SUPREME COURT NO. 101279-9
NO. 37343-6-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALEJANDRO OCAMPO MARTINEZ,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR BENTON COUNTY

The Honorable Cameron Mitchell, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Alex Ocampo Martinez asks this Court to grant review of the court of appeals' part-published decision in State v. Alejandro S. Martinez, No. 37343-6-III, filed June 28, 2022 (Appendix A). The court of appeals denied Alex's motion for reconsideration on August 18, 2022 (Appendix B).

B. ISSUES PRESENTED FOR REVIEW

1. Is this Court's review necessary to determine whether the defense has a constitutional right to inquire into prospective jurors' potential racial and ethnic biases during voir dire where, as here, the court of appeals agreed there was a rational concern about juror bias against the defendant, a Mexican immigrant accused of rape?

2. Is this Court's review warranted, where the court of appeals' decision sanctions the prosecution's use of an alleged alias to argue consciousness of guilt, based on nothing more than

the defendant's use of his given name, consistent with Latinx naming conventions?

3. Is this Court's review warranted, where no court has previously determined whether defendants—here, brothers—may be joined for trial based on separate rapes that occurred at different times?

C. STATEMENT OF THE CASE[1]

Alejandro Ocampo Martinez was born in Mexico in 1978. 10RP 1279-80. His father was Cresenciano Ocampo Ocampo and his mother was Urbina Martinez Marinda. 10RP 1311. He goes by Alex Ocampo or Alex Ocampo Martinez. 10RP 1279-80, 1305-06. His Mexican passport and birth certificate, as well as his marriage license, are all in the name Alex Ocampo or Alex Ocampo Martinez. 3RP 28; 9RP 656-57;

[1] For brevity, this section summarizes only the relevant substantive evidence and procedural history. The facts related to the three issues presented for review are summarized in their corresponding argument sections below.

10RP 1298, 1305. His younger half-brother is Eduardo Salgado Martinez, born in 1980. 10RP 1305, 1321.

In 1993, Alex's and Eduardo's mother, Urbina, married Santiago P., who has three sons of his own, E.P. (born in 1988), J.P. (born in 1989), and R.P. 9RP 843-44; 10RP 1037, 1105. That same year, Urbina and Santiago, along with Eduardo and Santiago's three sons, moved from Mexico to the United States. 9RP 844-45. Alex was already living and working in Grandview, Washington, by that time. 10RP 1288-89.

The family settled in Prosser, Washington. 10RP 1038-39. In the summer of 1995, the family lived in a mobile home park behind the Burger King in Prosser. 9RP 847. Alex would occasionally stay with the family. 10RP 1282. In the fall of that same year, Santiago and Urbina separated, and Santiago moved with his sons to Grandview, where they enrolled in Whitstran Elementary. 9RP 858-61, 885. The families did not see each other again. 9RP 866.

Nothing of note happened for three years. In September of 1998, however, an explicit drawing was passed around the school bus and confiscated. 9RP 933. It had J.P.'s name at the top and depicted an adult man having anal sex with an adult woman. 9RP 712-14. The Whitstran principal spoke with J.P. about it. 9RP 929-33. J.P. gave multiple explanations for the drawing, including that another student drew it. 9RP 959-61. But the principal pressed J.P. until he admitted he drew the picture and claimed the same thing happened to him. 9RP 934.

Detective Lee Cantu investigated. 9RP 605. He talked with J.P., who claimed Eduardo sexually abused him, and E.P., who claimed both Eduardo and Alex sexually abused him. 9RP 614-16. Cantu learned Eduardo was living with Urbina at the same trailer park behind the Burger King in Prosser. 9RP 615-617. However, the boys' father thought Alex had moved to New York. 9RP 617.

Cantu went to the trailer park and found a handwritten sign for the manager, Alejandro Martinez, along with a phone

number. 9RP 626. Cantu called the number and the man identified himself as Alejandro Martinez. 9RP 627. The man told Cantu he was working at a produce plant in Sunnyside, so Cantu went there to speak with him. 6RP 627-28.

When Cantu arrived, the plant manager informed him no Alejandro Martinez worked there, only a Ricardo Martinez. 9RP 629. The man working under the name Ricardo verbally identified himself as Alejandro Martinez, but did not have any identification. 9RP 630, 735. Cantu explained it is common practice for people in the industry to work under false names if they lack the proper paperwork. 9RP 724.

Cantu informed the man he was investigating a matter involving E.P. and J.P. that occurred in the fall of 1995, but did not say he was investigating allegations of sexual abuse. 9RP 734, 740. The man agreed to provide a written statement—a single line that, translated literally, read, "Me, Alejandro, did that with [E.] one time." 9RP 643. The man never stated what "that" was. 9RP 741. Cantu did not arrest the man, but told

him the case would be forwarded to the prosecutor's office. 9RP 644.

After that, Cantu tried to contact Eduardo and the man who identified himself as Alejandro Martinez but could not reach them. 9RP 647-48. Cantu learned the man was going to be terminated from his job for working under a false name. 9RP 743-44.

In November of 1998, Alex was charged under the name Alejandro S. Martinez with one count of first degree child rape against E.P. CP 1. Eduardo was charged with one count of first degree child rape against E.P. and another count against J.P. CP 10-11, 279. Warrants issued for their arrest. 9RP 649. Cantu did not make any further attempt to locate the brothers, and nothing happened for 20 years. 6RP 650-51, 806-08.

Alex and Eduardo both settled in Bridgeport, Connecticut. 10RP 1295. Alex worked for several years as a gas station attendant and then as an automotive mechanic. 10RP 1290-92. He started an automotive repair shop with his

brother in 2013 and got married in 2015. 10RP 1291-95. Eduardo, too, got married and raised three children. 10RP 1325-26. Neither brother had any run-ins with the police for those 20 years. 1RP 141-42, 152; CP 240-41.

In November of 2018, Eduardo got in a fender bender. 10RP 1343-44. As a result, police discovered Eduardo's outstanding warrant. 9RP 562, 583. Eduardo was transported back to Washington, at which time he told police he made some mistakes when he was younger and was paying for the consequences now. 9RP 920. Eduardo also supposedly said he moved to Connecticut when he heard of this investigation. 9RP 920. Eduardo later explained he regretted an unresolved DUI from his youth and left Washington for that reason, not because of any knowledge of the investigation involving E.P. and J.P. 10RP 1334, 1348.

The prosecution proceeded to trial solely against Eduardo. CP 72-73. Eduardo's trial ended in a mistrial after

Detective Cantu commented, in the prosecution's rebuttal case, on Eduardo's invocation of his right to counsel. CP 73.

When Alex learned of the charge against him, he voluntarily returned to Washington to resolve it. 10RP 1297. At Alex's first court appearance, his counsel informed the court that Alex's name was incorrect on the information and noted his true name, Alex Ocampo Martinez. 1RP 6-8. The prosecution moved to join Alex's and Eduardo's cases for trial. CP 294-305; 1RP 74. The trial court granted joinder over both brothers' objections. CP 4-9; 1RP 75-86.

The parties proceeded to a second trial, which ended in a hung jury and another mistrial was declared. 5RP 4-12; CP 41. A third trial began, but yet another mistrial was declared after Eduardo's attorney violated a ruling in limine in opening statement. 8RP 625-27.

The parties proceeded to a fourth trial in October of 2019. 9RP 519. E.P. testified, one time in 1995, Alex put his penis in E.P.'s mouth and then his anus. 10RP 1041-43. Alex

would have been 17 years old at the time. 10RP 1280. Both E.P. and J.P. testified Eduardo anally penetrated them on multiple occasions. 10RP 1044-47, 1109-15. J.P. said Alex never molested him. 10RP 1183.

Both Alex and Eduardo testified at trial. 10RP 1279, 1321. Alex explained he goes by Alex Ocampo Martinez, not Alejandro Martinez. 10RP 1279-80. He moved to Connecticut in November of 1995. 10RP 1289. Around 1998, he lived in Mexico for about a year before returning to Connecticut. 10RP 1290. Alex testified he never met Detective Cantu—he was not living in Washington in 1998 when Cantu interviewed an Alejandro Martinez. 10RP 1298, 1304. Alex noted he has a cousin by that name who lived in Prosser at the time. 10RP 1299. Santiago agreed Alex has a cousin named Alejandro Martinez and Cantu agreed it is a common name. 9RP 827-28, 893-94. Alex explained he did not know of any arrest warrant and, in fact, had returned to Washington several times in the interim, including getting his passport in 2006. 10RP 1298.

The jury found Alex and Eduardo guilty. CP 150-52.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. **The court of appeals held the defense has no constitutional right to inquire into prospective jurors' potential racial or ethnic biases except in extremely limited circumstances, apparently not present here, even though the court of appeals admitted the defense had a rational concern about juror bias against Latinx immigrants.**

During voir dire, both defense attorneys requested that they be allowed to inquire into prospective jurors' opinions on immigration and any prejudices they hold against immigrants, including undocumented immigrants. 2RP 444-47. Counsel for Alex explained:

> Your Honor, I think immigration situation in this country has been a legitimate factual question to ask these jurors because this country seems to be very divided and very prejudiced now with the wall issue about whether or not we accept people coming into this country to do work. And quite frankly, both the victims and the defendants are subject to the way the jury views them and how they're going to treat the immigration process.
>
> They could easily see this as a way to get rid of people from this country, or they can see it as a

> way to stand up against the president of this country. I think it is a legitimate question.

2RP 445-46. Alex's counsel emphasized, "[t]hroughout the trial there is going to be that undercurrent of immigration," and so it was critical for the defense "to fetter [sic] out bias." 2RP 459.

Counsel for Eduardo acknowledged he could ask prospective jurors whether they were prejudiced against Hispanic people. 2RP 460. But, he explained, "I've been doing this a long time, I never heard anybody in a jury pool admitted to be prejudiced by anything, ever." 2RP 460-61. He lamented, "So I usually don't ask it. I'm not going to get anywhere with it. No one is going to stand up and say I just can't do it." 2RP 461. However, "some people have very strong feelings" about immigration, so Eduardo's counsel proposed that he could ask questions about the border wall and the like, to "get an idea how people think, at least in terms of if I want to use my challenges." 2RP 461. He attorney reiterated, "we live in a time that's extremely divisive." 2RP 461.

The trial court prohibited any "inquiry into the jury venire's opinions regarding immigration, illegal immigration," erroneously relying on ER 413(a), which applies only to the admission of *evidence*. 2RP 470. The court allowed the attorneys to inquire only "regarding whether or not any of the venire members have any particular prejudice against those of Hispanic descent or ethnicity." 2RP 470.

Unsurprisingly, no prospective jurors volunteered that they would be prejudiced against a Hispanic defendant. 2RP 493-94; State v. Berhe, 193 Wn.2d 647, 657, 444 P.3d 1172 (2019) ("Due to social pressures, many who consciously hold racially biased views are unlikely to admit to doing so.").

The court of appeals acknowledged Alex's and Eduardo's attorneys expressed a "rational" concern the jury would infer they were undocumented and, furthermore, "the evidence rules would not protect them from a risk of juror bias." Appendix A, 28. The court nevertheless concluded the brothers had no constitutional right to inquire into prospective jurors' biases against Mexican

immigrants, documented or otherwise. Appendix A, 24-26. The court reasoned the right to inquire into racial or ethnic bias in non-capital cases applies "only narrow circumstances," apparently not present here, despite defense counsel's admittedly rational concern about juror bias. Appendix A, 25.

The court of appeals' decision in cannot be squared with other court of appeals cases or evolving case law from the United States Supreme Court and this Court, including this Court's recent decision in State v. Zamora, 199 Wn.2d 698, 512 P.3d 512 (2022). All four RAP 13.4(b) criteria are met.

"The constitutional promise of an 'impartial jury trial' commands jury indifference to race." State v. Monday, 171 Wn.2d 667, 680, 257 P.3d 551 (2011). "A searching voir dire is a necessary incident to the right to an impartial jury." United States v. Bear Runner, 502 F.2d 908, 911 (8th Cir. 1974). While the trial court has considerable discretion in shaping the limits and extent of voir dire, that discretion is limited "by the need to

assure a fair trial by an impartial jury." State v. Frederiksen, 40 Wn. App. 749, 752, 700 P.2d 369 (1985).

A trial court's refusal to permit specific questions requires reversal "if the questioning is not reasonably sufficient to test the jury for bias or partiality." Id. The Frederiksen court articulated three situations that require specific voir dire questions "because of the real possibility of prejudice":

> (1) when the case carries racial overtones; (2) when the case involves other matters (*e.g.*, the insanity defense) concerning which either the local community or the population at large is commonly known to harbor strong feelings that may stop short of presumptive bias in law yet significantly skew deliberations in fact; and (3) when the case involves other forms of bias and distorting influence which have become evident through experience with juries (*e.g.*, the tendency to overvalue official government agents' testimony).

40 Wn. App. at 753; see also State v. Brady, 116 Wn. App. 143, 148, 64 P.3d 1258 (2003) (applying Frederiksen factors to conclude improper restriction of voir dire necessitated reversal in part because three of the four defendants were Black). Alex

demonstrated in his opening brief why all three situations were present in his case. Am. Br. of Appellant, 27-31.

The court of appeals dismissed the rule of Frederiksen out of hand (and made no mention of Brady), because Frederiksen made only "passing reference to the right to an impartial jury." Appendix A, 27. This Court's review is necessary because the Frederiksen rule is and should be a constitutional one.

In recent years, our high courts have made "significant strides" towards rooting out both explicit and implicit racial bias in our criminal justice system. Berhe, 193 Wn.2d at 664. Although identifying implicit racial bias, in particular, "is inherently challenging," we must not "'throw up our hands in despair at what appears to be an intractable problem. Instead, we should recognize the challenge presented by unconscious stereotyping . . . and rise to meet it.'" Id. (quoting State v. Saintcalle, 178 Wn.2d 34, 49, 309 P.3d 326 (2013)). Therefore, "as our understanding and recognition of implicit bias evolves, our procedures for addressing it must evolve as well." Id. at 663.

For instance, in Berhe and Peña-Rodriguez v. Colorado, 580 U.S.__, 137 S. Ct. 855, 865, 197 L. Ed. 2d 107 (2017), this required that the general rule prohibiting impeachment of jury deliberations must yield to allegations that racial bias was a factor in the verdict. In State v. Jefferson, 192 Wn.2d 225, 249-50, 429 P.3d 467 (2018), and with the adoption of GR 37, this required modification of the toothless Batson test to curb discrimination in the exercise of peremptory challenges. And, in Monday, this required application of the heightened constitutional error standard when a prosecutor engages in race-based misconduct. 171 Wn.2d at 680.

Just two days after the court of appeals' decision in Alex's case, this Court in Zamora held the heightened standard adopted in Monday "has proved insufficient to deter such conduct." 199 Wn.2d at 722. This Court therefore adopted "the tested and proven rule of automatic reversal" (i.e., structural error) to "enforce the Constitution's guarantee against state-sponsored racial discrimination in the jury system and safeguard a criminal

defendant's fundamental protection of life and liberty against race or color prejudice." Id. (quoting Peña-Rodriguez, 137 S. Ct. at 867) (internal quotation marks omitted).

In Zamora, the prosecution purposefully and repeatedly appealed to negative stereotypes about Latinx immigrants during jury selection. Id. at 719-20. This Court recognized "our nation's history—remote and recent—is rife with examples of discrimination against Latinxs based on ethnicity," detailing institutional discrimination, segregation, illegal deportations, and mob violence inflicted against Latinx individuals even *suspected* to be of Mexican descent. Id. at 719. The court further recognized "the topics of border security at the United States-Mexico border, undocumented immigrants, and alleged criminal acts committed by immigrants were covered in the news contemporaneous with the trial." Id. at 720. "The rhetoric associated with these topics often conveyed implicit or explicit prejudices and stereotypes about Latinxs." Id.

Fortunately, the prosecution did not infect Alex's and Eduardo's jury selection with the same kind of racial bias as in Zamora. But Zamora highlights the pressing need for defense counsel to try to ferret out racial and ethnic bias among prospective jurors in this case.

Though decided quite some time ago, the Eighth Circuit's decision in Bear Runner is analogous. There, the trial court's single, general question concerning racial bias, put to prospective jurors as a group, was insufficient to discover potential juror bias against Native Americans. Bear Runner, 502 F.2d at 912-13. The Eighth Circuit emphasized recent events involving the occupation of Wounded Knee and took judicial notice that "[t]he feelings of the local citizenry ran high." Id. The "sincere concern over prejudicial issues" necessitated a more "searching" inquiry. Id. at 912-13.

Consistent with Bear Runner, the Zamora court emphasized voir dire is a critical aspect of criminal defendants' Sixth Amendment and article I, section 22 right to a fair and

impartial jury. Zamora, 199 Wn.2d at 712. Voir dire "serves to protect the defendant's right to an impartial jury by exposing possible biases on the part of potential jurors and by selecting a jury capable and willing to decide the case solely on the evidence." Id. Therefore, our state and federal constitutions "at times demand[] that defendants be permitted to ask questions . . . that are designed to explore potential racial bias." Id. (quoting Peña-Rodriguez, 137 S. Ct. at 868). Frederiksen articulates exactly the circumstances that demand this more searching voir dire inquiry.

Negative stereotypes and bias against Latinx immigrants continue to pervade our public discourse and, in turn, our criminal justice system. But the court of appeals nevertheless concluded there is no constitutional right in a non-capital case like Alex's—even where the defense has a "rational" concern about bias—to inquire into biases prospective jurors might hold against Latinx immigrants. Our ever-evolving understanding of the systemic harm racial and ethnic bias inflicts on our justice

system requires more. Zamora, 199 Wn.2d at 709. This Court should grant review to answer whether the Frederiksen standard is a constitutional one.

2. **The court of appeals' decision condones admission of alleged "alias" evidence based on a Latinx defendant going by his given name, consistent with Latinx naming conventions.**

As discussed, Alex's father is Cresenciano Ocampo Ocampo and his mother is Urbina Martinez Miranda. 10RP 1311. Consistent with Latinx naming conventions, Alex's given name is Alejandro Ocampo Martinez and he most often goes by Alex Ocampo.[2] 10RP 1305-06, 1311. Alex acknowledged people sometimes call him Alejandro, but he goes by and prefers

[2] Former Director of the Office of Public Defense, Joanne Moore, capably explained in her book Immigrants in Court: "All Mexicans officially carry two surnames, composed of their father's paternal (first) surname and their mother's paternal surname. Thus the child of José Rodríguez Sánchez and María Barrero Ruiz will receive one or more first, or given, names, such as María del Pilar, along with each parent's first surname, in this case Rodríguez Barrero. If she is to be addressed by only one of her names, it would be her paternal surname, in this case Rodríguez." JOANNE MOORE, IMMIGRANTS IN COURT 93 (1999); accord United States v. Ornelas Ledesma, 16 F.3d 714, 715 (7th Cir. 1994) (explaining the same).

Alex. 10RP 1280, 1302. His Mexican passport, birth certificate, and his marriage license, among other official documents, are all in the name Alex Ocampo or Alex Ocampo Martinez. 3RP 28; 9RP 656-57; 10RP 1298, 1305, 1310-11.

The prosecution moved to admit Alex's purported name change from Alejandro S. Martinez to Alex Ocampo Martinez and his "continued use of an alias" as probative of "his consciousness of guilt." 2RP 310-12; CP 285. The prosecution claimed Alex "changed his name" when he "fled from Washington to Connecticut [in 1998]." CP 286.

Defense counsel strenuously objected to this alleged alias evidence. 2RP 312-14. Counsel put it, quite bluntly, "I'm sure glad I'm not Hispanic, Your Honor. I'm glad my family members are not Hispanic. They seem to want to use a name which is traditional in Hispanic family and imply different meanings to it." 2RP 312. Counsel explained: "He chose Alex because he's never liked Alejandro. He's never gone by Alejandro. People may call him Alejandro, just like somebody's

mother may call a Ted a Theodore or something like that." 2RP 314. Counsel asserted an inference of guilt from Alex's name reflected "this misunderstanding of his cultural background and the way the Hispanic name system works." 2RP 313. It was therefore "unfair and prejudicial." 2RP 314.

The trial court admitted the evidence, concluding, simply, "I think there has been a threshold showing sufficient to allow the State to present their evidence." 2RP 316.

The court of appeals found no problem with the prosecution arguing consciousness of guilt from such ambiguous evidence regarding Alex's name.[3] Appendix A, 31-33. In so concluding, the court of appeals failed to apply the rule from this

[3] This conclusion is particularly troubling, where research has demonstrated mock jurors are more likely to view ambiguous evidence as indication of guilt for darker skinned suspects. The Sentencing Project, Race and Punishment: Racial Perceptions and Crime and Support for Punitive Penalties, 13-14 (2014), https://www.sentencingproject.org/publications/race-and-punishment-racial-perceptions-of-crime-and-support-for-punitive-policies/ (last visited Sept. 12, 2022).

Court's recent decision in State v. Slater, 197 Wn.2d 660, 486 P.3d 873 (2021).

At issue in Slater was whether a single failure to appear (FTA) for court amounted to flight evidence from which the prosecution could argue consciousness of guilt. 197 Wn.2d at 664-65; State v. Freeburg, 105 Wn. App. 492, 497-98, 20 P.3d 984 (2001) (recognizing test for flight evidence also applies to other concealment evidence, such as resisting arrest and assumption of a false name). The Slater court adopted the following test for determining when flight evidence is admissible to show an inference of consciousness of guilt:

> "the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged."

197 Wn.2d at 669 (quoting Freeburg, 105 Wn. App. at 498). The court emphasized such an inference must be "*substantial*

and real," not "*speculative, conjectural, or fanciful*." Id. at 668 (quoting State v. Bruton, 66 Wn.2d 111, 112-13, 401 P.2d 340 (1965)).

Slater's single FTA failed the first inference, where he appeared for all prior court hearings and timely quashed the bench warrant. Slater, 197 Wn.2d at 673. It was therefore error for the trial court to admit the evidence and, additionally, misconduct for the prosecutor to "improperly equate the FTA with consciousness of guilt." Id. at 683.

The court of appeals failed to examine the "alias" evidence under the four-part test mandated by Slater. RAP 13.4(b)(1). The alleged alias evidence in Alex's case failed all four inferences, including the first inference, as in Slater. The decision emphasizes the prosecution "was able to demonstrate that all of the documents Alex pointed to as identifying him as Alex Ocampo or Alex Ocampo Martinez were created after 1998." Appendix A, 33. However, this failed to take into account the undisputed fact that Alex's father was Cresenciano

Ocampo Ocampo and his mother was Urbina Martinez Miranda and, so, Alex's given name is Alex Ocampo Martinez, consistent with also undisputed Latinx naming conventions. 9RP 835-36; 10RP 1305-06, 1311.

The court of appeals' decision further ignores a second important holding of Slater. RAP 13.4(b)(4). That is, courts can no longer consider supposed flight or concealment evidence in a vacuum, without consideration of real-world factors and their effects on persons of color. The Slater court explained there are many innocent reasons people fail to appear for court, often impacting indigent people and people of color:

> Using an FTA to infer consciousness of guilt negatively interprets homelessness, an inability to stay organized, transportation issues, the choice between coming to court or keeping a job or caring for a child, and other real-life reasons why one may be unable to attend court on a particular date. In no other context would these circumstances be construed as a rational inference of guilt.

197 Wn.2d at 675-76. Courts must consider these circumstances in evaluating whether consciousness of guilt may be inferred from flight evidence. Id. at 674.

The same analysis applies in Alex's case. Alex goes by his given name. 10RP 1305-06, 1311. He prefers the shortened Alex to Alejandro. 10RP 1280, 1302. He did not attempt to conceal himself with that name. He owned and operated a business in Connecticut. 10RP 1291-93. He came back to Washington several times in the interim. 10RP 1298. He got married. 10RP 1293-94. He voluntarily returned to Washington when he learned of the charge against him. 10RP 1297. Then, at his first court appearance, he notified the court the information did not state his correct name—*before* he knew the prosecution would attempt to argue consciousness of guilt from use of his given name. 1RP 6-8.

Like the failure to appear in Slater, it is speculative at best to say Alex's name reflects an attempt at concealment, as opposed to Anglo ignorance regarding Latinx names. Such

speculation does not allow for the prosecution to argue consciousness of guilt therefrom. Slater, 197 Wn.2d at 673, 683. This Court should grant review.

3. **No Washington court has previously considered whether defendants may be joined for trial based on separate rapes that occurred at different times.**

CrR 4.3(b) enumerates the limited circumstances in which two defendants—here, brothers—may be joined in the same charging document. The only possible basis for joinder in Alex's and Eduardo's case would be CrR 4.3(b)(3):

> (3) When, even if conspiracy is not charged and all of the defendants are not charged in each count, it is alleged that the several offenses charged:
>
> (i) were part of a common scheme or plan; or
>
> (ii) were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others.

CP 302. Even if the CrR 4.3(b)(3) criteria are met, joinder is still improper "'if prosecution of all charges in a single trial would prejudice the defendant.'" State v. Bluford, 188 Wn.2d 309, 309,

393 P.3d 1219 (2017) (quoting State v. Bryant, 89 Wn. App. 857, 865, 950 P.2d 1004 (1998)). "[I]f joinder will cause clear, undue prejudice to the defendant's substantial rights, no amount of judicial economy can justify requiring a defendant to endure an unfair trial." Id. at 311.

No Washington case has ever addressed whether two defendants accused of separate rapes that occurred at separate times, with no evidence of some overarching plan or any collusion, may be joined for trial under CrR 4.3(b)(3). Nor has any Washington case previously addressed whether such joinder, even if permissible under CrR 4.3(b), nevertheless causes substantial prejudice to each defendant. Appendix A, 22 (finding no substantial prejudice).

The only analogous case appears to be State v. Harkness, 196 Wash. 234, 82 P.2d 541 (1938). There, brothers Rex and Lyle Harkness, along with physician P.L. Sanders, were charged with multiple counts of forging prescriptions to procure narcotics. Id. at 235-36. This Court determined the charges against

Sanders, the physician, were properly joined with either brother "because of the close connection between the issue of a false prescription and its presentation with knowledge of its falsity." Id. at 238. However, the court held, brothers Rex and Lyle were improperly joined in the same information. Id. The court explained: "While they are charged with crimes of the same class, the crimes are alleged to have been committed independently and at different times. The crimes are related to each other only by the fact that the prescriptions used were issued by the same physician." Id. It was not enough that the brothers "had a similar general purpose in view." Id.

So, too, in Alex's case. While the alleged rapes occurred under similar circumstances—in the family home when adults were absent—they were committed independently and at different times. There was not even complete commonality in alleged victims (J.P. accused only Eduardo, not Alex). The general purpose of sexual gratification does not establish Eduardo and Alex together devised any sort of overarching plan.

Harkness cuts against any conclusion that two defendants are involved in a common scheme or plan merely because of similarities in the allegations against them. As in Harkness, joinder was improper under the circumstances, both under CrR 4.3(b)(3) and because the joinder caused substantial prejudice to Alex's defense. This Court's review is warranted under RAP 13.4(b)(1), (3), and (4).

E. CONCLUSION

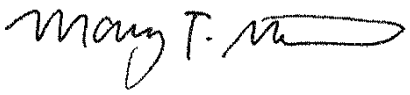
For the reasons discussed, this Court should grant review and reverse the court of appeals.

DATED this 14th day of September, 2022.

I certify this document contains 4,989 words, excluding those portions exempt under RAP 18.17.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC



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Appendix A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. ALEJANDRO S. MARTINEZ, Appellant.	)	No. 37343-6-III OPINION PUBLISHED IN PART

SIDDOWAY, C.J. — Twenty-three years after then 16-year-old Alejandro Martinez is alleged to have raped his young stepbrother, and 20 years after the youngster's allegation came to light and was charged as a crime, Alejandro, who had gone by the name "Alex" for many years,[1] was located across the country. He returned to Benton County to stand trial and was convicted of the charge.

On appeal, Alex assigns error to the trial court's abuse of discretion in granting joinder of his prosecution with that of his brother Eduardo, prohibiting questioning about illegal immigration during voir dire, and admitting alias evidence. He also assigns error to the trial court's failure to apply sentencing laws in effect in 1995.

[1] To avoid confusion given the number of parties and witnesses with the common paternal or maternal surnames, we refer to the members of those families by their first names. We intend no disrespect.

In the published portion of the opinion, we hold that the trial court did not abuse its discretion in granting the State's motion for joinder of the brothers' cases. We explain why several arguments raised on appeal misapprehend the Washington Supreme Court's decision in *State v. Bluford*, 188 Wn.2d 298, 393 P.3d 1219 (2017), and confuse joinder-of-offenses and joinder-of-defendants situations.

In the unpublished portion of the opinion, we agree with Alex that he is entitled to resentencing under more lenient sentencing laws in place at the time of his crime and reject his remaining challenges. The conviction is affirmed and the case remanded for resentencing.

FACTS AND PROCEDURAL BACKGROUND

Alejandro Martinez was born in the state of Morelos in Mexico and came to the United States in 1991 with his mother, Urbina Martinez Miranda. He was about 13 years old at the time. When Urbina returned to Mexico, she left Alejandro with a man, Zamora, with whom she had been in a relationship. Alejandro lived with Zamora at an orchard in Grandview.

In 1993, Urbina met and married Santiago P.V.[2] in Mexico. Their blended family consisted of Urbina's son Eduardo, who is a year younger than Alejandro, and Santiago's

[2] To protect the privacy of Santiago's sons we substitute pseudonyms for first names and initials for surnames. *See* Gen. Orders of Division III, *In re Use of Initials or Pseudonyms for Child Victims or Child Witnesses* (Wash. Ct. App. June 18, 2012).

three young sons, who we will refer to pseudonymously as Emiliano, Julian, and Rodrigo. Soon after the marriage, the couple, Eduardo, and Santiago's sons traveled to the United States and settled in Prosser.

For about a year, the family lived in a single-wide trailer in a mobile home park on Highway 22. According to Santiago, Alejandro lived with them part of the time, and lived part of the time in Grandview. In the summer of 1995, Santiago purchased a recreational type trailer and located it in a trailer park behind the Burger King in Prosser (hereafter the "Prosser trailer park"). Reports differ as to whether Alejandro lived with the family at the trailer part of the time or only stayed there occasionally.

In 1995, Urbina and Santiago separated several times. They eventually divorced. During one of the separations, Santiago moved with his three sons to Grandview and the boys enrolled at Whitstran Elementary. The two families did not see or hear from each other thereafter.

Three years later, allegations of sexual abuse to Julian and Emiliano came to light when a parent of a Whitstran student brought to the school's attention an explicit drawing that had circulated on the school bus. It bore Julian's name. Most prominent in the drawing was a depiction of a man having anal sex with a woman. The principal of Whitstran Elementary, Sarah Juzeler, met with fourth-grader Julian to discuss the drawing bearing his name.

Julian initially denied creating the drawing, but before long admitted authorship and disclosed he had been sexually abused three years earlier by his stepbrother Eduardo. As a mandatory reporter, Principal Juzeler notified Child Protective Services of what she had been told.

The allegation was referred to the Benton County Sheriff's Office and Detective Lee Cantu undertook the investigation in late September 1998. He and a sexual assault counselor conducted interviews of Julian and Emiliano.

According to Detective Cantu, Julian told him that Eduardo had sexually abused him. He told the detective he believed Eduardo and Urbina still lived at the Prosser trailer park. The detective then spoke with Emiliano, who told the detective that both Eduardo and Alejandro had sexually abused him. Like Julian, Emiliano believed Eduardo and Urbina were still living at the Prosser trailer park.

Detective Cantu contacted the boys' father, Santiago, who disclaimed any knowledge of the abuse, which was never reported to him by either Emiliano or Julian. According to Detective Cantu, Santiago also told him that Eduardo was living at the Prosser trailer park, and told him he believed Alejandro was in New York.

On October 12, Detective Cantu went to the Prosser trailer park in hopes of finding Eduardo and Alejandro. He went to the manager's mobile home and knocked on the door, but no one answered. A handwritten sign in the window identified "Alejandro Martinez" as the manager, and provided a telephone number, which the detective called.

The individual who answered spoke English and identified himself as Alejandro Martinez. The detective told Alejandro that his name had been provided in connection with a case the nature of which he did not identify, and he would like to speak with him. Alejandro said he was at work and would not get off until 5 p.m., but he provided the name of the produce warehouse where he was working and Detective Cantu drove there to meet with him.

On arriving, the detective contacted the warehouse manager and asked if he had an employee by the name of Alejandro Martinez. The manager said no, but they did have an employee named Ricardo Martinez. Detective Cantu met with this employee who identified himself as Alejandro Martinez, but had no identification to produce when requested by the detective. Alejandro communicated with the detective in English and waived his *Miranda*[3] rights.

An advice of rights form that was later admitted at trial includes, in Detective Cantu's handwriting, the Benton County case number, the date and time the rights were read, the location where the rights were read, Alejandro's name, and a date of birth, address, and phone number that the detective stated were provided by Alejandro. The date of birth provided was January 25, 1979. The form is legibly signed "Alejandro S.

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Martinez" in two places, acknowledging being informed of rights and waiving them. The form is also signed by Detective Cantu, as witness.

Detective Cantu asserts that at the inception of the interview, he told Alejandro he was investigating an incident involving Emiliano and Julian that occurred in the fall of 1995 but did not specifically describe it as sexual abuse. Alejandro told the detective he remembered the incident but "it was very hard for him to talk about." Report of Proceedings (RP) (Trial)[4] at 639. Alejandro then gave a written statement to the detective in Spanish, which translated to: "Me, Alejandro, did that with [Emiliano] one time," with no identification of what "that" was. RP (Trial) at 643. The signed confession was later admitted at trial. Asked where Eduardo could be found, Alejandro said Eduardo was living with him and his mother at the Prosser trailer park.

Detective Cantu told Alejandro he would be sending information to the prosecutor to support a charge of rape of a child in the first degree. He did not immediately book Alejandro due to overcrowding at the jail, however. According to the detective's notes of the interview, he spoke with Alejandro for a little over 40 minutes.

Three days later, the detective tried to contact Alejandro and Eduardo at the Prosser trailer park but found no Martinez family member there. Alejandro did not answer calls to the phone number Detective Cantu had reached him at a few days earlier.

[4] "RP (Trial)" refers to the three consecutively-paginated volumes reported by Cheryl Pelletier that include the final trial taking place in September and October 2019.

Detective Cantu forwarded information to the prosecutor that resulted in charges being filed. An information filed on November 2, 1998, charged Alejandro S. Martinez with one count of first degree rape of a child (Emiliano) under former RCW 9A.44.073 (1988). An information filed on December 14, 1998, charged Eduardo S. Martinez with two counts of first degree rape of a child (Emiliano and Julian) under former RCW 9A.44.073. Warrants were issued in 1998 for both brothers' arrest.

Detective Cantu would later testify at trial that the warrants issued "were placed in the system. The national system as well as the local [system]," but that he took no other steps to locate Alejandro or Eduardo. RP (Trial) at 650. The record does not reveal that any action was taken on the charges for over two decades.

2018

In the years that passed, Eduardo and Alejandro moved to Connecticut, worked, married, purchased homes, and started families. Alejandro consistently went by "Alex," not Alejandro, and often used his paternal surname Ocampo, with or without his maternal surname Martinez. We refer to him hereafter as Alex, except when we describe testimony of members of the P.V. family and Detective Cantu, who knew him as Alejandro.

In November 2018, Eduardo was driving on a Connecticut highway when someone rear-ended him. The police responded to the accident and a check of Eduardo's

identification documentation turned up an outstanding arrest warrant for a Connecticut driving under the influence (DUI) charge from October 1997. According to Eduardo, he had failed to resolve that old charge because he had caused an accident at the time, and he became concerned he might be jailed or even deported.

It was in connection with the continued prosecution of the old DUI charge that Connecticut police became aware of the outstanding Washington warrants and associated charges. Benton County obtained fugitive from justice warrants for Alex and Eduardo, who lived next to each other in a duplex in Bridgeport. Both were arrested a few weeks later.

Eduardo waived extradition and Detective Cantu traveled to Connecticut to transport him to Washington. He was arraigned on his charges on March 25, 2019.

Alex returned to Washington to surrender himself. He was arraigned on May 1, 2019. At arraignment, Alex's lawyer told the court that the State's charges were against Alejandro S. Martinez, which was incorrect, and that his client's name was Alex Ocampo Martinez. He told the court that the State's birthdate for his client was also wrong. The State's position was and remained that Alex adopted a different name and date of birth after becoming aware of the molestation investigation. It has never changed its identifying information for Alejandro.

Eduardo's first trial on the charges began on May 13, 2019, shortly after Alex was arraigned. It ended in a mistrial.

On May 31, the State filed a motion to join its cases against Alex and Eduardo and consolidate them for trial. In moving for joinder, the State argued that "[t]he charges and the evidence in the defendants' cases are virtually identical" and proceeding with one trial as opposed to two would "minimize the number of occasions that [Julian] and [Emiliano] must testify as to the sexual abuse they suffered as young children." Clerk's Papers (CP) at 304. At the hearing on the motion, the State emphasized that at Eduardo's trial Emiliano testified that the brothers had "tak[en] turns" molesting him and Julian. RP (Munoz)[5] at 77. It also argued that their defenses were consistent, since Eduardo had testified at his trial and "flat-out denied" ever molesting either brother; he had also testified he did not think Alex was around in October 1998 when Detective Cantu claims to have interviewed him. RP (Munoz) at 77-78.

Alex's briefing to the court pointed out that in *Bluford,* the Washington Supreme Court had recently clarified that prejudice to a defendant is relevant to a decision on

[5] RP (Munoz) refers to the single volume reported by Renee L. Munoz that includes argument of the State's joinder motion on June 13, 2019.

joinder, just as it is to a decision on severance. 188 Wn.2d at 305.[6] At the hearing Alex's lawyer argued that the unfairness in Alex's case was not knowing whether Eduardo would testify at the second trial:

> [A]s a historical background for me, I can tell you honestly that I never make a decision on whether my client's gonna testify until after we've heard all of the evidence.
>
> You know, in this case I'd have to make that decision before we go there, and I think it puts him in a terribly awkward position, and I think it violates his rights for confrontation.

RP (Munoz) at 80.

The trial court granted the joinder motion, finding that Alex had not identified any specific prejudice and "difficulties that foreseeably inure in mounting a joint defense . . . while concededly not insignificant . . . are legally insufficient as a basis to resist the motion." CP at 8.

A second trial, this time against both brothers, began in June. The second trial ended in a mistrial after the jurors informed the court they were deadlocked with no hope of reaching a verdict.

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[6] The State had argued in *Bluford*, with some support from published decisions of Division Two of this court, that when joinder rather than severance is being considered, the only issue is whether it is allowable in accordance with the plain language of the rule; the likelihood of prejudice is not relevant. The Supreme Court took the opportunity in *Bluford* to disapprove of Division Two's approach and confirm, as established in *State v. Thompson*, 88 Wn.2d 518, 525, 564 P.2d 315 (1977), *overruled on other grounds by State v. Thornton*, 119 Wn.2d 578, 580, 835 P.2d 216 (1992), that the likelihood of undue prejudice to the defendant must also be considered when the State moves for joinder. *Bluford*, 188 Wn.2d at 307-09.

A third trial began in August. It ended in a mistrial on Alex's motion, after counsel for Eduardo was perceived by the trial court to have violated an in limine order, to the potential detriment of Alex.

In motions in limine argued before the fourth trial, the State sought to offer certain evidence from which it contended consciousness of guilt could be inferred, including evidence of Alex's self-identification as Alex Ocampo and Alex Ocampo Martinez after Detective Cantu's investigation and the filing of charges. Admission of the evidence turned out not to be at issue, since Alex responded that *he* would offer evidence that he self-identified as Alex Ocampo and Alex Ocampo Martinez.

In what amounted to a counter-motion, Alex asked the court to prohibit the State from arguing that his self-identification as Alex Ocampo and Alex Ocampo Martinez supported an inference of consciousness of guilt. The trial court denied the counter-motion, ruling that "[b]oth sides have an opportunity to argue their positions to the jury." RP (Trial) at 316.

The fourth trial began in late September. Witnesses called by the State included Detective Cantu; Julian and Emiliano's father, Santiago; Principal Juzeler; Emiliano; and Julian.[7]

[7] Urbina had died a couple of years before the trial.

Detective Cantu was asked in his direct examination if he saw the Alejandro Martinez that he interviewed in 1998 in the courtroom; he said he did and identified Alex. The detective also testified that after he picked up Eduardo at a Norwalk, Connecticut, courthouse, they drove to LaGuardia Airport, and during the drive, Eduardo volunteered a couple of things: that he moved to Connecticut but returned to Prosser following the 1997 DUI charge and that he returned to Connecticut when he learned authorities needed to speak with him about the charges at issue in this case.

Santiago testified that Alejandro had lived with the family at the Highway 22 mobile home park for a time and also lived with the family off and on when they moved to the Prosser trailer park. Asked by Alex's lawyer if he recalled that Urbina had a nephew "in the area" who was also named Alejandro Martinez, Santiago said he did, but he did not know where he lived or who he had worked for. RP (Trial) at 893-94.

Emiliano testified to being born in March 1988, making him 31 years old at the time of trial. He testified that he recalled the abuse by Alejandro and Eduardo happening during the first quarter of his second-grade year. Alejandro was the first to abuse him by putting his penis in Emiliano's mouth; then he inserted his penis in Emiliano's anus "repeatedly." RP (Trial) at 1042. He testified that this occurred in the bedroom, and both of his younger brothers were present in the trailer. He testified that Eduardo had not been present.

Emiliano testified that Eduardo later assaulted him as well, calling him into the bedroom where he "proceeded to pull my pants down and insert his penis in my anus." RP (Trial) at 1044. Emiliano testified he was raped by Eduardo on more than one occasion, often in the bedroom.

Asked if he was able to fight back, he said he could not because Alejandro and Eduardo were older, bigger and stronger. In the fall of 1995, when this is alleged to have occurred, Alejandro would have been 16 years old and Eduardo would have been nearly 15.

Emiliano testified that he knew that his younger brother Julian had also been raped, "[b]ecause it happened to me" and "I could just hear him screaming, begging for him to stop." RP (Trial) at 1045. He testified that he also saw Julian being raped once, in the trailer's bathroom. Emiliano testified that he never talked to Julian or anyone else about the abuse, because he was scared and "they threatened us." RP (Trial) at 1046.

Julian testified to being born in 1989, making him 30 years old at the time of trial. He testified that he was assaulted by Eduardo, who took him in the back room of the trailer and put his penis in Julian's anus. He remembered pain, and that he was crying, and that it was against his will. He also recalled that it happened on a few occasions. Emiliano was present in the trailer when it happened. Julian testified he knew it happened to Emiliano, too, because Emiliano was taken to the back room and Julian could hear him crying. Julian did not fight back because Eduardo was older than him and

he was scared. It happened in the first quarter of his first-grade year, so he would have been 6 years old at the time. Julian testified that Alejandro never molested him.

Alex and Eduardo testified in their own defense. Alex testified that others have referred to him as Alejandro, but he, personally, has always gone by Alex. Asked about his birthdate, he testified that he was born on March 21, 1978, which is not the date of birth attributed to him by the State. He testified that he came to the United States in 1991 and lived with a family acquaintance in Grandview. He occasionally stayed with his mother in the Prosser trailer park once she returned to the United States.

Alex testified that in November 1995, he left Washington with plans to go to Chicago, but ended up going to Connecticut. He testified that he moved to Mexico in 1998, stayed for about a year, and then returned to Connecticut where he continued to live until the charges in this case brought him back to Washington.

Alex testified that the first he ever heard of the charges against him in Washington was in March 2019, when police came to his home looking for him and Eduardo. He denied meeting Detective Cantu at any time prior to 2019. He testified that his cousin Alejandro Martinez was a couple of years older than him and he believed he had lived in Prosser in 1995. He denied ever molesting Emiliano.

In cross-examination, the State questioned Alex about a school record from Prosser High School that identified student "Alejandro S. Martinez." RP (Trial) at 1304. The record listed Alejandro's parent or guardian as Urbina Martinez, identified him as

living at the Highway 22 mobile home park address, and it reflected January 25, 1979, as the date of birth—the same date provided to Detective Cantu by the "Alejandro Martinez" interviewed in 1998. Alex testified that he could not say the record was incorrect but "it wasn't me." RP (Trial) at 1303.

Eduardo testified after Alex. He testified he first left Washington in February 1996. He had dropped out of school, and Alex had driven from Connecticut to pick him up. In October 1997 he received the DUI in Connecticut and, fearful of problems the DUI could cause, he returned to Washington in February 1998 and lived with his mother. He testified that he remained in Washington for only four months.

Eduardo denied having any knowledge of the investigation or pending case against him in Washington until sometime after his November 2018 auto accident. It was during the revived proceedings on his 1997 DUI that he learned about it from Connecticut law enforcement. He denied ever telling Detective Cantu that he fled Washington when he learned the police were looking for him; he testified that he only told Detective Cantu about fleeing Connecticut for Washington after being charged with the DUI.

In questioning by Alex's lawyer, Eduardo testified that he believed his cousin Alejandro Martinez was older than Alex, but could not say for sure. He did not know where the cousin had worked, other than that he was "basically working in the field." RP (Trial) at 1328.

The jury found the brothers guilty as charged. Based on what was identified as a seriousness level for the charges of XII, Alex's standard range was 93 to 123 months. The court sentenced Alex to a period of total confinement of 120 months and 24 months of community custody. He appeals.

ANALYSIS

I. ALEX DOES NOT DEMONSTRATE THAT THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING JOINDER

Alex's first assignment of error is that the trial court abused its discretion in granting the State's motion to join the charge against him with the charges against Eduardo.

CrR 4.3(b) allows two or more defendants to be joined in the same charging document under several circumstances. If joined under CrR 4.3(b), the charges against them are consolidated for trial unless the court orders severance. CrR 4.3.1.

The State contends that joinder was proper under CrR 4.3(b)(3), which permits joinder even when conspiracy is not charged and all of the defendants are not charged in each count, if it is alleged that the several offenses charged:

> (i) were part of a common scheme or plan; or
>
> (ii) were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others.

In arguing that joinder was improper, Alex relies heavily on case law addressing the special prejudice that arises when evidence of a defendant's prior sex crimes is

admitted under ER 404(b) on, e.g., "common scheme or plan" grounds. He argues that this special prejudice existed in the joint trial, since evidence of Eduardo's rapes was admitted. But evidence of a defendant's *own* prior crimes risks being used by jurors "to prove the character of a person in order to show action in conformity therewith," hence the special rule limiting admissibility. ER 404(b). No legal authority is cited that evidence of a crime committed by a defendant's family member, or friend, or cohort, presents a similarly special risk, and no rule specially prohibits such evidence. ER 404(b) has no application when evidence of a different person's rapes has relevance in a case, although ER 403 could apply.[8]

[8] All of the following cases relied on by Alex involve the need to exclude evidence of a defendant's own prior acts under ER 404(b) and are inapposite: *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982) ("'Once the accused has been characterized as a person of abnormal bent, driven by biological inclination it seems relatively easy to arrive at the conclusion that he must be guilty.'" (quoting M.C. Slough & J. William Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325, 333-34 (1956))); *State v. Ramirez*, 46 Wn. App. 223, 227, 730 P.2d 98 (1986) ("[A]n intelligent application of ER 404(b) is particularly important in sex cases."); *State v. Gresham*, 173 Wn.2d 405, 433, 269 P.3d 207 (2012) ("When the support of RCW 10.58.090 is removed, we are . . . left with evidence admitted in violation of ER 404(b)."); *State v. Sutherby*, 165 Wn.2d 870, 886, 204 P.3d 916 (2009) (Had child pornography charges been severed, "highly likely" that its possession would have been excluded under ER 404(b).); *State v. Carleton*, 82 Wn. App. 680, 684, 919 P.2d 128 (1996) ("'Evidence of prior misconduct is likely to be highly prejudicial.'" (quoting *State v. Lough*, 125 Wn.2d 847, 862, 889 P.2d 487 (1995))); *State v. Gunderson*, 181 Wn.2d 916, 925, 337 P.3d 1090 (2014) (The risk of unfair prejudice of a defendant's prior acts of domestic violence is very high.).

Alex also argues on appeal that the trial court failed to heed *Bluford* because in analyzing the risk of undue prejudice to Alex it did not address the four factors analyzed in *Bluford*: "'(1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial.'" 188 Wn.2d at 311-12 (quoting *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994)). But *Bluford*, like *Russell*, was a joinder-of-offenses by a single defendant case, not a joinder-of-defendants case, as the four factors illustrate ("each count," "each count," "each count," and "other charges"). As *Russell* explained, those factors relate to the risk of prejudice where an individual defendant offers different defenses to different counts, detracting from the credibility of the defenses, or where multiple charges against an individual defendant invite the jury to cumulate evidence or infer a criminal disposition. They are not necessarily the same risks of prejudice likely to be present in a joinder-of-defendants situation. Indeed, in *Bluford*, when the Supreme Court turned to the analysis of that joinder-of-offenses case, its overarching concern was ER 404(b).

Recognizing this difference, both the State and Alex reasonably relied in their briefing to the trial court on a then-recent joinder-of-defendants case, *State v. Moses*, 193 Wn. App. 341, 359, 372 P.3d 147, *review denied*, 186 Wn.2d 1007 (2016). *Moses* involved child mistreatment that had been jointly charged against a husband and wife. As pointed out by the court, in the joinder-of-defendants context:

> Specific prejudice may be demonstrated by showing:
>
> "(1) antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive; (2) a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant's innocence or guilt; (3) a co-defendant's statement inculpating the moving defendant; (4) or gross disparity in the weight of the evidence against the defendants."

Id. at 360 (quoting *State v. Canedo-Astorga*, 79 Wn. App. 518, 528, 903 P.2d 500 (1995) (quoting *United States v. Oglesby*, 764 F.2d 1273, 1276 (7th Cir. 1985))). *Canedo-Astorga*'s statement of the prejudice considerations in joinder-of-defendants cases had often been relied on by Washington courts, including by the Supreme Court. *See State v. Emery*, 174 Wn.2d 741, 753, 278 P.3d 653 (2012).

Bruton[9] concerns predominated in *Moses.* The defendant argued that his wife's pretrial statement, which had been ruled admissible, inculpated him. The trial court disagreed and this court affirmed. The wife professed innocence, and statements she made that would be understood to refer to the defendant were not inculpatory. *Moses*, 193 Wn. App. at 359.

In this case, the trial court observed that no *Bruton* issue was presented. While an incriminating statement from each of Alex and Eduardo would be admitted in evidence, neither statement incriminated the other brother. No party disagreed.

[9] *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

As previously noted, the State pointed out in its briefing and argument that there were no antagonistic defenses. Alex did not identify any position Eduardo had taken in his first trial that would be problematic for his own defense. The only prejudice Alex identified to the trial court was that he would not know until the end of the State's case whether Eduardo was going to testify.

Turning to the evidence that Alex now argues would have been excluded if he had been tried separately, the State pointed out testimony at Eduardo's aborted trial that Alex and Eduardo "took turns" with Emiliano and Julian. There was testimony that both Alex and Eduardo threatened their young stepbrothers. The rapes took place in the same opportunistic circumstance: when the young boys were left at home with their older stepbrothers while their parents worked.

As in all cases of a child's delayed report of sexual abuse, it was not only relevant but important to be able to present evidence why Emiliano's allegation against Alex first came to light in 1998, and why he did not say anything to anyone earlier, especially when he had another older stepbrother who could presumably protect him.

In the trial court's written order granting joinder, the trial court alluded to the types of specific prejudice identified in *Moses* and found none of them present. Alex never argued in the trial court that there was a massive and complex quantity of evidence. He never argued in the trial court that there was a gross disparity in the weight of the

evidence against the defendants.[10] The court's order heeds *Bluford*'s clarification that prejudice must be considered before ordering joinder, finding that Alex did not identify any specific prejudice to him from a consolidated trial.

Despite relying on *Moses* in the trial court, Alex now argues it was error for the trial court to rely on it. He argues that *Moses* addressed severance, not joinder, so it should not be relied on after *Bluford.* But *Bluford* supports the relevance of severance cases. It characterized pretrial joinder and severance as "often 'six of one, half dozen of the other' because the issues are so closely related." 188 Wn.2d at 309. It observed that "[e]ver since Washington first allowed for the joinder of offenses, our courts have recognized the close relation of joinder and severance" and "we have typically analyzed joinder and severance together." *Id.* at 307-08. As *Bluford* points out, the salient differences are that if charges are joined in the original charging document, asking for severance is the defendant's only course of action, and because joinder in forward-looking, review of a joinder ruling looks at only facts known to the judge at the time of the ruling, not those developed later. *Id.* at 310.

Alex's final challenge is that the trial court applied an incorrect balancing test after *Bluford* when it stated in its order, the resisting party "must . . . demonstrate that joinder

[10] He does argue for the first time on appeal that the case against Eduardo was stronger. But the State had a written confession from Alex, with Detective Cantu's identification of him as the individual who provided it. It had no confession from Eduardo.

is 'manifestly prejudicial,' and thus outweighs the substantial interest in joinder." Br. of Appellant at 14-16. But Alex argued for a virtually identical balancing test in his briefing to the trial court. *See* CP at 5, 13-17. Alex's trial lawyer evidently did not see daylight between *Moses*'s language about balancing "manifest prejudice" against a "substantial interest in joinder," and *Bluford*'s language about balancing "clear, undue prejudice" against "important considerations of economy and expedition in judicial administration."[11] He described them to the trial court as "similar" tests. *Id.* at 5. While we would be disposed to use *Bluford*'s language as the most recent and controlling statement of the required balancing, Alex does not demonstrate that speaking of "manifest prejudice" rather than "clear, undue prejudice" was error. If it had been error, it was invited. *Cf. City of Seattle v. Patu*, 147 Wn.2d 717, 721, 58 P.3d 273 (2002) (erroneous jury instruction was invited error).

No abuse of discretion in ordering joinder is shown.

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[11] *Bluford* provided the following statement of how the competing interests are balanced:

> [I]f joinder will cause clear, undue prejudice to the defendant's substantial rights, no amount of judicial economy can justify requiring a defendant to endure an unfair trial. However, where the likely prejudice to the defendant will not necessarily prevent a fair trial, "'the court must weigh prejudice to the defendant caused by the joinder against the obviously important considerations of economy and expedition in judicial administration.'"

188 Wn.2d at 311 (quoting *State v. Smith*, 74 Wn.2d 744, 755, 446 P.2d 571 (1968) (quoting, in turn, *Drew v. United States*, 331 F.2d 85, 88 (1964)), *overruled in part on other grounds by State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975).

We affirm the conviction and remand for resentencing.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder, having no precedential value, shall be filed for public record pursuant to RCW 2.06.040, it is so ordered

II. THE TRIAL COURT'S LIMITATION OF VOIR DIRE WAS NOT CONSTITUTIONAL ERROR OR A REVERSIBLE ABUSE OF DISCRETION

Alex next assigns error to the trial court's ruling preventing defense counsel from questioning members of the venire about their attitude toward illegal immigration.

Part way through voir dire, outside the presence of the jury, Eduardo's lawyer asked if he could question whether prospective jurors held strong feelings about people being in the United States illegally. Alex's lawyer joined the request, observing that the country appeared politically divided on the topic and the questioning could reveal prejudices. Asked by the court why it was relevant, the defense lawyers suggested that the back story of the defendants and victims suggested they were in the country illegally; Detective Cantu's interview of Alejandro at the fruit warehouse would lead to discussion of the use of false names by undocumented workers; and the defense may rebut the allegation of flight with evidence of the defendants' fear of deportation. The defense lawyers also argued that the questioning could serve as a proxy for questions about racial bias, since people are defensive when asked outright about racial bias and tend not to

provide helpful information. Neither defense lawyer had specific proposed questions, although both suggested that asking about Donald Trump's promise to build a border wall with Mexico would be a way to ferret out the jurors' attitudes.

The trial court heard considerable argument and even continued consideration of the issue overnight, allowing the defendants to further address it the following morning. It ultimately ruled that it would not allow inquiry into prospective jurors' attitudes about illegal immigration, but would allow the lawyers to inquire whether venire members had any prejudice against those of Hispanic descent or ethnicity. It explained it had reviewed ER 413 and was satisfied that none of the evidence identified by defense counsel went to the bias or prejudice of a witness, nor was immigration status an essential fact to prove an element of, or defense to, the offenses charged.

In assigning error to the court's ruling, Alex does not challenge it as an abuse of discretion but only as violating his constitutional right to a fair trial by an impartial jury.

The right to trial by jury includes the right to an unbiased and unprejudiced jury. U.S. CONST. amend. VI, XIV; WASH. CONST. art. I, § 22. The state constitutional right to an impartial jury does not provide any greater protection than the federal constitutional right. *State v. Munzanreder*, 199 Wn. App. 162, 174, 398 P.3d 1160, *review denied*, 189 Wn.2d 1027 (2017); *State v. Rivera*, 108 Wn. App. 645, 648 n.2, 32 P.3d 292 (2001).

In noncapital cases, the United States Supreme Court has found the constitutional right to an impartial jury to require that a defendant be allowed to question prospective

jurors about racial bias in only narrow circumstances. In *Ham v. South Carolina*, 409 U.S. 524, 93 S. Ct. 848, 35 L. Ed. 2d 46 (1973), the Court held that Ham was constitutionally entitled to require the asking of a question specifically directed to racial prejudice "under the facts shown by this record." *Id.* at 527. Several years later, in *Ristaino v. Ross*, 424 U.S. 589, 597, 96 S. Ct. 1017, 47 L. Ed. 2d 258 (1976), the Court clarified that because Ham was a prominent civil rights activist and defended against a charge of possessing marijuana on the basis he had been framed for his civil rights activities, "[r]acial issues . . . were inextricably bound up with the conduct of the trial." It observed that Ham's reputation as an activist and the defense he interposed "were likely to intensify any prejudice that individual members of the jury might harbor." *Id.*

The Court in *Ristaino* held that petitioner Ross, who was Black, had no constitutional right to pose similar questions to prospective jurors in his prosecution for violent crimes against a white security guard. The circumstances "did not suggest a significant likelihood that racial prejudice might infect [his] trial." *Id.* at 598. The Court rejected a per se rule that would require defense counsel to be allowed to specifically question prospective jurors about racial prejudice in cases in which the defendant was a different race from the victim, or because of the race of his own or adverse witnesses. *Id.* at 596 n.8. It reasoned that "policy as well as constitutional considerations militate against the divisive assumption as a per se rule that justice in a court of law may turn

upon the pigmentation of skin [or] the accident of birth." *Id.* (citing *Connors v. United States*, 158 U.S. 408, 415, 15 S. Ct. 951, 39 L. Ed. 1033 (1895)).

Given the narrowness of the constitutional right to specifically question about racial bias, a federal court's denial of a defendant's request for such questioning is almost always challenged as an abuse of discretion under nonconstitutional rules. In *Ristaino*, the Court had observed in a footnote that exercising its supervisory authority, it would have required the questioning that Ross requested. *Id.* at 598 n.9. It pointed to its decision in *Aldridge v. United States*, 283 U.S. 308, 51 S. Ct. 470, 75 L. Ed. 1054 (1931), as one in which it had reversed the conviction of a Black man for the murder of a white policeman because of the court's refusal to question the venire about racial prejudice, without grounding the outcome on any constitutional requirement. *Id.* a 597-98 nn.9 & 10.

In *Rosales-Lopez v. United States*, 451 U.S. 182, 101 S. Ct. 1629, 68 L. Ed. 2d 22 (1981), the Court again stated that because there is no constitutional presumption of juror bias for or against members of any particular racial or ethnic group, there is no constitutional rule requiring inquiry as to racial prejudice in every prosecution of a defendant who is a member of such a group. *Id.* at 189-90 (citing *Ristaino*, 424 U.S. at 597).

> Only when there are more substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case does the trial court's denial of a defendant's request to examine the jurors' ability to deal

> impartially with this subject amount to an unconstitutional abuse of discretion.
>
> Absent such circumstances, the Constitution leaves it to the trial court, and the judicial system within which that court operates, to determine the need for such questions.

Id. at 190.

Turning to the federal supervisory rule, the opinion in *Rosales-Lopez* observed that if a defendant claims a meaningful ethnic difference between himself and the victim, a request to conduct voir dire into racial prejudice should ordinarily be granted. *Id.* at 191 n.7. It held that "[f]ailure to honor [the defendant's] request, however, will be reversible error only where the circumstances of the case indicate that there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury." *Id.* at 191.

For the first time on appeal, Alex contends that the questioning he and Eduardo sought to pursue falls within categories for which, he contends, such questioning is mandated by *State v. Frederiksen*, 40 Wn. App. 749, 700 P.2d 369 (1985). *Frederiksen* makes passing reference to the right to an impartial jury, but it involved an abuse of discretion challenge and relies on a federal abuse of discretion case, *United States v. Jones*, 722 F.2d 528, 529 (9th Cir. 1983) and ultimately on *United States v. Robinson*, 475 F.2d 376, 380-81 (D.C. Cir. 1973).[12]

[12] *See Perez v. Prunty*, 139 F.3d 907 n.2 (9th Cir. 1998) (unpublished) (pointing out that *States v. Jones*, 722 F.2d 528, 529 (9th Cir. 1983), "did not announce a constitutionally-compelled rule," but was authorized by the court's supervisory powers).

We could end our analysis here, because Alex did not assign error to an abuse of discretion, only a constitutional violation. No constitutional violation has been shown. Because the trial court's consideration of the defendants' request should not have ended with consideration of ER 413, however, we address the trial court's exercise of its discretion.

The trial court justified its limitation on voir dire based on ER 413's limits on the admissibility of evidence of a party's or witness's immigration status. The fact that the defendants could not point to any evidence of immigration status admissible under ER 413 was a relevant consideration, but depending on the case, it would not be the only consideration. The trial court erred in not recognizing that it was required to more broadly consider *any* real possibility that racial or ethnic prejudice might influence the jury.

Alex and Eduardo reasonably contended that even in a trial conducted in conformity with ER 413, jurors would infer that they were undocumented. Since the evidence rules would not protect them from a risk of juror bias, they deemed voir dire and their ability to exercise peremptory challenges as their best protection. Another, similarly-situated defendant might decide against highlighting the issue in voir dire. But Alex's and Eduardro's position was a rational one, and when a defendant faces a foreseeable risk that admissible evidence will suggest that they are undocumented, a trial court should respect the defendant's concern.

Careful thought should be given to how such voir dire will be conducted, however, and here, Alex and Eduardo's request fell short of what a trial court is reasonably entitled to expect. Even given the opportunity to refine and support their request overnight, they never provided the court with proposed questioning other than to suggest asking jurors their attitudes about former President Trump's border wall. Questioning of that sort would have politicized voir dire, presenting its own problems for the fairness of the trial.[13] *E.g.*, *State v. Loughbom*, 196 Wn.2d 64, 69–70, 470 P.3d 499 (2020) ("Justice can be secured only when a conviction is based on specific evidence in an individual case;" "We do not convict to make an example of the accused, we do not convict by appeal to a popular cause"). The questions should be framed in narrow terms, avoiding politics. In *Rosales-Lopez,* for example, in which a defendant of Mexican descent was prosecuted for his alleged participation in a plan by which three Mexican residents were illegally brought into the United States, questioning untied to partisan politics was permitted. 451 U.S. at 185-86.[14]

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[13] Politicizing voir dire by discussing border security was argued to be reversible error in *State v. Zamora*, No. 37019-4-III, slip op. at 32-34 (Wash. Ct. App. June 8, 2021) (unpublished), available at https:///www.courts.wa.gov/opinions/pdf/370194_unp.pdf, *review granted in part on this issue*, 198 Wn.2d 1017 (2021).

[14] Questions posed in *Rosales-Lopez*, which was tried in 1979, were, "Do any of you have any feelings about the alien problem at all?" and "Do any of you have any particular feelings one way or the other about aliens or could you sit as a fair and impartial juror if you are called upon to do so?" 451 U.S. at 186.

A trial court has considerable discretion to direct voir dire "with reasonable expedition." *Frederiksen*, 40 Wn. App. at 753. The trial court allowed the defendants to question prospective jurors about prejudice against persons of Hispanic descent or ethnicity. Here, not having been presented with any carefully crafted questions, the trial court could reasonably perceive the request for permission to question jurors about former President Trump's border wall with Mexico as "a vague, speculative inquiry to see if [counsel] could unearth something prejudicial." *Id*. at 755.

Clearly no violation of Alex's constitutional right to an impartial jury was demonstrated. Nor does Alex assign error to or demonstrate a prejudicial abuse of discretion by the trial court.

III. THE COURT DID NOT ABUSE ITS DISCRETION IN RULING ON THE STATE'S "CONSCIOUSNESS OF GUILT" MOTION IN LIMINE

Alex's next assignment of error challenges a ruling made in the course of addressing a State motion in limine seeking permission to offer evidence of what it characterized as the defendants' flight and Alex's use of an "alias," as reflecting consciousness of guilt. CP at 473-75.

The State's proposed evidence of use of an alias was that Alejandro began using the names Alex Ocampo and Alex Ocampo Martinez after learning from Detective Cantu that the results of the detective's investigation would be forwarded to the prosecutor for possible prosecution.

In responding to the State's motion, Alex's lawyer made it clear that Alex would *himself* present evidence that he used the names Alex Ocampo and Alex Ocampo Martinez, just as he had in the prior trials. He took the position that these were his name. Accordingly, the admissibility of evidence of Alex's use of the names was never disputed.

In what amounted to a countermotion in limine, Alex argued that the State was laboring under a misunderstanding of Hispanic naming conventions in attaching any significance to Alex's use of the names. He argued that this was culturally insensitive, if not racist, and the State should be precluded from arguing that Alex began using the names after 1998 to evade apprehension.

The State responded that it was not being disrespectful of Alex's cultural heritage but it was a fact that by using different iterations of his name, Alex had avoided coming to the attention of law enforcement for many years.

The court ruled, "Both sides have an opportunity to argue their positions to the jury." RP (Trial) at 316. It is this ruling that is being challenged by Alex.

Most of the consciousness of guilt cases on which Alex relies are inapposite because the defendants in those cases were arguing for the exclusion of *evidence*, they were not arguing that the evidence was admissible but an inference was foreclosed. *See State v. Freeburg*, 105 Wn. App. 492, 499, 20 P.3d 984 (2001) (defendant objected to evidence that he was carrying a handgun at the time of his arrest); *State v. McDaniel*,

155 Wn. App. 829, 838, 855, 230 P.3d 245 (2010) (defendant objected to evidence that he attempted to elude when police, seeking to arrest him on warrants, tried to pull over the car in which he was a passenger and did not cooperate after the stop); *State v. Smith*, 55 Wn.2d 482, 484, 348 P.2d 417 (1960) (defendant objected to the fact that evidence of her unproved aliases was inadvertently provided to the jury).

State v. Cartwright, 76 Wn.2d 259, 263, 456 P.2d 340 (1969), is also cited by Alex; it is different and frankly unhelpful to him. In that case, several witnesses testified to conduct by Cartwright, but referred to him as Martin, the name by which they knew him. Cartwright did not challenge the fact that the witnesses were allowed to testify and refer to him by the name Martin, but did challenge the trial court's refusal to give a jury instruction that he had the right to use a different name without incurring an inference of criminality. *Id.* at 263-64. The Supreme Court held that it was not error to refuse to give the requested instruction.

Alex cites two cases for the proposition that it is improper to infer guilt or criminal activity from racist misconceptions: *State v. Monday*, 171 Wn.2d 667, 678-79, 257 P.3d 551 (2011), and *State v. Barber*, 118 Wn.2d 335, 346-47, 823 P.2d 1068 (1992). But he does not point to any racist misconception that was advanced by the State. Although the State used the word "alias" in its motion in limine, it never used that word to refer to Alex's use of his paternal surname when the jury was present. Alex does not identify

anywhere in the record where the State questioned, let alone denigrated, Hispanic naming conventions.

In fact, it was through Detective Cantu that Alex's lawyer presented evidence of Hispanic naming conventions. In response to Alex's lawyer's questions, Detective Cantu testified that "typically in my culture, you take the father's last name." RP (Trial) at 836. Detective Cantu agreed with Alex's lawyer that sometimes a Hispanic person's surnames get inverted through no fault of their own, with the detective adding that "I think we here in the U.S. are the ones that do that because perhaps we don't understand how it's being utilized." RP (Trial) at 836.

The State was able to demonstrate that all of the documents Alex pointed to as identifying him as Alex Ocampo or Alex Ocampo Martinez were created after 1998.[15] Detective Cantu testified that the name Benton County used in investigating was Alejandro S. Martinez, and Alex's use of the names Alex Ocampo and Alex Ocampo Martinez made it more difficult to locate him.

Alex does not demonstrate that the trial court abused its discretion in allowing the State to argue that jurors could infer consciousness of guilt from name changes that foreseeably added difficulty to Alex's apprehension.

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[15] Alex offered his Mexican passport, birth certificate, driver's licenses (Connecticut and Washington), and marriage license.

IV. ALEX DEMONSTRATES THAT RESENTENCING IS REQUIRED

Finally, Alex points out that several sentencing errors were made because the parties and the court overlooked the need to apply the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, as in effect in 1995, when the crime occurred. Most serious is a failure to take into consideration the earlier and more lenient seriousness level and associated sentencing range for the crime.

RCW 9.94A.345 commands, "Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed." *State v. Jenks*, 197 Wn.2d 708, 715, 487 P.3d 482 (2021). The plain language is unambiguous. *Id.* RCW 9.94A.345 applies to all sentences imposed under "this chapter," meaning the SRA. *Id.* Application of prior law is also required by the saving clause provided by RCW 10.01.040.[16] In increasing the seriousness level of first degree rape of a child in 1997, the legislature expressed no intent that the change should apply retroactively. LAWS OF 1997, ch. 340, §§ 1-4. RCW 10.01.040 applies to

[16] RCW 10.01.040 provides:

> Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein.

substantive changes in the law, not procedural ones, and changes to criminal punishments are substantive. *Jenks*, 197 Wn.2d at 721.

Alex was convicted of committing first degree rape of a child in violation of former RCW 9A.44.073 (1988) on or about August 1, 1995 to October 30, 1995. In 1995, a conviction of first degree rape of a child carried a seriousness level of XI. Former RCW 9.94A.320 (1995) (presently codified at RCW 9.94A.515). He had no prior criminal history. Under the sentencing grid applicable in 1995, the standard range sentence for an offender score of zero was 78 to 102 months. Former RCW 9.94A.310 (1995) (presently codified at RCW 9.94A.510). The State concedes that Alex was sentenced based on an assumed sentencing range of 93 to 123 months, that the 120-month sentence imposed by the trial court exceeds the high end of his correct sentencing range, and that resentencing is required.

Alex argues a remand is required to correct other errors in his judgment as well, including the imposition of legal financial obligations that were not authorized in 1995. The State concedes some but not all of these alleged additional errors. Since a full resentencing will be required to apply the correct standard range, we decline to address other corrections that might be required. The parties can present their positions on proper judgment terms to the sentencing court.

We affirm the convictions and remand for resentencing.

Siddoway, C.J.

WE CONCUR:

Fearing, J.

Pennell, J.

Appendix B

FILED
AUGUST 18, 2022
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ALEJANDRO S. MARTINEZ, Appellant.	)	No. 37343-6-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered Appellant's motion for reconsideration, and the reply thereto, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of June 28, 2022, is hereby denied.

PANEL: Judges Siddoway, Fearing, Pennell

FOR THE COURT:

Siddoway, C.J.

LAUREL H. SIDDOWAY
Chief Judge

NIELSEN, BROMAN & KOCH P.L.L.C.

September 14, 2022 - 8:08 AM

Transmittal Information

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