NO. 43384-2-II

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

STATE OF WASHINGTON, Respondent

v.

REYCEL PEREZ-MARTINEZ, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-01115-1

CONSOLIDATED BRIEF OF RESPONDENT AND RESPONSE TO PERSONAL RESTRAINT PETITION

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

ANNE M. CRUSER, WSBA #27944
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

A. RESPONSE TO ASSIGNMENTS OF ERROR

I. THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION FOR SUBSTITUTION OF COUNSEL.

II. THE PROSECUTOR DID NOT COMMIT MISCONDUCT, AND ANY ERROR COULD NOT HAVE AFFECTED THE OUTCOME OF THE CASE.

B. STATEMENT OF THE CASE

Eric Luna-Claro lived in an apartment in Vancouver with his wife and baby girl. RP 134. He is a legal immigrant from Cuba. RP 135-36. Mr. Luna-Claro and the defendant, Reycel Perez-Martinez, were very good friends, having known each other in Cuba. RP 136-38. Mr. Luna-Claro worked a regular job in maintenance, but he also sold drugs. RP 138-39. In 2005 or 2006 the defendant came to Florida from Cuba and Mr. Luna-Claro traveled to Florida to visit him. RP 137. In 2011 the defendant called Mr. Luna-Claro and told him that he needed help supporting his family. RP 140. Mr. Luna-Claro met up with the defendant again and agreed to teach him how to sell drugs, which he did. RP 140, 144. The last time Mr. Luna-Claro saw the defendant prior to the incident giving rise to this case was two months prior to it. RP 143.

On June 28, 2011 at around ten in the morning the defendant and another man showed up at Mr. Luna-Claro's house unexpectedly. RP 143-

44. Mr. Luna-Claro believed the other man was Mexican based upon his accent. RP 145. Mr. Luna-Claro was surprised to see the defendant because he believed the defendant was in Florida. RP 143-44. Mr. Luna-Claro was there with his wife and daughter. RP 144. At first Mr. Luna-Claro was reluctant to let them in because he didn't know the second man. RP 144-45. Antonio Luna Claro, his wife, also saw that he was reluctant to let the men in. RP 378. Mr. Luna-Claro put his daughter down in the living room and the three men went to the garage to talk. RP 144-45. They began talking about Mr. Luna-Claro retrieved sodas for everyone to drink. RP 145. When Mr. Luna-Claro went to sit in a chair the defendant pulled out a gun and shot Mr. Luna-Claro from a distance of about four to five feet. RP 146. They were not arguing at the time and Mr. Luna-Claro was caught by surprise. RP 146. Mr. Luna-Claro did not think that the defendant had brought a gun with him. RP 147. After the first shot, as Mr. Luna-Claro lay on the ground, the defendant tried to shoot him again but the gun didn't shoot. RP 147. The defendant then kicked Mr. Luna-Claro several times before Antonia Luna-Claro appeared in the doorway. RP 152-53. Antonia screamed at the men to leave. RP 380. During the defendant's attack on Mr. Luna-Claro he called Mr. Luna-Claro a "fucking bitch" and told him he would kill him. RP 146. The victim knew that Mr. Luna-Claro had surveillance cameras in the home and after the shooting

he demanded to know where the camera was and instructed his cohort to look for a camera. RP 153-55. After Antonia assured the men she would turn off the camera the men ran out of the house. RP 381. Antonia saw the defendant tuck the gun into his waistband prior to running away. RP 381. A neighbor saw a man that looked like the defendant and another man go into Mr. Luna-Claro's house as she was getting her mail, and then she saw the same men running out of the house in a different direction. RP 330-31. Within five minutes she saw the police and ambulance arrive. RP 331,350-51. The neighbor's teenage daughter also saw the men, whom she described as "dark," possibly Hispanic. RP 360. When the men left the house they were "trotting." RP 361.

Mr. Luna-Claro believed that the defendant came to his home that night because he (Luna-Claro) owed money to the "Mexico Cartel," and the Cartel was using the defendant to get to him. RP 149-51. Specifically, Mr. Luna-Claro lost some drugs on a drug run from Mexico. RP 151. Losing the drugs didn't relieve Mr. Luna-Claro from having to pay the Cartel. RP 152. Mr. Luna-Claro woke up in the hospital three days after the shooting. RP 155. During the investigation into this shooting the police found drugs in Mr. Luna-Claro's home, which eventually led to him being charged with, and convicted of, possession with the intent to deliver. RP

156-57. Mr. Luna-Claro did not receive any deal in exchange for his testimony. RP 219. He pled guilty as charged. Id.

The defendant was taken into custody several weeks later in Orlando, Florida. RP 253-54. During a search warrant of Mr. Luna-Claro's house detectives found one spent bullet round in the garage as well a live round. RP 272-73. No other guns or ammunition were found in the house. RP 304. Detective Swenson of the Clark County Sheriff's Department testified it would be unusual for someone who keeps a gun in his house not to have any ammunition to go with it, much less a holster or cleaning equipment (which also were not found at the home). RP 309. Detective Kevin Harper concurred, stating:

> [W]e didn't find any paraphernalia that you might expect from someone who had ownership or possession of a firearm, no holsters, no cleaning supplies, no ammunition, ammunition boxes, receipts, absolutely nothing that you might expect if someone had ownership of a firearm.

RP 500.

Surveillance video taken from the victim's house showed the defendant and his accomplice arriving at, and leaving, the Luna-Claro home. RP 482-84, 551, 565. The video of the defendant leaving the home shows him placing a gun in his waistband. RP 568.

At trial, the defendant testified that Mr. Luna-Claro asked him to come out to Vancouver to work with him in June of 2011. RP 533-34. He

claimed that Mr. Luna-Claro asked him to meet a man in Las Vegas and drive with the man to Vancouver. RP 534. The defendant testified that he met a Mexican man named Arnaldo at the Las Vegas airport. RP 534-35. From Las Vegas the men drove to Seattle after stopping once in Idaho. RP 535-36. After leaving Seattle, the pair drove to Vancouver. RP 536. Once back in Vancouver, the defendant learned that Mr. Luna-Claro had continued renting a storage facility in his name (that he had previously agreed to have in his name) and it made him very angry. RP 528-29, 537-40, 550-51. He and his accomplice drove to Mr. Luna-Claro's house because the defendant wanted to confront Mr. Luna-Claro. RP 550-51. The defendant claimed that where his accomplice can be seen on the video hesitating before entering, it was because he (the accomplice) didn't want to go in, not because Mr. Luna-Claro was reticent to let him in. RP 551-52. He also testified that he was angry with Mr. Luna-Claro because he felt like Mr. Luna-Claro was trying to hide him (the defendant) from "his woman." RP 567. Once inside, the defendant testified that he and Mr. Luna-Claro immediately began arguing about the storage facility but Mr. Luna-Claro was not giving him the answers he wanted to hear. RP 552-53. He claimed that Mr. Luna-Claro called him a "fucker" and then, "with slowness," took out a gun from his waist and said "this thing here is for you." RP 553-54. The defendant then claimed that he "just went at him

and wrestled the gun. And I grabbed it away from him with all my might, all that might that I could. And in doing that, the gun went off. I don't know what the distance was, but it went off." RP 554. The defendant testified that Mr. Luna-Claro was sitting down at the time. RP 554. While testifying, the defendant estimated the distance between him and Mr. Luna-Claro to be about four feet at the time of the shooting. RP 555. The defendant testified that he didn't remember pulling the trigger and if he did, it was an accident. RP 555-56. The defendant testified that after shooting Mr. Luna-Claro, he "got up to him" and said "you're more of a fucker." RP 556. He testified that Mr. Luna-Claro told him to take the gun and leave. RP 557. He said that after the shooting he threw the gun away along Interstate 84. RP 560. On cross examination, the defendant admitted that someone in the jail with whom he had shared the police reports wrote a letter to the trial court at his behest stating that the shooting had been at close range, not a distance of four to five feet. RP 584-85, 587-88. At trial, however, he testified that the shooting was at a distance of about four feet. RP 555. Detective Kevin Schmidt also examined the shirt that the victim was wearing and determined that the victim was not shot at close range. RP 430-34.

The defendant was charged with Attempted Murder in the First Degree and Assault in the First Degree, each with a firearm enhancement.

CP 72-73. The jury heard all of the above testimony and was properly instructed on the law of self-defense. CP 130-31, 137. The jury found the defendant guilty of Assault in the First Degree, and found that he was armed with a firearm during the commission of the crime. CP 146-47. This timely appeal followed.

C. ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DENYING THE DEFEDANT'S MOTION FOR SUBSTITUTION OF COUNSEL.

On December 1, 2011 the defendant mailed a letter to the Judge Collier of the Clark County Superior Court asking him to replace Mr. Kurtz as counsel. CP 16-27. The motion was heard before the trial court on December 12, 2011. At the outset of the hearing it was discovered that the motion filed by the defendant was a stock motion making its way through the jail and that it was not prepared by the defendant. RP 4-5, 7-8. Indeed, the motion contained numerous factual mistakes, such as the assertion that a defense investigator had not been appointed. RP 5. Because the motion itself was a copycat motion that contained numerous assertions that had no applicability to this case (because they were demonstrably inaccurate), the trial court gave the defendant on opportunity to be heard and explain why he wanted new counsel. RP 5-6. The

defendant only said that he thought counsel was "not doing a good job for me," and that counsel had accused him of killing someone when, in fact, the victim didn't die. RP 5-6. He also said he believed defense counsel was working for the prosecutors. RP 6. The court observed that perhaps there had been a slight mistranslation, given that he was charged with attempting to kill someone, but that there was no allegation he had actually killed anyone. RP 6. Defense counsel also noted that the Information clearly states "attempted murder," and that it was read to him by the interpreter. RP 6. The trial court assured the defendant that counsel was not working for the prosecution. RP 6. The court observed that starting over with a new attorney would create a substantial delay in a case such as this, and that it had not heard any basis for the claims and allegations made by the defendant in support of his motion. RP 8. Although defense counsel did make a motion for a continuance at this hearing so that he could review the video evidence in the State's possession as well as investigate whether he needed to hire a DNA expert to testify on behalf of the defendant. RP 10-12. Counsel was also considering asking for funds for a polygraph. RP 12. The defendant agreed to the requested continuance of three months. RP 13-14.

One business day before trial the defendant again moved for substitution of counsel. RP 23. He complained that his attorney had

nothing but his (the defendant's) own testimony to defend him, that his attorney didn't have any facts showing that facts were not as the victim said they were, and that he failed to secure a counteroffer from the State. RP 23. In fact, defense counsel told the defendant that he proposed a resolution of assault in the second degree with a deadly weapon enhancement to the State, that the State rejected the proposed settlement and had countered with an offer of 96 months if he pled guilty to assault in the first degree. RP 24. The defendant rejected that offer. RP 24. The defendant told the court that he didn't, in fact, reject the offer. RP 24. As it turned out, the defendant's claim that he didn't reject the offer stemmed from his belief that he would be able to do that to the State directly, not through his attorney. RP 27. Defense counsel explained that he had tried, on several occasions, to explain to the defendant that he doesn't get to talk to the prosecutor directly; that communications with the State go through counsel. RP 27-28. As the State had agreed to hold open the offer of 96 months until the conclusion of the hearing, the defendant was given an opportunity to confer privately with his counsel and talk about the offer. RP 29. The defendant declined, stating "I just don't feel like I can trust him...I wouldn't like to go to trial with him." RP 30.

The court then issued a thorough ruling denying the defendant's motion to substitute counsel, noting that the defendant is not entitled to

appointed counsel of his choice and noting that the defendant had not demonstrated any prejudice from counsel's actions. RP 30-33. The defendant then rejected the State's counteroffer (the one he complained he didn't receive). RP 34.

Finally, during trial (on the final day of testimony), the court received a letter that the defendant actually sent the day before the court held a hearing on his eve-of-trial motion for substitution of counsel, asking for new counsel. RP 544-45. The defendant confirmed that he had not written the letter; that someone else acting as his adviser wrote it. Id. He also stated that he was pleased with his counsel's performance in the trial and wanted to apologize to his attorney. Id.

This Court reviews a trial court's decision to deny a motion for substitution of counsel for abuse of discretion. *State v. Varga,* 151 Wn.2d 179, 200, 86 P.3d 139 (2004). The trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable reasons or grounds. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997) (*Stenson I*). A defendant does not have a Sixth Amendment right to counsel of his choice where his counsel is appointed at public expense. *State v. Schaller*, 143 Wn.App. 258, 267, 177 P.3d 1139 (2007); *State v. DeWeese,* 117 Wn.2d 369, 375-76, 816 P.2d 1 (1991); *Wheat v. United States*, 486 U.S. 153, 159, n.3, 108 S.Ct. 1692 (1988). A defendant "must

show good cause to warrant substitution of counsel, such as conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant." *Schaller* at 268; *Stenson I*, 132 Wn.2d at 734 (citing *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991). Substitution of counsel is not justified due solely to a "general loss of confidence or trust" in appointed counsel, *Stenson I*, 132 Wn.2d at 734, nor is "general dissatisfaction and distrust" in counsel enough. *Varga* at 200-01.

Upon reviewing whether the trial court erred, this Court reviews (1) the extent of the conflict; (2) the adequacy of the trial court's inquiry; and (3) the timeliness of the motion. *United States v. Moore*, 159 F.3d 1154, 1158-59 (9th Cir. 1998); *accord In re Personal Restraint of Stenson*, 142 Wn.2d 710, 724, 16 P.3d 1 (2001) (*Stenson II*). This test is somewhat different than the test previously employed in Washington, which evaluated (1) the reasons given for the dissatisfaction with counsel; (2) the court's own evaluation of counsel; and (3) the effect of any substitution upon the scheduled proceedings. *Stenson II*, 142 Wn.2d at 723. The Court in *Stenson II* noted that Ninth's Circuit's test for irreconcilable conflict "covers some of the same ground as our test for substitution of counsel."[1]

[1] The Court's opinion in *Stenson II* suggests that the Ninth Circuit's test supersedes Washington's test, but later cases have continued to refer to both tests. In this case, none of the factors in either test warrant relief.

Stenson II, 142 Wn.2d at 724. The most obvious difference is that under the Ninth Circuit's test, the reviewing court must look at the adequacy of the court's inquiry. Under both tests, the reviewing court will look at the quality of the representation the defendant actually received:

> In examining the extent of the conflict, this court considers the extent and nature of the breakdown in the relationship and its effect on the representation actually presented. If the representation is inadequate, prejudice is presumed. If the representation is adequate, prejudice must be shown. Because the purpose of providing assistance of counsel is to ensure that defendants receive a fair trial, the appropriate inquiry necessarily must focus on the adversarial process, not only on the defendant's relationship with his lawyer as such. "[T]he essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers."

Schaller, supra, at 270, quoting *Wheat v. United States,* 486 U.S. at 159.

Here, the extent of the purported conflict between the defendant and Mr. Kurtz, his counsel, clearly did not warrant substitution of counsel. The defendant provided nothing but generic, stock complaints about how he didn't trust Mr. Kurtz and didn't think he was doing anything for him. Because this motion was identical (right down to the handwriting) to several other motions filed in other cases in Clark County Superior Court, it is obvious that there was/is an inmate at the jail who is dispensing legal advice to other inmates, most likely advising them on how to create as many appeal issues as possible in their case. Complaints about counsel are

a classic go-to in this regard. Complaints about counsel can also cause delay, and it is axiomatic that delay hurts the prosecution, particularly where the case rests on the testimony of reluctant witnesses who might flee or be persuaded not to testify. "[G]eneral discomfort with [counsel's] representation" is insufficient to warrant substitution of counsel. *State v. Staten*, 60 Wn.App. 163, 169, 802 P.2d 1384 (1991), quoting *State v. Sinclair*, 46 Wn.App. 433, 436, 730 P.2d 742 (1986). Although the defendant characterizes the extent of the conflict as "substantial," the facts belie this claim. This is particularly so where the defendant confirmed, during trial, that he was quite pleased with his counsel's performance and actually apologized to his attorney. In claiming a conflict the defendant has merely stated general complaints of the sort found to be insufficient to warrant substitution of counsel. Moreover, counsel's representation wasn't merely adequate but exceptional. The defendant makes no claim in this direct appeal that he received inadequate representation.

The defendant also claims that the extent of the trial court's inquiry was insufficient because it was not conducted in private, relying exclusively on *United States v. Moore*, 159 F.3d 1154 (9th Cir. 1998) and *United States v. Nguyen*, 262 F.3d 998 (9th Cir. 2002). But both cases are distinguishable. In *Nguyen*, a Vietnamese-speaking defendant sought to replace his appointed counsel with privately retained counsel and the

district court judge, sitting in the District of Guam, held a hearing without the defendant's knowledge or presence in which he told private counsel that if he substituted in, he would have to be prepared to go to trial *that day*. *Nguyen*, 262 F.3d at 1000. Because private counsel could not possibly be ready, he declined to substitute in and the trial court proceeded with trial without even telling the defendant about the hearing. *Id.* Later, during jury selection, the defendant twice complained about his appointed attorney and the district court twice denied his motion for substitution without explanation. *Id.* When defense counsel tried to impress upon the court the need for his client to be able to hire his own attorney the judge replied "Do the best you can...I didn't travel halfway around the world to continue this trial." *Nguyen* at 1001. The judge also remarked that if defense counsel didn't do a good job, the defendant could just appeal on the grounds of ineffective assistance of counsel. *Id.* Unsurprisingly the Ninth Circuit reversed the conviction, finding the trial court's inquiry inadequate, and finding that the trial court's irrational need to adhere to the trial schedule infected his judgment. *Nguyen*, supra, at 1003. As in *Schaller* (in which the Court of Appeals considered and rejected the defendant's claim that *Nguyen* requires the trial court to always question a defendant in private), the trial court here conducted substantial inquiry

into the defendant's claim of irreconcilable conflict. The facts here are nothing like those in *Nguyen.*

Likewise, this case is distinguishable from *United States v. Moore*, supra. Unlike here, the attorney in *Moore* testified that he felt physically threatened by his client, and that he and his client did not "have any communication at all." *Moore*, 159 F.3d at 1159. In this case, defense counsel confirmed that the defendant was an ideal client and indicated there were no real communication issues beyond the defendant not understanding that he could not speak to the prosecutor directly. The defendant here agreed to the continuance that his attorney sought so that he could better prepare his defense, and he agreed, during trial, that he was very pleased with his attorney's performance. The trial court's inquiry was not inadequate.

The defendant's first motion for substitution of counsel came roughly twenty days before the first trial setting. The defendant makes much, in this appeal, about the fact that after the trial court denied his motion for substitution of counsel his attorney sought a three month continuance, as though it demonstrates that the trial court abused its discretion in denying the motion for substitution of counsel. But a continuance of three months is very different from the continuance that would have been needed if a new attorney came on the case. The case,

with charges of attempted murder in the first degree and assault in the first degree, both with firearm enhancements, would have started over. The delay would have been substantial. Ordering substitution of counsel under these circumstances, where the defendant failed to articulate a sufficient basis for it, would have prejudiced the State and, potentially, the defendant. The defendant's second motion (that, again, he didn't prepare himself) was brought with only one business day remaining before the commencement of trial. This motion was not timely. The trial court did not abuse its discretion in denying the motion.

II. THE PROSECUTOR DID NOT COMMIT MISCONDUCT, AND ANY ERROR COULD NOT HAVE AFFECTED THE OUTCOME OF THE CASE.

The defendant's claim of prosecutorial misconduct rests on his erroneous assertion that the prosecutor misstated the law of self-defense by telling the jury that there was no evidence of self-defense (she didn't) and telling the jury they need not consider the court's instructions on self-defense (she didn't do that either). The only pages of the record the defendant cites in support of his claim are pages 651-652 of the Verbatim Report of Proceedings, which will be examined below. The defendant lodged no objections to the prosecutor's remarks.

To demonstrate prosecutorial misconduct the defendant must show that "the prosecutor's conduct was both improper and prejudicial in the

context of the entire record and the circumstances at trial." *State v. Hughes*, 118 Wn.App. 713, 727, 77 P.3d 681 (2003), *review denied*, 151 Wn.2d 1039 (2004); *State v. Gregory*, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006); *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). In order to prove prejudice the defendant must show that there is a "substantial likelihood" that the prosecutor's remarks affected the jury's verdict. *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008); *Dhaliwal* at 578. But where a defendant fails to object to the allegedly improper remark, he must go further and prove that "the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995).

In claiming that the prosecutor committed misconduct, the defendant fails to quote any particular passage from the Verbatim Report of Proceedings (VRP), instead generally citing to pages 651-52 of the VRP. On those pages, the prosecutor said:

> We're here to talk about what he did on June 28th. What we know—when you--a defendant is facing the repercussions of his actions he has three options. Option number one is to say, "It wasn't me. I didn't do it." Option number two is to say, "It was me, but it was an accident." And option number three is to say, "It was me, but I had to do it. It was self-defense."

> The defendant, he didn't have a choice in the first option because there was surveillance footage that caught him going into that house on that day and caught him going out at such a fast pace, he had to put the gun away prior to--I [sic] had to put the gun away without tucking it into his sweatshirt prior to hitting the street. And so we were able to see that portion, and so his only story could be was--it was self-defense or it was an accident.
>
> You're going to get a self-defense instruction the Court told you in your jury instructions. The interesting thing about that is he's never claimed that it was self-defense. He said that what happened on that day was not that he--that the gun was ever pointed at him, but that he lunged for the gun once he slowly saw it coming out in the middle of an argument. He was never faced with the imminent danger. He was arguing with his friend, which he himself said is something you can do.
>
> He's not claiming self-defense. He's claiming it was an accident. He's claiming it was an accident because his hand has lost feeling. We have no medical records to indicate that this is actually what happened, and it's a pretty darn good story. But he showed you which hand that was. That was his left hand. If you were struggling for your life, for a gun, will you be pulling it with your strong hand or your weak hand? You will be grabbing the gun with your right hand. You will know that you pulled the trigger. You will have pulled it with the hand that has feeling. We have to take his word for the hand that doesn't have feeling; but even doing so, it doesn't make sense.

RP 651-52.

Relying almost exclusively on *State v. McCreven*, 170 Wn.App. 444, 470, 284 P.3d 793 (2012), the defendant argues that the prosecutor committed misconduct that was so flagrant and ill-intentioned that it could

not have been obviated by a curative instruction. The defendant's reliance on *McCreven* is misplaced. In *McCreven*, a bevy of errors worked to deprive the defendant of a fair trial. First, the court gave erroneous instructions on the law of self-defense which shifted the burden of disproving self-defense onto the defendants. *McCreven* at 463-467. Then the prosecutor argued during closing argument that the defendants bore the burden of disproving self-defense by a preponderance of the evidence. *McCreven* at 469. When the defendants objected to this flagrantly improper remark that any prosecutor should have known better than to make, the trial court compounded the error by refusing to rule on the objection (and thereby endorsing the argument). Indeed, after receiving this tacit green light from the trial court the prosecutor repeated this ridiculous argument. *McCreven* at 470. Then, in rebuttal closing argument after hearing the defendants' attorneys argue the law correctly, the prosecutor said:

> How do I disprove that the Defendant reasonably believed that there was imminent danger, when there has been no evidence that the Defendant reasonably believed that there was imminent danger? Ladies and gentlemen, there is nothing to disprove that because there is no evidence of it.
>
> So if there is no evidence of self-defense, *how is it that they even get to argue it?*

McCreven at 470 (emphasis added).

The Court of Appeals held that the remarks were improper because, among other things, "'A prosecutor may not comment on the lack of defense evidence because the defense has no duty to present evidence.'" *McCreven* at 470, citing *State v. Thorgerson*, 172 Wn.2d 438, 467, 258 P.3d 43 (2011). The Court said "[h]ere the prosecutor's misleading comments suggested that the codefendants must first prove self-defense to the *jury*, and that the State could not disprove the affirmative defense. This is not the law in Washington." *McCreven* at 471. This argument, again, improperly shifted the burden to the defense. *Id.* The Court concluded: "Because we hold that the self-defense jury instructions impermissibly lowered the State's burden to disprove self-defense, we cannot hold that the prosecutor's misstatements were harmless when viewed in the context of the entire case." *McCreven* at 471.

What occurred in *McCreven* bears no resemblance to what occurred in this case. The prosecutor in this case did not argue that the defendant was *not entitled* to argue self-defense, as the prosecutor did in *McCreven*, nor did she ever say that the defendant had presented "no evidence of self-defense," as the defendant claims in his brief. See Brief of Appellant at 20. She also never told the jury that it need not consider the claim of self-defense. *Id.* She simply never said that.

In this case, the prosecutor's argument, taken as a whole and in context, was that the defendant's assertions *were not credible*--not that the jury should disregard the court's instructions or that the defendant bore a burden of proof. Although the defendant was certainly entitled to present ostensibly inconsistent defenses (accident and self-defense), the prosecutor argued that in this case, under these facts, those defenses (even though they complemented one another in this case) were not credible. That the trial court initially ruled there was sufficient evidence of self-defense to warrant the instructions does not mean the prosecutor was not entitled to argue that the defendant's account lacked credibility. Could the prosecutor have spoken more articulately? Of course. In a perfect world, a closing argument would mirror the considered, labored and edited remarks that appear in appellate briefs. But that isn't the reality of closing argument. Trial prosecutors speak quickly and from their handwritten notes. They don't have a Westlaw screen in one hand and a verbatim report of proceedings in the other. Perfection is neither possible nor required. What is required is that the defendant receive a fair trial. Here, the defendant received a fair trial.

Even if the prosecutor's remarks were erroneous, they could not have affected the outcome of the case. The evidence disproving accident and self-defense was overwhelming. The defendant's own testimony was

that he was angry with the victim and went to the victim's house to confront him. He admitted to shooting the victim from a distance of at least four feet (not at close range) while the victim was sitting down. The State's evidence bore this out. This was a critical fact because if the shooting had occurred in the manner claimed by the defendant, it would have been at close range. The defendant's claim that the victim brought the gun was not credible because there was no other evidence of gun ownership in the victim's house. The State's evidence established that it was simply unbelievable that a man who maintains a gun in his home would have no ammunition beyond the ammunition in the gun, would have had no holster, and would have no cleaning equipment or other gun paraphernalia. Moreover, it was not believable that after being shot, the victim would tell the shooter to take the gun with him. Finally, the defendant's story made little sense. Beyond the fact that they were supposedly arguing over the victim keeping the defendant's name on a storage unit, the defendant offered no clear motive for the victim to shoot him. The victim, however, had a far more plausible account of why the defendant would want to shoot him--to penalize him for failure to pay a drug debt to a drug cartel.

Even if the prosecutor had committed misconduct in this case, the misconduct was could not have affected the jury's verdict. The defendant's conviction should be affirmed.

D. CONCLUSION

The defendant's conviction should be affirmed.

E. RESPONSE TO PERSONAL RESTRAINT PETITION

I. IDENTITY OF RESPONDENT

The State of Washington is the Respondent in this matter.

II. AUTHORITY FOR RESTRAINT

The defendant is restrained by the authority of the Clark County Judgment and Sentence under cause number 11-1-0115-1, sentencing him for assault in the first degree. See Appendix A.

III. STATEMENT OF THE CASE

Respondent incorporates the Statement of the Case from its responsive brief in the direct appeal for this personal restraint petition response. These personal restraint petitions under case number 42517-9 and case number 43569-1 have been consolidated. The response below is consolidated.

IV. ARGUMENT WHY PETITION SHOULD BE DISMISSED

A personal restraint petition is not a substitute for a direct appeal. *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982). A personal restraint petitioner must prove either a constitutional error that caused actual prejudice or a nonconstitutional error that caused a

complete miscarriage of justice. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). The petitioner must state the facts on which he bases his claim of unlawful restraint and describe the evidence available to support the allegations; conclusory allegations alone are insufficient. RAP 16.7(a)(2)(i); *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988); *In re Pers. Restraint of Stockwell*, 161 Wn.App. 329, 254 P.3d 899 (2011).

In evaluating personal restraint petitions, the Court can: (1) dismiss the petition if the petitioner fails to make a prima facie showing of constitutional or nonconstitutional error; (2) remand for a full hearing if the petitioner makes a prima facie showing but the merits of the contentions cannot be determined solely from the record; or (3) grant the personal restraint petition without further hearing if the petitioner has proven actual prejudice or a miscarriage of justice. *Cook*, 114 Wn.2d at 810-11; *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

Here, in petition #43517-9, the defendant argues two things: (1) That he received ineffective assistance of counsel for his counsel's failure to contact an alleged alibi witness; and (2) that he should have been provided with a "Cuban" interpreter.

But the defendant provides no facts on which he bases his petition. In a personal restraint petition, petitioner bears the burden of showing prejudicial error. *State v. Brune*, 45 Wn.App. 354, 363, 725 P.2d 454 (1986); *In re Pers. Restraint of Monschke*, 160 Wn.App. 479, 489, 251 P.3d 884 (2010). The petitioner must support the petition with the facts upon which the claim of unlawful restraint rests, and he may not rely solely on conclusory allegations. *Monschke*, supra, at 488; *In re Personal Restraint of Cook*, 114 Wn.2d 802, 813-14, 792 P.2d 506 (1990); RAP 16.7 (a) (2) (i). When the allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. *Monschke* at 488; *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). If the petitioner fails to make this threshold showing then he cannot bear his burden of showing prejudicial error. *Monschke*, supra, at 489.

The respondent cannot respond to a personal restraint petition that contains no facts. The defendant makes reference to an alibi witness, but doesn't say who it is. Also, the defendant testified *he was there*. Indeed, he was caught entering and leaving the home on a surveillance tape. There was no ineffective assistance of counsel.

As to his second claim, he cites no facts which would support his claim that he could not understand the certified Spanish interpreter that was provided to him. At no point in the proceedings did he complain, or indicate in any way, that he could not understand his interpreter. Nor did his attorney express such a concern. There are no facts available to support this claim and it must be dismissed.

In petition #43569-1 the defendant attached an affidavit to his petition which is largely conclusory and contains mostly legal argument with very little facts. He appears to argue that the evidence is insufficient because "the video shows clearly that there was no arm nor pistol and the fact is there was no gun before jury trial nor evidence to that nor defense counsel fail to call defense witnesses to present a better defense and better explanation to the jury." But the defendant is wrong. The surveillance video clearly showed him putting a gun into his waist band, and he admitted to the jury that he possessed a gun and shot the victim. The evidence was not insufficient. He again argues that his counsel was ineffective for failing to call witnesses, but he doesn't identify what these alleged witnesses would say. He names three people but doesn't say what they would testify to. The defendant repeatedly cites the "Brady Rule" but clearly has no idea what that is. He believes the "Brady Rule" applies where "the defense trial counsel did not provided [sic] all the witnesses."

There was no "Brady" violation here and the defendant makes no true assertion there was. In his brief in support of the petition the defendant talks about when he believes judges and lawyers have conflicts of interest, such as when they have lunch or coffee together. But he doesn't say that the lawyers and/or the judge in this case had lunch or coffee together. And he suggests that trial lawyers are unfair if they perform pro-bono work while part of a law firm. Again, Respondent is at a loss as to what this has to do with this case, and cannot respond to this. Last, the defendant complains that the jury was not instructed on a lesser included offense or degree, but he didn't ask for a lesser included instruction at trial. And he doesn't demonstrate that a lesser included or inferior degree instruction would have been required even if requested. This petition fails to make a prima facie showing of error and must be dismissed.

DATED this 19th day of March, 2013.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: Anne M. Cruser
ANNE M. CRUSER, WSBA #27944
Deputy Prosecuting Attorney

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C David Kurtz

S10

CCSO x 2

SCANNED

FILED

APR 27 2012

10:09

Scott G. Weber, Clerk, Clark Co.

Superior Court of Washington
County of Clark

State of Washington, Plaintiff,

vs.

REYCEL PEREZ-MARTINEZ, aka REYCEL MARTINEZ-PEREZ,
Defendant.

SID: _____
If no SID, use DOB: 5/16/1980

No. 11-1-01115-1 ✓

Felony Judgment and Sentence -- Prison (FJS) 12-9-02543-5

☒ **Clerk's Action Required, para 2.1, 4.1, 4.3, 5.2, 5.3, 5.5 and 5.7**
☐ **Defendant Used Motor Vehicle**
☐ **Juvenile Decline** ☐ **Mandatory** ☐ **Discretionary**

I. Hearing

1.1 The court conducted a sentencing hearing this date; the defendant, the defendant's lawyer, and the deputy prosecuting attorney were present.

II. Findings

There being no reason why judgment should not be pronounced, in accordance with the proceedings in this case, the court ***Finds:***

2.1 Current Offenses: The defendant is guilty of the following offenses, based upon
☐ guilty plea ☒ jury-verdict 3/16/2012 ☐ bench trial :

Count	*Crime*	*RCW (w/subsection)*	*Class*	*Date of Crime*
02	ASSAULT IN THE FIRST DEGREE	9A.36.011 / 9A.36.011(1)(a)	FA	6/28/2011

Class: FA (Felony-A), FB (Felony-B), FC (Felony-C)
(If the crime is a drug offense, include the type of drug in the second column.)
☐ Additional current offenses are attached in Appendix 2.1a.

The jury returned a special verdict or the court made a special finding with regard to the following:

☒ The defendant used a **firearm** in the commission of the offense in Count 02. RCW 9.94A.825, 9.94A.533.
☐ The defendant used a **deadly weapon other than a firearm** in committing the offense in Count _____. RCW 9.94A.825, 9.94A.533.
☐ For the crime(s) charged in Count(s) _____, domestic violence was pled and proved. RCW 10.99.020.
☐ Count _____, **Violation of the Uniform Controlled Substances Act (VUCSA)**, RCW 69.50.401 and RCW 69.50.435, took place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park,

129
AS

public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.

☐ The defendant committed a crime involving the manufacture of methamphetamine, including its salts, isomers, and salts of isomers, **when a juvenile was present in or upon the premises of manufacture** in Count _____. RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.

☐ Count _____ is a **criminal street gang**-related felony offense in which the defendant compensated, threatened, or solicited a **minor** in order to involve that minor in the commission of the offense. RCW 9.94A.833.

☐ Count _____ is the crime of **unlawful possession of a firearm** and the defendant was a **criminal street gang** member or associate when the defendant committed the crime. RCW 9.94A.702, 9.94A._____.

☐ The defendant committed ☐ **vehicular homicide** ☐ **vehicular assault** proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030.

☐ Count _____ involves **attempting to elude** a police vehicle and during the commission of the crime the defendant endangered one or more persons other than the defendant or the pursuing law enforcement officer. RCW 9.94A.834.

☐ Count _____ is a felony in the commission of which the defendant used a **motor vehicle**. RCW46.20.285.

☐ The defendant has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.

☐ For the crime(s) charged in Count _____ domestic violence was pled and proved. **RCW 10.99.020.**

☐ Counts _____ encompass the same criminal conduct and count as one crime in determining the offender score. RCW 9.94A.589.

☐ **Other current convictions listed under different cause numbers used in calculating the offender score are** (list offense and cause number):

	Crime	Cause Number	Court (county & state)
1.			

☐ Additional current convictions listed under different cause numbers used in calculating the offender score are attached in Appendix 2.1b.

2.2 Criminal History (RCW 9.94A.525):

	Crime	Date of Crime	Date of Sentence	Sentencing Court (County & State)	A or J Adult, Juv.	DV?*	Type
1	No known felony convictions						

*DV: Domestic Violence was pled and proved

☐ Additional criminal history is attached in Appendix 2.2.

☐ The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.

☐ The prior convictions for _____ are one offense for purposes of determining the offender score (RCW 9.94A.525)

☐ The prior convictions for _____ are not counted as points but as enhancements pursuant to RCW 46.61.520.

2.3 Sentencing Data:

Count No.	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus Enhancements*	Total Standard Range (including enhancements)	Maximum Term	Maximum Fine
02	0	XII	93 MONTHS to 123 MONTHS	(F) (60)	153 183	LIFE	$50,000.00

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present, (CSG) criminal street gang involving minor, (AE) endangerment while attempting to elude.

☐ Additional current offense sentencing data is attached in Appendix 2.3.

For violent offenses, most serious offenses, or armed offenders, recommended **sentencing agreements or plea agreements** are ☐ attached ☐ as follows: _____.

enhancement

2.4 ☒ Exceptional Sentence. The court finds substantial and compelling reasons that justify an exceptional sentence:

☐ below the standard range for Count(s) _____.

☐ above the standard range for Count(s) _____.

☐ The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

☒ Aggravating factors were ☐ stipulated by the defendant, ☐ found by the court after the defendant waived jury trial, ☒ found by jury, by special interrogatory.

☐ within the standard range for Count(s) _____, but served consecutively to Count(s) _____.

Findings of fact and conclusions of law are attached in Appendix 2.4. ☐ Jury's special interrogatory is attached. The Prosecuting Attorney ☐ did ☐ did not recommend a similar sentence.

2.5 Ability to Pay Legal Financial Obligations. The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds:

☐ That the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

☐ The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

_____.

☐ The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

III. Judgment

3.1 The defendant is ***guilty*** of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 ☐ The court ***dismisses*** Counts _____ in the charging document.

IV. Sentence and Order

It is ordered:

4.1 Confinement. The court sentences the defendant to total confinement as follows:

(a) ***Confinement***. RCW 9.94A.589. A term of total confinement in the custody of the Department of Corrections (DOC):

183 months on Count 02

☐ The confinement time on Count(s)_____ contain(s) a mandatory minimum term of _____.

☒ The confinement time on Count 02 includes 60 months as enhancement for ☒ firearm ☐ deadly weapon ☐ VUCSA in a protected zone
☐ manufacture of methamphetamine with juvenile present.

Actual number of months of total confinement ordered is: 42 102.

All counts shall be served concurrently, except for the portion of those counts for which there is an enhancement as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____.

The sentence herein shall run consecutively with any other sentence previously imposed in any other case, including other cases in District Court or Superior Court, unless otherwise specified herein: _____.

Confinement shall commence immediately unless otherwise set forth here: _____.

(b) ***Credit for Time Served***: The defendant shall receive 267 days credit for time served prior to sentencing for confinement that was solely under this cause number. RCW 9.94A.505. The jail shall compute earned early release credits (good time) pursuant to its policies and procedures

(c) ☐ ***Work Ethic Program***. RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic program. The court recommends that the defendant serve the sentence at a work ethic program. Upon completion of work ethic program, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions in Section 4.2. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of confinement.

4.2 Community Custody. (To determine which offenses are eligible for or required for community custody see RCW 9.94A.701)

(A) The defendant shall be on community custody for the longer of:

(1) the period of early release. RCW 9.94A.728(1)(2); or

(2) the period imposed by the court, as follows:

Count(s) 1 36 months for Serious Violent Offenses
Count(s) _____ 18 months for Violent Offenses
Count(s) _____ 12 months (for crimes against a person, drug offenses, or offenses involving the unlawful possession of a firearm by a street gang member or associate)

(B) While on community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while on community custody; (6) not own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; and (9) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706. The defendant's residence location and living arrangements are subject to the prior approval of DOC while on community custody.

The court orders that during the period of supervision the defendant shall:

☐ consume no alcohol.
☒ have no contact with: Eric Luna Claro
☐ remain ☐ within ☐ outside of a specified geographical boundary, to wit: _____.

☐ not serve in any paid or volunteer capacity where he or she has control or supervision of minors under 13 years of age.
☐ participate in the following crime-related treatment or counseling services:

_____.

☐ undergo an evaluation for treatment for ☐ domestic violence ☐ substance abuse ☐ mental health ☐ anger management, and fully comply with all recommended treatment. _____
☐ comply with the following crime-related prohibitions: _____

_____

_____.

☐ Additional conditions are imposed in Appendix 4.2, if attached or are as follows:

_____

_____

_____.

Court Ordered Treatment: If any court orders mental health or chemical dependency treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

4.3 Legal Financial Obligations: The defendant shall pay to the clerk of this court:

JASS CODE			
RTN/RJN	$18,959.71	Restitution to: CVCP ($18,959.71) (Name and Address--address may be withheld and provided confidentially to Clerk of the Court's office.)	
PCV	$ 500.00	Victim assessment	RCW 7.68.035
PDV	_____	Domestic Violence assessment	RCW 10.99.080
CRC	$_____	Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190	
		Criminal filing fee $ 200.00 FRC	
		Witness costs $_____ WFR	
		Sheriff service fees $_____ SFR/SFS/SFW/WRF	
		Jury demand fee $ 250.00 JFR	
		Extradition costs $_____ EXT	
		Other $_____	
PUB	$_____	Fees for court appointed attorney	RCW 9.94A.760
	$_____	Trial per diem, if applicable.	
WFR	$1,131.40	Court appointed defense expert and other defense costs	RCW 9.94A.760
	$_____	DUI fines, fees and assessments	
FCM/MTH	$ 500.00	Fine RCW 9A.20.021; ☐ VUCSA chapter 69.50 RCW, ☐ VUCSA additional fine deferred due to indigency RCW 69.50.430	
CDF/LDI/FCD NTF/SAD/SDI	$_____	Drug enforcement Fund # ☐ 1015 ☐ 1017 (TF)	RCW 9.94A.760
	$ 100.00	DNA collection fee	RCW 43.43.7541

CLF	$_____	Crime lab fee ☐ suspended due to indigency	RCW 43.43.690
FPV	$_____	Specialized forest products	RCW 76.48.140
RTN/RJN	$_____	Emergency response costs (Vehicular Assault, Vehicular Homicide, Felony DUI only, $1000 maximum)	RCW 38.52.430
	$_____	Other fines or costs for:_____	
	$_____	***Total***	RCW 9.94A.760

☐ The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

☒ shall be set by the prosecutor.

☐ is scheduled for_____(date).

☒ The defendant waives any right to be present at any restitution hearing (sign initials):_____.

☒ ***Restitution*** Schedule attached.

☐ Restitution ordered above shall be paid jointly and severally with:

RJN	**Name** of other defendant	**Cause Number**	Victim's name	Amount

The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than $_____ per month commencing_____. RCW 9.94A.760.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b).

☐ The court orders the defendant to pay costs of incarceration at the rate of $_____ per day, (actual costs not to exceed $100 per day). (*JLR*) RCW 9.94A.760.

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.4 DNA Testing. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

☐ ***HIV Testing***. The defendant shall submit to HIV testing. RCW 70.24.340.

4.5 No Contact:

☒ The defendant shall not have contact with ERIC OSCAR LUNA-CLARO including, but not limited to, personal, verbal, telephonic, written or contact through a third party for 100 years (which does not exceed the maximum statutory sentence).

☒ The defendant is excluded or prohibited from coming within:

☐ 500 feet ☐ 880 feet ☒ 1000 feet of:

☒ ERIC OSCAR LUNA-CLARO (name of protected person(s))'s

☒ home/ residence ☒ work place ☒ school

☐ (other location(s)) _____

☐ other location _____,

for _____ years (which does not exceed the maximum statutory sentence).

☐ A separate Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed concurrent with this Judgment and Sentence.

4.6 Other: _____

_____

_____

_____.

4.7 Off-Limits Order. (Known drug trafficker). RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections: _____

_____.

4.8 For Offenders on Community Custody, when there is reasonable cause to believe that the defendant has violated a condition or requirement of this sentence, the defendant shall allow, and the Department of Corrections is authorized to conduct, searches of the defendant's person, residence, automobile or other personal property. Residence searches shall include access, for the purpose of visual inspection, all areas of the residence in which the defendant lives or has exclusive/joint control/access and automobiles owned or possessed by the defendant.

4.9 If the defendant is removed/deported by the U.S. Immigration and Customs Enforcement, the Community Custody time is tolled during the time that the defendant is not reporting for supervision in the United States. The defendant shall not enter the United States without the knowledge and permission of the U.S. Immigration and Customs Enforcement. If the defendant re-enters the United States, he/she shall immediately report to the Department of Corrections if on community custody or the Clerk's Collections Unit, if not on Community Custody for supervision.

V. Notices and Signatures

5.1 Collateral Attack on Judgment. If you wish to petition or move for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, you must do so within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 Length of Supervision. If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 Notice of Income-Withholding Action. If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections (DOC) or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 Community Custody Violation.
(a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.633.
(b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.714.

5.5 Firearms. **You may not own, use or possess any firearm unless your right to do so is restored by a superior court in Washington State, and by a federal court if required. You must immediately surrender any concealed pistol license.** (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.6 Reserved

5.7 Motor Vehicle: If the court found that you used a motor vehicle in the commission of the offense, then the Department of Licensing will revoke your driver's license. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke your driver's license. RCW 46.20.285.

5.8 Other: _____.

5.9 Persistent Offense Notice

The crime(s) in count(s) 02 is/are "most serious offense(s)." Upon a third conviction of a "most serious offense", the court will be required to sentence the defendant as a persistent offender to life imprisonment without the possibility of early release of any kind, such as parole or community custody. RCW 9.94A.030, 9.94A.570

The crime(s) in count(s) _____ is/are one of the listed offenses in RCW 9.94A.030.(31)(b). Upon a second conviction of one of these listed offenses, the court will be required to sentence the defendant as a persistent offender to life imprisonment without the possibility of early release of any kind, such as parole or community custody.

Done in Open Court and in the presence of the defendant this date: April 27 2012.

Judge/Print Name:

Deputy Prosecuting Attorney	~~Attorney for Defendant~~	Defendant
WSBA No. 33835	WSBA No. 12452	Print Name:
Print Name: Camara L. Banfield	Print Name: David S. Kurtz	REYCEL PEREZ-MARTINEZ

Defendant refused to sign

Voting Rights Statement: I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

My right to vote is provisionally restored as long as I am not under the authority of DOC (not serving a sentence of confinement in the custody of DOC and not subject to community custody as defined in RCW 9.94A.030). I must re-register before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal financial obligations or an agreement for the payment of legal financial obligations

My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring

the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

Defendant's signature: Defendant refused to sign

I am a certified or registered interpreter, or the court has found me otherwise qualified to interpret, in the Spanish language, which the defendant understands. I interpreted this Judgment and Sentence for the defendant into that language.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is ture and correct.

Signed at Vancouver, Washington on (date): 4-27-12

Korinne O. Wells — Korinne O. Wells

Interpreter — Print Name

I, Scott G. Weber, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

Witness my hand and seal of the said Superior Court affixed this date: _____.

Clerk of the Court of said county and state, by: _____, Deputy Clerk

Identification of the Defendant

REYCEL PEREZ-MARTINEZ

11-1-01115-1

SID No: _____ Date of Birth: 5/16/1980
(If no SID take fingerprint card for State Patrol)

FBI No. Local ID No.

PCN No. _____ Other _____

Alias name, DOB: , aka REYCEL MARTINEZ-PEREZ, REYCEL MARTINEZ-PEREZ

Race: W **Ethnicity:** **Sex:** M

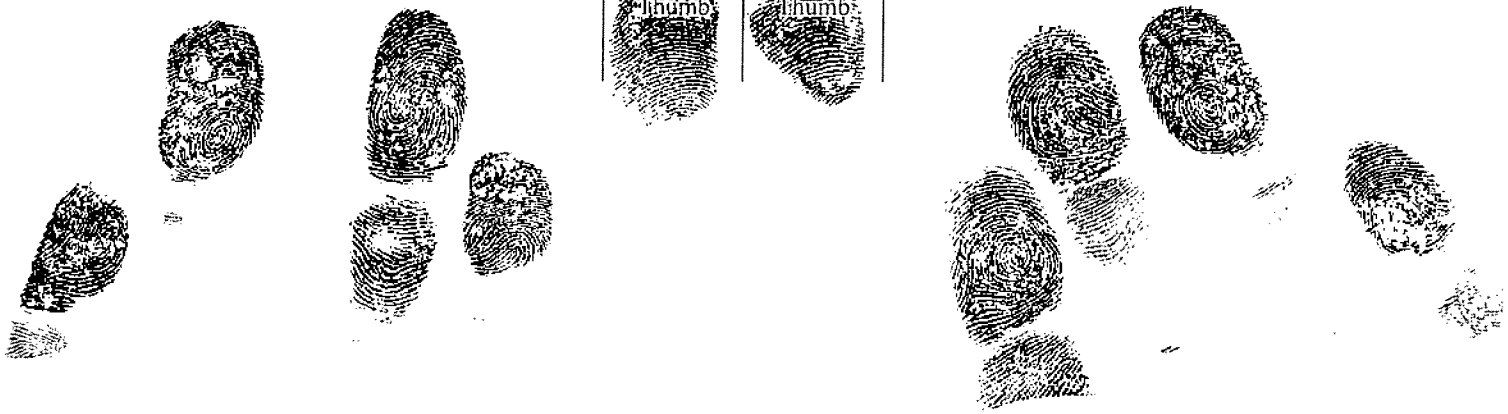
Fingerprints: I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto.

Clerk of the Court, Deputy Clerk, _____ Dated: 4-27-12

Seal of the Superior Court STATE OF WASHINGTON Of Clark County

The defendant's signature: Defendant refused to Sign

Left four fingers taken simultaneously | Left thumb | Right thumb | Right four fingers taken simultaneously



SUPERIOR COURT OF WASHINGTON - COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, v. REYCEL PEREZ-MARTINEZ, Defendant. SID: _____ DOB: 5/16/1980	NO. 11-1-01115-1 **WARRANT OF COMMITMENT TO STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS**

THE STATE OF WASHINGTON, to the Sheriff of Clark County, Washington, and the State of Washington, Department of Corrections, Officers in charge of correctional facilities of the State of Washington:

GREETING:

WHEREAS, the above-named defendant has been duly convicted in the Superior Court of the State of Washington of the County of Clark of the crime(s) of:

COUNT	CRIME	RCW	DATE OF CRIME
02	ASSAULT IN THE FIRST DEGREE	9A.36.011/9A.36.011(1)(a)	6/28/2011

and Judgment has been pronounced and the defendant has been sentenced to a term of imprisonment in such correctional institution under the supervision of the State of Washington, Department of Corrections, as shall be designated by the State of Washington, Department of Corrections pursuant to RCW 72.13, all of which appears of record; a certified copy of said judgment being endorsed hereon and made a part hereof,

NOW, THIS IS TO COMMAND YOU, said Sheriff, to detain the defendant until called for by the transportation officers of the State of Washington, Department of Corrections, authorized to conduct defendant to the appropriate facility, and this is to command you, said Superintendent of the appropriate facility to receive defendant from said officers for confinement, classification and placement in such correctional facilities under the supervision of the State of Washington, Department of Corrections, for a term of confinement of :

COUNT	CRIME	TERM
02	ASSAULT IN THE FIRST DEGREE	123 ~~Days~~/Months + 60 months enhancement = 183 months

These terms shall be served concurrently to each other unless specified herein:

The defendant has credit for 267 days served.

The term(s) of confinement (sentence) imposed herein shall be served consecutively to any other term of confinement (sentence) which the defendant may be sentenced to under any other cause in either District Court or Superior Court unless otherwise specified herein:

[redacted] his sentence has a 60 month firearm enhancement

And these presents shall be authority for the same.

HEREIN FAIL NOT.

WITNESS, Honorable [redacted]

JUDGE OF THE SUPERIOR COURT AND THE SEAL THEREOF THIS DATE: 4-27-12

SCOTT G. WEBER, Clerk of the
Clark County Superior Court

By: _____
Deputy

Seal of the Superior Court STATE OF WASHINGTON Of Clark County

CLARK COUNTY PROSECUTOR

March 19, 2013 - 2:56 PM

Transmittal Letter

Document Uploaded: 433842-Perez-Martinez, 43384-2 - Consolidated Brief of Respondent and Response to Personal Restraint Petiti.PDF

Case Name: State v. Reycel Perez-Martinez

Court of Appeals Case Number: 43384-2

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

■ Other: Consolidated Brief of Respondent and Response to Personal Restraint Petition

Comments:

(Consolidated)

Sender Name: Barbara L Melton - Email: **barbara.melton@clark.wa.gov**

A copy of this document has been emailed to the following addresses:
cathyglinski@wavecable.com