -- actually three altogether -- in the supplementary  
11 verdict form, the question before you is simply a factual  
12 one, and the burden of proof is simply more likely than  
13 not. That's your question number three. It's not a  
14 criminal case. It's not beyond a reasonable doubt.  
15 There's no presumption of innocence. It's just more  
16 likely than not, 51 percent to 49 percent on the facts.

17 The question at question two is as follows --  
18 excuse me -- question one of your verdict form: Did  
19 Defendant Schnall during the time when plaintiffs were  
20 minors engage in any conduct that was communications with  
21 a minor for immoral purpose as to plaintiffs?

22 And as you recall, in all three of these  
23 cases -- in all three cases, the improper touching, the  
24 sexualized touching, the sexualized conversation that you  
25 heard so much about in the trial began before they were

22

1 18 years of age. In the case of Daniel Fewel, Daniel was  
2 born in December of 1989. All of the conduct occurred  
3 before he was 18 years old; the sexualized touching, the  
4 excessive questions about sexuality and so forth, so both  
5 by words and by conduct.

6 And what that instructions tells you is that  
7 communication may be any words or conduct with a minor  
8 for immoral purpose of a sexual nature. And, simply,

9 sexual nature doesn't mean sex. It doesn't mean even a  
10 wholly sexual purpose. You don't need to decide even his  
11 particular specific intent. It simply means, objectively  
12 viewed: was the conduct sexualized? Did it appear to be  
13 of a sexual nature?

14 So I've summarized that here for you. What  
15 happened here is the abuse and betrayal of his position  
16 as a physician led to his trying to break down barriers.  
17 That was his pattern. That was his progression. Or as  
18 Dr. Lessin told you, that was stages involved. That's  
19 why patient one was so important because we could see an  
20 end stage for patient one. That was a very sexualized  
21 stage.

22 Now, no one knows exactly what Dr. Schnall was  
23 thinking in his head as he was doing these things. But  
24 we do know that he was trying to break down barriers.  
25 And we do know in every case for every plaintiff, it

23

1 began with sexualized conduct, conduct that was of a  
2 sexual nature.

3 That's all this question is about on question  
4 one. Was there communication? And that's defined as any  
5 words or conduct. It can be words, for instance, when  
6 they would talk about masturbation, fantasies, all of  
7 those things, on and on and on. Or conduct. And that

8 would be any of that prolonged or sexualized touching  
9 that you heard so much evidence about on each plaintiff.  
10 Was it with a minor? That simply means under 18. For an  
11 immoral purpose. That simply means was it bad or  
12 wrongful. Of a sexual nature. The purposes would be it  
13 was not accidental.

14 He did purposeful action, and it was  
15 objectively viewed of a sexual nature. It need not be --  
16 it need only be of a sexual nature. And that was  
17 referred to by many of the witnesses as sexualized.  
18 You'll recall also that the MQAC documents that you saw,  
19 the State authority, likewise found that when he was  
20 exceeding his boundaries, many of these acts were of a  
21 sexual nature. It's in your Exhibit 7 and I think it's 9  
22 and 8, for example.

23 Again, you don't need actual sex. You don't  
24 need a wholly sexual purpose, and you don't need to  
25 decide his particular specific intent. It's just a

24

1 simple question objectively viewed, one: Was it  
2 improper? Was it on purpose? That is, not accidental.  
3 And was it of a sexual nature?

4 And you'll recall this was covered very  
5 specifically in the hypocratic oath that was read by  
6 several of the witnesses. Just to remind you on that --

7 it was an illustrative exhibit. But on the words read to  
8 you by Dr. Robert Olson, as you recall, he read to you  
9 the following part of that most basic oaths for doctors.  
10 That was here: From whatever houses I enter, I will go  
11 into them for the benefit of the sick and will abstain  
12 from any voluntary act of mischief and corruption.

13 Corruption is what we're talking about here.  
14 It was a corruption of the basic principles of a  
15 physician. And it was a corruption of the boundaries  
16 that we talked about so often in this case.

17 So, the first answer would be as to the four  
18 plaintiffs that did that occur, any conduct that was  
19 communications with a minor for immoral purpose of a  
20 sexual nature, and the answer we would submit to you for  
21 that first question is -- an important question for the  
22 plaintiffs -- is to answer yes.

23 With regard to the second question, that is  
24 just a timing question. It is as follows: Did any of  
25 the causes of action for which he was assessed any

25

1 damages -- so as we understand your prior verdict, that  
2 would be as to three of the plaintiffs; not Paul. But as  
3 to the others, did it arise from communications with a  
4 minor for immoral purposes by Defendant Schnall as to  
5 that plaintiff?

6                    Questions two and three are simply timing  
7 questions. Did these things occur before they were 18  
8 years of age at all? If so, was that the beginning of  
9 breaking down the barriers? Was that when it was  
10 originating? Arise simply means springing from or  
11 flowing from or starting with. That's all we're talking  
12 about here with all of the three.

13                    With Jonathan Kuhn, again, Jonathan born in  
14 1986 would not have been 18 until November, the end of  
15 the year of 2004, as you see. So all of this conduct,  
16 but beginning like all the patients and like patient one,  
17 it began with grooming and manipulation and inappropriate  
18 physical exams and discussions about masturbations and  
19 sexual fantasies and on and on and on.

20                    As you heard in Jonathan's case, he was  
21 milking the cow. You remember how graphic that was. All  
22 of these things are communications with minors, both in  
23 words or in terms of prolonged and excessive touching  
24 also indeed. It can be either one. It's simply a very  
25 low standard. You don't have to have actual molestation.

26

1 You don't have to have actual sex. It's simply  
2 communication. If it occurred before 18, then the second  
3 question should be answered in the affirmative for each  
4 of these plaintiffs.

5 Daniel Fewel, same thing. All of them were  
6 before. The last one with regard to Jeff and Paul --  
7 with regard to Jeff, you remember he turned 18 -- he was  
8 the older of the boys. He turned 18 while he was in  
9 Montana. So he would have turned 18 here. And as you  
10 see with Jeff also -- Jeff is in the green here. It  
11 began, that is, it started, it arose from sexualized  
12 touching and sexualized conversation. And they were all  
13 in evidence here. And Dr. Lessin went through actually  
14 visit by visit with you on each boy at the time.

15 Sexualized physicals, masturbation, sex, penis  
16 size, et cetera, et cetera, et cetera, all of this  
17 happening to Jeff before he was 18. It arose there and  
18 later eventually damaged him. But that's where it  
19 started. That's all the question asks. Where it arose.  
20 In other words, where did it begin. So that would be  
21 your answer to -- we would submit -- your answer to  
22 question number two.

23 Finally, your answer to question number three  
24 is with regard to the causes of actions that you did find  
25 a verdict for with regard to the three particular

27

1 plaintiffs. On violations of standard of care by  
2 Schnall, did that occur after this -- after the  
3 sexualized behavior had begun? And the answer is yes.

4 In other words, sexualized behavior began when they  
5 were -- before 18. But even if they are being damaged  
6 through that time and through later times, it still arose  
7 back from when they were 18.

8 So the third question is simply asking you to  
9 write down consistent with your earlier verdict those  
10 three or four causes of action that relate to those --  
11 each of those particular plaintiffs that are on question  
12 three. So it is three questions.

13 You'll see also that MQAC agreed in each case.  
14 Each started out of conduct by Schnall. Each of these  
15 actions started out by conduct of Schnall of a sexual  
16 nature -- that's all these questions are going to --  
17 before the boys turned 18 years old, and then it  
18 progressed, as you know, from each of their time lines.

19 Similarly, the State authorities found that  
20 violations were of a sexual nature. That's at Exhibit 7  
21 in your materials. That is the ex parte motion for order  
22 of summary action. Exhibit 5 in your materials, the ex  
23 parte order of summary action, likewise found boundary  
24 violations sexual in nature. That simply is the exact  
25 same words that is used in the question. It simply means

28

1 sexualized conduct objectively viewed.

2 The statement of charges similarly at 1.4 that

3 you know so much about on the statement of charges, which  
4 is Exhibit 6, Respondent -- that's Schnall -- had  
5 violated proper physician-patient boundaries including  
6 violations that are sexual in nature and is progressively  
7 testing boundaries, as you know from the evidence and  
8 from your verdict.

9           So these questions are important to be  
10 answered. We'd ask that you answer the first two in the  
11 affirmative and then you just fill in on the third one to  
12 which one it arise.

13           The common definition for arise, as I said --  
14 and this is from the Random House Dictionary -- is simply  
15 to originate from or to spring up from or to flow from.  
16 It does not have to be a cause and effect. It simply has  
17 to have started with that kind of conduct which has been  
18 the undisputed evidence in terms of what the plaintiffs  
19 have said, Dr. Lessin has said and the experts have said  
20 throughout this case and is as consistent with your  
21 verdict in terms of at least three of the four, if not  
22 all four of the boys.

23           Finally, this is my -- so, it's very important  
24 that you answer these. We think that they are questions  
25 that hopefully you'll find you can answer even in perhaps

2 tomorrow or not. The Court will decide on that.

3 In this case it's simply a factual  
4 determination. And so I have my initial time here to  
5 have talked to you about it. Defendants will now get  
6 their time to talk to you about it. I will not get a  
7 rebuttal in this case. It's simply one side and then the  
8 other.

9 I just want you to know that if they start  
10 talking about, oh, you need to find a particular type of  
11 intent, look through those instructions. There's no word  
12 "intent" in those instructions. It's simply: Was it not  
13 accidental, was it of a sexual nature and was it  
14 improper? I think you've already found that in your  
15 verdicts so far. We would ask you to answer these in the  
16 affirmative.

17 And, likewise, don't be distracted. Please  
18 read those instructions very carefully. I won't have an  
19 opportunity to come back. And I can assure you, I would  
20 have had a comeback to whatever they're saying if it's at  
21 all different from what I've just told you. Thank you  
22 very much.

23 THE COURT: Thank you, Mr. Bemis. Please  
24 give your attention to Mr. Gagliardi.

25 MR. GAGLIARDI: Thank you, Your Honor.

1 Good afternoon, ladies and gentlemen of the jury. Thank  
2 you for your patience. Here for one last time to talk  
3 about these final issues.

4 Again, I think I'm going to start this closing  
5 like I started my first closing and that's instruction  
6 number one which says, again, I just want you to go back  
7 there and base your findings on the evidence and on the  
8 facts proven to you in this trial based on your verdict  
9 that you've now arrived at. Don't base it on  
10 allegations.

11 They continue to refer to things in the  
12 statement of charges and the ex parte motion. Those are,  
13 again, allegations by the State. Those are not the facts  
14 proven to you at trial. And your job as a juror, as  
15 instruction number one says, is to base your verdict on  
16 facts and evidence, not on sympathy, bias, emotion or  
17 preference.

18 So, the most important instruction is  
19 instruction number two which talks about what does it  
20 take to have communication with a minor for immoral  
21 purposes. Communicates with a minor for immoral purposes  
22 of a sexual nature. The communication may be by words or  
23 conduct. The minor means any person under the age of 18.

24 I break this down to it requires three things.  
25 You've got to have communication, meaning, there's got to

1 be a message sent, and that can be either words or  
2 conduct. It has to be received by the plaintiff.

3           Second, the person has to be under the age of  
4 18. And I think for Jeff Hawley, that's going to be a  
5 significant issue for you, because I would submit to you  
6 the evidence established that nothing unusual happened  
7 with Jeff Hawley before the age of 18. He himself told  
8 the MQAC that he didn't have any problem with Dr. Schnall  
9 before the age of 18. All the conduct that Jeff Hawley  
10 complained about occurred after the age of 18, after he  
11 came back from Spring Creek. That's an important one for  
12 Jeff Hawley.

13           The last point though, that's the big one.  
14 That's this issue. What does this mean? What is immoral  
15 purposes of a sexual nature? Now, one of the ways you  
16 can think about what this means is to think about what  
17 Washington courts have interpreted that to mean. The  
18 Washington Supreme Court, which is our highest court in  
19 the land, suggests that this language means the person in  
20 making the communication must have the predatory purpose  
21 of promoting --

22           MR. BEMIS: Objection. This is improper  
23 argument.

24           THE COURT: Sustained. And the argument  
25 is stricken.

1 MR. BEMIS: We would like a sidebar, Your  
2 Honor.

3 THE COURT: I will have you remove the  
4 chart, please. Counsel, let's just go forward. The  
5 argument is sustained -- the argument is stricken. The  
6 objection is sustained. The argument is stricken. And  
7 the board has been removed.

8 MR. GAGLIARDI: Can I reword, Your Honor?

9 THE COURT: The objection is sustained.

10 MR. GAGLIARDI: I would suggest to you  
11 that when you think about immoral purposes, that suggests  
12 something of a predatory nature. That suggests severe  
13 sexual misconduct. And if you think about that, ladies  
14 and gentlemen, if that's your definition of immoral  
15 purposes of a sexual nature, then --

16 MR. BEMIS: Same objection, Your Honor.

17 THE COURT: Sustained given -- sustained.  
18 Please move on to the next point.

19 MR. GAGLIARDI: Fair enough.

20 MR. BEMIS: Move to strike the statement.

21 THE COURT: The last statement is  
22 stricken.

23 MR. GAGLIARDI: So it's for you to decide  
24 what you think immoral purposes of a sexual nature means.  
25 That's fine, ladies and gentlemen. I would submit to you

1 that in this case, however, the plaintiffs have not met  
2 their burden of proof of showing communication for  
3 immoral purposes. The reason I say that is this: If you  
4 recall the evidence -- and all the experts agree -- that  
5 it's okay for doctors to talk about things like  
6 masturbation and sexual fantasies in the course of the  
7 physician-patient relationship. That's things that  
8 pediatricians do.

9 I showed you this article from the American  
10 Academy of Pediatrics -- this is Exhibit 283 -- that  
11 talked about how the role of the pediatrician is to  
12 discuss things like anatomy, masturbation, menstruation,  
13 erections, nocturnal emissions, sexual fantasies, sexual  
14 orientations, and orgasms. So this is the American  
15 Academy of pediatrics that says it's okay for physicians  
16 to talk about these things.

17 So if you believe the discussions were  
18 appropriate and okay about those issues, then by  
19 definition it would not have been for an immoral purpose  
20 of a sexual nature. So keep that in mind.

21 And, really, the evidence we have about this  
22 issue -- the concrete evidence -- comes from Dr. Schnall  
23 in terms of what did he testify about, what was his  
24 purpose in doing these communications.

25 Now, you can find that it was a boundary

1 violation. You can find he was abusive or controlling.  
2 And for some of them, you did find that. But it's a  
3 different step to get was it for purposes of -- immoral  
4 purposes of a sexual nature. That's one further step.  
5 You don't necessarily get there unless you believe it was  
6 for immoral purposes of a sexual nature.

7           Again, abusive or controlling doesn't  
8 necessarily satisfy the burden. Again, it has to be more  
9 likely than not is where you have to get to before you  
10 can make a finding on that.

11           So, again, if we consider about was it for  
12 immoral purposes for a sexual purpose, I would ask that  
13 you consider, again, Dr. Schnall put everything in his  
14 e-mails. Dr. Schnall communicated excessively with the  
15 parents. He sent these patients to other health care  
16 providers. If he was doing it, in his mind, for immoral  
17 purpose of a sexual nature, why would he be doing all  
18 those things?

19           You had an opportunity to review all the  
20 e-mails. You had an opportunity to see the health care  
21 records. It's your decision to make based on that  
22 information. But keep in mind that it's inconsistent to  
23 think that a physician that's doing all those things  
24 would be doing it in his mind for an immoral purpose of a  
25 sexual nature. He thought he was trying to help. You

1 can agree he violated a boundary and exceeded his  
2 standard of care. But that doesn't necessarily make it  
3 sexual.

4 Now, I think it's important when we look at  
5 the special verdict form that we consider these questions  
6 carefully. The first question asks: Did he engage in  
7 conduct that was communication with a minor for immoral  
8 purposes? Again, I've already discussed that. For Jeff  
9 Hawley, the important issue was: Do you believe there  
10 was any improper conduct before the age of 18? Because  
11 if you believe the improper conduct that was for immoral  
12 purposes, if any, occurred after the age of 18, then your  
13 answer to this should be no. I would submit to you that  
14 the evidence establishes that for all of these the answer  
15 should be no. And if that's the case, you're done.

16 Now, if you find that there were  
17 communications for an immoral purpose, you still have to  
18 go to question two, which asks: Did any of the causes of  
19 action for which you have assessed damages to  
20 plaintiff -- so that's important. You can only answer  
21 this question if you assessed damages to the plaintiff.  
22 So for Paul Hawley, for instance, the answer to question  
23 two has to be no because you assessed no damages to Paul  
24 Hawley.

25 And I would submit to you, ladies and

1 gentlemen, on some of the other causes of action, you  
2 also found no causation. For instance, for the negligent  
3 infliction of emotional distress claims, I think you  
4 found no causation with respect to Jonathan and Daniel.  
5 You will have to look at your verdict form. I'm not sure  
6 about that. You will have that back there. You have to  
7 consider that as well. You didn't find damages on those  
8 claims.

9 I submit to you, though, if you answer this  
10 question for these others -- if you answer no, again, you  
11 are done and you can sign the verdict form and be done.

12 THE COURT: Mr. Gagliardi, you've got a  
13 minute left.

14 MR. GAGLIARDI: Thank you, Your Honor. As  
15 to the last question, ladies and gentlemen, again, you  
16 have to refer back to your special verdict form. Because  
17 if you didn't find any damages as to the claims, then I  
18 think they cannot be included on this form. So, again, I  
19 don't think you get to Paul Hawley. And on Jonathan Kuhn  
20 and Daniel Fewel, I believe the only claim for which the  
21 jury awarded damages was on the violation of the standard  
22 of care. So I think that would be the only claim for  
23 which the jury could find would be involved, if any, if  
24 you ever get to that question would be for that one  
25 claim. And Jeff Hawley, I believe it would only be a

1 negligent infliction claim and the violation of the  
2 standard of care claim. Because I think those are the  
3 only two claims that the jury found damages.

4 So I just wanted to briefly walk through that  
5 with you. Again, my last words is go back and do your  
6 job as a juror. Base your decision on the evidence as  
7 you have done in this case. And that's the most we can  
8 ask of you. Thank you very much.

9 THE COURT: Thank you, Mr. Gagliardi.  
10 Ladies and gentlemen, I will have you step into the jury  
11 room. You can discuss with the bailiff your schedule.  
12 You remain under the Court's instructions that applied to  
13 your previous deliberation. You are still a deliberating  
14 jury. That means you may not talk to anyone else about  
15 the case. You may talk only with each other until you  
16 have completed this second phase.

17 You previously completed what we entitled the  
18 special verdict form. The bailiff will give you a copy  
19 of that -- it will be plainly marked copy -- so that you  
20 have it there with you in this second phase. She will  
21 also give you the supplemental verdict form. You already  
22 have working copies of that. Those are the colored  
23 copies. She will give you the original of that. She  
24 will give you the original supplemental instructions.  
25 You each have copies of that now. The same rules apply.

1 You should select a presiding juror. Deliberate only  
2 when all of you are present. Please step into the jury  
3 room. Thank you.

4 (Jury exits.)

5 THE COURT: Have a seat, please. Ladies  
6 and gentlemen, the bailiff is going to ask the jurors  
7 about their schedule and indicate if they want to stay  
8 for a brief period that we are willing to stay. So we  
9 will take a minute and see what the jury has to say. If  
10 you all want to reconvene --

11 MS. BREMNER: Your Honor, we actually have  
12 something to address on the record.

13 THE COURT: Let me finish though. If  
14 everyone wants to reconvene, we will have an idea in a  
15 few minutes what the jury is requesting for their  
16 schedule. Ms. Bremner?

17 MS. BREMNER: We noted at least three nine  
18 to three, quote, unquote, verdicts. I counted actually  
19 four. They are in answer to question five on Paul  
20 Hawley; on question 11 F, nine to three on noneconomic  
21 for Joan Kuhn; and on Joe Fewel, nine to three on  
22 noneconomic damages. So, we don't have a verdict.

23 THE COURT: In the hands count?

24 MS. BREMNER: Yes.

# *APPENDIX C*

## *KEY WASHINGTON STATE CASES*

- *State v. Briggs*, 55 Wn.App. 44, 776 P.2d 1347 (1989)
- *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 313, 868 P.2d 835 (1994)
  - *State v. Johnson*, 137 Wn.App. 862, 869, 155 P.3d 183 (2007)

▷

Court of Appeals of Washington,  
Division 1.

STATE of Washington, Respondent,  
v.  
Tyrone BRIGGS, Appellant.  
No. 21435-7-I.

July 31, 1989.  
As Changed Aug. 14, 1989.

Defendant was convicted in the Superior Court, King County, Faith Enyeart, J., on multiple counts of robbery, attempted robbery, assault and attempted rape. The Court of Appeals, Coleman, C.J., held that where defendant's defense was based upon victims' failure to identify him as stutterer, juror's failure to disclose his speech disorder during voir dire, and his discussion during jury deliberation of stutterers' ability to perform certain acts without stuttering, constituted misconduct requiring new trial.

Vacated and remanded.

**\*\*1348 \*46** David Allen, Richard Hansen, Donald Roistacher, Allen & Hansen, Seattle, for Tyrone Briggs.

Norm Maleng, King County Pros. Atty., Mark Larson, Deputy Pros. Atty., Seattle, for the State.

COLEMAN, Chief Judge.

Tyrone Briggs appeals from his conviction for multiple counts of robbery, attempted **\*\*1349** robbery, assault, and attempted rape. A deadly weapon allegation accompanied each count. Briggs alleges that he did not receive a fair trial because of juror misconduct. We agree and reverse and remand for a new trial. Briggs raises additional issues that we address in this opinion only insofar as they are likely to arise on retrial.

The charges against Briggs arose from a series of attacks on five women that occurred near Harborview Hospital and Seattle University between November 28 and December 18, 1986. The prosecution's case rested primarily on eyewitness identification of Briggs by the victims and others who witnessed the

assaults. The principal defense theory was that none of the victims ever noted that their attacker spoke with a stutter and that Briggs has a profound stutter. **\*47** Briggs' first trial ended in a mistrial on May 12, 1987 when the jury was unable to reach a verdict. His second trial resulted in conviction on August 17, 1987.

After the verdict in the second trial, Briggs' counsel learned that one of the jurors had related in deliberations how he once had a speech production problem that only occurred in certain circumstances and was amenable to control. The court granted the defense motion for a mistrial on the grounds that the juror withheld information on voir dire concerning his speech disorder and that his comments amounted to an impermissible introduction of evidence into the jury's considerations. The court, however, reversed itself on November 19, 1987 and reinstated the verdict after hearing argument on the State's motion for reconsideration.

We first review appellant's argument that juror misconduct entitles him to a new trial.

During voir dire, appellant's counsel asked the panel that included juror Carroll White the following question: "Is there anyone in the panel who has any past experience, study or contact with stuttering or speech problems in general?" White did not respond to the question. After the verdict, the defense learned in the course of juror interviews that juror White had a history of a speech production disorder.<sup>FN1</sup> White signed a statement prepared by a defense investigator that provided, in part: "I have had a problem with hesitation in my speech that I believe is like a stutter. When with peers or authority or acquaintances[,] I have long known that I have this hesitating speech impediment." **\*48** White also characterized his problem as a "stutter-like hesitation" and as a "speech problem." White admitted discussing his speech problem during deliberations to help the jury understand certain evidence regarding appellant's stutter.

<sup>FN1.</sup> Several venire members responded in voir dire that they had some experience with speech disorders. Appellant's counsel pursued those responses with questions about their knowledge and experience with the subject. *See, e.g.*, RP (7/27/87) at 14, 22-23, 24-25, 31. No venire member answering af-

firmatively to the initial question was challenged peremptorily or removed for cause by the defense, RP (7/27/87) at 14, 22-23, 31, 94-95, 101-03, 133, 135, 137-40. These venire members did, however, agree under oath to set aside any independent knowledge or opinions about stuttering and to decide the case only on the evidence presented. *See, e.g.,* RP (7/27/87) at 82, 87-88, 135-40.

I offered this personal experience to the jury as an aid to understanding evidence of the stuttering issue. The stuttering issue was reduced in value to no reasonable doubt. My experience as a person with this speech problem pointed out to the jury's conclusion that Tyrone did not always stutter.

Two other jurors, Helen Klatt and Eleanor Smith, signed similar statements corroborating White's admissions. Klatt's statement provided, in part:

3. One member of the jury, Carroll White, spoke about his personal experience as a stutterer. White told us that he stuttered often and he was unaware of his stuttering until someone would point it out to him. He also explained that under certain circumstances he would be able to control his stuttering.

**\*\*1350** 4. Carroll White introduced this subject and his personal experience as a stutterer to the jury in order to explain how Tyrone Briggs might be unaware of his stuttering and how someone like Tyrone might be able to commit the crimes without stuttering.

The trial court conducted a post-trial hearing on the issue of juror misconduct. The court reviewed the jurors' statements and heard testimony from juror White. White testified that he did not divulge his speech problem in voir dire because he regards it as a hesitancy or pausing between words and not a stutter, which he defines as an inability to form proper sounds. White testified that he is not, and does not know, a stutterer. White did, however, again admit discussing his speech problem during deliberations:

THE COURT: But you did talk about your personal experience with a speech problem?

THE WITNESS: With a speech problem, yes.

THE COURT: Whether you call it stuttering or whether you call it pausing or some other type of speech problem, you did discuss your personal experience with a speech problem with the other jurors?

THE WITNESS: Yes, I did.

Based upon this evidence, the trial court made the following findings regarding White's failure to disclose the speech \*49 problem and his discussion of that problem during jury deliberations:

First, that Mr. White did not answer the question that he had a speech problem when so asked on voir dire as a general question. That this failure to answer that he had knowledge of speech problem or experience with a speech problem deprived the defense of an opportunity to inquire further as to any potential bias he may have on that subject.

Secondly, that stuttering and speech problems were material to this case, in fact, central. The State called an expert witness, a speech pathologist. I think that in and of itself is evidence of the centrality and materiality of this issue to the case.

Third, Mr. White discussed with the jury his personal experience with speech problems, including how he could overcome his speech problem and that Briggs might have used the same techniques.

Four, although Mr. White denies he is a stutterer, he signed a statement that states, "I have a problem with hesitation in my speech that I believe is like a stutter."

Even if we eliminated the word stutter and only talked about a speech problem, it would not materially affect the decision the Court is making today [to grant a new trial]. His discussion of his speech problems in the jury room, whether you characterize them as hesitation, whether you characterize them as slowness, or whether you characterize them as stuttering, was impermissible testimony, if you will, to the jury that did not come from the witness stand.

Three other jurors identified Mr. White as talking about his experience as a stutterer, and that is the

word that was used in affidavits which were apparently prepared by the investigator for the defendant. Even if that was changed from stutterer to speech problem, or something less than stutterer, it is clear and Mr. White acknowledged that that was his only quarrel with what those jurors had to say about his discussions, that he clearly discussed his speech problems and what he did to overcome them with the other jurors, bringing before the jury his personal experience and his speech problem and the methods of overcoming them allowed impermissible evidence other than from the proceedings properly brought before the jury.

The Court makes no findings that Mr. White acted with an intent to deceive on voir dire.

The court ordered a new trial. At a later hearing the court explained that it had **\*\*1351** decided appellant was entitled to a new trial because “the combination of [White's] failure to disclose and his discussions during deliberation required a finding of misconduct even though juror White did not **\*50** act intentionally.” In arriving at this decision, the court relied upon *Smith v. Kent*, 11 Wash.App. 439, 523 P.2d 446 (1974). The *Kent* case held that a party is entitled to a new trial if juror misconduct deprived the party of the opportunity to exercise a challenge:

That misconduct may consist of a prospective juror's false answer to a material question that either (1) conceals or misrepresents his bias or prejudice, or (2) prevents the intelligent exercise by a litigant of his right to exercise a peremptory challenge<sup>[FN2]</sup> or his right to challenge a juror for cause.

<sup>FN2.</sup> No peremptory challenge was available to the appellant at the time juror White was seated, and thus appellant's right to exercise a peremptory challenge was not impaired by juror White's material nondisclosure.

*Kent*, at 443, 523 P.2d 446. The *Kent* rule applied to material omissions as well as to material misrepresentations.

It is jury misconduct warranting a new trial for a juror to give a false answer on a material matter during voir dire examination that conceals information properly requested by a litigant to enable him

to determine whether or not to excuse the prospective juror ...

*Kent*, at 444, 523 P.2d 446.

On November 18, 1987, however, after applying the standard of juror misconduct set forth in *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984), the court granted the State's motion to reconsider, vacated the order granting a new trial, and reinstated the verdict. *McDonough* holds that

to obtain a new trial in such a situation [material nondisclosure on voir dire], a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause.

*McDonough*, 464 U.S. at 556, 104 S.Ct. at 850. The trial court concluded that it should apply the *McDonough* rule, which is considerably more restrictive than is the *Kent* rule in determining if a new trial is required for a juror's material nondisclosure on voir dire, reasoning that there is “no persuasive reason why the courts of Washington would not follow the standard on nondisclosure announced by the Supreme Court in **\*51** *McDonough*.” Applying *McDonough*, the trial court determined that juror White's speech problem, had it been disclosed, would not have entitled appellant to a challenge for cause. The court also determined that White's discussion of his speech disorder during deliberations, did not, in and of itself, require a new trial because the State had demonstrated that White's comments were not prejudicial.

In our view, *McDonough* is not dispositive of the issue that confronted the trial court in this case. *McDonough* only concerns whether a party is automatically entitled to a new trial on a showing that a juror failed to disclose material information on voir dire. The instant case not only involves nondisclosure of material information, but it also involves the juror discussing during deliberations the undisclosed information in an effort to assist the jury in resolving the central issue of the case.

*McDonough* is a products liability case in which the plaintiff sought to recover damages incurred when a child's feet were amputated by a riding lawn mower.

The jury was asked whether any member of a juror's family had ever sustained a severe injury resulting in disability or prolonged pain and suffering, and a juror failed to reveal that his son had broken a leg when a truck tire exploded. McDonough, 464 U.S. at 550-51, 104 S.Ct. at 847. There was no showing in McDonough that the offending juror committed any misconduct during deliberations involving the withheld information. The only prejudice shown by the \*\*1352 appellant in that case was the denial of the opportunity to exercise a peremptory challenge.

The use of peremptory challenges does not involve a constitutional right. State v. Kender, 21 Wash.App. 622, 626, 587 P.2d 551 (1978). Peremptory challenges allow a party to exclude jurors whom a party, for one reason or another not rising to the level of bias, would like to exclude. See Kent, 11 Wash.App. at 443, 523 P.2d 446. Challenges for cause allow a party to exclude any juror who cannot be impartial. See RCW 4.44.170. The deprivation of \*52 a peremptory challenge, unlike the deprivation of a challenge for cause, does not necessarily impair a party's ability to exclude an impartial juror. Accordingly, the McDonough Court held that a juror's failure to disclose a material fact alone is a nonprejudicial error not affecting the essential fairness of a trial and does not entitle a party to a new trial unless a truthful response by the juror would have provided the basis for a challenge for cause or it otherwise denied a party a fair trial. McDonough, 464 U.S. at 556, 104 S.Ct. at 850.

McDonough was followed by this court in State v. Rempel, 53 Wash.App. 799, 803, 770 P.2d 1058 (1989). In the Rempel case, a juror denied during voir dire knowing the complaining witness in a burglary and rape prosecution. When the victim appeared in court to testify, however, the juror realized that she indeed knew the victim from having previously worked with her. The juror immediately informed the court of their acquaintance, and a hearing was held to determine whether the juror's nondisclosure required a mistrial. Rempel, like McDonough, rejects the idea that a party is entitled to a new trial merely because the opportunity to exercise a peremptory challenge is lost because of a juror's material nondisclosure. State v. Rempel, supra; see also McDonough, 464 U.S. at 556, 104 S.Ct. at 850.

[1] The facts of the instant case, however, signifi-

cantly differ from those in McDonough and Rempel. This is not just a case of a juror's material nondisclosure. The nondisclosure is also inseparably involved with the juror's discussion of the undisclosed information during the jury's deliberations. Thus, while the undisclosed information alone probably would not have entitled appellant to challenge the juror for cause, or, consequently, to receive a new trial under McDonough, the nondisclosure, coupled with the later misconduct in deliberations amounts to actual prejudice entitling appellant to a new trial.

[2] Under McDonough and Rempel, the relevant inquiry essentially ended when it was determined that the juror's material nondisclosure would not have provided the basis for a challenge for cause and there were no additional \*53 facts showing prejudice. See McDonough, 464 U.S. at 556, 104 S.Ct. at 850; Rempel, 53 Wash.App. at 804, 770 P.2d 1058. But where the record demonstrates that the undisclosed information is later employed in the jury's deliberations, additional analysis is required. See Smith v. Kent, 11 Wash.App. 439, 448-49, 523 P.2d 446 (1974); accord, United States v. Perkins, 748 F.2d 1519, 1533 (11th Cir.1984). When a juror withholds material information during voir dire and then later injects that information into deliberations, the court must inquire into the prejudicial effect of the combined, as well as the individual, aspects of the juror's misconduct. See Kent, 11 Wash.App. at 448-49, 523 P.2d 446; Perkins, at 1532-34.

The Kent case stands for the proposition that this kind of misconduct is prejudicial. The plaintiff in Kent was injured when a dump truck traveling ahead of her automobile threw a large rock through her windshield. The plaintiff's theory was that the rock came from the defendant's truck and, thus, the defendant's negligence was responsible for the injury. The defense theory was that the rock was picked up from the roadway and thrown by the truck's rear wheels and, thus, the injury was an unforeseeable accident. During voir dire, one of the jurors failed to disclose a history \*\*1353 of driving heavy equipment trucks. Kent, 11 Wash.App. at 441, 523 P.2d 446. During deliberations, however, the nondisclosing juror argued that his experiences as a truck driver confirmed the defense's theory of the accident. Kent, at 449, 523 P.2d 446.

The Kent court's holding that a new trial is required

when a juror's material nondisclosure deprives the plaintiff of the opportunity to intelligently exercise a challenge has been limited and redefined by McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984), and Rempel to require a new trial only if the withheld information would have provided a challenge for cause. Kent nonetheless retains vitality.

The Rempel court left standing the alternative holding in Kent. Rempel, 53 Wash.App. at 802-03, 770 P.2d 1058. The Kent court was not required to reach the question of the actual prejudicial effect of the juror's misconduct once it had decided sufficient prejudice \*54 accrued from the denial of the peremptory challenge; nonetheless, it did so in passing. Kent, 11 Wash.App. at 449, 523 P.2d 446. The Kent court held that the offending juror's conduct established actual prejudice. Kent, at 449, 523 P.2d 446. In that case, the juror's comments about how the rock might have been picked up by the truck tires related directly to the central issue in the case and were based on the juror's experience that he had failed to disclose on voir dire. In the Rempel case, the court refused to grant a new trial specifically because such evidence of prejudice was lacking. Rempel, 53 Wash.App. at 803, 770 P.2d 1058.

Our analysis of the record in the instant case establishes that juror White committed two closely related acts of misconduct-material nondisclosure <sup>FN3</sup> during voir dire and the use of the undisclosed information during jury deliberations. This misconduct translated into two closely related types of prejudice: (1) appellant was denied the opportunity to detect, and to prevent from being used during deliberations, juror White's prior experience with, and opinions about, speech disorders; and (2) appellant was prejudiced by having the undisclosed information interjected into the jury's deliberations.

FN3. It is indisputable that juror White's failure to disclose his speech problem was material. The trial court so found when granting the motion for a new trial and reiterated that finding when rendering its decision not to grant a new trial. That finding has not been challenged by the parties and is a verity on this appeal. Lassila v. Wenatchee, 89 Wash.2d 804, 809, 576 P.2d 54 (1978).

As to the first type of prejudice, it is important to note that

*Voir dire* examination serves to protect [the right to an impartial jury] by exposing possible biases, both known and unknown, on the part of potential jurors. Demonstrated bias in the responses to questions on *voir dire* may result in a juror's being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges. The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious.

McDonough, 464 U.S. at 554, 104 S.Ct. at 849. Had juror White responded truthfully to the relevant voir dire question in this case, \*55 appellant could have pursued the matter to determine whether the juror should be excused for cause. Certainly he would have been asked, as were the other jurors who revealed in voir dire their prior experiences with speech disorders, if he would be able to refrain from doing precisely what he did in this case—discussing his unique personal experience in deliberations. If he had answered no, he would not set aside his personal experience with a speech disorder, but would use it to reinforce the expert testimony and to rebut the defense witnesses who claimed appellant always stuttered, he undoubtedly would have been excused for cause.

What juror White did in this case by introducing the withheld information into \*\*1354 deliberations was precisely what voir dire is intended to avoid, by either exposing an inability to set aside personal considerations or by getting the juror to commit, under oath, not to do so. Accordingly, appellant was prejudicially denied the protection voir dire offers to preserve jury impartiality, which is “ ‘a jury capable and willing to decide the case solely on the evidence before it.’ ” McDonough, 464 U.S. at 554, 104 S.Ct. at 849 (quoting Smith v. Phillips, 455 U.S. 209, 217, 102 S.Ct. 940, 946, 71 L.Ed.2d 78 (1982)).

Moreover, appellant was also prejudiced by juror White's use of the undisclosed information during jury deliberations. Juror misconduct involving the use of extraneous evidence during deliberations will entitle a defendant to a new trial if there are reasonable grounds to believe the defendant has been prejudiced.

State v. Lemieux, 75 Wash.2d 89, 91, 448 P.2d 943 (1968). Any doubt that the misconduct affected the verdict must be resolved against the verdict. Halverson v. Anderson, 82 Wash.2d 746, 752, 513 P.2d 827 (1973). This is an objective inquiry into whether the extraneous evidence could have affected the jury's determinations and not a subjective inquiry into the actual effect of the evidence on the jury because the actual effect of the evidence inheres in the verdict. Gardner v. Malone, 60 Wash.2d 836, 841, 376 P.2d 651, 379 P.2d 918 (1962). This \*56 inquiry necessarily involves consideration of the purpose for which the extraneous evidence was interjected into the jury's deliberations. "[A] new trial must be granted unless 'it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict.'" United States v. Bagley, 641 F.2d 1235, 1242 (9th Cir.1981) (quoting Gibson v. Clanon, 633 F.2d 851, 855 (9th Cir.1980); see also United States v. Bagnariol, 665 F.2d 877, 887 n. 6 (9th Cir.1981); Llewellyn v. Stynchcombe, 609 F.2d 194, 195 (5th Cir.1980) ("a defendant is entitled to a new trial unless there is no reasonable possibility that the jury's verdict was influenced by the material that improperly came before it."))

Other courts in similar circumstances have found such comments to be unavoidably prejudicial. See, e.g., Haley v. Blue Ridge Transfer Co., 802 F.2d 1532, 1538 (4th Cir.1986). In Haley, a venire member was erroneously placed on a jury without being subject to voir dire. The case involved whether a trucking company treated its truckers fairly, and this "nonjuror", during deliberations, said he knew from experience that trucking companies treat truckers badly and that he would not believe what the trucking company had to say. The Haley court found that there was a reasonable possibility these comments were prejudicial. Haley, at 1534, 1538. Similarly, in this case the juror interjected his personal experience into deliberations on the central issue being tried. His comment, while less direct than that in Haley concerning the company's credibility, rebutted the credibility of those witnesses who said appellant always stutters. See also United States v. Perkins, 748 F.2d 1519, 1534 (11th Cir.1984) (there was an obvious likelihood of prejudice where during voir dire a juror denied knowing the defendant, but then argued for the defendant's conviction during deliberations while indicating his acquaintance with the defendant); Arthur v. Washington Iron Works Div. of Formac Int'l, Inc., 22 Wash.App. 61, 68, 587 P.2d 626 (1978)

(juror's introduction of extraneous evidence regarding the credibility of the parties' experts was \*57 prejudicial where the jury's resolution of the dispute turned on those credibility determinations).

We hold that juror White's use of the very information he failed to disclose in voir dire during deliberations prejudiced appellant. The misconduct in this case is indistinguishable from the misconduct in the Kent case, which was found to constitute actual prejudice. Kent, 11 Wash.App. at 449, 523 P.2d 446.

The trial court, however, when deciding not to grant a new trial despite this misconduct, determined that the State had rebutted the existence of any prejudicial effect \*\*1355 resulting from juror White's actions. The court explained that there were four reasons why juror White's comments during deliberations were not prejudicial: (1) the comments were redundant or cumulative in light of similar testimony by experts at trial; (2) the comments involved the use of the kind of life experience that jurors are expected to use; (3) the comments did not reveal any fact about the appellant; and finally (4) the comments were rendered harmless by the foreperson's repeated admonitions to the jurors to base their decision on evidence adduced at trial and not on personal experience. Relevant case law, however, does not establish that these reasons rebut the existence of prejudice in this instance.

As to the first reason, the court, in finding that the existence of testimony in the record substantially equivalent to juror White's extraneous comments rendered those comments harmless, relied on Sher v. Stoughton, 666 F.2d 791 (2d Cir.1981). In that case an unknown person phoned five jurors in a murder prosecution and told them, among other things, that the defendant had a criminal record and that he had committed the murder. The comments were harmless, however, in light of the fact that they were cumulative and involved undisputed facts-the defendant's record was already before the jury, having been introduced in support of his insanity defense, which was not premised on a denial of having committed the murder. Sher, at 794-95.

The crucial distinction between the harmless cumulative comments in Sher and the cumulative comments in \*58 the instant case is the fact that juror White's comments involved the central issue of the case, which was sharply disputed. The substance of

White's comments about his history and knowledge of speech disorders was probably duplicative in light of expert testimony adduced at trial on the subject of stuttering and the testimony of other witnesses as to whether the appellant always stutters. The jurors' signed statements and the testimony of juror White establish that White's comments did, however, pertain to the weight to be given to the trial testimony by the speech expert and the sharply differing witnesses on the central question as to whether appellant always stutters.<sup>FN4</sup> Cumulative or not, these comments were presented to the jury for the purpose of weighing the value of similar testimony properly introduced at trial and might reasonably have influenced the jury's verdict. *Stynchcombe*, 609 F.2d at 195. The comments were therefore prejudicial. See *Perkins*, 748 F.2d at 1553; *Halverson v. Anderson*, 82 Wash.2d 746, 748, 513 P.2d 827 (1973).

FN4. Juror White's stated purpose for offering "this personal experience to the jury [was] as an aid to understanding evidence of the stuttering issue." That the other juror's could have reasonably understood juror White's comments to reinforce the speech expert and to rebut the testimony of witnesses who claimed that appellant always stuttered is apparent from juror Helen Klatt's statement: "Carroll White introduced this subject and his personal experience as a stutterer to the jury in order to explain how Tyrone Briggs might be unaware of his stuttering and how someone like Tyrone might be able to commit the crimes without stuttering."

The court's second reason as to why the juror's comments did not have a prejudicial effect was that the comments involved the kind of life experiences jurors are expected to bring to bear in deliberations. While a jury, in exercising its collective wisdom, is expected to bring its opinions, insights, common sense, and everyday life experience into deliberations, see *United States v. Howard*, 506 F.2d 865, 867 (5th Cir.1975), the information related by juror White was of a different character. It was highly specialized, as evidenced by the fact that the topic was the subject of expert testimony by a prosecution witness. Juror White's \*59 comments were used to elaborate upon and clarify the expert testimony by explaining how appellant might have controlled his stuttering in cer-

tain instances, despite the existence of testimony that he always stutters.

This is evidence outside the realm of a typical juror's general life experience and \*\*1356 therefore should not have been introduced into the jury's deliberations. *Halverson*, 82 Wash.2d at 752, 513 P.2d 827 (new trial ordered where juror misconduct consisted of telling fellow jurors the salaries of airline pilots and surveyors in an action wherein the plaintiff sought lost wages and had shown an inclination to enter those professions but had failed to introduce evidence regarding salaries in those professions); see also *Fritsch v. J.J. Newberry's, Inc.*, 43 Wash.App. 904, 907, 720 P.2d 845 (1986) (juror's extraneous remarks regarding the value of damages was in the nature of expert testimony that should have been subject to cross examination and was thus prejudicial). Similarly, appellant was prejudiced by juror White's use of his particular knowledge about this crucial issue during the jury's deliberations.

The court's third reason as to why the juror's extraneous remarks were not prejudicial was that they did not reveal a fact about the appellant. While the cases do speak of the importance of the jury not considering "specific facts about the specific defendant then on trial" not introduced by testimony in the courtroom, *United States v. McKinney*, 429 F.2d 1019, 1023 (5th Cir.1970), that is not to say it is permissible for the jury to consider any other extraneous facts as long as they are not facts about the defendant. See *State v. Rinkes*, 70 Wash.2d 854, 862, 425 P.2d 658 (1967) (impermissible for jury to consider newspaper editorial and cartoon about liberal court decisions in deliberations on criminal prosecution). Accordingly, just because juror White's comments were not about appellant does not establish that they had no prejudicial effect.

Finally, the court's fourth reason why the juror's comments did not have a prejudicial effect was that the foreperson's admonitions rendered the extraneous evidence \*60 harmless. While the jury is presumed to follow instructions and admonishments, *U.S. v. Bagnariol*, 665 F.2d 877, 889 (9th Cir.1981); *State v. Trickel*, 16 Wash.App. 18, 28, 553 P.2d 139 (1976), if the extraneous evidence is sufficiently prejudicial, a new trial must be ordered despite admonitions to the jury. *United States v. Heller*, 785 F.2d 1524, 1526-28 (11th Cir.1986) (court became aware of ju-

rors prejudicial comments and ordered a new trial even though a hearing was conducted and jurors individually assured the court they could set aside consideration of the prejudicial remarks); United States v. Vasquez, 597 F.2d 192, 193 (9th Cir.1979) (court's file containing prejudicial material was inadvertently sent with jury into deliberations and reviewed by several jurors; although the jurors denied having been influenced by the material, the relevant inquiry is whether the materials could have influenced their decision), cf. Bagnariol, at 889 (admonition from court can ameliorate the effect of prejudice); Lockwood v. A C & S, Inc., 109 Wash.2d 235, 265, 744 P.2d 605 (1987) (court's curative instruction can significantly reduce the probability that misconduct had a prejudicial effect). The fact that the foreperson in this case felt compelled to make these repeated admonishments is itself objective evidence that she recognized the impropriety and potential prejudice of juror White's remarks. Due to the nature of juror White's comments and their pertinence to the central dispute in this trial, it is not possible to say that the admonitions to the jury left no reasonable possibility that the comments could have influenced the verdict. See Llewellyn v. Stynchcombe, 609 F.2d 194, 195 (5th Cir.1980).

[3] While great deference is due the trial court's determination that no prejudice occurred, greater deference is owed a decision to grant a new trial than a decision not to grant a new trial. State v. Cummings, 31 Wash.App. 427, 430, 642 P.2d 415 (1982). A trial court abuses its discretion when its decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." \*61 State ex rel. Carroll v. Junker, 79 Wash.2d 12, 26, 482 P.2d 775 (1971). Juror White's material nondisclosure, coupled with his later discussion of \*\*1357 the undisclosed information during deliberations, was not harmless beyond a reasonable doubt and could have affected the jury's verdict. Appellant was prejudiced by juror White's misconduct because it deprived him of an impartial jury and, therefore, of a fair trial. Accordingly, there was no tenable basis for the trial court's refusal to grant appellant a new trial based on juror White's misconduct.

We next address whether the trial court erred by permitting expert testimony on the subject of stuttering. Appellant argues that it was error for the trial court to deny his motion in limine to limit expert testimony

on the subject of stuttering. Appellant wanted the trial court to exclude Dr. Selmar's anecdotal reference to public personalities who have a stuttering problem and his "speculation" as to whether appellant would have stuttered under circumstances such as those under which the charged crimes were committed.

Questions regarding the admissibility of expert testimony are invested in the sound discretion of the trial court. State v. Smisaert, 41 Wash.App. 813, 814, 706 P.2d 647 (1985). That discretion is guided by ER 702, which provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. [ER 702.]

The admissibility of expert testimony under this rule depends upon whether (1) the witness qualifies as an expert, (2) the opinion is based upon an explanatory theory generally accepted in the scientific community, and (3) the expert testimony would be helpful to the trier of fact. State v. Canaday, 90 Wn.2d 808, 585 P.2d 1185 (1978). See generally 5A K. Tegland, Wash.Prac., *Evidence* § 288, at 25 (2d ed. 1982).

State v. Allery, 101 Wash.2d 591, 596, 682 P.2d 312 (1984) (quoting ER 702).

[4] \*62 Appellant complains that it was error to allow Dr. Selmar to compare appellant, whom he had not treated or examined, with public personalities who stutter and whom the expert also did not know. Appellant argues that such testimony, particularly that which indicates those personalities did not stutter in all circumstances, is inadmissible under State v. Black, 109 Wash.2d 336, 745 P.2d 12 (1987). Black prohibits the use of symptoms common to rape victims, the "rape victim syndrome," in an attempt to prove that a rape occurred. The court held such evidence inadmissible because the relevant scientific literature establishes that there is no "typical" response to rape. Black, at 343, 745 P.2d 12. Black is inapposite to Dr. Selmar's testimony. Dr. Selmar was not attempting to establish that an underlying event, such as a rape, can be inferred from the existence of some overlying symptom, such as "rape victim syn-

drome.” One of the crucial issues in this case was whether stutterers always stutter, and the use of well-known personalities who stutter to illustrate that point would obviously be useful to the jury. The trial court did not abuse its discretion by permitting the testimony.

Similarly, the trial court did not err by permitting Dr. Selmar to testify that there were situations in which there was a high probability that a person would not stutter, including the statistical percentage of that probability. Appellant cites *People v. Collins*, 68 Cal.2d 319, 66 Cal.Rptr. 497, 438 P.2d 33 (1968), and *United States v. Massey*, 594 F.2d 676 (8th Cir.1979), for the proposition that experts cannot testify as to statistical probabilities. Neither case is so broad. In *Collins*, the testimony lacked foundation and was used to assess the statistical likelihood of the defendant's guilt. *Collins*, 66 Cal.Rptr. at 505, 438 P.2d at 41. In *Massey*, the very high statistical probability that various hairs in evidence came from the same individual was equated in the prosecutor's closing argument to the probability that the defendant was guilty. *Massey*, at 681. No such misuse of statistics occurred in the testimony of Dr. Selmar,\*\*1358 which \*63 concerned certain facts about stuttering and not the statistical likelihood that appellant was the attacker. There is no prohibition against using well-founded statistics to establish some fact that will be useful to the trier of fact. *Collins*, 66 Cal.Rptr. at 505, 438 P.2d at 41. It was obviously useful for the jury to hear Dr. Selmar's testimony on the subject of whether people always stutter and under which circumstances stutterers usually do not stutter. The trial court did not err by permitting this testimony.

[5] We next address whether the trial court erred by excluding expert testimony on the issue of the reliability of eyewitness identifications. Appellant argues it was an abuse of discretion for the court to exclude the testimony of Dr. Elizabeth Loftus on the reliability of eyewitness identifications. Expert testimony on the issue of the reliability of eyewitness identifications has been the subject of several appellate court opinions. The court in *State v. Moon*, 45 Wash.App. 692, 726 P.2d 1263 (1986), announced the standard under which a trial court's decision to exclude such testimony will be scrutinized. The decision to exclude such testimony

is an abuse of discretion in a very narrow range of

cases: (1) where the identification of the defendant is the principal issue at trial; (2) the defendant presents an alibi defense; and (3) there is little or no other evidence linking the defendant to the crime.

*Moon*, at 697, 726 P.2d 1263. The court in *State v. Johnson*, 49 Wash.App. 432, 743 P.2d 290 (1987), later elaborated upon and refined *Moon*, adding that before an abuse of discretion will be found, the case must also involve a close and confusing fact pattern that cries out for an explanation that the expert testimony would provide. *Johnson*, at 440, 743 P.2d 290.

In *Moon*, the trial court excluded expert testimony on the subject of eyewitness identifications because it would invade the province of the jury. Such a ground for exclusion was untenable because an expert may testify as to ultimate \*64 issues. *Moon*, 45 Wash.App. at 698, 726 P.2d 1263. Accordingly, the court abused its discretion by excluding the testimony because the sole evidence tying the defendant to the crime in that case was an eyewitness identification. In *Johnson*, however, it was not an abuse of discretion to exclude such testimony:

While in *Moon* there was but a single eyewitness who had only a “brief look” at the robber, here there were four different eyewitnesses who were able to view the robber for much longer periods. Furthermore, there is no significant discrepancy in this case, as there was in *Moon*, between the victims' initial descriptions of the robber and the defendant's actual appearance. Finally, there is nothing comparable in this case to the “complicated background” of [*State v. Chapple*, 135 Ariz. 281, 660 P.2d 1208, at 1217-18 (1983),] which included numerous photographic lineups, multiple exposures of the witnesses to the defendant's photograph, and a close resemblance between the defendant and another suspect. See *Chapple*, 660 P.2d at 1217-18; see also [*People v. McDonald*, 37 Cal.3d 351,] 690 P.2d [709,] at 711-15, [208 Cal.Rptr. 236 (1984)]. Therefore, we conclude that this is simply one of the “great majority of cases” where the reasons cited by the trial court correctly permit exclusion of expert testimony on eyewitness identification. See *Chapple*, 660 P.2d at 1220.

(Footnote omitted.) *Johnson*, 49 Wash.App. at 440, 743 P.2d 290.

In the instant case, there was a tenable basis for the trial court's decision to exclude the testimony. The court concluded that the case did not cry out for the kind of explanation appellant's eyewitness expert would provide. For one reason, there was "other evidence" linking appellant to the crime:

[The victim's] purse was found in close proximity of the defendant's home within a short time following the attack.

**\*\*1359** There were two jackets which had been identified in a general description, which were located in the defendant's home and which fit the defendant, and the defendant is proposed to be left-handed and several of the individuals identified their attacker as left-handed.

This "other evidence" establishes a tenable basis for the trial court's decision to exclude Dr. Loftus's testimony because its presence means the third *Moon* factor was not present. Moreover, while there were some discrepancies between the eyewitnesses' initial descriptions and appellant, mostly involving whether his hair was in an Afro or \*65 had been processed, they were minor. The *Johnson* court noted that unless such discrepancies were significant discrepancies or there were "serious contradictions" in the eyewitness testimony, it would not be an abuse of discretion to exclude an expert in eyewitness identifications. Here, the trial court found that the victims' descriptions were consistent; each victim having given a "good description" of her attacker and each victim having described "a light-skinned black male of like weight and height to the defendant."

Finally, the *Johnson* court indicated that there is less need to have this kind of expert testimony if the eyewitnesses had clear and ample opportunity to view the defendant. *Johnson*, at 440, 743 P.2d 290. In this case, the trial court noted that

these attacks which are the subject of this case took place in daylight hours, between 8:00 and 10:00 a.m., with varying degrees of daylight, but not in the course of the night. None of which the Court would consider to be fleeting glimpses. In each case the person was confronted by, and in each case spoken to, by their attacker.

... It was close proximity and opportunity to ob-

serve each person and in some cases being touched by the attacker.

Accordingly, this record provides a tenable basis for the trial court's conclusion that this case did not cry out for the kind of explanation an expert on eyewitness identifications could provide. *Johnson*, at 440, 743 P.2d 290. It was not an abuse of discretion for the trial court to exclude Dr. Loftus' testimony.

[6] We next address whether the trial court erred in limiting the admissibility of evidence of other suspects for the crimes of which appellant is charged. Appellant attempted to introduce evidence of a look alike suspect, Paul Abram, who had a criminal record, including a purse snatching, and who was stopped by the police during a stakeout in Yesler Terrace in December 1986. Appellant also sought to introduce other look alike testimony from a victim of an allegedly similar crime, not the basis of charges against appellant, who would testify that appellant was not her attacker. Finally, appellant sought to introduce testimony \*66 from witnesses who said they saw someone in the area of the attacks at the time they occurred who looked like appellant, but who was not appellant.

The trial court did not abuse its discretion by limiting the testimony regarding Paul Abram.

Once a proper foundation has been laid, a defendant may introduce evidence that another person committed the crime charged. *State v. Kwan*, 174 Wash. 528, 25 P.2d 104 (1933); *State v. Downs*, 168 Wash. 664, 13 P.2d 1 (1932). In *Downs*, at page 667, 13 P.2d 1 the court stated:

Before such testimony can be received, there must be such proof of connection with the crime, such a train of facts or circumstances as tend clearly to point out someone besides the accused as the guilty party.

*State v. Jones*, 26 Wash.App. 551, 555, 614 P.2d 190 (1980) (quoting *State v. Downs*, 168 Wash. 664, 13 P.2d 1 (1932)). Here, circumstances linking Abram to the crimes charged in this case are sufficiently remote to provide a tenable basis for the trial court's decision to place limits on the amount of testimony introduced about Abram. Appellant argues that the alleged physical resemblance between appellant and Abram,

the mere fact that Abram was \*\*1360 in the same city and once in the same area as the attacks, and the fact that he committed a purse snatching, a very different crime from appellant's, indicate Abram might have committed these crimes. The alleged resemblances do not clearly point to Abram as the guilty party. Jones, 26 Wash.App. at 555, 614 P.2d 190. The trial court did not err.

Similarly, the only connection between the other proffered testimony regarding other possible look alikes was speculation and coincidence. The court did not abuse its discretion. Jones, at 555, 614 P.2d 190.

[7] We next address whether the trial court erred in restricting the cross examination about the prior convictions of certain of the prosecution's witnesses in order to impeach their credibility. Appellant claims his right to confront his accusers was denied by the court's refusal to allow him to cross-examine two State witnesses about their criminal \*67 records. Julie Carney, who has a criminal record for prostitution and who was on misdemeanor probation at the time, testified that Briggs does not always stutter. Jeffrey Maesner testified that while he was an inmate at King County jail he had several conversations with appellant and that appellant does not always stutter. Appellant was not permitted to cross-examine Maesner on whether a recent reduction in charges against him was related to his testimony against appellant.

The trial court did not abuse its discretion in either case. In Carney's case, the court denied the introduction of her misdemeanor criminal history because there was no showing that there was any connection between her arrests or probation and any motive by the witness to fabricate testimony. The court noted that there was no order in place that would be revoked if she failed to cooperate or any showing that the police or others would offer her consideration in the future if she failed to cooperate with appellant's prosecution.

Otherwise inadmissible evidence of prior convictions is admissible in cross examination if the witness's testimony provides "a crucial link in the proof" against the defendant. Davis v. Alaska, 415 U.S. 308, 317, 94 S.Ct. 1105, 1111, 39 L.Ed.2d 347 (1974). Nothing in the record suggests that Carney's testimony was critical to appellant's prosecution or that her criminal record created a likelihood that she

would be biased against appellant. Accordingly, Davis does not mandate that appellant have unrestricted cross examination into Carney's criminal record. See Davis, at 415 U.S. at 317-18, 94 S.Ct. at 1110-11; see also ER 609.

[8] Similarly, Davis does not require that appellant be permitted to conduct cross examination into Maesner's criminal history. Appellant's principal interest in Maesner's criminal history was in the reduction of a first degree murder charge to rendering criminal assistance. The reduction was given in return for Maesner's cooperation with the police. It is apparent, however, from the record in this case \*68 that at the time Maesner came forward with the information about appellant, he had already been sentenced in the prior matter involving the charge reduction. Since it involved a felony, the fact of this conviction was allowed into evidence under ER 609. There was no reason under Davis to permit cross examination about bias because there was no showing that Maesner was in any position to have leverage applied to him in return for his testimony. Moreover, he did not provide testimony critical to appellant's prosecution. Accordingly, the court did not err by excluding cross examination on the matter. See Davis, 415 U.S. at 318, 94 S.Ct. at 1111.

[9] We finally address whether the trial court improperly calculated appellant's sentence by considering rape and robbery to constitute different criminal conduct.<sup>FNS</sup> At sentencing, the trial court counted the first degree robbery against A. W. and the attempted rape of her as separate offenses, thereby increasing appellant's offender score.

FNS. This issue is significant only in the event that appellant is convicted on retrial.

RCW 9.94A.400(1) provides:

**Consecutive or concurrent sentences.** (1)(a) Except as provided in (b) of this subsection, whenever a person is to be sentenced for two or more current offenses,\*\*1361 the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: *Provided*, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses

shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently.

The test for whether different offenses constitute the same criminal conduct is set forth in State v. Dunaway, 109 Wash.2d 207, 215, 743 P.2d 1237 (1987).

[I]n deciding if crimes encompassed the same criminal conduct, trial courts should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next. As it did in [State v.] Edwards, [45 Wn.App. 378, 725 P.2d 442 (1986),] part of this analysis will often include the related issues of whether one crime furthered the other and if \*69 the time and place of the two crimes remained the same. See Edwards, at 382 [725 P.2d 442].

See also State v. Collicott, 112 Wash.2d 399, 404-06, 771 P.2d 1137 (1989). The objective intent of rape and robbery are entirely different. The two crimes in this case may have been committed at the same time and place, but neither offense was committed in furtherance of the other. Accordingly, the trial court did not err by considering them to be separate crimes. Dunaway, 109 Wash.2d at 215, 743 P.2d 1237; cf. State v. Rienks, 46 Wash.App. 537, 544, 731 P.2d 1116 (1987) (assault, burglary, and robbery constituted same criminal conduct because defendant had sole purpose of taking victim's money, and each crime furthered that purpose).

In light of our disposition of this case, appellant's remaining assignments of error need not be addressed.

We do not take lightly our decision to reverse the trial court. The trial judge presided over a difficult trial with care and skill. Neither the court nor counsel were in a position to prevent, detect, or remedy the juror misconduct forming the basis of our decision to reverse this conviction. We also recognize the regrettable burden our decision imposes on the victims who will be called upon once again to testify in this matter. Nonetheless, we cannot permit a criminal conviction to stand where the jury's deliberations have been tainted by prejudicial misconduct. To do so would violate the fundamental principle that a defendant is entitled to a fair determination of guilt or innocence.

The judgment of the trial court is vacated and this

cause is remanded to the trial court for further proceedings consistent with this opinion.

GROSSE, Acting C.J., and PEKELIS, J., concur.  
Wash.App., 1989.  
State v. Briggs  
55 Wash.App. 44, 776 P.2d 1347

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Supreme Court of Washington,  
En Banc.

In the Matter of the PERSONAL RESTRAINT OF  
Brian Keith LORD, Petitioner.  
No. 60000-7.

Feb. 24, 1994.

As Amended March 10, 1994.

Following affirmance of conviction and death sentence for aggravated first-degree murder, 117 Wash.2d 829, 822 P.2d 177, petitioner brought personal restraint petition (PRP). The Supreme Court, Durham, J., held that: (1) information charging petitioner with aggravated first-degree murder “and/or” first-degree felony-murder was not invalid; (2) death penalty notice was not invalid; (3) additional change in venue due to pretrial publicity was not warranted; (4) petitioner had no constitutional right to be present at proceedings regarding purely legal issues; (5) trial court's ex parte contacts with nonparties were not improper; (6) voir dire was adequate to determine jurors' views of death penalty; (7) juror was not subject to challenge for cause based on his views on death penalty, and counsel was not ineffective in not challenging others on that basis; (8) use of peremptory challenges did not deny defendant his right to jury from fair cross section of community; (9) alleged juror misconduct did not warrant reversal; (10) claims of ineffective assistance of appellate counsel were not reviewable; (11) defendant was not entitled to impeach prosecution witness with prior conviction; (12) evidence pointing to other suspects was inadmissible; (13) no hearing was required to examine defendant's waiver of his right to testify; (14) verdict was unanimous; (15) defendant was not entitled to hearing as to whether prosecutor made threats or promises to witness; (16) there was no “new evidence” requiring vacation of conviction or sentence; (17) juvenile conviction and false imprisonment conviction were admissible as criminal history evidence in penalty phase; (18) penalty phase instructions were adequate; (19) death penalty statute did not violate State Constitution by incorporating first-degree murder statute by reference; (20) execution by hanging was not unconstitutional; (21) petitioner was not entitled to appointment of experts to support claims; and (22) issues raised on direct appeal did not merit reconsideration.

Petition denied.

Utter, J., filed dissenting opinion.

**\*\*842 \*301** Mair, Camiel & Kovach, Peter A. Camiel; and Sheryl Gordon McCloud (appointed), Seattle, for petitioner.

C. Danny Clem, Pros. Atty., and Pamela B. Loginsky, Irene K. Asai, Jeffrey M. Wolf, and Donald J. Porter, Deputy Pros. Attys., Port Orchard, for respondent.

**\*302** DURHAM, Justice.

Petitioner Brian Keith Lord brings this personal restraint petition (PRP) challenging his aggravated first degree murder conviction and death sentence. We deny the petition and remand for immediate issuance of a death warrant in accord with RCW 10.95.160(2).

Lord was convicted in 1987 of the rape, kidnapping, and aggravated first degree murder of 16-year-old Tracy Parker. The jury found insufficient mitigating circumstances to merit leniency, and Lord was sentenced to death. A summary of the pertinent facts can be found in State v. Lord, 117 Wash.2d 829, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992). Lord's conviction and death sentence were affirmed. Lord, 117 Wash.2d at 837, 822 P.2d 177. Through new counsel, Lord now files this PRP and supplement which raises some 67 issues, many of which are repetitious of those rejected in his initial appeal.

After addressing the standard of review for personal restraint petitions, we will address each of Lord's new claims in chronological order, beginning with pretrial issues and continuing through the penalty phase. Pertinent facts will be set forth in connection with the particular issues to which they relate. The issues already considered in Lord's direct appeal will be dealt with last.

[1] Before beginning our analysis of the substance of Lord's petition, however, we must comment on its scope. The PRP filed by Lord's appointed counsel is 387 pages long and includes a 430-page appendix. In response, the State filed a 333-page brief along with

an additional 400 pages of appendix. Lord then filed a 50-page reply brief. These briefs are in addition to those filed on the direct appeal, as well as the numerous motions filed in connection with this action.

The “process of ‘winnowing out weaker arguments ... and focusing on’ those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy”. Smith v. Murray, 477 U.S. 527, 536, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434 (1986) (quoting Jones v. Barnes, 463 U.S. 745, 751-52, 103 S.Ct. 3308, 3313, 77 L.Ed.2d 987 (1983)). Here, appointed counsel has thrown the chaff in with the wheat, ignoring their duty under RPC 3.1 to present only meritorious claims and contentions and leaving \*303 it for this court to cull the small number of colorable claims from the frivolous and repetitive.<sup>FN1</sup> In all, the 1,200-plus pages of briefing filed here far exceeds zealous advocacy and borders on abuse of process. We hereby provide notice that such behavior *will not* be tolerated in the future.

<sup>FN1</sup>. We recognize that claims must often be brought first in state court in order to be cognizable in a later federal habeas corpus petition. Nonetheless, a claim which is adjudged frivolous in state court will not suddenly develop merit merely from a change in jurisdiction. Counsel do a disservice to their clients and the courts by taking a shotgun approach to appellate and postconviction advocacy.

#### STANDARD OF REVIEW

[2][3][4][5] As a threshold matter, it is important to note that a personal restraint petitioner may not renew an issue that was raised and rejected on direct appeal unless the interests of justice require relitigation of that issue. In re Taylor, 105 Wash.2d 683, 688, 717 P.2d 755 (1986). The petitioner may raise new issues, however, including both errors of constitutional magnitude and nonconstitutional errors which constitute a fundamental defect and inherently result in a \*\*843 complete miscarriage of justice. In re Cook, 114 Wash.2d 802, 812, 792 P.2d 506 (1990); In re Hews, 99 Wash.2d 80, 87, 660 P.2d 263 (1983). To obtain relief with respect to either constitutional or nonconstitutional claims, the petitioner must show that he was actually and substantially prejudiced by the error. In re Cook, 114 Wash.2d at

810, 792 P.2d 506; In re St. Pierre, 118 Wash.2d 321, 329, 823 P.2d 492 (1992). To obtain an evidentiary hearing, the petitioner must demonstrate that he has competent, admissible evidence to establish facts which would entitle him to relief. In re Rice, 118 Wash.2d 876, 886, 828 P.2d 1086, cert. denied, 506 U.S. 958, 113 S.Ct. 421, 121 L.Ed.2d 344 (1992).

#### PRETRIAL ISSUES

[6][7] 1. Information. Lord claims that the amended information is defective because it charges him, in one count, with aggravated first degree murder “and/or” first degree felony murder. Clerk's Papers (CP) (Mar. 15, 1988), at 200. Lord does not claim the information omitted any of the elements of either of these crimes. Rather, he claims the “and/or” language rendered the information invalid under \*304 State v. Golladay, 78 Wash.2d 121, 470 P.2d 191 (1970). In a challenge to this information, Lord has the “burden ... to establish the charging document failed to notify him he might be convicted [of either felony murder or aggravated murder] and that the failure to so inform him prejudiced him in the preparation of his defense”. In re St. Pierre, 118 Wash.2d at 329-30, 823 P.2d 492.

Golladay is not on point. The defendant there was accused of first degree murder committed with premeditated intent, and the information charged two different means of committing the offense. The jury returned a general verdict of guilty. This court reversed the conviction because there was insufficient evidence to support one of the means. However, aggravated first degree murder and first degree felony murder are not different means of committing the same offense, nor are they greater and lesser offenses. State v. Irizarry, 111 Wash.2d 591, 592, 763 P.2d 432 (1988). They are, rather, two different offenses. Irizarry, at 593-95, 763 P.2d 432. Thus, for the jury to be instructed on both offenses, the State must include both charges in the information. Irizarry, at 594-95, 763 P.2d 432. This is precisely what the State did here. Neither separating the charges into two counts nor using “and” instead of “and/or” would have provided any additional or better notice to Lord or his attorney that Lord was accused both of felony murder and aggravated murder.

[8] 2. Death Penalty Notice. Lord claims the death penalty notice is invalid because it was filed the same

day as the amended information charging him with aggravated first degree murder. Lord argues that the timing of the notice proves the Kitsap County Prosecutor does not exercise discretion in seeking the death penalty, but does so automatically upon the filing of an aggravated murder charge.<sup>FN2</sup>

FN2. Many capital defendants (including Lord on direct appeal) have unsuccessfully challenged death penalty statutes on the ground that the subjective nature of the decision and the consequent existence of prosecutorial charging discretion render the statute unconstitutional. See *State v. Lord*, 117 Wash.2d 829, 915-16, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992). This argument was specifically rejected in *State v. Dictado*, 102 Wash.2d 277, 297, 687 P.2d 172 (1984) on the ground that the prosecutor “must file a notice of a special sentencing proceeding” if he or she determines there is reason to believe there are insufficient mitigating circumstances to merit leniency. To comply with that holding, a prosecutor must evaluate the evidence in each case and determine if there is reason to believe there are insufficient mitigating circumstances to merit leniency.

\*305 [9] This issue is patently frivolous. The decision to impose the death penalty requires the prosecutor to make the “subjective determination of whether there is ‘reason to believe that there are not sufficient mitigating circumstances to merit leniency’ ”. *In re Harris*, 111 Wash.2d 691, 694, 763 P.2d 823 (1988) (quoting RCW 10.95.040), cert. denied, 490 U.S. 1075, 109 S.Ct. 2088, 104 L.Ed.2d 651 (1989). Although a policy of seeking the death penalty in every aggravated murder case would be an abrogation of that duty and, in that sense, an abuse of discretion, see *Harris*, 111 Wash.2d at 693-94, 763 P.2d 823, Lord has made no showing \*\*844 that the Kitsap County Prosecutor does in fact seek the death penalty in every aggravated murder case.

[10] 3. Venue. Lord claims the trial court erred in changing venue from Kitsap County to Pierce County rather than to a county in eastern Washington where the victim's disappearance and murder had not been so heavily publicized. Lord's argument is without

merit. The parties did not experience any publicity-related difficulty in selecting a jury in Pierce County. Few of the 55 prospective jurors who were questioned recalled any details about the case, and those who did generally recalled only the initial search for a missing girl. Most of the questioning on voir dire dealt with the jurors' attitudes toward the death penalty. Even with the challenges for cause granted on that issue, and the parties' 30 peremptory challenges, a panel of 12 jurors and 3 alternates was selected after questioning only 55 members of the venire. The trial court did not violate Lord's rights by holding the trial in Pierce County. See *State v. Rupe*, 108 Wash.2d 734, 750-52, 743 P.2d 210 (1987) (capital defendant validly retried in Thurston County, where crime and first trial had both occurred), cert. denied, 486 U.S. 1061, 108 S.Ct. 2834, 100 L.Ed.2d 934 (1988).

[11] 4. Waiver of Presence. Lord claims he did not validly waive his right to be present during the April 28 and May \*306 20, 1987, proceedings and during numerous unspecified in-chambers hearings and sidebar conferences. Lord also contends that a capital defendant cannot waive his right to be present and that, even if such waivers are permissible, the record does not show he made a knowing, intelligent, and voluntary waiver.

[12][13][14] The core of the constitutional right to be present is the right to be present when evidence is being presented. *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985) (per curiam). Beyond that, the defendant has a “right to be present at a proceeding ‘whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge....’ ” *Gagnon*, 470 U.S. at 526, 105 S.Ct. at 1484 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674, 90 A.L.R. 575 (1934)). The defendant therefore does not have a right to be present during in-chambers or bench conferences between the court and counsel on legal matters, *United States v. Williams*, 455 F.2d 361 (9th Cir.), cert. denied, 409 U.S. 857, 93 S.Ct. 140, 34 L.Ed.2d 102 (1972), at least where those matters do not require a resolution of disputed facts. *People v. Dokes*, 79 N.Y.2d 656, 584 N.Y.S.2d 761, 595 N.E.2d 836 (1992) (right to be present during hearing on admissibility of prior conviction).

All of the proceedings during which Lord was absent meet that description. During the pretrial hearing on April 28, 1987, the court deferred ruling on an ER 609 motion, granted defense counsel's motion for funds to get Lord a haircut and clothing for trial, settled on the wording of the jury questionnaires and the pretrial instructions, and set a time limit on the testing of certain evidence. During the May 20, 1987, proceeding, the court announced its rulings on evidentiary matters which had previously been argued, ruled that the jurors could take notes, and directed the State to provide the defense with summaries of its witnesses' testimony. To the extent the various sidebar conferences and in-chambers hearings can be identified, they too involved only discussion between the court and counsel on matters of law. Lord had no constitutional right to be \*307 present during any of these proceedings.<sup>FN3</sup> Prejudice to the defendant will not simply be presumed. Rushen v. Spain, 464 U.S. 114, 117-20, 104 S.Ct. 453, 455-56, 78 L.Ed.2d 267 (1983) (per curiam); see also State v. Rice, 110 Wash.2d 577, 615 n. 21, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910, 109 S.Ct. 3200, 105 L.Ed.2d 707 (1989). Lord does not explain how his absence affected the outcome \*\*845 of any of the challenged proceedings or conferences, nor can we find any prejudice.

FN3. CrR 3.4(b) says the defendant's voluntary absence after commencement of trial shall not prevent the trial from continuing "[i]n prosecutions for offenses not punishable by death..." Even under this court rule, the defendant "need not be present during deliberations between court and counsel or during arguments on questions of law". State v. Walker, 13 Wash.App. 545, 557, 536 P.2d 657, review denied, 86 Wash.2d 1005 (1975).

[15][16] 5. "Ex Parte" Contacts. Lord claims the trial judge had improper ex parte contacts with nonparties regarding discovery matters. This issue is patently frivolous. With both parties' consent, the trial judge contacted the attorney for the Washington State Patrol in an attempt to facilitate the production of documents regarding an internal investigation into the State Crime Laboratory's examination of certain evidence in Lord's case. Since these contacts were made with both parties' consent, and provided Lord with documents relevant to his cross examination of

prosecution witnesses, we can find no prejudice. Moreover, ex parte communications by the trial judge can be held harmless. Rushen, 464 U.S. at 117-18, 104 S.Ct. at 455.

## JURY SELECTION

[17][18][19][20] 6. "Presumption of Life". Lord contends, without supporting argument, that the trial court erroneously prevented defense counsel "from asking jurors about the presumption of life." PRP, at 355. A juror in a capital case is subject to challenge for cause if his "views [on capital punishment] would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980)). \*308 Whether conducted by the trial court or by the parties themselves, voir dire must be sufficient to enable the parties to identify "jurors who, even prior to the State's case-in-chief, had predetermined the terminating issue of [the] trial, that being whether to impose the death penalty". Morgan v. Illinois, 504 U.S. 719, ---, 112 S.Ct. 2222, 2233, 119 L.Ed.2d 492, 507 (1992). The trial judge is afforded considerable discretion in determining how many questions the parties may ask and how the questions should be worded. Mu'Min v. Virginia, 500 U.S. 415, ---, 111 S.Ct. 1899, 1905-06, 114 L.Ed.2d 493, 506-07 (1991).

The record shows that each prospective juror was repeatedly informed, during the voir dire process, of the State's burden of proving insufficient mitigating circumstances to merit leniency. See, e.g., Report of Proceedings (RP), at 30-31, 94. Counsel were permitted to question all of the jurors regarding their understanding of this concept and willingness to follow it. Lord does not explain how this procedure was inadequate to enable counsel to ascertain the juror's views regarding "the presumption of life" or why it was essential to ask that specific question. The court's own questioning and that permitted by counsel was clearly adequate to enable both parties to intelligently exercise their challenges based on jurors' views of the death penalty.

[21] 7. Challenge for Cause Denied. Lord also claims the trial court erroneously denied his challenge for cause to juror James Raymond. Raymond said he was

“for the death penalty”. RP, at 660. When asked if he would be absolutely committed to vote for the death penalty before the penalty phase began, however, he said “[n]o”. RP, at 663. He also answered “[n]o, ma'am” when asked if his views regarding the death penalty were such that he would automatically vote for that penalty without regard to the evidence developed during trial. RP, at 663. Raymond stated he would be willing to consider mitigating circumstances presented or argued in the penalty phase, and he could not think of any particular type of case in which he could not consider mitigating factors.

\*309 Both the defense counsel and the prosecutor conducted extensive voir dire on juror Raymond. The defense twice challenged him for cause. However, his testimony indicates that Raymond was somewhat confused about the 2-stage process in capital cases. Once this was clarified, Raymond was able to explain, “the first phase is solely for the prove-him guilty and the second part is for the sentence, which I didn't clearly understand before, but now I do, and that's when the determination would be to decide, either death or life in prison”. RP, at 695. He also said he was “not going to base everything on my personal opinion” regarding the death penalty or allow it to “override my judgment”. RP, at 695.

\*\*846 [22] The trial court concluded that Raymond “would be open to all the facts presented during [the penalty] phase” and was not, therefore subject to challenge for cause. RP, at 697. Since that conclusion is based on the court's application of the correct rule of law and its assessment of Raymond's demeanor and credibility, it must be given considerable deference. Wainwright, 469 U.S. at 427-29, 105 S.Ct. at 854. Although Raymond's initial understanding of the procedures involved in a capital trial was confused, the record as a whole demonstrated that his “views [on capital punishment] would [not] ‘prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.’ ” Wainwright, 469 U.S. at 424, 105 S.Ct. at 852 (quoting Adams v. Texas, 448 U.S. at 45, 100 S.Ct. at 2526). The trial court's ruling is not, therefore, erroneous.

[23] 8. Challenges for Cause Not Made. Lord next claims that defense counsel represented him ineffectively by failing to challenge jurors Richard Birnel, Gary Kopf, and Patricia Raether based on their views

regarding the death penalty. Lord was not prejudiced by counsel's failure to challenge these jurors unless such challenges for cause would have been granted. See Kimmelman v. Morrison, 477 U.S. 365, 375, 106 S.Ct. 2574, 2582, 91 L.Ed.2d 305 (1986) (to prevail on ineffectiveness claim involving counsel's failure to raise legal issue, defendant must show that issue has merit). As explained above, such a challenge need only be granted if it \*310 is obvious that the juror's views on capital punishment would prevent the performance of his or her duties in accordance with the instructions and oath. Wainwright, 469 U.S. at 424, 105 S.Ct. at 852.

[24] Juror Birnel said he “wouldn't be convinced ahead of time” either for or against the death penalty, indicated that he would give consideration to all mitigating circumstances, and could only “reluctantly” vote for the death penalty if the State proved there were insufficient mitigating circumstances to merit leniency. RP, at 715, 716, 721. Originally, Birnel indicated his initial support for imposition of the death penalty for premeditated murder committed to conceal a rape or kidnapping. However, following an explanation of the instructions that would be given in the case, Birnel indicated he would not vote for the death penalty unless “the prosecutor proves there are no mitigating circumstances....” RP, at 731. Later, defense counsel asked Birnel if he would start out committed to vote for the death penalty after the State proved premeditated murder. RP, at 734. Birnel said “no” and explained that there would be a penalty phase and he “would have to listen and see what the State has to say, if they prove it or don't prove it”. RP, at 734-35.

Similarly, in response to a question from counsel, juror Kopf said he would automatically vote for the death penalty if Lord was convicted of premeditated murder done during a kidnapping or rape. RP, at 1008. When asked, “[w]ithout considering whether or not there's any mitigating circumstances?”, Kopf answered, “[n]o, you have to” consider mitigating circumstances before deciding on a sentence. RP, at 1008.

Juror Raether also indicated in response to a question from defense counsel that she would vote for the death penalty for a person convicted of a premeditated murder. When informed of the law she would be required to apply, however, she said, “I don't want

to take anybody's life from them, and once I knew what the law was I could probably put my feelings aside". RP, at 1297-98. She also answered \*311 "[n]o" in response to the court's questions as to whether she was committed to the death penalty and whether she would automatically vote for the death penalty without regard to evidence developed at trial. RP, at 1281.

Each of these jurors evidenced an openness to consideration of all the facts, a fundamental acceptance of their duty to make an independent and thorough evaluation of the facts, and a willingness to follow their instructions and oath. Lord has not shown that a challenge to any of these jurors would have been successful.

[25] 9. Minor on Jury. Lord claims one of the jurors was 17 years old and therefore not qualified to act as a juror. This argument, which is based on what appears to be \*\*847 either an error in transcription or a misstatement by the prosecutor,<sup>FN4</sup> is patently frivolous. According to the juror questionnaires, the youngest person summoned for jury duty was born in 1964; the youngest of the panel was born in 1960, and was 27 at the time of trial. Thus, Lord's claim is baseless.

<sup>FN4</sup>. After the penalty phase verdict was received, prosecutor Clem stated for the record "that the jury makeup was eight men and four women from seventeen to eighty-three". RP, at 7908.

[26][27] 10. State's Peremptory Challenges. Lord claims the State's use of peremptory challenges to remove jurors who did not favor the death penalty denied him his right to a jury representing a fair cross section of the community. The Supreme Court has held that the equal protection clause of the Fourteenth Amendment prohibits the use of peremptory challenges to exclude members of a racial group.<sup>FN5</sup> \*312 Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). However, the Supreme Court has made it equally as clear that the Sixth Amendment, which protects the right to a jury representing a fair cross section of the community, does not apply to "groups defined solely in terms of shared attitudes" such as opposition to the death penalty. Lockhart v. McCree, 476 U.S. 162, 174, 106 S.Ct. 1758, 1765, 90 L.Ed.2d 137 (1986). Similarly, this

court will not "invoke[ ] the fair-cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors...." Lockhart, 476 U.S. at 173, 106 S.Ct. at 1765.

<sup>FN5</sup>. As Lord notes, one federal district court has held that the Sixth and Fourteenth Amendments prohibit the use of peremptory challenges to exclude jurors who are opposed to the death penalty. Brown v. Rice, 693 F.Supp. 381 (W.D.N.C.1988). The Fourth Circuit reversed that holding, however, and held that the Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) equal protection clause analysis applies only to challenges based on race. Brown v. Dixon, 891 F.2d 490 (4th Cir.1989), cert. denied, 495 U.S. 953, 110 S.Ct. 2220, 109 L.Ed.2d 545 (1990). Several other courts have reached the same conclusion. People v. Marshall, 50 Cal.3d 907, 790 P.2d 676, 269 Cal.Rptr. 269 (1990), cert. denied, 498 U.S. 1110, 111 S.Ct. 1023, 112 L.Ed.2d 1105 (1991); People v. Davis, 794 P.2d 159 (Colo.1990), cert. denied, 498 U.S. 1018, 111 S.Ct. 662, 112 L.Ed.2d 656 (1991). Thus, any equal protection challenge to this use of peremptory challenges would fail under the prevailing case law.

[28] 11. Juror Misconduct. Lord contends that juror Manuel Rosario falsely answered voir dire questions regarding his awareness of pretrial publicity. On his written questionnaire, Rosario said he worked as a press operator for the Tacoma News Tribune. In response to the question, "[h]ave you heard anything about this case?" Rosario checked the box labeled "[n]o." PRP app. 53, at 9. He also answered "[n]o" to the question whether he had heard anyone talk about the case or express any opinion about it. PRP app. 53, at 9. During his individual voir dire, the court asked Rosario, "[n]ow that you've had a couple days to think about it, do you recall hearing or seeing anything about the case?" RP, at 412. Rosario said "[n]o, ma'am" and confirmed that he had not heard anything about the case except what had been described to the panel prior to voir dire. RP, at 412.

In February of 1993, defense investigator Paul Henderson telephoned Rosario and asked him several questions regarding Lord's trial. According to Hen-

derson's affidavit, Rosario said:

I was questioned about this during the jury selection. I said I had read about the crime in the Tacoma newspaper but I hadn't formed an opinion on the guilt or innocence. I had no in-depth background on the case-none whatsoever. I said this during the jury selection.

PRP app. 54. Henderson also states that "Mr. Rosario explained that he has worked for many years as a pressman for the Tacoma News-Tribune and further stated that he read accounts of the murder in that newspaper". PRP app. 54.

\*313 [29][30][31][32] Henderson's affidavit would be hearsay to the extent it relates to Rosario's out-of-court unsworn statements. ER 801. A personal restraint petitioner "must present evidence showing that his factual allegations are based on more than ... hearsay". *In re Rice*, 118 Wash.2d 876, 886, 828 P.2d 1086, cert. denied, \*\*848506 U.S. 958, 113 S.Ct. 421, 121 L.Ed.2d 344 (1992).<sup>FN6</sup> Beyond the hearsay problem, there is also no indication that Rosario injected any previously withheld information into the deliberative process. To the contrary, Henderson's affidavit suggests that Rosario "had no in-depth background on the case" which he could have imparted. Any misleading or false answers during voir dire require reversal only if accurate answers would have provided grounds for a challenge for cause. *State v. Briggs*, 55 Wash.App. 44, 52-53, 776 P.2d 1347 (1989) (discussing *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984)). A juror is not subject to challenge for cause merely because he is aware of the facts of the case. See *Rupe*, 108 Wash.2d at 751, 743 P.2d 210 (fact that most of the venire remembered the case was irrelevant). Rosario's limited knowledge about the case would not provide grounds for such a challenge.

<sup>FN6</sup>. Lord's attorneys claim they have been unable to comply with *Rice* because they voluntarily cut off attempts to contact Lord's jurors in response to a State's motion to preclude such contacts. However, there has been no court order precluding such contacts.

#### GUILT PHASE ISSUES

[33][34][35] 12. Assistance of Counsel. Lord claims he was represented ineffectively in several respects both at the trial court level and on appeal. We have already considered numerous challenges brought by Lord relating to his representation at the trial court level, and find his challenges to that phase of his representation to be both repetitive and a transparent attempt to relitigate issues already decided on appeal. See *Lord*, 117 Wash.2d at 883-86, 822 P.2d 177. His challenge to appellate counsel, which we will consider, is simply that his attorneys did not raise all of the issues Lord now raises and that some of the issues which were raised were not argued in precisely the way Lord's present counsel \*314 argue them. Failure to raise all possible nonfrivolous issues on appeal is not ineffective assistance, however. Rather, the exercise of independent judgment in deciding which issues may be the basis of a successful appeal is at the heart of the attorney's role in our legal process. *Smith v. Murray*, 477 U.S. 527, 536, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434 (1986); *Jones v. Barnes*, 463 U.S. 745, 751-54, 103 S.Ct. 3308, 3312-14, 77 L.Ed.2d 987 (1983)). See also RPC 3.1 (lawyer shall not bring claim upon frivolous basis). Moreover, in order to prevail on the appellate ineffectiveness claim, Lord must show the merit of the underlying legal issues his appellate counsel failed to raise or raised improperly and then demonstrate actual prejudice. *Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). The claim of ineffective assistance on appeal thus adds nothing of substance to the personal restraint petition and appears only to have been made to permit Lord to renew claims that were raised in part or in another manner on direct appeal. Each of Lord's substantive claims is addressed elsewhere in this opinion. The effectiveness of Lord's appellate counsel requires no additional discussion.

[36] 13. Scope of Cross Examination. Lord claims defense counsel's cross examination of four prosecution witnesses (Don Phillips, Rex Harvey, Sonny Belgard, and Robert Machinski) was improperly limited. Lord's claims with respect to the first three of these witnesses were rejected on direct appeal, *Lord*, 117 Wash.2d at 869-70, 873-75, 822 P.2d 177, and need not be discussed again now. The only new claim is that Lord should have been permitted to impeach Machinski with his Texas felony conviction.

Machinski tied Lord to the orange U-Haul blanket on

which blood matching the victim's type had been found. Defense counsel wanted to impeach Machinski's credibility with his 1983 Texas conviction. In an offer of proof conducted by the prosecutor, Machinski admitted that he had been convicted of attempted burglary in 1983. He also said his civil rights had been restored when he was dismissed from probation in 1987. The court asked Machinski to get \*315 whatever documents he had regarding the conviction during the next recess, "[m]eanwhile, defense cannot use his prior record". RP, at 3308. No documentation was produced, and Machinski's prior conviction was not admitted. Lord is now concerned because the order \*\*849 dismissing Machinski's probation says "[d]eft [w]itness in [m]urder [t]rial in State of Washington". PRP app. 29. Although nothing in the order indicates that Washington authorities were involved in the Texas proceedings, Lord suggests the dismissal of the Texas charge was a reward for Machinski's testimony and therefore evidence of bias or motive which the State should have disclosed.

As a threshold matter, it is questionable whether there was even a "conviction" for the trial court to have admitted as impeachment evidence under ER 609.<sup>FN7</sup> Cf. *State v. Dixon*, 17 Wash.App. 804, 565 P.2d 1207, review denied, 89 Wash.2d 1012 (1977) (dismissed conviction not admissible for impeachment). The trial court itself specifically excluded the evidence under ER 609(c), which renders inadmissible convictions which have "been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure...." Moreover, Machinski testified that, although he considered himself a friend of Lord's, he contacted the police on his own after reading a newspaper article about Tracy Parker's murder and the discovery of an orange blanket. Based on the evidence before it, the trial court does not appear to have committed any error on this issue.

FN7. The documents appended to the PRP show that Machinski was never in fact convicted of any crime in Texas. After he entered a plea of guilty, the Texas court placed him on probation and deferred further proceedings "without entering an adjudication of guilt...." PRP app. 29. His probation was dismissed on March 31, 1987.

[37] 14. Other Possible Suspects. Lord claims the trial court erred in excluding evidence that (a) other

individuals had refused to give hair samples or take polygraph examinations when the police asked them to do so, (b) one of Parker's neighbors owned a blue pickup truck which was not seen after Parker disappeared, (c) Parker's boyfriend wanted to have sex with her, (d) Parker had expressed \*316 concern about being followed by someone in a car, (e) several other persons had access to the U-Haul blanket and the residence in which Parker had last been seen alive. The trial court excluded this evidence under *State v. Mak*, 105 Wash.2d 692, 716-17, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986), which holds that evidence connecting another person with the crime charged is not admissible unless there is a train of facts or circumstances which tend clearly to point to someone other than the defendant as the guilty party. See also *State v. Downs*, 168 Wash. 664, 667, 13 P.2d 1 (1932); *State v. Kwan*, 174 Wash. 528, 533, 25 P.2d 104 (1933). Lord does not explain how any of the above evidence tends to point clearly to anyone else as the guilty party.

[38] 15. Waiver of Right to Testify. Lord claims he did not validly waive his right to testify in the guilt phase. After the defense forensic expert completed his testimony, the court asked counsel if the defense had any other witnesses. Counsel said no. The court then asked if Lord was going to testify. Counsel again said no and explained that "we have spent a number of hours talking to Mr. Lord about his testifying, and, based on our advice, he is not going to". RP, at 7153. The court asked Lord if he understood that, if he chose not to testify, the jury could be advised not to consider that choice against him. Lord said he understood. He also confirmed that based on his attorneys' advice he had chosen not to testify.

Lord claims the trial court's "lack of adequate colloquy with [him] failed to ensure that his waiver" of his right to testify "was knowing and voluntary". PRP, at 235. As evidence that he did not wish to waive that right, Lord points to a portion of the allocution statement he made to the jury during the penalty phase. He told the jury he "didn't get to testify, my lawyers thought that was the wrong thing for me to do, which I wanted to but I was told not to, and I just would have liked to have been able to testify to be able to say my part of the story...." RP, at 7845. Lord asks this court to order an evidentiary hearing to determine if he voluntarily waived his right to testify in

the guilt phase or was coerced to do so by his attorneys.

\*317 [39][40] An evidentiary hearing would be required if the defendant “alleges ... that his attorney actually prevented him from testifying\*\*850 in his own behalf”. *State v. King*, 24 Wash.App. 495, 499, 601 P.2d 982 (1979). Lord does not allege that his attorneys “actually prevented” him from testifying, only that they told him it was the “wrong thing” for him to do. Moreover, for the court to discuss the choice with the defendant could intrude into the attorney-client relationship protected by the Sixth Amendment and might also appear to encourage the defendant to invoke or to waive his Fifth Amendment rights. See *United States v. Goodwin*, 770 F.2d 631, 637 (7th Cir.1985), cert. denied, 474 U.S. 1084, 106 S.Ct. 858, 88 L.Ed.2d 897 (1986). It is counsel's responsibility, not the judge's, to advise the defendant whether or not to testify. Petitioner does not present any credible evidence of coercion and we see no need for a re-examination of his decision not to testify.

[41] 16. Guilt Phase Instructions. Lord claims the guilt phase instructions misdefined “premeditation” and did not preserve his right to a unanimous verdict. Lord's challenge to the court's premeditation instruction is patently frivolous. This pattern instruction, which set forth the statutory definition of premeditation, has already been held to be adequate. *State v. Benn*, 120 Wash.2d 631, 657-58, 845 P.2d 289 (1993); *Rice*, 110 Wash.2d at 603, 757 P.2d 889.

[42] The unanimity issue was raised on direct appeal. Lord argued that the “to convict” instruction on aggravated murder did not ensure a unanimous verdict on all elements of the offense because the jury was not required to agree as to whether the crime had been committed during a first or second degree rape or attempted rape on the one hand or a first or second degree kidnapping or attempted kidnapping on the other. This court held that the jury's additional verdicts finding Lord guilty of felony murder based on both rape and kidnapping cured this deficiency. *Lord*, 117 Wash.2d at 876-81, 822 P.2d 177. Lord now argues that our analysis was flawed because a finding of first degree felony murder can rest on either a completed or an attempted first or second degree rape or \*318 kidnapping, whereas aggravated murder requires a completed first degree kidnapping or first or second degree rape.

Lord is correct that the definition of first degree felony murder includes attempted crimes (RCW 9A.32.030(1)(c)), whereas the aggravating factor defined in RCW 10.95.020(9) does not. The jury expressly found that Lord committed the crime during the course or furtherance of a completed rape and a completed kidnapping. Felony murder can be founded upon a second degree kidnapping, whereas only first degree kidnapping constitutes an aggravating factor under RCW 10.95.020(9). In view of the jury's additional finding that Lord committed rape, however, the kidnapping would by definition be first degree. RCW 9A.40.020(1)(b) (kidnapping to facilitate the commission of another felony is first degree).

As the State notes, the other aggravating factor charged and instructed here is that the murder was committed to conceal the commission of “a crime” or to conceal the identity of any person committing “a crime”. RCW 10.95.020(7). This factor includes any crime, including attempts and second degree kidnapping. See *In re Jeffries*, 110 Wash.2d 326, 752 P.2d 1338 (theft), cert. denied, 488 U.S. 948, 109 S.Ct. 379, 102 L.Ed.2d 368 (1988). Thus, there is no unanimity problem with respect to this aggravating factor.

[43] 17. Prosecutorial Misconduct. Lord claims the prosecutor violated his right to due process by failing to disclose that prosecution witness Rex Harvey was in violation of his probation. In a sworn statement, Harvey stated:

I received several probation violations in early 1987 after my release from the Kitsap County Jail. No action was taken on the probation violations until after I testified in the Brian Keith Lord trial and after that trial was completed. The Kitsap County Prosecuting Attorney Danny Clem constantly reminded me that I was on probation each time that I met with him before the trial.... I specifically recalled Clem telling me ... prior to the trial that if I didn't cooperate, “I'm going to burn you.”

\*\*851 PRP app. 22, at 1-2. Lord has also provided this court with a notice to Harvey that he had violated the conditions of his \*319 supervision, and a show cause petition regarding the violation. The notice is dated March 18, 1987, which is before Harvey testi-

fied against Lord, and it recommends that Harvey serve 30 days in jail. The show cause petition was filed on August 4, 1987, after Harvey testified, and it asks the court to set a payment schedule for Harvey's financial obligations. Prosecutor Clem denies Harvey's factual allegations, and has provided evidence to support this denial.

[44][45][46] Lord requests an evidentiary hearing to determine whether any threats or promises were actually made. Such a hearing is required if the defendant has stated with particularity facts which, if proved, would entitle him to relief. In re Rice, 118 Wash.2d 876, 886, 828 P.2d 1086, cert. denied, 506 U.S. 958, 113 S.Ct. 421, 121 L.Ed.2d 344 (1992). Such relief would only be available if the failure to disclose such information "deprives the defendant of a fair trial". United States v. Bagley, 473 U.S. 667, 678, 105 S.Ct. 3375, 3381, 87 L.Ed.2d 481 (1985). The trial was not fair "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different". Bagley, 473 U.S. at 682, 105 S.Ct. at 3383. The jury was informed of Harvey's five convictions for theft by deception, and his credibility to that extent had been impeached. Moreover, Harvey particularly stated in his affidavit that he refused to change his testimony despite any alleged coercion on the part of the prosecutor. In sum, Lord has not shown that the prosecution's acts denied him a fair trial.

[47] 18. Newly Discovered Evidence. Lord alleges that he has new evidence which was previously undiscoverable and which would affect either his conviction or his sentence. Newly discovered evidence is grounds for relief in a personal restraint petition if those facts "in the interest of justice require" vacation of the conviction or sentence. RAP 16.4(c)(3). The standard applied under this rule is the same as that applied to motions for new trial made on the same ground. See In re Jeffries, 114 Wash.2d 485, 493, 789 P.2d 731 (1990) (citing State v. Williams, 96 Wash.2d 215, 223, 634 P.2d 868 (1981)). Under that test, the defendant must show:

\*320 that the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching.

Williams, at 223, 634 P.2d 868.

[48] One piece of "new evidence" Lord presents is a report prepared by Dr. Edward Blake in March of 1992. Except with respect to Dr. Blake's DNA analysis (which was not exculpatory), the examination was based on procedures and tests available prior to Lord's trial. Blake simply retested certain exhibits and expressed disagreement with some of the State crime laboratory's conclusions. Thus, in addition to the fact that this evidence was available before trial, it is also only cumulative or impeaching.

[49] Lord also offers a Washington State Patrol inter-office communication regarding the internal investigation of Donald Phillips, the crime lab employee who tested the suspected crime scene and subsequently filed false reports to his superiors regarding the procedures he used. The defense was informed before trial of Phillips' testing error and his false statements to his superiors. This court dealt with this problem at length in its decision on direct appeal. Lord, 117 Wash.2d at 863-69, 822 P.2d 177. The only new allegations Lord now makes deal with the point at which the prosecutor's office actually learned of Phillips' misconduct. This is immaterial; the significant fact is that the misconduct was revealed, and Lord was able to cross-examine Phillips about his testing procedures and his false report to his superiors.

#### PENALTY PHASE

[50][51] 19. Criminal History. We rejected on direct appeal a number of Lord's claims regarding the introduction and use of his criminal history in the penalty phase. \*\*852 Lord, 117 Wash.2d at 896-97, 889-95, 822 P.2d 177. Lord now claims that his juvenile adjudication of guilt is not a "conviction" at all and is therefore inadmissible under State v. Bartholomew, 98 Wash.2d 173, 654 P.2d 1170 (1982), State's cert. granted and remanded, 463 U.S. 1203, 103 S.Ct. 3530, 77 L.Ed.2d 1383, defendant's cert. denied, 463 U.S. 1212, 103 S.Ct. 3548, 77 L.Ed.2d 1395 (1983), adhered to on remand, \*321101 Wash.2d 631, 683 P.2d 1079 (1984). He also raises other evidentiary challenges to the admission of the juvenile matter and accuses his prior attorneys of representing him ineffectively by not raising these issues. Although most of his contentions on this issue are merely re-worked versions of his original arguments on appeal,<sup>FN8</sup> we

will consider the *Bartholomew* issue and his challenge to the false imprisonment conviction.

FN8. Specifically, Lord claims the State failed to present adequate evidence to prove the existence or validity of the juvenile conviction and that the record does not affirmatively show that the juvenile court found him guilty beyond a reasonable doubt or advised him of his right to appeal. The State presented copies of the juvenile court order finding Lord guilty of second degree murder. See PRP app. 5. The order shows Lord was represented by counsel, the State's witnesses testified under oath and were cross-examined, defense witnesses were called, Lord exercised his right to remain silent, and the trial judge found Lord guilty of second degree murder. Clearly, despite Lord's claim that no "conviction" exists, these documents prove there was an adjudication of guilt. As to his other contentions, Lord cannot rely solely on the silence in the record on these matters, but must present some affirmative evidence that he was ignorant of his rights and that the court applied the wrong standard of proof. See *In re Harris*, 111 Wash.2d 691, 696-98, 763 P.2d 823 (1988), cert. denied, 490 U.S. 1075, 109 S.Ct. 2088, 104 L.Ed.2d 651 (1989); *In re Runyan*, 121 Wash.2d 432, 449-50, 853 P.2d 424 (1993). These matters were also addressed on appeal. *Lord*, 117 Wash.2d at 896-97, 822 P.2d 177.

[52][53][54] Lord has submitted several appendices to show that California law does not treat juvenile adjudications as "convictions". <sup>FN2</sup> PRP apps. 1-6. It does not matter if the adjudication is technically a "conviction", however. One of the "relevant\*322 factors" the jury is to consider in the penalty phase of a capital case is "[w]hether the defendant has or does not have a significant history, either as a juvenile or an adult, of prior criminal activity". RCW 10.95.070(1). The issue in *Bartholomew* was whether the defendant's "criminal history" included alleged criminal conduct for which he had never been charged or convicted. *Bartholomew*, 98 Wash.2d at 196-97, 654 P.2d 1170. We concluded that "[i]nformation relating to defendant's criminal past should ... be limited to his record of convictions".

*Bartholomew*, at 197, 654 P.2d 1170. Although we used the word "convictions", it was meant only to distinguish *allegations* of criminal activity from *adjudications* of guilt, not adult convictions from findings of guilt in juvenile proceedings. See also *In re A. B. C. D. E.*, 121 Wash.2d 80, 87, 847 P.2d 455 (1993) (noting that juvenile court adjudications of guilt are treated as "convictions" for several purposes, including criminal history).

FN9. Lord further claims the adjudication cannot be considered because it was set aside automatically upon his completion of probation. The California statute Lord cites says a juvenile is relieved from "all penalties or disabilities" arising from an adjudication of guilt if he is honorably discharged from control of the Youthful Offender Parole Board. Cal.Welf. & Inst.Code § 1179(a). Lord presents no evidence of such an "honorable discharge"; to the contrary, the evidence shows that Lord has committed several violations of his probation and committed his prior adult felony while still on probation. State's Answer to PRP apps. P, T. Moreover, the phrase "penalties and disabilities" in the California statute does not include use of the juvenile adjudication to enhance the defendant's sentence for an adult offense. *People v. Shields*, 228 Cal.App.3d 1239, 279 Cal.Rptr. 403 (1991); *People v. Jacob*, 174 Cal.App.3d 1166, 220 Cal.Rptr. 520 (1985). Finally, such adjudications are admissible in the penalty phase of a California capital trial. *People v. Frierson*, 53 Cal.3d 730, 808 P.2d 1197, 280 Cal.Rptr. 440 (1991), cert. denied, 502 U.S. 1061, 112 S.Ct. 944, 117 L.Ed.2d 114 (1992); *People v. Burton*, 48 Cal.3d 843, 771 P.2d 1270, 258 Cal.Rptr. 184 (1989), cert. denied, 494 U.S. 1039, 110 S.Ct. 1502, 108 L.Ed.2d 637 (1990).

[55] Lord also did not challenge the admission of the false imprisonment conviction on direct appeal. He now claims the conviction is constitutionally invalid. As with the juvenile adjudication, Lord relies on perceived deficiencies in the record of the conviction; he makes no affirmative claim of ignorance of his rights, the elements of the crime, or the penalties he was facing. Lord has, therefore, failed to meet his burden

of proof on this issue. **\*\*853***In re Harris*, 111 Wash.2d 691, 696-98, 763 P.2d 823 (1988) (rejecting similar challenge to prior conviction admitted in penalty phase of capital case), *cert. denied*, 490 U.S. 1075, 109 S.Ct. 2088, 104 L.Ed.2d 651 (1989). We find no error in the admission of either conviction in the penalty phase.

[56][57] 20. Evidence. Lord claims the trial court erred in admitting the guilt phase exhibits in the penalty phase. This argument is patently frivolous. It is well settled that all evidence which is admissible in the guilt phase is also admissible in the penalty phase. *Bartholomew*, 101 Wash.2d at 643, 683 P.2d 1079; *State v. Mak*, 105 Wash.2d 692, 720-21, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986), *sentence vacated on writ of habeas corpus sub nom. Mak v. Blodgett*, 754 F.Supp. 1490 (W.D.Wash.1991), *aff'd*, 970 F.2d 614 (9th Cir.1992), *cert. denied*, 507 U.S. 951, 113 S.Ct. 1363, 122 L.Ed.2d 742 (1993). Lord presents no compelling arguments why such established precedent should be re-examined.

[58] 21. Penalty Phase Instructions. Lord claims the penalty phase instructions improperly permitted the jury to treat his dangerousness as an aggravating factor, erroneously permitted “double counting” of aggravating factors, erroneously allowed the jury to consider “any relevant factors” instead of “relevant mitigating factors”, required the jury to find more than one mitigating factor in order to vote against the death penalty, improperly required the jury to reach a unanimous verdict, and omitted reference to the “presumption of leniency”.

“[T]he proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction” in an improper manner. *Boyde v. California*, 494 U.S. 370, 380, 110 S.Ct. 1190, 1197, 108 L.Ed.2d 316 (1990). However, “a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.” *Boyde*, 494 U.S. at 378, 110 S.Ct. at 1196 (quoting *Cupp v. Naughten*, 414 U.S. 141, 146-47, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973)). This court has already rejected similar challenges to indistinguishable instructions given in other death penalty cases. *In re Rice*, 118 Wash.2d 876, 894-96, 828 P.2d 1086 (1992) (unanimity, more than one mitigating factor), *cert. denied*, 506 U.S. 958,

113 S.Ct. 421, 121 L.Ed.2d 344; *State v. Mak*, 105 Wash.2d 692, 740-60, 718 P.2d 407 (presumption of leniency, unanimity, “relevant factors”, double counting of factors), *cert. denied*, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986), *sentence vacated on writ of habeas corpus sub nom. Mak v. Blodgett*, 754 F.Supp. 1490 (W.D.Wash.1991), *aff'd*, 970 F.2d 614 (9th Cir.1992), *cert. denied*, 507 U.S. 951, 113 S.Ct. 1363, 122 L.Ed.2d 742 (1993); *State v. Jeffries*, 105 Wash.2d 398, 421, 717 P.2d 722 (“relevant factors”), *cert. denied*, 479 U.S. 922, 107 S.Ct. 328, 93 L.Ed.2d 301 (1986); *State v. Rupe*, 108 Wash.2d 734, 763, 743 P.2d 210 (1987) (“relevant factors”, unanimity), *cert. denied*, 486 U.S. 1061, 108 S.Ct. 2834, 100 L.Ed.2d 934 (1988); *State v. Campbell*, 103 Wash.2d 1, 27-28, 691 P.2d 929 (1984) (“relevant factors”), *cert. denied*, 471 U.S. 1094, 105 S.Ct. 2169, 85 L.Ed.2d 526 (1985); **\*324***State v. Rupe*, 101 Wash.2d 664, 701, 708-10, 683 P.2d 571 (1984) (“relevant factors”); *State v. Frampton*, 95 Wash.2d 469, 489, 627 P.2d 922 (1981) (“future dangerousness” is not unconstitutionally vague). The instructions, taken as a whole, appear adequate.

[59] Lord contends, however, that the Ninth Circuit has found that instructions identical to those given here contained an incorrect statement of law which, taken alone, might have improperly suggested that the jury had to reach a unanimous outcome in the penalty phase. *Mak v. Blodgett*, 970 F.2d 614 (9th Cir.1992), *cert. denied*, 507 U.S. 951, 113 S.Ct. 1363, 122 L.Ed.2d 742 (1993). It is instruction number 6 upon which the dispute centered in *Mak*, and which Lord now contests. Lord's argument is patently frivolous. The instruction given in Lord's trial differs significantly from that given in *Mak*. Lord's instruction 6 read as follows:

You must answer one question. All twelve of you must agree before you answer the question “yes” or “no”. *If you do not unanimously agree then answer “unable to unanimously agree”*. Fill in the **\*\*854** answer to the question in the verdict form to express your decision....

(Italics ours). CP, at 675. The addition of the italicized language in the above instruction cures the problems found by the Ninth Circuit in *Mak*. <sup>FN10</sup> These instructions, taken as a whole, allowed each individual juror to consider any factor he or she felt was mitigating whether or not any of the other jurors

agreed it had been proved or was mitigating. See Campbell v. Kincheloe, 829 F.2d 1453, 1466 (9th Cir.1987) (noting that Washington's statute "imposes no limits on the mitigating evidence a capital defendant may introduce"), cert. denied, 488 U.S. 948, 109 S.Ct. 380, 102 L.Ed.2d 369 (1988). These instructions were entirely proper and did not prejudice the defendant in any way.

FN10. Moreover, the Ninth Circuit found that a lone instructional error would "be tolerable were it the only error in the sentencing proceeding...." Mak, 970 F.2d at 625. Because the court found additional errors which on their own required remand, the Ninth Circuit instructed the trial court to also correct the instructional error at resentencing. Mak, 970 F.2d at 625. We agree with the Ninth Circuit that minor instructional errors do not necessitate resentencing.

\*325 [60] 22. Constitutionality of Death Penalty Statute. Lord contends that RCW 10.95.020, which defines aggravated murder, violates article 2, section 37 of our constitution because it incorporates the premeditated murder statute by reference, without setting it out in full. Article 2, section 37 says, "[n]o act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length". RCW 10.95.020 does not amend or revise RCW 9A.32.030(1)(a). It simply says that aggravated murder is "first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended", plus one or more specified aggravating factors. "It is well established that Const. art. 2, § 37 is not violated when a complete act adopts by reference provisions of prior acts". Steele v. State, 85 Wash.2d 585, 591, 537 P.2d 782 (1975). See also State ex rel. State Toll Bridge Auth. v. Yelle, 32 Wash.2d 13, 200 P.2d 467 (1948). The adoption by reference of the first degree murder statute into RCW 10.95.020 therefore does not violate article 2, section 37 of our constitution.

[61] 23. Death by Hanging. Lord contends that hanging is an unconstitutional method of execution. This court rejected identical contentions in State v. Framp-ton, 95 Wash.2d 469, 512-14, 627 P.2d 922 (1981) (opinions of Rosellini, J., and Stafford, J.); State v. Rupe, 101 Wash.2d 664, 701, 683 P.2d 571 (1984); and State v. Campbell, 112 Wash.2d 186, 192, 770

P.2d 620 (1989). Other state courts have also concluded that hanging does not involve the infliction of pain beyond that necessary for the extinguishment of human life. DeShields v. State, 534 A.2d 630 (Del.1987), cert. denied, 486 U.S. 1017, 108 S.Ct. 1754, 100 L.Ed.2d 217 (1988); State v. Coleman, 185 Mont. 299, 605 P.2d 1000 (1979), cert. denied, 446 U.S. 970, 100 S.Ct. 2952, 64 L.Ed.2d 831 (1980); State v. Kilpatrick, 201 Kan. 6, 439 P.2d 99 (1968). Having already decided that death by hanging is not an unconstitutional punishment, we need not now revisit the issue. Moreover, we note that Lord will not be hanged if he selects the lethal injection alternative, RCW 10.95.180, which is undoubtedly constitutional.  
FN11

FN11. The Ninth Circuit, sitting en banc, also has considered the claim that hanging is unconstitutional, and recently held that "judicial hanging, as conducted under the Washington Field Instruction, does not involve the wanton and unnecessary infliction of pain, and therefore does not violate the Eighth Amendment". Campbell v. Wood, No. 89-35210, 1994 WL 33393, at \*22 (9th Cir. Feb. 8, 1994) (en banc). Moreover, any finding that hanging is an impermissible method of execution would only mean that the defendant's sentence would be carried out by lethal injection. RCW 10.95.180. A similar finding that lethal injection is an unconstitutional method of execution would be tantamount to forbidding the death penalty altogether. The Supreme Court has already concluded that the death penalty itself does not invariably violate the Constitution. Gregg v. Georgia, 428 U.S. 153, 169, 96 S.Ct. 2909, 2923, 49 L.Ed.2d 859 (1976).

#### \*326 MOTIONS

1. Expenditure for Experts. Lord requests this court to authorize an expenditure of public funds to enable him to hire a jury consultant to determine whether the jury instructions were understandable, an investigator\*\*855 to locate and interview numerous witnesses, and a fetal alcohol syndrome expert to determine if trial counsel was ineffective by failing to present mitigating evidence on this issue. Lord contends that he needs to hire these persons in order to meet his burden of showing that he has competent, admissible

evidence to support his claims of error. See *In re Rice*, 118 Wash.2d 876, 886, 828 P.2d 1086, cert. denied, 506 U.S. 958, 113 S.Ct. 421, 121 L.Ed.2d 344 (1992). He cites no authority, however, which suggests that expert services must be provided in postconviction proceedings.

[62][63][64] At the trial court level, the appointment of experts is treated as part of the defendant's constitutional right to the assistance of counsel. *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985); CrR 3.1. There is no absolute constitutional right to counsel in postconviction proceedings, even in death penalty cases. *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Thus, the Sixth Amendment provides no support for Lord's request for funds.

RAP 16.15(g) gives the appellate court discretion to appoint counsel for a personal restraint petitioner and also to authorize "payment of such other expenses as may be necessary to consider the petition in the appellate court". This rule permits this court to authorize expenditures for expert witnesses and other services. In fact, the court authorized\*327 payment of a forensics expert who re-examined numerous exhibits in the present case. However, we do not find that these additional expenditures are necessary to our consideration of this personal restraint petition.

[65] Specifically, Lord wants to hire a fetal alcohol syndrome expert in order to seek information to support his claim of ineffective assistance of counsel. Motion To Employ Fetal Alcohol Syndrome Expert (Feb. 10, 1993), at 1. Lord's trial counsel spoke to several of Lord's family members and were aware he had psychological problems, and they called a neuropsychologist in the penalty phase to describe those problems. Since there is no evidence that counsel had reason to believe that Lord's mother drank while she was pregnant with Lord, counsel's failure to tie Lord's psychological problems to the fetal alcohol syndrome would not, as a matter of law, be considered unreasonable or ineffective. See *Burger v. Kemp*, 483 U.S. 776, 794-95, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987). His requested expenditure for a fetal alcohol syndrome expert is denied.

[66] Lord also wishes an expert jury consultant to assist counsel in supporting their contention that the jury instructions are too confusing for the average

juror to understand. Lord made a very similar claim on direct appeal and submitted a computer-generated evaluation of the jury instructions which concluded that they were extremely difficult to comprehend. This court held that the complexity of the instructions was not objected to at trial, did not constitute an error of constitutional magnitude, and therefore could not be raised for the first time on appeal. *Lord*, 117 Wash.2d at 881, 822 P.2d 177. This court also noted that virtually identical instructions had previously been found to be satisfactory. *Lord*, 117 Wash.2d at 881 n. 13, 822 P.2d 177. An expert's conclusion that the instructions are confusing would not change the nature of Lord's claim so as to allow him to raise it in a postconviction proceeding. Moreover, "[t]he individual or collective thought processes leading to a verdict 'inhere in the verdict' and cannot be used to impeach a jury verdict." *State v. Ng*, 110 Wash.2d 32, 43, 750 P.2d 632 (1988); *State v. Whitney*, 96 \*328 Wash.2d 578, 580 n. 1, 637 P.2d 956 (1981); *State v. Crowell*, 92 Wash.2d 143, 146, 594 P.2d 905 (1979). Thus, one of Lord's own jurors could not impeach the verdict by claiming he or she misunderstood the instructions. *State v. McKenzie*, 56 Wash.2d 897, 900, 355 P.2d 834 (1960). It would be somewhat anomalous to allow the verdict to be impeached with evidence that members of the public who were not jurors, but who participated in an empirical study of jury instructions, would have misunderstood the same instructions.<sup>FN12</sup> Lord's request to \*\*856 expend funds to hire a jury consultant is denied.

FN12. The District Court in *United States ex rel. Free v. Peters*, 806 F.Supp. 705 (N.D.Ill.1992) held that a study of this sort established that Illinois' pattern instructions for capital cases confuse jurors with respect to unanimity and consideration of nonstatutory aggravating factors. In a later case, however, the Seventh Circuit expressly rejected the District Court's analysis. *Gacy v. Wellborn*, 994 F.2d 305 (7th Cir.1993).

[67] Finally, Lord wants funds to employ an investigator to "acquire information about the full scope" of the internal investigation of Donald Phillips. Motion to Employ Investigator (Feb. 10, 1993), at 1. How the internal investigation of Phillips' misconduct was handled is irrelevant to Lord's guilt or innocence or to any penalty phase issue. His request to expend funds to hire this expert is denied.

[68] 2. State's Motion To Strike. The State asks this court to strike appendices 2, 3, 4, 18, and 54 to Lord's petition, references to these appendices throughout the petition, argument based on "judicially forbidden post-verdict contact with jurors", and citations to two Louisiana cases the State claims were unpublished decisions. State's Motion To Strike (Feb. 16, 1993), at 2. The appendices in question contain statements of California attorneys regarding the legal effect of a juvenile court adjudication of guilt, opinions of two Washington attorneys regarding the conflict of interest issue, and investigator Paul Henderson's conversation with juror Rosario. Since none of the attorneys' statements proved necessary (or even particularly helpful) to the disposition of any legal issue, no purpose would be served in striking them. With respect to Henderson's declaration, there is in fact no court order prohibiting contact with Lord's jurors. There is, \*329 therefore, no basis for striking the declaration. Finally, the Louisiana cases were in fact published, so there is no basis for striking the citations to them. The State's motion to strike is denied.

#### ISSUES ALREADY RAISED ON APPEAL

[69][70] This court has given full consideration to every issue raised by the petitioner. Nonetheless, we find many of the issues raised in this PRP to be obvious attempts to get this court to reconsider issues it had already addressed on direct appeal. "Simply 'revising' a previously rejected legal argument ... neither creates a 'new' claim nor constitutes good cause to reconsider the original claim". In re Jeffries, 114 Wash.2d 485, 488, 789 P.2d 731 (1990). As the Ninth Circuit recently explained, a "petitioner may not create a different ground [for relief] merely by alleging different facts, asserting different legal theories, or couching his argument in different language". Campbell v. Blodgett, 982 F.2d 1321, 1326 (9th Cir.1992), *reh'g denied, amended and superseded*, 997 F.2d 512 (9th Cir.1993). A personal restraint petition is not meant to be a forum for relitigation of issues already considered on direct appeal, but rather is reserved for consideration of fundamental errors which actually prejudiced the prisoner. See In re Runyan, 121 Wash.2d 432, 453-54, 853 P.2d 424 (1993). We find that the following issues were adequately considered in the direct appeal, do not constitute fundamental errors which sufficiently prejudice the petitioner such that reconsideration is necessary,

and may be summarily disposed of now.

1. Continuance. Lord claims that the trial court violated his right to due process and to effective assistance of counsel by denying a defense motion for a continuance and allowing "the prosecution to continue its discovery during trial and allow[ing] evidence developed during this period to be admitted into evidence". PRP, at 250. On direct appeal, Lord also assigned error to the trial court's failure to limit discovery once trial started. This was among the "number of other issues" which this court reviewed and found not to "merit individual attention". Lord, 117 Wash.2d at 916, 822 P.2d 177.

\*330 [71] 2. Ineffective Assistance of Trial Counsel. With respect to the effectiveness of his trial counsel, this court rejected Lord's contention on appeal that trial counsel represented him ineffectively by, among other things, failing to call witnesses who claimed to have seen the victim alive the day after the State's evidence indicated she had been killed, and making an inadequate closing argument. Lord, 117 Wash.2d at 883-86, 822 P.2d 177. Lord now claims that his trial \*\*857 counsel generally represented him ineffectively by failing to conduct an adequate investigation, failing to call an additional witness to impeach one of the State's witnesses and failing to present certain mitigating evidence in the penalty phase. Lord specifically alleges that the trial court denied him his right to effective representation by denying his request to fire Ron Ness, one of his two trial counsel, that Ness' representation was ineffective because Ness had previously represented one of the State's witnesses, Rex Harvey, and that Ness represented him ineffectively by being absent during the prosecutor's penalty phase closing argument and so failed to make objections during that argument. Finally, Lord claims the trial court's failure to release all of the crime lab's internal investigative reports denied him his right to effective assistance of counsel.

After examining the record and investigating Lord's claims, we find nothing new of substance to consider. Defense counsel vigorously defended Lord, and we do not find that any of these newly raised allegations, even if proved, would rise to the level of a fundamental error necessitating retrial or resentencing. In sum, petitioner has neither raised any substantially new issues regarding the competence of his representation at trial, nor has he been able to show any prejudice

resulting from the same.

[72] 3. Hammer and Trace Evidence. Lord claims the trial court erred in admitting evidence regarding the hammer, the trace evidence connecting Lord with the murder, and the charts summarizing the trace evidence.<sup>FN13</sup> These \*331 issues were dealt with at length in this court's decision on direct appeal. Lord, 117 Wash.2d at 849-70, 822 P.2d 177.

FN13. Lord's principal argument is that the chart precluded the jury from treating "residual doubts" as to his guilt as a mitigating factor. PRP, at 74. Residual doubt as to the defendant's guilt is not one of the "relevant factors" listed in RCW 10.95.070 (or the jury instructions), nor does the constitution require that it be treated as a mitigating factor. Franklin v. Lynaugh, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988).

4. Alcohol and Marijuana Use. Lord claims the trial court erred in admitting evidence of his alcohol and marijuana use. This issue was raised as an ER 403 and 404(b) issue on direct appeal. This court found no error. Lord, 117 Wash.2d at 872-73, 822 P.2d 177. Lord now claims the same rulings denied him due process of law. We find no independent merit to his contention.

5. Sufficiency of the Evidence. Lord claims the State failed to prove all the elements of aggravated first degree murder. Lord challenged the sufficiency of the evidence of identity, premeditation, and reliability of the State's evidence on direct appeal. This court found sufficient evidence to prove that he committed a premeditated murder and that the victim was raped, thus making the killing an aggravated first degree murder. Lord, 117 Wash.2d at 882-83, 822 P.2d 177. The court declined to "inquire further as to if the evidence was also sufficient to establish kidnapping". Lord, 117 Wash.2d at 883, 822 P.2d 177. The court also rejected Lord's challenges to the reliability of the State's scientific evidence. Lord, 117 Wash.2d at 850-54, 822 P.2d 177. Although he has refashioned his claim based on California case law, it remains the same proposition rejected on appeal.

6. Scope of Cross Examination. Lord claims the trial court improperly limited the scope of cross examination as to prosecution witnesses Rex Harvey, Don

Phillips and Sonny Belgard. These contentions were considered and rejected on direct appeal. Lord, 117 Wash.2d at 869-70, 873-75, 822 P.2d 177.

7. Prosecutorial Misconduct. Lord alleges prosecutorial misconduct based on statements made by the prosecutor in the penalty phase closing argument. This court rejected Lord's challenge to the prosecutor's penalty phase argument on direct appeal. Lord, 117 Wash.2d at 904-05, 822 P.2d 177.

8. Penalty Phase Evidence. Lord claims it was error to preclude him from presenting evidence of other similar \*332 cases in which the defendant did not receive the death penalty. This court rejected Lord's claim regarding sentences in other cases on direct appeal. Lord, 117 Wash.2d 829, 914, 822 P.2d 177; accord Brogdon v. Blackburn, 790 F.2d 1164, 1169 (5th Cir.1986) (evidence of \*\*858 co-defendant's life sentence relevant only to judicial proportionality review), cert. denied, 481 U.S. 1042, 107 S.Ct. 1985, 95 L.Ed.2d 824 (1987).

9. Cross Examination at Allocation. Lord claims the trial court erred in allowing the prosecutor to cross-examine Lord after he exercised his right of allocution. This court rejected this contention on direct appeal. Lord, 117 Wash.2d at 897-900, 822 P.2d 177.

10. Passion or Prejudice. Lord claims his death sentence is the result of passion or prejudice. This court held otherwise on direct appeal. Lord, 117 Wash.2d at 915, 822 P.2d 177.

11. Criminal History. Lord claims error in admitting his criminal history in the penalty phase and in allowing cross examination of his father on that subject. Both of these issues were dealt with and rejected on direct appeal. Lord, 117 Wash.2d at 896-97, 889-95, 822 P.2d 177.

12. Cumulative Errors. Finally, Lord contends that, even if none of the claimed errors set forth in his 387-page personal restraint petition by themselves require reversal, the cumulative error was so prejudicial as to require a new trial. See Walker v. Engle, 703 F.2d 959, 963 (6th Cir.) (errors may cumulatively produce a trial that is fundamentally unfair), cert. denied, 464 U.S. 962, 104 S.Ct. 396, 78 L.Ed.2d 338 (1983). This issue was raised and rejected on direct appeal, albeit as a question of passion or prejudice. Lord, 117

Wash.2d at 915, 822 P.2d 177. This PRP has similarly failed to demonstrate an accumulation of error of such magnitude that resentencing or retrial is necessary.

### CONCLUSION

After thoroughly considering each and every claim brought by petitioner Brian Keith Lord, and conducting a complete and independent evaluation of the record and supporting evidence, we can find no reversible error in either \*333 Lord's conviction of aggravated first degree murder or his sentence of death. Therefore, we deny the petition.

ANDERSEN, C.J., and BRACHTENBACH, DOLLIVER, SMITH, GUY, JOHNSON and MADSEN, JJ., concur.

UTTER, Justice (dissenting).

Errors at the penalty phase of a capital case are subject to heightened judicial scrutiny. State v. Lord, 117 Wash.2d 829, 888, 822 P.2d 177 (1991). Applying this heightened scrutiny, I believe the errors made during the penalty phase denied Lord a fundamentally fair sentencing proceeding.

The trial court erred in sending the State's evidentiary chart into the jury room, in permitting the State to introduce evidence about the circumstances surrounding Lord's prior convictions, in cross-examining him after allocution, and in instructing the jury they needed to be unanimous before answering "yes" or "no" to the question whether the death penalty should be imposed. I have already discussed these issues at length in my dissent in Lord's direct appeal, see Lord, 117 Wash.2d at 918-46, 822 P.2d 177, and only briefly reiterate my concerns here. Finally, I disagree with the majority that death by hanging is permissible in Washington.

### SUMMARY CHART

The majority finds the defendant's argument that the summary chart should not have been introduced at the penalty phase frivolous. As grounds for this characterization of the argument, the majority notes that in Lord's direct appeal this court held the chart's introduction was not reversible error at the guilt phase. The majority also cites the general rule that exhibits which are introduced at the guilt phase may be introduced at the penalty phase. Majority, at 853 (citing

State v. Bartholomew, 101 Wash.2d 631, 643, 683 P.2d 1079 (1984)); State v. Mak, 105 Wash.2d 692, 720-21, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986), sentence vacated on writ of habeas corpus sub nom. \*334 Mak v. Blodgett, 754 F.Supp. 1490 (W.D.Wash.1991), aff'd, 970 F.2d 614 (9th Cir.1992), cert. denied\*\*859, 507 U.S. 951, 113 S.Ct. 1363, 122 L.Ed.2d 742 (1993).

The majority's citations do not support the conclusion that Lord's argument is "patently frivolous". It is true a majority of this court held it was not reversible error to send the chart into the jury room at the guilt phase. See State v. Lord, 117 Wash.2d 829, 861-62, 822 P.2d 177 (1991). The majority did however recognize that generally charts should not be sent into the jury room. See Lord, 117 Wash.2d at 861, 822 P.2d 177. Concluding the chart's presence in the jury room at the guilt phase was not reversible error does not dispose of the question whether sending the chart into the jury room in the penalty phase is reversible.

Even assuming the majority is correct as to the guilt phase, I believe the effect of the chart's admission at the penalty phase must be independently evaluated. Such separate analysis is appropriate because we examine the penalty phase of a capital case with heightened scrutiny. See Lord, 117 Wash.2d at 888, 822 P.2d 177 (citing Johnson v. Mississippi, 486 U.S. 578, 584, 108 S.Ct. 1981, 1985, 100 L.Ed.2d 575 (1988)); State v. Bartholomew, 101 Wash.2d at 638, 683 P.2d 1079 (citing Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977)); Caldwell v. Mississippi, 472 U.S. 320, 329, 105 S.Ct. 2633, 2639, 86 L.Ed.2d 231 (1985).

It is true that evidence admissible in the guilt phase is generally admissible in the penalty phase. See, e.g., Bartholomew, 101 Wash.2d at 643, 683 P.2d 1079. Nevertheless, matters that are highly prejudicial and of questionable relevance that should be excluded in criminal trials under ER 403 should not be admitted in the penalty phase of a capital case. See Bartholomew, 101 Wash.2d at 641, 683 P.2d 1079.

A court examining a due process challenge to the admissibility of evidence should evaluate whether the probative value of the evidence outweighs its prejudice to the accused:

When it must be said that the probative value of such

evidence, though relevant, is greatly outweighed by the prejudice to the accused from its admission, then the use of such evidence by a state may rise to the posture of the denial of fundamental fairness and due process of law.

*\*335 United States ex rel. Palmer v. DeRobertis*, 738 F.2d 168, 171 (7th Cir.1984) (quoting *United States v. Pate*, 426 F.2d 1083, 1086 (7th Cir.1970), cert. denied, sub nom. *Durso v. Pate*, 400 U.S. 995, 91 S.Ct. 469, 27 L.Ed.2d 445 (1971)).

The State's chart was not relevant to the jury's deliberations in the penalty phase. There, the relevant inquiry is whether there are sufficient mitigating circumstances to merit leniency. See RCW 10.95.070. Moreover, the chart's potential for prejudice should not be lightly discounted at a stage in which the defendant is subject to the harshest penalty available under our sentencing scheme. See *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976); *Beck v. Alabama*, 447 U.S. 625, 638, 100 S.Ct. 2382, 2390, 65 L.Ed.2d 392 (1980); *Gardner v. Florida*, 430 U.S. at 357, 97 S.Ct. at 1204. At the very least, the chart distracted the jury from properly focusing on the question whether Lord had shown sufficient mitigating circumstances to warrant leniency.

Under these circumstances, the erroneous admission of the State's summary chart, which consisted of irrelevant and prejudicial matters, denied Lord a fundamentally fair proceeding and therefore denied him due process of law.

#### SCOPE OF EVIDENCE OF PRIOR CONVICTIONS

The trial court also erred in permitting the State to introduce before the jury evidence about the circumstances of Lord's prior murder and unlawful imprisonment convictions.

In the penalty phase, the State elicited testimony that the victim in Lord's juvenile adjudication for murder was a close family friend, was shot with two guns, and was shot in the stomach while she was using the telephone to summon help. Report of Proceedings, at 7731-32, 7780-81, 7863. The State also elicited tes-

timony that the victim of Lord's unlawful imprisonment conviction was his 13- or 14-year-old sister-in-law, that he assaulted her in his automobile, and that she sustained injury at his hands. See Report of Proceedings, at 7736-38.

**\*\*860 \*336** The admissibility of prior convictions under RCW 10.95.070 does not give the State license to expose the jury to the facts and circumstances attending those convictions. See *Bartholomew*, 101 Wash.2d at 640-41, 683 P.2d 1079. Cf. *Lord*, 117 Wash.2d at 889-90, 822 P.2d 177. This court has expressly rejected the notion that cross examination may be conducted indiscriminately. *Bartholomew*, 101 Wash.2d at 643, 683 P.2d 1079. ("We do not intend ... that the prosecution be permitted to produce any evidence it cares to so long as it points to some element of rebuttal no matter how slight or incidental.") (quoting *State v. Bartholomew*, 98 Wash.2d 173, 654 P.2d 1170, State's cert. granted and remanded, 463 U.S. 1203, 103 S.Ct. 3530, 77 L.Ed.2d 1383 defendant's cert. denied, 463 U.S. 1212, 103 S.Ct. 3548, 77 L.Ed.2d 1395 (1983)). In deciding whether to admit the prosecutor's evidence, the trial court is required to apply a balancing test similar to that contemplated by ER 403. *Bartholomew*, 101 Wash.2d at 643, 683 P.2d 1079 (citing *Bartholomew*, 98 Wash.2d at 197-98, 654 P.2d 1170).

As I already indicated in my dissent in *Lord*, the State used the statement by Lord's father that Lord was a "good boy" to introduce evidence of his prior bad acts. Such evidence could not have been properly admitted in a criminal trial under the rules of evidence. See ER 405. Lord's father was not introducing character evidence about his son. He was rather expressing his affection for him, making rebuttal evidence improper. *State v. Lord*, 117 Wash.2d 829, 927-30, 822 P.2d 177 (1991) (Utter, J., dissenting).

The State's introduction of statements about Lord's prior bad acts violated RCW 10.95.070 as construed by *State v. Bartholomew*, 101 Wash.2d 631, 643, 683 P.2d 1079 (1984). It was also unwarranted under the Rules of Evidence. Finally, some of the information elicited by the State was inadmissible as hearsay. See Report of Proceedings, at 7731-32. The procedural protections attending criminal prosecutions should be conscientiously applied, rather than suspended, in the context of a capital proceeding. See *Beck v. Alabama*, 447 U.S. 625, 635-38, 100 S.Ct. 2382, 2388-89, 65

L.Ed.2d 392 (1980).

\*337 There can be no doubt the references to the circumstances pertaining to Lord's juvenile adjudication and his prior criminal convictions were both legally unwarranted and exceedingly prejudicial. Under these circumstances, the majority's conclusion that Lord has not shown prejudice is unjustified, particularly in the context of a death penalty proceeding. It is critically important to both the defendant and the community that a decision to impose the death sentence be based upon reason rather than caprice or emotion. *See Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

The trial court also erred in permitting the state to cross-examine Lord after his allocution. For the reasons set forth in my dissent in Lord's direct appeal, doing so is improper. *See Lord*, 117 Wash.2d at 936-39, 822 P.2d 177 (Utter, J., dissenting).

#### JURY UNANIMITY WITH RESPECT TO IMPOSING THE DEATH PENALTY

Finally, the Ninth Circuit has held that an instruction suggesting the jury must be unanimous before finding insufficient mitigating circumstances to merit leniency constitutes error. *See Mak v. Blodgett*, 970 F.2d 614 (9th Cir.1992), cert. denied, 507 U.S. 951, 113 S.Ct. 1363, 122 L.Ed.2d 742 (1993). In *Mak* the instruction was "All twelve of you must agree before you answer a question 'yes' or 'no.'" In this case, the instructional infirmity was similar. The court instructed the jury as follows: "*You must answer one question "yes" or "no". If you do not unanimously agree then answer "unable to unanimously agree".*" (Italics mine.) Clerk's Papers, at 675. In view of the *Mak* court's disapproval of this type of instruction, I believe the flaw in the instruction here, combined with the other errors indicated above, denied Lord a fundamentally fair sentencing proceeding. Accordingly, I would reverse his sentence and remand for a new sentencing proceeding consistent with the law as set forth here.

#### \*\*861 DEATH BY HANGING

I also take exception to the majority's citation of *State v. Frampton*, 95 Wash.2d 469, 627 P.2d 922 (1981) for the proposition\*338 that hanging is a permissible method of execution. Majority, at 36. A careful read-

ing of *Frampton* indicates that a majority of the court only held there was *insufficient undisputed evidence* to warrant holding hanging unconstitutional. *See Frampton*, 95 Wash.2d at 512, 514, 627 P.2d 922.

*Frampton* is not controlling because its discussion of hanging is dicta. Likewise not binding is the comment in *State v. Rupe*, 101 Wash.2d 664, 683 P.2d 571 (1984) that *Frampton* "rejected the argument that death by hanging was unconstitutional". 101 Wash.2d at 701, 683 P.2d 571. Itself dictum, this statement does not alter the fact that the discussion in *Frampton* is dicta. *State v. Campbell*, 112 Wash.2d 186, 192, 770 P.2d 620 (1989) is not controlling either. *Campbell* only refused to reconsider *Frampton*, which we have already seen did not establish controlling law on the constitutionality of hanging.

It is, moreover, critical to understand that the court's discussion of hanging in *Frampton* was in part based on a misapprehension that death was rapid and virtually painless because the spinal cord was severed in the drop, a condition that was thought to produce almost instantaneous loss of consciousness and death shortly thereafter. More recent medical and scientific evidence reveals this assumption to be false. In most cases, the spinal cord is not severed, and death can be relatively slow and agonized. *See State v. Dodd*, 120 Wash.2d 1, 30, 838 P.2d 86 (1992) (Utter, J., dissenting); see also, e.g., R. James & R. Nasmyth-Jones, *The Occurrence of Cervical Fractures in Victims of Judicial Hanging*, 54 Forensic Sci. Int'l 81, 90-91 (1992); I. Gray & M. Stanley, *A Punishment in Search of a Crime* 22-29 (1989); *An Unnatural Way To Die*, New Scientist, Oct. 27, 1983, at 278.<sup>FN1</sup>

<sup>FN1</sup>. I note a divided Ninth Circuit of the United States Court of Appeals, sitting en banc, has recently concluded death by hanging is not unconstitutional. *See Campbell v. Wood*, No. 89-35210, 18 F.2d 662, 1994 WL 33393 (9th Cir. Feb. 8, 1994). For the reasons amply set forth in the sources cited above, and in the dissent in *Campbell v. Wood*, *supra*, I disagree.

\*339 For the reasons just set forth, the majority's conclusion that hanging is a constitutionally permissible method of execution is unwarranted.

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Court of Appeals of Washington,  
Division 2.  
STATE of Washington, Respondent,  
v.  
Jimi Lee JOHNSON, Appellant.  
No. 33645-6-II.

April 10, 2007.

**Background:** Defendant was convicted in the Superior Court, Mason County, Toni A. Sheldon, J., of first degree burglary with sexual motivation, indecent liberties, and first degree attempted rape. Defendant appealed.

**Holdings:** The Court of Appeals, Penoyar, J., held that:

- (1) juror's failure to disclose material information during voir dire, and interjection of such undisclosed information during deliberations, was misconduct, and
- (2) juror misconduct was prejudicial, warranting new trial.

Reversed and remanded.

**\*\*184** Thomas Edward Doyle, Hansville, WA, Patricia Anne Pethick, Tacoma, WA, for Appellant.

Monty Dale Cobb, Mason County Prosecutors Office, Shelton, WA, for Respondent.

#### OPINION PUBLISHED IN PART

PENOYAR, J.

**\*864** ¶ 1 NT was attacked in her bed by a man she later identified as Jimi Lee Johnson. After a jury trial, Johnson was convicted of first degree burglary with sexual motivation, indecent liberties, and first degree attempted rape. He now appeals, arguing in part that he was denied his right to a fair trial due to juror misconduct. We agree. A juror's nondisclosure at voir dire, combined with her later interjection of the non-disclosed information into jury deliberations, prejudiced Johnson, and we remand for a new trial.

#### **\*865** FACTS

¶ 2 On the evening of May 15, 2004, Johnson visited the residence of Russell Cultee (Cultee residence), where NT was staying. When Johnson left with Cultee and his friends, NT went to bed. Later that evening, she awoke to find Johnson on top of her, "trying to pull down [her] pants and ... to spread [her] legs open." 9 Report of Proceedings (RP) at 77. NT later testified that there was skin-to-skin contact. She asked him repeatedly to stop and get off of her and finally was able to push him off. When she flipped on the light switch, she "[saw] Jimi Johnson." 9 RP at 79. Johnson **\*\*185** grabbed her arm, and NT "told him no" and ran to a friend's house across the street. 9 RP at 80. Johnson followed her into the house but ran away after NT's friend "grabbed a big old stick and chased him out the door." 9 RP at 81.

¶ 3 Johnson was taken into custody at his residence later that evening. The following morning, NT identified Johnson as her assailant.

¶ 4 Johnson was charged with first degree burglary with sexual motivation (count I), residential burglary with sexual motivation (count II, charged in the alternative to count I), indecent liberties (count III), first degree attempted rape (count IV, charged in the alternative to counts V and VI), second degree attempted rape (count V, charged in the alternative to counts IV and VI), and second degree assault with sexual motivation (count VI, charged in the alternative to counts IV and V).

¶ 5 Trial commenced November 22, 2004. A jury returned guilty verdicts on all charges except second degree attempted rape (count V). The jury also returned special verdicts finding sexual motivation for counts I, II, and VI and found that count VI was committed with the intent to commit first degree rape.

¶ 6 The trial court dismissed the alternative counts II and VI and sentenced Johnson within his standard range on counts I, III, and IV.

#### **\*866** I. JUROR NONDISCLOSURE

¶ 7 On January 5, 2005, the trial court received a letter from the presiding juror (juror A) in the case expressing her concerns about possible juror miscon-

duct. In response to in-court questioning, the juror A testified that in the “last third of the deliberations,” during a “lively debate,” juror B stated that “[Juror A] wouldn’t understand unless [she] had the experience of [her] daughter being raped or attempted rape. And ... her story not being believed.” 14 RP at 359. Ultimately, three jurors other than juror A testified that they heard another juror disclose information about a sexual assault.<sup>FN1</sup>

FN1. Juror C testified that she remembered another juror disclosing during deliberations that her daughter was the victim of a date rape or attempted rape, and “[s]he ... seemed frustrated because we were deliberating.” 14 RP at 411. Juror D testified that he remembered “hearing something about” a female juror disclosing during deliberations that her daughter had been the victim of a rape, attempted rape, or sexual assault. 14 RP at 427. Finally, juror E testified that he heard that “a lady ... talked about ... rape in the family” during deliberations. 14 RP at 430-33.

¶ 8 Juror B, in response to the court’s questions, testified that she did disclose that her daughter had been a date rape victim. She stated that the comment was not during deliberations—that they had already decided the verdict and were “sitting around just talking.” 14 RP at 377.

¶ 9 Juror B further testified that her daughter’s date rape did not come to mind during voir dire questioning “because this happened over 14, 15 years ago.” 14 RP at 379. During voir dire, the trial court asked the juror pool whether they “or a family member or a close friend ever had a similar experience with this type of case? ... Have your [*sic*] or a family member or a relative or close friend had a personal experience with a sexual assault case?” 1 Clerk’s Papers (CP) at 78. Eight members of the initial jury pool answered in the affirmative, and each were spoken with individually. Of those eight, five were excused for cause. The other three were allowed to remain in the jury pool \*867 because, after questioning, they asserted that they could be fair.<sup>FN2</sup>

FN2. A similar pattern occurred in the afternoon voir dire session, but none of the jurors from that session ended up on the jury.

¶ 10 The trial court entered findings of fact on the juror misconduct issue as follows:

VIII. The court finds that juror [B] disclosed during the course of the jury deliberations that her daughter had been the victim of ‘date rape.’

IX. That during the course of the voir dire process prior to the evidentiary phase of the trial herein the court asked the members of the jury pool the question ‘Have you or a family member or close friend ever had a similar experience with \*\*186 this type of case, ... Have you or a family member or relative or close friend had a personal experience with a sexual assault case.’ In light of the actual question asked by the court pertaining to an experience with a ‘sexual assault case’, as opposed to an incident of sexual assault, the court does not find that [juror B] withheld material information during voir dire.

...

X. That one comment was made by juror [B] that her daughter had been the victim of date rape. That the comment was made during the deliberation phase of the trial. That the comment was heard or overheard by only four jurors. That the comment was not discussed further. That the comment was made in casual conversation as opposed to being part of the deliberation process. That the comment did not become a subject of the actual deliberations. That the court finds that there are no reasonable grounds to believe that the defendant was prejudiced by the comment by juror [B]. The court finds no juror misconduct by the interjection of any extraneous evidence or information into the deliberations by [juror B] on this alleged basis.

Supplemental CP at 330-31.

¶ 11 The trial court denied Johnson’s motion for a new trial, and this appeal followed.

#### \*868 ANALYSIS

##### I. JUROR MISCONDUCT

¶ 12 Johnson argues that juror B’s withholding of information at voir dire, along with her injection of

this information into deliberations, amounts to juror misconduct sufficient to warrant a new trial. The State responds that the lack of disclosure at voir dire is insufficient to warrant a new trial under the rule the United States Supreme Court set out in McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984).<sup>FN3</sup>

FN3. The State also argues that the low number of jurors exposed to the information illustrates no prejudice to defendant. The number of jurors who heard the information is irrelevant. Criminal defendants in Washington have a right to a unanimous jury verdict. State v. Ortega-Martinez, 124 Wash.2d 702, 707, 881 P.2d 231 (1994) (citing WASH. CONST. art. 1, § 21). Therefore, if the information changed even one juror's mind, it prejudiced the verdict.

¶ 13 In McDonough, a products liability case, the Supreme Court declined to grant a new trial where a juror did not disclose that his son had been the victim of an accident involving a truck tire. McDonough, 464 U.S. at 550-51, 104 S.Ct. 845. The Court decided that “[t]o invalidate the result of a 3-week trial because of a juror’s mistaken, though honest response to a question, is to insist on something closer to perfection than our judicial system can be expected to give.” McDonough 464 U.S. at 555, 104 S.Ct. 845. Accordingly, the court held that to obtain a new trial, a party must first demonstrate that a juror failed to honestly answer a material question on voir dire and then show that a correct response would have provided a valid basis for a challenge for cause. McDonough, 464 U.S. at 556, 104 S.Ct. 845.

¶ 14 McDonough applies here, as the initial point of alleged juror misconduct occurred when Juror B offered inaccurate answers at voir dire. However, Johnson argues that another juror misconduct incident occurred when juror B injected this information into deliberations. Where the record demonstrates that the undisclosed information is later employed in the jury's deliberations, additional analysis\*869 is required. State v. Briggs, 55 Wash.App. 44, 53, 776 P.2d 1347 (1989).

[1] ¶ 15 When a juror withholds material information during voir dire and then later injects that information into deliberations, the court must inquire into the

prejudicial effect of the combined, as well as the individual, aspects of the juror's misconduct. Briggs, 55 Wash.App. at 53, 776 P.2d 1347.

[2] ¶ 16 Voir dire protects the right to an impartial jury by exposing possible biases. McDonough, 464 U.S. at 554, 104 S.Ct. 845. Truthful answers by prospective jurors are necessary for this process to serve its purpose. McDonough, 464 U.S. at 554, 104 S.Ct. 845. Had juror B answered truthfully to the relevant voir dire questions, Johnson could have pursued the matter to examine \*\*187 whether to excuse her for cause, or at least to ask her whether she could refrain from discussing her personal experiences during deliberations. As described above, every other juror who answered in the affirmative to the court's question on sexual assault was asked about their experiences and whether they could be fair, and five were excused for cause. The other three jurors were allowed to stay only after they asserted that they could put their personal experiences aside and be objective about the case at hand.

[3][4] ¶ 17 Juror B's injection of nondisclosed information into deliberations illustrated that she could not be objective about the case at hand—the precise danger that voir dire is designed to prevent. Due to her actions, Johnson was denied the protection voir dire offers to preserve jury impartiality.

[5][6][7] ¶ 18 Johnson was also likely prejudiced by the injection of juror B's personal undisclosed information into deliberations. Juror misconduct involving the use of extraneous evidence during deliberations will entitle a defendant to a new trial if there are reasonable grounds to believe a defendant has been prejudiced. Briggs, 55 Wash.App. at 55, 776 P.2d 1347 (citing State v. Lemieux, 75 Wash.2d 89, 91, 448 P.2d 943 (1968)). Any doubt that the misconduct affected the verdict must be resolved against the verdict. Briggs, 55 Wash.App. at 55, 776 P.2d 1347 (citing \*870 Halverson v. Anderson, 82 Wash.2d 746, 752, 513 P.2d 827 (1973)). This is an objective inquiry into whether the extraneous evidence could have affected the jury's determination, not a subjective inquiry into the actual effect of the evidence, and includes consideration of the purpose for which the extraneous evidence was interjected into deliberations. Briggs, 55 Wash.App. at 55-56, 776 P.2d 1347. A new trial must be granted unless “it can be concluded beyond a reasonable doubt that extrinsic evi-

dence did not contribute to the verdict.” *Briggs*, 55 Wash.App. at 56, 776 P.2d 1347 (quoting *United States v. Bagley*, 641 F.2d 1235, 1242 (9th Cir.1981)).

¶ 19 Here, the purpose for which juror B injected her information into deliberations is unclear. She argues that it was “small talk,” 14 RP at 376, but other jurors remember that she was “frustrated,” 14 RP at 411, and that it was in the midst of a “lively debate.” 14 RP at 359. Objectively, it seems that her comment was injected to generate sympathy for the victim, a witness in this case. Regardless of purpose, it seems quite likely that her comment gave greater credibility and sympathy to the witness.

¶ 20 A review of the record therefore indicates that Johnson was prejudiced by two related instances of juror misconduct: (1) nondisclosure during voir dire, and (2) injection of the undisclosed information into the jury's deliberations. Furthermore, the trial court did not specifically examine the *combined* effects of juror B's actions, only considering them separately.

¶ 21 As stated above, the trial court found that juror B did not withhold information during voir dire because the court's question asked about experience with a “sexual assault case,” not any sexual assault incident. Supplemental CP at 330. The trial court separately found that there were “no reasonable grounds to believe that the defendant was prejudiced by the comment by [juror B].” Supplemental CP at 331. Accordingly, the trial court denied Johnson's motion for a new trial.

[8][9] ¶ 22 A trial court's discretionary ruling regarding a new trial will not be reversed absent an abuse of discretion.\*871 *State v. Cho*, 108 Wash.App. 315, 320, 30 P.3d 496 (2001). However, while great deference is due to the trial court's determination that no prejudice occurred, greater deference is owed to a decision to grant a new trial than a decision not to grant a new trial. *Briggs*, 55 Wash.App. at 60, 776 P.2d 1347. A trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. *Briggs*, 55 Wash.App. at 60, 776 P.2d 1347.

¶ 23 The trial court here should have granted Johnson a new trial. It did not consider the combined effect of juror B's actions at voir dire and during deliberations

but, rather, only examined them separately. Furthermore, the court did not objectively examine whether juror B's injected information\*\*188 could have affected the jury's determination.

[10] ¶ 24 We cannot conclude that Juror B's material nondisclosure, coupled with her later discussion of the undisclosed information during deliberations, was harmless beyond a reasonable doubt. Her actions could easily have affected the jury's verdict. This misconduct prejudiced Johnson because it deprived him of an impartial jury and a fair trial. While a new trial would impose a serious burden on the victims and other participants in this matter, a criminal conviction cannot be permitted to stand where prejudicial misconduct tainted the jury's deliberations. Therefore, we remand for a new trial.

¶ 25 A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.