IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY

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| STATE OF WASHINGTON<br><br>Plaintiff,<br><br>vs.<br><br>TALBOTT, William E.<br><br>Defendant. | Case No: 18-1-01670-31<br><br>DEFENSE MOTION TO SEVER OFFENSES PURSUANT TO CrR 4.4(b) |

**ORIGINAL**

## I. MOTION

COMES NOW the defendant, by and through undersigned counsel, and moves the court to sever count 2 (involving the homicide of Mr. Cook) from Count 1, on the basis of the disparity in the strength of the evidence of the two charges. This motion is based on CrR 4.4(b), and the cases and supporting authority cited herein.

## II. FACTS

On November 18, 1987, Tanya Cuylenborg and Jay Cook traveled from Sannich, British Columbia, Canada, to Washington State in a Ford Van with the intention of traveling to Seattle via the ferry crossing from Bremerton. There is evidence that a ferry ticket was purchased for the crossing, but the whereabouts of the two and their activities are unknown in the days immediately thereafter.



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On November 24, 1987, the body of Ms. Cuylenborg was discovered in a ditch off a rural road in Skagit County. She had been shot once in the head.

On November 25, 1987, the Ford Van was discovered in parking lot in Bellingham.

On November 26, 1987, Mr. Cook's body was discovered in rural Snohomish County, south of Monroe, approximately 70 miles from where Ms. Cuylenborg had been found. Mr. Cook had been beaten and strangled.

Semen DNA was reportedly collected from some black knit slacks belonging to Ms. Cuylenborg that were found in the Ford Van.

In 2018, that DNA from those slacks was reportedly found to be consistent with Mr. Talbott's DNA, and Mr. Talbott was charged with these two murders.

Following Mr. Talbott's arrest, police conducted an investigation of him. The results of that investigation were not fruitful. As of the writing of this memo, the prosecutor has produced no evidence which connects Mr. Talbott to either of the two victims with the exception of the reported DNA match. They were never seen together, and they were not known to have ever communicated. There is no forensic evidence that links Mr. Talbott to the crime of Mr. Cook. The firearm used to murder Ms. Cuylenborg was not discovered in any search of Mr. Tablott's property, nor was Mr. Talbott ever known by friends or family to possess firearms or be interested in firearms.

While the reported DNA evidence is consistent with sexual intercourse, there exist no forensic evidence supporting the state's initial claim that this intercourse was the result of sexual assault.

Mr. Talbot has lived the entirety of his life in the Snohomish and King County area, and he has never been convicted of a crime. After his arrest, his DNA profile was


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compared to DNA evidence collected in other cases through criminal investigative databases nationally and internationally, and no match was ever discovered.

Despite an exhaustive investigation, the most significant connection between Mr. Talbott and the two persons who were killed in different ways and at different locations and different times is the DNA connection associated between he and Ms. Cuylenborg.

## III. LEGAL AUTHORITY

Severance of offenses is required when that severance will promote a fair determination of the defendant's guilt or innocence of each offense. CrR 4.4(b). A motion to sever offenses brought under CrR 4.4(b) focuses on the potential prejudice to the defendant notwithstanding proper joinder. State v. Gatalski, 40 Wn.App 601, 606 *rev denied* 104 Wn.2d 1019 (1985).

Prejudice in the context of two or more properly joined offenses arises when the multiple offenses are tried in a single trial, thus inviting the jury to cumulate evidence to find guilt or to infer guilt from a charge with stronger evidence to a charge with weaker evidence. State v. Smith, 74 Wn.2d 744, 754-55 (1968), *overruled on other grounds* 85 Wn.2d 758 (1975). (*citing to* Drew v. United States, 331 F.2d 85, 88 (1964) noting that a defendant can be prejudiced when "the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other..." crime, and because "the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find.").

The courts have identified four factors which may offset or neutralize the prejudicial effect of joining multiple offenses in a single trial: (1) the strength of the State's evidence on each count; (2) the clarity of defenses to each count; (3) the court's


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instruction to the jury to consider the evidence of each crime separately; and (4) the admissibility of the evidence of one crime in the trial of the other if they were tried separately. State v. Eastabrook, 58 Wn.App. 805, 811-12, *rev denied* 115 Wn.2d 1031 (1990).

In the case at bar, the disparate strength of the State's evidence as to each count could not be greater. The extent of this disparity can best be judged by noting that if the offenses were severed, it would be very unlikely that the state could even proceed in a prosecution against the accused regarding the charge of homicide involving Mr. Cook. There exists no physical or testimonial evidence which links Mr. Talbott to Mr. Cook at all, much less to Mr. Cook's homicide. The state's prosecution of Mr. Talbott as it relates to Mr. Cook rests entirely on speculation and assumptions stemming from the presence of DNA evidence from the other victim which, taken in a light favorable to the state, is consistent with the proposition that Ms. Van Culyenborg and Mr. Talbott engaged in sexual intercourse.

When there is a disparity of such quality and quantity of evidence between offenses, appellate courts have found prejudice. In State v. Hernandez, 58 Wn.App. 793 (1990), *rev denied* 117 Wn.2d 1011 (1991), for example, the Court of Appeals reversed two of three robbery convictions that were tried in the same trial in part because the strength of the state's evidence on each count was much weaker in regard to two of the counts as opposed to the third. The evidence in all three of the robberies consisted of eyewitness identifications. However, in the case with the strongest evidence, three eyewitnesses identified the defendant as being the robber, with each rating their own certainty respectively as 100%, 98%, and 75-80%. Regarding the other two 'weaker' charges, one had a single eyewitness who self-rated his identification of the defendant as


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65%, and the third robbery had one eyewitness who felt positive of her identification but whose identification was otherwise uncorroborated. The court ruled that "because the State's evidence on these two counts was somewhat weak, any prejudice flowing from the joinder would likely be significant." The court also found that the evidence of the separate robberies would likely not be cross-admissible.

Regarding the consideration of cross admissibility of evidence in the case at bar, it is likely that there would be res gestae evidence of the facts and circumstances related to the two separate victims which would be cross admissible – i.e. the two came from Canada together in the same vehicle, and they went missing around the same time – but there is no substantive evidentiary link between the two crimes. This is an important distinction when weighing this consideration. In this case, the two victims were found around 70 miles apart in separate counties. They were killed in distinctly different ways and by different means. Their bodies were found on different days. There is no accounting for their whereabouts during any of the time (6 and 8 days) between when they were missing to when their bodies were found. There is no explanation for how or when or if they became separated from each other prior to their demise, nor under what circumstances that may have happened. There is no evidence that Mr. Talbott ever met or had any contact with Mr. Cook. There is no physical evidence linking Mr. Talbott to the crime scene where it is believed Mr. Cook was killed, nor to any evidence found in the examination of Mr. Cook's body and effects which connects to Mr. Talbott.

No evidence exists that supports an inference that these two homicides involved unique methodology such that the identity of the killer of one of the victims could be inferred from the similar methodology used to commit the other homicide (*see e.g.* State v. Smith, 106 Wn.2d 772, 777 (1986) Evidence of other crimes can be relevant on the


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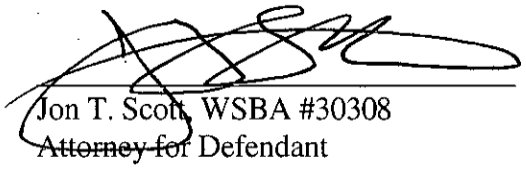
issue of identity only if the method employed in the commission of the crimes was "so unique" that proof that an accused committed one of the crimes creates a high probability that he also committed the other crime.).

In short, while there are shared narrative circumstances which would likely be admissible in separate trials of these offenses should they be severed, there is not substantive evidence identifying Mr. Talbott as the perpetrator that would be admitted in separate trials. Indeed, if the offenses were severed, it is unlikely there would be two trials because the state's evidence against Mr. Talbott regarding the allegation of the homicide of Mr. Cook is insufficient to merit going forward without the prejudicial effect gained by the State in prosecuting these offenses together.

## IV. CONCLUSION

For the above stated reasons, the defense moves the court to sever count 2 from count 1 to avoid the prejudicial effect of trying the offense together.

Respectfully submitted,



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