NO. _____

SUPREME COURT OF THE STATE OF WASHINGTON

(COURT OF APPEALS NO. 50206-9-I)

STATE OF WASHINGTON,

Respondent,

v.

STEVEN DARBY MCDONALD,

Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Steven McDonald asks this Court to accept review of the Court of Appeals decision terminating review (Appendix A).

II. COURT OF APPEALS DECISION

A copy of the decision affirming Mr. McDonald's conviction and sentence is contained in Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. Mr. McDonald was sentenced to life without parole as a "three striker" for first-degree arson. Does the appellate court's decision upholding this penalty conflict with controlling authority, given the undisputed context (that he burned an outdoor welcome mat with a fire so small that it was doused by two ice-buckets of water) and our complete 50-state comparison (showing that such a punishment for this crime is unmatched in severity in all but three other states)?

2. Did the trial court's decision to prevent Mr. McDonald from investigating and introducing impeachment information, such as a state witness' informant status and drug abuse history violate due process protections of the state and U.S. Constitutions?

3. Was Mr. McDonald deprived of his rights to counsel and of access to the courts (U.S. Const. amends. I, VI, XIV) by denial of his requests to communicate with lawyers and legal organizations and denial of counsel of choice?

4. Was the evidence insufficient to convict Mr. McDonald, thus violating his right to due process of law, under U.S. Const. amend. XIV?

5. Did the trial court's exclusion of the policy protocols of the Mt. Vernon Police Department deny Mr. McDonald due process in violation of U.S. Const. amend. XIV?

IV. STATEMENT OF THE CASE

A. Overview

Mr. McDonald was charged with first-degree arson based on the burning of an outdoor welcome mat, and the charring of the motel room door that it caused, on or about February 4, 1996, at the West Winds Motel in Skagit County, in violation of RCW 9A.48.020(1)(a), (b) and (c). CP:231-32. Second-degree arson of a vehicle was also charged. Id. He was convicted. Because the burning of the welcome mat was a Class A felony, he qualified as a Persistent Offender and was sentenced to life without parole.

B. Procedural History

Mr. McDonald's earlier conviction for these crimes was reversed due to a conflict with his standby counsel. He proceeded pro se again at retrial.

1. *Pretrial Suppression Motions*

Mr. McDonald moved to suppress his statements. CP:1476-1561. Following an evidentiary hearing, it was denied. CP:1562-63.

2. *Pretrial Motions Re: Denial of Investigation, and Exclusion of Impeachment Material*

Mr. McDonald also moved – several times – for permission to investigate and present impeachment evidence on the state's witnesses.

He sought such information about Officers Ruxton and Lindberg.[1] He specifically sought access to their internal investigation files. CP:309.[2] The trial court denied these motions, ruling that internal investigation files were neither relevant nor discoverable. 10/18/01 VRP:11-20.

He also sought impeachment information on the state witness Barry Campbell, a taxi driver who had served as a paid informant in past cases. Mr. McDonald sought specific information about this informant, such as evidence concerning his drug use and his prior police contacts that had led to his informant status and expectation of benefits in return for information.[3] He sought information about Mr. Campbell's benefits received, including evasion of possible charges, in exchange for information.[4] Then, upon discovering some of this information on his own,

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[1] E.g., CP:71-80; CP:81-83.

[2] See also CP:141-43.

[3] E.g., CP:204-211 (Subpoena Duces Tecum to Squim [sic] Drug Treatment Center and Rehabilitation Clinic; an attached "Memorandum of Fact and Law" lists material for them to bring, including its records about state's listed witness Barry Leo Campbell's drug rehab and treatment); Sub No. 369B (Subpoena for: "All Criminal Records, Arrest Reports, Affidavits of PC, Statement of Defendant on Plea of Guilty, Informations, Warrants for Arrest or Bench Warrants, Plea Agreements, Amended Informations, Releases on Personal Recognizance, Orders Forfeiting Cash Bail, Order to Exonerate Bond, on Barry Leo Campbell, DOB 9/29/52, in Case Number 96-1-00160-0"); Sub No. 369D (SDT (Oct. 1, 2001): for records re Campbell as follows: "Barry Leo Campbell, DOC # 754813, DOB 9/29/52, SS. #539-56-0943; Judgment and Sentence to The DOC for Receipt of the Above DOC Number; and all DOC Infractions Received While Committed Therein."); CP:997-1014 (Motion to Compel State Agent Barry Leo Campbell to Answer Written Interrogatories (Nov. 19, 2001)).

[4] CP:1096-1114 (arguing that Skagit County Drug Task force removed "various felony

Mr. McDonald sought permission to cross-examine witness Campbell about his informant status and drug use. Sub No. 530; CP:1185-1215.

The trial court denied these motions. She ruled admissible only Campbell's drugs use on Feb. 5, 1996 and Sept. 19, 1996, the date of the event and the date of the last trial and Campbell's convictions for third degree theft; she excluded what she called, "collateral impeachment regarding 'benefit' for testifying." CP:1433.[5] See also CP:1434 (since "no direct evidence of benefit provided by [prosecutor] Volluz to Campbell and circumstantial evidence of same not strong," "no impeachment of Volluz regarding 'benefit' provided to Campbell"); CP:1576-1600; CP:1603 (Order denying disclosure of law enforcement personnel records; ordering parties to avoid above topics).

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charges against State Agent Campbell from the computer. Thus, it is impossible for the defendant to ascertain accurate impeachment evidence against him, after his record was 'sanitized' by state officials.").

[5] The verbal ruling on the motion for a subpoena to obtain this information similarly shows Mr. McDonald's desire to obtain information regarding the witness' informant status and drug history, and the trial court's belief that this was irrelevant. 8/29/01 VRP:91-101 (McDonald's Defense motion number 8 seeks subpoena for Campbell drug records, arrests; "He was arrested the day after I was for breaking into a garage and stealing two chain saws from Mr. Nelson. He's got an extensive criminal history. This just wiped it all away and said we will just give you third degree misdemeanor."; prosecutor responds that "any prior arrests would [not] be relevant or any law enforcement contacts would [not] be re relevant to this particular defense" and drug use would be impeachment on a collateral matter; Court rules "I do not think both from privacy standpoint and for impeachment purposes, I don" think the drug, the records of drug treatments are discoverable"; "Certainly to the extent to which, and also under the evidence rule, I think the only thing that's admissible for purposes of impeachment are convictions"; court specifically rules that arrest records are neither discoverable nor admissible: "You can get in his history that's admissible for purposes of impeachment under the the rules. Arrest history isn't included in that.").

The trial court specifically ruled that prior criminal acts that did not result in convictions were neither relevant nor admissible. 10/25/01 VRP:27-30.[6]

3. *Trial – Overview*

Mr. McDonald registered for a room at the West Winds Motel on February 3, 1996, the night the fires occurred. The state called three types of witnesses to prove that McDonald started the fires: members of the family who were staying in that motel room and who saw Mr. McDonald standing outside near the doormat while it burned (1/29/02 VRP:55-132); three taxi cab drivers (including informant Campbell) who testified that they transported Mr. McDonald to that motel, and to and from nearby gas stations, at different times that evening, including twice with gasoline (VRP:241-255; 1/30/01 VRP:410-427; 1/31/01 VRP:476-490); and official state employees who testified about Mr. McDonald's statements and their observations of the scene (1/29/02 VRP:133-201, 1/31/02 VRP:508-38, 567-592).

Mr. McDonald called several witnesses to impeach the testimony of the state's officers, experts, and taxi cab drivers. Dennis Hofstad, fire

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[6] Mr. McDonald moved for relief again, post-trial, on the trial court's refusal to allow him to impeach witness Campbell with circumstantial evidence of his expectation of benefits for testifying against Mr. McDonald in this case. Sub No. 739. The trial court denied this motion. CP:1875-77.

chief for City of Mount Vernon in February of 1996, testified that he responded to a call to the West Winds Motel and went into McDonald's room to check for additional fires; he was there for about three minutes and did *not* smell any petroleum hydrocarbon products or gasoline in McDonald's room. 2/1/96 VRP:737-38.

He called Dr. Roy Giles, for whom he acted as caretaker for approximately a year preceding this incident. 2/4/01 VRP:901. Dr. Giles is a retired physician and anesthesiologist, with prior RAF WWII piloting military service. He described how he trusted Mr. McDonald with odd jobs, caretaking, and his personal security, and never noticed anything weird or violent abut Mr. McDonald. VRP:902-07. He said that Det. Ruxton told him to "make false accusations" of theft against McDonald for material supposedly taken from the house, even though it belonged to McDonald.

Mr. McDonald then testified. He explained that he dumped sand out of the bucket near his room to fill up the bucket to put out the fire. VRP:933. He continued that that 2 1/2 gallon square bucket never had gasoline in it. He denied talking to himself, as state's witnesses had asserted. He denied taking Campbell's or Hackley's cab (as they claimed) and he denied going to the gas station, buying gasoline, and pouring it on Mrs. Clarke's doormat or van. VRP:934. He said that a "Tommie" started

the fire, and explained who this acquaintance from a bar that evening was. He said that he, McDonald was the one who "pulled the mat away from the lady's door so it would not burn her door, then I ran down and I had grabbed the bucket and I dumped the sand out of the bucket. Then I ran back to the room and I put the bucket in the bathtub, and was filling the bucket with the water and I dialed 911." VRP:934. He continued that his clothes and his room never smelled like gasoline. VRP:935-36.

Mr. McDonald then explained his whereabouts that evening. He went to a restaurant/bar next door, but came back and then helped put out the fire. VRP:938-41.

Sgt. Lindberg then came to his room; McDonald described him coming in and questioning him, then handcuffing him forcibly, and "He says if we don't get Tommie, you are going to take the heat for this." VRP:945-46. McDonald also described taxi driver Evans meeting him at Dr. Giles', demanding gifts and food, wanting to charge him $50 to go to Mount Vernon, so he said he would take the bus instead – but that he took a different cab down for only $20. VRP:950-55.

Mr. McDonald then called his expert, Dr. DeHaan, a forensic scientist specializing in the investigation and reconstruction of fires and explosions. 2/5/02 VRP:988. He explained a variety of errors that were made in the investigation, packaging, and testing of evidence – errors that

made it impossible to determine now whether specific items, like Mr. McDonald's clothing or the bucket in his bathtub, actually had any petroleum products on them. VRP:993-1007.

Additionally, witness McFarland's prior testimony was read by agreement of the parties. 2/4/02 VRP:884. On February 4, 1996, he worked at the College Way Unocal, Mt. Vernon, and at 3 a.m. a man came in "with a bucket wanting gas," "like a detergent bucket." VRP:885. He gave a full description of the man, but it differed from the appearance of Mr. McDonald: "six footish or more, blondish hair, pretty sure had a baseball cap on, some sort of a hat, about 170, 180 pounds," "about 30, 35" VRP:886. Critically, this witness stated that the man who came in had injured knuckles: "bloody knuckles like wrench had slipped off the nut or something," a "fairly recent" injury. VRP:888. (There was no sign of injury on Mr. McDonald's knuckles.) This witness could not identify anyone from the montage he viewed prior to the first trial. VRP:892.

A more complete summary of the state witnesses' testimony is contained in our Opening Brief, at pp. 11-19.

4. ***Sentencing***

The court ruled that McDonald was a Persistent Offender. 3/12/02 VRP:6-7; CP:1903-05; Sub No. 783. It imposed a sentence of life without parole on Count I. VRP:10-11; Sub No. 783 (Judgment).

V. ARGUMENT IN FAVOR OF GRANTING REVIEW

A. Washington Stands Almost Alone With Its Mandatory Life Without Parole Sentence For Arson as a Third Strike; The Appellate Court Erred in Rejecting This Fact and Its Legal Implications For Eighth Amendment and Wash. Const. Art. 1 § 14 Analysis.

1. *The Appellate Court's Decision on the Proportionality of Sentence Issue.*

The state and the appellate court acknowledged that "[t]he Washington Constitution's provision against cruel punishment under Wash. Const. Art. 1 § 14 is more protective than its federal counterpart." Response, p. 38 (citing State v. Fain, 94 Wn.2d 387, 392-93, 617 P.2d 720 (1980)); Opinion, p. 12 & nn. 24-25. Both the state and the appellate court even agreed that the factors we cited, including dis-proportionality when compared with punishments in other jurisdictions, are crucial to the Art. 1, § 14 analysis. Response, pp. 41-42; Opinion, p. 13.

The appellate court's main response to our discussion of the four Fain factors governing whether a sentence is disproportionate is, "Although McDonald argues that no other states impose life without parole for first degree arson, McDonald incorrectly focuses on sentences imposed absent a third strike." Opinion, p. 14. The appellate court continued, "most states that have 'three strikes' laws include first degree arson in the list of qualifying crimes," Opinion p. 14, suggesting

Washington's penalty is in line with that of the other states.

2. ***A Multi-State Comparison With Other States' Three-Strikes Laws Shows That Washington Stands Almost Alone Among the 50 States With Its Mandatory Life Without Parole Sentence for Arson as a Third Strike.***

The appellate court's first holding on this issue is wrong as a factual matter. We did a complete multi-state analysis comparing Washington's sentence for this crime with sentences imposed in other states, including states that have three-strikes laws. Reply, pp. 6-13.

The appellate court's second holding on this issue conflicts with the laws on the books of almost every one of the other fifty states. Those statutes show that Washington stands virtually alone in imposing life without parole as an automatic, mandatory, statutory minimum, as well as maximum, punishment for arson.

This holding also conflicts with controlling state and U.S. Supreme Court decisions on the importance of the state standing virtually alone in imposing such a harsh penalty. In fact, the number of other states imposing this harsh of a penalty for arson –three – is the same as the number of other states that imposed the harsh penalty of death as the penalty in Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (invalidating death penalty for rape of adult woman) and that

imposed life as the penalty in Fain (invalidating life sentence for minor theft as recidivist). Nevertheless, the U.S. and Washington Supreme Courts – respectively – invalidated those penalties as disproportionate and hence unconstitutional.

This petition presents the question of whether the appellate court's decision that such a sentence was not disproportionate here, despite the applicability of the same constitutional protections and despite the same evidence about Washington standing virtually alone in imposing its harsh penalty, conflicts with that controlling Eighth Amendment and Washington (Wash. Const. art 1, § 14) precedent.

A multi-state survey of the punishments provided for arson of the three sorts of which Mr. McDonald was convicted – arson as defined by RCW 9A.48.020(1)(a), (b), and (c) – shows that the vast majority of the states *do not* punish arson of this sort – or any sort – as a third strike with life without parole.

There are *six states* that do not have "three strikes," or equivalent "persistent offender," or "habitual criminal," laws applicable to a third felony conviction at all. They are: Alaska, Georgia, Iowa, Oregon (McDonald does not meet definition of "dangerous offender"), South

Carolina (McDonald does not meet criteria for increase) and Vermont.[7] Some of these have "fourth" strike statutes, but none have statutes that would punish a man in Mr. McDonald's position – with a third strike for the type of arson charged here – more harshly. Obviously, these states do not provide the harsh automatic penalty of life without possibility of parole for arson even where it is a third serious felony.

There are then seven states that have "three strikes" or equivalent laws applicable to a third felony conviction, but their third strike type of laws are completely discretionary in their application – they do not automatically "click in" upon proof of prior convictions but are activated only if the priors are proved *and* the sentencing judge believes that the extended sentence is appropriate given the nature of the offense and the character of the defendant. Those states are Hawaii, Kentucky, Maine, New Hampshire, New Jersey, North Dakota and Rhode Island.[8] These states do not provide the harsh automatic penalty of life without parole for arson even where it is a third serious felony – they leave sentencing discretion where it has traditionally been, with the trial court judge.

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[7] Alaska (Alaska Stat. § 11.46.400 (2002)); Georgia (O.C.G.A. § 16-7-60(a)(5)(2002)); Iowa (Iowa Code § 712.2 (2002)); Oregon (ORS § 161.725 (2001)); South Carolina (S.C. Code Ann. § 16-1-120 (2002)); and Vermont (13 V.S.A. § 11 (2003)).

[8] Hawaii (HRS § 706-661(3) (2003)); Kentucky (KRS § 532.080 (6)(a)(7) (2002)); Maine (17-A M.R.S. § 1252 (2003)); New Hampshire (RSA 651:6 II(a) (2002)); New Jersey (N.J. Stat. § 2C:43-7-a-3 (2002)); North Dakota (N.D. Cent. Code, § 12.1-32-09(2)(b) (2002)); and Rhoda Island (R.I. Gen. Laws § 12-19-21(b) (2002)).

Then there are the four states and the District of Columbia that do mandate some sort of increase in the statutory *maximum* sentence for arson like that committed by Mr. McDonald, where it is a third serious felony. Those states are Connecticut, District of Columbia, Michigan, Missouri and Wisconsin.[9] But these listed states mandate an increase in the statutory maximum for arson as a third "strike" – they do not increase the statutory mandatory minimum. Hence, they do not provide the harsh automatic penalty of life without parole for arson even where it is a third serious felony. They do not provide any automatic sentence at all, but simply increase the discretion of the sentencing judge.

There are other states that have a mandatory increase in the statutory minimum sentence for arson where as here it is the equivalent of a third "strike." Most of them have not extended that mandatory increase in the minimum sentence for arson as a third "strike" to life without parole. Instead, they increase the mandatory minimum sentence by a matter of years. Thus, the following states which have increased the statutory mandatory minimum for arson as a third "strike" by a term of years have provided the following increases: Alabama (99 years), Arizona (14 years), Arkansas (4 years), California (life with parole eligibility after

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[9] Connecticut (Conn. Gen. Stat. § 53a-40(2)(h) (2003)); District of Columbia (D.C. Code § 22-1804a(2) (2003)); Michigan (MCL § 769.11(10)(a) (2002)); Missouri (R.S.Mo. § 558.016(7)(2) (2003)); and Wisconsin (Wis. Stat. § 961.48 (1)(a) (2002)).

20 years), Colorado (40 years), Florida (15 years), Idaho (5 years), Indiana (10 years), Kansas (37 months), Maryland (25 years [parole eligible after 15 years at age 65]), Massachusetts (20 years), Minnesota (20 years), Mississippi (20 years), Montana (10 years), Nebraska (25 years), Nevada (15 years), New Mexico (14 years), New York (20 years), North Carolina (116 months), Ohio (10-15 years), Oklahoma (20 years), Pennsylvania (25 years), Tennessee (40 years), Texas (25 years), Utah (5 years), Virginia (life [parole eligible at age 60 after serving at least 15 and at age 65 after serving at least 5]), West Virginia (life with parole eligibility) and Wyoming (10 years).[10]

Finally, there are some states that, like Washington, automatically and without discretion increase the sentence for arson as a third "strike" to life without possibility of parole. *But there are only three of them* or four counting South Dakota, whose increase to this sentence does not apply to

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[10] Alabama (Code of Alabama § 13A-5-9(b)(3) 2003)); Arizona (A.R.S. § 13-604(D) (2003)); Arkansas (A.C.A. § 16-90-201(2) (2002)); California (Cal Pen Code § 667.7 (2003)); Colorado (C.R.S. § 18-1.3-801(2.5) (2003); Florida (Fla. Stat. § 775.084(4)(b) (2002)); Idaho (Idaho Code § 19-2514 (2002)); Indiana (Burns Ind. Code Ann. § 35-50-2-8(h) (2002)); Kansas (K.S.A. § 21-4709 (2002)); Maryland (Md. C.L. Code Ann. § 14-101 (2002)); Massachusetts (Mass. Ann. Laws ch. 279 § 25 (2003)); Mississippi (Miss. Code Ann. § 99-19-81 (2003)); Montana (Mont. Code Anno. § 46-18-502(2) (2002)); Nebraska (R.R.S. Neb. § 29-2221(1)(a) (2002)); Nevada (NRS § 207.010(1)(a) (2002)); New Mexico (N.M. Stat. Ann. 31-18-17B (2002)); New York (NY CLS Penal § 70.08(3)(a) (2003)); North Carolina (N.C. Gen. Stat. § 17-7.6 (2003)); Ohio (ORC Ann. 2929.14(1)(b) (Anderson 2002)); Oklahoma (21 Okl. St § 51.1 4 (B) (2003)); Pennsylvania (42 Pa.C.S. § 9714 (2002)); Tennessee (Tenn. Code Ann. § 40-35-112(c) (2002)); Texas (Tex. Penal Code § 12.42(d) (2002)); Utah (Utah Code Ann. § 76-3-203.5 (2)(c) (2003)); Virginia (Va Code Ann. § 19.2-297.1A(g) (2003)); West Virginia (W. Va. Code § 61-11-18(C) (2003)); and Wyoming (Wyo. Stat. 6-10-201(b) (2002)).

all the forms of first-degree arson charged here. They are: Delaware, Illinois, Louisiana (and perhaps South Dakota).[11]

This is actually comparable to the situation in Fain itself: in that case there were three other states that had the same harsh punishment of life for theft in the second degree, but this Court still ruled that sentence disproportionate. This is comparable to the situation in one of the leading federal Eighth Amendment/proportionality cases, Coker v. Georgia: in that case there were approximately three other states that still imposed death for rape of an adult woman, but the U.S. Supreme Court ruled that penalty was disproportionate anyway.

This chart summarizes these penalties:

Subsequent 3rd Strike Penalty	**State**	**Statute**
No Equivalent Third Strike Statute	Alaska Georgia Iowa Oregon So. Carolina Vermont	No statute No statute Habitual Offender for Class C/D Dangerous Offender – ORS § 161.725 SC Code. Ann. § 16-1-120 13 V.S.A. § 11 (4th Strike)
Completely Discretionary	Hawaii Kentucky Maine New Hampshire	HRS § 706-661(3) KRS § 532.080 6(a), 7 17-A M.R.S. § 1252 RSA 651:6 II(a)

[11] Delaware (11 Del. C. § 4214(b) (2003)); Illinois (720 ILCS 5/33B-1(e) (2003)); Louisiana (La. R.S. 15:529.1(b)(ii) (2003)); and South Dakota (S.D. Codified Laws § 22-7-7 (2002)).

	New Jersey North Dakota Rhode Island	N.J. Stat. § 2C:43-7-a-3 N.D. Cent. Code, § 12.1-32-09(2)(b) R.I. Gen. Laws § 12-19-21(b)
Mandated Increase to Maximum Sentence, But Not Minimum	Connecticut District of Columbia Michigan Missouri Wisconsin	Conn. Genn. Stat. § 53a-40(2)(h) D.C. Code § 22-1804a(2) MCL § 769.11(10)(a) R.S. Mo. § 558.016(7)(2) Wis. Stat. § 961.48(1)(a)
Mandatory Minimum Sentence, But Not Life Without Parole Mandatory Minimum Sentence, But Not Life Without Parole (continued)	Alabama (99 years) Arizona (14 years) Arkansas (4 years) California (20 years) Colorado (40 years) Florida (15 years) Idaho (5 years) Indiana (10 years) Kansas (37 months) Maryland (25 years) [exception at age 65] Massachusetts (20 years) Minnesota (20 years) Mississippi (20 years) Montana (10 years) Nebraska (25 years) Nevada (15 years) New Mexico (14 years) New York (20 years) North Carolina (116 months) Ohio (10-15 years) Oklahoma (20 years) Pennsylvania (25 years) Tennessee (25 years) Texas (25 years) Utah (5 years) Virginia (Life w/parole)	Code of Ala. § 13-A-5-9(b)(3) A.R.S. § 13-604(D) A.C.A. § 16-90-201(2) Cal Pen Code § 667.7 C.R.S. §18-1.3-801(2.5) Fla. Stat § 775.084(4)(b) Idaho Code §19-2514 Burns Ind. Code Ann. § 35-50-2-8(h) K.S.A. § 21-4709 Md. C.L. Code Ann. §14-101 Mass. Ann. Laws ch. 279 § 25 Minn. Stat. § 609.1095 Miss. Code Ann. § 99-19-81 Mont. Code Anno. § 46-18-502(2) R.R.S. Neb. § 29-2221(1)(a) NRS § 207010(1)(a) N.M. Stat. Ann. § 31-18-17B NY CLS Penal § 70.08(3)(a) N.C. Gen. Stat § 14-7.6 ORC Ann. 2929.14(1)(b) 21 Okl. St. § 51.1 42 Pa.C.S. § 9714 Tenn. Code Ann. § 40-35-112(c) Tex. Penal Code § 12.42(d) Utah Code Ann. § 76-3-

	West Virginia (Life w/parole) Wyoming (10 years)	203.5(2)(c) Va. Code Ann. § 19.2-297.1A(g) W. Va. Code § 61-11-18(C) Wyo. Stat. § 6-10-201(b)
Mandatory Life without Parole	Delaware Illinois Louisiana South Dakota Washington	11 Del. C. § 4214(b) 720 ILCS 5/33B-1(e) La. R.S. 15:529.1(b)(ii) S.D. Codified Laws § 22-7-7 RCW § 9.94A.570

Please refer to Appendix A for a summary of each state's applicable statute; Appendix B contains each statute to which Appendix A refers.

Thus, the appellate court's decision that the multi-state analysis of the available punishments for first-degree arson shows that Washington's punishment is in line with that of the other states, and that this tends to support the proportionality of the sentence, conflicts with the statutes on the books of those other fifty states (showing that only three other states have a mandatory, automatic, increase to life as statutory minimum as well as maximum); conflicts with Fain's holding that these numbers show disproportionality; and conflicts with Coker's holding to the same effect.

B. The Appellate Court's Decision That McDonald Had No Right to Investigate or Offer Information About Witness Campbell's Informant Status and Drug Abuse History Violated Brady.

1. *The Appellate Court's Decision Concerning Witnesses Campbell and the Two Detectives.*

We have summarized the trial court's decisions preventing Mr.

McDonald from investigating and using informant status, receipt of benefits, drug use and absence of drug prosecutions, as impeachment evidence against witness Campbell, in Procedural History § IV(B)(2) and also in the Opening Brief, Procedural History § II(A) (incorporate by this reference). We summarized the decisions preventing disclosure of Officer Ruxton's and Lindberg's personnel files in both of those section, also.

The appellate court rejected these claims because of the trial court's "broad discretion when choosing to admit or deny evidence," Opinion p. 5 & n.2, as well as the privileged nature of the Campbell medical records McDonald sought. Opinion, p. 6.

2. *The Trial Court's Limits Violate U.S. Supreme Court Authority Holding that Informant Status and Drug Abuse History is Critical, Relevant, Exculpatory Evidence that Must be Disclosed.*

The state must disclose all evidence "favorable to the accused upon request." Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Impeachment evidence clearly falls within the disclosure mandate of Brady. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1984), cert. denied, 488 U.S. 924 (1988); United States v. Brumel-Alvarez, 991 F.2d 1452 (9th Cir. 1993). Thus, each area of inquiry proposed by McDonald was not just discoverable, but admissible; the appellate court's decision to the contrary conflicts with the following:

1. Prior Acts of Wrongdoing: The trial court prevented investigation of and ruled inadmissible prior acts of wrongdoing that did not result in convictions. But the state must disclose prior criminal conduct of its witnesses, whether or not it resulted in a conviction, and the government has a duty to seek this information out.[12] The fact that the witness's acts created only a suspicion of wrongdoing, and resulted in no adverse government action, is irrelevant; disclosure is still required.[13]

2. Upcoming Opportunities for Leniency: The court prevented investigation of Campbell's informant status and prior benefits. But the state must disclose its witnesses' upcoming opportunities to seek leniency from the government, even where the government has made no explicit promise. Continuing informant status certainly presents such an opportunity.[14]

3. Internal Affairs, Employment, and Other Government Files:

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[12] United States v. Perdomo, 929 F.2d 967, 980 (3rd Cir. 1991) (government failure to disclose prior arrest and conviction record of main witness was Brady violation requiring reversal; prosecution team with duty to disclose includes both investigative and prosecution personnel); United States v. Osorio, 929 F.2d 753, 760 (1st Cir. 1991) (government erred in failing to disclose that its witness had been involved with trafficking drugs for 18 months prior to trial, even though a different A.U.S.A., not the one trying the case, was the one with knowledge of that criminal background).

[13] United States v. Phibbs, 999 F.2d 1053, 1089 (6th Cir. 1993), cert denied, 510 U.S. 1119 (1994) (Brady material includes evidence of "suggested wrongdoing" by witnesses; "The Supreme Court, in construing the government's obligation under Brady v. Maryland and its offspring, has drawn no distinction between such evidence, and that pertaining to proven or admitted criminal behavior.").

[14] Reutter v. Solem, 888 F.2d 578, 578-82 (8th Cir. 1989) (failure to disclose witness' upcoming appearance before Board of Pardons and Paroles a few days after testimony at defendant's trial was error).

The court prevented discovery of two detectives' personnel files. The state has a duty, however, to search police and investigative agency files, employment, Internal Affairs, and other government files for information about past cooperation and past criminal acts.[15]

4. Plea Agreements: The trial court prevented discovery of witness Campbell's bargains for testimony. But government witness' plea bargains and other agreements for benefits, or to avoid detriments, must always be disclosed.[16] Even witness agreements in prior, unrelated cases constitute Brady material, because evidence of past deals is relevant to what the witness might expect in exchange for current testimony.[17]

5. Medical Records re Drug Use: The appellate court ruled

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[15] Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 1567 (prosecution duty to learn of favorable evidence known to the others working on the government's behalf in the case, including the police); United States v. Wood, 57 F.3d 733, 737 (9th Cir. 1995) (FDA must, in criminal trial, disclose contents of Investigational New Drug applications that bear on safety of drug defendant is charged with dispensing unlawfully); United States v. Brooks, 966 F.2d 1500, 1502-03 (D.C. Cir. 1992) (government duty to search other agencies includes duty to search police department and Internal Affairs file); United States v. Perdomo, 929 F.2d 967, 980 (3d Cir. 1991) (prosecution team with duty to disclose includes both investigative and prosecution personnel); United States v. Osorio, 929 F.2d 753, 760; United States v. Deutsch, 475 F.2d 55 (government duty to search personnel file of Postal employee who testified against defendants).

[16] United States v. Smith, 77 F.3d 511, 512 (D.C. Cir. 1996).

[17] United States v. Leja, 568 F.2d 493, 498-99 (6th Cir. 1977) (reversed due to exclusion of evidence of past deals and compensation because they are relevant to what government witness might expect from current testimony); United States v. Salsedo, 607 F.2d 318, 332 (9th Cir. 1979) (citing Leja with approval). Accord United States v. Williams, 954 F.2d 668, 669 (11th Cir. 1992), cert. denied, 517 U.S. 1157 (1996) (reversed because relevant evidence regarding how much the government paid an informant in prior cases was excluded on the basis that such evidence would be too prejudicial to the government's case).

that this "was privileged, and McDonald provided the court with no basis for overcoming the privilege." Opinion, p. 6. But drug dealing is relevant to credibility.[18] This is particularly true when the government is aware of the use yet declines to prosecute, as appears to have occurred in witness' Campbell's case.[19] "[A] reasonable jury could infer that the government's failure to stop such drug use ... [and prosecute] was motivated by a desire to both curry favor with these witnesses and preserve their credibility."[20]

III. THE APPELLATE COURT ERRED IN UPHOLDING THE TRIAL COURT'S ORDERS BARRING HIM FROM CONTACTING LAWYERS AND LEGAL ORGANIZAITONS AND APPOINTING ONLY CONFLICTED COUNSEL TO REPRESENT HIM.

A. The Appellate Court's Decision

Mr. McDonald raised, pro se, the deprivation of his right to counsel. He tried his case pro se and did so, he asserted, because the trial court denied his requests to contact lawyers or legal organizations to try to obtain counsel of choice. Pro Se Brief, pp. 5-8. The appellate court rejected the factual basis for his claim, without discussing any of his legal arguments. Opinion,

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[18] Benn v. Lambert, 283 F.3d 1040 (9th Cir.), cert. denied, 537 U.S. 942 (2002). "[I]nformation about [the witness's] substantial drug dealings could have served to erode [his] credibility significantly and thereby diminish the weight a jury would give to his testimony." Osorio, 929 F.2d at 758.

[19] United States v. Boyd, 833 F. Supp. 1277, 1360 (N.D. Ill. 1993), affirmed 55 F.3d 239 (7th Cir. 1995); United States v. Atherton, 936 F.2d 728, 733 (2nd Cir. 1991), cert. denied, 502 U.S. 1101 (1992).

[20] Boyd, 833 F. Supp. at 1360-61.

pp. 15-17 ("At no time was McDonald forced to choose between incompetent or unqualified counsel and self-representation. At every juncture, when asked about continuing to represent himself, he unequivocally chose to proceed pro se.").

B. The Appellate Court's Ruling that Mr. McDonald Had to Accept The Conflicted Lawyer It Was Willing to Appoint, and Could Be Barred From Contacting Other Lawyers and Legal Organizations, Conflicts with Controlling Authority Concerning the Right to Counsel of Choice and Access to the Courts

The appellate court's decision was based on the notion that it satisfied Mr. McDonald's initial request for counsel by offering to appoint one lawyer, Mr. Gaer, with whom Mr. McDonald previously had a conflict, and that there was no need to permit Mr. McDonald to contact other lawyers. 10/4/01 VRP 1-9. See State v. McDonald, 143 Wn.2d 506, 22 P.3d 791 (2001) (reversing Mr. McDonald's prior conviction because appointed stand-by counsel Mr. Gaer had a conflict with McDonald). It therefore upheld the trial court's orders prohibiting Mr. McDonald from spending funds to contact other attorneys or legal organizations. CP 2049-50. It did so despite Mr. McDonald's direct statements, post-dating this order, that he did want a lawyer to represent him at trial. 10/3/0- VRP:63-66; 10/4/01 VRP:7. The complete history of Mr. McDonald's requests for counsel, and requests to contact lawyers and legal organizations to assist in his defense, appears in his

pro se brief at pp. 5-8.

The appellate court's decision restricting Mr. McDonald's access to attorneys and legal organizations, and thereby restricting his access to the courts, deprived him of his right to unconflicted counsel and to counsel of choice, as well as his right of access to the courts (U.S. Const. amends. I, VI, XIV). This decision conflicts with the legal authority cited in Mr. McDonald's own brief, pp. 8-13, and incorporated herein by reference, including Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Crandell v. Bunnell, 144 F.3d 1213 (9th Cir. 1998); Brown v. Craven, 424 F.2d 1166 (9th Cir. 1970).

C. The Appellate Court's Ruling that Mr. McDonald Had to Accept That Mr. McDonald's Right-to-Counsel Claim Fails Due to Lack of Prejudice Conflicts With Controlling Authority Holding that No Prejudice Need be Shown to Prevail on a Denial of Counsel Claim

The appellate court also erred in ruling that "Mr. McDonald fails to establish any prejudice" on this claim. Opinion, p. 17. Controlling authority actually holds that no prejudice need be shown to prevail on a claim of denial of counsel. See Flanagan v. United States, 465 U.S. 259, 267-68, 104 S.Ct. 1051, 79 L.Ed.2d 288 (1980); Bland v. California Dept. of Corrections, 20 F.3d 1469 (9th Cir. 1994), cert. denied, 513 U.S. 947 (1994); State v. McDonald, 143 Wn.2d 506, ___.

IV. THE APPELLATE COURT'S DECISION THAT THE EVIDENCE WAS SUFFICIENT TO CONVICT CONFLICTS WITH JACKSON V. VIRGINIA.

A. The Appellate Court's Decision

The appellate court characterized Mr. McDonald's insufficiency of evidence claim as one that was based on the testimony of his own witnesses, without giving proper credence to the testimony presented by witnesses for the state, and denied the claim by reasoning in full: "Because the facts as established by Edith [who was staying in the motel room with the burned mat] and the cabdrivers are sufficient to support McDonald's conviction, we reject this argument." Opinion, p. 17.

B. The State's Evidence Was Not Sufficient

The appellate court is correct that Mr. McDonald's evidence shows his innocence and cannot provide a basis to convict, but only to acquit. We call this Court's attention to the summary of Mr. McDonald's evidence provided in the Statement of the Case, § IV, above.

But Mr. McDonald's argument was not based solely on this evidence. His pro se brief, incorporated herein by this reference, summarizes the testimony presented by a variety of *state's* witness, and shows how that evidence was also consistent with innocence – by confirming that Mr. McDonald's demeanor was normal, that he had no odor of gasoline about him or his room, and that he did not engage in weird or

delusional behavior. Pro Se Brief pp. 17-36 (summarizing testimony of state's witnesses); VRP 380-94 (Patricia Stevens testifies that Mr. McDonald at check in did not appear unusual in demeanor); VRP 200 (testimony of Sandra Early, 911 dispatch operator, who characterized him as straightforward and not delusional); VRP 542 (arson investigator Malone – no indication that McDonald was delusional or weird); VRP 229 (Officer Booth testimony; no abnormal behavior by McDonald; VRP 888-98, 199-200 (Sgt. Lindberg testimony – no injuries on McDonald's hands or petroleum odor on him or in his room); VRP 223, 226-28, 556, 425-565, 379-80, 738, 944 (testimony of numerous state witnesses that there was no petroleum odor on McDonald or in his room). Similarly, the inculpatory evidence presented by state witnesses was severely undermined by their many contradictions and changes over time. E.g., VRP63, 81, 94-95, 923-39, 73, 665) (differences in Ms. Clarke's testimony over time); see also pro se brief at pp. 24-36).

The state's evidence was not, therefore, sufficient to convict, under the proper federal standard of Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d. 560 (1979).

V. THE APPELLATE COURT'S DECISION UPHOLDING THE EXCLUSION OF THE POLICY MANUAL CONFLICTS WITH THE CONTROLLLING AUTHORITY CONCERNING THE DUE PROCESS RIGHT TO PRESENT AN IMPEACHMENT DEFENSE.

A. The Appellate Court's Decision On the Policy Manual

The trial court conducted an *in-camera* review of the Mt. Vernon Policy Manual and concluded that it was not relevant. The appellate court agreed. Opinion, pp. 17-18.

B. The Policy Manual Provided Substantial Impeachment and, Hence, the Federal Constitutional Right to Present a Complete Defense, to a Fair Trial and to Due Process Guaranteed its Admission Even if State Law Does Not

Mr. McDonald sought specific material from the Mount Vernon Police Department's Policy Protocols to support his theory of defense, that is, that he was set up by Det. Ruxton and Sgt. Lindberg so that they could become Skagit County's first officers to make a three-strikes case. He sought to obtain the manual to show that protocols were in place for virtually every aspect of this arson investigation, but that these officers flouted them to pursue their own ends.

Six specific areas were requested, including protocols on: drafting and executing a warrant and logging items seized; interrogating a suspect

they believe is mentally unstable; presenting a montage; obtaining statements from the defendant if he requests to be taped; allowing the arson investigator who is a first responder to collect, package and process all vital arson evidence if no one else has arson experience; and investigating an alternate suspect named by the defendant. CP:71-80.

At hearings on these motions, the state acknowledged that some of these areas would be relevant. 10/3/01 VRP:17, 21-22.

As trial progressed, the relevant of these materials became even more clear. Det. Ruxton stated that there was "no policy or procedure" concerning photo montages in the MVPD. VRP 766, 814-15. He stated that there was no policy on how to package or who should package arson evidence. VRP 749, 761. Nearly each time asked, both officers denied knowledge of official MCPD policy in at least the six specific areas requested. VRP:173-75; 191-92; 195-96; 200-01; 208-11; 216-17; 746-49; 754-55; 761; 766; 814-15.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) (citations omitted). It is rooted in the due process right to present a defense, the Sixth Amendment

right to "compulsory process,"[21] and the Sixth Amendment right to confrontation.[22] The right to present evidence cannot be denied where it is critical to the defense and directly relevant to guilt or innocence.[23]

The right to present a defense is of constitutional magnitude, but: "(1) the evidence sought to be admitted must be relevant; and (2) the defendant's right to introduce relevant evidence must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process." State v. McDaniel, 83 Wn. App. 179, 185, 920 P.2d 1218 (1996), review denied, 131 Wn.2d. 1011 (1997).

The appellate court's decision that policy protocols that would have contradicted or undermined the testimony of the key officers testifying about the validity of the arson investigation, the interrogation, and the collection of evidence, conflicts with this controlling federal authority.

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[21] Perry v. Rushen, 713 F.2d 1447, 1450 (9th Cir. 1983), cert. denied, 469 U.S. 838 (1984)).

[22] See Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). Accord Taylor v. Illinois, 484 U.S. 400, 408-09, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988) (fundamental Sixth Amendment right to present witnesses and a defense); Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

[23] Chambers v. Mississippi, 410 U.S. at 302.

VI. CONCLUSION

This petition for review should be granted.

DATED this ____ day of June, 2004.

Respectfully submitted,

_____

Sheryl Gordon McCloud, WSBA No. 16709
Attorney for Steven Darby McDonald

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the _____ day of June, 2004, a copy of the foregoing Petition for Review of Steven Darby McDonald was forwarded to the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

Thomas L. Verge
Skagit County Prosecutor
Erik Pedersen
Senior Deputy Prosecuting Attorney
605 South Third
Mount Vernon, WA 98273

_____
Sheryl Gordon McCloud