IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SNOHOMISH

STATE OF WASHINGTON, Plaintiff, vs. TERRENCE MILLER, Defendant	Case No.: 19-1-00773-31 DEFENSE TRIAL BRIEF AND MOTIONS IN LIMINE

I. OVERVIEW

The State of Washington has charged the defendant, Terrence Miller with one count of First-Degree Murder. Mr. Miller has entered a plea of not guilty to the charge and maintains his innocence.

II. DEFENSE WITNESSES

- Detective James Headrick, Snohomish County Sheriff's Office
- Dr. Gregory Hampikian, Ph D

Defense also reserves the right to call Mr. Miller and any necessary rebuttal witnesses, including defense investigator Todd Reeves, should the need for such testimony arise.

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

III. FACTUAL OVERVIEW

On August 23, 1972, Jody Loomis left her home in Bothell to go ride her horse Saudi. Her horse was stabled at the home of [redacted] in unincorporated Snohomish County. To get to the stables she rode her white 10-speed bike. In the late morning hours, on her way to the stables, she stopped by to see her friend [redacted] She asked if [redacted] wanted to join her horseback riding. [redacted] declined as she was packing for an out-of-state move. [redacted] recalled that Ms. Loomis had a horse bridle with her that day in preparation for her ride. The two women spoke for about 15 minutes and Jody left back on her bike.

The specific route Jody took to the stables is unknown, however, on her way there it is believed that Jody biked past a fruit stand at the intersection of 164th and Bothell-Everett Hwy. This fruit stand was owned and operated by the [redacted] family. [redacted] then 14 years old, was working at the stand. She recalled seeing a woman riding her bike up to the stop sign at the intersection near the stand. The woman drew her attention as she stopped because she was looking around left and right and waited at the stop even though no cars were passing. She couldn't recall the color of the bike the woman was riding but remembered a metal bike clamp around the woman's pant leg so her pant wouldn't get caught in the chain. The woman continued up the hill, then called Penny Creek Road. Less than 10 minutes later, [redacted] remembered seeing a long, wood-paneled station wagon with two 20-something age male occupants coming down from 164th and stopping at the stop sign. She could not recall the color of the car, but the wood-paneling stuck out in her mind. Thirty minutes later that same car, with those same men, came down the same hill and stopped at the produce stand where each man bought a bag of apples. [redacted] is the last known witness to have seen Ms. Loomis before she was shot.

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

That same day, in the early evening hours [redacted] called [redacted] to see if she wanted to go "target shooting". [redacted] agreed. She looked at it as an excuse for the two to spend some intimate time together; target shooting was the cover. The two were involved in an illicit relationship. This was both due to an age difference between them [redacted] was 15 years older than [redacted]) but also because [redacted] was married. At the time, [redacted] babysat [redacted] children and lived with [redacted] in-laws off Filbert Road in Lynnwood.

Because of the nature of their relationship, if the two wanted to have sex, they would need to go to a motel, or sometimes the woods. So as to not be detected, [redacted] picked [redacted] up down the street some distance from his in-laws' house. At [redacted] suggestion, they headed to the woods off Penny Creek Road. This area was known for various activities: horseback riding, bird hunting, and target shooting. There was no designated spot to shoot guns, but this was an area [redacted] had taken her maybe one time before to shoot [redacted] was not a gun girl. When they would go shooting [redacted] would bring his guns. [redacted] remembers the guns were small handguns, not rifles--probably .22 caliber.

From where [redacted] picked [redacted] up to the wooded area where they went "to shoot," was approximately 4.2 miles. [redacted] recalled that the drive to Penny Creek took about 10-15 minutes. When they arrived, [redacted] pulled off the main road, and drove up an incline to a clearing. As they crested the incline [redacted] stopped the car to move a log out of the way. He told [redacted] he saw a woman lying on the ground in a clearing about 100 yards off to the right. She was practically naked except a pair of underwear. She had pink tape in a crisscross pattern covering her nipples. Her jeans were by her side and her bra was in her left hand. She was gasping for breath and had a gunshot wound on the right side of her head. [redacted] suggested [redacted] wait there while he went to get help, but [redacted] refused. She had no desire to stay there

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

alone in the forest in case the shooter was still there. Instead, the two loaded the woman into [redacted] car and drove to Stevens Hospital in Edmonds. The drive to Stevens took approximately 30 minutes. The woman was dead on arrival. This woman was later identified by family members as Jody Loomis.

Because it was clear Ms. Loomis had been shot, the death would be investigated as a homicide. Both the coroner and the police were called out to the hospital. Ken Christensen was the deputy coroner on duty that night. This would be Mr. Christensen's first solo death investigation. Mr. Christensen awaited the arrival of law enforcement prior to examining the body. Detectives Clausing and Lewis arrived at the hospital to document the initial coroner examination of the body and collect evidence. The detectives assisted in rolling Ms. Loomis's body over and in pulling her underpants down. Observations were made about leafy debris and dirt stuck to her buttocks and inside her underpants and what was believed to be semen.

Detective Clausing took in as evidence the boots Ms. Loomis was wearing, and the jeans, blouse, and bra that were lying next to her on the gurney. These items were purportedly placed into separate bags. The detectives then returned to the scene where they talked to several witnesses, photographed the area, and collected as evidence a dime, metal bike clamp, a bicycle, and blood and leaf debris. The horse bridle was not located. Other than the bicycle, there is no record that any of these items were ever booked into evidence.

The following day an autopsy was performed by Dr. Robertson in the presence of two prosecutors and members of the Sheriff's Office, in addition to a photographer Jim Leo. During the autopsy Dr. Robertson removed the underpants worn by Ms. Loomis and placed them in a paper sack. He also removed the pink tape from her nipples. Anal, oral, and vaginal swabs were taken, and bullet fragments were removed from Ms. Loomis's head. These items were

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

collected, but as with the evidence from the initial examination, no record exists that these items were ever booked into evidence.

In September of 1972, certain items of evidence were sent to the FBI for forensic analysis. It is unknown which items were returned or when those items of evidence were returned. The FBI could find nothing of evidentiary value other than a small hair on evidence item #3, the left boot.

The next time any member of law enforcement laid eyes on the evidence was in March of 2000. Evidence items 1, 2, 6 and 7 were missing from the box associated with the Jody Loomis case. Missing from the evidence were the bullet fragments, underwear, pink tape, the bike clamp, the dime, her eyeglasses, as well as the anal, oral and vaginal samples. No property logs exist of where this evidence was in the intervening decades. The missing evidence has never been found.

In 2008, detectives in the cold case unit decided to give the Jody Loomis case a fresh look. DNA had become a tool commonly used to solve crimes. The evidence was sent to the Washington State Patrol Crime Lab (WSPCL) to determine if they could get any further clues into the death of Ms. Loomis. Brian Smelser, an analyst at the crime lab, examined the evidence and determined that evidence item #3, the left boot, had a visible stain. The stain was sampled and extracted and found to contain semen. DNA testing revealed the non-sperm fraction to be a mixture of two individuals (male and female). The DNA profile from the spermatozoa was consistent with the male DNA profile in the non-sperm fraction.

In July, 2018 Detective Scharf, working with Parabon Nanolabs, had the DNA extract of the unknown male contributor from item #3 left boot sent in for Autosomal DNA testing in an attempt to identify the male through relatives who may have used the open source genetic

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

database. Parabon uploaded the DNA profile to the public database GEDMatch, and based on that search, was able to develop a family tree related to the DNA from the boot.

Genetic genealogists determined that the DNA profile belonged to a son of [redacted] and [redacted] This couple had six sons and one daughter. One of those sons is Terrence Miller. Despite the lack of any connection to Jody Loomis, police decided to surveil Terrence because of his history of sexual assault.

In August of 2018, Mr. Miller went to the Quil Ceda Casino where he drank from a cup of coffee, and when finished, threw the coffee cup in the trash. Police officers obtained that coffee cup and had it sent to the lab for analysis. The crime lab determined that the DNA profile from the coffee cup of Mr. Miller matched that of the sperm extract taken from item #3, the left boot.

Based on this match, law enforcement attempted to find any connection that Mr. Miller might have to Ms. Loomis or the evidence. Nothing was found, which is why, on April 10, 2019 they arrested Mr. Miller for the murder of Jody Loomis in the hopes that he might crack under the pressure of interrogation. Mr. Miller however did not confess. Following his arrest, police began an extensive investigation of him, which included interviewing friends and family, obtaining employment records, property records and certificates of marriage. That investigation revealed:

- Mr. Miller had no connection to Jody Loomis
- Mr. Miller had no connection to the Mill Creek area
- Mr. Miller did not own or posses a .22 caliber handgun
- Mr. Miller did not drive a white station wagon with wood paneling
- Mr. Miller had never been seen with a horse bridle

Other than the DNA on evidence item #3, there is no evidence to suggest Mr. Miller committed this crime.

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

IV. MOTION TO ADMIT OTHER SUSPECT EVIDENCE

The Sixth Amendment and due process require the accused be given a meaningful opportunity to present a complete defense. U.S. CONST. amend. V, VI, XIV; CONST. art. 1, section 3, 22; State v. Cayetano-Jaimes, 190 Wn. App. 286, 295-98, 359 P.3d 919 (2015); Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

Criminal defendants have the right to present evidence that might influence the jury's determination of guilt. Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987). Absent a compelling justification, excluding relevant defense evidence denies the right to present a defense because it "deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" Crane, 476 U.S. at 690-91 (*quoting* United States v. Cronic, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)).

Courts must safeguard the right to present a defense "with meticulous care." State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (*quoting* State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976)). Defense evidence need only be relevant to be admissible. State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. "All facts tending to establish a theory of a party, or to qualify or disprove the testimony of his

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

adversary, are relevant." State v. Perez-Valdez, 172 Wn.2d 808, 824-25, 265 P.3d 853 (2011) (quoting Fenimore v. Donald M. Drake Constr. Co., 87 Wn.2d 85, 89, 549 P.2d 483 (1976)).

If evidence is relevant, the burden is on the prosecution to show the evidence is not so prejudicial or inflammatory that its admission would disrupt the fairness of the fact-finding process. State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). The prosecution must demonstrate a compelling interest to exclude a defendant's relevant evidence. Id. at 15-16. The prosecution's interest in excluding the prejudicial evidence must be balanced against the defendant's need for the information sought. Darden, 145 Wn.2d at 622. "[E]vidence relevant to the defense of an accused will seldom be excluded, even in the face of a compelling state interest." State v. Reed, 101 Wn. App. 704, 715, 6 P.3d 43 (2000).

Courts must consider "other suspect" evidence against this backdrop of the accused's constitutional right to present a defense. "The standard for relevance of other suspect evidence is whether there is evidence 'tending to connect' someone other than the defendant with the crime." State v. Franklin, 180 Wash.2d 371, 381 373 (2014) (*quoting* State v. Downs, 168 Wash. 664, 667, 13 P.2d 1 (1932)). The focus must be on whether the proffered evidence tends to create a reasonable doubt as to the defendant's guilt, not whether it establishes the other suspect's guilt. Id. "[S]ome combination of facts or circumstances must point to a nonspeculative link between the other suspect and the charged crime." Id. Put simply, "if there is an adequate nexus between the alleged other suspect and the crime, such evidence should be admitted." Id. at 373.

Admissibility of "other suspect" evidence is based solely on the strength of the defendant's showing of some tangible connection between the other person and the crime charge, irrespective of the strength of the State's case. Id. at 325. *See also*, Holmes v. South

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

Carolina, 547 U.S. 319, 327-29 (2006)(a trial court cannot exclude defense-proffered other suspect evidence because of the perceived strength of the State's case. Id. at 378). The proper inquiry focuses upon whether the evidence offered tends to create a reasonable doubt as to the defendant's guilt, not whether it establishes the guilt of a third party beyond a reasonable doubt." Franklin at 381. Put simply, "if there is an adequate nexus between the alleged other suspect and the crime, such evidence should be admitted." Id. at 373.

For instance, in Maupin, the supreme court held eyewitness testimony that a kidnapping victim was seen after the kidnapping with a person other than the defendant was sufficiently probative to pass the other suspect test. 128 Wn.2d at 928. The evidence "point[ed] directly to someone else as the guilty party" and "would have brought into question the State's version of the events of the kidnapping." Id.

Similarly, in Franklin, the trial court erroneously excluded Franklin's proffered evidence that someone else committed the charged cyberstalking. 180 Wn.2d at 372. Specifically, the court excluded evidence that Franklin's live-in girlfriend Hibbler had sent threatening e-mails to his other girlfriend Fuerte even though Hibbler had the motive (jealousy), the means (access to the computer and e-mail accounts at issue), and the prior history (sending threatening e-mails to Fuerte regarding her relationship with Franklin). Id. The Supreme Court reversed because evidence of Hibbler's motive, ability, and opportunity to commit the crime created a chain of circumstances that tended to create a reasonable doubt as to Franklin's guilt. Id. at 382.

Here, the defense seeks to introduce evidence of [redacted] as an alternate suspect. A sufficient nexus exists between Mr. [redacted] and this crime based on his motive, ability or opportunity and other circumstantial evidence. There is significant probative and relevant

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

evidence of a nonspeculative nature that would tend to create a reasonable doubt as to Mr. Miller's guilt and demonstrates Mr. [redacted] motive and opportunity to commit this crime.

Unlike many other potential suspects that were investigated during the decades since the murder of Jody Loomis, [redacted] has not been excluded as a contributor to the DNA profile found on Jody's Loomis's shoe. It is unclear why, even when presented with an opportunity to get a sample from [redacted] himself during the preservation deposition, that the State never sought a sample from [redacted] directly. Instead, the State sought DNA from [redacted] son [redacted] The State performed YSTR testing on [redacted] reference sample and excluded his patrilineal line from being a contributor to the DNA profile from Jody Loomis's boot. Because it is unknown if [redacted] and [redacted] are biologically related, this testing does not excluded [redacted]

On August 23, 1972, when questioned, [redacted] told Detective Cook that he and [redacted] were in the area to park. In interviews and depositions done in preparation for trial, Mr. [redacted] had difficulty remembering the events of August 23, 1972. However, Mr. [redacted] did not seem to have any problem remembering that he and Ms. [redacted] went to go berry picking off Penny Creek Road that day. He mentioned nothing about going there to shoot guns. Nor did he admit to being in possession of a pistol, likely a .22, the same caliber as the bullet and bullet fragment that were pulled from Jody Loomis's skull. Additionally, if Mr. [redacted] was the shooter, he didn't have to be concerned that one was still on the loose when he told [redacted] to wait in the woods. If Mr. [redacted] is concerned about being considered a suspect in Ms. Loomis's death, he has every motivation to not divulge that he was he was in possession of a .22 caliber handgun at the location where Ms. Loomis was shot.

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

The evidence that Mr. [redacted] is an "other suspect" in the murder of Jody Loomis is circumstantial, but significant, and it easily satisfies the requirements outlined in Franklin. Mr. [redacted] was at the location where Jody Loomis was found on August 23, 1972. He was there with a much younger [redacted] whom he picked up on the road ten to fifteen minutes before the couple found Jody. He was in the area with a .22 caliber pistol, the same type of gun that is believed to have killed Ms. Loomis. Moreover, both in 1972 and up until the moment he was interviewed by Detective Scharf and in the preservation deposition, he continued to lie about why he was in that area with Ms. [redacted] There would be no reason for him to misrepresent his presence in the area other than to potentially obscure his involvement in this crime. This combination of facts or circumstances points to a link between Mr. [redacted] and the death of Jody Loomis that is more than just speculation.

The State's case against Mr. [redacted] is based solely on the DNA found on Jody Loomis's boot. Unlike Mr. [redacted] an eyewitness cannot place Mr. [redacted] in the area of this murder at the time it occurred, and he cannot be placed there with the exact same caliber gun that was used to kill Ms. Loomis. Despite the State's perceived strength of their case, this evidence against Mr. [redacted] could create a reasonable doubt as to the allegations against Mr. [redacted] and should be permitted in his trial.

V. MOTIONS IN LIMINE

Comes now the respondent and motions this court to exclude the following, in limine:

1. Exclude all prior bad acts or other evidence relating to claims of misconduct including for purposes of impeachment should the defendant choose to testify.

Evidence of other bad acts is generally inadmissible. ER 404(b). Exclusion is grounded on the principle that the accused must be tried for the crimes charged, not for uncharged crimes. State v. Kilgore, 147 Wn.2d 288, 296 (2002). A trial court must initially

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

presume that any evidence of prior bad acts is inadmissible. State v. DeVincentis, 150 Wn.2d 11, 17 (2003). "The State must meet a substantial burden when attempting to bring in evidence of prior bad acts under one of the exceptions to this general prohibition." State v. Lough, 125 Wn.2d 847, 852 (1995).

"[W]hen the State seeks admission of evidence under ER 404(b), that the defendant has committed bad acts that constitute crimes other than the acts charged, the trial court must (1) find by a preponderance of the evidence that the uncharged acts probably occurred before admitting the evidence; (2) identify the purpose for which the evidence will be admitted; (3) find the evidence materially relevant to that purpose; and (4) balance the probative value of the evidence against any the prejudicial effect." Kilgore, 147 Wn.2d at 296. The State has the burden of establishing elements 1-3. DeVincentis, 150 Wn.2d at 17.

ER 404(b) is not limited to bad or illegal acts, instead, the rule bars any acts used to show the character of a person to prove that the person acted in conformity with it on a particular occasion. State v. Everybodytalksabout, 145 Wn.2d 456, 466, 39 P.3d 294 (2002).

> Petitioner correctly concludes that "acts" inadmissible under ER 404(b) include any acts used to show the character of a person to prove the person acted in conformity with it on a particular occasion. The court in Halstien did not limit inadmissible acts under ER 404(b) to unpopular or disgraceful acts, but only stated the prior misconduct may include acts that are merely unpopular or disgraceful. Inadmissible "acts" under ER 404(b) are not limited to acts that are unpopular or disgraceful.

Everybodytalksabout, at 466.

In a criminal case, in which the evidence is being offered against the accused, any doubt should normally be resolved in favor of excluding the evidence. *See e.g.* State v. Meyers, 49 Wn.App 243 (1997)("When considering misconduct which does not rise to a level of criminal activity, but which may nonetheless disparage the defendant, extreme caution must be used to

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

avoid prejudice...where the decision is doubtful, the scale must tip in favor of the defendant and the exclusion of the evidence.").

The defense understands that the State does not seek to admit other bad act evidence in its case in chief. If the State intends to introduce such evidence, or should the State believe that the defense has opened the door to such evidence, the defense requests a hearing on its admissibility outside the presence of the jury. ER 402, 403, 404(a), 404(b), 608.

☐ Granted, ☐ Denied, ☐ Reserved, ☐ Agreed

2. Exclude evidence of any prior convictions of the defendant upon which the State intends to rely upon for impeachment unless and until the defendant chooses to testify.

ER 609 states in relevant part that "[e]vidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement ...unless the court determines in the interests of justice, that the probative value of the conviction...substantially outweighs its prejudicial effect." The rule also provides that the State must provide "sufficient" advance written notice of the intent to use such evidence. The defense is not aware of any criminal convictions the State is seeking to admit. ER 609(b).

☐ Granted, ☐ Denied, ☐ Reserved, ☐ Agreed

3. Exclude reference to newspapers found in the ceramics shop both during a ruse visit and during the execution of the search warrant.

Detectives Spellman and Cracchiolo went on an undercover operation to the ceramic's shop located in the Miller's garage. They dressed in civilian clothing and pretended to be customers interested in ceramics. Their goal was to engage Mr. Miller in conversation with the hopes of gaining information that could be used against him in trial. Two visits were made to the shop, one on October 26, 2018 and the second on November 30, 2018. On both occasions the

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

detectives were greeted by [redacted] Mr. Miller's wife. At no time did they speak with or even see Mr. Miller.

During their initial visit to the shop the detectives noted that the ceramics shop was full of unfinished ceramics lining the walls. They noted a table for painting the unfinished ceramics for customers. Boxes of shredded newspapers and computer paper were seen on the floor. Shipping boxes were clearly stacked directly outside the shop. On the second visit to the shop, both detectives took note of a newspaper on the painting table that caught their attention—it was an Everett *Herald* from May of 2018. The cover story on the paper regarded William Talbott--another cold case/genetic genealogy DNA case.

Based on the sighting of this newspaper, upon Mr. Miller's arrest the State sought a search warrant to seize all "standard printed newspapers observed in a stack located inside the ceramics shop...." Upon executing the search warrant detectives seized multiple newspapers spanning the years from 2012-2019 from a dusty stack in the ceramics shop. The newspaper observed by the detectives during the ruse entry was apparently not found, but they seized multiple other newspapers they thought had evidentiary value. Those newspapers headlined stories about arsons, assaults, shots at Everett Mall, two papers on DNA and cold cases, a man using drugs in attack, a boy saved at Wallace Falls, salmon, and an attack at a school thwarted. This is not evidence of Mr. Miller seeking out articles related to murder or sexual assault; rather, news outlets cover the news. Murders, rapes, and shootings make headlines because that sells newspapers.

The newspapers and testimony related to them is not admissible as it is speculative, and its limited probative value is outweighed by the danger of unfair prejudice. ER401, 402, 403. There is no evidence to suggest that Mr. Miller was stockpiling articles related to cold cases. If that were true, there would be far more newspaper articles than two since 2012. There is no evidence that Mr. Miller read any of the newspapers that the State seeks to admit. Moreover, if

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

Mr. Miller were cataloging articles about cold case investigations and DNA, the newspaper detectives had seen during the ruse entry would have remained in the stack. It was not found during a thorough search of the house and shop.

Importantly, law enforcement had learned from [redacted] Mr. Miller's wife, that he spends a great deal of time on the internet. Pursuant to the search warrant they also seized and searched Mr. Miller's home computer. A thorough search of the internet browsing history on the computer revealed no evidence of searches related to cold cases, DNA, murder, rape, or genetic genealogy. If Mr. Miller were so interested in discovering information on these related topics, one would expect he would not limit his search to the local newspaper-- he would search the internet. There is no evidence that he did.

The State would like to argue that this "interest in cold cases" (two newspapers of many) shows that Mr. Miller was keeping track of DNA advances in cold cases out of a consciousness of guilt. There is insufficient evidence to establish this connection and this testimony and evidence is not admissible.

☐ Granted, ☐ Denied, ☐ Reserved, ☐ Agreed

4. Exclude reference to the firearms and any bullets found in Mr. Miller's home and shop.

On April 10, 2019, law enforcement applied for and was granted a search warrant on the Miller residence and attached ceramics shop. The warrant authorized the seizure of any small caliber firearms to compare to the firearm used in the shooting of Jody Loomis. Two firearms were seized: a Kel Tec pistol found in the living room of the home, and a Titan revolver secured in the cash box in the ceramics shop. A trace was conducted on the seized firearms. The trace determined that the Titan revolver was made in 1973, (and it appears Mr. Miller could not have possessed it until sometime after 1986 as the firearm was at a trade shop in the State of Florida at that time), and the Kel tec pistol in 2010. Neither firearm could have been used in the shooting

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

of Jody Loomis. No evidence exists as to when Mr. Miller came into possession of either firearm.

Any testimony that Mr. Miller was in possession of these firearms at the time of his arrest is not relevant under ER 402, is unduly prejudicial under ER 403 given the nature of the offense and is otherwise inadmissible under 404(b). There is no probative purpose for which to admit testimony that 47 years after the incident Mr. Miller was in possession of firearms. Moreover, it is not possible given the date these guns were made to connect the firearms to the shooting of Ms. Loomis. The firearms in fact had such little significant to the investigation that they were not even sent to the Washington State Patrol Crime Lab for comparison testing as there could be nothing learned of evidentiary value.

In addition, the State may seek to admit testimony from Mr. Miller's family members and close friend, [redacted] that Mr. Miller would go on hunting trips and that he may have had a rifle or access to a rifle used while hunting. Like the firearms located during the service of the search warrant, the fact that Mr. Miller would go hunting with a rifle or that he had access to a rifle is not relevant, and its only purpose would be for propensity. This testimony does not show a motive, common scheme or plan, a modus operandi, identity, or knowledge, and Mr. Miller is not claiming mistake or accident. He maintains his innocence. Further, it is not alleged that the firearm used to kill Jody Loomis was a rifle. State's expert Dr. Lacy opines that Ms. Loomis was shot with a .22 caliber handgun. The evidence, he says, does not suggest a hunting rifle was used. With the exception of a single hunting trip during an unknown timeframe with [redacted] this testimony would also amount to hearsay.

The baseline for admissibility of any piece of evidence is relevance. Evidence is not considered relevant unless (1) it has the tendency to prove or disprove a fact, and (2) the fact is of some consequence to the determination of the action. ER 401. Under ER 402, evidence that is not relevant is not admissible, and under ER 404(b) any acts used to show the character of a

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

person to prove that the person acted in conformity with it on a particular occasion is inadmissible.

Evidence of weapons entirely unrelated to the crime is inadmissible. State v. Jeffries, 105 Wn.2d 398, 412, 717 P.2d 722, cert. denied, 479 U.S. 922 (1986). Only where "the jury could infer from the evidence that the weapon could have been used in the commission of the crime, then evidence regarding the possession of that weapon is admissible." State v. Luvene, 127 Wn.2d 690, 708, 903 P.2d 960 (1995).

In State v. Hartzell, 153 Wash.App. 137 (2009), a prosecution arising out of a shooting, a handgun was found in the defendant's possession at the time of arrest 1 month after the shooting. The court found the firearm was admissible because forensic analysis linked the gun found at the time of arrest to the shooting. The Court of Appeals found the gun was circumstantial evidence connecting the defendant to the *particular gun* used in the shooting. As such the probative value outweighed the prejudice to the defendant. Id. at 152.

In Luvene, a prosecution arising out of a robbery and murder, the court allowed witnesses to testify that they had seen Luvene in possession of the same type of firearm used in the murder around the time of the crime. A firearms expert also testified that one of the cartridges found in Luvene's apartment had been cycled through the same gun as the three shell casings found at the crime scene. Luvene, at 903. The Washington Supreme Court held that in light of the fact that the .380 cartridges recovered from Luvene's apartment matched the caliber of those used in the robbery, and one of them was cycled through the same firearm used in the robbery, the cartridges were highly relevant and admissible.

This case is distinguishable from cases like Hartzell and Luvene as no evidence suggests that Mr. Miller was in possession of any firearm, let alone a firearm similar to the firearm used to kill Jody Loomis at the time of the crime, and it is not possible that either gun found in Mr. Miller's home could have been used in the shooting of Jody Loomis. That some 47 years later

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

Mr. Miller happens to be in lawful possession of firearms unrelated to the crime charged is not relevant and admission of the firearms would amount to nothing more than propensity.

Moreover, constitutionally protected behavior cannot be the basis of criminal punishment. State v. Rupe, 101 Wash.2d 664, 704 (1984) *citing* Hess v. Indiana, 414 U.S. 105, 107 (1973) (constitutional guaranties of freedom of speech forbid states to punish use of words or language not within narrowly limited classes of speech); Stanley v. Georgia, 394 U.S. 557 (1969) (State may not punish mere possession of obscene material in privacy of home). To protect the integrity of constitutional rights, the courts have developed two related propositions: The State can take no action which will unnecessarily "chill" or penalize the assertion of a constitutional right and the State may not draw adverse inferences from the exercise of a constitutional right. Id. at 705 *citing* State v. Jackson, 390 U.S. 570, 581 (1968) (capital punishment provision of the Federal Kidnapping Act unconstitutionally chilled Fifth Amendment right to not to plead guilty and Sixth Amendment right to demand jury trial); State v. Frampton, 95 Wash.2d 469 (1981) (previous Washington death penalty statute needlessly chilled defendant's right to plea not guilty and demand a jury trial); Griffin v. California, 380 U.S. 609, 614 (1965) (drawing adverse inference from defendant's failure to testify unconstitutionally infringed on defendant's Fifth Amendment rights). *See also* State v. Mace, 97 Wash.2d 840 (1982) (defendant's post arrest silence cannot be viewed as evidence of guilt).

In Rupe, a case involving a bank robbery with a firearm that left two bank tellers dead, the Washington Supreme Court agreed that evidence concerning Mr. Rupe's gun collection, that was considered in sentencing him to death, was "irrelevant, prejudicial and violative of his due process rights." Id. at 702. The challenged evidence in that case included the admission of several weapons: (1) a CAR 15 semiautomatic rifle (civilian version of the military's M-16), (2) a 12-gauge shotgun with one shortened barrel, (3) a .22 caliber rifle, and (4) a pistol with interchangeable barrels. The last item belonged to Mr. Rupe's landlord. In addition to the

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

weapons themselves, the prosecution presented the testimony of several experts on firearms who alleged that, though the weapons were legal, they were not suitable for hunting or sport. The prosecutor sought to portray Mr. Rupe as an extremely dangerous individual. In arguing to the court for the gun collection's admissibility, he noted that it would give the jury an insight into defendant's personality, because the guns he owned were only good for one purpose, "killing others in combat." Rupe at 704.

The admissibility of evidence unrelated to the underlying crime is restricted in the case of constitutionally protected behavior, like the possession of firearms. In Rupe the Court characterized the impermissible use of constitutionally protected behavior as a violation of due process, and because the evidence in question allowed the jury to draw adverse inferences from a constitutional right it reversed Mr. Rupe's death sentence.

The protection of the integrity of constitutional rights is not limited to issues of sentencing as was the case in Rupe. In this case, as in Rupe, the challenged evidence directly implicates Mr. Miller's right to bear arms. Wash. Const. art. 1, §24 provides: "The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men".

This constitutional provision is facially broader than the Second Amendment which restricts its reference to "a well-regulated militia." Mr. Miller's constitutional rights, like Mr. Rupe's, to possess legal weapons falls squarely within the confines of the right guaranteed by Const. art. 1 §24. "Defendant was thus entitled under our constitution to possess weapons, without incurring the risk that the State would subsequently use the mere fact of possession against him in a criminal trial unrelated to their use." Rupe at 707.

Additionally, the Rupe court notes, and it can be equally applied to Mr. Miller, that "this (gun) evidence is both irrelevant and highly prejudicial. The guns in question had *no connection*

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

with the crime and were all, admittedly, legally owned. We see no relation between the fact that someone collects guns and the issue of whether they deserve the death sentence. Furthermore, we take judicial notice of the overwhelming evidence that many nonviolent individuals own and enjoy using a wide variety of guns. This fact has no bearing on the issue of whether they deserve to live or die." Id. at 708 (emphasis added).

Finally, the court in Rupe, notes the prejudicial effect of introducing irrelevant evidence of gun ownership:

> Personal reactions to the ownership of guns vary greatly. Many individual view guns with great abhorrence and fear. Still others may consider certain weapons as acceptable but others as "dangerous." A third type may react solely to the fact that someone who has committed a crime has such weapons. Any or all of these individuals might believe that the defendant was a dangerous individual and therefore deserved to die, just because he owned guns. This was, in fact, the crux of the prosecutor's argument to the jury for defendant's death. Consequently, we reject the State's argument that no prejudice resulted from admission of these weapons.

While Rupe was a case involving the admission of gun evidence at the sentencing phase, the Court's concerns apply equally in the case against Mr. Miller where the State is simply seeking to admit this evidence to imply to the jury that gun owners use guns to kill. An inference that is unduly prejudicial and should be prohibited.

☐ Granted, ☐ Denied, ☐ Reserved, ☐ Agreed

5. Exclude testimony that Jody Loomis is included as a possible contributor to the non-sperm fraction of Evidence Item #3.

On May 27, 2008, Brian Smelser, a forensic scientistic with the Washington State Patrol Crime Lab, was tasked with analyzing evidence items #3 (left shoe), #4 (right shoe), and #12 (jeans), purportedly worn by Jody Loomis before she was shot. All but the left shoe tested negative for acid phosphatase, a substance found in high amounts of semen and lower amounts in other bodily fluids like vaginal secretions, and P30 which is a protein used to identify semen. The stain, located on Item #3, the left boot, tested positive for both acid phosphatase and P30. A

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

differential DNA extraction was done to separate the sperm fraction from the non-sperm fraction of DNA. A partial DNA typing profile obtained from the non-sperm fraction was a mixture of at least two-individuals, a male and a female.

On July 23, 2008, in an attempt to determine whether Ms. Loomis was a contributor to the non-sperm fraction on the left boot, Mr. Smelser extracted a DNA sample from evidence item #9 (red/brown flakes presumed to be blood from Jody Loomis) to compare with the partial DNA typing profile obtained from the non-sperm fraction from Item #3. According to Mr. Smelser, "[t]he donor of the sample, (item 9), Jody Loomis, is included as a possible contributor to this profile. The profile from the semen and the sample from Jody Loomis could account for all of the alleles observed in this mixture." Mr. Smelser offered no statistical calculation of the likelihood that Ms. Loomis is included as a contributor. When interviewed by the defense, Mr. Smelser indicated he could not provide a statistical calculation for the inclusion.

For evidence to be admissible under ER 401, it must be relevant. Relevant evidence may not be admissible if its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." ER 403. Finally, ER 702 provides that an expert may testify "if the testimony will assist the trier of fact to understand the evidence, or determine a fact in issue..."

For an expert witness to state only that Ms. Loomis is "included as a possible contributor" would be misleading to the jury; and it would necessarily be interpreted as a "match", which it is not.

The Washington State Supreme Court held in State v. Cauthron, 120 Wn.2d 879, 906, 846 P.2d 502, 516 (1993) (overruled on other grounds) that "testimony of a match in DNA samples, without the statistical background or probability estimates, is neither based on a generally accepted scientific theory nor helpful to the trier of fact." This holding was reiterated by the Supreme Court in State v. Copeland, where the Court held "statistical evidence of

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

genetic profile frequency probabilities *must* be presented to the jury." 130 Wn.2d 244, 264, 922 P.2d 1304, (1996)(emphasis added).

Furthermore, the Scientific Working Group on DNA Analysis Methods (SWGDAM[1]), sets out the quality assurance standards for the interpretation of DNA typing results from short tandem repeats (STR). These standards are required by federal law as a condition of participation in the National DNA Index System. Section 3.2 of the "Interpretation Guidelines for Autosomal STR Typing by Forensic DNA Testing Laboratories" states in pertinent part:

> **3.2.1** Except for a reasonably assumed contributor, the laboratory shall perform statistical analysis in support of any inclusion (or a "cannot be excluded" conclusion) irrespective of the number of alleles detected and the quantitative value of the statistical analysis.

See Exhibit A.

A match statistic *must* be provided for any inclusion or cannot be excluded conclusion. Mr. Smelser cannot assign a statistical probability to this inclusion. The testimony is not admissible.

☐ Granted, ☐ Denied, ☐ Reserved, ☐ Agreed

6. Exclude the letter written by Dr. Elder as a testimonial statement of a non-appearing declarant implicating Mr. Miller's right to confrontation under the Sixth Amendment.

During the autopsy of Ms. Loomis, a vaginal swab was obtained for cytologic examination. The swab was purportedly delivered by Detective Clausing to Tacoma General Hospital. It is unclear why the sample was taken to a hospital in Tacoma. No forensic report was produced by the hospital. Instead, Dr. Thomas Elder who was an associate pathologist for the hospital, wrote a letter to the prosecuting attorney's office with his findings. The letter is dated

[1] According to its website, SWGDAM "provide[s] recommendations to the FBI Director on quality assurance standards for forensic DNA analysis. The responsibilities of SWGDAM are: (1) to recommend revisions, as necessary, to the Quality Assurance Standards for Forensic DNA Testing Laboratories and the Quality Assurance Standards for DNA Databasing Laboratories; (2) to serve as a forum to discuss, share, and evaluate forensic biology methods, protocols, training, and research to enhance forensic biology services; and (3) to recommend and conduct research to develop and/or validate forensic biology methods.

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

August 25, 1972. The letter indicates that the sample was examined under a microscope and revealed "numerous well preserved spermatozoa." This examination was subsequently provided to Dr. Robertson, who conducted the autopsy of Ms. Loomis and who wrote in his findings that there was evidence of "numerous well preserved spermatozoa" based on Dr. Elder's examination.

This letter contains no case number and does not identify a specimen number. There is merely a reference to "Loomis Case" at the top. The hospital maintains no records on this case. These slides no longer exist. There is no evidence to suggest who took custody of the slides from the hospital, or whether they were ever retrieved and put in evidence. If the slides were retained as evidence as one would expect, they have gone missing.

On September 19, 2019, Dr. Elder was deposed for this case. During the deposition Dr. Elder testified:

a. He is 90 years old and his memory is "very poor".
b. He believes he might have worked at Tacoma General Hospital in pathology.
c. He occasionally did forensic examinations.
d. He could not recall if as part of his practice he examined samples for blood or seminal fluid.
e. He had no memory of the letter or the Loomis case.
f. He could not read the letter but believed it was his signature.
g. He could not recall how a sample would come to him for examination, how it was labeled, or where it was stored.
h. He could not be certain that he was the person who examined the sample here.
i. He could not recall if it were common practice to produce a report after examining a sample or where such a report would be kept.

The State is not calling Dr. Elder as a witness as it was clear in the deposition that he was not competent to testify. Further, his deposition is not admissible in evidence as there was no meaningful opportunity to cross-examine this witness.

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

a. The letter is testimonial.

The Sixth Amendment to the United State Constitution provides that, "in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." Likewise, Article 1, § 22 of the Washington State Constitution states that "in criminal prosecutions, the accused shall have the right to meet the witnesses against him face to face." This right to confrontation, known as the Confrontation Clause, applies to hearsay testimony. Therefore, even if a hearsay statement is admissible pursuant to the Rules of Evidence, the Sixth Amendment may prohibit its admission. As described below, whether hearsay runs afoul of the Confrontation Clause depends on whether that hearsay is "testimonial" in nature.

In 2004, the United States Supreme Court redefined the Sixth Amendment right to confrontation by holding that "testimonial" hearsay is not admissible against a criminal defendant unless the out-of-court declarant is present at trial and available for cross-examination. Crawford v. Washington, 541 U.S. 36, 50–51, 124 S.Ct. 1354 (2004). Under the old precedent, hearsay statements were admissible when the declarant was unavailable for trial, but the statements contained sufficient "indicia of reliability," or "particular guarantees of trustworthiness". Ohio v. Roberts, 448 U.S. 56, 66 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004). Crawford changed the inquiry: if a hearsay statement is offered against the defendant in a criminal trial and its declarant does not testify, the statement is inadmissible for its truth if the statement is "testimonial" irrespective of its reliability. Id. at 53-54.

In its decision in Crawford the Court left "testimonial" undefined however it did identify the core class of testimonial statements with which the confrontation clause is primarily concerned:

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

1) *Ex parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially
2) Extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions and
3) Statements that were made under circumstances which would leave an objective witness reasonably to believe that the statement would be available for use at a later trial.

Id. at 51-52.

Since the Court's decision in Crawford, the Court has revisited and continued to refine its definition of "testimonial" statements in several cases. The Court's consideration of the admissibility of testimonial hearsay statements falls into two "camps". The first "camp" concerns the conventional, nonexpert witness who had witnessed or had been the victims of the subject of the crimes[2]. Here, the Court finds that when the "primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution," the statement is testimonial and the defendant has the right to face his accuser. Davis v. Washington, 547 U.S. 813, 826 (2006). The second "camp" concerns the expert witness or laboratory analyst who performed lab testing or analysis but did not testify[3]. The Court has not adopted a single "test" or theory on this issue. This is an area of the law that is at best unstable and many jurisdictions, including Washington, have wrestled with the central issue since Crawford. The following are the cases most relevant to the Court's consideration of the issues here.

In 2009 the United States Supreme Court decided the case of Melendez-Diaz v. Massachusetts. This was the first Supreme Court case dealing with testimonial status of forensic documents. The issue before the court was certificates of analysis sworn by analysts at the state laboratory, attesting that a substance analyzed was cocaine, and proffered at a drug trafficking

[2] Crawford supra, Davis v. Washington, 547 U.S. 813 (2006), Michigan v. Bryant, 562 U.S. 344 (2011).
[3] Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), Bullcoming v. New Mexico, 564 U.S. 647 (2011), Williams v. Illinois, 567 U.S. 50 (2012).

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

trial as proof of the substance's weight and composition. There the Court declined to create a "forensic evidence" exception to Crawford, holding that a forensic laboratory report, created specifically to serve as evidence in a criminal proceeding, ranked as "testimonial" for Confrontation Clause purposes. The sworn statements were "functionally identical to live, in court testimony, doing precisely what a witness does on direct examination". 557 U.S. at 307. It is important to note that the certificates were determined to be testimonial even though the documents themselves did not accuse *the defendant* of wrongdoing. Id. at 313. Justice Scalia noted that it was sufficient for the documents to "provid[e] testimony against petitioner, proving one fact necessary for his conviction—that the substance he possessed was cocaine." Id. Absent stipulation, the prosecution may not introduce such report without offering a live witness competent to testify to the truth of the report's statements. 557 U.S. at 324.

Two years later the Court considered this question again in Bullcoming v. New Mexico. There the State introduced a certificate recording the defendant's blood alcohol level at an aggravated DUI trial through a co-worker of the lab analyst who had neither observed nor reviewed the actual testing. At trial, the defense counsel objected to the testimony, but the trial court admitted the report as a business record and permitted the results of the report to be introduced through the co-worker. The trial court reasoned that the Confrontation Clause was not violated because the analyst was simply transcribing a machine-generated result, the true accuser then being the machine, not the analyst. The United States Supreme Court reversed the judgment. The Court reasoned that the representations in the report (that the seal of the tube was unbroken, that the analyst checked to ensure the report and sample numbers corresponded, and the type of testing done adhered to a precise protocol) are not just machine-generated results for which cross-examination would serve no purpose. Instead, the representations in the report,

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

"relating to past events and human actions not revealed in raw, machine produced data, are meet for cross examination." Id. at 660. The report was created solely for an evidentiary purpose which ranks as testimonial. The witness had no function except as a "surrogate," merely relaying the conclusions of another and that this could not satisfy the State's confrontation clause burden; the defendant had the right to confront the analyst who performed the test. 564 U.S. at 661.

In 2012, the Court again addressed the issue as to whether the right to confrontation is implicated when an expert for the State testifies on the basis of reports or records prepared by laboratory technicians who are not present to testify. In the case of Williams v. Illinois, an expert testified that a DNA profile taken from a rape victim matched a DNA profile recovered from the defendant. The expert who testified had not prepared the DNA profile; rather she relied on DNA prepared by an outside laboratory, but importantly, came to her own conclusions regarding the DNA. A plurality of the Court found that the lab report was not testimonial. However, based on the division of the Court, Williams it is not controlling.

When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Nichols v. U.S., 511 U.S. 738, 745 (1994), *quoting* Marks v. U.S., 430 U.S. 188, 193 (1977). However, in some cases "there is no lowest common denominator or 'narrowest grounds' that represents the Court's holding," and thus it is not useful to engage in this inquiry. Nichols at 745. Because this situation is presented in Williams where there is no "narrowest ground" between Justice Alito and Justice Thomas' opinions, Williams is not controlling.

In 2014, our State Supreme Court attempted to resolve this unstable area of the law in the case of State v. Lui, 179 Wash.2d 457 (2014). Arguably the State Supreme Court did nothing

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

more than confuse the issue further. Lui was a prosecution for a cold case murder. At trial, the State presented expert testimony from Chief Medical Examiner Harruff. Harruff's testimony related to the autopsy. Harruff did not himself conduct the autopsy, Dr. Karen Raven did, but he was Raven's supervisor, and he reviewed her work. Harruff did not testify to Raven's conclusions and Raven's report was not admitted at trial. Instead, Harruff reviewed the photographs from the autopsy of the victim's injuries to testify to his own opinion as to the cause of death, but made several statements taken from the autopsy to explain the positioning of the victim's body and the clothing she was wearing. Harruff also testified to the victim's body temperature, which had been taken by Raven, and to the conclusions of the toxicology report prepared by a lab analyst who likewise did not testify at trial. Id. at 465-66.

DNA samples taken from the crime scene were sent to a lab outside of the Washington State Patrol Crime Lab. The Associate Director of one of the labs, DNA expert Gina Pineda, testified for the State. She had not personally participated or observed the testing, which was done in the lab, but used the electronic data produced during testing to create a DNA profile that reflected her interpretation and conclusions. Id. at 466.

Lui objected to Harruff's and Pineda's testimony on hearsay and confrontation grounds. The trial court rejected the hearsay argument because ER 703 allows experts to rely on hearsay in forming their opinions and concluded there was no confrontation issue as Harruff and Pineda were available for cross examination. Id. The Court of Appeals affirmed, holding no Confrontation Clause violation as Harruff and Pineda testified to their own conclusions and, while both testified to contents of reports they did not prepare, the reports were offered to explain the basis of their opinions under ER 703. Id. at 467.

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

The Supreme Court accepted review. A majority of five held that an expert for the State may express an opinion based upon the work of technical, rank-and-file laboratory employees, including their written lab reports. The Lui Court reasoned that these reports are not testimonial in the first place (the Confrontation Clause not being implicated where the opinion of the expert witness is based upon technical, nontestimonial materials). The Court held, that an expert comes within the scope of the Confrontation Clause if two conditions are satisfied: (1) the person must be a "witness" by virtue of making a statement of fact to the tribunal, and (2) the person must be a witness "against" the defendant by making a statement that tends to inculpate the accused or be adversarial in nature. As the majority put it, "the definition of 'witness against the accused' does not sweep in analysts whose only role is to operate a machine or add reagent to a mixture". Id. at 480. This test "allows expert witnesses to rely on technical data prepared by others when reaching their own conclusions". Id. at 483. However, an expert witness may not parrot the conclusions of others and circumvent the Confrontation Clause. Id. at 484.

In Lui, the Court held that the "witness against" the defendant in the DNA testing process is the final analyst who examines the data, creates the profile, and makes a determination that the defendant's DNA matches some other profile. Thus, Pineda was the proper witness to call under the Lui "test". Regarding the temperature testimony, the Court found that the temperature data had no relevance to the case until Harruff used that data to estimate a time of death, giving the raw data meaning. The data did not itself inculpate Lui, without the intervening analysis of an expert. Thus, the Confrontation Clause was not violated by Harruff's testimony regarding the body temperature.

The Court however reached a different result about the autopsy and toxicology evidence. Like the temperature readings, the information taken from the toxicology report and the autopsy

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

report were statements of fact. But unlike the temperature readings, these statements had an inculpatory effect: the toxicology report was prepared to identify the cause and manner of death (and to rebut Lui's testimony that the victim had been smoking prior to her death), and the autopsy was prepared to identify the manner of death and to prove that she was dressed postmortem. Both statements were used by the prosecution at trial to convict Lui, but unlike the temperature readings, Harruff did not bring his expertise to bear or add original analysis --he merely recited the conclusions of non-testifying witnesses. Id. at 494. Haruff's testimony thus fell squarely within the scope of testimony proscribed by the United States Supreme Court and it was error to admit it.

When applying these cases here, there can be no doubt that this letter was produced specifically to aid in a criminal investigation and is testimonial under any test the court might use to analyze it. The anal, oral, and vaginal samples were brought to the hospital by the police for forensic examination upon belief that Ms. Loomis was both raped and murdered. The analysis was to be used later in a criminal prosecution. The letter was signed by Dr. Elder and sent directly to the prosecuting attorney who was investigating the crime, which would rank as unquestionably testimonial under Melendez-Diaz.

This was not machine-generated data for which cross examination would prove fruitless as the Court noted in Bullcoming. Instead, as noted above, examination of the slides requires a high degree of skill and judgment for which cross examination is necessary. This is especially true given that many questions exist regarding how the sample came to be analyzed, how it was connected to the Loomis case, who analyzed it, what methods were used to analyze it, where it was stored, what happened to the slide after the examination, Dr. Elder's qualifications to

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

determine if a substance contains spermatozoa, and a host of other cross-examination worthy questions.

Lastly, under the Lui "test," very clearly Dr. Elder comes within the scope of the Confrontation Clause: (1) well-preserved spermatozoa is a statement of fact and (2) Elder is a "witness against" the defendant as the spermatozoa tends to connect him to the crime. This is true because the State's theory at trial will be that Mr. Miller killed Jody Loomis to cover up a rape. The only way for the State to argue Ms. Loomis was raped (and the only reason that testimony would even be relevant under ER 402) is based on the spermatozoa observed on the vaginal slide. Given that the only physical evidence the State has to connect Mr. Miller to the murder is DNA derived from spermatozoa, that there were well-preserved spermatozoa observed in the sample taken from her vagina connects the spermatozoa on the boot with the spermatozoa on her person. Even though, as the State might argue, Mr. Miller was not himself identified as a suspect, it is sufficient under Crawford and its progeny that the statement provides testimony against Mr. Miller in that it tends to connect him to the murder and a motive for committing it. It is testimony that is adversarial in nature as it inculpates Mr. Miller and would violate his constitutional rights by its admission.

Expert witnesses cannot be used as conduits for the admission of otherwise inadmissible testimonial statements of others. The state cannot "rely on [the testifying witness'] status as an expert to circumvent the [c]onfrontation [c]lause's requirements". Williams v. Illinois, supra, 567 U.S. at 126. Permitting any witness to testify to Dr. Elder's conclusion violates Mr. Miller's right to confrontation.

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

b. Even if the court finds the letter to be nontestimonial, the State cannot lay the proper foundation for its testimony.

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. ER 901(a). The proponents must put forth evidence to support two basic findings: (1) identification, which requires that the item is what the proponent claims; and (2) authentication, which requires that the item be in substantially the same condition.

While it contains a list of illustrations only, ER 901 does not provide a model or rule for authenticating certain types of evidence. Rule 901(b)(1) states that authenticity or identity may be established by testimony that a matter is what it is claimed to be. Where the evidence is a written document, testimony by its author, by a person who signed the document, or by others (a supervisor or custodian) may be acceptable. 5D Karl Tegland, Wash. Prac.,Evidence § 901.4, at 466 (2017-2018 ed.). Nevertheless, the authenticating witness should be speaking from personal, first-hand knowledge that the document is authentic. Id.

Here, Dr. Elder cannot authenticate a copy of the letter nor can any witness being called by the State. No witness is being called by the State who has personal knowledge of this letter. Dr. Elder cannot recall having received or analyzed these slides nor can he identify the letter other than what he believes to be his signature at the bottom. In addition, this court would need to engage in some measure of speculation to find that the slides Dr. Elder examined were in reference to this case. The letter cannot be authenticated.

Moreover, hearsay is not admissible unless it fits under a recognized exception. ER 802. The only plausible exception that could apply is the business records exception to the hearsay rule. To be admissible under the business records exception to the rule, the record must (1) be in record form; (2) be of an act, condition, or event; (3) be made in the regular course of business;

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

(4) be made at or near the time of the fact, condition or event; and (5) the court must be satisfied that the sources of information, method, and time of preparation justify admitting the evidence. RCW 5.45.020; State v. Ziegler, 114 Wash.2d 533, 538, 789 P.2d 79 (1990). This includes records such as "payrolls, accounts receivable, accounts payable, bills of lading" and similar records that are "the routine product of an efficient clerical system." In re Welfare of J.M., 130 Wash.App. 912, 924, 125 P.3d 245 (2005), citing Young v. Liddington, 50 Wash.2d 78, 83, 309 P.2d 761 (1957) (citing New York Life Ins. Co. v. Taylor, 147 F.2d 297, 300 (D.C.Cir.1944)). What such records have in common is that cross-examination would add nothing to the reliability of clerical entries: no skill of observation or judgment is involved in their compilation. New York Life, 147 F.2d at 301. In general, information gathered and recorded solely for purposes of litigation is out the scope of the exception. *See* State v. Hopkins, 134 Wash.App. 780, 142 P.3d 1104 (2006).

The State cannot establish the necessary prerequisites for the business record exception, nor do they have a custodian of records to admit this letter. There is no exception for the foundational requirements of authentication and identification under the business records act. State v. Devries, 149 Wash.2d 842, 847 (2003). The letter here was hardly a routine clerical notation of the occurrence of objective facts. The evidence documented in the letter involved such a high degree of skill of observation, analysis, and professional judgment that it was sent to a hospital two counties away. No witness can testify to how the report was made, whether it was in the normal course of business, or whether the record is accurate. Further, the letter was clearly written for purposes of litigation as the specimen was brought to the hospital by law enforcement and the letter was directed to the prosecuting attorney relating to a criminal case.

☐ Granted, ☐ Denied, ☐ Reserved, ☐ Agreed

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

7. Exclude the autopsy report by Dr. Robertson as a testimonial statements of a non-appearing declarant implicating Mr. Miller's right to confrontation under the Sixth Amendment.

When Ms. Loomis was brought to the hospital it was evident that this was a homicide, not a death from natural causes. Two detectives from the Snohomish County Sheriff's Office met deputy coroner Ken Christensen at the hospital and were present for the initial examination of her body and to collect evidence before returning to the scene of the crime. The following day, Dr. Alex Robertson performed the autopsy of Jody Loomis's body. Present as witnesses in the Snohomish County morgue at the time were various deputy coroners, detectives from the sheriff's office, and multiple prosecuting attorneys. A photographer named Jim Leo was present to document the autopsy. Physical items and biological samples were collected as potential evidence to the crime.

a. The autopsy is testimonial.

This was not a routine autopsy. Dr. Robertson, a pathologist, was performing an autopsy to aid in the investigation of a murder. *See* U.S. v. James, 712 F.3d 79 (2d Cir. 2013)(differentiating a "routine autopsy" where there was no suspicion that the individual had been murdered or that the autopsy was creating a record for later use at trial was held nontestimonial). He is not a rank-and-file witness operating a machine or generating raw-data where cross-examination would serve no purpose. There can be no question that the statements in the autopsy were made under circumstances that would leave the witness to reasonably believe the findings would be available for use at a later trial. The autopsy had an evidentiary purpose—to prove the cause and manner of death. This ranks as a testimonial statement under Melendez-Diaz and Bullcoming, *supra*.

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

The State will argue that under ER 703, another expert witness, here Dr. Lacy, can testify to the contents of the autopsy report to form the basis of his opinion. However, as noted above, our Supreme Court rejected this very argument in State v. Lui, 179 Wash.2d at 494. There the expert called at trial testified to statements taken directly from the autopsy about which he had no personal knowledge, and these statements had an inculpatory effect in that they were used to identify the manner of death. All statements were then used by the State at trial to convict Lui. Furthermore, the expert in Lui did not bring his expertise to bear on the statements or add original analysis, he merely recited the statements and conclusions prepared by the non-testifying witness. This satisfied both prongs of the Lui two-part "test" making the statements testimonial, implicating Mr. Lui's right to confrontation. Id.

The State proposes to do the same thing the court found was error: to allow Dr. Lacy to testify to another expert's report for which he has no personal knowledge and to repeat those statements made in the report to aid in his testimony. This would violate Mr. Miller's rights and the court should not allow it. The constitution trumps the rules of evidence.

b. Even if the court finds the autopsy to be nontestimonial, it is still hearsay and does not meet requirements for the business record exception.

As stated above, the business records exception applies only to the record of an act, condition, or event. This hearsay exception was designed for objective, virtually clerical records, and does not include reports reflecting the exercise of skill, judgment, and discretion. *See* In Re Welfare of J.M., *supra* at 924. Here, Dr. Robertson's autopsy was clearly designed to assist in a later prosecution. Information gathered and recorded for purposes of litigation falls outside the scope of the business records exception to the hearsay rule. Moreover, as stated above, this autopsy was far from clerical.

☐ Granted, ☐ Denied, ☐ Reserved, ☐ Agreed

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

8. Should the court permit testimonial hearsay, defense moves to exclude those opinions for which Dr. Lacy is either not qualified to testify to, or which would amount to speculation.

Evidence Rule 702 governs the admissibility of expert testimony. Expert testimony is admissible if 1) the witness is qualified, and 2) the witness's testimony will assist the trier of fact in understanding the evidence or determining a fact in issue. A determination of whether expert testimony will assist the trier of fact will depend on the particular facts of the case. Even expert testimony must be relevant to be admissible. 5D Karl Tegland, Wash. Prac.,Evidence § 702.5, at 331 (2017-2018 ed.)(emphasis added), ER 401, 402. Expert testimony is not helpful or relevant if it is based on speculation. State v. Lewis, 141 Wn.App. 367, 388-89 (2007). Admission of expert testimony is within the trial court's discretion. Id.

Practical experience is sufficient to qualify a witness as an expert. State v. Ortiz, 119 Wash.2d 294, 310, 831 P.2d 1060 (1992). However, "the expert testimony of an otherwise qualified witness is not admissible if the issue at hand lies outside the witness' area of expertise." State v. Farr–Lenzini, 93 Wash.App. 453, 461, 970 P.2d 313 (1999) (citing Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha, 126 Wash.2d 50, 103–04, 882 P.2d 703, 891 P.2d 718 (1994)).

Evidence Rule 703, allows an expert to rely on hearsay facts and data for his opinion, but the terms "facts" and "data" do not imply hearsay opinions or speculation. The opinion of other non-testifying witnesses is not admissible. The rule does not provide a blank check for an expert witness to bolster his own opinion by maintaining it is corroborated by other inadmissible evidence of a non-testifying expert's opinion. *See e.g.*, State v. Wicker, 66 Wn.App. 409 (1992).

ER 703 authorizes an expert to base her opinion on data that is not otherwise admissible as long as the data is of a type reasonably relied upon by experts in her field. In re Det. of Coe,

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

160 Wn. App. 809, 829–30, 250 P.3d 1056, 1066 (2011), aff'd on other grounds, 175 Wn.2d 482, 286 P.3d 29 (2012), citing Det. of Marshall v. State, 156 Wn.2d 150, 162 125 P.3d 111 (2005).

Dr. Robertson performed the autopsy on Jody Loomis's body. He has since died. As a result, the State hired Dr. Matthew Lacy as a consultant. Dr. Lacy did not examine any of the physical evidence in this case (other than photographs) and, in fact, many of the evidence items that would be of import to his conclusions are missing, underpants worn by Ms. Loomis with what appeared to be a semen stain; cytologic smears from the oral, anal, and vaginal canals; and the bullet and bullet fragment removed from Ms. Loomis's head. Instead, according to Dr. Lacy's report, his opinions are based on having reviewed the autopsy report by Dr. Robertson, which, as argued above, is not itself admissible at trial, photographs taken during the autopsy, the coroner's report, a letter from Dr. Thomas Elder identifying spermatozoa from a vaginal swab taken during the autopsy (also not admissible in evidence--see above), witness statements from [redacted] and [redacted] and news articles.

Based on his review of the above records, Dr. Lacy "independently conclude[d]" that Ms. Loomis died of a gunshot wound to the head, from a small caliber gun at an indeterminate range. The defense does not dispute that there is likely sufficient foundation for this testimony. However, Dr. Lacy goes on to opine that (1) the gun muzzle was above and to the right of Ms. Loomis's face when shot, and (2) that she was raped at gunpoint. This testimony is either barred by the evidence rules (ER 402, 403, 702, 703) or is a violation of Mr. Miller's Sixth Amendment right to confrontation.

a. *Testimony that the "gun muzzle was above and to the right of Ms. Loomis's face when it was fired" is speculative and not admissible.*

Dr. Lacy opines that the gun used to kill Ms. Loomis was "above and to the right" of her head when fired. It is not contested that the firearm used to kill Ms. Loomis was "to the right" of

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

her head based on the bullet wound. However, that the perpetrator was "above" her is not testimony this witness can offer. Firstly, the testimony is not relevant. ER 401, 402. The defense is not arguing accident or mistake. The defense is arguing that Mr. Miller is not the killer. The positioning of the perpetrator is not a fact in issue. As such, this testimony is not helpful to the trier of fact. Secondly, this opinion is speculative. There is no evidence how Ms. Loomis's body was positioned when she was shot. No one can say that she was seated, standing, or lying down at the time. The evidence only supports at some point that her bare bottom had contact with the ground. Further, the photos taken during the autopsy only reveal the entry of the bullet. The path the bullet took once it entered Ms. Loomis's head cannot be determined based on these photographs. Dr. Lacy would be relying exclusively on the report written by Dr. Robertson to come to this conclusion, which is not admissible. That the perpetrator may have been "above" her when she was shot is not helpful and is speculative, making the testimony inadmissible under the rule.

b. Testimony that Jody Loomis was "raped at gunpoint" is irrelevant and speculative.

Dr. Lacy is a pathologist. The job of the pathologist is to certify the cause and manner of death based upon the information gathered at the scene, at the lab, and from the examination at the autopsy. The cause of death refers to the disease or injury that caused the death, while the manner of death relates to whether the death was classified as natural, accident, suicide, homicide, or undetermined. While Dr. Lacy might be qualified to testify that Ms. Loomis died of a gunshot wound to the head, he is not qualified to testify that she was raped.

In his report, Dr. Lacy opines that Ms. Loomis was raped, and that this happened at gunpoint. While he agrees that there were no physical trauma consistent with a sexual assault, he bases the conclusion that Ms. Loomis was raped on the following facts: (1) that she was found in

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

a state of partial undress, (2) that she had debris on her buttocks and perineal region, and (3) the spermatozoa that was discovered in her vagina. He concludes this means she was raped (as opposed to simply having had a consensual sexual encounter) by employing "common sense".

When Dr. Lacy was asked about his opinion that this rape happened at gunpoint, he again underscored that this was purely common sense. "The whole picture with her being shot is inconsistent with what would be, in my mind, just common sense for a consensual encounter." He assumes it happened at "gunpoint" because in his mind she must have been trying to dress quickly before she was shot. He further bases *that* assumption on the fact that someone wouldn't likely pull their pants up over dirty parts of their skin.

Firstly, this testimony is not relevant. Mr. Miller is charged with murder, not rape. Testimony regarding his opinion that she was raped does not make any fact at issue in the determination of this matter more or less likely.

Secondly, Dr. Lacy is not qualified to opine on whether someone was raped at gunpoint. His opinion is based on common sense, not scientific, technical, or other specialized knowledge. He is in no different position than the jury to use his "common sense." Moreover, there is no evidence to suggest that the information he relied on is of a type reasonably relied upon by experts in his field.

Lastly, Dr. Lacy cannot testify to Dr. Elder's opinion that the vaginal slide contained spermatozoa (see above). His "opinion" thus amounts to nothing more than conjecture and speculation. In fact, Dr. Lacy agrees that without the information from Dr. Elder he would not be able to jump to the conclusion that Ms. Loomis was raped. Even if the court were to permit Dr. Lacy to parrot the opinion of Dr. Elder in violation of Mr. Miller's right to confrontation, nothing about the presence of spermatozoa makes this a rape versus a consensual sexual encounter. Dr.

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

Lacy jumps to the conclusion that this was not a consensual encounter only based on Ms. Loomis's state of partial undress and the debris on her buttocks. His "common sense" testimony is not helpful to the trier of fact. The major danger of testimony of this kind, coming from an expert witness, is its potential to mislead the jury with an aura of scientific infallibility that may cause the jury to accept it without critical scrutiny.

☐ Granted, ☐ Denied, ☐ Reserved, ☐ Agreed

9. Exclude any opinion testimony that the substance seen upon examination of Jody Loomis's body was seminal fluid.

ER 701 provides that a witness not testifying as an expert can offer opinions that are (1) rationally based on the witness's perceptions, (2) helpful to the trier of fact in understanding the witness's testimony or determining a fact in issue, and (3) not based on scientific, technical, or other specialized knowledge covered by ER 702. ER 701; State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008).

In determining whether such statements are impermissible opinion testimony, the court will consider the circumstances of the case, including the following factors: "(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact." State v. Blake, 172 Wn. App. 515, 527, 298 P.3d 769, 775 (2012), *citing* Montgomery at 591.

At trial, the State will call Kenneth Christensen to testify. Mr. Christensen was the deputy coroner who was called to examine Ms. Loomis's body when it was brought to the hospital. In August of 1973, Mr. Christensen had been employed as a deputy coroner for somewhere between 8 months and approximately 1.5 years (these answers were inconsistent). His job as a deputy coroner was to assist with death investigations, removal of deceased persons for later examination by the pathologist, and sometimes to go out to the scene. He had no

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

training in evidence collection, and had only been involved with 2-3 prior death investigations. None involved sexual assault. This was his first "solo" death investigation.

When Mr. Christensen was examining Ms. Loomis's body, he observed what appeared to him to be seminal fluid. In an interview with defense counsel, he acknowledged that he had no experience in identifying seminal fluid and could not be certain what the substance was. Mr. Christensen is not being called as an expert and, in fact, would not qualify as an expert to testify on this subject.

Defense also interviewed Dr. Matthew Lacy, who the State anticipates calling as an expert witness at trial. Dr. Lacy is the Chief Medical Examiner in Snohomish County and has conducted thousands of autopsies since 2004. In an interview with Dr. Lacy, he told defense that he cannot determine if a fluid is semen without microscopic examination and would not testify that something was or was not semen without such examination of the substance. Further, he indicated there is nothing that can definitively be identifiable as semen without microscopic examination.

Here, even an expert in forensic pathology would not testify to the identity of seminal fluid without microscopically examined it. Testimony of this kind requires scientific, technical, or other specialized which falls outside the scope of ER 701.

☐ Granted, ☐ Denied, ☐ Reserved, ☐ Agreed

10. Motion to prohibit witnesses from commenting directly, or indirectly to Mr. Miller's right to remain silent.

Calling attention to a defendant's exercise of Miranda and the right to remain silent violates a defendant's right against self-incrimination and Due Process of law under the 5th and 14th Amendments of the U.S. Constitution and Article 1, Section 9 of the Washington State Constitution. Doyle v. Ohio, 426 U.S. 610, 617, 96 S.Ct. 2240, 2244, 49 L.Ed.2d 91 (1976);

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

State v. Easter, 130 Wn.2d 228, 238, 922 P.2d 1285 (1996); State v. Burke, 163 Wn.2d 204, 217, 181 P.3d 1 (2008).

The State may not elicit testimony from witnesses or make closing arguments relating to a defendant's silence to infer guilty from such silence. State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996). The prosecution may not use at trial the fact that the defendant stood mute or claimed his privilege in the face of an accusation. Miranda v. Arizona, 384 U.S. 436, 468, 86 S. Ct. 1602, 16 L. Ed. 694 (1966). The purpose of this rule is to ensure that an accused's Fifth Amendment right is not circumvented by the State questioning the arresting officer or commenting in closing argument on the defendant's assertion of his right. State v. Fricks, 91 Wn.2d 391, 396, 588 P.2d 1328 (1979).

☐ Granted, ☐ Denied, ☐ Reserved, ☐ Agreed

11. Motion to refer to all witnesses by their name

All individuals should be referred to by their true names. Mr. Miller moves this court to order that the State and all witnesses be instructed to refrain from referring to him as the "suspect" or the "defendant." Such a ruling is appropriate under State v. Reed, 102 Wn.2d 140 (1984) (impermissible for counsel to assert opinion on guilt or innocence), State v. Black, 109 Wn.2d 336 (1987) (witnesses may not express opinion as to guilty directly or indirectly) and State v. Jones, 71 Wn.App. 798 (1993), and State v. Case, 49 Wash.2d 66, 68 (1956)(This is "an attempt to impress upon the jury the [prosecutor's] personal belief in the defendant's guilt. As such, it was not only unethical but extremely prejudicial"). ER 701, ER 702.

☐ Granted, ☐ Denied, ☐ Reserved, ☐ Agreed

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

12. Motion to prevent the prosecutor from vouching for or expressing any personal opinion about the credibility of any witness.

The defense requests that the witnesses also be instructed not to offer such opinions. State v. Jerrels, 83 Wn.App. 503 (1996); State v. Fiallo-Lopez, 78 Wn.App. 717 (1995). Any such testimony or inference would deprive Mr. Miller of a fair trial. State v. Jerrels, 83 Wn.App. 503 (1996); State v. Fiallo-Lopez, 78 Wn.App. 717 (1995).

☐ Granted, ☐ Denied, ☐ Reserved, ☐ Agreed

13. Motion to prohibit the State from appealing to the jury's passion and prejudice

This is a 48 year-old homicide case where the alleged victim was a young woman when she was shot. There are several issues in this case that may be emotional for jurors to consider. The State should be prohibited, in all phases of this trial, from appealing and encouraging these emotions in reaching their verdict.

A prosecutor is forbidden from appealing to jurors' passions and encouraging them to render a verdict based on emotion. State v. Belgarde, 110 Wash.2d 504, 507-08 (1988). Improper appeals to passion or prejudice include arguments intended to incite feelings of fear, anger, or desire for revenge, and that otherwise prevent calm and dispassionate evaluation of the evidence. State v. Elledge, 144 Wn.2d 62, 85 (2001). To permit the State to appeal to jurors' emotion is counter to the constitutional duty of this court to ensure Mr. Miller is given a fair trial.

Examples of statements that must not be permitted include, but are not limited to; speculation as to what Ms. Loomis's life might have been like if she were still alive *see* State v. Pierce, 169 Wn.App. 533, 553 (2012) (it is reversible misconduct for the prosecutor the urge the jury to decide the case based on evidence outside the record), comments on the pain of the victim's family *see* State v. Severson, 215 P.3d 414, 440 (Idaho 2009), and asking the jurors to identify with the victim, s*ee* State v. Watlington, 579 A.2d 490, 493 (Conn.1990).

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300

☐ Granted, ☐ Denied, ☐ Reserved, ☐ Agreed

14. Motion to compel the State to disclose physical evidence and exhibits intended to be used at trial.

This would include copies of any recordings, photographs, court documents, transcripts, reports, videos, or recorded statements, including but not limited to any statements made by any witness to law enforcement, the prosecutor, and/or victim advocate about this case. CrR 4.7.

☐ Granted, ☐ Denied, ☐ Reserved, ☐ Agreed

15. Motion to exclude all witnesses from the courtroom, with the exception of Mr. Reeves, who is the defendant's managing witness and who will testify, only if necessary, for rebuttal purposes.

The State should also be ordered to admonish all State witnesses not to discuss their testimony with each other until the close of the proceedings, including police officers. This would include individuals who are witnesses in this case and who have not been excused may not watch the testimony of other witnesses via a livestream feed of this trial. Defense requests that the court inquire as to this issue with each testifying witness. ER 615.

☐ Granted, ☐ Denied, ☐ Reserved, ☐ Agreed

16. Motion that counsel inform any witness called to testify of the Court's rulings on these and other pre-trial motions and instruct them not to comment on or refer to any excluded matters. Also, that if counsel feels that the door has been opened to any excluded matter, that counsel clarify that before proceeding.

ER 103(C).

☐ Granted, ☐ Denied, ☐ Reserved, ☐ Agreed

DATED this 17th day of October, 2020.

Respectfully submitted,

Laura Martin
LAURA MARTIN, WSBA #32897
Attorney for the Accused

Fred Moll
FREDERIC MOLL, WSBA #36979
Attorney for the Accused

Snohomish County Public Defenders Association
2722 Colby Ave. Suite 200
Everett, WA 98201
425-339-6300