71532-1

NO. 71532-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JORGE LIZARRAGA,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE PATRICK OISHI

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The defendant sought to admit an out-of-court statement of witness/declarant Jonathan Cervantes, even though Cervantes did not testify at trial and no hearsay exception applied. Did the trial court abuse its discretion in denying the defendant's request to admit the statement?

2. The United States Supreme Court and the Washington State Supreme Court have both ruled that jurors must unanimously agree that the charged crime has been committed, but that jurors need not be unanimous as to the means. Has the defendant shown that these cases are "incorrect and harmful," the standard required to overturn precedent?

3. The Supreme Court has held that the language of WPIC 4.01 defining "reasonable doubt," provides an accurate statement of the law. Has the defendant shown that this holding is "incorrect and harmful"?

4. In determining the admissibility of evidence based upon novel scientific theories or methods, Washington courts employ the "general acceptance" standard set forth in Frye v. United States.[1] Should this Court find that the defendant waived any claim that ballistics evidence does not meet the Frye standard? And, consistent with State v. Pigott,[2] should this

[1] 293 F. 1013 (D.C. Cir. 1923).

[2] 181 Wn. App. 247, 325 P.3d 247 (2014).

Court reject the defendant's claim that the court was required to hold a Frye hearing before admitting fingerprint evidence?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was charged with second-degree murder with a firearm enhancement, two counts of first-degree unlawful possession of a firearm, residential burglary, theft of a firearm and possession of a stolen firearm. CP 245-47. A jury found the defendant guilty as charged. CP 77-83. With a myriad of other felony convictions, the defendant received a standard range sentence of 457 months. CP 384-93.

2. SUBSTANTIVE FACTS

On October 27, 2010, Washington State Patrol Trooper Jason Keays' house was burglarized. 11/19/13 RP 19-37, 46-70. The burglar made entry by moving a plastic lawn chair up against the house and climbing through a window. 11/19/13 RP 23, 25, 29. Latent prints were lifted from the scene. 11/19/13 RP 28, 91, 100-03; 11/19/13 RP 3-4 (afternoon session).

Among items taken were Keays' old service weapon, a Heckler & Koch .40 caliber semiautomatic handgun and some .40 caliber ammunition. 11/19/13 RP 68-71. The gun's magazine had a 15 round capacity and was stamped "law enforcement." 11/19/13 RP 71. Four days

later, Keays' gun was used to murder Devin Topps. 11/19/13 RP 73; 12/12/13 RP 54-56.

Topps was an 18-year-old graduate of Kentridge High School. 11/12/13 RP 46. On the night of October 31, 2010, Topps was shot in the back at a Halloween party and died at the scene. 11/12/13 RP 46, 173-74; 11/13/14 RP 16-17. The bullet entered Topps' mid-back, fractured two ribs, pierced his lung, and exited through his chest. 12/10/13 RP 163-65. The shot was a contact wound, meaning that the muzzle of the gun was pressed up against Topps' back when the shot was fired. 12/10/13 RP 169. The gases emitted from the gun barrel burned an impression of the gun muzzle into Topps' back. 12/11/13 RP 49-53.

Eight .40 caliber shell casings and one unfired .40 caliber bullet were found on the ground. 11/20/13 RP 40, 58. No other casings or bullets were found. 11/20/13 RP 46, 58; 11/21/13 RP 86, 90. All of the casings and the unfired bullet were found at the end of the driveway where the party was located. 11/20/13 RP 46.

A week later, George Frans' home was burglarized. 12/9/13 RP 41. Among items taken was a Smith & Wesson handgun. 12/9/13 RP 42-44.

On December 21, 2010, detectives acting on a tip staked out the King's Arms Motel looking for the defendant. 12/4/13 RP 134-37; 12/5/13 RP 31. Detectives observed a number of individuals enter a

suspect vehicle, but when the car was stopped by patrol officers, only one person remained in the car. 12/4/13 RP 138-40. This person provided information about the vehicle the defendant was now travelling. 12/4/13 RP 93-94, 140. However, when officers tried to stop that vehicle, the defendant fled on foot. 12/4/13 RP 96, 141, 143. Shortly thereafter, he was spotted at a 7/11 store and taken into custody. 12/4/13 RP 143-46.

The defendant was not wearing a jacket despite the inclement weather, and his jeans were wet from the knees down. 12/5/13 RP 16, 20. He had in his possession a cell phone, an ID card in the name of Jorge Brambila, and a room key for the King's Arms Motel. 12/4/13 RP 149, 151, 152, 156. When asked if he was Jorge Lizarraga, he lied and claimed to be Jorge Brambila. 12/10/13 RP 26-27.

Detectives searched the defendant's motel room. 12/5/13 RP 31. Hidden under the dresser in the bedroom were Trooper Keays' stolen Heckler & Koch and Frans' stolen Smith & Wesson, along with a great deal of ammunition. 11/20/13 RP 118; 12/5/13 RP 34-35, 47-48, 71-78, 110-14; 12/9/13 RP 44-45. The Heckler & Koch had seven bullets remaining in the magazine, consistent with a 15 round clip having been fired eight times (an additional bullet can be loaded in the chamber of the gun and would be ejected unfired if the gun is racked before the trigger is pulled). 12/5/13 RP 73-74.

The shell casings recovered from the murder scene were compared to a casing from a test bullet fired through Trooper Keays' gun. 11/21/13 RP 27-33; 12/12/13 RP 54-56. Each casing was consistent with having been fired from Keays' gun. 12/12/13 RP 54-56. The markings on the unfired bullet found at the scene were consistent with having been cycled through the gun. 11/21/13 RP 31; 12/12/13 RP 57-58. The muzzle imprint burned into Topps' back was consistent with the shape and design of Trooper Keays' gun. 12/12/13 RP 66. On the defendant's phone was a photograph of himself holding Trooper Keays' stolen firearm. 12/4/13 RP 86-88; 12/12/13 RP 74, 76-78.

The latent prints lifted from Trooper Keays' home were examined by Cheri Mahar, a print examiner with over 15 years' experience. 11/14/13 RP 91-92. A fingerprint and a palm print lifted from the lawn chair that had been placed against the house identified to the defendant. 11/14/13 RP 147; 11/19/13 RP 102-03. A fingerprint lifted from a money jar that had been moved during the burglary identified to the defendant. 11/14/13 RP 147; 11/19/14 RP 3-4 (afternoon session).

By stipulation, the jury was informed that the defendant had previously been convicted of a "serious offense." 12/12/13 RP 158.

The testimony of Topps' fellow party attendees varied as to the specifics of the shooting, and none of them could identify the defendant

and his entourage who had crashed the party. 11/12/13 RP 56-57, 70-71; 11/13/14 RP 43, 45. What is clear is that Topps was unarmed and was confronted by members of the defendant's group at the end of the driveway, that the group apparently disparaged Topps for wearing a football uniform to the party, and that a physical fight broke out at which point a Hispanic male fired a number of shots into the air and then shot Topps in the back. 11/12/13 RP 56-57, 72-75, 79; 11/19/13 RP 36-39 (afternoon session); 11/21/13 RP 106, 113-20, 151-52, 163-64. Luckily, detectives were able to track down some of the members of the defendant's group.

Samuel Lizarraga, the defendant's cousin, arrived at the party with his sister, Carmen, and ex-girlfriend, Elizabeth, in a silver Pontiac. 11/25/13 RP 80-83. After the shooting, Samuel was stopped by a patrol officer as he tried to walk away from the scene. 11/25/13 RP 97-102, 105; 11/26/13 RP 27-28. Samuel lied and told the officer that he had not heard anything and that he had just been dropped off and was looking for his girlfriend. 11/25/13 RP 153, 180; 11/26/13 RP 38, 42.

Samuel admitted at trial, and phone records showed, that he received a text message from the defendant just before he was stopped by the police. 11/25/13 RP 144-46. The text message read "Don't say anything to the cops. You don't know anything." 11/25/13 RP 145-46.

At trial, Samuel admitted that he said nothing about the defendant being present at the party until detectives confronted him with the information from his cell phone. 11/25/13 RP 154-56. He then told detectives that the defendant had been at the party with his friend, David, but that the defendant had left the party prior to the shooting. 11/25/13 RP 91-93, 157. At trial, he confessed that the defendant had left after the shooting. 11/25/13 RP 157. He claimed, however, that he did not see the shooting, that he only heard the shots. 11/25/13 RP 144-46.

Like Samuel, Carmen Lizarraga testified that she too did not see the shooting; that she was inside the garage with Samuel and Elizabeth when she heard the shots being fired. 11/26/13 RP 109-10. She admitted to fleeing the scene with Hugo Valencia and a person named Christoso. 11/26/13 RP 116. A few hours later, detectives contacted Carmen and told her that Samuel was in custody and that she needed to come to the precinct and talk with them. 11/26/13 RP 128. Before going to the precinct, however, Carmen had a conversation with the defendant. 11/26/13 RP 56. The defendant instructed her to say that she had not seen or talked to him. 11/26/13 RP 60, 64. She admitted at trial that she lied when she told detectives that the defendant had not been at the party. 11/26/13 RP 70-73.

Marlit Vela is a 22-year-old medical assistant. 11/13/13 RP 41-42. She is friends with some of the defendant's friends, including David and

Valencia, and she had seen the defendant on three or four prior occasions. 11/13/13 RP 47, 50-52, 91.

Marlit testified how she was part of a circle of the defendant's friends at the end of the driveway when Topps walked through, that something was said to him that triggered an argument and a physical fight between Hugo Valencia and Topps. 11/13/13 RP 43-44, 54-58. Marlit then saw the defendant shoot into the air a few times and then walk up to Topps and shoot him in the back. 11/13/13 RP 44, 66. She was no more than ten feet away when the defendant shot Topps. 11/13/13 RP 67.

Marlit testified that after shooting Topps, the defendant fired more shots into the air as everyone fled. 11/13/13 RP 70, 72. Marlit never saw Valencia or anyone else with a gun. 11/13/13 RP 86. Although initially she could not recall the defendant's name, Marlit picked him out of a photo montage as the person she saw shoot Topps. 11/13/13 RP 101-03; 11/14/13 RP 9-10, 32. She confirmed her identification in court. 11/14/13 RP 88. Unlike the friends of the defendant, Marlit's statements to the police were consistent with her testimony. 11/14/13 RP 81-82, 87.

At the time of the murder, the defendant was living with Marjorie Kramer at the King's Arms Motel. 12/5/13 RP 155-57. She and the defendant shared the bedroom, while David and a person named Eduardo shared the front room. 12/5/13 RP 157-60. Kramer testified that a week

prior to the defendant's arrest, he showed her a KOMO 4 News video of the shooting and said that was why they needed to change their cell phone numbers. 12/5/13 RP 167.

Kramer testified that on the day of the defendant's arrest, they were driving to the motel when the defendant noticed undercover officers following them. 12/5/13 RP 162. When they were able to get out of sight of the officers, they abandoned the vehicle and fled on foot. 12/5/13 RP 163. Kramer testified that as they were running, the defendant said that he had to get rid of the gun because it was going to get traced back to him. 12/4/13 RP 163. Later, after Eduardo came and picked them up, they were stopped by the police and the defendant fled on foot. 12/4/13 RP 165.

Prior to trial, the defendant was housed in the jail with Gerardo Ortiz. 12/10/13 RP 85. Although Ortiz was a reluctant witness, he admitted that the defendant told him that he had shot Topps. 12/10/13 RP 100. The defendant told Ortiz that he had stolen the gun from a police officer's house and that it was in his motel room. 12/10/13 RP 105-06.

The defendant did not testify. Additional facts are included in the sections below they pertain.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY REJECTED THE DEFENDANT'S REQUEST TO ADMIT AN OUT-OF-COURT STATEMENT THAT MET NO HEARSAY RULE EXCEPTION

The defendant contends that the State violated his right to due process and right to compulsory process, and that as a sanction, the trial court should have allowed him to admit an out-of-court statement that did not meet any hearsay exception. Specifically, he claims that a statement made by a jail inmate (Jonathan Cervantes), who sought and failed to obtain a deal to provide information that Hugo Valencia shot Topps, and who was later deported, should have been admitted by the trial court. The defendant's claim is without merit. His right to due process and right to compulsory process were not violated. The trial court did not abuse its discretion in denying the request to admit the out-of-court statement of Jonathan Cervantes.

a. The Facts Regarding Jonathan Cervantes

Devin Topps was murdered on October 31, 2010. CP 8. No one was immediately charged with his killing.

On December 14, 2010, Federal Agent J. Bianche contacted Kent Detectives saying that a person he had arrested, Cervantes, supposedly had information about Topps' murder. Trial Exhibit 148. Cervantes is a gang

member with a "significant" and "violent" criminal history who was facing prison time on an assault charge. 10/10/13 RP 20-21; 12/11/13 RP 106, 108-09; Trial Exhibit 148. Cervantes told detectives that he would not provide any information unless he got a deal. 12/11/13 RP 106. Detectives told Cervantes "no," but that they would contact the prosecutor on Topps' case. 12/11/13 RP 106.

On December 17, 2010, prosecutor Jessica Berliner accompanied detectives to the jail to meet with Cervantes. 12/11/13 RP 106. Cervantes was told that no promises would be made for his cooperation other than letting the people who were handling his assault case know that he was trying to be helpful. 12/11/13 RP 106. Cervantes refused to be sworn or to provide a taped statement. 12/11/13 RP 107. Cervantes was willing to provide only a limited amount of information, information that was found not to be reliable. 12/11/13 RP 107.[3]

Cervantes told detectives that Valencia and Topps were in a fight when Valencia pulled out a gun and shot Topps. Trial Exhibit 148. He

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[3] To support his claim that Valencia shot Topps, the defendant asserts that there was a photo on his phone that showed Valencia holding Trooper Keays' gun. Def. br. at 4. This is incorrect. The defendant does not cite to the evidence presented at trial in making this claim, rather, he cites to closing argument. Id. (citing 12/16/13 RP 34). Along with not being evidence -- the statement in closing argument appears to be either a misstatement by the prosecutor or a transcription error. The only evidence presented at trial shows that the other photo (besides the one showing the defendant holding Keays' gun) shows a person named Angel Rulio holding the gun. 12/5/13 RP 177.

Additionally, the defendant relates that some of the witnesses believed the shooter had a scar on his face, and that Valencia has such a scar. Def. br. at 7. What he omits is the fact that he too was identified as having a scar on his face. 11/13/13 RP 101.

did not know where on his body Topps was shot, or whether Valencia was on top of Topps or under Topps when the shot was fired. Id. Cervantes said two other people also fired shots, a black male friend of Topps, and from an area where "Chistoso" was standing. Id.

Four days later, on December 21, 2010, a cohort of the defendant, Luis Garcia, disclosed that the defendant showed him a gun and bragged about having "shot some fool" at a party. CP 4. He believed the gun was a Glock that had "law enforcement" stamped on it. Id. Garcia said that the gun was in the defendant's room at the King's Arms Motel. CP 4. In a search of the defendant's motel room, detectives found the murder weapon, Trooper Keays' stolen firearm. CP 5.

On December 23, 2010, the defendant was charged with unlawful possession of a firearm. CP 1-7. He remained under investigation for Topps' murder. CP 2-3.

The defendant was arraigned on January 5, 2011. CP 562. On March 7, 2011, longtime defense attorney Jerry Stimmel entered a notice of appearance. CP 565.[4] On March 31, 2011, the defendant was charged with murdering Topps. CP 8-14. In the probable cause certification, the defense was notified that Cervantes had claimed that Valencia shot Topps. CP 12. Between his initial arraignment in January of 2011, and his trial in

[4] Stimmel has tried hundreds of cases over a 25 year career. http://www.jerrystimmel.com/.

October of 2013, the defendant waived speedy trial and/or continued his trial date over 20 times spanning nearly three years. CP 563-64, 566-75, 578, 580-83, 585-88.

On October 3, 2013, nearly three years after Topps' murder, defense counsel informed the court for the first time that he was having trouble finding Cervantes. 10/3/13 RP 15. Counsel did not ask the court to take any action. Id.

Counsel would ultimately tell the court that he first tried to interview Cervantes in January of 2013. 10/22/13 RP 108. Cervantes was in federal custody at the time on a criminal matter, not an immigration matter. 10/22/13 RP 108; 12/11/13 RP 108. When the prosecutor and counsel arrived at the federal detention facility, they found out that the defendant had been released from custody. 10/22/13 RP 108. His current whereabouts were unknown. 10/22/13 RP 108.

It was not until September of 2013 that defense counsel began looking for Cervantes again. 10/3/13 RP 15; 10/10/13 RP 49-50. The defense asked the prosecutor if she had any current contact information for Cervantes. 10/10/13 RP 50. The prosecutor then learned that Cervantes had been deported through El Paso to Mexico on July 23, 2013. 10/10/13 RP 50; CP 561. On October 23, 2013, the defense presented, and the court

signed, a material witness warrant for Cervantes.[5] 10/22/13 RP 119; 10/23/13 RP 40-41.

On December 11, 2013, the defense told the court that they did not know if Cervantes was in the United States or Mexico, but that in any event, they could not locate him. 12/11/13 RP 29. The defense asked the court to allow for the admission of Cervantes' out-of-court statement he made to the detectives back in December of 2010. 12/11/13 RP 29.

The trial court denied the motion, noting that while a defendant has a constitutional right to put on a defense, that right is not absolute. 12/11/13 RP 111-12. The right is subject to reasonable restrictions and must yield to established rules of procedure and rule of evidence designed to assure both fairness and reliability in the ascertainment of innocence or guilt. Id. The court stated that hearsay in general is inherently unreliable and that this was certainly true in regards to the statements of Cervantes. Id. at 112-13.

What the defense was asking, the court noted, was for Cervantes' statements to be admitted unchallenged, with no way for the State to cross examine the declarant or test the reliability of the statements. Id. The

[5] Although the warrant was active, for an unknown reason it did not go online until 23 days later on November 15, 2013, whereupon the prosecutor discovered and immediately rectified the problem. 11/18/13 RP 8-9. The prosecutor also enlisted the help of the Homeland Security Investigations unit, and put out an alert on a listserve for law enforcement gang officers, one of the most effective law enforcement material witness warrant service tools. 11/18/13 RP 17; 11/19/13 RP 7 (morning session).

court found that Cervantes' statements had little probative value, and any value was far outweighed by the possibility of unfair prejudice. Id. at 114.

b. The Defendant's Claim That His Constitutional Rights Were Violated Is Not Supported By The Law Or The Facts

The defendant cites to United States v. Valenzuela-Bernal,[6] in asserting that the State violated his right to due process and right to compulsory process by having Cervantes deported and that the sanction could have been dismissal of his case, and should at least have been admission of Cervantes' out-of-court statements. Def. br. at 13-17. He also asserts that the State failed to tell him prior to Cervantes' removal that he was going to be deported and failed to obtain a stay of removal pursuant to the U.S. Code. Id. at 8.

In Valenzuela-Bernal, the defendant was stopped while driving a vehicle across the border with five other persons in the car. Three passengers were apprehended along with Valenzuela-Bernal. All three passengers admitted that they were illegally entering the country and that Valenzuela-Bernal was the driver. The Assistant United States Attorney kept one of the passengers in custody to provide non-hearsay testimony of Valenzuela-Bernal's crime of transporting an illegal alien. The U.S. Attorney also made the determination that the other two passengers

[6] 458 U.S. 858, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1981).

possessed no different or material evidence, and thus, he had them deported, a deportation that happened prior to the defense having an opportunity to interview them.

The Supreme Court recognized that the Executive Branch had a dual function to perform, (1) carry out Congress' immigration policy by promptly deporting illegal-alien witnesses upon the Executive's good-faith determination that they possess no evidence favorable to the defense, and (2) ensuring that the due process and compulsory process rights of defendants they are prosecuting are not violated. Valenzuela-Bernal, 458 U.S. at 872-73. In finding no violation, the Court stated that "the mere fact that the Government deports such witnesses is not sufficient to establish a violation of the Compulsory Process Clause of the Sixth Amendment or the Due Process Clause of the Fifth Amendment." Id. "Sanctions may be imposed on the Government for deporting witnesses only if the criminal defendant makes 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." Id.

The defendant then cites to two cases involving deported witnesses to support his position. In People v. Valencia, 218 Cal.App.3d 808 (1990), the defendant was charged with possession of cocaine for sale,

with a firearm enhancement. The charges were based on drugs and a gun found during a search of an apartment that was occupied by the defendant and Benjamin Alcala, a Mexican national. At the time of the search, Alcala told the police that the gun belonged to someone other than Valencia. However, Alcala was deported six days later. Valencia moved to dismiss the charges against him based on a violation of his right to due process, specifically, the deportation of Alcala -- a material witness. When the State could not produce Alcala for trial, the case was dismissed.

In upholding the trial court's dismissal order, the appellate court noted that Alcala's anticipated testimony that the gun did not belong to Valencia was clearly known to the State and was clearly material. Valencia, 218 Cal.App.3d at 827. Critical to the court's analysis regarding the action by the State and bad faith was the fact that the State failed to take any action to preserve the evidence it knew was exculpatory, specifically, that the State failed to give Valencia or his counsel advance notice that Alcala was going to be deported. Id.

In United States v. Leal-Del Carmen, 697 F.3d 964 (C.A.9 2012), the defendant was arrested for alien smuggling. Along with the defendant, federal border patrol agents took into custody four Mexican nationals. Three of the Mexican nationals said that Leal-Del Carmen was the leader of the smuggling ring, while the fourth Mexican national said that Leal-

Del Carmen was not the person who gave orders to the rest of the group. Prior to Leal-Del Carmen being arraigned and provided with counsel, the one Mexican national who could provide exculpatory testimony was deported, while the other three were detained as material witnesses.

The court of appeals reversed Leal-Del Carmen's conviction, finding that Leal-Del Carmen had met the two part test for showing a due process violation – that the government acted in bad faith and prejudice. Leal-Del Carmen, 697 F.3d at 970-72. Specifically, the court found that the government acted in bad faith by deporting a witness that it knew could give exculpatory evidence before the defendant had an attorney appointed and an opportunity to object. Id.; see also Arizona v. Youngblood, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988) (proving "bad faith" requires more than a showing that the government acted negligently); California v. Trombetta, 467 U.S. 479, 488, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984) (bad faith may be established where there is (1) willful conduct motivated by a desire to obtain a tactical advantage or (2) there is a clear departure from the government's normal procedures), and United States. v. Pena-Gutierrez, 222 F.3d 1080, 1085 (C.A.9) (to establish bad faith, the defendant must show either "that the Government departed from normal deportation procedures" or "that the Government deported [the witness] to gain an unfair tactical advantage over him at

trial") (citing United States v. Dring, 930 F.2d 687, 693 (9th Cir. 1991), cert. denied, 506 U.S. 836 (1992)), cert. denied, 531 U.S. 1057 (2000).

The defendant here focuses on the materiality aspect of Cervantes' expected testimony, while glossing over the fact that he must prove that the State took some action and that the action was taken in bad faith. In order for compulsory process or due process to be violated, "the '*sovereign's conduct*' must impermissibly interfere with the right to mount a defense." State v. McCabe, 161 Wn. App. 781, 787, 251 P.3d 264 (citing United States v. Theresius Filippi, 918 F.2d 244, 247 (1st Cir. 1990)), rev. denied, 172 Wn.2d 1016 (2011). In other words, "[t]he contested act or omission must be attributable to the sovereign." McCabe, at 787 (citing United States v. Hoffman, 832 F.2d 1299, 1303 (1st Cir. 1987)).[7]

Here, there was neither bad faith nor any act by the sovereign State of Washington that prevented the defendant from either obtaining Cervantes' presence at trial or perpetuating his expected testimony. The existence of Cervantes' potentially exculpatory testimony was made known to the defense upon the filing of charges, nearly three years prior to trial. During that time period, the defendant had equal access to

[7] See also United States v. Gonzales, 617 F.2d 1358, 1363 (9th Cir.) ("[D]ue process is not violated unless a material witness's unavailability is attributable to unilateral government action"), cert. denied, 499 U.S. 899 (1980); accord United States v. Hernandez-Gonzalez, 608 F.2d 1240, 1244 (9th Cir. 1979) (the unavailability of a witness does not constitute denial of due process "unless the unavailability ... is the result of unilateral, overt action by the government").

Cervantes. The defense could have deposed Cervantes to preserve his testimony, but did not. The defense could have sought a material witness warrant prior to the eve of trial, but did not. Further, for an unknown portion of time, Cervantes was not in custody at all, let alone the custody of the State. On the one occasion that the defense sought to interview Cervantes, he was in Federal custody on a criminal matter, not an immigration matter, and was subsequently released to the community.

The defense also asserts that the State could have ordered a stay of removal proceeding and that the State did not tell the defense that Cervantes was being deported. These assertions are not accurate. There is no evidence in the record that the State knew that Cervantes was subject to deportation and/or that deportation proceedings had been initiated against him prior to his actual deportation. The State also has no authority to order that someone be deported or that deportation proceedings be stayed. Deportation is a Federal matter under the jurisdiction of the Federal Government. In other words, to stay removal proceedings once they have begun, the United States Attorney has jurisdiction. See 8 U.S.C. § 1231(c)(2)(A)(ii); 8 C.F.R. section 215.2(a); 8 C.F.R. section 2215.3(g). Although there is no guarantee that a stay would be granted, either the State or the defense could have asked the U.S. Attorney to impose a stay. Id. In short, there is no evidence that the State acted or failed to take some

required action in bad faith. Thus, regardless of the potential materiality of Cervantes' testimony, the defendant's constitutional argument fails.

c. The Rules Of Evidence

The defendant is left with arguing that his right to put on a defense trumps well-established rules of evidence. This argument also fails.

The Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution have been interpreted to include the right to present a defense. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). It is well settled, however, that the right to present a defense is not absolute. Montana v. Egelhoff, 518 U.S. 37, 42, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996); Maupin, 128 Wn.2d at 924. For example, the right to present a defense does not extend to irrelevant or inadmissible evidence. State v. Strizheus, 163 Wn. App. 820, 830, 262 P.3d 100 (2011) (citing State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010)), rev. denied, 173 Wn.2d 1030 (2012).

The Court has been circumspect when assessing whether the exclusion of certain evidence amounts to a constitutional violation. Crane v. Kentucky, 476 U.S. 683, 689-90, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986). Even where Confrontation Clause rights are implicated, a trial judge still retains wide latitude and may exclude prejudicial evidence or evidence that may confuse the issues. Delaware v. Van Arsdall, 475 U.S. 673, 106 S. Ct.

1431, 89 L. Ed. 2d 674 (1986); see also Taylor v. Illinois, 484 U.S. 400, 108 S. Ct. 646, 98 L. Ed. 798 (1988) (an accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence--court properly excluded defense witness for a willful discovery violation); United States v. Scheffer, 523 U.S. 303, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998) (rules excluding evidence do not abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve--rule excluding polygraph evidence proper exercise of legitimate State interest in ensuring that only reliable evidence is presented at trial).

State v. Finch, 137 Wn.2d 792, 975 P.2d 967 (1999) is particularly relevant. Finch was convicted of capital murder for the killing of a friend of his estranged wife and a police officer. During the State's case-in-chief, a friend of defendant testified that Finch told him that he deliberately shot the police officer. Finch sought to rebut this evidence with testimony from another person who would testify that, in a separate conversation, Finch told her that he did not intend to kill the officer. The trial court excluded the testimony as self-serving hearsay and Finch appealed.

First, the Supreme Court noted that the out-of-court statement of Finch was hearsay and inadmissible under the rules of evidence. Finch, 137 Wn.2d at 824. The Court noted that:

> The problem with allowing such testimony is that it places the defendant's version of the facts before the jury without subjecting the defendant to cross-examination. This deprives the State of the benefit of testing the credibility of the statements and also denies the jury an objective basis for weighing the probative value of the evidence.

Id. at 825. Still, Finch argued that the exclusion of the evidence denied him his right to compulsory process. But the Court stated the firmly established rule that "[a] defendant's right to admit evidence pursuant to his right to compulsory process is subject to established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." Id. (citing Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). The Court held that the right to compulsory process did not trump the evidence rules and allow the defendant to tell his story and escape cross-examination. Thus, the trial court did not abuse its discretion in excluding the testimony. Id.

Here, to begin, the record clearly shows that the defendant was not prevented from presenting his defense that somebody other than himself shot Topps. Rather, he was denied only the ability to admit a single piece of otherwise inadmissible hearsay testimony. The trial court appropriately ruled that it would be patently unfair to admit Cervantes' out-of-court statement -- a statement the court found suspect and of minimal probative value, without the State having the ability to cross examine the declarant and

allow for the jury to weigh the credibility and truthfulness of Cervantes' claim. The defendant has failed in his attempt to elevate what is a pure evidentiary issue into an issue of constitutional magnitude and he has failed to prove that the trial court abused its discretion in denying his request to admit inadmissible hearsay evidence.

2. UNANIMITY IS NOT REQUIRED FOR ALTERNATIVE MEANS CRIMES

The defendant contends that this Court should "clarify" whether jurors must be unanimous as to which alternative means they find committed when they find a defendant guilty of a crime, in this case felony murder or intentional murder. Def. br. at 27. Both the United States Supreme Court and the Washington State Supreme Court have already done so. A jury in a criminal case must unanimously agree as to the guilt of the defendant to the crime charged, but the jury does not have to unanimously agree on the particular means for how each element is met where the legislature has defined the crime as an alternative means crime.[8]

An alternative means crime is one "that provide[s] that the proscribed criminal conduct may be proved in a variety of ways." State v. Smith, 159 Wn.2d 778, 784, 154 P.3d 873 (2007). Here, for the single act of placing a gun to the back of Devin Topps and firing a single round into

[8] The defendant does not argue that there was insufficient evidence supporting both means charged. Rather, he asserts that it does not matter; if a jury is not told it must be unanimous as to the means, the conviction must be reversed.

his back, killing him, the defendant was charged with second degree murder. CP 245; RCW 9A.32.050. In enacting the second degree murder statute, the legislature provided for two different alternative means of committing the crime, intentional murder that requires that the defendant intend to cause the death of the victim, and felony murder, here based on second degree assault, that requires that the defendant intend to assault the victim with a deadly weapon thereby causing the death of the victim. RCW 9A.32.050(1)(a) and (b); CP 245. State v. Berlin, 133 Wn.2d 541, 549, 947 P.2d 700 (1997) (second degree murder is an alternative means crime). Here, the jurors were instructed that while they had to be unanimous that the defendant committed second degree murder, they did not need to be unanimous as to the means. CP 528-29; see WPIC 4.23

In Schad v. Arizona,[9] the defendant argued that his conviction under instructions that did not require jury unanimity as to one of the alternative means of premeditated and felony murder must be reversed because he had a constitutional right to a unanimous verdict. Schad, 501 U.S. at 631. The Court stated that Schad's argument begged the question, that the issue really becomes a question of "what [is it that] the jury must be unanimous about." Id.

[9] 501 U.S. 624, 111 S. Ct. 2491, 111 L. Ed. 2d 555 (1991).

The Court stated that legislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate offenses. Id. at 636. This appropriately supports the presumption that the legislature is competent "to determine the appropriate relationship between means and ends in defining the elements of a crime." Id. at 637-38.

In the case of intentional and felony murder, a general verdict, the Court noted, is predicated upon "what can best be described as alternative mental states," one being intent to kill and one being intent to assault with a deadly weapon. Id. at 632. Schad's argument, the Court stated, amounts to a claim that each means must be treated as an independent element in contrast to the legislature's intent to create a unitary crime. Id. at 639. The Court rejected this argument, holding that unless the statute itself violates some constitutional principle, where the legislature intends to create an alternative means crime, it is the guilt of having committed the offense that the jurors must be unanimous, not the means of how the crime was committed. Id. at 638-45.

Under Schad, the question becomes whether the legislature intended to create an alternative means crime. In Washington, for the crime of murder, that question was answered by State v. Fortune.[10]

Fortune was convicted of first degree murder. In returning a verdict as to whether Fortune was guilty of the crime charged, the jury was not required to agree unanimously on whether he premediated the killing or committed the killing in the course of a robbery. Fortune, 128 Wn.2d at 466. On appeal, Fortune did not question the evidence supporting his conviction; he simply argued that the jury was required to be unanimous as to the means. The Supreme Court disagreed, stating "jurors can give a general verdict on that crime without giving express unanimity on which alternative means was employed by the defendant." Id. at 467. The Court noted that as far back as 1939, the Court upheld the use of a general verdict where felony murder and premeditated murder are charged. Id. at 474 (citing State v. Talbott, 199 Wash. 431, 437-38, 91 P.2d 1020 (1939)) (felony murder and premeditated murder "merely charge the same offense in different ways"). And while having the jury find express unanimity as to alternative means may be useful in preventing a conviction from being

[10] 128 Wn.2d 464, 909 P.2d 930 (1996).

overturned should there be insufficient evidence of one of the means, unanimity, the Court held, is not required. Id. at 475.[11]

In support of his argument, the defendant quotes the following: "unanimity with respect to at least one of the theories by which the crime may be committed remains the minimum constitutional requirement for conviction." Def. br. at 29 (quoting State v. Franco, 96 Wn.2d 816, 838 n.4, 639 P.2d 1320 (1982)). However, this quotation comes from the dissent, and it is in direction conflict with Fortune, *et al.*

The defendant also cites to a few out-of-state cases, relying heavily on State v. Boots, 308 Or. 371, 780 P.2d 725 (1989). In Boots, the Oregon Supreme Court held that under Oregon's aggravated murder statute, jurors must be unanimous as to each aggravating factor charged. Reliance upon Boots is misguided. Shortly after Boots was decided, the Oregon Supreme Court limited the scope of Boots to the aggravated murder statute. State v. King, 316 Or. 437, 852 P.2d 190 (1993).

King was charged with driving under the influence by either having a blood alcohol level exceeding .08 or by being perceptibly impaired. The Court held that these were simply different circumstances

[11] See also State v. Arndt, 87 Wn.2d 374, 377-78, 553 P.2d 1328 (1976), holding that "it is unnecessary to a guilty verdict that there be more than unanimity concerning guilt as to the single crime charged," overruling dictum in State v. Golladay, 78 Wn.2d 121, 470 P.2d 191 (1970) that stated in a felony murder case that "a conviction requires the jury agree upon one of the means charged."

or ways of committing a single offense and thus the jurors did not need to be unanimous as to the means. King, 316 Or. at 446-47 (overruled in part on other grounds by Farmers Ins. Co. v. Mowry, 350 Or. 686, 697, 261 P.3d 1 (2011)); also State v. Duffy, 216 Or. App. 47, 51-54, 171 P.3d 988 (2007) (recognizing the limitation of the Boots decision).

In addition, as the Supreme Court in Schad recognized, a state court can interpret their own statutes as providing for alternative means not requiring unanimity or as separate crimes requiring unanimity as to each element. Schad, at 637-38. As pertaining to premeditated or aggravated murder, the Court noted that the vast majority of states do not require unanimity as to means. Schad, at 641-42 (listing cases dating back to 1903). The Court cited Oregon as an anomaly. Id. In other words, an Oregon court's determination as to a particular Oregon statute cast little doubt upon a determination already made by Washington's Supreme Court interpreting a Washington statute.

The doctrine of stare decisis requires a "clear showing that an established rule is incorrect and harmful" before precedent is abandoned. In re Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). The defendant fails to make that showing here.

3. THE WPIC JURY INSTRUCTION DEFINING "REASONABLE DOUBT" IS A CORRECT STATEMENT OF THE LAW

The defendant asserts that the language of WPIC 4.01 defining "reasonable doubt" as "one for which a reason exists," is a misstatement of the law and therefore his conviction (along with every other conviction where WPIC 4.01 has been given) must be reversed. This argument has no merit. The defendant fails to cite the plethora of Supreme Court and Court of Appeals cases that have upheld WPIC 4.01, and the language used therein, and he fails to show that these cases are "incorrect and harmful," the standard required to overturn precedent.

Here, the trial court used WPIC 4.01 to instruct the jury as follows:

> 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 as to these elements.
>
> 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 is one for which a reason exists*** and 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 512 (emphasis added). It is the highlighted language to which the defendant complains. Ignoring the instructions as a whole, the defendant claims that the highlighted language shifts the burden of proof; in other words, that jurors would be led to believe that it is a defendant's burden to prove he or she is not guilty. The Supreme Court has found otherwise.

Jury instructions are read as a whole and in a commonsense manner. State v. Bowerman, 115 Wn.2d 794, 809, 802 P.2d 116 (1990). A court will not assume a strained reading of an instruction. State v. Moultrie, 143 Wn. App. 387, 394, 177 P.3d 776, rev. denied, 164 Wn.2d 1035 (2008). The instructions are legally sufficient if they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). The instructions must define reasonable doubt and convey to the jury that the State bears the burden of proving every essential element of the crime beyond a reasonable doubt. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

The latest Supreme Court case to hold that the language of WPIC 4.01 is an accurate statement of the law is State v. Bennett, supra. In addressing a challenge to a substitute instruction, the Court stated:

> We have approved WPIC 4.01 and concluded that it adequately permits both the government and the accused to argue their theories of the case. . .Even if many variations of the definition

> of reasonable doubt meet minimal due process requirements, the presumption of innocence is simply too fundamental, too central to the core of the foundation of our justice system not to require adherence to a clear, simple, accepted, and uniform instruction. We therefore exercise our inherent supervisory power to instruct Washington trial courts not to use the Castle instruction. We have approved WPIC 4.01 and conclude that sound judicial practice requires that this instruction be given until a better instruction is approved. ***Trial courts are instructed to use the WPIC 4.01 instruction to inform the jury of the government's burden to prove every element of the charged crime beyond a reasonable doubt.***

Bennett, 161 Wn.2d at 317-18 (emphasis added).

The Bennett case is not the first time that the Court has ruled on similar language in jury instructions. As far back as 1901, the Supreme Court addressed the following instructional language which defined reasonable doubt as "***a doubt for which a good reason exists***, - a doubt which would cause a reasonable and prudent man to hesitate and pause in a matter of importance, such as the one you are now considering." State v. Harras, 25 Wash. 416, 421, 65 P. 774 (1901) (emphasis added). In upholding the instruction, the Court stated that "[t]his instruction is according to the great weight of authority, and is not error." Id.

In State v. Tanzymore, the Court addressed the reasonable doubt instruction that provided that "[t]he jury is further instructed that the doubt which entitles the defendant to an acquittal ***must be a doubt for which a reason exists***." 54 Wn.2d 290, 291 n.1, 340 P.2d 178 (1959). In rejecting

a claim that the trial court should have given a different reasonable doubt instruction, the Court held that "the court gave the standard instruction on reasonable doubt. This instruction has been accepted as a correct statement of the law for so many years, we find the assignment [of error] without merit." Id. at 291; see also State v. Pirtle, 127 Wn.2d 628, 658, 904 P.2d 245 (1995) ("the jury instruction here follows WPIC 4.01, which previously has passed constitutional muster"), accord, State v. Nabors, 8 Wn. App. 199, 202, 505 P.2d 162 (1973).

In State v. Thompson, the defendant challenged this exact same language "argu[ing] rather strenuously that this phrase (1) infringes upon the presumption of innocence, and (2) misleads the jury because it requires them to assign a reason for their doubt in order to acquit." 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975). Rejecting the challenge, the court stated:

> Although we recognize that this instruction has its detractors, it was specifically approved in State v. Tanzymore, [...] and also in State v. Nabors, [...]. We are, therefore, constrained to uphold it. We would comment only that ***it does not infringe upon the constitutional right that a defendant is presumed innocent; but tells the jury when, and in what manner, they may validly conclude that the presumption of innocence has been overcome.***
>
> ***Furthermore, the particular phrase, when read in the context of the entire instruction does not direct the jury to assign a reason for their doubts, but merely points out that their doubts must be based on reason, and not something***

> ***vague or imaginary***. A phrase in this context has been declared satisfactory in this jurisdiction for over 70 years.

Id. (emphasis added).

The defendant fails to address these cases. Instead, he tries to equate a misconduct case involving improper closing argument with the statement of the law as contained in the jury instructions. Specifically, he claims that the jury instruction improperly requires jurors to articulate a reason for having reasonable doubt — similar to the "fill-in-the-blank" argument that the Court held improper in State v. Emery, 174 Wn.2d 741, 759, 278 P.3d 653 (2012). But the defendant's argument fails under Emery, the very case upon which he principally relies.

In Emery, the Court held that the prosecutor committed misconduct by telling the jurors that they had to articulate a reason for any doubt they found, i.e., to fill in the blank what their doubt was. But in finding that the argument itself was misconduct, the Court specifically noted that the prosecutor had "properly describ[ed] reasonable doubt as a 'doubt for which a reason exists[.]'" 174 Wn.2d at 760. Emery only prohibits the misuse of this instruction by prosecutors in closing argument; but in so doing, it starts with the premise that the definition of reasonable doubt employed by WPIC 4.01 is correct.

The doctrine of stare decisis requires a "clear showing that an established rule is incorrect and harmful" before precedent is abandoned. In re Stranger Creek, supra. "The test for determining if jury instructions are misleading is not a matter of semantics, but whether the jury was misled as to its function and responsibilities under the law." State v. Brown, 29 Wn. App. 11, 18, 627 P.2d 132 (1981). The defendant has failed to show that the Supreme Court's decisions are wrong.[12]

4. FINGERPRINT AND BALLISTICS EVIDENCE: A FRYE HEARING WAS NOT REQUIRED

In determining the admissibility of evidence based upon novel scientific theories or methods, Washington courts employ the "general acceptance" standard set forth in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). The defendant contends that the trial court erred in admitting fingerprint and ballistics evidence without first conducting a Frye hearing. This claim has no merit. First, the defendant specifically waived objection to the admission of the ballistics evidence under Frye. Second, the defendant has provided no new evidence than was in front of this Court in

[12] The defendant's implication that the prosecutor committed misconduct in closing is not supportable. See Def. br. at 36. In explaining to the jurors that there were two alternative ways in which they could find the defendant guilty of murder – murder based on assault and intentional murder, the prosecutor stated that, "You all must agree, however, that all of the elements of one of those alternatives have been found. And the converse is true. In order to find him not guilty of felony murder, you must find that at least one element in each alternative has been – you have a reasonable doubt to at least one element in each alternative." 12/16/13 RP 15-16. The claim that this statement constitutes misconduct is spurious. The statement is an accurate statement of the law and no challenge to the statement was made at trial or as an assignment of error on appeal.

State v. Pigott, 181 Wn. App. 247, and other courts across the nation, that have all rejected the argument that fingerprint evidence is no longer generally accepted in the scientific community.

a. The Facts

Prior to trial, defense counsel said that he wanted to hire an expert and bring a Frye challenge to the fingerprint evidence. 5/11/12 RP 6. However, he noted that it was difficult to find an expert who would say what he needed him to say in order to raise the motion, to which the judge responded, maybe that says something about your position. Id. Subsequently, counsel stated that at least seven judges had already rejected the motion and that he just wanted to make a record and tag along with the other cases in the court of appeals. 6/1/12 RP 4; 6/15/12 RP 10. Counsel said he was not going to hire an expert, rather, he was just going to take advantage of the briefing that was already out there and file a motion for appellate purposes. 6/15/12 RP 11-12; 10/10/13 RP 63; 10/21/13 RP 25. That is exactly what he did. CP 34-117; CP 127-201.

The trial court reviewed the defense motion and noted that the defense had provided nothing new in regards to past motions the court had heard. 10/21/13 RP 29. The court denied the request to hold a Frye hearing, stating that the defense had not presented sufficient evidence which seriously questioned the continued general acceptance of latent

fingerprint evidence. 10/21/13 RP 29-30; CP 229-31. The defense then addressed the ballistics evidence, telling the court that "[t]he jurisprudential development of ballistics is a little different from fingerprints, so ***I don't have a Frye motion for that.***" 10/21/13 RP 31.

b. The Defendant's Ballistics Evidence Claim Has Been Waived

The failure to raise a Frye challenge with the trial court constitutes waiver of the issue on appeal. In re Post, 145 Wn. App. 728, 755-56, 187 P.3d 803 (2008); In re Morgan, 161 Wn. App. 66, 85-86, 253 P.3d 394 (2011); State v. Florczak, 76 Wn. App. 55, 72, 882 P.2d 199 (1994). Here, the defendant specifically said that he was not raising a Frye issue with regards to the ballistics evidence, thus, this issue has been waived.

Additionally, on appeal, the defendant provides virtually no argument in regards to the ballistics evidence, devoting but a single paragraph to the issue and citing no case law. See Def. br. at 48. "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." Palmer v. Jensen, 81 Wn. App. 148, 153, 913 P.2d 413 (1996), rev'd on other grounds, 132 Wn.2d 193 (1997). Bare allegations unsupported by citation to authority, or persuasive reasoning cannot sustain the defendant's burden. State v. Brune, 45 Wn. App. 354, 363, 725 P.2d 454 (1986).

c. A Frye Hearing Does Not Need To Be Held Before Fingerprint Evidence Is Admitted

In 2009, the National Research Council of the National Academy of Sciences issued a report entitled "Strengthening Forensic Science in the United States: A Path Forward," hereinafter the "NAS report." In the NAS report, multiple fields of forensic science were studied with an eye towards systemic and scientific advancement within the various forensic science disciplines. Subsequently, across the nation and here in Washington, the defense bar has unsuccessfully used language from the NAS report to argue for the wholesale exclusion of fingerprint evidence from courts of law. In the case at bar, relying exclusively on the NAS report, the defendant claimed that the trial court was required to hold a Frye hearing because, he asserted, fingerprint evidence is no longer considered reliable within the relevant scientific community.[13] Finding that the defendant had failed to provide sufficient evidence to show that fingerprint evidence was not generally accepted in the relevant community, the court denied the request to hold a Frye hearing.

This is the exact same issue, based on the exact same "evidence," that was raised and rejected by this Court in Pigott. The doctrine of *stare decisis* provides that a court must adhere to a prior ruling unless the

[13] The defendant has failed to cite a single case from anywhere in the nation wherein a court has accepted this same claim.

defendant can make "a clear showing" that the rule is "incorrect and harmful." In re Stranger Creek, supra; see also State v. Kier, 164 Wn.2d 798, 804, 194 P.3d 212 (2008) (the court does "not lightly set aside precedent, and the burden is on the party seeking to overrule a decision to show that it is both incorrect and harmful."). Because the defendant fails to show that this Court's decision in Pigott is incorrect and harmful, this Court must adhere to the holding that a Frye hearing is not necessary for admission of fingerprint evidence.

In determining the admissibility of evidence based upon novel scientific theories or methods, Washington courts employ the "general acceptance" standard set forth in Frye v. United States, supra; State v. Copeland, 130 Wn.2d 244, 922 P.2d 1304 (1996). The Frye standard provides that evidence deriving from a scientific theory or principle is admissible if that theory or principle has achieved general acceptance in the relevant scientific community. State v. Baity, 140 Wn.2d 1, 10, 991 P.2d 1151 (2000) (citing State v. Martin, 101 Wn.2d 713, 719, 684 P.2d 651 (1984)). "Unanimity" as to general acceptance "is not required." State v. Gore, 143 Wn.2d 288, 302-03, 21 P.3d 262 (2001). It is only where a party can prove that "there is a ***significant dispute*** among qualified scientists in the relevant scientific community" that the evidence will not be admitted under Frye. Gore, 143 Wn.2d at 302.

It has never been held that a trial court must undergo the substantial burden of holding a Frye hearing every time scientific evidence is sought to be admitted at trial, every time a defendant raises an objection to such evidence, or even if a particular person or persons in the scientific community have a differing opinion. To the contrary, "[o]nce a methodology is accepted in the scientific community, then application of the science to a particular case is a matter of weight and admissibility under ER 702, which allows qualified expert witnesses to testify if scientific, technical, or other specialized knowledge will assist the trier of fact." State v. Gregory, 158 Wn.2d 759, 829-30, 147 P.3d 1201 (2006). And when an appellate court has previously determined that the Frye standard has been met as to a specific scientific theory, a trial court may rely upon the prior ruling to govern admissibility of the same theory in subsequent cases. State v. Cauthron, 120 Wn.2d 879, 888 n.3, 846 P.2d 502 (1993); Baity, 140 Wn.2d at 10 (citing State v. Ortiz, 190 Wn.2d 294, 831 P.2d 1060 (1992)). It is only when a party produces "new evidence" which "seriously questions" the continued general acceptance or lack of acceptance as to the theory within the relevant scientific community that a court must conduct a Frye hearing anew. Id. In making this determination, a court may consider, among other things, decisions from this and other jurisdictions. State v. Russell, 125 Wn.2d 24, 41, 882 P.2d 747 (1994).

Here, the trial court did not abuse its discretion in finding that the defendant had provided insufficient "new evidence" calling into question the over 100 years of courts allowing for the use of fingerprint evidence in trials. While the defendant may argue that reasonable persons could disagree, that is not the standard. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). An abuse of discretion is shown only when this Court is satisfied that "no reasonable judge would have reached the same conclusion." State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989) (citing Sofia v. Fibreboard Corp., 112 Wn.2d 636, 667, 771 P.2d 711 (1989)).[14] In addition, because this case is governed by existing precedence, the defendant must prove that the ruling in Pigott is both "incorrect and harmful." In re Stranger Creek, supra.

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[14] While it ultimately would not change the result in this case, the State disagrees with the statement in Pigott that a trial court's determination whether to hold a Frye hearing is reviewed *de novo*. Pigott, at 249 n.2 (citing Gregory, 158 Wn.2d at 830). Gregory involved a different procedural situation.

In Gregory, a case involving certain challenges to DNA testing, the Court made the following statement in deciding to review the trial court's ruling *de novo*:

> Appellate review of a Frye ruling (issued after a Frye hearing) is de novo. It is not clear what standard of review should be applied to a trial court's decision not to conduct a Frye hearing at all. Yet the trial court here declined to conduct a Frye hearing ***because it found that the scientific evidence has been generally accepted in the scientific community, the same question ultimately addressed on appeal after a Frye hearing***. Thus, application of a de novo standard is appropriate.

Gregory, at 830 (emphasis added). That is a different situation than exists here.

It is without question that fingerprint evidence has been generally accepted in the scientific community for decades. Once a methodology has been generally accepted, a court need not conduct a Frye hearing; the application of the science becomes a matter of weight and admissibility under ER 702. Id. at 829-30. The question before the trial court here was whether the defendant had provided sufficient evidence to call the existing general acceptance into doubt. The court did not, and was not called upon to find, general acceptance – and neither is this Court. Thus, *de novo* review is not appropriate.

American courts have allowed for the admission of fingerprint identification evidence in trials for more than a century. In 1911, one court, after reviewing the then available scientific literature stated that:

> [T]here is a scientific basis for the system of fingerprint identification, and that the courts are justified in admitting this class of evidence; that this method of identification is in such general and common use that the courts cannot refuse to take judicial cognizance of it.

People v. Jennings, 252 Ill. 534, 549, 96 N. E. 1077 (1911).

Washington too has a long history of admitting fingerprint identification evidence. In upholding the conviction of a defendant as a habitual offender, a conviction that was based on fingerprint identification evidence, the Supreme Court, in finding the evidence was properly admitted, noted that "Identification of individuals by means of comparison of fingerprints is generally accepted in this and other states." State v. Johnson, 194 Wash. 438, 442, 78 P.2d 561 (1938) (citations omitted). Most recently, this Court considered the propriety of admitting digitally enhanced latent fingerprints, finding the evidence admissible under Frye. State v. Hayden, 90 Wn. App. 100, 950 P.2d 1024 (1998).

The overwhelming and long history of acceptance of fingerprint identification evidence faced its first significant – and unsuccessful –

modern challenge in 1999. In United States v. Mitchell,[15] the defense attacked the admissibility of the fingerprint evidence under the Daubert[16] admissibility standard. The court found the fingerprint evidence admissible at trial.

The Mitchell case spawned a rash of unsuccessful challenges to the long-standing precedents of admitting fingerprint identification evidence. One observer, Professor Jennifer Mnookin, noted that:

> The years after Mitchell saw many challenges of a similar type to the admissibility of fingerprints. Since 1999, nearly 40 judges have considered whether fingerprint evidence meets the Daubert test, the Supreme Court's standard for the admissibility of expert evidence in federal court, or the equivalent state standard. Every single judge who has considered the issue has determined that fingerprinting passes the test.

Mnookin, "Fingerprints: Not A Gold Standard," *Issues in Science and Technology,* Fall 2003.

The challenges raised across the nation are similar, if not identical, to the challenge the defendant raises here. The defendant had not cited, and the State has not found, a single case in which the defense has prevailed. In short, the defendant can cite to no published case that has

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[15] 178 F.3d 904 (7th Cir.), cert. denied, 528 U.S. 946 (1999).

[16] Referring to Daubert v. Merrill Dow Pharm., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Daubert sets forth the federal test for admissibility of scientific evidence. The distinctions between the Frye standard and the Daubert standard are not particularly relevant to the issue raised herein. See, e.g., Baity, 140 Wn.2d at 15 n.12. Most states have adopted the Frye standard, the Daubert standard, or a similar facsimile.

ever held that fingerprint identification evidence—if done properly, is not generally accepted within the relevant scientific community. As a result, there is no jurisdiction in the United States that does not admit properly conducted fingerprint identification evidence—including Washington.

The following is a review of the recent state cases that have all rejected similar defense challenges:[17]

Barber v. State, 952 So.2d 393, 418-19 (Ala.Crim.App. 2005) (rejecting claims that there is not general acceptance in the relevant scientific community of the underlying principles of fingerprint identification), cert. denied, 549 U.S. 1306 (2007).

People v. Farnam, 28 Cal.4th 107, 160 (Cal. 2002) (upholding the use of an automated fingerprint identification system because the system does not make identifications, the system only provides a list of candidates, like AFIS, that are then subject to "long-established" fingerprint comparison performed trained experts"), cert. denied, 537 U.S. 1124 (2003).

State v. Cooke, 914 A.2d 1078, 1095 (Del.Super. 2007) ("Fingerprint comparison testimony...has been tested and proven to be a reliable science over decades for judicial purposes with established principles and scientific methods approved in the field").

State v. Escobido-Ortiz, 109 Hawai'i 359, 370, 126 P.3d 402 (Hawai'i App. 2005) ("We take judicial notice, based on the overwhelming case law from other jurisdictions, that the theory underlying latent fingerprint identification is valid and that the procedures used in identifying latent fingerprints, if performed properly, have been widely accepted as reliable...the proper means of attacking an expert's positive fingerprint identification is through rigorous cross-examination or

[17] While addressing the same issues as raised herein, this first group of cases does not specifically cite to the NAS report. In other words, the issues raised by the NAS report are not new issues, the report simply provided the defense with a platform to raise the same arguments anew.

presentation of an opposing expert to challenge the positive identification, not the wholesale exclusion of a reliable methodology").

Burnett v. State, 815 N.E.2d 201, 208 (Ind.App. 2004) (Holding that the ACE-V methodology of fingerprint identification is generally accepted within the relevant scientific community).

Markham v. State, 189 Md.App. 140, 163, 984 A.2d 262 (Md.App. 2009) (Upholds trial court's rejection of Markham's motion to hold a Frye hearing regarding the ACE-V method of fingerprint identification).

Commonwealth v. Patterson, 445 Mass. 626, 644, 840 N.E.2d 12 (Mass. 2005) (Court rejects request to hold a Daubert hearing finding that the ACE-V method of fingerprint identification is generally accepted in the relevant community), overruled on other grounds by Commonwealth v. Britt, 465 Mass. 87, 987 N.E.2d 558 (Mass. 2013).

State v. Langill, 157 N.H. 77, 90, 945 A.2d 1 (N.H. 2008) (while acknowledging that the defense can point to "a small number of misidentifications cases," the court stated that "it is undisputed that ACE-V methodology has been reliably applied in countless cases" and the fact that blind verifications are not used does not affect admissibility of the reliable evidence. The court added that "[w]here errors do not rise to the level of negating the basis for the reliability of the principle itself, the adversary process is available to highlight the errors and permit the fact-finder to assess the weight and credibility of the expert's conclusions"), internal citations omitted, conviction reversed on other grounds, State v. Langill, 161 N.H. 218, 13 A.3d 171 (N.H. 2010).

People v. Burnell, 89 A.D.3d 1118, 1122, 931 N.Y.S.2d 776 (N.Y.A.D. 3 Dept. 2011) (no need for a Frye hearing where examiner conducted standard side-by-side fingerprint examination), rev. denied, 18 N.Y.3d 922 (2012).

State v. Davis, 116 Ohio St.3d 404, 424-25, 880 N.E.2d 31 (Ohio) (Daubert hearing is not required because "reliability of fingerprint evidence is well established."), cert. denied, 555 U.S. 861 (2008).

State v. Maestas, 2012 UT 46, 299 P.3d 892, 935 (Utah 2012) (Court rejects recent articles criticizing fingerprint identification evidence and notes that fingerprint identification evidence is widely accepted and

there are no reported decisions finding otherwise), cert. denied, 133 S. Ct. 1634 (2013).

Earnest v. Commonwealth of Virginia, 61 Va.App. 223, 226, 734 S.E.2d 680 (Va.App. 2012) (trial court properly excluded testimony of academic who intended to testify "that there was no statistical or clinical basis for the claim that a partial latent fingerprint can be matched to a known fingerprint using the methods" employed. "The accuracy of fingerprint identification is a matter of common knowledge and no case has been cited, and we have found none, where identification so established has been rejected.") (internal citations omitted).

Dowdy v. Commonwealth of Virginia, 278 Va. 577, 601, 686 S.E.2d 710 (Va. 2009) (rejecting challenge based on a claim that no error rate can be attached to ACE-V fingerprint identifications).

After the NAS report came out in 2009, the defense bar continued – unsuccessfully – its attack on fingerprint identification evidence. Although the report specifically stated that it was not questioning the admissibility of fingerprint identification evidence, the defense would rely on certain quotations from the report to claim that there was no general acceptance of fingerprint identification evidence. In reality, the report merely suggested that more scientific research should be conducted regarding the science of fingerprint identification, and the report contained certain criticisms regarding the lack of uniform training and standards in the various jurisdictions. Importantly, the issues raised in the report are similar, if not identical, to the issues raised in the above cited state cases, the case at bar, and Pigott. The following is a review of the state cases that have rejected the defense challenge based on the NAS report:

People v. Luna, 989 N.E.2d 655, 671, 371 Ill.Dec. 65 (Ill.App. 1 Dist.) (In a detailed analysis, Luna's request to hold a Frye hearing based on the NAS report is rejected. "[W]holesale objections to the ACE-V methodology have been uniformly rejected by state appellate courts (under Frye, Daubert, or some hybrid standard of admissibility) and by federal appellate courts (under Daubert)"), rev. denied, 996 N.E.2d 20 (2013).

Commonwealth v. Gambora, 457 Mass. 715, 724, 727, 933 N.E.2d 50 (Mass. 2010) (Gambora argued that the NAS report called into question the reliability of the theory of latent print identification and the ACE-V methodology. Court rejects claim, finding that the report did not question the underlying theory that "there is scientific evidence supporting the theory that fingerprints are unique to each person and do not change over a person's life." The court "recognize[d]" that there were issues raised by the NAS report, but noted that the report accepted the theory that "a careful comparison of two impressions can accurately discern whether or not they had a common source. NAS report at 142.").

Johnston v. State, 27 So.3d 11, 21-22 (Fla.) ("Nothing in the report renders the forensic techniques used in this case unreliable." Court notes that NAS committee specifically stated that the report was not able to or intended to address admissibility questions in criminal and civil cases), cert. denied, 131 S. Ct. 459 (2010).

State v. Dixon, 822 N.W.2d 664, 674 (Minn.App. 2012) (finding that there was not a single case wherein a court had relied on the NAS report to exclude fingerprint evidence. "[E]xperts in the relevant scientific field widely accept the ACE-V methodology and individualization and believe that the ACE-V methodology produces scientifically reliable results admissible at trial." The "fact that there is a subjective component to print analysis does not mean that the analysis is not reliable or accurate, but only means that testimony about the conclusions should be related to an examiner's experience and knowledge.").

Webster v. State, 252 P.3d 259 (Okla.Crim.App. 2011) (rejecting a NAS report challenge the court states that "fingerprint evidence has long been recognized, in this State and around the world, as a remarkably powerful tool of identification," and Webster has "fail[ed] to cite any jurisdiction" that had held that the evidence was "so scientifically unreliable as to be inadmissible"), cert. denied, 134 S. Ct. 2729 (2014).

In re O.D., 221 Cal.App.4th 1001, 1008 n.5, 164 Cal.Rptr.3d 578 (Cal.App. 1 Dist.2013) ("We are aware of no decision that has excluded fingerprint-comparison evidence on the basis that it is either unreliable or no longer generally accepted. Decisions from other jurisdictions have uniformly rejected the argument that the NAS Report warrants exclusion of fingerprint-comparison evidence.").

Commonwealth v. Wadlington, 467 Mass. 192, 204-05, 4 N.E.3d 296 (Mass. 2014) (affirming that NAS report does not lead to conclusion that fingerprint evidence should be suppressed).

Commonwealth v. Joyner, 467 Mass. 176, 182 n.7, 4 N.E.3d 282, 289 (Mass. 2014) (noting that since publication of the NAS Report, preliminary statistical evidence has emerged showing error rates of below 1 percent with verification step).

The state courts were not alone in fighting these repeated attempts to have fingerprint identification evidence held inadmissible. The following is a review of the federal cases that have rejected this challenge:

United States v. Herrera, 704 F.3d 480, 487 (7th Cir.) (addressing NAS report, the court holds that if properly done, fingerprint identification evidence by the ACE-V method, a method that contains a subjective component, "is admissible evidence, in general and in this case."), cert. denied, 134 S. Ct. 175 (2013).

United States v. Mitchell, 365 F.3d 215, 235-36 (3rd Cir.) (Daubert hearing is not required, the theory that fingerprints are unique and permanent has been tested and the estimated error rate of identifications "is very low"), cert. denied, 543 U.S. 974 (2004).

United States v. Stone, 848 F.Supp.2d 714, 717-18 (E.D.Mich. 2012) (We are "unpersuaded that the NAS Report provides a sufficient basis to exclude [the fingerprint] ... testimony." The "[w]holesale objections to latent fingerprint identification evidence have been uniformly rejected by courts across the country").

United States v. John, 597 F.3d 263, 274-76 (5th Cir. 2010) (Daubert hearing need not be held, the "the reliability of the technique

[fingerprint examination] has been tested in the adversarial system for over a century and has been routinely subject to peer review... [and] ...as a number of courts have noted, the error rate is low." Rejects claim based on fact that there exists no error rate and or required blind verifications).

United States v. Pena, 586 F.3d 105 (1st Cir. 2009) (while acknowledging that there may be shortcomings of the ACE-V method, court holds that fingerprint identification testimony is sufficiently reliable under Daubert), cert. denied, 559 U.S. 1021 (2010).

United States v. Gutierrez-Castro, 805 F.Supp.2d 1218, 1234 (D.N.M. 2011) (ACE-V method of fingerprint examination is sufficiently reliable to be admissible).

United States v. Aman, 748 F.Supp.2d 531, 542 (E.D.Va. 2010) ("[I]t can hardly be questioned that the ACE-V method has achieved widespread acceptance in the fingerprint examination community."), cert. denied, 133 S. Ct. 366 (2012).

United States v. Baines, 573 F.3d 979, 992 (10th Cir. 2009) (finding that while more scientific research may be useful in this area, utilization of this "bedrock forensic identifier" is not affected by the current challenges to the ACE-V method).

United States v. Llera Plaza, 188 F.Supp.2d 549, 575-76 (E.D.Pa. 2002) (ACE-V method of fingerprint identification is admissible).

United States v. Crisp, 324 F.3d 261, 268-70 (4th Cir) (fingerprint identification evidence satisfies Daubert), cert. denied, 540 U.S. 888 (2003); United States v. Janis, 387 F.3d 682, 690 (8th Cir. 2004) (same); United States v. Havvard, 260 F.3d 597, 601-02 (7th Cir. 2001) (same); United States v. Sherwood, 98 F.3d 402, 408 (9th Cir. 1996) (same); United States v. Abreu, 406 F.3d 1304, 1307 (11th Cir. 2005) (same); United States v. George, 363 F.3d 666, 673 (7th Cir. 2004) (same); United States v. Collins, 340 F.3d 672 (8th Cir. 2003) (same).

United States v. Rose, 672 F.Supp.2d 723, 726 (D.Md. 2009) (In rejecting a challenge based on the NAS report and Dr. Ralph Haber, the court concludes that "fingerprint identification evidence based on the ACE-V methodology is generally accepted in the relevant scientific community, has a very low incidence of erroneous misidentifications, and is

sufficiently reliable to be admissible under Fed. R. Ev. 702 generally and specifically in this case.").

As stated above, the "Frye test is not implicated if the theory and the methodology relied upon and used by the expert to reach an opinion ... is generally accepted by the relevant scientific community." Anderson v. Akzo Nobel Coatings, Inc., 172 Wn.2d 593, 597, 260 P.3d 857 (2011). It is only where a party can prove that "there is a ***significant dispute*** among qualified scientists in the relevant scientific community" that the evidence will not be admitted under Frye. Gore, at 302 (emphasis added). Lack of certainty in scientific tests (that are generally accepted by the scientific community) goes to the weight to be given the testimony, not to its admissibility. State v. Lord, 117 Wn.2d 829, 854-55, 822 P.2d 177 (1991). The same is true in regards to the possibility of a mistake or human error in a particular case. Cauthron, 120 Wn.2d at 890.

The NAS report, while making certain criticisms and recommendations of the field overall, was never purported to stand for the proposition that the ACE-V method of fingerprint examination is not generally accepted in the relevant scientific community. The NAS report recognized that "a careful comparison of two impressions can accurately discern whether or not they have a common source." NAS report at 142. This is the bedrock principle at issue here. This Court is not reviewing a

Frye hearing. Rather, this Court must determine whether the defendant has proven that within the relevant scientific community, there is a significant disagreement that fingerprint identification evidence can be done in a manner that shows the results are reliable. Here, the defendant has done nothing more than reiterate the same attack that has been raised across the nation – and rejected every single time, including by this Court in Pigott. Thus, he has failed to prove that the trial court abused its discretion in rejecting his claim that it was required to hold a Frye hearing, and he has failed to show that the ruling in Pigott is incorrect and harmful.

d. The Trial Court Did Not Err In Admitting Fingerprint Identification Evidence

"Once a methodology is accepted in the scientific community, then application of the science to a particular case is a matter of weight and admissibility under ER 702, which allows qualified expert witnesses to testify if scientific, technical, or other specialized knowledge will assist the trier of fact." Gregory, at 829-30. Thus, the evidence "is merely subject to meeting the two-part inquiry under ER 702 -- whether the witness qualifies as an expert, and whether the testimony would be helpful to the trier of fact." Baity, 140 Wn.2d at 10.[18]

[18] ER 702 provides that "[i]f 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 knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

The trial court necessarily has broad discretion in determining whether expert testimony should be admitted under ER 702. State v. Rafay,168 Wn. App. 734, 783-84, 285 P.3d 83 (2012), rev. denied, 176 Wn.2d 1023 (2013). A reviewing court will overturn a trial court's decision to admit ER 702 evidence only upon a finding that "no reasonable judge would have reached the same conclusion." Hopson, 113 Wn.2d at 284.

A lack of certainty in scientific tests goes to the weight to be given the testimony, not to its admissibility. Lord, 117 Wn.2d at 854-55. Similarly, the credibility of experts offering conflicting testimony is for the trier of fact. State v. Benn, 120 Wn.2d 631, 662, 845 P.2d 289 (1993). The possibility of a mistake or human error in a particular case is also a matter left to the trial court as a matter of admissibility, not an issue under Frye. Cauthron, 120 Wn.2d at 890.

Here, the defendant did not attack the qualifications of the state fingerprint experts. He also did not assert that they made an error in their analysis. Thus, there is no basis to argue that the trial court erred in admitting the fingerprint evidence.

D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's conviction.

DATED this 24 day of March, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Lila Silverstein, at Washington Appellate Project containing a copy of the Brief of Respondent, in STATE V. LIZARRAGA, Cause No. 71532-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

03-24-15

Date

Done in Seattle, Washington