No. 93895-4

SUPREME COURT OF THE STATE OF WASHINGTON

Angel Anthony Fernandez,

Petitioner,

V.

State Of Washington,

Respondent.

MOTION FOR DISCRETIONARY REVIEW, RAP 13.4

Angel Anthony Fernandez, Pro Se
Clallam Bay Correction Center
1830 Eagle Crest Way
Clallam Bay, Wa. 98326

TABLE OF AUTHORITIES

Appellate Court

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STATUTES

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A. IDENTITY OF PETITIONER

ANGEL ANTHONY FERNANDEZ, ask's this Supreme Court to accept review of the decision or part of the decision designated in part B of this motion.

B. CITATION TO THE COURT OF APPEALS DECISION

Petitioner seeks review of the decision of the Court of Appeals in case:

It stated, Angel Anthony Fernandez, appeals from the conviction and sentence of aggravated murder in the first degree. Although the trial court erred by denying Fernandez his right to a lawyer, the error was harmless. In statement of additional grounds (SAG), Fernandez makes many assertions. Because the issues could have and should have been raised on his initial direct appeal, we do not consider them. We affirm.

A copy of that decision is attached to this motion as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

Petitioner does seek review from the COA decision that is in conflict with the Supreme Court, under RAP 13.4(b)(1) also under RAP 13.4(b)(2), present a question of law under a constitutional issue.

1). Petitioner was placed in double jeopardy when the Trial Court presented charging information of Aggravated First Degree Murder, and/or First Degree Felony Murder where petitioner was convicted of two offenses of the same RCW 9A.32.030 (1)(a) and RCW 9A.32.030 (1)(c), for the same victim. See Verdict forms and special verdict form "A" See Appendix B, with judgment and sentence Appendix C.

2). Petitioner was also denied, Right to Counsel, under CrR 3.1 (b)(2), Which provides, " A lawyer shall be provided at every stage of the proceedings, including sentencing, appeal, and post-conviction review." The specific request for appointment of counsel also was denied, thus did deprive petitioner of counsel of choice.

D. STATEMENT OF CASE

Petitioner was charged with Aggravated murder in the first degree and/or Felony murder in the first degree, Kidnapping in the first or second degree, Robbery in the first or second degree, Theft in the first, second third degree.

On August 3rd, 2000, the Trial Court sentenced petitioner to life without the possibility of parole or release. (See judgment and sentence Appendix C) reflects convictions on all charges. Verdicts of Premeditated murder in the first degree and Felony murder in the first degree were entered. No other verdicts for kidnapping, Robbery, Theft were recorded. (See Appendix B verdicts) Special verdict form "A" did hold that Premeditated murder in the first degree was (1) that the murder was committed in the course of, in the futherance of, in the immediate flight from, kidnapping in the first degree, ANSWER: Guilty

(2) that the defendant committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime, to wit: Robbery, and/or Theft and/or Kidnapping. ANSWER (NO UNINIMUS AGREEMENT) See Appendix B Verdicts

On May 14th, 2015 Petitioner filed a motion to the Trial Court, to dismiss one of two convictions for purposes of being placed in violation of Double Jeopardy. Petitioner was in fact convicted of two offenses of the same statute for the same victim.

On June 23, 2015 Trial Court did receive a motion to dismiss one of two convictions based on Double Jeopardy grounds. Petitioner argued that " A person cannot be convicted of two offenses for the same act." Petitioners fact finding jury was instructed that it could fined the Petitioner guilty of both offenses, thus Double Jeopardy violation did accrue.

A motion for Appointment of Counsel was also entered, was set aside because petitioner was not present. A hearing was then set for July 21st, 2015 at 9:00.

On July 17th, 2017 petitioner was present without representation, in which the Court did ask the State's position on counsel, the State's response was " It is the understanding he does not have a right to counsel, but it's up to the court."

The Trial Court then denied the motion for appointment of counsel and set the matter over to July 21st, 2015. Petitioner again requested reconsideration for appointment of counsel, which was again denied.

On July 21st, Petitioner was present, Trial Court proceeded with motion of Double Jeopardy.

The State then conceded to the Double Jeopardy issue, but said that this issue was a scrivener's error in the judgment and sentence that included a reference to a charge that should be vacated and has no legal authority. The State did admit that the jury rendered a verdict on the First Degree Felony Murder.

The State introduced an amended judgment and sentence, in which does contain issue's with a nonexistent crime of (RCW 9A.41.010) a definition of (RCW 9A.56.190) (RCW 9A.56.020 Theft definition, 9A.56.030, Theft 1, RCW 9A.56.040, Theft 2, RCW 9a.56.050, Theft 3) These offenses do not have verdicts. (RCW 10.95.020 (9) in special verdict form "A" was deemed 'NO UNINIMUS AGREEMENT). This judgment and sentence is for sure invalid on it's face and for sure unenforceable to hold any authority of any confinement because it's unconstitutionally erroneous. (See Appendix C Judgment and Sentence).

On August 4th, 2015 A hearing was scheduled for motion to vacate and resentence and also to hear new trial motion.

Trial Court stated that the new issues should be addressed, since it's dealing with the same judgment and sentence.

The Trial Court reset the matter for August 25th, 2015 at 3:00pm.

On August 25th, 2015 Petitioner did make record with argument to the Trial Court on all motions presented to the Court.

The Trial Court did grant the petitioner to make his record in supporting his motions that were submitted.

Petitioner's recorded argument's are from Hearing Proceeding's on pages 34-46, supporting the issues which led from the charging information in which did substantially prejudice the petitioner being placed ion Double Jeopardy, which completely turns off the very fountain head of justice, ie., Due Process of Law.

Trial Court gave statements on Hearing Proceeding page 47, line 18-25 and through page 48, line 1-19, his ruling on verdict entered included special verdict form "A" on the aggravator, the kidnap, there was a verdict on that as an element of the offense.

The Trial Court also states that the defendant is entitled to an amended judgment and sentence that strikes the First degree Felony murder conviction that was charged in the alternative.

Trial Court stated there is no basis for the argument that the defendant is entitled to be sentenced just on the lesser of the merged offenses or alternative offenses or to a lesser charge the he was brought at the time as a possible lesser-included.

Petitioner questioned new judgment and sentence presented by the state.

Petitioner did question the legality of the new judgment and sentence which in fact does contain RCW's, that are unenforceable. One that is nonexistant, no verdicts for the other crimes alleged.

Petitioner did refuse to sign the invalid judgment and sentence.

Trial Court stated "I'11 sign it."

These proceedings ended. See Hearings of proceedings Appendix D

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED under RAP 13.4(b)

Petitioner was prejudiced by the Trial Court in convicting him with two offenses of the very same statue of RCW 9A.32.030 (1)(a) and RCW 9A.32.030 (1)(c) for the very same victim, as the evidence does not support both convictions to have been applied as convictions, thus petitioner was placed in complete Double Jeopardy, which is Constitutionally Erroneous. One can never be placed in violation of a Constitutional error that completely turns off the very fountain head of Justice, ie., Due Process of Law.

Here a manifest error had accrued which effected a Constitutional Right. To qualify for the exception

provided by RAP 2.5 (2)(3), an appellant must demonstrate (1) The error is manifest and (2) The error is truly of Constitutional demention. **STATE V.O'HARA**, 167 Wn 2d 91, 98, 217 P. 3d 756 (2001). An error will be considered manifest when there is actual prejudice, meaning that the asserted error had practical and identifiable consequences in trial. **STATE V. IRBY**, 187 Wn App 183, 193, 347 P. 3d 1103 (2015)(citing **STATE V. GORDEN**, 172 Wn 2d at 676. "[T]he focus of the actual prejudice [inquiry] must be on whether the error is so obvious on the record that the error warrants appellate review." O'Hara, 167 Wn 2d at 99-100.

The Court has held "We may grant petitioner collateral relief from unlawful restraint if He establishes by a proponderance of the evidence that a Constitutional violation resulted in actual and substantial prejudice. **In re Pers. Restraint of Coggin**, 182 Wn 2d 115, 121, 340 P. 3d 810 (2014). The Court does determine actul prejudice in light of the totality of the circumstances. **In re Pers. Restraint of Brockie**, 178 Wn 2d 532, 539, 309 P. 3d. 498 (2013). The ultimate question in determining whether the petitioner has been actually prejudiced is whether the error "So infected petitioner's entire trial that the resulting conviction violates Due Process." **In re Pers. Restraint of Music**, 104 Wn 2d 189, 191, 704 P. 2d 144 (1985). To receive relief following a nonconstitutional error, the petitioner must show a fundamental defect resulting in a complete miscarriage of justice. **n re Pers. Restraint of Cross**, 180 Wn 2d 694, 676, 327 P. 3d. 660 (2014).

Here the Trial Court did in fact violate a Constitutional Right of Double Jeopardy, which does violate the petitioner's Due Process Right to a fair and impartial trial that actuly prejudice the petitioner of being found guilty twice for a single statutes of the

very same RCW 9A.32.030 (1)(a) and 9A.32.030 (1)(c).

The Washington State Constitution does in fact guarantee the right to be free of being placed in Jeopardy twice for the same offense. The Trial Court is suggesting that this is a scrivener's error, but why did we need to vacate the Felony First degree murder in order to be re-sentenced? **STATE V. TVEDT**, 153 Wn 2d 705, When choice has to be made between two readings of what conduct congress has made a crime, it is appropriate, before courts choose the harsher alternative, to require that congress should have spoken in language that is clear and definite. Courts should not derive criminal outlawry from some ambiguous implication. Therefore, if the legislature fails to define the unit of prosecution or it's intent is unclear, under rule of lenity any ambiguity must be resolved against turning a single transaction into multiple offenses.

To further the prejudice to petitioner, the Trial Court stated, aggravating factors are elements of the offense charged." **STATE V. BRETT**, 126 Wn 2d 136 1995 [27] Aggravating factors are sentencing enhancements; They are not "CRIMES" as such cf. **STATE V. KINCADE**, 103 Wn 2d 304, 312-13, 692 P. 2d 823 (1985)(Aggravating factors are not elements of first degree murder). Thus, the same criminal conduct provision does not apply to aggravating factors. Moreover, even if applicable, the aggravators of burglary, robbery, kidnapping and concealment do not require the same objective criminal intent. See **DUNAWAY**, 109 Wn 2d at 216 (intent behind robbery distinct from the intent behind attempted murder); **STATE V. LESSLEY**, 118 Wn 2d 773, 778, 829 P. 2d 996 (1992)(" burglary and kidnapping are not the same criminal conduct because the intent was not the same for both crimes."

Due Process requires a criminal defendant be convicted only when every element of the charged crime is proved beyond a reasonable doubt. U.S. Const. Amend. XIV; Wash.

Const. Art 1 § 22
Here Due Process has been violated which deprived petitioner a fair and impartial trial, warranting relief.

2)<u>The Right to Counsel Violation</u>

The Right to Counsel was violated because of the questions of law that have been presented in this motion for review, which by having adequate representation on matters of law, prejudice would have less likely have happened.

CrR 3.1(b)(2) provides, " A lawyer shall be provided at every stage of the proceedings, including sentencing, appeal, and post-conviction review."

Here the Trial Court did deny the petitioner his Due Process Right's of the Sixth Amendment when the Trial Court with the Court of Appeals denying petitioner counsel at a critical stage of the proceedings, ie., Sentencing.

Under both the U.S. Const. Amend. VI and Wash. Const. Art. 1 § 22, A criminal defendant is entitled to the assistance of counsel at critical stage in the litigation. A critical stage is one in which a defendant's right's may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case would otherwise substantially affected. A complete denial of counsel at a critical stage of the proceedings is presumptively prejudicial and calls for automatic reversal.

<u>GONZALEZ-LOPEZ</u>, 548 U.S. 140, 126, S. Ct. 2557 165 L. Ed 2d. 4009 (2006)

CONSTITUTIONAL LAW § 831 CRIMINAL LAW § 46, 46.3 FAIR TRIAL-DUE PROCESS-COUNSEL

6. With respect to criminal trials, the Federal Constitution guarantee's a fair trial through the Due

Process Clause's, but defines basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause. (SCALIA, J., JOINED BY STEVENS, SOUTER, GINSBURG, AND BREYER, JJ.

-APPEALS § 1535, 1603 STRUCTURAL DEFECTS-NO HARMLESS-ERROR ANALYSIS-

9. For purposes of appellate review in criminal cases, the Federal Constitutional error's, sometimes called structural defects, that defy analysis by harmless-error standards include (1) the denial of Counsel, (2) the denial of the right to self-representation, (3) the denial of the right to public trial, and (4) the denial of the right to trial by the giving of a defective reasonable instruction. (SCALIA, J., JOINED BY STEVENS, SOUTER, GINSBURG AND BREYER, JJ.)

Here the petitioner was not only denied assistance of Counsel, by not conducting a hearing on the issue of the petitioner having the opportunity to hire lawyer of choice. Petitioner did in fact request specific counsel of choice of Mr. Jefferey Ellis, to represent petitioner in these proceedings a mot

Wrongful deprivation of Counsel in a criminal case is recognized as structural error. NEDER V. UNITED STATES, 527, U.S. 1, 8, 119 S.Ct. 1827, 144, L.Ed. 2d 35 (1999)(citing GIDEON V. WAINRIGHT, 327 U.S. 335, 83, S. Ct. 792, 9 L. Ed. 2d. 799 (1963).

STATE V. HAMPTON, 182 Wn 2d 805 (2014)

CRIMINAL LAW-RIGHT TO COUNSEL-COUNSEL OF CHOICE-PROVISION OF COURT APPOINTED LAWYER-SUFFICIENCY.

Providing defendant with an effective Court-appointed-lawyer is not a Constitutionally acceptable substitute for representation of the defendant by the Counsel of choice.

The right to select Counsel of one's choice, by

contrast, has never been derived from the Sixth Amendment's purpose of ensuring a fair trial, it has been regarded as the root of the meaning of the Sixth Amendment. In re PERS. RETRAINT OF KHAN, !*$ Wn 2d 679 (2015).

POWELL V. ALABAMA, 287 U.S. 445, 69, 53 S. Ct. 55, 77 L. Ed. 158 (1932).

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be hear by Counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of Law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of Counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lack both the skill and knowledge adequately to prepare his defense, even though he gave a perfect one. He requires the guiding hand of Counsel at every step in the proceedings against him. Without it, though he be not guilt, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate or those of feeble intellect.

F. CONCLUSION

Wherefore, given the above, petitioner does move this Supreme Court to grant Discretionary review of the cause number above.

Respectfully submitted this 5 Day of January 5th, 2017

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

September 27, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANGEL ANTHONY FERNANDEZ, Appellant.	No. 48087-5-II UNPUBLISHED OPINION

MELNICK, J. — Angel Anthony Fernandez appeals from his conviction and sentence of aggravated murder in the first degree. Although the trial court erred by denying Fernandez his right to a lawyer, the error was harmless. In a statement of additional grounds (SAG), Fernandez makes many assertions. Because the issues could have and should have been raised on his initial direct appeal, we do not consider them. We affirm.

FACTS

The State charged Fernandez with aggravated murder in the first degree and felony murder in the first degree. A jury found Fernandez guilty of both charges. On August 3, 2000, the trial court sentenced Fernandez to life imprisonment without the possibility of release or parole.

Fernandez appealed his conviction. We affirmed in an unpublished opinion. *State v. Osalde*, noted at 116 Wn. App. 1039, 2003 WL 1875588. He subsequently filed a personal restraint petition which we denied. Order Denying Petition, No. 40204-1-II, (Wash. Ct. App. Dec. 6, 2010).

On May 14, 2015, approximately fifteen years after the jury convicted Fernandez, he filed a motion in the trial court to dismiss one of his two murder convictions based on double jeopardy grounds. Fernandez did not specify which count he wanted dismissed. He argued that although the court only sentenced him on the aggravated murder conviction, he was convicted of two counts of murder for one killing, and the judgment and sentence did not show a dismissal of the felony murder count. Fernandez moved for a hearing on his motion to dismiss and for an appointed lawyer.

On June 23, the trial court held a hearing to discuss whether Fernandez's motions had any merit. Fernandez was not present and he did not have representation. The trial court and the State agreed that once Fernandez was brought before the trial court, it could determine whether he needed a lawyer for his motion.

Fernandez appeared at the next trial court hearing. The State argued that, based on its understanding of the law, Fernandez did not have a right to a lawyer. The trial court denied Fernandez's motion for a lawyer and set the matter over for argument.

On July 21, the trial court heard arguments on Fernandez's motion regarding the alleged double jeopardy violation. The State conceded that the judgment and sentence should not have included the felony murder charge, even though the court did not sentence Fernandez on it. The State proposed an amended judgment and sentence that omitted the reference to the felony murder conviction. The State also noted that a conviction for felony murder did not appear in Fernandez's criminal record. Fernandez continued to argue that it was a clear double jeopardy violation.

Fernandez also argued that the aggravated murder charge was a greater crime than the felony murder charge, and he should be sentenced on the felony murder charge instead of the aggravated murder in the first degree conviction because it was a lesser charge. The trial court set the hearing over for more argument.

On July 21, Fernandez filed a motion for a new trial and to vacate his sentence of aggravated murder in the first degree. The State argued that Fernandez was not entitled to a new trial or resentencing on the vacated felony murder conviction.

Fernandez filed another motion to dismiss his judgment and sentence, arguing that because the State conceded a double jeopardy violation, his judgment and sentence was invalid on its face.

On August 25, the trial court heard more arguments on all of Fernandez's motions. It determined that no legal basis existed to sentence Fernandez solely on the lesser charge of felony murder. The trial court entered an amended judgment and sentence that listed only aggravated murder in the first degree under "Current Offenses." Clerk's Papers at 98. Fernandez's sentence remained "prison without parole." CP at 100.

Fernandez appeals.

ANALYSIS

I. RIGHT TO COUNSEL

Fernandez argues he was wrongfully denied his right to the assistance of counsel under CrR 3.1. We agree with Fernandez that the trial court should have appointed him a lawyer; however, the error was harmless.

A. Legal Principles

CrR 3.1(b)(2) provides, "A lawyer shall be provided at every stage of the proceedings, including sentencing, appeal, and post-conviction review." The specific provision at issue here, CrR 3.1(b)(2), broadly describes the various stages of a criminal proceeding to which the right to counsel attaches, "including sentencing, appeal, and post-conviction review." But the right is not limitless.

With CrR 7.8 motions the trial court must initially determine whether they establish grounds for relief. *State v. Robinson*, 153 Wn.2d 689, 696, 107 P.3d 90 (2005). If no grounds for relief exist, the trial court may deny the motions without a hearing on the merits. *Robinson*, 153 Wn.2d at 696. If the motions do establish grounds for relief, counsel shall be provided. *Robinson*, 153 Wn.2d at 696.

CrR 7.8(b) allows a court to "relieve a party from a final judgment, order, or proceeding" for many reasons. A defendant bringing a CrR 7.8 motion must, however, support it "by affidavits setting forth a concise statement of the facts or errors upon which the motion is based." CrR 7.8(c)(1). A defendant is entitled to appointed counsel on a CrR 7.8 motion if the trial court initially determines that the motion establishes grounds for relief. *Robinson*, 153 Wn.2d at 699.

> CrR 7.8(b) provides that motions made under this rule are subject to RCW 10.73.090, .100, .130, and .140. These code provisions generally apply to collateral attacks and most notably to PRPs. This evinces a strong intention on the rule drafters' part that motions made under CrR 7.8 in superior court are subject to the same limitations, when appropriate, that apply to PRPs.

Robinson, 153 Wn.2d at 695-96. Thus, if motions filed under CrR 7.8 are not frivolous, the defendant should be provided counsel. *Robinson*, 153 Wn.2d at 696.

B. Fernandez's Right to Counsel

Fernandez asserts that he was entitled to counsel at the State's expense under CrR 3.1(b)(2) when he moved to dismiss his conviction after sentencing pursuant to CrR 7.8. We agree.

Here, Fernandez argued that one of his convictions should be dismissed because the judgment and sentence was invalid on its face and violated double jeopardy. He argued that because he was convicted of two counts of murder for one killing and because the judgment and sentence did not indicate that the trial court dismissed the felony murder count, there was a double jeopardy violation. The trial court allowed Fernandez to argue the issue, which showed that the trial court determined it was not frivolous. Even though Fernandez's argument that he was sentenced for both convictions is inaccurate, the trial court held hearings on the issue. And the State conceded the judgment and sentence was inaccurate and should be corrected to exclude the charge of felony murder that appeared on the first page of the judgment and sentence (without a count number). Based on Fernandez's motions, the trial court entered a corrected judgment and sentence. It is clear that Fernandez's motion established grounds for relief and he should have been provided counsel. The trial court erred by denying Fernandez's motion to appoint him a lawyer.

C. Harmless Error

A violation of a court rule may be harmless. *Robinson*, 153 Wn.2d at 697. Thus, reversal is warranted only if the error was prejudicial and there is a reasonable probability that the outcome of the motion would have been materially affected. *Robinson*, 153 Wn.2d at 697.

There is not a reasonable probability that the outcome of Fernandez's motion would have been materially affected. When a trial court is faced with multiple convictions for the same

conduct, it "'should enter a judgment on the greater offense only and sentence the defendant on that charge *without reference to the verdict* on the lesser offense.'"[1] *State v. Turner*, 169 Wn.2d 448, 463, 238 P.3d 461 (2010) (quoting *State v. Trujillo*, 112 Wn. App. 390, 411, 49 P.3d 935 (2002)). The trial court sentenced Fernandez on the aggravated murder charge and vacated the felony murder charge; therefore, the trial court's error in failing to provide Fernandez counsel was harmless. *In re Strandy*, 171 Wn.2d 817, 819-20, 256 P.3d 1159 (2011); *Turner*, 169 Wn.2d at 465.

II. SAG

"[T]he general rule is that a defendant is prohibited from raising issues on a second appeal that were or could have been raised on the first appeal." *State v. Mandanas*, 163 Wn. App. 712, 716, 262 P.3d 522 (2011). Even issues of constitutional import often cannot be raised in a second appeal. *Mandanas*, 163 Wn. App. at 717. "'Even though an appeal raises issues of constitutional import, at some point the appellate process must stop. Where, as in this case, the issues could have been raised on the first appeal, we hold they may not be raised in a second appeal.'" *Mandanas*, 163 Wn. App. at 717 (quoting *State v. Sauve*, 100 Wn.2d 84, 87, 666 P.2d 894 (1983)). All of the issues Fernandez raises in his SAG are issues that could have and should have been raised on his first direct appeal or in his personal restraint petition. Therefore, we do not address his SAG issues.

[1] A trial court "may violate double jeopardy *either* by reducing to judgment both the greater and the lesser of two convictions for the same offense *or* by conditionally vacating the lesser conviction while directing, in some form or another, that the conviction nonetheless remains valid." *Turner*, 169 Wn.2d at 464.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Bjorgen, C.J.

Maxa, J.

NO. 48087-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

ANGEL A. FERNANDEZ,

Appellant.

PRO SE SUPPLEMENTAL BRIEF

Pursuant to RAP 10.10

Angel A. Fernandez #286520
Clallam Bay Corr. Cntr.
1830 Eagle Crest Way
Clallam Bay, WA 98326

A. ASSIGNMENTS OF ERROR

1. Judicial Misconduct deprived appellant of his right to a fair trial.

2. Prosecutor Misconduct deprived appellant of his right to a fair trial.

3. Appellant was deprived of his right to a fair sentence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1(a); Was the appellant deprived of his 6th and 14th amendment rights to a fair trial where the State charged Aggravated Murder in the First Degree after it elected to not seek the death penalty?

1(b); Was the appellant deprived of his 6th and 14th amendment rights to a fair trial when the jury (hung) on the aggravating factors?

1(c); Was the appellant deprived of his 6th and 14th amendment rights to a fair trial where the jury was not instructed that the appellant had personally committed the aggravating factors?

1(d); Based on a recent Supreme Court decision was the appellant deprived of his 6th amendment right to a fair trial where the liability instruction allowed the jury to find guilt

solely on his codefendant's conduct?

2(a); Was the appellant deprived of his 6th and 14th amendment rights to a fair trial where the Prosecutor failed to prove aggravated murder in the first degree?

2(b); Was the appellant deprived of his 6th and 14th amendment rights to a fair trial where the Prosecutor failed to prove robbery in the first degree?

2(c); Was the appellant deprived of his 6th and 14th amendment rights to a fair trial where the Prosecutor failed to prove appellant was an accomplice to the aggravating factors to increase the penalty of the crime(s)?

3(a); Was the appellant deprived of his 6th and 14th amendment rights to a fair and just sentence where the Judgment and Sentence states that the appellant was convicted of Robbery, Theft, kidnapping, to conceal the commission of the crime(s) and the identity of the defendant or any person committing a crime, where the jury (hung) or was not unanimous?

3(b); Was the appellant deprived of his 6th and 14th amendment rights to a fair trial where the charging document failed to allege the underlying crimes as separate counts?

3(c); Was the appellant deprived of his 6th and 14th amendment rights to a fair trial where the jury was not

instructed properly on the to-convict instruction on aggravated murder?

B. STATEMENT OF THE CASE

Since the appellant's assigned counsel on direct appeal has informed him that the Verbatim Report of Proceedings are lost or have been destroyed, the appellant is forced to rely on the facts asserted in this Courts previous opinion. **COA. NO. 26327-1-II consolidated with 26342-4-II.**[1]

1. Substantive Facts

Ed Ross, Paul Sarkis, and Angel A. Fernandez were in the drug business. RP____. Ross was the dealer, Sarkis the delivery man, and Fernandez the debt collector. RP____. Sarkis introduced Jesse Osalde, a high school friend to Fernandez. RP____. Osalde did not regularly participate in the drug business; but Osalde, along with the others, regularly used the drugs. RP_____.

In October 1999, Fernandez and Ross had an argument over an outstanding debt. RP____. This argument spawned the following sequence of events. RP____. On the morning of October 10, 1999, Ross and his girlfriend, Cat Fischer, planned to pick up some methamphetamine at a house on Whidbey Island. RP____. While waiting in line for a ferry, Ross had a heated cell phone conversation with Fernandez. RP____. About

1. Appellant is entitled to a complete record. State v. Tilton 149 Wn.2d 775 (2003)

two minutes after the phone call, Fernandez and Osalde, displaying a knife and a gun respectively entered Ross's vehicle. RP____.

According to Fischer, Fernandez said '[g]ive me your gun, your wallet, your drugs, your money." 1RP July 20, 2000, at 84. At Fernandez's instruction, Ross drove the vehicle out of the ferry line and proceeded through Mukilteo to I-5. RP____.

Sarkis testified that he and Talee Coulter followed Ross in his Ford Explorer. RP____. He followed Ross, Fischer, Fernandez, and Osalde around Whidbey Island, to the top, through Oak Harbor and down to the bottom of the Island. RP____, ____. They stopped the vehicles, where everybody switched cars. RP____. Ross got into the explorer, Coulter, Osalde, and Fischer rode in Ross's car. RP____. Fernandez, Ross, and Sarkis rode in the Explorer stopped someplace to sell drugs. RP____. Eventually the group split up while Coulter and Osalde drove Fischer home. RP____.

After dropping off Fischer, while heading back to Coulter's home the car broke down. RP____. Fernandez, Ross, and Sarkis went to pick them up. RP____. That evening upon arrival to Coulter's home, Osalde, Sarkis, and Ross went down stairs to the basement. RP____. They proceeded to tie

Ross up. RP____. Sarkis testified that Ross was only tied up for a few minutes. RP____. All through the night they got high. RP____. Ross was freely moving about. RP____. At some point Fernandez, Ross, and Sarkis went to a house on Whidbey Island belonging to Yvette Hoy and Kodie Kinser. RP____. They were there for a long time drinking and getting high before they caught the ferry to Everett to meet back up with Coulter and Osalde. RP____.

During opening statements the Prosecutor stated that he planned to introduce testimony from Hoy and Kinser to corroborate the movements of Ross, Fernandez, and Sarkis. The testimony being presented was an out of court statement by Hoy and Kinser. Hoy and Kinser did not testify due to unavailability. RP____. During closing counsel for the defense argued that the testimony of Hoy, eliminated the elements of kidnapping. RP____.

Sarkis further testified that the following day Ross, Fernandez, Osalde and himself drove to some property that Fernandez claimed his family owned in Rose Valley, Cowlitz County. RP____. At some point while on the property Sarkis observed Ross running from behind a large bush while blood ran from his neck. RP____. Ross ran to the front of Sarkis's vehicle, with Fernandez about 20 feet behind and then

collapsed. RP____. Fernandez then picked Ross up, hit in the face, "stomped" on his head, and made two stabbing motions at Ross with a knife. RP____.

After Ross fell, fernandez tried to drag him into the bushes. RP____. Finding Ross too heavy, Fernandez told Sarkis and Osalde to help. RP____. The three carried Ross, who was moaning and flailing, "into the woods." 2RP July 24, 2000 at 273. When Sarkis returned to his vehicle, he cleaned blood off of the front of the car with "[b]eer and the shirt Ross was wearing." 2RP July 24, 2000 at 276.

When the three men left the property, Sarkis heard Fernandez state that "he loves it when takes somebody's soul[.] 2RP July 24, 2000 at 278. Prior to returning to Seattle that evening, the men disposed of Ross's clothes in garbage dumpsters.[2]

After not hearing from Ross State's witness Fischer called the FBI on Tuesday, October 12, 1999. Based on the statement she had given, the next day, a Mukilteo police officer arrested Fernandez. Osalde was arrested in another state. RP____, ____. On November 18, 1999, the Cowlitz County Prosecutor charged Fernandez with first degree murder of Ross, and kidnapping of Fischer. RP____. Count 1 of the information alleged first degree murder by 'aggravated murder and or felony murder." Count 2 alleged "kidnapping in the first

2. Appellant does not agree with the facts found in the opinion because the facts are not complete

degree." RP____.

Prior to trial the state amended the charges/information for a third time. The state charged 1 count of Aggravated Murder in the First Degree. Alleging that the defendant...on or about October 11, 1999, with premeditated intent to cause the death of another person, **RCW 9A.32.030(1)(a),** did feloniously cause the death of Edward Ross, a human being; and the murder was committed in the course of, in furtherance, or in immediate flight from the crime of **kidnapping** in the first degree and/or the murder was committed to conceal the commission of a crime, to wit: **robbery** and/or **theft** and/or **kidnapping** and/or to conceal the identity of the defendant or any other person committing a crime; to wit: **robbery** and/or **theft** and/or **kidnapping;** and/or

Felony Murder in the First Degree. Alleging, while **committing or attempting to commit** the crime of Robbery in the First Degree, and/or **robbery in the second degree,** and/or **kidnapping in the first degree,** and/or **kidnapping in the second degree,** and in the course of or in furtherance of such crime or crimes or in immediate flight therefrom, the defendant or another participant, caused the death of a human being, a person other than one of the participants, to wit: Edward Ross... See Third Amended Information attached as App.

A. to this brief.

2. Procedural Facts.

On 07/27/2000, the appellant was found guilty by jury of Aggravated Murder in the First Degree, and Felony Murder in the First Degree as charged in the information. The jury concluded that premeditated murder was committed by the defendant and or an accomplice, and that felony murder was committed by the defendant and or an accomplice. However, the defendant Angel A. Hernandez was not charged as an accomplice.

B). The jury was not instructed on criminal attempt **RCW 9A.28.020(1),** where the state alleged that the crime(s) of attempt had occurred, i.e. Attempted Robbery and and Attempted Kidnapping in the First Degree.

C). In the special verdict form to convict on Aggravated Murder, not only was the word "should" added to the instruction the element of Attempted Kidnapping in the First Degree was "omitted". See Court's Instructions To The Jury attached as App. B. to this brief. And

D). The information that the court read to the jury was and is defective. the information charges the defendant with Aggravated Murder in the First Degree. According to the 2008 WPIC the law clearly states that "Aggravated Murder" isn't a crime. However, none of the above was challenged or raised as

constitutional errors on appellant's initial direct appeal in 2000. In 2015 the court remanded appellant back to Superior Court to correct the judgment and sentence where double jeopardy attached to both of the crimes of Premeditated Murder and Felony Murder. The court vacated the Felony Murder but continued to add the underlying crimes of Robbery, Kidnap, and Theft to the Aggravating Circumstance of **RCW 10.95.020(9); RCW 10.95.020(11)(d).** This anomaly is highly troubling as well as the other claimed 10 errors, in that the jury was not unanimous as instructed in the special verdict to convict on the aggravators. Effectively stating that the jury had hung on the elements and was not convinced beyond a reasonable doubt.

By law, the appellant's judgment and sentence is in error based on this revelation and because the jury was not instructed on the element of attempted kidnapping that is charged in the information, the appellant's entire sentence and conviction is in error. Thus, reversal is required as shown below. **State v. Irby; State v. Green;** supra, controls.

C. ARGUMENT/GROUNDS

1. Introduction

Due Process requires the state to prove each element of an offense charged beyond a reasonable doubt. **In re Winship,** 397 U.S. 358, 364, 90 S.Ct. 1068 (1970). The state bears the burden of proving the elements. Apprendi v. New Jersey, 530

U.S. 466, 490, 190 S.Ct. 2348, 147, L.ed.2d 435 (2000). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. **In re Winship**, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Const. amend. XIV. On Appellate review evidence is sufficient to support a conviction only if "after viewing the evidence in light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." **Jackson v. Virginia**, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); **State v. Green**, 94 Wn.2d 216, 616 P.2d 628 (1980); **State v. Irby**, 187 Wn.App. 183, 347 P.3d 1103 (2015).

2. Supplement of The Record

Because the issues pertaining to assignments of error are purely based on the sufficiency of the evidence presented at trial through the state's key witnesses Fischer, Sarkis, Hoy, and Kinser as well as opening and closing arguments it is vital to Fernandez' additional grounds for review that tne Court supplement this brief with the record. **State v. Tilton**, 149 Wn.2d 775, 783, 72 P.3d 739 (2003). A criminal defendant is "constitutionally entitled to a record of sufficient completeness to permit effective appellate review of his or her claims." **State v. Thomas**, 70 Wn.App. 296, 298,

852 P.2d 1130 (1993).

[I]f this Court finds that there is a defect in the record, or the record cannot be reproduced then the remedy is to allow the appellant to "supplement the record with appropriate affidavits and discrepancies resolved by the judge who heard the case. RAP 9.3, 9.4, 9.5. However, where the affidavits are unable to produce a record which satisfactorily recounts the events material to the issues on appeal, the Appellate Court must order a new trial." Id. Citing **State v. Larson**, 62 Wn.2d 64, 381 P.2d 120 (1963). Further, although it it is not mandatory that the prosecutor respond to appellant's SAG on direct review. Since the issues are directed at the way the prosecutor charged or failed to charge or instruct the jury, where the errors directly affect the appellant's current sentence of life without parole, it is imperative that the prosecutor respond to the allegations found herein. See, **Beck Dye**, 200 Wash. 1, 92 P.2d 1113 (1939).[3]

3. **Insufficient Evidence Deprived Fernandez The Right To A Fair Trial Where The Prosecutor Charged and Tried Him On A Defective Charging Document/Information.!**

First: Aggravated Murder in the First Degree is Premeditated Murder in the First Degree accompanied by presence of one or more **aggravating circumstances** listed in

3. SEE LETTER FROM LAWYER APP. C.

the criminal procedure title of the code (**RCW 10.95.020**). Thus, **Aggravated Murder in the First Degree** is not a crime in and of itself! **State v. Roberts**, 142 Wn.2d at 501 (quoting **State v. Irizarry**, 111 Wn.2d 591, 593-94, 763 P.2d 432 (1988)).

Here, the prosecutor charged Fernandez with Aggravated Murder in the First Degree, (count 1) and Felony Murder in the First Degree as an alternative to the Aggravated Murder. See App. B. A defendant cannot be tried for a crime that don't exist. See **In re Hinton**, 152 Wn.2d 853, (2004); **In re Stoudmire**, ____Wn.2d____, ____. To do so would constitute a defective charging document, that could not be treated as a true bill of particulars because the framework on which the elements of the underlying offenses would be tainted. The court cannot charge the jury to hear a case based on a crime that does not exist. Id.

Felony Murder is not an alternative to Aggravated Murder and Fernandez should not have been charged in that manner. Instruction 35 and 36 clearly show the effects of the charging error. In the to-convict instruction 35 the word aggravated was crossed out and replaced with premeditated. And in Instruction 36 the word aggravated was crossed out and replaced with premeditated.

To correct the error in the charging document, the prosecutor could have amended the information a fourth time and changed the language to the following:

That the defendant Angel A. Fernandez and/or and **accomplice** in the County of Snohomish and/or Island and/or Cowlitz, State of Washington, on or about October 11, 1999, did unlawfully and feloniously, with premeditated intent to cause the death of another person, did cause the death of Edward Ross, a human being, and that **further aggravated circumstances exists**, to wit: the murder was committed in the course of, in furtherance of, or in immediate flight from the crime of **Kidnapping in the First Degree** and/or Theft and/or Robbery, and/or the murder was committed to conceal the commission of a crime, to wit: Robbery,and/or Theft and/or Kidnapping and/or to conceal the identity of the defendant or any person committing a crime; to wit: Robbery and/or Theft and/or **Kidnapping...**

[E]ven if this Court was to conclude that aggravated murder could be charged as a crime. That still would not cure the defect in the charging information.

Adequate notice of the specific crime charged is an absolute requirement of law. **U.S. Const. amend. VI: Wash. Const. art. 1, § 22**. **State v. Vangerpen**, 125 Wn.2d 782, 787,

888 P.2d 117 (1995), A charging document is constitutionally adequate only if all essential elements of a crime, statutory, and nonstatutory are included in the document so as to apprise the accused of the charges against him. **State v. Brewczynski**, 173 Wn.App. 541, 294 P.3d 825 (2013). Words in a charging document are read as a whole, construed according to common sense and include facts which are necessarily implied. **State v. Kjorsvik**, 117 Wn.2d 93, 109, 812 P.2d 86 (1991). See also **State v. Taylor**, 140 Wn.2d 229, 243, 996 P.2d 571 (2000). If the necessary elements are neither found nor fairly implied in the charging document the court presumes prejudice and reverse without reaching the question of prejudice. **State v. McCarty**, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

Here, two essential elements were not included in the charging document. 1) the elements **"of a common scheme or plan"** and 2) **accomplice** was ommitted. Both of the missing elements are an important component to the crimes charged.

The prosecutor alleged that felony murder was committed but failed to add the crimes was... part of a common scheme or plan. **RCW 10.95.020(11)(d)** requires a nexus between murders alleged to be part of a common scheme or plan. **State v. Finch**, 137 Wn.2d 792, 975 P.2d 967 (1999). Although the phrase "common scheme or plan" need not be defined for jurors. **State**

Yates, 161 Wn.2d 714, 168 P.3d 359 (2007), the phrase is mandated by law to be included in the information when charged with a felony to the murder in the first degree. **See WPIC's 30.03 Volume 11 Third Edition 2010 Pocket Part** issued in August 2010 at Page 36. The element "common scheme or plan was crucial in the notification of the charge of Felony Murder, because the jury was instructed on accomplice liability to both premeditated murder and felony murder.

In order for Fernandez to be an accomplice in the commission of a crime... he either 2) aids or agree to aid another person in planning or committing the crime.. **RCW 9A.08.020.** Both elements require some form of planning, and when tied together it paints a strong picture of a defendants actions. However, Fernandez was not charged as an accomplice. And since due process requires that the defendant be informed of the nature of the offense charged, including the manner of committing the crime. **State v. Bray**, 52 Wn.App. 30, 34, 756 P.2d 1332 (1988), failure to include the elements of a "common scheme or plan" and "accomplice liability" are considered to be uncharged offenses. The manner of committing a crime is an element and the defendant must be informed of this element in the information in order to prepare a proper defense. See **State v. Carothers**, 84 Wn.2d 256, 263, 525 P.2d 731 (1974)(One

cannot be tried for an uncharged offense). The adequacy of a charging document is reviewed de novo. A charging document is constitutionally defective under the Sixth Amendment to the United States Constitution and Article I section 22 of the Washington State Constitution if it fails to include "all essential elements of a crime." **State v. Johnson**, 289 P.3d 662 (2012). The rationale underlying this rule is that a defendant must be apprised of the charges against him or her and allowed to prepare a defense. An "essential element is one whose specification is necessary to establish the very illegality of the behavior charged." Id.

Simply put, where the prosecutor "omitted" the element of "a common scheme or plan" in relation to the felony murder and aggravated murder statutes **RCW 10.95.020(11)(d) and RCW 9A.32.030(1)(c)**, and where the prosecutor also "omitted" the element of "accomplice liability" from the information it relieved the state of its burden to prove every element of the crime(s) charged beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 318, 99 S.Ct. 628, (1970). And by doing so, it allowed the jury to guess at what actions Fernandez was actually guilty of, since the jury was not instructed on "a common scheme or plan" but was instructed instructed on "accomplice liability". See Instructions 18, 26,

35, and 36. "Either Fernandez was a part of the plan or he wasn't." See **Maddox v. City of L.A.**, 792 F.2d 1408, 1412 (9th Cir. 1986). However, the question of guilt cannot be answered by this Court in the affirmative because the instructions at best mislead the jury in their deliberations. **Binks Mfg. Co. v. Nat'l Presto Indus.,Inc.**, 709 F.2d 1109, 117 (7th Cir. 1983). Thus, absent the essential elements in the charging document, the jury had no way to fully understand the legal significance of the evidence supporting the felony aggravated murder circumstances. See App. B. Jury Notes. The remedy for informations failure to include essential elements is reversal and dismissal without prejudice. **State v. Vangerpen**, 125 Wn.2d 782, 888 P.2d 1177 (1995).

4. **Insufficient Evidence Deprived Fernandez The Right To A Fair Trial Where The Prosecutor Failed To Prove Every Element Of Kidnapping And Attempted Kidnapping In The First Degree As Charged In The Charging Document/Information.!**

Standard of Review

The U.S. Const. 5th Amendment provides "no person shall be deprived of life liberty or property, without due process of law." Washington Constitution Article 3 provides "no person shall be deprived of life, liberty or property without due process of law".

The state "must prove the elements of the predicate felony to prove the offense of felony murder." **State v. Gamble**, 154 Wn.2d 457, 466, 114 P.3d 646 (2005); **State v. Carter**, 145 Wn.2d 71, 80, 109 P.3d 823 (2005)("in order for a person to be found guilty of felony murder the state must prove that he or she committed or attempted to commit a predicate felony"). **State v. Wanrow**, 91 Wn.2d 301, 311, 588 P.2d 1320 (1978). While a predicate felony such as kidnapping and attempted kidnapping in the first degree are elements of this felony murder charge, Fernandez was not actually charged with the underlying crime(s). See App. A. However, our Supreme Court made it very clear that the jury must be instructed on and the state must actually prove each element of a predicate felony in felony murder. **State v. Gamble**, supra. And the proof can be substantiated in the to-convict instructions and the companion instructions. **State v. Irby**, 187 Wn.App. 183, 347 P.3d 1103 (2015); **State v. Majors**, supra. **State v. Collins**, supra; **State v. Green**, 94 Wn.2d 216, 616 P.2d 628 (1980).

In this case the state had the burden to prove that Fernandez "committ[ed] or attempted to commit kidnapping in the first or second degree or theft or robbery in the first or second degree, and in the course of or in furtherance of such crime or in immediate flight therefrom, Fernandez, or another

participant, cause[d] the death of a person other than one of the participants" as charged in the information for felony murder. **RCW 9A.32.030(1)(c). RCW 9A.56.190, RCW 9A.56.200, 9A.56.210, RCW 9A.40.010, RCW 9A.40.020 and RCW 9A.40.030.**

In the to-convict instruction for felony murder the the jury was instructed that "the defendant or an accomplice, was committing or attempting to commit Robbery in the first degree and/or Robbery in the Second Degree and/or Kidnapping in the First Degree and/or Kidnapping in the Second Degree. See App. A. Instruction 26.

However, in the special verdict to convict on the aggravating circumstances the jury was only instructed on Kidnapping in the First Degree. See App. A. Special verdict Form A. In the companion Instructions 32, 33, the jury was instructed on abduction and kidnapping, but the jury was not instructed on "attempted kidnapping". Criminal Attempt. **RCW 9A.28.020(1)** Being instructed on the definition of attempt was paramount in this case, because there was evidence that a possible abduction had occurred while Ross was briefly tied up in the basement. RP____. And because Attempted Kidnapping does not require the use of deadly force as where kidnapping does, the jury should have been instructed on attempt because kidnapping and attempted kidnapping are separate and distinct

crimes which require the jury to base there determination on a separate set of facts. See **State v. Green**, 94 Wn.2d 216, 616 P.2d 628 (1980). For example: The state charged that kidnapping and or attempted kidnapping was committed by (intent to facilitate the commission of any degree of murder) **RCW 9A.40.020(b)** and/or (inflicting bodily injury on the person) **RCW 9A.40.020(c)** and/or (inflicting extreme mental distress on that person or on a third person) **RCW 9A.40.020(d)**. See App. A. Information. Instruction 31 "omits the attempt elements. The above set of facts were crucial to the aggravating circumstances as will be shown below.

In **State v. Majors**, the court opined that to establish the attempt, the state need only prove that the defendant took a substantial step toward completion of the crime. 82 Wn.App. 843, 847, 919 P.2d 1258 (1996). **RCW 9A.28.020(1)** would have correctly set forth the applicable law as stated in **RCW 9A.32.030(1)(c)**. **State v. Collins**, 45 Wn.App. 541, 726 P.2d 491 (1986). The Appellate Courts has repeatedly held that attempt crimes have two elements (1) intent, and (2) a substantial step. Both of these essential elements should have been included in the instructions. Where the only evidence of a kidnapping was during the time Ross was in the basement briefly tied up. Absent the attempt definition the jury was

forced to equate what could have been contrued as unlawful imprisonment with first degree kidnapping. See **State v. DeRyke**, 110 Wn.App. 815, 41 P.3d 1225 (2002). Because there was evidence that Ross was under no restraint and was freely moving around with Fernandez and the others getting high prior to the basement ordeal and after they left the basement the state could not have proved kidnapping or attempted kidnapping in the first degree. **State v. Wanrow**, 91 Wn.2d 301, 311, 588 P.2d 1320 (1978)("The intent necessary to prove the felony murder is the intent necessary to prove the underlying felony. The intent must be proved by the state as a necessary element of the crime, and the question it was present is presented to the jury.").

It is constitutional error not to give instruction defining **attempt** and informing the jury that both intent and a substantial step are elements of an attempt to commit a crime. See **State v. Jackson**, 62 Wn.App. 53, 813 P.2d 156 (1991)(citing the note on use to WPIC 100.01 with approval); **State v. Stewart**, 35 Wn.App. 552, 555, 667 P.2d 1139 (1983). Thus, reversal is required. **Green**, controls, the consideration of the appellate court to review error(s) raised for the first time on appeal when the giving or failure to give an instruction invades a fundamental constitutional right of the

accused. Such as the right to a jury trial. State v. Green, 94 Wn.2d 216 supra, citing Const. 1 § 21: State v. McHenry, 88 Wn.2d 211, 213, 558 P.2d 188 (1977). Moreover, in considering kidnapping by any of the four means set forth in this case it is important to note that each is wholly separate and distinct from the others. **RCW 9A.40.010, RCW 9A.40.020(b), (c), and (d).** Each must be independently proved and none can stand upon a combination of the others to fill a critical void. State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). To consider the kidnapping we must first analyze the element of kidnapping. **RCW 9A.40.010;** Abduction. There was no evidence that Ross was secreted in a place where he could not be found, and there was no evidence of use or threatened use of force. Other than the brief moment Ross was bound or tied up, the state cannot attribute those actions as abductions under the statute.

In Green, the court reasoned that "considering the unusually short time involved, the minimal distance the victim was moved, the location, the clear visibility of that location from outside as well as the total lack of evidence of actual isolation from public areas there was no substantial evidence of restraint by means of secreting the victim in a place where she was not likely to be found. Id. Here, there was evidence that after the group left the basement they went looking for

drugs to get high. There was evidence that Ross was free to move about in the home of Hoy and Kinser and that no one was threatening him to stay in the company of Fernandez or Osalde.

Although **RCW 9A.40.020(b), (c), and (d) was not alleged in the felony murder** alternative, it was alleged in the aggravated murder. Which was confusing and quite possibly mislead the jury. In order for first degree felony murder to be proved the state must allege certain acts had occurred. Yet the only acts that they alleged were (abduction RCW 9A.40.010 and general kidnapping RCW 9A.40.020)(by committing or attempting to commit).

In the to-convict instruction for aggravating circumstances the state asks whether the murder was committed in the course of, in furtherance of, or in immediate flight from kidnapping in the first degree. See App. B. Instruction 18. The elements of **RCW 9A.40.020(b), (c), and (d) were not included.** But they were included in the information for aggravated murder.

In order to convict on aggravating circumstances the jury had to be unanimous as to which aggravating circumstances exists. However, the jury could not make the determination if they were not instructed on which act of kidnapping to rely on. **State v. Irby**, 187 Wn.App. 183, 347 P.3d 1103 (2015).

In **Irby**, the Court was asked two significant questions of law. 1) Was there a lack of jury unanimity where the state failed to tell the jury which act to rely on: and 2) Was there sufficient evidence to convict on the aggravating circumstances.

Under Washington's constitution, a defendant may be convicted only when a unanimous jury concludes the criminal act charged in the information has been committed. **WASH. CONST.** art.I, § 21; State v. Petrich , 101 Wash.2d 566, 569, 683 P.2d 173 (1984); **State v. Ortega-Martinez**, 124 Wash.2d 702, 707, 881 P.2d 231 (1994). When the prosecutor presents evidence of several acts which could form the basis of one count charged, either the state must tell the jury which act to rely on in its deliberations or the court must give what is known as a **Petrich**, instruction requiring all jurors to agree that the same underlying criminal act has been proved beyond a reasonable doubt. **State v. Kitchen**, 110 wash.2d 403, 409, 756 P.2d 105 (1988), citing **Petrich**, 101 Wash.2d at 570, 683 P.2d 173; **State v. Workman**, 66 Wash. 292, 294-95, 119 P. 751 (1911).

The jury was instructed that, to convict **Irby** of burglary in the first degree, the state had to prove the following four elements beyond a reasonable doubt:

1) That on or about the 8th day of March, 2005, the

defendant entered or remained unlawfully in a building;

2) That the entering or remaining was with intent to commit a crime against a person or property therein;

3) That in so entering or while in the building or in immediate flight from the building, the defendant was armed with a deadly weapon or assaulted a person; and

4) That the acts occurred in the State of Washington.

The state invited the jury to rely on either of these acts to convict **Irby**, of first degree burglary without no election by the state and no **Petrich**, instruction. Id. at 198.

The jury was also instructed on aggravating circumstances, with burglary in the first or second degree being the charged aggravator. The state charged two aggravating circumstances: 1) the murder was committed in the course of, in furtherance of, or in immediate flight from burlary in the first or second degree or residential burglary and 2) the murder was committed to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime...**RCW 10.95.020(9)** (concealment); **RCW 10.95.020(11)** (committed in the course of a felony).

The special verdict form split the two aggravators into five questions. The jury answered "yes" to all but one of them:

We, the jury having found the defendant guilty of premeditated murder in the first degree as defined in instruction 8, unanimously make the following anwsers to the questions submitted by the court:

Has the state proven the existence of the following aggravating circumstance beyond a reasonable doubt?

Did the defendant intend to conceal the commission of a crime?

ANSWER: yes

(Yes, No or Not Unanimous)

Did the defendant intend to protect or conceal the identity of any person committing a crime?

ANSWER: yes

(Yes, No or Not Unanimous)

Was the murder committed in the course of, in furtherance of, or in immediate flight from burglary in the first degree?

ANSWER: yes

(Yes, No or Not Unanimous)

Was the murder committed in the course of, in futherance of or in immediate flight from burglary in the second degree?

ANSWER: no

(Yes, No or Not Unanimous)

Was the murder committed in the course of, in furtherance of, or in immediate flight from residential burglary?

ANSWER: yes

(Yes, No or Not Unanimous)

Irby, Id. at 200-201.

The Court concluded that the it could not sustain the jury findings that the murder was committed in the course of in furtherance of, or in immediate flight from residential burglary, and that insufficient evidence supports the jury finding of a concealment aggravator. Id. at 203.

Similar to **Irby**, where there is no distinction the jury was instructed that, to convict the defendant of the crime of felony murder in the first degree, as charged as the second alternative in the Information, each of the following elements of the crime must be proved beyond a reasonable doubt:

1) That on or about the 11th day of October, 1999, Edward Ross was killed by the defendant or one with whom he was an accomplice;

2) That the defendant or an accomplice, was committing or attempting to commit Robbery in the First Degree and/or Robbery in the Second Degree and/or Kidnapping in the First

Degree and/or Kidnapping in the Second Degree;

3) That the defendant or an accomplice caused the death of Edward Ross in the course of or in furtherance of such crime or in immediate flight from such crime;

4) That Edward Ross was not a participant in the crime; and

5) That the acts which caused the death of the decedent occurred in the State of Washington.

Instruction 26

Although Fernandez was not charged with Robbery or Kidnapping in a separate count like **Irby**, the crime(s) of Robbery and Kidnapping was bundled into one element of the to-convict for felony murder. However, what is problematic about instruction 26, is the state did not instruct the jury on which act that they had to rely on to find Fernandez guilty of felony murder in the first degree. **WPIC 4.25** should have been given to ensure that the jury was convinced beyond a reasonable doubt that the state had effectively proven its case.

Further, in the to-convict instruction for aggravating circumstances it appears that the state chose the crime for the jury. See Instruction 18. Kidnapping in the second degree or robbery in the first or second degree was not included, yet

they were a part of the jury's determination to convict on felony murder. This omission was critical because we will never know how the jury arrived to their verdict. Whether they relied on robbery or kidnapping because there wasn't a separate verdict for the underlying crime(s) charged like in **Irby**. Speculating on what the jury might have decided is a grave error. **State v. Irby**, 187 Wn.App. at 202. And it should be considered error where the prosecutor interjected its own verdict to determine the aggravating circumstances. If anything the prosecutor should have included kidnapping in the second degree, and robbery in the first or second degree. However, absent an election by the state on which crime to rely on it is understandable how the state was forced to just put kidnapping in the first degree as an aggravating circumstance irregardless of the effect of the constitutional error that attached.

In the special verdict to convict on the aggravating circumstances, the form was split into two questions, the jury answered yes to the first one and was not unanimous to the second one.

We, the jury return a special verdict by answering as follows:

1) that the murder was committed in the course of, in

furtherance of, or in immediate flight from Kidnapping in the First Degree.

(yes) (no) (no unanimous agreement)

ANSWER: yes

2) that the defendant committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime, to-wit: Robbery and/or Theft and/or Kidnapping.

(yes) (no) (no unanimous agreement)

ANSWER: no unanimous agreement

Special verdict Form A. App. B.

The question raised to this Court is how can the jury find guilt of kidnapping in the first degree as an aggravator, and in the same breadth not be unanimous on the kidnapping as an aggravator. Maybe its because both aggravators rely on the same elements and require that the killing occurred in the course of, in furtherance of, or in immediate flight from a felony. **State v. Irby**, 187 Wn.2d at 204, 347 P.3d 1103 (2015). And maybe its because in the charging document for aggravated murder the information charged four means of committing first degree kidnapping; Abduction by secreting or holding the person in a place where that person is not likely to be found and/or using or threatening to use deadly force **RCW 9A.40.010**

with intent to facilitate the commission of any degree of murder and/or robbery RCW 9A.40.020(b), intent to inflict bodily injury on the person RCW 9A.40.020(c), and with intent to inflict extreme mental distress on that person or on a third person RCW 9A.40.020(d), where the state failed to elect which act of the crime of kidnapping it was relying on. And/Or maybe it was because the prosecutor "omitted" the elements of attempted kidnapping or robbery and the phrase "a common scheme or plan". State v. Jackson, 62 Wn.App. 53 supra; State v. Finch, 137 Wn.2d 792 supra, to show that the crime(s) or acts were in conformity. **Equally troubling is Fernandez' current judgment and sentence** shows that he was found guilty of the aggravating circumstances in section 2 of special verdict form A. See App. E. Judgment and Sentence. Nevertheless, RCW 9A.40.010 and 020(b),(c), and (d), are separate means distinct from each other and must be proved independently. State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980), and a Petrich, instruction should have been given or the state should have told the jury which act of kidnapping it was relying on. State v. Irby, controls.

And like Irby, none of the special verdict findings of aggravating circumstances are supported by the evidence, and the felony murder verdict is not supported by the evidence,

because the only evidence of Kidnapping was the incident in the basement of Coulters home. The drive to Rose Valley was a drive in pursuit of more drugs. Edward Ross, was a willing participant in the hunt for drugs. However, when the group arrived to Fernandez' property things took a turn for the worse. There was no evidence of restraint or abduction. The only evidence came from Sarkis where he testified that at some point he seen Ross and Fernandez coming from some bushes where Ross had blood on him and moments later Fernandez stabbed him ultimately killing him. Id. at COA Opinion **No. 26342-4-II.** App. F.

The state may establish kidnapping if the victim is restrained by the use of deadly force. Restraint by an ultimate killing does not, in and of itself, establish kidnapping. **State v. Green**, 94 Wn.2d 216, 616 P.2d 628 (1980). Therefore, based on the facts of this case insufficient evidence deprived Fernandez of his right to a fair trial, because the prosecutor omitted the attempt element where Fernandez was charged with an attempt crime; omitted the phrase common scheme or plan, where aggravated murder requires the phrase; omitted accomplice liability from the charging document where the jury was instructed on accomplice acts; omitted a **Petrich** instruction and failed to instruct the jury

on which act of kidnapping to rely on. **State v. Irby**, controls.

Finally!

A corollary of due process requirement that a jury find proof beyond a reasonable doubt in order to return a verdict of guilty is that it must return verdict of not guilty if the state does not carry its burden. Jury instructions must convey this. It is reversible error to instruct the jury in a manner relieving the state of its burden. **State v. Bennett**, 161 Wash.2d 303, 307, 165 P.3d 1241 (2007).

Here, in the to-convict instruction on aggravating circumstances it states the following in part:

The state has the burden of proving the existence of an aggravating circumstance beyond a reasonable doubt. In order for you to find that there is an aggravating circumstance in this case, you must unanimously agree that either aggravating circumstance 1) or aggravating circumstance 2) or both, has been proved beyond a reasonable doubt.

You "**should**" consider each of the aggravating circumstances above separately. If you unanimously agree that a specific aggravating circumstance has been proved beyond a reasonable doubt, you "**should**" answer "yes" on the special verdict form as to that circumstance. Instruction 18., App. B,

Fernandez briefly argues that the word "**should**" reduced the state's burden by connoting what is proper rather than what is required. By directing the jury that it "**should**" consider each aggravating circumstances separately and "**should**" answer yes if they unanimously agreed that the state has proven beyond a reasonable doubt the circumstances, the jury was left with the impression that it ought to acquit if possessed of reasonable doubt but that it was not mandatory. See **State v. Smith**, 174 Wn.App. 359, 298 P.3d 785 (2013).

5. **Remedy**

A jury is not required to search other instructions to see if another element should have been included in the instruction defining a crime. Failure to instruct on an element of an offense is automatic reversible error. the omission of an element of the crime produces a "fatal error" by relieving the state of its burden of proving every essential element beyond a reasonable doubt. **State v. Smith**, 131 Wn.2d 258 (1996).

As shown above tne remedy when the state presents insufficient evidence is dismissal with prejudice. **State v. Irby**, supra; citing **State v. Hickman**, 135 Wash.2d 97, 103, 954 P.2d 900 (1998). Because the issues raised herein are directed at Fernandez' life sentence based on the aggravators, this

this Court should vacate Fernandez' aggravated murder conviction, and remand to Cowlitz County Superior Court for new trial. [I]f the state objects, then this Court should require the state to make a prima facie showing why this remedy should not be allowed. Further, this Court should remand to correct the current judgment and sentence showing the convictions for Robbery, Concealment of the Commission of a crime, Concealment of the identity of the persons, and Theft.

D. CONCLUSION

Based on the above constitutional errors, this Court should vacate Fernandez' Aggravated Murder in the First Degree sentence and grant new trial. In the alternative this Court should remand for an evidentiary/reference hearing on the points raised. **State v. Irby**, controls.

Respectfully submitted,,,

Angel A. Fernandez Pro Se

DATED April 11th, 2016

APPENDIX B

FILED
SUPERIOR COURT

2000 JUL 27 P 10: 59

COWLITZ COUNTY
TERI A. NIELSEN, CLERK
BY

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	No. 99-1-00998-1
	)	
v.	)	VERDICT FORM A
	)	
ANGEL ANTHONY FERNANDEZ,	)	
	)	
Defendant.	)	

We, the jury, find the defendant, Angel Anthony Fernandez, GUILTY
(Write in "not guilty" or "guilty")

of the crime of Premeditated Murder in the First Degree as charged in the First Alternative.

Gregory A. Oathes
PRESIDING JUROR

If this Verdict Form is "guilty", please complete "Special Verdict Form A".

(90)

0631

FILED
SUPERIOR COURT

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

2000 JUL 27 P 10:59

COWLITZ COUNTY
TERI A. NIELSEN, CLERK
BY

STATE OF WASHINGTON, Plaintiff,	)	No. 99-1-00998-1
vs.	)	SPECIAL VERDICT FORM A
ANGEL ANTHONY FERNANDEZ, Defendant.	)	

THIS SPECIAL VERDICT IS TO BE ANSWERED ONLY IF THE JURY FINDS THE DEFENDANT, ANGEL ANTHONY FERNANDEZ, GUILTY OF PREMEDITATED MURDER IN THE FIRST DEGREE AS CHARGED IN THE FIRST ALTERNATIVE.

We, the jury, return a special verdict by answering as follows:

(1) that the murder was committed in the course of, in furtherance of, or in immediate flight from Kidnapping in the First Degree.

	(yes)	(no)	(no unanimous agreement)
ANSWER:	YES	_____	_____

(2) that the defendant committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime, to-wit: Robbery and/or Theft and/or Kidnapping.

	(yes)	(no)	(no unanimous agreement)
ANSWER:	_____	_____	NO UNANIMOUS AGREEMENT

Please answer "yes" or "no" or "no unanimous agreement" as to both (1) and (2).

Dwayne A. Oathes
PRESIDING JUROR

0629

91

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	No. 99-1-00998-1
	)	
v.	)	VERDICT FORM A-1
	)	
ANGEL ANTHONY FERNANDEZ,	)	
	)	
Defendant.	)	

We, the jury, having found the defendant, Angel Anthony Fernandez, not guilty of the crime of Premeditated Murder in the First Degree in Verdict Form A, as charged, or being unable to unanimously agree as to that charge, find the defendant, Fernandez, _____
(Write in "not guilty" or "guilty")

of the lesser included crime of Murder in the ~~First~~ Second Degree.

_____
PRESIDING JUROR

0629

92

FILED
SUPERIOR COURT

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

2000 JUL 27 P 10:59

COWLITZ COUNTY
TERI A. NIELSEN, CLERK
BY

STATE OF WASHINGTON, Plaintiff, v. ANGEL ANTHONY FERNANDEZ, Defendant.	No. 99-1-00998-1	VERDICT FORM B

We, the jury, find the defendant, Angel Anthony Fernandez, GUILTY
(Write in not guilty or guilty)

of the crime of Felony Murder in the First Degree as charged in the Second Alternative.

Gregory A. Oaths
PRESIDING JUROR

0630

93

FILED
SUPERIOR COURT

2000 JUL 18 P 3:54

COWLITZ COUNTY
TERI A. NIELSEN, CLERK
BY

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

STATE OF WASHINGTON, Plaintiff, - vs. - **ANGEL ANTHONY FERNANDEZ,** JESSE OSALDE 99-1-01005-9 Defendant.	**No. 99-1-00998-1** **THIRD AMENDED INFORMATION AS TO DATE** **AGGRAVATED MURDER IN THE FIRST DEGREE and/or FELONY MURDER IN THE FIRST DEGREE**

COMES NOW JAMES J. STONIER, Prosecuting Attorney of Cowlitz County, State of Washington, and by this Information accuses the above-named defendant of violating the criminal laws of the State of Washington as follows:

AGGRAVATED MURDER IN THE FIRST DEGREE

The defendant, in the County of Snohomish and/or Island and/or Cowlitz, State of Washington, on or about October 11, 1999, with premeditated intent to cause the death of another person, did feloniously cause the death of Edward Ross, a human being; and the murder was committed in the course of, in furtherance of, or in immediate flight from the crime of Kidnapping in the First Degree and/or the murder was committed to conceal the commission of a crime, to-wit: Robbery and/or Theft and/or kidnapping and/or to conceal the identity of the defendant or any person committing a crime; to-wit: Robbery and/or Theft and/or Kidnapping; contrary to RCW 9A.32.030(1)(a); RCW 9A.40.010; RCW 9A.40.020(b) and/or (c) and/or (d); RCW 9A.56.190; RCW 9A.56.020; RCW 9A.56.030; RCW 9A.56.040; RCW 9A.56.050; RCW 10.95.020(9); RCW 10.95.020(11)(d) and against the peace and dignity of the State of Washington.

0243

Cowlitz County Prosecuting Attorney
312 S.W. 1st Street
Kelso, Washington 98626
Telephone [360] 577-3080

AND/OR

FELONY MURDER IN THE FIRST DEGREE

The defendant, in the County of Snohomish and/or Island, State of Washington, on or about the 11th day of October, 1999, while committing or attempting to commit the crime of Robbery in the First Degree, and/or Robbery in the Second Degree, and/or Kidnapping in the First Degree, and/or Kidnapping in the Second Degree, and in the course of or in furtherance of such crime or crimes or in immediate flight therefrom, the defendant or another participant, caused the death of a human being, a person other than one of the participants, to-wit: Edward Ross; contrary to RCW 9A.32.030(1)(c), 9A.56.190, 9A.56.200, 9A.56.210, 9A.40.010, 9A.40.020 and 9A.40.030 and against the peace and dignity of the State of Washington.

DATED: Tuesday, July 18, 2000.

14021

JAMES J. STONIER, WSBA #4890
Cowlitz County Prosecuting Attorney

DEFENDANT INFORMATION						
NAME: ANGEL ANTHONY FERNANDEZ				DOB: 01/04/1965		
ADDRESS:				CITY:		
STATE:		ZIP CODE:		PHONE #(s):		
DRIV. LIC. NO.	DL ST	SEX: M	RACE:	HGT: 508	WGT: 190	EYES: Bro
HAIR: Blk	OTHER IDENTIFYING INFORMATION:					

STATE'S WITNESSES:

REFER TO SUPPLEMENTAL WITNESS LIST(S).

Cowlitz County Prosecuting Attorney
312 S.W. 1st Street
Kelso, Washington 98626
Telephone [360] 577-3080

APPENDIX C

COUNTY OF COWLITZ

STATE OF WASHINGTON, Plaintiff,

v.

ANGEL ANTHONY FERNANDEZ,
Defendant.

SID: WA12201151
If no SID, use DOB:

No. 99-1-00998-1

JUDGMENT AND SENTENCE
[ ] Prison
[ ] Jail One Year or Less
[ ] First Time Offender
[ ] Drug Offender Sentencing Alternative
[ ] Special Sexual Offender Sentencing Alternative
[ ] Clerk's action required, Restraining Order entered para. 4.4

I. HEARING

1.1 A sentencing hearing was held on August, 2000 and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the Court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on July 27, 2000 (Date)

by [ ] plea [X] jury-verdict [ ] bench trial [ ] stipulated facts of:

COUNT	CRIME	RCW	DATE OF CRIME
I	AGGRAVATED MURDER 1°	9A.32.030(1)(a) 9A.40.010;9A.40.020(b) and/or(c) and/or(d)	10/11/99
		9A.56.190;9A.56.020 9A.56.030;9A.56.040	
		9A.56.050;10.95.020(9) 10.95.020(11)(d)	
	FELONY MURDER 1°	9A.32.030(1)(c);9A.56.190 9A.56.200;9A.56.210;9A.40.010;9A.40.020;9A.40.030	10/11/99

as charged in the (_____ Amended) Information.

[ ] Additional current offenses are attached in Appendix 2.1.
[ ] The Burglary in Count #_____ involved a theft or intent of theft.
[ ] A special verdict/finding for use of **deadly weapon** was returned on Count(s) _____. RCW 9.94A.125, .310
[ ] A special verdict/finding of **sexual motivation** was returned on Count(s) _____. RCW 9.94A.127
[ ] A special verdict/finding for **Violation of the Uniform Controlled Substances Act** was returned on Count(s) _____, RCW 69.50.401 and RCW 69.50.435, taking place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, in a public transit vehicle, or in a public transit stop shelter, or within 1000 feet of the perimeter of, a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.
[ ] The defendant was convicted of **vehicular homicide** which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and is therefore a violent offense. RCW 9.94A.030
[ ] This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130
[ ] The court finds that the offender has a **chemical dependency** that has contributed to the offenses(s). RCW 9.94A.____.
[X] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.400): Aggravated Murder 1°/Felony Murder 1°

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

DEFENDANT'S COPY

FILED
SUPERIOR COURT
2015 AUG 25 P 5:23
COWLITZ COUNTY
STACI L. MYKLEBUST, CLERK
BY

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

STATE OF WASHINGTON, Plaintiff, vs. ANGEL ANTHONY FERNANDEZ Defendant. DOB: 1/4/1965 PCN: SID: WA12201151	No. 99-1-00998-1 ---AMENDED--- **Felony Judgment and Sentence -- Prison (FJS)** ☐ **Clerk's Action Required, para 2.1, 4.1, 4.3, 4.8 5.2, 5.3, 5.5 and 5.7** ☐ **Defendant Used Motor Vehicle**

15 9 01357 9

I. Hearing

1.1 The court conducted a sentencing hearing this date 8/25/15; the defendant, the defendant's lawyer, and the (deputy) prosecuting attorney were present.

II. Findings

2.1 **Current Offenses:** The defendant is guilty of the following offenses, based upon ☐ guilty plea (date) _____ ☒ jury-verdict (date) 07/27/2000 ☐ bench trial (date) _____: SMW

Count	*Crime*	*RCW (w/subsection)*	*Class*	*Date of Crime*
I	AGGRAVATED MURDER IN THE FIRST DEGREE	9A.32.030(1)(a), 9A.41.010, 9A.40.020(b) and/or (c) and or (d), 9A.56.190, 9A.56.020, 9A.56.030, 9A.56.040, 9A.56.050, 10.95.020(9), 10.95.020(11)(d)	FA	10/11/99

Class: FA (Felony-A), FB (Felony-B), FC (Fclony-C)
(If the crime is a drug offense, include the type of drug in the second column.)
☐ Additional current offenses are attached in Appendix 2.1a.
The jury returned a special verdict or the court made a special finding with regard to the following:
☐ The **burglary** in Count _____ involved theft or intended theft.
GV☐ For the crime(s) charged in Count _____, **domestic violence** was pled and proved. RCW 10.99.020.
☐ The defendant used a **firearm** in the commission of the offense in Count _____. RCW 9.94A.825, 9.94A.533.
☐ The defendant used a **deadly weapon other than a firearm** in committing the offense in Count _____ _____. RCW 9.94A.825, 9.94A.533.

☐ Count _____, **Violation of the Uniform Controlled Substances Act (VUCSA)**, RCW 69.50.401 and RCW 69.50.435, took place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.

☐ In count _____ the defendant committed a robbery of a pharmacy as defined in RCW 18.64.011(21), RCW 9.94A.____.

☐ The offense in Count _____ was committed **in a county jail or state correctional facility**. RCW 9.94A.535(5).

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

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

☐ Count _____ is the crime of **unlawful possession of a firearm** and the defendant was a **criminal street gang** member or associate when the defendant committed the crime. RCW 9.94A.702, 9.94A.829.

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

☐ In Count _____, the defendant had (number of) _____ **passenger(s) under the age of 16** in the vehicle. RCW 9.94A.533.

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

☐ In Count _____ the defendant has been convicted of **assaulting a law enforcement officer** or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault, as provided under RCW 9A.36.031, and the defendant intentionally committed the assault with what appeared to be a firearm. RCW 9.94A.831, 9.94A.533.

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

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

☐ In Count _____, assault in the 1st degree (RCW 9A.36.011) or assault of a child in the 1st degree (RCW 9A.36.120), the offender used force or means likely to result in death or intended to kill the victim and shall be subject to a mandatory minimum term of 5 years (RCW 9.94A.540).

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

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

	Crime	*Cause Number*	*Court (county & state)*	*DV* Yes*
1.				
2.				

* DV: Domestic Violence was pled and proved.

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

2.2 Criminal History (RCW 9.94A.525):

	Crime	Date of Crime	Date of Sentence	Sentencing Court (County & State)	A or J Adult, Juv.	Type of Crime	DV* Yes
1	BURGLARY 2		10/08/82	COWLITZ CO., WA	A		
2	ESCAPE 2		10/28/82	LEWIS CO., WA	A		
3	TMVWP		08/27/85	EUREKA, CA	A		
4	ESCAPE Paroled 10/13/87		01/25/86	EUREKA, CA	A		
5	ASSAULT 4 02/28/90 ASSAULT 4 03/09/03 DWLS 07/11/97						

* DV: Domestic Violence was pled and proved.

☐ Additional criminal history is attached in Appendix 2.2.

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

☐ The prior convictions listed as number(s) _____, above, or in appendix 2.2, are one offense for purposes of determining the offender score (RCW 9.94A.525)

☐ The prior convictions listed as number(s) _____, above, or in appendix 2.2, are not counted as points but as enhancements pursuant to RCW 46.61.520.

2.3 Sentencing Data:

Count No.	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus Enhancements *	Total Standard Range (including enhancements)	Maximum Term
I	0	XVI	PRISON WITHOUT PAROLE			LIFE

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (RPh) Robbery of a pharmacy, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present, (CSG) criminal street gang involving minor, (AE) endangerment while attempting to elude, (ALF) assault law enforcement with firearm, RCW 9.94A.533(12), (P16) Passenger(s) under age 16.

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

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

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

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

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

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

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

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

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

2.5 Legal Financial Obligations/Restitution. The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160). The court makes the following specific findings:

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

_____.

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

☐ (Name of agency) _____ 's costs for its emergency response are reasonble. RCW 38.52.430 (effective August 1, 2012).

2.6 ☐ Felony Firearm Offender Registration. The defendant committed a felony firearm offense as defined in RCW 9.41.010.

☐ The court considered the following factors:

☐ the defendant's criminal history.

☐ whether the defendant has previously been found not guilty by reason of insanity of any offense in this state or elsewhere.

☐ evidence of the defendant's propensity for violence that would likely endanger persons.

☐ other: _____.

☐ The court decided the defendant ☐ should ☐ should not register as a felony firearm offender.

III. Judgment

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

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

IV. Sentence and Order

It is ordered:

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

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

LIFE W/O PAROLE months on Count I _____ months on Count _____

_____ months on Count _____ _____ months on Count _____

_____ months on Count _____ _____ months on Count _____

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

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

Actual number of months of total confinement ordered is: _____.

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

This sentence shall run consecutively with the sentence in the following cause number(s) (see RCW 9.94A.589(3)): _____.

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

(b) ***Credit for Time Served.*** The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The jail shall compute time served.

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

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

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

Note: combined term of confinement and community custody for any particular offense cannot exceed the statutory maximum. RCW 9.94A.701.

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

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

☐ consume no alcohol or marijuana.
☐ have no contact with: _____.
☐ remain ☐ within ☐ outside of a specified geographical boundary, to wit:
_____.
☐ not serve in any paid or volunteer capacity where he or she has control or supervision of minors under 13 years of age.
☐ participate in the following crime-related treatment or counseling services:
_____.
☐ undergo an evaluation for treatment for ☐ domestic violence ☐ substance abuse ☐ mental health ☐ anger management, and fully comply with all recommended treatment.
☐ comply with the following crime-related prohibitions:_____
_____
_____.
☐ Other conditions:
_____
_____
_____
_____.

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

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

JASS CODE			
PCV	$ 500.00	Victim assessment	RCW 7.68.035
PDV	$	Domestic Violence assessment	RCW 10.99.080
CRC	$ 110.00	Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190	
		Criminal filing fee $110.00 FRC	
		Witness costs $ WFR	
		Sheriff service fees $ SFR/SFS/SFW/WRF	
		Jury demand fee $ JFR	
		Extradition costs $ EXT	
		Incarceration Fee $ JLR	
		Other $	
PUB	$ 619.00	Fees for court appointed attorney	RCW 9.94A.760
WFR	$	Court appointed defense expert and other defense costs	RCW 9.94A.760
FCM/MTH	$	Fine RCW 9A.20.021; ☐ VUCSA chapter 69.50 RCW, ☐ VUCSA additional fine deferred due to indigency RCW 69.50.430	
CDF/LDI/FCD NTF/SAD/SDI	$	Drug enforcement fund of Cowlitz County Prosecutor.	RCW 9.94A.760
	$	DUI fines, fees and assessments	
CLF	$	Crime lab fee ☐ suspended due to indigency	RCW 43.43.690
	$	DNA collection fee	RCW 43.43.7541
FPV	$	Specialized forest products	RCW 76.48.140
MTH	$	Meth/Amphetamine Clean-up fine $3000. 69.50.401(a)(1)(ii).	RCW 69.50.440,
	$	Other fines or costs for:	
DEF	$	Emergency response costs ($1000 maximum, $2,500 max. effective Aug. 1, 2012.) RCW 38.52.430 Agency:	
	$	Restitution to:	
RTN/RJN	$	Restitution to:	
	$	Restitution to: (Name and Address--address may be withheld and provided confidentially to Clerk of the Court's office.)	
	$ 1229.00	***Total***	RCW 9.94A.760

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

☐ shall be set by the prosecutor.

☐ is scheduled for _____ (date).

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

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

RJN	*Name* of other defendant	*Cause Number*	(Amount-$)

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

☒ All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than $ 25.00 per month commencing_____. RCW 9.94A.760.

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

☐ The court orders the defendant to pay costs of incarceration at the rate of $_____ per day, (actual costs not to exceed $100 per day). (*JLR*) RCW 9.94A.760. (This provision does not apply to costs of incarceration collected by DOC under RCW 72.09.111 and 72.09.480.)

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

4.4 DNA Testing. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. This paragraph does not apply if it is established that the Washington State Patrol crime laboratory already has a sample from the defendant for a qualifying offense. RCW 43.43.754.

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

4.5 No Contact:

☐ The defendant shall not have contact with _____ _____ (name) including, but not limited to, personal, verbal, telephonic, written or contact through a third party until _____ (which does not exceed the maximum statutory sentence).

☐ The defendant is excluded or prohibited from coming within _____(distance) of: ☐ _____(name of protected person(s))'s ☐ home/ residence ☐ work place ☐ school ☐ (other location(s)) _____ _____, or ☐ other location: _____, until _____ (which does not exceed the maximum statutory sentence).

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

4.6 Other: _____ _____ _____ _____

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

4.8 Forfeiture: The Court hereby forfeits these items: _____ to _____ a law enforcement agency.

4.9 Exoneration: The Court hereby exonerates any bail, bond and/or personal recognizance conditions.

V. Notices and Signatures

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

5.2 **Length of Supervision.** If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). **You are required to contact the Cowlitz County Collections Deputy, 312 SW First Avenue, Kelso, WA 98626, (360) 414-5532 with any change in address or employment or as directed. Failure to make the required payments or advise of any change in circumstances is aviolation of the sentence imposed by the Court and may result in the issuance of a warrant and a penalty of up to 60 days in jail.** The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

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

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

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

5.5b ☐ **Felony Firearm Offender Registration.** The defendant is required to register as a felony firearm offender. The specific registration requirements are in the "Felony Firearm Offender Registration" attachment.

5.6 Reserved

5.7 ☐ **Department of Licensing Notice:** The court finds that Count _____ is a felony in the commission of which a motor vehicle was used. **Clerk's Action**–The clerk shall forward an Abstract of Court Record (ACR) to the DOL, which must revoke the Defendant's driver's license. RCW 46.20.285. **Findings for DUI, Physical Control, Felony DUI or Physical Control, Vehicular Assault, or Vehicular Homicide (ACR information) (Check all that apply):**

☐ Within two hours after driving or being in physical control of a vehicle, the defendant had an alcohol concentration of breath or blood (BAC) of ____.
☐ No BAC test result.
☐ BAC Refused. The defendant refused to take a test offered pursuant to RCW 46.20.308.
☐ Drug Related. The defendant was under the influence of or affected by any drug.
☐ THC level was_____ within two hours after driving.

☐ Passenger under age 16. The defendant committed the offense while a passenger under the age of sixteen was in the vehicle.

Vehicle Info.: ☐ Commercial Veh. ☐ 16 Passenger Veh. ☐ Hazmat Veh.

5.8 IF AN APPEAL IS PROPERLY FILED AND APPEAL BOND POSTED, THE DEFENDANT WILL REPORT TO THE DEPARTMENT OF CORRECTIONS, WHO WILL MONITOR THE DEFENDANT DURING THE PENDENCY OF THE APPEAL, SUBJECT TO ANY CONDITIONS IMPOSED BY DOC AND/OR INCLUDED IN THIS JUDGMENT AND SENTENCE AND NOT SPECIFICALLY STAYED BY THE COURT.

5.9 FAILURE TO COMPLY WITH THE CONDITIONS OF THIS JUDGMENT & SENTENCE, INCLUDING ANY REPORTING CONDITIONS OR CONDITIONS OF COMMUNITY CUSTODY, MAY RESULT IN A FORFEITURE OF YOUR RIGHT TO APPEAL AND DISMISSAL OF ANY PENDING APPEAL OR COLLATERAL ATTACK.

5.10 Other: _____.

Done in Open Court and in the presence of the defendant this date: 8/25/15.

Judge/~~Print~~ Name:

Deputy Prosecuting Attorney	Attorney for Defendant	Defendant
WSBA No.36637	WSBA No.	
Print Name: DAVID PHELAN	Print Name:	Print Name: ANGEL ANTHONY FERNANDEZ

Refused

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

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

My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

Defendant's signature: REFUSED

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

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

Signed at (city) _____, (state) _____, on (date) _____.

_____ _____

Interpreter Print Name

VI. Identification of the Defendant

SID No. WA12201151 (If no SID complete a separate Applicant card (form FD-258) for State Patrol)

Date of Birth: 1/4/1965

FBI No.: 378932AA8

Local ID No. _____

PCN No. _____

Other _____

Alias name, DOB: _____

Race:			**Ethnicity:**	**Sex:**
☐ Asian/Pacific Islander	☐ Black/African-American	☐ Caucasian	☒ Hispanic	☒ Male
☐ Native American	☐ Other: _____		☐ Non-Hispanic	☐ Female

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

Clerk of the Court, Deputy Clerk, _____ Dated: _____

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

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

_____.

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

The defendant's signature: Refused

Left four fingers taken simultaneously	Left Thumb	Right Thumb	Right four fingers taken simultaneously

REFUSED

APPENDIX D

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF COWLITZ

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 99-1-00998-1
	)	
ANGEL FERNANDEZ,	)	Appeal No. 48087-5-II
	)	
Defendant.	)	

HEARING PROCEEDINGS
JUNE 8, 2015, BEFORE THE HONORABLE GARY BASHOR
JUNE 23, 2015, BEFORE THE HONORABLE STEPHEN WARNING
JULY 17, 2015, BEFORE THE HONORABLE MICHAEL EVANS
JULY 21, 2015, BEFORE THE HONORABLE MICHAEL EVANS
AUGUST 4, 2015, BEFORE THE HONORABLE MICHAEL EVANS
AUGUST 25, 2015, BEFORE THE HONORABLE MICHAEL EVANS

APPEARANCES:

For the State:	E. BENTSON (6/08/15) JASON LAURINE (6/23/15) JODY NEWBY (7/17/15) DAVID PHELAN (7/21, 8/04, 8/25/15) Deputy Prosecuting Attorneys
For the Defendant:	TERRY MULLIGAN (7/17/15) JOHN SIKORA (7/21/15) Attorneys at Law
PREPARED BY:	R.V. WILSON Wilson Transcription Services (425) 391-4218 rosievwilson@yahoo.com

I N D E X

WITNESSES:	DIRECT	CROSS	REDIRECT	RECROSS
(None Offered)				

* * *

EXHIBITS FOR IDENTIFICATION	MARKED	RECEIVED
(None Offered)		

* * *

PROCEEDINGS PAGE

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P R O C E E D I N G S

JUNE 8, 2015

THE COURT: We've also got No. 1 which is no attorneys involved. I've got those pleas. Did your office get copies of all that?

MR. BENTSON: Your Honor, we did get a motion from -- it looks like it's from -- probably from prison.

THE COURT: It is. I've not had a chance to look it over.

MR. BENTSON: I don't really -- yeah, I don't know really the details of what needs to be done, if anything, on that.

THE COURT: Let's do this. I'm going to put that over two weeks. I'll take a look at it and I'll see -- I mean, it's a motion. I haven't had a chance to even review it yet. It probably should be on the 3 o'clock docket, it's a motion.

MR. BENTSON: So this is on the 22nd.

THE COURT: The 22nd at 3:00, and let me hang onto this and I'll see if I can figure out what he's trying to do.

MR. BENTSON: Okay.

THE COURT: If I can transfer this over to 3 o'clock.

P R O C E E D I N G S

JUNE 23, 2015

MR. LAURINE: We also have Angel Fernandez. This matter is 99-1-00998-1. The defendant is not here.

THE COURT: He's in custody, and I don't see any reason to have him brought here at this point.

MR. LAURINE: Evidently, we just need to amend the J&S and any reference to the alternative count. I don't have a judgment and sentence.

THE COURT: Okay. Well --

MR. LAURINE: With the defendant --

THE COURT: We probably need him brought here in order to do that.

MR. LAURINE: Yeah.

THE COURT: All right. So, Counsel, I'll leave it to you to do the TRO?

MR. LAURINE: Yeah.

THE COURT: And then once he's here, we can address whether or not he needs counsel for that. Because the decision has already been made at the Appellate Courts. His concern is just that the judgment doesn't reflect it adequately.

All right. So let's set a review date about 30 days out just to see where we are. So that would be July

21. All right. Well, we can just put that on the 9 o'clock calendar.

MR. LAURINE: Okay.

THE COURT: July 21 at 9:00.

(PROCEEDINGS ADJOURNED.)

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P R O C E E D I N G S

JULY 17, 2015

THE COURT: All right. Good afternoon, sir. Would you tell me your name, please.

THE DEFENDANT: My name is Angel Anthony Fernandez.

THE COURT: Thank you, Mr. Fernandez.

Mr. Fernandez, it looks like you've been transferred up here from prison; is that correct?

THE DEFENDANT: That's -- yes, that's correct, your Honor.

THE COURT: And you have a motion that you want to have heard related to a motion to dismiss one of the two murder convictions based on a double-jeopardy argument; is that accurate?

THE DEFENDANT: That is correct, your Honor.

THE COURT: And are you -- your motion for appointment of counsel, let me just find that here.

Okay. I found that. And then I'll ask Ms. Newby if

the State has had an opportunity to review that document and what the State's response is.

MS. NEWBY: Your Honor, I was told before coming up here that Mr. Fernandez was not here and so it was stricken. I was also told that statutorily there's no right to counsel at this point. I don't have anything with me because I was informed it was not on. I guess he was brought in at something like 11:30 today, so there was some miscommunication obviously there.

It is the State's understanding he does not have the right to counsel, but it's up to the court. So, like I said, I don't have anything before me because I was told it was stricken.

I do understand that the motion is set for Tuesday at 3 o'clock, so we would just ask that it be set to then.

THE COURT: When you say the motion, meaning the motion to dismiss one of the convictions; is that --

MS. NEWBY: That is correct, your Honor. That's the State's understanding.

THE COURT: Okay.

MR. MULLIGAN: Your Honor, and if I might.

THE COURT: Please.

MR. MULLIGAN: I don't know if the court had a chance to read the motion, but there was a sentence

imposed on aggravated murder and also referenced in the judgment and sentence was felony murder, which was charged as an alternative3. Mr. Phelan, I believe, is handling this case, and it's my understanding that in essence he is in agreement with the defendant's motion and his intention was to on Tuesday propose an amended judgment and sentence striking any reference to the felony murder. That is what Mr. Phelan indicated earlier today. But it would have to be done with his presence because he would need to be present and available to sign documents.

THE COURT: Okay. All right. So, Mr. Fernandez, related to your motion to appoint counsel, I'm going to deny that, and we'll set this matter over to Tuesday, the 21st, which it sounds like it's probably already been set to that date, but we'll set it officially if it hasn't been done before to Tuesday, July 21st at 3:00 p.m. to hear your motion related to the motion for getting rid of one of the convictions.

Any questions?

THE DEFENDANT: Yes, your Honor. I'm under the understanding that because I'm incarcerated that I am entitled for counsel because this does hinge on the life and liberty of my freedom, and we do come to this court today seeking remedy for two convictions. They

were just not made reference to in court. I was convicted of two murders, not one. So obviously a true double-jeopardy violation has been occurred here (sic), and this is not per se a collateral attack as, you know, one might think. But because we're in the Superior Court, I do believe that I am entitled to counsel. So I would ask the court to reconsider and maybe we could take that up again Tuesday.

THE COURT: Okay. So in your motion for appointment of counsel, you cite to zero authority. If you can point me to some other authority that I'm not aware of, I'd be happy to relook at that, but at this point I'll deny the motion to appoint counsel and I'll deny the motion to reconsider as requested.

So we'll see everybody on Tuesday at 3:00 p.m.

THE DEFENDANT: Okay.

THE COURT: Thanks.

(PROCEEDINGS ADJOURNED.)

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P R O C E E D I N G S

JULY 21, 2015

THE COURT: Okay. We're here on the matter of State of Washington versus Angel Fernandez, 99-1-00998-1. We're here on Mr. Fernandez' motion to address the double-jeopardy issue.

And, Mr. Phelan, have you had an opportunity to review the motion by Mr. Fernandez?

MR. PHELAN: I have, your Honor. And we concede that there was a scrivener's error in the judgment and sentence that included a reference to a charge which was essentially not addressed anywhere else in the judgment and sentence and should I guess was or in fact I guess I should say it should be vacated, but since it has no legal status. There isn't anything to vacate because it was never taken. But there's a reference to another charge that a jury had rendered a verdict on, and so it was inappropriately included in the judgment and sentence.

So I've prepared a new judgment and sentence that omits that reference.

THE COURT: Okay. Have you given Mr. Fernandez a copy of that?

MR. PHELAN: I have not yet. I'll provide one to

Mr. Fernandez, and I'll hand everything up to the court.

THE DEFENDANT: Thank you. Is it possible I could get a free hand here, your Honor, so I can sign some documents here?

THE COURT: Everybody that I've seen in that has been able to sign just fine.

THE DEFENDANT: Okay.

THE COURT: It may not be the prettiest signature, but I'll deny the request.

THE DEFENDANT: All right.

MR. SIKORA: Your Honor --

THE COURT: Tell me your name, please.

MR. SIKORA: John Sikora, S-i-k-o-r-a.

THE COURT: Thanks, Mr. Sikora. Tell me what you wanted to say.

MR. SIKORA: Angel's wife was scheduled to be here. She cannot be here today because she's ill.

THE COURT: Thanks.

So, Mr. Fernandez, you want to look over that amended judgment and sentence and then specifically, Mr. Phelan, the amendment -- can you point out where --

MR. PHELAN: And, your Honor, I'll hand forward the original.

THE COURT: Okay.

MR. PHELAN: The original judgment and sentence so the court can see what had happened, but essentially it indicates Count I, aggravated murder in the first degree, and then there's a separate indication of a felony murder charge, but it doesn't give any effect to it. It's not mentioned anywhere else in the judgment. There's no sentence rendered. I have run Mr. Fernandez' criminal history through NCIC and DISCUS and there's no reference to it as being a conviction on his record, so it's just an offhand mention on the front page of the original J&S.

THE COURT: So the amended, what it does, it removes the felony murder in the first degree completely and just leaves the aggravated murder in the first degree.

MR. PHELAN: Yes, it's essentially whited it out, but we just prepared a new judgment so that we don't have to white it out.

THE DEFENDANT: At this time, your Honor, I'd like to object to what the prosecutor has just mentioned. I was in fact found guilty by a jury for felony murder.

MR. PHELAN: That's correct.

THE DEFENDANT: Okay. So that is a true charge.

THE COURT: Okay.

THE DEFENDANT: Okay? And so I would like to make sure that that's on the record.

THE COURT: Okay. All right. So what the State is -- it appears that they're conceding as far as the amended felony judgment and sentence, it's simply showing -- it's simply showing an aggravated murder in the first degree. Is it more properly denoted as aggravated murder in the first degree and felony murder in the first degree and then showing a murder for purposes of double-jeopardy? No.

MR. PHELAN: No, your Honor.

THE DEFENDANT: It was listed as same criminal conduct, your Honor.

THE COURT: Okay.

MR. PHELAN: Well, it wasn't actually, Mr. Fernandez. It wasn't listed as same criminal conduct on the judgment and sentence, the original one. It shouldn't be considered same criminal conduct, and that's what that double-jeopardy case law suggests. Basically, the charge goes away.

If for some reason the original conviction is ever overturned, the court can still consider that verdict on an appellate -- if it were to ever come back, but for all intents and purposes it ceases to exist as it is now. So any mention of the judgment and sentence would be inappropriate.

THE DEFENDANT: Your Honor, if I may.

THE COURT: Go ahead.

THE DEFENDANT: I have the original judgment and sentence here, and it clearly indicates it is the same criminal conduct.

THE COURT: Where does it say that?

THE DEFENDANT: Right here under it says: Current offenses same criminal conduct and counting as one crime is --

THE COURT: What page are you looking at?

THE DEFENDANT: On Page 1, your Honor.

THE COURT: That's helpful. And about the middle of the page, where are you at?

THE DEFENDANT: Towards the bottom.

THE COURT: Okay.

THE DEFENDANT: Second box from the bottom. I have it crossed off here as -- and then aggravated murder one/felony murder one is typed in.

THE COURT: Okay.

THE DEFENDANT: So the prosecution is, you know, trying to get past that I wasn't convicted of two crimes for one act when in fact I was. It's a clear double-jeopardy violation, your Honor, and to amend just to the aggravator violates my Eighth Amendment. And once the jury has found a person guilty and there's question as to which crimes, which of two degrees or

two crimes, that they have --

THE COURT: There wasn't any confusion in the jury's mind. They found you guilty of both, correct?

THE DEFENDANT: Absolutely not, there wasn't, because there was improper instruction in the very beginning.

THE COURT: Okay.

THE DEFENDANT: That it was okay to find me guilty of both offenses when in fact that's clearly a violation, your Honor. I cannot be found guilty for two acts of murder for one act.

THE COURT: Okay. And so your argument is that -- your position is that aggravated murder one is a greater crime than felony murder one?

THE DEFENDANT: Absolutely.

THE COURT: And that you should be sentenced to the felony murder one as opposed to the aggravated murder one?

THE DEFENDANT: Absolutely.

THE COURT: Okay.

THE DEFENDANT: And if I may, your Honor, I have a motion here. If your Honor is going to proceed with the aggravator as the sentence today, I have a motion for a new trial and a motion to vacate that.

THE COURT: So we'll pause on that because we need

to make the decision first, and that's a follow-up argument, so we'll need to pause on that.

THE DEFENDANT: Right. Because --

THE COURT: So we'll make the decision --

THE DEFENDANT: Your Honor, all we want is fair --

THE COURT: Hold on.

THE DEFENDANT: Excuse me?

THE COURT: I speak, you listen. And when you speak, I listen.

THE DEFENDANT: Okay. Thank you.

THE COURT: I was in the middle of speaking, and you may not have heard me because I'm fairly soft-spoken.

So we're going to hold off on that request because we need to make the initial decision, then we'll get to that point. So we're going to hold off on that.

THE DEFENDANT: Okay. I apologize, your Honor.

THE COURT: So I was looking at the case that you cited, Mr. Fernandez, State v. Turner, where you quote the language that says: To assure that double-jeopardy proscriptions are carefully observed, the judgment and sentence must not include any reference to the vacated conviction nor may any order to append thereto include such reference.

So your argument is that the State got that part of it right, they just put the wrong charge in there. It

should be felony murder one, not aggravated murder one?

THE DEFENDANT: As well as I should have been found -- or sentenced to the lesser degree, correct.

THE COURT: Okay.

THE DEFENDANT: Of felony murder.

THE COURT: And then did you cite in your motion to any either case law or statute that says that felony murder one is the lesser of aggravated murder one?

THE DEFENDANT: That's my next motion, your Honor, and I do include that language and authority for that.

THE COURT: So where do you cite that?

THE DEFENDANT: Like I said, that's in the motion for a new trial if we don't --

THE COURT: Can you tell me what the support for that is, what the reference is?

THE DEFENDANT: Going through my notes here, your Honor.

THE COURT: Thanks.

THE DEFENDANT: I'm reading from my motion that I made, same cause number, that you would want it addressed later on, but my information is on this.

THE COURT: So I'm just looking for the citation to the authority that says aggravated murder one is greater than felony murder one.

THE DEFENDANT: In State versus Iriziri (phonetic),

111 Wn.2d. 591, 763 P.2d. 432, 1988, your Honor.

THE COURT: Thanks.

THE DEFENDANT: Statutory circumstances which when combined with elements of premeditated murder in the first degree constitute aggravated murder, aggravated factors are not elements of a crime per Anderson J. with two Justices concurring in separate Opinion, three Justices concurring in part. Because commission of felony murder is not a necessary element of aggravated murder in the first degree, felony murder is not a lesser degree of aggravated murder in the first degree. An offense of felony murder cannot be an included offense within the charge of aggravated murder in the first degree per Anderson J. with two Justices concurring, two Justices concurring in separate Opinion and three Justices concurring in part. West R.C.W. AW 10.61.020, 10.95.020. First-degree felony murder is not a lesser-included offense within the offense of aggravated murder in the first degree and trial court error in instructing that it was.

The defendant's conviction of this nonincluded offense constitutes prejudicial error requiring a new trial.

THE COURT: Okay. Thanks.

Mr. Phelan.

MR. PHELAN: Your Honor, at least insofar as the motions that we were given, I haven't seen any reference to anything that suggests a lesser charge should be favored over the greater. I mean, what clearly happened here is that there were two counts -- or a charge in the alternative. The jury returned -- or found him guilty of both. The court sentenced on the aggravated murder and then did not sentence him on the other charge. It should just simply be removed from the judgment and sentence. There's no indication that he was actually placed in jeopardy for it. Like I said, I consulted his criminal history. There's no mention of it there. The only reference to another charge in terms of any conviction documents is just that the motion on the front page, if you go through to the part where he's actually like sentenced for time -- or the time for incarceration which is later in the judgment, it's basically life for the one count and then there's no mention of the other.

And then finally on the face of the judgment and sentence, it doesn't indicate that there was a Count I or a Count II or no count numbers assigned to that lesser-included charge. So -- or the lesser charge, but it's not an included charge.

So again this was a scrivener's error. It shouldn't

have been noted on the judgment and sentence. We've made that change. I'd ask the court not to rule on any other motions brought by Mr. Fernandez. I think certainly there's some issues with him being time-barred unless they're related specifically to the court's decision on this particular issue.

THE COURT: So, Mr. Fernandez, when you were reading that information from 111 Wn.2d. 591, it seemed to me that that's where you're saying that that case stands for the proposition that felony murder one is not a lesser-included offense of aggravated murder one. I think that's a summary of what you were reading to me on that.

So what I'm looking at here on the -- so the charging document apparently in this case initially charged one count in the alternative, either agg murder one or felony murder one, and those are submitted to the jury. The jury made a finding of guilt on both, and then it shows as far as the J&S, it shows Count I as a prison without parole, and then on Count I it shows confinement life without parole. It doesn't mention a second count. So I'm going to kind of tell you where I'm leaning at this point. I'm leaning to one -- I just want to double-check and look at that statutory reference just one more time before -- and

actually read it in its entirety, but at this point I'm leaning towards granting the amended judgment and sentence. And I just want to hear from you if you have any concerns about that. And you can reiterate or bring any new arguments related to that potential direction that I'm looking at.

THE DEFENDANT: I do, your Honor. I just want to make it part of the record that I'm objecting to the State's position on my conviction. I was convicted of two offenses by the jury. Clearly, the law is in my favor on t hat. If I could cite another. In Beck versus Alabama, 447 US 625, 100, S.Ct. 2382, 65 L.Ed., 201, 392. When a crime has been proven against a person and there exists reasonable doubt as to which two or more crimes that person is guilty, he or she shall be convicted only of the lowest crime.

THE COURT: So when you say "the lowest crime," the reference that you gave me related to a lesser-included offense, it's not necessarily a lower crime, and so is the sentence on the felony murder one different than the aggravated murder?

THE DEFENDANT: Absolutely.

THE COURT: What is it?

THE DEFENDANT: That's somewhere in the neighborhood of a release date.

THE COURT: Okay.

THE DEFENDANT: It's a Level 6 -- Level 15 -- as it stands today, I'm sentenced under a Level 16 which is mandatory life without parole because we didn't seek the death penalty in this case.

THE COURT: Okay. And then you're saying Level 15 is --

THE DEFENDANT: Level 15 is --

THE COURT: -- felony murder.

THE DEFENDANT: -- up to -- exactly. And I have obviously zero points, your Honor. But it's clear that I was found guilty of both, both alternatives. And if I may also add -- read from my notes here, the difference between charging a defendant in the alternative and charging a defendant for separate offenses is insignificant for purposes of double-jeopardy. Ultimately, juries are required to return verdicts on all counts, and trial courts, where appropriate, are required to either merge convictions or enter judgments and sentences only on one of multiple convictions so as to avoid double-jeopardy.

Your Honor, by being convicted of both these alternatives means I was placed in double-jeopardy.

THE COURT: So do we merge the convictions then?

THE DEFENDANT: No, we sentence to the lesser

because that's what the Constitution says.

THE COURT: Okay.

THE DEFENDANT: That's what the Eighth Amendment stands for.

THE COURT: The question is, though, if a jury made a finding of the greater, that you're guilty of that, then your argument is that even though they found you guilty of the greater that you should receive the lower punishment because you're convicted of the lower one?

THE DEFENDANT: Your Honor, they found me guilty of both the lesser and the greater.

THE COURT: Right. Right. But they found you guilty of the greater, so why don't we sentence you to the greater?

THE DEFENDANT: Because the Eighth Amendment says so. So does 10.58.020. It's the same principle as if there's a question as to which two degrees of which crimes that the fact-finder, the jury, was given --

THE COURT: There you're mixing -- when you say the two degrees, that authority earlier said felony one is not a lesser-included of aggravated murder. And then you're just saying that's a lesser degree --

THE DEFENDANT: Within the charge of aggravated murder, within the charge of aggravated murder. One has to be greater or not. And to take it further, your

court papers that had already been printed on, so.

THE COURT: So what are you asking? Are you talking about like paper and pencils and writing utensils?

THE DEFENDANT: Exactly. Exactly.

THE COURT: Sure, reasonable --

THE DEFENDANT: Reasonable, you know, nothing extraordinary.

THE COURT: -- paper and writing utensils are appropriate, too.

THE DEFENDANT: Absolutely.

THE COURT: Okay. So we'll see everybody back on August 4th at 3:00 p.m.

THE DEFENDANT: Thank you.

THE COURT: Thanks.

(PROCEEDINGS ADJOURNED.)

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P R O C E E D I N G S

AUGUST 4, 2015

THE COURT: Okay. The first matter we have is State of Washington versus Angel Fernandez. We're on today for Mr. Fernandez' motion to vacate and resentence and also a new trial.

I also received yesterday a copy from Mr. Fernandez, a handwritten motion for a motion to dismiss which appears to be on separate grounds from the initial motion; is that accurate, Mr. Fernandez?

THE DEFENDANT: It is, your Honor.

THE COURT: Did you serve a copy on the prosecution?

THE DEFENDANT: It was with the same delivery of what you got.

THE COURT: Okay.

THE DEFENDANT: I was hoping that we could kill two birds with one stone, so to speak, because I am over at the jail and I had short notice [INAUDIBLE], if the court would excuse that. I'd appreciate that.

THE COURT: So I guess the question at this point is whether we proceed with the currently-scheduled motions or whether we set the matter over to allow the State to review the new motion to dismiss and have everything heard on a single date. So I'll hear from the parties

what their suggestions are related to that.

MR. PHELAN: I have not seen yet the motion, the handwritten motion. I did try and check the court file before court today, but it hadn't gone into the court file yet either. So I don't know how long it will take to ...

THE COURT: There's nothing been filed in the court file. I'll tell you what happened. I received a manila envelope from Mr. Fernandez. It was hand-delivered yesterday to my chambers, and it has two copies of his motion to dismiss and it has a cover page of a judgment and sentence from the 1999 cause number.

MR. PHELAN: Okay.

THE COURT: So nothing's been filed.

MR. PHELAN: So it sounds like from what Mr. Fernandez says, one of those copies was intended for the State?

THE DEFENDANT: Exactly.

THE COURT: It's kind of my understanding.

MR. PHELAN: Okay.

THE COURT: So give that to the State.

THE DEFENDANT: I would ask that -- you know, that I be allowed to read the motion in open court. I must make my record, your Honor.

THE COURT: That's fine, but we're not going to do

that today. We're going to give the opportunity to the State to respond in writing, and if you want to read it into the record when we're back to hear the motion, if you'd like to do that, that's fine.

THE DEFENDANT: Right.

THE COURT: That's fine.

THE DEFENDANT: And this motion was put in -- Mr. Phelan, is that correct?

THE COURT: It's pronounced Phelan.

THE DEFENDANT: Phelan?

THE COURT: Uh-huh.

THE DEFENDANT: In light of further double-jeopardy principles that were found on the face of the judgment and sentence itself, so.

THE COURT: All right. So I think it's raising new issues that should be addressed, and I think that since it's dealing with the same judgment and sentence --

THE DEFENDANT: Right.

THE COURT: -- I'll hear it all at once. And so --

THE DEFENDANT: Exactly.

THE COURT: So we won't hear the two motions that are set for today. We're going to set this over and hear all three motions on the same docket. So today is the 5th (sic). We could look at setting this for the 26th of August.

MR. PHELAN: It's a Wednesday, your Honor.

THE COURT: Oh.

THE DEFENDANT: Any time sooner?

THE COURT: I should look at the 25th. If we were to set it -- Madam Clerk?

CLERK: I was just wondering if you were wanting to hear the motion.

THE COURT: I don't think there's any particular person who can hear it.

CLERK: I didn't know if you had read everything and researched it or if you were just --

THE COURT: I have. The amount of research is not overwhelming. I think it's doable preparation.

THE DEFENDANT: Right.

THE COURT: So we could set it -- I'm not going to be here on the 18th to hear the matter, and I think the 11th would be too soon, so the 25th I think would be our first opportunity to set it for a hearing. So I'll just check with the parties and see if that works okay with them.

MR. PHELAN: That would be fine with the State.

THE COURT: Okay. Mr. Fernandez, are you okay with that date?

THE DEFENDANT: Sure.

THE COURT: Okay. So let's set it then for Tuesday,

August 25th at 3:00 p.m. for the hearing of all the motions together.

And then what we'll do, this copy that Mr. Fernandez gave to the court, we will file that and that will become a part of the court file. So I'll give that to the clerk for filing and then we make that part of the official record.

THE DEFENDANT: Absolute, your Honor.

MR. PHELAN: Your Honor, if we could get a deadline for any additional pleadings in the case to be filed perhaps by the 18th, that would give both parties a fair amount of time but would also make sure that we wouldn't be in a situation where we come up like this again.

THE COURT: Sure. I think that's reasonable. I think that's a reasonable request. I had actually thought of that myself that a deadline should be imposed. So all pleadings related to any motions related to this case need to be filed no later than Tuesday, August 18th --

THE DEFENDANT: Okay.

THE COURT: -- to be heard on the 25th.

THE DEFENDANT: And then one other issue, Mr. Phelan, if you could properly address my name correctly, Angel Anthony Fernandez instead of just

Angel Fernandez, that would be something I would request.

THE COURT: Okay.

THE DEFENDANT: All my paperwork says Angel Anthony Fernandez. I don't want it to be mistaken for somebody else. I've met an Angel Fernandez, so that's why I say that.

THE COURT: Okay.

THE DEFENDANT: During my incarceration, so.

THE COURT: All right. So we will see everybody then August 25th at 3:00 p.m.

MR. PHELAN: Thank you, your Honor.

THE COURT: Okay. Thanks.

(PROCEEDINGS ADJOURNED.)

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P R O C E E D I N G S

AUGUST 25, 2015

THE COURT: All right. We're here on Mr. Fernandez' motion.

THE DEFENDANT: Yes, your Honor.

THE COURT: Mr. Fernandez, anything you want to say in support of the motion?

THE DEFENDANT: Absolutely.

THE COURT: Go ahead.

THE DEFENDANT: First off, I'd like to say good day to you, Judge.

THE COURT: How do you do?

THE DEFENDANT: Long time no see.

THE COURT: Yes, sir.

THE DEFENDANT: I was understanding that we was going to be with Mr. Evans, Judge Evans, today.

THE COURT: He is not available today.

THE DEFENDANT: Okay. So in support of this motion, I understood that I would be able to make my record today on the motion itself.

THE COURT: Go ahead and make any argument you wish to make.

THE DEFENDANT: My hands are a little short in these chains.

Your Honor, we come here today, we first started with motions. The first motion that I presented to the court was a motion to dismiss for one of two murders of violation of double-jeopardy, and that was submitted April 27, 2015.

Upon further review of motion for a new trial, a motion to vacate was entered July 21, 2015. The State responded with State's response to defendant's motion for a new trial and sentencing for felony murder in form of a motion on July 30, 2015.

The State also entered jury instructions and charging documents for exhibits in the motion.

Defendant then presented a motion on August 3, 2015 for dismissal of judgment and sentence being a complete violation of double-jeopardy.

With said charging document as having a fundamental flaw in the charging document itself by way of listing duplicity charges and multiplicity charges which in turn become insufficient thus making them invalid on their face. The judgment and sentence reflects this.

There's a constitutional right to be free of constitutional violations which, when violations detain a person unlawfully, the defendant's charging document is insufficient and fundamentally flawed due to being in complete double-jeopardy which does violate due

process and without question places the defendant completely in unlawful restraint and violating cruel and unusual punishment clause of the Eighth Amendment.

One cannot be charged, tried and convicted of duplicity and multiplicity offenses of the same fact and in law for one single act for one victim.

By having said motion be read to the jury and instructions given, then having judgment and sentence reflect the duplicity and multiplicity charges, the charging Information becomes insufficient and defendant is entitled to have charges dismissed.

Constitution, Article I, Section 8 -- Section 9, excuse me, double-jeopard with the Fifth Amendment to the United States Constitution guarantees that no person shall be subject for the same offense to be twice put in jeopardy of life and limb. This guarantee is made enforceable against the States through the Fourteenth Amendment.

The concept of double-jeopardy embodies a legal, social principle of the most fundamental nature. The essence of this guarantee is that no person shall be forced to twice run the gauntlet for an offense alleged in State versus Roibel (phonetic), 82 Wn.2d.577, 1973.

Given the plain information from the State in way of the instructions, we have further violations which

cannot be ignored by this honorable court. The jury instructions have and do affect the constitutional right to a fair trial. The court did lack authority when it gave the instructions of erroneous accomplice liability issues and have placed the defendant in jeopardy and now become total error of constitutional magnitude by relieving the State of its burden of proving accomplice liability separately for each crime. That is an error of constitutional magnitude. State versus Rice, 102 Wn.2d.102, 105, 683 P.2d.199, 1984.

If the instructions allow the jury to convict the defendant without finding essential elements of the crime charged, the State has been relieved of its burden of proving all elements of the charge beyond a reasonable doubt and thus the [INAUDIBLE] effect of a constitutional right to a fair trial. State versus Stein, 144 Wn.2d.236, 241, 27 P.3d.184, 2001.

In State versus Thomas, 166 Wn.2d.380, 2008, under Chapter 10.95 RCW, United States Constitutional Article 3, Subsection 2, Paragraph 3, United States Constitution Amendment 6, Constitution Article 1, Subsection 21, Criminal Rule 6.1(a) and Criminal Rule 6.16(b), a trial court may when circumstances require separately convene a jury to try allegations of aggravating circumstances against the defendant after

the defendant has been convicted of first-degree premeditated murder.

In the Thomas court, your Honor, also alleged aggravating factors instruction claiming the instructions did not require the jury to find the person committed the facts alleged, the aggravating factors instruction given in Thomas' trial read the defendant or an accomplice committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime. Irby (phonetic) 842, 43.

We held that the "or" removes the requirement that the jury find any form of actus reus at all on Thomas' part and relieves the State of its burden to prove the aggravating circumstances as they pertain to the defendant, Irby, 843, relying on State versus Roberts, 142 Wn.2d.471, 14 P.3d.713, 2000, your Honor.

The significance -- the significant difference between this verdict for and the one that we held unconstitutional for purposes of upholding Thomas' death sentence in Thomas 1 is the removal of the phrase "or an accomplice." Each question specifically asked if the defendant Thomas personally committed the aggravating factors, and the jury answered yes to each question.

With the State's new verdict form, the State has proven the existence of the following aggravating circumstances beyond a reasonable doubt.

1. Did the defendant commit the murder to conceal the commission of a crime or to protect or conceal the identity of a person committing a crime?

(INTERRUPTION IN PROCEEDINGS.)

THE COURT: Go ahead.

THE DEFENDANT: Is there an issue, your Honor?

THE COURT: No, sir. Go ahead.

THE DEFENDANT: 2. Did the defendant commit the murder in the course of and in the furtherance of or immediate flight from robbery in the first degree?

Did the defendant commit the murder in the course of and in the furtherance of or in the immediate flight from robbery in the second degree?

Did the defendant commit the murder in the course of and in the furtherance of and immediate flight from residential burglary?

The power to impanel a jury to hear aggravating factors is a court-mandated component of the power to hear cases requiring to be tried by a jury and not procedure crafted out of whole cloth. Criminal Rule 6.1(a). And the defendant in a criminal trial has a right to have the jury determine issues of fact, U.S.

Constitution, Article 3, subsection 2, Paragraph 3, Amendment 6, Constitution Article 1, Subsection 21, Blakely versus Washington, your Honor.

Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt, quoting Apprende (phonetic), 520 US at 490, as aggravating factors -- aggravation of penalty factors are not elements of a crime. Aggravating factors need to be charged -- need not be charged in the Information but nevertheless need to be proved to a jury beyond a reasonable doubt. That's in Kincade (phonetic), your Honor, 103 Wn.2d.

In the Washington judicial decision of the State for 2015, the judicial authority has made the following standard in State versus Irby, 2015, Wn.App.Lexus 812, 2015. The State charged two aggravating circumstances.

1. The murder was committed in the course of, in the furtherance of, or in the immediate flight from, burglary in the first or second degree or residential burglary. The murder was committed to conceal the commission of the crime or to protect or conceal the identity of a person committing a crime, Instruction 11.

RCW 10.95.020(9), concealment, RCW 10.95.020(11), committed in the course of a felony. The State's closing argument did not identify any particular item of evidence that supported either aggravation. The prosecutor merely cited the aggravating factors and asked the jury to return verdicts on those aggravating factors that, yes, each of them was committed based on the evidence that you were given here today.

The special verdict forms split the two aggravators into five questions. The jury answered yes to all but one. We, the jury, having found the defendant guilty of premeditated murder in the first degree defined in Instruction 8 unanimously make the following answers to questions submitted by this court. Has the State proven the existence of the following aggravating circumstances beyond a reasonable doubt? Did the defendant intend to conceal the commission of the crime? The answer, yes. In parentheses, yes, no, or not unanimous. Did the defendant intend to protect or conceal the identity of any person committing a crime? Answer, yes. In parentheses, yes, no, not unanimous. Was the murder committed in the course of, in the furtherance of or in the immediate flight from burglary in the first degree? Answer, yes. In parentheses, no, not unanimous. Was the murder committed in the course

of, the furtherance of, in the immediate flight from burglary in the second degree? Answer, no. In parentheses, yes, no, not unanimous. Was the murder committed in the course of, in the furtherance of or in the immediate flight from residential burglary? Answer, yes. In parentheses, yes, no, not unanimous. Special Verdict Form 1B. Jury's handwriting findings in italics.

Your Honor, I read this in light of the prosecutor sending me, along with his motion, the instructions and the instructions and the charging information, and upon further review we find that the instructions, your Honor, themselves are unconstitutional by Washington law as well as the Supreme Court law by the accomplice liability that were given back then. This is 2015. Things change. Things change in a way that maybe sometimes we don't want them to, but they do. Today we just want the color of the law to show.

We started with the motion of double-jeopardy, being convicted of two murders on paper. The State conceded to the double-jeopardy violation. I then produced and submitted a motion for a new trial to vacate and to be sentenced on the lesser but also informed by way of motion -- let me find it -- the charging documents themselves that are insufficient.

Lastly, I put in a motion to dismiss the judgment and sentence due to the double-jeopardy for each offense. Two RCWs for aggravated murder. Two RCWs for murder. Three RCWs for robbery. Three RCWs for kidnap. And three RCWs for theft.

The Information was sent to a trial, and I was convicted, your Honor, which you know, you were there.

After the instructions were given, verdicts were done. I have two verdicts, your Honor. One for premeditated murder and one for felony murder. The young prosecutor stated in his motion that I'm not entitled for relief because the felony murder was vacated. This is the first time I've been back in this County since you sentenced me. I don't know how he could vacate a sentence without your authority, so, therefore, I couldn't be discharged, couldn't be vacated.

But what I do know and what I've learned is that through all this we need to have verdicts for the predicate crimes, and we don't have those. I requested all the verdicts from the trial, and I only come up with three verdicts, four verdict forms, one that's not filled out, second-degree murder.

We do have one special verdict form, but as it said in State versus Irby and State versus Thomas and State

versus Roberts, that we have to have verdicts of the predicate crime.

When we have a murder conviction and a trial of this magnitude that there's only one sentence, I believe this trial should have been added a bifurcated trial as well (sic) from crime and punishment so that we wouldn't be sitting here today doing what we're doing right now. I'm not here to reinvent the wheel, your Honor. We're here to fix it.

There's a time and a place for a mass culpability, and I'm here to do that today, but with these constitutional violations when these laws are changing for I think the better for one's culpability, it's a definite plus. There's on winners here. Nobody is winning. We've lost so much time already, and a man has lost his life.

What I'm saying is, the way that things were brought up, there was only one side to this issue. There was one theory. When the prosecutor ended, so did the defense. There was nothing presented but a closing argument. How could the jury not find me guilty?

We're here on double-jeopardy issues today, and I believe that my standing is true with these double-jeopardy issues, and I believe that my standing is true with the insufficiency because without having

the insufficiency of the charging documents and then having the judgment and sentence reflect word for word the RCWs, a complete duplicate and multi -- in triplet, I don't see how that could stand, your Honor.

I understand about the merging doctrine to some degree, but even there we have to have verdicts for the predicate crimes themselves. When we have the special verdict, it says only to yes as to one of the crimes (sic) and unanimous as to the other three and they had the kidnap in there. Robbery, theft and kidnap, unanimous.

I didn't have three kidnappings, I didn't have three robberies, I didn't have three of anythings. My position is today, your Honor, is that you see the law. I don't believe that I'm here to try to waste your time or waste anybody else's. I'm here to get this corrected. There's things of constitutional magnitude here that are unjust, they've been ruled upon in our courts, you know, brand-new cases, old cases. In our situation, they were just deciding those cases in our situation, in our time, in Roberts is where it starts. And I don't believe that that was put out there, otherwise, you would have did something with those verdicts because I know you, I've known you for quite a while, and I know that you're a man of law and I know

that you're a man of reasoning. And today when they say that those are unconstitutional, the way they're written up, that's what we're talking about.

Correct this, your Honor. Correctly stating the law can hardly compensate for the law being misstated multiple times. I come to you the best way I know how, I have my family sitting here, with these things. Like I said, there's no winners here. I'm just here to try to fix this. And I believe I'm in good standing with this. I have said -- and I say those words and I get those words from a mentor of mine that I used to listen to, Chief Dan George. He says that when he makes reference to his words are true. So I leave you with that. I have said my words are true.

THE COURT: Mr. Phelan.

MR. PHELAN: Your Honor, we stand on our brief and ask the court to enter the Amended Judgment and Sentence and then submit any remaining issues Mr. Fernandez has to the Court of Appeals in the form of appeal.

THE COURT: Anything you want to respond to?

THE DEFENDANT: I believe that it's a waste of time going to the Court of Appeals, being that you're the presiding judge that took care of this then, and it's just going to come back down again. There's -- we've

already wasted 17 years almost. How much more time do we need to waste? And I know that, you know, there's culpability, you know, at hand, but there's clear violations of constitutional magnitude that can't be turned away and they're right in front of us. The young prosecutor sent me some of the instructions and I went and purchased the rest of them. The law clearly is in my favor today, your Honor. Unconstitutional to be not tried by a reasonable -- beyond a reasonable doubt by the State for accomplice liability.

Double-jeopardy principles have been conceded to. How can we not rule on that? I don't see how we go further and further and further down the road. This is where it starts, this is where it should end. Let's get on the road to fixing this. Let's quit wasting people's money, people's time. Like I said, there's no winners here. I have said hope (sic).

THE COURT: All right. Okay. The prior verdict entered included the special verdict form on the aggravator, which was the underlying crime, the kidnap, that Mr. Fernandez addresses. So there was a verdict on that as an element of the offense.

The defendant is entitled to an amended judgment and sentence that strikes the felony murder conviction that was charged as an alternative. They merged for

purposes of sentencing and for purposes of conviction as has been pointed out here. So he should have been sentenced just on the aggravated murder conviction. The only possible sentence on that conviction was life without parole. There is no basis for the argument that the defendant is entitled to be sentenced just on the lesser of the merged offenses or alternative offenses or to a lesser charge that he was -- that was brought at the time as a possible lesser-included.

Even if there were some additional punishment as a result of the felony murder conviction, again, the proper remedy is to strike that conviction and sentence him just for the aggravated murder. So I will grant the motion insofar as I strike the conviction for felony murder in the first degree. Having done that, the sentence on the more serious charge, the aggravated murder in the first degree, because that conviction is unaffected, remains the same.

And I will fill that out at this time.

THE DEFENDANT: Do we have a new judgment and sentence?

MR. PHELAN: Yes.

THE DEFENDANT: Is that the one that you gave me the last time?

THE COURT: I'm filling that out right now, yes.

MR. PHELAN: Yeah, I think I already gave you a copy last time.

THE DEFENDANT: Is this it?

MR. PHELAN: I've got another copy.

THE DEFENDANT: I have a problem with this right now.

THE COURT: What's that?

THE DEFENDANT: Mr. Phelan --

THE COURT: What's the issue with the judgment, sir?

THE DEFENDANT: The issue is there's still all these RCWs on here, your Honor, and one of them is a nonexistent crime. I can't be tried, charged for a nonexistent crime.

THE COURT: Okay. Well, I suggest at this point if you choose to take that up, you may. I'm finding to the contrary, so.

Okay. Do we have the signature page?

MR. PHELAN: Yes.

THE DEFENDANT: I'm not going to sign this, your Honor, because it's illegal.

THE COURT: I understand. All right.

THE DEFENDANT: On its face --

THE COURT: Pass it up, I'll sign it.

THE DEFENDANT: It's illegal on its face.

THE COURT: I understand your position.

THE DEFENDANT: And as to the verdict forms for the predicate crimes, your Honor ...

THE COURT: All right. We are in recess.

THE DEFENDANT: Well, Judge, at any rate, it was good to see you again.

THE COURT: Take care.

THE DEFENDANT: We'll see you again. This I know to be true.

(PROCEEDINGS CONCLUDED.)

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C E R T I F I C A T E

STATE OF WASHINGTON)
)
COUNTY OF KING)

I hereby declare under penalty of perjury that the foregoing transcript of proceedings was prepared by me from electronic recordings of the proceedings, monitored by me and reduced to typewriting to the best of my ability;

That the transcript is, to the best of my ability, a full, true and correct record of the proceedings, including the testimony of witnesses, questions and answers, and all objections, motions and exceptions of counsel made and taken at the time of the proceedings;

That I am neither attorney for, nor a relative or employee of any of the parties to the actions; further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

(Date) R.V. WILSON

DECLARATION OF SERVICE BY MAIL

GR 3.1

I, Angel Anthony Frenandez, declare that, on this 5th day of January 2017, deposited the foregoing documents:

Motion for Discretionary Review RAP 13.4 (b)(1) or a copy thereof, in the internal legal mail system, here at the Clallam Bay Correction Center from the address:

Clallam Bay Correction Center
1830 Eagle Crest Way
Clallam Bay, Wa. 98326

These documents were sent to the following parties:

The Washington State Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, Wa. 98504-0929

Cowlitz County Prosecuting Office
1338 Commerce Avenue, Suite 305
Longview, Wa. 98632-3726

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

Dated at Clallam Bay, Washington on January 5th, 2016.

Angel Anthony Fernandez #286520
Clallam Bay Correction Center
1830 Eagle Crest Way
Clallam Bay, Wa. 98326