NO. 88086-7

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ALLEN EUGENE GREGORY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Roseanne Buckner

No. 98-1-04967-9

BRIEF OF RESPONDENT

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2. Should this court find meritless defendant's argument that a new notice of special sentencing proceeding had to be filed after any amendment of the information as that it is not required by any provision of RCW 10.95? 1

3. Should this court reject defendant's claim that the fourth amended information was insufficient for not alleging the "absence of sufficient mitigating circumstances to merit leniency" when this court's jurisprudence holds such language need not be included in an information alleging premeditated first degree murder with aggravating circumstances? 1

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Va. Code Ann. §18.2-31 128

Wainwright v. Witt, 469 U.S. 412, 424, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985) 42

Washington v. Bartholomew, 463 U.S. 1203, 103 S. Ct. 3530, 77 L. Ed. 2d 1383 (1983) 119

Winfield v. Missouri, 134 S. Ct. 2837 (2014) 130

Worthington v. Steele, 135 S. Ct. 22 (2014) 131

Wyo. Stat. Ann. §6-2-101 128

Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983) 119

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Other Authorities

Bennett L. Gershman, *Trial Error and Misconduct* 171

Katherine Beckett, Ph.D. entitled *The Role of Race in Washington State Capital Sentencing, 1981-2012* 175, 176, 177

Scheidegger, *Rebutting the Myths about Race and the Death Penalty*, Ohio State Journal of Criminal Law, Vol 10:1, p.147 (2012) 178

Shakespeare, *Midsummer Night's Dream,* Act III, scene I 180

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Appendix A

Appendix B

Appendix C

Appendix D

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should this court refuse to review, under the law of the case doctrine, defendant's claim that a new notice of special sentencing proceeding had to be filed after any amendment of the information as this issue could have been raised in the prior appeal?

2. Should this court find meritless defendant's argument that a new notice of special sentencing proceeding had to be filed after any amendment of the information as that it is not required by any provision of RCW 10.95?

3. Should this court reject defendant's claim that the fourth amended information was insufficient for not alleging the "absence of sufficient mitigating circumstances to merit leniency" when this court's jurisprudence holds such language need not be included in an information alleging premeditated first degree murder with aggravating circumstances?

4. Should this court decline to review, under the law of the case doctrine, issues raised and rejected in the first appeal?

5. Has defendant failed to show an abuse of discretion in the trial court's denial of his motion for dismissal, new trial and a *Franks* hearing when it found no evidence to support the factual claims underlying the arguments in the motion?

6. Should this court refuse to review arguments regarding the trial court's denial of defendant's motion for dismissal, new trial and a *Franks* hearing when they were not raised and ruled upon in the trial court?

7. Has defendant failed to show any abuse of discretion in the trial court's denial of a challenge for cause on Juror 132 when the record shows the juror had an open mind about listening to mitigation evidence and would follow the instructions of the court?

8. Has defendant failed to show that his claimed evidentiary errors were properly preserved in the trial court or that the trial court abused its discretion in admitting evidence that: 1) had been admitted in the prior guilt phase; 2) had been held properly admitted in the prior appeal; and, 3) was relevant to showing the facts and circumstances of the murder?

9. Has defendant failed to meet his burden of showing that the trial court erred in how it ruled upon objections to the prosecutor's closing argument or in showing that arguments not objected to were improper or so flagrant and ill-intentioned that no curative instruction could have eliminated the prejudice?

10. Has defendant failed to present any compelling argument as to why this court should review claims raised for the first time on appeal or revisit its numerous determinations that Washington's capital punishment statutes do not violate the Eighth Amendment or Art. 1, § 14 of the state constitution?

11. Should this court summarily reject defendant's argument that the death penalty is disproportionate under the state constitution and ***State v. Fain*** when this claim was not raised below and when this court has repeatedly rejected such claims?

12. Has defendant failed to show any non-compliance with RCW 10.95.050(1) or that this provision is unconstitutional because it gives too much discretion to prosecutors?

13. Has defendant failed to show any reason this court should reexamine its holding in ***Bartholomew I*** and ***II***, upholding the constitutionality of RCW 10.95.060(3) to the extent that it allows evidence in the penalty phase to show the "facts and circumstances of the murder?"

14. Has defendant failed to show any reason this court should reexamine it many decisions holding Washington's death penalty statutes satisfy the Eighth Amendment in narrowing the class of murders eligible for the death penalty?

15. Should this court summarily reject defendant's claim that a penalty phase heard by a different jury than the one that determined guilt violates equal protection, as this claim is being raised for the first time on appeal and the claimed error is not manifest as the record is devoid of any factual support for it?

16. Has defendant failed to meet his burden under *stare decisis* to overturn this court's prior holding that the proper remedy for error in the penalty phase is a remand for a new penalty phase when there is no showing this holding is either incorrect or harmful?

17. As Washington's death penalty statutes require a jury to find beyond a reasonable doubt all facts that make a defendant eligible for a sentence of death, should this court find that the statutes comport with the United State's Supreme Court's Sixth Amendment jurisprudence found in ***Apprendi*** and its progeny?

18. After conducting mandatory review, should this court uphold the jury's death verdict when it was an appropriate verdict, consistent with death verdicts in similar cases, based upon sufficient evidence, and not brought about by passion or prejudice?

B. STATEMENT OF THE CASE.

1. Procedure

In 2001, the appellant, ALLEN EUGENE GREGORY, hereinafter "defendant," was convicted of premeditated murder in the first degree with aggravating circumstances, while armed with a deadly weapon (knife). CP 6122, 6123, 6125. S*ee also* CP 6120–21(Fourth Amended Information). The aggravating circumstances were that the murder was committed in the course furtherance or flight from rape in the first or second degree and a robbery in the first or second degree; the jury found unanimously that the aggravating circumstance had been proved as to both the rape and robbery. CP 6123-24. The State had filed a notice of special sentencing proceeding, so the case proceeded to a penalty phase hearing. CP 5744–46. The same jury that found defendant guilty of his crime found the State had proved there were not sufficient mitigating circumstances to merit leniency, so returned a death verdict. *See* ***State v. Gregory***, 158 Wn.2d 759, 867, 147 P.3d 1201 (2006).

On appeal, the court consolidated the review of the capital case with review of a separately tried rape case; evidence of the rape convictions had been admitted in the penalty phase of the murder case. *Id.* This court reversed the rape convictions, affirmed the defendant's conviction for murder in the first degree with aggravating circumstances,

but reversed his death sentence and remanded to Pierce County Superior Court for resentencing. *Id.* The mandate issued January 8, 2007. Mandate (w/opinion), CP 5–176; Amended Mandate, CP 177–78.

The defendant made his first appearance back in Superior Court on February 9, 2007, and on March 23, 2007, the trial court formally vacated the 2001 death sentence. CP 195–96. Over the next five years, the penalty phase was continued multiple times for different reasons, but each time was by agreement of the parties. *See* CP 211, 240, 251, 260, 283, 356, 612.

On June 24, 2011, the court held a hearing on several defense motions. 6/24/2011 RP 261–314.[1] There was a motion to dismiss the death penalty, have a new guilt phase trial, or have a *Franks* hearing relating to the blood draw orders obtained in 1998 and 2000. 6/24/2011 RP 262–84; CP 373–407 (motion and memorandum); CP 408–509 (supporting declaration with/ appendices). After argument, the court denied the motion and entered a written order. 6/24/2011 RP 283–84; CP 617–19. The defendant later sought reconsideration of that ruling, which

[1] The verbatim report of proceedings in this case consists of 36 volumes of consecutively paginated trial proceeding transcripts and over twenty additional volumes, some of which are consecutively numbered and paginated, but most of which are not. The 36 volumes of trial transcripts will be referred to as "RP." Reference to the remaining volumes will include a cite to the date of the hearing, i.e. "3/5/2012 RP."

was again denied and reduced to a written order. RP 21 2232–38; CP 1193–94.

The defendant brought a motion to dismiss, claiming RCW 10.95 did not sufficiently narrow the class of individuals who could face the death penalty. 6/24/2011 RP 290–95; CP 301–45 (motion); CP 582–86 (supporting declaration); CP 563–67 (State's response). That motion was denied and reduced to a written order. 6/24/2011 RP 295; CP 622–23.

The defendant also brought a motion to dismiss, claiming RCW 10.95.060(3) was unconstitutional; that motion was denied. 6/24/2011 RP 296–308; CP 524–42 (motion and memorandum); CP 557–62 (State's response); CP 620–21 (order). The trial court heard a related motion in which the defense sought to limit the evidence that could be presented about the "facts and circumstances" of the crime; that motion was also denied. 3/5/2012 RP 61–73; CP 666–79 (motion); CP 731 – 35 (State's response); CP 738–39 (order).

Beginning in March 2012, jury selection for a new penalty phase hearing began. RP 1-8. Jury voir dire was done individually, first for hardships and then substantive questions; this process lasted from March 27, 2012, through April 19, 2012. RP 301 –2208. On April 24, 2012, the court seated the jury and the State and defense each exercised all of their respective peremptory challenges to the 12 seated jurors; each side

accepted Juror 132 as the first alternate, then each side exercised its allotted peremptory challenge for the second and third alternates. RP 2260–2315; CP 989–90 (peremptory challenge sheet); CP 1004 (jury panel).

After hearing the evidence presented in penalty phase and being instructed as to the law, the jury returned its verdict, on May 15, 2012, finding there were not sufficient mitigating circumstances to merit leniency, so that the sentence shall be death. RP 3097–99; CP 1156. On June 13, 2012, the court formally sentenced the defendant to death. RP 3129–38; CP 1179–88.

After several post-trial motions were completed, the defendant timely filed his notice of appeal. CP 1226–42. The trial judge's report was filed November 16, 2012. CP 1261–75.

2. Facts

Geneine Harshfield was born in 1953. RP 2357. In early July of 1996, she moved into a house on Grant St. in Tacoma that was next door to the house her mother, Lee Peden, lived in. RP 2360-61. She went by "Genie," but her friends also called her "Bean" or "Beanie." RP 2407. She was 46 years old, 5'2" tall, and weighed 102 pounds. RP 2603. Ms.

Harshfield's bedroom window was on the north side of her house and looked out at her mother's house. RP 2549-60, 2463.

Ms. Peden had lived in her house for over 30 years by July 1996. RP 2357. Mae Hudson lived behind Ms. Peden, with their houses separated by an alley that ran at the back of Ms. Peden's house. RP 2357-58. Ms. Hudson had lived in her home for even longer than Ms. Peden had lived in hers. RP 2358.

Defendant was Ms. Hudson's grandson. RP 2358. During summer 1996, prior to the date of this incident, Ms. Peden had seen the defendant at his grandmother's home several times, either outside in the back yard or on the front porch. RP 2363.

Ms. Harshfield worked at Johnny's Dock, as a bartender or cocktail waitress in the evening, and sometimes as a bookkeeper in the morning. RP 2364. She kept a record of the shifts that she worked in a small notebook with cats on it. *Id.* She also kept "very close tabs" on her tips. *Id.* In her book, Ms. Harshfield marked her shifts in July leading up to July 26, 1996, and the amount she had made in tips for each shift. RP 2366. *Id.*

On Friday, July 26, 1996, Ms. Harshfield worked as a bartender from 4:00 p.m. until closing; Friday is the best night for tips at Johnny's Dock. RP 2637, 2414. The bartenders at Johnny's kept their own tips and

also received a portion of tips from each cocktail waitress, which numbered six or seven on a Friday night. RP 2408-09; 2415-16. Another bartender at Johnny's testified that she never worked a Friday night shift without receiving tips. RP 2409-10. Ms. Harshfield commonly kept her tips in her apron pocket while working. RP 2413; 2410-12. She had recorded $81.77 and $78.52 in tips for the two nights prior to July 26, 1996. RP 2412. The night of her death, Ms. Harshfield left Johnny's Dock after midnight, walked out with the night supervisor, Brandee Pittenger, said good night, and left. RP 2509, 2516.

On Saturday, July 27, 1996, Ms. Harshfield was scheduled to work as a bartender starting at 4:00 p.m. RP 2417. As she regularly arrived early for her shift, it was unusual when she had not shown up by four o'clock. *Id.* Another employee, Denise Delacruz was sent from the restaurant to look for Ms. Harshfield. RP 2418.

Ms. Delacruz parked in front of Ms. Harshfield's house, knocked on her front door, but there was no response. RP 2420. Ms. Delacruz walked around the back of the house and noticed Ms. Harshfield's car parked in the garage that was behind the house. RP 2420. Ms. Delacruz went to the back door of the house to knock, after opening the screen door she noticed the back door wasn't latched and stood slightly ajar. RP 2421.

Ms. Delacruz walked into the house, calling out Ms. Harshfield's name. RP 2421. She noticed Ms. Harshfield's purse with the wallet outside of it. *Id.* After walking through the house, Ms. Delacruz walked into Ms. Harshfield's bedroom and found her. RP 2422.

The victim's body was lying face down on her bed, wearing only her socks and shoes; her hands were tied behind her back, with visible stab wounds on her back, and "blood everywhere." RP 2422. Her head was up against the wall. RP 2487. Her upper shoulder and head were covered with a pillow. RP 2442. The underside of the pillow was blood soaked in three places that appeared to match up with the stab wounds on her back. RP 2545. All of the victim's clothing was cut from her body, including her t-shirt, bra, work apron, shorts, and underpants. RP 2487, 2544. Her hands were bound with a tie from a work apron that was tied so tightly, it cut off her circulation. RP 2487, 2544, 2562.

There was a large amount of blood around the victim's head, and there was blood spray and spatter on her bedroom wall that had a clump of hair stuck in it. RP 2487. The curtain and rod were pulled down from the window by the bed. RP 2488. There was also blood smeared on the kitchen floor and in the hallway leading to her bedroom. RP 2463-64.

The victim's book for noting shifts and tips was found on the kitchen floor with a receipt in it that showed total "beverage sales" and a

handwritten percentage of that total. RP 2471-72. There was no cash found in the victim's wallet, her apron, or in her book. RP 2476; 2498. She had not recorded her tips for July 26, 1996. RP 2368.

The victim had a pair of diamond stud earrings that she always wore. RP 2374-75. The diamond earrings were not in Ms. Harshfield's ears when she was found and they have never been found. RP 2547-48, 2375-76.

The day the victim's body was discovered, defendant contacted Officer Robert Baker as he was securing the rear of the victim's house; defendant inquired as to what was going on. RP 2429-30. Defendant told Officer Baker about two vehicles he saw driving in the alley the night before and gave a description of the drivers. RP 2431. He then walked back in the direction of his grandmother's house. RP 2432-33.

The victim's injuries were documented at her autopsy. She was bruised on her forehead, shoulder, back, arms, and legs. RP 2566. Those bruises represented multiple impacts. RP 2572-73. She had a laceration on her right eyelid. *Id.* She had a "very significant" black eye, swelling on the left side of her face, a bruised left temple, and a bruised ear, all which were inflicted while she was alive. RP 2585-86, 2589. The victim suffered several significant injuries to her throat. RP 24 2587-2594. She had a 7 inch long, ½ inch deep laceration on the right side of her neck,

extending upward, that cut into her neck muscles. *Id.* She had a 3 inch long, ½ inch deep laceration to the left side of her neck, as well as a stab wound to her neck on that side. *Id.* The victim's neck was sliced open along the front, 7 ½ inches long, cutting completely through her airway and into her esophagus behind it. *Id.* Each of these wounds was potentially fatal in and of itself. *Id.*

There were three separate stab wounds to the victim's back. RP 2573-80. Those wounds were inflicted with a single-edged knife. RP 2580. The left uppermost stab wound was 3 ¾ inches deep, from back to front and slightly upwards, went between her ribs and into her left lung, nicking her aorta. RP 2573-80. The lower left stab wound was 3 ½ inches deep, back to front and slightly upwards, went between her ribs and into her left lung. *Id.* The stab wound on the victim's right back was 3 inches deep, from back to front, between her ribs, nicking one, and into her right lung. *Id.* Each of the stab wounds was, by itself, a fatal injury, but it would have taken several minutes for her to bleed to death. *Id.* There was a "significant" amount of bleeding into the victim's chest cavity; this occurred while she was alive and would have made it hard for her to breathe. *Id.*

The victim had an abrasion near the entry to her anus that was consistent with penetration of her anus while she was alive. RP 2567.

Cotton swabs were used to collect evidence from her mouth, vagina, and anus. RP 2565.

The evidence presented about scientific testing of evidence was presented to the jury by reading a written stipulation. RP 2628-2642. The stipulation included the following evidence: There was semen, with sperm heads in it, recovered from the bedspread on the victim's bed. There was also semen found on the vaginal and anal swabs collected during the autopsy, as well as thigh swabs; sperm heads were found on the vaginal and anal swabs. Scientists at two WSP Crime Labs and at a private lab conducted DNA testing in this case. During all of the work done in this case, the defendant's DNA profile "matched" the DNA profile from the semen and sperm found on the swabs collected from the victim's vagina and anus.

In August of 1998 police recovered a knife from defendant's car. RP 2500. That knife was capable of inflicting the stab wounds to the victim's back. RP 2582-83. There was no blood found on the defendant's knife. RP 2637.

Defendant's criminal history was presented to the jury during the penalty phase. He was convicted of theft in the first degree in 1986, challenging to fight in 1992, carrying a concealed weapon in 1994, driving with a suspended license three separate times in 1998, possession of

cocaine in 1999, attempted escape in the second degree and malicious mischief in the third degree in 2000. RP 2663-65.

The evidence that defendant presented in mitigation will be described in the section of the brief addressing the mandatory review issue of sufficiency of the evidence.

C. ARGUMENT.

1. DEFENDANT IS PRECLUDED BY THE LAW OF THE CASE FROM RAISING A CLAIM AS TO WHETHER THE STATE SHOULD HAVE FILED A NEW NOTICE OF SPECIAL PENALTY PROCEEDING AFTER FILING AN AMENDED INFORMATION; BUT IN ANY CASE, THE CLAIM IS WITHOUT MERIT.

The capital punishment statutes are set out in RCW 10.95[2]. Those statutes provide the framework for all capital proceedings. One provision, RCW 10.95.040, sets out the notice requirement and requires the State to file a written notice of intent to seek the death penalty and serve that notice on the defendant and his attorney. RCW 10.95.040(1) and (2). If proper notice is not given, the State cannot seek the death penalty. RCW 10.95.040(3).

The purpose of RCW 10.95.040 is to "apprise 'the accused of the penalty that may be imposed upon conviction of the crime.'" ***State v.***

[2] *See* Appendix A

Woods, 143 Wn.2d 561, 589, 23 P.3d 1046 (2001)(quoting ***State v. Clark***, 129 Wn.2d 805, 811, 920 P.2d 187 (1996)). The requirement of notice to the defendant under this statute "applies by its terms only to the prosecutor's original decision to seek the death penalty." ***Woods***, 143 Wn.2d at 589 (quoting ***State v. Rupe***, 108 Wn.2d 734, 740, 743 P.2d 210 (1987)).

In this case, the State filed a notice of intent to seek the death penalty in 1999 in compliance with RCW 10.95.040. Notice of Special Sentencing Proceeding to Determine Imposition of the Death Penalty. CP 5744 – 46 (filed April 22, 1999). The defense concedes this point.

This court has previously rejected the argument that the prosecution is required to file a "new" notice of intent to seek the death penalty when a defendant's death sentence is reversed on appeal. ***State v. Rupe***, 108 Wn.2d 734, 743 P.2d 210 (1987), *cert. denied*, ***Rupe v. Washington***, 486 U.S. 1061, 108 S. Ct. 2834, 100 L. Ed. 2d 934 (1988). This court stated:

> RCW 10.95.040 applies by its terms only to the prosecutor's original decision to seek the death penalty. There is no statutory requirement that the prosecutor file a second notice of a special sentencing proceeding when a defendant's conviction is upheld on appeal but the case is remanded for a new sentencing proceeding. Thus, there is no statutory violation here.

> There also is no due process violation based upon lack of notice. In [Rupe's prior appeal], this court directed: "[T]he case is remanded for a new sentencing proceeding, with a new jury, in accordance with the principles set forth above, to determine whether the death penalty should be imposed." Clearly, Rupe was informed that the death penalty would be again at issue. Moreover, even if there were a due process notice problem here, which there is not, Rupe has shown no resulting prejudice.

Rupe, at 740-41.

In this case, defendant contends that the prosecution was required to file a "new" notice of intent to seek death back in 2001 when an amended information was filed. This claim fails for two reasons: 1) the issue was not raised in the defendant's first appeal and is now law of the case; and 2) even if this court considers this issue on its merits, the issue is controlled by statute and well-settled law.

a. <u>As This Issue Could Have Been Raised On The Defendant's First Appeal, But It Was Not, It Is Now Law Of The Case</u>.

Under the law of the case doctrine, "once there is an appellate holding enunciating a principle of law, that holding will be followed in later stages of the same litigation." ***State v. Schwab***, 134 Wn. App. 635, 644, 141 P.3d 658 (2006). The law of the case doctrine binds the parties, the trial court, and subsequent appellate courts to the holdings of an appellate court in a prior appeal until such holdings are authoritatively

overruled. ***Humphrey Indus., Ltd. v. Clay Street Assocs., LLC***, 176 Wn.2d 662, 669, 295 P.3d 231 (2013) (*quoting* ***Greene v. Rothschild***, 68 Wn.2d 1, 10, 414 P.2d 1013 (1966)). The law of the case doctrine will also permit an appellate court to refuse to consider issues that *could* have been raised in a prior appeal. ***State v. Elmore***, 154 Wn. App. 885, 896, 228 P.3d 760 (2010) (*citing* RAP 2.5(c)(2)) and ***Folsom v. County of Spokane***, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988)).

The defendant's current claim challenges actions that occurred in 2001, ***prior to*** the guilt phase and first penalty phase, and prior to his first direct appeal.

Defendant does not claim there was an objection to the fourth amended information when it was filed in 2001 or that there was any motion to dismiss the death penalty on this basis back in 2001. This issue was not raised in defendant's first appeal. Nor does defendant cite to the record to show this issue was addressed to the trial court during the current proceeding.

In short, defendant claims error occurred in 2001 but has waited until his second appeal to raise the claim.

When an issue would naturally be made at the first instance, and is not, the party now raising that issue should first be required to provide this court with a basis upon which to hear the issue at this time. Defendant

makes no effort to explain the failure to raise this issue on prior direct appeal. While there are exceptions to the law of the case doctrine, *see* RAP 2.5(c)(2), defendant has not briefed or argued any of them.

Defendant has failed to provide this court with a factual and legal basis upon which to raise an untimely claim. The only case cited by the appellant in its opening brief that post-dates the 2001 trial is ***State v. Woods***, 143 Wn.2d 561, 23 P.3d 1046 (2001). But that case does not, as argued infra, create new law on this issue. Having failed to provide this court with any justification to consider as untimely claim this court should should apply the law of the case doctrine to reject this untimely claim.

b. <u>If This Court Hears The Merits, This Issue Is Still Controlled By Well Settled Law And Statutes</u>.

In this case, the defendant concedes he had notice of the State's intention to seek the death penalty, and that the notice of that intent was in proper form under the statute. *See* Brief of Appellant, at pp. 144-45. That concession is well taken. Because it is firmly established law that RCW 10.95.040 applies solely to the prosecutor's original decision to seek the death penalty, and the defense concedes that decision was properly filed and served, the inquiry should end.

In ***Woods***, the defendant claimed the State had to file a new notice of intent to seek the death penalty after filing an amended information. ***Woods***, 143 Wn.2d at 589. That is the identical claim being made by this defendant. This court rejected that argument stating:

> We do not believe that the State was required to file a second notice of its intention to seek the death penalty after Woods's arraignment on the amended information. We say that because as we have observed previously, the purpose underlying the statutory notice requirement embodied in RCW 10.95.040 is to apprise "the accused of the penalty that may be imposed upon conviction of the crime." ***State v. Clark***, 129 Wn.2d 805, 811, 920 P.2d 187 (1996). We have also observed that this notice requirement of RCW 10.95.040 "applies by its terms only to the prosecutor's original decision to seek the death penalty." ***State v. Rupe***, 108 Wn.2d 734, 740, 743 P.2d 210 (1987).

State v. Woods, 143 Wn.2d at 589.

In ***Woods***, the amended information added an additional aggravating factor to the prior information. *See* ***Woods***, 143 Wn.2d. at 589-90 (State added the "multiple victims" aggravator to the existing aggravating factors). In this current appeal, the defense attempts to distinguish ***Woods*** on the basis of a footnote in the case, wherein this court speculated on the possibility of a circumstance under which a new death penalty notice was a potential issue:

> We can imagine a case where the filing of an amended information might cast doubt on the prosecutor's original decision to seek the death penalty. For example, if an

> amended information eliminated an aggravating factor that was set forth in the original information, it may be reasonable to conclude that the prosecutor's original decision is in question and a new notice need be filed.

Woods, 143 Wn.2d at 590 fn. 9. That footnote certainly does not constitute a holding. In the first place, requiring the State to ever file a second death penalty notice runs afoul of the direct language of the statute and the case law interpreting it. The statute applies solely to the prosecutor's initial decision to seek death. *See* ***Woods, Clark***, ***Rupe***, *supra.* That specific holding has never been overruled or even questioned.

To require the State to file a "new" notice each time there is an amended information would also run contrary to plain language of the capital punishment statutes in RCW 10.95. Several sections of that statutory scheme would be rendered absurd, and this court must interpret a statutory scheme in an effort to avoid an absurd result because it is presumed the legislature does not intend absurd results. *See, e.g.,* ***State v. Engel***, 166 Wn.2d 572, 579, 210 P.3d 1007 (2009).

RCW 10.95.040 does not include any language that requires multiple notices or new notices whenever any amendment is made to the charging document. The failure to include that language must mean it is not required. Other statutes in RCW 10.95 support that interpretation. For

example, a special sentencing hearing is mandated in every instance where a death penalty notice has been filed:

> a special sentencing proceeding **shall** be held if **a** notice of special sentencing proceeding was filed and served as provided by RCW 10.95.040. No sort of plea, admission, or agreement may abrogate the requirement that a special sentencing proceeding be held.

RCW 10.95.050(1)(emphasis added). Moreover, the State is not required to file a new notice of intent to seek death when a prior death sentence is reversed and remanded to the trial court for a new sentencing hearing:

> If ... a retrial of the special sentencing proceeding is necessary for any reason including but not limited to a mistrial ... or as a consequence of a remand from an appellate court, the trial court **shall** impanel a jury of twelve persons plus whatever alternate jurors the trial court deems necessary ....

RCW 10.95.050(4)(emphasis added); *see also* ***State v. Gregory***, 158 Wn.2d 759, 867, 147 P.3d 1201 (2006)("We remand for resentencing in the murder case."). It does not appear there has ever been a case remanded by this court to a trial court for a new special sentencing proceeding where a new notice of intent to seek death was required. There has never been a case from this court holding the State was required to file a "new" notice of intent to seek the death penalty after properly filing one in the original instance.

There is simply no language in the capital punishment statutes that requires a "new" notice of intent to seek the death penalty. That decision, once made, remains in effect until such time as a jury decides against a death sentence, or an appellate court invalidates a death sentence (RCW 10.95.090), or the governor commutes a death sentence (RCW 10.95.090), or the appellate courts uphold the sentence to its actual imposition.

2. THE FOURTH AMENDED INFORMATION CONTAINED ALL OF THE ELEMENTS OF MURDER IN THE FIRST DEGREE WITH AGGRAVATING CIRCUMSTANCES.

The defendant has a constitutional right to have the charging document include "all essential elements of the crime." ***State v. Yates***, 161 Wn.2d 714, 757, 168 P.3d 359 (2007) (*quoting* ***State v. Tandecki***, 153 Wn.2d 842, 846, 109 P.3d 398 (2005)). Whether an element is "essential" depends on whether its "specification is necessary to establish the very illegality of the behavior." ***Yates***, 161 Wn.2d at 757 (*quoting* ***State v. Johnson***, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)). The purpose of requiring all essential elements be included in the charging document is "to apprise the accused of the charges against him or her and to allow the defendant to prepare a defense." ***Yates***, 161 Wn.2d at 757 (*quoting* ***State v. Vangerpen***, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995)); *see* U.S. Const. amend 6 ("the accused shall be ... informed of the nature and cause

of the accusation); Wash. Const. art. I, § 22 ("the accused shall have the right ... to demand the nature and cause of the accusation against him").

In addressing the sufficiency of an information for capital litigation, this court has previously held that the "absence of sufficient mitigating circumstances to merit leniency" is not an essential element of the crime of murder in the first degree with aggravating circumstances, commonly referred to as aggravated murder. ***Yates***, *supra*; ***State v. Clark,*** 129 Wn.2d 805, 811, 920 P.2d 187 (1996). In ***Yates***, this court reaffirmed the holding of ***Clark***, stating: "[W]e have previously held that the absence of mitigating circumstances is not an essential element of the crime of aggravated first degree murder." ***Yates***, 161 Wn.2d at 759. The court explained the reasoning behind that decision:

> The statutory death notice here is not an element of the crime of aggravated murder. Instead, the notice simply informs the accused of the penalty that may be imposed upon conviction of the crime. While we require formal notice to the accused by information of the criminal charges to satisfy the Sixth Amendment and art. I § 22, we do not extend such constitutional notice to the *penalty* exacted for conviction of the crime.

Yates, 161 Wn.2d at 759 (citing ***State v. Clark,*** 129 Wn.2d 805, 811, 920 P.2d 187 (1996) (further citations omitted)). The purpose of the charging document is distinctly different from the purpose of the statutory notice requirement: the former gives the defendant notice of the charge and

enable him to prepare a defense, while the second gives him notice of the potential penalty he faces if convicted on the charge. ***Yates,*** 161 Wn.2d at 759. As such, the State was not required to list the absence of sufficient mitigating circumstances to merit leniency in the charging document. *See* ***Yates,*** 161 Wn.2d 759-60; *compare* ***State v. Siers,*** 171 Wn.2d 269, 363-64, 274 P.3d 358 (2012) (State is not required to set out in the charging document the specific aggravating factors that could support an exceptional sentence, provided that notice is given to the defendant in other documentation).

Recently, this court revisited this issue in ***State v. McEnroe,*** 181 Wn.2d 375, 333 P.3d 402 (2014). In that case, the trial court considered a defense challenge to the charging document that was "based on" ***Alleyne v. United States,*** ____ U.S. ____, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), the latest in the line of cases that have come out of ***Apprendi v. New Jersey***, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). ***McEnroe***, 181 Wn.2d at 379-80. Accepting the defense argument, the trial court found the "absence of sufficient mitigating circumstances to merit leniency" was an essential element of a case where the death penalty was being sought, and it ordered the State to include that language in the charging document or be precluded from seeking the death penalty. ***McEnroe,*** at 382. This court reversed, holding that the charging

document and separate notice of intent to seek the death penalty "satisfied all applicable constitutional and state charging requirements." ***McEnroe***, 181 Wn.2d at 386.

This defendant also cites ***Alleyne*** as the sole basis for his argument that ***Yates*** must be reconsidered and the charging document must include language about the absence of sufficient mitigating circumstances. Brief of Appellant, at 132, *et. seq.* The defendant did not have the benefit of ***McEnroe*** and this court's analysis at the time he filed his opening brief; defendant's argument is the same as in ***McEnroe***. This court has once again rejected the argument that the charging document must contain "absence of sufficient mitigating circumstance to merit leniency."

The defendant cites no objection to the Fourth Amended Information or its content at the trial court proceeding that is currently before this court. That charging document sets out all of the elements of the crime of Murder in the First Degree, and it sets out the aggravating circumstances that are alleged to bring this case within RCW 10.95. *See* Fourth Amended Information, CP 6120-21. The defense concedes the State filed proper notice of intent to seek the death penalty, and that document specifically states "there are not sufficient circumstances to merit leniency," putting the defendant on the required notice of the potential for the death penalty. *See* Notice of Special Sentencing

Proceeding to Determine Imposition of Death Penalty, CP 5744-46. Those documents are sufficient under this court's decision in ***McEnroe***.

3. THIS COURT SHOULD DECLINE TO REVIEW ISSUES RAISED AND REJECTED IN THE FIRST APPEAL UNDER THE LAW OF THE CASE DOCTRINE.

"The law of the case doctrine promotes the finality and efficiency of the judicial process by protecting against the agitation of settled issues." ***State v. Elmore***, 154 Wn. App. 885, 897, 228 P.3d 760, *review denied*, 169 Wn.2d 1018 (2010) (*citing* ***State v. Harrison***, 148 Wn.2d 550, 562-63, 61 P.3d 1104 (2003)). This doctrine is on that reflects a "deep-seated" "institutional bias inherent in the judicial system against the retrial of issues that have already been decided," and shares the goals of similar doctrines such as *stare decisis, res judicata*, and double jeopardy. ***United States v. Goodwin***, 457 U.S. 368, 376, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982). The doctrine of *collateral estoppel* stands for the proposition that when "an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." ***State v. Williams***, 132 Wn.2d 248, 253-54, 937 P.2d 1052 (1997) (quoting ***Ashe v. Swenson***, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970)); *see also* ***Harrsion***, 148 Wn.2d at 560-61.

In its simplest terms, "the law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation." ***Roberson v. Perez***, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). Thus, the current reviewing court "may to refuse to address issues that were raised or could have been raised in a prior appeal." ***Elmore***, 154 Wn. App. at 896 (*citing* ***Folsom v. County of Spokane***, 111 Wn.2d 256, 263-64, 759 P.2d 1196 (1988)). This principal is also embodied in the rules of appellate procedure, because "[t]he Supreme Court loses the power to change or modify a Supreme Court decision upon issuance of the mandate of the Supreme Court in accordance with rule 12.5, except when the mandate is recalled as provided in rule 12.9." RAP 12.7(b).

There is one exception to the finality of a prior decision: "The appellate court retains the power to change a decision as provided in rule 2.5(c)(2)." RAP 12.7(d). When "the same case is again before the appellate court following a remand:"

> The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

RAP 2.5(c)(2). The appellate courts have described two circumstances when the law of the case doctrine should not be used as a bar to the

subsequent review of the same issues: "(1) where the prior decision was clearly erroneous and (2) where there has been an intervening change in controlling precedent between trial and appeal. ***Elmore***, 154 Wn. App. 896 (*citing* ***Roberson v. Perez***, 156 Wn.2d at 42).

In his current appeal, defendant claims this court should reverse his murder conviction, and then lists six grounds that were raised in the prior appeal. *See* Brief of Appellant, pp. 278-79. Defendant cites RAP 2.5(c)(2), but he provides no factual or legal argument to support his argument. The entirety of his "argument" is the bald assertion that "[w]ith all due respect, the Court erred" in reaching its unanimous decision to affirm his conviction. *See* ***State v. Gregory***, 158 Wn.2d 759, 147 P.2d 1201 (2006). It is bad enough to claim this court was wrong, but it is certainly unwarranted when there is no supporting argument or authority.

It has long been a principal of appellate law that the reviewing court "will not, for the purpose of finding reversible error, presume the existence of facts as to which the record is silent." ***State v. Jasper***, 174 Wn.2d 96, 124, 271 P.3d 876 (2012) (citing cases back to 1935). The record in front of this court on this appeal is related solely to the death sentence imposed on the defendant. The brief from the defense is silent as to any factual or legal basis upon which this court should review its own

unanimous decision on identical grounds that it previously rejected. This court should decline to consider this issue.

4. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR DISMISSAL, NEW TRIAL, AND *FRANKS* HEARING WHEN IT FOUND NO EVIDENCE TO SUPPORT THE FACTUAL CLAIMS UNDERLYING THE MOTIONS; THIS COURT SHOULD SUMMARILY REJECT ARGUMENTS RAISED ON APPEAL THAT WERE NOT PRESERVED BELOW OR THAT WERE RAISED AND DECIDED IN THE PRIOR APPEAL.

On June 24, 2011, the trial court heard a defense motion for dismissal of the death penalty, for a new guilt phase trial, and for a *Franks* hearing. 6/24/2011 RP 262–84. The only factual basis for the motion was the State's alleged "failure" to provide information that the victim in defendant's separate rape case worked as a confidential informant. *See* CP 393–407 (Memorandum). Defense counsel provided the court with 100 pages of documents. *See* CP 408 – 509 (Declaration of Defense Counsel; Appendices A – R). The first 80 pages (Appendices A through P) were documents from the rape case or from pre-trial hearings in the 2001 murder trial; the final 20 pages (Appendices Q through T) is documentation received from Tacoma Police Dept. about the informant work done by the rape victim.

At the hearing on the motion, defense counsel argued the court should "dismiss the death penalty proceeding pursuant to CrR 8.3(b)," grant a new guilt phase trial after "suppressing the blood draw that was taken without a full rendition of the facts," or order a *Franks* hearing on the issue of the materiality of the omission of the informant information. 6/24/2011 RP 267–68. The trial court found that defendant's attorney in the rape case knew the victim worked as an informant prior to the 2000 trial in that case. 6/24/2011 RP 283. As such, there was no discovery violation. 6/24/2011 RP 283–84. The court denied all of the requested relief. CP 617 – 19 (Order). Defense counsel did not request the court clarify its ruling as to any specific detail or request the court rule on any matter that was not addressed in the oral ruling. *See* 6/24/2011 RP 284–85.

On April 16 2012, defendant submitted a handwritten statement to the court entitled "Motion to Reconsider." CP 951–53. Defense counsel then submitted a motion to reconsider that simply attached defendant's handwritten statement. CP 965–69. That motion was argued April 19, 2012. RP 21 2233–38. Defense counsel argued the court should reconsider the order on the blood draw and conduct a *Franks* hearing because there was "new evidence" about the rape victim's "background as a paid informant," her "prostitution activities that she was engaged in,"

and "her perjured testimony" at the rape trial. RP 21 2234–35, 2237. Defense counsel also claimed the rape victim made "material misrepresentations" in her statements to the police about being raped. RP 21 2234. The court denied the motion for reconsideration. RP 21 2237 – 38; CP 1193–94 (Order).

These were the ***only*** grounds argued by defendant below on the motion for dismissal, new trial, and *Franks* hearing; there were no other facts presented to the trial court as a ground upon which to challenge the blood draw order.

a. This Court Should Decline To Review The Trial Court's Rulings On The Motion to Dismiss The Death Penalty Or Grant A New Guilt Phase Trial Because Defendant Has Not Substantively Argued In This Appeal That The Trial Court Erred.

This court reviews a trial court's denial of a motion to dismiss based on a discovery violation for a manifest abuse of discretion, ***State v. Woods***, 143 Wn.2d 561, 582, 23 P.3d 1046 (2001), and it reviews a trial court's denial of a motion for new trial for a clear abuse of discretion, ***State v. Bourgeois***, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997). The defendant on appeal bears the burden of establishing the trial court's decision "manifestly unreasonable or based on untenable grounds or reasons," meaning "no reasonable judge would have ruled as the trial court

did." ***State v. Yarbrough***, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009) (*quoting* ***State v. Powell,*** 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

After hearing argument on the defendant's motion, the trial court found the defendant's attorney in the rape case knew, before that trial in 2000, that the rape victim worked as an informant. *See* CP 617-19. This finding is supported by the documents in the appendices to defendant's motion, which include several pages of transcript from the victim's pre-trial interview in the rape case where she lists a number of police agencies that she did work for as an informant, as well as the State's motions in limine seeking to exclude evidence of her informant work from the rape trial. *See* CP 445-49; 450-58. Having rejected the factual basis underlying the defense motions, the trial court properly denied the motion for dismissal and new trial. The court's order was a proper exercise of discretion that was clearly supported by the facts presented at the hearing.

In his current appeal, defendant makes ***no*** argument that the trial court erred in denying his motion to dismiss the death penalty, makes ***no*** argument the trial court erred in denying his motion for a new guilt phase trial, cites ***no*** authority for the standard of review, and cites ***no*** facts to support a claim the trial court erred in the facts it considered at the motion. In other words, he does not challenge the ruling below, but rather raises new arguments that were not litigated in the trial court. The only mention

of the trial court's ruling on this motion is in the heading of the argument. *See* Brief of Appellant, p. 152 (Issue #7). This court should affirm the trial court's rulings as they are essentially unassailed on appeal.

b. The Trial Court Properly Denied The Defendant's Motion For A *Franks* Hearing Because There Was No Showing Of A Material Omission In The Motion For A Blood Draw.

This court previously upheld the finding of probable cause to support the 2000 order authorizing a blood draw: "We conclude that the January 2000 blood draw was supported by probable cause and was valid." ***State v. Gregory***, 158 Wn.2d 759, 825, 147 P.3d 1201 (2006). The trial court could not err by following that holding during the second penalty phase proceeding.

Generally, a review the factual basis for issuance a search warrant is confined to the four corners of the document setting it out, but the defendant can challenge the factual basis by showing there was a "deliberate falsehood" or a "deliberate omission" or a "reckless disregard for the truth." ***State v. Garrison***, 118 Wn.2d 870, 872, 827 P.2d 1388 (1992) (*citing* ***Franks v. Delaware***, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)). The defendant must make a "substantial preliminary showing" that "must be accompanied by an offer of proof." ***Garrison***, 118

Wn.2d at 872. If the defendant fails, "the inquiry ends." *Id.* at 873. Only if the defendant meets the threshold must the court consider the affidavit for search warrant. *Id.*

In his motion on June 24, 2011, the defendant argued one basis for the court to grant his motion for a *Franks* hearing, and that was the factual request for a blood draw did not include information that the victim of the rape, R.S., had been a police informant. *See* 6/24/2011 RP 263-74, 280-83. The court rejected the argument that the defense only recently discovered her status. 6/24/2011 RP 283. The court also outright rejected the argument that the information regarding her work as an informant was exculpatory. 6/24/2011 RP 283-84. The defendant did not assert and presented no evidence of any information about R.S.'s informant work that negatively affected her credibility, as no officer who provided information about her reported anything negative about her work. The defense also did not claim that the detective who investigated the rape case had any knowledge of her being an informant for his department. In fact, R.S. denied, in 2000, knowing the detective from either the rape investigation or murder investigation. *See* CP 445-49.

In short, while the defendant below argued there were material misrepresentations and material omissions made in the warrant affidavits, there was no ***factual*** basis given for that argument. The defendant thus

made no showing, much less a substantial showing, of any "material omission" with regards to the motion for blood draw, as required before a *Franks* hearing will be granted. As such, the trial court properly denied his motion for a *Franks* hearing.

c. This Court Should Decline To Review Matters Raised By The Defendant That Are Law Of This Case Or That Were Not Raised In The Trial Court During This Current Penalty Phase Proceeding; Those Issues Are Also Completely Without Merit.

In this appeal, defendant attempts to challenge the issuance of the blood draw order from 2000, on different grounds from those raised in the trial court, discussed *supra*. To raise an issue that was decided in the prior appeal, defendant must show justice would be served by the review, which generally requires showing an intervening change in the law. *See* RAP 2.5(c)(2). To raise a completely new issue in the current appeal, defendant must meet the criteria for manifest constitutional error. *See* RAP 2.5(a)(3); *also* ***State v. McFarland***, 127 Wn.2d 322, 899 P.2d 1251 (1995). Because there has been no showing of manifest constitutional error or any actual change in the law, this court should not review these issues.

i. This Court Has Already Rejected Defendant's Claim Relating To The Standard For Issuance Of An Order For DNA Sample From A Defendant, Using It's Prior Decision In *Gregory* As The Model.

Defendant argues that "this court has also clarified the standards used to judge court orders for biological samples," citing ***State v. Garcia-Salgado***, 170 Wn.2d 176, 240 P.3d 153 (2010), and that this should provide a basis for relitigation. *See* Brief of Appellant, p. 166. The defendant fails to identify where in the record this argument was raised at the trial court level. ***Garcia-Salgado*** was published in 2010 and extant at the time of defendant's second penalty phase hearing in 2012, so there is no reason this claim could not have been litigated in the trial court. Nor does that case provide support for defendant's claims. The court in ***Garcia-Salgado*** discussed its prior decision upholding the lawfulness of defendant's 2000 blood draw order and reaffirmed the correctness of the prior holding by rejecting the exact claim now being made for the first time during this appeal:

> In ***Gregory***, we upheld a search that intruded into the body made pursuant to a CrR 4.7 order. Gregory was convicted of three counts of first degree rape and, in a separate trial, one count of aggravated first degree murder. ***Gregory***, 158 Wn.2d at 777. Prior to his conviction on the rape charges, the trial court ordered Gregory to permit the State to take blood samples for the purpose of comparing Gregory's DNA with the DNA evidence discovered in a rape kit

> examination of the victim. *Id.* at 820. On appeal, Gregory challenged the collection of his DNA. *Id.* at 821-21.
>
> We upheld the search as valid because the order met the requirements of a search warrant. First, a sworn declaration provided sufficient evidence to establish probable cause to search. *Id.* Second, there was no question that the judge who entered the order was a neutral and detached magistrate. Finally, an order for the seizure of blood for DNA sampling necessarily describes the place to be searched and the item to be seized. *Id.* at 820. The blood draw also met the ***Schmerber*** [3] requirements for searches that intrude into the body. First, Gregory did not challenge the reasonableness of the blood draw or the manner in which it was performed. *Id.* at 822-23. Second, the evidence established a clear indication that Gregory's DNA would match the DNA recovered in the rape kit. *See id.* at 822-25. Because the order met the requirements of a valid warrant, and the bodily intrusion met the additional requirements of ***Schmerber*** the search was constitutional.

State v. Garcia-Salgado, 176 Wn.2d at 186-87. So rather than being a case that "clarified the standard" in the defendant's favor, ***Garcia-Salgado*** is yet another reason this court should decline to revisit what is now clearly settled law.

[3] ***Schmerber v. California***, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

ii. The Defendant Misrepresents This Court's Use Of The Phrase "Inevitable Discovery" In Attempting To Raise Yet Another Issue Not Raised In The Trial Court.

The defendant claims this court should review the 2000 blood draw order because it has now rejected the "inevitable discovery" exception to the search warrant requirement, citing ***State v. Winterstein***, 167 Wn.2d 620, 220 P.3d 1226 (2009). *See* Brief of Appellant, p. 166. In that case, this court did formally reject that exception to the warrant requirement under art. I, § 7 of the Washington Constitution. The inevitable discovery exception provides for admissibility of evidence seized during an unlawful search if the evidence itself would have inevitably been seized lawfully. That is not what happened in this case.

In the prior appeal in this case, this court upheld the validity of the 2000 blood draw order; defendant's blood was lawfully seized under that order. ***Gregory***, 158 Wn.2d at 825. The court then declined to determine the validity of the prior blood draw order (from 1998), saying the evidence would have been "inevitably discovered" as a result of the 2000 order. *Id.* As there was no unlawful seizure of evidence in this case, the court did not need to consider whether any exception to the warrant requirement applied. This court should reject defendant's twisting of the court's

phrasing in an attempt to raise yet another issue not raised in the trial court during the proceeding currently on appeal.

iii. This Court Should Not Reconsider Its Prior Ruling About The Use Of Lawfully Seized DNA Sample Under The Principles Of The Law Of The Case And Stare Decisis.

Defendant argues that this court should reconsider its conclusion that defendant's DNA profile, obtained from lawfully seized blood in one case, could be compared to evidence obtained in other cases. *See* ***Gregory***, 158 Wn.2d at 826-27. The totality of the argument is: "With all due respect, this court should reconsider this conclusion," coupled with the citation to two cases from other jurisdictions, neither of which is factual similar to the facts in ***Gregory***. *See* Brief of Appellant, at 181.

The doctrine of stare decisis requires defendant make "a clear showing that an established rule is incorrect and harmful" before this court will abandon its prior ruling. *See, e.g.,* ***State v. Witherspoon***, 180 Wn.2d 875, 893, 329 P.3d 888 (2014). Defendant cites no authority from after this court issued ***Gregory*** and makes no substantive argument whatsoever. This is yet another example of current counsel's attempt to raise an issue from the prior appeal with no showing of any legal basis for a new review.

Defendant's attempt to create issues where none exist is demonstrated by his repeated citation to Clerk's Papers 408–509, the vast majority of which are documents relating solely to the rape case or documents from 2001 proceedings herein. That is also the reason there are no citations to the transcripts from the current proceedings during the argument on this assignment of error. This court should reject what is nothing more than an attempt to relitigate issues decided in the prior appeal, or raise issues that could have been raised in the prior appeal, but were not. The only issue that is properly before this court in this error assignment is the trial court's ruling denying the motion for a *Franks* hearing, and that issue is wholly without merit.

5. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S CHALLENGE FOR CAUSE AS TO PROSPECTIVE JUROR 132.

A criminal defendant has a constitutional right to an impartial jury, both under the Sixth Amendment to the United States Constitution and Article I, Section 22 of the Washington State Constitution. ***State v. Yates***, 161 Wn.2d 714, 742, 168 P.3d 359 (2007). To ensure an impartial jury is seated in a capital case, the trial court must "death qualify" the jury, which means "the court must satisfy itself that prospective jurors will be able to impose the death penalty if the state meets its statutorily mandated

burden." ***Yates***, 161 Wn.2d at 742 (*citing* ***Wainwright v. Witt,*** 469 U.S. 412, 424, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985)). For each juror, the trial court must consider whether the juror's views on the death penalty "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." ***Yates***, 161 Wn.2d at 742 (*quoting* ***Witt***, 469 U.S. at 424, and ***Adams v. Texas***, 448 U.S. 38, 45, 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980)); *see also* ***State v. Davis***, 141 Wn.2d 798, 856-57, 10 P.3d 977 (2000). If a juror expresses a strong personal opinion but says he could set it aside and follow the law, the trial court can dismiss that juror without finding bias that is "unmistakably clear," so long as the court gets a "definite impression" of the juror's inability to impartially apply the law. ***Yates***, 161 Wn.2d at 742 (quoting ***Witt***, 469 U.S. at 424-260).

"Whether a juror can set aside personal feelings about the death penalty involves a credibility determination that is necessarily factual in nature." ***State v. Gregory***, 158 Wn.2d 759, 814, 147 P.3d 1201 (2006) (*citing* ***Witt,*** 469 U.S. at 424). Therefore, a trial judge's ruling on a challenge for cause against a prospective juror is reviewed for a manifest abuse of discretion. ***State v. Davis***, 175 Wn.2d 287, 312, 290 P.3d 43 (2012) (*citing* ***Gregory,*** 158 Wn.2d at 814). This court said the reason such deference is given is:

> [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.

Davis, 175 Wn.2d at 312 (*quoting* ***State v. Gentry***, 125 Wn.2d 570, 634, 888 P.2d 1105 (1995)). An abuse of discretion occurs only when the trial court's decision "is manifestly unreasonable or based on untenable grounds or reasons." ***State v. Yarbrough***, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009) (*quoting* ***State v. Powell,*** 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). An abuse of discretion only rises to a manifest abuse if "no reasonable judge would have ruled as the trial court did." ***Yarbrough,*** 151 Wn. App. at 81 (*citing* ***State v. Mason***, 160 Wn.2d 910, 933-34, 162 P.3d 396 (2007), *cert. denied,* 553 U.S. 1035, 128 S. Ct. 2430, 171 L. Ed. 2d 235 (2008)).

Trial judges are afforded particular deference in jury selection because jurors are different than attorneys, parties, or witnesses. On this subject, the United Supreme Court observed:

> The testimony of each of the three challenged jurors is ambiguous and at times contradictory. This is not unusual on *voir dire* examination, particularly in a highly publicized criminal case. It is well to remember that the lay persons on the panel may never have been subjected to the type of leading questions and cross-examination tactics that frequently are employed, and that were evident in this case. Prospective jurors represent a cross section of the community, and their education and experience vary widely. Also, unlike witnesses, prospective jurors have had

> no briefing by lawyers prior to taking the stand. Jurors thus cannot be expected invariably to express themselves carefully or even consistently. Every trial judge understands this, and under our system it is that judge who is best situated to determine competency to serve impartially. The trial judge properly may choose to believe those statements that were the most fully articulated or that appeared to have been the least influenced by leading.

Patton v. Yount, 467 U.S. 1025, 1038-39, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984).

Defendant seeks review of the trial court's denial of his challenge for cause as to Juror 132. A review of the record shows the following about Juror 132.

Juror 132 had a son who had been incarcerated more than one time. VRP 19 2047-48. In his written questionnaire, he answered "no" to a question asking him if he would automatically vote for the death penalty (Question 29) and "yes" to a question asking him if he would consider evidence presented against the death penalty (Question 34). *See* VRP 19 2060. He was asked if he would require three different persons facing the death penalty to present reasons why they should be spared and said "I would give them the opportunity." VRP 19 2053. Juror 132 said he was a devoted family man who would struggle with his feelings about the death penalty if he had a family member facing that sentence. VRP 19 2050. He said he "very much so" expected that testimony from the victim's

mother and the defendant's mother would be equally emotional, and he thought it was possible testimony from the defendant's mother would affect him. VRP 19 2050-51.

Juror 132 gave his *personal opinion* that the defense should "prove a reason for life," if he made the laws. VRP 19 2052. When it came to setting that aside, Juror 132 committed to following the law, answering "yes" that he would consider evidence about the defendant's upbringing (VRP 19 2056), and about future dangerousness (VRP 19 2056). Juror 132 said "yes" when asked if he would "listen to anything that's presented to you on any subject" about the defendant. VRP 19 2055. And critically important, Juror 132 gave these answers:

> Mr. Neeb: Can you commit to us now, under your oath to tell the truth, that you will, in fact, vote for life if the State doesn't prove beyond a reasonable doubt that the death penalty is appropriate?
>
> Juror 132: That would be the correct ruling, yes.
>
> Mr. Neeb: It would be a just ruling?
>
> Juror 132: Yes.
>
> Mr. Neeb: Can you commit that you'll do it?
>
> Juror 132: Yes.

VRP 19 2057.

The voir dire questioning of Juror 132 covers thirty pages. *See* VRP 19 2033 – 63. The juror believes in the death penalty. But it is clear from the transcript when Juror 132 is giving his personal opinion and when he is committing to following the law. It is also clear the trial court considered the juror as a whole, including his written answers in the questionnaire and his oral answers during voir dire, in deciding the challenge for cause.

In its ruling, the trial court specifically addressed the concern the defense now asserts on appeal, that Juror 132 would shift the burden of proof to the defense:

> The juror did answer "yes" to the question by Mr. Purtzer, do we have to prove to you reasons that he should live. However, I believe we have to take that into context of his other answers and his confusion around the burden. Because otherwise he was clear that he could consider life without parole and vote for that. So I will deny the challenge for cause for this juror.

VRP 19 2062–63. The court was in the best position to determine which of Juror 132's arguably inconsistent answers to give more credence to, or less credence. It carefully considered his answers in full context of Juror 132's appearance, body language, tone of voice, posture, and other things that do not appear from solely the written record.

The trial court presided over the substantive individual voir dire of seventy-six jurors over twelve court days. *See* VRP 9 – 19 (April 2 – 18,

2012). The defense challenged ***twenty*** of those seventy-six for cause based on their view on the death penalty.[4] The State challenged nine jurors for their view on the death penalty.[5] Each and every time, the court considered the totality of the juror's answers in making her ruling, including the juror's written answers in the questionnaire and the juror's answers to questions from the State and defense. *See, e.g.*, voir dire of Juror 130, VRP 19 2011–2032 (very similar views as Juror 132, also challenged for cause by the defense for his view on the death penalty, then actually seated on the jury, and trial court's ruling not challenged on appeal). The court's conduct during all of voir dire reflected consideration and an examination of the totality of the circumstance – the very model of appropriately exercised discretion.

Defendant cannot show that the court based its decision as to Juror 132 on untenable grounds or under a misapprehension of the relevant law. It cannot be said that ***no*** reasonable judge would have ruled the way the trial court did with respect to the challenge for cause on Juror 132. Defendant has failed to meet his burden in showing any abuse of discretion in the court's denial of his challenge for cause on Juror 132.

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[4] Jurors 9, 19, 20, 22, 31, 36, 41, 42, 43, 57, 67, 70, 126, 93, 105, 108, 113, 130, 132, 139.
[5] Jurors 13, 26, 38, 64, 128, 104, 111, 119, 146.

6. DEFENDANT HAS FAILED TO SHOW THAT HIS CLAIMED EVIDENTIARY ERRORS WERE PRESERVED BELOW OR THAT THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE IN THE PENALTY PHASE THAT HAD BEEN ADMITTED IN THE GUILT PHASE AND WAS RELEVANT TO SHOW THE FACTS AND CIRCUMSTANCES OF THE MURDER.

This Court reviews rulings on the admissibility of evidence to determine if the trial court manifestly abused its discretion. ***State v. Stenson***, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). The same standard of review applies in a capital case as a non-capital case, but in a penalty phase hearing, the court gives the issue "more searching scrutiny." ***State v. Gregory***, 158 Wn.2d 759, 849, 147 P.3d 1201 (2006).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." ER 401. In a penalty phase, the jury is asked to answer the following question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" RCW 10.95.060(4). When the "jury sitting in the special sentencing proceeding has not heard evidence of the aggravated first degree murder of which the defendant stands convicted, both the defense and prosecution may introduce evidence concerning the facts and

circumstances of the murder." RCW 10.95.060(3). Thus, in the context of a penalty phase hearing with a newly impaneled jury, evidence is relevant if it relates to the "facts and circumstances of the murder." RCW 10.95.060.

Beginning with ***State v. Bartholomew***, 101 Wn.2d 631, 642, 683 P.2d 1079 (1984) (***Bartholomew II***) this Court's opinions are clear that this "facts and circumstances" provision permits evidence that was admitted -or would have been admissible - at the guilt phase to be admitted in the penalty phase. *See also* ***State v. Clark***, 143 Wn.2d 731, 780, 24 P.3d 1006 (2001); ***State v. Pirtle***, 127 Wn.2d 628, 666, 904 P.2d 245 (1995).

On appeal defendant challenges the admission of certain evidence during the penalty phase. The challenged evidence falls into three categories: 1) evidence defendant describes as showing "the high quality of the police investigation;" 2) DNA evidence; and, 3) evidence that defendant owned a knife. *See* Appellant's brief at pp 246-53. Defendant does not dispute that all of his challenged evidence was admitted in the guilt phase of his first trial or that, as his second penalty phase was in front of a new jury, its admissibility is permitted under RCW 10.95.060(3). Rather defendant labels this evidence as being evidence of "residual doubt" and asserts that it is irrelevant. The tacit premise underlying

defendant's argument is that the only information the jury needs to know when assessing the portion of the statutory question that asks it to consider "the crime of which the defendant has been found guilty" is that the crime was "murder in the first degree with aggravating circumstances." He cites no authority for this principle.

This court should summarily reject this argument as it ignores clear authority that the jury is to hear the *facts and circumstances* of the underlying crime rather than just be informed of the name of the crime committed. Defendant fails to address the doctrine of stare decisis and show that this Court's prior holdings that evidence admitted at the guilt phase is both relevant and admissible in the penalty phase hearing is both: 1) incorrect; and, 2) harmful. *See* ***State v. Barber***, 170 Wn.2d 854, 863–65, 248 P.3d 494 (2011). As the trial court's rulings admitting this evidence were in accord with current controlling authority, defendant has failed to show any abuse of discretion. As defendant has failed to meet the standard for overturning prior precedent under the doctrine of stare decisis, his arguments should be summarily dismissed. The State will, however, present additional reasons below why the court should dismiss the claims as to the three areas of challenged evidence.

a. Defendant Did Not Properly Preserve His Challenge To Evidence He Describes As Evidence About The High Quality Of The Police Investigation.

A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; ***State v. Guloy***, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. ***Guloy***, 104 Wn.2d at 421. A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. ***State v. Thetford***, 109 Wn.2d 392, 397, 745 P.2d 496 (1987). For example, in ***State v. Hettich***, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993), the court held that Hettich could not raise a *Frye* objection on appeal because he did not make a *Frye* objection at trial.

Defendant challenges evidence that he characterizes as "evidence about the high quality of the police investigation" which he identifies as being "testimony about the securing, preservation, processing and documentation of the crime scene and [the victim's] body, details about the autopsy, the neighboring canvass, the attempts to collect fingerprint evidence, the course of the investigation between 1996 and 1998, and how [defendant] was categorized by police as a 'person of interest.'" *See* Appellant's brief at p. 247, n.143. He identifies this evidence as being admitted at RP 2430-35, 2452-58, 2464-66, 2466-68, 2474-75, 2486,

2496-99, 2540-51, 2562[-]2603. *Id.* A review of the record reveals only four defense objections within the cited pages. The first objection was sustained. RP 2434. The second objection went more to the form of the question – that it was seeking an interpretation of blood spatter- rather than asking for the witness's observations; it was overruled when the prosecutor clarified that he was asking only for the witness's observation. RP 2465. The third objection was sustained. RP 2595-96. The last objection was to a question asked of the medical examiner as to whether blood spatter shown in a photograph of the crime scene was consistent with being produced by the injuries to the victim's neck, if the victim's heart were beating when the wounds were inflicted; this objection was overruled and the medical examiner indicated that it was possible the spatter had been made when those wounds were inflicted. RP 2597. Thus, a review of the verbatim report of proceedings does not reveal preservation of this claimed evidentiary error.

Nor was there a defense objection to this evidence made in any pretrial motion. While there was a pretrial motion to limit the evidence presented in the penalty phase, defendant did not seek to exclude "evidence of the high quality of the police investigation." *See* CP 666-679. Defendant did seek to exclude some crime scene photographs and medical examiner's photographs on the grounds that they were unduly

prejudicial due to their gruesome nature, but no motion to exclude any testimony of the medical examiner was made on the basis that was "evidence of the high quality of the police investigation" as is challenged on appeal. Defendant does not pursue review of the court's rejection of his argument regarding the gruesome nature of the evidence. Thus, defendant has failed to show that he preserved his challenge to the medical examiner's testimony on the same ground that he raises on appeal. This Court should refuse to consider his claim for failure to preserve it below.

Moreover, the court did not abuse its discretion in admitting this evidence. The medical examiner testified that the victim's body revealed many injuries and wounds, including three stab wounds to her back and two significant wounds to the neck, and that many of these wounds could, independent of any other injury, cause death. *See* RP 2573-92. The medical examiner opined that even with all of these injuries, the victim could have lived for several minutes. RP 2599. The jury could conclude from the challenged evidence that the victim was alive when the two wounds to the neck were inflicted and that those wounds were inflicted in the bedroom where the spatter appeared on the wall. Such information is circumstantial evidence of the terror the victim endured in the last moments of her life, of the viciousness of the attack on her person, and of her physical suffering, all of which constitutes "facts and circumstances"

about the nature of the murder defendant committed. As this evidence was admissible under the controlling authority and relevant to an issue before the jury, the trial court did not abuse its discretion in admitting the evidence.

b. The Trial Court Properly Admitted Evidence That Defendant Owned A Knife That Could Have Inflicted The Victim's Stab Wounds As It Was The Law Of The Case.

Under the law of the case doctrine, "once there is an appellate holding enunciating a principle of law, that holding will be followed in later stages of the same litigation." ***State v. Schwab***, 134 Wn. App. 635, 644, 141 P.3d 658 (2006). The law of the case doctrine binds the parties, the trial court, and subsequent appellate courts to the holdings of an appellate court in a prior appeal until such holdings are authoritatively overruled. ***Humphrey Indus., Ltd. v. Clay Street Assocs., LLC***, 176 Wn.2d 662, 669, 295 P.3d 231 (2013) (*quoting* ***Greene v. Rothschild***, 68 Wn.2d 1, 10, 414 P.2d 1013 (1966)). The law of the case doctrine will also permit an appellate court to refuse to consider issues that could have been raised in a prior appeal. RAP 2.5(c)(2); ***State v. Elmore***, 154 Wn. App. 885, 896, 228 P.3d 760 (2010); ***Folsom v. County of Spokane***, 111 Wn.2d 256, 263, 759 P.2d 1196(1988).

In defendant's prior appeal he challenged the admissibility of evidence that he owned a Buck knife that the medical examiner testified could have inflicted the stab wounds to the victim; he argued the knife was insufficiently connected to the murder and any reference to his ownership of the knife improperly chilled his right to bear arms. *See* ***State v. Gregory***, 158 Wn.2d 759, 835-36, 147 P.3d 1201 (2006). This court held:

> In this case, Gregory's objections were based on the absence of direct evidence that the knife was used to commit the murder. However, these objections went to weight, not admissibility. We conclude that the trial court did not abuse its discretion when it admitted the knife.

Id. This court further found that admitting this evidence did not chill any of defendant's constitutional rights. *Id.*

Nevertheless, when defendant's case was returned to the trial court for a new penalty phase, defendant again sought to exclude evidence of the knife arguing that it was irrelevant as insufficiently connected to the homicide. *See* CP 678-79. The trial court denied the motion noting that the case law interpreting RCW 10.95 holds that the prosecution can present the "facts and circumstances" of the murder to a jury that is seated solely to determine the defendant's sentence in the same manner as it does in the guilt phase. CP 738-39. It further noted that the Washington Supreme Court had addressed the admissibility of most of the evidence

defendant sought to exclude in the opinion affirming defendant's conviction. *Id.* Consequently it denied the motion to exclude. *Id.*

Defendant fails to address why the law of the case doctrine does not preclude this Court from considering his claim when it was already rejected it in the prior appeal. Certainly, defendant cannot show that the trial court acted improperly or abused its discretion by applying the law of the case doctrine and allowing the jury to hear evidence that this Court had ruled admissible. This court should summarily dismiss this claim under the law of the case.

c. The DNA Evidence Provided Additional Information About The Facts And Circumstances Of The Crime Beyond The Defendant's Identity.

Defendant moved to exclude admission of DNA evidence showing that sperm left in and on the body of the victim as well as on the victim's bedspread was consistent with the defendant's DNA profile by arguing that it was irrelevant as identity was no longer at issue in the penalty phase. CP 677-78. The court denied the motion as the evidence had been admitted in the guilt phase in the prior trial and the Supreme Court had rejected previous challenges to the admissibility of this evidence on appeal. CP 738-39; *see also* ***Gregory***, 158 Wn.2d at 820-829, 829-835. The majority of the DNA evidence was presented to the jury in

the penalty phase via a stipulation that was read to the jury. RP 2627-42. When the evidence was presented, the defense retracted its objection to the presentation of the evidence. RP 2621. Thus, defendant fails to show that his objection to this evidence was properly preserved in the trial court. The court should refuse to consider this claim on that reason alone.

Furthermore, while much of the DNA stipulation concerns the testing procedures for DNA evidence, the multiple times the evidence in this case was tested by different experts, and the resulting probabilities of a random match -all of which goes to the identity of the perpetrator of a crime, the admitted evidence provided additional "facts and circumstances" about the murder that went beyond identity.

For example, the stipulation informed the jury that an expert at the State Crime lab found semen was present on the swabs taken from the victim's vagina, anus, and thighs, but not those taken from her mouth. This leads to the reasonable inference that the victim was forced to have vaginal and anal intercourse, but not oral. RP 2629. The fact that semen matching the defendant's profile was found on the victim's bedspread, leads to a reasonable inference that the rapes occurred in her bedroom. RP 2629, 2631, 2633, 2635. The evidence also established that blood found in the kitchen belonged to the victim, creating an inference that the attack started in the kitchen and progressed to the bedroom. RP 2637-38. The

stipulation informed the jury that while a suspect DNA profile was established in February 1997, approximately six months after the murder, that it was run against the profiles in the known offender database without a match being identified. RP 2630-32. The first time there was a match of this suspect DNA profile to the defendant's DNA profile did not occur until November of 1998. RP 2632-33. Evidence that was favorable to the defendant was admitted as well; the stipulation established that the knife found in defendant's possession was examined but that no blood could be found on the knife. RP 2637.

Thus, defendant's contention that this evidence was *only* relevant to the issue of identity is incorrect. The defendant has failed to show any abuse of the trial court's discretion in admitting this evidence.

7. THE TRIAL COURT PROPERLY ADDRESSED CHALLENGES TO IMPROPER ARGUMENT WHEN AN OBJECTION WAS MADE IN THE TRIAL COURT; AS FOR CLAIMS RAISED FOR THE FIRST TIME ON APPEAL, DEFENDANT HAS FAILED TO SHOW EITHER THAT THE ARGUMENTS WERE IMPROPER OR THAT THEY WERE SO FLAGRANT AND ILL-INTENTIONED THAT THE PREJUDICE COULD NOT HAVE BEEN CURED BY A TIMELY INSTRUCTION.

When a claim of prosecutorial misconduct is raised on appeal, defendant bears the burden of establishing both the impropriety of the

remark and its prejudicial effect. ***State v. Gregory***, 158 Wn.2d 759, 858-59, 147 P.3d 1201 (2006). The standard of reviewing a claim of misconduct does not change when it comes in the context of penalty phase proceeding rather than a guilt phase in a death penalty case. ***Gregory***, 158 Wn.2d at 858 (*citing* ***Davis***, 141 Wn.2d at 870-72). This court will construe more liberally the procedural rules regarding issues raised for the first time on appeal in a penalty phase. ***Gregory***, 158 Wn.2d at 859 (*citing* ***State v. Lord***, 117 Wn.2d 822, 849, 822 P.2d 177 (1991)). The court will also "conduct a more searching review" of claims of error from a penalty phase. ***Gregory***, 158 Wn.2d at 859 (*citing* ***Lord***, 117 Wn.2d at 888). The lack of objection at trial waives the claim unless the misconduct is "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice" that could not have been cured by a jury instruction. *Id.* (*citing* ***State v. Davis***, 141 Wn.2d 798, 871-72, 10 P.3d 977 (2000) and *quoting* ***State v. Gentry***, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995)).

For a comment to be prejudicial, "a substantial likelihood must exist that the misconduct affected the jury's verdict." ***State v. Davis***, 175 Wn.2d 287, 331, 290 P.3d 43 (2012) (*citing* ***State v. Yates***, 161 Wn.2d 714, 774, 168 P.3d 359 (2007)). The prejudicial effect of misconduct must be judged "in context of the penalty phase as a whole." *Id.* When reviewing a claim, this court will "focus less on whether the prosecutor's

misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." ***State v. Emery***, 174 Wn.2d 741, 762, 278 P. 3d 653 (2012). "The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?" ***Emery***, 174 Wn.2d at 762 (*quoting* ***Slattery v. City of Seattle***, 169 Wash. 144, 148, 13 P.2d 464 (1932)).

Defense counsel has a duty to object to misconduct at the time it occurs; this allows the trial court the opportunity to address the challenge immediately and issue an appropriate admonition to the jury if needed. ***State v. Emery***, 174 Wn.2d 741, 761-62, 278 P.3d 653 (2012). The purpose behind that rule is to twofold: to prevent improper remarks and to prevent potential abuse of the appellate system by encouraging a defendant to "remain silent," while "speculating upon a favorable verdict," then if that does not occur, to "use the claimed misconduct as a life preserver" on appeal. ***Emery***, 174 Wn.2d at 762 (*quoting* ***Jones v. Hogan***, 56 Wn.2d 23, 27, 351 P.2d 153 (1960)).

Defendant claims multiple incidents of prosecutorial misconduct during closing argument. Each of those will be addressed individually, then discussed in the context of the claim of the overall effect.

a. The State's Argument Using The Phrase "Declare the Truth" Was Improper Under ***Evans***, But It Was Not Objected To, Not Used To Inflame The Passion Or Prejudice Of The Jury, And Could Have Been Cured By An Instruction.

Defendant's first claim of misconduct relates to the portion of the State's argument where the phrase "declare the truth" was used. By the time this penalty phase was held, several decisions of Division II of the Court of Appeals had disapproved of the use of a similar argument when talking about the jury's function in a guilt phase. *See, e.g.,* ***State v. Evans,*** 163 Wn. App. 635, 260 P.3d 934 (2011); ***State v. Emery***, 161 Wn. App. 172, 253 P.3d 413 (2011); ***State v. Anderson,*** 153 Wn. App. 417, 220 P.3d 1223 (2009), *review denied*, 170 Wn.2d 1002 (2010). While these cases had found the argument improper, the court had not found them flagrant and ill-intentioned causing incurable prejudice. *See* ***Emery***, 161 Wn. App. at 43; ***Evans***, 163 Wn. App. at 646, ***Anderson***, 153 Wn. App. at 432.

This court also determined that argument was improper in a guilt phase, but this decision issued after closing arguments in this case occurred. ***State v. Emery***, 174 Wn.2d 741, 278 P.3d 653 (2012). In ***Emery***, this court affirmed the convictions from trial (and the appellate court's decision), holding the improper argument did not warrant reversal. *See* ***Emery***, 174 Wn.2d at 764. The court noted the "declare the truth"

argument was "not the type of comments which this court has held to be inflammatory," so there was "no possibility" the prosecutor's statements engendered an "inflammatory effect." ***Emery***, 174 Wn.2d at 762-63 (*quoting* ***State v. Brett***, 126 Wn.2d 136, 180, 892 P.3d 29 (1995) and ***State v. Perry***, 24 Wn.2d 764, 770, 167 P.2d 173 (1946)). Even improper remarks that touch on the defendant's constitutional rights are not per se incurable. ***Emery***, 174 Wn.2d at 763 (*citing* ***State v. Smith***, 144 Wn.2d 665, 30 P.3d 1245 (2001)). This court has also upheld convictions when the prosecutor misstated the burden of proof and called the trial a "search for the truth," even when defendant objected and the court gave an "imperfect" instruction. *See* ***State v. Warren***, 165 Wn.2d 17, 24-25, 195 P.3d 940 (2008).

In this case, the State used the phrase "declare the (or that) truth" twice during argument. There was no objection from defendant at either instance. The first was moments into closing argument:

> The word verdict in our system comes from the Latin word veredictum, which means to ***declare the truth***. I would suggest to you that in this case there's only one ***truth that you can declare***, and that is that this defendant deserves and should get the ultimate penalty for his crime, and that is death.

RP 3013. The second occasion was at the very end of the State's initial closing argument:

> The evidence that was presented to you in this case cries out for a death sentence. It's a horrific, brutal, savage crime. He beat her and he raped her again and again. He stabbed her. He stabbed her again and again. The law dictated a death sentence. The law says to you, if you find beyond a reasonable doubt that there are not sufficient mitigating circumstances, the sentence shall be death.
>
> The State has met and exceeded its burden of proof in this case. The defendant deserves the death penalty for what he did to Geneine Harshfield, for what he is. I would ask that you ***declare that truth***. Allen Gregory deserves the death penalty. And on behalf of the State of Washington and all of its law abiding citizens, I would ask that you sentence him to the appropriate sentence, and that is sentence Allen Gregory to his death.

RP 3054-55.

In the context of a penalty phase, the State's choice of words was, at best, inartful, and at worst, improper. By the time of this closing argument, the State knew the appellate courts did not approve of that argument when a jury was determining guilt as it did not properly describe the jury's role is assessing whether the State had proved each element of the crime beyond a reasonable doubt. But by the same token, defense counsel was also on notice that the argument was not considered inflammatory and could be cured by an instruction from the court after a timely objection from defense. Defendant did not object at trial. In the overall context of this penalty phase, the State's use of that phrasing did not have any inflammatory effect on the jury or create an enduring bias.

Had the defense objected, the court could have admonished the jury to disregard the phrase and cured any potential problem.

This court noted that comments like the "declare the truth" argument have the potential to confuse the jury "about its role and the burden of proof." ***Emery***, 174 Wn.2d at 763. The court, therefore, considers "what would likely have happened if the defendant had timely objected." *Id.* The court concluded the court could have "eliminated any possible confusion and cured any potential prejudice stemming from the prosecutor's improper remarks" had a timely objection been made. *Id.* at 764.

The same is true in this case. Had the defendant objected, the trial court would have had the opportunity to strike the improper comment or given the jury an instruction that corrected the misstatement and clarified the jury's role. The State would also have been able to correct its misstatement. If the word "verdict" were used instead of the word "truth," for example, the argument is proper. There would have been nothing improper about telling the jury there was only one "true verdict that you can declare" in the first instance or asking them to "declare that verdict" in the second. Additionally, the court's instructions told the jury to disregard any argument that was inconsistent with the law as given by the court. CP 1069. To the extent the argument misstated the jury's role or the burden

of proof, the jury would have followed the court's instruction and disregarded it.

At the time of this trial, the State should not have used the phrasing it did during closing argument. But that improper phrase could have been cured. Given the horrifying nature of this crime, the defendant's criminal history and behavior in prison, and the absence of any significant mitigation evidence, it cannot be said that those improper statements affected the jury's verdict, even with the enhanced scrutiny this court gives in a death penalty case.

b. The State Did Not Shift The Burden Of Proof In Its Argument About The Quantity And Quality Of Defendant's Mitigation Evidence.

The defense next claims the State shifted the burden of proof during closing argument when it was addressing the mitigation evidence presented by the defense.

The State bears the burden of proving each element of a crime beyond a reasonable doubt. ***In re Winship***, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). In a death penalty sentencing hearing, that burden is to prove that there are not sufficient mitigating circumstances to merit leniency. Shifting the burden of proof to the defendant is improper,

and doing so in closing argument is prosecutorial misconduct. *See, e.g.,* ***State v. Fleming***, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996).

The State is, however, "entitled to comment upon quality and quantity of evidence presented by the defense." ***Gregory,*** 158 Wn.2d at 860. Such argument "does not necessarily suggest that the burden of proof rests with the defense." *Id.* (*citing* ***People v. Boyette***, 29 Cal.4th 381, 127 Cal.Rptr.2d 544, 58 P.3d 391 (2002) (death penalty case where prosecutor's comment on the lack of corroboration for defendant's story did not shift the burden of proof)). This court has previously rejected a claim of prosecutorial misconduct when the State argued the mitigation evidence presented by the defense was "excuse" and not "true mitigation." *See* ***Davis,*** 175 Wn.2d at 336. The State's argument was proper because, in context, it was "directed at the evidence's weight, not its relevance." *Id.*

Defendant's argument is that the State shifted the burden of proof by commenting on both the quantity of evidence presented in mitigation and its quality, particularly commenting on what was missing. *See* Brief of Appellant, at 27-29. In doing so, defendant takes portions of the State's closing argument out of context. The State argued to the jury:

> [The defendant] does not have any obligation to present mitigation, none at all. Could have sat there and said nothing, the defense attorneys. But they chose to present to

> you mitigation. And because of that, you judge the mitigation presented the same way as any evidence. Is there in this proceeding any incentive to hold back anything? I would suggest to you the answer is no. So that means that what you heard was the best that there is to say about Allen Gregory.

RP 3034.

It is proper to argue the State's and defendant's evidence should be judged by the same standard. *See* ***Davis***, 175 Wn.2d at 337. ("Significantly, the deputy prosecutor began discussing Davis's mitigating evidence by reminding the jury that it should judge Davis's mitigating evidence in the same way it judged any other evidence"). Similarly, it is not improper to argue the defendant has every incentive to put on all available evidence, and the best evidence, that it can when it chooses to present mitigation. *See* ***Gregory***, 158 Wn.2d at 859-61. There, the State argued:

> [Y]ou can be certain, you can be certain, they put on everything they had and the very best that they had because there is no incentive to do anything else. So what you heard from the witness stand presented by the defense is the best that can be said about Allen Gregory.

Gregory, at 859. In the first penalty phase hearing, there was no objection from defendant to this argument. On appeal it was challenged as being improper for shifting the burden. This court rejected that argument, noting

the trial court properly instructed the jury and "even absent the remarks, the jury would have reached the same result." *Id.*, at 861.

In this case, defense counsel objected to the State's argument. RP 3034-36. The court overruled the objection, finding the State "does have the right to comment on the quality of the evidence that was presented," and when the defense responded "not the extent" of the evidence, the court ruled "I find that goes along with the quality of the evidence, as well." RP 3035-36. In making its ruling, the trial court was mindful of the State's argument just a few minutes earlier with regards to mitigation:

> I'm not suggesting that you reject any of it from your consideration. I would certainly suggest that when you told us that you could determine true mitigation from excuse that you apply that standard when you review this evidence. I'm not saying don't consider anything.

RP 3028-29. The trial court recognized that, in context, the State was arguing the weight to be given the mitigation evidence that was presented. That ruling was a proper exercise of discretion and consistent with this court's discussion of the issue in ***Gregory*** and ***Davis***.

The defendant chose to present evidence in mitigation. Defendant called family members and detention officials. The State was entitled to address both the quality and the quantity of that evidence. The trial court also instructed the jury that the State bore the burden of proof. RP 3006; CP 1072. The State told the jury several times that the State bore the

burden of proof. *See* RP 3055 ("The State has met and exceeded its burden of proof in this case") 3088-89 ("defendant still now as he sits here in this courtroom during rebuttal closing is entitled to the presumption of leniency."); 3091 ("mercy alone is a sufficient mitigator to prevent the State from reaching its burden of proof"); 3092 ("it's the State's responsibility to present the case to you, to prove the case to you"). The State argued the weight that should be given the mitigation evidence in the context of whether it was true mitigation or excuse, in an effort to establish for the jury that the State met its burden of proving the absence of sufficient mitigating circumstances to merit leniency. The claim that this argument is burden shifting and misconduct has been rejected twice before in death penalty cases under quite similar factual circumstances. ***Davis***, 175 Wn.2d at 337-38; ***Gregory***, 158 Wn.2d at 859-61.

Defendant's argument that the State shifted the burden by "faulting the defense for failing to produce certain evidence" is also taken out of context. The State did not argue there was no evidence presented on certain issues to "fault" the defendant for not producing it. While discussing the enumerated list of potential mitigating factors, *see* CP 1074 (Instruction #5), the State directed argument at one of those factors, extreme mental disturbance, which had been requested by the defense, as follows:

> You review the evidence and you listen to the argument, but I'll tell you this, folks, the fact that he raped her and stabbed her and cut her throat and tried to cut her head off is psychotic, but it's not mentally ill. It's crazy. There's other words for it that aren't appropriate in court. But not defensible by any imagination for something that happened to him. No evidence of drug use. No evidence of alcohol use. No evidence of psychological impairment. The fact is, if you look at the crime itself, he did it because he got off on it.

RP 3032-33.

The State's argument, taken in full context, was a discussion of all the evidence that was presented in mitigation. The State did not suggest to the jury an obligation of the defendant to present evidence, having previously stated the opposite. The State's comment was, considering the all of the evidence presented during the penalty phase, there was nothing from which the jury could find the defendant acted under extreme mental disturbance. The State is entitled to argue how the evidence fits into the instructions and proves or does not prove a particular point. The State is "entitled to comment upon quality and quantity of evidence presented by the defense," and doing so does not "necessarily suggest that the burden of proof rests with the defense." ***Gregory***, 158 Wn.2d at 860 (*citing* ***Boyette***, 58 P.3d at 425) (death penalty case wherein the prosecutor did not shift the burden by arguing the defendant's failure to call "logical witnesses" or present "material evidence" to support his testimony about being

threatened in jail). Here, taken in its full context, the State was arguing the evidence of mitigation was not sufficient to meet a particular factor and not the defendant had an obligation to present evidence.

c. The State Did Not Improperly Comment On Defendant's Exercise Of His Rights Or "Set Up A False Dichotomy" Of Comparing Defendant's Rights To Others.

The defendant has a constitutional right to go to trial, and the State is prohibited from using the exercise of that right against the defendant. *See* U.S. Const. Amend 6; Wa. Const. art I, § 22. This court has recognized that "'[t]he State can take no action which will unnecessarily 'chill' or penalize the assertion of a constitutional right and the State may not draw adverse inferences from the exercise of a constitutional right.'" ***State v. Gregory***, 158 Wn.2d 759, 806, 147 P.3d 1201 (2006) (*quoting* ***State v. Rupe***, 101 Wn.2d 664,705, 683 P.2d 571 (1984)).

Defendant argues the State commented on his right to trial and that this set up a "false dichotomy" of his rights versus the victim's and society's rights.[6] Those claims take the State's argument completely out of the context in which it was made.

[6] The heading of this section of defendant's brief includes "the prosecutor called Mr. Gregory names." Brief of Appellant, at 32 (sec. d). The argument that follows, however, contains no example of name calling and no citation to any example in the record, so it appears the heading contains a misstatement, and that subject will not be addressed further.

Near the beginning of closing argument, the State discussed the concept of justice in a death penalty case, saying this case was about "justice for Geneine Harshfield as much as it's justice for Allen Gregory, the sentence that you return in this case." RP 3016. The State also discussed the meaning of justice:

> There was a Chief Justice of the highest court in New York who became a United States Supreme Court Justice who talked about the concept of justice in our society. He said: "Justice, though due to the accused, is due to the accuser, also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." That quote is important, more so in this case than in others, because you are balancing the defendant's rights with society's rights and Geneine Harshfield's rights and her family.
>
> Justice for a criminal defendant charged with a crime includes due process of our laws, includes representation by counsel, the right to confront witnesses and the right to a fair and impartial jury. He has a right to a fair sentencing hearing as a whole. And Allen Gregory has had each and every one of those things.
>
> Justice for society demands an opportunity to heal, not just for the victim's family but for all of society. Nothing that you do, no decision that you make is going to bring Geneine Harshfield back to her family. I can assure you, they [w]ould choose that option if they had it. But the fact is society has the right to impose punishment for crimes. It has the right to ensure the punishment that is imposed fits the crime. In this case, it will ensure that Allen Gregory never hurts another person. That's why we talk about the concept of an appropriate sentence not just a sufficient sentence.

RP 3019-20.

There is nothing improper about this argument. The State never commented on whether or not the defendant should have had a penalty phase hearing or argued that because he is exercising his rights that the jury should hold that against him when deciding what penalty to impose. The State discussed the justice system as a whole and the punishment options that exist in a death penalty case, but there was no request the jury lower the burden of proof or use any improper consideration in reaching its decision. Further, throughout closing argument, and rebuttal argument, the State addressed the proper burden of proof, the proper party who bore that burden, and the evidence that was admitted at trial that proved the proper verdict.

Defendant also argues the State commented on his "right to a jury trial" by mentioning the defendant "had all his rights" and "now he wants you to give him a break." Brief of Appellant, at 33. Again, defendant takes the State's argument completely out of context. Those two comments were separated by twenty-five pages of transcript, *see* RP 3021-22; 3046, and were not connected to the same topic.

The State never criticized the defendant for exercising his rights. Rather, the State compared the due process preceding imposition of a death sentence on defendant versus the complete lack of any due process the victim received from the defendant:

> Another argument that's made about the death penalty is that it is state sponsored murder. Geneine Harshfield was killed by the defendant. Now we're killing Allen Gregory. So are we any better than he is for killing another person? That argument is too simplistic because the only thing those two have in common is the fact that death results. Look at the differences. Allen Gregory had all of his rights. Genie Harshfield, she didn't get any. The defendant was judge, jury and executioner for her.

RP 3021-22.

The State may properly comment on the rights of a defendant that he did not afford his victim. *See* ***Davis***, 141 Wn.2d at 873. In ***Davis,*** this court upheld the use of the "judge, jury, and executioner" reference made during a discussion of the "historical context" of the death penalty. *See* ***Davis***, 141 Wn.2d at 872-73. This court upheld the same argument in Davis's appeal from his second death penalty. *See* ***Davis***, 175 Wn.2d 335-37.

The State's comments about "balancing" rights, taken in its actual context, were made discussing the concept of justice as a whole and society's right to demand justice for a victim and exact punishment on a defendant. *See* RP 3019-20. This same is true of the comment about the defendant acting as "judge, jury and executioner" of his victim. Both of those comments are proper under both ***Davis*** cases, *supra.*

The State, when arguing that defendant wanted "a break," was not criticizing defendant for exercising his rights. This comment came after

an extensive discussion of the minimal mitigation evidence presented and the horrifying facts of the crime. *See* RP 3038-46. In context, the State argued the defendant "wants you to give him a break" by finding that his weak mitigation evidence was sufficient to keep the State from meeting its burden of proof. That is proper argument.

d. The State Did Not Argue Outside The Evidence; Nor Was Any Part Of The Argument Designed To Inflame Passion Or Prejudice In The Jury Or Create A False Impression Of The Crime.

Defendant next argues the State argued facts that were not in evidence as a means to support "political arguments," "inflame the jury's passions," and create a "false proposition" about the nature of the crime. Those will be addressed separately, below.

"Allegedly improper comments by prosecuting attorneys must be reviewed in the context of the total argument, the issues in the case, and the instructions to the jury." ***Davis***, 141 Wn.2d 798, 872, 10 P.3d 977 (2000). When no objection was made at trial, defendant bears the burden of proving the impropriety of the comment and its prejudicial effect. *Id.* at 871 (*citing* ***State v. Gentry***, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995)). This court will not reverse if the error could have been cured by an instruction that was not timely requested. ***Davis***, at 871. Failure to make

such a timely objection waives the issue unless the defendant establishes the remark was so flagrant and ill-intentioned that it resulted in an enduring and resulting prejudice that could not have been cured by an instruction. ***Davis***, at 871-72. These standards have been consistently applied by this court in reviewing claims of prosecutorial misconduct in death penalty cases. *See, e.g.,* ***State v. Davis***, 175 Wn.2d 287 (2012); ***State v. Yates***, 161 Wn.2d 714 (2007); ***State v. Gregory***, 158 Wn.2d 759 (2006).

The first allegation is the State used facts not in evidence to support its "political arguments," citing to portions of the argument where the State discussed reasons why the death penalty is such a controversial topic. RP 3020-28. The argument started:

> There are commonly arguments that are made against the death penalty and I want to go through some of them because you might hear them from the defense and you might have heard them in the public and you might be thinking about it yourself.

RP 3020. The argument then addressed, in this order, "uncivilized punishment" (RP 3020-21), "state sponsored murder" (RP 3021-22), "misguided compassion" (RP 3022-23), "sympathy and prejudice" (RP 3023-24), "life without parole is good enough" (RP 3024-25), and "deterrence" (RP 3025-27). These arguments, and one more discussed

below, are the "facts not in evidence" statements complained of in defendant's brief. *See* Brief of Appellant, pp. 37-47.

There were no objections to any of these arguments on the grounds or arguing "facts not in evidence" as the basis for the objection, and only a single objection to any of the above listed arguments. The only objection came when the State argued that "there isn't any message that you can send to people who disagree with the death penalty...." RP 3027. Defense counsel's objection that the jury was "not here to send a message to anyone" was overruled when the State responded the argument was not that the jury should send a message but that no message could work. *See* RP 3027-28. That objection does not preserve the claims defendant now raises for the first time on appeal.

This court has previously held that it is proper for the State to argue the "historical context" of the death penalty in a penalty phase proceeding. *See* ***Davis***, 141 Wn.2d at 871-74. There is nothing improper about discussing "the issues in the case." *Id.* at 872. In a capital case, where the jury is about to decide between a life sentence and a death sentence, it can hardly be said that common arguments about the death penalty are not an issue in the case. The State is entitled to talk about the issues that surround the decision to be made by each of the jurors,

individually and collectively, when anything other than a unanimous decision for death will result in a life sentence.

To the extent the State's discussion of these issues included "facts" that were not "in evidence," the jury was specifically instructed it "must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." CP 1069. Jurors are presumed to follow the court's instructions. *See, e.g.,* ***State v. Stenson***, 132 Wn.2d 668, 729-30, 940 P.2d 1239 (1997).

The defendant cannot show there was any prejudice resulting from the arguments referenced above in the "historical context" part of the closing argument. The focus of that part of the argument was the topic of the death penalty in general, not the verdict in this particular case. Those subjects were discussed in the general context of why having the death penalty in our society was appropriate, not whether it should be imposed on this defendant, and certainly not imposed in the absence of sufficient factual proof.

Defendant next argues the State argued facts not in evidence to create a "made-up narrative of Ms. Harshfield's last moments." Brief of Appellant, at 47. This court previously rejected the argument that describing a murder victim's last moments of life before being murdered was prosecutorial misconduct. *See* ***Davis***, 175 Wn.2d at 334-36. In

Davis, the State in closing argument asked the jury to consider the victim's final hour when the defendant was burglarizing, robbing, raping, and killing her, and the State's description of those moments included dialogue between the victim and defendant. *See Id.* This court found this portion of the State's argument "borders on improper" because, while it was reasonable to argue the victim struggled against the defendant, "inventing actual dialogue stretches the idea of a reasonable inference to near its breaking point." ***Davis***, at 338. This court rejected the claim of misconduct because there had been no objection at trial and the statements were not flagrant and ill-intentioned in the context of the entire argument. *Id.* at 338-39. The court said, however, that while it was "the prosecutor's responsibility to aid the jury in comprehending the brutality of the crime," "the better practice would be to not put words in [the victim's] mouth at all." ***Davis***, at 339.

In this case, when the State described the victim's last moments, there was no use of any dialogue between the defendant and Ms. Harshfield. The State asked the jury to consider what the victim was thinking and doing at the time, not what was said between the defendant and victim. That is proper argument.

During this portion of the State's argument, there were three objections, but none was addressed to the overall subject of argument, the

interaction between defendant and victim. *See* RP 3048-53. Rather, each was raised about a specific fact being stated at the time.

Prosecutor:	And then, just for good measure, Allen Gregory decided that murder alone wasn't sufficient, so he took her and he tried to start to cut her throat. And you know that she resisted him. And you know that she shook her head and jerked her head and that [she] moved her head every way she could and
Defense Counsel:	Objection. Facts not in evidence.
Prosecutor:	-- you know that –
Defense Counsel:	I'm sorry. Mr. Neeb, there's an objection.
Prosecutor:	And I'm about to explain why there is facts in evidence.
Defense Counsel:	I'll overrule the objection.
Prosecutor:	We know that because there were multiple wounds in her neck. There's a stab wound on the side, there's a slice that got started, there's a slice that got started and there's a third slice, and then there's the one that's all the way across her neck. Three or four times this defendant cut at Geneine Harshfield.

RP 3051.

The State's argument that Ms. Harshfield resisted the defendant's efforts and moved her head to keep from having her throat cut is a

reasonable inference from the evidence that there were multiple wounds on her neck, larger and smaller, deeper and shallower, slicing and stabbing. The court properly overruled the defendant's objection to this argument.

Defendant's second objection came when the State mentioned the defendant "broke a bone her neck." *See* RP 3052. That objection was overruled. The facts at this penalty phase did not include the broken bone in the victim's neck, so that individual fact was not in evidence, and the defendant's objection was well-taken.[7] Given the horrendous extent of the injuries to the victim's neck, that one fact is clearly not prejudicial, and there is no evidence the State mentioned that to inflame prejudice of the jury. The jury presumably followed the court's instruction to disregard any "fact" that was not supported by the evidence.

Prosecutor:	And the indignity of all, the indignity of it all is when he pulled her head back, she was looking at the window that faced her mom's house...."
Defense Counsel:	Your Honor, I'm going to object. There's no facts in evidence. This is totally inappropriate argument.

[7] That evidence was presented during the first penalty phase in 2001 but was not repeated when Dr. Ramoso testified about the results of his autopsy of the victim. *See* ***Gregory***, 158 Wn.2d at 811.

Prosecutor:	[Lt.] Karen Kelly said that the bedroom – the window her head was out –
Defense Counsel:	We should argue this outside out –
Prosecutor:	Maybe he should –
The Court:	Overrule the objection. You may continue.

RP 3052-53.

The evidence at trial was that Ms. Harshfield's bedroom window faced north, and her mother's house was to the north of hers. RP 2549-50; 2360-61. Her head was resting against the wall under the window that was on the north wall of her bedroom. *See* Trial Exhibit #5, #32, #46. It is a reasonable inference that when the defendant pulled Ms. Harshfield's head back and slit her throat several times, she was able to see the window directly in front of her, which is the window that showed her mother's house. The trial court properly overruled the objection to the State's argument.

Finally, defendant argues the State's comment that defendant's crime was "as bad as it gets" was a reference to "facts" not in evidence about other crimes and defendants.

This court previously held the phrase "worst of the worst" used in closing argument to describe this defendant's crime did not violate due

process or constitute prosecutorial misconduct. ***Davis*** 175 Wn.2d at 340 (citing ***Gregory***, 158 Wn.2d at 856). The court also said asking "if not now, then when" in relation to the death penalty for the defendant on trial did not argue facts not in evidence by creating an inference that the specific defendant was worse than other defendants about whom no evidence had been presented. ***Davis***, 175 Wn.2d at 340; This court has upheld statements like these when it is clear from the context of the entire closing argument that the State is arguing the facts of the specific crime merit death on their own, without comparison to other cases; this does not open the door to presentation of evidence of other murder cases. *See* ***Gregory***, 158 Wn.2d at 857-58 (*citing* ***State v. Brown***, 132 Wn.2d 529, 568-69, 940 P.2d 546 (1997) (prosecutor's statement "If the death penalty is not appropriate in this case, I'd ask you to try to think of a case that it would be appropriate in" not improper)).

The State was clearly arguing the facts of this particular crime when it argued the crime as "as bad as it gets." In its full context, the State said "There is no fact about this offense that mitigates it. This is as bad as it gets." RP 3030. There was no objection at the time the statement was made. *See* RP 3030. After the State finished argument, and after the noon recess, defense counsel asked to be heard based on his notes that the State said the phrase in the context of "some crimes ... are so bad that the

death penalty is the only right thing." RP 3056. The defense did not ask for a curative or limiting instruction, but rather moved for a mistrial, which was denied. RP 3063. In making its ruling, the court recognized the statement "was used in reference to the actual facts and circumstances of the crime and not even an inference to any other type of crimes that might have been committed by any other persons. RP 3063.

That statement was not made during a discussion about the death penalty for this defendant ***as compared*** to others. Rather, it was made as the State was going through the definition of what constitutes a mitigating factor. *See* RP 3029-30. In its full context, the State was arguing that there was no evidence within this offense that mitigated the defendant's conduct. Defendant attacked Ms. Harshfield in her own kitchen, forced her to the bedroom, bound her so she could not resist, raped her vaginally and raped her anally, stabbed her in the back three separate times, each 3 inches or more deep into her chest cavity, sliced and stabbed her in the neck several times, through the muscles, through cartilage, and into the esophagus behind it, then took her diamond earrings out of her ears and any cash he could find. The statement "as bad as it gets" certainly describes the facts of this particular case, the violence, humiliation, and degradation inflicted on Ms. Harshfield by this defendant during this

incident. The State's comment this crime was "as bad as it gets" was a proper label for the facts of this crime.

e. The State's Comment On Defendant's Demeanor Was Improper, But The Trial Court Properly Granted Defense Counsel's Remedy For That Comment By Sustaining A Timely Objection, So Any Potential For Prejudice Was Cured.

It is improper for the State to comment on a defendant's demeanor while he is in the courtroom, as opposed to while on the witness stand, in a manner that suggests the jury should draw a negative inference. ***State v. Smith***, 144 Wn.2d 665, 679, 30 P.3d 1245 (2001) (citing ***State v. Klok***, 99 Wn. App. 81, 85, 992 P.2d 1039 (2000)). While such comment might touch on a constitutional right, the prejudice that might result from such comment can be cured by an instruction from the court. ***Smith***, 144 Wn.2d at 679-80 *(citing* ***State v. Belgarde***, 110 Wn.2d 504, 507, 755 P.2d 174 (1988)); ***Klok***, 99 Wn. App. at 80. If there is no objection at trial, the issue on appeal is whether the comment was so flagrant and ill-intentioned that no curative instruction would have been effective. ***Smith***, at 679 (*citing* ***Belgarde***, at 507).

During closing argument, the State made two references that are challenged on appeal. The first comment came near the beginning of

closing, when the State was talking about the undisputed fact of the defendant's guilt for the substantive crime:

> The issue in this case is not a sufficient punishment for Allen Gregory. Make no mistake. That person sitting there, Allen Gregory, sitting behind his attorneys so you're not seeing him right now, is the man who did all of these horrific things to Geneine Harshfield. There is no doubt about that. There is no question about that.

RP 3012. There was no objection to that comment.

This comment is not improper. The prosecutor's words are clearly aimed at getting the jury to look at the defendant, with the prosecutor then realizing the jury cannot see him due to the way he and his attorneys are sitting. The fact that this did not prompt an objection reinforces the conclusion that this was an innocuous comment and one that accurately described how participants in the trial were sitting. Even were this court to find some nefarious motive behind this comment, the comment is not the type to immediately engender bias or prejudice. *See* ***Smith***, 144 Wn.2d at 678-79 (prosecutor said defendant had "an attitude" and "a chip on his shoulder"); ***Klok***, 99 Wn. App. at 82 (prosecutor said defendant was "the guy who has been laughing through about half of this trial"); *compare* ***Belgarde***, 110 Wn.2d at 506-08 (instruction could not have cured prejudice after prosecutor called group defendant was associated with a "deadly group of madmen" and "butchers," likened the group to the IRA

and "Kadafi" and said the group was responsible for "Wounded Knee"). The State's comment in this first instance was less prejudicial than those in ***Smith*** and ***Klok***, so with a timely objection, this issue could have been easily cured.

The second comment was made when the State was discussing the facts of the crime:

> You review the evidence and you listen to the argument, but I'll tell you this, folks, the fact that he raped her and stabbed her and cut her throat and tried to cut her head off is psychotic, but it's not mentally ill. It's crazy. There's other words for it that aren't appropriate in court. But not defensible by any imagination for something that happened to him. No evidence of drug use. No evidence of alcohol use. No evidence of psychological impairment. The fact is, if you look at the crime itself, he did it because he got off on it. He did it because he enjoyed it. And he can smirk over there all he wants to at my argument, but that's what the evidence shows.

RP 3032-33.

This second comment was improper and should not have been made. Not surprisingly, it prompted a timely objection, which was sustained by the court:

Defense Counsel:	Your Honor, let the record reflect that Mr. Gregory is not smirking and that's an improper argument about the defendant.
The Court:	Sustain the objection.

RP 3033.

It is important to note that not only did the interjection by defense counsel lodge an objection against the argument, it denied the factual premise underlying the prosecutor's argument by asserting the defendant was not smirking. Defense counsel effectively gave his own "curative instruction" by disputing the State's representation of defendant's countenance at the time and by stating the State's argument was improper. The court immediately validated both of defense counsel's comments by sustaining his objection. Defendant on appeal does not argue the trial court's ruling was incorrect or ineffective. Following this exchange the State moved immediately onto another topic. RP 3033.

The State concedes the impropriety of its remark in this second instance. But the court promptly eliminated any prejudice by sustaining defense counsel timely objection and comment. Defense counsel did not seek further remedy, either a further instruction from the court or a mistrial. Rather, counsel appears to have made the tactical decision to address the issue with his own comment that directly refuted the State's comment. *See* ***Smith***, 144 Wn.2d at 679-80 (this court declined to reverse for misconduct when defense counsel made a tactical decision not to formally object to an improper comment on defendant's demeanor and addressed it in himself later). The situation in this case is remarkably

similar to that in ***Smith*** and ***Klok***, except that the trial court's actions herein eliminated any prejudicial effect.

This court should find the first comment was not improper and the second comment was appropriately and effectively handled by the trial court.

f. There Was No Cumulative Error In Closing Argument That Affected The Defendant's Right To A Fair Penalty Phase Proceeding.

A defendant is "entitled to a fair trial but not a perfect one, for there are no perfect trials." ***In re Elmore***, 162 Wn.2d 236, 267, 172 P.3d 335 (2007) (*citing* ***Brown v. United States***, 411 U.S. 223, 232, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973)). The doctrine of cumulative error recognizes that sometime numerous errors, each of which standing alone might have been harmless, can combine to deny a defendant not only a perfect trial, but also a fair trial. ***In re Lord***, 123 Wn.2d 296, 332, 868 P.2d 835 (1994).[8]

The cumulative error doctrine is intertwined with the harmless error doctrine in that the type of error will affect the court's weighing of the errors. ***State v. Russell***, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994). There are two dichotomies of harmless error that are relevant to the

[8] Subsequent history omitted.

cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitution errors have a more stringent harmless error test and therefore will weigh more on a scale when accumulated. *See Id.* Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *See Id.*

Second, there are errors that are harmless because of the strength of the untainted evidence and errors that are harmless because they are not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. *See, e.g.,* ***State v. Johnson***, 90 Wn. App. 54, 74, 950 P.2d 981 (1998). Errors that are not prejudicial can never add up to cumulative error because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See, e.g.,* ***State v. Stevens***, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025 (1990).

Cumulative error does not turn on whether a certain number of errors occurred. *Compare* ***State v. Whalon***, 1 Wn. App. 785, 804, 464 P.2d 730, *review denied*, 78 Wn.2d 992 (1970) (three errors was cumulative and required reversal), *with* ***State v. Wall***, 52 Wn. App. 665, 679, 763 P.2d 462 (1988), *review denied*, 112 Wn.2d 1008 (1989) (three errors was not cumulative error) *and* ***State v. Kinard***, 21 Wn. App. 587, 592-93, 585 P.2d 836, *review denied*, 92 Wn.2d 1002 (1979) (three error

was not cumulative error). Rather, reversal for cumulative error is reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, *see, e.g.*, ***State v. Badda***, 63 Wn.2d 176, 385 P.2d 859 (1963) (trial court failed to give instructions: 1) not to use co-defendant's confession, 2) to disregard a statement of the prosecutor, 3) to weigh an accomplice's testimony with caution, and 4) to be unanimous in their verdicts), or because the errors centered around a key issue, *see, e.g.*, ***State v. Coe***, 101 Wn.2d 772, 684 P.2d 668 (1984) (four errors relating to defendant's credibility combined with two errors relating to credibility of state's witnesses when credibility was central to both State and defense cases), or because the conduct was repeated so many times that a curative instruction lost all effect, *see, e.g.*, ***State v. Torres***, 16 Wn. App. 254, 554 P.2d 1069 (1976) (seven separate incidents of prosecutorial misconduct). Cumulative error does require, however, that the errors that accumulate be prejudicial errors. *See* ***Stevens***, 58 Wn. App. at 498.

In this case, defendant has accused the State of multiple acts of misconduct during closing argument. Most of those accusations are baseless, and the State's argument was not improper at all in those instances. *See* Argument, *supra*. The few occasions where there were misstatements made during closing argument were either cured by the trial

court or disregarded by the jury based on the court's instructions. There was no prejudicial error that resulted from prosecutorial misconduct, so there can be no cumulative error.

8. DEFENDANT PRESENTS NO COMPELLING ARGUMENT AS TO WHY THIS COURT SHOULD REVIEW CLAIMS THAT WERE NOT RAISED BELOW OR REVISIT ITS MANY DETERMINATIONS THAT WASHINGTON'S CAPITAL PUNISHMENT STATUTES DO NOT VIOLATE THE EIGHTH AMENDMENT OR ARTICLE I, §14 OF THE STATE CONSTITUTION.

Defendant contends that, for various reasons, his death sentence violates the Eighth Amendment of the federal constitution prohibiting "cruel and unusual punishments" and the state constitution's prohibition against cruel punishments in article I, §14. Appellant's brief at pp. 104-15, 228-38, 239-56, 264- 277. This court has repeatedly rejected challenges to Washington's capital punishment provisions under the Eighth Amendment and article I, §14. As will be discussed below, defendant presents no compelling reason why prior cases rejecting these claims should be reconsidered.

a. Defendant Has Failed To Properly Preserve A Claim That Imposition Of The Death Penalty Scheme Is Disproportionate Under ***State v. Fain*** And Article I, §14 Of The State Constitution Or Show Any Reason Why The Court Should Reexamine Its Many Decisions Rejecting Similar Claims.

In reviewing a habitual criminal sentence in ***State v. Fain***, 94 Wn.2d 387, 617 P.2d 720 (1980), this Court articulated four factors to be considered in analyzing claims of disproportionate or cruel punishment under the state constitution; those factors are: (1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment the defendant would have received in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction. Defendant contends that his death sentence is disproportionate under the analysis in ***Fain***, which noted the differences in languages between the federal constitution's protection against "cruel and unusual" punishment and the state's constitutional protection against "cruel" punishment, and which found the state provision provides greater protection. *See* Appellant's brief at p. 104-116.

The decision in ***Fain*** issued prior to ***State v. Gunwall***, 106 Wn.2d 54, 720 P.2d 808 (1986) so the Court did not conduct a *Gunwall* analysis before finding greater protection under the state constitution. When a *Gunwall* analysis was done on article I, §14, this Court found no reason to

give it a broader interpretation than that given under the similar federal provision. ***State v. Dodd***, 120 Wn.2d 1, 20-22, 838 P.2d 86 (1992).

This Court has repeatedly examined whether RCW 10.95 violates article I, §14 and always found that it does not. ***In re Cross***, 180 Wn.2d 664, 730-31, 327 P.3d 660 (2014); ***State v. Yates***, 161 Wn.2d 714, 792, 168 P.3d 359 (2007)(holding that chapter 10.95 RCW violates neither the Eighth Amendment nor article I, §14 as that provision has not been interpreted as providing more protection than its federal counterpart); ***State v. Gentry***, 125 Wn.2d 570, 631, 888 P.2d 1105 (1995)(noting that Const. art. I, §14 need not be interpreted more broadly than federal counterpart and holding introduction of victim impact evidence does not violate it); ***State v. Dodd***, 120 Wn.2d 1, 20-22, (analyzing Const. art.I, §14 under *Gunwall* factors and concluding that it does not extend greater protection than the Eighth Amendment and does not preclude a defendant from waiving a general review of his conviction); ***State v. Lord***, 117 Wn.2d 829, 915-16, 822 P.2d 177 (1991); ***Matter of Harris***, 111 Wn.2d 691, 763 P.2d 823 (1988); ***State v. Jeffries***, 105 Wn.2d 398, 428, 717 P.2d 722 (1986)(noting that the court has previously rejected defendant's claim that the death penalty violates Const. art. I, §14); ***State v. Campbell***, 103 Wn.2d 1, 31-35, 691 P.2d 929(1984), *cert. denied*, 471 U.S. 1094, 105 S. Ct. 2169, 85 L. Ed. 2d 526 (1985)(finding "no grounds for invalidating the

death penalty as cruel punishment in violation of Const. art. 1, § 14"); ***State v. Rupe***, 101 Wn.2d 664, 697-99, 683 P.2d 571 (1984)(holding that "so long as the sentencing procedures sufficiently protect against juries imposing the death penalty in an arbitrary manner, the death penalty is not per se unconstitutional" and noting that "to hold that the death penalty is per se unconstitutional [under the state constitution] would be to substitute [the court's] moral judgment for that of the people of Washington."). Defendant fails to address these prior precedents.

Moreover, defendant fails to identify where in the trial court he raised this claim. While one of defendant's motions to dismiss referenced art. I, §14 and cited to ***Fain***, it did so to support its argument that RCW 10.95.060(3) was unconstitutional because no guidance is given as to what "facts and circumstances of the murder" the jury may consider or how it should consider them. CP 524-542. This argument he pursues on appeal. *See* Appellant's brief at p. 239-56. The portion of his motion that cites to ***Fain***, however, contains no argument or analysis regarding the ***Fain*** factors or that his sentence disproportionally cruel. *See* CP 540.

Thus, to the extent that defendant relies upon the ***Fain*** factors to show his sentence is unconstitutional under art. I, §14, this Court's review is constrained by RAP 2.5 as ordinarily, the court does not address issues raised for the first time on appeal. RAP 2.5(a); ***State v. McFarland***, 127

Wn.2d 322, 332-33, 899 P.2d 1251 (1995). The rules of appellate procedure provide an exception for "manifest error affecting a constitutional right." RAP 2.5(a)(3). But this narrow exception "is not intended to swallow the rule, so that all asserted constitutional errors may be raised for the first time on appeal." ***State v. Trout***, 125 Wn. App. 313, 317, 103 P.3d 1278 (2005). "Manifest error" requires defendant to demonstrate actual prejudice and he must make a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case. ***State v. Ohara***, 167 Wn.2d 91, 99, 217 P.3d 756 (2009).

> In determining whether the error was identifiable, the trial record must be sufficient to determine the merits of the claim. ***If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.***

Id. (internal citations and quotations omitted)(emphasis added).

In presenting his argument regarding the ***Fain*** factors, defendant refers the court to factual information that is not found in the trial record.

See Appellant's brief at p. 110-15.[9] Because the facts that defendant needs to support his claimed error are not in the trial record, his claim is not manifest and may not be raised under RAP 2.5.

As noted above, this court has repeatedly rejected claims that Washington's capital punishment statutes violate the state constitutional prohibition against cruel punishment. If defendant wanted to assert a new challenge to this long standing controlling authority, he needed to raise this claim in the trial court and present his evidence to support the factual claims underlying his argument. More than once, a criminal defendant's evidence - such as a study, statistics, or research – that purports to show some constitutional problem with capital punishment has not held up when subject to scrutiny in a trial court. *See* ***State v. Bartholomew***, 98 Wn.2d

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[9] The defendant refers the court to articles found on web sites that are opposed to the death penalty and to polls that purport to show declining support for the death penalty. The ABA report he references was presented as a basis for finding an Eighth Amendment violation in ***In re Cross***, 180 Wn.2d at 732, but the court did not find it persuasive. Had this issue been raised and litigated below, the State could have presented opposing information or challenged the methodology of the polls presented. For example, defendant claims that polls show a sharp decline in public support. *See* Appellant's Brief at p. 112-13. Looking objectively at the information the Gallup Poll has collected since 1936 regarding the death penalty, it shows that there was a drop in public support for the death penalty in the 1960s and a spike in public support in the early 1990s, but that for the most part public opinion over the years has been in support of the death penalty at a fairly constant rate between 60-70%. *See* Appendix B. Defendant suggests that there are few executions of single victim defendants. *See* Appellant's Brief at p. 111. The executions listed in the execution database on the Death Penalty Information Center's website – the only portion of this website that presents facts without commentary or bias- shows that of the executions in the United States occurring in 2014 and so far in 2015, 37 of the 48 prisoners executed were for single victim offenses. *See* Appendix C. The State disputes most of the claims made in this section of the brief. This Court however is a reviewing court, not a fact finding court. This is why claims that are based upon facts need to be litigated in the trial court.

173, 209-11, 654 P.2d 1170 (1982) (***Bartholomew I***) (discussing a California case that held a hearing to examine evidence that a death qualified jury was guilt prone and found that the research data presented by the defense was distorted); ***McClesky v. Kemp***, 481 U.S. 279, 287-91, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987) (while Supreme Court assumed the validity of the Baldus study, upon which McClesky relied to show that his death sentence was based upon his race, the District Court had held an evidentiary hearing on the study and found the methodology was flawed in several respects, *see* ***McCleskey v. Zant***, 580 F.Supp. 338 (ND Ga.1984)). Had this been properly raised below, the State would have had the opportunity to develop the record with competing evidence and argument. If this had been done the issue would have been properly presented for appellate review. It is not properly before this court for review.

Nor can defendant show how his claimed error had any practical and identifiable consequences in the trial of his case. His claim that the Washington's death penalty violates the state constitution did not affect the presentation of evidence, the court's instructions, the burden of proof, or the jury's deliberation; his trial was unaffected by this claim. Therefore, this newly raised claim does not meet the criteria of RAP 2.5 and should be summarily rejected.

The court should note that defendant's primary contention is that support for the death penalty is waning, but if the people of this state wanted to get rid of the death penalty it could happen as early as next November through the initiative process. Almost every Legislative session, there are bills introduced to abolish the death penalty (*see* HB 1739 and SB 5639 in the 2015-16 session), but they do not get enacted because there is not enough support among the members of the Legislature to abolish the death penalty. Since death penalty abolitionists are unable to convince large numbers of Washingtonians to abolish the death penalty, defendant turns to this court in hopes that he can convince five of the court's members that abolishing the death penalty is reflective of current public opinion.

Essentially, defendant asks this court to become a legislative entity and to override the desire of the people of this state to have the death penalty as an available sanction for certain homicides. Courts have wisely ignored pleas to step into what should be a legislative decision.

> Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.

Gregg v. Georgia, 428 U.S. 153, 175, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976)(footnote omitted)(quoting ***Dennis v. United States***, 341 U.S. 494, 525, 71 S. Ct. 857, 95 L. Ed. 1137 (1951)(Frankfurter, J., concurring in affirmance of judgment). This court has long recognized that arguments about the morality of the death penalty are an issue for the legislature not the court.

> Clearly the mandate of the people of Washington, as expressed through the legislative and initiative processes, is to impose the death penalty. We, as Justices, are bound to uphold and enforce this law absent a constitutional prohibition. We must not superimpose personal morality nor utilize strained interpretations of the law to sidestep this difficult issue.

State v. Campbell, 103 Wn.2d at 34. This quote comes at the end of an analysis where this Court rejected Campbell's claim that the death penalty violated the state constitution's prohibition against cruel punishment using the factors set forth in ***Fain***. *Id.* at 31- 34. It found "no grounds for invalidating the death penalty as cruel punishment in violation of Const. art. I, §14." Defendant's argument asks this court not only to step out of its judicial role and become a legislative body, but to also ignore precedent. This court should decline that invitation.

b. This Court Has Repeatedly Found That Washington's Death Penalty Scheme Does Not Violate The Eighth Amendment's Prohibition Of Cruel And Unusual Punishment And Defendant's Arguments Fail To Raise Any Proper Legal Argument As To Why This Claim Needs Reexamination.

Under ***Furman v. Georgia***, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), and its progeny, the death penalty is constitutional only if it is properly constrained to avoid freakish and wanton application. *See* ***Gregg v. Georgia***, 428 U.S. 153, 169, 173, 189, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976)("where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."). An Eighth Amendment claim generally focuses on whether the challenged provision "fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with ... open-ended discretion." ***Maynard v. Cartwright***, 486 U.S. 356, 361-62, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988). The capital sentencing scheme must also genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on

the accused compared to others found guilty of murder. *See* ***Lowenfield v. Phelps***, 484 U.S. 231, 244, 108 S. Ct. 546, 554, 98 L. Ed. 2d 568 (1988).

Over the years there have been numerous challenges to Washington's death penalty statute as being violative of the Eighth Amendment's prohibition against cruel and unusual punishment. This court has repeatedly rejected such challenges holding that Washington's statutes meet this Eighth Amendment standard as they: 1) properly constrain prosecutorial discretion in seeking the death penalty; 2) properly direct the jury to consider appropriate factors; and, 3) provide for meaningful mandatory appellate review in every case. *See* ***State v. Cross***, 156 Wn.2d 580, 623, 132 P.3d 80 (2006), *citing* ***State v. Brett***, 126 Wn.2d 136, 210–11, 892 P.2d 29 (1995); ***State v. Yates***, 161 Wn.2d 714, 791-94, 168 P.3d 356 (2007)(noting the statute has eight statutory protections in addition to mandatory proportionality review that prevent arbitrary and capricious application of the death penalty and specifically rejecting claims that it violates an international treaty or that one prosecutor's decision to allow Yates to avoid the death penalty by pleading guilty to 13 murders while another sought the death penalty on two additional murders rendered the statute unconstitutional or disproportionate); ***In re Davis***, 152 Wn.2d 647, 750-53, 101 P.3d 1 (2004)(rejecting claims that the statute discriminates against minorities and the poor); ***In re Brown***, 143 Wn.2d

431, 457-61, 21 P.3d 687 (2001)(rejecting claims that "budgetary constraints" rendered the sentence unconstitutional); ***State v. Dodd***, 120 Wn.2d 1, 92-96, 838 P.2d 86 (1992)(holding RCW 10.95 does not violate the Eighth Amendment because it allows defendant to waive his general right to appellate review); ***Matter of Harris***, 111 Wn.2d 691, 763 P.2d 823 (1988)(rejecting claim that Washington's statute does not meet the standard of reliability that death is the appropriate punishment); ***State v. Mak***, 105 Wn.2d 692, 758-60, 718 P.2d 407 (1986);***State v. Rupe***, 101 Wn.2d 664, 697–701, 683 P.2d 571 (1984). To determine whether there is a violation, the court "looks to the sentencing scheme as a whole to determine that 'discretion under the statute was sufficiently controlled by clear and objective standards.'" ***State v. Campbell***, 103 Wn.2d 1, 30, 691 P.2d 929 (1984), citing ***Pulley v. Harris***, 465 U.S. 37, 45, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984), citing ***Gregg v. Georgia***, 428 U.S. 153, 197-98, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); ***State v. Bartholomew***, 98 Wn.2d 173, 192-98, 654 P.2d 1170 (1982)(although provision allowing prosecution to present non-conviction data must be stricken as violative of Eighth Amendment, that portion may be severed without affecting constitutionality of remainder of statute).

Once again a capital defendant is asserting that RCW 10.95 violates the Eighth Amendment. He argues that: 1) it gives the prosecutor

too much discretion after appellate remand as to whether to seek the death penalty (Appellant's brief at p. 228-38); 2) it is vague and overbroad because it does not sufficiently define what "facts and circumstances" may be presented at a second sentencing hearing (Appellant's brief at p. 239-56); and 3) it fails to properly narrow class of eligible defendants (Appellant's brief at p. 264- 277).

The first of these arguments is being raised for the first time on appeal. Defendant brought motions to dismiss premised on the second and third arguments in the trial court. CP 301-45, 524-42. The prosecution filed a response and after a hearing, the court denied the motions. CP 557-62, 563-67, 620-21, 622-623; 6/24/11 RP 293-95, 295-308. As for the failing to sufficiently narrow the class, the trial court noted that the Supreme Court has consistently upheld the constitutionality of RCW 10.95.020 against Eighth Amendment challenges including when the aggravator applicable to defendant's case was at issue. 6/24/11 RP 295. The trial court saw no reason to look beyond the Supreme Court's prior decisions when none of the four aggravating factors that were added to the statute were at issue in defendant's case. CP 622-23. This court should affirm trial court's decision upholding the constitutionality of Washington's statutes.

i. Defendant Has Failed To Show Any Non-Compliance With RCW 10.95. 050(1) Or That This Provision Is Unconstitutional Because It Gives Too Much Discretion To Prosecutors.

Washington's death penalty provisions, in particular RCW 10.95.020 and 10.95.040(1), set parameters for the prosecutor as to which cases are eligible for the death penalty and guidance in the exercise of his discretion as to when a notice of special sentencing proceeding should be filed. Once a prosecutor makes the decision to file a notice of special sentencing proceeding, his exercise of discretion has largely come to an end. For when a defendant is convicted of aggravated murder "a special sentencing proceeding *shall be held* if a notice of special sentencing proceeding was filed and served as provided by RCW 10.95.040[ ] and [n]o sort of plea, admission, or agreement may abrogate the requirement that a special sentencing proceeding be held." RCW 10.95.050(1) (emphasis added). In ***State v. Bartholomew***, 104 Wn.2d 844, 710 P.2d 196 (1985)("***Bartholomew III***"), the court examined the provisions of RCW 10.95.050 and held the statute creates a mandatory duty to hold a second penalty hearing after appellate remand when a defendant remains convicted of aggravated murder but the prior jury's verdict for death was vacated on appeal. *Id.* at 848–49.

In Gregory's case, the prosecution complied with both RCW 10.95.050 and the holding of ***Bartholomew III***. After appellate review, defendant remained convicted of aggravated murder but his death sentence had been vacated. ***State v. Gregory***, 158 Wn.2d 759, 867,147 P.3d 1201 (2006). As mandated by RCW 10.95.050, a second jury was impaneled and asked to determine whether sufficient mitigating circumstances existed to merit leniency; the jury concluded there were not sufficient mitigating circumstances and sentenced him to death. CP 1156. Defendant cannot complain that the statute was not followed in his case.

Rather defendant contends that this *court* has been inconsistent as to whether or not the prosecution must hold a second penalty phase hearing after appellate remand when the death verdict was vacated on appeal. This argument was not litigated in the trial court. Defendant's support for this argument consists of: 1) a citation to the concluding paragraph of the majority opinion in ***State v. Clark***, 143 Wn.2d 731, 783-84, 24 P.3d 1006 (2001)(" we reverse his death sentence and remand to the trial court *where, if the state desires, a new special sentencing proceeding may take place*." (emphasis added)); and, 2) language in the prior appellate decision in this case that, defendant contends, suggests a new sentencing hearing was optional, ***State v. Gregory***, 158 Wn.2d.at 849

("since the State *may* seek the death penalty at resentencing, the issues raised in this appeal may arise again." (Emphasis added)).

The State submits that defendant's "evidence" of inconsistency does not show actual inconsistency and, therefore, fails to support his claim. First, this court did not cite to RCW 10.95.050 in ***Clark***, much less construe it in a manner inconsistent with its decision in ***Bartholomew III***. Defendant's reliance upon language in a concluding paragraph in a case where the relevant statute was not even discussed cannot be said to be signaling an inconsistent interpretation of the relevant statute. The same is true of this Court's opinion in ***State v. Gregory***, 158 Wn.2d 759. This court referenced RCW 10.95.050 once in that entire opinion and did not construe its terms at all. *Id.* at 896. The only time this court revisited its construction of RCW 10.95.050 was in ***State v. Benn***, 120 Wn.2d 631 845 P.2d 289 (1993). The court did not depart from its holding in ***Bartholomew III***, but reiterated it:

> The prosecution has no right, statutory or constitutional, to usurp the jury's functions to determine mitigation in this case, and make the decision whether the defendant should live or die. The prosecutor does have the right to appear before the jury and ask for mitigation and the sparing of defendant's life. The final decision, however, will rest with the jury, subject to review by this court.

Benn, 120 Wn.2d at 672, citing ***Bartholomew[III]***, 104 Wn.2d at 850. As noted in this quote, the holding of a second penalty phase hearing does not

necessarily mean that the prosecution will still be actively *seeking* the imposition of the death penalty. Thus, this court's phrasing in the prior decision stating that "the State may seek the death penalty at resentencing" could refer to this Court's recognition that the State *might* take a different position as to whether the death penalty should be imposed at a second sentencing hearing as opposed to it reflecting the possibility that a second sentencing hearing might not occur. Defendant has shown no inconsistency in the opinions of this court.

Defendant also contends that the record suggests "*the parties* below believed that the Pierce County Prosecuting Attorney retained the discretion to decide whether to seek the death penalty a second time." Appellant's brief at p. 233 (emphasis added). Defendant's three citations to the record do not support his claim. The first citation to the record pertains to a hearing on June 3, 2009, when the rape charges were still pending. 6/3/09 RP 121-22. This portion of the record does no more than reflect the prosecutor's personal belief that were defendant to be acquitted of the rape charges, he would expect the defense attorneys to lobby the elected prosecutor to change his mind about seeking the death penalty. *Id.* The second citation is to a hearing on August 28, 2009, again at a time when the rape case is still pending, and the parties were before the court to discuss the trial dates for both cases. 8/28/09 RP 131. The prosecutor

indicates to the court that defense counsel had "met with the administration in my office in an attempt to determine whether or not there is going to be any ability to resolve *this case* short of a trial" and that discussions were at "a dead end or an impasse;" consequently, it was now clear that "these cases are both going to trial." 8/28/09 RP at 132-33 (emphasis added). It cannot be determined from the record whether the prosecutor was referring to the rape case or the homicide case when he spoke of "this case." *Id.* No further information is provided as to why the parties were at an impasse. The final citation to the record occurs after the rape case has been dismissed and the parties are continuing the hearing date for the penalty phase. 8/26/10 RP 222-25. The record reflects a statement by defense counsel that the prosecutor "has made known on numerous occasions , the impetus for going forward on the capital case was the rape conviction, which is no longer present, and that may have some impact on the state's decision to continue on in that vein." *Id.* at 222. The prosecutor responds that while he has indicated that it would be more difficult to get a death sentence without the rape conviction that he did not think it was impossible and that, essentially, the violence and nature of the homicide spoke for itself. ***Id.*** at 224. The prosecutor also made it clear that any such statements were his personal opinions and not necessarily the opinion of his office. *Id.*

In sum, all the record shows is that defendant's attorneys were trying to negotiate defendant's cases and that they hoped to convince the elected prosecutor to change his mind about seeking death penalty against defendant. The record is too vague to establish anything more about the negotiations. For example, the negotiations could have involved whether the prosecution would advocate for the death penalty at a second penalty phase rather than whether a second penalty phase would occur. What is known is that no resolution between the parties was reached and that a second penalty phase hearing occurred in accordance with RCW 10.95.050 and ***Bartholomew III***. Defendant has shown no error in his case.

Unable to show any error in his own case, defendant contends that as Richard Clark did not face a second penalty phase hearing after this Court vacated his death sentence that this has rendered RCW 10.95.050 unconstitutional under ***Bartholomew III*** as it gives unfettered discretion to prosecutors and is applied inconsistently. *See* ***State v. Clark***, 143 Wn.2d 731, 780, 24 P.3d 1006 (2001); Trial Report (TR) No. 277; Appellant's brief at 235-38. His argument is both factually unsound and legally unclear.

First he contends that the reason Mr. Clark did not face a second penalty phase hearing was because he admitted his guilt. Appellant's brief

at p. 236. Mr. Clark's conviction for aggravated murder remained intact after his direct appeal; the prosecutor did not need Clark to admit guilt. *See* ***Clark***, 143 Wn.2d at 783. While the second Trial Report filed in Mr. Clark's case notes that Mr. Clark did admit he was solely responsible for the victim's death, it does not indicate that this was the reason[10] for the prosecutor's change in position as to the death penalty.

Defendant fails to cite to anything in the record before this court to show that an "admission of guilt" was being demanded by the prosecution in his own case. Again, defendant's conviction was left intact after the first appeal and the state did not need an admission of guilt from defendant in order to proceed with the second penalty hearing. Thus, defendant's argument that he faced a second death penalty hearing because, unlike Clark, he wouldn't admit guilt has no basis in fact.

Next defendant asks a rhetorical question as to whether there is "any guarantee that the prosecutor's decision to seek death a second time against Mr. Gregory was not based on improper grounds?" Appellant's brief at 236. Defendant's initial position was that RCW 10.95.050 and ***Bartholomew III*** *require* the holding of the second penalty phase when the death sentence has been vacated on appeal and that there is no decision

[10] The reason indicated in the report is: "The wishes of the victim's family were a significant factor in the decision to withdraw the notice of special sentencing proceeding." TR No. 277 at p. 13.

for the prosecutor to make other than, perhaps, a decision about whether to advocate for the death penalty at the hearing. The fact that a second penalty phase hearing was held in defendant's case shows compliance with the statute, as opposed to "a decision based upon improper grounds." Defendant's argument now asks the court to infer improper motives from *compliance* with the statute. In short, his argument has come full circle and swallowed its own tail.

While defendant's argument is confusing, it seems to rest upon language in ***Bartholomew III*** that is dicta. In ***Bartholomew III***, the court construed the language of RCW 10.50.050 and found the "statute is clear, unambiguous, and requires that the trial court impanel a jury to decide the proper penalty after a remand on the death penalty question." ***Bartholomew III***, 104 Wn.2d at 848. This holding was based upon the rules of statutory construction, not the constitution. The next part of the decision begins a discussion of constitutional implications; this discussion was unnecessary to the holding based upon statutory construction and is, therefore, dicta. *See* ***Protect the Peninsula's Future v. City of Port Angeles***, 175 Wn. App. 201, 215, 304 P.3d 914, *review denied*, 178 Wn.2d 1022 (2013)(a statement is dicta when it is not necessary to the court's decision in a case; dicta is not binding authority.). The court in ***Bartholomew III*** went on to say: "To allow the prosecution this

discretion in a death penalty case absent specific statutory guidance *could* also give an unconstitutional delegation of authority to the prosecutor." *Id.* (emphasis added). In the discussion that follows, the court mentions only the Fourteenth Amendment's equal protection clause as being at issue and relies upon its decision in ***State v. Zornes***, 78 Wn.2d 9, 475 P.2d 109 (1970). ***Zornes*** is no longer good authority for its equal protection analysis; this court has recognized that the equal protection analysis in ***Zornes*** has been overruled by ***United States v. Batchelder***, 442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979). ***City of Kennewick v. Fountain***, 116 Wn.2d 189, 802 P.2d 1371 (1991).

Moreover, this court has repeatedly rejected the argument that RCW 10.95 et seq. is unconstitutional because it allows prosecutors too much unguided discretion in the decision to seek the death penalty. ***State v. Yates***, 161 Wn.2d 714, 791-92, 168 P.3d 359 (2007); ***State v. Cross***, 156 Wn.2d 580, 625, 132 P.3d 80 (2006); ***State v. Benn***, 120 Wn.2d 631, 667, 845 P.2d 289 (1993); ***State v. Lord***, 117 Wn.2d 829, 916, 822 P.2d 177 (1991); ***State v. Campbell***, 103 Wn.2d 1, 26, 691 P.2d 929 (1984); ***State v. Rupe***, 101 Wn.2d 664, 699-700, 683 P.2d 571(1984).

These decisions are consistent with the analysis in the United States Supreme Court's decision in ***Gregg v. Georgia***, 428 U.S. 153, 199, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) and its focus on standards or

guidelines for the sentencing authority (i.e., the jury or judge depending on jurisdiction) making the decision on the appropriate penalty rather than the discretionary decisions, such as prosecutorial charging decisions and executive clemency, that precede and follow the judicial processes of trial and appellate review. *See* ***Yates***, 161 Wn.2d at 792, n.31. Gregg contended that the capital penalty statutes in Georgia were arbitrary and capricious in violation of ***Furman v. Georgia***, *supra*, because: 1) the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for a capital offense, and to plea bargain with them; 2) the jury had the ability to convict of a lesser offense even when the evidence was sufficient for the capital offense; and 3) the governor, or other executive officer, might commute a death sentence. The court disagreed noting that:

> At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. ***Furman***, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. *Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution.* ***Furman*** held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.

Gregg v. Georgia, 428 U.S. at 199 (emphasis added). Thus, the decision in ***Furman*** requires that Washington juries are provided with standards by which to decide whether to impose the death penalty on a person who has been convicted of a capital offense. It does not apply to the prosecutor's decision not to seek the death penalty. ***State v. Rupe***, 101 Wn.2d 664, 700, 683 P.2d 571 (1984).

Unquestionably, a legislature has the ability to limit a prosecutor's ability to retreat from an initial decision to seek the death penalty by enacting statutes that do not allow it. But there is no United States Supreme Court case that requires inclusion of such a provision in order for the death penalty statutes to be constitutional. In fact, the court in ***Gregg*** pointed out that enacting provisions that remove the ability of various criminal justice participants to show mercy at different stages of a capital litigation is likely to be unconstitutional. ***Gregg***, 428 U.S. at 199, n.50.

As defendant's arguments do not undermine any of this court's many decisions upholding RCW 10.95 to challenges based upon the Eighth Amendment, he has failed to show any reason for this court to reexamine its prior holdings.

ii. Defendant Has Failed To Show Any Reason This Court Should Reexamine Its Holding In *Bartholomew I* And *II* That The Majority Of RCW 10.95.060(3) Is Constitutional, Including The Part That Allows Evidence In The Penalty Phase Of The "Facts And Circumstances Of The Murder."

Washington's death penalty statutes create a bifurcated process that includes a guilt phase and a penalty phase. RCW 10.95.050(1). A special sentencing proceeding (penalty phase) is held only if the prosecutor has filed a notice of special sentencing proceeding and only after the defendant has been adjudicated guilty of aggravated first degree murder. *Id.* The statute reflects a preference that the same jury which decided a capital defendant's guilt in the guilt phase will also determine his sentence in the penalty phase, but the legislature recognized that there will be times when there was no guilt phase jury or when the guilt phase jury will be no longer available for a penalty phase. RCW 10.95.050. The legislature therefore authorized the impaneling of a jury for a special sentencing proceeding when necessary. RCW 10.95.050(4).

Whether the penalty phase is conducted before the jury that heard the evidence in the guilt phase or a newly selected one, the question it must answer is the same: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable

doubt that there are not sufficient mitigating circumstances to merit leniency?" RCW 10.95.060(4). Since the answer to this question requires the jury to consider the nature of the crime, the Legislature further provided a means of getting relevant information about the crime to a jury that did not sit in the guilt phase; RCW 10.95.060(3) provides in the relevant part: "if the jury sitting in the special sentencing proceeding has not heard evidence of the aggravated first degree murder of which the defendant stands convicted, both the defense and prosecution may introduce evidence concerning the facts and circumstances of the murder."

The goal of a constitutionally valid death penalty scheme is the establishment of standards which will focus the jury's consideration of the particularized circumstances of the crime and the defendant to guide its death penalty decision. ***Gregg v. Georgia***, 428 U.S., at 199, 96 S. Ct., at 2937 (Opinion of Stewart, Powell, Stevens, JJ.). Washington's statutes properly focus the jury on the nature of the murder committed – a factor that has always been considered critical in making the penalty decision.

> "Considerations such as the extent of premeditation, the nature of the crime, and any prior criminal activity have been considered relevant to the determination of the appropriate sentence. The requirement that the jury focus on factors such as these is designed to ensure that the punishment will be 'tailored to [the defendant's] personal responsibility and moral guilt.'"

California v. Ramos, 463 U.S. 992, 1022, 103 S. Ct. 3446, 3464 (1983), citing ***Enmund v. Florida***, 458 U.S. 782, 801, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982).

In ***State v. Bartholomew***, 98 Wn.2d 173, 64 P.2d 1170 (1982)("***Bartholomew I***"), this court construed the provisions of RCW 10.95.060. After the jury found Bartholomew guilty of aggravated murder, the State introduced evidence in the penalty phase of his non-conviction criminal history based upon the wording of RCW 10.95.060(3). ***Bartholomew I***, 98 Wn.2d at 178-79. The jury returned a death sentence. *Id.* at 179-80. On appeal, Bartholomew claimed RCW 10.95.060(3) was unconstitutional and that Washington's entire death penalty scheme should be invalidated because it allowed evidence of non-statutory aggravating factors in the penalty phase. This Court held that the first sentence of RCW 10.95.060(3) was unconstitutional because it allowed evidence of criminal behavior that had not resulted in conviction ("a non statutory aggravating factor"), but upheld the constitutionality of the remaining language of RCW 10.95.060(3), and the death penalty scheme in general, because it found the first sentence could be severed from the statute without rendering the entire statute unconstitutional. ***Bartholomew I***, 98 Wn.2d at 197.

The State petitioned for certiorari in the United States Supreme Court and while the petition was pending, the United States Supreme Court issued its opinion in ***Zant v. Stephens***, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983), where it rejected a federal constitutional challenge to a death sentence imposed, in part, on a statutory aggravating circumstance that had been invalidated by the Georgia Supreme Court after the defendant's trial. In that opinion, the Supreme Court held that the sentencing jury may consider evidence of non statutory aggravating factors in the penalty phase. Consequently, the U.S. Supreme Court reversed and remanded ***Bartholomew I*** for reconsideration in light of ***Zant***. ***Washington v. Bartholomew***, 463 U.S. 1203, 103 S. Ct. 3530, 77 L. Ed. 2d 1383 (1983); *see also* ***State v. Bartholomew***, 101 Wn.2d 631, 636, 683 P.2d 1079 (1984)("***Bartholomew II***").

On remand, this Court re-affirmed its decision, but did so on both federal and state constitutional grounds. ***Bartholomew II***, 101 Wn.2d at 638-41. This Court reiterated that it was abiding by its initial decision that the first sentence of RCW 10.95.060(3) was unconstitutional, but that portion of the statute may be invalidated without affecting the validity of the remainder of the statute. ***Bartholomew II***, 101 Wn.2d at 640-44. This court explained how the remainder of the provision would be construed:

> [T]he the remaining provisions in RCW 10.95.060 and the provisions of RCW 10.95.070 must be construed subject to the Rules of Evidence and the state and federal constitutional strictures we have identified in this opinion. Specifically, the liberal authority provided by RCW 10.95.060(3) to receive "any relevant evidence" must be limited to mitigating evidence only. Similarly, the jury's liberal mandate under RCW 10.95.070 to consider "any relevant factors" shall be limited to mitigating factors only. *The admission of evidence of aggravating factors and consideration by the jury of aggravating factors must be restricted to meet the evidentiary, and state and federal constitutional standards we have articulated. Specifically,* evidence of nonstatutory aggravating factors must be limited to defendant's criminal record, *evidence that would have been admissible at the guilt phase,* and evidence to rebut matters raised in mitigation by the defendant.

Bartholomew II, 101 Wn.2d at 642-43 (emphasis added). While there have been numerous decisions by this court in capital cases since ***Bartholomew II***, this Court has never backed away from its holding that RCW 10.95.060(3) is constitutional and governs the evidence that gets admitted in the prosecution's case in chief in penalty phase proceedings. *See* ***State v. Elmore***, 139 Wn.2d 250, 287, 985 P.2d 289 (1999)("while we did hold portions of RCW 10.95.060(3) paragraph one unconstitutional in ***Bartholomew [III]***, we specifically upheld paragraph two of the same statute" which permits evidence of the facts and circumstances of the murder to be admitted in the penalty phase).

Despite this jurisprudence upholding the remainder of RCW 10.95.060(3), defendant asserts that it is unconstitutional for being vague

and overbroad because it permits "evidence concerning the facts and circumstances of the murder" without defining "facts and circumstances." Appellant's brief at p. 241. This, he contends results in a jury that is unguided as to how to consider such "facts and circumstances" rendering the statute unconstitutional. Defendant's argument is without merit.

Defendant is correct that the phrase "facts and circumstances of the murder" is not defined anywhere in RCW 10.95, *et. seq.* This is not surprising; other than an occasional statute creating a statutory basis for the admission or exclusion of evidence, the Legislature does not usually enact provisions governing the scope of admissible of evidence in a criminal trial - be it capital litigation or otherwise. Clearly, the Legislature recognizes that the trial judge is the gatekeeper of what evidence is relevant and admissible at trial to determine guilt and that the court has the Rules of Evidence and case law to guide it in making its rulings. No decision of this court - nor of the United States of Supreme Court - has required statutes defining the scope of "relevant" evidence in the guilt phase in order to satisfy Eighth Amendment concerns in the penalty phase. Thus, defendant's entire argument is based upon a fallacious premise.

Moreover, defendant's challenge completely ignores this court's prior opinions that "the provisions in RCW 10.95.060 and the provisions

of RCW 10.95.070 must be construed subject to the Rules of Evidence." ***Bartholomew II***, 101 Wn.2d at 642; *see also* ***State v. Davis***, 175 Wn.2d 287, 325-28, 290 P.3d 43 (2012). Beginning with ***Bartholomew I,*** this court's opinions are clear that the prosecution's penalty phase case may include guilt phase evidence. *Id.*, 98 Wn.2d at 197; s*ee also* ***State v. Clark***, 143 Wn.2d 731, 780, 24 P.3d 1006 (2001); ***State v. Pirtle***, 127 Wn.2d 628, 666, 904 P.2d 245 (1995); ***State v. Mak***, 105 Wn.2d 692, 721, 718 P.2d 407 (1986)(subsequent history omitted); ***Bartholomew II***, 101 Wn.2d at 642.

Thus, as in any trial proceeding, the prosecution will proffer evidence that it believes is relevant and admissible; the defense may object to any evidence it believes should not be admitted, and the court will make the ruling on admissibility. If evidence is admitted over the defendant's objection, he may seek review of that ruling on appeal if needed. The jury hearing the evidence in a penalty phase is not responsible for determining the scope of what is admissible as the "facts and circumstances of the murder" and nothing in Title 10.95 suggests that the Legislature was placing such responsibility upon the jury. The determination of admissibility of evidence is left, as in any trial, to the discretion of trial court, as informed by the Rules of Evidence and relevant case law. Consequently, the jury does not need statutory guidance on what evidence

is admissible, but only on how to consider the evidence that is presented in the penalty phase.

The statutes that direct a jury how to consider the facts and circumstances of the murder are RCW 10.95.060(4), where it is directed to answer the question "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" and in RCW 10.95.070 which sets forth factors about the crime that might be relevant in deciding whether leniency is merited. Defendant does not challenge the constitutionality of either RCW 10.95.060(4) or RCW 10.95.070.

Defendant's challenge to RCW 10.95.060(3) is similar to a challenge to the provisions of RCW 10.95.070(1) raised in ***In re Brown***, 143 Wn.2d 431, 21 P.3d 687 (2001). Brown argued that "RCW 10.95.070(1) violates the Eighth and Fourteenth Amendments to the United States Constitution because the word "relevant" in the statute is vague when interpreted in the context of his "prior criminal activity." *Id.* at 457. As in ***Bartholomew I*** and ***II***, this Court held that this provision had to be construed subject to the rules of evidence and case law holding "evidence of nonstatutory aggravating factors must be limited to defendant's criminal record, evidence that would have been admissible at

the guilt phase, and evidence to rebut matters raised in mitigation by the defendant." *Id.* at 458. This Court rejected Brown's challenge to the constitutionality of RCW 10.95.070(1) on grounds of vagueness, just as it should reject defendant's similar challenge to RCW 10.95.060(3).

iii. Washington's Death Penalty Statutes Satisfy The Eighth Amendment In Narrowing The Class Of Murders Eligible For The Death Penalty.

The United States Supreme Court has been "unwilling to say that there is any one right way for a State to set up its capital sentencing scheme." ***Spaziano v. Florida***, 468 U.S. 447, 464, 104 S. Ct. 3154, 3164 (1984). It has noted that a jurisdiction has options as to how it narrows the class of persons eligible for the death penalty. ***Loving v. United States***, 517 U.S. 748, 755, 116 S. Ct. 1737 (1996); ***Lowenfield v. Phelps***, 484 U.S. 231, 244-46, 108 S. Ct. 546 (1988). The two most common methods to accomplish this narrowing are: 1) to require the jury to find of an aggravated circumstance; ***or*** 2) by defining capital murder [meaning those murders that are death penalty eligible] in a restrictive manner. *Id.* "The use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion." ***Lowenfield***, 484 U.S. at 244-245.

In sum, the United States Supreme Court has held that the use of aggravating circumstances is not constitutionally required in the narrowing process, when the definition of capital murder is sufficiently restrictive. ***Lowenfield***, 484 U.S. at 246 (rejecting argument that aggravating circumstance which duplicated one of the elements of crime rendered death sentence unconstitutional when the statute narrowly defined the categories of murders for which a death sentence could be imposed).

Washington's capital punishment scheme is one of the most narrow in the country as it defines capital murder to encompass *only* premeditated murders ***and*** it also requires the jury to find the existence of an aggravating circumstance. RCW 10.95.020. Only a few other states with capital punishment limit the type of murder eligible for the death penalty solely to premeditated murders; most other jurisdictions also include intentional murders, extreme indifference homicides, and/or some forms of felony murder as being death penalty eligible. *See* Ala. Code §13A-5-40(b), 13A-6-2(a)(1)(includes intentional murder); Ariz. Rev. Stat. §13-1105 and §13-751(A)(1)(premeditated murder, intentional murder of law enforcement officer), §13-751(A)(3)(certain felony murders); Ark. Code Ann. §5-10-101 (includes some felony murders and extreme indifference to life homicides); Cal. Penal Code §190(a)(first degree murder punishable by death) §189 (first degree murder includes

premeditated, certain felony murders and intentional drive-by murders); Colo. Rev. Stat. §18-1.3.1201 (class 1 felony punishable by death), §18-1-102 (murder in first degree is class 1 and includes intentional murder, some felony murders, extreme indifference homicides and others); Del. Code. Ann Title 11, ch. 42 §4209 (first degree murder punishable by death), Title 11, ch 5 §636 (first degree murder includes intentional, felony murder and others); Fla. Stat Ann. §775.082 (capital felonies punishable by death), §782.04 (first degree murder, a capital felony, includes premeditated and certain felony murders); Ga.Code Ann §16-5-1 (murders eligible for death penalty include intentional and felony murders); Idaho Code Ann. §18-4004 (first degree murder punishable by death), §18-4003 (first degree murder includes premeditated and those killings perpetrated by poison or torture); Ind. Code §35-50-2-3 (murder punishable by death), §35-42-1-1 (murder includes intentional and certain felony murders); Kan. Crim. Code Ann. §21-5401 (all capital murders are premeditated); Ky. Rev. Stat. Ann. §507.020 (intentional and extreme indifference murders are capital offenses), §507A.020 (fetal homicide in the first degree a capital offense); La. Rev. Stat. Ann. §14:30 (first degree murder includes intentional and certain felony murders and can be capital offense); Miss. Code Ann. §97-3-19 (capital murder includes certain felony murders and non-premeditated murders of certain classes of victims); Mo. Rev. Stat

§565.020 (defines first degree murder as premeditated and makes capital offense); Mont. Code Ann. §45-5-102 (includes intentional and felony murders in definition of deliberate [capital] murder); Neb. Rev. Stat. §28-105 (Class I felonies eligible for death), §28-303 (felony murder can potentially be a Class I felony); Nev. Rev. Stat. §200.030 (first degree murder may be punished by death and it includes certain felony murders); N. H. Rev. Stat. Ann. §630:1 (knowing or intentional murders); N.C. Gen Stat. Ann. §14-17 (includes certain felony murders); Ohio Rev. Code Ann. §2903.01 (includes premeditated , certain felony murders, purposeful murders by felony escapees, and by purposely causing the death of a person under 13 years old or of a law enforcement officer as death eligible murders); Okla. Stat. Ann. §701.1 (murder in first degree includes premeditated, certain felony murders, intentional killing of law enforcement officer, and willful torturing of a child), §701.9 (first degree murder a capital offense); Or. Rev. State Ann. §163.095 (aggravated murder defined as murder committed under §163.115 accompanied by certain circumstances and §163.115 includes intentional, certain felony murders, causing death of child under 14 by abuse); 18 Pa. Cons. Stat. Ann. §2502 (first degree murder is intentional killing) and §1102 (death penalty authorized for first degree murder); S.C. Code Ann. §16-3-20 (murder eligible for death penalty) and §16-3-10 (murder is killing with

malice aforethought); S.D. Codified Laws §22-16-4 (murder in the first degree includes premeditated and certain felony murders), §22-6-1 (Class A felony is death penalty eligible), and §22-16-12 (murder in first degree is Class A felony); Tenn. Code Ann. §39-13-202 (death penalty authorized for first degree murder which includes premeditated murder, certain felony murders and killing by use of bomb or destructive device); Tex. Penal Code Ann. §19.03 (capital murder requires a murder as defined by §19.02(b)(1), which describes an intentional murder); Utah Code Ann. §76-5-202 (defines aggravated murder, which is death penalty eligible, as an intentional murder committed under a variety of circumstances or by a person with a prior conviction for murder or as an extreme indifference homicide committed under certain circumstances); Va. Code Ann. §18.2-31 (all capital murders are premeditated); Wyo. Stat. Ann. §6-2-101 (first degree murder, a capital offense, includes premeditated and certain felony murders).

Defendant's Eighth Amendment argument directs the court to focus solely on the list of aggravating factors in RCW 10.95.020, thereby ignoring the Legislature's decision to limit the type of murder that qualifies as a capital murder to a very narrow field. This runs contrary to case law where the constitutional question is answered by examining the statutory scheme in its *entirety*. *See* ***Lowenfield***, *supra,* at 246 (Supreme

Court noting that it has upheld the death penalty provisions in Texas and Louisiana based upon narrow definition of capital offense). Defendant presents no argument or authority to show that the Legislature's decision to limit capital murder to premeditated murders does not satisfy the Eighth Amendment – independent of the additional requirement of an aggravating circumstance.

Missouri, like Washington, limits the class of murders eligible for the death penalty to premeditated murders and also requires the jury to find at least one of seventeen statutory aggravating circumstances . Mo. Rev. Stat §565.020[11] and §565.032. In ***State v. Ervin***, 835 S.W.2d 905 (Mo.1992), *cert. denied sub nom,* ***Ervin v. Missouri***, 507 U.S. 954, 113 S. Ct. 1368, 122 L. Ed. 2d 746 (1993), the Missouri Supreme Court addressed a challenge to its statute which argued that one of the statutory aggravating factors was worded too broadly to properly narrow the class of persons eligible for the death penalty. The Missouri Supreme Court quickly rejected the challenge noting the restrictive definition of capital crimes:

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[11] It provides in the relevant part:

> 1. A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.
>
> 2. Murder in the first degree is a class A felony, and the punishment shall be either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor;...

> Ervin argues that Section 565.032.2(11) provides inadequate guidance to the jury because it does not distinguish between cases involving a defendant who was engaged in the perpetration or attempted perpetration of a designated felony during the murder in the first degree and cases in which a defendant, committing the same felonious act, might only be charged with second-degree murder. *Ervin's comparison of the statutory aggravator with felony-murder is inapt because it fails to acknowledge the requirement in Missouri that one must knowingly cause the death of another after deliberation in order to be convicted of a capital crime*. Section 565.020.1. This requirement of deliberation renders moot Ervin's argument of inadequate guidance or possible confusion.

Id. at p. 925-26. According to the Execution Database maintained by the Death Penalty Information Center Mr. Ervin was executed on 3/28/2001 and no less than ten prisoners were executed in Missouri in 2014: Herbert Smulls, (1/28), Michael Taylor (2/25); Jeffrey Ferguson (3/25);William Rousan (4/22); John Winfield (6/17); John Middleton(7/15); Michael Worthington (8/5); Earl Ringo (9/9); Leon Taylor (11/18); Paul Goodwin (12/9). *See* Appendices D and C. It would appear that the United States Supreme Court sees no Eighth Amendment infirmity in Missouri's death penalty provisions as it repeatedly denies certiorari in capital cases out of Missouri. ***Smulls v. Missouri***, 134 S. Ct. 1057 (2014); ***Taylor v. Bowersox***, 134 S. Ct. 1375 (2014); ***Ferguson v. Steele***, 134 S. Ct. 1581 (2014); ***Rousan v. Lombardi***, 134 S. Ct. 1932 (2014); ***Winfield v. Missouri***, 134 S. Ct. 2837 (2014); ***In re Middleton***, 135 S. Ct. 15 (2014);

Worthington v. Steele, 135 S. Ct. 22 (2014); ***Ringo v. Lombardi***, 135 S. Ct. 40 (2014); ***Taylor v. Lombardi***, 135 S. Ct. 701 (2014); ***Goodwin v. Steele***, 135 S. Ct. 780 (2014). Missouri's provisions are similar to Washington's in defining which crimes are death penalty eligible.

Defendant argues that some of the aggravating factors in RCW 10.95.020 have been construed so broadly by courts that it has rendered them unconstitutional. Most of this argument discusses aggravating factors that are not at issue in this case. *See* Appellant's brief at p. 271-75. Defendant fails to explain how broad construction of aggravating factors not relevant to his case can affect the constitutionality of his death sentence. The only statutory aggravating factor applicable to his case is currently codified at RCW 10.95.020(11):

> The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes:
>
> (a) Robbery in the first or second degree;
> (b) Rape in the first or second degree;
> (c) Burglary in the first or second degree or residential burglary;
> (d) Kidnapping in the first degree; or
> (e) Arson in the first degree;

Only certain of these felonies were applicable to the defendant's crime and the jury was instructed that the following aggravating factor had been found: the murder was committed in the course of, in furtherance of, or in the immediate flight from a rape in the first degree or second degree and a

robbery in the first degree. CP 1071. The only argument defendant makes about the aggravating factor applicable to his case is to claim that this Court expanded its scope by broadly construing it[12] in ***State v. Brett***, 126 Wn.2d 136, 892 P.2d 29 (1995). Defendant mischaracterizes ***Brett.***

In rejecting Brett's argument that this aggravating factor only applies to murders committed in the course of and in furtherance of completed crimes but not attempted crimes, this Court construed the words the Legislature enacted:

> The felony murder statute, RCW 9A.32.030(1)(c), provides that when a death occurs in the course of robbery in the first or second degree, or in the course of an attempted robbery, the participants are guilty of felony murder. In contrast, under RCW 10.95.020(9)(a), only premeditated murders committed during the course of robbery are within the scope of the statute. Premeditated murders committed during the course of an attempted robbery are not. Whether the death penalty may be imposed depends upon whether the murder occurs "in the course of" the robbery, not whether the robbery was completed or attempted.

Id., 126 Wn.2d at 163. Defendant fails to explain how this Court's construction of the words "in course of" expand it beyond what the Legislature intended. Defendant fails to show any deficiency in the aggravating factor applicable to his case.

Similar to the ***Ervin*** case noted above, defendant's arguments focus on the perceived problems with the aggravating factors and fail to

[12] When ***Brett*** was decided, this aggravating factor was codified in subsection (9) of RCW 10.95.020. While the numbering has changed the text of the provision has not.

address the very limited scope of death eligible murders in Washington, consequently he fails to show any constitutional deficiency under the Eighth Amendment.

Next, defendant's argument is based primarily on personal opinion and individual viewpoint rather than legal analysis. Defendant cites to language from the concurring opinions of Justices Brennen, White, and Stewart in ***Furman*** articulating their concerns about Georgia's death penalty provisions, but does not discuss that four years later Justices White and Stewart had no difficulty finding Georgia's revised death penalty provisions constitutional in ***Gregg***. As noted earlier, Justice Brennan never deviated from the position he took in ***Furman*** that the death penalty was, in all circumstances, unconstitutional. *See* ***Furman***, 408 U.S. at 257 and 314 (Brennan, J. and Marshall, J., concurring); ***Gregg v. Georgia***, 428 U.S. 227, 96 S. Ct. 2971 (Brennan J. dissenting). But after ***Gregg***, Justice Brennan's viewpoint on the death penalty cannot be said to be an accurate statement of the law in this country.

Defendant also relies upon law review articles and a report by the American Law Institute, *see* Appellant's brief at p. 267-68, which advocate that no state has successfully confined the death penalty to a narrow band of the most aggravated cases. Such articles and studies are not equivalent to a decision of a court applying constitutional principles to

statutes and finding a provision unconstitutional. Such articles may do no more than reflect the personal opinion of its author. In contrast to such articles, every year in this country there are several executions carried out after extensive judicial review of the sentence of death. *See* Appendix C. This concrete enforcement of the death penalty would tend to rebut the claim in the ALI report that no state has managed to draft a constitutionally sound death penalty scheme that sufficiently narrows the class of persons eligible to receive the death penalty.

Similarly, while Governor Inslee has the power to impose a moratorium on executions while he is governor, his opinion that the death penalty is imposed "randomly" is his personal opinion. It is not a judicial finding of unconstitutionality after applying the legal standards established by the United States Supreme Court and this Court to assess Eighth Amendment claims. Defendant has the burden of demonstrating a constitutional infirmity with RCW 10.95 under the relevant legal standards and cannot meet this burden by referencing personal opinion, even if they are from persons in positions of authority.

Defendant's argument as to why RCW 10.95.020 is deficient is muddled. Defendant argues that "it would be difficult to find a premeditated murder that could not be covered by at least one of the aggravating factors in RCW 10.95.020," then immediately gives several

examples of murders that would not qualify. Appellant's Brief at p. 269-70. In addition to the examples cited by defendant of non-eligible murders, there are three large categories of murders that do not qualify: felony murders, extreme indifference murders, and intentional, but not premeditated, murders. As discussed above, these categories of excluded murders must also be considered when assessing an Eighth Amendment challenge that RCW 10.95 does not sufficient narrow the class of murders eligible for the death penalty.

Next, defendant asserts that the list of "aggravating factors of RCW 10.95.020 are both over - and under - inclusive such that the statute violates the constitutional prohibition on cruel and unusual punishment." Appellant's Brief at p. 270. The tacit assumption underlying this argument is that defendant's examples of murders that fall *outside* the purview of an aggravating circumstance in RCW10.95.020 are just as worthy of the death penalty as murders that *are* covered by an aggravating circumstance. It is a legislative function to make value judgments about which murders should qualify for the death penalty and which should not. Different states have drawn different lines as to what is covered and what is not based upon its legislature's determination as to what should be a death eligible murder. Such legislation reflects value judgments; while other states have included the murder of a child under the age of 14 a

death eligible crime, *see e.g.*, Ohio Rev. Code Ann. §2903.01, Washington did not. The fact that defendant disagrees with the value judgments reflected in Washington's death penalty provisions does not create a constitutional issue. As shown above, Washington's death penalty statutes make a narrow class of murders eligible for the death penalty – premeditated murders. While that is likely sufficient to satisfy the Eighth Amendment, Washington has further limited that eligible class of murders by requiring a finding of an aggravating circumstance before the death penalty can be imposed.

In short, defendant presents no true Eighth Amendment claim. This Court has repeatedly found that Washington's statute comports with the Eighth Amendment under the standards set forth in ***Gregg***. Nothing has changed in the text of the statute as it applies to defendant to require reexamination of any Eighth Amendment claim. Defendant cites to no United States Supreme Court case issued since ***Yates*** -the last time this Court rejected an Eighth Amendment challenge - that would necessitate any reexamination of the statute under new controlling authority. This court should summarily reject this claim as it has done so many times in the past.

9. DEFENDANT'S EQUAL PROTECTION ARGUMENT, RAISED FOR THE FIRST TIME ON APPEAL, DOES NOT SHOW MANIFEST ERROR AND THEREFORE SHOULD BE SUMMARILY DISMISSED.

Washington Constitution article I, §12, and the Fourteenth Amendment to the United States Constitution guarantee that persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. Defendant contends that his second penalty phase hearing violates equal protection because a penalty phase with a newly empaneled jury provides a different type of hearing than occurs when a defendant is given the death penalty by the same jury that heard the guilt phase.

Defendant does not identify where he raised this claim in the trial court. As there is no pleading in the clerk's papers raising an equal protection claim, it would appear this claim is being raised for the first time on appeal. As a general rule, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a). A claim of error may be raised for the first time on appeal, however, if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); ***State v. Scott***, 110 Wn.2d 682, 686–87, 757 P.2d 492 (1988). "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is

shown and the error is not manifest." ***State v. McFarland***, 127 Wn.2d at 333, 899 P.2d 1251 (1995).

The factual basis for defendant's equal protection argument does not appear in the record below. His factual base relies solely on a declaration that was filed in support of a personal restraint petition in *a different* death penalty case – ***In re Elmore***, 162 Wn.2d 236, 255-56, 172 P.3d 335 (2007). *See* Appellant's brief at p. 253-54. The declaration in ***Elmore*** was filed by a defense expert who was supporting Elmore's ineffective assistance of counsel claim and states that "by conducting a trial on guilt, the jury can begin to discharge its emotional reactions to the crime and begin concentrating on the defendant as a human being." *Id.* This is apparently the expert's personal opinion as there is nothing to indicate that this comment is based upon studies or research. Obviously, because this claim was not raised during defendant's trial, the State had no ability to explore the basis of the expert's opinion; challenge to the quality of the evidence or present contrary evidence.

Because defendant raises a claim of disparate treatment that is wholly unsupported by any evidence in the trial record, the court should decline to consider his equal protection challenge. *See* ***McFarland***, supra; ***State v. Riley***, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993) (RAP 2.5(a)(3)

does not mandate appellate review of newly-raised argument if record does not contain facts necessary for its adjudication).

Although the State maintains that this Court should not consider defendant's unpreserved and undeveloped claim, the State would also contest defendant's assertion that his claim would be reviewed under a strict scrutiny standard. Equal protection challenges are analyzed under one of three standards of review: strict scrutiny, intermediate scrutiny, or rational basis. ***State v. Manussier***, 129 Wn.2d 652, 672–73, 921 P.2d 473 (1996); ***State v. Berrier***, 110 Wn. App. 639, 648, 41 P.3d 1198 (2002).

> Strict scrutiny applies when a classification affects a suspect class or threatens a fundamental right. Intermediate or heightened scrutiny, used by this court in limited circumstances, applies when important rights or semisuspect classifications are affected. The most relaxed level of scrutiny, commonly referred to as the rational basis or rational relationship test, applies when a statutory classification does not involve a suspect or semisuspect class and does not threaten a fundamental right.

Manussier, 129 Wn.2d at 672-673, 921 P.2d 473 (1996)(citations omitted). Defendant presents no authority that persons convicted of aggravated first degree murder are a suspect class.

While there is no fundamental right to appeal under the federal constitution, *see* ***Pennzoil Co. v. Texaco, Inc.***, 481 U.S. 1, 31–32, 107 S. Ct. 1519, 95 L. Ed. 2d 1, 55 (1987)(collecting cases) and ***Cobbledick v. United States***, 309 U.S. 323, 325, 60 S. Ct. 540, 84 L. Ed. 783 (1940)

("the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice"), a state may provide a constitutional right to appeal, it "may not 'bolt the door to equal justice.'" ***M.L.B. v. S.L.J.***, 519 U.S. 102, 110, 117 S. Ct. 555, 136 L. Ed. 2d 473, 65 (1996), quoting ***Griffin v. Illinois***, 351 U.S. 12, 24, 76 S. Ct. 585, 100 L. Ed. 891 (1956). There is authority that the right to appeal in a criminal case is a fundamental right in Washington, *see* ***Housing Auth. v. Saylors***, 87 Wn.2d 732, 738-39, 557 P.2d 321 (1976)(nothing that state constitution provides right to appeal only in criminal cases, that civil litigants do not have a fundamental right of appeal).

Defendant argues that "RCW 10.95 infringes upon a fundamental right, the right to an appeal under article 1, section 22." Appellant's brief at p. 255. He does not explain this statement any further and the authority he cites to support it provides support for only general principles applicable to equal protection claims. Defendant fails to explain how any provision of RCW 10.95 threatens his right of appeal.

In his first trial, petitioner was found guilty of aggravated murder and the jury returned a verdict of death. He exercised his right of appeal directly to this Court and obtained a new penalty phase hearing on review. He was given his full appeal rights after his first trial; he can show no infringement of those rights. When a second jury also returned a verdict

of death, he again exercised his right of appeal to this Court. Not only can defendant not show any threat to the exercise of his right to appeal that actually occurred, he fails to offer any plausible argument how he might be tempted or compelled or coerced into not trying to overturn a death sentence on appeal because, if successful, his new penalty phase hearing would be in front of a different jury. Most criminal defendants under a death sentence will use every appellate avenue open to them to have the death sentence vacated even if it still means they will still be in jeopardy at a new penalty phase hearing.

As defendant cannot show either a suspect class or an infringement of a fundamental right, the appropriate standard of review for his equal protection claim -were it properly preserved - would be the rational basis test.

10. DEFENDANT CANNOT MEET HIS BURDEN UNDER STARE DECISIS TO OVERTURN THIS COURT'S HOLDING THAT THE PROPER REMEDY FOR ERROR IN THE PENALTY PHASE IS A REMAND FOR A NEW PENALTY PHASE HEARING.

Courts do not "lightly set aside precedent." ***State v. Kier***, 164 Wn.2d 798, 804–05, 194 P.3d 212 (2008). The law must be reasonably certain, consistent, and predictable so as to allow citizens to guide their conduct in society and to allow trial judges to make decisions with a

measure of confidence. *See* ***In re Matter of Mercer***, 108 Wn.2d 714, 720–21, 741 P.2d 559 (1987). The doctrine of stare decisis provides this necessary clarity and stability in the law, gives litigants clear standards for determining their rights, and "prevent[s] the law from becoming 'subject to incautious action or the whims of current holders of judicial office.'" ***Lunsford v. Saberhagen Holdings, Inc.***, 166 Wn.2d 264, 278, 208 P.3d 1092 (2009)(quoting ***In re Rights to Waters of Stranger Creek***, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)). Consequently the standard for overturning precedent is difficult to meet; the doctrine of stare decisis "requires a clear showing that an established rule is incorrect *and* harmful before it is abandoned." ***Stranger Creek***, 77 Wn.2d at 653(emphasis added).

In ***Bartholomew I***, there was a split in the court as to what the legislature intended when an appellate court found trial error in a penalty phase hearing where the jury had returned a death sentence; the dispute centered on whether the provisions in RCW 10.95.090 or RCW 10.95.050(4) controlled the disposition of the case. Four justices believed the statutes were ambiguous and argued the rule of lenity required the court to apply RCW 10.95.090 and remand for entry of a sentence of life without the possibility of parole. 98 Wn.2d at 214-16. Four justices, however, joined Justice Dolliver, in his concurrence /dissent, which

examined the whole of the statutory scheme in Title 10.95 and held that the provisions of RCW 10.95.050(4) controlled and remand for a new penalty phase hearing was proper. *Id.* at 223-26. This portion of the decision became the controlling precedent on this issue. Importantly, all nine justices looked at the issue of one of statutory construction and legislative intent, not a constitutional issue. *Id.* at 214-16, 223-26.

Defendant argues that ***Bartholomew I*** was wrongly decided[13] on this issue and asks this court to overturn this precedent. *See* Appellant's brief at p. 257-264.

The legislature is presumed to be familiar with past judicial interpretations of statutes, including appellate court decisions. *See* ***Riehl v. Foodmaker, Inc.***, 152 Wn.2d 138, 147, 94 P.3d 930 (2004); ***State v. Calderon***, 102 Wn.2d 348, 351, 684 P.2d 1293 (1984); ***State v. Fenter***, 89 Wn.2d 57, 62, 569 P.2d 67 (1977). Indeed, legislative inaction following a judicial decision interpreting a statute is often deemed to indicate legislative acquiescence in or acceptance of the decision. ***Soproni v. Polygon Apartment Partners***, 137 Wn.2d 319, 327 n. 3, 971 P.2d 500 (1999); ***Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.***,

[13] Defendant also suggests that "to avoid constitutional infirmities with RCW 10.95" discussed in the previous sections of his brief, the court should overturn ***Bartholomew I***. Appellant's brief at p. 257. But as he does not show any constitutional infirmities with RCW 10.95 in the other sections of his brief, this does not provide the court with a reason to abandon precedent.

105 Wn.2d 778, 789, 719 P.2d 531 (1986). "[W]here statutory language remains unchanged after a court decision the court will not overrule clear precedent interpreting the same statutory language." ***Riehl***, 152 Wn.2d at 147, 94 P.3d 930.

Since 1982, the year in which ***Bartholomew I*** issued, the legislature has never amended either RCW 10.95.090 or RCW 10.95.050(4), to indicate its dissatisfaction with the holding of ***Bartholomew I***. While there have been changes to Title 10.95, *see e.g.*, Laws of 2010 ch. 94, § 3, the legislature has never taken the opportunity to adjust any provision in Title 10.95 to alter the effect of ***Bartholomew I*** on this point. This indicates legislative acceptance of the decision. Thus, defendant utterly fails to establish that holding of ***Bartholomew I*** as to the proper remedy when the court finds error in the penalty phase hearing was inconsistent with the intent of the legislature. By so failing, defendant fails to establish that ***Bartholomew I*** was wrongly decided and he cannot meet the heavy burden required to overturn precedent under the doctrine of stare decisis.

11. AS WASHINGTON'S DEATH PENALTY STATUTES REQUIRE A JURY TO FIND BEYOND A REASONABLE DOUBT ALL FACTS THAT MAKE A DEFENDANT ELIGIBLE FOR A SENTENCE OF DEATH THEY COMPORT WITH THE UNITED STATE'S SUPREME COURT'S SIXTH AMENDMENT JURISPRUDENCE FOUND IN ***APPRENDI*** AND ITS PROGENY.

In ***Apprendi v. New Jersey***, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), the United States Supreme Court held that the Sixth Amendment does not permit a defendant to be "expose[d] ... to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.*, 530 U.S. at 483 (emphasis deleted). Two years later, the U.S. Supreme Court applied the ***Apprendi*** rule in ***Ring v. Arizona*** to invalidate Arizona's capital sentencing scheme, which permitted the trial judge to determine the presence of aggravating factors required for imposition of the death penalty. ***Ring v. Arizona***, 536 U.S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). The Court made clear that "[c]apital defendants, no less than noncapital defendants,... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.*, at 589. When a state makes an increase in a defendant's authorized punishment contingent on a finding of fact, "that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." ***Ring***, 536 U.S.

at 602. Most recently, the Supreme Court has held that facts that increase a mandatory minimum sentence must be submitted to a jury. ***Alleyne v. United States***, ___U.S. ___, 133 S. Ct. 2151, 2161, 186 L. Ed. 2d 314 (2013); *see also* ***Apprendi***, 530 U.S., at 499, (SCALIA, J., concurring) ("[A]ll the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury").

Under Washington's capital penalty scheme, the jury determines whether the state has proved beyond a reasonable doubt: 1) the elements of the substantive crime of first degree [premeditated] murder; 2) the existence of an aggravating circumstance under RCW 10.95.020 (which acts as a sentencing enhancement); and, assuming the former have been established and the State has filed a death penalty notice, 3) whether there are sufficient mitigating circumstances to merit leniency – which determines whether a defendant will receive a death sentence or life without the possibility of parole. *See* RCW 10.95 et. seq; ***State v. Yates***, 161 Wn.2d 714, 758, 168 P.3d 359(2007)("As explained above, at every step in the Washington death penalty scheme, the jury makes the factual determinations."). This comports with the constitutional requirements of ***Apprendi*** and ***Ring***.

Defendant contends that the provisions of RCW 10.95.130(2) and 10.95.120 violate ***Apprendi*** because it assigns the task of mandatory

appellate review of certain issues to this Court and tasks the trial courts with the responsibility of filling out the trial reports which are used in proportionality review; he argues both of these acts require the court to make factual determinations. *See* Appellant's brief at pp 117-128. Defendant's argument misses a key point: when a jury has authorized the death sentence with its fact finding, there is no higher penalty that can be imposed. Defendant fails to identify what facts the court is finding that is increasing his sentence to something greater than a death sentence.

Additionally, the Sixth Amendment does not proscribe all judicial fact finding.

> In holding that facts that increase mandatory minimum sentences must be submitted to the jury, we take care to note what our holding does not entail. Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment.

Alleyne v. United States 133 S. Ct. at 2161, citing ***Dillon v. United States***, 560 U.S. ——, 130 S. Ct. 2683, 2692, 177 L. Ed. 2d 271 (2010); *see also* ***State v. Clarke***, 156 Wn.2d 880, 890–91, 134 P.3d 188 (2006) (the Sixth Amendment does not bar judicial fact finding relating to a sentence that does not exceed the relevant statutory maximum).

Nothing a court might do under the provisions of RCW 10.95.120 and 10.95.130 could *increase* the punishment beyond what was authorized

by the jury's verdicts, thus there is no implication of the Sixth Amendment right to a jury trial in these statutes. Rather these provisions are to aid in the review of the death sentence and are designed to protect a defendant from a disproportionate death sentence. He is not being harmed by these provisions.

Finally, proportionality review of every capital sentence is not constitutionally required. ***Pulley v. Harris***, 465 U.S. 37, 44-46, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984); ***McCleskey v. Kemp***, 481 U.S. 279, 306,107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987)("[W]here the statutory procedures adequately channel the sentencer's discretion, such proportionality review is not constitutionally required"). Washington death penalty provisions have a severability clause: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." RCW 10.95.900. Thus, statutes that address proportionality review could be held invalid without invalidating the capital sentencing scheme as a whole. Even, if defendant were able to show some constitutional deficiency in the statutes that direct trial courts to collect information for proportionality review or in those directing an appellate court to determine whether a sentence is disproportionate, defendant fails to show that he would be entitled to any relief. Under RCW 10.95.900,

the remedy would be to strike the unconstitutional provisions and leave the remainder of the death penalty statutes intact, which would not affect the jury's death sentence in defendant's case.

12. THIS COURT SHOULD UPHOLD THE DEFENDANT'S DEATH SENTENCE AFTER CONSIDERING ALL OF THE COMPONENTS OF MANDATORY STATUTORY REVIEW.

This court must review defendant's death sentence as required by RCW 10.95 to determine: (a) whether there was sufficient evidence to justify the affirmative finding by the jury that there were not sufficient mitigating circumstances to warrant leniency; (b) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant; (c) whether the sentence of death was brought about by passion or prejudice; and (d) whether the defendant was mentally retarded. After doing so this court will find that defendant's death sentence is supported by sufficient evidence, proportionate to similar cases, not brought about passion or prejudice and that the defendant is not mentally retarded.

a. Defendant Makes No Claim That He Is Mentally Retarded.

RCW 10.95.030(2) provides that no person who is mentally retarded shall be executed. The statute further provides that when a

defendant contends that he is mentally retarded so as to prohibit execution, the defense bears the burden to prove mental retardation by a preponderance of evidence. In addition, the law imposes the duty upon the trial court to make a finding as to the existence of mental retardation. "To be considered 'mentally retarded' under the statute a person must have a 'significantly subaverage intellectual functioning,' which is defined as an IQ of 70 or below." ***State v. Davis***, 141 Wn.2d 798, 886-887, 10 P.3d 977 (2000), *quoting* RCW 10.95.030(2)(a), (c).

Defendant presented no evidence in the penalty phase that he was mentally retarded. He does not assert on appeal that he is mentally retarded within the meaning of RCW 10.95.030. Defendant's inaction constitutes waiver of any claim that he was mentally retarded.

b. There Was Sufficient Evidence To Justify The Affirmative Finding By The Jury That There Were Not Sufficient Mitigating Circumstances To Merit Leniency.

In addressing the sufficiency of evidence in a capital case, this court determines whether sufficient evidence exists to support the jury's finding that the mitigating circumstances were insufficient to merit leniency. ***State v. Yates***, 161 Wn.2d 714, 786, 168 P.3d 359 (2007); ***State v. Elmore***, 139 Wn.2d 250, 305, 985 P.2d 289 (1999), *citing* ***State v. Stenson***, 132 Wn.2d at 756. The test is whether, after viewing the

evidence in the light most favorable to the State, any rational trier of fact could have found sufficient evidence to justify the jury's finding beyond a reasonable doubt. ***State v. Brown***, 132 Wn.2d 529, 551, 940 P.2d 546 (1997); ***State v. Gentry***, 125 Wn.2d at 654.

In applying this test, the court does not duplicate the jury's role and reweigh the aggravating circumstances *against* the mitigating factors, but rather the court considers the circumstances of the crime along with any mitigating factors and defendant's criminal record then determines whether a rational jury could have concluded the mitigating circumstances do not outweigh the circumstances of the crime. ***State v. Elmore***, 139 Wn.2d 250, 321, 985 P.2d 289 (1999), *citing* ***State v. Dodd***, 120 Wn.2d 1, 24-25, 838 P.2d 86 (1992); ***State v. Rice***, 110 Wn.2d 577, 623-25, 757 P.2d 889 (1988), *cert. denied*, 491 U.S. 910, 109 S. Ct. 3200, 105 L. Ed. 2d 707 (1989). The mere presence of mitigating factors does not require reversal if the jury is convinced the circumstances of the crime outweigh the proposed mitigating factors. ***Elmore***, *supra, citing* ***Brown***, 132 Wn.2d at 553.

Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find sufficient evidence to support the jury's conclusion that defendant did not merit leniency.

Defendant's crime was particularly brutal. He entered the victim's home, beat her, bound her with strips of cloth, cut her clothes off, raped her anally and vaginally, robbed her, stabbed her three times in the back with a knife inflicting potentially fatal wounds, and slit her throat so deeply she was nearly decapitated. The blood spatter evidence supports a conclusion that the victim was still alive when her throat was slit. The injuries to the victim bespoke a level of rage, hatred, and viciousness that was frightening to comprehend. While the victim lived in defendant's neighborhood, they did not know each other. Defendant's animosity toward his victim did not flow from any interaction or past history with her; he generated this destructive force within himself and unleashed it on an unsuspecting and innocent target.

Defendant's criminal record included convictions for:

1. Theft in the first degree. A 1986 felony conviction in juvenile court for a crime committed when defendant was 13. (Ex. 7, 8; RP 2663-65).

2. Challenge to fight in public. A 1992 non-felony conviction from California committed when defendant was 20. (Ex. 9; RP 2663-65).

3. Carrying a concealed weapon in vehicle. A 1994 non-felony conviction from California committed when defendant was 22. (Ex. 10; RP 2663-65).

4. Driving while license suspended in the third degree. A 1998 misdemeanor conviction from Tacoma Municipal Court. (Ex. 11; RP 2663-65).

5. Driving while license suspended in the third degree. A 1998 misdemeanor conviction from Pierce County District Court. (Ex. 12; RP 2663-65).

6. Driving while license suspended in the third degree. A 1998 misdemeanor conviction from Lakewood Municipal court. (Ex.13; RP 2663-65).

7. Unlawful possession of a controlled substance(cocaine). A 1999 felony conviction from Pierce County Superior Court. (Ex. 14, 15; RP 2663-65).

8. Attempted Escape. A 2000 misdemeanor conviction from Pierce County Superior Court. (Ex. 16, 17; RP 2663-65).

9. Malicious Mischief in the Third Degree. A 2000 misdemeanor conviction from Pierce County Superior Court. (Ex. 16, 17; RP 2663-65).

Defendant's nine convictions, not including his current offense, span over fourteen years represents significant interaction with the criminal justice system. Defendant's criminal history, while void of any violent offenses, reveals a person who has been unable to conform his behavior to the law over an extended period of time. Not even his incarceration stopped his criminal behavior. Moreover, his convictions for challenging to fight and the carrying concealed weapon suggest that he is ready to engage in physical violence if the need arises

In this case, defendant offered mitigating evidence for the jury to consider in determining whether he merited leniency. For the most part he

presented the testimony of family members to describe their contact with him and what they observed of his home life. Defendant, born in 1972, was the middle child of three siblings and the only son. RP 2671, 2914. Family members described that he was a part of an extended family of a grandmother, four aunts, and many cousins, predominantly female, who lived in the Tacoma area. RP 2672-73, 2676-77, 2686-87, 2770-72, 2911-16.

Defendant's father and mother separated when he was about three years old. RP 2673. His mother and sisters indicated that after his parents separated in 1975, defendant didn't have much contact with his father. RP 2674-76, 2780, 2921, 2934. His mother worked hard to support her family and always stressed the importance of education to her children. RP 2925-26.

Defendant had difficulties in some school subjects, so was put into a special education class that was smaller in size and which offered him more attention. RP 2699-701, 2781, 2926-27. Defendant appeared for school clean and neatly dressed; his mother and grandmother would attend teacher conferences and showed interest in his progress in school. RP 2703-04, 2927-28. The special education classes ended by the time he was in seventh grade and he returned to mainstream classes. RP 2933.

Defendant had friends that he would play with, including a large group of cousins who were together frequently. RP 2932-33. Defendant was good in sports. RP 2705.

When defendant was 14, his mother decided to relocate to California and he was sent to live with his father in Sacramento while she got settled in her new location. RP 2679-80, 2935-36. Defendant returned to live with his mother in the Los Angeles area after she got a report from Child Protective Services that defendant had been beaten by his father. RP 2936-37.

His mother lived in what she described as a "a bad area" in California - the Crenshaw District - and she soon learned her son was skipping school. RP 2937-38. As this was unacceptable to her, she told him that he had to either go to school or join the Job Corps if he wanted to live in her house; defendant chose Job Corps. RP 2937-38. Defendant was in Job Corps in Utah for about 11 months; he came back to California just before his eighteenth birthday. RP 2941. After his return from Utah, defendant got involved with a woman and became a father in 1992 at the age of eighteen; his family members described him as a loving and caring father to his daughter when she visited him in Tacoma and when she later came to live with him. RP 2681-82, 2764-65, 2773, 2776, 2787, 2944-45.

Defendant had custody of his daughter for about two years prior to his arrest in 1998. RP 2955.

Defendant got a GED in 2001. RP 2958-59.

An expert in prison classifications and risk assessments reviewed defendant's incarceration history and opined that he would be unlikely to inflict violence on another person while incarcerated. RP 2812-2835. The expert maintained this opinion despite the fact that: 1) defendant had several altercations with other inmates while incarcerated in the Pierce County jail, including one where his attack sent another inmate to the hospital for stitches; 2) an escape attempt; and, 3) recent infractions for disobeying staff. RP 2856 -59, 2883, 2902.

The jury apparently discounted evidence of defendant's relatively normal childhood and his positive interactions with family members as being mitigating. No doubt this is because it is hard to comprehend how events in defendant's past mitigate his current crime. Defendant was long past his childhood years, was a father himself, and was loved by many. Defendant had a place to live, food to eat, with nothing to prevent him from earning a living other than his own inertia. Defendant may not have had a "perfect" childhood or "perfect" parents, but neither was it a parade of horribles. His parents separated at an early age; he had some difficulties in school which he overcame; his mother, while always

working to provide him with the necessities of life, was also involved and caring; his father may have used excessive force on him on one occasion; he had a large extended family, who loved him. There is nothing in the evidence of his life and family history that could begin to explain why he committed such a vicious rape, robbery, and murder. Looking at the evidence presented in mitigation, none of it makes defendant less culpable for his crimes.

Defendant argues that his young age at the time of the crime is an important mitigating factor because it is "well settled that the part of the brain which performs 'executive functions' is not completely developed before the mid-20s." Appellant's Brief at p. 227-28. No evidence about "executive functions" or brain development was put before the jury, so it has no relevance to a discussion of the sufficiency of the evidence. The jury could determine that defendant was 24 years old at the time of the murder, well out of his teens. At the time of the crime, he had been a father for six years and primary caretaker of his daughter for two years. Defendant fails to cite to any evidence presented to the jury that showed him to be particularly immature at the age of 24. The worst that can be said is that there was no evidence that he could hold a job for any length of time after he left the Job Corps. Other than a lack of evidence about

steady employment, defendant was living an adult life that included responsibility for the care of a young child.

In looking at defendant's remaining arguments on this aspect of statutory review, it is clear that he is conflating arguments that relate to the sufficiency of the evidence with arguments that relate to proportionality. *See* Appellant's brief at p. 222-228. The sufficiency component of statutory review looks at the information that was before the jury and which would have been considered by it in answering the question "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" It is the sufficiency of the evidence supporting the jury's answer to this question that is being tested. As the jury did not hear the facts and circumstances of other "similar cases" it could not have based its answer on that information. Arguments that compare and contrast the facts of defendant's case against these other cases is appropriately considered when looking at the proportionality component of mandatory review.

Viewing all the evidence in the light most favorable to the State, a rational trier of fact could have found sufficient evidence to support the jury's finding that defendant did not merit leniency. This court therefore should find that the State presented sufficient evidence to support the

jury's finding that there were not sufficient mitigating circumstances to warrant leniency.

c. The sentence was not disproportionate when compared to other similar cases.

In performing its proportionality review, this court compares the case to all aggravated murder cases, to see whether the sentence is wanton, freakish, or otherwise disproportionate. In performing this review, this Court has looked at a number of factors, including the nature of the crime, the defendant's criminal record, and the extent of any mitigating factors. ***State v. Pirtle***, 127 Wn.2d 628, 687, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S. Ct. 2568, 135 L. Ed. 2d 1084 (1996); *see also* ***Gentry***, 125 Wn.2d at 653 54; ***State v. Benn***, 120 Wn.2d 631, 677 78, 845 P.2d 289, *cert. denied*, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993); ***State v. Rice***, 110 Wn.2d 577, 623 25, 757 P.2d 889 (1988), *cert. denied*, 491 U.S. 910, 109 S. Ct. 3200, 105 L. Ed. 2d 707 (1989). The court has acknowledged that this type of review may not be easily quantified:

> We have quantified those factors that are easily quantifiable in order to be as objective as possible. By this we do not suggest proportionality as is a statistical task or can be reduced to a number, but only that numbers can point to areas of concern. At its heart, proportionality review will always be a subjective judgment as to whether a particular

> death sentence fairly represents the values inherent in Washington's sentencing scheme for aggravated murder.

Pirtle, 127 Wn.2d at 687. A statistical approach is not required. ***State v. Elmore***, 139 Wn.2d at 308. If the facts of defendant's case are similar to some of the facts taken from cases in which the death penalty was upheld, the proportionality review is satisfied. *Id.*

RCW 10.95.130(2)(b) defines the comparison pool as follows:

> "Similar cases" means cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965, in which the judge or jury considered the imposition of capital punishment regardless of whether it was imposed or executed, and cases in which reports have been filed with the supreme court under RCW 10.95.120 (emphasis added).

The pool of similar cases includes those in which the death penalty was sought and those in which it was not. ***State v. Davis***, 141 Wn.2d 798, 880, 10 P.3d 977 (2000).

As noted by this court recently, there are many reasons while there will be more life sentences than death sentences amongst the "similar cases" relevant to proportionality review, but primarily it is because the current system is designed to favor life sentences. ***State v. Davis,*** 175 Wn.2d 287, 361, 290 P.3d 43 (2012). Specific reasons include: 1) the majority of persons convicted of aggravated first degree murder are never subject to a special penalty phase hearing because the prosecutor does not

seek the death penalty; 2) in a special sentencing proceeding, the burden of proof is on the prosecution to prove the absence of sufficient mitigating circumstances beyond a reasonable doubt; 3) as it takes only 1 juror with a reasonable doubt to bring about a life sentence but 12 jurors to agree to return a death verdict, such verdicts are hard to obtain - less than half of the persons who faced a special sentencing proceeding received a sentence of death. *Id.* at 361. Thus, it is to be expected that -no matter what factor is being examined- there will be more "similar cases" where the sentence was for life without parole than where there was a death sentence. The fact that a death sentence is so infrequently sought and rarely obtained should not be held against a death sentence that is successfully obtained during proportionality review.

Proportionality review does not preclude variation on a case by case basis, nor does it guarantee that the death penalty is always imposed in superficially similar cases. ***Lord***, 117 Wn.2d at 910. Precise uniformity is unworkable because of the nature of the offenses and because juries are directed to tailor their decision to the individual circumstances of the crime. *Id.* "Precise uniformity is not possible because 'the brutal and extreme [crimes] with which we deal in death penalty cases are unique.'" ***State v. Davis***, 141 Wn. 2d at 881. Comparing death penalty cases to one another is not an exact science, nor could it ever be:

> Our proportionality review is guided by two fundamental goals: to avoid "random arbitrariness and imposition of the death sentence in a racially discriminatory manner." Consistent with these objectives, we have noted that our proportionality review:
>
> > does not guarantee there will be no variations from case to case, nor that a sentence of death will be uniformly imposed in all superficially similar circumstances. Mathematical precision is unworkable and unnecessary. "There is no constitutional or statutory requirement to ensure an unattainable degree of identity among particular cases which are invariably unique." Instead, we must determine whether a death sentence has been imposed generally in similar cases, and not imposed wantonly and freakishly.

State v. Elledge, 144 Wn.2d 62, 80, 26 P.3d 271 (2001) (citations omitted, quoting ***State v. Brown***, 132 Wn.2d 529, 555, 940 P.2d 546 (1997)).

Further, a decision to afford one defendant mercy, and not another, does not violate the constitution. ***State v. Mak***, 105 Wn.2d 692, 724, 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986) (quoting ***Gregg v. Georgia***, 428 U.S. 153, 199, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976)). Essentially all of defendant's arguments regarding proportionality are that others who committed worse crimes did not receive the death penalty so he should not either. This argument is not new and has been repeatedly rejected by this court in ***Lord*** and ***Davis***, *supra; see also* ***State v. Yates***, 161 Wn.2d 714, 793, 168 P.3d 359 (2007); ***State v. Cross***, 156 Wn.2d 580, 642, 132 P.3d 80 (2006). As this court succinctly put it recently:

> Yates misunderstands the concept of proportionality embodied in RCW 10.95.130(2)(b). Yates appears to believe that if some capital defendant has received life without parole, sentencing a similarly situated capital defendant to death violates RCW 10.95.130(2) (b). But this court has repeatedly rejected the notion that proportionality requires mathematical precision or that the cases "'be matched up like so many points on a graph.'"

In re Yates, 177 Wn.2d 1, 903, 296 P.3d 872 (2013), citing ***Elmore***, 162 Wn.2d at 270, 172 P.3d 335 (quoting ***State v. Lord***, 117 Wn.2d 829, 910, 822 P.2d 177 (1991)). Instead, proportionality review involves ensuring that the death penalty is not imposed wantonly or and freakishly.

Below, the State addresses the factors this court has articulated as being the proper ones for consideration in proportionality review.

i. Aggravating circumstances.

In this case the jury was informed the following aggravating circumstance had been proved:

> The murder was committed in the course of, in furtherance of, or in immediate flight from a Rape in the First Degree or Second Degree or a Robbery in the First Degree.

CP 6123.[14] This constitutes two aggravators. *See* ***State v. Davis***, 175 Wn.2d at 351.

Only one aggravating factor is needed for imposition of the death penalty. RCW 10.95.030(2); ***State v. Elledge***, 144 Wn.2d 62, 81, 26 P.3d

[14] The first jury also answered special interrogatories indicating it unanimously found the aggravator applied to the rape and to the robbery. CP 6124.

271 (2001). Previous cases have found the death penalty not disproportionate when based on one aggravator. *See* Elledge, TR 183; Gentry, TR 119; Harris, TR 29; Benn, TR 75; Davis TR 180; Thomas, TR 194. Imposition of the death penalty in this case is not disproportionate in light of other cases in which the sentence of death was upheld based on one or two aggravators. *See* ***Yates***, 161 Wn.2d at 789–90 (two aggravators); ***Cross***, 156 Wn.2d at 633, 132 P.3d 80 (one aggravator); ***Elledge***, 144 Wn.2d at 81, 26 P.3d 271 (one aggravator, also referencing the ***Gentry***, ***Harris***[15], and ***Benn*** cases).

It would appear that the fact a capital defendant has raped or sexually abused his homicide victim can carry great weight with the jury, as many defendants given the death penalty have this factor present in their crime. *See* Brown, TR 140, Davis, TR 180. Elmore, TR165. Gentry, TR 119. Woods, TR 177, Sagastegui, TR 160, Dodd, TR 76, Furman, TR 73, Lord, TR 47.

ii. Nature of the crime.

The nature of this crime was described in the section addressing the sufficiency of the evidence to support the jury's determination that the defendant did not merit leniency. The victim's body indicates that her last minutes in this world were ones of terror and pain. As this court has stated

[15] ***State v. Harris***, 106 Wn.2d 784, 725 P.2d 975 (1986).

"[a] brutal murder involving substantial conscious suffering of the victim makes the murderer more deserving of the death penalty." ***Stenson***, 132 Wn.2d at 759 (citing ***Gentry***, 125 Wn.2d at 657); *see also* ***Elledge***, 144 Wn.2d at 81.

Comparing this case with other "similar cases," it is apparent defendant's crime was *more* vicious and brutal that other cases in which the death penalty was imposed. Cases where the victim was shot and died quickly are Rupe, TR. 31, Hazen, TR 39, and Stenson, TR. 144. Other cases that are arguably less brutal are Benn, TR75 (gunshot wounds to the head and trunk, no torture); Harris, TR 29 (gunshot wounds to the head and neck, no torture, contract killing); Marshall, TR 181 (gunshot wound, no torture); Harris TR 29 (gunshot wounds, contract killing). The imposition imposed in this case with a more brutal crime than these cases, is not disproportionate. The brutal facts of this case are very similar to those in the Davis case, TR 180 & 281, and the Furman case, TR 73, both of whom received the death penalty.

While aggravated murderers who kill multiple victims are more likely to receive the death penalty, there have been several who, like the defendant, had a single victim. *See* Scherf, TR 313 (corrections officer killed by prisoner), Davis, TR 180 & 281 (the victim was killed during a burglary/rape); Elledge TR 183 (the victim was held hostage for short time

before being strangled); Luvene, TR 135 (the victim was shot during the course of a liquor store robbery); Marshall, TR 181 (defendant shot a single victim in the course of a robbery); Furman, TR 73 (victim bludgeoned to death after hiring defendant to wash windows); Harris TR 29 (contract killing). Thus, a number of defendants who have been sentenced to death were convicted of only one aggravated first degree murder. Defendant's sentence is not disproportionate simply because he had a single victim.

iii. Criminal history.

Defendant's death sentence is not disproportionate when his criminal history is considered. Defendant's criminal history was set forth above in the section addressing the sufficiency of the evidence. *Supra*, at p. 152-53. He has nine prior convictions including three felonies. While it does not include any violent felonies, it does include an attempted escape conviction, which occurred in 2000 while he was pending trial in this case. This conviction could weigh with a jury as to defendant's future dangerousness.

One person received the death penalty with no criminal history. Schierman TR 303. Defendant's criminal history is arguably more extensive than others who received the death penalty; it is, at least,

equivalent to their criminal history. Cross TR 220 (reckless endangerment); Stenson TR 144 (three drug offenses and a tax evasion offense); Elmore TR 165 (forgery, burglary and grand larceny); Sagategui TR 160 (six misdemeanors); Luvene TR 135 (grand larceny and possession of stolen property).

Nothing about defendant's criminal history suggests that the jury imposed the death sentence in a wanton or freakish manner.

iv. Personal history.

Defendant was 24 when he committed these crimes, beyond his teenage years. There is no evidence that he was impulsive rash or irresponsible; he had primary care of his young daughter at the time of the crime. While he had some issues with learning in his early childhood, there is no evidence of any significant learning disability or any mental health issues. As noted earlier in the section addressing the mitigation evidence, defendant was raised primarily by his mother, who had to work hard to keep her three children housed and fed. There is little evidence of any positive male influences in his life, as his extended family was primarily female. There was evidence that he was subjected to physical abuse by his father on one occasion. Despite the lack of any significant exposure to his father or any male parental figure, defendant was,

according to his family members, a good father to his daughter when she was young. The evidence showed a relatively normal upbringing in a single parent home. He had frequent interaction with members of his large extended family, who loved him. There was no evidence of any ongoing abuse, deprivation, or suffering.

There is nothing in defendant's personal history to explain what triggered the vicious, brutal rape and murder of an innocent neighbor, other than to surmise a deep seated anger and hatred of women. This is similar to the personal history of Robert Yates. *See* ***Yates***, 161 Wn.2d at 786-87, 790. The subjective factors in defendant's personal history are not sufficient to override the circumstances and consequences of his crime.

In conclusion, it is important to remember the function of proportionality review. It is a statutory safeguard; proportionality review is not required to make a capital sentencing scheme pass muster under the Eighth Amendment. ***Pulley v. Harris***, 465 U.S. 37, 45-46, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). Essentially, it is a failsafe provision in a capital sentencing scheme that already has sufficient protections in place to satisfy the Eighth Amendment. This failsafe operates only in the unlikely event that a penalty phase jury returns an outlier death verdict.

There is no indication that the Legislature, by enacting proportionality review, did so to provide the Supreme Court the opportunity to opine, in general, on the wisdom of having the death penalty available. There is nothing to indicate that proportionality review was enacted to give the court a means of reviewing prosecutorial decisions to seek (or not seek) the penalty in certain cases. Clearly, it is not meant to provide the court an opportunity for overriding the death verdict the jury returned just because it disagrees with it or the imposition of the death penalty in general. It was enacted to protect against the freakish and wanton imposition of a death sentence. As argued above the decision of the jury in this case was perfectly reasonable and similar to other cases where a death verdict has been returned; it should be upheld.

The United States Supreme Court has stated that nothing in "any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." ***Gregg v. Georgia***, 428 U.S. 153, 199, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); *see also* ***State v. Mak***, 105 Wn.2d 692, 724, 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986). The showing of mercy is a reasoned moral response resulting in the forgiving treatment of someone who could be treated harshly. Whether mercy is shown by a prosecutor, in deciding not to seek the death penalty, or a penalty phase jury, which decides to return a sentence of life even though the

circumstances of the crime justifies a sentence of death, such a showing will mean that persons deserving of a death sentence will be in prison for life. This is not a reason to find a particular death sentence invalid or the entire death penalty scheme invalid. As this court stated:

> The fact that more life sentences are imposed than death sentences does not prove that the system "defies rationality." ... In our view, it shows that the system is working as intended and that the different actors in the system are performing their assigned roles conscientiously—prosecutors in the exercise of discretion, jurors in considering mitigating evidence, and defense attorneys endeavoring to humanize defendants guilty of the most inhuman acts. While it is easy to imagine a system in which the death penalty is routinely sought and routinely imposed, that would not be a system superior to that extant in Washington and it would be inconsistent with the present values of our citizenry

Davis, 175 Wn.2d at 361-62.

In sum, there is nothing freakish or wanton about the jury returning a death verdict in this case. Two separate juries have examined the facts of this crime, the defendant's criminal history, his personal history, and his mitigation evidence and returned a verdict of death. The jury's verdict should be upheld.

d. The Death Sentence Did Not Result From Passion Or Prejudice.

This court has said the following about the statutory review factor in RCW 10.95.130 that looks at whether the death sentence was brought about through passion or prejudice:

> We will vacate sentences that were the product of appeals to the passion or prejudice of the jury, such as "arguments intended to 'incite feelings of fear, anger, and a desire for revenge' and arguments that are 'irrelevant, irrational, and inflammatory ... that prevent calm and dispassionate appraisal of the evidence.'"

State v. Cross, 156 Wn.2d 580, 634–35, 132 P.3d 80 (2006) (alteration in original), *quoting* ***State v. Elledge***, 144 Wn.2d 62, 85, 26 P.3d 271(2001) (quoting Bennett L. Gershman, *Trial Error and Misconduct* § 2–6(b)(2), at 171–72 (1997)); *see also* ***State v. Davis***, 175 Wn.2d 287, 374-75, 290 P.3d 43 (2012). In these cases, this court has examined the arguments made to the jury to see if they included improper appeals. *Id.*

Despite this consistent approach to this component of statutory review, defendant argues that this "Court has never precisely explained what standards are applied." Appellant's Brief at p 207. Defendant then argues that this standard must mean something more or different than what could be raised in a challenge to improper argument as part a claim of prosecutorial misconduct, because if there were errors causing a reversal from prosecutorial misconduct the court would never reach the passion or

prejudice review. *Id.* Defendant fails to comprehend this component of statutory review is a legislative safeguard to ensure this court will *always* examine this issue regardless of whether a claim of prosecutorial misconduct is raised in an appeal of a death sentence.

This state has now seen three capital defendants who waived appellate review of their convictions and death sentences; but in each case this court has held that they could not waive the statutory review required by RCW 10.95.130. *See* ***State v. Dodd***, 120 Wn.2d 1, 838 P.2d 86 (1992); ***State v. Sagastegui***, 135 Wn.2d 67, 954 P.2d 1311(1998); ***State v. Elledge***, 144 Wn.2d at 62. In each of these cases, the only issues examined by the court were: 1) whether the waiver of the right to appeal was made knowingly and voluntarily; and, 2) those required by RCW 10.95.130.

Review for whether the death sentence was brought about by passion and prejudice may seem redundant in a case where the capital defendant is both exercising his appellate rights and raising a claim of prosecutorial misconduct, but that will not be the posture of every death penalty appeal. This mandatory review was the Legislature's way of assuring that no person in this state would be executed without this court ensuring that the death sentence was not a result of passion or prejudice. Because this provision is a safeguard, defendant's arguments do not

provide a reason for abandoning precedent as to what is examined when looking at this component of mandatory review.

In this case, the jury was instructed that the only evidence it was to consider was the testimony of witnesses and the exhibits admitted during the penalty phase. CP 1068, Penalty Phase Inst. No. 1. It was explicitly told that the arguments of counsel were not evidence and to disregard any remark or argument that was not supported by the evidence. CP 1069, Penalty Phase Inst. No. 1. Lastly, the jurors were instructed that they were not to be influenced by sympathy, prejudice, or personal preference and that the verdict should be based upon reason not emotion. CP 1070, Penalty Phase Inst. No. 1. Nothing in the record even hints that they disregarded this instruction. *See* ***State v. Sagastegui***, 135 Wn.2d 67, 94 95, 954 P.2d 1311 (1998).

Defendant argues that the jury's passions were somehow inflamed by the argument of the prosecutor in the penalty phase- alleging the prosecutor argued facts not in evidence and invited the jury to base its verdict on sympathy for the victim. The propriety of the prosecution argument was addressed in the earlier section of the brief dealing with claims of prosecutorial misconduct. *See* Response Brief at p. 58-92. Additionally, defendant does not address that the only way for him to succeed in his argument is for this court to conclude that the jury

disregarded all of the court's instructions noted above. It is a fundamental precept that juries are presumed to heed the court's instructions. *See* ***State v. Lord***, 117 Wn.2d 829, 861, 822 P.2d 177 (1991). This court should reject the invitation to casually abandon such a fundamental principle.

Next defendant suggests that the court should invalidate the death sentence because it was a result of racial bias in the criminal justice system, picking up on themes expressed in Justice Wiggin's opinion in ***State v. Saintcalle***, 178 Wn.2d 34, 309 P.3d 326 (2013). *See* Appellant's Brief at p. 208. While ***Saintcalle*** dealt with peremptory challenges during jury selection, Justice Wiggin's also expressed concerns about the effect of racial bias in returning a death sentence in a concurrence in dissent in a capital case. *See* ***State v. Davis,*** 175 Wn.2d at 388-401 (Wiggins, J. concurring in dissent). In ***Davis***, Justice Wiggins cited to many commentators who were dismayed over what they perceived as racial discrimination in capital punishment. He wanted an evidentiary hearing examining "the statistical significance of the racial patterns that emerge from the aggravated-murder trial reports." *Id.*

The majority opinion in ***Davis*** addressed many of the claims raised in the concurrence in dissent and found, based upon its own review of the trial reports in aggravated murder cases, that "the likelihood of a white defendant receiving the death penalty in Washington is practically

the same as the likelihood of a black defendant receiving it." ***Davis***, 175 Wn.2d at 362. The court went on to rebut many of the arguments raised by Justice Wiggins, then concluded from its review of the trial reports on aggravated murder cases there was "no evidence that racial discrimination pervades the imposition of capital punishment in Washington and, therefore, see no reason to remand this matter to the superior court for an evidentiary hearing that the petitioner did not seek." *Id.* at 362-373. The ***Davis*** case, decided in 2012, is the most recent capital case on direct review of a death sentence. Defendant's entire argument is premised on a conclusion that was just recently rejected by this court.

i. The court should not accept the conclusions of the Beckett report as the State has had no opportunity to challenge the validity of the study.

Defendant also relies upon a report by Katherine Beckett, Ph.D. entitled *The Role of Race in Washington State Capital Sentencing, 1981-2012*. *See* Appellant's brief, Appendix A. The State filed an unsuccessful motion to strike this appendix because it was not before the trial court. RAP 10.3(a)(8). The State reiterates its objection to this report as it is a cardinal principle of appellate review that such review is confined to the trial court record. ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d

1251 (1995), *citing* ***State v. Crane***, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237, 111 S. Ct. 2867, 115 L. Ed. 2d 1033 (1991), and ***State v. Blight***, 89 Wn.2d 38, 45–46, 569 P.2d 1129 (1977) ("Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record.").

Appellate courts are not an appropriate forum for litigating facts and adducing evidence. In this case, appellant's counsel commissioned the Beckett Report[16] and actively participated[17] in developing the "coding protocol" used to take information from the death penalty reports gathered pursuant to RCW 10.95 for use in the statistical analysis. Appellant's counsel are not disinterested or scholarly researchers, but are advocates trying to convince the court that there is racial bias in imposition of the death penalty. Their active participation in the genesis of the study and in the creation of the protocol casts a shadow over the reliability of the outcomes and raises questions as to whether the report was done fairly or in an unbiased manner. Had this study been the subject of a hearing or motion in the trial court, the author of the Beckett Report could have been cross-examined about: 1) appellant's counsel's level of participation; 2) their influences on her methodology; 3) whether she adjusted which factors were considered in order to achieve a particular result; and 4) the

[16] This is noted on the cover page of the Report
[17] *See* Report at p. 14, n.55.

reasoning behind why she made some of the classification decisions that she did.[18]

These are but a few of the questions that could have been explored in an evidentiary hearing had this report been submitted to the trial court as evidentiary support for a motion. The State would have been provided

[18] While the undersigned has no expertise in statistical analysis, even a cursory review of the Beckett Report raises questions about the coding protocol employed. There is a chart setting forth the case characteristics that were examined to see their impact on prosecutorial decisions to seek the death penalty. Report at p. 41. While it makes sense that the analysis might be comparing cases with black defendants versus non-black defendants, police officer victims against non-police victims, child victims against adult victims, and white victims against non-white victims, it is unfathomable why the author would compare cases with stranger victims against cases with white defendants; yet the report indicates that this was done. *Id.* The report indicates there were three categories for coding the number of victims: 1) a single victim; 2) two to four victims; and 3) more than five victims. Report at p. 39. Treating defendants who victimized two people the same as those who had three or four victims results in a very crude method of classification that does not accurately reflect the seriousness of their crimes. Four categories were used to describe the race of the victims. *Id.* More categories could have been employed to accurately reflect the number of victims. This Court has no explanation for why only three categories were used to describe the number of victims or why decision was made to divide the number of victims within the categories as it was done. Moreover, this coding protocol was not used consistently throughout the analysis, for when the impact of a particular social characteristics was being examined – such as the race of the defendant- the cases were re-categorized as having either "one victim" or "more than one victim." Beckett Report at p. 26. Inconsistency in the criteria examined is also shown in other areas. There is no explanation as to why numerous different social factors were examined when looking at the impact of case characteristics and social factors on the prosecutorial decision to seek the death penalty, but information on only one social factor - whether the defendant was black- when looking at the impact on the jury decision. Compare, Table 5, Report at p. 27, with Table 7, Report at p. 31. The jury would have known the sex and race of the victim and whether the victim was known to the defendant, yet there is no information in the tables about the impact of these characteristics. This raises the questions as to why the same social factors were not examined -and the results documented- for both the prosecutorial and jury decision making processes. Inconsistency in the selection of criteria examined and the results reported at each phase of the study opens up the possibility of manipulation of the outcome. Finally, the inclusion of legally irrelevant considerations - such as the percentage of Republicans in the county where the case was filed, *see* Table 5, report at p. 27, raises additional questions about the motives and biases of the authors/opposing counsel.

an opportunity to test the reliability of the contents of the report through cross-examination and the presentation of other evidence, including expert testimony. Legal commentators have noted the problems inherent with statistical models used to examine imposition of the death penalty and that "studies need to be challenged by someone with ... incentive and expertise" before their conclusions are accepted as accurate. *See* Scheidegger, *Rebutting the Myths about Race and the Death Penalty*, Ohio State Journal of Criminal Law, Vol 10:1, p.147 (2012). Defendant's reliance on the report to support arguments in his brief seeks to by-pass the truth-finding aspect of the adversary process. As noted earlier, on more than one occasion, an evidentiary hearing revealed that the results of study were untrustworthy. Response Brief at p. 97-98. While this court denied the motion to strike, it should not accept the untested conclusions of the report as "evidence" supporting defendant's claim, when the State has had no opportunity to challenge the contents in a fact finding hearing.

ii. As this mandatory review factor examines whether the jury's death verdict was the product of passion or prejudice, there is no reason to consider events that occurred in a previous proceeding or outside the jury's presence as these incidents could not have impacted the jury's verdict. Nothing that happened in the presentation of this shows that the verdict was the result of passion and prejudice.

In an effort to prove that his death sentence was the result of racial prejudice, defendant cites to many incidents that occurred during his prosecution to show that "the issue of race was ever present in this case." Appellant's brief at p. 209- 221. Several of these incidents occurred during the guilt phase, the first penalty phase proceeding, or outside the presence of the jury who deliberated in the second penalty phase. Such incidents include, among others: 1) the fact that the charging document identified defendant's race, 2) his first jury was all white; 3) the findings made in the first trial to support the court's ruling that defendant would wear a stun belt were based on "his size age and physical condition" which defendant labels as "racially suggestive;" 4) the use of the term "Negroid" in the guilt phase to describe the racial characteristics of the person who left a hair found on the victim; 5) comments made in individual voir dire by jurors who were excused for cause; 6) allegations

that the prosecutor did not fight as strenuously to rehabilitate[19] African American venire persons that were challenged for cause; and, 7) the prosecutor used the term "lily-white"[20] in an argument about the admission of crime scene photographs. *Id.* Defendant fails to explain how these incidents could have affected the jury's decision in the second penalty hearing, if the jury was unaware of them.

There is no evidence of racial bias in the presentation of this case to the jury. While it is true that defendant and the victim were of different races, the trial court did not find that this was an apparent factor at trial. CP 1272, 1274. Finally, while defendant tries to focus the court on the fact that there were no African-Americans on the jury, he fails to

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[19] Defendant points the court to actions taken by the prosecutor on Jurors Nos. 19 and 20, citing the record at RP 672-94, 697-709. While both jurors indicated that the facts of the crime would weigh heavily in their decision on whether to impose the death penalty, Juror No.19 articulated that he was willing to consider information about the defendant in deciding the appropriate punishment. RP 667-69. Once Juror 20 was given a basic description of the crime in this case, there was nothing else he needed to know in order to impose a death sentence and he thought, in general, the death penalty was appropriate for any premeditated murder. RP 696-700. Juror No. 20's answers left little basis for rehabilitation. It should also be noted, that the next day the State successfully argued against a defense challenge for cause on a different African-American juror –Juror No. 31. RP 925-26. Ultimately, the defense excused this juror with a peremptory challenge. CP 989-990.

[20] Outside the presence of the jury, the prosecutor stated "Case law is replete with you can't depict a violent crime in a lily white manner." RP 2352. This was no doubt a reference to ***State v. Adams***, 76 Wn.2d 650,655, 458 P.2d 558 (1969), *reversed on other grounds by* ***Adams v. Washington***, 403 U.S. 947, 91 S. Ct. 2273, 29 L. Ed. 2d 855 (1971) ("A bloody, brutal crime cannot be explained to a jury in a lily-white manner to save the members of the jury the discomforture of hearing and seeing the results of such criminal activity."). The prosecutor's use of the term came from his familiarity with case law, not the "Lily White Movement." Contrary to the assertion that the term "lily-white" had its origins in this anti civil rights movement, the use of the term "lily-white" as an adjective to describe something pure white has existed for centuries. *See* Shakespeare, *Midsummer Night's Dream,* Act III, scene I ("Most radiant Pyramus, most lily-white of hue").

acknowledge his own participation in removing African-Americans from the panel. As the trial court put in its trial report:

> There were a number of African –American jurors in the venire that was chosen for this case. Several were challenged for cause by either the State or defendant during voir dire for hardships or for their views on the death penalty. There were nine African Americans on the list of jurors passed for cause by both sides. During the course of peremptory challenges, each of those jurors was excused by either the State or defendant by exercise of a peremptory challenge. There was no Batson-based issue raised by either side during the process of seating the jury.

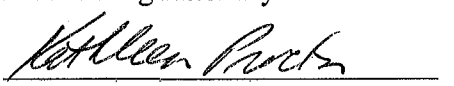
CP 1272-73. Defendant has failed to show that racial issues were highlighted in the presentation of evidence or in the closing argument; as such he has failed to show the death verdict was the result of passion or prejudice due to racial bias.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the death sentence returned by the jury.

DATED: April 20, 2015.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

JOHN NEEB
Deputy Prosecuting Attorney
WSB # 21322

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

Date Signature

APPENDIX "A"

RCW 10.95

RCW 10.95

10.95.010. Court rules

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

[1981 c 138 § 1.]

10.95.020. Definition

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

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

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

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

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

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

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

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

(8) The victim was:

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

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

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

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

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

(a) Robbery in the first or second degree;

(b) Rape in the first or second degree;

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

(d) Kidnapping in the first degree; or

(e) Arson in the first degree;

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

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

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

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

(b) Any criminal assault.

[2003 c 53 § 96, eff. July 1, 2004; 1998 c 305 § 1. Prior: 1995 c 129 § 17 (Initiative Measure No. 159); 1994 c 121 § 3; 1981 c 138 § 2.]

10.95.030. Sentences for aggravated first degree murder

(1) Except as provided in subsections (2) and (3) of this section, any person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or

parole. A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer and the indeterminate sentence review board or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation. The department of social and health services or its successor or any executive official may not permit such prisoner to participate in any sort of release or furlough program.

(2) If, pursuant to a special sentencing proceeding held under RCW 10.95.050, the trier of fact finds that there are not sufficient mitigating circumstances to merit leniency, the sentence shall be death. In no case, however, shall a person be sentenced to death if the person had an intellectual disability at the time the crime was committed, under the definition of intellectual disability set forth in (a) of this subsection. A diagnosis of intellectual disability shall be documented by a licensed psychiatrist or licensed psychologist designated by the court, who is an expert in the diagnosis and evaluation of intellectual disabilities. The defense must establish an intellectual disability by a preponderance of the evidence and the court must make a finding as to the existence of an intellectual disability.

(a) "Intellectual disability" means the individual has: (i) Significantly subaverage general intellectual functioning; (ii) existing concurrently with deficits in adaptive behavior; and (iii) both significantly subaverage general intellectual functioning and deficits in adaptive behavior were manifested during the developmental period.

(b) "General intellectual functioning" means the results obtained by assessment with one or more of the individually administered general intelligence tests developed for the purpose of assessing intellectual functioning.

(c) "Significantly subaverage general intellectual functioning" means intelligence quotient seventy or below.

(d) "Adaptive behavior" means the effectiveness or degree with which individuals meet the standards of personal independence and social responsibility expected for his or her age.

(e) "Developmental period" means the period of time between conception and the eighteenth birthday.

(3)(a)(i) Any person convicted of the crime of aggravated first degree murder for an offense committed prior to the person's sixteenth birthday shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of twenty-five years.

(ii) Any person convicted of the crime of aggravated first degree murder for an offense committed when the person is at least sixteen years old but less than eighteen years old shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of no less than twenty-five years. A minimum term of life may be imposed, in which case the person will be ineligible for parole or early release.

(b) In setting a minimum term, the court must take into account mitigating factors that account for the diminished culpability of youth as provided in Miller v. Alabama, 132 S.Ct. 2455 (2012) including, but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated.

(c) A person sentenced under this subsection shall serve the sentence in a facility or institution operated, or utilized under contract, by the state. During the minimum term of total confinement, the person shall not be eligible for community custody, earned release time, furlough, home detention, partial confinement, work crew, work release, or any other form of early release authorized under RCW 9.94A.728, or any other form of authorized leave or absence from the correctional facility while not in the direct custody of a corrections officer. The provisions of this subsection shall not apply: (i) In the case of an offender in need of emergency medical treatment; or (ii) for an extraordinary medical placement when authorized under RCW 9.94A.728(3).

(d) Any person sentenced pursuant to this subsection shall be subject to community custody under the supervision of the department of corrections and the authority of the indeterminate sentence review board. As part of any sentence under this subsection, the court shall require the person to comply with any conditions imposed by the board.

(e) No later than five years prior to the expiration of the person's minimum term, the department of corrections shall conduct an assessment of the offender and identify programming and services that would be appropriate to prepare the offender for return to the community. To the extent possible, the department shall make programming available as identified by the assessment.

(f) No later than one hundred eighty days prior to the expiration of the person's minimum term, the department of corrections shall conduct, and the offender shall participate in, an examination of the person, incorporating methodologies that are recognized by experts in the prediction of dangerousness, and including a prediction of the probability that the person will engage in future criminal behavior if released on conditions to be set by the board. The board may consider a person's failure to participate in an evaluation under this subsection in determining whether to release the person. The board shall order the person released, under such affirmative and other conditions as the board determines appropriate, unless the board determines by a preponderance of the evidence that, despite such conditions, it is more likely than not that the person will commit new criminal law violations if released. If the board does not order the person released, the board shall set a new minimum term not to exceed five additional years. The board shall give public safety considerations the highest priority when making all discretionary decisions regarding the ability for release and conditions of release.

(g) In a hearing conducted under (f) of this subsection, the board shall provide opportunities for victims and survivors of victims of any crimes for which the offender has been convicted to present statements as set forth in RCW 7.69.032. The procedures for victim and survivor of victim input shall be developed by rule. To facilitate victim and survivor of victim involvement, county prosecutor's offices shall ensure that any victim impact statements and known contact information for victims of record and survivors of victims are forwarded as part of the judgment and sentence.

(h) An offender released by the board is subject to the supervision of the department of corrections for a period of time to be determined by the board. The department shall monitor the offender's compliance with conditions of community custody imposed by the court, department, or board, and promptly report any violations to the board. Any violation of conditions of community custody established or modified by the board are subject to the provisions of RCW 9.95.425 through 9.95.440.

[2014 c 130 § 9, eff. June 1, 2014; 2010 c 94 § 3, eff. June 10, 2010; 1993 c 479 § 1; 1981 c 138 § 3.]

10.95.035. Return of persons to sentencing court if sentenced prior to June 1, 2014, for a term of life without the possibility of parole for an offense committed prior to eighteenth birthday

(1) A person, who was sentenced prior to June 1, 2014, to a term of life without the possibility of parole for an offense committed prior to their eighteenth birthday, shall be returned to the sentencing court or the sentencing court's successor for sentencing consistent with RCW 10.95.030. Release and supervision of a person who receives a minimum term of less than life will be governed by RCW 10.95.030.

(2) The court shall provide an opportunity for victims and survivors of victims of any crimes for which the offender has been convicted to present a statement personally or by representation.

(3) The court's order setting a minimum term is subject to review to the same extent as a minimum term decision by the parole board before July 1, 1986.

(4) A resentencing under this section shall not reopen the defendant's conviction to challenges that would otherwise be barred by RCW 10.73.090, 10.73.100, 10.73.140, or other procedural barriers.

[2014 c 130 § 11, eff. June 1, 2014.]

10.95.040. Special sentencing proceeding--Notice--Filing--Service

(1) If a person is charged with aggravated first degree murder as defined by RCW 10.95.020, the prosecuting attorney shall file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.

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

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

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

[1981 c 138 § 4.]

10.95.050. Special sentencing proceeding--When held--Jury to decide matters presented--Waiver--Reconvening same jury--Impanelling new jury--Peremptory challenges

(1) If a defendant is adjudicated guilty of aggravated first degree murder, whether by acceptance of a plea of guilty, by verdict of a jury, or by decision of the trial court sitting without a jury, a special sentencing proceeding shall be held if a notice of special sentencing proceeding was filed and served as provided by RCW 10.95.040. No sort of plea, admission, or agreement may abrogate the requirement that a special sentencing proceeding be held.

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

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

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

[1981 c 138 § 5.]

10.95.060. Special sentencing proceeding--Jury instructions--Opening statements--Evidence--Arguments--Question for jury

(1) At the commencement of the special sentencing proceeding, the trial court shall instruct the jury as to the nature and purpose of the proceeding and as to the consequences of its decision, as provided in RCW 10.95.030.

(2) At the special sentencing proceeding both the prosecution and defense shall be allowed to make an opening statement. The prosecution shall first present evidence and then the defense may present evidence. Rebuttal evidence may be presented by each side. Upon conclusion of the evidence, the court shall instruct the jury and then the prosecution and defense shall be permitted to present argument. The prosecution shall open and conclude the argument.

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

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

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

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

[1981 c 138 § 6.]

10.95.070. Special sentencing proceeding--Factors which jury may consider in deciding whether leniency merited

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

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

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

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

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

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

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

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

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

[2010 c 94 § 4, eff. June 10, 2010; 1993 c 479 § 2; 1981 c 138 § 7.]

10.95.080. When sentence to death or sentence to life imprisonment shall be imposed

(1) If a jury answers affirmatively the question posed by RCW 10.95.060(4), or when a jury is waived as allowed by RCW 10.95.050(2) and the trial court answers affirmatively the question posed by RCW 10.95.060(4), the defendant shall be sentenced to death. The trial court may not suspend or defer the execution or imposition of the sentence.

(2) If the jury does not return an affirmative answer to the question posed in RCW 10.95.060(4), the defendant shall be sentenced to life imprisonment as provided in RCW 10.95.030(1).

[1981 c 138 § 8.]

10.95.090. Sentence if death sentence commuted, held invalid, or if death sentence established by chapter held invalid

If any sentence of death imposed pursuant to this chapter is commuted by the governor, or held to be invalid by a final judgment of a court after all avenues of appeal have been exhausted by the parties to the action, or if the death penalty established by this chapter is held to be invalid by a final judgment of a court which is binding on all courts in the state, the sentence for aggravated first degree murder if there was an affirmative response to the question posed by RCW 10.95.060(4) shall be life imprisonment as provided in RCW 10.95.030(1)

[1981 c 138 § 9.]

10.95.100. Mandatory review of death sentence by supreme court--Notice--Transmittal--Contents of notice--Jurisdiction

Whenever a defendant is sentenced to death, upon entry of the judgment and sentence in the trial court the sentence shall be reviewed on the record by the supreme court of Washington.

Within ten days of the entry of a judgment and sentence imposing the death penalty, the clerk of the trial court shall transmit notice thereof to the clerk of the supreme court of Washington and to the parties. The notice shall include the caption of the case, its cause number, the defendant's name, the crime or crimes of which the defendant was convicted, the sentence imposed, the date of entry of judgment and sentence, and the names and addresses of the attorneys for the parties. The notice shall vest with the supreme court of Washington the jurisdiction to review the sentence of death as provided by this chapter. The failure of the clerk of the trial court to transmit the notice as required shall not prevent the supreme court of Washington from conducting the sentence review as provided by chapter 138, Laws of 1981.

[1981 c 138 § 10.]

10.95.110. Verbatim report of trial proceedings--Preparation--Transmittal to supreme court--Clerk's papers--Receipt

(1) Within ten days after the entry of a judgment and sentence imposing the death penalty, the clerk of the trial court shall cause the preparation of a verbatim report of the trial proceedings to be commenced.

(2) Within five days of the filing and approval of the verbatim report of proceedings, the clerk of the trial court shall transmit such verbatim report of proceedings together with copies of all of the clerk's papers to the clerk of the supreme court of Washington. The clerk of the supreme court of Washington shall forthwith acknowledge receipt of these documents by providing notice of receipt to the clerk of the trial court, the defendant or his or her attorney, and the prosecuting attorney.

[1981 c 138 § 11.]

10.95.120. Information report--Form--Contents--Submission to supreme court, defendant, prosecuting attorney

In all cases in which a person is convicted of aggravated first degree murder, the trial court shall, within thirty days after the entry of the judgment and sentence, submit a report to the clerk of the supreme court of Washington, to the defendant or his or her attorney, and to the prosecuting attorney which provides the information specified under subsections (1) through (8) of this section. The report shall be

in the form of a standard questionnaire prepared and supplied by the supreme court of Washington and shall include the following:

(1) Information about the defendant, including the following:

(a) Name, date of birth, gender, marital status, and race and/or ethnic origin;

(b) Number and ages of children;

(c) Whether his or her parents are living, and date of death where applicable;

(d) Number of children born to his or her parents;

(e) The defendant's educational background, intelligence level, and intelligence quotient;

(f) Whether a psychiatric evaluation was performed, and if so, whether it indicated that the defendant was:

(i) Able to distinguish right from wrong;

(ii) Able to perceive the nature and quality of his or her act; and

(iii) Able to cooperate intelligently with his or her defense;

(g) Any character or behavior disorders found or other pertinent psychiatric or psychological information;

(h) The work record of the defendant;

(i) A list of the defendant's prior convictions including the offense, date, and sentence imposed; and

(j) The length of time the defendant has resided in Washington and the county in which he or she was convicted.

(2) Information about the trial, including:

(a) The defendant's plea;

(b) Whether defendant was represented by counsel;

(c) Whether there was evidence introduced or instructions given as to defenses to aggravated first degree murder, including excusable homicide, justifiable homicide, insanity, duress, entrapment, alibi, intoxication, or other specific defense;

(d) Any other offenses charged against the defendant and tried at the same trial and whether they resulted in conviction;

(e) What aggravating circumstances were alleged against the defendant and which of these circumstances was found to have been applicable; and

(f) Names and charges filed against other defendant(s) if tried jointly and disposition of the charges.

(3) Information concerning the special sentencing proceeding, including:

(a) The date the defendant was convicted and date the special sentencing proceeding commenced;

(b) Whether the jury for the special sentencing proceeding was the same jury that returned the guilty verdict, providing an explanation if it was not;

(c) Whether there was evidence of mitigating circumstances;

(d) Whether there was, in the court's opinion, credible evidence of the mitigating circumstances as provided in RCW 10.95.070;

(e) The jury's answer to the question posed in RCW 10.95.060(4);

(f) The sentence imposed.

(4) Information about the victim, including:

(a) Whether he or she was related to the defendant by blood or marriage;

(b) The victim's occupation and whether he or she was an employer or employee of the defendant;

(c) Whether the victim was acquainted with the defendant, and if so, how well;

(d) The length of time the victim resided in Washington and the county;

(e) Whether the victim was the same race and/or ethnic origin as the defendant;

(f) Whether the victim was the same sex as the defendant;

(g) Whether the victim was held hostage during the crime and if so, how long;

(h) The nature and extent of any physical harm or torture inflicted upon the victim prior to death;

(i) The victim's age; and

(j) The type of weapon used in the crime, if any.

(5) Information about the representation of the defendant, including:

(a) Date counsel secured;

(b) Whether counsel was retained or appointed, including the reason for appointment;

(c) The length of time counsel has practiced law and nature of his or her practice; and

(d) Whether the same counsel served at both the trial and special sentencing proceeding, and if not, why not.

(6) General considerations, including:

(a) Whether the race and/or ethnic origin of the defendant, victim, or any witness was an apparent factor at trial;

(b) What percentage of the county population is the same race and/or ethnic origin of the defendant;

(c) Whether members of the defendant's or victim's race and/or ethnic origin were represented on the jury;

(d) Whether there was evidence that such members were systematically excluded from the jury;

(e) Whether the sexual orientation of the defendant, victim, or any witness was a factor in the trial;

(f) Whether any specific instruction was given to the jury to exclude race, ethnic origin, or sexual orientation as an issue;

(g) Whether there was extensive publicity concerning the case in the community;

(h) Whether the jury was instructed to disregard such publicity;

(i) Whether the jury was instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when considering its verdict or its findings in the special sentencing proceeding;

(j) The nature of the evidence resulting in such instruction; and

(k) General comments of the trial judge concerning the appropriateness of the sentence considering the crime, defendant, and other relevant factors.

(7) Information about the chronology of the case, including the date that:

(a) The defendant was arrested;

(b) Trial began;

(c) The verdict was returned;

(d) Post-trial motions were ruled on;

(e) Special sentencing proceeding began;

(f) Sentence was imposed;

(g) Trial judge's report was completed; and

(h) Trial judge's report was filed.

(8) The trial judge shall sign and date the questionnaire when it is completed.

[1981 c 138 § 12.]

10.95.130. Questions posed for determination by supreme court in death sentence review--Review in addition to appeal--Consolidation of review and appeal

(1) The sentence review required by RCW 10.95.100 shall be in addition to any appeal. The sentence review and an appeal shall be consolidated for consideration. The defendant and the prosecuting attorney may submit briefs within the time prescribed by the court and present oral argument to the court.

(2) With regard to the sentence review required by chapter 138, Laws of 1981, the supreme court of Washington shall determine:

(a) Whether there was sufficient evidence to justify the affirmative finding to the question posed by RCW 10.95.060(4); and

(b) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. For the purposes of this subsection, "similar cases" means cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965, in which the judge or jury considered the imposition of capital punishment regardless of whether it was imposed or executed, and cases in which reports have been filed with the supreme court under RCW 10.95.120;

(c) Whether the sentence of death was brought about through passion or prejudice; and

(d) Whether the defendant had an intellectual disability within the meaning of RCW 10.95.030(2).

[2010 c 94 § 5, eff. June 10, 2010; 1993 c 479 § 3; 1981 c 138 § 13.]

10.95.140. Invalidation of sentence, remand for resentencing--Affirmation of sentence, remand for execution

Upon completion of a sentence review:

(1) The supreme court of Washington shall invalidate the sentence of death and remand the case to the trial court for resentencing in accordance with RCW 10.95.090 if:

(a) The court makes a negative determination as to the question posed by RCW 10.95.130(2)(a); or

(b) The court makes an affirmative determination as to any of the questions posed by RCW 10.95.130(2) (b), (c), or (d).

(2) The court shall affirm the sentence of death and remand the case to the trial court for execution in accordance with RCW 10.95.160 if:

(a) The court makes an affirmative determination as to the question posed by RCW 10.95.130(2)(a); and

(b) The court makes a negative determination as to the questions posed by RCW 10.95.130(2) (b), (c), and (d).

[1993 c 479 § 4; 1981 c 138 § 14.]

10.95.150. Time limit for appellate review of death sentence and filing opinion

In all cases in which a sentence of death has been imposed, the appellate review, if any, and sentence review to or by the supreme court of Washington shall be decided and an opinion on the merits shall be filed within one year of receipt by the clerk of the supreme court of Washington of the verbatim report of proceedings and clerk's papers filed under RCW 10.95.110. If this time requirement is not met, the chief justice of the supreme court of Washington shall state on the record the extraordinary and compelling circumstances causing the delay and the facts supporting such circumstances. A failure to comply with the time requirements of this subsection shall in no way preclude the ultimate execution of a sentence of death.

[1988 c 202 § 17; 1981 c 138 § 15.]

10.95.160. Death warrant--Issuance--Form--Time for execution of judgment and sentence

(1) If a death sentence is affirmed and the case remanded to the trial court as provided in RCW 10.95.140(2), a death warrant shall forthwith be issued by the clerk of the trial court, which shall be signed by a judge of the trial court and attested by the clerk thereof under the seal of the court. The

warrant shall be directed to the superintendent of the state penitentiary and shall state the conviction of the person named therein and the judgment and sentence of the court, and shall appoint a day on which the judgment and sentence of the court shall be executed by the superintendent, which day shall not be less than thirty nor more than ninety days from the date the trial court receives the remand from the supreme court of Washington.

(2) If the date set for execution under subsection (1) of this section is stayed by a court of competent jurisdiction for any reason, the new execution date is automatically set at thirty judicial days after the entry of an order of termination or vacation of the stay by such court unless the court invalidates the conviction, sentence, or remands for further judicial proceedings. The presence of the inmate under sentence of death shall not be required for the court to vacate or terminate the stay according to this section.

[1990 c 263 § 1; 1981 c 138 § 16.]

10.95.170. Imprisonment of defendant

The defendant shall be imprisoned in the state penitentiary within ten days after the trial court enters a judgment and sentence imposing the death penalty and shall be imprisoned both prior to and subsequent to the issuance of the death warrant as provided in RCW 10.95.160. During such period of imprisonment, the defendant shall be confined in the segregation unit, where the defendant may be confined with other prisoners not under sentence of death, but prisoners under sentence of death shall be assigned to single-person cells.

[1983 c 255 § 1; 1981 c 138 § 17.]

10.95.180. Death penalty--How executed

(1) The punishment of death shall be supervised by the superintendent of the penitentiary and shall be inflicted by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until the defendant is dead, or, at the election of the defendant, by hanging by the neck until the defendant is dead. In any case, death shall be pronounced by a licensed physician.

(2) All executions, for both men and women, shall be carried out within the walls of the state penitentiary.

[1996 c 251 § 1; 1986 c 194 § 1; 1981 c 138 § 18.]

10.95.185. Witnesses

(1) Not less than twenty days prior to a scheduled execution, judicial officers, law enforcement representatives, media representatives, representatives of the families of the victims, and representatives from the family of the defendant who wish to attend and witness the execution, must submit an application to the superintendent. Such application must designate the relationship and reason for wishing to attend.

(2) Not less than fifteen days prior to the scheduled execution, the superintendent shall designate the total number of individuals who will be allowed to attend and witness the planned execution. The superintendent shall determine the number of witnesses that will be allowed in each of the following categories:

(a) No less than five media representatives with consideration to be given to news organizations serving communities affected by the crimes or by the commission of the execution of the defendant.

(b) Judicial officers.

(c) Representatives of the families of the victims.

(d) Representatives from the family of the defendant.

(e) Up to two law enforcement representatives. The chief executive officer of the agency that investigated the crime shall designate the law enforcement representatives.

After the list is composed, the superintendent shall serve this list on all parties who have submitted an application pursuant to this section. The superintendent shall develop and implement procedures to determine the persons within each of the categories listed in this subsection who will be allowed to attend and witness the execution.

(3) Not less than ten days prior to the scheduled execution, the superintendent shall file the witness list with the superior court from which the conviction and death warrant was issued with a petition asking that the court enter an order certifying this list as a final order identifying the witnesses to attend the execution. The final order of the court certifying the witness list shall not be entered less than five days after the filing of the petition.

(4) Unless a show cause petition is filed with the superior court from which the conviction and death warrant was issued within five days of the filing of the superintendent's petition, the superintendent's list, by order of the superior court, becomes final, and no other party has standing to challenge its appropriateness.

(5) In no case may the superintendent or the superior court order or allow more than seventeen individuals other than required staff to witness a planned execution.

(6) All witnesses must adhere to the search and security provisions of the department of corrections' policy regarding the witnessing of an execution.

(7) The superior court from which the conviction and death warrant was issued is the exclusive court for seeking judicial process for the privilege of attending and witnessing an execution.

(8) For purposes of this section:

(a) "Judicial officer" means: (i) The superior court judge who signed the death warrant issued pursuant to RCW 10.95.160 for the execution of the individual, (ii) the current prosecuting attorney or a deputy prosecuting attorney of the county from which the final judgment and sentence and death warrant were issued, and (iii) the most recent attorney of record representing the individual sentenced to death.

(b) "Law enforcement representatives" means those law enforcement officers responsible for investigating the crime for which the defendant was sentenced to death.

(c) "Media representatives" means representatives from news organizations of all forms of media serving the state.

(d) "Representatives of the families of the victims" means representatives from the immediate families of the victim(s) of the individual sentenced to death, including victim advocates of the immediate family members. Victim advocates shall include any person working or volunteering for a recognized victim advocacy group or a prosecutor-based or law enforcement-based agency on behalf of victims or witnesses.

(e) "Representative from the family of the defendant" means a representative from the immediate family of the individual sentenced to death.

(f) "Superintendent" means the superintendent of the Washington state penitentiary.

[1999 c 332 § 1; 1993 c 463 § 2.]

10.95.190. Death warrant--Record--Return to trial court

(1) The superintendent of the state penitentiary shall keep in his or her office as part of the public records a book in which shall be kept a copy of each death warrant together with a complete statement of the superintendent's acts pursuant to such warrants.

(2) Within twenty days after each execution of a sentence of death, the superintendent of the state penitentiary shall return the death warrant to the clerk of the trial court from which it was issued with the superintendent's return thereon showing all acts and proceedings done by him or her thereunder.

[1981 c 138 § 19.]

10.95.200. Proceedings for failure to execute on day named

Whenever the day appointed for the execution of a defendant shall have passed, from any cause, other than the issuance of a stay by a court of competent jurisdiction, without the execution of such defendant having occurred, the trial court which issued the original death warrant shall issue a new death warrant in accordance with RCW 10.95.160. The defendant's presence before the court is not required. However, nothing in this section shall be construed as restricting the defendant's right to be represented by counsel in connection with issuance of a new death warrant.

[1990 c 263 § 2; 1987 c 286 § 1; 1981 c 138 § 20.]

10.95.900. Severability--1981 c 138

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

[1981 c 138 § 22.]

10.95.901. Construction--Chapter applicable to state registered domestic partnerships--2009 c 521

For the purposes of this chapter, the terms spouse, marriage, marital, husband, wife, widow, widower, next of kin, and family shall be interpreted as applying equally to state registered domestic partnerships or individuals in state registered domestic partnerships as well as to marital relationships and married persons, and references to dissolution of marriage shall apply equally to state registered domestic partnerships that have been terminated, dissolved, or invalidated, to the extent that such interpretation does not conflict with federal law. Where necessary to implement chapter 521, Laws of 2009, gender-specific terms such as husband and wife used in any statute, rule, or other law shall be construed to be gender neutral, and applicable to individuals in state registered domestic partnerships.

[2009 c 521 § 28, eff. July 26, 2009.]

APPENDIX "B"

Death Penalty Historical Trend

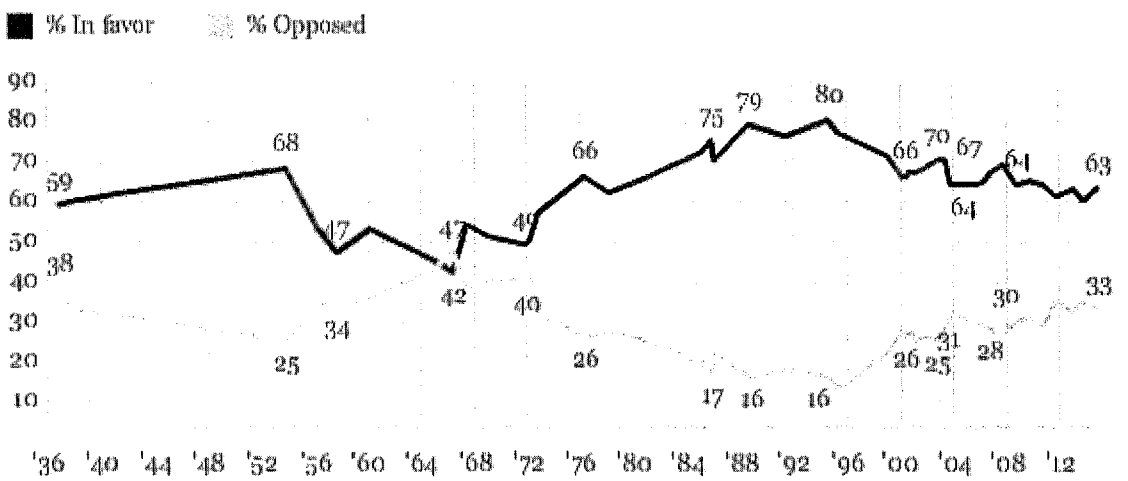
GALLUP®

Search...

CRIME

Death Penalty

Are you in favor of the death penalty for a person convicted of murder?



GALLUP

Are you in favor of the death penalty for a person convicted of murder?

	Favor	Not in favor	No opinion
	%	%	%
2014 Oct 12-15	63	33	4
2013 Oct 3-6	60	35	5
2012 Dec 19-22	63	32	6
2011 Oct 6-9	61	35	4
2010 Oct 7-10 ^	64	29	6
2009 Oct 1-4	65	31	5
2008 Oct 3-5	64	30	5
2007 Oct 4-7	69	27	4
2006 Oct 9-12	67	28	5

2006 Oct 9-12	67	28	5
2006 May 5-7 ^	65	28	7
2005 Oct 13-16	64	30	6
2004 Oct 11-14	64	31	5
2003 Oct 6-8	64	32	4
2003 May 19-21	70	28	2
2002 Oct 14-17	70	25	5
2001 Oct 11-14	68	26	6
2001 Feb 19-21 ^	67	25	8
2000 Aug 29-Sep 5	67	28	5
2000 Jun 23-25	66	26	8
2000 Feb 14-15	66	28	6
1999 Feb 8-9	71	22	7
1995 May 11-14	77	13	10
1994 Sep 6-7	80	16	4
1991 Jun 13-16	76	18	6
1988 Sep 25-Oct 1	79	16	5
1988 Sep 9-11	79	16	5
1986 Jan 10-13	70	22	8
1985 Nov 11-18	75	17	8
1985 Jun 11-14	72	20	8
1981 Jun 30-Feb 2	66	25	9
1978 Mar 3-6	62	27	11
1976 Apr 9-12	66	26	8
1972 Nov 10-13	57	32	11
1972 Mar 3-5	50	41	9
1971 Oct 29-Nov 2	49	40	11
1969 Jun 23-28	51	40	9
1967 Jun 2-7	54	38	8
1966 May 19-24	42	47	11
1965 Jun 7-12	45	43	12
1960 Mar 2-7	53	36	11
1957 Aug 29-Sep 4	47	34	18
1956 Mar 29-Apr 3	53	34	13
1953 Nov 1-5	68	25	7
1937 Dec 1-6	60	33	7
1936 Dec 2-7	59	38	3

^ Asked of a half sample.

GALLUP

Why do you favor the death penalty for persons convicted of murder? [OPEN-ENDED]

	2014	2003	2001	1991

APPENDIX "C"

Death Penalty Information
as to Executions
in the United States
Between 01/01/14 & 04/15/15

DP IC **DEATH PENALTY INFORMATION CENTER**

2011 - 2014 TOP NON-PROFIT

Fact Sheet
Upcoming Executions
Execution Database
State-by-State
Podcasts

Searchable Execution Database

Filter Results By:

Name (leave blank to search all names, do not include middle name): Reset / Start Over

Year:

Select All

☐ 1977 ☐ 1979 ☐ 1981 ☐ 1982 ☐ 1983 ☐ 1984 ☐ 1985 ☐ 1986 ☐ 1987 ☐ 1988 ☐ 1989 ☐ 1990
☐ 1991 ☐ 1992 ☐ 1993 ☐ 1994 ☐ 1995 ☐ 1996 ☐ 1997 ☐ 1998 ☐ 1999 ☐ 2000 ☐ 2001 ☐ 2002
☐ 2003 ☐ 2004 ☐ 2005 ☐ 2006 ☐ 2007 ☐ 2008 ☐ 2009 ☐ 2010 ☐ 2011 ☐ 2012 ☐ 2013 ☑ 2014
☑ 2015

Age at Execution:

Select All

☐ 22 ☐ 23 ☐ 24 ☐ 25 ☐ 26 ☐ 27 ☐ 28 ☐ 29 ☐ 30 ☐ 31 ☐ 32 ☐ 33 ☐ 34 ☐ 35
☐ 36 ☐ 37 ☐ 38 ☐ 39 ☐ 40 ☐ 41 ☐ 42 ☐ 43 ☐ 44 ☐ 45 ☐ 46 ☐ 47 ☐ 48 ☐ 49
☐ 50 ☐ 51 ☐ 52 ☐ 53 ☐ 54 ☐ 55 ☐ 56 ☐ 57 ☐ 58 ☐ 59 ☐ 60 ☐ 61 ☐ 62 ☐ 63
☐ 64 ☐ 65 ☐ 66 ☐ 67 ☐ 71 ☐ 72 ☐ 74 ☐ 76 ☐ 77

Race of Person Executed:

Select All

☐ Asian ☐ Black ☐ Latino ☐ Native American ☐ Other ☐ White

Gender of Person Executed:

◉ - Any -
○ f
○ m

State:

Select All

☐ AL ☐ AR ☐ AZ ☐ CA ☐ CO ☐ CT ☐ DE ☐ FE ☐ FL ☐ GA ☐ ID ☐ IL ☐ IN ☐ KY
☐ LA ☐ MD ☐ MO ☐ MS ☐ MT ☐ NC ☐ NE ☐ NM ☐ NV ☐ OH ☐ OK ☐ OR ☐ PA
☐ SC ☐ SD ☐ TN ☐ TX ☐ UT ☐ VA ☐ WA ☐ WY

Region:

Select All

☐ M ☐ N ☐ S ☐ W

Race of Victim:

Select All

☐ Asian ☐ Black ☐ Latino ☐ Native American ☐ Other ☐ White

Gender of Victim:

◉ - Any -
○ f
○ m

Method:

Select All

☐ Electrocution ☐ Firing Squad ☐ Gas Chamber ☐ Hanging ☐ Lethal Injection

Federal:

◉ - Any -
○ n
○ y

Foreign National:

◉ - Any -
○ n

Juvenile:

◉ - Any -
○ n

Volunteer:

◉ - Any -
○ n

O y O y O y

Apply

48 execution(s) match your current filters:

Date	Name	Age	Sex	Race	Number, Race, and Sex of Victims	State	County	Region	Method	Juvenile	Federal	Volunteer	Foreign National
01/07/14	Askari Muhammad	62	m	Black	1 White Male(s)	FL	Bradford	S	Lethal Injection	No	No	No	No
01/09/14	Michael Wilson	38	m	Black	1 White Male(s)	OK	Tulsa	S	Lethal Injection	No	No	No	No
01/16/14	Dennis McGuire	53	m	White	1 White Female(s)	OH	Preble	M	Lethal Injection	No	No	No	No
01/22/14	Edgar Tamayo	46	m	Latino	1 White Male(s)	TX	Harris	S	Lethal Injection	No	No	No	Yes
01/23/14	Kenneth Hogan	52	m	White	1 White Female(s)	OK	Oklahoma	S	Lethal Injection	No	No	No	No
01/29/14	Herbert Smulls	56	m	Black	1 White Male(s)	MO	St. Louis	M	Lethal Injection	No	No	No	No
02/05/14	Suzanne Basso	59	f	White	1 White Male(s)	TX	Harris	S	Lethal Injection	No	No	No	No
02/12/14	Juan Chavez	46	m	Latino	1 White Male(s)	FL	Miami-Dade	S	Lethal Injection	No	No	No	Yes
02/26/14	Michael Taylor	47	m	Black	1 White Female(s)	MO	Jackson	M	Lethal Injection	No	No	No	No
02/26/14	Paul Howell	48	m	Black	1 White Male(s)	FL	Jefferson	S	Lethal Injection	No	No	No	No
03/19/14	Ray Jasper	33	m	Black	1 Latino Male(s)	TX	Bexar	S	Lethal Injection	No	No	No	No
03/20/14	Robert Henry	55	m	Black	1 White Female(s) 1 Black Female(s)	FL	Broward	S	Lethal Injection	No	No	No	No
03/26/14	Jeffrey Ferguson	59	m	White	1 White Female(s)	MO	St. Charles	M	Lethal Injection	No	No	No	No
03/27/14	Anthony Doyle	29	m	Black	1 Asian Female(s)	TX	Dallas	S	Lethal Injection	No	No	No	No
04/03/14	Tommy Sells	49	m	White	1 White Female(s)	TX	Val Verde	S	Lethal Injection	No	No	No	No
04/09/14	Ramiro Hernandez	44	m	Latino	1 White Male(s)	TX	Bandera	S	Lethal Injection	No	No	No	Yes
04/16/14	Jose Villegas	39	m	Latino	1 Latino Male(s) 2 Latino Female(s)	TX	Nueces	S	Lethal Injection	No	No	No	No
04/23/14	William Rousan	57	m	White	1 White Female(s)	MO	Washington	M	Lethal Injection	No	No	No	No
04/23/14	Robert Hendrix	47	m	White	1 White Male(s) 1 White Female(s)	FL	Lake	S	Lethal Injection	No	No	No	No
04/29/14	Clayton Lockett	38	m	Black	1 White Female(s)	OK	Clark	S	Lethal Injection	No	No	No	No
06/17/14	Marcus Wellons	58	m	Black	1 Black Female(s)	GA	Cobb	S	Lethal Injection	No	No	No	No
06/18/14	John Henry	63	m	Black	1 White Female(s)	FL	Pasco	S	Lethal Injection	No	No	No	No
06/18/14	John Winfield	46	m	Black	2 Black Female(s)	MO	St. Louis	M	Lethal Injection	No	No	No	No
07/10/14	Eddie Davis	45	m	White	1 White Female(s)	FL	Polk	S	Lethal Injection	No	No	No	No
07/16/14	John Middleton	54	m	White	2 White Male(s) 1 White Female(s)	MO	Harrison	M	Lethal Injection	No	No	No	No
07/23/14	Joseph Wood	55	m	White	1 White Male(s) 1 White Female(s)	AZ	Pima	W	Lethal Injection	No	No	No	No
08/06/14	Michael Worthington	43	m	White	1 White Female(s)	MO	St. Charles	M	Lethal Injection	No	No	No	No
09/10/14	Earl Ringo	40	m	Black	1 White Female(s) 1 White Male(s)	MO	Boone	M	Lethal Injection	No	No	No	No
09/10/14	Willie Trottie	45	m	Black	1 Black Male(s) 1 Black Female(s)	TX	Harris	S	Lethal Injection	No	No	No	No
09/17/14	Lisa Coleman	38	f	Black	1 Black Male(s)	TX	Tarrant	S	Lethal Injection	No	No	No	No

CSV

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Apply

48 execution(s) match your current filters:

Date	Name	Age	Sex	Race	Number, Race, and Sex of Victims	State	County	Region	Method	Juvenile	Federal	Volunteer	Foreign National
10/28/14	Miguel Paredes	32	m	Latino	1 Latino Male(s) 1 Latino Female(s) 1 White Male(s)	TX	San Antonio	S	Lethal Injection	No	No	No	Yes
11/13/14	Chadwick Banks	43	m	Black	1 Black Female(s)	FL	Leon	S	Lethal Injection	No	No	No	No
11/19/14	Leon Taylor	56	m	Black	1 White Male(s)	MO	Jackson	M	Lethal Injection	No	No	No	No
12/09/14	Robert Holsey	49	m	Black	1 White Male(s)	GA	Baldwin	S	Lethal Injection	No	No	No	No
12/10/14	Paul Goodwin	48	m	White	1 White Female(s)	MO	St. Louis County	M	Lethal Injection	No	No	No	No
01/13/15	Andrew Brannan	66	m	White	1 White Male(s)	GA	Laurens	S	Lethal Injection	No	No	No	No
01/15/15	Johnny Kormondy	42	m	White	1 White Male(s)	FL	Escambia	S	Lethal Injection	No	No	No	No
01/15/15	Charles Warner	47	m	Black	1 Black Female(s)	OK	Oklahoma City	S	Lethal Injection	No	No	No	No
01/21/15	Arnold Prieto	41	m	Latino	1 Latino Male(s) 1 Latino Female(s) 1 White Female(s)	TX	Bexar	S	Lethal Injection	No	No	No	No
01/27/15	Warren Hill	54	m	Black	1 White Male(s)	GA	Lee	S	Lethal Injection	No	No	No	No
01/29/15	Robert Ladd	57	m	Black	1 White Female(s)	TX	Smith	S	Lethal Injection	No	No	No	No
02/04/15	Donald Newbury	52	m	White	1 White Male(s)	TX	Dallas	S	Lethal Injection	No	No	No	No
02/11/15	Walter Storey	47	m	White	1 White Female(s)	MO	St. Charles	M	Lethal Injection	No	No	No	No
03/11/15	Manuel Vasquez	46	m	Latino	1 Latino Female(s)	TX	Bexar	S	Lethal Injection	No	No	No	No
03/17/15	Cecil Clayton	74	m	White	1 White Male(s)	MO	Barry	M	Lethal Injection	No	No	No	No
04/09/15	Kent Sprouse	42	m	White	1 White Male(s) 1 Latino Male(s)	TX	Ellis	S	Lethal Injection	No	No	No	No
04/14/15	Andre Cole	52	m	Black	1 Black Male(s)	MO	St. Louis	M	Lethal Injection	No	No	No	No
04/15/15	Manuel Garza	34	m	Latino	1 Latino Male(s)	TX	Bexar	S	Lethal Injection	No	No	No	No

CSV

APPENDIX "D"

Death Penalty Information
Re: Thomas Ervin

DP IC **DEATH PENALTY INFORMATION CENTER**

2011 - 2014 TOP NON-PROFIT

Fact Sheet
Upcoming Executions
Execution Database
State-by-State
Podcasts

Searchable Execution Database

Filter Results By:

Name (leave blank to search all names, do not include middle name): Reset / Start Over

Year:

Select All

☐ 1977 ☐ 1979 ☐ 1981 ☐ 1982 ☐ 1983 ☐ 1984 ☐ 1985 ☐ 1986 ☐ 1987 ☐ 1988 ☐ 1989 ☐ 1990
☐ 1991 ☐ 1992 ☐ 1993 ☐ 1994 ☐ 1995 ☐ 1996 ☐ 1997 ☐ 1998 ☐ 1999 ☐ 2000 ☑ 2001 ☐ 2002
☐ 2003 ☐ 2004 ☐ 2005 ☐ 2006 ☐ 2007 ☐ 2008 ☐ 2009 ☐ 2010 ☐ 2011 ☐ 2012 ☐ 2013 ☐ 2014
☐ 2015

Age at Execution:

Select All

☐ 22 ☐ 23 ☐ 24 ☐ 25 ☐ 26 ☐ 27 ☐ 28 ☐ 29 ☐ 30 ☐ 31 ☐ 32 ☐ 33 ☐ 34 ☐ 35
☐ 36 ☐ 37 ☐ 38 ☐ 39 ☐ 40 ☐ 41 ☐ 42 ☐ 43 ☐ 44 ☐ 45 ☐ 46 ☐ 47 ☐ 48 ☐ 49
☐ 50 ☐ 51 ☐ 52 ☐ 53 ☐ 54 ☐ 55 ☐ 56 ☐ 57 ☐ 58 ☐ 59 ☐ 60 ☐ 61 ☐ 62 ☐ 63
☐ 64 ☐ 65 ☐ 66 ☐ 67 ☐ 71 ☐ 72 ☐ 74 ☐ 76 ☐ 77

Race of Person Executed:

Select All

☐ Asian ☐ Black ☐ Latino ☐ Native American ☐ Other ☐ White

Gender of Person Executed:

◉ - Any -
○ f
○ m

State:

Select All

☐ AL ☐ AR ☐ AZ ☐ CA ☐ CO ☐ CT ☐ DE ☐ FE ☐ FL ☐ GA ☐ ID ☐ IL ☐ IN ☐ KY
☐ LA ☐ MD ☑ MO ☐ MS ☐ MT ☐ NC ☐ NE ☐ NM ☐ NV ☐ OH ☐ OK ☐ OR ☐ PA
☐ SC ☐ SD ☐ TN ☐ TX ☐ UT ☐ VA ☐ WA ☐ WY

Region:

Select All

☐ M ☐ N ☐ S ☐ W

Race of Victim:

Select All

☐ Asian ☐ Black ☐ Latino ☐ Native American ☐ Other ☐ White

Gender of Victim:

◉ - Any -
○ f
○ m

Method:

Select All

☐ Electrocution ☐ Firing Squad ☐ Gas Chamber ☐ Hanging ☐ Lethal Injection

Federal:

◉ - Any -
○ n
○ y

Foreign National:

◉ - Any -
○ n

Juvenile:

◉ - Any -
○ n

Volunteer:

◉ - Any -
○ n

O y O y O y

Apply

7 execution(s) match your current filters:

Date	Name	Age	Sex	Race	Number, Race, and Sex of Victims	State	County	Region	Method	Juvenile	Federal	Volunteer	Foreign National
02/07/01	Stanley Lingar	37	m	White	1 White Male(s)	MO	St. Francois	M	Lethal Injection	No	No	No	No
03/28/01	Thomas Ervin	50	m	White	1 White Male(s) 1 White Female(s)	MO	Callaway	M	Lethal Injection	No	No	No	No
04/25/01	Mose Young	46	m	Black	3 White Male(s)	MO	St. Louis City	M	Lethal Injection	No	No	No	No
05/23/01	Samuel Smith	40	m	Black	1 Black Male(s)	MO	Callaway	M	Lethal Injection	No	No	No	No
07/11/01	Jerome Mallet	42	m	Black	1 White Male(s)	MO	Perry	M	Lethal Injection	No	No	No	No
10/03/01	Michael Roberts	27	m	White	1 White Female(s)	MO	St. Louis	M	Lethal Injection	No	No	No	No
10/24/01	Stephen Johns	55	m	White	1 White Male(s)	MO	St. Louis	M	Lethal Injection	No	No	No	No