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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

In re Personal Restraint Petition of

JOHN SCHOENHALS,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Should this untimely personal restraint petition be dismissed because Schoenhals has failed to establish that State v. Monschke[1] is a significant and retroactive change in the law that is material to his case?

2. Even if this Court determines that Schoenhals' petition is timely, should it nonetheless be dismissed because Schoenhals has failed to establish actual and substantial prejudice from the sentencing court's failure to exercise discretion?

B. STATEMENT OF THE CASE

Schoenhals was 20 years old in 1985 when he killed 14-year-old Mark Wallace, and he was 21 years old when he was convicted of aggravated first-degree murder. See Appendix A (judgment and sentence). Schoenhals knew Wallace's older brother and was aware that Wallace's father kept guns in their

[1] 197 Wn.2d 305, 482 P.3d 276 (2021).

home. See Appendix B (certification for determination of probable cause). Schoenhals and a friend burglarized the Wallace home, stole the firearms and other items, and stabbed the teenage Wallace in the throat, killing him. Id. The evidence at trial was summarized by this Court in its unpublished opinion on direct appeal. See Appendix C (unpublished opinion and mandate in 21323-7-I). The jury determined that Schoenhals killed Wallace to conceal his identity as a participant in the crime. See Appendix D (verdict forms and special interrogatory).

At sentencing, the court imposed the statutorily mandated sentence of life without parole (LWOP). Appendix A. This Court affirmed Schoenhals' conviction on appeal. Appendix C. The mandate issued December 7, 1988. Id.

C. ARGUMENT

Schoenhals seeks resentencing. He argues that the plurality opinion in Monschke is a significant and retroactive change in the law, material to him, that makes his claim timely.

But no court has held that Monschke constitutes a significant and retroactive change in the law authorizing an untimely claim for resentencing under RCW 10.73.100(6). And even if this Court were to conclude that Monschke significantly and retroactively changed the law, Schoenhals has not established that it did so in a way that is material to him. He has not shown his own sentence to be constitutionally disproportionate.

Schoenhals also argues that he is not required to establish prejudice in this collateral attack. According to him, the mandatory nature of his LWOP sentence alone entitles him to relief. But LWOP is a constitutionally permissible sentence — and is still the statutorily mandated punishment — for a defendant such as Schoenhals who commits aggravated murder at age 20. Thus, even if this Court were to conclude that Monschke retroactively changed the procedure relating to imposition of an LWOP sentence, Schoenhals must still establish prejudice from the sentencing court's failure to follow that procedure at his sentencing hearing.

To do so, Schoenhals must establish by a preponderance of the evidence that he would have received a lesser sentence if his youth was fully considered. Schoenhals denies that he committed aggravated murder and has not established that youth mitigated his culpability for his crime. He thus has not established prejudice from the sentencing court's mandatory imposition of sentence. His untimely personal restraint petition should be dismissed.

1. LWOP REMAINS A CONSTITUTIONALLY PERMISSIBLE SENTENCE AFTER MONSCHKE.

Monschke is a plurality opinion. The lead opinion, signed by four justices, concluded that the consolidated petitioners' mandatory LWOP sentences violated article I, sec. 14 of the Washington Constitution because of the risk of disproportionate punishment when applied to aggravated murderers who are 18, 19, and 20 years old. Monschke, 197 Wn.2d at 325-26 (lead opinion).

The lead opinion cited to Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), and its requirement for discretion before imposing LWOP on juvenile offenders. Monschke, 197 Wn.2d at 327 (citing Miller, 567 U.S. at 483). The lead opinion concluded there is no meaningful distinction between the brain of a 17-year-old and that of an 18-year-old, and extended Miller's requirement of discretion to the 19- and 20-year-old consolidated petitioners. Id. at 321-25, 26, 29.

The lead opinion did not *prohibit* an LWOP sentence for 18- to 20-year-old offenders, even though that is an unconstitutional sentence for all *juvenile* offenders after State v. Bassett, 192 Wn.2d 67, 428 P.3d 343 (2018). See Monschke, 197 Wn.2d at 325 ("petitioners have neither argued nor shown that LWOP would be *categorically* unconstitutional as applied to [defendants at least 18]") (emphasis in original); see also In re Pers. Restraint of Kennedy, 200 Wn.2d 1, 24, 513 P.3d 769

(2022) ("discretion … is the solution to the constitutional problem identified by the lead opinion in Monschke").

A fifth justice concurred, stating his continued belief that State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015), was a change in the law that allowed the petitioners "a new sentencing hearing to determine whether their ages at the time of their crimes is a mitigating factor justifying a downward departure from the standard sentence." Monschke, 197 Wn.2d at 329 (González, C.J., concurring). In other words, the concurring justice believed that LWOP was the "standard" sentence for those at least 18 who commit aggravated murder, but a defendant who shows the diminished culpability of youth could seek a departure.

The dissent, which was signed by four justices, believed that mandatory LWOP for aggravated murderers who are at least 18 is constitutional. Monschke, 197 Wn.2d at 340-41 (Owens, J., dissenting). The dissent believed that "the lead opinion improperly elevated evolving neuroscience above

legislative enactments." Kennedy, 200 Wn.2d at 22 (citing Monschke, 197 Wn.2d at 341).

2. MONSCHKE DID NOT ANNOUNCE A BINDING RATIONALE AS TO THE TIMELINESS OF SCHOENHALS' CLAIM.

Plurality opinions have limited precedential value and are not binding on the courts. In re Pers. Restraint of Isadore, 151 Wn.2d 294, 302, 88 P.3d 390 (2004), abrogated on other grounds, State v. Buckman, 190 Wn.2d 51, 409 P.3d 193 (2018). When there is no majority that agrees on the rationale for a decision, the court's holding is "the narrowest ground upon which a majority agreed." State v. Patton, 167 Wn.2d 379, 391, 219 P.3d 651 (2009). Moreover, a plurality opinion should not be relied upon for establishing new frameworks for criminal procedure. Isadore, 151 Wn.2d at 302.

All nine justices in Monschke agreed that an untimely challenge to a mandatory LWOP sentence must fit within an exception to RCW 10.73.090's one-year time limit for

collateral attacks. But there was no majority holding regarding a rationale for the timeliness of the petitioners' claims before it.

The four justices signing the lead opinion believed that the petitioners' untimely challenges fell within the exception found in RCW 10.73.100(2) that applies when the statute the "defendant was convicted of violating was unconstitutional … as applied to the defendant's conduct." Monschke, 197 Wn.2d at 309-11.

But the concurring justice and the four dissenting justices disagreed with the lead opinion's "shoehorning" of the petitions into RCW 10.73.100(2). Monschke, 197 Wn.2d at 335 (Owens, J., dissenting); Monschke, 197 Wn.2d at 329 (Gonzalez, J., concurring). Instead, the five justices recognized that the plain language of RCW 10.73.100(2) applies only to challenges to *convictions* obtained pursuant to an unconstitutional statute, not to *sentences*. See also State v. Kennedy, 200 Wn.2d at 22 ("Together, the concurrence and the dissent make a total of five

votes for the conclusion that RCW 10.73.100(2) did not provide an exemption for the petitioners in Monschke.").

As noted above, the concurring justice believed (contrary to the decision in In re Pers. Restraint of Light-Roth, 191 Wn.2d 328, 422 P.3d 444 (2018)), that O'Dell, supra, was a significant and retroactive change in the law that was material to the petitioners' claims, and therefore would have applied the exception in RCW 10.73.100(6). Monschke, 197 Wn.2d at 329 (González, C.J., concurring). None of the other eight justices adopted that view.

A single judge cannot overrule a prior decision of the court. Thus, Monschke does not contain a timeliness holding that can apply to any defendants other than the Monschke petitioners themselves. See Patton, 167 Wn.2d at 391 ("Where there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds."). Monschke does not

state a theory of timeliness that Schoenhals can rely upon to bring his untimely claim for resentencing.

3. MONSCHKE IS NOT A SIGNIFICANT AND RETROACTIVE CHANGE IN THE LAW.

In his supplemental brief, Schoenhals argues that the Monschke plurality opinion itself constitutes a significant and retroactive change in the law authorizing his untimely resentencing claim under RCW 10.73.100(6). This Court should reject Schoenhals' expansive interpretation of Monschke.

a. Schoenhals' Expansive Interpretation of Monschke Should Be Rejected.

The lead opinion in Monschke concluded that, as a matter of state constitutional law, "the aggravated murder statute's rigid cutoff at age 18 combined with its mandatory language creates an unacceptable risk that youthful defendants without fully developed brains will receive a cruel [LWOP] sentence." 197 Wn.2d at 325. Central to this conclusion was

the assertion that offenders aged 19 and 20 are "*essentially* juveniles in all but name" because there is no "*meaningful*" or "*distinctive* scientific difference, *in general* between the brains of a 17-year-old and an 18-year-old." Monschke, 197 Wn.2d at 312, 321-22 (emphasis added).

The above italicized words were used in the opinion because there are *actual* differences in human brains during infancy, childhood, adolescence, young adulthood, adulthood, and the geriatric stage. A human brain necessarily develops over time. The words *meaningful* and *distinctive* and *generally* sidestep true biological differences between the brains of juveniles and young adults. The way these words were used in the lead opinion reveals subconscious value judgments as to whether these brain differences are significant at a policy level and portrays any legislative choice as to where lines should be drawn along an age continuum as indefensibly arbitrary.

The lead opinion's criticism — that choosing to treat 18-year-olds as adults is irrational — is an example of a continuum

fallacy in logic. A continuum fallacy argues against logic that, if there is no definable point between two extremes, then there is no difference between the two extremes themselves. For example: A differs from Z by a continuum of insignificant changes, and there is no non-arbitrary place at which a sharp line between the two can be drawn, so A and Z are not different.

It is a mistake to reason that we should not accept a distinction purely on the basis that there is a continuum between points of distinction. It is illogical to argue that there is no distinction between red and blue because there is a continuum of colors in between them. This logically flawed reasoning invites expansion, for if there is no difference between 17 and 18, or between 19 and 20, then arguably there is also no difference between 20 and 21, and so on. By such fallacious reasoning one arrives at the absurd conclusion that a person never becomes an adult, or that it is irrational to draw a line at any given point. Indeed, the larger the continuum, the

more fallacious the argument. Just because any single step makes no apparent difference, there is still a difference that becomes more noticeable as the number of steps increases.

The lead opinion's skepticism of legislative line-drawing follows such fallacious reasoning. Under the law, when does sobriety become drunkenness, or speed become unsafe, or a child reach an age to consent to sexual relations or to vote, or to smoke and drink, or to be drafted into war? The answers to these questions involve complex judgments, but they are not arbitrary. If your doctor tells you that you are "overweight," it would be illogical and unhealthy to argue that because "overweight" has no clear demarcation then you need not slim down.

In the end, a societal decision must be made as to where on the continuum to draw a line. Behavioral scientists, neuroscientists, lawyers, teachers, parents and non-parents, young people — and convicted killers — may all have different opinions. But drawing a line, when line-drawing is difficult or

indeterminate, is a classic policy-based and political decision that we entrust to our elected legislature. And there is nothing in the state constitution generally, or in article I, section 14 specifically, that grants the judicial branch the power to make that decision instead of the elected representatives of this state.

Caution would seem particularly appropriate as to the nebulous concept of "majority" where even scientific experts temper their conclusions. Monschke, 197 Wn.2d at 320. The lead opinion concedes that where to draw the line of adulthood for sentencing purposes is highly indeterminate and that "research does not currently allow us to move from … group data … to measuring the neurobiological maturity of an individual adolescent because there is too much variability within age groups and across development [and that] we do not currently have accurate behavioral measures of maturity." Monschke, 197 Wn.2d at 325 (citing Richard J. Bonnie & Elizabeth S. Scott, The Teenage Brain: Adolescent Brain

Research & the Law, 22 CURRENT DIRECTIONS IN PSYCHOL. SCI. 158, 161 (2013)).

The fundamental constitutional question is where society draws the line between childhood and adulthood. Monschke, 197 Wn.2d at 317. "National consensus" is the standard ordinarily applied in federal and state constitutional analysis. Graham v. Florida, 560 U.S. 48, 61, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010); Bassett, 192 Wn.2d at 83; State v. Fain, 94 Wn.2d 387, 617 P.2d 720 (1980). But the lead opinion in Monschke did not apply this standard. Instead, it looked to statutes in six states and the District of Columbia, found that their laws constituted "a trend worthy of note," and concluded that this "trend" supported its view that a "meaningful" line cannot be drawn under the age of 21.[2] The opinion also examined Washington's statutes to observe that the age of

[2] The "trend" is even weaker than the lead opinion asserted. The lead opinion failed to note that some of the cited statutes did not apply to murder cases. Monschke, 197 Wn.2d at 339-40 (Owens, J., dissenting).

majority is varied and flexible under our laws, acknowledged that "majority" is a "nebulous concept," but nonetheless extended the age of majority based on such observations. Monschke, 197 Wn.2d at 319-20.

The dissenting opinion by Justice Owens went to great lengths to point out these deficiencies in the reasoning of the plurality, which are significant. And after Monschke, our state supreme court has itself expressed skepticism that the plurality decision produced a legal rule of any kind, rather than just a result limited to the petitioners in that case. See Kennedy, 200 Wn.2d at 24 ("*Even if* Monschke's lead opinion could be read as announcing a holding of this court," it would not be material to Kennedy) (emphasis added); accord In re Pers. Restraint of Davis, 200 Wn.2d 75, 84, 514 P.3d 653 (2022) (stating that "*even assuming* Monschke is retroactive," it would not be material to Davis) (emphasis added). If Monschke does not even state a rule of law, there is no justification for finding its flawed analysis retroactively applies to Schoenhals.

b. Monschke's Procedural Rule Does Not Apply Retroactively.

Washington applies the retroactivity test of Teague v. Lane, 489 U.S. 288, 100 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), to constitutional changes to the law. In re Pers. Restraint of Hinton, 1 Wn.3d 317, 329, 525 P.3d 156 (2023). Under Teague, new substantive constitutional rules apply retroactively on collateral review, but new procedural rules — even those that give effect to a new substantive rule — are not retroactive. Hinton, 1 Wn.3d at 329 (quoting Edwards v. Vannoy, 593 U.S. ___, 141 S. Ct. 1547, 1560, 209 L. Ed. 2d 651 (2021)).

Bassett is an example of a substantive, and therefore retroactive, rule under Teague because it prohibits a category of punishment (LWOP) for a class of defendants (juveniles). 192 Wn.2d at 91.

> Substantive rules "'set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose'" and include "'rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.'" In re Pers. Restraint of Ali, 196 Wn.2d 220, 237, 474

> P.3d 507 (2020) (internal quotation marks omitted) (quoting Montgomery v. Louisiana, 577 U.S. 190, 201, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016)), cert. denied, 141 S. Ct. 1754 (2021).

In re Pers. Restraint of Williams, 200 Wn.2d 622, 520 P.3d 933 (2022).

In State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017), the Washington Supreme Court announced a *substantive* Eighth Amendment rule prohibiting adult standard-range sentences and enhancements for juveniles who possess such diminished culpability that the adult sentences would be disproportionate punishment. Hinton, 1 Wn.3d at 328. In addition, Houston-Sconiers announced new *procedural* rules (discretion and consideration of youth) to effectuate its substantive rule. Id.

But Houston-Sconiers' constitutional procedural rules requiring discretion and consideration of youth are not independently reviewable in an untimely collateral attack. Hinton, 1 Wn.3d at 330-31. See also In re Pers. Restraint of

Forcha-Williams, 200 Wn.2d 581, 597, 520 P.3d 939 (2022) (unless a juvenile with diminished culpability is mandatorily sentenced to an adult standard range or enhancement, "no procedural mechanism — discretion to impose a lesser sentence — is required.").

In other words, newly announced procedural rights (consideration of youth and discretion) are not retroactive absent a substantive error (i.e., the imposition of a constitutionally disproportionate adult sentence). Thus, a 17-year-old who has not demonstrated a *substantive* error (a disproportionate sentence) has no independent *procedural* right to an untimely resentencing merely because the court did not originally consider youth or exercise discretion. Hinton, 1 Wn.3d at 330-31. See also Forcha-Williams, 200 Wn.2d at 597 ("Again, we stress that the Eighth Amendment is violated only when a juvenile *who possesses diminished culpability* is mandatorily sentenced to an adult standard range or enhancement.") (emphasis added).

Even if the Monschke plurality opinion announced a binding rule on this Court, following the reasoning of Houston-Sconiers and Hinton, an 18-, 19-, or 20-year-old aggravated murderer has no retroactive right to resentencing merely because the judge did not follow proper procedural requirements (consideration of youth and discretion) at the original sentencing hearing. The *most* that could be said of the lead opinion in Monschke is that it announced a procedural rule that a sentencing court must have discretion to consider youth and to deviate from LWOP if appropriate under the facts of the case. It deemed this procedural rule necessary to avoid the "unacceptable risk" that a youthful defendant will receive an unconstitutionally disproportionate sentence. Monschke, 197 Wn.2d at 325.

This rule is comparable to the procedural rules announced in Houston-Sconiers meant to effectuate its substantive rule. Since the procedural requirements of Houston-Sconiers do not apply retroactively to sentences that

were already final when Houston-Sconiers was issued, Monschke's identical procedural rules would not satisfy RCW 10.73.100(6)'s exception to the one-year time limit for collateral attacks. This Court should decline to find that any new procedural rule announced in the lead opinion of Monschke applies retroactively independent of a substantive, retroactive sentencing error.

4. SCHOENHALS HAS FAILED TO ESTABLISH THAT MONSCHKE IS MATERIAL TO HIS SENTENCE.

Even if this Court were to conclude that Monschke announced a new substantive and retroactive rule, Schoenhals must also establish that it is material to him. RCW 10.73.100(6); In re Pers. Restraint of Colbert, 186 Wn.2d 614, 619, 380 P.3d 504 (2016). In other words, Schoenhals must show that any such substantive, retroactive rule "changed the law in a way that entitles [Schoenhals] to relief." Kennedy, 200 Wn.2d at 21. Schoenhals can do that only by establishing that *his crime* reflects the diminished culpability of youth such that

LWOP is unconstitutionally disproportionate *as to him*. He has failed to do so.

Importantly, Schoenhals denies committing the offense that, at the same time, he claims was impacted by his immature brain. To this day, Schoenhals denies that he killed 14-year-old Mark Wallace and asserts that he "only had to be guilty of a murder while committing a burglary in the first degree to be convicted," suggesting incorrectly that a person can commit aggravated murder merely through participation in a felony. Supp. CrR 7.8 Brf. at 13. That legally is not true, and more importantly, it is not what Schoenhals was convicted of.

Schoenhals was found guilty of aggravated murder — not felony murder. See Appendix D. Aggravated murder requires a *premeditated intentional* murder with the presence of one or more statutorily enumerated aggravating circumstances. See RCW 10.95.020; RCW 9A.32.030(1)(a). The jury found that Schoenhals premeditatedly and intentionally killed the 14-year-old Wallace, that he was armed with a deadly weapon at

the time, and that he murdered Wallace to conceal his own identity. Id. Schoenhals, nearly 40 years later, denies the crime that he was convicted of and minimizes his acts as mere participation in a burglary during which Wallace happened to die.[3]

Schoenhals cannot demonstrate that his premeditated and aggravated murder of Mark Wallace reflected "youthful immaturity, impetuosity, or failure to appreciate risks and consequences" when he does not even admit that he killed Wallace. Schoenhals' own expert, Dr. Ronald Roesch, acknowledged that Schoenhals denied committing the murder, and yet Roesch asserted that Schoenhals nonetheless "accepts full responsibility for it." Roesch Report, at pg. 15. The impossibility of such an assertion aside, it appears to account

[3] In addition to other evidence that Schoenhals was the one who stabbed Wallace, the jury heard that Wallace's aspirated blood was discovered on Schoenhals' pants, demonstrating that Schoenhals was the one standing close to Wallace when the boy's throat was cut. See Appendix C (COA opinion at pg. 8).

for Roesch's inability to render an opinion as to whether and how youth played a role in the crime Schoenhals actually committed.[4]

Because Schoenhals denies that he committed the crime for which he alleges diminished culpability, he has not established that his LWOP sentence was unconstitutionally imposed and Monschke is not material to him. Proof of diminished culpability requires more than, "I did not commit the crime, but if I did, I was youthfully immature." It requires proof that diminished culpability actually played a part in the crime.

Furthermore, youth alone does not establish a right to a lesser sentence. "[S]ome under 18 have already attained a level of maturity some adults will never reach." Roper v. Simmons,

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[4] Roesch has admitted, in a different case, that if that juvenile defendant had denied committing the crime, it would have made it impossible for Roesch to render an opinion as to the role immaturity played in that "offense context." See App. B to State's Resp. to CrR 7.8 Mot.

543 U.S. 551, 574, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). An adult sentence is constitutionally disproportionate only for those juvenile offenders whose crimes reflect youthful immaturity, impetuosity, or the failure to appreciate risks and consequences. State v. Anderson, 200 Wn.2d 266, 286, 516 P.3d 1213 (2022).

Roesch's report does not support a conclusion that immaturity played a role in Schoenhals' offense such that an LWOP sentence is unconstitutionally disproportionate. Roesch incredibly speculates that Schoenhals was "likely" more impulsive and immature than other 20-year-olds based on a standardized assessment meant for juveniles aged 9-18 that Roesch administered to Schoenhals in his fifties. Roesch Report, at pgs. 10-11. Roesch apparently directed Schoenhals to respond to questions on the assessment as he would if he were an "adolescent." Id. How Schoenhals — an adult — could possibly suspend four decades of lived experience and respond to the questions "as an adolescent" is unclear, and it

seriously undermines the validity of the test results and Roesch's opinions.

Moreover, Roesch is not a neurologist. He did not take or review any brain scans, and he offers no opinion regarding neurological evidence of Schoenhals' brain development at the time of the crime. Roesch's report makes no mention of how neurological brain science might apply to Schoenhals — who was 20 at the time of the crime — in particular. There is almost no discussion whatsoever of how such science might inform the sentencing of a 20-year-old offender, and there is no discussion of the facts of the crime or how principles of brain science might apply to such behavior. At no point in his report does Roesch offer any opinion that Schoenhals' *crime* reflected youthful immaturity.

Moreover, Roesch's report repeatedly refers to "adolescents" and "juveniles" and makes no distinction between a 14-year-old juvenile and a 20-year-old young adult like Schoenhals. Instead, Roesch repeatedly refers to

Schoenhals as an "adolescent," and erroneously states at one point that Schoenhals was 19 at the time of his crime.[5] Roesch Report, at 15. Roesch's report simply does not support a conclusion that Schoenhals' culpability for committing aggravated first-degree murder was mitigated by youth. Generalities about the science of brain development are not sufficient to establish a connection between those traits and Schoenhals' criminal behavior. But generalities are all Schoenhals offers.

An adult sentence is constitutionally disproportionate *only* for those juvenile offenders whose *crimes* reflect youthful

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[5] The Superior Court here noted the importance of such accuracy when transferring Schoenhals' CrR 7.8 motion to this Court: "If the lenses that people have on are incorrect, the conclusions that they reach are questionable to me, so when I have someone discussing Mr. Schoenhals' trial and incarceration, and believe that he was 20 at the time of the trial or the verdict, frankly, and sentencing in February of 1986, that is just fundamentally incorrect … I am not persuaded by those who didn't take the time to verify or to double check that on something that is so significant when you are talking about youthfulness." 7/21/23RP 25.

immaturity, impetuosity, or the failure to appreciate risks and consequences. Anderson, 200 Wn.2d at 286. A jury concluded that Schoenhals stabbed Mark Wallace in the neck, intentionally killing the teen to conceal his identity. Schoenhals denies that he committed these acts. Because Schoenhals has failed to establish that his youth or immaturity reduced his culpability for the murder of Mark Wallace, he has failed to establish that his sentence is constitutionally disproportionate. Even if this Court were to conclude that Monschke is a significant and retroactive change in the law, Schoenhals has not established that it is material to him. His petition is time-barred.

5. SCHOENHALS HAS FAILED TO ESTABLISH ACTUAL AND SUBSTANTIAL PREJUDICE FROM ANY ERROR OF THE SENTENCING COURT.

Even if this Court were to conclude that Schoenhals' claim is timely, he has failed to establish actual and substantial

prejudice from any failure of the sentencing court to discretionarily impose sentence after considering youth.

A defendant claiming collateral relief is required to show both error and prejudicial effect. For claimed constitutional errors, a defendant must establish actual and substantial prejudice. In re Pers. Restraint of Davis, 152 Wn.2d 647, 671-72, 101 P.3d 1 (2004). Schoenhals argues that no showing of prejudice is needed here, but he is wrong.

The Washington State Supreme Court has rejected Schoenhals' argument in the context of Houston-Sconiers and its rule of individualized sentencing for juvenile offenders in adult court. In Forcha-Williams, the court stated that "the ultimate question" was whether a trial court's failure to understand and exercise discretion was a violation of the substantive rule prohibiting punishment disproportionate to culpability. 200 Wn.2d at 599. As such, the court reaffirmed the holding of In re Pers. Restraint of Meippen, 193 Wn.2d 310, 440 P.3d 978 (2019), that juvenile offenders collaterally

challenging their sentences under Houston-Sconiers must show prejudice in addition to procedural error. Forcha-Williams, 200 Wn.2d at 600-01. There is no logical basis to require *adult* petitioners to make *less* of a showing than *juvenile* offenders.

Schoenhals has not established himself to be a member of the class of offenders that Monschke addressed — 18- to 20-year-olds whose culpability was reduced by the mitigating qualities of youth, because he has not shown his crime to mitigated by such qualities. Consistent with the "ultimate question" outlined in Forcha-Williams, Schoenhals has not established that the failure of the trial court to exercise discretion resulted in the imposition of an unconstitutional sentence in his case.

Schoenhals denies committing aggravated murder. Dr. Roesch's report does not convincingly state a basis to conclude that immaturity played a role in the crime or that the sentencing court would have imposed a lesser sentence if it had considered youth. See Anderson, 200 Wn.2d at 291-92 (legislatively

mandated sentence appropriate where crime does not reflect youthful immaturity, impetuosity, or failure to appreciate risks and consequences). When Schoenhals cannot show that immaturity played a role in a crime that he will not even admit committing, he cannot show actual and substantial prejudice. His personal restraint petition should be dismissed.

6. THE COURTS CANNOT ADOPT A SENTENCING SCHEME TO FILL IN STATUTORY GAPS CREATED BY MONSCHKE.

The statutorily required sentence for an offender who commits aggravated murder at 20 years old is LWOP.[6] Monschke did not amend RCW 10.95.030. It concluded only that the statute's mandatory imposition of LWOP is

[6] Legislative proposals to address Monschke have thus far failed. Most recently, in the 2023 and 2024 regular sessions, HB 1396 did not make it out of the Rules Committee and HB 2213's language relating to sentencing for 18- to 20-year-old aggravated murderers was stricken by floor amendment. See https://app.leg.wa.gov/billsummary?BillNumber=1396&Initiative=false&Year=2023 and https://app.leg.wa.gov/billsummary?BillNumber=2213&Initiative=false&Year=2023 (last accessed May 9, 2024).

unconstitutional as to 18- to 20-year-olds. If this Court were to grant Schoenhals' petition for resentencing at this time, the sentencing court would be limited in the action it could take.

The drafting of laws to fix penalties and punishments for criminal offenses is a legislative function, not a judicial power. Colvin v. Inslee, 195 Wn.2d 879, 892, 467 P.3d 953 (2020); Forcha-Williams, 200 Wn.2d at 591-92; State v. Guzman Nuñez, 174 Wn.2d 707, 711, 285 P.3d 21 (2012). Courts are not authorized to adopt a new sentencing procedure when the existing one is held unconstitutional. State v. Davis, 163 Wn.2d 606, 610-11, 184 P.3d 639 (2008); State v. Pillatos, 159 Wn.2d 459, 469-70, 150 P.3d 1130 (2007).

The only remedy for an unconstitutional sentencing statute is for the legislature to enact a new law. Davis, 163 Wn.2d at 610-11; Pillatos, 159 Wn.2d at 469-70. If sentencing proceedings need be altered, the legislature must do so. Forcha-Williams, 200 Wn.2d at 592; State v. Hughes, 154 Wn.2d 118, 148-49, 110 P.3d 192 (2005), abrogated on other grounds by

Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); State v. Monday, 85 Wn.2d 906, 909-10, 540 P.2d 416 (1975), overruled on other grounds by In re Pers. Restraint of Phelan, 97 Wn.2d 590, 596, 647 P.2d 1026 (1982).

As of this date, the legislature has not enacted new statutes or amended existing statutes to provide an alternative to mandatory LWOP for those youthful offenders whose aggravated murders reflect youthful immaturity, impetuosity, or failure to appreciate risks and consequences. Until it does so, a new sentence for Schoenhals that is not based on statutory authority would be unlawful.[7]

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[7] The consolidated cases of State v. Carter, No. 101777-4 and State v. Reite, No. 101859-2, pending before the Washington Supreme Court and argued on September 14, 2023, may speak to the courts' authority to sentence 18- to 20-year-old aggravated murderers.

D. CONCLUSION

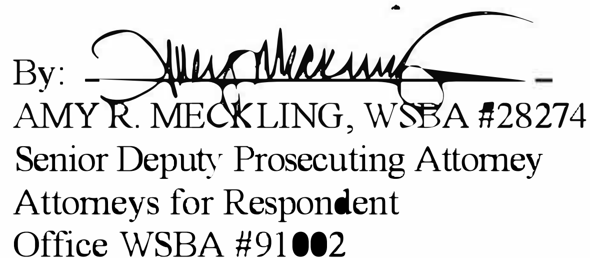
For all of the above reasons, the State respectfully requests that this Court dismiss Schoenhals' personal restraint petition.

This document contains 5223 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 13th day of MAY, 2024.

Respectfully submitted,

LEESA MANION (she/her)
King County Prosecuting Attorney



By: ______________________
AMY R. MECKLING, WSBA #28274
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

APPENDIX A

FILED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF KING

STATE OF WASHINGTON,

Plaintiff, SUPERIOR COURT CLERK SEATTLE, WA.) NO. 85-1-00123-7

v.) JUDGMENT AND SENTENCE

JOHN HOWARD SCHOENHALS

Defendant.

SID # ______

This court having conducted a sentencing hearing pursuant to RCW 9.94A.110 on February 11, 1986 upon defendant's conviction(s) of the crime(s) set forth below, and the court having heard from the parties and considered the presentence reports and the records and files herein, and otherwise being fully advised, now makes the following findings:

1. PARTIES PRESENT: Present at the sentencing hearing were the defendant, ______ the defendant's attorney, ~~Mark Mestel~~ and John Muenster
Deputy Prosecuting Attorney Frederick L. Yeatts, and

2. CURRENT OFFENSE(S): The defendant has been convicted of the following current offense(s) ~~upon a plea of guilty~~ conviction by jury ~~verdict of guilty by the court~~ on the 26th day of November, 19 85

Count I Crime: AGGRAVATED MURDER IN THE FIRST DEGREE
RCW: 9A.32.030(1)(a)/10.95.020(?) Crime Code: ______
Date of Crime: 8-9 January 1985
Incident Number: ______
Special Finding: AGGRAVATING CIRCUMSTANCE AND DEADLY WEAPON

Count ______ Crime: ______
RCW: ______ Crime Code: ______
Date of Crime: ______
Incident Number: ______
Special Finding: ______

Count ______ Crime: ______
RCW: ______ Crime Code: ______
Date of Crime: ______
Incident Number: ______
Special Finding: ______

( ) Additional current offenses attached as Appendix A.

This court has jurisdiction of the defendant and the subject matter. It is ADJUDGED that the defendant is guilty of the current offenses set forth above (and as indicated in Appendix A).

The following group(s) of current offenses encompassed the same criminal conduct and should be counted as one crime in determining the offender score (RCW 9.94A.400(1)): ______

The following counts in the ______ Information are hereby dismissed: ______

3. CRIMINAL HISTORY: This Court finds that the defendant has the following criminal history used in calculating the offender score pursuant to RCW 9.94A.360:

	Sent. Date	Crime	Adult/ Juv.	Crime Date	Crime Type
1.					
2.					
3.					
4.					

( ) The defendant's criminal history is attached in Appendix B and incorporated by reference into this Judgment and Sentence.

CERTIFIED COPY TO COUNTY JAIL FEB 11 1986

COPY TO DOC. CENTRAL RECORDS FEB 11 1986

COPY TO SENTENCING GUIDELINES COMMISSION FEB 11 1986

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4. SENTENCE DATA

	OFFENDER SCORE	SERIOUSNESS LEVEL	RANGE	MAXIMUM TERM
Count I	n/a	XIV	n/a	LIFE IMPRISONMENT WITHOUT POSSIBILITY OF RELEASE OF PAROLE
Count				
Count				

( ) Presumptive data score sheet(s) is attached as Appendix C and is incorporated by reference into this judgment.

5. SENTENCE ALTERNATIVE FINDINGS

( ) A. FIRST-TIME OFFENSE: The defendant qualifies as a first-time offender pursuant to RCW 9.94A.120(5). The first-time offender waiver is/is not used in this sentence.

( ) B. EXCEPTIONAL SENTENCE: Substantial and compelling reasons exist which justify a sentence above/below the standard range for count(s) ________. Findings of Fact and Conclusions of Law pursuant to RCW 9.94A.120(3) and Stipulations as to real and material facts, if any, are attached as Appendix D.

( ) C. SPECIAL SEXUAL OFFENDER SENTENCING ALTERNATIVE: The defendant has been convicted of a felony sexual offense as specified in RCW 9.94A.120(7)(a) and is eligible for use of the special sexual offender sentencing alternative. The defendant and/or the community will/will not benefit from use of the alternative.

( ) D. SEXUAL OFFENDER TREATMENT PROGRAM: The defendant has been convicted of a felony sexual offense, does not qualify for the special sexual offender sentencing alternative, and is to be sentenced to a term of confinement of more than one year but less than six years. The defendant shall/shall not be ordered committed for evaluation for treatment pursuant to RCW 9.94A.120(7)(b).

(X) E. RESTITUTION: Based on information concerning restitution as indicated below in item 6.C. and in attached Appendix E, the defendant is responsible for payment of restitution:

( ) For offenses adjudicated herein pursuant to RCW 9.94A.140(1).

( ) For offenses which were not prosecuted and for which the defendant agreed to make restitution in a plea agreement, which is attached as Appendix E.

6. MONETARY PAYMENTS JUDGMENT AND SENTENCE: The defendant is ADJUDGED to be responsible for making monetary payments as stated below, within ten years, under the supervision of the Department of Corrections. The defendant is ORDERED to make the following monetary payments:

(X) A. COSTS: Court costs in the amount of $ as determined by the clerk

(X) B. VICTIM ASSESSMENT: Penalty assessment pursuant to RCW 7.68.035: $ 70.00

(X) C. RESTITUTION: Restitution payments (with credit for amounts paid by co-defendants, if any) to:

reserved for further hearing $ ____

____ $ ____

____ $ ____

____ $ ____

( ) Restitution information attached in Appendix E—total amount ordered: ____

(X) D. RECOUPMENT: Recoupment for defense attorney's fees to reserved for further hearing of $ ____

( ) E. RECOUPMENT: Recoupment for services provided by the court pursuant to CrR3.1(f) to ____ of $ ____

( ) F. FINE: A monetary fine in the amount of $ ____

( ) G. DRUG ENFORCEMENT FUND: Reimbursement to ____ in the amount of $ ____

( ) H. OTHER: Other costs in the amount of $ ____ for ____

The above payments shall be made to the King County Superior Court Clerk, E609, King County Courthouse, Seattle, Washington 98104, according to the rules of the clerk and according to the following terms:

and the Clerk of the Court shall credit monetary payments to the above obligations in the above-listed order.

7 DETERMINATE JUDGMENT AND SENTENCE: The Court having determined that no legal cause exists to show why a further judgment should not be pronounced, it is therefore ORDERED, ADJUDGED and DECREED the defendant serve the determinate sentence and abide by the conditions set forth below.

The defendant is sentenced to a term of total confinement in the custody of the Department of Corrections for ________ ~~months on Count I; ________ months on Count II; ________ months on Count III; with credit for time served of ( ) ________ days/months.~~

LIFE IMPRISONMENT WITHOUT POSSIBILITY OF RELEASE OR PAROLE ON COUNT I

( ) the terms in counts ________ are concurrent.

( ) the terms in counts ________ are consecutive,

for a total term of ________ months.

The following appendices are attached to this Judgment and Sentence and are incorporated by this reference:

( ) Appendix A, Current Offenses

( ) Appendix B, Current History

( ) Appendix C, Sentence Scoring Worksheet(s)

( ) Appendix D, Exceptional Sentence

( ) Appendix E, Restitution

DONE IN OPEN COURT this 11th day of February, 1986.

Herbert M. Stephens
JUDGE

OBJECTIONS NOTED
~~Approved as to form:~~

Presented by:

Frederick L. Yeatts
Deputy Prosecuting Attorney

[signature]
Attorney for the Defendant

A-3

Defendant's Signature: X xJohn Schoenhals

(Right hand)
Fingerprint(s) of: JOHN HOWARD SCHOENHALS

Attested by: M. JANICE MICHELS

Clerk

By: [signature]

Deputy Clerk

Date: 14 February 1986

[signature]

Judge, King County Superior Court

CERTIFICATE

I, ______________________, Clerk of this court, certify that the above is a true copy of the Judgment and Sentence in this action on record in my office.

Date: ______________________

____

Clerk

By: ______________________

Deputy Clerk

OFFENDER IDENTIFICATION

State I.D. Number: ______________________

Date of Birth: 8-29-64

Sex: Male

Race: White

A-4

APPENDIX B

'85 JAN 11 1:50

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff,	)	NO. 85-1-00123-7
v.	)	INFORMATION
JOHN HOWARD SCHOENHALS, Defendant.	)	

~~WARRANT ISSUED~~
~~CHARGE COUNTY $70.00~~

WARRANT ISSUED
CHARGE COUNTY $70.00

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the state of Washington, do accuse John Howard Schoenhals of the crime of Aggravated First Degree Murder, committed as follows:

That the defendant John Howard Schoenhals, with another, in King County, Washington, during a period of time intervening between January 8, 1985 and January 9, 1985, with premeditated intent to cause the death of another person, did cause the death of Mark A. Wallace, a human being, who died during the time intervening between January 8, 1985 and January 9, 1985;

That further, aggravating circumstances do exist, to-wit: 1) that the defendant John Howard Schoenhals committed the murder to conceal the commission of the crime of burglary in the first or second degree, and to protect or conceal the identity of the persons committing the crime, to-wit: the defendant John Howard Schoenhals and Robert W. Mathews; and 2) that the defendant John Howard Schoenhals committed the murder in the course of, in furtherance of, or in immediate flight from the crime of burglary in the first degree or second degree;

Contrary to RCW 9A.32.030(1)(a) and 10.95.020(7) and (9)(c), and against the peace and dignity of the state of Washington.

And I, Norm Maleng, Prosecuting Attorney for King County, in the name and by the authority of the state of Washington further do accuse the defendant John Howard Schoenhals at said time of being armed with a deadly weapon, to-wit: a knife, under the authority of RCW 9.94A.125.

NORM MALENG
Prosecuting Attorney

By Marilyn A. Nowogroski
MARILYN A. NOWOGROSKI
Deputy Prosecuting Attorney

Information

NORM MALENG
Prosecuting Attorney
W554 King County Courthouse
Seattle, Washington 98104
583 2200

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CAUSE NO. 85-1-00123-7

CERTIFICATION FOR DETERMINATION OF PROBABLE CAUSE

That Marilyn A. Nowogroski is a Senior Deputy Prosecuting Attorney for King County and is familiar with the police report and investigation conducted in King County Department of Public Safety case No. 85-5334;

That this case contains the following upon which this motion for the determination of probable cause is made;

Mark A. Wallace, age 14, lived with his father Thomas Wallace at 2601 - 212 S.E., Issaquah, King County. Mr. Wallace, a Mercer Island police officer last saw Mark alive at approximately 10:00 p.m. on Janury 8, 1985 when Mark was in bed and about to go to sleep, and Mr. Wallace was leaving to go to work on the graveyard shift.

Mr. Wallace returned to the residence after completing work, at approximately 7:35 a.m. on January 9, 1985. He immediately noticed that there was no smoke coming from the chimney, which was unusual because Mark normally would have started a fire by the time of his father's return from work. Mr. Wallace entered the residence by the front door, which was locked as he had left it, and noticed that the house was very cold. He walked into the kitchen and found that the window portion of the door had been broken and the door stood open.

Mr. Wallace called out for Mark. There was no reply, and he walked to Mark's bedroom. There, he found his son lying partially on the floor, his feet tangled in the bedsheets. Mark's throat had been cut by several deep slashes and he had bled to death.

Detectives responding to the scene, determined that the residence had been burglarized and numerous items had been stolen. A room which was normally kept locked, had been kicked open and a bootprint was visible on the door. The room was used by Mr. Wallace to store numerous firearms. Stolen from that room were several ammunition cans, a .22 pistol, an AR-15 rifle, and a gun belt. A double-barrel shotgun was stolen from Mr. Wallace's bedroom. Several knives, one of which was a scuba knife with a serrated edge were stolen. Cigarettes, a camera, flash equipment and a camera bag were also taken from the residence.

Medical Examiner Reay told detectives that the neck wounds were made by a knife with a serrated edge.

On the evening of January 9, 1985 Issaquah police officers observed defendant at a gas station. He was wearing camouflage fatigues with a knife at his side, and met the description of a suspect in a previous arson. They contacted defendant, who they knew, and with his permission looked in his car. Defendant told them there were two AR-15's between the seats. When an officer opened the driver's door he observed the barrel of a double-barreled shotgun behind the driver's seat. The firearms were checked to see if they were loaded. Defendant told the officers that one of the AR-15's belonged to his friend, Robert Mathews, who was inside the station. A responding King County officer exchanged information with the Issaquah officers and determined that the firearms in defendant's vehicle matched those stolen from the Wallace residence. Defendant and Mathews were arrested.

NORM MALENG
Prosecuting Attorney
W554 King County Courthouse
Seattle, Washington 98104
583-2200

King County police detectives arrived at the scene and, with defendant's consent, searched his vehicle. The shotgun, one of the AR-15's, and .22 pistol were verified by serial number to be Mr. Wallace's. The stolen camera, flash equipment, cigarettes and camera bag were also observed in the vehicle, which was sealed and towed away. A search warrant was later executed on the vehicle, and detectives seized the camera gear, knives, ammunition cans, and gun belt, all of which had been stolen from the Wallace residence.

Detectives also seized from the vehicle the stolen serrated-edge scuba knife. It is consistent with the weapon used to cut Mark Wallace's neck, and its edge matches a scrape on his neck.

At his arrest defendant was wearing boots whose sole print matched the print on the kicked-open gun room door at the Wallace residence. The pants defendant was wearing at his arrest appeared to be splattered with blood.

Defendant is known to the Wallace family as he is a friend of an older son, who is currently in the service.

After advisement of his constitutional rights defendant told detectives that he had been with his girlfriend at the time of the murder, and had spent the rest of the night and early morning driving around Seattle with a black male, whose name and address he did not know; that he met up with Mathews mid-morning of January 9, 1985 and was with him until his arrest; that late in the afternoon of January 9, 1985 he and Mathews and several others went to the Mt. Si area to do some target shooting and that while there Mathews uncovered a hole covered with a tarp and pulled out an AR-15, double barrel shotgun, pistol, and a camera bag containing numerous items, all of which were eventually placed in defendant's vehicle a short time before his arrest. Defendant later stated that he had not been with his girlfriend but in fact had spent the evening of January 8, 1985 to January 9, 1985 with Mathews, and later with the unidentified black male, driving around Seattle.

Witnesses who saw defendant and Mathews on the morning of January 9, 1985 stated that they noticed items eventually determined to have been stolen from the Wallace residence already in defendant's vehicle at that time. Witnesses who went to Mt. Si with defendant and Mathews state that the stolen weapons were in the vehicle already, and not uncovered later as defendant stated.

Mathews gave a statement to police after advisement of his constitutional rights. He stated that defendant told him he knew a house where they could steal guns. Mathews stood look-out with defendant's loaded AR-15 while defendant broke out the kitchen door window. Mathews then entered the home where defendant had Mark Wallace by the arm. Defendant and Mark Wallace obviously knew each other as they referred to each other by their first names. Mark Wallace was placed in the bathroom while defendant and Mathews rummaged through the residence. Defendant kicked in the locked door to the gun room and Mathews helped gather guns and the other property from around the house. Defendant told Mathews he wanted to drown Mark Wallace, but the boy was eventually returned to his bedroom. Defendant asked Mathews for the scuba knife, which Mathews had placed in his boot, and which

NORM MALENG
Prosecuting Attorney
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583 2200

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Mathews handed over. Defendant then cut Mark Wallace's throat with the scuba knife. Defendant stated that he was "not going to get busted" for the burglary.

Bail of $500,000 is requested because of the nature and circumstances of the charge and potential penalty.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct. Signed and dated by me this 14th day of January, 1985, at Seattle, Washington.

MARILYN A. NOWOGROSKI

Certification for Determination of Probable Cause - 3

NORM MALENG
Prosecuting Attorney
W554 King County Courthouse
Seattle, Washington 98104
583 2200

APPENDIX C

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON, Respondent, v. JOHN HOWARD SCHOENHALS, Appellant.	)	MANDATE No. 21323-7-I King County No. 85-1-00123-7

COMMITMENT ISSUED DEC 12 1988

The State of Washington to: The Superior Court of the State of Washington in and for King County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division 1, filed on August 22, 1988, became the decision terminating review of this court in the above entitled case on December 7, 1988. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

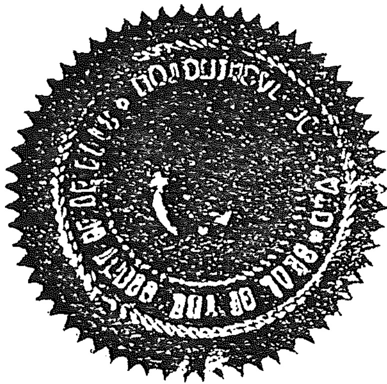
No. 21323-7-I, State v. Schoenhals

Mandate after opinion is filed. Petition for review denied on November 29, 1988. Pursuant to RAP 14.4 costs are taxed as follows: Sixty-Two and 08/100 ($62.08) Dollars against appellant and in favor of respondent.

cc: Julie A. Kesler
Eric J. Nielsen
John H. Schoenhals
Frederick Yeatts
The Honorable Gerard Shellan, Presiding Judge
Reporter of Decisions
Indeterminate Sentencing Review Board
Ross M. Peterson

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 7th day of December, 1988.

RICHARD D. TAYLOR
Clerk of the Court of Appeals, State of Washington, Division I.



FILE
IN CLERKS OFFICE
COURT OF APPEALS
STATE OF WASHINGTON - DIVISION I
DATE AUG 2 2 1988
Scholfield CJ
CHIEF JUDGE

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 21323-7-I
Respondent,	)	
v.	)	DIVISION ONE
JOHN HOWARD SCHOENHALS,	)	
Appellant.	)	Filed AUG 2 2 1988

SCHOLFIELD, C.J. -- John Howard Schoenhals appeals his conviction for the aggravated first degree murder of Mark Wallace. We affirm.

FACTS

The body of 14-year-old Mark Wallace was discovered in his bedroom on the morning of January 9, 1985, when his father, a police officer, came home from working the night shift. Officer Wallace also discovered that the house had been burglarized, and that certain guns had been taken, along with several knives, a camera, an American flag, some ammunition, and a cartridge belt.

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The medical examiner determined the cause of death as a knife cut severing Mark's jugular vein, although several other stab wounds were present. All of the wounds were caused by a sharp instrument with a serrated blade. The medical examiner estimated the time of death to be between midnight and 3 a.m. on January 9, 1985.

On the evening of January 9, after receiving a tip that a young blond man wearing green camouflage pants had been seen recently in the Wallaces' neighborhood, an Issaquah police officer encountered Schoenhals, who matched the description. The officer noticed a large knife strapped to Schoenhals' leg and became suspicious. The officer returned with reinforcements and obtained Schoenhals' permission to search his vehicle. The consent search yielded two AR-15 rifles, a double-barreled shotgun, a flag, some knives, and a blood-stained washcloth. The items other than the washrag were identified as coming from the Wallace home. In his conversation with the officers, Schoenhals implicated another youth, Robert Tredway, and both were arrested. Schoennals was a friend of Mark's older brother, Al, and had spent nearly every day with Al over the recent Christmas holidays, while Al was on leave from the Navy. Schoenhals was familiar with Officer Wallace's gun collection.

After his arrest, Schoenhals waived his rights, and a statement was taken during which Schoenhals apparently denied any involvement in the burglary or murder. Det. Gillis of the King County Police testified at trial that after the denial, he told Schoenhals that his story was "totally incredible." Det. Gillis also testified that Sgt. Bollinger told Schoenhals that Tredway's story was that Schoenhals had been involved in the burglary and had killed Mark, and Sgt. Bollinger told Schoenhals he believed Tredway. Following each of these confrontational remarks, Schoenhals became extremely agitated. At one point, he began crying and asked, "Is Markie dead?", and at another point he stated, "I am not a killer."

Following Det. Gillis' testimony, defense counsel moved for a mistrial based on the admission of lay opinion evidence regarding guilt or innocence of the defendant. The motion was denied. Defense counsel also requested but was denied a curative instruction on this testimony.

Tredway pleaded guilty to murder in the second degree in exchange for his promise to testify truthfully in Schoenhals' trial. Although Tredway had not been sentenced at the time of the trial, the prosecutor's recommendation was for him to be sentenced to 18 years in prison. Tredway testified that Schoenhals suggested the burglary of the Wallace house to steal

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guns. Tredway and Schoenhals drove to the Wallace house at approximately 2 a.m. on January 9, 1985. Schoenhals broke the glass in the kitchen door and went inside. Both youths were armed, Schoenhals with his own recently purchased AR-15 and Tredway with Schoenhals' hunting knife.

According to Tredway, Schoenhals went inside, took Mark into the bathroom and put handcuffs on the boy. Tredway and Schoenhals then went through the house obtaining various items. Schoenhals suggested to Tredway that they drown Mark in the bathtub. Tredway's rejoinder was that Schoenhals was "nuts". Tredway told Schoenhals to start collecting the items and that he (Tredway) would take care of everything. Tredway took Mark, now without handcuffs, back to the boy's bedroom, and told him to get into bed. Tredway stated that it may have crossed his mind to tie Mark up or hit him over the head, to facilitate their escape. Tredway then suggested what story Mark should tell his father about the burglary.

Tredway testified that Schoenhals came into the room and asked him for a scuba knife that Tredway had taken from a closet and strapped to his leg. Wielding the knife, Schoenhals lunged for Mark, stating, "You ain't going to tell nobody", slapped his hand over the boy's mouth, and stabbed the boy in the neck. Tredway testified that he went into the hall, and then heard a

sort of gurgling sound coming from the bedroom. Then Schoenhals came out of the room and handed Tredway the knife, which Tredway wiped off with a washrag from the bathroom. After the two left, Tredway deposited the knife and the rag under the seat of Schoenhals' vehicle.

On cross examination, Tredway was asked whether he knew that Schoenhals was charged with aggravated murder in the first degree, and whether Tredway knew that the penalty was life in prison without parole. Tredway responded affirmatively. The State objected because the question put the issue of Schoenhals' punishment before the jury. The trial court ruled that the question was improper as stated, but that defense counsel could rephrase his question to leave out the exact penalty. The court declined to give a curative instruction. It does not appear that defense counsel asked the question again. The issue was not raised in closing argument.

Tredway's testimony was interrupted by a holiday weekend. Over that weekend, he contacted the prosecutor and told him that he actually did see Schoenhals stab Mark and that the boy sat up in the bed, there was a gurgling sound, and blood sprayed in a heavy mist from the boy's throat.

On cross examination, Tredway was asked whether certain newspaper articles appearing over the weekend describing his testimony as "unemotional" caused him to change his testimony. The State's objection to the question was sustained, because the court felt that the question of whether Tredway's testimony was "unemotional" was for the jury.

Tredway was also asked on cross examination whether he had ever seen any other stabbings, to which Tredway responded that he had. An in camera hearing was held in which Tredway declined to answer any specifics concerning that prior stabbing, invoking his Fifth Amendment privilege. The court was satisfied after the hearing that the claim of privilege was valid. The trial court denied defense counsel's request that Tredway's claim of Fifth Amendment privilege be put on the record in front of the jury.

The State sought to introduce Tredway's tape-recorded second statement given on the evening of January 9, 1985. Defense counsel objected to its admission on the grounds Tredway's first statement denied any involvement in the crime, and the second statement was taken after Tredway was told that Schoenhals was placing all the blame on him, and thus was made after a motive to fabricate arose. The State argued that the second January 9 statement was a prior consistent statement made before a plea bargain was agreed on and, thus, before a motive to fabricate

arose. The trial court ruled that the second January 9 statement was made prior to when the motive to fabricate arose, and was admissible, but that a later statement of February 28, 1985, made after a plea bargain was agreed upon, was not admissible.

In the State's case-in-chief, several still photographs of the crime scene and the victim's body were introduced into evidence, along with a videotape of the crime scene. The State's reason for offering the videotape was to provide the jury with an accurate depiction of the house and the crime scene. As for the still photographs, the State argued that they were useful to the medical examiner to illustrate his testimony. Defense counsel objected to both the videotape and the photos.

The defense theory of the case was that Tredway, rather than Schoenhals, had killed Mark Wallace. The defense called Brian Lombardy, a former cellmate of Tredway's. Lombardy testified that Tredway announced in jail that he had killed a cop's son, a 14-year-old boy. Lombardy explained that he was testifying because after talking with both Tredway and Schoenhals in jail, he (Lombardy) believed that Schoenhals did not commit the murder. The State requested and the court gave a curative instruction that no witness may express an opinion on the guilt or innocence of the defendant.

Washington State crime lab personnel analyzed blood stains found on Schoenhals' and Tredway's clothing and on items seized at the time of arrest. Schoenhals' camouflage shirt had blood stains on both cuffs and the right sleeve that were compatible with Mark's blood type, but not with that of Schoenhals or Tredway. Schoenhals' camouflage pants had a large number of small blood stains that were compatible with Mark's blood type. The pattern of stains on the pants and on the front of Schoenhals' shirt were described by the expert as probably coming from a high-velocity blood release, such as that caused by an aspirated release of breath. The expert testified that Mark's bed was approximately 22 inches off the ground, and that the stains on Schoenhals' pants were approximately 20 inches above the edge of the pant leg. Tredway's pants contained blood smears, not aspirated stains. The analysis of these stains was compatible with either Tredway's or Mark's blood.

The washrag found in Schoenhals' truck contained blood compatible with Mark's blood type. The blood stains on the scuba knife found in Schoenhals' truck were compatible with Mark's blood type. The medical examiner testified that the scuba knife was very likely the murder weapon.

The defense presented expert testimony that the blood on Schoenhals' pants and jacket was not from Mark, but rather, matched that of Schoenhals' friend, James Beauprey, who testified that he and Schoenhals wrestled frequently, and that he (Beauprey) had frequent nosebleeds. At the appropriate time, defense counsel objected to the trial court's failure to give an accomplice cautionary instruction.

The jury found Schoenhals guilty of aggravated murder in the first degree, and that at the time he was armed with a deadly weapon.

ACCOMPLICE CAUTIONARY INSTRUCTION

In State v. Harris, 102 Wn.2d 148, 685 P.2d 584 (1984), the defendant was prosecuted for robbery in the first degree. He did not deny his participation in the crime, but argued a defense of diminished capacity. His codefendants contradicted his diminished capacity defense. The trial court refused to give an accomplice cautionary instruction.[1]

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[1]As an example of an accomplice instruction, WPIC 6.05 provides: "The testimony of an accomplice, given on behalf of the plaintiff, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth."

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On appeal, the Harris court clarified a prior holding in State v. Carothers, 84 Wn.2d 256, 525 P.2d 731 (1974), and held that a cautionary instruction on the limitations of accomplice testimony should be given whenever accomplice testimony is presented, but that the failure to give such an instruction is not reversible error unless (1) the State relies solely on accomplice testimony or (2) other evidence relied on by the State does not substantially corroborate the accomplice testimony. Harris, at 155.

Schoenhals notes that the Carothers court held that an accomplice cautionary instruction was particularly appropriate in circumstances like his because "a suspicious view of [the accomplice's] testimony may well have led the jury to the conclusion that, in recounting the event, [the accomplice] reversed the roles which he and the petitioner played." Carothers, at 267.

However, applying the Harris test to the facts before us, it is obvious that the State did not rely solely on Tredway's testimony for conviction. The other evidence that the State relied on included the items found in Schoenhals' truck which came from the Wallace home and the blood patterns found on Schoenhals' clothing. The testimony from the crime lab experts indicated that Schoenhals, rather than Tredway, was the person in

close proximity to Mark when the fatal wound was inflicted. We find that this evidence relied on by the State substantially corroborated Tredway's testimony that Schoenhals was the murderer. The trial court's failure to give the accomplice cautionary instruction did not constitute reversible error.[2]

In addition, trial court instructions are sufficient if they state the law correctly, are not misleading, and allow the parties to argue their theories of the case. State v. Theroff, 95 Wn.2d 385, 622 P.2d 1240 (1980). Examining the trial court instructions below, nothing precluded Schoenhals from arguing Tredway's bias and motive to lie. Thus, the instructions were sufficient, even in the absence of the accomplice cautionary instruction.

RIGHT OF CONFRONTATION

The sixth amendment to the United States Constitution, along with article 1, section 22 of the Washington Constitution, gives a criminal defendant the right to confront witnesses against him. Under cross examination, defense counsel can test not only a witness' perception and memory, but can impeach a witness as well. See Davis v. Alaska, 415 U.S. 308, 39 L. Ed. 2d 347, 94 S.

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[2]We note, however, the holding in Harris that the better practice is to give the accomplice cautionary instruction whenever accomplice testimony is presented.

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Ct. 1105 (1974). The scope of cross examination is within the discretion of the trial court. However, "[w]here a case stands or falls on the jury's belief or disbelief of essentially one witness, that witness' credibility or motive must be subject to close scrutiny." State v. Roberts, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980).

Schoenhals argues that his counsel should have been permitted to cross-examine Tredway about the particulars of a prior stabbing incident Tredway had indicated he had observed. However, cross examination of this type is prohibited by ER 608 (b):

> **Specific Instances of Conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning his character for truthfulness or untruthfulness . . .

The State cites a pre-rule case, State v. Battle, 16 Wn. App. 66, 553 P.2d 1367 (1976), which upheld a trial court's refusal to allow an accomplice to be questioned concerning prior check passing incidents after she indicated that she would invoke her Fifth Amendment right against self-incrimination. Battle, at 72. The Battle court determined that the inquiry would be into

collateral matters, and did not fall within any exception to the rule that a witness may not be impeached by showing prior acts of misconduct. Battle, at 72-73.

In State v. Acosta, 34 Wn. App. 387, 661 P.2d 602 (1983), reversed on other grounds, 101 Wn.2d 612, 683 P.2d 1069 (1984), the Court of Appeals affirmed the trial court's refusal to permit defense counsel to impeach a prosecution witness by asking whether she frequented taverns as a minor. The Acosta court stated that such questions were not probative of the witness' truthfulness or untruthfulness. Acosta, at 391. Similarly, in the case before us, questioning Tredway about his involvement in a prior stabbing was not probative of his veracity.

Schoenhals argues that Tredway waived his Fifth Amendment privilege on this issue by answering the court's questions in the in camera hearing, and that the hearing was not confidential because a police detective was present. Schoenhals does not cite any authority stating that testimony at an in camera hearing results in a waiver of the Fifth Amendment privilege. The trial court is charged with the responsibility of determining when a witness' Fifth Amendment privilege can be invoked. See State v. Parker, 79 Wn.2d 326, 485 P.2d 60 (1971). If responding to the trial court's inquiry as to the validity of the claim of

privilege always resulted in a waiver of the privilege, no witness could successfully claim his or her right against self-incrimination.

Schoenhals argues that if Tredway's claim of privilege was not waived, then the trial court erred in failing to strike his direct testimony. In State v. Nelson, 65 Wn.2d 189, 396 P.2d 540 (1964), the State's witness claimed her Fifth Amendment privilege when questioned about the possibility that she had unlawfully received public assistance. The Nelson court held that the trial court did not abuse its discretion in failing to strike the witness' direct testimony concerning the matter before the court, stating:

> Her cross-examination had been unrestricted, as to her participation in the crime for which the defendant was being tried; and that which was not permitted related to collateral and unrelated matters.

Nelson, at 196. Similarly, we hold that the trial court below did not abuse its discretion by failing to strike Tredway's direct testimony, because other cross examination relating to Tredway's involvement in Mark's murder was unrestricted.

Schoenhals further argues that Tredway should have been required to claim his Fifth Amendment privilege in front of the jury. The State cites State v. Smith, 74 Wn.2d 744, 446 P.2d 571

(1968), in which the Washington Supreme Court noted that the claiming of the privilege is not evidence, and the jury may not draw any inferences from it. Smith, at 757.

However, Schoenhals cites United States v. Seifert, 648 F.2d 557 (9th Cir. 1980), in which the Court of Appeals held that it was error for the trial court to prevent defense counsel from asking a certain question to which the witness would claim his privilege in the jury's presence. However, in Seifert, that questioning was the only opportunity for defense counsel to attempt to impeach the witness. Because defense counsel here had other opportunities to impeach Tredway, and because the testimony about the prior stabbing was inadmissible in any event, we hold that no error occurred.

Schoenhals argues further that his confrontation rights were violated when defense counsel was prohibited from questioning Tredway about the newspaper articles he had read. However, as the trial court found, putting evidence of the newspaper articles before the jury would negate the court's admonition that the jury not read newspapers during the trial. In addition, Tredway's change in testimony was only that he remained in the room after Schoenhals lunged for Mark, and saw, rather than heard, the stabbing. This change is minimal rather than crucial. Showing

that Tredway's reason for the change was based on the newspaper articles would have had little or no impact on the credibility of Tredway as a witness.

Schoenhals further argues that his confrontation rights were violated by the trial court's failure to permit defense counsel to question Tredway about his knowledge of the penalty for aggravated murder in the first degree or to mention the issue in closing argument. In State v. Brooks, 25 Wn. App. 550, 611 P.2d 1274 (1980), the defendant was charged with first degree robbery and unlawful possession of a firearm. Included in the State's evidence was the inculpatory testimony of a codefendant who had pleaded guilty to the robbery, in exchange for which the State had dropped a deadly weapon allegation. On cross examination, defense counsel sought to inquire about the legal effect of a deadly weapon finding--a mandatory minimum term of 5 years in prison. The State's objection was sustained.

On appeal, the Brooks court noted that great latitude must be allowed in cross examination, and that the trial court had committed reversible error by restricting the cross examination of the codefendant. Brooks, at 551. The Brooks court stated that the right to cross-examine permits more than asking general

questions concerning bias--that the defense should have the opportunity to show specific reasons for the possible bias of the witness. Brooks, at 551-52.

Schoenhals admits that defense counsel elicited from Tredway that Tredway knew the penalty for aggravated first degree murder was life imprisonment without parole, and also elicited from Tredway that the prosecutor's recommendation for Tredway's conviction for murder in the second degree would be 18 years in prison, according to the plea bargain. However, Schoenhals contends that the trial court's ruling precluded defense counsel from arguing in closing the specific motivation for Tredway to lie, based on the plea bargain. In addition, Schoenhals argues that defense counsel was precluded from clarifying Tredway's understanding of the penalty for aggravated first degree murder, and that this was important because Tredway appeared confused about the penalty for murder in the second degree, and the jury might infer that he was also confused about the penalty for aggravated murder in the first degree.

We find Schoenhals' arguments to be unpersuasive. Defense counsel had the opportunity to place before the jury the difference between Tredway's expected sentence and the sentence he presumably escaped--for aggravated murder in the first degree. The trial court's ruling, after the State objected to this line

of questioning, was that defense counsel could not specifically inquire further as to whether Tredway knew that Schoenhals was facing life imprisonment without parole. However, the trial court suggested that defense counsel could inquire whether Tredway knew that Schoenhals was facing a far greater penalty, and defense counsel stated that he would be happy just asking Tredway if he knew what type of penalty Schoenhals was facing, without going into specifics.

At closing, defense counsel chose to argue Tredway's lack of credibility based on the inconsistency of his various statements, and based on Tredway's wish to avoid culpability for the actual murder. Defense counsel apparently chose to avoid mention of the actual plea bargain as a motive to lie. Instead, defense counsel argued that Tredway lied due to his apparent contempt for the truth, and because he wished to ensure that Schoenhals was found culpable, because he, Tredway, had already been found culpable to some degree.

While we acknowledge that under Brooks, the trial court erred in restricting defense counsel's questioning here, we believe that defense counsel could have argued the motivation/bias of the plea bargain and kept within the trial court's ruling, so long as specific amounts of time were not mentioned.

We also note that Tredway's entry into a plea bargain in order to avoid a charge of aggravated first degree murder could not be intelligently done without Tredway knowing the penalties involved. The penalty would be the primary subject of discussion. This fact, implicit in the plea bargain, would be obvious to the jury. For this reason, there was no prejudice to Schoenhals because Tredway's knowledge and obvious benefit from the plea bargain could be argued fully. Based on this freedom to argue, coupled with defense counsel's elicitation on cross examination of the specific penalties for murder in the second degree and aggravated murder in the first degree, we hold that the trial court's ruling did not violate Schoenhals' right to confrontation.[3]

POLICE OFFICER'S TESTIMONY

Schoenhals argues he was denied a fair trial when Det. Gillis testified that he had told Schoenhals that his story was incredible, and when Det. Gillis testified further that another officer told Schoenhals that he believed Tredway. Schoenhals

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[3]With respect to the notion that the jury may have inferred that Tredway was confused as to the actual penalty for aggravated murder in the first degree, our examination of the record does not indicate any possibility of such confusion.

argues that Det. Gillis' testimony was inadmissible because it expressed an opinion as to Schoenhals' guilt, violating his constitutional right to a jury trial.

ER 701 states as follows:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

In addition, ER 704 states as follows:

> Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Opinions based on facts not within the personal knowledge of the lay witness are inadmissible. Furthermore, testimony, whether lay or expert, is objectionable if it expresses an opinion on a question of law. Thus, testimony expressing the witness' personal opinion on the guilt or innocence of the accused is inadmissible. See 5A K. Tegland, Wash. Prac. § 309 (1982). Pre-rule case law is in accord. "A witness may not testify to his opinion as to the guilt of a defendant." State v. Haga, 8 Wn. App. 481, 492, 507 P.2d 159 (1973). See also State v. Carlin. 40 Wn. App. 698, 700 P.2d 323 (1985).

The statements by the officers to Schoenhals were interrogation techniques that succeeded in producing a reaction by Schoenhals that indicated guilt. Schoenhals became agitated, cried and asked questions about whether Mark was really dead. An examination of the transcript indicates that at no time did Det. Gillis testify as to his opinion or anyone else's opinion on the guilt or innocence of Schoenhals. Rather, the detective was describing the interrogation technique used. No attempt was made during the testimony to show that Det. Gillis actually believed that Schoenhals' statement was incredible, or that Det. Gillis' statement was offered as proof that the story was incredible. Sgt. Bollinger's statement was also admitted to show the circumstances to which Schoenhals reacted in a guilty manner.

The theory upon which evidence of flight is held admissible is that "flight is an instinctive or impulsive reaction to a consciousness of guilt . . ." State v. Bruton, 66 Wn.2d 111, 112, 401 P.2d 340 (1965). Other conduct which can reasonably be interpreted as a reaction to a consciousness of guilt is admissible on the same theory. Williams v. Department of Licensing, 46 Wn. App. 453, 455-56, 731 P.2d 531 (1986); 5 K. Tegland, Wash. Prac. § 85 (1982). Thus, we hold that the testimony of Det. Gillis was properly admitted.

However, although the statements did not constitute opinion evidence, the jury could have misinterpreted them as expressing the opinion that Schoenhals was guilty. Therefore, it would have been appropriate for the trial court to have given the jurors a limiting instruction.

ER 105 states as follows:

> When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

If an appropriate limiting instruction is requested when evidence is admitted for a limited purpose, the trial court may not refuse to give the instruction. 5 K. Tegland, Wash. Prac. § 24 (1982). In the case before us, an examination of the transcript shows that defense counsel requested that the trial court strike Det. Gillis' testimony and instruct the jurors that testimony regarding another's credibility or regarding guilt or innocence was not competent evidence. As noted above, the trial court declined to strike the testimony or give the requested instruction.

Defense counsel asked for a curative instruction, appropriate for inadmissible evidence inadvertently heard by the jury, rather than an appropriate limiting instruction, cautioning the jury to use the evidence only for its limited purpose.

However, while it is true that defense counsel's request could have been clearer, we believe that the request was sufficient here to alert the trial court to the potential for jury misinterpretation of Det. Gillis' testimony and the need for a limiting instruction. Thus, instead of merely denying defense counsel's motion to strike and request for a curative instruction, the better practice would have been to instruct the jurors that Det. Gillis' testimony was admitted only to show what occurred when Schoenhals was questioned.

However, any error that occurred was not prejudicial, because the curative instruction given with respect to Lombardy's opinion testimony (see footnote 4) was sufficient to prevent the jury from mistakenly treating either Det. Gillis' statement or Sgt. Bollinger's statement to Schoenhals as opinion evidence of guilt.

LOMBARDY'S TESTIMONY

Schoenhals argues that Lombardy's testimony for the defense was rehabilitative, following Det. Gillis' expression of opinion regarding Schoenhals' guilt, such that the giving of a curative

instruction was error. The State argues that because Lombardy's testimony was an improper expression of an opinion, the court's curative instruction[4] was not a comment on the evidence.

In State v. Oughton, 26 Wn. App. 74, 612 P.2d 812 (1980), the defendant argued on appeal that the trial court erred in permitting a detective to testify about his opinion of the defendant's truthfulness. The trial court had already permitted an exchange in which the defense counsel was allowed to ask similar questions of another police officer. On appeal, the Oughton court held that because the defendant opened the door to the subject with his own question, any error was invited error and would not be considered on appeal. Oughton, at 77.

Having held that the evidence given by Det. Gillis was not opinion evidence, we do not find that the State opened the door to opinion evidence concerning Schoenhals' guilt. Therefore, Lombardy's testimony was inadmissible opinion testimony as to Schoenhals' innocence, entitling the State to a curative instruction.

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[4]The court's instruction to the jury was:
"No witness may express his or her opinion regarding the issue of guilt or innocence. That issue of guilt or innocence is totally reserved for the judgment of the jury."

ADMISSION OF TAPED STATEMENT

Schoenhals argues that Tredway's taped statement was inadmissible as a prior consistent statement because it was tainted by a motive to fabricate. Further, Schoenhals argues that the error was not harmless because Tredway's veracity was at issue in the trial.

ER 801(d) states in pertinent part:

> **Statements Which Are Not Hearsay.** A statement is not hearsay if--
> (1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is . . . (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive . . .

In State v. Ellison, 36 Wn. App. 564, 676 P.2d 531 (1984), a juvenile was charged with the first degree murder of a cab driver. A coparticipant who had pleaded guilty testified against the defendant. A statement taken from the coparticipant just prior to the defendant's arrest was inconsistent with his trial testimony, and was introduced for impeachment purposes by the defense. The prosecution attempted to rehabilitate the coparticipant by introducing a statement made several months later, after the coparticipant had been offered a plea bargain. The defendant claimed that it was error for the trial court to

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admit the later statement because it was made after the coparticipant had a motive to fabricate arising out of his acceptance of the plea bargain.

On appeal, the Ellison court noted that ER 801(d)(1)(ii) only requires that the declarant testify at trial and be subject to cross examination, and that the statement be used to rebut a charge that trial testimony is a recent fabrication or the product of improper influence or motive. However, the Ellison court stated that pre-rule case law had consistently held that prior consistent statements were admissible only if made at a time when the declarant had no motive to fabricate, and that such a requirement was still necessary after the adoption of the Rules of Evidence. Ellison, at 568.

The Ellison court noted that nothing contained in ER 801(d) suggests any intention of the drafters to eliminate the motive to fabricate rule, and that federal decisions interpreting Fed. R. Evid. 801(d)(1)(B), the federal counterpart to the Washington rule, have concluded that the motive to fabricate rule continues to apply. Ellison, at 569. Therefore, the Ellison court held that the coparticipant's statement, made after the offer of a plea bargain, was made at a time when the coparticipant had a

motive to fabricate. Although the admission of the statement was error, the Ellison court ruled that such error was harmless. Ellison, at 569-70.

It is apparent that the trial court below concluded that Tredway did not have a motive to fabricate until he was offered a plea bargain. However, Schoenhals argues that because Tredway was told on January 9 that Schoenhals was blaming him for the murder, the motive to fabricate arose then.

The admission of prior consistent statements is discretionary with the trial court and is subject to reversal only on the ground of manifest abuse. State v. Dictado, 102 Wn.2d 277, 290, 687 P.2d 172 (1984). No manifest abuse of discretion occurred in the trial court's admission of Tredway's January 9 statement. The question of when a motive to fabricate arises is a factual one, making it particularly appropriate for the trial court, rather than an appellate tribunal, to decide.

It is true that any person facing a charge of criminal conduct has a motive to lie. However, to find error in the trial court's decision here would extend the Ellison holding beyond its appropriate boundaries, and, in practical terms, make all prior consistent statements made after an individual is accused of criminal conduct inadmissible, because of the accused's motive to lie. We decline to go that far. We hold that Tredway's January

9 statement was properly admitted, while noting that Tredway's later statement, made after the plea bargain, was properly excluded.

VIDEOTAPE & PHOTOGRAPHS

Schoenhals argues that the videotape and the photographs admitted were so disturbing that one juror had to be excused from serving in the case. Schoenhals further argues that the items were much more prejudicial than probative.

In State v. Adams, 76 Wn.2d 650, 458 P.2d 558 (1969), the defendant was prosecuted for murder, and the trial court permitted the introduction of certain color slides taken of the victim during an autopsy. The defendant claimed that the only reason for showing the photographs was to inflame the jury. On appeal, the Adams court determined that photographs accurately depicting the true state or condition of a crime are admissible if they are probative upon an element of the crime charged, for example, when they are used to illustrate a doctor's testimony. Adams, at 654. The Adams court stated that the test for admissibility is whether the probative value of the photographs is overwhelmed by their inherently prejudicial qualities. Adams, at 655-56. Furthermore, "[t]he admissibility of photographs is generally within the sound discretion of the trial court, and the

trial court's ruling will not be disturbed on appeal, absent the showing of abuse of discretion." State v. Crenshaw, 98 Wn.2d 789, 659 P.2d 488 (1983).

We hold that the trial court erred in admitting the videotape. As Schoenhals correctly notes, no witness referred to the videotape after it was shown to the jury. Thus, we cannot ascertain any probative value in admitting it. However, the error in its admission was harmless. The only possible prejudicial aspect of the videotape was that it showed the bloody crime scene. Because the same scene is depicted in the still photographs, we do not believe that the videotape was so prejudicial as to constitute reversible error.

We further hold that the admission of the still photographs was proper. As the State notes, the photographs were useful to the medical examiner to illustrate his testimony. Given their probative value, we do not find that the still photographs, while unpleasant to view, were so prejudicial as to outweigh their probative value.

CUMULATIVE ERROR

Schoenhals argues that his conviction should be reversed because the combined effect of trial court errors deprived him of a fair trial. We find that the trial court erred only in failing

to give an accomplice cautionary instruction, failing to give a limiting instruction, and in the admission of the videotape. We believe these three errors, even taken together, were not prejudicial, and reject Schoenhals' argument of cumulative error.

Judgment affirmed.

Scholfield, J.

WE CONCUR:

Pekelis, J. Webster, J.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, IT IS SO ORDERED.

Scholfield, J.
~~CHIEF~~ JUDGE

APPENDIX D

FILED
KING COUNTY, WASHINGTON
NOV 2 6 1985
SUPERIOR COURT CLERK
BY DEBRA L. BAILEY
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff,

v.

JOHN HOWARD SCHOENHALS, Defendant.

NO. 85-1-00123-7

VERDICT FORM A

DEPT. 27

We, the jury, find the defendant John Howard Schoenhals GUILTY of the crime of Aggravated First Degree Murder.

C. Thomas Fay
FOREMAN

POSTED

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C-1

FILED
KING COUNTY, WASHINGTON
NOV 2 6 1985
SUPERIOR COURT CLERK
BY DEBRA L BAILEY
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, v. JOHN HOWARD SCHOENHALS, Defendant.	NO. 85-1-00123-7 SPECIAL VERDICT FORM (DEADLY WEAPON) DEPT. 27

We, the jury, return a special verdict by answering as follows:

Was the defendant John Howard Schoenhals armed with a deadly weapon at the time of the commission of the crime?

ANSWER: YES
(Yes or No)

[signature]
FOREMAN

POSTED

96.3

C-2

FILED
KING COUNTY, WASHINGTON
NOV 26 1985
SUPERIOR COURT CLERK
BY DEBRA L. BAILEY
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, v. JOHN HOWARD SCHOENHALS, Defendant.	NO. 85-1-00123-7 SPECIAL INTERROGATORY FORM 1 DEPT. 27

The Jury will answer these questions only if you find the defendant "guilty" of the crime of Aggravated First Degree Murder. You must be unanimous to answer any question.

1.1 Did the defendant commit this murder to conceal the commission of a crime, that is Burglary in the First or Second Degree?

No
(Yes or No)

1.2 Did the defendant commit this murder to conceal his identity as a participant in the crime?

Yes
(Yes or No)

1.3 Did the defendant commit this murder in the course of, in furtherance of, or in immediate flight from the crime of Burglary in the First or Second Degree?

No
(Yes or No)

C. Thomas [signature]
FOREMAN

POSTED

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KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT

May 13, 2024 - 7:52 AM

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