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No. 71532-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JORGE LIZARRAGA,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Lizarraga's rights under the Sixth and Fourteenth Amendments by prohibiting him from examining Detective Gee about a witness's report that a different person killed the victim.

2. The conviction on count one violated Mr. Lizarraga's right to a unanimous jury verdict guaranteed by article I, section 21 of the Washington Constitution.

3. The trial court violated Mr. Lizarraga's Fifth and Fourteenth Amendment rights by instructing the jury, over Mr. Lizarraga's objection, that a reasonable doubt is "one for which a reason exists."

4. The trial court erred by admitting unreliable fingerprint and ballistics "matching" evidence that is not generally accepted in the relevant scientific community.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Fourteenth Amendment guarantees the right to due process and the Sixth Amendment guarantees the rights to present a defense, to present favorable witnesses, and to cross-examine adverse witnesses. Only one witness identified Jorge Lizarraga as the shooter in this case. Another witness identified Hugo Vaca Valencia as the shooter, but that

witness was deported before trial without prior notice to defense counsel, and a material witness warrant was not properly executed. Did the trial court violate Mr. Lizarraga's Sixth and Fourteenth Amendment rights by denying his motion to examine the lead detective about this witness's identification of someone else as the shooter?

2. Article I, section 21 of the Washington Constitution guarantees the right to a unanimous jury verdict. Mr. Lizarraga was charged in count one with intentional murder and felony murder in the alternative. There was no special verdict form stating which crime the jury found the State proved beyond a reasonable doubt, and the jury was explicitly instructed that it did not have to agree that the State proved the elements of felony murder or intentional murder, so long as each juror thought the State proved the elements of at least one crime. Does the conviction on count one violate Mr. Lizarraga's right to a unanimous jury verdict, requiring reversal of the conviction on that count and remand for a new trial?

3. Telling a jury that it must provide a reason to acquit violates the Fifth Amendment right not to testify and the Fourteenth Amendment rights to the presumption of innocence and proof beyond a reasonable doubt. Over Mr. Lizarraga's objection, the trial court instructed the jury that a reasonable doubt is "one for which a reason exists." This is the portion of the instruction prosecutors have repeatedly relied on to violate

defendants' Fifth and Fourteenth Amendment rights, prompting this Court to reverse numerous convictions for prosecutorial misconduct. Did the trial court err in overruling Mr. Lizarraga's objection to this portion of the reasonable doubt instruction?

4. Scientific testimony is admissible only if (a) the witness qualifies as an expert, (b) the opinion is based upon an explanatory theory generally accepted in the relevant scientific community, and (c) the testimony will assist the trier of fact. Recent developments in forensic science, including the respected 2009 report of the National Academy of Sciences, show a significant dispute among forensic scientists regarding the scientific validity and reliability of latent fingerprint analysis and ballistics matching. Did the trial court err by denying a Frye hearing and denying Mr. Lizarraga's motions to exclude testimony that his fingerprints matched latent prints taken from the burglarized residence, and that shell casings were fired from the gun stolen from the residence?

C. STATEMENT OF THE CASE

On October 31, 2010 dozens of young people attended a Halloween party in Kent. RP (11/12/13) 55, 61. One of the attendees, Devin Topps, was a former high school football player who wore a

football uniform as a costume.[1] RP (11/12/13) 47-49. A group of young Hispanic men at the party made fun of Mr. Topps's costume, and a fight ensued. RP (11/12/13) 56; RP (11/19/13) 37-41. Although Mr. Topps was outnumbered, he was winning the fight because he was much bigger than the others. RP (11/12/13) 46, 79. While Mr. Topps was on top of one of the men he was fighting, another member of the pinned man's group shot Mr. Topps on the side of the back. RP (11/12/13) 154; RP (11/13/13) 66; RP (11/21/13) 163; RP (11/26/13) 57-58. Mr. Topps eventually died of his wound. RP (12/10/13) 172.

Most partygoers did not see the incident, and those who did provided conflicting descriptions of the shooter. RP (11/12/13) 169. Indeed, at least two witnesses said the shooter was wearing black while at least two others said the shooter was wearing white. RP (11/12/13) 100; RP (11/21/31) 120, 164; RP (11/26/13) 63.

Only two witnesses told police they could identify the shooter by name: one said the perpetrator was Jorge Lizarraga; the other said the perpetrator was Hugo Vaca Valencia. RP (11/12/13) 28; CP 368. A couple of months later, police found pictures of both of these young men holding the alleged murder weapon. RP (12/16/13) 34.

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[1] The transcripts and other portions of the record in this case alternately spell Mr. Topps's first name as "Devin" and "Devon". Counsel believes "Devin" is correct, but is not absolutely certain.

The State charged Jorge Lizarraga with second-degree intentional murder and second-degree felony murder, with assault as the underlying felony. CP 245. Mr. Lizarraga was also charged with burglary for a separate incident, as well as several firearms-related counts. CP 245-47.

The witness who said Hugo Vaca Valencia was the shooter was deported before trial, while the witness who identified Mr. Lizarraga as the perpetrator testified. RP (11/12/13) 28; CP 370. For the murder charge, the court instructed the jury it did not have to agree that the State proved the elements of felony murder beyond a reasonable doubt or that the State proved the elements of intentional murder beyond a reasonable doubt, so long as each juror believed one crime or the other was proved. CP 528-29. The trial court admitted fingerprint and ballistics "matching" evidence over Mr. Lizarraga's objection that this evidence was no longer generally accepted in the field of forensic science. CP 34-120; RP (10/10/13) 63-67; RP (10/21/13) 25-35; RP (12/12/13) 5-9.

Mr. Lizarraga was convicted of all counts as charged, and sentenced to 457 months in prison. CP 377-91.

D. ARGUMENT

1. **The trial court violated Mr. Lizarraga's rights under the Sixth and Fourteenth Amendments by prohibiting him from examining Detective Gee about a witness's report that a different person killed the victim.**

a. Witness Jonathan Cervantes told police the shooter was Hugo Vaca Valencia, but detectives did not follow up with Mr. Cervantes and the government did not prevent him from being deported, did not notify defense counsel that he would be deported, and did not execute the material witness warrant.

The issue in this case was the identity of the shooter. Although there were many people at the party where Devin Topps was killed, most people claimed not to have seen the shooting. RP (11/12/13) 169. Of those who did witness the incident, the descriptions of the perpetrator varied significantly. One described the shooter as the person wearing a black Northface jacket. RP (11/12/13) 100. Another agreed that the perpetrator was wearing "all black." RP (11/21/31) 120. A third stated the opposite – that the killer wore "a plain white shirt." RP (11/21/13) 164. Another witness also stated that the shooter wore white. RP (11/26/13) 63.

Only Marlit Vela told police (and the jury) that Jorge Lizarraga fired the fatal shots. RP (11/12/13) 28. Yet she said Mr. Lizarraga was wearing a white shirt under a long-sleeve blue and white striped shirt – which was not the attire others described as that of the killer. RP

(11/13/13) 92. Furthermore, Marlit Vela's good friend Vanessa Quiroz said that Mr. Lizarraga was wearing a white jacket that night. RP (12/3/13) 48.

Although Marlit Vela was the only one who identified Mr. Lizarraga as the shooter, one other witness did provide police with the name of the perpetrator. Less than two months after the incident, in December of 2010, Jonathan Cervantes told Detective Gee and the prosecutor that Hugo Vaca Valencia was the person who shot and killed Devin Topps. CP 368. Mr. Cervantes was in jail on assault charges, and the detective told Mr. Cervantes he could not make any promises to him about his own case in exchange for information. CP 368. Mr. Cervantes nevertheless told the detective and prosecutor what he saw, and named Hugo Vaca Valencia, not Jorge Lizarraga, as the perpetrator. CP 368-69.

Others also placed Mr. Vaca Valencia at the party that night, and described him as the person who started the fight. RP (11/13/13) 58-65. Consistent with Jonathan Cervantes's identification of Mr. Vaca Valencia as the shooter, one of the victim's best friends stated that the person who killed Mr. Topps was the person who started the fight – the one who had a scar on his face. RP (11/14/13) 29 (Hugo Vaca Valencia has a scar on his face); RP (11/26/13) 72 (Austin Daniels stated that person who started the

fight fired the shots); RP (11/25/13) 33 (Austin Daniels stated that person who fired the shots had a scar on his face).

Notwithstanding the critical nature of Mr. Cervantes's tip, the State did not follow up with Mr. Cervantes or ensure his presence for proceedings in this case. When Mr. Lizarraga's attorney attempted to interview Mr. Cervantes in January 2013, eleven months before trial, he was told Mr. Cervantes was at the Federal Detention Center. CP 369-70. However, when he and the prosecutor went to the facility to interview the witness, they were informed that he was no longer there. CP 370. Mr. Lizarraga's attorney attempted to locate Mr. Cervantes again in September, but the prosecutor told him Mr. Cervantes had been deported in July. CP 370. This was so even though the prosecutors could have obtained a stay of removal because Mr. Cervantes was a witness in a prosecution. 8 U.S.C. § 1231(c)(2)(A)(ii); 8 C.F.R. § 215.2; 8 C.F.R. § 215.3.

The prosecutor stated she understood that Mr. Cervantes was a "critical witness" for the defense. RP (10/3/13) 20. She was not concerned about his absence, though, because she thought that since he had family in the United States, he would likely try to return. She assured the court and counsel that Mr. Cervantes "would be fairly easy to find." RP (10/3/13) 20.

In early October, Mr. Lizarraga's attorney told the court that he still could not find Mr. Cervantes, despite having a Spanish-speaking investigator looking for him. He said, "Mr. Cervantes is important for us for the defense because he said to the police at or near the time of the shooting that he saw another person do the shooting, by name." RP (10/10/13) 49. On October 21, counsel updated the court, stating he still had been unable to track down Mr. Cervantes. RP (10/21/13) 51.

The next day, Mr. Lizarraga moved for and was granted a material witness warrant for Mr. Cervantes. CP 370; RP (10/22/13) 118-28; Supp. CP ___ (sub no. 126); Supp. CP ___ (sub no. 129). Defense counsel stated he did not know how to ensure that the warrant would get "into the electronic system so that the police [would] know about it." RP (10/22/13) 127. The clerk assured the judge and the parties, "I have a criminal department that I take all warrants to, and it's the same person every time, and he takes care and enters them all into the system." RP (10/22/13) 128. The court said, "So it will get taken care of as soon as I can sign it." RP (10/22/13) 128.

However, some administrative error occurred and law enforcement was not informed of the existence of the material witness warrant. CP 370. The warrant expired on December 10, 2013, and Mr. Cervantes was not produced for trial. CP 370.

Mr. Lizarraga accordingly moved for leave to examine Detective Gee about Jonathan Cervantes's identification of Hugo Vaca Valencia as the shooter. CP 368-70. Mr. Lizarraga noted that his constitutional rights to due process, to call witnesses in his behalf, and to present a defense must prevail over the state's hearsay rule. CP 369 (citing, inter alia, U.S. Const. amends. VI, XIV; Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006); Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)). The trial court nevertheless denied the motion on the basis that the statement did not fall within an exception to the rule against hearsay. RP (12/11/13) 103-14.

b. The trial court violated Mr. Lizarraga's rights under the Sixth and Fourteenth Amendments by denying his motion to examine Detective Gee about Jonathan Cervantes's identification of the shooter.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." State v. Franklin, 180 Wn.2d 371, 378, 325 P.3d 159 (2014) (quoting Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)). This right is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington Constitution. U.S. Const. amends. VI, XIV; Const. art. I, § 22; Rock v. Arkansas, 483 U.S. 44, 52,

107 S.Ct. 2704, 97 L.Ed.2d 37 (1987); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

This constitutional right may not be abrogated by statute or court rule. For example, the U.S. Supreme Court held that a defendant's Sixth Amendment right to have compulsory process for obtaining witnesses in his favor was violated by a rule prohibiting alleged accomplices from testifying for each other in criminal trials. Washington v. Texas, 388 U.S. at 23. The Court explained:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Id. at 19.

Our state supreme court similarly held that an evidentiary statute could not trump the defendant's Sixth Amendment rights in Jones, 168 Wn.2d at 7210. There, the defendant was accused of rape, and his defense was that the complainant consented to intercourse during a drug-fueled sex party, where she also had sex with two other men. Id. at 717. The trial court found that the defendant's evidence was offered for the purpose of

attacking the alleged victim's credibility, and was barred by the rape shield statute. Id. at 717-18. The Supreme Court reversed. Jones, 168 Wn.2d at 725. It held the statute did not bar the evidence, but that even if it did, Jones's constitutional right to present a defense would take precedence over the statute. Id. at 719-24.

The Court emphasized that "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Id. at 720 (quoting Chambers, 410 U.S. at 294). Thus, so long as a defendant's proffered evidence is minimally relevant, the trial court may not exclude it unless the State proves "the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." Jones, 168 Wn.2d at 720. For evidence of high probative value, "no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. I, § 22." Id. Following these rules, the Court held that because the proffered evidence regarding a consensual all-night sex party was "Jones's entire defense," the trial court violated the defendant's constitutional rights by excluding such evidence. Id. at 721.

The same is true here. Mr. Lizarraga's defense was that he was not the shooter. RP (11/12/13) 32-36. The eyewitnesses provided descriptions of the shooter that directly conflicted, with at least two saying

the shooter wore black while at least two others said he was wearing white. Only one witness identified Jorge Lizarraga as the shooter. Jonathan Cervantes identified Hugo Vaca Valencia as the shooter, and the exclusion of this evidence violated Mr. Lizarraga's rights to due process and to present a defense under the Sixth and Fourteenth Amendments.

Furthermore, Mr. Lizarraga's proposed remedy of introducing Mr. Cervantes's statement through the detective was a less drastic remedy than the usual sanction for loss of a material witness. Generally, the remedy for the State's failure to preserve material, exculpatory evidence is dismissal of the charge. See People v. Valencia, 218 Cal.App.3d 808, 267 Cal.Rptr. 257 (1990) (applying United States v. Valenzuela-Bernal, 458 U.S. 858, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1981) and affirming dismissal of a charge where witness who made material, exculpatory statement was deported without prior notice to the defense). If the trial court was disinclined to permit Mr. Lizarraga to examine Detective Gee about Jonathan Cervantes's identification of someone else as the shooter, it should have dismissed the charge altogether.

The Supreme Court explained the rules regarding the deportation of witnesses in Valenzuela-Bernal, supra. There, the defendant was detained for failing to stop at a Border Patrol checkpoint. Valenzuela-Bernal, 458 U.S. at 861. All three of his passengers told authorities that

that they were in the country illegally and that the defendant, Valenzuela-Bernal, was their driver. Id. Mr. Valenzuela-Bernal was charged with transporting an illegal alien. Prior to trial, two of the passengers were deported to Mexico, while the third was retained as a witness. The defendant moved to dismiss the indictment on the ground that the deportation of these witnesses violated his rights to due process and to compulsory process for obtaining favorable witnesses. Id.

The Supreme Court ruled that the defendant's constitutional rights were not violated by the removal of these witnesses because their statements were not exculpatory. The Court held that to establish a Sixth Amendment violation based on the deportation of witnesses, a defendant must "make some plausible showing of how their testimony would have been both material and favorable to his defense." Valenzuela-Bernal, 458 U.S. at 867.

The Court held that the rules under the Due Process Clause are similar, and that "at least the same materiality requirement obtains" with respect to that constitutional provision. Id. at 872. "Due process guarantees that a criminal defendant will be treated with that fundamental fairness essential to the very concept of justice." Id. (internal citation omitted). The Court reasoned that notions of fundamental fairness are not

offended by the deportation of witnesses "unless there is some explanation of how their testimony would have been favorable and material." Id.

As noted above, the California appellate court properly applied the rules of Valenzuela-Bernal in affirming the dismissal of a charge in People v. Valencia, 218 Ca.App.3d at 810-11. There, police officers found drugs and a gun at a house where multiple people lived. Id. at 811. Two of the inhabitants, Jose Valencia and Benjamin Alcala, were charged with crimes. Id. at 812. An officer's report indicated that Alcala said the gun in question belonged to Ricardo Avila. Nevertheless, the State charged Valencia with illegal possession of the firearm, along with other counts. Meanwhile, Alcala was deported to Mexico without prior notice to Valencia's attorney. Id. at 812.

The trial court granted Valencia's motion to dismiss all charges, and the appellate court affirmed the dismissal as to the firearm charge. The court recognized that the question is whether the defendant made "a plausible showing that the testimony of the deported [witness] would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses." Id. at 825 (quoting Valenzuela-Bernal, 458 U.S. at 867). The court held the defendant met his burden under the "material and favorable" standard by showing that the deported witness told the officer that a person other than Valencia owned the gun.

Id. at 826-27. Because the prosecutor knew of this statement, yet failed to give Valencia advance notice of Alcala's deportation, dismissal of the charge was required. Id. at 827.

Valencia is on point and dismissal of the murder charge would have been an appropriate remedy. But at a minimum, the trial court should have granted the less severe sanction proposed by Mr. Lizarraga, and allowed him to examine Detective Gee about Jonathan Cervantes's identification of Hugo Vaca Valencia as the shooter.

A recent Ninth Circuit case is also instructive. See United States v. Leal-Del Carmen, 697 F.3d 964 (9th Cir. 2012). There, officers arrested the defendant on suspicion of alien smuggling. As part of their investigation, they interviewed at least four illegal aliens found in the same area. Id. at 967-68. One witness repeatedly told investigators that Leal-Del Carmen was not the leader of the group. This witness was deported, while three others were retained for trial. Id. at 968. Defense counsel moved to dismiss the indictment or in the alternative to admit the witness's statement to police, but the motions were denied and the defendant was convicted of three counts of bringing in illegal aliens without presentation. Id. at 969.

The Court of Appeals reversed. It noted, "[w]hether grounded in the Sixth Amendment's guarantee of compulsory process or in the more

general Fifth Amendment guarantee of due process, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense."[2] Leal-Del Carmen, 697 F.3d at 969. The Court applied a two-part test derived from Valenzuela-Bernal to determine whether the deportation of a witness constitutes a constitutional violation. First, the defendant must show that the government acted in bad faith. This phrase does not necessarily mean ill will; it means "[t]here is no violation where the executive has made a 'good-faith determination' that the alien-witness possesses no evidence that might exculpate the defendant." Id. at 970 (quoting Valenzuela-Bernal, 458 U.S. at 872-73). Second, the defendant must demonstrate that deportation of the witness prejudiced his case. "To prevail under the prejudice prong, the defendant must at least make 'a plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses.'" Leal-Del Carmen, 697 F.3d. at 970 (quoting Valenzuela-Bernal, 458 U.S. at 873).

The Court held the defendant met both prongs of the test. As to the first prong, the government had interviewed the witness and knew she had favorable testimony to give.

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[2] In state cases, of course, it is the Fourteenth Amendment's due process clause that applies. U.S. Const. amend. XIV.

> Once the government is aware that an alien has potentially exculpatory evidence, it must treat that person as a material witness and give defense counsel the opportunity to interview him and make a reasoned determination whether to seek his retention pending trial. ... If defense counsel advises the government that the witness may be useful to the defense, he may not be deported until defense counsel indicates he is no longer needed.

Id. (emphasis added). As to the second prong, the deported witness's testimony was material, favorable, and not cumulative. The crime required proof that the defendant was the leader of the group, but the deported witness told police that the defendant was not the one "giving orders." Id. at 971-72.

The Ninth Circuit accordingly held that the trial court should have either dismissed the charges or applied the less severe alternative remedy proposed by the defense: the admission of the witness's statements to police. Id. at 972-976. Because the government could not prove the constitutional error was harmless beyond a reasonable doubt, reversal was required. Id. at 975-76.

This Court should hold the same is true in this case. As in Leal-Del Carmen and Valencia, the government was well aware of the material, exculpatory nature of Jonathan Cervantes's testimony before he was deported. Indeed, the prosecutor acknowledged on the record that Mr. Cervantes was a "critical witness" for the defense. RP (10/3/13) 20. "If

defense counsel advises the government that the witness may be useful to the defense, he may not be deported until defense counsel indicates he is no longer needed." Leal-Del Carmen, 697 F.3d. at 970. Furthermore, the deportation of Jonathan Cervantes prejudiced Mr. Lizarraga, because Mr. Cervantes identified Hugo Vaca Valencia as the shooter. "It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense." State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974).

Finally, even if this Court disagrees that Mr. Cervantes's identification of another person as the shooter should have been admitted for its truth, at the very least it should be admissible to show the investigation was incomplete. See Alvarez v. Ercole, 763 F.3d 223 (2d Cir. 2014). In Alvarez, the defendant was charged with various crimes including a homicide, and he sought to cross-examine the lead detective to show that the police had not investigated a witness's tip that someone else committed the crimes. Id. at 225. The trial court denied the motion on hearsay grounds, but the Second Circuit ultimately granted a new trial, even under the highly deferential standard of review applicable to habeas proceedings. Id. The court noted that the cross-examination would have been proper "to show that the NYPD's incomplete investigation indicated

that the NYPD had prematurely concluded that Alvarez was the guilty party, and in that way to raise a reasonable doubt that Alvarez was in fact responsible." Id. at 230. The Second Circuit explained that the state trial court's rulings "entirely precluded Alvarez from fleshing out his main defense theory: that the police investigation into the murder was flawed and had improperly disregarded a promising alternate suspect." Id. at 232. The court emphasized that "state evidentiary rules 'may not be applied mechanistically to defeat the ends of justice' where the result is the exclusion of 'testimony ... critical to [the] defense.'" Alvarez, 763 F.3d at 232 (quoting Chambers v. Mississippi, 410 U.S. at 302).

Here, as in Alvarez, Chambers, and Jones, state evidentiary rules were applied mechanistically to defeat the ends of justice and exclude testimony critical to the defense. An eyewitness with material, favorable evidence was deported without prior notice to the defense, yet Mr. Lizarraga was not permitted to examine Detective Gee about the witness's statements. The exclusion of this key evidence violated Mr. Lizarraga's rights under the Sixth and Fourteenth Amendments.

c. The remedy is reversal of the conviction on count one.

Constitutional errors require reversal unless the State can prove beyond a reasonable doubt that the error did not contribute to the verdict.

Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The State cannot meet this heavy burden here. Indeed, the improper exclusion of Jonathan Cervantes's identification of Hugo Vaca Valencia as the shooter was prejudicial under any standard.

Both Mr. Lizarraga and Hugo Vaca Valencia were at the party and both were in the area of the shooting at the time of the shooting. RP (11/13/13) 58-66. As noted above, only one witness, Marlit Vela, identified Mr. Lizarraga as the shooter. RP (11/13/13) 65-66. Other witness gave conflicting accounts of the killer's clothing. RP (11/12/13) 100 (black jacket); RP (11/21/31) 120 ("all black"); RP (11/21/13) 164 ("plain white shirt"); RP (11/26/13) 63 (white).

An acquaintance of Hugo Vaca Valencia's described him as Hispanic, around 5'10, of average weight, with black hair and a scar on his face. RP (11/14/13) 29. One of the decedent's best friends said the shooter was a Mexican male, 5'9 or 5'10, and had a tattoo or scar on his face. RP (11/25/13) 33.

Furthermore, the same circumstantial evidence that applied to Mr. Lizarraga also applied to Mr. Vaca Valencia. Each of them told Carmen Lizarraga not to tell police he was at the party. Thus, Carmen initially told investigators that Jorge Lizarraga was not at the party, and provided a false name for Hugo Vaca Valencia – calling him "Carlos." RP (12/2/13)

8-9, 12, 18, 60-72, 86, 108, 111-12. Additionally, police found pictures of both Hugo Vaca Valencia and Mr. Lizarraga holding the alleged murder weapon after the crime. RP (12/16/13) 34.

Under these circumstances, the State cannot come close to proving beyond a reasonable doubt that the violation of Mr. Lizarraga's Sixth and Fourteenth Amendment rights was harmless. The remedy is reversal of the conviction on count one, and remand for a new trial or dismissal of the charge. See Jones, 168 Wn.2d at 724-25; Leal-Del Carmen, 697 F.3d at 976.

2. The conviction on count one violated Mr. Lizarraga's right to a unanimous jury guaranteed by article I, section 21 of the Washington Constitution.

a. The to-convict instruction on count one expressly told the jury it did not have to agree unanimously that Mr. Lizarraga committed either felony murder or intentional murder.

The State charged Mr. Lizarraga with both second-degree intentional murder and second-degree felony murder, alleging:

> That the defendant Jorge Luis Lizarraga in King County, Washington, on or about October 31, 2010, while committing and attempting to commit the crime of Assault in the Second Degree, and in the course of and in furtherance of said crime and in the immediate flight therefrom, and with intent to cause the death of another person, did cause the death of Devin Topps, a human being, who was not a participant in said crime, and who died on or about October 31, 2010;

Contrary to RCW 9A.32.050(1)(a), (b), and against the peace and dignity of the State of Washington.

CP 245 (Third Amended Information).

Mr. Lizarraga proposed definitional and to-convict instructions for count one that tracked the language of the third amended information. CP 262, 264. The defense proposed to-convict instruction read:

> To convict the defendant of the crime of murder in the second degree as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about October 31, 2010, defendant committed Assault in the Second Degree;
>
> (2) That Devin Topps was not a participant in the crime of Assault in the Second Degree;
>
> (3) That the defendant caused the death of Devin Topps in the course of and in furtherance of the crime of Assault in the Second Degree;
>
> (4) That the defendant acted with intent to cause the death of Devin Topps;
>
> (5) That Devin Topps died as a result of defendant's acts; and
>
> (6) That any of these acts occurred in the State of Washington.
>
> To return a verdict of guilty to count 1 as charged, you must unanimously find that each of these elements has been proved beyond a reasonable doubt.
>
> If, after weighing all of the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty as to this count.

CP 264.

Defense counsel also proposed a concluding instruction containing the standard admonition that, "[b]ecause this is a criminal case, each of you must agree for you to return a verdict." CP 282.

The State, on the other hand, proposed a to-convict instruction for count one which not only framed intentional murder and felony murder as alternatives, but expressly told the jury it could find Mr. Lizarraga guilty even if it did not unanimously agree that the State proved the elements of one crime or the other. RP (12/12/13) 169-70. The court gave the State's proposed instruction over Mr. Lizarraga's objection. RP (12/12/13) 171-72. The instruction read:

> To convict the defendant of the crime of Murder in the Second Degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> **Intentional Murder**:
>
> (1) That on or about October 31, 2010,
>
> (a) The defendant acted with intent to cause the death of Devin Topps;
>
> (b) That Devin Topps died as a result of defendant's acts; and
>
> (c) That any of these acts occurred in the State of Washington.
>
> **OR**
>
> **Felony Murder**:
>
> (2) That on or about October 31, 2010,
>
> (a) The defendant committed or was attempting to commit Assault in the Second Degree;
>
> (b) That the defendant caused the death of Devin Topps in the course of and in furtherance of such crime;

(c) That Devin Topps was not a participant in the commission or attempted commission of the crime of Assault in the Second Degree; and
(d) That any of these acts occurred in the State of Washington.

If you find from the evidence that either elements (1)(a), (b), and (c) have been proved beyond a reasonable doubt or that elements (2)(a), (b), (c), and (d) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count I. *To return a verdict of guilty, the jury need not be unanimous as to which alternative, (1) or (2), has been proved beyond a reasonable doubt, as long as each juror finds that all of the elements in at least one alternative have been proved beyond a reasonable doubt.*

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to at least one element in (1)(a)(b) and (c) and at least one element in (2)(a)(b)(c) and (d), then it will be your duty to return a verdict of not guilty as to Count I.

CP 528-29 (italics added).

The jury returned a general verdict of guilty on count one. CP 383.

b. The conviction on count one violated Mr. Lizarraga's state constitutional right to a unanimous verdict.

Article I, section 21 guarantees criminal defendants the right to a unanimous jury verdict. Const. art. I, § 21; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). This right includes the right to unanimity on the means by which the defendant committed the crime. State v. Green, 94 Wn.2d 216, 232-33, 616 P.2d 628 (1980). Where an alternative means crime is alleged, the preferred practice is to provide a

special verdict form and instruct the jury that it must unanimously agree as to which alternative means the State proved. State v. Whitney, 108 Wn.2d 506, 511, 739 P.2d 1150 (1987). If the jury does not provide a particularized expression of unanimity through a special verdict form, a reviewing court must be able to "infer that the jury rested its decision on a unanimous finding as to the means" in order to affirm. Ortega-Martinez, 124 Wn.2d at 707-08.

Here, the Court cannot conclude that the jury rested its decision on a unanimous finding as to the means. Not only did the court fail to provide a special verdict form and fail to instruct the jury that it must unanimously agree as to which alternative means the State proved, it affirmatively told the jury it did not have to be unanimous. This instruction violated Mr. Lizarraga's right to unanimity under article I, section 21, and prevents this Court from being able to infer that the jury rested its decision on a unanimous finding as to the means. Accordingly, this Court should reverse the conviction on count one and remand for a new trial.

c. Washington courts should clarify that because due process and unanimity are separate rights, the fact that the State presented sufficient evidence does not cure the violation of the constitutional right to a unanimous jury.

The State may argue that because it presented sufficient evidence to survive a due process challenge as to both alternative means, this Court should affirm. The State would find support for this argument in Ortega-Martinez, 124 Wn.2d at 707-08. However, it is generally understood that the assumption on which this rule is based is flawed. The Court in Ortega-Martinez reasoned:

> If the evidence is sufficient to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction because we infer that the jury rested its decision on a unanimous finding as to the means.

Id.

There are two problems with this presumption: First, it makes no sense unless the jury is told that it must be unanimous as to the means. Under such circumstances, a reviewing court could presume that the jury was unanimous as to the means even without a special verdict form, because juries are presumed to follow instructions.[3] See State v. Lamar,

[3] The only problem in such a situation would be that if there were insufficient evidence as to one of the means, and no special verdict form showed that the jury agreed on the means for which there was sufficient

180 Wn. 2d 576, 586, 327 P.3d 46 (2014). But if the jury is not told it must be unanimous as to the means, then the fact that sufficient evidence is presented as to both means logically makes it less likely that the jury unanimously agreed as to the means.[4] Unanimity is certainly unlikely where, as here, the jury is explicitly told it need not be unanimous as to which alternative the State proved.

The second problem with the presumption is that it conflates the due process right to sufficiency of the evidence with the state constitutional right to a unanimous jury. These are separately guaranteed rights, and the fact that one right is honored does not mean the other can be ignored. The right to a unanimous jury is the right to unanimity on the necessary elements of the offense, and the elements of felony murder are different from the elements of intentional murder. See State v. Franco, 96 Wn.2d 816, 830-38, 639 P.2d 1320 (1982) (Utter, J., dissenting). Thus,

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evidence, then issues would exist implicating not only the right to unanimity, but also the right to due process and the right to appeal. But if there were sufficient evidence as to both means, and the jury was instructed that it had to be unanimous as to the means, there would be no reversible error. Thus, in the absence of a special verdict form, a reviewing court may affirm only where (1) the jury is instructed it must be unanimous as to which alternative was committed; and (2) sufficient evidence is presented of both (or all) alternatives.

[4] The King County deputy prosecutor arguing before the Supreme Court in State v. Sandholm, no. 90246-1, agreed that the presumption discussed in this portion of Ortega-Martinez is illogical. http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2014110002 at ~ 38:48-39:00.

"unanimity with respect to at least one of the theories by which the crime may be committed remains the minimum constitutional requirement for conviction." Id. at 838 n.4.

Cases from other states are informative. In an Oregon case, a defendant was charged with two alternative means of committing aggravated murder, and, as in Mr. Lizarraga's case, the court instructed the jury that it did not have to agree on which alternative was committed:

> "With regard to this charge, it is not necessary for all jurors to agree on the manner in which Aggravated Murder was committed. That is, some jurors may find that it was committed during the course of and in furtherance of Robbery in the First Degree, and others may find it was committed to conceal a crime or its perpetrator. Any combination of twelve jurors agreeing that one or the other or both occurs is sufficient to establish this offense."

State v. Boots, 308 Or. 371, 374-75, 780 P.2d 725 (1989) (quoting instruction).

The jury convicted the defendant of aggravated murder, but the Oregon Supreme Court reversed, holding the state constitutional guarantee of unanimity was violated. The court explained that it is obvious the jury must agree on all of the elements of the crime if only one alternative or the other is charged. Id. at 377. Accordingly, it "should be no less obvious when the state charges a defendant both under [one subsection of the statute] and under [another]." Id. "In order to convict, the jury must

unanimously agree on the facts required by either subsection. Indeed, they may agree on both, if both are proved beyond a reasonable doubt." Id. Because the jury was wrongly told it did not have to be unanimous as to either alternative, reversal and remand for a new trial was required, with no discussion of sufficiency of the evidence. Boots, 308 Or. at 381.

The Massachusetts Supreme Court has held that the common law provides a right to unanimity on the means of committing an alternative means crime. Commonwealth v. Berry, 420 Mass. 95, 112, 648 N.E.2d 732 (1995). Berry was somewhat similar to this case; it involved a charge of first-degree murder, where the alternative methods alleged were premeditated murder and felony murder. Id. at 111-12. Although the trial court did not affirmatively instruct the jury it need not be unanimous (as it did in this case and Boots), it denied the defendant's request to instruct the jury that it had to be unanimous as to the means. The state supreme court affirmed not because there was sufficient evidence to satisfy a due process challenge, but because it was clear on the record that, despite the absence of the instruction, the jury was unanimous as to felony murder. Id. at 112. The court held that, "hereafter, as a matter of common law, when requested, a judge should give an instruction to the jury that they must agree unanimously on the theory of culpability where the defendant has been charged with murder in the first degree." Id.

A Michigan case is also instructive. See People v. Olsson, 56 Mich. App. 500, 224 N.W.2d 691 (1974). There, the defendant was charged with first degree murder by the alternative means of premeditation and felony murder. The Court of Appeals ruled that the evidence of felony murder was insufficient, and that the trial court accordingly erred by instructing the jury on that alternative. Id. at 504. Furthermore, because there was only a general verdict form and the jury did not indicate upon which theory it relied, reversal was required because the Court of Appeals could not "conclusively state" that the jury relied upon the alternative supported by sufficient evidence. Id. at 505. Apart from the insufficiency of the evidence, the court held the jury instructions "did not adequately inform the jury of their duty to make a unanimous finding as to whether defendant was guilty of premeditated murder or murder in the perpetration of a felony." Id. at 506. This failure to ensure unanimity constituted an independent error:

> We agree with defendant that on the basis of these instructions, it is possible that the jury arrived at a compromise verdict, that is, some members may have felt that defendant was guilty beyond a reasonable doubt of murder in the perpetration of a robbery or larceny while the remaining members may have felt that defendant was guilty beyond a reasonable doubt of premeditated murder. Such a verdict would not be unanimous and could not convict defendant.

Olsson, 56 Mich. App. at 506. Other states similarly enforce their unanimity requirements independent of the sufficiency of the evidence. E.g., State v. Saunders, 992 P.2d 951, 968 (Utah 1999); Probst v. State, 547 A.2d 114, 121 (Del. 1988).

In sum, Mr. Lizarraga has a constitutional right to a verdict in which all 12 jurors agree on the elements of the crime that were proven beyond a reasonable doubt. The verdict in this case does not satisfy this constitutional requirement.

d. The remedy is reversal of the conviction on count one and remand for a new trial.

Because there was no special verdict form showing all 12 jurors unanimously agreed that the State proved all of the elements of either felony murder, intentional murder, or both, reversal is required unless this Court can nevertheless infer the jury was unanimous as to the means. The Court cannot make this inference because the jury was specifically instructed it did not have to be unanimous as to whether the State proved the elements of felony murder or the elements of intentional murder. The remedy is reversal and remand for a new trial on count one.

3. The trial court violated Mr. Lizarraga's Fifth and Fourteenth Amendment rights by instructing the jury that a reasonable doubt is "a doubt for which a reason exists."

a. Mr. Lizarraga proposed an instruction without the "doubt for which a reason exists" language.

Consistent with caselaw, Mr. Lizarraga proposed an instruction for reasonable doubt and the presumption of innocence which omitted the portion of WPIC 4.01 describing a reasonable doubt as a doubt "for which a reason exists." CP 253. The defense proposed the following:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 253.

Counsel explained that he omitted the phrase "for which a reason exists" because it undermines the presumption of innocence and invites improper burden-shifting, as discussed in numerous prosecutorial misconduct cases. RP (12/11/13) 135-36. The court indicated that it was familiar with the cases in which this Court had reversed convictions because Pierce County prosecutors had used this part of the instruction to argue that jurors had to "fill in the blank with a reason" in order to acquit. RP (12/11/13) 136. But the judge stated that he trusted the prosecutors in this case would not commit misconduct based on the instruction. RP (12/11/13) 137.

Defense counsel pointed out that even if the prosecutors did not shift the burden, the State's proposed instruction invited the jury to shift the burden, and that is why the expression "for which a reason exists" should be omitted. RP (12/11/13) 137. The judge reiterated that he understood the argument but would give the State's proposed instruction anyway, over Mr. Lizarraga's objection. RP (12/11/13) 137.

b. The trial court erred in giving the State's proposed instruction, because this Court and the Supreme Court have made clear that requiring the jury to provide a reason for doubting the State's case constitutes improper burden-shifting and punishment for the exercise of the right to silence.

This Court should reverse and hold that the "for which a reason exists" language should be omitted from the reasonable doubt instruction, in order to protect defendants' Fifth and Fourteenth Amendment rights. The Fifth Amendment guarantees the right not to testify, and the Due Process Clause of the Fourteenth Amendment promises a presumption of innocence and places the burden of proof on the prosecutor. U.S. Const. amends. V, XIV; Michigan v. Tucker, 417 U.S. 433, 440-41, 94 S. Ct. 2357, 41 L. Ed. 2d 182 (1974); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Coffin v. United States, 156 U.S. 432, 453, 15 S.Ct. 394 (1895). Both of these provisions are offended by language implying that the defendant must provide a reason to acquit. State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996).

It is well-settled that prosecutors commit misconduct by telling jurors they must be able to explain a reason for doubting the State's case. State v. Emery, 174 Wn.2d 741, 759-60, 278 P.3d 653 (2012); State v. Johnson, 158 Wn. App. 677, 684, 243 P.3d 936 (2010); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). Yet, the prosecutors'

improper "fill in the blank" argument was not made in a vacuum; it was based on the portion of the jury instruction to which Mr. Lizarraga objected.

When making the improper argument, the prosecutors were explaining the instruction to the jury. For example, in Johnson, the prosecutor said:

> What that [the reasonable doubt instruction] says is "a doubt for which a reason exists." In order to find the defendant not guilty, you have to say, "I doubt the defendant is guilty and my reason is … ." To be able to find reason to doubt, you have to fill in the blank; that's your job.

Johnson, 158 Wn. App. at 682. Similarly, in Anderson, the prosecutor stated:

> A reasonable doubt is one for which a reason exists. That means, in order to find the defendant not guilty, you have to say "I don't believe the defendant is guilty because," and then you have to fill in the blank. It is not something made up. It is something real, with a reason to it.

Anderson, 153 Wn. App. at 424.

In this case, the prosecutor made a similar argument – despite promising not to – presumably because the instruction invites the argument. She said, "In order to find him not guilty, … you must have a reasonable doubt to at least one element in each alternative." The prosecutor made this statement notwithstanding that "Washington has long

recognized the 'in order to find the defendant not guilty' argument as flagrant and ill-intentioned." Anderson, 153 Wn. App. at 433 (Quinn-Brintnall, J., concurring in result).

Thus, it is the jury instruction itself which invites the improper burden-shifting and punishment for failure to testify. This is even worse than a prosecutor violating a defendant's constitutional rights, because juries are instructed that counsel's arguments are not the law and that the law is provided by the court's instructions. See Anderson, 153 Wn. App. at 426; CP 510. When a court instructs a jury that a reasonable doubt is "one for which a reason exists," the jury is led to believe it must acquit unless it finds a reason to doubt the State's case. Because this inference undermines the presumption of innocence, shifts the burden of proof, and punishes the failure to testify, this Court should hold that this portion of the "reasonable doubt" instruction is unconstitutional and should be stricken from WPIC 4.01.

4. The trial court erred by admitting unreliable fingerprint and ballistics "matching" evidence that is not generally accepted in the relevant scientific community.

Mr. Lizarraga moved to exclude latent fingerprint identification and ballistics matching evidence, and he requested a Frye hearing to address whether the fingerprint "matching" analysis continues to be

accepted in the scientific community. CP 34-120; RP (10/10/13) 63-67; RP (10/21/13) 25-35; RP (12/12/13) 5-9. Mr. Lizarraga argued that the State's witnesses should be permitted to point out similarities in fingerprint features or ballistics markings, but should not be permitted to claim there were any scientific "matches". RP (10/21/13) 25-35; CP 118-20.

Mr. Lizarraga's motion was based upon criticism of such analyses found in the 2009 report prepared by the prestigious National Research Council (NRC) of the National Academy of Science. In addressing latent fingerprint analysis, the NRC concluded that the ACE-V method used in this case has not been "rigorously shown to have the capacity to consistently and with a high degree of accuracy, demonstrate a connection between evidence and a specific individual or source." National Research Council of the National Academy of Sciences, Strengthening Forensic Science in the United States: A Path Forward 7 (2009) (hereafter 2009 NRC Report).[5] Similarly, "[t]he validity of the fundamental assumptions of uniqueness and reproducibility of firearms-related toolmarks has not yet been fully demonstrated." Id. at 154.

[5] Available at www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf (last viewed 12/5/14).

The court denied both motions. RP (10/21/13) 29-31, 34-35. The court acknowledged that the study was performed by "a very impressive and reputable organization," and was "very interesting to read." RP (10/21/13) 30. The court nevertheless ruled that the report did not constitute "sufficient new evidence which seriously questions the continued general acceptance of latent print evidence." The judge said, "Washington courts have long held that latent print evidence does meet the Frye standard and is admissible." RP (10/21/13) 30. The court similarly stated, "ballistics testing ... has long been held to be generally accepted in the scientific community." RP (10/21/13) 34.

a. Admission of fingerprint and ballistics evidence must satisfy reliability standards under *Frye v. United States*.

"Trial courts perform an important gate keeping function when determining the admissibility of evidence. Anderson v. Akzo Nobel Coatings, Inc., 172 Wn.2d 593, 600, 260 P.3d 857 (2011). The admissibility of expert testimony in Washington is generally governed by ER 702.[6] Id. Washington courts apply the Frye standard in determining

[6] ER 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by

the reliability and admissibility of scientific evidence. Anderson, 172 Wn.2d at 602; State v. Copeland, 130 Wn.2d 244, 255-60, 922 P.2d 1304 (1996); see Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). Frye directs courts to apply certain criteria in assessing the reliability and admissibility of expert testimony. Evidence based on a scientific theory or principle must have "achieved general acceptance in the relevant scientific community" before it is admissible at trial. State v. Gentry, 125 Wn.2d 570, 585, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995); accord Frye, 293 F. at 1014. "[T]he core concern . . . is only whether the evidence being offered is based on established scientific methodology." State v. Cauthron, 120 Wn.2d 879, 889, 846 P.2d 502 (1993). "Unreliable evidence is not helpful to the jury." Anderson, 172 Wn.2d at 601.

The admissibility of evidence under Frye is subject to de novo review. Anderson, 172 Wn.2d at 600 (Copeland, 130 Wn.2d at 255-56).

b. Changes in scientific opinion may necessitate a *Frye* hearing despite past acceptance of the procedure.

Frye hearings are unnecessary when a scientific practice has been previously found to be generally accepted in the scientific community. State v. Russell, 125 Wn.2d 24, 69, 882 P.2d 747 (1994), cert. denied, 514

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knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

U.S. 1129 (1995). However, general acceptance may change over time, and the Frye admissibility determination must take into account any recent changes in the perceived reliability of the instrument or theory in question. State v. Kunze, 97 Wn. App. 832, 853, 988 P.2d 977 (1999), rev. denied, 140 Wn.2d 1022 (2000); Blackwell v. Wyeth, 408 Md. 575, 971 A.2d 235, 243 (2009) (Maryland utilizes Frye test in determining if a theory which had met the Frye standard in the past continues to do so). General acceptability is not satisfied "if there is a significant dispute between qualified experts as to the validity of scientific evidence." Kunze, 97 Wn. App. at 853 (citing Cauthron, 120 Wn.2d at 887).

This Court recently upheld a trial court's refusal to conduct a Frye hearing for fingerprint comparison evidence using the ACE-V method in State v. Pigott, 181 Wn. App. 247, 325 P.3d 247 (2014). According to the Pigott Court, "once the scientific community accepts a methodology, application of the methodology to a particular case is matter of weight and admissibility under ER 702." Pigott, 181 Wn. App. at 249. The court also noted that "the reliability of fingerprint identification has been tested in our adversarial system for over a century and routinely subjected to peer review." Id. at 251. Scientific opinion, however, is not static, and courts are capable of responding to fundamental shifts in what the scientific community generally accepts.

Fingerprint comparison evidence was introduced in the early 1900's, when standards for admitting scientific evidence were considerably lower. Jennifer L. Mnookin, Fingerprint Evidence in an Age of DNA Profiling, 67 Brook. L. Rev. 13, 32 (Fall 2001). "Courts began admitting fingerprint evidence early last century with relatively little scrutiny, and later courts, relying on precedent, simply followed along." United States v. Crisp, 324 F.3d 261, 277 (4th Cir. 2003) (Michael, J., dissenting). As the 2009 NRC Report observed, "[o]ver the years, courts have admitted fingerprint evidence, even though the evidence has made its way into the courtroom without empirical validation of the underlying theory and/or its particular application." 2009 NRC Report at 102 (quotation and citation omitted).

The 2009 NRC Report and the other authorities cited by Mr. Lizarraga show that the scientific community's faith in the scientific underpinnings and methodology of fingerprint comparison analysis has significantly changed. Mr. Lizarraga demonstrated that acceptance of latent fingerprint identification as a science is crumbling and a Frye hearing was required.

c. The 2009 NRC Report is representative of the relevant scientific community for purposes of *Frye*.

In evaluating the admissibility of expert testimony, courts consider whether the underlying scientific theory or methodology is "generally accepted in the scientific community." State v. Gregory, 158 Wn.2d 759, 829, 147 P.3d 1201 (2006), overruled on other grounds by State v. W.R., ___ Wn.2d ___, 336 P.3d 1134 (2014). The relevant scientific community includes "the community of scientists familiar with the challenged theory." Russell, 125 Wn.2d at 41. The Michigan Supreme Court defined the relevant scientific community as "scientists not technicians . . . with direct empirical experience with the procedure in question." People v. Young, 425 Mich. 470, 481, 391 N.W. 2d 270 (1986); accord People v. Brown, 40 Cal.3d 512, 530, 726 P.2d 516 (1985) ("The witness must have academic and professional credential which equip him to understand both the scientific principles involved and any difference of view on their reliability."), reversed on other grounds, 479 U.S. 538 (1987); Ramirez v. State, 810 So.2d 836, 851 (Fa. 2001) ("[G]eneral scientific recognition requires the testimony of impartial experts or scientists. It is this independent impartial proof of general scientific acceptability that provides the necessary Frye foundation."). The testimony of technicians, like the witnesses in this case, is not sufficient to establish the technique's

validity. Paul C. Giannelli, The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later, 80 Col. L. Rev. 1197, 1214-15 (1980).

In preparing its report, the NRC convened the relevant scholars, forensic scientists, and experts who are qualified to evaluate latent fingerprint examinations and ballistics. 2009 NRC Report at 2, 307. Committee members included people with long careers in forensic science laboratories as well as academicians and authors. Id. The Committee reviewed published materials, studies and reports, engaged in independent research, and heard testimony from experts. Id. Latent fingerprint examiners, representatives of the International Association for Identification (IAI), the chair of the International Association for Identification, Firearm/Toolmark Committee, and representatives of major forensic science organizations and crime labs were among those providing testimony. Id. at xi-xii, 304, 305, 307. The report was also reviewed by a group of experts "chosen for their diverse perspective and technical expertise. Id. at xii-xiii.

The United State Supreme Court relied upon the 2009 NRC report for the point that serious deficiencies have been found in the forensic evidence used in criminal trials and "to refute any suggestion that this category of evidence is uniquely reliable." Melendez-Diaz v.

Massachusetts, 557 U.S. 305, 318-20, 319 n.6, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). The Melendez-Diaz Court also cited to the report's discussion of "problems with subjectivity, bias, and unreliability of common forensic tests such as latent fingerprint analysis, pattern/ impression analysis, and toolmark and firearms analysis." Id. at 320-21. Washington has recognized the conclusions of the NRC regarding the reliability of other scientific methodologies. See Gregory, 158 Wn.2d at 833; Copeland, 130 Wn.2d at 262; Cauthron, 120 Wn.2d at 885. This Court should accept the NRC report's conclusions as representative of the relevant forensic scientific community for purposes of evaluating the reliability of fingerprint and ballistics comparison analysis.

d. Professionals substantially debate the validity of ballistics matching, fingerprint comparisons, and the ACE-V methodology.

"[T]he accuracy of latent print identification has been subject to intense debate." Simon Cole, More than Zero: Accounting for Error in Latent Fingerprint Identification, 95 J. Crim. L. & Criminology 985, 986 (Spring 2005). In its summary assessment of fingerprint analysis, the NR report pointed out the "limited information about the accuracy and reliability of friction ridge analyses." 2009 NRC Report at 142. For example, a 2002 article points out a complete lack of testing in the field: "the reality is that the fingerprint community has never conducted any

scientific testing to validate the premises upon which the field is based." Robert Epstein, Fingerprints Meet Daubert: The Myth of Fingerprint "Science" is Revealed, 75 So. Cal. L. Rev. 605, 622 (2002).

The article describes the only published study testing the premise that "fingerprint examiners can make reliable identifications from the type of small distorted latent fingerprint fragments that are typically detected at crime scenes." Epstein, at 622. This study, commissioned by Scotland Yard, was "an utter embarrassment to the fingerprint community." Id. The results showed wide variation among experienced fingerprint examiners, who disagreed on (a) how many points of comparison were necessary to match prints and (b) whether identifications could even be properly effectuated in the sample pairs used (examiners were almost evenly split on this issue on at least one sample pair). Id. at 623. As the Scotland Yard-commissioned researchers concluded, "[t]he variation [in the responses] confirms the subjective nature of points of comparison." Id.

The 2009 NRC Report also pointed out the ACE-V method used by fingerprint examiners lacks scientific validity:

> ACE-V provides a broadly stated framework for conducting friction ridge analyses. However, this framework is not specific enough to qualify as a validated method for this type of analysis. ACE-V does not guard against bias; is too broad to ensure repeatability and

> transparency; and does not guarantee that two analysts following it will obtain the same results. For these reasons, merely following the steps of ACE-V does not imply that one is proceeding in a scientific manner or producing reliable results. A recent paper by Haber and Haber presents a thorough analysis of the ACE-V method and its scientific validity. Their conclusion is unambiguous: "We have reviewed available scientific evidence of the validity of the ACE-V method and found none."

2009 NRC Report at 142-43 (citing J.L. Mnookin, The Validity of Latent Fingerprint Identification: Confession of a Fingerprinting Moderate, Law, Probability and Risk 7:127 (2008)). The report further quotes from researchers' findings that latent print examiners' conclusions differ at each stage of the ACE-V method, their descriptions of the method differ, and the profession has no accepted protocol. Id. at 143. "As a consequence, at this time the validity of the ACE-V method cannot be tested." Id.

In addition, the NRC report found no scientific support for the underpinning of forensic fingerprint identification – the conclusion that all fingerprints are unique and permanent. 2009 NRC Report at 143-44; see 2/27/13 RP 83; Michael J. Saks, Merlin and Solomon: Lessons from the Law's Formative Encounters with Forensic Science Identification, 49 Hastings L. J. 1069, 1105-06 (1998) (finding basic premises of fingerprint science untested by conventional means); Epstein, supra n.2, at 623 ("no testing has been conducted to determine the probability of two different people having a number of fingerprint ridge characteristics in common").

Yet the State's latent print examiner was permitted to testify to the contrary, stating, "The reason why we're able to use fingerprints to make identifications or exclusions is because they've determined over decades and decades that fingerprints are permanent, meaning they don't change over the course of your life, and because they're unique." RP (11/14/13) 98. She claimed, "there have been trillions of fingerprint comparisons over the hundred years, and never once has two fingerprints been found to be alike." RP (11/14/13) 100.

The same fallacy exists for ballistics. "A significant amount of research would be needed to scientifically determine the degree to which firearms-related toolmarks are unique or even to quantitatively characterize the probability of uniqueness." 2009 NRC Report at 154 (citing National Research Council. 2008. *Ballistic Imaging*. Washington, DC:The National Academies Press, p. 3). Yet the State's ballistics expert testified that the cartridge casings entered as exhibits 57, 58, 59, 60, 61, 62, 64, 65, and 66 were all fired from the gun entered as exhibit 39, and did not say these casings could have been fired by any other gun. She also testified that the bullet presented as exhibit 63 was chambered in the gun entered as exhibit 39. RP (12/12/13) 55-58.

In sum, the relevant scientific community is not in agreement that latent fingerprint analysis or ballistics matching are scientifically based or

that they produce reliable results. The trial court should have granted Mr. Lizarraga's motion to exclude this evidence, or held a Frye hearing.

e. The remedy is reversal of the convictions on counts one, three, and four, and remand for a new trial.

In Sipin, this Court engaged in harmless error review subsequent to determining that simulation evidence using a particular computer program, which was admitted at defendant's trial, was inadmissible under Frye. State v. Sipin, 130 Wn. App. 403, 420, 123 P.3d 862 (2005). Thus, that defendant had to show that "the outcome of the trial might reasonably have been different if the trial court had excluded the challenged evidence." Sipin, 130 Wn. App. at 421. Because absent the unreliable computer simulation, both the State and the defendant produced persuasive identity evidence, the outcome of the trial might reasonably have been different if the computer simulation evidence had been excluded. Id.

In Kunze, supra, on the other hand, Division Two of this Court did not engage in harmless error review. It found simply that the admission of evidence not generally accepted in the scientific community required reversal of defendant's conviction and remand for a new trial. 97 Wn. App. at 857.

Even under harmless error review, reversal is required in this case for counts one, three, and four. Although the errors may not have affected the other charges, the unreliable fingerprint and ballistics evidence definitely contributed to the convictions for murder, burglary, and theft of the H&K .40 caliber handgun. The error in admitting the evidence cannot be said to be harmless as to those counts.

Without the latent fingerprint evidence, the State could not place Mr. Lizarraga in the Keays' dwelling and thus could not prove an essential element of residential burglary. For the same reason, it could not prove Mr. Lizarraga was guilty of theft of the H&K. And absent the improper ballistics matching evidence, the State could not show that the cartridge casings came from this particular gun. The fingerprint testimony also provided circumstantial evidence connecting Mr. Lizarraga to the murder. The State relied heavily on both the fingerprint and ballistics testimony in closing, even claiming to the jury that the science was "uncontested." RP (12/16/13) 30-32, 114-16. Consequently, the admission of the unreliable evidence affected the jury verdict and was not harmless as to counts one, three, and four. This Court should reverse and remand for a new trial on those counts.

E. CONCLUSION

Mr. Lizarraga asks this Court to reverse his convictions and remand for a new trial.

Respectfully submitted this 12th day of December, 2014.

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Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON, Respondent, v. JORGE LIZARRAGA, Appellant.	)))))))))	NO. 71532-1-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF DECEMBER, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 12TH DAY OF DECEMBER, 2014.

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