APPENDIX

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APPENDIX A

THE SUPREME COURT OF WASHINGTON

No. 98810-2

Court of Appeals
No. 35297-8-III

[Filed: November 4, 2020]

STATE OF WASHINGTON,	)
	)
Respondent,	)
	)
v.	)
	)
CHAD GERRIT BENNETT,	)
	)
Petitioner.	)
	)

O R D E R

Department I of the Court, composed of Chief Justice Stephens and Justices Johnson, Owens, Gordon McCloud, and Montoya-Lewis, considered at its November 3, 2020, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the petition for review is denied.

DATED at Olympia, Washington, this 4th day of November, 2020.

For the Court

/s/_____
CHIEF JUSTICE

APPENDIX B

[Seal of the Court of Appeals]

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

No. 35297-8-111

[Filed: June 25, 2020]

STATE OF WASHINGTON,	)
	)
Respondent,	)
	)
v.	)
	)
CHAD GERRIT BENNETT,	)
	)
Appellant.	)
	)

UNPUBLISHED OPINION

LAWRENCE-BERREY, J. — Chad Bennett appeals his 2017 conviction and 660-month exceptional sentence for the second degree intentional murder of his 82-year-old landlord, Lucille Moore. We find no prejudicial error and affirm.

FACTS AND PROCEDURE

Lucille Moore owned and rented out several homes in her Ephrata neighborhood. In late July 2014, she rented a house to Chad Bennett, then age 24, and married with four children. Mr. Bennett was employed as a farm worker for C & C Farms, owned by the Cobb family.

On September 7, 2014, Mr. Bennett went to Ms. Moore's house to pay his rent. According to Bennett, he was there three times that day: first at around 12:30 p.m. to pay rent, second to pay the remainder of his deposit, and third at around 1:00 p.m. to retrieve his wallet, which he had inadvertently left behind.

On the morning of September 8, 2014, Moore's neighbor, Joyce Andersen, found Ms. Moore lying on the floor with a pillow over her face and her shirt soaked with blood. Ms. Andersen called police, who saw a slash across Moore's throat and confirmed she was dead. Forensic pathologist Dr. Eric Kiesel later determined Moore had sustained multiple significant head injuries, was likely manually strangled, had received two shallow cuts and a stab wound to her neck, and was stabbed 17 times in her chest, 11 of which penetrated her heart.

Detective Todd Hufman was the lead detective. He set forth details of his investigation in a probable cause statement. Hufman enlisted the Washington State Patrol (WSP) Crime Scene Response Team (CSRT) to help process the scene. CRST's team leader, forensic scientist Trevor Allen, worked with Hufman to prioritize collection of items that could contain

deoxyribonucleic acid (DNA) evidence. Among those items sent for testing were the blood-stained pillow, a swab of a bloodstain located on a kitchen cabinet door, and a cigarette butt found on the floor near Moore's body.

Ms. Andersen told investigators she had last seen Moore on Saturday, September 6, around 7:30 p.m. Moore's daughter, Wendy Swain, reported last speaking to her September 6, around 2:30 p.m. Moore's pastor confirmed she had attended Sunday church services on September 7, from 9:00-10:15 a.m. Moore declined a lunch date with Ms. Andersen that day, saying she needed to be at her house around 12:30 p.m. because her tenants from 106 G Street NE (Chad and Trisha Bennett) were coming over to pay their delinquent rent.

Detective Hufman contacted Chad Bennett. Bennett said he went to Moore's residence on Sunday, September 7, between noon and 1:00 p.m. and paid his rent. In later interviews, Bennett told Hufman he had been to Moore's house three times after 10:30 a.m. that day–first to pay rent, second to pay money still owing on the deposit, and third to retrieve his wallet after Moore called and told him that he had left it. He also gave various descriptions of his activities and whereabouts throughout that day. Bennett agreed to give a DNA sample. Ultimately, investigators determined Bennett was the last known person to have seen Moore alive on September 7.

WSP Crime Laboratory forensic scientist Anna Wilson reported DNA test findings on November 21, 2014. DNA matching Chad Bennett's was present on

the cigarette butt, with a 1 in 1.1 sextillion probability of selecting an unrelated individual at random with a matching profile. The bloodstain swab from the kitchen cabinet matched Bennett's Y-STR DNA typing profile. Neither he nor any of his paternal male relatives could be excluded as a donor. The profile is not expected to occur more frequently than 1 in 8,600 males in the United States population. One area of the pillow contained a mixture of three male individuals, with the major contributor matching Bennett's Y-STR DNA typing profile. Again, neither he nor any of his paternal male relatives could be excluded as a donor, and the profile is not expected to occur more frequently than 1 in 8,600 males in the United States population. A second area on the top side of the pillow contained two DNA profiles, one from the victim. The other profile matched Bennett's DNA, with an estimated 1 in 50 billion probability of selecting an unrelated individual at random from the United States population with a matching profile.

Bennett was arrested on November 25, 2014, and charged with first degree murder.

On December 16, 2014, the court entered an omnibus order directing the State to provide the defense with "[a]ll photographs, police reports, lab reports, witness statements, audio and video recordings and State's witness list . . . by December 29, 2014." Clerk's Papers (CP) at 2245. Trial was originally set for January 22, 2015, but was continued several times throughout 2015 and into the first half of 2016.

Meanwhile, on December 2, 2014, Detective Hufman began receiving recordings of Bennett's jail

calls. A recorded message at the beginning of each call informed the persons on the line that the call was subject to recording and monitoring. Hufman eventually accumulated more than 250 hours of Bennett's recorded jail calls over the next 18 months.

Until April 2016, the parties had anticipated the trial would be held in September of that year. In April, defense counsel David Bustamante was occupied in an unrelated homicide trial and, after that trial, would need ample time to review the State's evidence in Bennett's case. However, four days after the unrelated trial concluded on April 21, the State learned Bennett was now demanding an immediate trial. On May 13, the court set trial for June 8, with a speedy trial expiration date of July 8. On May 31, the court continued the trial to July 7, 2016.

On June 1, 2016, Bustamante conducted a pretrial interview with crime lab forensic scientist, Anna Wilson. Deputy prosecutor Edward Owens and the State's in-house investigator, Dan Dale, were also present. During the interview, Wilson told Bustamante that she was just assigned a new request to test Moore's blood-soaked shirt. Bustamante responded, "Oh, good." CP at 203. The shirt had been collected as evidence in September 2014, but Wilson believed it was too blood soaked to likely yield any DNA other than Moore's. She thought the massive amount of female DNA would likely mask any male DNA. Due to the crime lab's resource limitations, it chose other items for testing that it considered more likely to identify the killer.

The new request to test the shirt came from Owens after he and Dale learned from Wilson in a late May interview that Bennett was an unusually "heavy shedder" of his DNA, meaning he left more DNA on items he touched than most persons would. CP at 281. Dale, a former trooper with the WSP, asked whether that would make it more likely Bennett's DNA could be recovered from Moore's blood-saturated shirt. Considering the high amount of Bennett's DNA present on the blood-stained pillow, Wilson concluded there was a greater chance the shirt would yield useful evidence than originally believed. She agreed to test the shirt.

In a June 6, 2016 pretrial hearing, Bustamante told the Court he approved testing the shirt because he believed the results might exonerate Bennett, but he was otherwise concerned about the timing and ability of his defense DNA expert, Dr. Randell Libby, to review the results in advance of the July 7 trial. He did not, however, object to the late testing.

Wilson produced the DNA test results on June 29, 2016. DNA obtained from several areas on the front of the shirt showed a mixture consistent with three male individuals, with the partial major Y-STR profile matching Bennett. Neither he nor any of his paternal male relatives could be excluded as the donor. In one area of the shirt, the profile is not expected to occur more frequently than 1 in 9,400 male individuals in the United States population. In other areas of the shirt, including around the puncture holes, the profile is not expected to occur more frequently than 1 in 75 male individuals in the United States population. Other

potential suspects, including Wendy Swain's boyfriend John Rehfield, Ricky Swain, and Guy Austin (Moore's former boyfriend) were excluded as contributors of any DNA on the shirt. There was no male DNA detected on the neck area of the shirt. The test procedure consumed the entire DNA sample, as agreed to in advance by the defense.

Meanwhile, Detective Hufman had been listening to recordings of Bennett's jail calls but he was nine months behind due to time constraints. In late April 2016, he started listening to the recordings of Bennett's calls made between December 2, 2014, and January 27, 2015. Sometime after June 6, 2016, he heard for the first time a late 2014 conversation in which Bennett cautioned his wife Trisha that they needed to keep their stories straight. Hufman notified the prosecutor's office and, on June 15, delivered a report and a copy of all of the recordings he had reviewed to that date. All the while–since December 2014–Hufman did not want Bennett to know law enforcement was reviewing his calls, so he unilaterally decided to withhold the recordings from the prosecution. For this reason, Bustamante was not apprised of the recordings until the prosecutor gave him a compact disc (CD) containing over 200 hours' worth of calls on June 17, 2016.

On July 1, 2016, Bennett moved to dismiss the charge for governmental mismanagement under CrR 8.3(b), alleging the State had untimely tested the shirt it had in its possession since September 2014 and that it violated the omnibus order by deliberately withholding over 200 hours of recorded phone calls until June 2016. Bustamante explained the defense

team would be unable to finish listening to all of the jail call recordings by the trial date, and the defense DNA expert would need four to five weeks to analyze the new test results–all of which would necessitate adjusting trial strategy accordingly. Bennett argued the State's mismanagement prejudiced his right to a fair trial by forcing him into a "Hobson's choice" between his speedy trial right and his right to effective assistance of counsel. CP at 150. As alternatives to dismissal, Bennett asked the court to suppress all evidence received after May 31, 2016, or continue the trial two months.

The State denied any mismanagement, but joined in the request for a two-month trial continuance to September 2016, as the parties had earlier contemplated before Bennett's immediate trial demand in late April. The court denied Bennett's motion to dismiss or suppress evidence, but granted a two-month continuance. Additional facts relating to the CrR 8.3(b) dismissal motion are discussed in the analysis.

The jury trial began in September 2016. The State's theory was that Bennett was the last person known to see Moore alive on September 7, 2014, his DNA was present on multiple items at the crime scene, he gave inconsistent statements to police about his activities and whereabouts on the afternoon of September 7, and he became enraged at Moore and killed her because she was about to evict him for nonpayment of rent. The defense theory, as argued in closing, was that Bennett's DNA was on the items in question because he was in Moore's house paying rent, not because he killed her. Because he paid his rent, he had no reason to be angry

with her or kill her. He argued the killer could have been Moore's daughter or another of Moore's tenants who was delinquent on rent. Those persons' DNA were not tested. Bennett did not testify. The jury could not reach a unanimous verdict, and the court declared a mistrial.

Prior to the second trial, the State asked Bennett whether he intended to proffer "other suspect" evidence, and, if so, to identify the other suspects.[1] In response, Bennett identified Moore's daughter Wendy Swain and her boyfriend John Rehfield, tenants Charles and Brandi Larr who struggled to pay rent, and any of Moore's other tenants who were delinquent on rent.

The State moved in limine to exclude the other suspect evidence on the grounds that Bennett had failed to proffer any nonspeculative evidence tending to create a reasonable doubt as to Bennett's guilt. The trial Court granted the State's motion and excluded Bennett's other suspect evidence. Additional aspects related to the court's ruling are discussed in the analysis.

The second jury trial began in February 2017. The State's theory of the case, again, was that Bennett went into a rage and killed Moore on September 7 because he could not pay his overdue rent and she was about to evict him. The State posited that Bennett returned to Moore's house later on September 7 with his wife to clean up the murder scene.

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[1] The State had not moved to limit "other suspect" evidence in the first trial.

The State's evidence detailed the discovery of Moore's body on September 8, the ensuing investigation and determination that Bennett was the last known person to be in Moore's house and see her alive. The evidence also included testimony of Detective Hufman relating Bennett's various accounts of his whereabouts and activities on the afternoon and evening of September 7, testimony of Dr. Kiesel about Moore's multiple injuries, and testimony of Anna Wilson confirming the DNA test results showing the presence of DNA, consistent with Bennett's, on the pillow found on Moore's face, on her blood-soaked shirt, on her kitchen cabinet, and on a cigarette butt found near Moore's body. The State also introduced several jail call recordings between Bennett and his wife Trisha that the State argued contained inculpatory statements. The Bennetts later testified that the purported inculpatory statements were misconstrued by the State and related to marital issues rather than the murder. These statements are discussed more fully in the analysis.

Bennett's theory of the case, as presented through his evidence and cross-examination of State's witnesses, was that he paid his rent to Moore on September 7, he fully accounted for his whereabouts and activities that day, and he was not involved in her murder. He also explained that the presence of his DNA on multiple items was due to contamination at the murder scene or in the crime lab or was due to direct or secondary transfer onto the tested items during his multiple interactions with Moore.

As evidence that Bennett was about to be evicted, the State introduced testimony from Moore's neighbor, Joyce Andersen, that Moore declined a lunch invitation for September 7 because " 106 G" was supposed to come over at 12:30 p.m. to pay rent. Report of Proceedings (RP) (Feb. 15, 2017) at 4313. Moore told Andersen, "[I]f he doesn't pay me what he's supposed to pay me, I'm going to tell him if he can't afford it, he can go find someplace he can afford." RP (Feb. 15, 2017) at 4314. The State also introduced testimony from Bennett's coworker at C & C Farms, Nicholas Cobb, that in early September 2014, Bennett asked for him for a $700 loan to pay his rent. Cobb did not loan him the money.

The State also presented evidence that officers and CSRT members took careful measures at the murder scene to not touch, disturb, or contaminate evidence or leave any DNA on items. This included wearing gloves and shoe covers and changing gloves when handling each different item. On cross-examination, Trevor Allen discussed the protocol used for taking, handling, and packing blood swabs so they do not become contaminated, as well as DNA collection training to avoid cross-contamination from coughing and sneezing. He explained that small aerosolized droplets can spread out a short distance. Hypothetically, if a person was standing near the kitchen cabinet and coughed in that direction, it could account for that person's DNA being present in a later-deposited bloodstain.

Forensic scientist Anna Wilson described the crime lab's procedures that control against contamination and ensure accuracy and reliability of test results. Procedures include wearing a lab coat, mask, and

gloves. The lab bench area is cleaned and new gloves are worn between each item of evidence. Without changing gloves, DNA could accidentally get transferred from one item to another. To preserve evidence, it is repackaged in its original package and placed in the evidence vault. Wilson discussed the concept of transfer DNA. For example, DNA could be transferred by shaking a person's hand and the second person touching a table untouched by the first person. Wilson said the crime lab scientists wear gloves to prevent DNA transfer/cross-contamination. In this case, Wilson said she saw no evidence of contamination either at the crime scene or in the laboratory.

Discussing hypotheticals posed by defense counsel on cross-examination, Wilson said the transfer concept by shaking hands could possibly account for Bennett's DNA being on the pillow that he said he never touched. Addressing the bloodstain on the kitchen cabinet, Wilson said it could not be determined when or how Bennett's DNA was deposited–just that it was there. She said it would be very easy for a person coughing or sneezing in that area to deposit their DNA on the object's surface. She said if Bennett's DNA was already present on the cabinet from a prior cough, but later someone else made a swipe with their hand without leaving detectable DNA, it would explain why Bennett's DNA was in the bloodstain. Similarly, the scenario could be explained if Bennett's DNA was deposited on the cabinet from coughing at an earlier time, and that third person swiped it with a gloved hand and, therefore, left no DNA on the blood pattern. In the case of someone like Bennett, a heavy shedder, if he were to shake hands with someone like Moore,

and then she casually brushed her hand against her shirt later, this could result in transferring Bennett's DNA onto her shirt. Wilson concluded with respect to Bennett's "what-if examples" that she cannot say how his DNA got on the items but could only say "is this possible or not." RP (Mar. 2, 2017) at 5833. Wilson also confirmed that DNA can be detected on an item even many years after it was deposited, depending on storage conditions.

Bennett testified on his own behalf. He said in July 2014, when he signed the lease at Moore's house, he had a tickle in his throat and went into her kitchen for a glass of water while coughing five or six times. He had mentioned this in an interview with Detective Hufman. He also said he never touched the pillow.

Bennett testified he was at Moore's house three times on September 7. He first arrived at around 12:30 p.m. and paid her $525 for rent. He petted her dog while he was there. He went home and returned a short time later to pay $400 that he had forgotten to bring for the remainder owed on his deposit. He paid everything in cash. He said Moore wrote him receipts from her carbon copy receipt book and placed the money in her bank bag. He returned to Moore's house a third time, at around 1:00 p.m., to retrieve his wallet, which he had inadvertently left behind. He said Moore met him at the front door and handed him his wallet. He thanked her, and they shook hands. He never returned to her house or to her alleyway at any time that day. He denied any involvement in Moore's murder and insisted he would have no reason to kill her. He denied she told him he would have to find a

new place to live. Trisha Bennett likewise testified that neither she nor her husband were ever in the alleyway near Moore's house on September 7. She denied involvement in cleaning up the murder scene.

Bennett also denied asking Nicholas Cobb for a $700 loan in September to pay his rent. He did concede he had not repaid $750 that he had borrowed from Mike Cobb for August move-in costs. Detective Hufman asked Bennett for the rent receipts, but he was never able to find them.

Moore's personal representative, Terry Kinzel, had earlier testified she inventoried Moore's belongings after her death, including her business records. She knew Moore as a meticulous record keeper. Ms. Kinzel said there was only $418.59 in the bank bag Moore used for rent payments. She also said she could not find Moore's rent receipt book for 2014, which was the only missing receipt book, and she did not find a September 2014 receipt for Bennett.

The jury acquitted Bennett of first degree murder, but found him guilty of second degree murder. The jury also found that the State had proved two aggravating circumstances–deliberate cruelty and particularly vulnerable victim. The court denied motions by Bennett to vacate the aggravators for insufficient evidence and vagueness and to be sentenced within the standard range of 134 to 234 months. The court imposed a 660-month exceptional sentence.

Bennett timely appealed.

ANALYSIS

Bennett argues the trial court erred by denying his CrR 8.3(b) motion to dismiss for governmental mismanagement, by excluding "other suspect" evidence, and by imposing an exceptional sentence. He also argues prosecutorial misconduct during closing argument deprived him of a fair trial.

A. GOVERNMENTAL MISCONDUCT

Bennett argues the trial court abused its discretion in denying his motion to dismiss the case for governmental mismanagement, or, in the alternative, to suppress evidence, due to the State's withholding of the jail call recordings and belated DNA testing of Moore's blood-soaked shirt. He contends this mismanagement prejudiced his right to a fair trial by forcing him to choose between his rights to a speedy trial and effective counsel.

1. The governing court rule

CrR 8.3(b) provides:

> The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

2. Standard of review

We review a court's ruling under CrR 8.3(b) for abuse of discretion. *State v. Michielli,* 132 Wn.2d 229, 239-40, 937 P.2d 587 (1997). "A court abuses its discretion when an 'order is manifestly unreasonable or based on untenable grounds.'" *State v. Salgado-Mendoza,* 189 Wn.2d 420, 427, 403 P.3d 45 (2017) (internal quotation marks omitted) (quoting *In re Pers. Restraint of Rhome,* 172 Wn.2d 654, 668, 260 P.3d 874 (2011)).

3. Legal standards

To obtain dismissal under CrR 8.3(b), the defendant must show by a preponderance of the evidence (1) arbitrary action or governmental misconduct and (2) actual prejudice affecting the defendant's right to a fair trial. *State v. Rohrich,* 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting *Michielli,* 132 Wn.2d at 239-40). Dismissal of charges under CrR 8.3(b) is an extraordinary remedy saved for egregious cases and is improper absent material prejudice to the rights of the accused. *State v. Moen,* 150 Wn.2d 221, 226, 76 P.3d 721 (2003); *Rohrich,* 149 Wn.2d at 653. Governmental misconduct can be something as basic as simple mismanagement. *State v. Barry,* 184 Wn. App. 790, 797, 339 P.3d 200 (2014) (citing *Michielli,* 132 Wn.2d at 239). Violations of the State's discovery obligations can support a finding of governmental misconduct. *Id.* at 796-97; *Salgado-Mendoza,* 189 Wn.2d at 429.

Meeting the prejudice prong of CrR 8.3(b) "requires a showing of not merely speculative prejudice but actual prejudice to the defendant's right to a fair trial."

Rohrich, 149 Wn.2d at 649. Late disclosure of material facts can support a finding of actual prejudice. *Salgado-Mendoza,* 189 Wn.2d at 432. "In the dismissal context, a defendant is prejudiced when delayed disclosure interjects 'new facts' shortly before litigation, forcing him to choose between his right to a speedy trial and to be represented by an adequately prepared attorney." *Id.*; *Michielli,* 132 Wn.2d at 240; *Barry,* 184 Wn. App. at 796-97.

4. Application of legal standards to facts

Jail call recordings

As stated above, Detective Hufman accumulated some 250 hours of recordings of Bennett's jail calls, but due to resource limitations, he was nine months behind in listening to them. It was not until sometime after June 6, 2016, when he first heard a late 2014 conversation in which Bennett cautioned his wife they needed to keep their stories straight. Hufman immediately notified the prosecutor's office. On June 15, he delivered a report and a copy of all of the recordings he had reviewed to date. Hufman admitted he had, until then, unilaterally decided to withhold the recordings because he did not want Bennett to know law enforcement was reviewing his calls. Defense counsel Bustamante was, thus, not apprised of the recordings until June 17, 2016, when the prosecutor turned over a CD containing a recording of all the jail calls.

In responding to Bennett's CrR 8.3(b) dismissal motion, the prosecutor stated that Bennett's late 2014 call with his wife about keeping their stories straight

was the sole recording the State might use at trial and only in the event Bennett's wife testified. Bustamante maintained that the defense team would be unable to finish listening to 250+ hours of recordings by the trial date. He told the court it was necessary to listen to all of the calls for potential exculpatory evidence that could impact his trial strategy.

The prosecution has a continuing duty to disclose to the defense any written or recorded statements made by the defendant. CrR 4.7(a)(1)(ii), (h)(2). Contrary to what the State suggests, CrR 4.7(a)(1)(ii) does not condition the prosecutor's obligation on intent to use the statements at trial.

Here, as the trial court recognized, there was no governmental misconduct. Detective Hufman learned of the "stories straight" recording on June 6 and immediately notified the prosecutor's office. CP at 286. On June 15, he delivered a report and a copy of all of the recordings to the prosecutor's office. The prosecutor promptly disclosed the recordings to Bennett two days later and identified to the defense the "stories straight" recording that he intended to use for impeachment purposes. The government, thus, promptly disclosed the recording once it learned of it.

To the extent the delay attributable to Detective Hufman's time constraints can be considered mismanagement, it is not of a magnitude to warrant dismissal or suppression. Moreover, the fact the recordings and the contents of those conversations were within Bennett's own knowledge cannot be a surprise to him. If Bennett had exculpatory information, he knew the information and could have informed defense

counsel without counsel reviewing all of the recordings. To the extent defense counsel actually believed all of the recordings needed to be reviewed, a two-month trial continuance was an appropriate remedy.

Testing of the blood-soaked shirt

As stated above, Moore's blood-soaked shirt was collected by investigators in September 2014, but forensic expert Wilson believed it was too saturated to likely yield any DNA other than Moore's. And due to resource limitations, the crime lab limited initial testing to items most likely to identify the murderer. A deputy prosecutor later asked Wilson to test the shirt when she disclosed to him in late May 2016 that Bennett was an unusually heavy shedder of his DNA. Wilson agreed to test the shirt because Bennett had left what she considered to be a surprisingly high amount of DNA on the pillow, and she concluded there was a greater chance the shirt would yield useful evidence. Given the unanticipated accelerated proceedings, the State had not intended to test the shirt if trial had remained set for June 8, but instructed Wilson to do so on May 31 , when, on that date, trial was continued to July 7.

When Wilson told Bustamante during the June 1 interview that the shirt would be tested, he approved. The State offered to allow a defense expert to observe the testing, provided it was not Bennett's disclosed DNA expert, Dr. Libby, who was barred from the testing areas in all WSP crime labs. The State gave Bustamante a list of private DNA experts, but he declined to use someone other than Dr. Libby.

At the June 6 pretrial hearing, Bustamante voiced concern to the court about his June 1 interview with Wilson. He criticized the State for not having tested the shirt sooner and said he would oppose any further requests for continuances while awaiting the results. He said the results should be excluded if they are not produced one week before trial. The prosecutor explained he had wanted the shirt tested earlier but the crime lab declined because their policy is to test only so many pieces in a case.

Bustamante responded:

> [A]gain, in principle, I am totally in favor of testing these items. I believe they may exonerate my client. However, the timeliness is the only thing I question. And if the state crime lab says, no, we're not going to test it a year and a half ago and then they suddenly decide to do it a . . . month before the trial, then that's government mismanagement, even though it may not be the prosecuting attorney's fault.

RP (June 6, 2016) at 25.

When the June 29 test results showed that Bennett's DNA was on the blood-soaked shirt, Bennett moved for dismissal on grounds the belated testing was inexcusable governmental mismanagement. During the July 5 hearing, Bustamante argued that Wilson knew since late 2014 that Bennett was a "heavy shedder" of DNA, yet the shirt was not tested until June 2016. He argued the crime lab's resource limitations are not a valid excuse for delay. For the first time, he contended the testing delay forced him to ask for a continuance to

analyze the DNA results and placed him in a Hobson's choice between his rights to a speedy trial and effective assistance of counsel. During the hearing, Bustamante confirmed he had favored the testing just one month earlier at the previous hearing. Given the results, which Bustamante characterized as a "mixed bag" and "potentially exculpatory" because only minuscule partial profiles of Bennett's DNA were present, he said it would take Dr. Libby four to five weeks to conduct his testing. RP (July 5, 2016) at 69. Thus, if not granted the remedy of dismissal or suppression, Bustamante requested a two-month trial continuance. The court summarily declined to dismiss the case or suppress evidence.

The court commented to the prosecutor:

> But it sounds to me like you're agreeing with Mr. Bustamante, when he says that Mr. Bennett has been placed in a position where he has to choose between the effective assistance of counsel and a speedy trial. And that that delay is due to the state's failure to test this shirt a year and a half ago.

RP (July 5, 2016) at 81. The prosecutor partially agreed and explained he had fast-tracked the testing in June, and defense counsel invited the test because he thought the results would be exculpatory. The court ultimately granted a two-month trial continuance.

Given Bennett's unanticipated refusal to continue the trial date past July 2016, and given Bennett's tactical decisions surrounding the testing of the shirt, we agree with the State that Bennett has no grounds to

claim mismanagement. Even though the State had the blood-soaked shirt since September 2014, Bustamante had favored testing in June 2016 because he believed the results would be exculpatory. It is apparent that Bennett rolled the dice, gambling that the test results would be exculpatory. Bennett's failure to object to the late testing–indeed his agreement to it–renders the trial court's decision to grant a two-month continuance very reasonable. We conclude the trial court did not abuse its discretion.

B. OTHER SUSPECT EVIDENCE

Bennett argues the trial court violated his constitutional right to present a defense when it excluded his "other suspect" evidence. He argues he should have been allowed to present evidence and argue that (Moore's daughter) Wendy Swain, and (her boyfriend) John Rehfield committed the murder, or Moore's tenants Charles and Brandi Larr committed the murder, or any other tenant who had not paid Moore rent may have committed the murder. Bennett contends the trial court misapplied the law by requiring him to establish that these other suspects had taken a step indicating an intention to act on their various motives for committing the crime.

1. Standard of review

We review claims of evidentiary error implicating constitutional rights for an abuse of discretion. *State v. Arndt,* 194 Wn.2d 784, 797, 453 P.3d 696 (2019); *State v. Blair,* 3 Wn. App. 2d 343, 351, 415 P.3d 1232 (2018). We then review claims the evidentiary ruling violated

the defendant's constitutional right to present a defense de novo. *Arndt,* 194 Wn.2d at 797.

2. Legal principles for evidentiary ruling

A trial court's exclusion of "other suspect" evidence is an application of the general evidentiary rule that excludes evidence if its probative value is outweighed by unfair prejudice, confusion of the issues, or potential to mislead the jury. *State v. Franklin,* 180 Wn.2d 371, 378, 325 P.3d 159 (2014) (quoting *Holmes v. South Carolina,* 547 U.S. 319, 326-27, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006)). Before the trial court will admit "other suspect" evidence, the defendant must present a combination of facts or circumstances that points to a nonspeculative link between the other suspect and the crime. *Franklin,* 180 Wn.2d at 381. The standard for the relevance of such evidence is whether it tends to connect someone other than the defendant with the charged crime. *Id.*

The inquiry "'focuse[s] upon whether the evidence offered tends to create a reasonable doubt as to the *defendant's* guilt, not whether it establishes the guilt of the *third party* beyond a reasonable doubt.'" *Id.* (alteration in original) (quoting *Smithart v. State,* 988 P.2d 583, 588 & n.21 (Alaska 1999)). Additionally, the probative value of "other suspect" evidence must be based on whether it has a logical connection to the crime, not based on the strength of the State's case. *Id.* at 381-82.

The *Franklin* court discussed the rule in *Downs*[2]– that other suspect evidence is admissible only if the defendant can show "'a train of facts or circumstances as tend clearly to point out some one besides the [accused] as the guilty party.'" *Franklin,* 180 Wn.2d at 379 (quoting *State v. Downs,* 168 Wash. 664, 667, 13 P.2d 1 (1932)). The *Franklin* court affirmed the rule, but explained "'[m]ere evidence of motive in another party, or motive coupled with threats of such other person, is inadmissible, unless coupled with other evidence tending to connect such other person with the actual commission of the crime charged.'" *Id.* (alteration in original) (quoting *State v. Kwan,* 174 Wash. 528, 533, 25 P.2d 104 (1933)). The *Franklin* court also noted, "'[r]emote acts, disconnected and outside of the crime itself, cannot be separately proved for such a purpose.'" *Id.* at 380 (alteration in original) (quoting *Kwan,* 174 Wash. at 533).

Franklin, quoting *People v. Mendez,* 193 Cal. 39, 52, 223 P. 65 (1924), *overruled in part on other grounds by People v. McCaughan,* 49 Cal. 2d 409, 317 P.2d 974 (1957), explained that these rules rested on the necessity that trial of cases be both orderly and expeditious. *Id.* Without requiring a sufficient nexus between the other suspect and the crime, a defendant "'might easily . . . produce evidence tending to show hundreds of other persons had some motive or *animus* against the deceased . . . .'" *Id.* (quoting *Mendez,* 193 Cal. at 52).

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[2] *State v. Downs,* 168 Wash. 664, 13 P.2d 1 (1932).

"When the State's case is entirely circumstantial, the *Downs* rule is relaxed to an extent to allow a reply in kind: the 'defendant may neutralize or overcome such evidence by presenting sufficient evidence of the same character tending to identify some other person as the perpetrator of the crime.'" *State v. Hilton,* 164 Wn. App. 81, 99, 261 P.3d 683 (2011) (quoting *State v. Clark,* 78 Wn. App. 471, 479, 898 P.2d 854 (1995)).

3. Legal principles for the constitutional right to present a defense

Both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a criminal defendant the right to present a defense. *State v. Strizheus,* 163 Wn. App. 820, 829-30, 262 P.3d 100 (2011). This right includes the right to examine witnesses and to offer testimony. *State v. Jones,* 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (citing *Chambers v. Mississippi,* 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). These rights are not absolute. "Evidence that a defendant seeks to introduce must be of at least minimal relevance." *Id.* (internal quotation marks omitted). A criminal defendant does not have a constitutional right to present irrelevant or inadmissible evidence. *Id.*; *State v. Hudlow,* 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

"'[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.'" *Jones,* 168 Wn.2d at 720 (quoting *State v. Darden,* 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)). The integrity of the truth-finding process and a defendant's right to a fair trial are important considerations. *Hudlow,* 99 Wn.2d at 14.

4. Bennett's "other suspect" evidence

Bennett points to Detective Hufman's speculation at the outset of the investigation that a close family member committed the crime because there were no signs of forced entry. Hufman thought it appeared to be a "rage" killing and staged burglary because valuables such as cash, credit cards, and a coin collection worth several thousand dollars were clearly accessible but not stolen. According to Bennett, Wendy Swain and John Rehfield had opportunity and ability to commit the crime because Swain lived within one mile of Moore, was welcome in her home, and could not verify her claim she was out "rock picking" on the day of the murder. RP (Feb. 6, 2017) at 3163. Bennett contended Swain had motive because she stood to receive a significant inheritance from her mother and also had had an argumentative relationship with her. According to Moore's sister-in-law, Camilla Hatch, Moore's children "were just waiting for her to die." CP at 64.

In addition, two days after the murder, Swain and Rehfield went to Moore's bank and asked how someone could gain access to a safe deposit box belonging to a person who had become deceased. Bennett theorized this was circumstantial evidence that Swain and Rehfield may not have found a particular item when they ransacked the house, so they went to the safe deposit box to look for it. The bank manager, Jeff Mackey, said Rehfield did most of the talking for the two of them. He described the interaction as "very '[c]old.'" CP at 64. Detective Hufman reported a similar experience when he gave Swain the keys to Moore's house after the crime scene was processed. He

recommended they hire a cleaning service but Rehfield said they would do cleanup themselves. Hufman testified at his first trial that his contact with Swain and Rehfield was "very cold and unsettling." CP at 8. Rehfield was given a polygraph examination, and the examiner determined he "'was not being truthful during the testing.'" CP at 68. Bennett also proffered that some of Moore's other tenants, in particular Charles and Brandi Larr, may have committed the crime.

The State's theory was that Bennett killed Moore because he could not afford to pay rent and was about to be evicted, but Bennett pointed out that other tenants had been further in arrears. The Larrs had problems with timely rent payments. Wendy Swain told Detective Hufman early in the investigation that the Larrs could have had something to do with the killing because they were about to be given an eviction notice. Their next door neighbor, Daniel Keyser, testified at the first trial that a few days prior to the murder, he heard Moore arguing with Brandi Larr in the Larrs' front yard. Keyser heard Moore loudly say, "'Do I have to show you the lease?'" CP at 871. Brandi Larr testified at the first trial and denied the argument ever took place. In his "other suspect" proffer, Bennett contended the denial of the argument was suspicious and showed consciousness of guilt. Another neighbor, Anastasia Bunakova, saw a man cross the street from the general direction of the Larrs' residence and enter the back of Moore's house on the afternoon of September 7. Bennett contended this supported the theory that Charles Larr was the killer.

5. Hearing on State's motion to exclude

At the hearing on the State's motion to exclude "other suspect" evidence, the court first commented that Bennett's offer of proof showed "a strong argument here about motive and opportunity." RP (Feb. 16, 2017) at 3154. The court then stated:

> The question is what evidence is it that links that motive and opportunity to potentially this crime?" And I think the case that I looked at, *State vs. Starbuck,* [189 Wn. App. 740, 752, 355 P.3d 1167 (2015)] says, "The proposed evidence must also show that the third party took a step indicating an intention to act on the motive or opportunity." And so that's what I'm searching for. What is the evidence that shows a step indicating an intention to act on the motive or opportunity? I think you've laid out motive and opportunity, potentially, but what is it there that's going to show me an intention to act on either the motive or opportunity?

RP (Feb. 6, 2017) at 3154-55.

Defense counsel Bustamante emphasized the principle recited in *Starbuck* that when, as here, the State's case is entirely circumstantial, the train of facts or circumstances rule in *Downs* is relaxed to allow the defendant to present evidence of the same character tending to identify some other person as the perpetrator of the crime. Bustamante argued other circumstantial evidence included the fact Moore's rental receipt book was missing, thus inferring she could have been killed by any one of her tenants or that

Swain had taken it upon gaining access to Moore's house after her death and was attempting to cast blame on a tenant. He argued other suspects could also be inferred because there were unidentified footprints at the scene and the DNA of two other unknown males besides Bennett's was also present on the pillow and on Moore's shirt. Bustamante conceded the evidence is circumstantial that someone besides Bennett was there at the time of the killing, but argued the evidence should be considered and weighed by a jury because the State's case also is circumstantial.

The State responded that there was no evidence beyond speculation that Swain, Rehfield, or either of the Larrs were at Moore's house on the day of the murder or that they had anything to do with the crime. Anastasia Bunakova did not pick Rehfield or Larr in a photomontage, but her daughter Vera Bunakova had picked Bennett as the person she saw in the alley behind Moore's house. Bennett was the only one known to be present in Moore's house on the day of the murder.

In granting the State's motion, the court reasoned:

> [B]asically I'm just relying on the *Starbuck* case and the ones that it cites to, and in particular the line that I quoted, which was, "The proposed evidence must also show that the third party took a step indicating an intention to act on the motive or opportunity."
>
> *As far as I can tell, I've not heard anything that identifies evidence that would show some type of step taken by any of these other*

> *individuals that the defendant has identified as potentially having committed the crime.*
>
> I'll also note that there's a case called *State v. Franklin,* this is 180 Wn.2d 371, they cite to a California case, for an interesting quote, this is from [*People v. Mendez*, 193 Cal. at 52], and it says, "It is quite apparent that if evidence of motive alone upon the part of other persons were admissible, that in a case involving the killing of a man who had led an active and aggressive life, it might easily be possible for the defendants to produce evidence tending to show that hundreds of other persons had some motive or animus against the deceased."
>
> And I think that's kind of instructive as to what we have here, which is we have somebody obviously who is deceased, and there might be other people who might have had a motive. And certainly, you know, the motive can be identified. *But without something that shows some affirmative step towards actually doing the crime, it comes down to basically it not being relevant enough to outweigh the burden or outweigh the–what's the rule say, [ER] 403?– outweigh the danger of potential confusion of the issues or misleading the jury or potentially unfair prejudice.*

RP (Feb. 6, 2017) at 3170-71 (emphasis added).

6. Application of facts to legal principles

The trial court relied on language in *Starbuck* that requires Bennett to show that the other suspect "took a step indicating an intention to act on the motive" to

commit the crime. 189 Wn. App. at 752. Support for this requirement can be traced back to language in *Downs* that "a train of facts or circumstances as tend clearly to point out someone besides the accused as the guilty party."[3] *Downs,* 168 Wash. at 667. We need not determine whether the "took a step indicating an intention to act" requirement in *Starbuck, Rafay,* and *Rehak* is consistent with *Downs*. Rather, we can affirm the trial court simply by applying the legal principles outlined above in part B2, principles that Bennett does not contest.

The State's evidence against Bennett was both circumstantial *and* direct. The State's circumstantial evidence included DNA consistent with Bennett's on Moore's blood-soaked shirt, the pillow on her head, a cigarette butt near Moore's body, and a blood smear on a kitchen cabinet. In addition, Bennett was the last person known to have seen Moore alive.

The State's direct evidence consisted of a recorded jail call between Bennett and his wife, in which Bennett used his cellmate's callout identification code. The most inculpatory statement Bennett made was:

> Trisha, I'm not going to drag you down in this. I'm going to say this on the phone so it's set in

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[3] *Starbuck* cites *State v. Rafay,* 168 Wn. App. 734, 800, 285 P.3d 83 (2012), which cites *State v. Rehak,* 67 Wn. App. 157, 162, 834 P.2d 651 (1992), which cites and quotes this language in *Downs*.

> stone. Okay? You know that I did it, and you were there with me.

CP at 1307. Although Bennett and his wife testified they were not talking about the murder, they were talking about the criminal case both before and after the quoted statement. Shortly after the statement, Bennett told his wife:

> We hold each other hostage . . . . Because right now, you can hang me by my neck. And I'm being serious. Because this account is going to be canceled tomorrow because my celly gets out tomorrow . . . . So all this shit will be gone by tomorrow. You can hang me out to dry in a matter of seconds . . . . But I can hang you out to dry in a matter of seconds. We hold each other hostage. We're at a Mexican standoff. . . .

CP at 1308. If the jury believed that Bennett's statements were a confession, a belief consistent with the context of the statements, the confession was direct evidence that Bennett was guilty of murder.

At the hearing to strike "other suspect" evidence, Bennett failed to present a combination of facts or circumstances that points to a nonspeculative link between his proffered other suspects and the crime. Although Bennett established his other suspects had motive and opportunity–that is all he established.

First, Bennett failed to link Swain and Rehfield to the crime with a train of facts or circumstances. For instance, there was no evidence that either Swain or Rehfield was seen near Moore's house after Moore attended Sunday church, or that either had ever

threatened to kill Moore, or either person's DNA was found at the murder scene. In fact, Rehfield's DNA was excluded as being present on Moore's shirt. The only nonmotive evidence Bennett points to is Rehfield's question to a bank officer *after* the murder, about how Swain might access her mother's safe deposit box if she did not have the key. Such a question is not uncommon or suspicious.

Bennett also failed to link Mr. Larr or other tenants to the crime with a train of facts or circumstances. It is true that a man was seen walking into Moore's house the afternoon of her murder, but the only man identified as being near Moore's house the afternoon of her murder was Bennett. It also is true that DNA of three men was found on the pillow and Moore's bloody shirt, but the only DNA identified was DNA consistent with Bennett's. It also is true that other tenants were behind in rent, but the only tenant known to have seen Moore the day she was murdered was Bennett. He was the last known person to have seen her alive, and DNA consistent with his was found on multiple crime scene items. In sum, any tenant could have killed Moore, but only Bennett was linked to the murder with a train of facts or circumstances.

> Mere evidence of motive in another party, or motive coupled with threats of such other person, is inadmissible, unless coupled with other evidence tending to connect such other person with the actual commission of the crime charged.

Kwan, 174 Wash. at 533.

We conclude the trial court did not abuse its discretion by excluding Bennett's proffered "other suspect" evidence. The evidence was so speculative and clearly inadmissible under applicable evidentiary standards that its admission would have disrupted the fairness of the fact-finding process. For this reason, Bennett had no constitutional right to present it. *Jones,* 168 Wn.2d at 720.

C. PROSECUTORIAL MISCONDUCT

Bennett contends the prosecutor committed prejudicial misconduct on six separate occasions during closing argument and rebuttal. The alleged instances of misconduct are discussed individually below.

Legal principles

To prevail on a claim of prosecutorial misconduct, the defendant must establish "'that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.'" *State v. Thorgerson,* 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (internal quotation marks omitted) (quoting *State v. Magers,* 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). Only when the conduct is improper does the reviewing court determine whether the conduct resulted in prejudice. *State v. Emery,* 174 Wn.2d 741, 760, 278 P.3d 653 (2012). The State has wide latitude in drawing and expressing reasonable inferences from the evidence, including inferences about credibility. *State v. Thompson,* 169 Wn. App. 436, 496, 290 P.3d 996 (2012). Misconduct is prejudicial if there is a substantial likelihood it affected the verdict. *Emery,* 174 Wn.2d at 760-61.

However, a defendant who fails to object to the State's improper act at trial waives any error unless the act was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. *Id.*; *Thorgerson,* 172 Wn.2d at 443. In making that determination, the courts "focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Emery,* 174 Wn.2d at 762.

Arguing facts not in evidence re: Bodziak testimony

This issue arises from Bennett's request for an order in limine to preclude the State's shoeprint expert, William Bodziak, from testifying to any facts or conclusions not specifically stated in his report. Bennett focuses on the following portion of Bodziak's report in reference to a single bloody shoeprint at the crime scene:

> In addition, present throughout this entire area are wipe marks in multiple directions. The wiping action has physically smeared the blood in some of those areas, including portions of the herringbone pattern. The characteristics evident [in] these images as well as images taken before enhancement *are typical of attempts to clean-up bloody footwear evidence.*

CP at 1373 (emphasis added).

Bennett argued that saying evidence is "typical of attempts to clean-up footwear evidence" is quite different from rendering an opinion that someone actually tried to clean up the scene. He argued Bodziak

did not opine that the wipe marks were evidence that someone cleaned up bloody footwear prints in this case and it would be unfair to require the defense to respond to such an opinion without advance notice. The court commented that it expected Bodziak will say exactly what he wrote because that is all he opined. The parties agreed. The court later reiterated its ruling:

> So with regard to Bodziak, when he's asked the question to the effect, did you see any evidence of attempts to clean, his answer needs to be in line with what he states, which is what I saw in the images taken before enhancement are typical of attempts to clean up bloody footwear evidence.

RP (Mar. 3, 2017) at 6037. The prosecutor concurred. The court confirmed these limitations with Mr. Bodziak and asked whether he would be able to stick with his opinion as stated in the report. Bodziak clarified that it was his opinion that the footprint was cleaned up. Bennett argued it would be unfair to allow him to deviate from his report and, if allowed, the defense would need a recess to hire an expert and move for a *Frye*[4] hearing.

The Court again reiterated its ruling:

> And so there is a slight distinction there. Certainly, [the prosecutor] can argue this in closing and say, based on that it appears to have evidence of a typical attempt to clean up bloody footwear, that's certainly an argument you can

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[4] *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923).

> make before the jury. But to have the expert come up and actually express that opinion that in this case there was, in fact, in his opinion, an attempt to clean up this particular scene, there is a slight difference there.

RP (Mar. 6, 2017) at 6069. The prosecutor responded:

> Judge, I know we've got–but can I ask the court, what do you make of the sentence before that where he says, "In addition, present throughout this entire area"– and he's referring to this shoe print–"are wipe marks in multiple directions. The wiping action has physically smeared the blood in some of those areas, including portions of the herringbone pattern."
>
> That clearly says that he sees some wiping action through that herringbone. I mean I don't know how else you could draw the conclusion that–

RP (Mar. 6, 2017) at 6069-70. The court clarified:

> [H]e can state that entire paragraph. That is his opinion that he put in this. It's the step further that I ruled on Friday that he's prohibited from stating, which is that officially in this scene, there was an attempt to clean up. But he can certainly state that whole paragraph, if that's what he wants to state. And then you can argue in closing that his opinion, based on what he says, is, in fact, what you just argued.

RP (Mar. 6, 2017) at 6070.

Bodziak testified about the wipe marks visible in photographs of the shoeprint. In reference to slide number 8, he said:

> You see on the left from maybe running at 10 :00 to 4:00 direction, from left to right, are a series of streaks. . . . And on the right, right underneath the orange–the B on the orange paper are again some other streaks. And at the bottom part of those there are actually streaks running down in a different direction. . . . So at least three different angles of wiping or wipe marks or streaks in these areas. And in the center are some remnants of a herringbone design impression.

RP (Mar. 6, 2017) at 6104. Addressing slide number 9, Bodziak said:

> In addition, present throughout this entire area are wipe marks in multiple directions. So these were the streaks, this direction, this direction. And then over here outside of this close-up over in this direction. So at least three very obvious areas where there's some wipe marks. . . . The wiping action has physically smeared the blood in some of those areas, including portions of the herringbone pattern.

RP (Mar. 6, 2017) at 6108. Bodziak continued:

> So this is just showing that the wipe marks are not just in different directions, but there's actually some additional ones in there that are curved. Then the end of the paragraph of my report says, "The characteristics evident in these

> images, as well as images taken before enhancement, are typical of attempts to clean-up bloody footwear evidence."

RP (Mar. 6, 2017) at 6110.

The prosecutor then asked Bodziak to confirm whether he found evidence of what he thought was characteristics of a wipe mark in a curved nature. Bodziak responded, "Yes. If someone's wiping, it's not always straight. . . . There's both evidence of curvature, curving streaks and straight streaks in multiple areas." RP (Mar. 6, 2017) at 6111.

In closing argument, the prosecutor referred to Bodziak's testimony regarding the shoeprint. He stated Bodziak's "observation was that there was clear evidence of clean-up to the impression B, the blood." RP (Mar. 21, 2017) at 8202. The prosecutor contemporaneously showed a PowerPoint purporting to summarize Bodziak's testimony, including one slide stating in bold: "**Clear evidence of clean up to Impression B (Blood)**." Ex. 528, slide 32.

Bennett objected and moved for a mistrial on grounds the argument stated facts not in evidence. The court overruled the objection and directed the jury to consider only the evidence it believes was presented. The prosecutor continued:

> And in those photographs, you heard him testify about the clear swipe marks around and through the impressions. The swipe marks are multi-directional, as well. *His testimony is this is a typical characteristic of clean-up*. . . . And the testimony he's talking about looking at the

> purple there, you can see the swipe marks through here and the swipe marks coming along there that he was talking about, and the swipe marks up there.

RP (Mar. 21, 2017) at 8203 (emphasis added).

During a recess, Bennett renewed his objection and motion for mistrial. The prosecutor responded that following the court's admonition to the jury regarding the "clear evidence of clean-up" statement, he "left it be. And . . . didn't go back to there." RP (Mar. 21, 2017) at 8224. After commenting that Bodziak's testimony had included the phrase "[a]ttempt to clean-up," the court said it considered the prosecutor's use of the phrase "clear evidence of clean-up" to be argument. The court concluded: "I don't see that as an issue." RP (Mar. 21, 2017) at 8225.

In rebuttal closing, the prosecutor again referred to the shoeprint, without objection from Bennett:

> Bill Bodziak talked about . . . a conscious attempt to clean that area up. Do you remember the illustration he showed you, showing the wipes through the foot impression?

RP (Mar. 23, 2017) at 8588-89. The prosecutor showed another PowerPoint slide stating there was "Evidence of Clean up per Bodziak." Ex. 528, slide 81. Again, there was no objection.

The court instructed the jury, both orally at the end of closing and in its written instructions, that the lawyers' statements are not evidence. The evidence is the testimony and exhibits and that the jury must

disregard any remark, statement, or argument that was not supported by the evidence or the law in the instructions provided.

A prosecutor commits reversible misconduct by urging the jury to consider evidence outside the record. *State v. Pierce,* 169 Wn. App. 533, 553, 280 P.3d 1158 (2012); *State v. Jones,* 144 Wn. App. 284, 293, 183 P.3d 307 (2008) (prosecutors are not permitted to make prejudicial statements unsupported by the record). It is the court's role to sustain proper objections to prosecutorial misconduct, and the court's failure to do so sends a message to the jury that the State's argument is legitimate. *State v. Allen,* 182 Wn.2d 364, 378, 341 P.3d 268 (2015).

The State's initial "clear evidence of clean-up" argument, without clarification, did not reflect Bodziak's testimony or comport with the trial court's ruling in limine. But in continuing his argument immediately after Bennett's objection and the court's admonition to the jury, the prosecutor walked back any error by clarifying that Bodziak had testified that the clear evidence of swipe marks was a typical characteristic of cleanup. Unfortunately, the prosecutor's later argument–that Mr. Bodziak testified about a conscious attempt to cleanup–again misstated the evidence.

But these misstatements were not prejudicial because they did not have a substantial likelihood of affecting the jury's verdict. Whether someone tried to clean up a bloody shoeprint was not critical to Bennett's conviction. His conviction was based on circumstantial evidence that he could not pay rent, his

DNA being found on Moore's blood-soaked shirt, the pillow on her head, a cigarette butt next to her body, and on a blood smear on the cabinet. His conviction was also based on direct evidence of his confession–the jail call where Bennett used his cellmate' s callout code.

To the extent the prosecutor's comments about Bodziak's testimony were improper, we conclude they were not prejudicial.

Arguing facts not in evidence: Vera Bunakova saw Bennett in the alley

This issue stems from Vera Bunakova's trial testimony that late in the afternoon on the day of the murder, she was picking cucumbers along her alleyway fence adjacent to Moore's property when she saw a "gentleman right around here walking and he was on a cell phone approaching me." RP (Mar. 1, 2017) at 5575. Bunakova said the man saw her and turned and walked away, but not before they looked directly at one another for two or three seconds. She saw the same man walking with a female a short while later. Again, the man turned away from Bunakova. She described him as taller than 5'10", not overweight, very young, and wearing a dark baseball cap, dark T-shirt, and dark wash, wide-legged jeans. Bunakova further testified she had identified the man that she saw in the alley in a photomontage shown to her at the prosecutor's office about one year after the murder. At trial, she answered "correct" when asked whether her initials next to a particular photograph in a montage exhibit indicated the person she believed she saw behind Moore's house. RP (Mar. 1, 2017) at 5597. The prosecutor then asked Bunakova: "From your

observation today, is that person in the courtroom today?" Bunakova answered, "Yes." RP (Mar. 1, 2017) at 5598. Bunakova then turned and identified Bennett as both the man she believed she had seen in the alley and had picked in the photomontage one year earlier.

The defense investigator Ellyn Berg testified she was the one who presented the photomontage to Vera Bunakova at the prosecutor's office. On defense cross-examination, Berg said that when Bunakova picked out Bennett she said she was a little more than 50 percent sure it was him in the alley. According to Berg, Bunakova seemed a lot more certain in her current trial testimony than she was when shown the photomontage in September 2015.

In closing, the prosecutor argued Vera Bunakova "saw the defendant, Chad Bennett, from approximately 15 feet away in the alley on his cell phone. She testified he looked right at Vera and made eye contact." RP (Mar. 21 , 2017) at 8207. Bennett objected on grounds the prosecutor misstated the testimony and argued facts not in evidence. He moved for a mistrial or at least a curative instruction. The court overruled the objection, stating, "So I will tell you the jury one more time, you are the sole determiners or the individuals who will identify what, in fact, the facts were as presented. And ultimately this is just argument by the attorneys." RP (Mar. 21 , 2017) at 8207.

The State has wide latitude in drawing and expressing reasonable inferences from the evidence, including inferences about credibility. *Thompson,* 169 Wn. App. at 496. Identification does not require knowledge of identity, as Bennett suggests. Vera

Bunakova told the jury the man sitting at counsel table was the man she identified in the photomontage–the same man she saw twice in the alley and who made eye contact with her. It was accurate for the prosecutor to argue that Bunakova saw Bennett in the alley. Her testimony was a matter of weight and credibility for the jury to determine.

Bennett's citation to *Allen* is inapposite. There, the court committed prejudicial error in twice overruling defense objections to the prosecutor's misstatement of the legal definition of "knowledge" in closing argument. *Allen,* 182 Wn.2d at 378. There is no such error here.

Prosecutor's emotional appeals during rebuttal closing

This issue arises from the following statements in the prosecutor's rebuttal closing argument:

> I also need to say–and I forgot to–because we get up here and you've got a six-week trial, and you forget about things. But I needed to say to you that preliminarily, and I should have done that, to acknowledge Judge Estudillo for handling this case, six, seven weeks we've been together, some of you may have become friends, great friends in this process, but Judge Estudillo handling this case, did an exceptional job. Tom Bartunek, our court reporter, he and Claudia Mills keeping track of everything that's being said, which is a monumental task and keeping track, and keeping the lawyers straight with the exhibits that Claudia goes through is a big job, and the state wanted to acknowledge them.

> Along with Garey Clements, your bailiff, who is taking you in and out of court. And all the jail staff and the people that are here listening to this case with great interest.

RP (Mar. 23, 2017) at 8529-30. Bennett did not object.

Bennett's failure to object to the prosecutor's statements is a waiver of any error unless the act was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. *Emery,* 174 Wn.2d at 760-61. The prosecutor's statements exhibiting courtesy are, at most, a de minimis attempt to ingratiate himself with the jury. Bennett shows no apparent prejudice and certainly none that could not have been cured by an instruction.

The same is true even if Bennett had objected. In *State v. Scherf,* 192 Wn.2d 350, 394, 429 P.3d 776 (2018), the prosecutor took advantage of his courtroom seating position to smile and thank individual jurors during voir dire. The defense twice objected, and the court admonished the prosecutor. The Washington Supreme Court rejected Scherf's allegation of prosecutorial misconduct. The court held that Scherf did not show that the prosecutor's contact with the jurors raised the risk of influencing the verdict, any such conduct was de minimis, and it did not deny Scherf a fair trial. *Id.* at 395-96. Bennett likewise shows no measurable prejudice.

Bennett's cited case, *State v. Walker,* 182 Wn.2d 463, 341 P.3d 976 (2015), is not helpful. There, the prosecutor committed flagrant, pervasive, and incurable misconduct by using a PowerPoint

presentation to confuse and mislead the jury, much like the State had done in *In re Personal Restraint of Glassman,* 175 Wn.2d 696, 286 P.3d 673 (2012). *Walker,* 182 Wn.2d at 479. The prosecutor did not confuse or mislead the jury here.

Prosecutor's "we know" arguments

This issue arises from the prosecutor's use of the phrase "we know" in closing and rebuttal closing argument. First, in closing argument, the prosecutor discussed the earlier quoted jail call between Bennett and his wife. The prosecutor displayed a PowerPoint slide that said, "What we do know is they are discussing this case during this call." Ex. 528, slide 79. Narrating the slide, the prosecutor argued:

> What we do know is they are discussing this case during this call. Chad states, "You know that I did it, and you were there with me." This is the information they were discussing when they were talking about holding each other hostage multiple times.

RP (Mar. 22, 2017) at 8314-15. Bennett did not object.

The next day, in rebuttal closing, the prosecutor was discussing the evidence of Bennett's DNA on items from the crime scene. The prosecutor stated:

> The crime scene lab people, they went through that, they tested everybody they thought was in the house. That doesn't mean anybody else participated. But we know that

> Chad Bennett was there. We know that he grabbed the center of that pillow. And the only reasonable–

RP (Mar. 23, 2017) at 8531. Defense counsel objected to "that form of argument, what we know" as being the prosecutor's opinion. RP (Mar. 23, 2017) at 8531. The following exchange ensued:

> MR. DANO: I apologize, Counsel. I know counsel did that a few times himself, so–
>
> MR. BUSTAMANTE: It's easy enough.
>
> MR. DANO: It's an occupational hazard. Sorry, folks.
>
> The state's position, I'll say that, I've got to keep saying that, the state's position is that it's only–the only plausible explanation for that is that Chad Bennett grabbed that pillow after he killed Lucille Moore, and that's why his DNA is there.

RP (Mar. 23, 2017) at 8532. The Court did not weigh in on the matter and the prosecutor resumed his argument.

By failing to object, Bennett has waived the first instance of alleged misconduct for using "we know" along with the PowerPoint slide. The comment was not so flagrant and ill intentioned that an instruction could not have cured any resulting prejudice. *Emery,* 174 Wn.2d at 760-61. The statement is within the wide latitude afforded the State to argue–contrary to the Bennett' testimonies–that they were, in fact, talking about the murder.

With regard to the second instance, Bennett must show there is a substantial likelihood it affected the verdict. *Id.* He does not meet that burden. The prosecutor's explanation to the jury that his argument was the State's position, based on the evidence, essentially served as a curative instruction that required no further discussion or input from the court. As this court recently explained in *State v. Rodriguez-Perez,* 1 Wn. App. 2d 448, 460, 406 P.3d 658 (2017):

> There is a difference between the prosecutor's personal opinion, as an independent fact, and an opinion based on or deduced from the evidence. *State v. McKenzie,* 157 Wn.2d 44, 53, 134 P.3d 221 (2006) (quoting *State v. Armstrong,* 37 Wash. 51, 54-55, 79 P. 490 (1905)). Misconduct occurs only when it is clear and unmistakable that the prosecutor is not arguing an inference from the evidence but is expressing a personal opinion. *Id.* at 54 (quoting *State v. Papadopoulos,* 34 Wn. App. 397, 400, 662 P.2d 59 (1983)).

Unlike in Bennett's cited case of *State v. Stith,* 71 Wn. App. 14, 21-22, 856 P.2d 415 (1993), the prosecutor was not expressing his personal opinion here.

Burden shifting

Bennett argues the prosecutor shifted the burden of proof by stating that if there was any favorable evidence, the defense would have presented it. This issue arises from the following argument by the prosecutor in rebuttal closing, concerning initial steps by law enforcement to lock down the crime scene:

> What did they do? They began processing the scene. They were meticulous about changing gloves. Counsel made a substantial–spent a lot of time with you talking about DNA and cross-contamination and so forth. *The state's position is if there was any evidence that there was actual contamination of this crime scene, the defense would have been talking about it.* They talk about a lot of possibilities, possibly this, possibly that, possibly this. *But there was nothing pointed out that there was any contamination introduced into this crime scene* where Chad Bennett's DNA was planted on the cigarette butt, on the pillow area–the pillow area. I know you recall that Anna Wilson talked about that.

RP (Mar. 23, 2017) at 8526-27 (emphasis added). Bennett did not object. The prosecutor then summarized the State's evidence of Bennett's DNA on each item and explained why Bennett's speculative hypotheses were unlikely.

A defendant has no duty to present evidence; the State bears the burden of proving each element beyond a reasonable doubt. *State v. Fleming,* 83 Wn. App. 209, 215, 921 P.2d 1076 (1996). It is misconduct for the prosecutor to argue otherwise. *Id.*

Again, by failing to object, Bennett has waived the issue unless the comments were so flagrant and ill intentioned that an instruction could not have cured any resulting prejudice. *Emery,* 174 Wn.2d at 760-61. Allegedly improper arguments should be viewed in the context of the total argument, the issues in the case, and evidence addressed in the argument. *State v.*

Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994); *see also Thorgerson,* 172 Wn.2d at 442. Here, when viewed in context, the prosecutor's comments were an appropriate response to the defense closing argument.

Bennett's counsel made extensive closing argument about various contamination/secondary transfer hypotheses to explain exculpatory reasons for the presence of Bennett's DNA at the crime scene. He theorized the killer may have been wearing gloves because no male DNA was found on the victim's neck; thus, it is unknown how Bennett's DNA could have been deposited on the kitchen cabinet. He asked how DNA from two unidentified males could have gotten on Moore's shirt when she was not known to be a handshaker or hugger. He emphasized that the highly trained CSRT professionals were constantly changing gloves to avoid inadvertent transfer of DNA. He cited to Trevor Allen's and Anna Wilson's testimony giving hypothetical examples of ways DNA evidence can easily be contaminated or deposited, both through direct contact and secondary transfer, which can occur before investigators arrived, while they were processing the crime scene, or even at the crime laboratory. He argued various hypothetical theories of how Bennett's DNA could have come into contact with or been transferred onto the blood smear on kitchen cabinet, pillow, and Moore's shirt. He reminded the jury that forensic expert Wilson had admitted such transfer was "easy" without the necessary precautions. RP (Mar. 23, 2017) at 8458. Counsel concluded his closing argument recounting a hypothetical he had given Wilson, arguing Wilson's testimony allowed the jury to consider "if [Bennett] was a heavy shedder and his hand was very

sweaty on a hot summer day when he shook hands with Lucille Moore, that might have been enough." RP (Mar. 23, 2017) at 8468.

The prosecutor's rebuttal argument did not suggest Bennett had any duty to present evidence of actual contamination, but was a proper direct response to Bennett inviting the jury to speculate about nonexistent contamination evidence in the State's case. *Russell,* 125 Wn.2d at 86 (pertinent remarks of prosecutor not grounds for reversal when invited by defense counsel). The prosecutor merely pointed out there was no such evidence. This is entirely consistent with the trial testimony–particularly Wilson's testimony that she saw no evidence of DNA contamination in this case either at the crime scene or in the crime lab. In this situation, it was not improper for the prosecutor to argue that in light of Bennett's various contamination hypotheses, he would have demonstrated actual contamination had there been any.

Bennett's cited case *Fleming* is distinguishable. There, the prosecutor argued lack of reasonable doubt because there was no evidence the victim had fabricated the charge or was confused, and, if there had been such evidence, the defendants would have presented it. 83 Wn. App. at 214. The court held the comments were improper burden shifting and also infringed on the defendants' election of the right to remain silent when viewed in conjunction with the prosecutor's additional remark that if the defendants are suggesting reasonable doubt, they would explain some fundamental evidence in the case. *Id.* at 214-15.

Here, on the other hand, the prosecutor did not shift the burden when directly responding to Bennett's hypotheticals.

Undermining the presumption of innocence and trivializing the jury's role

This issue arises from the following argument by the prosecutor in rebuttal closing:

> I did want to say one other thing, as well, that I forgot to say at the outset. And that is that the system that we're involved in, of a jury trial, you hear the words due process. And this is an example. This is probably the biggest example of due process that this office–or that the state has participated in, where we've afforded the defendant every opportunity to–the state put on its case, and for the defense to have an opportunity to put on their response, and to speak to you.
>
> So there's been no rush to judgment in this. This has been ongoing for, as we know, since September of 2014. The investigation done by Detective Hufman and his crew, thousands of man hours have been devoted to this case. So this wasn't just a situation where a snap judgment was made, a decision to arrest the wrong man, to frame the wrong man was made. Nothing of that.

RP (Mar. 23, 2017) at 8536. Bennett did not object.

Once again, by failing to object, Bennett has waived the issue unless the comments were so flagrant and ill intentioned that an instruction could not have cured

any resulting prejudice. *Emery,* 174 Wn.2d at 760-61. And again, the prosecutor's comments must be viewed in context; they were in response to the defense closing argument. *Russell,* 125 Wn.2d at 86.

Bennett's counsel began his closing argument in the six-week trial by stating that "90 percent of the state's case is based on one of four things . . . ." RP (Mar. 22, 2017) at 8329. The first thing was "statements that defendant has given at various times to Detective Hufman that contain relatively minor discrepancies as to exact sequence of events, exact[ly] what he did that day, where he went first, second and third, what times he did what." RP (Mar. 22, 2017) at 8329. The second thing was the "state's basing its case on [jail telephone] statements of the defendant taken after he was arrested, which the state is now twisting, taking out of context and completely trying to make them appear that the defendant is guilty, contrary to his testimony, contrary to his own explanations why he said what he said, and contrary in some instances to common sense." RP (Mar. 22, 2017) at 8329. The third thing was "statements and testimony from unreliable witnesses who changed their stories from what they originally told the police at the time the investigation first started. Or who completely made up things. Completely fabricated details to suit what they found out later." RP (Mar. 22, 2017) at 8330-31. "And finally, the state's case is based on speculation, supposition, outlandish theorizing and jumping to conclusions and inviting you, ladies and gentlemen, to go along for the ride." RP (Mar. 22, 2017) at 8331.

As the State contends, it was defense counsel's latter statement that invited the alleged inappropriate rebuttal comments. A comparison to the facts in *Stith* illustrates that the prosecutor's comments–to the extent any portion was arguably inappropriate–were not of a magnitude that any prejudice could not be cured with an instruction.

In *Stith,* a drug delivery case where the defendant had previously been convicted of that crime, the prosecutor commented in closing argument that defendant "'was just coming back and he was dealing again.'" *Stith,* 71 Wn. App. at 16. The prosecutor went on to remark in rebuttal:

> "And this case, ladies and gentlemen, wouldn't be . . . in court here today if there was any problem about the way Officer[s] Grady and Rossen acted. Our system has incredible safeguards that would not allow a case like this to come to court if somehow the police acted improperly. So the question of probable cause is something the judge has already determined before the case came before you today."

Id. at 17 (second alteration in original). The defense objected to both comments and the court gave curative instructions.

In finding that both comments were flagrantly improper, the court reasoned:

> The first comment indicated to the jury that the prior crime for which appellant was convicted was drug related (a fact which had not previously been entered into evidence) and is

> also impermissible opinion "testimony" that the appellant was selling drugs again and thus was guilty, not only of the previous charge, but also of the current charge. Moreover, the remark was made in spite of a direct court order on a motion in limine to exclude any evidence of prior drug convictions.
>
> The second comment concerning "incredible safeguards" and the court's prior determination of probable cause not only constituted "testimony" as to facts not in evidence but also indicated to the jury that, if there were any question of the defendant's guilt, the defendant would not even be in court. This was tantamount to arguing that guilt had already been determined. Clearly, both comments were flagrantly improper.

Id. at 22. The court applauded the trial court's efforts to cure the violations, but held the misconduct was so egregious as to be incurable. *Id.* at 22-23. The court concluded:

> [T]hese comments clearly reflect the prosecutor's personal assurances to the jury as to the defendant's guilt. Taken together these comments not only implied that the trial was a useless formality because the real issues had already been determined but also directly stated that Stith was out on the streets, dealing again. Such comments strike at the very heart of a defendant's right to a fair trial before an impartial jury.

Id. at 23.

Bennett contends the same is true here. He equates the prosecutor's phrase "the biggest example of due process"[5] the State has ever seen with the "our system has incredible safeguards" comment in *Stith*. And like the comments in *Stith* that the police did not act improperly and probable cause had already been determined, the prosecutor here told the jury the police had worked "thousands of man hours" and did not "arrest the wrong man." RP (Mar. 23, 2017) at 8536. Additionally, Bennett contends, the prosecutor here perversely used the length of time that had passed since the crime as evidence that the State had taken the time to charge the right man–even though a significant portion of that time was due to the hung jury in the first trial. In sum, as in *Stith,* the prosecutor's comments struck at the very heart of Bennett's right to a fair trial before an impartial jury and instructions could not have cured the prejudice. Bennett's argument fails.

Unlike in *Stith,* the prosecutor did not violate a limine ruling to introduce prejudicial facts not in evidence or imply that Bennett's guilt had already been determined by probable cause. The prosecutor's point here was that due process was fully satisfied because the trial provided both sides the full opportunity to present their positions to the jury and that the lengthy investigation showed there was no snap judgment decision to arrest the wrong man. That the State considered the right man to have been charged after lengthy investigation was a statement of the obvious,

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[5] RP (Mar. 23, 2017) at 8536.

but without personal assurances by the prosecutor that Bennett was guilty.

The prosecutor's comments were a largely appropriate response to Bennett's closing argument that the State was inviting the jury to go along for the ride in a case "based on speculation, supposition, outlandish theorizing, and jumping to conclusions." RP (Mar. 22, 2017) at 8331. The prosecutor calling this the "biggest example" of due process the State has seen was gratuitous hyperbole. But again, unlike in *Stith,* the comment here did not suggest that due process was a safeguard that ensured Bennett's guilt. He makes no showing that any impropriety in the prosecutor's remarks in response to Bennett's argument were egregious and could not have been cured by an instruction.

Cumulative effect of misconduct

Bennett contends the cumulative effect of the prosecutor's improper arguments amounts to reversible error. But the cumulative error doctrine "does not apply where the errors are few and have little or no effect on the outcome of the trial." *State v. Weber,* 159 Wn.2d 252, 279, 149 P.3d 646 (2006). Here, we determined the prosecutor twice misstated Mr. Bodziak's testimony, but those misstatements were not prejudicial. We conclude the cumulative error doctrine does not apply.

D. EXCEPTIONAL SENTENCE

The jury returned special verdict forms finding that Bennett manifested deliberate cruelty in the commission of second degree murder and Moore was a

particularly vulnerable victim. The trial court imposed an exceptional sentence of 660 months.

Bennett challenges his exceptional sentence on grounds that (1) insufficient evidence supports the aggravating factors, (2) the aggravating factors are unconstitutionally vague, and (3) the length of the sentence is arbitrary and excessive.

1. Sufficiency of the evidence

We review whether the record supports the jury's special verdict on the aggravating circumstances under the clearly erroneous standard. *State v. Hale,* 146 Wn. App. 299, 307, 189 P.3d 829 (2008).

A court may depart from the presumptive sentence range if the offense involves substantial and compelling reasons. RCW 9.94A.535. "Aggravating circumstances" that can support a departure from the guidelines include the defendant's conduct "manifested deliberate cruelty to the victim" and the defendant knew or should have known the victim "was particularly vulnerable." RCW 9.94A.535(3)(a), (b).

A jury must find any facts supporting aggravating circumstances beyond a reasonable doubt and by special interrogatory. *State v. Stubbs,* 170 Wn.2d 117, 123, 240 P.3d 143 (2010). We use the same standard of review for the sufficiency of the evidence of an aggravating factor as we use for sufficiency of the evidence for the elements of a crime. *State v. Webb,* 162 Wn. App. 195, 205-06, 252 P.3d 424 (2011). Specifically, evidence is sufficient to support the special interrogatory if, after reviewing the evidence in the light most favorable to the prosecution, any rational

trier of fact could have found the essential elements of the aggravating factor beyond a reasonable doubt. *See Jackson v. Virginia,* 443 U.S. 307, 318-19, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

Deliberate cruelty. "Deliberate cruelty consists of gratuitous violence or other conduct that inflicts physical, psychological, or emotional pain as an end in itself." *State v. Tili,* 148 Wn.2d 350, 369, 60 P.3d 1192 (2003). To justify an exceptional sentence, the cruelty must go beyond what is normally associated with the commission of the charged offense or what is inherent in the elements of the offense. *Id.* The trial court's jury instruction defined "deliberate cruelty" consistent with these principles.

Bennett contends the deliberate cruelty finding is unsupported by sufficient evidence and must be struck because the State failed to prove gratuitous violence that inflicted pain as an end in itself or that this murder was significantly more egregious than the typical murder. We disagree.

Dr. Eric Kiesel, the forensic pathologist who performed Moore's autopsy, gave testimony describing her injuries and the likely cause of death. He described a number of "injuries, abrasions, contusions on both sides of the head, as well as on the nose, cheek and lips." RP (Feb. 23, 2017) at 5081. Included were multiple significant head injuries that resulted in subarachnoid hemorrhage on both sides of her brain, indicating it had been severely shaken by blunt force trauma. Her maxilla was fractured with force that Dr. Kiesel compared to a boxing injury or car crash. He believed the head injuries were most likely inflicted by

fist or hand. Moore also sustained a sharp, incised wound on her right hand, which Dr. Kiesel found consistent with a defensive wound incurred while she was alive. He also found evidence of blunt force injury to her neck. Petechial hemorrhages in both eyes correlated with fractures to the superior horns of the thyroid cartilage, which Kiesel said strongly suggests manual strangulation.

Moore also sustained two sharp force injuries to the throat, which Dr. Kiesel described as incised wounds caused by a sharp instrument. She received another two-inch deep stab wound to the right side of her neck. In addition, she was stabbed 17 times in the chest. Eleven of those wounds penetrated the heart muscle itself. Dr. Kiesel opined that the sharp force injuries, including those to the throat, were most likely inflicted by a knife with about a one-half inch wide blade.

Dr. Kiesel could not be certain of the order in which the injuries were inflicted. He did conclude Moore was on the ground when she received the stab wounds because her shirt was covered with blood but none was on her pants, where blood would have dripped had she been standing. Kiesel said Moore could potentially have died solely from the blunt force trauma to the head but there is no way to say with 100 percent certainty. But she certainly would have died from either the incised wounds to the neck or stab wounds to the heart had there been no other injuries. Kiesel believed Moore was still alive when she received the stab wounds that went through the fat around the heart and penetrated the heart itself.

Ultimately, while acknowledging the blunt force injuries were a significant part of the total picture, Dr. Kiesel concluded the mechanism of death was most likely loss of blood resulting from the sharp force wounds to the neck and chest. He said bleeding from the neck wounds would have caused her to lose consciousness within 10 to 20 seconds and then it takes a matter of minutes to die. He also opined the injuries inflicted on Moore were in excess of what it takes to kill a person.

Bennett focuses on Dr. Kiesel's testimony that any of Moore's head, neck, or chest injuries could have caused her death–a fact that the prosecutor acknowledged in closing argument and the trial court echoed in its exceptional sentence finding of fact 6. Bennett then points to Dr. Kiesel' s testimony that the stab wounds would have caused the victim to lose consciousness in 10 to 20 seconds and the prosecutor's acknowledgment in closing argument that she was "not probably alive for a long time." RP (Mar. 22, 2017) at 8322. He couples this with the testimony of crime scene specialist, Trevor Allen, who said it appeared the victim was knocked down and then stabbed and that the incident appeared to be contained to a very small location without a prolonged struggle. He said, "It didn't seem like there was a long, drawn-out fight." RP (Feb. 22, 2017) at 4881.

Bennett uses the above testimony to contrast this case with *State v. Scott,* 72 Wn. App. 207, 866 P.2d 1258 (1993), *aff'd sub nom. State v. Ritchie,* 126 Wn.2d 388, 894 P.2d 1308 (1995), whereas the State contends *Scott* is analogous and supports the deliberate cruelty

finding. In *Scott,* the victim was elderly, weak, and had diminished mental capacities. *Scott,* 72 Wn. App. at 214. The court explained:

> Scott could easily have killed her by strangulation, which he did, but only after physically and sexually assaulting her. The medical examiner found that the manual and ligature strangulation were separate acts of violence. The first act of strangulation and/or any of the blows to the victim's head were sufficient evidence upon which to base a finding of premeditation. All of the other blows to the head, face, and ribs, which occurred in three different rooms and resulted in 20 broken bones, were additional violent acts separate from the premeditation and the final strangulation.

Id. at 214-15. Scott contended his case was unlike cases involving deliberate cruelty due to prolonged attacks and lingering suffering. *Id.* at 215. The court disagreed:

> [T]he record supports a finding of a prolonged attack by Scott and lingering suffering by the victim. It took time to break 20 bones, strangle the victim twice, and sexually assault her. The evidence that the assaults occurred in three different rooms also suggests a prolonged attack and lingering suffering.

Id.

Bennett contends the lack of evidence that Moore was subject to prolonged attack or lingering suffering makes his case like *State v. Brush,* No. 71067-2-I, 2014 WL 1912009 (Wash. Ct. App. May 12, 2014)

(unpublished) http://www.Courts.wa.gov/opinions/pdf/710672.pdf, *aff'd in part, rev'd in part by* 183 Wn.2d 550, 353 P.3d 213 (2015) and *State v. Serrano,* 95 Wn. App. 700, 977 P.2d 47 (1999), where the Courts reversed deliberate cruelty verdicts in similar circumstances. In *Brush,* the defendant shot the victim Bonney four times in rapid succession. 2014 WL 1912009 at *1. At trial, the medical examiner described the homicide as one of the two worst he had observed in terms of being "'gratuitously violent'" and causing damage in excess of that necessary to kill someone. *Id.* at *2. The jury found deliberate cruelty. *Id.* In reversing the aggravator on appeal as unsupported by the record and therefore clearly erroneous, the Court reasoned:

> [T]the entire incident was over in seconds and the actual shots occurred in rapid succession. Although the first nonlethal shot undoubtedly caused Bonney pain, there is no indication that Brush deliberately sought to inflict pain as an end in itself or to prolong Bonney's suffering in any way. Indeed, the evidence is to the contrary; all of the eyewitnesses suggested that he fired the second lethal shot almost immediately after the first.

Id. at *6.

In *Serrano,* the defendant was convicted of second degree murder for shooting the victim in the back five times while he was up in the air in an "orchard ape" (caged platform) thinning apples. The trial court found the conduct deliberately cruel and imposed an exceptional sentence, in part on that factor. *Serrano,* 95

Wn. App. at 703, 710-11. In holding the deliberate cruelty finding was unsupported by the record and therefore clearly erroneous, this court reasoned:

> Some Washington cases have upheld exceptional sentences on the basis of the number of wounds inflicted. *See, e.g.,* [*State v.*] *Ross,* 71 Wn. App. 556[, 861 P.2d 473 (1993)] (over 100 wounds); *State v. Drummer,* 54 Wn. App. 751, 775 P.2d 981 (1989) (stabbing 20 times); *State v. Harmon,* 50 Wn. App. 755, 750 P.2d 664 (stabbing/slicing 64 times), *review denied,* 110 Wn.2d 1033 (1988). In each of those cases, however, the sheer number of wounds demonstrated a cruelty not usually associated with the offenses. Mr. Senano shot [the victim] five times. This fact itself does not suggest he gratuitously inflicted pain as an end in itself.

Id. at 713.

A majority of this court distinguishes this case from *Brush* and *Serrano* where rapid gun fire suggested a quick death without any gratuitous infliction of pain. Here, viewing the evidence in the light most favorable to the State, the multiple blows to Moore's head, the manual strangulation, the knife slash to her neck, and 17 stab wounds to her chest–including 11 of which pierced her heart–permitted a rational trier of fact to find beyond a reasonable doubt that Bennett gratuitously inflicted pain on Moore. The sheer number and variety of serious injuries inflicted demonstrates a

cruelty not usually associated with the offense.[6] The majority concludes, when viewing the evidence in the light most favorable to the State, a rational trier of fact could find the State proved this aggravating factor beyond a reasonable doubt.

Bennett also contends the State was required to provide the jury with comparative facts of other murder cases to prove the murder was atypical to other murders. His assertion is unsupported by any authority and lacks merit. His cited cases *State v. Suleiman,* 158 Wn.2d 280, 294 n.5, 143 P.3d 795 (2006) and *State v. Faagata,* 147 Wn. App. 236, 249-51, 193 P.3d 1132 (2008), *rev'd on other grounds by State v. Turner,* 169 Wn.2d 448, 238 P.3d 461 (2010), merely reiterate the

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[6] This judge believes the evidence is insufficient for a rational trier of fact to make the required findings beyond a reasonable doubt. The evidence was consistent with the State's theory that Bennett struck Moore multiple times with his fist or an object, attempted to strangle her, then slashed her throat, and stabbed her numerous times in the chest and heart. The location of the knife slash to the throat and the numerous stabs to the chest and heart indicate Bennett sought to kill Moore quickly once he knocked her to the ground. A brief violent attack is inconsistent with inflicting gratuitous fear or pain. The State believed Moore died quickly and did not even argue the injuries occurred in a manner designed to inflict pain as an end in itself. From this evidence, a jury would need to speculate whether the wounds occurred by a brief violent attack or by a methodical series of acts designed to inflict pain as an end in itself. Where the State's evidence requires a jury to speculate rather than make reasonable inferences, the verdict must be overturned. *State v. Hummel,* 196 Wn. App. 329, 357, 383 P.3d 592 (2016). I would reverse the jury's finding of deliberate cruelty and remand for resentencing.

principle that post-*Blakely*[7] it is the jury's role to determine atypicality. The cases do not require the State to present comparative evidence.

Particularly vulnerable victim. The trial court instructed the jury that a victim is "particularly vulnerable" if he or she is more vulnerable to the commission of the crime than the typical victim of first or second degree murder, and the victim's vulnerability must also be a substantial factor in the commission of the crime.

Bennett argues the State presented insufficient evidence that Moore's vulnerability was a substantial factor in her murder. He notes that the State's theory of the case, as argued in closing, was that Moore threatened to evict Bennett for being unable to pay rent and this threat caused Bennett to snap. Bennett argues the record conclusively shows Moore's age played no factor at all in his decision to kill her, let alone a substantial factor. He likens his case to *Serrano* and *State v. Barnett,* 104 Wn. App. 191, 16 P.3d 74 (2001).

As stated above, the victim in *Serrano* was in an orchard ape and could not run or protect himself from the gunshots. The trial court imposed the exceptional sentence, in part on a finding of victim vulnerability. *Serrano,* 95 Wn. App. at 710-11. This court reversed because the record did not suggest the victim's vulnerability was a substantial factor in the shooting. *Id.* at 712. Instead, the apparent motive was that the

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[7] *Blakely v. Washington,* 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

defendant's wife had an affair with the victim. *Id.* at 703 n.1, 710.

In *Barnett,* the defendant committed multiple crimes against his ex-girlfriend. 104 Wn. App. at 194. The court imposed an exceptional sentence in part based on victim vulnerability because she was 17 years old and the defendant waited until she was home alone to initiate the attack. *Id.* at 202. In reversing the aggravator as unsupported by the evidence, this court reasoned the victim was not particularly vulnerable because she led the defendant on a lengthy chase and did not suffer because of age, disability, or ill health. *Id.* at 204. Further, she was not incapacitated by the attack and thereby rendered vulnerable. Instead, she was able to avoid his attempts to stab her and eventually escaped. *Id.* In addition, her being home alone was not the reason the defendant chose her as a victim. He chose her because of their failed relationship, not because she presented an easy target for a random crime. *Id.* at 205.

We disagree with Bennett's implied argument that he could not have snapped *and* decided to kill Moore because she was particularly vulnerable. A person who snaps can decide either to attack the person who made them angry or to walk away in anger. Viewing the evidence in the light most favorable to the State, a rational trier of fact could have found beyond a reasonable doubt: (1) Moore, a woman in her 80s who lived alone, was more vulnerable to being murdered than a typical person, and (2) her vulnerability was a substantial factor why Bennett murdered her (instead of walking way in anger).

Bennett also contends the State was required to present the jury with comparison evidence of vulnerability from other murder cases. His assertion is unsupported by authority and lacks merit. His cited cases *State v. Vermillion,* 66 Wn. App. 332, 832 P.2d 95 (1992) and *State v. Bedker,* 74 Wn. App. 87, 871 P.2d 673 (1994) contain no such requirement.

2. Vagueness challenge to aggravating factors

Bennett argues the aggravating factors of "deliberate cruelty" under RCW 9.94A.535(3)(a), and "particularly vulnerable" under RCW 9.94A.535(3)(b) are unconstitutionally vague, both facially and as applied.

The due process clauses of the Fifth and the Fourteenth Amendments to the United States Constitution require that statutes afford citizens a fair warning of prohibited conduct. *City of Spokane v. Douglass,* 115 Wn.2d 171, 178, 795 P.2d 693 (1990). The due process vagueness doctrine requires that criminal statutes (1) be specific enough to give citizens fair notice of what conduct is proscribed, and (2) provide ascertainable standards of guilt to protect against arbitrary arrest and prosecution. *Id.*; *State v. Baldwin,* 150 Wn.2d 448, 458, 78 P.3d 1005 (2003). The prohibition against vagueness applies both to statutes defining elements of crimes and to "statutes fixing sentences." *Johnson v. United States,* __ U.S. __, 135 S. Ct. 2551, 2557, 192 L. Ed. 2d 569 (2015). Statutes that fix sentences must "specify the range of available sentences" with sufficient clarity. *Beckles v. United States,* __ U.S. __, 137 S. Ct. 886, 892, 197 L. Ed. 2d 145 (2017).

In *Baldwin,* the Washington Supreme Court held: "[D]ue process considerations that underlie the void-for-vagueness doctrine have no application in the context of sentencing guidelines." *Baldwin,* 150 Wn.2d at 459. The court reasoned that sentencing guideline statutes "do not define conduct nor do they allow for arbitrary arrest and criminal prosecution." *Id.* And, "[s]entencing guidelines do not inform the public of the penalties attached to criminal conduct nor do they vary the statutory maximum and minimum penalties assigned to illegal conduct by the legislature." *Id.* The court concluded that the guidelines are intended only to structure discretionary decisions affecting sentences; they do not specify that a particular sentence must be imposed. Since the guideline statutes do not require a certain outcome, they create no constitutionally protectable liberty interest. *Id.* at 461.

At the time of *Baldwin,* the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, authorized judges to impose a sentence outside the standard range based on the judge's finding that there were "substantial and compelling reasons justifying an exceptional sentence." Former RCW 9.94A.120(2) (2000). The judge was required only to provide written findings and conclusions and to base the exceptional sentence on factors not used in computing a standard range sentence. Former RCW 9.94A.120(3); *State v. Gore,* 143 Wn.2d 288, 315, 21 P.3d 262 (2001), *overruled by State v. Hughes,* 154 Wn.2d 118, 131, 110 P.3d 192 (2005). Therefore, the SRA allowed the judge "to impose an exceptional sentence . . . without the factual determinations being charged, submitted to a jury, or

proved beyond a reasonable doubt." *Gore,* 143 Wn.2d at 314.

In *Blakely v. Washington,* 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the Court ruled this sentencing scheme unconstitutional. To comply with the Sixth Amendment, the Court held that, except for the fact of a prior conviction, any fact that increases the penalty for a crime must be admitted by the defendant or submitted to a jury and proved beyond a reasonable doubt. A trial court's sentencing authority must be limited to the maximum sentence the court could impose without making any additional findings. *Id.* at 303-04. Under the SRA, such a sentence would be the maximum punishment within the standard range rather than the statutory maximum for the particular crime. *Id.* After *Blakely,* the trial court is allowed to impose an exceptional sentence based on a finding of substantial and compelling reasons. RCW 9.94A.535. But the facts supporting aggravating sentences in RCW 9.94A.535(3) must be proved to a jury, or to the court if a jury is waived, beyond a reasonable doubt, or by the defendant's stipulation. RCW 9.94A.537(3).

In *Johnson v. United States,* the United States Supreme Court struck down as unconstitutionally vague a provision of the Armed Career Criminal Act of 1984 in 18 U.S.C. § 924(e)(1) that required courts to increase the sentence from a 10-year maximum to a 15-year mandatory minimum for defendants convicted of felon in possession of a firearm with three prior violent felony convictions. *Johnson,* 135 S. Ct. at 2555. *Johnson* ruled that such "statutes fixing sentences" are subject to a vagueness challenge. *Id.* at 2556-57.

In *Beckles,* the United State Supreme Court addressed a vagueness challenge to advisory federal sentencing guidelines. *Beckles,* 137 S. Ct. at 890. The Court observed that vagueness concerns apply to laws that define criminal offenses and that "*fix the permissible sentences* for criminal offenses." *Id.* at 892. The laws "must specify the range of available sentences" with sufficient clarity. *Id.* The Court distinguished *Johnson* because unlike the sentence-fixing statute at issue there, the guidelines did not fix the permissible range of sentences that a trial court must impose. *Id.* Instead, they "merely guide the exercise of a Court's discretion in choosing an appropriate sentence within the statutory range." *Id.* Therefore, the guidelines were not subject to a vagueness challenge under the due process clause. *Id.* at 895.

Recognizing and applying *Beckles,* all three divisions of this court continue to reject due process vagueness challenges to aggravating factors like Bennett's and adhere to *Baldwin* as controlling law. *State v. DeVore,* 2 Wn. App. 2d 651, 413 P.3d 58 (2018) (Division Three), *review denied,* 191 Wn.2d 1005 (2018); *State v. Brush,* 5 Wn. App. 2d 40, 425 P.3d 545 (2018) (Division Two), *review denied,* 192 Wn.2d 1012 (2019); *State v. Lloyd,* 3 Wn. App. 2d 1060, 2018 WL 8642839 (Division One), (unpublished) http://www.courts.wa.gov/opinions/pdf/751115.pdf., *review denied,* 191 Wn.2d 1016 (2018).

In *Devore,* we stated:

> We consider Matthew DeVore's appeal akin to *Beckles v. United States,* not *Johnson v.*

> *United States*. The destructive impact factor does not increase the permissible sentence of the offender. The trial court must still sentence the defendant within the statutory maximum of the crime, life imprisonment. Therefore, we hold that challenges to the destructive impact factor *and other aggravating factors under RCW 9.94A.535(3)* do not merit review under the void for vagueness doctrine. We do not then address any vagaries of the aggravating factor.

DeVore, 2 Wn. App. 2d at 665 (emphasis added).

In *Brush,* Division Two of this court ruled likewise, rejecting the same arguments Bennett makes and citing to *DeVore*. *Brush,* 5 Wn. App. 2d at 61-63. In the unpublished case, *Lloyd,* Division One also rejected a void for vagueness challenge to the deliberate cruelty and particular vulnerability factors, upholding *Baldwin* and citing *Beckles* as reaffirmation that the aggravating factors merely guide the sentencing court's decision to impose an exceptional sentence. *Lloyd,* 2018 WL 8642839 at *26. In short, the requirements under *Blakely* and RCW 9.94A.535 and .537 that a jury must determine the applicability of certain aggravators does not change the *Baldwin* analysis.

Bennett nevertheless contends *DeVore* and *Brush* misapply *Beckles*. He also contends that in two post-*Blakely* cases, the Washington Supreme Court has signaled its understanding that *Baldwin* no longer applies and aggravators are subject to the prohibition on vague laws because the cases assumed the defendants could bring void for vagueness challenges. *State v. Murray,* 190 Wn.2d 727, 732 n.1, 416 P.3d 1225

(2018); *State v. Duncalf,* 177 Wn.2d 289, 298, 300 P.3d 352 (2013). But the court in those cases determined that "even if we assume" or "even assuming" the vagueness doctrine applies, the defendants' vagueness challenges failed; thus, the court in each case found it unnecessary to address whether *Baldwin* survived *Blakely*. Whatever the Supreme Court's future intent on this issue, it is currently resolved in *DeVore, Brush,* and *Lloyd*. The Supreme Court denied review in each of those cases.

Baldwin remains good law and applies here. Bennett cannot assert a vagueness challenge to RCW 9.94A.535(3)(a), (b).

Even assuming Bennett can make his vagueness challenges, he makes no showing that the deliberate cruelty and victim vulnerability factors are vague as applied to his conduct.

3. Excessive length of sentence

Bennett contends the 660-month length of his exceptional sentence for second degree murder was based on untenable reasons and is arbitrary and excessive.

We review whether a sentence is clearly excessive only for an abuse of discretion. *Ritchie,* 126 Wn.2d at 392. If the record supports the reasons for the exceptional sentence and justifies an increased exceptional sentence, we will reverse only if no reasonable person would have imposed the sentence, i.e., it is based on untenable grounds or imposed for untenable reasons. *Id.* at 392-93; *State v. Bluehorse,* 159 Wn. App. 410, 434, 248 P.3d 537 (2011). If the trial

court does not base its sentence on an improper reason, such as race or receipt of prison good time credit, this court will not deem the sentence excessive unless its length, in light of the record, shocks the conscience. *Ritchie,* 126 Wn.2d at 396.

In imposing Mr. Bennett's 660-month sentence, the trial court reasoned:

> I do believe there are similarities between the case of *State vs. Scott* and the present matter. And I have attempted to draw some conclusions about how the trial judge reached its decision in that case, considering the heinous facts of that case. And what it appears to me that the trial court did in that case was to first identify a sentence within the higher end of the applicable standard range, and then applied a multiplier of three as a result of the presence of the aggravating factors. And this court believes that that is a reasonable guidance or reasonable instructions [sic] to follow.
>
> So in the present case the standard range is between 134 and 234 months. And based on my analysis, again, of the method used in *State vs. Scott,* Mr. Bennett, your sentence will be 660 months.

RP (May 12, 2017) at 8761.

In *Scott,* the defendant was convicted of first degree murder for raping and killing a 78-year-old woman who suffered from Alzheimer's disease and lived alone. 72 Wn. App. at 209-10. The defendant's standard range was 240 to 320 months. Based on four aggravating

factors–abuse of trust, victim vulnerability, deliberate cruelty, and multiple injuries inflicted in the commission of the crime–the trial court imposed an exceptional sentence of 900 months. *Id.* at 210. On appeal, the court affirmed the sentence because it did not shock the conscience, and, although harsh, was not so clearly excessive that no reasonable person would have imposed it. *Id.* at 221-22.

Bennett's 660-month sentence is approximately 2.82 times greater than the 234-month top end of his standard range. Although the sentence is harsh and quite substantial relative to Bennett's standard range, its length does not shock the conscience in light of what the record shows to be a violent murder of a particularly vulnerable 82-year-old woman. Contrary to Bennett's contention, using *Scott* for comparison does not make the court's sentencing decision here untenable. The 660-month sentence is not one that no reasonable person would have imposed.

As the State notes, exceptional sentences of similar magnitude have been affirmed on appeal. *See e.g., Ritchie,* 126 Wn.2d at 399 (upholding 900-month exceptional sentence where standard range was 240 to 320 months); *State v. Van Buren,* 112 Wn. App. 585, 596-601, 49 P.3d 966 (2002) (upholding 600-month sentence for first degree murder where plea agreement recommended 292-month standard range sentence); *State v. Burkins,* 94 Wn. App. 677, 697, 702, 973 P.2d 15 (1999) (upholding 720-month sentence despite 333-month standard maximum); *see also State v. Smith,* 82 Wn. App. 153, 156, 167, 916 P.2d 960 (1996) (upholding 100-year sentence that was 3.1 times the top end of the

standard range for attempted first degree murder, robbery, rape, and kidnapping).

Finally, Bennett's assertion of youth as a mitigating factor to lessen his 660-month sentence is without merit. He was two weeks shy of his 25th birthday when he committed the murder. Assuming, at his age, that he could have argued youth as a mitigating factor under *State v. O'Dell,* 183 Wn.2d 680, 358 P.3d 359 (2015), he presented no such evidence or argument at sentencing. Youth does not "per se automatically reduce an adult offender's culpability." *Id.* at 689. For the court to consider it, the "defendant must provide some evidence that youth *in fact* impaired his capacities." *Id.* Bennett did not do so. He steadfastly maintained his innocence all the way through sentencing. The youth factor was appropriately absent from the trial court's sentencing decision.

We conclude the court did not abuse its discretion by imposing the 660-month exceptional sentence.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

/s/ Lawrence-Berrey, J.
Lawrence-Berrey, J.

WE CONCUR:

/s/ Korsmo, A.C.J.	/s/ Melnick, J.
Korsmo, A.C.J.	Melnick, J.[8]

[8] The Honorable Rich Melnick is a Court of Appeals, Division Two, judge sitting in Division Three under CAR 21(a).

APPENDIX C

Trial Court Transcript Excerpts

* * * *

[pp. 8769]

Thank you.

THE COURT: Okay. Does anybody want to put any further analysis or comments on the record regarding the case law that was cited? There was the issue about vagueness. Does either party want to make any further comments on that?

MR. DANO: No, your Honor.

MR. BUSTAMANTE: No, your Honor.

THE COURT : Okay. So let me just briefly address that issue and then I'll give you what I drafted and then go over my edits that I made.

First of all, the case that was cited, the primary case was Johnson vs. United States, 135 Supreme Court 2551, a 2015 case. And in that case, the issue was whether a particular definition of violent felony as contained in the Armed Career Criminal Act violated -- or survived, rather, the Constitution's prohibition of vague criminal laws.

And the holding was, "We hold that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process."

The court noted, in general, that the vagueness doctrine does apply, not only to statutes defining elements of crimes, but also to statutes fixing sentences. And in that case, they were attempting to apply the what was called the residual clause of the Armed Career Criminal Act to the facts of that case.

And the court noted -- well, more of the background facts were that, in general, it is unlawful in that case for felons to "ship, possess, and receive firearms." And that carries with it a punishment of up to ten years of imprisonment. However, if a particular defendant had three or more "serious drug offenses" or three or more offenses involving a "violent felony," then automatically the prison term would increase to a minimum of 15 years and a maximum of life.

So, in essence, that enhancement or sentencing enhancement changed the statutory maximum. It went from a potential of up to ten years imprisonment to a minimum of 15 and up to life imprisonment. And in that case the defendant pled guilty to being a felon in possession of a firearm, and the state argued that three prior offenses qualified as a violent offense or violent offenses, "including one which involved unlawful possession of a short-barreled shotgun."

And the court noted that in evaluating the residual clause, it applied the "categorical approach" for determining whether an offense qualifies as a violent felony. And under the categorical approach, a court must assess whether a crime qualifies as a violent felony "in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion."

And the court noted that in determining whether a particular offense was a violent felony under the definition that was included in the residual clause, that evaluation "ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not real-world facts or statutory elements."

And as the court noted, it was one thing to apply imprecise "serious potential risk" standard to real-world facts; it is quite another to apply it to a "judge-imagined abstraction." And this was kind of the crux of its analysis. "By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates."

That case, though, is distinguishable from the present case. First, because there's no doubt that here life imprisonment is the statutory maximum regardless of what the sentencing guidelines may indicate. And that is not vague, as a defendant is put on notice of the potential maximum penalty he or she can receive upon committing the offense of murder in the second degree. And that basically is the analysis that's contained in the State vs. Baldwin case, which is the 2003 State Supreme Court decision cited to by the state in its memorandum.

In addition, the aggravators – in general, the aggravators under our sentencing guidelines and those that were specifically applied in this case do not require the application of the modified categorical

approach to determine whether they apply in a particular case.

In other words, a court is not assessing the aggravators in terms of how the law defines the aggravator. Rather, the court is assessing in the jury, in fact, how an individual might have committed the offense on a particular occasion. And in this case the particular occasion being the current offense.

In essence, the court is not dealing with a judge-imagined abstraction of what deliberate cruelty or particularly vulnerable person might be. Rather, the court and the jury is being to apply a standard to a real-world set of facts, which in this case are the facts of this case.

So as a result of that, I don't find that the challenge to the aggravators based on the vagueness doctrine apply, and that's why I deny that objection.

. . .

APPENDIX D

SUPERIOR COURT OF WASHINGTON
IN AND FOR GRANT COUNTY

NO. 14-1-00778-0

[Filed: May 22, 2017]

STATE OF WASHINGTON,	)
	)
Plaintiff,	)
	)
vs.	)
	)
CHAD GARRETT BENNETT	)
	)
Defendant.	)
	)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR AN EXCEPTIONAL SENTENCE

THIS MATTER having come before the Court on May 12, 2017 for sentencing; the jury having reached its verdict on March 29, 2017. The defendant being present together with his attorney, David Bustamante, Prosecuting Attorney Garth Dano and Deputy Prosecutor Edward A. Owens representing the State.

The Court, pursuant to RCW 9.94A.535, and having reviewed the files, records, sentencing memoranda, and transcript of the sentencing hearing, attached as Exhibit "A" hereto, and having heard the argument of

counsel and the statement of the defendant, and having further considered Defendant's objections to the State's Proposed Findings of Fact, Conclusions of Law and Order for Exceptional Sentence filed May 18, 2017, and being otherwise fully advised in the premises, and now makes the following:

FINDINGS OF FACT

1. Lucille Moore was brutally attacked and murdered on September 7, 2014.

2. In the attack that took her life, Lucille Moore suffered strangulation; head injuries; contusions; brain injury; and a broken upper jaw;

3. Lucille Moore was stabbed 17 times;

4. Lucille Moore suffered 11 puncture wounds to her heart;

5. Lucille Moore's throat was slit twice and stabbed in the neck.

6. The head injuries, the stab wounds to the chest, or the injuries to the neck/throat could have caused the death of Lucille Moore.

7. At the time of her death, Lucille Moore was 82 years of age and lived alone.

8. The defendant knew of Lucille Moore's advanced age.

9. At the time Lucille Moore was murdered, the defendant, Chad Bennett, was 24 years of age.

10. On March 29, 2017, after a trial lasting several weeks, a jury found the defendant, Chad Bennett, guilty beyond a reasonable doubt of the crime of Murder in the Second Degree.

11. The jury further found, beyond a reasonable doubt by special interrogatory, that the defendant's conduct manifested deliberate cruelty to the victim, Lucille Moore.

12. The jury further found, beyond a reasonable doubt by special interrogatory, that the victim, Lucille Moore, was particularly vulnerable or incapable of resistance.

13. Lucille Moore, was inhumanely attacked and murdered by the defendant, Chad Bennett.

BASED UPON the foregoing Findings of Facts, the Court now enters the following:

CONCLUSIONS OF LAW

1. The Court concludes that substantial evidence, as outlined in Findings of Fact 2, 3, 4, 5, and 6 above, supports the jury's conclusion, beyond a reasonable doubt, that Lucille Moore was subjected to deliberate cruelty at the hands of the defendant, Chad Bennett, establishing the statutory aggravating factor as defined in RCW 9.94A.535(3)(a).

2. The Court concludes that the facts show that, in the course of murdering Lucille Moore, the defendant engaged in gratuitous violence which was significantly more serious than typical of the crime and

imparted physical, psychological, and emotional pain upon Mrs. Moore as an end itself.

3. The Court concludes that substantial evidence, as outlined in Findings of Fact 7, 8, and 9, supports the jury's conclusion, beyond a reasonable doubt, that Lucille Moore was a victim who was particularly vulnerable or incapable of resistance, establishing the statutory aggravating factor as defined in RCW 9.94A.535(3)(b).

4. The Court concludes that Lucille Moore's advanced age alone can be a sufficient basis for the jury's conclusion that Mrs. Moore was particularly vulnerable or incapable of resistance.

5. The Court concludes that Lucille Moore's age made it easier for the defendant to overcome any resistance and easily overpower Mrs. Moore, are also a sufficient basis for the jury's conclusion that Mrs. Moore was particularly vulnerable or incapable of resistance.

6. [Left Blank]

7. The Court concludes that the jury's finding that the defendant's conduct manifested deliberate cruelty to the victim and that the defendant knew or should have known that his victim was particularly vulnerable or incapable of resistance are amply supported by facts in the record.

8. The Court concludes that, considering the purposes of RCW 9.94A, these aggravating factors establish substantial and compelling reason justifying the imposition of an exceptional sentence.

9. The Court further concludes that either of the aggravating factors standing alone might establish a substantial and compelling reason justifying the imposition of an exceptional sentence. However, the more substantial and compelling reason for the imposition of an exceptional sentence in this case is the deliberate cruelty Mrs. Moore suffered at the time of her death.

10. The Court concludes that there is no doubt that the victim, Lucille Moore, suffered a brutal, violent, and inhumane death, which the jury concluded, based upon the evidence, that the defendant, Chad Bennett, committed beyond any reasonable doubt.

11. The Court concludes that in order to carry out the purpose and intent of the Sentencing Reform Act, as defined in RCW 9.94A.010, the appropriate sentence for the defendant, Chad Bennett, to serve is a term of confinement in a State Correctional Facility of 660 months (55 years).

ORDER

The Court, having entered the foregoing Findings of Fact and Conclusions of Law, pursuant to RCW 9.94A.535, NOW THEREFORE, it is Hereby Ordered, Adjudged, and Decreed; that the defendant, Chad Gerrit Bennett, be sentenced to a term of confinement with the Department of Corrections of 660 months (55 years).

DATED this 22nd day of May, 2017.

/s/_____
THE HONORABLE DAVID ESTUDILLO
Judge

APPENDIX E

Superior Court of Washington
County of Grant

No. 14-1-00778-0

[Filed: May 12, 2017]

State of Washington,	)
Plaintiff,	)
	)
vs.	)
	)
CHAD GARRIT BENNETT,	)
Defendant.	)
	)
SID:WA22073528	)
DOB: 09/23/1989	)
OIN: EPD, 14EP3773	)
PCN: 925989843	)

JUDGMENT # 17-9-00752-0

Felony Judgment and Sentence --
Prison
(FJS)

[X] Clerk's Action Required, para 2.1, 4.1, 4.3, 4.8, 5.2, 5.3, 5.5 and 5.7
[ ] Defendant Used Motor Vehicle
[ ] Juvenile Decline [ ] Mandatory [ ] Discretionary

I. Hearing

1.1 The Court conducted a sentencing hearing this date and present were:
Defendant: CHAD GARRIT BENNETT
Defendant's Lawyer: David Bustamante
Prosecuting Attorney: Garth Dano

II. Findings

2.1 Current Offenses: The defendant is guilty of the following offenses, based upon a Jury Verdict on March 29, 2017:

Count	***Crime***	***RCW (w/sub section)***	***Class***	***Date of Crime***
2	Murder in the Second Degree (Intentional Murder)	9A.32.050(1)(a)	A	09/07/2014
2	Aggravated Circumstance-Deliberate Cruelty	9.94A.535(3)(a)	SA	09/07/2014
2	Aggravated Circumstance-Particularly Vulnerable Victim	9.94A.535(3)(b)	SA	09/07/2014

Class: A (Felony-A), B (Felony-B), C (Felony-C), GM (gross misd), M (misd), SA (Special Allegation)

(If the crime is a drug offense, include the type of drug in the second column.)
[ ] Additional current offenses are attached in Appendix 2.1a.
The jury returned a special verdict or the court made a special finding with regard to the following:
GV [ ] For the crime(s) charged in Count _____, **domestic violence** was pled and proved. RCW 10.99.020.
[ ] The defendant used a **firearm** in the commission of the offense in Count _____. RCW 9.94A.602, 9.94.A.533.
[ ] The defendant used a **deadly weapon other than a firearm** in committing the offense in Count _____. RCW 9.94A.602, 9.94A.533.
[ ] Count _____, **Violation of the Uniform Controlled Substances Act (VUCSA),** RCW 69.50.401 and RCW 69.50.435, took place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.
[ ] In count _____ the defendant committed a robbery of a pharmacy as defined in RCW 18.64.011(21), RCW 9.94A.___.
[ ] The defendant committed a crime involving the manufacture of methamphetamine, including its salts, isomers, and salts of isomers, **when a juvenile was**

present in or upon the premises of manufacture in Count _____. RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.

[ ] Count _____ is a **criminal street gang**-related felony offense in which the defendant compensated, threatened, or solicited a **minor** in order to involve that minor in the commission of the offense. RCW 9.94A.833.

[ ] Count _____ is the crime of **unlawful possession of a firearm** and the defendant was a **criminal street gang** member or associate when the defendant committed the crime. RCW 9.94A.702, 9.94A.___.

[ ] The defendant committed [ ] **vehicular homicide** [ ] **vehicular assault** proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030.

GY [ ] In Count _____, the defendant had (number of) _____ **passenger(s) under the age of 16** in the vehicle. RCW 9.94A.834.

[ ] Count _____ involves **attempting to elude a** police vehicle and during the commission of the crime the defendant endangered one or more persons other than the defendant or the pursuing law enforcement officer. RCW 9.94A.834.

[ ] In Count _____ the defendant has been convicted of **assaulting a law enforcement officer** or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault, as provided under RCW 9A.36.031, and the defendant intentionally committed the assault with what appeared to be a firearm. RCW 9.94A.831, 9.94A.533.

[ ] Count _____ is a felony in the commission of which the defendant used a **motor vehicle.** RCW46.20.285.
[ ] The defendant has a **chemical dependency** that has contributed to the offense(s)- RCW 9.94A.607.
[ ] Reasonable grounds exist to believe the defendant is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. RCW 9.94B.080
[ ] In Count _____, assault in the 1st degree (RCW 9A.36.011) or assault of a child in the 1st degree (RCW 9A.36.120), the offender used force or means likely to result in death or intended to kill the victim and shall be subject to a mandatory minimum term of 5 years (RCW 9.94A.540).
[ ] Counts _____ encompass the same criminal conduct and count as one crime in determining the offender score. RCW 9.94A.589.
[ ] **Other current convictions listed under different cause numbers used in calculating the offender score are** (list offense and cause number):

Crime	***Cause Number***	***Court (county & state)***	***DV* Yes***

* DV: Domestic Violence was pied and proved.

[ ] Additional current convictions listed under different cause numbers used in calculating the offender score are attached in Appendix 2.1b.

2.2 Criminal History (RCW 9.94A.525):

[*See Fold-out Exhibit*]

[ ] The defendant has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.

[ ] Reasonable grounds exist to believe the defendant is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. RCW 9.94B.080

[ ] In Count _____, assault in the 1st degree (RCW 9A.36.011) or assault of a child in the 1st degree (RCW 9A.36.120), the offender used force or means likely to result in death or intended to kill the victim and shall be subject to a mandatory minimum term of 5 years (RCW 9.94A.540).

[ ] Counts _____ encompass the same criminal conduct and count as one crime in determining the offender score. RCW 9.94A.589.

[ ] **Other current convictions listed under different cause numbers used in calculating the offender score are** (list offense and cause number):

Crime	Cause Number	Court (county & state)	DV* Yes

* DV: Domestic Violence was pled and proved.

[ ] Additional current convictions listed under different cause numbers used in calculating the offender score are attached in Appendix 2.1b.

2.2 Criminal History (RCW 9.94A.525):

	Crime	Date of Crime	Date of Sentence	Sentencing Court (County & State)	A or J Adult, Juv.	Type of Crime	DV* Yes	
1	DWLS 3rd Degree	07/05/13	12/10/13	Grant County WA 3Z0625715	A	NV		
2	DWLS 3rd Degree	12/06/10	08/09/11	Grant County WA XY0595288	A	NV		
3	DWLS 3RD Degree	05/13/10	07/13/10	Grant County WA EPC029090	A	NV		
4	Possess Stolen Property 3rd Degree	09/22/09	06/05/12	Grant County WA 09-1-00498-9	A	NV		
5	Theft 3rd Degree	07/08/08	08/01/08	Grant County WA EPC027600	A	NV		
6	Harassment – Prev Conv Death Threat (Felony)	03/01/06	04/11/06	Cowlitz County WA 06-8-00092-0	J	NV		1/2
7	Telephone Calls to Harass (Felony)	03/04/04	06/08/04	Cowlitz County WA 04-8-00137-7	J	NV		1/2
8	Telephone Calls to Harass (Felony)	03/03/04	06/08/04	Cowlitz County WA 04-8-00137-7	J	NV		1/2
9	Telephone Calls to Harass	03/07/04	06/08/04	Cowlitz County WA 04-8-00137-7	J	NV		
10	Harassment (5 CTS)	11/06/03	02/18/04	Grant County WA 03-8-00632-5	J	NV		1 1/2

* DV: Domestic Violence was pled and proved.

[ ] Additional criminal history is attached in Appendix 2.2.

[ ] The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.

[ ] Additional criminal history is attached in Appendix 2.2.
[ ] The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.
[ ] The prior convictions listed as number(s) _____, above, or in appendix 2.2, are one offense for purposes of determining the offender score (RCW 9.94A.525)

[ ] The prior convictions listed as number(s) _____, above, or in appendix 2.2, are not counted as points but as enhancements pursuant to RCW 46.61.520.

2.3 Sentencing Data:

Count No.	***Offender Score***	***Serious -ness Level***	***Standard Range (not including enhance ments)***
2	1 (1.5 pts)	XIV	134-234

Plus Enhancements*	Total Standard Range (including enhancements)	Maximum Term
	134-234	LIFE

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (RPh) Robbery of a pharmacy, (VH) Veh. Hom, see RCW 9.94A.533(7), (JP) Juvenile present, (CSG) criminal street gang involving minor, (AE) endangerment while attempting to elude, (ALF) assault law enforcement with firearm, *RCW*

9.94A.533(12), (P16) Passenger(s) under age 16.
[ ] Additional current offense sentencing data is attached in Appendix 2.3.
For violent offenses, most serious offenses, or armed offenders, recommended **sentencing agreements or plea agreements** are [ ] attached [ ] as follows:
_____.

2.4 [x] Exceptional Sentence. The court finds substantial and compelling reasons that justify an exceptional sentence:
[ ] below the standard range for Count(s) _____
[x] above the standard range for Count(s) 2.
- [ ] The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.
- [x] Aggravating factors were [ ] stipulated by the defendant, [ ] found by the court after the defendant waived jury trial, [x] found by jury, by special interrogatory.

[ ] within the standard range for Count(s) _____, but served consecutively to Count(s) _____.
Findings of fact and conclusions of law are attached in Appendix 2.4. [ ] Jury's special interrogatory is attached. The Prosecuting Attorney [ ] did [ ] did not recommend a similar sentence.

2.5 Legal Financial Obligations/Restitution. The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the

defendant's status will change. (RCW 10.01.160). The court makes the following specific findings:
[ ] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):
_____.

[ ] The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.
2.6 [ ] Felony Firearm Offender Registration. The defendant committed a felony firearm offense as defined in RCW 9.41.010, and
[ ] The defendant shall register as a felony firearm offender. The court considered the following factors in making this determination:
[ ] the defendant's criminal history
[ ] whether the defendant has previously been found not guilty by reason of insanity of any offense in this state or elsewhere.
[ ] evidence of the defendant's propensity for violence that would likely endanger persons.
[ ] other: _____.
[ ] The defendant must register as a felony firearm offender because the offense was committed in conjunction with an offense committed against a person under the age of 18, or a serious violent offense or offense involving sexual motivation as defined in RCW 9.94A.030. The defendant must register as a felony firearm offender.

III. Judgment

3.1 The defendant is *guilty* of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 [x] The court ***dismissed:***

1	Aggravated Circumstance-Lack of Remorse	9.94A.535(3)(q)	SA	09/07/ 2014
2	Aggravated Circumstance-Lack of Remorse	9.94A.535(3)(q)	SA	09/07/ 2014

IV. Sentence and Order

It is ordered:

4.1 Confinement The court sentences the defendant to total confinement as follows:
(a) ***Confinement***. RCW 9.94A.589. A term of total confinement in the custody of the Department of Corrections (DOC):

660 months on Count 2
[ ] The confinement time on Count(s) _____ contain(s) a mandatory minimum term of _____.
[ ] The confinement time on Count _____ includes _____ months as enhancement for [ ] firearm [ ] deadly weapon [ ] VUCSA in a protected zone [ ] manufacture of methamphetamine with juvenile present [ ] impaired driving

Actual number of months of total confinement ordered is: 660.

(b) ***Confinement.*** RCW 10.95.030 (Aggravated murder and under age 18.) The court orders the following: Count 2 minimum term: _____ maximum term: Life _____.

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

This sentence shall run consecutively with the sentence in the following cause number(s) (see RCW 9.94A.589(3)): _____.

Confinement shall commence immediately unless otherwise set forth here: _____.

(c) ***Credit for Time Served.*** The defendant shall receive credit for eligible time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The jail shall compute time served.

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

4.2 Community Custody. (To determine which offenses are eligible for or required for community custody see RCW 9.94A.701)

(A) The defendant shall be on community custody for:

Count(s) 2	36 months for Serious Violent Offenses
Count(s) _____	18 months for Violent Offenses
Count(s) _____	12 months (for crimes against a person, drug offenses, or offenses involving the unlawful possession of a firearm by a street gang member or associate)

Note: combined term of confinement and community custody for any particular offense cannot exceed the statutory maximum. RCW 9.94A.701.

(B) While on community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while on community custody; (6) nor own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; (9) obey all municipal, county, state, tribal and federal laws; and (10) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706. The defendant's residence location and living arrangements

are subject to the prior approval of DOC while on community custody.
The court orders that during the period of supervision the defendant shall:
[ ] not possess or consume alcohol.
[ ] not possess or consume controlled substances, including marijuana, without a valid prescription.
[ ] have no contact with: _____.
[ ] remain [ ] within [ ] outside of a specified geographical boundary, to wit: _____.
[ ] not serve in any paid or volunteer capacity where he or she has control or supervision or minors under 13 years of age.
[ ] participate in the following crime-related treatment or counseling services: _____.
[ ] undergo an evaluation for treatment for [ ] domestic violence [ ] substance use disorder
[ ] mental health [ ] anger management, and fully comply with all recommended treatment. _____
[ ] comply with the following crime-related prohibitions:
_____
_____.
[ ] Other conditions:
_____
_____.
Court Ordered Treatment: If any court orders mental health or substance use disorder treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

(C) If the defendant committed the above crime(s) while under age 18 and is sentenced to more than 20 years of confinement:

(i) As long as the defendant's conviction is not for aggravated first degree murder or certain sex crimes, and the defendant has not been convicted of any crime committed after he or she turned 18 or committed a disqualifying serious infration as defined by DOC in the 12 months before the petition is filed, the defendant may petition the Indeterminate Sentence Review Board (Board) for early release after the defendant has served 20 years.

(ii) If the defendant is released early because the petition was granted or by other action of the Sentence Review Board, the defendant will be subject to community custody under the supervision of the DOC for a period of time determined by the Board, up to the length of the court-imposed term, of incarceration. The defendant will be required to comply with any conditions imposed by the Board.

(iii) If I violate the conditions of community custody, the Board may return me to confinement for up to the remainder of the court-imposed term of incarceration.

4.3 Legal Financial Obligations: The defendant shall pay to the clerk of this court:

JASS CODE

PCV $ 500.00 Victim assessment RCW 7.68.035

PDV $ ___ Domestic Violence (DV) assessment RCW 10.99.080

$____ Violation of a DV protection order ($15 mandatory fine) RCW 26.50.100

CRC $200.00 Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190

Criminal filing fee $200.00 FRC
Witness costs $_____ WFR
Sheriff service fees $_____ SFR/SFS/SFW/WRF
Jury demand fee $_____ JFR
Extradition costs $_____ EXT
Other $_____

PUB $ ____ Fees for court appointed attorney RCW 9.94A.760

WFR $ ____ Court appointed defense expert and other defense costs RCW9.94A.760

FCM/MTH $ ____ Fine RCW 9A.20.021; [ ] VUCSA chapter 69.50 RCW, [ ] VUCSA additional fine deferred due to indigency RCW 69.50.430

CDF/LDI/FCD $ ____ *Drug* enforcement fund of _____
NTF/SAD/SDI RCW 9.94A.760

$ ____ DUI fines, fees and assessments

CLF $ ____ Crime lab fee [ ] suspended due to indigency RCW 43.43.690

$ 100.00 DNA collection fee RCW 43.43.7541

FPV $ ____ Specialized forest products RCW 76.48.171

$ ____ Other fines or costs for:

DEF $ ____ Emergency response costs (Vehicular Assault, Vehicular Homicide, Felony DUI only, $2,500 max.) RCW 38.52.430

$ ____ Restitution to: _____

RTN/RJN $ ___ Restitution to: _____

$ ____ Restitution to: _____
(Name and Address--address may be withheld and provided confidentially to Clerk of the Court's office.)

$ 800.^{00} ***Total*** RCW 9.94A.760

[ ] The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:
[ ] shall be set by the prosecutor.
[ ] is scheduled for _____ (date).

[ ] The defendant waives any right to be present at any restitution hearing (sign initials): _____.

[ ] ***Restitution*** Schedule attached.

[ ] Restitution ordered above shall be paid jointly and severally with:
Name of other defendant ***Cause Number*** (Victim's name) (Amount-$)

RJN _____
_____
_____

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

[X] All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than $ _____ per month commencing _____. RCW 9.94A.760.

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

[ ] The court orders the defendant to pay costs of incarceration at the rate of $ _____ per day, (actual costs not to exceed $100 per day). (*JLR*) RCW 9.94A.760.

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.4 DNA Testing. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. This paragraph does not apply if it is established that the Washington State Patrol crime laboratory already has a sample

from the defendant for a qualifying offense. RCW 43.4J.754.
[ ] ***HIV Testing***. The defendant shall submit to HIV testing. RCW 70.24.340.

4.5 No Contact:
[ ] The defendant shall not have contact with _____ (name) including, but not limited to, personal, verbal, telephonic, written or contact through a third party until (which does not exceed the maximum statutory sentence).

[ ] The defendant is excluded or prohibited from coming within _____ (distance) of: [ ] _____ (name of protected person(s))'s [ ] home/ residence [ ]work place [ ] school [ ] (other location(s)) _____ , or [ ] other location: _____, until _____ (which does not exceed the maximum statutory sentence).

[ ] A separate Domestic Violence No-Contact Order or Antiharassment No-Contact Order is filed concurrent with this Judgment and Sentence.

4.6 Other:_____
_____
_____
_____
_____.

4.7 Off-Limits Order. (Known drug trafficker). RCW 10.66.020. The following areas are off limits to the defendant white under the supervision of the county jail or Department of Corrections: _____
_____.

4.8 Exoneration: The Court hereby exonerates any bail, bond and/or personal recognizance conditions.

4.9 Sentence and Order as to Misdemeanor/Gross Misdemeanor Counts

Defendant is sentenced to imprisonment in the Grant County jail

for a period of _____ days, with _____ days suspended for _____ years upon the terms and conditions stated below as to Count _____.

for a period of _____ days, with _____ days suspended for _____ years upon the terms and conditions stated below as to Count _____.

for a period of _____ days, with _____ days suspended for _____ years upon the terms and conditions stated below as to Count _____.

[ ] the terms(s) in count(s) _____ is/are concurrent/consecutive
[ ] with each other [ ] with count(s) sentenced herein
[ ] with Cause No. _____

The defendant shall receive credit, against the sentence stated above, for early release time, if any, earned by the defendant pursuant to the policies of the Grant County jail.

[ ] **Partial Confinement** Defendant may serve the sentence, if eligible and approved, in partial confinement in the following programs, subject to the following conditions:

_____.

[ ] work crew [ ] home detention [ ] work release RCW 70.48.210

[ ] **Alternative Conversion.** _____ days of total confinement ordered above are hereby converted to _____ hours of community restitution (8 hours = 1 day, nonviolent offenders only, 30 days maximum) at a rate of _____ hours per month:

Confinement shall commence [ ] **immediately** [ ] **on or before** _____.

[ ] You are hereby advised that you have been convicted of one or more of the following crimes committed by one family household member against another: ☐ Fourth Degree Assault ☐ Coercion ☐ Stalking ☐ Reckless Endangerment in the Second Degree ☐ Criminal Trespass in the First Degree ☐ Violation of a Protection Order or No-Contact Order

As a result of the conviction marked above:
You may not own, use or possess any firearm unless your right to do so is restored by a Superior Court in Washington State, and by a federal court if required. You must immediately surrender any concealed pistol license. (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047. **The prohibitions applicable under Federal Law may be different.**

Conditions for Suspension:

[*Omitted for Purposes of this Appendix*]

[ ] **Mandatory Conditions of Suspension for any Jail Time resulting from a DUI Offense:**

You have been convicted of driving under the influence of alcohol and/or actual physical control of a vehicle while under the influence of alcohol and/or drugs. You are not to:
(I) drive a motor vehicle without a valid license to drive and proof of financial responsibility (SR 22);
(ii) drive while having an alcohol concentration of .08 or more within two (2) hours after driving;
(iii) refuse to submit to a test of his or her breath or blood to determine alcohol concentration upon request of a law enforcement officer who has reasonable grounds to believe the person was driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor.

Except for ignition interlock driver's license and device or alcohol monitoring requirements under RCW 46.61.5055(5), violation of **any** mandatory condition requires a minimum penalty of 30 days' confinement, which may not be suspended or deferred, and an additional 30-day license suspension. RCW 46.61.5055(11). Courts are required to report violations of mandatory conditions requiring confinement or license suspension to DOL. RCW 46.61.5055.
The Court's Jurisdiction with regard to the conditions applicable to DUI Offenses is Five Years.

RIGHTS, CONDITIONS, WARNINGS, ACKNOWLEDGMENT

1. PUNCTUAL APPEARANCES. You must appear in court at any time directed by the court throughout the period of time you have been placed on a deferred sentence or suspended sentence. You must pay all fines, costs and assessments when due. You must appear at the date and time assigned by the court or jail ready to serve your commitment.

2. ADDRESS CHANGES. You must keep the court advised of all address changes using the address provided above. If the court orders you to appear at a hearing regarding your compliance with the deferred sentence or suspended sentence and you fail to attend the hearing, your term of supervision is tolled (the time does not count) until you appear on the record.

3. EMPLOYMENT AND NEW VIOLATIONS. You must keep the court informed of your employment status and any new violations of the law.

4. PROOF OF COMPLIANCE. In each instance where you are requested to file proof of a condition checked on the Judgment and Sentence, the proof must be in writing, signed by the person supervising the required program and written on the agency's letterhead. The proof of completion must be filed with the court.

FAILURE TO MEET CONDITIONS. Failure to meet any of the conditions imposed in the Judgment and Sentence or any of the conditions listed above, to appear as scheduled, and/or to pay financial obligations as scheduled may result in the filing of additional criminal charges, the issuance of a bench warrant for

your immediate arrest, the revocation of your deferred sentence or suspended sentence, the imposition of warrant costs, the suspension of your driver's license and the referral of your fines to a collection agency. If the deferred sentence or suspended sentence is revoked because of failure to meet conditions, you are subject to the imposition of the maximum sentence and fine as permitted by law or such portion thereof as the court deems appropriate. This order shall remain in effect through the period of the deferred or suspended sentence until and unless changed by further order of the court.

V. Notices and Signatures

5.1 Collateral Attack on Judgment. If you wish to petition or move for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, you must do so within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 Length of Supervision. If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose

of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 Notice of Income-Withholding Action. If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections (DOC) or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 Community Custody Violation.

(a) If you are subject to a violation hearing and DOC finds that you committed the violation, you may receive a sanction of up to 30 days of confinement. RCW 9.94A.633(1).

(b) If you have not completed your maximum term of total confinement and you are subject to a violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.633(2)(a).

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

5.5b [ ] **Felony Firearm Offender Registration.** The defendant is required to register as a felony firearm offender. The specific registration requirements are in the "Felony Firearm Offender Registration" attachment.

5.6 Reserved

5.7 [ ] **Department of Licensing Notice:** The court finds that Count _____ is a felony in the commission of which a motor vehicle was used. **Clerk's Action** – The clerk shall forward an Abstract of Court Record (ACR) to the DOL, which must revoke the Defendant's driver's license. RCW 46.20.285. **Findings for DUI, Physical Control, Felony DUI or Physical Control, Vehicular Assault, or Vehicular Homicide (ACR information):**
[ ] Within two hours after driving or being in physical control of a vehicle, the defendant had an alcohol concentration of breath or blood (BAC) of _____.
[ ] No BAC test result.
[ ] BAC Refused. The defendant refused to take a test offered pursuant to RCW 46.20.308.

[ ] Drug Related. The defendant was under the influence of or affected by any drug.
[ ] THC level was _____ within two hours after driving.
[ ] Passenger under age 16. The defendant committed the offense while a passenger under the age of sixteen was in the vehicle.
Vehicle Info: [ ] Commercial Veh.; [ ] 16 Passenger Veh.; [ ] Hazmat Yeh.

5.8 [ ] **Department of Licensing Notice – Defendants under age 21 only.** Count _____ is (a) violation of RCW chapter 69.41 [Legend drug], 69.50 [VUCSA], or 69.52 [Imitation drugs], and the defendant was under 21 years of age at the time of the offense **OR** (b) a violation under RCW 9.41.040 [unlawful possession of a firearm], and the defendant was under the age of 18 at the time of the offense **OR** (c) a violation under RCW chapter 66.44 [Alcohol], and the defendant was under the age of 18 at the time of the offense, **AND** the court finds that the defendant previously committed an offense while armed with a firearm offense, or an offense in violation of chapter 66.44, 69.41, 69.50, or 69.52 RCW. **Clerk's Action** – The clerk shall forward an Abstract of Court Record (ACR) to the DOL, which must revoke the Defendant's driver's license. RCW 46.20.265

5.9 Other: _____.

DONE in Open Court and in the presence of the defendant this date: 5/12/2017.

/s/_____
Judge

_____
Prosecuting Attorney
WSBA No. 11226
Print Name:
Garth Dano

/s/ David Bustamante
Attorney for Defendant
WASBA No. 30668
Print Name:
David Bustamante

/s/ Chad Garrit Bennett
Defendant

Print Name:
CHAD GARRIT BENNETT

Voting Rights Statement: I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

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

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

Defendant's signature: /s/ C. Bennett

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____ language, which the defendant

understands. I translated this Judgment and Sentence for the defendant into that language.

Interpreter signature/Print name: _____.

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

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

Clerk of said county and state, by: _____, Deputy Clerk

VI. Identification of the Defendant

SID No. WA22073528
(If no SID complete a separate Applicant card (form FD-358) for State Patrol)

Date of Birth 09/23/1989

FBI No. 572140DC0 Local ID No.

PCN No. 925989843 Other DOC No.

Alias name, DOB:

Race:
[ ] Asian/Pacific Islander [ ] Black/African American
[x] Caucasian [ ] Native American [ ] Other: _____

Ethnicity:
[ ] Hispanic [x] Non-Hispanic

Sex:
Male

Fingerprints: I attest that I saw the defendant who appeared in court affix his or her fingerprints and signature on this document.

Clerk of the Court, Deputy Clerk, /s/ _____

[Seal]

Dated: 5-12-17

[*Fingerprints Have Been Omitted for Purposes of this Appendix*]

STATE OF WASHINGTON)
) ss.
County of Grant)

WARRANT OF COMMITMENT

THE STATE OF WASHINGTON, To the sheriff of Grant County and to the superintendent and officers in charge of the Washington State Correctional Institution at Shelton, Washington.

WHEREAS CHAD GARRIT BENNETT has been duly convicted in the Superior Court of the State of Washington, for said county, of the crime(s) of

Count	***Crime***	***RCW (w/subsection)***	***Date of Crime***
2	Murder in the Second Degree (Intentional Murder)	9A.32.050(1)(a)	09/07/ 2014
2	Aggravated Circumstance-Deliberate Cruelty	9.94A.535(3)(a)	09/07/ 2014
2	Aggravated Circumstance-Particularly Vulnerable Victim	9.94A.535(3)(b)	09/07/ 2014

and judgment has been pronounced against said defendant. Defendant shall receive __ day(s) credit for time served prior to this date.

( ) YOU, THE SHERIFF, ARE COMMANDED to receive the defendant for classification, confinement, and placement as ordered in the Judgment and Sentence.

(X) YOU, THE SHERIFF, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement, and placement as ordered in the Judgment and Sentence and these presents are your authority for the same, HEREIN FAIL NOT.

WITNESS THE HONORABLE _____ Judge of Grant Superior Court, and the seal thereof, this 5-12-17.

KIMBERLY A. ALLEN
Clerk of the Superior Court

By: /s/_____
Deputy Clerk
[Seal]

ACKNOWLEDGMENT OF ADVICE OF RIGHT TO APPEAL AND TIME LIMIT FOR FILING COLLATERAL ATTACK

The court has entered the Judgment and Sentence to which this form is attached. The undersigned, counsel for the defendant or the defendant, and a qualified or certified interpreter (where applicable) acknowledge that the defendant has read or heard, and has acknowledged understanding, the following rights:

RIGHTS REGARDING APPEAL

1. The defendant has the right to appeal to the Court of Appeals.

2. If the defendant pled guilty, the defendant has waived the right to appeal his finding of guilt, but still may appeal issues collateral to the finding of guilt, or a sentence imposed outside the standard range

3. Unless a notice of appeal is filed with the clerk of this court within thirty (30) days from the entry of the Judgment and Sentence, the right to appeal will be forever lost.

4. The defendant has the right to be represented by a lawyer for the purposes of appeal, including preparation and filing of the notice of appeal. If the defendant cannot afford to hire a lawyer, the court will appoint a lawyer to represent the defendant at public expense.

5. The defendant has the right to have those parts of the trial record necessary for appeal prepared at public expense if the defendant cannot afford to pay for such preparation.

TIME LIMITS FOR COLLATERAL ATTACK

6. No petition or motion for relief from the Judgment and Sentence may be filed after one (1) year has elapsed from the time the Judgment and Sentence becomes final.

   The Judgment and Sentence becomes final on the last of the following dates:

   a. when it is filed with the clerk of this court;

   b. after a direct appeal (see rights above), when an appellate court issues its mandate disposing of such appeal,

   c. when the United States Supreme Court denies a timely petition for certiorari to review a decision upholding the defendant's conviction on appeal. Filing a motion to reconsider denial of certiorari does not prevent the Judgment and Sentence from becoming final.

7. The time limit stated above does not apply to a petition or motion based solely on one or more of the following grounds:

   a. newly discovered evidence, if the defendant acted with due diligence in discovering the evidence and filing the petition or motion;

b. that the statute the defendant is convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;

c. the conviction was barred by double jeopardy, under Amendment V to the United States Constitution or Article 1, Section 9 of the Washington State Constitution

d. the defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;

e. the sentence imposed was in excess of the court's jurisdiction;

f. there has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence or other order entered in a criminal or civil proceeding instituted by the state or local government, and either (1) the legislature has expressly provided that the change in the law is to be applied retroactively, or (2) a court, in interpreting a change in the law that lacks such an express legislative intent, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

DEFENDANT'S ACKNOWLEDGMENT

I HAVE READ, OR HAVE HAD READ TO ME, THE FOREGOING STATEMENT; I UNDERSTAND THE RIGHTS ENUMERATED ABOVE AND ACKNOWLEDGE MY RECEIPT OF A COPY OF THESE RIGHTS.

Date: 5/12/17 /s/_____
DEFENDANT

DEFENSE COUNSEL'S CERTIFICATION

I CERTIFY, AS DEFENDANT'S COUNSEL OF RECORD, THAT THE DEFENDANT HAS READ, OR HAS HAD READ TO HIM/HER, AND HAS ACKNOWLEDGED TO ME HIS/HER UNDERSTANDING OF, THE FOREGOING STATEMENT.

Date: 5/12/17 /s/_____
DEFENDANT 30668

VOTING RIGHTS STATEMENT: RCW 10.64. I acknowledge that my right to vote has been lost due to felony conviction. I am registered to vote; my voter registration will be cancelled. My right to vote may restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 92A.84.660.

INTERPRETER'S CERTIFICATION

I AM CERTIFIED, OR HAVE BEEN FOUND BY THE COURT TO BE QUALIFIED, AS AN INTERPRETER IN THE _____ LANGUAGE, AND I HAVE TRANSLATED THE FOREGOING STATEMENT OF RIGHTS AND DEFENDANT'S ACKNOWLEDGMENT INTO THAT LANGUAGE TO THE DEFENDANT. THE DEFENDANT HAS ACKNOWLEDGED THAT HE/SHE UNDERSTANDS BOTH THE TRANSLATION AND THE SUBJECT MATTER OF THIS DOCUMENT. I CERTIFY, UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON, THAT THE FOREGOING IS TRUE AND CORRECT.

Date: 5/12/17 /s/_____

INTERPRETER

APPENDIX F

West's RCWA 9.94A.505

9.94A.505. Sentences

Effective: July 28, 2019

Currentness

(1) When a person is convicted of a felony, the Court shall impose punishment as provided in this chapter.

(2)(a) The court shall impose a sentence as provided in the following sections and as applicable in the case:

(i) Unless another term of confinement applies, a sentence within the standard sentence range established in RCW 9.94A.510 or 9.94A.517;

. . .

(x) RCW 9.94A.535, relating to exceptional sentences;

. . .

West's RCWA 9.94A.510

9.94-A.510. Table 1–Sentencing grid

Effective: June 1, 2014
Currentness

[*See Fold-Out Exhibit*]

West's Revised Code of Washington Annotated
Title 9. Crimes and Punishments (Refs & Annos)
Chapter 9.94A. Sentencing Reform Act of 1981 (Refs & Annos)
Sentencing

West's RCWA 9.94A.510

9.94A.510. Table 1--Sentencing grid

Effective: June 1, 2014
Currentness

TABLE 1

Sentencing Grid

SERIOUSNESS LEVEL	OFFENDER SCORE									
	0	1	2	3	4	5	6	7	8	9 or more
XVI	Life sentence without parole/death penalty for offenders at or over the age of eighteen. For offenders under the age of eighteen, a term of twenty-five years to life.									
XV	23y4m 240- 320	24y4m 250- 333	25y4m 261- 347	26y4m 271- 361	27y4m 281- 374	28y4m 291- 388	30y4m 312- 416	32y10m 338- 450	36y 370- 493	40y 411- 548
XIV	14y4m 123- 220	15y4m 134- 234	16y2m 144- 244	17y 154- 254	17y11m 165- 265	18y9m 175- 275	20y5m 195- 295	22y2m 216- 316	25y7m 257- 357	29y 298- 397
XIII	12y 123- 164	13y 134- 178	14y 144- 192	15y 154- 205	16y 165- 219	17y 175- 233	19y 195- 260	21y 216- 288	25y 257- 342	29y 298- 397
XII	9y 93- 123	9y11m 102- 136	10y9m 111- 147	11y8m 120- 160	12y6m 129- 171	13y5m 138- 184	15y9m 162- 216	17y3m 178- 236	20y3m 209- 277	23y3m 240- 318

XI	7y6m	8y4m	9y2m	9y11m	10y9m	11y7m	14y2m	15y5m	17y11m	20y5m
	78-	86-	95-	102-	111-	120-	146-	159-	185-	210-
	102	114	125	136	147	158	194	211	245	280
X	5y	5y6m	6y	6y6m	7y	7y6m	9y6m	10y6m	12y6m	14y6m
	51-	57-	62-	67-	72-	77-	98-	108-	129-	149-
	68	75	82	89	96	102	130	144	171	198
IX	3y	3y6m	4y	4y6m	5y	5y6m	7y6m	8y6m	10y6m	12y6m
	31-	36-	41-	46-	51-	57-	77-	87-	108-	129-
	41	48	54	61	68	75	102	116	144	171
VIII	2y	2y6m	3y	3y6m	4y	4y6m	6y6m	7y6m	8y6m	10y6m
	21-	26-	31-	36-	41-	46-	67-	77-	87-	108-
	27	34	41	48	54	61	89	102	116	144
VII	18m	2y	2y6m	3y	3y6m	4y	5y6m	6y6m	7y6m	8y6m
	15-	21-	26-	31-	36-	41-	57-	67-	77-	87-
	20	27	34	41	48	54	75	89	102	116
VI	13m	18m	2y	2y6m	3y	3y6m	4y6m	5y6m	6y6m	7y6m
	12+-	15-	21-	26-	31-	36-	46-	57-	67-	77-
	14	20	27	34	41	48	61	75	89	102
V	9m	13m	15m	18m	2y2m	3y2m	4y	5y	6y	7y
	6-	12+-	13-	15-	22-	33-	41-	51-	62-	72-
	12	14	17	20	29	43	54	68	82	96
IV	6m	9m	13m	15m	18m	2y2m	3y2m	4y2m	5y2m	6y2m
	3-	6-	12+-	13-	15-	22-	33-	43-	53-	63-
	9	12	14	17	20	29	43	57	70	84
III	2m	5m	8m	11m	14m	20m	2y2m	3y2m	4y2m	5y
	1-	3-	4-	9-	12+-	17-	22-	33-	43-	51-
	3	8	12	12	16	22	29	43	57	68
II		4m	6m	8m	13m	16m	20m	2y2m	3y2m	4y2m
	0-90	2-	3-	4-	12+-	14-	17-	22-	33-	43-

	Days	6	9	12	14	18	22	29	43	57
I			3m	4m	5m	8m	13m	16m	20m	2y2m
	0-60	0-90	2-	2-	3-	4-	12+-	14-	17-	22-
	Days	Days	5	6	8	12	14	18	22	29

Numbers in the first horizontal row of each seriousness category represent sentencing midpoints in years(y) and months(m). Numbers in the second and third rows represent standard sentence ranges in months, or in days if so designated. 12+ equals one year and one day.

West's RCWA9.94A.515

9.94-A.515. Table 2--Crimes included within each seriousness level

Effective: June 11, 2020
Currentness

Table 2

CRIMES INCLUDED WITHIN EACH SERIOUSNESS LEVEL

XVI	Aggravated Murder 1 (RCW 10.95.020)
XV	Homicide by abuse (RCW 9A.32.055) Malicious explosion 1 (RCW 70.74.280(1)) Murder 1 (RCW 9A.32.030)
XIV	Murder 2 (RCW 9A.32.050) Trafficking 1 (RCW 9A.40.100(1))
XIII	Malicious explosion 2 (RCW 70.74.280(2)) Malicious placement of an explosive 1 (RCW 70.74.270(1))
XII	Assault 1 (RCW 9A.36.011) Assault of a Child 1 (RCW 9A.36.120) Malicious placement of an imitation device 1 (RCW 70.74.272(1)(a)) Promoting Commercial Sexual Abuse of a Minor (RCW 9.68A.101) Rape 1 (RCW 9A.44.040) Rape of a Child 1 (RCW 9A.44.073) Trafficking 2 (RCW 9A.40.100(3))
XI	Manslaughter 1 (RCW 9A.32.060) Rape 2 (RCW 9A.44.050)

West's RCWA 9.94A.525

9.94A.525. Offender score

Effective: July 23, 2017

Currentness

The offender score is measured on the horizontal axis of the sentencing grid. The offender score rules are as follows:

The offender score is the sum of points accrued under this section rounded down to the nearest whole number.

(1) A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed "other current offenses" within the meaning of RCW 9.94A.589.

. . .

(9) If the present conviction is for a serious violent offense, count three points for prior adult and juvenile convictions for crimes in this category, two points for each prior adult and juvenile violent conviction (not already counted), one point for each prior adult nonviolent felony conviction, and ½ point for each prior juvenile nonviolent felony conviction.

. . .

West's RCWA 9.94A.530

9.94A.530. Standard sentence range

Effective: June 12, 2008

Currentness

(1) The intersection of the column defined by the offender score and the row defined by the offense seriousness score determines the standard sentence range (see RCW 9.94A.510, (Table 1) and RCW 9.94A.517, (Table 3)). The additional time for deadly weapon findings or for other adjustments as specified in RCW 9.94A.533 shall be added to the entire standard sentence range. The court may impose any sentence within the range that it deems appropriate. All standard sentence ranges are expressed in terms of total confinement.

(2) In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence, except as otherwise specified in RCW 9.94A.537. On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the

court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.

(3) In determining any sentence above the standard sentence range, the court shall follow the procedures set forth in RCW 9.94A.537. Facts that establish the elements of a more serious crime or additional crimes may not be used to go outside the standard sentence range except upon stipulation or when specifically provided for in RCW 9.94A.535(3)(d), (e), (g), and (h).

West's RCWA 9.94A.535

9.94A.535. Departures from the guidelines

Effective: July 28, 2019

Currentness

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

If the sentencing Court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

(1) Mitigating Circumstances--Court to Consider

. . .

(2) Aggravating Circumstances--Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

(a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

(b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

(3) Aggravating Circumstances--Considered by a Jury--Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the

standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.

. . .

(ff) The current offense involved the assault of a utility employee of any publicly or privately owned utility company or agency, who is at the time of the act engaged in official duties, including: (I) The maintenance or repair of utility poles, lines, conduits, pipes, or other infrastructure; or (ii) connecting, disconnecting, or recording utility meters.

West's RCWA 9.94A.537

9.94A.537. Aggravating circumstances-- Sentences above standard range

Effective: April 27, 2007

Currentness

(1) At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

(2) In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior Court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior Court in imposing the previous sentence, at the new sentencing hearing.

(3) The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.

(4) Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3) (a) through (y) shall be presented to the jury during the trial of the alleged crime, unless the jury has been

impaneled solely for resentencing, or unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(I), (o), or (t). If one of these aggravating circumstances is alleged, the trial court may conduct a separate proceeding if the evidence supporting the aggravating fact is not part of the res geste of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime.

(5) If the superior court conducts a separate proceeding to determine the existence of aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(I), (o), or (t), the proceeding shall immediately follow the trial on the underlying conviction, if possible. If any person who served on the jury is unable to continue, the court shall substitute an alternate juror.

(6) If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, the court may sentence the offender pursuant to RCW 9.94A.535 to a term of confinement up to the maximum allowed under RCW 9A.20.021 for the underlying conviction if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence.

West's RCWA 9A.20.021

9A.20.021. Maximum sentences for crimes committed July 1, 1984, and after

Effective: July 24, 2015

Currentness

(1) Felony. Unless a different maximum sentence for a classified felony is specifically established by a statute of this state, no person convicted of a classified felony shall be punished by confinement or fine exceeding the following:

(a) For a class A felony, by confinement in a state correctional institution for a term of life imprisonment, or by a fine in an amount fixed by the court of fifty thousand dollars, or by both such confinement and fine;

(b) For a class B felony, by confinement in a state correctional institution for a term of ten years, or by a fine in an amount fixed by the court of twenty thousand dollars, or by both such confinement and fine;

(c) For a class C felony, by confinement in a state correctional institution for five years, or by a fine in an amount fixed by the court of ten thousand dollars, or by both such confinement and fine.

. . .

West's RCWA 9A.32.030

9A.32.030. Murder in the first degree

Currentness

(1) A person is guilty of murder in the first degree when:

(a) With a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person; or

. . .

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

West's RCWA9A.32.050

9A.32.050. Murder in the second degree

Currentness

(1) A person is guilty of murder in the second degree when:

(a) With intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person; or

. . .

(2) Murder in the second degree is a class A felony.

APPENDIX G

STATE VS. BENNETT

Trial 10-10, 2016 & 10-12, 2016

* * * *

[pp. 276]

THE COURT: Right.

MR. BUSTAMANTE: -- when I was interrupted. I'd like to finish my response.

THE COURT: I'm gonna give you a chance to do that. I just want to make sure -- I just want to make sure I understand. We've got a -- and I not only have the proposed verdict here but -- or proposed instruction, and the aggravators are deliberate cruelty, egregious lack of remorse. Is that it?

MR. OWENS: Vulnerable victim.

MR. BUSTAMANTE: Vulnerable victim.

THE COURT: Vulnerable victim. And that's it?

MR. BUSTAMANTE: Yes.

MR. OWENS: Yes.

THE COURT: Okay. All right. I'm listening.

MR. BUSTAMANTE: Okay. So basically there's no evidence as to egregious lack of remorse at all. I'll just leave that on its face. So the Court should dismiss that at this point. And, you know, I -- again, I made that

motion at -- when the State -- at the time the State rested its case.

THE COURT: Right.

MR. BUSTAMANTE: The Court simply didn't decide it because it wanted to get the jury back in here.

As to the deliberate cruelty, I believe that multiple wounds can be evidence of that, but there also has to be some evidence that the multiple wounds somehow prolonged the victim's suffering. And Dr. Kiesel was very pointed in testifying that he had no way of knowing how long this ordeal went on nor did he have any way of knowing which wound came first, which one came second. For example, the throat could have been cut first or the person could have been strangled first and then had their throat cut and then the stabs to the chest. Or it could have been the other way around. The stabs to the chest could have come first, then the strangulation and then the throat cut. So there's no evidence as to how long this took. No evidence that it was done with intent to prolong the victim's suffering or inflict gratuitous pain. For that reason the deliberate cruelty should be dismissed as well.

And then, finally, there's no evidence that Ms. Moore was a particularly vulnerable victim. There's been no competent testimony as to her exact age. But I would argue that merely being elderly -- and I believe Dr. Kiesel estimated this person was late 70s or early 80s. But she was well developed and there was -- there was evidence that she lived an active life. No evidence that she was feeble. No evidence that she was crippled or handicapped in any way or particularly frail. So I

would argue just based on Dr. Kiesel's argument -- testimony rather -- that she was an elderly person, late 70s or early 80s, is not sufficient to show that she was particularly vulnerable.

He also testified that in his experience in martial arts there are people that are quite old that are in very good shape that are capable of defending themselves.

So since the State has the burden of proof and has not given any proof to the contrary, that this particular victim was particularly vulnerable, the Court should dismiss that aggravator and should not instruct the jury on it either.

Thank you. That's my argument.

THE COURT: And you need a ruling before you -- I -- I -- before you decide whether to put on evidence, any further evidence?

MR. BUSTAMANTE: Well, yeah, I would like a ruling on that now, sure, because I may inadvertently put something on, you know, that after the Court's made its ruling that it -- that -- after the Court has

* * * *

STATE VS. BENNETT

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* * * *

[pp. 558]

remorse" is still in the language here.

THE COURT: Right. Those are coming out.

MR. BUSTAMANTE: So needless to say, I guess they haven't revised it. But any mention of "egregious lack of remorse" needs to be removed. And right now there is -- it's mentioned in Number 19, for example, where they talk about the Special Verdict. So any place --

And then also --

THE COURT: Okay, slow down.

MR. BUSTAMANTE: -- I'm gonna ask that the Court not instruct the jury on deliberate cruelty or especially vulnerable victim.

THE COURT: All right.

MR. BUSTAMANTE: And the Court hasn't given a specific ruling on that motion either, so...

THE COURT: All right.

MR. BUSTAMANTE: And, also, I'm gonna ask for an instruction -- a limiting instruction on the evidence that the defendant terminated the October 2nd (sic) interview. I haven't yet drafted that, but it would be

something along the lines of, you know: "Evidence has been introduced that during the audio recorded interview of Mr. Bennett that occurred on October 23rd of 2014 he ended the interview."

APPENDIX H

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON COUNTY OF GRANT

Case No.: 14-1-00778-0

[Filed: May 18, 2017]

STATE OF WASHINGTON Plaintiff,	)
v.	)
CHAD GERRIT BENNETT, Defendant	)

DEFENDANT'S OBJECTIONS TO THE STATE'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR AN EXCEPTIONAL SENTENCE

COMES NOW THE DEFENDANT, by and through the undersigned attorney of record, and submits the following objections to the State's proposed Findings of Fact, Conclusions of Law and Order for an Exceptional Sentence in this matter. *See* annotated Proposed Findings, attached herewith as Appendix A.

. . .

* * * *

[pp. 5]

OBJECTIONS TO EXCEPTIONAL SENTENCE BASED ON DUE PROCESS OF LAW

The Defendant maintains that the "deliberate cruelty" aggravating factor in RCW 9.94A.535(3)(a) and the "vulnerable victim" aggravating factor are both unconstitutionally vague, facially and as applied. Contrary to pre-existing Washington case law, the United States Supreme Court, in *Johnson v. United States*, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015), has recently held that the vagueness doctrine applies in the context of sentencing guidelines.

Prior Washington state cases have recognized that sentencing factors implicate due process concerns. "The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the state constitution requires that citizens have fair warning of proscribed conduct." *State v. Chanthabouly*, 164 Wn.App. 104, 141, 262 P.3d 144 (2011) (*quoting State v. Bahl*, 164 Wn.2d 739, 752, 193 P.3d 678 (2008)). A valid statute must be clear enough to provide fair warning of the proscribed conduct and also must have ascertainable standards of guilt to prevent arbitrary enforcement. *Chanthabouly*, 164 Wn.App. at 141 (*citing State v. Baldwin*, 150 Wn.2d 448, 458, 78 P.3d 1005 (2003)). In addition, laws must provide ascertainable standards of guilt to protect against arbitrary arrest and prosecution. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); *City of Spokane v. Douglass*, 115 Wash.2d 171, 178, 795 P.2d 693 (1990).

In in *State v. Rhodes*, 92 Wash.2d 755, 600 P.2d 1264 (1979), the Washington Supreme Court held that the juvenile dispositional standards were subject to due process protections against arbitrary enforcement, such as vagueness challenges. The defendant there had claimed that the "'manifest injustice'" exception to a standard range sentence was unconstitutionally vague. *Id*. at 758. Although the state's high court acknowledged there that "most vagueness challenges are directed at statutes which prohibit particular conduct without defining that conduct," it went on to hold that "[t]he promulgation of standard disposition ranges for juvenile offenders creates a constitutionally protected liberty interest." *Id*. at 759, 758, 600 P.2d 1264.

But in *State v. Baldwin*, 150 Wn.2d 448, 461, 78 P.3d 1005 (2003), our Supreme Court held that the sentencing guideline statutes at issue "are not subject to a vagueness analysis." The Court there concluded, "[D]ue process considerations that underlie the void-for-vagueness doctrine have no application in the context of sentencing guidelines." 150 Wn.2d at 459 (emphasis added). The Court explained that the sentencing guideline statutes did not define conduct, permit arbitrary arrest and criminal prosecution, inform the public of penalties attached to criminal conduct, vary the statutory maximum or minimum penalties that the legislature assigned to illegal conduct, or set penalties. *Id*. at 459. Thus, because "nothing in these guideline statutes requires a certain outcome," the guideline statutes did not create a "constitutionally protectable liberty interest." *Id*. at 461.

Since *Baldwin* was decided in 2003, the issue of whether an aggravating sentencing factor is subject to a vagueness challenge was addressed by the U.S. Supreme Court in *Johnson v. United States*, 135 S. Ct. 2551, 2556-7, 192 L. Ed. 2d 569 (2015):

> The Fifth Amendment provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." Our cases establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357-358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). The prohibition of vagueness in criminal statutes "is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law," and a statute that flouts it "violates the first essential of due process." *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). These principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences. *United States v. Batchelder*, 442 U.S. 114, 123, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979).

[*emphasis added*]. Johnson dealt with a sentencing enhancement which permitted an exceptional sentence in situations wherein the offender's criminal history included three or more convictions for a drug offense of for a crime that qualified as a "violent felony" as

defined in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B). At issue was whether the definition of "violent felony" was unconstitutionally vague. The Court held that it was, but more importantly, held that aggravating factors are subject to due process challenges for vagueness. "We hold that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process." *Johnson v. United States*, 135 S. Ct. 2551, 2563, 192 L. Ed. 2d 569 (2015).

The practical effect of *Johnson* is to overrule the Washington Supreme Court's holding in *Baldwin*. Aggravating facts justifying an exceptional sentence can and should be subject to vagueness challenges under the Due Process clauses of the Fifth and Fourteenth Amendments.

In *Alleyne v. United States*, 133 S. Ct. 2151, 2156, 186 L. Ed. 2d 314 (2013), the Supreme Court addressed the constitutional status of a special sort of fact known as a "sentencing factor." Writing for the majority, Justice Thomas wrote, "The historic link between crime and punishment, ...led us to conclude that any fact that increased the prescribed statutory maximum sentence must be an "element" of the offense to be found by the jury." 133 S. Ct. at 2157.

Furthermore, the United States Supreme Court has previously made clear that due process and associated jury protections extend, to some degree, to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence. *Alleyne*, 133 S. Ct. at 2160, citing *Apprendi v. New Jersey*, 530 U.S. 466, 484, 120 S. Ct. 2348, 147 L. Ed.

2d 435 (2000). For these reasons, *Baldwin* should not be followed.

a. Deliberate Cruelty and Vulnerable Victim Aggravators Void for Vagueness

The Court of Appeals has said that "[d]eliberate cruelty consists of gratuitous violence or other conduct which inflicts physical, psychological, or emotional pain as an end in itself." *State v. Scott*, 72 Wash.App. 207, 214, 866 P.2d 1258 (1993), aff'd sub nom. *State v. Ritchie*, 126 Wash.2d 388, 894 P.2d 1308 {1995); *see also State v. Strauss*, 54 Wash.App. 408, 418, 773 P.2d 898 (1989). The Washington Supreme Court has held that this aggravating factor involves "cruelty 'of a kind not usually associated with the commission of the offense in question.'" *State v. Crane*, 116 Wash.2d 315, 334, 804 P.2d 10 (1991)(citation omitted), cert. denied, 501 U.S. 1237, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991) (*citing State v. Payne*, 45 Wash.App. 528, 531, 726 P.2d 997 (1986)). In *State v. Tili*, 148 Wn.2d 350, 369, 60 P.3d 1192 (2003), the Washington Supreme Court reiterated that both the "gratuity" prong and the "atypicality" prong are incorporated in the concept of deliberate cruelty. The opinion states each prong separately, but doing so appears to reflect the distinction between what is essentially a finding of fact, i.e., the "gratuity" prong, and a mixed question of fact and law, the "atypicality" prong.

The Court's Instructions to the Jury defined "deliberate cruelty" in a manner consistent with these prior Washington state court decisions: "Deliberate cruelty means gratuitous violence or other conduct which inflicts physical, psychological, or emotional pain

as an end in itself, and which goes beyond what is inherent in the elements of the crime or is normally associated with the commission of the crime." However, neither party introduced any evidence at trial of what is "normally associated with the commission of the crime of murder in the first degree." Therefore, there was insufficient evidence that Bennett's conduct satisfied the "atipicality" prong. The Court should use the same standard of review for the sufficiency of the evidence of an aggravating factor as it would for the sufficiency of the evidence of the elements of a crime. *State v. Zigan*, 166 Wn. App. 597, 601, 270 P .3d 625, 628 (2012), *citing State v. Yarbrough*, 151 Wash.App. 66, 96, 210 P.3d 1029 (2009).

The deliberate cruelty aggravator is void for vagueness both facially and as applied to the facts of this case. RCW 9.94A.535(3)(a) provides that an exceptional sentence is justified when "The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim" (emphasis added). The "deliberate cruelty" aggravator is unconstitutionally vague on its face because it defines qualifying conduct at too high a level of generality to give meaningful notice as to the type of behavior which can justify an exceptional sentence. Clearly, the intentional taking of another human life, not in self-defense, is inherently cruel. What the statute fails to provide is a meaningful understanding of when particular conduct rises to a level sufficiently above and beyond the cruelty inherent in first degree murder to justify an exceptional sentence.

Similarly, the application of the "vulnerable victim" aggravator is similarly unconstitutional, both facially and as applied to Mr. Bennett. The legislature has found that the court may impose an exceptional sentence where a jury finds: "The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance." RCW 9.94A.535(3)(b). Before imposing this aggravator, the evidence must first show that the victim was in fact vulnerable or incapable of resistance, and then, the evidence must also show that the defendant knew or should have known this. *Particularly* vulnerable suggests that the victim must be more vulnerable or incapable of resistance than the typical victim of murder in the second degree. As with the case of deliberate cruelty, there is simply no reasonable standard by which a rational jury can determine that (a) the victim in this case is actually significantly more vulnerable than the typical murder victim or (b) that the defendant knew of this vulnerability.

In conclusion, a statute is void for vagueness if it fails to define the offending conduct with sufficient precision that a person of ordinary intelligence can understand it, or it does not provide standards sufficiently specific to prevent arbitrary enforcement." *State v. Duncalf*, 177 Wn.2d 289, 296-97, 300 P. 3d 352 (2013) (internal quotation omitted). The test for vagueness is whether a person of reasonable understanding is required to guess at the meaning of the statute. *Id*. at 297. A statute fails to adequately guard against arbitrary enforcement where it lacks ascertainable or legally fixed standards of application

or invites "unfettered latitude" in its application. *Smith v. Goguen*, 415 U.S. 574, 578, 94 S. Ct. 1242, 15 L. Ed. 2d 447 (1973).

SIGNED AT EPHRATA, WA, this 18th day of May, 2017.

RESPECTFULLY SUBMITTED,

/s/ David Bustamante
David Bustamante WSBA #30668
Attorney for the Defendant

APPENDIX I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Supreme Court No. 98810-2
(Court of Appeals No. 35297-8-III)

[Filed: July 24, 2020]

STATE OF WASHINGTON,	)
	)
Respondent,	)
	)
v.	)
	)
CHAD BENNETT,	)
	)
Petitioner.	)
	)

PETITION FOR REVIEW

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A. INTRODUCTION

The State charged Chad Bennett with first-degree murder but the jury acquitted him of that crime and convicted him of second-degree murder. The trial court nevertheless imposed a sentence that was double what Mr. Bennett could have received if he had been convicted of the greater crime. This occurred because of two aggravating factors that are unconstitutionally vague and unsupported by the evidence.

Seventeen years ago, this Court held defendants could not challenge aggravating factors as vague in violation of the Fourteenth Amendment. But in light of later watershed opinions of the U.S. Supreme Court, this Court has twice recently assumed such challenges *could* be made. In these cases, this Court addressed the issues and rejected defendants' claims on the merits. Yet, all three divisions of the Court of Appeals have insisted defendants still may not even *raise* an issue of unconstitutional vagueness – let alone prevail – until and unless this Court explicitly overrules the old case.

This foreclosure of a legitimate constitutional issue must stop. A defendant's right to due process is violated when he is convicted and sentenced under a law that is either facially vague or vague as applied. For this reason, and because several other errors pervaded trial and sentencing, this Court should grant review.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Chad Bennett, through his attorney, Lila J. Silverstein, asks this Court to review the opinion of the Court of Appeals in *State v. Bennett*, No. 35297-8-III (filed June 25, 2020), attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Sentencing issues:

   a. May defendants challenge aggravating factors, which are simply elements of a greater crime, as vague in violation of the Fourteenth Amendment?

   b. Are the "deliberate cruelty" and "vulnerable victim" aggravating factors unconstitutionally vague, either facially or as applied to the facts of this case?

   c. Did the State present insufficient evidence to support the aggravating factors?

   d. Regardless of the validity of the aggravators, is the length of the sentence arbitrary and excessive?

2. Trial issues: ...

APPENDIX J

Jury Instruction Excerpts

* * * *

[pp. 01621]

Instruction No. 15

If you find the defendant guilty of Murder in the First Degree as charged in Count 1, then you must determine if any of the following aggravating circumstances exists:

Whether the defendant's conduct during the commission of the crime manifested deliberate cruelty to the victim.

Whether the defendant knew or should have known that the victim was particularly vulnerable or incapable of resistance.

Instruction No. 16

If you find the defendant guilty of Murder in the Second Degree as charged in Count 2, then you must determine if any of the following aggravating circumstances exists:

Whether the defendant's conduct during the commission of the crime manifested deliberate cruelty to the victim.

Whether the defendant knew or should have known that the victim was particularly vulnerable or incapable of resistance.

Instruction No. 17

"Deliberate cruelty" means gratuitous violence or other conduct which inflicts physical, psychological, or emotional pain as an end in itself, and which goes beyond what is inherent in the elements of the crime or is normally associated with the commission of the crime.

Instruction No. 18

A victim is "particularly vulnerable" if he or she is more vulnerable to the commission of the crime than the typical victim of Murder in the First Degree or Murder in the Second Degree. The victim's vulnerability must also be a substantial factor in the commission of the crime.