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JUL 21 2010

King County Prosecutor  
Appellate Unit

NO. 63980-3-I

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

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STATE OF WASHINGTON,

Respondent,

v.

SCOTT WHITE,

Appellant.

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

The Honorable Jeffrey Ramsdell, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The sentencing court's denial of the exceptional sentence request was based on material misinformation and violated appellant's right to due process.

2. The court's imposition of the maximum term was likewise based on material misinformation and violated appellant's right to due process.

Issue Pertaining to Assignments of Error

Where the court's pronouncement of sentence was based on a foundation so extensively and materially false, was appellant deprived of his right to due process?

B. STATEMENT OF THE CASE

1. State's Reduction of the Charge

Scott White is appealing from the court's denial of an exceptional sentence below the standard range and imposition of the maximum term following his guilty plea to second degree murder while armed with a deadly weapon. Supp. CP \_\_\_ (sub. no. 79, Statement of Defendant, 6/5/09), CP 35-45, 188. The state initially charged first degree murder, but moved to amend the charge after its expert, and an expert for the defense, evaluated White and found he suffered from schizoaffective

disorder at the time of the offense and most likely did not premeditate the killing of Michael Webb. 1RP 2.<sup>1</sup>

In anticipation of sentencing, the defense submitted a 142-page pre-sentence report, which urged several bases for imposing an exceptional sentence below the standard range (CP 45-50)<sup>2</sup> and attached the mitigation package it previously provided the state, which resulted in the reduced charge. CP 51-187. The mitigation package contained a detailed summary of White's childhood (CP 57-61) and lengthy struggle with mental illness and drug addiction (CP 61-62), which long pre-dated Webb's death. CP 61-62, 65-80. A review of the mitigation package reveals the information was gathered through interviews with White, his family and friends, treatment records and the state's and defense's expert psychological evaluations. CP 47, 49, 52, 53, 54, 57-60, 61-62, 81-82, 168.

## 2. White's Struggles with Mental Illness and Addiction

White's troubles with mental illness began early. Adoption paperwork indicated White's biological mother and grandfather both suffered from schizophrenia. CP 57. White's adoptive mother reported that White experienced developmental delays as a child and exhibited odd

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<sup>1</sup> This brief refers to the transcripts as follows: 1RP – plea hearing June 4, 2009; RP – sentencing hearing July 10, 2009. Both occurred before the Honorable Jeffrey Ramsdell.

behaviors, such as hiding books and silverware in strange places or burying them in the yard. CP 58. In late adolescence, White did not attend school or obtain employment, according to his mother. Instead, he would take his blanket and pillow out on the front porch and sit all day. CP 86.

His troubles became more apparent in adulthood. In 2000, when White was 20, he developed a “delusional fixation” on a married woman who lived a few blocks away whom he had never met. In the event culminating in his arrest for stalking, White picked 30 pounds of flowers on his way home from a grocery store, loaded them into a shopping cart and left them on the woman’s doorstep. CP 88.

White was given a deferred sentence and ordered to undergo mental health treatment. CP 88. During his intake at Seattle Mental Health, White reported that he had started hearing voices in 1998. White was diagnosed with Major Depressive Disorder, Anxiety Disorder and prescribed Prozac. He attended treatment for 10 months, but was discharged when his grant funds ran out. CP 66. White completed probation without incident. CP 66.

In January 2003, while undergoing treatment with Dr. Heidi Wasch, White complained of disturbed sleep and suicide ideation. He

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<sup>2</sup> Discussed infra.

acknowledged binge drinking and marijuana use. He described a “spiritual” experience of being watched by this grandfather while he slept. CP 66. Significantly, White’s biological parents described an incident when White’s “grandfather Don,” a family acquaintance, obtained permission to take White to dinner but did not bring him back until the next day, after White’s mother threatened to call the police. CP 58-59. White’s adoptive father reported that he was repeatedly raped by “grandfather Don” as a child, himself. CP 58.

White underwent treatment at Pathways Treatment Program in Yakima in May 2003. At intake, he reported alcohol and marijuana use, which was corroborated by his urinalysis. CP 66. During treatment, White reported paranoia about people being able to hear what he says and his thoughts through the ceiling vents. He also complained that nobody liked him and called him “gay.” CP 67. He felt significant guilt over smoking, eating meat and “letting God down.” CP 67. White completed treatment and was prescribed antipsychotic medication that only “partially” managed his symptoms. CP 67.

Following his discharge, White’s medical records from another treatment provider indicate White had been diagnosed with Schizoaffective Disorder while at Pathways and prescribed Paxil and Risperidol. CP 67. These records indicate White was regularly taking his

Paxil, but discontinued Risperidol, due to its cost. CP 67. White reported to this provider that the “wind follows him and keeps him company.” CP 67. He also believed a woman was controlling his feelings. CP 67.

On January 4, 2004, White reported to Harborview Medical Center Outpatient Mental Health Services (HVMC), as he was no longer taking the antipsychotic medication and had become increasingly paranoid. CP 68. White reported fear regarding a woman he believed to be following him and paranoia regarding his biological father whom he did not know. White also reported hearing voices calling him “bitch.” Doctors prescribed medication. CP 68.

Just ten days later, White reported back to HVMC, after an incident in which White cut himself. CP 68. White reported he pushed his girlfriend and then cut himself when she began to cry. He was upset with himself for pushing her. They had been arguing about a lock White put on his door, which he felt was necessary for his safety. CP 68-69. White was stabilized and sent home. CP 69.

Although White was reportedly compliant with his medication thereafter, he still complained of voices. CP 69. About a week after the cutting incident, White reported to Wasch that he felt he was being watched, stalked and poisoned. He reported that he avoided mirrors and

that some music had special messages for him. Wasch noted White had a “serious wound” on his arm from the cutting episode. CP 69.

In February 2004, Wasch contacted HVMC, because White needed more psychiatric care than she could provide. White had reported that despite taking his medication, he continued to fear poisoning, and accordingly, restricted his food intake. He reported feeling the presence of people in the ceiling. Wasch noted White was “very thin” and diagnosed him with “probable schizophrenia.” CP 70.

About a month later, White was voluntarily hospitalized at HVMC, due to suicide ideation. He was experiencing “severe anxiety” and hearing voices. At the time of his intake, White was not oriented to date or place. He reported his girlfriend had broken up with him and kicked him out. CP 70. He had been staying with his mother, but she had asked him to leave. CP 71.

Following his discharge, White was homeless and sleeping at the Lutheran Compass Shelter. CP 71. He continued outpatient services at HVMC. His doctor noted White was experiencing “catastrophic thoughts and paranoia,” was “doing poorly,” and diagnosed White with Schizoaffective Disorder and Anxiety. CP 72.

Near the end of April 2004, White participated in an intake at Community Psychiatric Clinic (CPC) seeking both case management and

substance abuse treatment services. He reported experiencing auditory hallucinations and described them as “a lot of people having conversations inn my head.” CP 72. He believed people were after him and planned to harm him. CP 72. White also reported that he had received messages through the TV and the radio and believed that the messages were from Satan. He reported he no longer watched television or listened to the radio to avoid the messages. White also reported the wind blows wherever he goes and said that if he walks past a tree, it will move. He was diagnosed with Schizoaffective Disorder, Depressed Type. White was enrolled in outpatient substance abuse treatment and the case management and medical management program. CP 72.

White attended group meetings for a while, but reportedly started drinking again and fell out of contact with his case manager. His last date of contact was in September 2004. CP 72.

White’s condition deteriorated. In November 2005, he presented at HVMC with three eight-centimeter gashes he cut in his right thigh. CP 75. And in January 2005, he was again voluntarily hospitalized at HVMC for five days. CP 75. Again, he was diagnosed with Schizoaffective Disorder. CP 75. Notes indicate White reported he had been sober from heroin for 60 days but relapsed on January 1, 2006, by smoking

marijuana.<sup>3</sup> CP 75. White reported he unsuccessfully tried to kill himself by injecting a large amount of heroin. CP 75-76. Notes indicated: "Client felt like 'cutting his arteries open.' Client has a history of cutting but wanted to come in for help before he cut himself again." CP 76. Notes shortly before his discharge also indicated White wanted to kill himself, because of the voices. CP 76.

In April 2006, White entered detoxification with Recovery Centers of King County Detox (RCKC). CP 76. In April, White obtained ADATSA funding and entered intensive in patient treatment at RCKC. He successfully completed treatment in June, but relapsed in August and was discharged from the outpatient program. CP 77.

### 3. Circumstances of the Offense

Despite his relapse in August, White continued to seek help for drug addiction and mental illness. CP 51, 99. Through his Alcoholics Anonymous (AA) sponsor, White met Kevin Helvie and Michael Unash. Both men were in treatment and offered White support and a place to live. CP 52.

All three attended AA/NA meetings at the Alano Club on Capitol Hill, which were predominantly attended by gay men. Helvie and Unash

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<sup>3</sup> It is unclear when White started using heroin. This first notation regarding heroin appears to come from Behavioral Research and Therapy Clinics, which noted in October

are both gay and suspected White might be, although White did not have a romantic relationship with either. CP 52.

In October 2006, White met Michael Webb at the Alano Club. CP 52, 100. White remembered that Unash had warned him to stay away from Webb. CP 100. Helvie and Unash confirmed they were concerned by Webb's obvious interest in White. CP 52. According to Helvie and Unash, Webb was known to "troll" gay meetings to pick up young gay men to "mentor." CP 52. According to Helvie and Nash, Webb held himself out as sober, but was known for abusing prescription medication. Helvie and Unash's concern for White was heightened by Webb's ex-boyfriend Brian Siegal, who described Webb as obsessive, controlling and difficult to break free of. According to Helvie, Webb's reputation was of one who "abuses and victimizes people he meets at the club, he uses them for sex. Het gets them hooked on drugs . . . ." CP 52.

White reported that in early October 2006, he and Brent Zimmerman watched movies at Webb's home 2-3 nights a week. CP 100. When White went there alone later in the month, however, he discovered Webb was abusing prescription painkillers. White took some, too, ending the six months of sobriety from drugs he had maintained since May (apart from using alcohol for 1-2 weeks in August). CP 100.

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2005, that White began counseling and medication to help him abstain from heroin use.

In November 2006, Webb broke his arm and needed help around the house. Although White hadn't formally moved out of Helvie's apartment, he moved in to help out. White was given room, board, a \$50.00 weekly allowance and painkillers.<sup>4</sup> CP 100. White reported that at Webb's insistence, they shared the same bed from the outset. White reported that he slept fully dressed under a separate blanket on top of the covers, though Webb repeatedly complained about this. CP 100.

In November 2006, Webb started giving White Xanax. It began with two tablets nightly and quickly progressed to 4-5 tablets daily, in addition to the painkillers and alcohol. White described that Webb would give him five painkillers at a time, three times daily. CP 100.

After Christmas 2006, White resumed shooting heroin. He described staying at Webb's 4-5 days weekly. On other days, White used his allowance and went to the residence of Noah Banx to buy and shoot heroin. When Webb was unable to obtain painkillers, White agreed to shoot him up with heroin. Subsequently, White was shooting heroin 2-3 days weekly at Banx's and on weekends with Webb. This pattern continued until the charged offense. CP 100.

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CP 74.

<sup>4</sup> The state's discovery indicated Webb purchased prescription medication over the internet in the name of Webb's dead ex-boyfriend. RP 22-24. Current prescriptions were found during a search of the home as well, including Xanax, Hydrocodone, Doxipin,

Meanwhile, Webb became increasingly obsessed with White and repeatedly called Helvie and Unash looking for White.<sup>5</sup> Eventually, Webb threatened both Unash and Helvie, telling Unash not to interfere in his relationship with White, and leaving Helvie menacing voicemail messages late at night. CP 52. Helvie remembered one occasion in December 2006 or January 2007, when Webb, after a barrage of phone calls looking for White, followed up with a text message to Helvie that read: “I carry a gun.”<sup>6</sup> CP 53. State psychologist Eric Strachan discussed such threats as well: “Mr. Webb had threatened others (discussed in interviews by both Mr. Helvie and Webb/White’s heroin dealer, Noah Banx).” CP 172.

As White described, over a period of months, his life “went to hell” -- he was using opiates, lost his job at Starbucks, lost his apartment with Helvie, and was a burden on Webb. White reported that Webb increasingly expressed dissatisfaction with White’s dependence, especially in the absence of a reciprocal sexual relationship. CP 100-101. In

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Lexapro and Ephedrine. CP 55. There was also the presence of some prescribed drugs in Webb’s system, according to the toxicology report. RP 23.

<sup>5</sup> Both Helvie and Unash remember several occasions when White tried to avoid Webb; once White dyed his hair black because he heard Webb preferred blonds. CP 52.

<sup>6</sup> Webb was known to carry a gun. CP 55-56. During his prosecution for insurance fraud, Webb reportedly threatened a reporter who was covering the case. CP 55-56, 119, 157-58. The reporter thereafter sought a protection order against Webb. In his affidavit for the order, the reporter stated he observed Webb threaten another reporter and knew that Webb had a permit to carry a gun. CP 56, CP 158. The defense averred in its mitigation package it had numerous witnesses who would testify Webb continued to

response to this pressure and at Webb's request, White began to provide massages to Webb, who would be in his underwear. Webb had a large, electric vibrator that White would place on Webb's underwear over his groin until Webb ejaculated. White reported that these "massages" began in February 2007 and progressed to daily frequency. CP 101. White stated he found this activity to be "disgusting," but felt he owed it to Webb. CP 101.

According to the defense psychologist, White reported:

Additional emotional conflicts of an incestuous nature as Mike Webb was "old enough to be my father" and "felt like a stepdad." Scott reported feeling, however, that he was "trapped" and had nowhere to go."

CP 101.

White described that Webb became more direct in his physical advances toward him in the weeks prior to the charged offense. White reported that almost nightly from February to the charged offense, Webb would "scoot" over next to White in bed, touch White's body "up and down" and attempt to unfasten White's pants. White reported that he variously pretended to be asleep, pushed Webb's hands away, told him to stop or moved to the couch. CP 101.

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carry a gun even after losing his legal right to do so. A gun was located in Webb's house during a search following Webb's death. CP 56.

White reported that during the spring of 2007, he was waiting for a bed to open up at “A New Vision.” CP 101. He was admitted on March 8, 2007,<sup>7</sup> but remained only two days, as he became drug sick and was provided no detoxification medication. CP 101. Helvie confirmed that in March 2007, White appeared at Helvie’s apartment to pick up his things. At the time, White told Helvie he was no longer with Webb and that he was checking into “lockdown heroin” rehabilitation.<sup>8</sup> CP 53.

White reported that as the tension increased, he began to fear that Webb was going to “rape” him. White explained, “he is a lot bigger than I am and he expected something I was not willing to give him.” CP 102. White reported that almost nightly during the two weeks prior to Webb’s death, he awoke to find Webb’s hand on White’s crotch. He also became more concerned that Webb kept a handgun on the headboard, fearing that this might be used by Webb to compel a rape.<sup>9</sup> CP 102.

On the night of Webb’s death (charged as occurring between April 13 and April 15, 2007), both Webb and White were highly intoxicated from a combination of drugs and alcohol. They were up late arguing about the relationship. Again, Webb was pushing for sex. At some point,

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<sup>7</sup> This was confirmed by medical records. CP 79.

<sup>8</sup> White had tried to leave Webb on prior occasions as well; once, by briefly taking Webb’s car. White returned, as he was suffering from drug withdrawal. CP 53.

Webb left the bedroom and White went outside to smoke a cigarette. While in the backyard, White grabbed an ax that had been there for some time. He placed it under the bed while Webb was still in the other room. White then got into bed and pretended he was asleep. When Webb came to bed, he began fondling White. CP 53, 103-104.

White described feeling “violated” as he had before, with thoughts of “this is really gross.” CP 104. White reported that he “peeled Mike’s hands off,” got up, and said he was going to go smoke. White described that he then grabbed the ax and “started swinging like a madman.” CP 104. White reported this was a “split-second decision,” that he was “high as a kite,” and that he suddenly “freaked out.” CP 104.

White reported that he covered Webb with blankets, took two Xanax and lay sleepless on the couch for several hours. He later recounted: “I knew I had just done that, but didn’t realize I had done it or the effect of what I had done.” CP 104. The next morning, White sent a message from Webb’s phone that Webb was not able to make an appointment.<sup>10</sup> He bound Webb’s body and dragged it into the crawlspace

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<sup>9</sup> As noted in note 10, a gun was found during a search of Webb’s house. Ammunition was located on the headboard. CP 53.

<sup>10</sup> White admitted to police he sent several text messages to friends of Webb, posing as Webb and stating variously that he could not make an appointment or was going out of town. CP 4.

downstairs. CP 104. Reportedly still high as a kite and taking more pills, White attempted to clean up the bedroom. CP 105.

White remained in Webb's home for several weeks. He left because he "didn't feel right being there" and was "scared" because people were wondering about Webb's whereabouts and might come looking for him. White acknowledged he also left because he had exhausted all of the pills. CP 105. Aside from using Webb's debit card and pawning a few items, White did not steal from Webb. CP 54.

#### 4. Psychological Evaluations

##### (i) Defense Expert

Psychologist Mark Cunningham evaluated White to determine his mental state at the time of the offense and made seven key findings. First, White suffers from Schizoaffective Disorder. CP 82-83. In making this diagnosis, Cunningham relied on: White's genetic predisposition; his developmental delay and bizarre behavior in childhood; his inability to establish a functional adult role; his symptoms of mood disorder and psychosis from adolescence; and his continued symptoms of mood disorder and psychosis since his arrest on the current charge. CP 83-96.

For instance, when Cunningham first assessed White in October 2007, White reported hearing voices on a daily basis. Mostly, they are low, female voices disparaging him. CP 96. In February 2008, although

White had been receiving antipsychotic medication since January, White reported hearing voices and frequently the name “Dana Duffy,” whom he identified as the detective who arrested him. CP 96. White reported the voices were “trying to get [him] to masturbate.”<sup>11</sup> CP 96. White described a belief Dana Duffy was watching him and wanted to find out what sort of person he is, particularly in regard to masturbation. CP 97. White got an ear infection from stuffing bread in his ears to shut out the voices. CP 97, 107.

Second, based on White’s self-history and treatment records, Cunningham found that White’s poly-substance dependence had escalated in severity in the days, weeks and months prior to the offense. CP 82-83, 98-99.

Third, Cunningham found that White experienced significant ambivalence and anxiety regarding his sexual orientation, which was aggravated by his Schizoaffective Disorder, substance dependence, and potential childhood victimization by a pedophile. Cunningham based this finding on several factors: White’s lifelong disability relating to others, evidenced in the profound misperception of his relationship with the woman he was accused of stalking; White’s sexuality and its presentation

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as a disturbed theme in his Schizoaffective Disorder, evidenced by his delusions about masturbation, detective Duffy, and sexual assault by corrections officers; and White's probable molestation by his step-grandfather Don. CP 99.

Fourth, Cunningham found that as described by White, his relationship with Webb was characterized by mutual heavy drug abuse, White's dependence on Webb, and growing tension over Webb pressuring White for sex. CP 100-101.

Fifth, Cunningham found that these factors converged at the time of the offense to create in White an unrealistic fear of being sexually assaulted, an inability to problem-solve an exit from the relationship, a sense of being justified in retrieving a weapon to defend himself, unreflective explosive reactivity, and enactment of a fatal attack White had not anticipated. CP 101-102. In support of this hypothesis, Cunningham cited White's psychotic symptoms. White reported that he had been troubled by feelings that someone was outside the window or in the air vents. He described beliefs that there had been a video camera in the bathroom and bedroom, and that someone was always listening or watching. Although White was unable to specify what these individuals

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<sup>11</sup> White also described three instances of waking to find a correctional officer sexually assaulting him. While Cunningham posited White was dreaming, White remained unconvinced. CP 98. He also believed he was being poisoned at the jail. CP 97.

were listening for, he suggested “a weakness – things I’m sensitive about. Things they can aggravate me with.” CP 103.

Cunningham also cited White’s drug dependence and intoxication. A substance abuse disorder is likely to further destabilize a person like White and aggravate their psychotic symptoms. CP 102.

And finally, Cunningham cited increasing sexual pressure on White and his fear of being raped. White described bringing the ax upstairs as a “security blanket to keep from getting raped.”<sup>[12]</sup> CP 103.

The Sixth key finding Cunningham made was that as a result of White’s severe mental illness and voluntary intoxication, he suffered from a diminished capacity to form the premeditated intent to murder Webb. CP 105.

Cunningham’s last finding was that at the time of the offense, as a result of mental disease, White’s mind was affected to such an extent that he was unable to tell right from wrong with reference to the act charged. CP 83, 107. Again, Cunningham emphasized White’s mental disorder, which is characterized by psychosis. CP 107. Cunningham opined that as a result of the disease, White suffered from the delusion he was about to be raped or molested by Webb. This delusion resulted in his conclusion

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<sup>12</sup> Regarding the men’s relative sizes, Helvie and Unash reported seeing White in May 2007. They said he appeared to weigh approximately 110 pounds. Webb was approximately 6’1” and reportedly weighed 250 pounds at the time of his death. CP 54.

he was justified in arming himself. CP 108. The disorder and White's interpersonal deficits prevented him from identifying and implementing more appropriate responses. CP 108. In Cunningham's opinion, the presence of a delusional belief and White's conclusion that he was justified in defending himself were not inconsistent with a lack of awareness that he would precipitously act on these beliefs. And finally, White's cover-up behaviors merely indicated that *the following day* White recognized his behavior might be regarded as illegal. The behaviors were not dispositive, however, of whether White knew his conduct was wrong *at the time he engaged in it*. CP 108.

(ii) State's Expert

Psychologist Eric Strachan agreed White suffered from schizoaffective disorder before, during and after the offense. CP 169. Strachan likewise agreed premeditation was unlikely – despite White's actions following the offense:

From a psychological perspective, the scenario in which Mr. White would be seen as most culpable in the death of Mr. Webb is one in which Mr. White manipulated Mr. Webb for access to housing and drugs and then turned on him in a deliberate and premeditated manner when the situation no longer suited him. In my opinion, this is unlikely despite Mr. White's actions subsequent to the alleged murder (continuing to live in Mr. Webb's house, taking his drugs, selling his valuables, and spending his money). I draw this conclusion for a number of reasons. First – and most empirically – Mr. White had no history of

serious violence toward anyone except himself. Although there are no perfect predictors of behavior, past actions are more reliable than other possible variables. In Mr. White's case, he went from instances of "throwing pillows," "screaming and hollering," and "stomping [his] feet" to killing Mr. Webb with an ax with surprising suddenness. In other words, he did not progress through some series of increasing threats or physicality before the alleged murder. This is more suggestive an impulsive decision (pulling out an ax and using it) that followed from a tragic decision (bringing the ax indoors as a simultaneous act of prevention and provocation).

CP 174.

However, Strachan disagreed White's symptoms affected his ability to understand the nature, quality or wrongfulness of his actions. In reaching this opinion, Strachan considered two *insanity*-related possibilities: (1) that White's delusions and hallucinations caused him to believe that he was in imminent, life-threatening danger from Mr. Webb and that he had no choice but to attack him in order to save his own life; and (2) that White was able to tell right from wrong but was compelled by some aspect of his psychosis to act against his own wishes. CP 171.

Regarding the first possibility, Strachan disagreed White misperceived his situation:

In other words, Mr. White's perception of his situation was not different from what most people would perceive under the same or similar circumstances. He did not believe he could leave, he did not want to stay, he was being pressured for a sexual experience that he did not desire, and each of these elements was getting worse over time. He was

responding to real problems and real anger in his relationship with Mr. Webb, not a delusional misrepresentation of the situation.

CP 171.

Regarding the second possibility or “delusional compulsion” argument, Strachan opined White may have been confused as a consequence of his symptoms, but not forced by them:

When asked whether he was feeling “controlled at that moment” (i.e. at the time of the alleged murder), Mr. White replied “Well, yeah” but then goes on to say,

Now, I don’t want to say I was – I was being instructed to do what I did, but – now that did not – that came out totally wrong. I don’t want to say I was – that I was being told what to do, but – oh, shit . . . The one thing it [the belief that he was being watched] did is it – it intensified the stuff Webb was doing . . . It intensified the feeling of I’m – I was losing control inside because my mind is focused on things over here, and Webb is doing these things over here. And my mind is thinking these people are watching and – and there’s just stuff going on in my head. I didn’t know what the fuck was going on.

CP 172 (emphasis added).

Significantly, White described what goes through his mind when he hears voices:

Like when the voice is heard by me, I know I hear the voice. But it’s like a piece of the puzzle. I hear the voice and that piece of the puzzle doesn’t fit with the other pieces, meaning that my thoughts are the puzzle pieces that I can’t fit together. Every puzzle piece is a thought, memory, etc., that my mind is constantly sorting through.

And I hear the voice [and] . . . it doesn't fit together, so I don't understand what's happening. And I'll try to explain to doctors what's going on and I'll try to explain the voices and I won't understand how to explain what I'm thinking because after I hear the voice it's like my mind is bringing pieces for the puzzle together that don't fit together. And no matter how much I try to understand what the puzzle is, when it's not put together right I can't form the picture.

CP 176.

In Strachan's opinion, White's reliance on visual imagery and the confusion generated by mismatched "puzzle pieces" appeared to fit both with Mr. White's description of his thoughts at the time of the killing ("i.e. 'losing control' of his mind because of all the competing inputs") and with what might be expected from Mr. White in stressful situations given his peculiar pattern of neuropsychological strengths and weaknesses. CP 177.

Strachan also opined White would not have committed the offense were it not for his voluntary use of drugs and alcohol. CP 172. In reaching this opinion, Strachan noted White's typical response to his psychotic symptoms was isolation rather than anger.<sup>13</sup> CP 172. To Strachan, two factors were available to fill in the gap between White's history and his actions that night. The first was that the living situation

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<sup>13</sup> In an interview, Helvie stated that White would close all the blinds in their apartment and seclude himself inside his "room" (which was actually a large walk-in closet) for long periods of time. CP 169. After Webb's death, but before White moved out, Brett Zimmerman noted upon visiting the house that "the . . . cupboards were open which was not normal for Webb. CP 170. To prevent being seen from the outside, White reported that because Webb did not have window covers in his kitchen, he would open all the cupboard doors to block windows and boil pans of water to fog them up. CP 169.

with Mr. Webb was particular unpleasant. The second was that White was using drugs and alcohol:

The more unpleasant the situation was for Mr. White, the more drugs and alcohol he used. The more drugs and alcohol he used, the more his judgment would have been impaired separate from his typical psychosis. Impaired judgment, in turn, is the more parsimonious explanation as to why Mr. White could have so profoundly misjudged the situation and therefore the wrongfulness of his actions, if indeed the court finds it a misjudgment.

It is worth noting that I believe the argument about voluntary intoxication is true regardless of the court's ultimate decision regarding insanity. In other words, I do not believe Mr. White would have attacked Mr. Webb with an ax in the absence of disinhibition and lack of judgment caused by his voluntary use of drugs and alcohol. (Nor would he have stayed in Mr. Webb's house in the absence of drugs and alcohol). The distinction I draw, however, is disinhibition versus delusion. I do not believe that Mr. White misjudged the threat he was under on the night of the alleged murder, but rather that he was vulnerable to making a series of profoundly bad decisions because of the use of drugs and alcohol.

CP 173-74 (emphasis added).

5. Sentencing

The defense asserted three bases for an exceptional sentence below the standard range: (1) To a significant degree, Webb was an initiator, willing participant or aggressor; (2) White's capacity to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of the law was significantly impaired; and (3) and White

suffered a continuing pattern of physical or sexual abuse by Webb, and the offense was a response to that abuse. CP 45-50; RCW 9.94A.535(1)(a), (e), (h).

Based on White's offender score of zero, the standard range was 123-220 months, plus a 24-month deadly weapon enhancement. CP 45; RP 2. The defense asked the court to impose 99 months, plus 24 months, for a total of 123 months or just over ten years. CP 45. The state recommended the low end of 123 months, plus the enhancement for a total of 147 months or just over twelve years. RP 3.

After hearing the parties' recommendations, the court asked the prosecutor for his thoughts on the allegation Webb was not sober, was soliciting White and plying him medication in an effort to make him dependent. More specifically, the court asked whether the state had evidence corroborating that Webb obtained prescription medication fraudulently. Considering the defense mitigation report was "hefty" and not being privy to discovery, the court wanted to know what facts were substantiated. RP 21.

The prosecutor acknowledged there were indications Webb had purchased prescription medication over the internet. RP 22. Yet, he argued it was only White's word as to whether Webb was consuming those drugs, although the toxicology report noted the presence of some

prescribed medication.<sup>14</sup> RP 22-23. In any event, the state argued that drug use did not provide corroboration of White's claim regarding Webb's sexual overtures. RP 22.

Defense counsel interjected that Webb's prescriptions were not legitimate:

They were also medications that were obtained in the name of Mr. Webb's dead ex-boyfriend. They clearly were not prescribed by a doctor and simply obtained lawfully through a warehouse. They came by virtue of some strange deal he had with some doctors out of state.

RP 23-24.

Regarding corroboration of Webb's sexual overtures, defense counsel represented:

Regarding substantiating Mr. Webb's – Mr. White's statements about what happened there, while no one was in the room with them all the time, there were people that provided statements to the defense, and at least one that was spoken with directly by the State's doctor [Kevin Helvie] who confirmed essentially a lot of the things that – reputation evidence that Mr. Webb was known with Al-Anon's community, which is a gay AA/NA program, that he was not clean, that he came through and solicited younger men to mentor, that when he – for lack of a better word – glommed onto Scott, he was very territorial and threatened at least one of them with a gun saying, if you don't stay out of this relationship, you're going to get it.

And there were – things were confirmed that didn't come just from Mr. White. So there were a number of people who confirmed, generally speaking, what was going on. There were people who knew that Scott was clean and

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<sup>14</sup> The prosecutor asserted they were consistent with prescriptions he was directed to take. RP 23.

sober when they brought him to that meeting. They watched him decline after meeting Mr. Webb and basically go from having a job and being clean and sober to disappearing and eventually moving in and then showing up drug sick at their house on occasion trying to get away from Mr. Webb and eventually going back.

RP 31-32.

Regarding the first proposed basis for an exceptional sentence – that Webb was in a significant degree an aggressor or provoker of the incident by supplying White drugs and pressuring for sex in return – the court found no credible evidence Webb was abusing nonprescription drugs while he knew White. Nor did the court find credible evidence Webb was supplying drugs to White. RP 37.

Nor did the court agree that White's sexuality was a source of ambivalence and anxiety that caused him, when coupled with Webb's pressure for sex, to have an unrealistic fear of being sexually assaulted:

Notably, however, the defendant reported having consensual sexual relations with at least two other men after having left Mr. Webb's residence following the murder. One of the incidents that was reported involved the exchange of cash, which the defendant subsequently used to purchase more heroin.<sup>[15]</sup> This behavior in my mind undermines the credibility of the defendant's asserted mitigation claim under RCW 9.94A.535(1)(a).

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<sup>15</sup> During one of the psychological evaluations, White reported that after leaving Webb's, he stayed in the apartment of Dominique Zambido and Dave Martin for 1-2 weeks. He stated he engaged in mutual fellatio with Dominique on 4-5 occasions in exchange for \$20-30, which he spent on heroin CP 105. At the time of his arrest in July 2007, White was living in a park on Queen Anne with Noah Banx. CP 54, 105. White stated he engaged in mutual fellatio with Banx on a single occasion. CP 105.

RP 38.

The court also disagreed White's diminished capacity had anything to do with his mental illness:

It is certainly undisputed that the defendant has suffered from schizoaffective disorder for at least a decade. However, that diagnosis by itself does not establish anything regarding the defendant's state of mind at the time of the murder. The defendant's diagnosis does not predispose him toward violent behavior or cause him to misjudge perceived threats.

Rather, the evidence indicates that the defendant's voluntary ingestion of alcohol and drugs impaired his judgment and perhaps his assessment of the circumstances. The drugs and alcohol did not render him delusional. Rather, it stifled his inhibitions and enabled him to take the brutal actions he took on the night of April 14, 2007. And under RCW 9.94A.535(1)(e), voluntary use of drugs and alcohol is excluded as a basis for mitigation under the statute.

RP 38-39.

Addressing the last proposed basis for the exceptional sentence request, the court found no credible evidence of a pattern of sexual abuse or that White was responding to that abuse:

Other than the defendant's own assertions, there is little else to support his assertions. And, as I have said before, the defendant's own sexual behavior following the murder seems to belie the contention that Mr. Webb's sexual entreaties, if any, motivated him to murder Mr. Webb.

RP 39. The court therefore denied the request for an exceptional sentence down. RP 39-40.

The court instead imposed the maximum, reasoning White was “exceptionally cunning, callous and calculated.”

In 13 years as a superior court judge, I must say that this is one of the two most brutal murders that have been before me. The horror of it all is thankfully almost unimaginable to most people. But to the people affected, it’s a waking nightmare whose images will not fade away.

As if that weren’t enough, this Court is struck by the defendant’s behavior following the murder: The secreting of Mr. Webb’s body in the crawl space of his own home; the creation of a post-murder to-do list to cover his tracks;<sup>[16]</sup> the pawning of Mr. Webb’s property; the use of Mr. Webb’s DSHS card and the attempted use of his credit cards; and, lastly, and perhaps in my mind the most sinister of all, the defendant’s masquerading as Mr. Webb for several weeks wherein he texts friends of Mr. Webb in an effort to convince them that Mr. Webb was just fine and that nothing was wrong.

This act of the defendant strikes me as exceptionally cunning, callous and calculated. By assuaging the concerns of Mr. Webb’s friends, he turned them into unwitting pawns in his effort to avoid detection and justice. For the rest of their lives, these individuals will relive just how they were lulled into inaction by the very person who killed their friend.

One has to wonder: Was this what he meant by being nice to the people who survived? In my mind, Mr. White is not some poor, unfortunate victim of circumstances in this scenario. I think and I believe the evidence supports that he’s a master manipulator who will do whatever it takes to attain his own ends.

RP 42.

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<sup>16</sup> At sentencing, one of the Webb’s friends referenced a “to-do” list purportedly written by White after Webb’s death listing such items as “wash the entire walls,” and by nice to the people who survived. RP 7.

The court imposed 220 months plus the 24-month enhancement, for a total of 244 months or 20 years of imprisonment. RP 42. This appeal timely follows. CP 188.

C. ARGUMENT

THE SENTENCING PROCEEDINGS VIOLATED WHITE'S RIGHT TO DUE PROCESS, AS THE COURT'S DENIAL OF THE EXCEPTIONAL SENTENCE REQUEST AND IMPOSITION OF THE STATUTORY MAXIMUM WERE BASED ON MISINFORMATION.

(i) There Are Limits on the Court's Exercise of Discretion Even When Imposing a Standard Range Sentence.

Under RCW 9.94A.585(1), "A sentence within the standard sentence length . . . for an offense shall not be appealed." However, as the Supreme Court has recognized, this statute is not an absolute prohibition on the right of appeal. State v. Herzog, 112 Wn.2d 419, 423, 771 P.2d 739 (1989). Rather, it precludes only appellate review of "challenges to the amount of time imposed when the time is within the standard range." Herzog, 112 Wn.2d at 423 (quoting State v. Ammons, 105 Wn.2d 175, 183, 713 P.2d 719, 718 P.2d 796, cert. denied, U.S. 930, 107 S. Ct. 398, 93 L. Ed. 2d 351 (1986)). "*An appellant, of course, is not precluded from challenging on appeal the procedure by which a sentence within the standard range was imposed.*" Herzog, 112 Wn.2d at 423 (adding italics, quoting Ammons, 105 Wn.2d 182-83). In any event, assuming the

statutory prohibition is absolute, a challenge based on constitutional grounds defeats the statute. Herzog, 112 Wn.2d at 423.

In Herzog, the issue before the Court was what limits apply to a trial judge when imposing a sentence within the standard range. Herzog, 112 Wn.2d at 423. The more precise question was whether the sentencing judge erred in considering the facts underlying a previous, constitutionally invalid foreign conviction to sentence Herzog to the maximum sentence within the standard range. Herzog, 112 Wn.2d at 420.

In answering this question, the Court noted judges historically have been afforded wide discretion in imposing sentences. Herzog, 112 Wn.2d at 424-425. The Herzog Court further noted that in commenting on Washington's sentencing practices since the adoption of the SRA, Professor Boerner characterized a trial judge's discretion as basically unfettered:

The judicial decision of what period of total confinement to impose within that permitted by the applicable sentence range is statutorily unguided. . . . No standard for determining appropriateness is provided, nor is a sentencing judge required to state the basis upon which his or her decision was made. Thus, within this zone of discretion, *sentencing judges may base decisions on any purpose of sentencing . . . .*

In allowing this free exercise of discretion the Act places no limitation on the information the sentencing judge may consider.

Herzog, 112 Wn.2d at 426 (adding italics, quoting D. Boerner, Sentencing in Washington § 613(a) (1985)).

But the Herzog Court disagreed the trial judge's sentencing discretion was in fact as unfettered as Professor Boerner suggested:

In one final sentence, citing no authority, Professor Boerner concludes:

Of course, a judge may not base a decision on constitutionally impermissible reasons such as race or sex, but absent this limitation, no limits of relevance exist.

D. Boerner, at 6-21.

Herzog, 112 Wn.2d at 426. According to the Herzog Court:

In fact, another such constitutionally impermissible reason, not discussed in the commentary, would be any action taken by the sentencing judge that fails to comport with constitutional due process requirements as afforded by amendment 14, section 1 of the United States Constitution.

Herzog, 112 Wn.2d at 426.

Indeed, such was the crux of Herzog's argument: that the judge violated his due process rights by relying on misinformation to impose the top of the range. Herzog, 112 Wn.2d at 426-28. In support, Herzog relied on United States v. Tucker, 404 U.S. 443, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972). In Tucker, the defendant was convicted of armed bank robbery. At sentencing, the trial judge gave "explicit attention" to the defendant's three prior felony convictions and then sentenced him to 25 years in prison, the maximum term authorized by statute. Tucker, 404 U.S. at 444,

92 S. Ct. at 590. In a subsequent proceeding, it was determined that two of the three prior felony convictions were constitutionally invalid. Herzog, 112 Wn.2d at 427.

In reversing the sentence, the Tucker majority held:

For we deal here, not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded at least in part upon misinformation of constitutional magnitude. As in Townsend v. Burke, 334 U.S. 736, [92 L. Ed. 1690, 68 S. Ct. 1252 (1948)]<sup>17</sup> “this prisoner was sentenced on the basis of assumptions concerning his criminal record which were *materially untrue*. Id., at 741 [68 S. Ct. at 1255].

Herzog, 112 Wn.2d at 427.

Turning to the specific facts of Herzog’s case, however, the court disagreed the judge’s sentence was based on misinformation:

The defendant’s argument in the case at hand fails to recognize the glaring distinctions between this case and Tucker or Townsend. In Tucker and Townsend, factual errors were made in the sentencing proceedings. In Tucker the sentencing judge was unaware of the fact that the prior, formal convictions were constitutionally infirm.

Herzog, 112 Wn.2d at 428 (emphasis added). In Herzog’s case, however, the judge was aware the prior West Germany conviction was constitutionally invalid in the United States, and thus, determined it could

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<sup>17</sup> In Townsend v. Burke, the Court discussed the propriety of a sentencing judge relying upon factually incorrect information pertaining to the defendant’s criminal history. In that case, the Court held that “it is the careless or designed pronouncement of sentence on a foundation so extensively and materially false ... that renders the proceedings lacking in due process.” Townsend, 334 U.S. at 741, 68 S. Ct. at 1255.

not be used as a conviction. Herzog, 112 Wn.2d at 428. There was therefore no mistake regarding the facts upon which the judge relied. Herzog, 112 Wn.2d at 429.

Despite the facts of Herzog's case, the Court reiterated, however:

Nonetheless, Tucker and Townsend do stand for the proposition that if a sentencing judge relies upon material facts of constitutional magnitude that are not true, the defendant's sentence has been enhanced in violation of due process.

Herzog, 112 Wn.2d at 431; See also In re the Personal Restraint Petition of Call, 144 Wn.2d 315, 332, 28 P.3d 709 (2001) (“[T]he sentencing court should be afforded an opportunity to determine the appropriate sentence based upon accurate information used as a basis for calculating an offender score and in determining the correct sentence range under the SRA”).

(ii) The Due Process Limitations Recognized in Herzog Apply Equally When a Judge Denies a Request for an Exceptional Sentence Down.

Relying on Herzog, this Court has held the same principles apply where a defendant has requested an exceptional sentence below the standard range. State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). Review is limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range.

Garcia-Martinez, 88 Wn. App. at 330. A court refuses to exercise its discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstances; i.e., it takes the position that it will never impose a sentence below the standard range. A court relies on an impermissible basis for declining to impose an exceptional sentence below the standard range if it takes the position, for example, that no drug dealer should get an exceptional sentence down or it refuses to consider the request because of the defendant's race, sex or religion. Garcia-Martinez, 88 Wn. App. at 330.

This Court further held:

Conversely, a trial court that has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion and the defendant may not appeal that ruling. So long as the trial court has considered whether there is a basis to impose a sentence outside the standard range, decided that it is either factually or legally insupportable and imposed a standard range sentence, it has not violated the defendant's right to equal protection.

Garcia-Martinez, 88 Wn. App. at 330.

As stated in Herzog, however, a defendant has the due process right to be sentenced based on *accurate* information. Herzog, 112 Wn.2d at 427-28. Accordingly, just as it violates due process for a judge to impose the maximum sentence within the standard range based on misinformation, it violates due process for a judge to deny a request for an

exceptional sentence down based on misinformation. This is necessarily so because: “it is the careless or designed pronouncement of sentence on a foundation so extensively and materially false . . . that renders the proceedings lacking in due process.” Townsend, 334 U.S. at 741.

(iii) The Court’s Denial of the Exceptional Sentence Request Was based on Misinformation and Violated Due Process.

The defense asserted three bases for an exceptional sentence below the standard range. First, that to a significant degree, Webb was an initiator, willing participant or aggressor. CP 45-50; RCW 9.94A.535(1)(a). In support, the defense alleged Webb was not sober and had plied White with prescription medication in an effort to make him dependent. Once White was dependent, Webb began pressuring him for a sexual relationship. On the night of the incident, Webb had accelerated his efforts to move their relationship to a mutually sexual one by trying to undo White’s pants. By way of his insistent and persistent attempts at sexual assault, Webb was the primary aggressor. CP 46-47.

In shooting down this mitigating factor, the court found no credible evidence Webb was abusing nonprescription drugs while he knew White or that he was supplying drugs to White. However, in a missing persons report filed May 7, 2007, Webb’s friends described him as addicted to the narcotic painkiller Vicodin. CP 55. Prescriptions found during the search

of Webb's home included: Xanax, Hydrocodone (Vicodin) Doxipin, Lexapro and Ephedrine. CP 55. Although Webb apparently suffered from Depression and possibly Bipolar Disorder (CP 56, 137), Hydrocodone is not a mood-stabilizing drug. Neither is Ephedrine. And significantly, the state's own discovery showed Webb purchased medication over the internet in the name of Webb's dead ex-boyfriend. CP 22-24. As defense counsel asserted, Webb's prescriptions were anything but legitimate. RP 23-24. Moreover, according to Helvie and Unash, Webb was well known in the AA community as an abuser of prescription drugs. This reputation evidence is corroborated by the missing persons report and drugs found in Webb's house. Even the state's expert opined: "There is little doubt that both Mr. White and Mr. Webb were using drugs on the night of the alleged murder and Mr. White specifically stated 'of course we were using drugs.'" CP 175. That Webb was abusing prescription drugs while he was acquainted with White was amply demonstrated by people who knew him at the time, as well as the prescription medication found at his house.

That Webb was supplying drugs to White was amply demonstrated as well. White had no job and no outside source of income. CP 100. Drugs cost money. There was no question White was heavily using drugs at the time of Webb's death. Helvie confirmed Webb showed up at his apartment saying he was entering lockdown heroin rehabilitation.

Although he stayed for only a few days, medical records confirmed that White was admitted to “A New Vision” at Union Gospel Mission. CP 79, 101. Clearly, White was getting drugs from somewhere. As it turned out, drugs were found at Webb’s house. And according to Helvie, Webb’s reputation was as one who “abuses and victimizes people he meets at the club, he uses them for sex. He gets them hooked on drugs . . . .” CP 52.

Also demonstrated was that White would not have stayed with Webb were it not for the drugs. Both Helvie and Unash remembered several occasions when White tried to avoid Webb. CP 52. Once, White dyed his hair black, because he heard Webb preferred blondes. CP 52. Another time, he took Webb’s car and drove to California. CP 47, 53. And in March, he told Helvie he was no longer with Webb and entered “lockdown heroin” rehabilitation. CP 53. That White tried to avoid Webb is also evidenced by the barrage of phone calls and threats Helvie reported receiving when Webb could not locate White. CP 53, 172. Noah Banks received similar threats. CP 172. Yet, despite his attempts to leave, White always returned. The only logical conclusion is that he returned for drugs. As the state’s expert himself described: “Mr. White had very few options for handling the difficult situation he found himself in because any exit from Mr. Webb’s house meant homelessness and serious drug withdrawal.” CP 177. According to Strachan, White would not “have

stayed in Mr. Webb's house in the absence of drugs and alcohol." CP 173.

And significantly, the state's expert did not believe White "misjudged the threat he was under on the night of the alleged murder, but rather that he was vulnerable to making a series of profoundly bad decisions because of the use of drugs and alcohol." CP 174. In other words, the state's expert agreed that to a significant degree, Webb was an initiator or aggressor to the incident. CP 171, 174.

The court discounted this mitigating factor, however, based on misinformation: that Webb's drug abuse and supply of drugs to White was uncorroborated. As set forth above, however, there was plenty of corroboration. The court's contrary finding amounted to factual error in the proceedings depriving White of his right to due process and to be sentenced based on accurate information.

The second basis offered for the exceptional sentence request was that White's capacity to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of the law was significantly impaired. CP 48-49; RCW 9.94A.535(1)(e). Both experts endorsed this mitigating factor, albeit for different reasons.

Cunningham opined that White's Schizoaffective Disorder, increased drug and alcohol abuse and dependence, ambivalence and

anxiety regarding his sexual orientation and increasingly acrimonious relationship with Webb converged and synergistically interacted to create in White an unrealistic fear of being raped or molested by Webb, an inability to problem-solve and exit from the relationship, a sense of justification in retrieving the weapon to defend himself, unreflective explosive activity and enactment of a fatal attack White had not anticipated. CP 101-102. In addition to finding White had diminished capacity to form the culpable mental state for first degree murder, Cunningham did not believe White was sane at the time of the offense. CP 83, 107-108.

Strachan, on the other hand, did not believe White misjudged “the threat he was under on the night of the alleged murder.” CP 174. However, Strachan opined White might have been confused by symptoms of his Schizoaffective Disorder at the time, based on White’s description of what was going on in his mind:

I was losing control inside because my mind is focused on things over here, and Webb is doing these things over here. And my mind is thinking these people are watching and – and there’s just stuff going on in my head. I didn’t know what the fuck was going on.

CP 172.

White further described that when he hears voices, they are like puzzle pieces in his brain, similar to other thoughts and memories, but that

they don't fit in the puzzle he is trying to piece together, and as a result, he is unable to understand what is happening. CP 176. To Strachan, White's reliance on visual imagery and the confusion generated by mismatched puzzle pieces appeared to fit with White's description of his thoughts at the time of the killing (i.e. losing control of his mind because of all the competing inputs) and with what might be expected from White in stressful situations given his neuropsychological strengths and weaknesses. CP 177.

Strachan's psychological report therefore supported a finding that White's capacity to conform his conduct to the requirements of the law was significantly impaired, due to his Schizoaffective Disorder.

In dismissing this mitigating factor, however, the court appeared to rely on two reasons. First, the court disagreed that White's sexuality was a source of ambivalence and anxiety that caused him – when coupled with Webb's pressure for sex – to have an unrealistic fear of being sexually assaulted. In support, the court pointed to the consensual sexual relations White had with two other men after Webb's death. RP 38. But White's willingness to have encounters with two other men does not establish that he would willingly have sex with Webb.

Significantly, White reported additional emotional conflict of an incestuous nature regarding Webb as he was “old enough to be my father”

and felt like a “stepdad,” according to White. CP 101. That he would find sexual activity with Webb “disgusting” because Webb was like a “stepdad” is also consistent with the fact White was likely molested by his step-grandfather Don.

And despite White’s *behavior*, the record is replete with references to White’s conflicted *feelings* regarding his sexuality. Long before meeting Webb, White reported to mental health professions a “spiritual” experience of being watched by his grandfather while he slept. CP 66. During his intake at Pathways, White complained that nobody liked him and called him “gay.” CP 67. He also described feeling significant guilt about “letting God down.” CP 67. And many of White’s delusions involved women. CP 67-68. Since his arrest, White’s sexuality had become a disturbed theme in his Schizoaffective delusions. CP 99.

Yet, the Court discounted diminished capacity as a mitigating factor because it disagreed with one facet of Cunningham’s evaluation – sexual ambivalence – based on evidence that did not in fact rebut White’s anxiety and conflict over his sexuality. This, too, was a factual error in the proceedings that deprived White of his right to due process.

As a second reason discounting the lack of capacity mitigating factor, the court reasoned White’s mental disorder did not predispose him toward violent behavior or predispose him to misjudge perceived threats.

Rather, the court reasoned it was his voluntary consumption of drugs and alcohol that impaired his judgment, stifled his inhibitions and enabled him to take violent action. CP 38-39.

At the outset, the court was incorrect that White's mental disorder did not predispose him to misjudge perceived threats. White's Schizoaffective Disorder is characterized by thought disorder. The record is replete with White's misperceived threats. For instance, while jailed following his arrest, White thought he was being poisoned and sexually assaulted by corrections officers. CP 98.

In making this finding, it appears the court was relying on Strachan's report. Cf. RP 38-39 and CP 170. Strachan noted, "it is a disservice to people diagnosed with schizophrenia-spectrum disorders to assume that the mere fact of a diagnosis presupposes either incapacity or violence." CP 170. Strachan also stated he did not believe White misjudged the threat he was under the night of Webb's death. CP 174. But Strachan never opined that White's disorder did not predispose him to misjudge perceived threats. Granted, however, it was Strachan's opinion that if White "misjudged the threat Webb posed," he would not have made such a terrible misjudgment, despite his history of psychotic symptoms, were it not for his voluntary consumption of drugs and alcohol. CP 173.

Significantly, however, Strachan offered this opinion after postulating that White was not insane at the time of the offense. Insanity is not established unless a defendant can show that, as a result of mental disease or defect, he was “unable to perceive the nature and quality of the act” or that he was “unable to tell right from wrong with reference to the particular act charged.” RCW 9A.12.010(1)(a), (b). In addition to premeditation and intent, White’s sanity at the time of the offense was the question Strachan addressed in his evaluation. CP 168, 172.

Strachan did not directly consider the mitigating factor of whether White’s capacity to conform his conduct to the requirements of the law was significantly impaired. RCW 9.94A.535(1)(e). This is a different question than sanity, as well as the legal defense of diminished capacity.<sup>18</sup>

Regarding what is commonly referred to as the “failed mental defense” (CP 48), Strachan’s evaluation suggests an opinion that White’s capacity to conform his conduct to the requirements of the law was

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<sup>18</sup> The diminished capacity defense allows a defendant to show that, because of a mental disorder, he lacked the mental state required as an element of the crime charged. State v. Swagerty, 60 Wash.App. 830, 833, 810 P.2d 1 (1991). Whether a defendant’s capacity to appreciate the wrongfulness of his conduct or to conform his behavior to the requirements of the law was significantly impaired is considered a “failed defense” of diminished capacity. Logically, therefore, it does not require the same level of disability as diminished capacity. As Professor Boerner has noted, “Certainly the fact that the substantive law treats these circumstances as complete defenses establishes the legitimacy of their use in determining relative degrees of blameworthiness for purposes of imposing punishment.” D. Boerner, Sentencing in Washington § 9.12(c) (1985); see also State v. Jeannotte, 133 Wn.2d 847, 848, 947 P.2d 1192 (1997) (“We hold the Sentencing Reform Act of 1981 (SRA), RCW 9.94A, explicitly authorizes a trial court to

significantly impaired, based on White's description of "mismatched puzzle pieces" in his mind, when he hears voices:

This description of reliance on visual imagery and confusion generated by mismatched "puzzle pieces" seems to fit both with Mr. White's descriptions of his thoughts at the time of the killing (i.e. 'losing control' of his mind because of all the competing inputs) and with what might be expected from Mr. White in stressful situations given his peculiar pattern of neuropsychological strengths and weaknesses. That said, these results do not preclude the idea that right and wrong were "puzzle pieces" present in Mr. White's mind at the time of the alleged murder (e.g. his comment regarding "Heaven and Hell"). They may, however, help explain why considerations of right and wrong were not sufficient to stop him from killing Webb.

CP 177. The confusion in White's mind was caused by his Schizoaffective Disorder, not the voluntary consumption of drugs and alcohol.

Accordingly, the court's conclusion that White's actions were solely attributable to drugs and alcohol is based on a misunderstanding of Strachan's report. It was based on factual errors and therefore violated White's right to due process.

As the final basis for an exceptional sentence down, the defense asserted White suffered a continuing pattern of sexual abuse by Webb and that White's offense was a response to that abuse. CP 49; RCW 9.94A.535(1)(h). Strachan's report wholeheartedly supports this theory.

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treat a failed defense as a mitigating factor supporting an exceptional sentence below the

CP 171, 174-175, 177. In dismissing this mitigating factor, the court again relied on White's sexual behavior after Webb's death: "And, as I have said before, the defendant's own sexual behavior following the murder seems to belie the contention that Mr. Webb's sexual entreaties, if any motivated him to murder Webb. RP 39.

As stated above, however, that Webb had consensual sexual relations with two other individuals does not establish his willingness to have sexual relations with Webb. Moreover, there was corroborating evidence of Webb's abuse. Webb's ex-boyfriend described him as obsessive, controlling and difficult to break free of. Helvie reported Webb was known to victimize people and use them for sex by getting them hooked on drugs. CP 52. Helvie also stated that Webb threatened him with a gun once when trying to locate White. Unash similarly reported that Webb threatened him. CP 52. According to Strachan's report, Webb threatened Noah Banx as well. CP 172. These obsessive and controlling behaviors corroborate White's description of Webb's increasing pressures for a sexual relationship and the increasing tension growing between them as a result.

In short, the court's reasons for denying the exceptional sentence were founded upon misinformation. As a result, the sentence imposed

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standard range.").

rests on a foundation “so extensively and materially false ... that renders the proceedings lacking in due process.” Townsend, 334 U.S. at 741.

Similarly, the court’s reasons for imposing the maximum term were founded on factual error; specifically, the court’s independent lay judgment of White’s psyche substituted for that of the professional psychologists:

As if that weren’t enough, this Court is struck by the defendant’s behavior following the murder: The secreting of Mr. Webb’s body in the crawl space of his own home; the creation of a post-murder to-do list to cover his tracks; the pawning of Mr. Webb’s property; the use of Mr. Webb’s DSHS card and the attempted use of his credit cards; and, lastly, and perhaps in my mind the most sinister of all, the defendant’s masquerading as Mr. Webb for several weeks wherein he texts friends of Mr. Webb in an effort to convince them that Mr. Webb was just fine and that nothing was wrong.

This act of the defendant strikes me as exceptionally cunning, callous and calculated. By assuaging the concerns of Mr. Webb’s friends, he turned them into unwitting pawns in his effort to avoid detection and justice. For the rest of their lives, these individuals will relive just how they were lulled into inaction by the very person who killed their friend.

One has to wonder: Was this what he meant by being nice to the people who survived? In my mind, Mr. White is not some poor, unfortunate victim of circumstances in this scenario. I think and I believe the evidence supports that he’s a master manipulator who will do whatever it takes to attain his own ends.

RP 42.

The court was incorrect in its conclusion that “the evidence supports that [White is] a master manipulator who will do whatever it takes to attain his own ends.” Both psychologists concluded that despite White’s actions following Webb’s death, he acted impulsively and did not plan to attack Webb. CP 107, 174. The court’s unfounded conclusion is also belied by White’s historical passivity and lack of interest in material possessions. CP 84-87, 173, 177. In essence, the court is relying on its own lay judgment as to White’s psyche instead of that of trained psychologists. Contrary to the court’s conclusion, there was no *evidence* supporting the finding that White is a “master manipulator.” As a result, the court’s decision to impose the maximum term was based on misinformation and violated White’s right to due process.

This Court should reverse and remand for a new sentencing hearing before a different judge. Several cases provide examples of this remedy under similar circumstances. See State v. Sledge, 133 Wn.2d 828, 846 n.9, 947 P.2d 1199 (1997) (remanded to different judge "in light of the trial court's already-expressed views on the disposition"); accord, State v. Harrison, 148 Wn.2d 550, 559-60, 61 P.3d 1104 (2003) (resentencing before different judge should be the remedy where state breaches a plea agreement and the defense seeks specific performance); State v. Talley, 134 Wn.2d 176, 182, 188, 949 P.2d 358 (1998) (remanded to different

judge where it appeared that initial judge may have "prejudged the matter"); State v. M.L., 134 Wn.2d 657, 661, 952 P.2d 187 (1998) (remand to different judge required where disposition was found clearly excessive); State v. Ameline, 118 Wn. App. 128, 134, 75 P.3d 589 (2003) (remand to different judge following improper exceptional sentence); State v. Romano, 34 Wn. App. 567, 570, 662 P.2d 406 (1983) (remanded to different judge where initial sentencing suffered from appearance of unfairness).

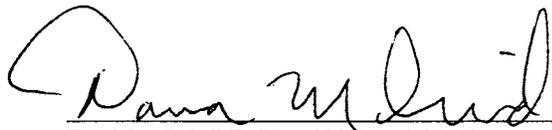
D. CONCLUSION

Because the court's pronouncement of sentence was based on a foundation so extensively and materially false, the proceedings were lacking in due process. This Court should reverse and remand for a new sentencing hearing before a different judge.

Dated this 25<sup>th</sup> day of June, 2010.

Respectfully submitted

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State v. Scott White

No. 63980-3-I

Certificate of Service of brief of appellant by Mail

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to:

Scott White 332502  
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Containing a copy of the brief of appellant, in State v. Scott White, Cause No. 63980-3-I, in the Court of Appeals, Division I, for the state of Washington.

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



John Sloane  
Done in Seattle, Washington

7-21-10  
Date

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