IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 80209-2
Respondent,	)	
	)	
v.	)	En Banc
	)	
CECIL EMILE DAVIS,	)	
	)	
Appellant.	)	
	)	Filed September 20, 2012

ALEXANDER, J.[*]—In 1997, Cecil Davis raped, robbed, and murdered 65-year-old Yoshiko Couch. A jury found Davis guilty of aggravated first degree murder and unanimously agreed that no mitigating factors warranted leniency. *State v. Davis*, 141 Wn.2d 798, 807, 10 P.3d 977 (2000). Davis was sentenced to death. On direct appeal, we upheld the conviction and sentence. We later granted Davis's personal restraint petition (PRP), reversing his sentence because jurors had seen him in shackles. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 101 P.3d 1 (2004). At the new penalty proceeding, the jury found no mitigating factors warranting leniency and Davis was again sentenced to death. This appeal followed. *See* RCW 10.95.130.

[*]Justice Gerry L. Alexander is serving as a justice pro tempore of the Supreme Court pursuant to Washington Constitution article IV, section 2(a).

Finding no reversible error in Davis's second penalty proceeding, we again affirm the sentence of death.

I. FACTUAL HISTORY

At approximately 2:30 a.m. on January 25, 1997, Cecil Davis was partying with friends outside his mother's home in the city of Tacoma when he said, "I need to rob somebody" and "I need to kill me a motherfucker." Report of Proceedings (RP) (Apr. 30, 2007) at 2638, 2641. Accompanied by his friend, Anthony Wilson, Davis proceeded to a home across the street from the party. Once there, Davis kicked open the door and started "beating on" and rubbing the breasts of an occupant of the home, Yoshiko Couch. *Id*. at 2643. At this point, Wilson left.

At approximately 11:30 a.m. the same day, friends of Couch found her dead in her bathtub, naked from the waist down, surrounded by bloody water and fecal matter. Wet towels were wrapped around Couch's head, and her vagina was red, raw, and covered in a white, powdery household cleanser. The bathroom smelled strongly of chemicals, and opened household cleansers were found within the room. Couch's wedding ring was missing from her ring finger, and her purse was lying open in a hallway.

An autopsy revealed that while alive, Couch's vagina had been lacerated by a hard object, not a penis; her face was bruised and marked in a manner consistent with manual suffocation; and her skin was degraded from xylene, a chemical found in cleaning agents. The physician who conducted the autopsy concluded that Couch died

of asphyxia by suffocation and chemical toxicity.

Yoshiko Couch's husband, Richard Couch, who was disabled from a number of strokes and unable to walk, was downstairs in his bed when the crime occurred. The telephone that was usually on his nightstand had been moved to a closet and, thus, was out of his reach.

Extensive evidence connected Davis to the crime, including blood, hair, and fingerprint samples. Meat and cigarettes that were believed to have belonged to the Couches were found in Davis's possession. The morning after the crime, Davis offered to sell his mother a gold wedding band matching the description of Couch's wedding ring. Davis also made incriminating statements. Upon seeing a neighbor pointing toward his mother's home and talking to police, Davis told his sister "[t]hat bitch was next." RP (Apr. 30, 2007) at 2605. In addition, upon hearing that the newspaper reported that he killed and raped Couch, he told a cellmate that "he might have killed the old bitch, but he didn't rape the old bitch." RP (May 2, 2007) at 2842-43.

II. PROCEDURAL HISTORY

Davis was charged in Pierce County Superior Court with premeditated first degree murder with aggravating circumstances of rape, robbery, and burglary. *Davis*, 141 Wn.2d at 821. In 1998, a jury found him guilty as charged. At the conclusion of the penalty phase of the trial, the jury found that there were no mitigating circumstances warranting leniency. Based on the jury's verdict, the trial judge, Frederick Fleming, sentenced Davis to death.

Davis filed a PRP challenging his conviction and sentence on several grounds, including that he received ineffective assistance of counsel because his attorney failed to object when jurors saw him in shackles. *Davis*, 152 Wn.2d at 757-60. We affirmed Davis's conviction but vacated the sentence, remanding for a new penalty phase based on our conclusion that shackling may have tainted the penalty proceeding and that his counsel was ineffective in not raising an objection to the shackling.

The second penalty proceeding took place in 2007 before a new jury. Judge Fleming again presided. Although the evidence presented at this penalty proceeding was similar to that presented in the first proceeding, the jury learned an additional fact—that in 2006, Davis had been convicted of second degree intentional murder for a killing that occurred the year before the murder of Couch. The jury did not find sufficient mitigating circumstances to warrant leniency, and Davis was again sentenced to death. Davis appealed, raising numerous issues that we address hereafter in addition to the issues this court is mandated to review pursuant to RCW 10.95.130.[1]

[1]Amicus Disability Rights Washington, as well as amici American Civil Liberties Union of Washington, Washington Association of Churches, and Lutheran Public Policy of Washington State (collectively, ACLU), each submitted a brief asking us to reverse Davis's death sentence. Disability Rights Washington argues that RCW 10.95.030, Washington's statute prohibiting the death sentence for defendants with intellectual disabilities, violates the United States Constitution because it excludes defendants who do not meet the statutory definition of "intellectually disabled" but still have substantially impaired reasoning and impulse control. The ACLU contends that Davis's death sentence violates article I, section 14 of the Washington Constitution because Davis killed only one victim and was mentally impaired. The State moved to strike both amicus briefs, and we passed its motion to the merits. Davis has not raised any constitutional claim here relating to mental impairment, and later in this opinion, we conclude that Davis's article I, section 14 argument is not properly preserved for review. We need not consider issues raised only by amici. *Accord State v. Gonzalez*,

III. ANALYSIS

In general, errors at a capital penalty proceeding are subject to heightened scrutiny. *State v. Stenson*, 132 Wn.2d 668, 743-44, 940 P.2d 1239 (1997). This requires a more careful look at the record but does not raise the standard of review.

Issues Raised by Davis

1. Did the trial court abuse its discretion by failing to recuse itself after communicating ex parte with prosecutors?

After this court reversed the death sentence that had been imposed at Davis's first trial, the case returned to Judge Fleming's court for a new penalty phase. Upon agreement between Davis and the State, the trial court initially set trial for September 2005. By April 2005, Davis's counsel realized that they needed more time to prepare and, thus, sought a continuance. The trial court granted the defense request to continue the trial to April 2006.

On January 20, 2006, the defense again moved for a continuance, this time on the basis that it could not be ready for trial in April 2006 because its mitigation specialist would not be available. Faced with this motion, Judge Fleming expressed frustration and said that the conviction had been

> reversed because they may have seen somebody walking—may have seen somebody walking in shackles.
> . . . .
> And now we are eight years hence and back—I just think that everyone—litigants, society, everyone has a right to have these matters resolved in a reasonable period of time.

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110 Wn.2d 738, 752 n.2, 757 P.2d 925 (1988). We therefore grant the State's motion.

RP (Jan. 20, 2006) at 10-11.

Despite these concerns, Judge Fleming continued the trial to January 8, 2007, noting that he was continuing the penalty phase "for the *final* time." Clerk's Papers (CP) at 621. He went on to say:

> I want to be responsible and fair to both sides. And as you can tell I don't think we are being now. But after listening to you, Mr. [Ronald] Ness and Mr. [John] Neeb, I'll give you almost—well, it will be another year. To me, that is wrong. But maybe the state of our law now in this state requires it, and maybe it's the fair and just thing to do. But I'm not so sure.

RP (Jan. 20, 2006) at 18.

In October 2006, on his own and without consulting the parties, Judge Fleming decided to accelerate the trial date, apparently realizing that the penalty hearing would conflict with his scheduled February 2007 vacation. He envisioned a new schedule with voir dire beginning on December 4, 2006, and opening statements on January 2, 2007. To that end, Judge Fleming arranged for a courtroom, 150 potential jurors, and the necessary security to be available on December 4, 2006.[2]

On October 24, 2006, a court reporter told Deputy Prosecuting Attorney John Neeb that Judge Fleming wanted Neeb to come to courtroom 550 at 1:30 p.m. Shortly before 1:30, Judge Fleming saw another deputy prosecuting attorney, John Hillman, in a hallway in the Pierce County Courthouse. Judge Fleming asked Hillman to prepare a scheduling order according to the new schedule, approve it, and then give defense

[2]Sometime before October 24, 2006, Judge Fleming's assistant did mention the possibility of accelerating the trial date to Deputy Prosecuting Attorney John Neeb. Neeb responded that he thought this was a bad idea. Neeb heard nothing further until the contact on October 24, 2006.

counsel a copy for signature. Hillman did as he was told and approved the order. Deputy Prosecuting Attorney Neeb arrived shortly thereafter, received the same instructions,[3] and also signed the order. Soon thereafter, a deputy prosecutor delivered the order to Davis's counsel, who signed it, noting an objection to the changed date for trial.

Davis's counsel then moved to reschedule the trial date and for Judge Fleming to recuse himself based on what they alleged was improper ex parte contact. The State joined in the motion to reschedule the trial date but opposed the recusal motion. Following a hearing, Judge Fleming agreed to continue trial until April 2007 but denied the motion to recuse.

Davis contends that Judge Fleming's ex parte communication with the deputy prosecuting attorneys violated former Canons 1 (1995), 2(A) (1995), and 3(A)(4) (1995) of the Code of Judicial Conduct (CJC)[4] and that these violations required Judge Fleming to recuse himself under former Canon 3(D)(1) (1995). The State concedes that ex parte contact occurred when Judge Fleming asked the deputy prosecutors to approve the scheduling order and deliver it to defense counsel for signature. It does not agree, however, that the contact required Judge Fleming to recuse. A trial judge's decision of whether to recuse himself or herself is reviewed for abuse of discretion.

[3]The defense's memorandum indicates that only Neeb, not Hillman, was instructed to give a copy of the order to defense counsel. Whether one or both prosecutors were ordered to deliver the order to the defense is immaterial.

[4]Substantial amendments to the CJC became effective January 1, 2011.

State v. Leon, 133 Wn. App. 810, 812, 138 P.3d 159 (2006) (citing *In re Marriage of Farr,* 87 Wn. App. 177, 188, 940 P.2d 679 (1997)).

Former Canons 1 and 2(A) set forth general principles relating to the standards of independence and integrity that judges should maintain.[5] Former Canon 3(A)(4) specifically prohibits judges from engaging in ex parte contact, providing:

> Judges should accord to every person who is legally interested in a proceeding, or that person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding.

Although the CJC does not define "ex parte communication," the parties agree that the primary definition is "'communication between counsel and the court when opposing counsel is not present.'" *State v. Watson*, 155 Wn.2d 574, 579, 122 P.3d 903 (2005) (quoting Black's Law Dictionary 296 (8th ed. 2004)); Appellant's Opening Br. at 32; Br. of Resp't at 19.

A violation of former Canons 1, 2(A), or 3(A)(4) does not necessarily require a judge to recuse. Rather, the rule for recusal is set forth in former Canon 3(D)(1), which provides in relevant part that "[j]udges should disqualify themselves in a proceeding in

[5]Former Canon 1 provides: "An independent and honorable judiciary is indispensable to justice in our society. Judges should participate in establishing, maintaining and enforcing high standards of judicial conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective."

Former Canon 2(A) provides: "Judges should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

which their impartiality might reasonably be questioned." In determining whether recusal is warranted, actual prejudice need not be proved; a "mere suspicion of partiality" may be enough to warrant recusal. *Sherman v. State*, 128 Wn.2d 164, 205, 905 P.2d 355 (1995). "The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that 'a reasonable person knows and understands all the relevant facts.'" *Id*. at 206 (quoting *In re Drexel Burnham Lambert*, 861 F.2d 1307, 1313 (2d Cir. 1988)).

In *Sherman*, we held that a judge engaged in prohibited ex parte contact under former Canon 3(A)(4) when, at the judge's request, a judicial extern called an organization that played a key role in the case and discussed general procedures for monitoring people in the plaintiff's position. This ex parte communication warranted recusal under former Canon 3(D), we concluded, because the judge "may have inadvertently obtained information critical to a central issue on remand," leading a reasonable person to question his impartiality. *Sherman,* 128 Wn.2d at 206.

In *In re Disciplinary Proceeding Against Sanders,* 159 Wn.2d 517, 524, 145 P.3d 1208 (2006), this court held that former Canon 3(D) required a justice to recuse himself from a consolidated case involving several sexually violent predators (SVPs) when he met with a group of SVPs, including at least one who was a party to the consolidated case and who inquired about a central issue in the case. This court concluded the justice's actions violated former Canons 1 and 2(A) and required recusal because a reasonable person would question the judge's partiality.[6] *Id*. at 525-26.

Here, as we have noted, the State concedes that ex parte contact occurred. That still leaves the question of whether a reasonable person who knew all relevant facts would conclude that Judge Fleming was actually prejudiced or appeared prejudiced. In answering that question, we observe that the record shows that although neither defense counsel nor the prosecution wanted an earlier trial date, Judge Fleming decided to reschedule the trial to complete trial in time for his February 2007 vacation and to complete sentencing within a reasonable time. When the defense pointed out the problems an earlier date would cause, Judge Fleming backed away from his earlier decision and gave Davis an additional four months to prepare and meet all relevant deadlines.

Unlike the problematic communications in *Sherman* and *Sanders*, nothing in Judge Fleming's ex parte communication revealed or implied a bias toward one party or that his future rulings in the case would be affected. The decision to accelerate trial, which the trial judged believed was purely ministerial, was made well before the communication occurred. Furthermore, the judge did not discuss any substantive issue during the communication. While Davis correctly points out that former Canon 3(A)(4) does not require the communication to be substantive for a violation to occur, the content of the communication is key in evaluating whether the judge appears partial for purposes of former Canon 3(D).

[6]The Washington State Commission on Judicial Conduct held that the justice did not violate former Canon 3(A)(4)'s prohibition on ex parte conduct, so that canon was not addressed in the opinion.

Davis further argues that the ex parte communication must be viewed in light of several "relevant facts." Reply Br. of Appellant at 1-3. In our view, none of Davis's observations alter the impartial nature of the ex parte communication that occurred. Many of the observations relate to the judge's desire to complete trial without long delays, a consideration he emphasized in open court as being important to both sides. *E.g.*, RP (Jan. 20, 2006) at 10-11 ("[L]itigants, society, everyone has a right to have these matters resolved in a reasonable period of time."), 18 ("I want to be responsible and fair to both sides."); RP (Nov. 3, 2006) at 15 ("I consider it a court responsibility to have these cases tried, managed, in a manner that's fair to both sides. The defendant has a right to have this matter concluded, as do the people of the State of Washington."). If the desire to finish trial within a reasonable amount of time shows prejudice, trial judges would be forced to grant every continuance a defendant requested in order to avoid being considered partial. This is an untenable position.

In sum, Judge Fleming's conversation with deputy prosecutors and his conduct throughout the proceeding did not show bias toward the State or against Davis. Rather, it showed a desire to complete the penalty phase of Davis's trial within a reasonable length of time from Davis's conviction and in time for the judge to enjoy his scheduled vacation. We therefore reject Davis's claim that Judge Fleming's denial of the recusal motion was error.[7]

[7]We note that our holding is consistent with our recent revisions to the CJC. The new canon prohibiting ex parte communications expressly provides that "[w]hen circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, . . . is permitted,

2. Did the trial court abuse its discretion by dismissing two jurors for cause?

In a written questionnaire, juror 1 indicated that she was in favor of imposing the death penalty on anyone who kills another person.[8] During voir dire, this juror indicated that she was 20 years old and had never before been questioned as a potential juror. Thus, when voir dire began, she understandably felt "[a] little bit" nervous and intimidated. RP (Apr. 10, 2007) at 324. The juror agreed with defense counsel's suggestion that she would "rather not be in this position" of being a juror but would do her duty if she sat on the case. *Id*. at 332. In contrast to that statement, however, she told the prosecutor that "I don't think that I could personally [impose the death penalty]—I would feel that I would be sending someone to death, and I don't think I could do that, just because I would probably just feel really bad if I did." *Id*. at 333.

Judge Fleming then asked the juror which statement best described her feelings: "under no circumstance would you consider voting for the death penalty" or "can consider the death penalty in an appropriate case." *Id*. at 333, 334. The juror said the first statement better described her feelings because "I don't think I could personally

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provided:

> "(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and
>
> "(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond."

CJC Canon 2.9(A)(1). Judge Fleming's ex parte contact would almost certainly be permissible under this exception.

[8]A blank copy of the jury questionnaire is included in the clerk's papers, but the completed questionnaires are not in the record.

vote for someone to go on death penalty." *Id*. at 334. After the questioning of juror 1 was completed, she was excused from the courtroom. The State then challenged her for cause based on her views on the death penalty.

After a colloquy with counsel, the judge called juror 1 back to the courtroom and reminded her of her earlier statement. The following exchange then occurred:

> THE COURT: What did you mean when you said, "I don't think I could do that."
> JUROR NO. 1: Personally, I don't think I could vote him to death. I don't think I could—
> THE COURT: Well, you're the only one that would know in the appropriate case.
> JUROR NO. 1: I know. I just—I would feel bad if I did it, just I would feel guilty if I—
> THE COURT: So, you are telling me, even in an appropriate case, you couldn't do it?
> JUROR NO. 1: Well, okay, an appropriate case, I think I could. I feel like I'm contradicting myself.

Id. at 352. In further questioning by the deputy prosecuting attorney and defense counsel, juror 1 reiterated multiple times that she did not know whether she could vote for the death penalty in the appropriate case. Defense counsel questioned her further:

> Q. . . . . And what you are saying is—tell me if I'm wrong—is that even in an appropriate case, you couldn't [sentence someone to death]?
> A. I don't think—I don't think I could personally do it, no. I don't think I would feel comfortable with making that decision.
> Q. Under any circumstances?
> A. Under any.

Id. at 367. Soon afterward, over Davis's objection, the court dismissed juror 1 for cause, concluding that

> I'm comfortable now in considering, as I'm required to do, her manner and her behavior and so on. She wanted so much to follow the law, which she

> thinks the Court represents, but it was against her personal beliefs, and I am convinced that there aren't any circumstances, except for, she said, [Gary] Ridgway, that would allow her to, in this case, vote for the death penalty.

Id. at 369.

Two days later, voir dire began for juror 39. After questioning, neither the prosecution nor Davis challenged this juror for cause. The juror then told the trial judge that her husband had told her, based on his Internet search, that he thought a juror in Davis's original trial had been influenced by seeing Davis in leg irons. Juror 39 said that she stopped her husband before he could elaborate. She also said that she could keep her husband from doing something like that again.

Although the State did not challenge juror 39 for cause, it asked the court to instruct the juror to disregard what she heard. Davis agreed and did not register a challenge for cause. The trial judge, however, decided to excuse juror 39 for cause, noting that

> the record, other than this, would reflect that this juror is intelligent, could be fair to both sides, would listen to the evidence and make a conscientious decision based on the evidence that is heard in this proceeding, but I can't take a chance and not follow the ruling of the court that she may be tainted because she knows at one time, in one proceeding, that Mr. Davis was seen in shackles, which carries with it, the court has said, an inference of he is dangerous.

Id. at 870-71.

Davis contends the trial court abused its discretion in dismissing jurors 1 and 39 for cause. In support of that contention, Davis argues that juror 1's objections to the

death penalty did not justify her dismissal for cause because "she said she could perform her duty as a juror despite her personal misgivings about imposing the death penalty." Appellant's Opening Br. at 48. Regarding juror 39, Davis asserts that her knowledge of facts surrounding the prior trial did not justify her dismissal for cause.

We review a trial court's ruling on a challenge for cause for manifest abuse of discretion. *State v. Gregory,* 158 Wn.2d 759, 814, 147 P.3d 1201 (2006). "The reason for this deference is that the trial judge is able to observe the juror's demeanor and, in light of that observation, to interpret and evaluate the juror's answers to determine whether the juror would be fair and impartial." *State v. Gentry,* 125 Wn.2d 570, 634, 888 P.2d 1105 (1995).

The Sixth and Fourteenth Amendments to the United States Constitution, as well as article I, section 22 of the Washington Constitution, guarantee a criminal defendant the right to trial by an impartial jury. *Taylor v. Louisiana*, 419 U.S. 522, 526, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975); *see Gregory,* 158 Wn.2d at 813. These provisions are not offended by excluding from capital case penalty hearings jurors whose views would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980)); *Gentry*, 125 Wn.2d at 635. However, jurors may not be dismissed simply because they have conscientious scruples against the death penalty if they can put aside those beliefs and follow the law. *Witherspoon v. Illinois*, 391 U.S.

510, 522, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968); *Gregory,* 158 Wn.2d at 814.

In *Gregory*, we held that a trial court did not abuse its discretion in dismissing for cause a juror who had indicated on her questionnaire that death was appropriate for serial murderers but testified during voir dire that she could follow the court's instructions and impose the death penalty if warranted. *Gregory*, 158 Wn.2d at 813-15. The latter statement appeared to contradict other statements during voir dire that she could not vote for the death penalty. The juror explained the apparent contradiction by saying she could tell what answer the attorneys wanted and felt uncomfortable disagreeing. *Id*. at 814. We held that "[g]iven juror 1's initial answers to questions regarding the death penalty and the suggestion that she changed her answers to please the attorneys, it is not surprising that the trial judge had the definite impression that juror 1 could not 'faithfully and impartially apply the law.'" *Id*. at 815 (quoting *Witt,* 469 U.S. at 426).

In *Gentry*, we upheld the trial court's exclusion of two jurors who testified they were "uncertain" they could impose the death penalty and "could not assure the trial court that they would be able to follow the instructions of the court regarding imposition of the death penalty." *Gentry*, 125 Wn.2d at 635. Despite these jurors' lack of certainty, we concluded that the trial court reasonably determined that the jurors' beliefs would substantially impair their abilities to perform their duties, especially given the trial court's unique ability to observe the jurors' demeanor.

In light of our decisions in *Gregory* and *Gentry*, we are satisfied that Judge

Fleming did not abuse his discretion in dismissing juror 1 for cause. Juror 1 indicated at least four times that she did not think she could personally impose the death penalty on anyone. Under *Gentry*, the fact that she prefaced her comments with "I think" does not bar the trial court from finding her beliefs would substantially interfere with her ability to perform her duty as a juror; unmistakable clarity is not required to support such a finding. As in *Gregory*, the contradictions in juror 1's testimony made her dismissal appropriate even though she said several times that she could follow the law.[9] The trial judge said he "must have somehow or another intimidated" the juror and that her demeanor showed that she wanted to follow the law but, on reflection, concluded that imposing the death penalty would violate her personal beliefs. RP (Apr. 10, 2007) at 369. The trial court had the opportunity to observe this juror and in our view did not abuse its discretion in dismissing her for cause.

Davis argues the trial court abused its discretion in dismissing juror 39 for cause

[9]Faced with a similar situation, the United States Supreme Court explained that such contradictions are both common and understandable: "The testimony of each of the three challenged jurors is ambiguous and at times contradictory. This is not unusual on *voir dire* examination . . . . It is well to remember that the lay persons on the panel may never have been subjected to the type of leading questions and cross-examination tactics that frequently are employed, and that were evident in this case. Prospective jurors represent a cross section of the community, and their education and experience vary widely. Also, unlike witnesses, prospective jurors have had no briefing by lawyers prior to taking the stand. Jurors thus cannot be expected invariably to express themselves carefully or even consistently. Every trial judge understands this, and under our system it is that judge who is best situated to determine competency to serve impartially. The trial judge properly may choose to believe those statements that were the most fully articulated or that appeared to have been least influenced by leading." *Patton v. Yount*, 467 U.S. 1025, 1038-39, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984).

on the basis that knowledge of prior proceedings does not establish prejudice under *State v. Rupe*, 108 Wn.2d 734, 750, 743 P.2d 210 (1987) and *Patton v. Yount*, 467 U.S. 1025, 1035, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984). Appellant's Opening Br. at 44-46. RCW 4.44.170(2) allows the trial judge to dismiss a juror for cause who "cannot try the issue impartially and without prejudice."

In *Rupe*, we held the court did not abuse its discretion when it denied a challenge for cause to a juror who read or heard that the defendant had been sentenced to death in an earlier penalty hearing and said he thought the previous jury did a good job. *Rupe*, 108 Wn.2d at 750. The juror assured the trial court that he could render a verdict based on the evidence presented at the trial. We concluded that "[k]nowledge of prior proceedings alone is insufficient to establish juror bias." *Id*. Similarly, in *Yount*, the United States Supreme Court determined that the trial court did not abuse its discretion in allowing the defendant's trial to go forward with jurors who had been exposed to news coverage of the defendant's murder conviction four years earlier when the jurors assured the trial court they could make an impartial decision. *Yount*, 467 U.S. 1025.

Davis's reliance on *Rupe* and *Yount* is misplaced for several reasons. First, Davis ignores the standard of review when he argues that the retention of the jurors in *Rupe* and *Yount* logically necessitates juror 39's retention here. Under a manifest abuse of discretion standard, the fact that a trial court did not abuse its discretion in retaining jurors does not mean that the court would have abused its discretion by

dismissing the jurors. "The question is not whether we, as a reviewing court, might disagree with the trial court's findings, but whether those findings are fairly supported by the record." *Gentry*, 125 Wn.2d at 635. Contrary to Davis's assertion, *Rupe* and *Yount* do not mandate the conclusion that retaining a juror with knowledge of prior proceedings is the only acceptable result.

Davis's case is also materially distinguishable from *Rupe* and *Yount* where the jurors' knowledge of the prior trial was not inherently prejudicial. In contrast, we reversed Davis's first death sentence because one juror's "partial and fleeting" view of Davis in shackles during the guilt phase of the trial prejudiced the penalty phase. *Davis*, 152 Wn.2d at 705. We reasoned that shackling implies the defendant is dangerous and unmanageable, potentially leading the jury to draw negative inferences regarding his future dangerousness. The partial and fleeting nature of the juror's view in *Davis* shows the inference of dangerousness arose not from the impact of repeatedly seeing the defendant in shackles over several weeks in the courtroom, but from the mere fact of the shackling, however brief. Thus, the trial court here could reasonably conclude juror 39 was prejudiced by simply knowing Davis had been shackled.

Finally, we believe that it is inappropriate to defer to a juror's assessment of his or her own ability to be objective when the knowledge at issue relates to shackling. In *Rupe* and *Yount*, the jurors' assurances that they could be impartial were critical to upholding the jurors' retention. In contrast, in our earlier *Davis* decision, we explicitly refused to consider the juror's testimony that shackling did not affect his decision

because the statement was made several years after the verdict was rendered. *Davis*, 152 Wn.2d at 688-89. Given this lack of deference to the juror's own assessment of his credibility, the trial court here reasonably concluded it could not rely on juror 39's testimony that knowledge of past shackling would not influence her decision. Under a manifest abuse of discretion standard, we will not disturb the trial court's reasonable interpretation of our earlier decision in this case or its finding that juror 39 possessed prejudicial knowledge warranting dismissal.

Davis also argues RCW 4.44.170 does not support juror 39's removal because that statute refers to the "challenged person," and neither Davis nor the State challenged the juror for cause. Reply Br. of Appellant at 8. CrR 6.4(c)(1) states that "[i]f the judge after examination of any juror is of the opinion that grounds for challenge are present, he or she shall excuse that juror from the trial of the case." This rule makes clear that a trial judge may excuse a potential juror where grounds for a challenge for cause exist, notwithstanding the fact that neither party to the case exercised such a challenge. In fact, the judge is obligated to do so. The trial court's dismissal of juror 39 for cause was, therefore, proper.

3. Did the trial court abuse its discretion in excluding Davis's aunts' testimony?

On May 7, 2007, slightly over a month into the penalty hearing, the trial court was called upon to decide whether videotaped interviews of Davis's paternal aunts, Eula Mae Brooks and Lillie Mae Jones, could be admitted.[1] The interviews took place

[1]The State had one week's notice of the defendant's intent to submit the video tapes of the interviews, and Brooks's and Jones's names were not included on a

in Kansas City, Missouri, where Brooks and Jones lived, and were conducted by the defense mitigation specialist, Mary Goody.[11] Brooks and Jones were not placed under oath during the video interviews but later signed declarations summarizing the information covered in their interviews. Each interview lasted slightly less than 20 minutes.

In the interviews, Brooks and Jones each discussed their personal histories and early memories. They both mentioned that Davis's father had trouble learning and dropped out of school early. Brooks said that although she never visited Davis or Davis's mother, Cozetta Taylor, she would have tried to help Davis if she had known of his problems in school or with his temper. Jones said that she had occasionally visited Taylor. She indicated that Taylor did not take care of her children or seem interested in them. Both aunts discussed how their mother, Davis's paternal grandmother, was institutionalized for mental illness when Brooks and Jones were in high school.

After reading the declarations and viewing the redacted video, the trial court excluded the interviews, concluding that portions of each were inadmissible on the grounds of hearsay, lack of personal knowledge, and relevance. The trial court also reasoned that the videotaped interviews were inadmissible because the interviewees were not subject to cross-examination.

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witness list.

[11]The defense sought to admit into evidence two copies of the video, a complete interview and a redacted version which it intended to show to the jury. All discussion of the interviews in this fact section is based on viewing the redacted video, exhibit 226, unless otherwise noted.

Davis argues that excluding his aunts' videotaped interviews violated his right to present mitigating evidence under the Eighth and Fourteenth Amendments to the United States Constitution; article I, sections 3 (due process) and 14 (cruel punishment) of the Washington Constitution;[12] and RCW 10.95.060(3) and RCW 10.95.070, two of Washington's special sentencing proceeding statutes. We review the trial court's evidentiary rulings for abuse of discretion. *See State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999); *Stenson*, 132 Wn.2d at 701. Discretion can be abused if the trial court's action is manifestly unreasonable or based on untenable grounds or reasons. *Finch*, 137 Wn.2d at 810. "However, a trial court's determination to exclude evidence may be sustained on any proper basis within the record and will not be reversed simply because the trial court gave a wrong or insufficient reason for its determination." *State v. Markle*, 118 Wn.2d 424, 438, 823 P.2d 1101 (1992).

Under the Eighth and Fourteenth Amendments, the finder of fact in a capital proceeding must "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that

[12]Davis cites Washington State Constitution article I, sections 3 and 14 as sources of his right to present mitigating evidence, but he cites only *Bartholomew* I and *Bartholomew* II for the proposition that the Washington State Constitution contains such a right. *E.g.,* Appellant's Opening Br. at 50, 54 (citing *State v. Bartholomew,* 98 Wn.2d 173, 194, 654 P.2d 1170 (1982) (*Bartholomew* I), *vacated*, 463 U.S. 1203, 103 S. Ct. 3530, 77 L. Ed. 2d 1383 (1983), *aff'd on remand,* 101 Wn.2d 631, 683 P.2d 1079 (1984) (*Bartholomew* II)). While *Bartholomew* II addressed the Washington State Constitution's limits on the introduction of *aggravating* factors at a capital penalty hearing, its analysis of *mitigating* evidence was based exclusively on federal law. *Bartholomew* II, 101 Wn.2d at 639-42. Davis has not provided any substantive argument regarding the Washington State Constitution. We therefore decline to address how the Washington State Constitution relates to this issue.

the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978). Notwithstanding this requirement, the trial court maintains its traditional authority "to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Id*. at 604 n.12; *see also Gregory*, 158 Wn.2d at 856-57 (facts of other crimes resulting in the death penalty were not relevant mitigating evidence because not related to the particular defendant or crime at issue); *State v. Pirtle*, 127 Wn.2d 628, 671, 904 P.2d 245 (1995) (essay written by victim in opposition to the death penalty was not relevant mitigating evidence because not related to the defendant's moral culpability).

In the instant case, the trial court correctly determined that the vast majority of Jones's and Brooks's offerings were not relevant mitigating evidence. The stories regarding their childhoods, for example, clearly do not relate to Davis's character, record, or the circumstances of the offense. The fact that Davis's father may have had difficulty in school also is unrelated to Davis's character or moral culpability because the difficulty occurred before Davis was born. The fact that Brooks never visited Davis or his mother renders her opinion that Davis had a hard upbringing lacking in foundation and irrelevant.

The evidence of Davis's grandmother's mental illness is also irrelevant because it was not connected to Davis's mental health or upbringing. One of the defense mental health experts considered records showing that Davis's grandmother had been

institutionalized for schizophrenia, but when asked what information he used to reach his opinion about Davis, the expert did not mention the grandmother's illness. RP (May 9, 2007) at 3247-48. Furthermore, there was no evidence that Davis suffered from schizophrenia or that Davis knew his grandmother or had any contact with her.[13] In the absence of testimony connecting the grandmother's illness to Davis's upbringing or mental health, it simply has no bearing on Davis's character, record, moral culpability, or the circumstances of the crime.

A few facts offered by Davis's aunts probably meet the low bar for relevance. Jones's observation that Davis had a difficult and troubled childhood is a relevant mitigating factor. *See Eddings v. Oklahoma*, 455 U.S. 104, 116, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982). In addition, the aunts' concern had relevance on the issue of mercy, their testimony showing that two family members were willing to be interviewed on Davis's behalf. In *Stenson*, we held that the trial court did not err in excluding on relevance grounds testimony concerning the potential impact an execution would have on the defendant's family, but we noted with approval that the trial court had admitted testimony from family members indirectly showing that the defendant had a caring family. Here, in contrast, the exclusion of Davis aunts' interviews completely eliminated the views of two family members from the jury's consideration, a fact that was underscored by the State's comment in closing argument that only two members of

[13]The defense mental health expert discussed here confirmed that he did not diagnose Davis with schizophrenia. A review of the defense witnesses' testimony reveals no other discussion of Davis's grandmother or her illness.

Davis's large family (his mother and brother) testified on Davis's behalf. *See Skipper v. South Carolina*, 476 U.S. 1, 5 n.1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986) (evidence that the defendant had made a good adjustment in prison was relevant mitigating evidence, especially because the prosecutor argued during closing that defendant would be dangerous and even rape other prisoners if sentenced to life in prison).

Davis argues that beyond the threshold requirement of relevance, the rules of evidence may not bar the admission of relevant mitigating evidence in a capital case. The State counters that while the rules of evidence are relaxed in capital penalty proceedings, "admissibility is not unfettered;" evidence still must be presented in a reliable form. Br. of Resp't at 44.

The United States Supreme Court has held that "'the hearsay rule may not be applied mechanistically to defeat the ends of justice'" by excluding reliable mitigating evidence from a capital penalty proceeding. *Green v. Georgia*, 442 U.S. 95, 97, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). The Court has not, however, totally prohibited use of the rules of evidence in death penalty cases. Because reliability is critical in determining whether to impose the sentence of death, the Eighth Amendment "does not deprive the State of its authority to set reasonable limits upon the evidence a defendant can submit, and to control the manner in which it is submitted." *Oregon v. Guzek*, 546 U.S. 517, 526, 126 S. Ct. 1226, 163 L. Ed. 2d 1112 (2006).

RCW 10.95.060(3) appears to provide an unfettered right to admit evidence

without regard to the rules of evidence in a capital penalty proceeding, as it states that "[t]he court shall admit any relevant evidence which it deems to have probative value *regardless of its admissibility under the rules of evidence*, including hearsay evidence." (Emphasis added.) Our case law, however, shows the trial court is not completely barred from considering reliability in capital penalty proceedings. In *State v. Bartholomew,* 101 Wn.2d 631, 646, 683 P.2d 1079 (1984) (*Bartholomew* II), we held that although polygraph evidence was inadmissible in a normal trial, absent stipulation, mitigating polygraph evidence was admissible in a capital penalty hearing if (1) the trial judge was convinced the examiner was qualified and the test conducted under proper conditions and (2) the opposing party had the opportunity to cross-examine the polygraphist. *Bartholomew* II shows that while the rules of evidence are relaxed in capital penalty phase trials, the trial court maintains its traditional ability to control the reliability of mitigating evidence.

We are satisfied that the trial court properly exercised its discretion in excluding the few relevant parts of the interviews because the interviews were presented in an unreliable form. As we have observed, Brooks and Jones had little to no contact with Davis during his childhood. Consequently, their opinions that Davis had a bad mother and childhood could have been based on family gossip, what they heard from the mitigation specialist in preparation for the interview, or even what they read in the newspaper about Davis's previous trials. Furthermore, the defense obtained and presented the evidence in a manner that gave the State almost no chance to explore

these potential problems, even though a video deposition or in-person testimony appears to have been possible.[14] Accordingly, the interviews' exclusion was not a wholesale bar to the admission of relevant mitigating evidence or a mechanistic application of the rules of evidence. Rather, the trial court properly exercised its "authority to set reasonable limits upon the evidence a defendant can submit, and to control the manner in which it is submitted." *Guzek*, 546 U.S. at 526.

In sum, the trial court properly excluded the videotaped interviews because their content was largely irrelevant, and any relevant portions were not presented in a reliable form.

4. Did the trial court abuse its discretion in admitting as rebuttal evidence a police officer's testimony about Davis's mental state shortly after the crime?

The defense presented the testimony of four experts regarding Davis's mental health: Dr. Richard Kolbell, psychologist; Dr. Barbara Jessen, neurologist; Dr. Zakee Matthews, psychiatrist; and Dr. Kenneth Muscatel, psychologist.

Kolbell, Matthews, and Muscatel each diagnosed Davis's mental condition based

[14]The defense conceded that video depositions could have been taken. Regarding in person attendance, Brooks wrote in her declaration that "I am unable to come to Tacoma, WA to testify on behalf of Cecil Davis, my nephew. My son recently died and I took a bad fall after that. I am not feeling very well at this time." Ex. 228, ¶ 3. In her video interview, however, she did not say that she was unable to testify in person. Jones's written declaration omits any mention of her unavailability to testify in person, and in her videotaped interview, she said simply that she was too old and just did not think she could come. Ex. 227, 226. At the hearing, the trial court noted that the aunts "didn't appear to be infirm in any way" and concluded there was an insufficient basis to establish they were unavailable to testify. RP (May 7, 2007) at 3055-56; CP at 1191.

on examinations performed in 2006 or 2007. Although their exact diagnoses varied, the doctors all opined that Davis bordered on mentally retarded[15] but was not actually classifiable as such. They also indicated that Davis suffered from other cognitive disorders such as posttraumatic stress disorder and learning disabilities. These diagnoses were based on a series of technical tests, such as intelligent quotient (IQ) tests. Each doctor also discussed how the 2006 or 2007 diagnosis compared to Davis's mental condition in 1997, the year he committed the crime.[16]

Kolbell and Muscatel both testified about Davis's behavior during testing. Kolbell said that Davis's functional levels could be measured in part by his ability to converse, follow a train of thought, and speak coherently. Kolbell also noted that at the beginning of the interview, he asked Davis what day it was to check whether Davis was oriented. Muscatel noted that while his interview of Davis "was really not the focus of the examination, I wanted to see if he could answer questions, respond, you know, to

[15]At the time of Davis's sentencing, Washington's death penalty statutes prohibited the execution of "mentally retarded" individuals. Former RCW 10.95.030(2) (1993). In 2010, pursuant to a statute promoting respectful language for people with disabilities, the death penalty statutes were revised to use the term "intellectually disab[led]" instead of "mentally retarded." *See* RCW 44.04.280 (respectful language); Laws of 2010, ch. 94, §§ 1-5 (revision to death penalty statutes). For clarity and accuracy, this opinion uses the term "mentally retarded" when that term was used by the court, parties, or witnesses at trial. When referring to the current death penalty statutes, we use the term "intellectually disabled" to be consistent with the respectful language requested by RCW 44.04.280.

[16]*E.g.*, RP (May 8, 2007) at 3111 (Dr. Kolbell notes that defendant scored higher on 1997 IQ tests than on the 2006 IQ tests); RP (May 9, 2007) at 3255 (Dr. Matthews opines that Davis had a major mental illness in 1997); RP (May 10, 2007) at 3383-85 (Dr. Muscatel discusses drop in IQ scores between 1997 and 2007).

me, if I had to adjust the testing to suit his individual needs." RP (May 10, 2007) at 3364. During cross-examination, without objection by the defense, Kolbell and Muscatel both said Davis was able to maintain a normal demeanor during their conversations.

Jessen testified regarding the results of an electroencephalogram (EEG) taken of the defendant's brain in August 1997. She concluded that the EEG showed a generalized slowing in Davis's brain that could have existed since birth or could have been caused by a later infection, head trauma, medications, or alcohol and drug use. Without objection, the State cross-examined Jessen about Davis's demeanor during a physical exam she conducted in July 1997. She agreed that Davis was alert, cooperative, oriented, spoke normally, had a reasonably good memory, and had no trouble using or pronouncing words.

The State's rebuttal consisted of testimony by Sergeant Tom Davidson's about his observations of Davis during an interview on January 31, 1997, six days after the crime was committed. The defense moved to exclude Davidson's testimony on the ground that it did not rebut the mental health experts' testimony. The trial court rejected the argument and allowed Davidson to take the stand.

Davidson testified that he had been a police officer for 26 years and, during that time, had interviewed hundreds of criminal suspects. Over relevance objections, Davidson testified that he had encountered people of different education levels and opined that academic education does not necessarily correlate with "street smarts." *Id*.

at 3458-59. Davidson said he did not have any formal training in psychology or psychiatry, but rather used his own scale to make observations about people he interviewed. He indicated that if he interviewed someone and had questions about that person's mental health, he would notify the jail so it could properly deal with the person.

Davidson then discussed the interview with Davis on January 31, 1997, which he conducted along with three other detectives. He said Davis was paying attention and seemed to understand when advised of his rights. According to Davidson, Davis gave appropriate responses to questions during the two-and-a-half-hour interview and never showed signs that he did not understand why he was there or what they were discussing. Davidson said that Davis looked at the person asking the question and showed no confusion when the subject changed. Davidson concluded by stating that nothing about the interview gave him cause for concern about Davis's mental status.

Davis contends that the trial court erred in admitting Davidson's testimony during the State's rebuttal case on several bases. We review the trial court's evidentiary rulings for abuse of discretion. *Finch*, 137 Wn.2d at 810; *Stenson*, 132 Wn.2d at 701.

Unlike with mitigating evidence, the introduction of aggravating factor evidence must strictly comply with the rules of evidence. *Bartholomew* II, 101 Wn.2d at 640-41; *Gentry*, 125 Wn.2d at 626. While the State may admit evidence to rebut the defendant's case, that evidence must be

> "relevant to a matter raised in mitigation by defendant. Evidence might be relevant, for instance, if it casts doubt upon the reliability of defendant's mitigating evidence. We do not intend, however, that the prosecution be permitted to produce any evidence it cares to so long as it points to some

element of rebuttal no matter how slight or incidental."

Bartholomew II, 101 Wn.2d at 643 (quoting *State v. Bartholomew*, 98 Wn.2d 173, 198, 654 P.2d 1170 (1982) (*Bartholomew* I), *vacated,* 463 U.S. 1203, 103 S. Ct. 3530, 77 L. Ed. 2d 1383 (1983), *aff'd on remand,* 101 Wn.2d 631). Relevant rebuttal evidence is subject to a balancing test similar to ER 403, where it is admitted "'"[o]nly if the rebuttal value of the evidence outweighs the prejudicial effect."'"[17] *State v. Lord*, 117 Wn.2d 829, 891, 822 P.2d 177 (1991) (quoting *Bartholomew* II, 101 Wn.2d at 643 (quoting *Bartholomew* I, 98 Wn.2d at 198)).

Davis first argues that Davidson's testimony was improper rebuttal evidence because, in his view, the professional opinions about his mental health could be rebutted only by expert testimony diagnosing his mental condition. However, the defendant's own experts established that Davis's conduct was relevant to determining whether he was affected by a mental illness. Kolbell said that Davis's ability to converse, follow a train of thought, and speak coherently factored into his "functional levels." RP (May 8, 2007) at 3141. Kolbell, Muscatel, and Jessen all testified, without any defense objection, to Davis's ability to communicate reasonably and understandably. From this testimony, the jury could reasonably conclude that Davis's

[17]Although the balancing test as articulated in *Bartholomew* II does not explicitly say "unfair prejudice," as does ER 403, the fact that the prejudice must be unfair or unreasonable is implicit in that decision and its progeny. *Bartholomew* II observed that "'[c]onceivably, any aggravating information could be said to prejudice a defendant, but presumably the Court intended to restrict the concept to undue or unreasonable prejudice.'" *Bartholomew* II, 101 Wn.2d at 637 (quoting *Bartholomew* I, 98 Wn.2d at 195).

ability to engage in a "normal" manner during an interview six days after the crime was relevant to whether mental illness influenced the crime's commission. Davidson's testimony was therefore a proper rebuttal.

Davis also contends that Davidson's testimony about his interviewing experience and the difference between "street smarts" and academic knowledge had no relevance. In our view, this testimony laid a proper foundation for Davidson's testimony about Davis's behavior by showing why Davidson was capable of making the observations that he did. This aided the jury in weighing the credibility of Davidson's observations.

Davis is also incorrect that Davidson's testimony was unduly prejudicial under the ER 403-like balancing test for rebuttal evidence in a capital case. The probative value of Davidson's testimony was high because it provided a firsthand observation of Davis's mental state near the time of the crime and allowed the jury to weigh the mental health experts' after-the-fact evaluations. In contrast, the prejudicial value was low because the evidence was not particularly gruesome, technical, or otherwise likely to cause an emotional or irrational decision.[18]

Davis argues, additionally, that Davidson's testimony was "thinly veiled" opinion

[18]Davis suggests the court erred by not balancing prejudice against probative value on the record. Reply Br. of Appellant at 27. However, balancing on the record was not required. We have repeatedly compared the balancing test for rebuttal evidence in a capital sentencing case to ER 403. *Lord*, 117 Wn.2d at 891; *Bartholomew* II, 101 Wn.2d at 643; *Bartholomew* I, 98 Wn.2d at 198. In contrast to ER 404(b) and ER 609(b), a trial court is not required to balance the interests weighed in ER 403 on the record. *See Carson v. Fine*, 123 Wn.2d 206, 226, 867 P.2d 610 (1994). Particularly here, where the defense did not even raise ER 403 or unfair prejudice in its motion to exclude the evidence, it would be inappropriate to require a balancing analysis on the record.

testimony that Davis was not mentally impaired, an opinion that Davidson was not qualified to render since he was not qualified as an expert witness under ER 702. Appellant's Opening Br. 63. The State did not, however, seek to admit Davidson as an expert witness. He was a fact witness and, consistent with this understanding, he testified only to his personal observations of and reactions to Davis's behavior. The State specifically elicited testimony from Davidson that he was not trained in psychology or psychiatry. The requirements for expert testimony in ER 702 are therefore inapplicable.

Alternatively, Davis argues that Davidson's testimony was inadmissible lay opinion testimony under ER 701. "It is well established in Washington that a lay witness may testify concerning the sanity or mental responsibility of others, so long as the witness' opinion is based upon facts he personally observed, and the witness has testified to such facts." *State v. Crenshaw*, 27 Wn. App. 326, 332-33, 617 P.2d 1041 (1980)[19] (trial court did not abuse its discretion in admitting lay person testimony that the defendant "'seemed very normal'" on the day he decapitated his wife and police officer testimony about the defendant's sanity soon after the offense), *aff'd,* 98 Wn.2d 789, 659 P.2d 488 (1983). Here, Davidson testified about Davis's behavior during the interview and said that he personally had no concerns about Davis's mental health. Unlike the facts in cases cited by Davis, Davidson never invaded the jury's province by testifying to an ultimate issue, such as whether Davis suffered from a mental illness at

[19]On appeal, the defendant did not raise the issue of lay person testimony regarding the defendant's mental state. *Crenshaw*, 98 Wn.2d 789.

the time of the crime. *See Ashley v. Hall*, 138 Wn.2d 151, 156, 978 P.2d 1055 (1999) (lay witness's testimony that accident was "unavoidable" was improper because it went beyond his rational sense perceptions to give an opinion on the ultimate issue of liability); *State v. Farr-Lenzini*, 93 Wn. App. 453, 461, 970 P.2d 313 (1999) (trooper's testimony that defendant was trying to get away from him was improper lay opinion where defendant's intent to elude a police officer was an element of the crime). Davidson's testimony was admissible as a lay opinion.

In summary, the trial court did not abuse its discretion in admitting Davidson's testimony. It properly rebutted the defense's mental health experts because it gave the jury a tool by which to evaluate Davis's mental state near the time of the crime and thereby weigh Davis's expert testimony regarding his mental health. It was not unduly prejudicial and was an admissible lay opinion under ER 701.

5. Did the trial court err in not instructing the jury that "major mental illness" could be a mitigating factor?

The trial court gave the following instruction regarding mitigating evidence:

> A mitigating circumstance is a fact about either the offense or about the defendant which in fairness or in mercy may be considered as extenuating or reducing the degree of moral culpability or which justifies a sentence of less than death, although it does not justify or excuse the offense.
> . . . .
> You are also to consider as mitigating circumstances any other factors concerning the offense or the defendant that you find to be relevant, including, but not limited to, the following:
> Whether the murder was committed while the defendant was under the influence of extreme mental disturbance, or
> Whether, at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to

> the requirements of law was substantially impaired as a result of mental disease or defect.

CP at 1165; RP (May 15, 2007) at 3490. The two mitigating circumstances listed in this instruction correspond to two statutory mitigating factors. RCW 10.95.070(2), (6). Over Davis's objection, the court rejected Davis's proposed instruction, which was identical to the instruction actually given except that it replaced the last paragraph with two nonstatutory mitigating circumstances: "[w]hether the defendant is mentally retarded" and "[w]hether the defendant suffers from a major mental illness." CP at 1119.

Davis contends that because the trial court's instruction on mitigating evidence led jurors to believe that the listed factors were the only mitigating factors relating to mental illness that it could consider, the instruction violated his right to have the fact finder consider all relevant mitigating circumstances.

In determining whether a jury instruction runs afoul of the constitutional requirement that the fact finder in a capital proceeding consider all relevant mitigating evidence, the test is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990); *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 921, 952 P.2d 116 (1998) (quoting *Boyde*, 494 U.S. at 380). The instruction must be viewed in light of the overall charge to the jury, not in "'artificial isolation.'" *Benn*, 134 Wn.2d at 922 (internal

quotation marks omitted) (quoting *Boyde*, 494 U.S. at 378).

In *Gentry*, we held that "[t]here is no constitutional requirement that each relevant mitigating circumstance be the subject of a specific instruction to the jury. The requirement is that such evidence be allowed to be presented to the jury, but a specific instruction as to each potentially mitigating factor is not mandated." *Gentry*, 125 Wn.2d at 650-51 (citing *Johnson v. Texas,* 509 U.S. 350, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993)). While we did hold in *Gentry* that the trial court did not err when it included nonstatutory mitigating circumstances in the jury instruction, we noted that in future cases, the better practice would be to include any statutory mitigating factors requested by the defendant but not to enumerate nonstatutory factors.

Here, there is not a reasonable likelihood that the jury read the instruction to preclude consideration of whether Davis suffered from a major mental illness. The express language of the instruction defined mitigating circumstance in broad terms and went on to say the jury should consider "*any other factors* concerning the offense or the defendant that you find to be relevant, *including, but not limited to*, the following." CP at 1165 (emphasis added). *Gentry* establishes that the instruction given here not only conformed with the constitutional requirement that the jury be allowed to consider all relevant mitigating circumstances, but also followed the preferred practice in Washington State by enumerating statutory but not nonstatutory mitigating factors.

6. Did the deputy prosecutor's comments prejudice Davis's right to a fair trial?

Davis contends that several aspects of the prosecutor's closing argument

constituted misconduct, denying Davis his constitutional rights to have the jury consider all mitigating evidence and to a fair trial. In particular, Davis assigns error to the prosecutor's (1) comments about compassion; (2) allegedly inflammatory remarks, including the re-creation of a possible dialogue between Davis and Couch during the rape and murder; (3) statement, "If not now, then when? And, if not Cecil Davis, then who[]?"; and (4) comments on whether Davis's actions showed remorse. He asserts, additionally, that even if these instances of alleged misconduct alone do not support reversal, collectively they do. RP (May 15, 2007) at 3495.

To make a successful claim of prosecutor misconduct, the defense must establish that the prosecuting attorney's conduct was both improper and prejudicial. *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007); *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). Conduct is improper if, for example, it encourages the jury to make a decision based on passion or prejudice, or if it refers to matters outside the record. *See State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). To be prejudicial, a substantial likelihood must exist that the misconduct affected the jury's verdict. *Yates*, 161 Wn.2d at 774. Prejudicial effect must be judged by viewing the improper comments in context of the penalty phase as a whole, not in isolation. *Id.*

If the defense does not object at trial, "[r]eversal is not required if the error could have been obviated by a curative instruction which the defense did not request." *Hoffman*, 116 Wn.2d at 93. Failure to object to an allegedly improper remark

constitutes waiver unless the remark is "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *Stenson*, 132 Wn.2d at 719 (citing *Gentry*, 125 Wn.2d at 596). If the defense does object to a prosecutor's comment, we review the trial court's ruling on the objection for abuse of discretion. *Id*. at 718. This standard of review recognizes that the trial court is in the best position to determine whether prosecutorial misconduct actually prejudiced the defendant's right to a fair trial. *Id*. at 718-19.

Comments about compassion

Before closing argument took place, the jury was instructed that a mitigating circumstance was "a fact about either the offense or about the defendant which in fairness *or in mercy* may be considered as extenuating." CP at 1165 (emphasis added); RP (May 15, 2007) at 3490. The jury was also instructed that "[t]hroughout your deliberations you must not be influenced by passion, prejudice or sympathy. *You may find mercy for the defendant to be a mitigating circumstance*." CP at 1159 (emphasis added); RP (May 15, 2007) at 3486.

In closing argument, the prosecutor said:

> Compassion is an emotion. Emotion is forbidden from playing a part in your decision in this case. When you look through those jury instructions—you each have a copy of them and you are going to get the originals—you can look through them as many times as you want and you will not see the word "compassion" anywhere. You will see the word "emotion." "Your verdict must be based upon reason and not emotion. You must not be influenced by passion, prejudice, or sympathy." Quite frankly, you must not be influenced by compassion, prejudice or sympathy.
> We tell you to check those things at the door. Don't bring in your anger at

> this defendant and sentence him to death because of it. Don't bring in your sympathy and compassion and sentence him to life because of it.
> You should keep the compassion in this case where it belongs. Feel sorry for Mrs. Couch. Feel sorry for her family. Feel sorry for the defendant's family. None of them did anything to deserve to be here involved in this case. Do not feel sorry for this defendant, because he is about to get a sentence, a penalty, that he richly deserves.
> But, by the same token, you cannot let that emotion be the reason for your decision. When you sentence this defendant to death, it must be for the right reasons, and those reasons are the evidence and the law.

RP (May 15, 2007) at 3505-06. A summary of the prosecutor's comments regarding compassion was displayed to the jury in PowerPoint slides. Defense counsel did not object to this argument.

Davis argues these comments prohibited the jury from considering mercy and that this violated his Eighth and Fourteenth Amendment rights to have the jury consider all relevant mitigating circumstances. In particular, he contends that because the dictionary definition of "mercy" includes the word "compassion" and because the two terms have been historically associated, the prosecutor's closing argument improperly forbade the jury from considering mercy.

Even if the jury is required to be permitted to consider mercy,[2] the prosecutor's

[2]Davis argues the jury, constitutionally, must be permitted to consider mercy based on the general directive in *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976) and *Lockett*, 438 U.S. 586, that the jury must give individualized consideration to each defendant, including consideration of all relevant mitigating facts about the defendant's character, record, or the circumstances of the offense. While we have held that the jury may consider mercy, we have never held that its consideration is constitutionally mandated. *See, e.g., Gentry*, 125 Wn.2d at 647-48 (instruction allowing jury to consider fairness or mercy was permissible because mercy, unlike sympathy, is based in reason). Here, because the prosecutor's closing argument did not preclude the jury from considering mercy, we need not reach the issue of whether the federal or state constitutions require such consideration.

argument did not foreclose the jury from doing so. The law draws a thin line between sympathy, which is based on a purely emotional response and may not be considered by a capital sentencing jury, and mercy, which is a reasoned moral response to evidence that the jury may take into account. *Gentry*, 125 Wn.2d at 648; *In re Pers. Restraint of Rupe*, 115 Wn.2d 379, 395-96, 798 P.2d 780 (1990). Contrary to Davis's argument, the dictionary does not link "compassion" only to "mercy"; "compassion" is listed also as a synonym for "sympathy." Webster's Third New International Dictionary 1413, 2317 (2002). Similarly, a historical association between mercy and compassion does not establish that compassion cannot also be thought of as an emotional, sympathetic response. The decisive factor is the context of the prosecutor's argument, which consistently described compassion as an unreasoned, sympathetic response, not a reasoned, merciful one. *E.g.*, RP (May 15, 2007) at 3505 ("Compassion is an emotion. Emotion is forbidden from playing a part in your decision."), 3506 ("[Y]ou cannot let that emotion [compassion for Couch] be the reason for your decision."). The jury instructions twice listed mercy as a relevant mitigating factor and on at least five occasions, defense counsel emphasized the jury's ability to grant mercy. *See* Appellant's Opening Br. at 84-85. Viewing the prosecutor's remarks in the context of the penalty phase as a whole, it is unreasonable to conclude the jury would have felt barred from considering mercy. Instead, jurors would have felt barred from making a decision based on pure emotion—whether that emotion is labeled as sympathy or compassion—which is exactly what the law requires.

Furthermore, there is no indication that the prosecutor's remarks about compassion were flagrant and ill intentioned. To the contrary, the prosecutor's argument revealed an intent to comply with the law by emphasizing that the jury should base its decision not on emotion, but on the evidence and reason. Even assuming the prosecutor went too far, a jury instruction clarifying the definition of compassion could have cured any error.

Inflammatory remarks and facts not in evidence

Davis argues that several elements of the prosecutor's closing argument played on jurors' passions and argued facts not in evidence. In particular, Davis identifies the following remarks as problematic:

1. The prosecutor's description of the bathtub as Couch's "death chamber." RP (May 15, 2007) at 3512.

2. The prosecutor's remarks encouraging the jurors to imagine Couch's final hour and what she must have said to Davis. For example, the prosecutor said when Davis entered the home, "[Y]ou can be sure that [Couch's] first reaction was, 'Get out of my house. What are you doing in my house? What do you think you're doing?' Or anything along those lines." RP (May 15, 2007) at 3536. The prosecutor continued by saying that the moment when Davis started beating and rubbing on Couch was "probably when [she] started to beg. Maybe she changed her attitude about 'get out of my house,' and at that point she was telling Cecil Davis, 'Leave me alone. Take whatever you want. Take anything you want, just leave me alone, leave my house.'"

Id. The description continued with more possible statements that Couch made.

3. The prosecutor's discussion of mercy at the end of the same description of the crime:

> What mercy did the defendant show Mrs. Couch?
> And then he dragged her to the bathroom and he sat her on that bathtub. Maybe he told her, "You know what, cooperate with me here and I'll let you live," because you know that Mrs. Couch wasn't going into that tub and going to her death quietly or voluntarily. And you can be sure that she was screaming and fighting and begging. And, who knows, maybe Mrs. Couch even said, "Have mercy on me." And what mercy did the defendant show her? He filled the bathtub with cold water. He forced her into that tub. He poured toxic chemicals on a rag. He put his hands around her throat, one of them at least, and then he put the other one on top of her face and he forced that rag against her nose and against her mouth. And as she struggled and fought just to breathe, she was rewarded with poisonous toxic chemicals. And you can be sure she wasn't quiet still, because you know that Mrs. Couch knew that she was very close to death. She had to give everything she could. And what mercy did the defendant show her?
> Eventually, Mrs. Couch stopped struggling. And, eventually, she stopped breathing. And probably the most compelling thing about this case that can be said is that at that point Mrs. Couch finally got some relief, finally got some mercy, but it wasn't anything this defendant did. It wasn't anything that he should be rewarded for. And so, when you decide how much mercy or whether to show mercy to this defendant, you should consider those final few minutes of Yoshiko Couch's life on this earth.

Id. at 3538-39.

4. The prosecutor's comment that while Davis received constitutional rights such as representation by counsel, the right to confront witnesses, and an impartial jury in determining whether he would live or die, Couch received no due process while facing death: "The defendant was her judge, jury, and executioner; no due process, no trial, no chance to present mitigation." *Id*. at 3502.

5. Comments implying that Davis scrubbed Couch's vagina while she was alive, when the evidence did not show whether the scrubbing occurred while she was alive or dead[21]: "[H]e put her in the bathtub, degraded her with no clothing on the bottom, scrubbed her vagina, and then he suffocated her." *Id*. at 3574.

6. The argument that Davis's background and psychological problems were not "true mitigation" but rather "excuse[s]." *Id*. at 3524.

The defense did not object to any of these remarks.

Davis bases much of his argument on *Urbin v. State*, 714 So. 2d 411, 421, 422 n.14 (Fla. 1998), a case in which the Florida Supreme Court held that a prosecutor committed misconduct during his closing argument when he put imaginary words in the victim's mouth ("'Don't hurt me. . . .'"), argued that the jury should "'show [the defendant] . . . the same amount of pity that he showed [the victim] on September 1, 1995, and that was none,'" and labeled the defense's mitigation evidence as "'excuses'" at least 11 times. *Urbin* is distinguishable because Florida law explicitly prohibited many of the comments at issue. It could be said, therefore, that the prosecutor's comments showed a flagrant disregard for precedent. *See id.* at 422 ("The fact that so many of these instances of misconduct are literally verbatim examples of conduct we have unambiguously prohibited in [several Florida cases] simply demonstrates that there are

[21]Davis does not cite any part of the record indicating the scrubbing occurred after death rather than while she was alive. Rather, he claims simply that the record does not support that the scrubbing occurred while she was alive. The testimony of the medical examiner who performed the autopsy supports Davis's claim that the timing of the scrubbing is inconclusive.

some who would ignore our warnings concerning the need for exemplary professional and ethical conduct in the courtroom."). In contrast, Washington law does not clearly prohibit a prosecutor from making the comments made in Davis's case.

Many of the remarks Davis identifies are proper. First, the description of the bathtub as Couch's "death chamber," while strong, is accurate and grounded in fact. *See* RP (May 1, 2007) at 2733-34 (medical examiner's testimony that Couch could have died in the bathtub). This comment did not incite the jury to make a decision based on improper grounds, but on a legitimate aggravating factor: the circumstances of the crime itself, and in particular, that Davis killed Couch by suffocating her with toxic chemicals in a bathtub. In contrast, see *Belgarde*, 110 Wn.2d at 506-08 (prosecutor's comments regarding the defendant's membership in the American Indian Movement were misconduct because they encouraged the jury to render a verdict based on that affiliation rather than the evidence).

Second, in Davis's first appeal, we rejected the argument that it was misconduct for the prosecutor to argue that the jury should show Davis the same amount of mercy that he showed Couch. *Davis*, 141 Wn.2d at 873. We also approved of the comment that Davis was Couch's "'judge, jury and executioner.'" *Id*. (quoting RP at 2518-19). Davis's only new support for the argument that these comments were prosecutorial misconduct is that the Florida Supreme Court did so in *Urbin*. As discussed earlier, *Urbin* is distinguishable because the prosecutor's comments there were explicitly forbidden under Florida law. *Urbin*, 714 So. 2d at 422. We are not inclined to abandon

our own, directly binding precedent in favor of distinguishable, nonbinding authority.

Third, calling the defense's evidence "excuses" was proper because context shows this label was directed at the evidence's weight, not its relevance. Significantly, the deputy prosecutor began discussing Davis's mitigating evidence by reminding the jury that it should judge Davis's mitigating evidence in the same way it judged any other evidence. The deputy prosecutor then pointed out several weaknesses of the evidence, such as that Davis's brothers and sisters were not violent despite their similar upbringings, that the defense witnesses were not credible, and that "[t]he defendant says he hears voices, but they don't tell him to kill people. They don't tell him to rob or rape people." RP (May 15, 2007) at 3523. The prosecutor then summarized these arguments by saying that the defendant's childhood and cognitive disorders were not true mitigation, but excuses. In this context, it is clear that there was no attempt to foreclose Davis from raising these issues. Rather, the argument was that the jury should give them little weight.

Moreover, there is no indication that any of the foregoing comments were flagrant or ill intentioned, or that they could not have been cured by a jury instruction. In *Gregory*, 158 Wn.2d at 864-67, we held it was flagrant, ill-intentioned prosecutor misconduct to comment on prison life when comments "blatantly violated" the trial court's order excluding such evidence.[22] Here, the deputy prosecutor's comments did

[22]Neeb, the prosecutor found to have committed the misconduct in *Gregory*, was also a prosecutor in Davis's case. The defense writes that "prosecutor Neeb holds the distinction of the only Washington prosecutor to commit misconduct resulting in reversal of a death sentence" and suggests this is relevant to a finding of flagrance and

not violate any of the trial court's evidentiary rulings and defense counsel did not indicate in any objections that the comments were inappropriate. To the extent they were, it is unclear why a limiting instruction could not have cured any damage.

The prosecutor's imagined dialogue between Couch and Davis during her rape and murder borders on improper. "In closing argument a prosecuting attorney has wide latitude in drawing and expressing reasonable inferences from the evidence." *Gentry*, 125 Wn.2d at 641. While it is reasonable to infer that Couch would have resisted Davis's assault, inventing actual dialogue stretches the idea of a reasonable inference to near its breaking point. However, because Davis did not object to this argument, the trial court did not have an opportunity to stop the prosecutor. As noted, reversal in such instances is warranted only if the prosecutor's remarks were flagrant or ill intentioned. The context of the argument indicates that they were not. The deputy prosecutor began his re-creation of the crime by explaining that the jury should look beyond the sterilized, after-the-fact evidence to imagine the actual crime and actual pain:

> [D]uring this trial you saw a videotape of the crime scene as it was found. You saw photographs of the crime scene . . . . [A]ll of that was done in a clinical setting. It is a controlled environment here. And, in fact, the videotape, the pictures, they're kind of like silent movies. What they don't really give you is what happened between the defendant and Mrs. Couch in the early morning hours of January 25th, 1997.

RP (May 15, 2007) at 3535. As he went on to describe the crime, he often prefaced

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ill intention. Reply Br. of Appellant at 38. This ad hominem attack against Neeb is inappropriate and irrelevant. The misconduct warranting reversal in *Gregory* is entirely different from the alleged misconduct in this case. *See Gregory*, 158 Wn.2d at 866.

Couch's imagined comments with qualifying language, such as "[m]aybe he told her" or "you can be sure that." RP (May 15, 2007) at 3538, 3536, 3537. While the better practice would be to not put words in Couch's mouth at all, it was the prosecutor's responsibility to aid the jury in comprehending the brutality of the crime. Given the argument's context, the imagined dialogue was not so flagrant or ill intentioned that reversal is warranted in the absence of an objection.

The only remaining comment that could be considered improper is the implication that Couch's vagina was scrubbed before death. Davis does not dispute that the evidence showed that he scrubbed Couch's vagina; he argues only that it was inconclusive whether the scrubbing occurred while she was alive. That being the case, we reject the suggestion that Davis was prejudiced in any way by this comment.

"If not now, then when? And, if not Cecil Davis, then who?"

In asking the jury to return a death penalty, the prosecutors asked the jurors during the opening statement and closing argument, "If not now, then when? And, if not Cecil Davis, then who[]?" RP (May 15, 2007) at 3495; RP (Apr. 27, 2007) at 2364. In both instances, the defense objected. Davis asserts that this question improperly appealed to emotion and argued facts not in evidence by implying that Davis's crime was worse than other aggravated murders.

In *Gregory*, a prosecutor made nearly identical arguments for imposing the death penalty when he asked without objection, "'[i]f not now, then when? And if not Allen Gregory, then who[]?'" and referred to the defendant as "'the worst of the worst.'" *Gregory*, 158 Wn.2d at 856 (alteration in original) (quoting MRP at 7717), 857. While we did not directly address the "if not now, then when?" question, we held that the "worst of the worst" comment did not violate due process or constitute prosecutor misconduct. *Id.*

Similarly, the prosecutors here properly argued that the death penalty was appropriate in Davis's particular case. Both times they asked, "[I]f not now, then when?"; it was in the context of arguing that the death penalty was appropriate given the circumstances of the crime and Davis's lengthy criminal history. The prosecutors never mentioned any other aggravated murders. Davis has not met his burden of showing impropriety, much less flagrance or ill intention.

Comments on remorse

The deputy prosecutor listed several actions of Davis's after the crime, asking, "Are those the actions of somebody who was remorseful?" RP (May 15, 2007) at 3569. Specifically, he noted that Davis stole Couch's wedding ring, money from her purse, and groceries from her kitchen; left her in the bathtub with her vagina exposed and rubbed her vagina with household cleanser and an abrasive pad to cover up the crime; said "'[t]hat bitch is next'" about a neighbor who was talking to police and pointing at his home; and told another inmate that he may have killed the "fucking old bitch," but he did not rape her. *Id*. at 3570. Each time the prosecutor asked if these actions showed remorse, the defense objected.

Davis argues that these comments constitute improper commentary on his right to remain silent because evidence of remorse could have come only from Davis's testimony. This argument is without merit. Davis gives no explanation for why only words, and not actions, could show remorse, and common sense suggests the opposite. It is a well settled principle of criminal law that a person's state of mind may be inferred from his or her actions. *See* 1 Wayne R. LaFave, Substantive Criminal Law § 5.2(f) at 357 (2d ed. 2003).[23] The fact that Davis burglarized Couch's home after

[23]LaFave writes:

"It is not always easy to prove at a later date the state of a man's mind at that particular earlier moment . . . . He does not often contemporaneously speak or write out his thoughts for others to hear or read. He will not generally admit later to having the intention which the crime requires. So of course his thoughts must be gathered from his words (if any) and actions in the light of all the surrounding circumstances. Naturally, what he does and what foreseeably results from his deeds have a bearing on

raping and murdering her, for example, could logically lead the jury to infer that he was not focused on "'a gnawing distress arising from a sense of guilt for past wrongs'" but, rather, on an attempt to profit from his crime. Appellant's Opening Br. at 100 (quoting Webster's Third New International Dictionary 1921 (1993)). Many people other than Davis could, and did, testify to his acts after the crime. The prosecutor's question specifically directed the jury to consider whether Davis's "actions" showed remorse, not whether his words did. His failure to testify was never mentioned and was not implicated.

Cumulative error

Davis argues that even if no single comment of the prosecutors denied him a fair trial, the cumulative effect of the comments did. Davis has established that only two remarks were improper: the invented dialogue between Couch and Davis and the implication that Davis scrubbed Couch's vagina while she was alive. Since the latter comment is insignificant, as explained above, it adds little or nothing to the prejudice caused by the invented dialogue. Because the prejudice caused by the invented dialogue was tempered by its context, and because the impropriety was not flagrant or ill-intentioned, it does not warrant reversal.

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what he may have had in his mind." 1 LaFave, *supra*, § 5.2(f) at 357.

7. Does Davis's sentence violate the Eighth Amendment to the United States Constitution and article I, section 14 of the Washington Constitution?

Citing *Furman v. Georgia,* 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), Davis contends that Washington's death penalty violates the prohibition in the Eighth Amendment to the United States Constitution against "cruel and unusual punishment[]." Davis argues in support of this contention that the death penalty is inflicted arbitrarily on some defendants but not others. He also asserts that the death penalty, as applied to him, violates article I, section 14 of the Washington Constitution under the four factors set forth in *State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980).[24] Large parts of these arguments were stricken pursuant to previous orders of this court, and, thus, we address each argument in its stricken form.

Federal constitutional claim

Without the stricken appendices, little remains of Davis's federal constitutional challenge. What is left is an argument that Washington's death penalty violates the Eighth Amendment under *Furman* because "many of this state's most prolific killers are spared." Appellant's Opening Br. at 111. We recently rejected this argument in *State v. Cross,* 156 Wn.2d 580, 623-24, 132 P.3d 80 (2006), where we concluded that *Furman*'s prohibition against the arbitrary and capricious application of the death penalty was satisfied by the eight protections set forth in Washington's special sentencing proceeding statutes, chapter 10.95 RCW. We again rejected the argument

[24]Article I, section 14 states that "[e]xcessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted."

in *Yates,* 161 Wn.2d at 792. Today, we reaffirm the holding of *Cross* and *Yates* that Washington's death penalty does not violate the Eighth Amendment.

State constitutional claim

At trial, Davis brought two motions to dismiss arguing that the death penalty was unconstitutional. His discussion of the Washington Constitution was limited to the following paragraphs in one of the motions[25]:

> Just as the Eighth Amendment to the federal constitution prohibits cruel and unusual punishment, [a]rticle I, section 14 of the Washington [C]onstitution prohibits 'cruel punishment.' In fact, the state constitutional prohibition is broader than its federal counterpart. *State v. Manussier*, 129 [Wn].2d 652, 921 P.2d 473 (1996).
> The standards of decency governing capital jurisprudence under our state constitution have evolved to prohibit the execution of an individual convicted of a single-victim murder. Because Mr. Davis falls into this category, this [c]ourt should dismiss the death penalty.

CP at 714-15. The balance of the motion was based on federal law and uncited statistics about the death penalty's imposition. The trial court's order denying that motion did not mention article I, section 14.

On appeal, Davis has developed a full-fledged article I, section 14 challenge based on the four factors in *Fain*, 94 Wn.2d 387. He supports this argument in part by statistics and data in appendices that we have stricken. Significantly, Davis has not assigned error to any of the findings or conclusions in the trial court's ruling denying his motion to dismiss.

[25]While the motion to dismiss also included the subheading "Relevant Sate [sic] Constitutional Considerations," that section did not analyze Washington constitutional law, but rather the execution trends in the country and in Washington State. CP at 719.

The State argues that Davis's state constitutional claim is inadequately preserved for review under RAP 2.5. RAP 2.5(a) states that an appellate court "may refuse to review any claim of error which was not raised in the trial court." The purpose of this rule is to give the trial court a chance to correct the error and give the opposing party a chance to respond. 2A Karl B. Tegland, Washington Practice: Rules Practice RAP 2.5 author's cmt. 1, at 233 (7th ed. 2011).

Notwithstanding the general rule, a party may raise a "manifest error affecting a constitutional right" for the first time on appeal. RAP 2.5(a). To be manifest, an error must result in actual prejudice, that is, the asserted error must have had practical and identifiable consequences in the trial of the case. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) (quoting *State v. Kirkman,* 159 Wn.2d 918, 935, 155 P.3d 125 (2007)). "[T]o determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error." *Id.* at 100. If the trial court could not have foreseen the potential error or the record on appeal does not contain sufficient facts to review the claim, the alleged error is not manifest.

We decline to review Davis's state constitutional argument because it is inadequately preserved under RAP 2.5. Davis's cursory discussion of article I, section 14 in his motion to dismiss is inadequate to raise the claim for purposes of RAP 2.5. Important to our decision is the fact that Davis's motion to dismiss did not mention *Fain*, the case around which Davis's argument here is based. Davis appears to concede that

the issue was not raised because he does not assign error to the trial court's denial of his motion and he responds to the State's preservation argument only by arguing that the claim is manifest constitutional error, not by arguing that the error was raised at trial.

The claimed error is not manifest because the record is insufficient to review it. The statistics in Davis's motion to dismiss were not supported by any citations or exhibits, and Davis did not attempt to rely on the motion to dismiss in his brief to this court. Rather, he attached new data in appendices, which we subsequently struck. The State did not present its own, competing data, arguing that it should have had a chance to do so at the trial court level. See Br. of Resp't at 90 n.17 and accompanying text. Thus, we have a severe lack of information on the death penalty's implementation, which makes it difficult for us to perform any meaningful analysis of portions of Davis's claim, such as whether capital punishment serves the legislative goal of deterrence or what punishment Davis would receive in other jurisdictions for the same offense. At the trial court level, this lack of information meant the court could not have foreseen and corrected the error, and the State lacked sufficient notice to properly argue the issue.

8. Should Davis's sentence be reversed due to cumulative error?

Davis contends that cumulative error denied him a fair sentencing. The accumulation of errors may deny the defendant a fair trial and therefore warrant reversal even where each error standing alone would not. *State v. Coe*, 101 Wn.2d

772, 789, 684 P.2d 668 (1984); *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963). Here, few errors occurred, and those that did were not so egregious or unduly prejudicial that they denied Davis a fair trial. "'[A] defendant is entitled to a fair trial but not a perfect one.'" *Brown v. United States*, 411 U.S. 223, 231, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973) (alteration in original) (quoting *Bruton v. United States*, 391 U.S. 123, 135, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968)). Reversal due to the accumulation of errors discussed above is unwarranted.

9. Should Davis's death sentence be invalidated pursuant to the provisions of RCW 10.95.130?

RCW 10.95.130 requires that in addition to any appeal raised by the defendant, the Supreme Court must determine whether (1) sufficient evidence justified the jury's finding that there were not sufficient mitigating circumstances to merit leniency; (2) the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant; (3) the death sentence was brought about through passion or prejudice; and (4) the defendant has an intellectual disability.[26]

Sufficiency of the evidence

The first statutory question we must consider is whether sufficient evidence justifies the jury's finding that, considering Davis's crime, there were not sufficient

[26]RCW 10.95.030(2)(a) defines "intellectual disability" as, among other characteristics, requiring an IQ of 70 or below. The term "intellectual disability" replaced the term "mentally retarded," which was used until 2010. Laws of 2010, ch. 94, § 3. The purpose of the change in terminology was to use respectful language but not to change the substantive law. RCW 44.04.280(4).

mitigating circumstances to merit leniency. RCW 10.95.130(2)(a), .060(4). If we make a negative determination as to that question, the sentence of death shall be invalidated. RCW 10.95.140(1)(a). The test as to the sufficiency of the evidence is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found sufficient evidence to justify that conclusion beyond a reasonable doubt.'" *Yates*, 161 Wn.2d at 786 (quoting *State v. Brown,* 132 Wn.2d 529, 551, 940 P.2d 546 (1997)).

We upheld the evidence as sufficient in Davis's first sentencing hearing, concluding that a rational jury could find that Davis did not merit leniency when he presented mitigating evidence of a difficult childhood and low intelligence, but the crime was brutal and the victim's family testified to its lasting, traumatic impact. Although the evidence presented at Davis's second sentencing was largely the same, Davis now argues that it is insufficient to support the jury's verdict because his mental health declined between the two proceedings. Specifically, Davis's IQ declined from 81 at the first sentencing to 74, as measured by the State's expert, at the second sentencing. *See Davis*, 141 Wn.2d at 877; RP (May 10, 2007) at 3368. Additionally, Davis's diagnoses changed. At the first sentencing, experts opined that Davis suffered from a learning disability, impaired neuropsychological functioning, and antisocial, borderline, and "schizotypal personality disorders," while at the second sentencing, experts diagnosed him with a cognitive disorder not otherwise specified and major depression with psychotic features. *Davis*, 141 Wn.2d at 877; RP (May 9, 2007) at 3256. Finally,

evidence of normal EEG test results was introduced at the first sentencing, while an EEG that showed slowing and disorganization in Davis's brain was introduced at the second sentencing. *Davis*, 141 Wn.2d at 877; RP (May 9, 2007) at 3216-17.

The evidence at Davis's second sentencing hearing, viewed in the light most favorable to the prosecution, is again sufficient to uphold the jury's finding that leniency was not merited. Despite the decline in Davis's mental health, no mental health professional opined that Davis was mentally retarded. Moreover, significant expert testimony tended to show that Davis's diminished mental capacity did not cause him to commit the crime. *E.g.,* RP (May 9, 2007) at 3291-92 (defense expert testimony that auditory hallucinations did not tell Davis to kill other people and that major depression did not cause Davis to commit the crime). The jury could have rationally determined that given the calculated, heinous nature of the crime, mental slowness and a difficult childhood did not warrant leniency.

Proportionality

The second question we must consider in our mandatory statutory review is whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." RCW 10.95.130(2)(b). If we answer this question in the affirmative, the sentence of death must be invalidated. RCW 10.95.140(1)(b). "'[S]imilar cases'" is defined as "cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965, in which the judge or jury considered the imposition of capital punishment regardless of whether

it was imposed or executed, and cases in which reports have been filed with the supreme court under RCW 10.95.120." RCW 10.95.130(2)(b). In turn, RCW 10.95.120 requires trial judges to submit reports with information on the defendant, the victim, and the crime in all cases where the defendant is convicted of aggravated first degree murder. Accordingly, the statute instructs us to compare Davis's death sentence to the penalty imposed in all cases of aggravated first degree murder, regardless of whether the prosecutor pursued the death penalty or whether the fact finder returned a sentence of death or life imprisonment. We have described this review as comparing the case at bar to all "death eligible cases." *Cross,* 156 Wn.2d at 630.

In *Cross*, we explained that our goal in proportionality review is to ensure that the death penalty's imposition is not "freakish, wanton, or random[] and is not based on race or other suspect classifications." *Id*. We noted there that we must consider at least (1) the nature of the crime, (2) the aggravating circumstances, (3) the defendant's criminal history, and (4) the defendant's personal history, as well as any additional substantive challenges to the proportionality of the sentence. *Id.* at 630-31; *see also Pirtle*, 127 Wn.2d at 686.

After evaluating the four required factors, a five-justice majority concluded that the death penalty was proportional for Cross, a man who fatally stabbed his wife and two teenage stepdaughters and held his 13-year-old stepdaughter at knife point for hours. Regarding the nature of the crime, we observed that, like in other death penalty

cases, Cross's murders exhibited a "marked level of cruelty" and "'involv[ed] substantial conscious suffering of the victim.'" *Cross*, 156 Wn.2d at 632 (internal quotation marks omitted) (quoting *State v. Elledge*, 144 Wn.2d 62, 81, 26 P.3d 271 (2001)). We concluded that "[w]e cannot say the prosecutor's decision to prosecute, and the jury's decision to sentence, were disproportionate based on the nature of the crime." *Id.* The single aggravating factor, that the crime involved the murder of multiple victims as part of a common scheme or plan, did not weigh for or against proportionality. Cross had a single prior conviction, leading us to conclude that "[w]e cannot say, based on this, that the death penalty is disproportionate." *Id*. at 633. Similarly, we concluded that Cross's abusive childhood and personality disorders, which did not rise to the level of destroying competence, "d[id] not necessarily render a death penalty disproportionate." *Id*. at 634.

In *Yates*, we closely followed the reasoning of *Cross* and upheld the death sentence against a proportionality challenge. The record showed that the defendant, Yates, murdered two women by shooting them and encasing their heads in plastic bags. We noted the defendant's marked cruelty and one victim's conscious suffering; two aggravating factors of common scheme or plan and robbery; extensive criminal history, including 13 first degree murder convictions; and lack of a troubled upbringing or other mitigating circumstances. *Yates*, 161 Wn.2d at 789-91.

In Davis's first appeal, we said regarding the nature of the crime that "'[a] brutal murder involving substantial conscious suffering of the victim makes the murderer more

deserving of the death penalty.'" *Davis*, 141 Wn.2d at 882 (quoting *Stenson*, 132 Wn.2d at 759); *Cross*, 156 Wn.2d at 632; *see also Yates,* 161 Wn.2d at 789 (discussing the victim's conscious suffering). Today, the same can be said about the brutal, cruel nature of Davis's crime and Couch's substantial conscious suffering. As we have observed above, Davis broke down the door of a 65-year-old woman's home, raped her to the point where her vagina ripped, strangled her, and left her to asphyxiate with chemical-soaked rags around her head in a bathtub filled with blood and feces. Her disabled husband was downstairs, unable to resist or react. After committing this act of violence, Davis rifled through Couch's purse, and took items from her refrigerator and cigarettes. He also took the wedding ring off her hand and then offered to sell it to his mother.

Davis argues that the nature of this crime compared to similar cases should be evaluated differently than in 2000 because since then, this court has affirmed only three death sentences: one where the defendant requested the death penalty and two in which there were multiple victims. Appellant's Opening Br. at 144 (citing *Elledge*, 144 Wn.2d at 69-79; *Cross*, 156 Wn.2d at 592; *Yates*, 161 Wn.2d at 728-32). He argues, additionally, that it is freakish and wanton to impose the death penalty on him when many others who killed multiple victims, including Gary Ridgway with 48 murders, were given life imprisonment.

We have upheld death sentences for other defendants based on the aggravated murder of a single victim. *Elledge*, 144 Wn.2d 62; *Brown*, 132 Wn.2d 529; *Gentry*, 125

Wn.2d 570. In *Yates*, we held that the small number of victims (two) did not make the nature of the crime weigh toward finding the death penalty disproportionate when the defendant showed cruelty and at least one victim consciously suffered. Moreover, while we recognize that quantifying factors may be helpful in a proportionality review, we reject the premise that proportionality review is ultimately a "statistical task." *Pirtle*, 127 Wn.2d at 687. To make number of victims a determinative factor in whether the death penalty was proportionate would fail to capture the significance of Couch's pain and degradation, and Davis's callous indifference.

In both *Cross* and *Yates*, we directly addressed the fact that prosecutors did not seek the death penalty for Gary Ridgway, convicted of 48 murders, and found that it did not invalidate the death penalty in those cases on a disproportionate basis. In *Yates*, we wrote:

> The effect of the Ridgway plea agreement on this court's proportionality review was an issue squarely before the court in *Cross.* There, the majority rejected the view that one prosecutor's discretionary decision could render chapter 10.95 RCW unconstitutional: 'Ridgway's abhorrent killings, standing alone, do not render the death penalty unconstitutional or disproportionate. Our law is not so fragile.'

Yates, 161 Wn.2d at 793 (quoting *Cross*, 156 Wn.2d at 624). Nothing about Ridgway's case that is relevant to proportionality has changed since we came to this conclusion four years ago. Under *Cross* and *Yates*, Ridgway's sentence remains an isolated incident that does not bear on whether imposition of a sentence of death in Davis's case is excessive or disproportionate.

Turning to aggravating factors, the jury in the guilt phase of Davis's trial found three such factors: the murder was committed in the course of or in furtherance of robbery, rape, and burglary. *Davis*, 141 Wn.2d at 882; *see also* CP at 1195. The jury at Davis's second penalty proceeding knew of these aggravators. *E.g.*, CP at 1161-62; RP (May 15, 2007) at 3487-88. In our opinion following Davis's appeal from his first death sentence, we indicated that three aggravators weighed in favor of proportionality because other defendants had been sentenced to death where only two or one aggravating factors were present. *Davis*, 141 Wn.2d at 883 n.449 (listing cases); *see also State v. Woods,* 143 Wn.2d 561, 617, 23 P.3d 1046 (2001) (three or more aggravating factors were present in only 21 percent of death eligible cases in 2001). This observation has strengthened with time, as the three defendants whose death sentences have been upheld since Davis's first appeal were all found to have less than three aggravators. *Yates*, 161 Wn.2d at 789-90 (two aggravators); *Cross*, 156 Wn.2d at 633 (one aggravator); *Elledge*, 144 Wn.2d at 81 (one aggravator).

The nature of the aggravating circumstances, as well as the number, is important to consider. *Cross*, 156 Wn.2d at 633. It is difficult to weigh the nature of aggravating factors because they are, by definition, facts that make a murder particularly reprehensible. But it is safe to say that nothing about the nature of this rape, robbery, or burglary makes the death penalty disproportionate. The rape was particularly brutal, causing serious internal damage to Couch. The robbery of Couch's wedding band is particularly offensive because Davis had the callousness to look at her wounded or

dead body and think of what more he could take, and because the object he took symbolizes an institution and commitment the courts have long revered and protected. *See, e.g., Loving v. Virginia,* 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."). And the burglary of a few cheap items, like meat and cigarettes, suggests that the true purpose of Davis's crime was the harm inflicted rather than the goods gained.

Finally, Davis's extensive criminal history supports the proportionality of his sentence even more than it did in 2000. When Davis was originally sentenced to death, the jury learned that Davis had the following convictions:

> (1) robbery in the second degree in 1986, (2) perjury in the second degree in 1986, (3) assault in the fourth degree in 1988, (4) assault in the second degree in 1990, (5) criminal trespass in the first degree in 1990, (6) driving without a valid operator's license in 1992, (7) driving without a valid operator's license in 1993, (8) theft in the third degree in 1992, and (9) violation of a domestic violence pretrial no-contact order in 1995.

Davis, 141 Wn.2d at 883. We observed that this criminal history was "comparatively more extensive than that of other appellants who received the death penalty." *Id*.

In Davis's second sentencing hearing, the jury heard the same criminal history, plus an additional conviction of intentional murder in the second degree that was obtained in 2006. This additional murder conviction is significant because in *Yates*, we recognized that "Yates's prior murder convictions place him in a unique category, since among those defendants included in the trial judge reports, only 13[[27]] had a prior

[27]Our review causes us to believe that this number should be 12.

conviction for murder or manslaughter." *Yates*, 161 Wn.2d at 790. It does not appear that this statistic has materially changed since *Yates*. Thus, Davis, like Yates, is in a special category of repeat murderers. Along with his extensive criminal history, this supports a finding of proportionality.

Finally, the personal history presented at Davis's second sentencing was largely the same as that presented in his first sentencing: a difficult childhood, low intelligence, and personality disorders. As explained in this court's analysis of sufficiency of the evidence, Davis's decline in mental health since 2000 does not change the fact that he is not intellectually disabled and there is no indication that mental illness caused him to rape, rob, burglarize, and murder Couch. None of the mitigating factors now renders the death penalty disproportionate.

The dissent opines that the imposition of the death penalty in the instant case is "'excessive or disproportionate'" in comparison with the "dozens of life sentences imposed for aggravated murders similarly brutal to the one Cecil Emile Davis committed," and advocates remanding the case "for imposition of a sentence of life imprisonment without possibility of parole." Dissent at 1 (quoting RCW 10.95.130(2)(b)). Although the dissent purports to limit its reach to rejecting Davis's death sentence, the opinion strikes us as nothing less than a sweeping condemnation of Washington's death penalty regime, the dissent saying, "I cannot escape the truth about Washington's death penalty." *Id*. at 19. "One could better predict whether the death penalty will be imposed on Washington's most brutal murderers by flipping a coin

than by evaluating the crime and the defendant." *Id*.

This denunciation of the death penalty's alleged "randomness" revives the proportionality challenge this court rejected in *Cross*, 156 Wn.2d 580, a decision the dissent mentions only in a footnote on an unrelated issue.[28] Indeed, its conclusion that "[o]ur system of imposing the death penalty defies rationality," dissent at 19, is highly reminiscent of the statement in the dissent in *Cross* that our proportionality review "defies rational explanation," and that the death penalty is "like lightning, randomly striking some defendants and not others." *Cross*, 156 Wn.2d at 652 (C. Johnson, J., dissenting).

The dissent embraces the standard expressed in a number of our past decisions that ""our duty"" under RCW 10.95.130(2)(b) is to ensure ""that no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed *generally* and not wantonly and freakishly imposed."" Dissent at 3 (quoting *State v. Harris*, 106 Wn.2d 784, 798, 725 P.2d 975 (1986) (quoting *Moore v. State*, 233 Ga. 861, 213 S.E.2d 829 (1975)) and citing *Brown*, 132 Wn.2d at 555; *State v. Benn*, 120 Wn.2d 631, 679, 845 P.2d 289 (1993)). Unfortunately, the dissent disregards the cautionary language contained in many of those same opinions that "[m]athematical precision is unworkable and unnecessary," *Brown*, 132 Wn.2d at 555 (footnote omitted), and that crimes "'cannot be matched up like so many points on a graph.'" *Benn*, 120 Wn.2d at 680 (quoting *Lord*, 117 Wn.2d at 910).

[28]The dissent also fails to acknowledge our opinion in *Yates*, 161 Wn.2d 714, reaffirming *Cross*.

In its effort to show that the "death penalty is not imposed generally in similar cases," dissent at 3, the dissent proceeds to list more than 40 murderers who received a sentence of life in prison instead of a death sentence for aggravated murders that it considers comparable to Davis's vicious slaying of Yoshiko Couch. *See id*. at 4-8. The dissent then observes that, in contrast, "only 13 death sentences other than Davis's have been imposed for murders involving rape or sexual assault." *Id*. at 8. Since more murderers have "escaped death for crimes comparable to those that support death sentences," the dissent concludes that "[c]onsidering the crime and the defendant, it is impossible to predict whether a defendant convicted of a brutal aggravated murder will be sentenced to life in prison or death." *Id*. at 3-4.

Contrary to the dissent's assertion, these "dozens of life sentences" do not prove that Davis's death sentence is disproportionate, and they certainly do not show that Washington's system of imposing the death penalty "defies rationality." *Id*. at 1, 19. RCW 10.95.130(2)(b) directs courts to consider "both the crime *and the defendant*." (Emphasis added.) In support of its position, the dissent has lined up dozens of gruesome aggravated murders that it suggests are similar to Cecil Davis's crime in that they involved rape or sexual assault; but while the dissent has considered the nature of the crime in compiling its list, it appears to us that the opinion does not give adequate consideration to the defendants and other relevant factors.[29] This is a significant flaw

[29]This is apparent from the start. The dissent leads off with Mario Ortiz, who had an IQ of 49 and had been enrolled "in special education" before he dropped out of school. TR 1, at 2. Ortiz's IQ placed him "in the low mild or high moderate range of mental retardation." *Id.* at 3. Unlike Cecil Davis, Ortiz also had no prior convictions.

in the dissent's reasoning because we have said in prior cases that "'[s]imply comparing numbers of victims or other aggravating factors may superficially make two cases appear similar, where in fact there are mitigating circumstances in one case to explain either a jury's verdict not to impose the death penalty or a prosecutor's decision not to seek it.'" *Lord*, 117 Wn.2d at 910 (quoting *In re Pers. Restraint of Jeffries*, 114 Wn.2d 485, 490, 789 P.2d 731 (1990)). The dissent might well have excluded many of the cases on its list based on a consideration of mitigating evidence, but it postpones its consideration of mitigating factors until after it has used its list of "dozens of life sentences" to suggest that Davis's death sentence is disproportionate. *See* dissent at 13-14.

One factor jurors are asked to consider is "[w]hether the defendant has or does not have a significant history, either as a juvenile or an adult, of prior criminal activity." RCW 10.95.070(1). While Cecil Davis had an extensive criminal record, including a prior intentional murder, at least nine of the defendants on the dissent's list of similar crimes had no criminal history.[3] Report of Trial Judge (TR) 1; TR 18; TR 50; TR 67; TR

The dissent, nevertheless, submits Ortiz's life sentence as evidence that "[o]ur system of imposing the death penalty defies rationality." Dissent at 19. Today, the law prohibits the execution of a person who "had an intellectual disability at the time the crime was committed," meaning "(i) Significantly subaverage general intellectual functioning; (ii) existing concurrently with deficits in adaptive behavior; and (iii) both significantly subaverage general intellectual functioning and deficits in adaptive behavior were manifested during the developmental period." RCW 10.95.030(2)(a); *see also Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) (executions of mentally retarded criminals "cruel and unusual punishments" prohibited by the Eighth Amendment to the United States Constitution).

[3]The space provided for criminal history on TR 124 at 3 states "unknown," on TR 150, at 3 "N/A," and on TR 166, at 3 "not known."

109; TR 172; TR 207; TR 236; TR 245. Although this may help to explain why prosecutors decided not to seek the death penalty in those cases,[31] or why the jury voted to spare the defendants' lives,[32] the dissent only discloses that fact belatedly. *See* dissent at 11-12.

The dissent, in our view, ignores other factors entirely. For instance, jurors are asked to consider "[w]hether the age of the defendant at the time of the crime calls for leniency." RCW 10.95.070(7). The dissent does not report that a number of the defendants on its list might have been spared the death penalty in part because of their age.[33] *See* TR 50 (16); TR 67 (16); TR 94 (20); TR 150 (19); TR 193 (20); TR 207 (18). Nor does the dissent reveal that there was credible evidence in several of these cases that "at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental disease or defect." RCW 10.95.070(6); *e.g.*, TR 8, at 3 (Clinical psychologist stated, "'The pattern of [IQ] scores is uniformly depressed and would indicate an individual of marginal cognitive capacity. The IQ which is reported here falls in the borderline range of mental retardation.'"); TR

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[31] *See*, *e.g.*, TR 207, at 6 ("The prosecutor did not seek death penalty because of the defendant's relative youth (19 years of age at time of incident) and complete lack of criminal history.").

[32] *See*, *e.g.*, TR 50, at 13 ("The jury would have had a very difficult decision . . . . The prosecutor withdrew his request [for the death penalty] based on [the report of the State's] psychologist. The defendant's youth, and lack of any prior record were factors.").

[33] Notably, the United States Supreme Court has held that the execution of individuals who were under 18 years of age at the time of their crime is prohibited by the Eighth Amendment. *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

252, at 3 & attach. A (defendant, whose competency was restored only after "an extensive period of hospitalization," had "a long history of mental illness, with several prior hospitalizations," and had been diagnosed with "schizo-affective disorder" by his psychiatrist, and "bipolar disorder, chronic severe with psychotic features" by both the defense expert and the evaluating psychologist from Western State Hospital); *see also* TR 1; TR 50; TR 56; TR 137; TR 185; TR 186.

Mitigating evidence is not the only reason a prosecutor might decide not to seek the death penalty. The strength of the State's case often influences that decision. For example, the trial judge's report regarding Martin Sanders states, "The plea agreement to recommend life without possibility of parole was due to the fact that the State felt there was a reasonable possibility of acquittal due to the circumstantial evidence available in the case." TR 81, at 6. The report goes on to reveal that the prosecutor consulted the victims' parents and the detectives in charge of the investigation. We learn from the report that the parents agreed to the plea because they did not want there to be "any chance" that the defendant might be set free by acquittal and "would have recommended life without the possibility of parole" at sentencing "in any event." *Id*. at 7. The detectives acknowledged the "appropriateness of this plea" provided the defendant offer a full confession and agree to speak with authorities about an unsolved murder in that jurisdiction. *Id*. Similarly, the report concerning Jack Spillman relates that "the prosecution's case did not include direct evidence of [the] defendant's involvement in the murders," although there was "strong circumstantial evidence," and

that "members of the victims' family spoke at the sentencing hearing in support of the life sentence and resolution of the case." TR 167, at 14.

Although these reports offer significant insight into the prosecutor's decision not to seek a death sentence or, in Spillman's case, to stipulate that it "could not prove beyond a reasonable doubt that there were not sufficient mitigating circumstances to merit leniency," TR 167, at 6, the dissent does not divulge this information. We merely learn from the dissent that "Martin Sanders raped two 14-year-old girls, beat one in the head with a tire jack, then strangled them," and that "Jack Spillman III repeatedly, fatally stabbed one woman and bludgeoned another, then sexually mutilated and eviscerated them." Dissent at 6-7. Unfortunately, a reader of the dissent would have no idea why the State did not seek the death penalty in those cases, the opinion essentially giving the reader no choice but to accept its suggestion that there was, in fact, *no* reason, and that the system simply doles out life and death on a random basis. The dissent claims that it "cannot escape" the conclusion that Washington's system of imposing the death penalty "defies rationality," but this conclusion is inescapable only because it fails to set forth adequately the reasons why persons convicted of crimes "similarly brutal to the one Cecil Emile Davis committed" received a sentence of life in prison instead of death.[34] *Id*. at 19, 1.

[34]We note that one of the defendants on the dissent's list was not even eligible for the death penalty, having murdered a young woman at a time when there was no valid death penalty statute on the books. *See* TR 100, at 7 ("death penalty was not a possibility"); *State v. Frampton*, 95 Wn.2d 469, 627 P.2d 922 (1981) (declaring death penalty statutes then in effect unconstitutional in light of *State v. Martin*, 94 Wn.2d 1, 614 P.2d 164 (1980), and *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L.

The dissent's failure to convey adequately the reason a defendant received a life sentence instead of death is on full display when it turns from statistical analysis to a comparison of Cecil Davis's case with that of Gerald Davis. The dissent is obviously struck by the facial similarity of the two cases: two defendants with the same name, roughly the same age, guilty of equally hideous murders committed in the same county only days apart, yet one was sentenced to death and the other to life in prison—the quintessence of randomness! Or is it? The dissent does concede that "small differences can be found between Cecil Davis's and Gerald Davis's cases," but, ignoring the possibility that "small differences" might legitimately matter, concludes that "without invading the jury's role, it is hard to fathom why Cecil Davis was sentenced to death while Gerald Davis was sentenced to life imprisonment." Dissent at 16.

The dissent's argument that the system is plagued by randomness would have greater force if the same prosecutor had looked at similar aggravated murders committed by similar defendants and decided to seek the death penalty in one case but not the other.[35] That did not happen, and so Gerald Davis's fate was decided by a jury

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Ed. 2d 138 (1968)).

[35]The prosecution sought the death penalty in nearly a third of the cases on the dissent's list. TR 2; TR 8; TR 36; TR 45; TR 50; TR 55; TR 56; TR 58; TR 100; TR 167; TR 184; TR 185; TR 186; TR 227. In one such case, 11 jurors voted in favor of a sentence of death, the lone dissenter informing his fellow jurors "that he had a strong philosophical opposition to the death penalty that he had not revealed during voir dire" and that "he would never vote to impose the death penalty." TR 45, at 13. In another case, the prosecution initially sought the death penalty, but the entire office was disqualified because the prosecutor had previously represented the defendant in an unrelated criminal matter. *See State v. Stenger*, 111 Wn.2d 516, 760 P.2d 357 (1988). The trial judge expressed his confidence that "had the trial proceeded in a normal manner, a jury may well have found death," but the "disqualification of the prosecutor

at a "[v]ery emotional" special sentencing proceeding where Gerald Davis's defense attorneys proffered evidence regarding his "[a]busive childhood, poverty, parental abandonment, deficits in executive mental functions, [and] drug abuse." TR 186, at 15, 7. Upon receipt of this evidence, 10 jurors found no mitigating circumstances. Two jurors, however, found that there were mitigating circumstances that warranted leniency. That is why Gerald Davis "escaped death." Dissent at 4.

The fact that the life versus death decision in Gerald Davis's case came down in the end to the votes of two jurors is apparently unsatisfactory to the dissent, which would seemingly prefer a more predictable system. It is worth remembering, given the overriding importance the dissent attaches to predictability, that there was a time when the people of Washington voted to make the death penalty mandatory for aggravated murder. *See* former RCW 9A.32.046 (1975) (Initiative 316, § 2). At that time, it would have been possible to predict a defendant's sentence with perfect accuracy, but this court, in accordance with the United States Supreme Court's decision in *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976), held that the mandatory imposition of the death penalty violated the Eight Amendment to the United States Constitution. *State v. Green*, 91 Wn.2d 431, 446-47, 588 P.2d 1370 (1979), *adhered to in part on recons.*, 94 Wn.2d 216, 616 P.2d 628 (1980). We said it was "'*essential* that the capital-sentencing decision allow for consideration of whatever

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by the State Supreme Court opinion gave rise to many significant legal problems to the special prosecutor." TR 55, at 14. The dissent does not reveal this information, instead expressing bewilderment that these defendants received life sentences.

mitigating circumstances may be relevant to either the particular offender or the particular offense.'" *Id*. at 445 (quoting *Roberts v. Louisiana*, 431 U.S. 633, 637, 97 S. Ct. 1993, 52 L. Ed. 2d 637 (1977)). As a consequence, Gerald Davis was given the opportunity to present mitigating evidence to a jury, and two jurors voted to spare his life. As long as juries are asked to make individualized determinations concerning the appropriateness of the death penalty, as they must under *Green*, sentences will undoubtedly turn on the "small differences" between cases that the dissent's approach barely registers.

This court has said that "[p]roportionality review is not an inquiry into sentencing percentage comparisons," *Benn*, 120 Wn.2d at 690, but percentages are what the dissent features. The results of its analysis are that "over three times as many defendants received life sentences for aggravated murders involving sexual assault as were sentenced to death," that the "disparity in favor of life sentences increases to more than four-to-one when we consider cases where rape was found to be an aggravating factor," and that defendants with a criminal record "were still almost two and one-half times more likely to be sentenced to life in prison than sentenced to death." Dissent at 15. These results are not surprising or troubling.[36] We say that

[36]In a prior decision, this court observed that "[o]f the 145 persons convicted of aggravated first degree murder, only forty-one faced a special sentencing proceeding," and of those, "only sixteen were sentenced to death." *Pirtle*, 127 Wn.2d at 685, 686. The fact that life sentences far outnumbered death sentences did not prompt this court to conclude that our system of imposing the death penalty defied rationality. On the contrary, we assumed that prosecutors and jurors had acted properly in considering mitigating evidence. *See id*.

because the current system is designed to favor life sentences, the jury at a special sentencing proceeding being asked, "'Having in mind the crime of which the defendant has been found guilty, are you convinced *beyond a reasonable doubt* that there are not sufficient mitigating circumstances to merit leniency?'" RCW 10.95.060(4) (emphasis added). The jury, moreover, must be unanimous in order to answer this question affirmatively, but not to answer negatively. *Id.* Thus, it takes only 1 juror with a reasonable doubt to bring about a life sentence, but 12 jurors to bring about a sentence of death.

The fact that more life sentences are imposed than death sentences does not prove that the system "defies rationality." Dissent at 19. In our view, it shows that the system is working as intended and that the different actors in the system are performing their assigned roles conscientiously—prosecutors in the exercise of discretion, jurors in considering mitigating evidence, and defense attorneys endeavoring to humanize defendants guilty of the most inhuman acts. While it is easy to imagine a system in which the death penalty is routinely sought and routinely imposed, that would not be a system superior to that extant in Washington and it would be inconsistent with the present values of our citizenry.

After endorsing the dissent's analysis of the death penalty's supposed "random and arbitrary nature," the justice specially concurring in dissent expresses his "deep concern that the death penalty might be much more predictable than we have recognized." Concurrence in dissent at 1. In this justice's view, the sentences that have been imposed in the last 30 years cannot be explained by aggravating and

mitigating circumstances or other proper considerations, but can be explained by "the race of the defendant." *Id*. The justice asserts that "[a] review of the reports of prosecutions for aggravated first degree murder quickly discloses that African-American defendants are more likely to receive the death penalty than Caucasian defendants," attributing this "lopsided record" to attitudes about race "so deeply buried in our individual and collective unconscious that it is difficult to evaluate their effect on our judgments or the judgments of others." *Id*. at 1, 7, 2. While we address the justice's assertions at some length hereafter, we feel constrained to note that the issue was not raised by the defendant, Davis, despite the fact that he is represented by very able counsel, and the State, understandably, has not addressed the issue in its brief.

We begin with the observation that the likelihood of a white defendant receiving the death penalty in Washington is practically the same as the likelihood of a black defendant receiving it: 8[37] of the 57 cases[38] (14 percent) involving an eligible black defendant resulted in a sentence of death, compared to 25[39] of the 184 cases[4] (14

[37]TR 29; TR 119; TR 135; TR 177; TR 180; TR 194; TR 216; TR 281.

[38]TR 12; TR 19; TR 24; TR 29; TR 33; TR 38; TR 77; TR 79; TR 83; TR 85, 85A; TR 88; TR 90; TR 91; TR 97, 97A; TR 102; TR 103; TR 105; TR 109; TR 110; TR 111; TR 119; TR 120; TR 126; TR 130; TR 131; TR 135; TR 138; TR 139; TR 141; TR 157; TR 166; TR 172; TR 177; TR 180; TR 185; TR 186; TR 187; TR 193; TR 194; TR 198; TR 216; TR 240; TR 248; TR 250; TR 252; TR 271; TR 272; TR 278; TR 280; TR 281; TR 289; TR 294; TR 296; TR 297; TR 306; TR 307; TR 309.

[39]TR 3; TR 7; TR 9; TR 15; TR 16A; TR 31; TR 39; TR 43; TR 47; TR 73; TR 75; TR 76; TR 125; TR 132; TR 140; TR 144; TR 154; TR 165; TR 175; TR 176; TR 181; TR 183; TR 220; TR 251; TR 303.

[4]TR 2; TR 3; TR 6; TR 7; TR 9; TR 10; TR 15; TR 16; TR 16A; TR 17; TR 18; TR

percent) involving an eligible[41] white defendant.[42] This court needs no convincing that "[w]e cannot ignore whether the defendant's race becomes a significant factor in imposing the death penalty." *Id*. at 2. However, our review of prosecutions for aggravated first degree murders does not reveal that black defendants "have in fact

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20; TR 21; TR 23; TR 25; TR 26; TR 27; TR 28; TR 30; TR 31; TR 32; TR 34; TR 34A; TR 35; TR 36; TR 37; TR 39; TR 40; TR 41; TR 42; TR 43; TR 44; TR 45; TR 46; TR 47; TR 48; TR 49; TR 50; TR 51; TR 52; TR 53; TR 54; TR 55; TR 56; TR 57; TR 58; TR 59; TR 60; TR 61; TR 62; TR 63; TR 64; TR 65; TR 66; TR 67; TR 68; TR 69; TR 73; TR 74; TR 75; TR 76; TR 78; TR 81; TR 84; TR 86; TR 87; TR 89; TR 92; TR 93; TR 94; TR 95; TR 96; TR 98; TR 99; TR 104; TR 106; TR 107; TR 108; TR 115; TR 116; TR 117; TR 118; TR 121; TR 122; TR 123; TR 124; TR 125; TR 127; TR 128; TR 129; TR 132; TR 133; TR 134; TR 136; TR 137; TR 140; TR 142; TR 144; TR 146; TR 148; TR 150; TR 151; TR 152; TR 153; TR 154; TR 155; TR 156; TR 159; TR 162; TR 163; TR 164; TR 165; TR 167; TR 168; TR 169; TR 173; TR 174; TR 175; TR 176; TR 178; TR 179; TR 181; TR 182; TR 183; TR 184; TR 190; TR 191; TR 192; TR 199; TR 200; TR 201; TR 202; TR 207; TR 213; TR 214; TR 215; TR 217; TR 218; TR 219; TR 220; TR 221; TR 225; TR 227; TR 231; TR 233; TR 234; TR 235; TR 236; TR 237; TR 238; TR 239; TR 242; TR 243; TR 245; TR 251; TR 253; TR 254; TR 255; TR 257; TR 258; TR 259; TR 260; TR 261; TR 262; TR 263; TR 264; TR 265; TR 268; TR 269; TR 275; TR 276; TR 277; TR 279; TR 283; TR 284; TR 287; TR 288; TR 291; TR 293; TR 295; TR 298; TR 302; TR 303; TR 308. This includes a number of cases in which the State decided not to seek the death penalty in a second trial or sentencing proceeding after a defendant's death sentence was overturned on appellate or collateral review. *See* TR 47, 259 (Brian Lord); TR 75, 263 (Gary Benn); TR 125, 200 (James Brett); TR 132, 262 (Blake Pirtle); TR 175, 277 (Richard Clark).

[41]We exclude TR 100, at 7 ("death penalty was not a possibility"). The defendant, Michael Hightower, raped and murdered a 19-year-old woman on May 2, 1981, less than a month after this court's decision in *Frampton* (April 16, 1981) holding the death penalty statutes then in effect unconstitutional, and 12 days before the effective date of Laws of 1981, ch. 138, amending those statutes.

[42]We count TR 9 (Charles Campbell), TR 42 (Kenneth Petersen), TR 60 (Susan Kroll), TR 181 (Henry Marshall), TR 258 (Barbara Opel), TR 261 (Donovan Allen), and TR 268 (Donald Durga) as white because their judges regarded them as white and indicated that no evidence of their ancestry was presented to the jury. *Compare* TR 9, at 13 ("Notwithstanding the trace of Hawaiian descent, I would regard Mr. Campbell as being of the white race."), *with* TR 8, at 13 ("There was evidence of the defendant's Native American background.").

been treated differently," *id.*, and it certainly does not show that the "sentence of death" in this case is "excessive or disproportionate to the penalty imposed in similar cases." RCW 10.95.130(2)(b).

This is not the first time that this court has considered the allegation that the death penalty is imposed in Washington on the basis of race.[43] In *Gentry*, 125 Wn.2d at 655, we said that

> there is no evidence that race was a motivating factor for the jury, and contrary to the Defendant's suggestion, a review of the first degree aggravated murder cases in Washington does not reveal a pattern of imposition of the death penalty based upon the race of the defendant or the victim.

The few statistics set forth in the concurrence in dissent do not convince us that our conclusion in *Gentry* was wrong or that the situation has since deteriorated.

The concurrence in dissent begins its analysis with the "73 aggravated first degree murder cases in which the prosecution sought the death penalty against African-Americans or Caucasians."[44] Concurrence in dissent at 2-3 (footnote omitted).

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[43]It is, however, the first time this court has addressed the issue when it was not raised by the petitioner or briefed by the parties. We do so in order to respond to the suggestion that we have allowed racial discrimination to "pervade the imposition of capital punishment in Washington" by allowing proportionality review to become an "'empty ritual.'" Concurrence in dissent at 12 (quoting *Benn*, 120 Wn.2d at 709 (Utter, J., dissenting)).

[44]TR 2; TR 3; TR 7; TR 9; TR 15; TR 16A; TR 20; TR 23; TR 25; TR 26; TR 29; TR 31; TR 34; TR 34A; TR 36; TR 39; TR 42; TR 43; TR 44; TR 45; TR 47; TR 48; TR 50; TR 51; TR 52; TR 53; TR 56; TR 58; TR 60; TR 62; TR 63; TR 64; TR 65; TR 66; TR 73; TR 75; TR 76; TR 77; TR 86; TR 88; TR 92; TR 93; TR 95; TR 119; TR 125; TR 132; TR 135; TR 140; TR 144; TR 154; TR 157; TR 164; TR 165; TR 167; TR 174; TR 175; TR 176; TR 177; TR 180; TR 181; TR 182; TR 183; TR 184; TR 185; TR 186; TR 190; TR 194; TR 216; TR 220; TR 227; TR 251; TR 258; TR 281; TR 303. The

Observing that 8 of the 13 black defendants were sentenced to death, compared to 24 of the 60 white defendants, it concludes that "African-Americans were much more likely than Caucasians to be sentenced to death (62 percent versus 40 percent)."[45] *Id*. at 4. The decision, however, to begin with the cases in which the prosecution sought the death penalty leads the concurrence in dissent to overlook the fact that the prosecution has done so far more often when the defendant was white than when the defendant was black, with the result that the pool of black defendants who faced a special sentencing proceeding is not only small but disproportionately small.

All told, the State has sought the death penalty in 61[46] of the 184 cases (33

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concurrence in dissent excludes TR 16A (Nedley Norman). We see no reason to do so. RCW 10.95.130(2)(b) defines "'similar cases'" as "cases reported in the Washington Reports . . . since January 1, 1965, in which the judge or jury considered the imposition of capital punishment regardless of whether it was imposed or executed, and cases in which reports have been filed with the supreme court under RCW 10.95.120." TR 16A qualifies, the case having been "reported in the Washington Reports . . . since January 1, 1965." *See Frampton*, 95 Wn.2d at 472 ("Nedley Norman, Jr., Howard Foren, Michael Robtoy, Floyd William Marr, and Morris Frampton are here on appeal from first degree murder convictions and sentences of death imposed after sentencing hearings held pursuant to RCW 10.94.020."). Thus, we include 74 cases in our analysis.

[45]Including TR 16A, it is 25 out of 61 white defendants (41 percent): TR 3; TR 7; TR 9; TR 15; TR 16A; TR 31; TR 39; TR 43; TR 47; TR 73; TR 75; TR 76; TR 125; TR 132; TR 140; TR 144; TR 154; TR 165; TR 175; TR 176; TR 181; TR 183; TR 220; TR 251; TR 303.

[46]TR 2; TR 3; TR 7; TR 9; TR 15; TR 16A; TR 20; TR 23; TR 25; TR 26; TR 31; TR 34; TR 34A; TR 36; TR 39; TR 42; TR 43; TR 44; TR 45; TR 47; TR 48; TR 50; TR 51; TR 52; TR 53; TR 56; TR 58; TR 60; TR 62; TR 63; TR 64; TR 65; TR 66; TR 73; TR 75; TR 76; TR 86; TR 92; TR 93; TR 95; TR 125; TR 132; TR 140; TR 144; TR 154; TR 164; TR 165; TR 167; TR 174; TR 175; TR 176; TR 181; TR 182; TR 183; TR 184; TR 190; TR 220; TR 227; TR 251; TR 258; TR 303.

percent) involving an eligible white defendant, but only 13[47] of the 57 cases (23 percent) involving an eligible black defendant. That fact alone should be sufficient to refute the notion that attitudes about race have led prosecutors to discriminate against black defendants in capital cases. Only by ignoring the large majority of black defendants who received a life sentence as a result of the prosecution's decision not to pursue the death penalty can it be said that black defendants have been "disproportionately sentenced to death." *Id*. at 6.

The concurrence in dissent fails to consider whether the "disproportionate number of African-Americans sentenced to death" at a special sentencing proceeding is related to the disproportionately low number of black defendants who actually faced such a proceeding.[48] *Id.* at 1. Given that nearly five times as many white defendants have faced a special sentencing proceeding, it is not surprising that a number of life sentences have resulted from circumstances unlike those in any of the 13 cases involving a black defendant. To take some of the most obvious examples, three white defendants received a life sentence after the prosecution stipulated that mitigating circumstances merited leniency. *See* TR 92; TR 167; TR 182.[49] In a case involving a

[47]TR 29; TR 77; TR 88; TR 119; TR 135; TR 157; TR 177; TR 180; TR 185; TR 186; TR 194; TR 216; TR 281.

[48]In criticizing our analysis of the results of special sentencing proceedings over time, the concurrence in dissent acknowledges that the number of black defendants who faced such a proceeding is "small," so small in fact "that a small adjustment in the time periods can give rise to wide variations." Concurrence in dissent at 6.

[49]*Cf.* TR 224 (prosecution stipulates that mitigating circumstances exist in a case involving a Mexican defendant with a sub-70 IQ who pleaded guilty to shooting a state patrol trooper).

16-year-old who shot and killed his family, the State withdrew its request for the death penalty based on the report of the State's own psychologist indicating that the defendant was "'highly disturbed.'" TR 50, at 3.[5] In another case, the prosecution ultimately recommended a life sentence. *See* TR 52.[51] The life sentences imposed in these cases obviously had nothing to do with the judge's or jurors' attitudes about race. Indeed, by stipulating that mitigating evidence merited leniency, the prosecution gave the fact finders no alternative. The 13 cases in which the prosecution sought the death penalty against a black defendant do not include any comparable situations.[52]

The concurrence in dissent also fails to consider the results of special sentencing proceedings over time. The reports filed under RCW 10.95.120 between 1981 and 1991 reveal that prosecutors sought the death penalty in only 4[53] of the 22

[5]The trial judge observed, "The jury would have had a very difficult decision as to whether or not death should be imposed. The prosecutor withdrew his request based on his psychologist. The defendant's youth, and lack of any prior record were factors." TR 50, at 13.

[51]Notably, the defendant was 18 and presented evidence of "extreme mental disturbance." TR 42, at 6. The trial judge remarked that "the sentence seemed appropriate to the crime, and the factors in mitigation. The sheriff, the prosecutor and the family of the victim were in agreement with the deputy prosecuting attorney's recommendation of life without possibility of release or parole." *Id*. at 13.

[52]There is also no case of juror nullification comparable to TR 45 (James Dykgraaf). TR 45, at 13 (The jury voted 11-1 for death, the "lone dissenting juror" indicating that "he had a strong philosophical opposition to the death penalty that he had not revealed during voir dire" and that "he would never vote to impose the death penalty.").

[53]TR 29; TR 77; TR 88; TR 119.

cases[54] (18 percent) involving an eligible black defendant, resulting in two death sentences (50 percent).[55] Meanwhile, prosecutors sought the death penalty in nearly half of the cases, 40[56] out of 82[57] (49 percent), involving an eligible white defendant, resulting in 12 death sentences (30 percent).[58] In the next 20 years, however, the State sought the death penalty in only 21[59] of the 102 cases[6] (21 percent) involving an

[54]TR 12; TR 19; TR 24; TR 29; TR 33; TR 38; TR 77; TR 79; TR 83; TR 85, 85A; TR 88; TR 90; TR 91; TR 97, 97A; TR 102; TR 103; TR 105; TR 109; TR 110; TR 111; TR 119; TR 120.

[55]TR 29; TR 119.

[56]TR 2; TR 3; TR 7; TR 9; TR 15; TR 16A; TR 20; TR 23; TR 25; TR 26; TR 31; TR 34; TR 34A; TR 36; TR 39; TR 42; TR 43; TR 44; TR 45; TR 47; TR 48; TR 50; TR 51; TR 52; TR 53; TR 56; TR 58; TR 60; TR 62; TR 63; TR 64; TR 65; TR 66; TR 73; TR 75; TR 76; TR 86; TR 92; TR 93; TR 95.

[57]TR 2; TR 3; TR 6; TR 7; TR 9; TR 10; TR 15; TR 16; TR 16A; TR 17; TR 18; TR 20; TR 21; TR 23; TR 25; TR 26; TR 27; TR 28; TR 30; TR 31; TR 32; TR 34; TR 34A; TR 35; TR 36; TR 37; TR 39; TR 40; TR 41; TR 42; TR 43; TR 44; TR 45; TR 46; TR 47; TR 48; TR 49; TR 50; TR 51; TR 52; TR 53; TR 54; TR 55; TR 56; TR 57; TR 58; TR 59; TR 60; TR 61; TR 62; TR 63; TR 64; TR 65; TR 66; TR 67; TR 68; TR 69; TR 73; TR 74; TR 75; TR 76; TR 78; TR 81; TR 84; TR 86; TR 87; TR 89; TR 92; TR 93; TR 94; TR 95; TR 96; TR 98; TR 99; TR 104; TR 106; TR 107; TR 108; TR 115; TR 116; TR 117; TR 118.

[58]TR 3; TR 7; TR 9; TR 15; TR 16A; TR 31; TR 39; TR 43; TR 47; TR 73; TR 75; TR 76.

[59]TR 125; TR 132; TR 140; TR 144; TR 154; TR 164; TR 165; TR 167; TR 174; TR 175; TR 176; TR 181; TR 182; TR 183; TR 184; TR 190; TR 220; TR 227; TR 251; TR 258; TR 303.

[6]TR 121; TR 122; TR 123; TR 124; TR 125; TR 127; TR 128; TR 129; TR 132; TR 133; TR 134; TR 136; TR 137; TR 140; TR 142; TR 144; TR 146; TR 148; TR 150; TR 151; TR 152; TR 153; TR 154; TR 155; TR 156; TR 159; TR 162; TR 163; TR 164; TR 165; TR 167; TR 168; TR 169; TR 173; TR 174; TR 175; TR 176; TR 178; TR 179; TR 181; TR 182; TR 183; TR 184; TR 190; TR 191; TR 192; TR 199; TR 200; TR 201; TR 202; TR 207; TR 213; TR 214; TR 215; TR 217; TR 218; TR 219; TR 220; TR 221;

eligible white defendant, resulting in 13 death sentences[61] (62 percent).[62] In comparison, the State sought the death penalty in 9[63] of the 35 cases[64] involving a black defendant (26 percent), resulting in 6 death sentences (67 percent),[65] two of which were imposed on Cecil Davis. Thus, for two decades, the percentage of white defendants sentenced to death at a special sentencing proceeding has been basically the same as the percentage of black defendants sentenced to death.[66] Furthermore, as

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TR 225; TR 227; TR 231; TR 233; TR 234; TR 235; TR 236; TR 237; TR 238; TR 239; TR 242; TR 243; TR 245; TR 251; TR 253; TR 254; TR 255; TR 257; TR 258; TR 259; TR 260; TR 261; TR 262; TR 263; TR 264; TR 265; TR 268; TR 269; TR 275; TR 276; TR 277; TR 279; TR 283; TR 284; TR 287; TR 288; TR 291; TR 293; TR 295; TR 298; TR 302; TR 303; TR 308.

[61]TR 125; TR 132; TR 140; TR 144; TR 154; TR 165; TR 175; TR 176; TR 181; TR 183; TR 220; TR 251; TR 303.

[62]Notably, the increase in the percentage of white defendants sentenced to death is offset by the sheer number of white defendants who faced a special sentencing proceeding between 1981 and 1991.

[63]TR 135; TR 157; TR 177; TR 180; TR 185; TR 186; TR 194; TR 216; TR 281.

[64]TR 126; TR 130; TR 131; TR 135; TR 138; TR 139; TR 141; TR 157; TR 166; TR 172; TR 177; TR 180; TR 185; TR 186; TR 187; TR 193; TR 194; TR 198; TR 216; TR 240; TR 248; TR 250; TR 252; TR 271; TR 272; TR 278; TR 280; TR 281; TR 289; TR 294; TR 296; TR 297; TR 306; TR 307; TR 309.

[65]TR 135; TR 177; TR 180; TR 194; TR 216; TR 281.

[66]The concurrence in dissent dismisses as "arbitrary" our comparison of "aggravated first degree murder cases [in] two time periods, 1981 to 1991 compared to 1991 to 2011." Concurrence in dissent at 6. This division is suggested by the fact that nearly two-thirds of the reported cases (40 out of 61) in which the prosecution sought the death penalty against a white defendant occurred in the first decade after the death penalty was reinstated. It is apparent that the State became much more selective in the succeeding decades, and, not surprisingly, the proportion of white defendants sentenced to death at special sentencing proceedings increased significantly. The point is that when the State seeks the death penalty against white and black

we have already observed, the overall percentage of black defendants sentenced to death is virtually identical to the percentage of white defendants sentenced to death (14 percent).[67] In our judgment, the record is not "lopsided," as the concurrence in dissent suggests. Concurrence in dissent at 7.

The concurrence in dissent states that "if the death penalty were color blind, one would expect to find that as a group, African-American defendants' crimes and past histories made them considerably more deserving of the death sentence than Caucasian defendants" but that "the trial reports contradict this expectation." *Id*. at 4. Our colleague claims, "When we consider *key statistics* for all African-Americans and Caucasians sentenced to death, it appears that African-American murder defendants as a group were no worse than Caucasian murder defendants." *Id*. (emphasis added). Mitigating evidence is certainly a "key statistic," perhaps *the* key statistic, jurors at a special sentencing proceeding being asked whether they are "'convinced beyond a reasonable doubt that there are not sufficient *mitigating circumstances* to merit leniency.'" RCW 10.95.060(4) (emphasis added). In that regard, it is important to note that "African-American murder defendants as a group" presented significantly fewer

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defendants in the same proportion, juries return verdicts of death in approximately the same percentage of cases.

[67]The concurrence in dissent says that this is a "false comparison" because it includes "defendants against whom the prosecution has not chosen to seek the death penalty." Concurrence in dissent at 5. We believe it is incorrect to disregard the large majority of black defendants convicted of aggravated first degree murder when evaluating the "danger that the death penalty might not be imposed in a fair, equal, or just manner." *Id*. at 6-7.

mitigating circumstances,[68] averaging 1.2,[69] compared to 1.7[7] for "Caucasian murder defendants." Concurrence in dissent at 4. Not surprisingly, those sentenced to death presented fewer still: as the concurrence in dissent admits, black defendants sentenced to death averaged only 0.63[71] mitigating circumstances, whereas white defendants sentenced to death averaged 1.6.[72] *Id*. at 4 n.9. Although this information

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[68]Reports filed under RCW 10.95.120(3) contain two questions regarding mitigating circumstances:

"(c) Was there, in the court's opinion, credible evidence of any mitigating circumstances as provided in Laws of 1981, ch. 138, § 7?. . . .

"(d) Was there evidence of mitigating circumstances, whether or not of a type listed in Laws of 1981, ch. 138, § 7, not described in answer to (3)(c) above?" *E.g.*, TR 29, at 6-7; *see* RCW 10.95.120(3)(c), (d). It is relatively simple to assign a numerical value to judges' answers to (3)(c). Answers to (3)(d) are more difficult to quantify. We have based our computation of mitigating circumstances on a database compiled by the dissent.

[69]Black defendants presented the following number of mitigating circumstances: TR 29 (0); TR 77 (5); TR 88 (2); TR 119 (1); TR 135 (3); TR 157 (1); TR 177 (0); TR 180 (0); TR 185 (2); TR 186 (1); TR 194 (1); TR 216 (0); TR 281 (0).

[7]White defendants presented the following number of mitigating circumstances: TR 2 (1); TR 3 (0); TR 7 (4); TR 9 (0); TR 15 (1); TR 16A (0); TR 20 (3); TR 23 (0); TR 25 (2); TR 26 (3); TR 31 (4); TR 34 (1); TR 36 (0); TR 39 (2); TR 42 (2); TR 43 (2); TR 44 (2); TR 45 (2); TR 47 (1); TR 48 (1); TR 50 (4); TR 51 (1); TR 52 (4); TR 53 (1); TR 56 (1); TR 58 (2); TR 60 (3); TR 62 (0); TR 63 (0); TR 64 (5); TR 65 (5); TR 66 (1); TR 73 (2); TR 75 (1); TR 76 (0); TR 86 (1); TR 92 (0); TR 93 (1); TR 95 (1); TR 125 (1); TR 132 (1); TR 140 (2); TR 144 (2); TR 154 (1); TR 164 (2); TR 165 (1); TR 167 (1); TR 174 (1); TR 175 (1); TR 176 (3); TR 181 (0); TR 182 (1); TR 183 (0); TR 184 (2); TR 190 (4); TR 220 (5); TR 227 (2); TR 251 (2); TR 258 (3); TR 303 (3).

[71]Black defendants sentenced to death presented the following number of mitigating circumstances: TR 29 (0); TR 119 (1); TR 135 (3); TR 177 (0); TR 180 (0); TR 194 (1); TR 216 (0); TR 281 (0).

[72]White defendants sentenced to death presented the following number of mitigating circumstances: TR 3 (0); TR 7 (4); TR 9 (0); TR 15 (1); TR 16A (0); TR 31 (4); TR 39 (2); TR 43 (2); TR 47 (1); TR 73 (2); TR 75 (1); TR 76 (0); TR 125 (1); TR 132 (1); TR 140 (2); TR 144 (2); TR 154 (1); TR 165 (1); TR 175 (1); TR 176 (3); TR

only finds a place in a footnote, it is exactly what "one would expect to find" if "the death penalty were color blind." *Id*. at 4.

The foregoing statistics suggest that mitigating circumstances, rather than "[a]ttitudes about race," explain the "unequal imposition of the death penalty when the jury is asked to decide death." *Id.* at 2, 5. They also suggest that jurors genuinely base their decisions on proof that mitigating evidence is insufficient to merit leniency. Except for 20-year-old Covell Thomas, none of the black defendants sentenced to death presented *any* "credible evidence of . . . mitigating circumstances as provided in RCW 10.95.070," and only a few offered some other "evidence of mitigating circumstances." RCW 10.95.120(3)(d), (c). The black defendants who received life sentences generally presented more mitigating evidence, and in some cases substantially more. *See*, *e.g.*, TR 77; TR 88; TR 185. Again, that is exactly what one would expect to find.[73]

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181 (0); TR 183 (0); TR 220 (5); TR 251 (2); TR 303 (3).

[73]The concurrence in dissent observes that "African-American defendants sentenced to death averaged fewer aggravating circumstances (2.0) than Caucasians (2.6)," referring to "Caucasian defendants sentenced to death." Concurrence in dissent at 4 & n.4. But if the point is to prove that the race of the defendant determines the sentence imposed, the relevant issue is not whether white defendants sentenced to *death* were "more deserving of the death sentence" than black defendants (we expect juries to return a verdict of death in more aggravated cases), but whether white defendants who received a *life* sentence were "more deserving of the death sentence" than black defendants. *Id.* at 4. In fact, white defendants who received a life sentence averaged fewer aggravating circumstances (1.9) than black defendants who received a life sentence (2.0). *Compare* TR 2 (1); TR 20 (1); TR 23 (1); TR 25 (1); TR 26 (2); TR 34 (2); TR 34A (1); TR 36 (1); TR 42 (1); TR 44 (2); TR 45 (4); TR 48 (1); TR 50 (1); TR 51 (1); TR 52 (2); TR 53 (3); TR 56 (3); TR 58 (2); TR 60 (1); TR 62 (2); TR 63 (3); TR 64 (4); TR 65 (4); TR 66 (2); TR 86 (1); TR 92 (2); TR 93 (1); TR 95 (1); TR 164 (3); TR 167 (2); TR 174 (2); TR 182 (2); TR 184 (1); TR 190 (1); TR 227 (5); and TR 258 (1), *with* TR 77 (1); TR 88 (1); TR 157 (2); TR 185 (5); and TR 186 (1).

The concurrence in dissent states that the "relevant issue is how often juries return a verdict of death when the prosecution seeks the death penalty." Concurrence in dissent at 5.[74] Our examination reveals that juries have returned verdicts on the basis of the evidence presented[75] rather than the racial attitudes that the concurrence in dissent ascribes to them.[76] *See id*. at 2. Notably, the jurors who spared the lives of Charles Tate and Ray Lewis were all white. *See* TR 77, at 12; TR 88, at 11. More to the point, the jury that sentenced Cecil Davis to death (for the second time) was the

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[74]We are certain that if the State sought the death penalty more often when the defendant was black than when the defendant was white, instead of the other way around, the concurrence in dissent would find that fact "relevant."

[75]If we subtract mitigating factors from aggravating factors, we find that on average the aggravating factors attributable to white defendants sentenced to death outnumbered mitigating factors by 1.0, but in the case of white defendants who received a life sentence, by only 0.1. The contrast between black defendants sentenced to death and those who received a life sentence is even sharper: aggravating factors presented by black defendants sentenced to death outnumbered mitigating factors by 1.4, but the *mitigating* factors presented by black defendants who received a life sentence outnumbered aggravating factors by 0.2. Thus, where aggravating factors predominated, juries returned a verdict of death. Where they were counterbalanced by mitigating factors, juries returned a verdict of life without parole. Such "quantitative measurements," of course, "do not tell the entire story," but it is striking how well they accord with what "one would expect to find." Concurrence in dissent at 6, 4.

[76]A jury "deliberated for two days before reaching its decision to impose the death sentence" on Dwayne Woods, even though Woods "instructed his lawyers not to present any mitigating evidence at the penalty phase of the trial" and exercised his right of allocution to urge the jury to "'vote to impose the death penalty.'" *Woods*, 143 Wn.2d at 621, 577, 578 (quoting Verbatim Report of Proceedings at 5774). As we said in *Woods*, "If the jury was motivated by racial prejudice, it seems probable, particularly in light of the absence of mitigating evidence, that it would have moved with more deliberate speed in imposing the death sentence." *Id*. at 621.

picture of diversity, containing two black jurors, two Hispanic jurors, and one Asian juror. TR 281, at 12.

The concurrence in dissent admits that its statistical analysis "cannot tell us that petitioner Cecil Davis would not have received the death sentence if he had not been African-American." Concurrence in dissent at 6. We could not have said it better, our review of the reports of aggravated first degree murders revealing that white defendants and black defendants are sentenced to death in the same proportion, 14 percent. Considering that no two cases of aggravated first degree murder are exactly alike, we find that fact remarkable. We acknowledge that "we are not statisticians," *id.* at 16, but we see no evidence that racial discrimination pervades the imposition of capital punishment in Washington and, therefore, see no reason to remand this matter to the superior court for an evidentiary hearing that the petitioner did not seek.

Finally, we take the opportunity to respond to the suggestion that we have hitherto "ignore[d]" the "danger that the death penalty might not be imposed in a fair, equal, or just manner." *Id*. at 2, 6-7. The concurrence in dissent deplores the fact that in Davis's previous personal restraint petition we relied on *McCleskey v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987), in rejecting Davis's "submission of . . . statistics that suggested that [the] death penalty is 'imposed more frequently when the defendant is nonwhite and the victim is white, and never, or almost never, when the racial equation is reversed.'"[77] Concurrence in dissent at 13 (quoting *Davis*, 152 Wn.2d

[77]Since the concurrence in dissent incorporates the argument by reference, we note that the death penalty was imposed in 6 of the 51 cases (12 percent) in which "'the

at 753). Our colleague states, "I fail to see how we can assure capital defendants or the legislature that race does not affect whether a capital defendant receives the death penalty in Washington when we brush aside the very statistical data that would assist us in making this determination." *Id*. at 15. We disagree that our opinion in *Davis* represents a refusal "to engage in some form of statistical analysis." *Id*. at 14. As our colleague himself recognizes, "the racial statistics in . . . *Davis* were put forth in the context of [a] constitutional challenge[] under the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution." *Id*. at 13. We consider it appropriate to rely on the United States Supreme Court's Eighth Amendment jurisprudence in reviewing an Eighth Amendment challenge. This court has not run from the issue of racial discrimination in capital sentencing. *See*, *e.g.*, *Gentry*, 125 Wn.2d 570.

Passion or prejudice

Under our mandatory statutory review,

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

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defendant [was] nonwhite and the victim [was] white,'" and 2 of the 14 cases (14 percent) in which "'the racial equation [was] reversed.'" Concurrence in dissent at 13 (quoting *Davis*, 152 Wn.2d at 753). *Compare* TR 1; TR 11; TR 19; TR 33; TR 38; TR 60; TR 70; TR 77; TR 79; TR 80; TR 82; TR 83; TR 85, 85A; TR 88; TR 102; TR 103; TR 109; TR 113; TR 119; TR 120; TR 126; TR 130; TR 135; TR 141; TR 158; TR 160; TR 161; TR 172; TR 177; TR 185; TR 186; TR 188; TR 193; TR 194; TR 204; TR 206; TR 212; TR 216; TR 224; TR 230; TR 248; TR 249; TR 252; TR 256; TR 271; TR 280; TR 289; TR 290; TR 301; TR 306; and TR 307, *with* TR 20; TR 27; TR 76; TR 99; TR 118; TR 162; TR 168; TR 174; TR 176; TR 217; TR 218; TR 219; TR 242; and TR 243.

Cross, 156 Wn.2d at 634-35 (alteration in original) (quoting *Elledge*, 144 Wn.2d at 85 (quoting Bennett L. Gershman, Trial Error and Misconduct § 2-6(b)(2), at 171-72 (1997))). Here, Davis's only argument that the jury's decision was based on passion and prejudice merely repeats the jury instruction and prosecutor misconduct issues, discussed above. We have already addressed and rejected these claims. There is no other evidence that the jury's verdict was based on an improper argument or improper motives. The jury was instructed not to be influenced by passion or prejudice, and we presume that jurors follow the court's instructions. *Lord*, 117 Wn.2d at 861. RCW 10.95.130(2)(c) provides no basis for reversing Davis's sentence.

Mental retardation

To have an intellectual disability considered by RCW 10.95.130(2)(d), the defendant's IQ must be 70 or below. RCW 10.95.030(2)(a), (c). At trial, no mental health expert testified that Davis's IQ was 70 or below. On appeal, Davis does not claim he is intellectually disabled or that he was intellectually disabled at the time of the crime.[78] RCW 10.95.130(2)(d) therefore does not require reversal.

IV. CONCLUSION

We conclude Davis has failed to establish reversible error and that reversal is

[78]At trial, Davis moved to dismiss based on a challenge to Washington's statutory scheme regarding mentally retarded defendants convicted of aggravated murder. The court denied the motion. The court also entered findings of fact that the defendant was not mentally retarded at the present time or at the time of the crime. On appeal, Davis does not challenge the denial of the motion to dismiss or the court's findings and conclusions on mental retardation.

not required under RCW 10.95.130. We therefore affirm his sentence of death.

AUTHOR:
Gerry L. Alexander, Justice Pro Tem.

WE CONCUR:
Chief Justice Barbara A. Madsen
Justice James M. Johnson
Justice Charles W. Johnson
Justice Tom Chambers, result only
Justice Susan Owens