SUPREME COURT NO. _____

NO. 74100-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALBERTO ÁVILA CÁRDENAS,

Petitioner.

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

The Honorable Bruce Heller, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Alberto Ávila Cárdenas, the appellant below, seeks review of the Court of Appeals decision in State v. Avila-Cardenas, ___ Wn. App. ___, No. 74100-4-I (Aug. 21, 2017), which is attached as Appendix A. This petition follows the October 5, 2017 order denying Ávila's motion for reconsideration.

B. ISSUES PRESENTED FOR REVIEW

1. The trial court permitted an other suspects defense with respect to both Ávila's codefendant, who had pleaded guilty, and another man, whose whereabouts were unknown. When defense counsel elicited that the codefendant pleaded guilty, the State argued that defense counsel's questioning implied that only the two other suspects were involved in the crimes and thus that defense counsel opened the door to the codefendant's statement on plea of guilty. The trial court admitted the codefendant's statement into evidence, despite the fact that it obviously implicated Ávila. Did the admission of the nontestifying codefendant's statement violate Ávila's right to confront a witness against him?

2. In opening statement, defense counsel told jurors they would hear Ávila's denial of involvement in the crimes and would also hear from a witness who saw the decedents on the night they disappeared at a time inconsistent with the State's evidence. This evidence was never presented, however. Did defense counsel render ineffective assistance by (a) referring to

Ávila's denial yet failing to recognize it was inadmissible and (b) failing to demand a mistrial when it became clear that promised exculpatory evidence would not be presented?

3. The trial court precluded the prosecution from eliciting details or context regarding an incident where Ávila's longtime girlfriend and coparent witnessed Ávila firing a gun. Nonetheless, the State elicited this precise testimony. Although the trial court later gave a curative instruction, the testimony was so prejudicial it was incapable of cure. Did the court err in denying Ávila's mistrial motion?

4a. Did the prosecutor commit misconduct when she violated the in limine ruling described in the immediately preceding issue statement?

4b. Did the prosecutor engage in reversible misconduct by encouraging a verdict based on passion and prejudice, attributing to Ávila the perception that the deaths of Mexican warehouse workers were not important enough to warrant society's attention?

5. At sentencing, the trial court relied in part on Ávila's "lack of remorse" when it imposed the highest available standard range sentence. Ávila maintained his innocence throughout trial and sentencing. Did the trial court's reliance on Ávila's purported lack of remorse improperly punish Ávila for the lawful exercise of his constitutional right against self-incrimination?

6. Did a former police officer's statements during voir dire taint the entire panel such that it deprived Ávila of a fair trial?

7. Should review be granted of all the issues raised in the pro se statement of additional grounds for review, attached as Appendix B?

C. STATEMENT OF THE CASE

a. Factual background and trial evidence[1]

The State charged Ávila Cárdenas with three counts of first degree premeditated murder, including firearm enhancements for each, for the shooting deaths of Jesús Bejar Ávila, Yazmani Queazada Ortiz, and Cristián Rangel. CP 1-2, 11-13.

On December 12, 2010, these men were reported missing when they did not return home after clocking out of work shifts. 2RP[2] 698-701, 714-15, 735-36, 850-51. Using its GPS signal, police located Quezada Ortiz's truck in Kent. 2RP 787-89, 805.

Information led officers to Ávila, who agreed to be interviewed regarding the men's disappearance. 2RP 805-06, 859. Ávila told police he had returned to the Puget Sound area from California on December 15, 2010,

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[1] For concision's sake, Ávila provides a brief summary of the trial evidence in this section of the petition. Facts necessary for his legal argument are included in each argument section with citations to the record. For a more thorough recitation of the facts, Ávila refers the court to his opening brief. Br. of Appellant 5-24.

[2] Consistent with the briefing below, Ávila refers to the verbatim reports of proceedings as follows: 1RP—March 13, 2015 and October 9, 2015; 2RP—July 1, 2, 6, 7, 8, 9, 13, 14, 15, 16, 20, 21, 22, and 23, 2015.

had no guns, and had no cell phone other than his employer's while in California. 2RP 863-66. These statements were contradicted at trial by witnesses who stated he had returned to the area before the men's disappearance. 2RP 886-87, 1154-55.

Police obtained a search warrant for Ávila's home, locating 9-millimeter bullets and handgun. 2RP 805-07, 710-11, 926-27, 945-46. A DNA analyst testified that blood spatter in the barrel of the gun was a 1 in 11 quadrillion DNA match to Cristián Rangel. 2RP 1372. The DNA analyst admitted that mishandling the gun could have caused contamination but denied the spatter evidence was contaminated. 2RP 961-62, 1412-13, 1420, 1422-23.

Police also searched Ávila's yard for ammunition because his girlfriend and coparent, Guadalupe Miranda Cruz told them Ávila had fired his gun in their yard. 2RP 1223-25. Police found a 9-millimeter bullet casing in the yard. 2RP 1228-29.

On March 10, 2011, the men's bodies were discovered in muddy, remote section of a Kent nursery. 2RP 920-72, 975-78, 1004. All men had at least one gunshot wound to the head. 2RP 1120, 1130-31, 1134, 1139-40.

Quezada Ortiz was buried with his hands bound in front with a zip tie. 2RP 1032. Several other zip ties were found at the scene. 2RP 1066, 1092-93. Police also found five 9-millimeter casings. 2RP 1045-46, 1489-90, 1675.

Although not definitive, a tool mark examiner testified the casings found at the scene matched the casing found in Ávila's yard and all the casings had been fired from the same gun found in Ávila's home. 2RP 1490.

Police matched the zip ties found at the scene to a particular brand sold at Lowe's. 2RP 1093-96, 1099, 1461-62. Police learned of a December 10, 2010 cash transaction from a Lowe's near Ávila's house. 2RP 1208-09, 1266-67. Based on the receipt, police purchased the same items themselves and compared the items to items found in Ávila's house, finding in common a peephole, lockset, smoke detectors, cabinet latch lock, package of appliance bulbs, and a can of WD-40. 2RP 1268-69, 1275-81. Police did not find brown work gloves or zip ties, which were purchased at the same time as the other items. 2RP 1282.

The State also presented cell phone evidence showing the general movements of phones associated with Ávila, codefendant Alfredo Vélez Fombona, and another suspect, Clemente Benítez, on the day the men went missing. 2RP 1563-621. Testimony indicated the patterns of movement among the phones was similar and explained the phones were in the Lakewood area in morning, moved to the South Lake Union Area (where the missing men worked) in the early afternoon, to the Kent Valley area where the nursery was located by the late afternoon, and back to Lakewood in the evening. 2RP 1620-21. Cell phone and tower data showed a pattern of

movement in the early afternoon between Ávila's residence and the Lakewood Lowe's store on December 10, 2010. 2RP 1580-83.

b. Verdicts, sentencing, and appeal

The jury found Ávila guilty of all three counts of first degree murder and determined he was armed with a firearm for each count. CP 211-16.

The trial court imposed a sentence of 1140 months. CP 228.

Ávila appealed. CP 233-34. As detailed below, the Court of Appeals rejected all of Ávila's arguments on appeal and affirmed his convictions and sentence. Appendix A.

D. ARGUMENT IN SUPPORT OF REVIEW

1. THE FORMER CODEFENDANT'S PLEA STATEMENT THAT HE COMMITTED THE MURDERS WITH "TWO OTHER MEN" OBVIOUSLY IMPLICATED ÁVILA CÁRDENAS, VIOLATING HIS CONFRONTATION RIGHTS

A State's witness read the guilty plea statement of former nontestifying codefendant Alfredo Vélez Fombona into evidence, which stated he "helped two men" with the kidnappings and was aware that the "other two men were armed with guns." 2RP 1334. Given the State's theory of culpability and the jury's knowledge when the statement was read, the statement obviously implicated Ávila and thereby violated his right to confront a witness against him under the Sixth Amendment and Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

The Court of Appeals determined there was no confrontation error because "the statement alone provides no information allowing the jury to infer that Avila-Cardenas was one of the 'two men.' If the statement were 'the very first item introduced at trial,' so that the jury heard it without any other evidence, it would not incriminate Avila-Cardenas." Appendix A at 6 (quoting State v. Fisher, 185 Wn.2d 836, 846, 374 P.3d 1185 (2016)). Thus, concluded the Court of Appeals, "Because the statement only became incriminating when linked with evidence introduced at trial, its admission did not violate the confrontation clause." Appendix A at 6.

Under Fisher, a statement violates the confrontation clause when it "obviously refers to the defendant," even when it does not implicate the defendant on its face. 185 Wn.2d at 845-46. Here, in opening statement, the jury heard the State's theory that exactly three men, Vélez Fombona, Ávila Cárdenas, and Benítez, were involved in the crimes. 2RP 672. Thus, the inference that Vélez's confession in the plea statement obviously referred to Ávila is one the jury would have drawn "'even were the confession the very first item introduced at trial." Fisher, 185 Wn.2d at 846 & n.7 (quoting Gray v. Maryland, 523 U.S. 185, 196, 118 S. Ct. 1151, 140 L. Ed. 2d 294 (1998)).

Prior to introducing the plea statement, the State elicited substantial evidence that Ávila was connected to Vélez before, after, and on the day the three men went missing. 2RP 1158-59, 1178, 1190-91. A detective testified

that both Vélez Fombona and Benítez were suspects alongside Ávila. 2RP 1298-304, 1311. Thus, when the plea statement was introduced, the jury well understood the State had identified and pursued three suspects and three suspects exactly. Even though "the other two men" or assisting "two men" was "not an obvious redaction and [did] not implicate Ávila by name, it nonetheless obviously refer[red] to Ávila." Fisher, 185 Wn.2d at 845.

The Court of Appeals held that Ávila failed "to recognize that the test is whether the statement itself, apart from the evidence introduced at trial, creates the inference that the defendant was involved." Appendix A at 6. On the contrary, it is the Court of Appeals that failed to recognize and apply Fisher's "obviously refers to" rule. The Fisher court relied heavily—exclusively even—on the evidence introduced at trial and the State's theory of culpability to determine whether the statement violated the confrontation clause. 185 Wn.2d at 845-46 & n.7 (expressly relying on evidence introduced before hearing Fisher's statement and the State's theory to determine whether Fisher's statement obviously referred to Trosclair).

Contrary to the Court of Appeals' claim that Fisher was "instructive," the Court of Appeals actually applied the rule advocated by the Fisher dissent. Compare Appendix A at 5-6 with Fisher, 185 Wn.2d at 854-55 (González, J., dissenting) (asserting there was no confrontation violation because the redacted statement became incriminating only when linked with evidence

introduced at trial). The conflict between the Court of Appeals and Fisher on the important constitutional issue of confrontation necessitates review. RAP 13.4(b)(1), (3).

The Court of Appeals decision also conflicts with its own precedent. In State v. Vincent, 131 Wn. App. 147, 150, 120 P.3d 120 (2005), the codefendant made incriminating statements to Jason Speek, who was housed in a nearby jail cell. Speek testified to these statements but was required to "omit all reference to [Vincent] and refer only to 'another person.'" Id. at 150-51. Speek repeatedly referenced "the other guy" but did not name Vincent directly. Id. at 151. Because "there were only two participants in the crimes and only two defendants," "the only reasonable inference the jury could have drawn from Speek's references to the 'other guy' was [Vincent]." Id.; see also United States v. Gonzalez, 183 F.3d 1315, 1322 (11th Cir. 1999) (holding confrontation violation clear "where a redacted confession implicates a precise number of the confessor's codefendants").

In State v. Vannoy, 25 Wn. App. 464, 473-74, 610 P.2d 380 (1980), the trial court admitted a nontestifying codefendant's statement that described participants in a robbery driving to a service station and then driving away while a police chase ensued. The court ordered that the names of the codefendants be redacted and replaced with the pronoun "we." Id. at 466, 473. Because police testified they observed *all* the defendants in the car, the jury

"could readily conclude that defendant Thomas Vannoy was included in the 'we's' of the codefendants' statements."[3] Id. at 474.

As in Vannoy and Vincent, Vélez Fombona's statement obviously implicated Ávila by referring to "two men" and "the other two men." These references readily allowed the jury to conclude the statement referred to the other two men the prosecution and witnesses had identified—Ávila and Benítez. The statement implicated both the precise number of men suspected of committing the crime and all the men suspected of committing the crime. It obviously referred to Ávila per Vincent and Vannoy. The Court of Appeals' contrary conclusion merits RAP 13.4(b)(2) and (3) review.[4]

Finally, the Court of Appeals harmlessness analysis neglected Ávila's primary argument under State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010). There, as a defense to rape, Jones wished to present evidence of consent given the complaining witness's participation in an all-night sex party, but the trial court disallowed it. Id. at 717-18. This was not harmless error because it

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[3] The Court of Appeals claims Vannoy is no longer good law because it preceded Gray and Richardson v. Marsh, 481 U.S. 200, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987). Appendix A at 7 n.3. But Vannoy has not been overruled and its analysis is entirely consistent with Gray, Richardson, and Fisher.

[4] The Court of Appeals declined to address the State's claim below that Ávila opened the door to a violation of his confrontation rights because he elicited testimony that Vélez Fombona had pleaded guilty. Appendix A at 8 n.4. As Ávila pointed out in his briefing no Washington case has addressed the opening-the-door doctrine in these circumstances but several out-of-state cases have. Br. of Appellant at 54-62; Reply Br. at 8-10. This issue merits review because it is both constitutional and in need of an authoritative determination by the Washington Supreme Court. RAP 13.4(b)(3)–(4).

"prevent Jones from presenting his version of the events." Id. at 724-25. When the trial court deprives the accused of his right to present his chosen defense, this error cannot be harmless.

The Court of Appeals claimed the plea statement did not preclude Ávila's other suspect defense, "it only prevented him from relying on Velez-Fombona's guilty plea to argue that defense." Appendix A at 8. This is untenable. Ávila wished to proceed with an other suspects defense and got pretrial approval from the court and the State to do so. CP 151-52; 2RP 84-86, 1160. But, due to the admission of the guilty plea statement, Ávila could not make this argument with any credibility—Vélez Fombona had confessed not just his own guilt but also Ávila's. Ávila could no longer counter the State's evidence with his own theory of events, during his own case-in-chief, and argue his own inferences that Vélez Fombona was the true culprit. Under Jones, the error was not harmless. The conflict with Jones's harmlessness reasoning merits RAP 13.4(b)(1) review.

2. UNDER STATE v. GREIFF, COUNSEL WAS INEFFECTIVE FOR MAKING TWO EVIDENTIARY PROMISES DURING OPENING STATEMENT AND THEN FAILING TO DELIVER ON BOTH

Promising to elicit certain evidence during opening statement and then failing to do so is "quite serious." State v. Greiff, 141 Wn.2d 910, 921, 10 P.3d 390 (2000). In Greiff, defense counsel told jurors in opening they would

hear a police officer's testimony that the victim repeatedly denied a sexual assault. Id. at 916-17. This representation was supported by the officer's testimony in the first trial. Id. at 917. However, the officer testified he never asked the victim whether she'd been raped, explaining he'd confused this victim with one from another case. Id. at 917-18.

This was "quite serious" because it severely damaged defense counsel's credibility. Id. at 921. However, the prejudice did not merit reversal given that "it would be 'obvious' to the jury that the reason [the officer] did not testify the way Greiff's counsel said he would is because [the officer] had made a mistake in his earlier testimony." Id. at 922. In addition, the trial court took curative steps, admitting the officer's previous trial testimony and instructing the jury to use it to assess the officer's credibility. Id. There was no ineffective assistance of counsel because the problem was that the State failed to disclose the change in the officer's testimony, not the incompetence of counsel. Id. at 925-26.

What the Greiff court stated was "quite serious" received no similar remedies in Ávila's trial.

First, defense counsel stated in opening that the defense would present Ávila's denials during a police interview and then never presented this evidence because no lawful route existed for its admission. Ávila's denials were not offered against him, so they were hearsay. ER 801(d)(2); State v.

Larry, 108 Wn. App. 894, 908, 34 P.3d 241 (2001). Nor were Ávila's denials necessary to explain the portions of Ávila's police interview the state had admitted under the rule of completeness. Id. at 910 (ER 106 requires the trial judge to admit remaining portions of a statement needed to clarify the portion already received).

Defense counsel has a duty to know relevant law and it is deficient performance not to recognize and apply it. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); State v. Adamy, 151 Wn. App. 583, 588, 213 P.3d 627 (2009). Here, counsel had no cogent theory of admissibility. 2RP 882 (complaining the State did not give notice it intended to admit only inculpatory portions of Ávila's statement). He had no argument to overcome the hearsay bar, no argument to place exculpatory statements within the rule of completeness, and no argument about why he was entitled to rely on the court's CrR 3.5 ruling to introduce any and all portions of the interview. His performance was deficient.[5]

Defense counsel's second unfulfilled promise in opening pertained to witness Johnny Bryant, who counsel said would testify he saw the missing men around 9:00 p.m. the evening they went missing, which conflicted with

[5] Ávila pointed the Court of Appeals to People v. Lewis, 240 Ill. App. 3d, 467-68, 182 Ill. Dec. 139, 609 N.Ed.2d 673 (1992), where the court concluded counsel was ineffective under very similar circumstances. The Court of Appeals did not address Lewis's persuasive reasoning, ostensibly because it could not.

the State's cell phone evidence. 2RP 679-80. Bryant never testified because he failed to show for trial. 2RP 1711-12, 1731-33, 1744. Defense counsel failed to move for mistrial even though his credibility was destroyed by failing to present two promised pieces of exculpatory evidence. Because nothing short of a mistrial could remedy the harm defense counsel's broken promises had done to Ávila, mistrial was necessary, appropriate, and would have been granted. State v. Post, 118 Wn.2d 596, 620, 826 P.2d 172 (1992).

The Court of Appeals asserted not moving for mistrial might be sound trial strategy. Appendix A at 13. But defense counsel already had moved for a mistrial based on a prejudicial violation of a motion in limine, discussed below, and expressly stated the trial had been going well until that point but now it had "been tainted beyond repair." 2RP 1213. After already moving for mistrial on another basis, there was no sound strategy for not moving for mistrial again, given the additional extremely prejudicial failure to present powerful exculpatory evidence to the jury promised in opening. The Court of Appeals' failed to "take [counsel] at his word" regarding his assessment of the case, in conflict with State v. Estes, 188 Wn.2d 450, 461, 395 P.3d 1045 (2017). RAP 13.4(b)(1), (3).

The Court of Appeals stated Ávila suffered no prejudice from counsel's deficient performance because "there is no substantial likelihood that the jury would have found [his] denial of involvement credible."

Appendix A at 12 (emphasis added). Ávila is not required to show a substantial likelihood but a reasonable probability—"a probability sufficient to undermine confidence in the outcome"—that, "'but for counsel's deficient performance, the outcome of the proceedings would have been different.'" Estes, 188 Wn.2d at 458 (quoting Kyllo, 166 Wn.2d at 862). By applying the incorrect standard under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the Court of Appeals decision conflicts with United States and Washington Supreme Court constitutional precedent. RAP 13.4(b)(1), (3).

The Court of Appeals' conclusion that there was no prejudice also conflicts with Greiff. Defense counsel promised two pieces of exculpatory evidence, not just one, and failed to follow through on both. The harm to counsel's credibility was thus double the harm in Greiff. Unlike Greiff, where defense counsel had a good faith basis for representing what the officer's testimony would be, defense counsel here failed to recognize that the evidence he told jurors he would introduce was inadmissible. His failure to follow up on his promises in opening statement were based on a misunderstanding of several points of law in significant contrast to Greiff. Unlike Greiff, short of mistrial, there was nothing available to the trial court that could cure the prejudice. Counsel's failure to demand the only sufficient remedy—mistrial—was prejudicial. The jury was left with the impression that counsel

was dishonest or overreaching, affecting the outcome of trial within a reasonable probability. The Court of Appeals contrary conclusion conflicts with Greiff, meriting review under RAP 13.4(b)(1) and (3).

3. THE COURT OF APPEALS MISSTATED THE FACTS AND THEREFORE MISAPPLIED THE LAW ON PREJUDICIAL VIOLATIONS OF PRETRIAL MOTIONS IN LIMINE

The Court of Appeals decision relies on an inaccurate version of the pretrial ruling in limine because it must do so to reach its incorrect result. The State, the defense, and the trial court agreed before trial that "no context" regarding Ávila's discharge of a firearm was to be elicited during trial, given ER 404(b) and ER 403 concerns. CP 186-87; 2RP 75-76, 109. Yet Guadalupe Miranda Cruz testified two times that Ávila fired a gun towards her feet. 2RP 1162, 1172. The Court of Appeals claims there was no in limine violation because Miranda Cruz did not say Ávila fired the gun to frighten her or give details about what led up to the gun's firing. Appendix A at 16-17. This hairsplitting misconstrues the facts and law. Ávila's mistrial motion should have been granted.

Under ER 404(b) and ER 403, evidence of other crimes, wrongs, or acts is not admissible to prove character and conformity therewith. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009); State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982); State v. Wade, 98 Wn. App. 326, 333,

989 P.2d 576 (1999). To justify admission, the evidence (1) must serve a legitimate purpose, (2) be relevant to prove an element of the crime charged, and (3) must have probative value that outweighs its prejudicial effect. State v. Magers, 164 Wn.2d 174, 184, 189 P.3d 126 (2008).

In determining whether a mistrial should have been granted, courts consider the seriousness of the claimed irregularity, whether the information imparted was cumulative of other properly admitted evidence, and whether admission of improper evidence can be cured by jury instruction. State v. Weber, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983); State v. Escalona, 49 Wn. App. 251, 255, 742 P.2d 190 (1987).

The Court of Appeals did not provide analysis of these principles, instead concluding that no violation of the in limine ruling occurred. Appendix A at 16-17. But the record could not be clearer that the parties proceeded with the understanding that the fact of the gun's discharge would come in, but that any evidence that Ávila shot towards Miranda would stay out. CP 186-87; 2RP 75-76, 109. The Court of Appeals misses the basic point that the evidence that Ávila shot at his longtime girlfriend painted him as a violent man who shoots guns intentionally or recklessly at others. Such evidence is "'inherently prejudicial'" and likely to impress itself on the minds of the jury, which is precisely why the evidence was excluded at trial. Escalona, 49 Wn. App. at 255-56 (quoting Saltarelli, 98 Wn.2d at 363). In a

triple homicide committed by firearms, the jury heard twice that Ávila had fired his gun at Miranda Cruz, violating the in limine ruling.

The Court of Appeals' refusal to grapple with the actual facts and the correct legal analysis places its decision at odds with precedent. Review is warranted under RAP 13.4(b)(1) and (2).

4. THE COURT OF APPEALS DECISION CONFLICTS WITH CASE LAW ON PROSECUTORIAL MISCONDUCT

a. Eliciting evidence in violation of in limine order

The prosecutor elicited excluded testimony from Miranda Cruz, as discussed above, by asking for details regarding Ávila's discharge of a firearm in his yard. 2RP 1160-62. When the State disregards an in limine order, it amounts to flagrant prosecutorial misconduct that is presumed prejudicial. State v. Fisher, 165 Wn.2d at 748-49 & n.4; State v. Smith, 189 Wash. 422, 428-29, 65 P.2d 1075 (1937); State v. Stith, 71 Wn. App. 14, 22-23, 856 P.2d 415 (1993).

This case is indistinguishable from Fisher, Smith, and Stith. In each case, the prosecution was ordered not to elicit specific evidence. Fisher, 165 Wn.2d at 747 (evidence of physical abuse); Smith, 189 Wash. at 428 (evidence of dishonorable discharge from military); Stith, 71 Wn. App. at 21-22 (evidence of prior drug dealing). In each case, the prosecution elicited the prohibited evidence. Fisher, 165 Wn.2d at 747; Smith, 189 Wash. at 428-29;

Stith, 71 Wn. App. at 21-22. In each case, the courts reversed, presuming prejudice. Fisher, 165 Wn.2d at 749; Smith, 189 Wash. at 429; Stith, 71 Wn. App. at 22.

The Court of Appeals attempted to distinguish these cases by again claiming that no violation of the in limine ruling occurred. Appendix A at 18. The prosecutor's increasingly specific questioning to elicit details and context it was ordered not to elicit belies the Court of Appeals' conclusion in black and white. 2RP 1160-62. Because the decision conflicts with Fisher, Smith, and Stith, review should be granted under RAP 13.4(b)(1) and (2).

b. The prosecutor's race- and class-based arguments to convict were adequately preserved for review and extremely prejudicial

The Court of Appeals agreed that it was misconduct for the prosecutor to appeal to passions and prejudices to the jury by "urg[ing] the jury to convict to demonstrate a societal lack of prejudice" against Mexican warehouse workers. Appendix A at 21. However, the court concluded that defense counsel's objection failed to preserve the error and that the error was harmless. Appendix A at 21-22.

The State began its argument but noting that some cases "escape the prolonged attention of the public. It's almost as if some lives have more value than others, some are more deserving of attention." 2RP 1753. Defense counsel objected, the trial court overruled the objection, and the State

continued that no one, including the "justice system," would pay "any attention to three Mexican warehouse workers who just disappear," asking jurors to prove this thinking wrong. 2RP 1753-54.

The Court of Appeals decision claims Ávila's initial objection to "inflaming the passions of the jury here. This has got nothing to do with the evidence," was not sufficient to preserve the error for review. 2RP 1753; Appendix A at 20. The court stated Ávila's "challenge on appeal concerns the prosecutor's references to the victims' ethnicity. He did not raise this objection below." Appendix A at 20. But counsel objected immediately after the State suggested that "some lives have more value than others" and "some are more deserving of attention." The "some lives" that had less value were clearly the lives of Mexican warehouse workers, which defense counsel immediately recognized and objected to. Moreover, where an additional objection is a "useless endeavor" in light of a prior objection being overruled, counsel need not continue objecting to preserve the error. State v. Cantabrana, 83 Wn. App. 204, 208-09, 921 P.2d 572 (1996). The Court of Appeals decision is factually baseless and warrants RAP 13.4(b)(2) review.

As for prejudice, the Court of Appeals overlooked that, by overruling Ávila's objection, the trial court endorsed the impropriety of the State's argument, which "lent an aura of legitimacy to what was otherwise improper argument." State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984).

Indeed, the trial court approved of the argument that some lives are less valuable, turning Ávila into a scapegoat for racism, classism, and inadequacies in the criminal justice system. This theme likely had a substantial effect on the jury, especially because the trial court endorsed it. It could not have been cured by an instruction. In addition, the State had no motive theory and its improper arguments supplied one: Ávila thought he could kill the men because society wouldn't care about their disappearance for racist and classist reasons. The Court of Appeals' decision conflicts with Davenport, meriting review under RAP 13.4(b)(1).

The Court of Appeals also rejected Ávila's related ineffective assistance of counsel claim for failure to continue objecting to the misconduct, noting "'Defense counsel's failure to object to a prosecutor's closing argument will generally not constitute deficient performance because lawyers do not commonly object during closing argument "absent egregious misstatements."'" Appendix A at 22 (quoting In re Pers. Restraint of Cross, 180 Wn.2d 664, 721, 327 P.3d 660 (2014) (quoting In re Pers. Restraint of Davis, 152 Wn.2d 647, 717, 101 P.3d 1 (2004))). But the Court of Appeals agreed with Ávila that it was improper for the prosecutor to make race- and class-based pleas to the jury—the prosecutor's remarks were therefore indeed

egregious misstatements. Under Cross and Davis, there was a duty to object.[6] The Court of Appeals' conclusion conflicts with these cases, warranting review. RAP 13.4(b)(1).

5. IT VIOLATES DUE PROCESS TO PERMIT INCREASED PUNISHMENT BASED ON EXERCISING THE RIGHT AGAINST SELF-INCRIMINATION DURING ALLOCUTION

The Court of Appeals concluded that an allocuting defendant must admit guilt or face a harsher punishment based on a lack of remorse. This conclusion is constitutionally repugnant and conflicts with precedent.

"To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978). The due process issue has arisen in cases where the trial court has increased a defendant's punishment for going to trial rather than pleading guilty. State v. Richardson, 105 Wn. App. 19, 22, 19 P.3d 431 (2001) (trial court imposed costs it would not have had Richardson pleaded guilty); State v. Grayson, 154

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[6] The legal standards governing prosecutorial misconduct are rife with "[c]onflicting decisions and principles" that "offer the court different paths to follow, which paths lead to opposite ends." State v. King, noted at 199 Wn. App. 10520, 2017 WL 2955540, at *2 (Fearing, J., concurring) (Ávila cites this unpublished decision pursuant to GR 14.1 as persuasive, nonbinding authority). Judge Fearing is correct that Washington courts lack uniform application of rules relating to claims of prosecutorial misconduct and their preservation for appeal by defense counsel. His indictment that the appellate courts are oriented primarily to their desired outcome rather than an evenhanded application of law is correct. His observations merit review in all prosecutorial misconduct cases under RAP 13.4(b)(1), (2), and (4).

Wn.2d 333, 341-42, 111 P.3d 1183 (2005) (although trial courts have broad discretion to refuse a sentencing alternative under the Sentencing Reform Act of 1981, they "are still required to act within its strictures and principles of due process of law"); State v. Montgomery, 105 Wn. App. 442, 446, 17 P.3d 1237 (2001) ("A defendant may not be subjected to a more severe punishment for exercising his constitutional right to stand trial."). Thus, an individual may not be subjected to increased punishment for continuing to deny guilt or asserting a failed defense.

RCW 9.94A.535(3)(q)'s egregious lack of remorse aggravator provides a useful analogy. A trial court may use this aggravator to impose an exceptional sentence where a jury finds the defendant "demonstrated or displayed an egregious lack of remorse." The pattern instruction on egregious lack of remorse specifies "[a] defendant does not demonstrate an egregious lack of remorse by [denying guilt] [,] [remaining silent] [,] [asserting a defense to the charged crime] [or] [failing to accept responsibility for the crime.]" 11A WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL 300.26 (4th ed. 2016).

Cases that discuss this aggravator are instructive. The court in State v. Garibay, 67 Wn. App. 773, 781, 841 P.2d 49 (1992), rejected the trial court's reliance on lack of remorse as an aggravator. The trial court noted Garibay expressed no remorse to the preparer of the presentence report and

expressed no remorse during allocution. Id. at 781 & n.8. The Court of Appeals concluded, "Trial courts may not use a defendant's silence or continued denial of guilt as a basis for justifying an exceptional sentence." Id. at 782 (emphasis added); accord State v. Strauss, 93 Wn. App. 691, 698, 969 P.2d 529 (1999) ("Denials of guilt may be the equivalents of silence.").

In State v. Ramires, 109 Wn. App. 749, 756, 37 P.3d 343 (2002), likewise, Ramires wrote to his girlfriend asking her to take the blame for the crime because she would be charged as a juvenile. Ramires testified at trial that his girlfriend committed the crime. Id. The trial court relied on Ramires's lack of remorse and attempt to shift the blame to impose an exceptional sentence. The Court of Appeals reversed, explaining that "[r]efusing to admit guilt or remaining silent is an exercise of one's rights, not an indication of lack of remorse." Id. at 766. The refusal to "apologize, show remorse, or accept responsibility for one's actions" is "consistent with [a] failed defense and right to maintain . . . innocence." Id.

Here, Ávila exercised his right of allocution and declared his innocence. 1RP 108-09. The trial court expressly took his lack of remorse—his refusal to admit guilt and apologize—into consideration in imposing a sentence. 1RP 112-13. Punishing Ávila for doing what the law allows him is a "due process violation of the most basic sort." Bordenkircher, 434 U.S. at 363.

The Court of Appeals rejected Ávila's due process argument, noting Ávila "was neither compelled to speak nor compelled to utter the words he spoke." This conflicts with Garibay, Ramires, and basic constitutional principles. Ramires was not "compelled" to write letters to his girlfriend or to testify, just as Ávila was never "compelled" to allocute. The trial court nonetheless erred in considering Ramires's continuous denials of guilt because Ramires had a right to do so throughout sentencing and appeal. Ramires, 109 Wn. App. at 766.

Ávila also had a right to maintain his innocence before sentencing. RCW 9.94A.500(1) ("The court shall . . . allow arguments from . . . the offender . . . ."). Under the Court of Appeals decision, courts may increase punishment for exercising this right anytime defendants refuse to admit guilt by expressing remorse. This conflicts with basic constitutional principles, case law, the allocution statute, and common sense. Review is warranted under RAP 13.4(b)(2), (3), and (4).

6. A RETIRED POLICE OFFICER'S DISPARAGEMENT OF THE PRESUMPTION OF INNOCENCE TAINTED THE ENTIRE VENIRE

Juror 61 stated he could not apply the presumption of innocence and stated it was hard to believe Ávila was not guilty. 2RP 279-80. Defense counsel moved for a new venire, which the trial court denied. 2RP 322-25. Later, another juror echoed Juror 61's statements, asserting they reinforced his

own feelings about not being able to apply the presumption of innocence. 2RP 377-79, 383. Counsel again moved for a new venire based on the prejudicial impact Juror 61's statements had, which the trial court again denied. 2RP 386-87. The trial court later sua sponte asked the jury about whether anyone shared Juror 61's view, attributing to Juror 61 that "the Defendant wouldn't be here if he was innocent, given the lengthy investigation that must have gone into this case." 2RP 610. Juror 61 never discussed the lengthy investigation as the reason he could not apply the presumption of innocence, so the trial court augmented Juror 61's remarks by giving them a seemingly valid reason.

The Court of Appeals relied on State v. Roberts, 142 Wn.2d 471, 518-19, 14 P.3d 713 (2000), to reject Ávila's treatment of Juror 61's remarks as a serious trial irregularity under State v. Weber, 99 Wn.2d 158, 164-66, 659 P.2d 1102 (1983).[7] Appendix A at 8-10 & n.5. But Roberts had to do with a claim of erroneous dismissal of jurors, not with a juror who taints the entire venire. 152 Wn.2d at 518. Juror 61's remarks are better treated as a trial irregularity. E.g., State v. Bourgeous, 133 Wn.2d 389, 408-09, 945 P.2d 1120 (1997) (treating spectator outburst as irregularity); State v. Rempel, 53 Wn. App. 799, 800-02, 770 P.2d 1058 (1989) (treating juror's late disclosure of

[7] Under Weber, courts consider (1) the seriousness of the claimed irregularity, (2) whether the information imparted was cumulative of other properly admitted evidence, and (3) whether prejudice can be cured by an instruction. Weber, 99 Wn.2d at 164-65; Br. of Appellant at 27-30 (applying the Weber factors).

unfitness to serve as irregularity), rev'd on other grounds, 144 Wn.2d 77, 785 P.2d 1134 (1990). The Court of Appeals inapt reliance on Roberts rather than on an application of the Weber factors merits RAP 13.4(b)(1) review.

E. ADDITIONAL ARGUMENT IN SUPPORT OF REVIEW OF ISSUES RAISED IN STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Ávila Cárdenas submitted an extensive statement of additional grounds for review. See Appendix B. He asks that review be granted on each of the issues argued in the statement of additional grounds, which he hereby incorporates by reference.

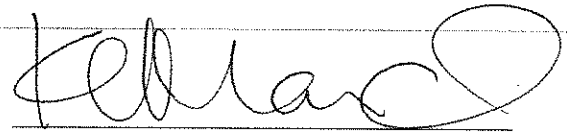
F. CONCLUSION

Because he meets all RAP 13.4(b) review criteria, Ávila Cárdenas respectfully requests that his petition for review be granted.

DATED this 30th day of October, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 74100-4-I
Appellant,	)	
	)	DIVISION ONE
v.	)	
	)	
ALBERTO AVILA-CARDENAS,	)	UNPUBLISHED OPINION
	)	
Respondent.	)	FILED: August 21, 2017

SPEARMAN, J. — Alberto Avila-Cardenas[1] appeals his conviction for three counts of first degree murder. He contends that the trial court erred in denying his motion to strike the jury panel, denying his motion for a mistrial, admitting inadmissible evidence, and considering his lack of remorse at sentencing. He also argues that he received ineffective assistance of counsel and the trial was marred by prosecutorial misconduct. He raises several further arguments in a statement of additional grounds. Finding no error, we affirm.

FACTS

Jesus Bejar-Avila, Yazmani Quezada-Ortiz, and Cristian Rangel were coworkers at Lake Union Wholesale Florists. The three men worked together on

[1] The appellant and several other persons involved in this case have two last names. In the record and briefing, they are inconsistently referred to by one last name, both last names without a hyphen, and both last names hyphenated. For consistency, we use both last names hyphenated throughout.

December 12, 2010. They did not return home from work and were not seen alive again. Family members reported the men's disappearance to police.

In the ensuing investigation, Avila-Cardenas became a person of interest. Pursuant to a warrant, police searched his home and found a 9 millimeter gun and ammunition. Avila-Cardenas's long term girlfriend, Guadalupe Miranda-Cruz, told police that Avila-Cardenas had brandished the weapon during an argument and fired a bullet into the grass in the backyard. Police recovered a 9 millimeter shell casing from the area she indicated.

A few months later, a worker found human remains on the grounds of a wholesale plant nursery. Police recovered three bodies and identified them as Bejar-Avila, Quezada-Ortiz, and Rangel. Police also recovered 9 millimeter shell casings from the site. Forensic testing determined that the bullet casings recovered from the crime scene matched the casing found in Avila-Cardenas's backyard. All of the casings had been fired by the gun found in Avila-Cardenas's home. Investigators found blood spatter in the barrel of the gun. Deoxyribonucleic acid (DNA) testing determined that the blood inside the gun was from Rangel.

In addition to Avila-Cardenas, police suspected that Alfredo Velez-Fombona and Clemente Benitez were involved in the crime. Cell phone records showed that, on the day the victims disappeared, the cell phones associated with Avila-Cardenas, Velez-Fombona, and Benitez all traveled from Avila-Cardenas's home to the area of Lake Union Wholesale Florists. All three cell phones then traveled to the vicinity of the nursery where the bodies were recovered.

Police arrested Avila-Cardenas and Velez-Fombona.[2] Velez-Fombona pleaded guilty to second degree murder. Avila-Cardenas went to trial and was convicted of three counts of first degree murder.

DISCUSSION

Confrontation Clause

Avila-Cardenas appeals his conviction on several grounds. We first address his claim that the trial court violated his rights under the confrontation clause by admitting Velez-Fombona's guilty plea.

A criminal defendant has the right to confront the witnesses against him. U.S. CONST. amend. VI. Admitting the statement of a nontestifying codefendant violates the confrontation clause if the statement facially incriminates the defendant. State v. Fisher, 185 Wn.2d 836, 842, 374 P.3d 1185 (2016) (citing Richardson v. Marsh, 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987)). A statement facially incriminates the defendant if it names him or if, from the statement, the jury could infer that it refers to the defendant even if it were "the very first item introduced at trial." Gray v. Maryland, 523 U.S. 185, 196, 118 S. Ct. 1151, 140 L. Ed. 2d 294 (1998)). On the other hand, where a statement does not refer to the defendant and is only incriminating when linked to evidence presented at trial, admission of the statement does not violate the confrontation clause. Id. (citing Richardson, 481 U.S. at 208).

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[2] Police could not locate Benitez and he remained at large.

In this case, Miranda-Cruz testified that, on the day the men went missing, Avila-Cardenas left the house in a beige Yukon with Oregon plates. Detective Chris Johnson of the King County Sheriff's office, testified that police identified Velez-Fombona as the driver of the Yukon. In cross examination, defense counsel and Johnson had the following exchange:

> Q. And there was some testimony, I believe, some through you, some through other people, that Clemente [Benitez] became a suspect in this case; is that correct?
> A. Yes.
> Q. And so did Alfredo [Velez] Fombona?
> A. Yes.
> Q. In fact, Alfredo [Velez] Fombona pled guilty; is that correct?
> A. Yes.
> Q. He pled guilty to murder?
> A. Yes.

Verbatim Report of Proceedings (VRP) (7/16/15) at 1311.

At the end of cross examination, the State asked to introduce Velez-Fombona's plea statement. The prosecutor argued that Avila-Cardenas opened the door to the plea statement because the implication from cross examination was that Velez-Fombona, and not Avila-Cardenas, committed the murders. Defense counsel took the position that he merely elicited evidence of other suspects and did not open the door to Velez-Fombona's plea.

The court agreed with the State and admitted Velez-Fombona's statement in part. On redirect examination, Johnson read the following portion of Velez-Fombona's statement:

> 'On or about 12-12-10, I helped two men who kidnapped Jesus Bejar-Avila, Yazmani Quezada-Ortiz, and Cristian Alberto Rangel, in King County, Washington.

> My role in the crime was to drive my car immediately behind the vehicle, the vehicle in which the three men were remaining so that no one was aware of their being restrained.
>
> This restraint continued as I followed the car to the Rainier Nursery, in Kent, and my role ended. Jesus Bejar-Avila, Yazmani Quezada-Ortiz, and Cristian Alberto Rangel were then killed by the men. I was aware that the other two men were armed with guns.'

Id. at 1334.

Avila-Cardenas contends this was error. He asserts that it was obvious to the jury that he was one of the two men referred to in Velez-Fombona's plea statement and the statement thus violated his rights under the confrontation clause. The State contends that the plea statement does not facially implicate Avila-Cardenas and so did not violate the confrontation clause.

Fisher is instructive. In that case, Fisher and Trosclair were tried jointly. Fisher, 185 Wn.2d at 839. Fisher made out-of-court statements that incriminated herself, Trosclair, a man named Steele, and a "man from California." Id. at 840. The trial court admitted a redacted version of Fisher's statement that referred to Trosclair as "'the first guy.'" Id. On appeal, the redaction was held insufficient. Id. at 847. The statement indicated that four people committed the crime and that Fisher, Steele, and "the first guy" had been arrested but "the man from California" had not. Id. at 846-47. Steele was obviously not the name of Fisher's codefendant. Id. at 847. And the man from California, having not been arrested, was obviously not present in the courtroom. Thus, from a process of elimination, the jury could quite easily discern from the statement alone that "the first guy" referred to Trosclair. Id. The Fisher court held that the statement would

incriminate Trosclair even if it were "'the very first item introduced at trial.'" Id. at 846 (quoting Gray, 523 U.S. at 196). Admitting the statement thus amounted to constitutional error. Id. at 847.

In this case, Avila-Cardenas was tried separately. Velez-Fombona's plea states that he "helped two men," "the other two men" were armed, and the victims were killed by "the men." CP at 419; VRP (7/16/17) at 1334. Unlike the statement in Fisher, in this case the statement alone provides no information allowing the jury to infer that Avila-Cardenas was one of the "two men." If the statement were "the very first item introduced at trial," so that the jury heard it without any other evidence, it would not incriminate Avila-Cardenas. Fisher, 185 Wn.2d at 846 (quoting Gray, 523 U.S. at 196). Because the statement only became incriminating when linked with evidence introduced at trial, its admission did not violate the confrontation clause. See Gray, 523 U.S. at 196.

Avila-Cardenas contends, however, that this case is analogous to Fisher and requires the same result. He asserts that, from the evidence introduced prior to Velez-Fombona's statement, the jury knew there were three suspects and could thus immediately infer that the statement referred to Avila-Cardenas. The argument is unpersuasive because it fails to recognize that the test is whether the statement itself, apart from evidence introduced at trial, creates the inference that the defendant was involved.

Avila-Cardenas also relies on State v. Vincent, 131 Wn. App. 147, 120 P.3d 120 (2005). In that case, two codefendants were tried jointly. Vincent, 131

Wn. App. at 149. The trial court admitted statements from one codefendant indicating that he committed the crime with one "other guy." Id. at 154. Because there were two participants in the crime and two codefendants, we held that "the only reasonable inference the jury could have drawn" was that the "other guy" was the second codefendant. Id.

Avila-Cardenas asserts that this case is analogous to Vincent because, here, "there were exactly three codefendants and Velez[-Fombona]'s statement referred to exactly three accomplices." Reply Br. at 7. But Avila-Cardenas was tried separately. The case is distinguishable.[3]

Moreover, even if, as Avila-Cardenas asserts, the statement was facially incriminating, the error was harmless. A confrontation clause violation is harmless if the appellate court is convinced beyond a reasonable doubt that the jury would have reached the same result in the absence of the error. Fisher, 185 Wn.2d at 847. "The test is whether the untainted evidence was so overwhelming that it necessarily leads to a finding of guilt." Id.

The untainted evidence in this case is overwhelming. The bullet casings found at the murder scene and the bullet casing found at Avila-Cardenas's home were fired by the gun found in Avila-Cardenas's home. The gun contained blood spatter from one of the victims. Cell phone records placed Avila-Cardenas in the

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[3] Avila-Cardenas also relies on State v. Vannoy, 25 Wn. App. 464, 610 P.2d 380 (1980). In that case, we considered whether the trial court erred in denying a motion for a separate trial. Vannoy, 25 Wn. App. at 471. We held that the statements of two codefendants implicated the third codefendant. Id. at 474. But the case is not helpful because it preceded Richardson and Gray, and thus, our analysis did not distinguish between inferences drawn from the statement itself and those drawn from linking the statement with evidence introduced at trial. Id. at 473-74.

location of the men's workplace and the site where their bodies were found at the relevant times. Given the untainted evidence, any confrontation clause error was harmless beyond a reasonable doubt.

Avila-Cardenas also contends that, by admitting the statement, the trial court precluded him from arguing that Velez-Fombona and Benitez were the true perpetrators and thus deprived him of the opportunity to present an other suspects defense. This argument is without merit. The plea statement did not prevent Avila-Cardenas from using an other suspects defense, it only prevented him from relying on Velez-Fombona's guilty plea to argue that defense.[4]

Motion to Strike the Venire

Avila-Cardenas next argues that the trial court erred in denying his motion to strike the venire. A challenge to the jury panel should only be sustained where the selection process did not substantially comply with statutory procedure or where the defendant demonstrates prejudice. State v. Roberts, 142 Wn.2d 471, 518-19, 14 P.3d 713 (2000) (citations omitted). We review the trial court's decision for abuse of discretion. Id. at 520.

Avila-Cardenas does not challenge the juror selection process on procedural grounds. He contends that he was prejudiced because comments by

[4] The State contends that, even if the statement was protected by the confrontation clause, Avila-Cardenas opened the door to its admission by eliciting the information that Velez-Fombona pleaded guilty to the murder. Washington courts have apparently not addressed the open door rule in the context of evidence protected by the confrontation clause. In light of our disposition of the confrontation clause error, we need not address the issue here.

one juror tainted the entire panel and the trial court therefore erred in denying his motion to strike the venire.

During general questioning by the court, Juror 61 stated that he had worked as a police officer. He expressed the opinion that the charges brought were generally true and stated that it might be difficult for him to apply the presumption of innocence. The State challenged Juror 61 for cause and he was struck. Avila-Cardenas, however, asserted that Juror 61's comments tainted the panel. He moved to dismiss the entire venire. The court denied the motion, noting that jurors often express similar sentiments during voir dire and the process is intended to weed out those persons who cannot be fair.

The court asked further questions about the jurors' experiences and how these might affect their ability to apply the presumption of innocence. The court gave the jurors the option of speaking privately, rather than in front of the entire venire. Juror 132 stated that he preferred to speak privately because he felt that sharing opinions publicly, as Juror 61 had done, "influences the whole audience." VRP (7/7/15) at 377. Juror 132 went on to explain that the presumption of innocence was difficult for him because, in his job as a school principal, he basically conducted trials every day to determine whether students had committed infractions. He stated that it was rare for a child who was 100 percent innocent to be brought to his office. Most of the time, the child had done "something." Id. Juror 132 stated that his own feelings about the presumption of innocence were similar to those expressed by Juror 61.

After questioning Juror 132, Avila-Cardenas renewed his motion to strike the entire panel, asserting that Juror 132's statements demonstrated that he had been affected by Juror 61. The court disagreed. The court stated that Juror 132 did not say that Juror 61 influenced his view, but that what Juror 61 said reflected his own concerns. The court denied the motion to strike the panel but stated that it would continue to question jurors about whether they had views similar to those expressed by Juror 61. In further questioning, the court identified and dismissed another juror who expressed that it might be difficult for her to be open minded.

Avila-Cardenas contends that Juror 132's statements demonstrate that Juror 61 infected other jurors with his bias. He asserts that the trial court compounded the prejudice by calling attention to Juror 61's remarks during later questioning. We disagree.

The trial court considered Juror 132's remarks and found no indication that he had been influenced by Juror 61. The record supports this finding. Avila-Cardenas points to nothing in the record indicating that any other juror was influenced by Juror 61. The trial court did not abuse its discretion in denying Avila-Cardenas's motion to strike the panel.[5]

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[5] In support of his claim that the trial court erred in failing to strike the panel after Juror 61's remarks, Avila-Cardenas also appears to rely on CrR 7.5(a)(5). That rule provides as grounds for a new trial an "[i]rregularity in the proceedings of the court, jury or prosecution ... by which the defendant was prevented from having a fair trial." He urges us to review the trial court's decision under the trial irregularity test set out in State v. Weber, 99 Wn.2d 158, 164-66, 659 P.2d 1102 (1983). First, we note that Avila-Cardenas did not move for a mistrial or a new trial on this ground below. But even if the test is applicable, and assuming the juror's remarks to be an irregularity, the argument fails. "To determine whether a trial was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury." Id. at 165. As discussed above, the record does not support Avila-Cardenas' claim that the juror's comment influenced the jury in any way. There was no error.

Ineffective Assistance of Counsel

Avila-Cardenas next argues that he received ineffective assistance of counsel because defense counsel led the jury to believe he would present evidence that he was unable to introduce.

To prevail in asserting ineffective assistance of counsel, an appellant must show that (1) counsel's representation was deficient and (2) he was prejudiced by the deficient performance. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). We may review these prongs in either order. In re Riley, 122 Wn.2d 772, 780, 863 P.2d 554 (1993). If the defendant fails to establish one prong, we need not consider the other. Id. Representation is deficient if it falls "below an objective standard of reasonableness. . . ." McFarland, 127 Wn.2d at 334. An appellant shows prejudice where "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 335 (citing State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

In a voluntary interview with police early in the investigation, Avila-Cardenas denied involvement in the disappearance of the three men and made several other exculpatory statements. At trial, defense counsel referred to this interview during opening statement. Counsel stated that Avila-Cardenas's statements to police were "one of the most telling things in this case" and, in those statements, Avila-Cardenas denied involvement in the crime. VRP (7/8/15)

at 680. Counsel was later unable to admit Avila-Cardenas's statement because it was hearsay.

Avila-Cardenas contends that mentioning the statement during opening was deficient performance because counsel should have known the statement was inadmissible hearsay. He argues that he was prejudiced because the deficient performance caused the jury to question defense counsel's credibility.

Avila-Cardenas fails to show that he was prejudiced by the allegedly deficient performance. Considering the overwhelming evidence linking Avila-Cardenas to the murders, there is no reasonable probability that the outcome of the trial would have been different if defense counsel had not mentioned the statement. There is also no reasonable probability that the outcome would have been different if defense counsel had succeeded in introducing the statement. In the voluntary police interview, Avila-Cardenas stated that he returned to Washington on December 15, he did not have a gun, he did not have a cell phone, and he was not involved with the disappearance of the three men. The State presented evidence that Avila-Cardenas returned to Washington on December 8, possessed a gun, and had a cell phone. Under those circumstances, there is no substantial likelihood that the jury would have found Avila-Cardenas's denial of involvement credible.

Avila-Cardenas also contends that he received ineffective assistance of counsel because his attorney failed to move for a mistrial when a defense witness did not appear for trial. The contention is without merit. In his opening

statement, defense counsel stated that he would call a witness named Johnny Bryant. Counsel stated that Bryant would testify that he saw the missing men at about 9:00 p.m. on the evening of their disappearance, contrary to the State's theory that Avila-Cardenas and his associates murdered the victims in the late afternoon. But Bryant failed to respond to the subpoena and did not appear in court. Avila-Cardenas asserts that when his attorney learned that Bryant would not be testifying, he was obliged to move for a mistrial and that the failure to do so was deficient. We disagree because defense counsel may have sound reasons not to move for a mistrial as a matter of trial strategy. State v. Dickerson, 69 Wn. App. 744, 748, 850 P.2d 1366 (1993).[6]

Avila-Cardenas fails to overcome the presumption of effective representation by showing the absence of legitimate reasons not to move for a mistrial. McFarland, 127 Wn.2d at 337. He also fails to show prejudice by demonstrating that, had counsel moved for a mistrial, the court would likely have granted the motion. We reject Avila-Cardenas's claim that he received ineffective assistance of counsel.

[6] Avila asserts that the failure to present evidence promised in opening statement is "quite serious." Reply Br at 2. He relies on State v. Greiff, 141 Wn.2d 910, 10 P.3d 390 (2000). The Greiff court, however, rejected the appellant's contention that defense counsel's credibility was seriously injured by the failure to produce evidence referred to during opening statement. Greiff, 141 Wn.2d at 921. Furthermore, the issue in Greiff was whether the trial court erred in denying counsel's motion for a mistrial. Greiff, 141 Wn.2d at 918. In this case the issue is whether counsel rendered deficient performance by not moving for a mistrial. Greiff does not support Avila's argument that the failure to move for a mistrial, in the circumstances here, was deficient performance.

Motion for Mistrial

Next, Avila-Cardenas contends that the trial court erred in denying his motion for a mistrial. His argument rests on Miranda-Cruz's testimony concerning Avila-Cardenas's gun.

During the investigation, Miranda-Cruz told detectives that Avila-Cardenas had a gun. She also told them that he had brandished the gun during an argument and fired into the grass near her feet in order to scare her. Police found a 9 millimeter shell casing in the ground in the area she indicated. A forensic scientist later testified that this casing and the casings found at the murder scene had been fired by the gun found at Avila-Cardenas's home.

Prior to trial, the State moved to admit evidence that Avila-Cardenas had fired the gun in his backyard to show that he had been seen with the gun, knew how to use it, and the casing found at his home matched those found at the murder scene. The court ruled that:

> [t]he State may elicit testimony that the defendant fired his gun in his yard in the presence of Guadalupe Miranda-Cruz sometime prior to the murders. The State may elicit testimony that the casing from this firing was later recovered by Sgt. McNabb. The State may not elicit testimony about the gun being fired in an attempt to frighten Guadalupe Miranda or elicit details about the incident that led to the firing of the gun.

Clerk's Papers (CP) at 186-87.

At trial, Miranda-Cruz testified that Avila-Cardenas had a gun and she had seen him fire it. The prosecutor and Miranda-Cruz had the following exchange:

> Q. And where did it happen?
> A. Outside, at the corner of the garage.
> Q. At your house?

A. Yes.
Q. And was anyone else there at the time?
A. One of his cousins.
Q. Where did Alberto aim his gun?
Defense counsel: Objection.
A. Towards my feet.

VRP (7/14/15) at 1162. Avila-Cardenas objected that the testimony that he had fired towards Miranda-Cruz was highly prejudicial, violated the court's ruling on the motion in limine, and reflected the State's intentional or negligent failure to instruct its witness. He moved for a mistrial.

The State asserted that it instructed Miranda-Cruz to say that Avila-Cardenas had fired the gun towards the ground and expected that she would so testify. The State argued that to Miranda-Cruz, who was testifying without an interpreter, "towards my feet" meant the same thing as "towards the ground." VRP (7/14/15) at 1167. The State proposed asking Miranda-Cruz a follow up question to clarify. The court allowed the State to follow up and reserved ruling on defense counsel's motion for a mistrial.

When Miranda-Cruz's testimony resumed, she and the prosecutor had the following exchange:

Q. Ms. Miranda, when you answered a moment ago that the gun was fired towards your feet, what did you mean?
A. Next to the grass. My feet were next to the grass.
Q. So it was fired into the grass?
A. Yes.

VRP (7/14/15) at 1172-73.

The next day, the trial court stated that it had reviewed the pretrial rulings and the previous day's testimony. The court noted that Miranda-Cruz had not

testified as to why Avila-Cardenas fired the gun or any of the surrounding circumstances, the topics prohibited by the pretrial ruling. The court stated that the fact that Avila-Cardenas fired the gun towards Miranda-Cruz's feet was not nearly as prejudicial as the fact that he fired the gun by the garage, where the shell casing was found. This evidence, while prejudicial, was also highly probative, which was why it was admitted in the court's pretrial ruling. The court denied the motion for a mistrial. The court later instructed the jury to consider the testimony "only for the purpose of assessing the significance, if any, of the bullet casing found outside the Defendant's home." VRP (7/16/15) at 1451.

We review the trial court's denial of a motion for a mistrial for abuse of discretion. State v. Gamble, 168 Wn.2d 161, 177, 225 P.3d 973 (2010). We will overturn the trial court's decision only if there is a substantial likelihood that a trial irregularity prejudiced the defendant and affected the outcome of the trial. Id. In making this determination, we consider (1) the seriousness of the irregularity; (2) whether the improper evidence was cumulative of other evidence; and (3) whether a curative instruction was given. State v. Weber, 99 Wn.2d at 164-65.

Avila-Cardenas asserts that a trial irregularity occurred when Miranda-Cruz introduced highly prejudicial evidence in violation of a pretrial ruling. This argument is without merit.

The ruling on the motion in limine admitted evidence that Avila-Cardenas fired the gun in his yard in the presence of Miranda-Cruz. It prohibited evidence that Avila-Cardenas fired the gun to frighten Miranda-Cruz and details about what

led to the incident. Miranda-Cruz did not testify to the circumstances that led Avila-Cardenas to fire the gun or his intent in so doing. Miranda-Cruz did not violate the pretrial ruling.

Furthermore, even if Miranda-Cruz's statement as to where Avila-Cardenas fired the gun was improper, any prejudice was cured by the limiting instruction. Avila-Cardenas fails to show a substantial likelihood that the allegedly improper testimony affected the outcome of the trial. The trial court did not abuse its discretion in denying Avila's motion for a mistrial.

Avila-Cardenas contends, however, that Miranda-Cruz's testimony amounted to impermissible character evidence that he had a propensity for violence. He thus appears to assert that, even if the evidence did not violate the pretrial ruling, it should not have been admitted. We review a trial court's decision on the admissibility of evidence for abuse of discretion. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). The trial court abuses its discretion only when it adopts a view that no reasonable person would take. Id.

Evidence that Avila-Cardenas fired a gun in the backyard, toward Miranda-Cruz's feet, was highly prejudicial. But, as the trial court stated, it was also highly probative. The decision to admit the evidence was not unreasonable. There was no abuse of discretion.

Prosecutorial Misconduct

Avila-Cardenas next contends that prosecutorial misconduct deprived him of a fair trial and requires reversal. To prevail on a claim of prosecutorial

misconduct, the defendant must show that the prosecutor's conduct was both improper and prejudicial. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

Avila-Cardenas first argues that the prosecutor committed misconduct by eliciting inadmissible evidence. Avila-Cardenas asserts that, by asking Miranda-Cruz where he aimed the gun, the State elicited details about the incident that led to the firing of the gun, details that were expressly prohibited by the pretrial ruling. Avila-Cardenas asserts that the prosecutor's conduct is identical to that identified as reversible error in Fisher. In that case, the prosecutor elicited the very evidence that the trial court ruled inadmissible under ER 404(b) in a pretrial ruling. Fisher, 165 Wn.2d. at 748-49.

Fisher is distinguishable because, as discussed above, Miranda-Cruz's testimony did not violate the pretrial ruling. And there is no indication that the State deliberately sought to elicit the statement that Avila-Cardenas fired towards Miranda-Cruz's feet.[7] Avila-Cardenas fails to show that the prosecutor's conduct was improper.

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[7] The trial court rejected the allegation of impropriety below. In response to Avila-Cardenas's assertion that the prosecutor intentionally elicited the information that Avila-Cardenas fired towards Miranda-Cruz's feet, the court stated:

> So let me just make one thing clear. I don't for a minute believe there's been any ethical violation here. I think that the answer that we were all expecting the witness to give was, 'towards the ground,' and instead she said, 'towards my feet.'

VRP (7/14/15) at 1169. Avila-Cardenas points to nothing in the record indicating that this ruling was error.

Avila-Cardenas next contends that the prosecutor committed misconduct by appealing to the jury's passion and prejudice during closing argument. Although a prosecutor has wide latitude in closing argument, "bald appeals to passion and prejudice constitute misconduct." Fisher, 165 Wn.2d at 747. A prosecutor may appeal to the jury's passion by urging it to convict in order to protect the community or to send a message to other criminals. See State v. Ramos, 164 Wn. App. 327, 338, 263 P.3d 1268 (2011); State v. Bautista Caldera, 56 Wn. App. 186, 195, 783 P.2d 116 (1989).

In this case, the prosecutor stated in closing argument that some crimes do not receive as much attention as others, "almost as if some lives have more value than others. . . ." VRP (7/22/15) at 1753. Avila-Cardenas objected to the argument as inflaming the passions of the jury. The trial court overruled the objection. The prosecutor continued, arguing that a predator may believe he can get away with a crime because no attention is focused on it. The prosecutor then stated:

> Why would anyone give any time, any attention to three Mexican warehouse workers who just disappear? Survivors won't report it. The police won't spend any time on it. And the justice system? Nothing will ever come of it.
>
> It would just be three Mexicans gone from sight in south King County, whatever score needed settling will have been settled, and just like that, it will be over, and people will move on.
>
> But as a result of that thinking, the defendant let down his guard. He became careless. He was sloppy. And he was arrogant in his belief that this day, today, would never come. He was wrong.
>
> The survivors did report it. The police did work on it. And now the justice system is addressing a crime and behavior that was in fact vicious and depraved and cruel, looking at it square in the

> eye, everyone in this courtroom, you, with caring and attention and purpose.

VRP (7/22/15) at 1753-54.

Avila-Cardenas challenges the propriety of this line of argument. As an initial matter, we must determine the standard of review. A defendant raising a claim of prosecutorial misconduct must generally show that the prosecutor's conduct was improper and prejudicial. Fisher, 165 Wn.2d at 747. But where the defendant did not object below, he has waived a claim of misconduct unless he demonstrates that the prosecutor's conduct was flagrant, ill-intentioned, and so prejudicial that it could not have been cured through an instruction to the jury. Id. (citing State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)).

Avila-Cardenas asserts that his objection at the beginning of the prosecutor's argument sufficed as an objection to all of the prosecutor's appeals to passion and prejudice. He thus contends that he must only demonstrate that the argument was improper and prejudicial. We disagree. Avila-Cardenas's challenge on appeal concerns the prosecutor's references to the victims' ethnicity. He did not raise this objection below. To prevail here, Avila-Cardenas must meet the heightened standard.

Avila-Cardenas contends that the prosecutor's argument was an improper appeal to the jury's passion and prejudice. He argues that the prosecutor's intent was to invoke a sense of societal shame, and the argument was thus analogous to asking the jury to convict in order to send a message about the justice system.

The State contends that the prosecutor was addressing the nature of the crime and drawing inferences from Avila-Cardenas's behavior after the crime. The State points out that the crime involved kidnapping and murdering three persons in an apparent execution. Evidence at trial indicated that, after shooting the victims, Avila kept the murder weapon, returned to his normal life, and voluntarily went to the police station to give a statement denying that he was in the state at the time of the murders.

The State's argument falls short because, while the evidence reasonably led to the inference that Avila-Cardenas believed he would not be caught, no evidence created the inference that Avila-Cardenas believed he would not be caught because the victims were Mexican and no one would pay attention to their disappearance. By arguing that, in this case, "the justice system is addressing a crime and behavior that was in fact vicious and depraved and cruel, looking at it square in the eye, everyone in this courtroom, you, with caring and attention and purpose," the prosecutor urged the jury to convict to demonstrate a societal lack of prejudice. VRP (7/22/15) at 1754. The argument was improper.

However, Avila-Cardenas must show that the improper argument was so prejudicial that it could not have been cured by an instruction to the jury. Fisher, 165 Wn.2d at 747. To establish prejudice, the defendant must show a substantial likelihood that the misconduct affected the jury's verdict. State v. Thorgerson, 172 Wn.2d 438, 443, 258 P.3d 43 (2011) (citing State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). We assess the prejudice of the misconduct in the

context of the entire case. Id. (citing State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)).

Avila-Cardenas makes no argument that the prosecutor's misconduct was so prejudicial that it could not have been cured through instruction. And, assessing the improper argument in the context of the entire case, we see no likelihood that the impropriety affected the jury's verdict.

The prosecutor's argument concerning the ethnicity of the victims was improper, but there was no objection to the argument and the prejudice was not incurable. We reject Avila-Cardenas's claim of prosecutorial misconduct.

Avila-Cardenas next asserts that, if his lack of objection below was fatal to his claim of prosecutorial misconduct, defense counsel rendered ineffective assistance in failing to object. We reject this attempt to overcome the lack of objection. Review under the standards for prosecutorial misconduct is sufficient to determine whether the prosecutor's remarks warrant reversal. The failure to establish prejudice as part of his prosecutorial misconduct claim is fatal to Avila-Cardenas's ineffective assistance of counsel claim. But, the claim fails in any event because Avila-Cardenas cannot show that defense counsel's failure to object during closing argument constituted deficient performance. "Defense counsel's failure to object to a prosecutor's closing argument will generally not constitute deficient performance because lawyers 'do not commonly object during closing argument 'absent egregious misstatements.'" In re Pers. Restraint

of Cross, 180 Wn.2d 664, 721, 327 P.3d 660 (2014) (quoting In re Pers. Restraint of Davis, 152 Wn.2d 647, 717, 101 P.3d 1 (2004)).

Cumulative Error

Next, Avila-Cardenas argues that the cumulative effect of the trial court's errors require reversal. An accumulation of otherwise nonreversible errors may deny a defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The doctrine is inapplicable here, where Avila-Cardenas has not demonstrated that the trial court erred.

Sentencing

Avila-Cardenas next contends that the trial court improperly considered his lack of remorse in imposing the maximum standard range sentence.

At sentencing, the court must allow arguments from, among others, the offender and survivors of the victim. State v. Mail, 121 Wn.2d 707, 709-10, 854 P.2d 1042 (1993) (citing former RCW 9.94A.110 (2001)). The court may impose any sentence it deems appropriate within the statutory standard range. Id. at 711 (citing former RCW 9.94A.370(1) (2001)). A standard range sentence may only be appealed on procedural or constitutional grounds. Id. at 712-13.

In this case, after hearing from the family of the victims, Avila-Cardenas chose to address the court. He stated that his hands and his conscience were clean. Avila-Cardenas also spoke about the victims and said there was a contrast between their actual lives and the "beautiful things" their families said about them. VRP (10/9/15) at 109. He lamented that he was unable to present

evidence about the victims because of "the way the system is designed." Id. at 109-10. In imposing its sentence the court stated as follows:

> And so while I don't punish people for maintaining their innocence, it is still the case that Mr. Avila-Cardenas has shown no remorse whatsoever for the horrendous harm that he caused to the three victims and to their families; and I think the Court -- it's legitimate for the Court to take the lack of remorse into consideration.
>
> But what really influences the Court more than that is the brutality of the crime that was committed, the cruelty that was part of this. The fact that three young men were kidnap[ped], they had their hands bound, they were stuffed into the back of a pickup truck and they were transported to their death and then they were executed in cold blood. The Court cannot imagine a more cold-blooded, horrendous crime than this one.
>
> There are no mitigating circumstances. This was a crime that was carefully planned, smoothly executed, and as a result three young men were taken away from their families, from their loved ones, and while their suffering was intense, the suffering of the -- it stopped when they were killed. But the suffering of families and their loved ones continues. And so while this court does not readily impose the maximum because the Court usually finds some mitigating circumstances, this is one of those cases where the Court believes that the maximum sentence is justified and, therefore, the Court imposes 1140 months on Mr. Avila-Cardenas, which equals 95 years in prison.

Id. at 113-14.

Avila-Cardenas contends, without citation to any relevant authority, that the trial court violated his constitutional right against self-incrimination by inferring lack of remorse from his statement.[8] He asserts that showing remorse would

[8] Avila-Cardenas relies on a Montana case, State v. Shreves, 313 Mont. 252, 60 P.3d 991 (2002). The case does not support his argument. In Shreves, the court held that it was improper to infer lack of remorse from a defendant's silence. Shreves, 313 Mont. at at 257. The Shreve court stated, however, that a sentencing court may properly infer lack of remorse from a defendant's statements. Id. at 260.

have required him to incriminate himself. The argument is meritless. Avila-Cardenas was neither compelled to speak nor compelled to utter the words he spoke. Instead, he voluntarily chose to make remarks that disparaged the victims and disputed the credibility of their families. That the court inferred a lack of remorse from his voluntary statements implicates no constitutional right. The court did not err in imposing its sentence.

Appellate Costs

Avila-Cardenas asks that, if we reject his claims, we deny any request for appellate costs. Appellate costs are generally awarded to the substantially prevailing party on review. RAP 14.2. However, when a trial court makes a finding of indigency, that finding remains throughout review "unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency." RAP 14.2.

The trial court found Avila-Cardenas indigent. Under RAP 14.2, if the State has evidence indicating that his financial circumstances have significantly improved since the trial court's finding, it may file a motion for costs with the commissioner. State v. St. Clare, 198 Wn. App. 371, 382, 393 P.3d 836 (2017).

Statement of Additional Grounds

In a statement of additional grounds, Avila-Cardenas contends that the trial court denied him a fair trial by denying a testimonial privilege, denying a motion to suppress, and making erroneous evidentiary decisions. He further

contends that the trial was marred by government and prosecutorial misconduct, ineffective assistance of counsel, media coverage that biased the jury, insufficient evidence, and an allegedly deficient information. These challenges are without merit. We address them briefly.

Avila-Cardenas asserts that the trial court erred in denying his motion to exclude Miranda-Cruz's testimony under the marital privilege. He contends Miranda-Cruz was his de facto spouse because they lived together and held themselves out as married.

The marital privilege applies to a "spouse or domestic partner." RCW 5.60.060. "Domestic partner" is defined as "state registered domestic partner." RCW 26.60.025. Avila-Cardenas and Miranda-Cruz were neither married nor registered domestic partners. The trial court properly ruled that the marital privilege did not apply.[9]

Avila-Cardenas next argues that the warrant authorizing the search of his home was deficient. He repeats arguments raised by counsel below in a motion to suppress. We review a trial court's factual findings on a motion to suppress for substantial evidence. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). We review the trial court's legal conclusions de novo. State v. Schultz, 170 Wn.2d 746, 753, 248 P.3d 484 (2011).

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[9] Avila-Cardenas's reliance on State v. Denton, 97 Wn. App. 267, 983 P.2d 693 (1999), is also unavailing. In this case, unlike in Denton, there is no evidence that the parties contracted for marriage.

Avila-Cardenas argued below that the officer who wrote the affidavit deliberately or recklessly misrepresented facts in violation of Franks v. Delaware, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). He also argued that informants relied upon in the affidavit were not reliable under the Aguilar-Spinelli test.[10]. After a hearing on the issue, the trial court found that the evidence did not support Avila-Cardenas's Franks claim. The court found that statements attributed to a confidential informant did not meet the Aguilar-Spinelli test and excised the relevant passages of the affidavit. The court concluded that, even with these excisions, the affidavit was sufficient to establish probable cause.

The trial court's findings are supported by substantial evidence. Avila-Cardenas points to no legal error. The trial court did not err in denying Avila-Cardenas's motion to suppress.

Avila-Cardenas also contends that the trial court erred in several evidentiary decisions. We review a trial court's decision to admit or exclude evidence for abuse of discretion. State v. Griffin, 173 Wn.2d 467, 473, 268 P.3d 924 (2012).

Avila-Cardenas asserts that the trial court erred in admitting expert testimony, the gun, and the cell phone evidence. He contends that the trial court erred in excluding evidence of the victims' lifestyle, Miranda-Cruz's infidelity and immigration status, and hearsay statements by Velez-Fombona. In each case,

[10] See State v. Jackson, 102 Wn.2d 432, 440-41, 668 P.2d 136 (1984) (holding that Washington uses the Aguilar-Spinelli test to evaluate informants' tips).

Avila-Cardenas fails to show that the trial court's decision was manifestly unreasonable. There was no abuse of discretion.

Next, Avila-Cardenas contends that he received ineffective assistance of counsel. He argues that defense counsel was deficient for failing to request a material witness warrant, proceeding with pretrial hearings in the absence of expected witnesses, failing to impeach Miranda-Cruz with evidence that the State offered her an "S" visa or with evidence of her infidelity, and failing to adequately prepare for trial. Avila-Cardenas fails to demonstrate prejudice from any of these alleged deficiencies.

Avila-Cardenas also asserts that he received ineffective assistance of counsel because his attorneys did not show the jury the contact list from his cell phone which, he asserts, would have supported his claim that he did not know Velez-Fombona. This argument depends upon evidence outside the record and is thus beyond our ability to consider. McFarland, 127 Wn.2d at 338.

Avila-Cardenas next asserts several claims of government misconduct. Government misconduct may be grounds for dismissal where the misconduct was prejudicial and materially affected the defendant's right to a fair trial. CrR 8.3(b).

Avila-Cardenas contends that the government committed misconduct by offering Miranda-Cruz an "S" visa[11] in exchange for her testimony and failing to

[11] An "S" Visa may be granted to a noncitizen who assists law enforcement as a witness or informant. 8 U.S.C. § 1101(a)(15)(S).

use court certified interpreters in all investigative interviews. He asserts that the trial court committed misconduct by allowing some witnesses to remain in the courtroom during trial and instructing the jury in accomplice liability. Avila-Cardenas fails to show that the conduct he complains of was improper or prejudicial. Avila-Cardenas also asserts that the prosecutor, police officers, and Miranda-Cruz lied, amounting to government or prosecutorial misconduct. If there is any evidence to support these claims, it is outside the record.

Avila-Cardenas argues that the government committed misconduct by manipulating the charges against him in order to take a custodial statement outside the presence of his attorney. Defense counsel raised this argument below and the State conceded the issue. The challenged statement was not introduced at trial. Because the statement was not used against him, Avila-Cardenas fails to show prejudice.

Next, Avila-Cardenas asserts that he did not get a fair trial because, despite news coverage that biased the jury against him, the court denied his motion for a mistrial. Consideration of evidence outside the record constitutes juror misconduct and may be grounds for a new trial. State v. Balisok, 123 Wn.2d 114, 118, 866 P.2d 631 (1994). We review the trial court's decision on a motion for a new trial for abuse of discretion. Id. at 117.

On the second day of trial, counsel informed the court that a local online news outlet published a photo of Avila-Cardenas being handcuffed. Avila-Cardenas argued that the jury was likely to see the photo and moved for a

mistrial. Id. at 685. The court asked the jury if anyone had seen any local media coverage regarding the case. Id. at 690. None of the jurors answered in the affirmative. Id. There was no error.

Avila-Cardenas next appears to challenge the sufficiency of the evidence supporting his conviction. He contends that there is no confession, eyewitness, motive, fingerprints, or DNA linking him to the crime. He also asserts that the State failed to prove that the gun was his and failed to prove that he bought the zip ties used in the murders.

Evidence is sufficient when, viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). Circumstantial and direct evidence carry equal weight. Id.

In this case, the State presented evidence that Avila's cell phone was in the vicinity of the crime scene at the relevant time, a gun with blood spatter from one of the victims was found in Avila's home, and that gun fired both the shell casings found at the murder scene and the casing found in Avila's backyard. The evidence is sufficient to support the conviction.

Finally, Avila-Cardenas contends that the information was deficient because it did not define "premeditation" or state the elements of premeditation. Charging documents must include all essential elements of a crime. State v. Zillyette, 178 Wn.2d 153, 158, 307 P.3d 712 (2013) (citations omitted). But the information does not need to include definitions of elements. State v. Johnson,

180 Wn.2d 295, 302, 325 P.3d 135 (2014). Avila-Cardenas's claim is without merit.

Affirmed.

Specrman, J.

WE CONCUR:

Mann, J.

Schindler, J.

APPENDIX B

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. ALBERTO AVILA CARDENAS, Appellant, and xx.	No. 7410?-4-I STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW (RAP 10.10) "Ineffective Hearing Assistance"

I. INTRODUCTION

Appellant Alberto Avila Cardenas making a special appearance pro se, with the help from an inmate who speaks and writes the English language, timely submits the following Statement of Additional Grounds pursuant to RAP 10.10(c).[1]

Justice cannot be equal where simply as a result of appellant's poverty and inability to speak and understand the english language, he is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake. Because language is the principle means of communication in a legal proceeding, appellant's ability to understand all proceedings and the changing information and to be informed to understand the elements of presentation, and speak the language is critical to the proceedings fairness. Thonvenh v. State, 474 N.E. 2d 617 (Ind 1985).

1. The statement of this case is set out on pages 5-26 in Brief of Appellant (BOA), and the Verbatim Report of Proceedings (RP) are referenced on page 5 of BOA and will be referenced in the same manner.

Appellant, hereby informs this court that he has additional claims/issues of ineffective assistance of counsel, prosecutor misconduct and other claims/issues raised by his appellate attorney, that appellant will raise in a Personal Restraint Petition (PRP), because there are facts and evidence that are not in the record. If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a PRP. State v. McFarland, 127 Wn.2d 322,335 (1995). See BOA at 30-37.

Appellant respectfully requests this court afford liberal construction to this pleading keeping in accordance with Haines v. Kerner, 404 U.S. 519,520 (1972)(Pro se pleadings were held to less stringent standards than formal pleadings filed by lawyers).

II. GROUNDS FOR RELIEF

GROUND ONE

APPELLANT'S RIGHT TO MARITIAL PRIVILEGE WAS VIOLATED

Appellant was prejudiced by the trial court's denial of his defense motion to exclude all statements and testimony from Guadalupe Miranda. Ms. Miranda was the spouse of Appellant for over 15 years at the time of the incident. Everything they did and held out to others was no different than any other married couple. They lived in a meretricious relationship. They owned and lived in the same home in their Lakewood home with their two children. They possessed joint bank accounts, and shared everything.

All this information was corroborated by Ms. Miranda when she was interviewed by the defense. 2RP 1150-1202, see also 3.5 hearing and trial court's 7/14/15 ruling pre-trial motions in limine.

Washington Courts have routinely held spouses accountable to other spouses in terms of spousal support when they separate. They view couples that hold themselves out as married couples as invoke marital when it comes to family law disputes.

Washington's spousal privilege is provided by statute, in part:

A husband shall not be examined for or against his wife, without the consent of the wife, nor wife for or against her husband without the consent of the husband; nor can either during marriage or afterward, be without the consent of the other, examined as to any communication made by one to the other during marriage. RCW 5.60.060(1). The statute affording the spousal privilege contemplates legal marital status. "It applies only when there is a valid, existing marriage, and it applies even if such marriage is in name only." State v. Cohen, 19 Wn. App. 838, 840 (1978).

In State v. Denton, 97 Wn.App. 267 (1999). The Court rules that even though a couple did not obtain a marriage license after a ceremony, it itself out as a married couple, thus the privilege applied.

Washington has a statutory requirement for a marriage license, but Washington does not have a statute plainly making an unlicensed marriage invalid. Therefore, the purpose of a license is purely regulatory, and the regulatory purpose cannot be enforced by "the radical process of rendering void and immoral a matrimonial union otherwise validly contracted and solemnized." Fenbley, 70 A at 668.

The spousal privilege, although strictly construed, State v. Sanders, 66 Wn.App 878,883 (1992), does apply when there is a valid, existing marriage. State v. Cohen, 19 Wn.App. at 670. Marriage voidable when party is unable to consent, or where consent obtained by force or fraud. State v. Denton, 97 Wn. App. 267,271-72 (1999).

Oral joint venture or partnership agreement for indefinite term was not void since termination was not necessarily beyond one year. Seeley v. Norris, 137 Wash. 274, 277-79, 242 P.360,361 (1926). Appellant's verbal agreement with Ms. Miranda to live as man and wife, have kids and both contribute emotionally, financially and physically without a marriage licensee, was not void since termination of their union was not beyond one year of the date of the murders, therfore, because appellant and Ms. Miranda verbally contracted for marriage without a license,their common-law marriage was valid.

The Court is aware of no authority for declaring a marriage to be valid for some purposes but not for others. Cohen at 670. The Court erred in allowing Ms. Miranda to testify without Appellant's consent, which material effected the outcome the trial. State v. Cunningham, 93 Wn.2d 823,831 (1980). Here without the testimony of Ms. Miranda, the jury may have accepted appellant's defense that he did not commit the crimes charged. Permitting Ms. Miranda to testify was not harmless error and appellant is entitled to a new trial, and requests this Court rule that appellant's common-law marriage was valid without a marriage license and marital privilege should have applied in this case.

2RP. 75,101,109
CP. 173

GROUND TWO

APPELLANT WAS PREJUDICED BY THE DEFICIENT SEARCH WARRANT

All the evidence obtained as a result of the search warrant of appellant's home on December 23,2010 should have been suppressed, because the search warrant affidavit authorizing the search was deficient, because (1) Detective Punzalan, the affiant, intentionally or recklessly misrepresented and omitted facts, and (2) critical parts of the affidavit do not pass muster under Aguilar-Spinelli, which is a violation of his rights under the Fourth Amendment of the U.S. Const. and Art. 1§6 Wash. Const.

Article 1 Section 7 provides that "no person shall be disturbed in his private affairs, or his home invaded, without authority of law." A search warrant may be issued only on a determination of probable cause. State v. Jackson, 150 Wn.2d 251,264 (2003). Defendants are entitled to an evidentiary hearing to determine if a warrant is valid if they can make a substantial preliminary showing that the warrant is predicated on false or misstated information if officers provided such information intentionally or with reckless disregard for the truth. Franks v. Delaware, 438 U.S. 154 (1978); See also State v. Chenoweth, 160 Wn. 454,462 (2007). The material that is misrepresented or omitted must be material statements or statements which were made in "reckless disregard for the truth" can result in the voiding of a warrant, but lesser factual inaccuracies would not. Mere negligence or innocent mistakes are insufficient. State v. Seagull, 95 Wn.2d 898,901(1981).

Detective Punzalan intended to misrepresent to the Court that he received vital information from two informants when he believed only one informant existed. This material misrepresentation to the trial court removed its ability to make an independent determination of probable cause when it authorized the search warrant. The trial court relied on the affiant to make truthful representations so it could make an independent determination if an informant is reliable and if the affiant has provided sufficient information to support probable cause. When detective Punzalan drafted the affidavit for the search warrant he believed there was only one informant, Ms. Mirand-Cruz. However, he intentionally misrepresented to the court that there was a second informant, so it would support his position for probable cause. In determining whether or not a search warrant is compromised, the Franks court was scrutinizing the credibility of the affiant. Franks, 438 U.S. at 171.

During the defense interview Det. Punzalan state unequivocally that there was only one informant, Ms. Mirenda. His affidavit mentions Mirandes on several occasions. It also mentions an unidentified informant. Det. Punzalan supporting his position that Miranda was the only informant when he gave a detailed account about how he determined her reliability. He states that officer Conolon contacted Mirenda on the play of the road during surveillance of her home. Punzalan explained that his conversations with Conolon led to his conclusion that Mirenda was the only reliable informant he included in his affidavit. However, the affidavit is clearly drafted to mislead the magistrate to believe that an additional informant has provided incriminating evidence in addition to Miranda's statements. As it turns out, after much delay, it appears there was another informant that officer Conolon spoke to. Nonetheless, the issue is whether the affiant misled the court.

A magistrate depends on the truthfulness of the affiant of a search warrant so it can make a constitutionally just determination of an informant's veracity and reliability and whether or not probable cause exists. State v. Jackson, 102 Wn.2d 432,437(1984). Det. Punzalan intended to deceive the court as to the strength of probable cause, therefore the search warrant is invalid.

1. The affidavit to support search warrant does not pass the Aguilar-Spinelli test for veracity.

Statements made by informants in search warrants affidavits must be supported by information about the informant's credibility and basis for their statement. Jackson at 435. The test applied in Washington is the Aguilar-Spinelli test. This test is more restrictive than what is required by the Fourth Amendment of the U.S.. Id. at 435,438; see also Illinois v. Gates, 462 U.S. 213 (1983).

The two prongs of Aguilar-Spinelli test have independent status; they are analytically severable and each insures the validity of the information. The officer's oath that the informant has often furnished reliable information in the past establishes general trustworthiness. While this is important, it is still necessary that the "basis of Knowledge" prong be satisfied-the officer must explain how the informant claims to have come by the information in this case. The opposite is also true. Even if the informant states how he obtained the information which led him to conclude that contraband is located in a certain building, it is still necessary to establish the informant's credibility. If a search warrant affidavit is predicated on insufficient information to establish probable cause, suppression evidence is the proper remedy. Id.

2. The information received by Ms. Miranda fails to pass the Aguilar-Spinelli test for veracity.

In order to satisfy the first prong of the Aguilar-Spinelli test--the veracity prong--the officer needs to establish the "track record" of the informant, using a history of good information on multiple occasions. If there is no track record, statements against penal interest are sufficient to satisfy this prong. Jackson 112 Wn.2d at 437. To satisfy the second prong--the basis of knowledge prong--the officer must show that the informant personally witnessed the information and is passing on first hand information. Id. Finally, if either prong has failed, the search warrant may still be enforceable if independent police investigation corroborates the defective tip. Id at 438.

Named citizen informants receive a relaxed veracity standard but are still subject to Aguilar-Spinelli. State v. Ibarra, 61 Wn.App. 735, 738 (1991). This relaxed veracity standard is generally satisfied when the named informant provides firsthand accounts of what occurred. Id. This relaxed standard is applied to named informants because, among other things, 'the information is less likely to be colored by self-interest.' Id.

Statement of Additional Grounds -2-

Here, unlike the general presumption of named citizen-witnesses, Ms. Miranda is essentially a confidential informant. Det. Funzelan declared in the defense interview that Ms. Miranda was the confidential informant he referred to in his affidavit. He stated that Det. Conlon used her as a confidential informant because she was scared. The prosecution cannot establish conclusively that Ms. Miranda's veracity is based on track-record because there is none. Jackson, 132 Un.2d at 438. The officers cannot show that she ever worked with them in any capacity or helped obtain convictions. Ms. Miranda does not make any statements against penal interests. Therefore the state cannot establish the "veracity" prong, thus the search warrant fails.

Even though the analysis ends once the veracity prong fails, the "basis for knowledge prong" is deficient. There is no first-hand knowledge that is passed on from Ms. Miranda to Det. Funzelan that establishes probable cause. Any other statements by her are via multiple layers of unreliable hearsay. Further her testimony is not corroborated by independent police investigation at any point thus failing the Aguilar-Spinelli test. Id.

STATEMENT OF ADDITIONAL GROUNDS -5-

3. No evidence the confidential informant was reliable.

The basic problem with the informant, is Det. Punzalan initially claims that it is Ms. Miranda, although it appears it is a male relative of hers. However, the affidavit is void of any information establishing the veracity of this informant and thus fails the first prong of the Aguilar-Spinelli test. The search warrant affidavit provides no insight into whether the officer's have worked with this CI before, and thus it fails to establish the informant's credentials and propensity to provide truthful information. State v. Smith, 110 Wn.2d 658,662 (1988)(noting that where search warrant affidavit laid out prior work with confidential informant, it sufficiently established the veracity of said informant). None of the necessary corroborating information required in the affidavit for the search warrant exits. Det. Punzalan did not corroborate the veracity of the informant prior to submitting his affidavit to the trial court.

The state cannot show that independent police investigation corroborates the tip by the confidential informant because independent police investigation only points out innocuous information. In satisfying this prong, the independent investigation "should point to suspicious activity, probative indications of criminal activity along the lines suggested by the informant." Jackson, 102 Wn.2d at 438.

The only information that officers were able to independently corroborate was the appellant was driving a grey SUV. This is precisely the sort of innocuous information Jackson contemplated as not sufficient to overcome an issue with the informant's veracity. Id. All we learn from this is that the CI knows of a car that appellant drove, and that officers saw him driving this car. This information does not provide any indication of criminality in and of itself, and thus the veracity of the CI is still unsupported. Because the CI's veracity was not established, the Aguilar-Spinelli test is not met.

4. Detective PUnzalan's affidavit is compromised because of his reckless disregard for the truth regarding Mark Salvino's statement.

There was a deliberate misrepresentation with the comment regarding Mark Salvino that alludes to motive in this case. There's also the omission of Johnny BRYANT which refutes the -- timeline theory of the case of how individuals initially went missing. Also Det. Punzalan did not record his conversations with Mr. Salvino and he destroyed his notes. 1RP at 18,43.

Det. PUNZALAN spoke with JOHNNY BRYANT before he wrote his affidavit. 1RP. 49,51,54,79.

Det. PUNZALAN knew information that would have lessened the impact of that offending Paragraph and choose not to include it in his affidavit. THAT'S RECKLESSNESS.

JUDGE AREND from Pierce County was provided with a very misleading document. 1RP. 20.

Det. Punzalan misled the trial court in his affidavit when he stated that Mark Salvino confirmed that appellant was upset because Mr. Ortiz received a promotion over him. However, none of the interviews by the state or defense of Mr. Salvino and his partner/wife Jennifer Trek support this position. In fact, the contrary is true. Evidence shows that for years appellant was a reliable, hardworking employee. When police took a recorded statement on 3/14/2011 from Mr. Salvino, he stated appellant was a conscience worker, he got along with his boss and really appreciated what his bosses did for him. According to Mr. Salvino, appellant was a devoted worker, who worked alot of overtime. Mr. Salvino denied knowledge of any personal riffs between the three missing men and Mr. Cardenas, Jr.

Det. Punzalan's claim that Mr. Salvino said there was a problem between appellant and Mr. Ortiz who promoted over appellant is absolutely false. Punzalan provided this materially false information either intentionally or with reckless regard for the truth which leads to an invalid search warrant. Franks, 438 U.S. 154. Mr. Salvino maintained that appellant was nothing but an outstanding employee who acted in his managerial capacity over his other coworkers, including Mr. Ortiz. Given Salvino's strong recorded statements regarding appellant, it is inconceivable that he would have provided different information to law enforcement prior to the application for the search warrant.

The search warrant must collapse because the trial JUDGE erred when HE Denied My 3.6 Motion to suppss evidence based on illegal search of home.
The Trial JUDGE rule on my 3.6 Motion without reading the TRANSCRIPTS that my attorney's provided to him. Everything it's very clear on those TRANSCRIPTS but the JUDGE "never" read any of this Transcripts.

"THE TRIAL JUDGE SAID THAT HE DO NOT READ THE TRANSCRIPTS FROM MY ATTORNEYS. 1RP. 5-6"

The Trial JUDGE BRUCE HELLER was recently reassigned to my case effective 1-12-2015 CP. 122

On Friday 12-20-2013 Defense interviewed Det. PUNZALAN and HE said that HE didn't have firsthand knowledge of the information that HE included in his affidavit. At the time PUNZALAN draifted his affidavit HE concluded the CI was Ms. Miranda. This acteon mislead the Pierce County Judge who sign the Search warrant. 1RP. 37-39.
Det. PUNZALAN also said that HE didn't know who was the CI, and that HE just "GUESS" and made a wrong assumption. 1RP. 32-33.

Det. PUNZALAN accept that he drew an encorrect conclusion and HE reognized that HE did Potentially and apparently wrongfully. 1RP. 40-41, 57

We were prepared for a 3.6 hearing with Detectives PUNZALAN and CONLON but the state NEVER call Det. CONLON who's interviews contradicts Det. PUNZALAN instead the State put Det. JOHNSON on the stand and Det JOHNSON also contradicts PUNZALAN's statements. 1RP. 16, 71-73

Det. PUNZALAN gave a new statement to the state where we can see how inconsistence it is. PUNZALAN do not said the same information that he gave to the ~~DEFENSE~~ INTERVIEW.

Detective CONLON also gave a different story. PUNZALAN and CONLON contradicts each other. 1RP. 7, 10-11

YOU CAN'T LIE TO A JUDGE, and thats what we have here.

Here we have the AFFIANT telling us in court that he intentionally drafted this affidavit knowing full well that it's misleading. This is a Violation of the LAW.

We have a potential admission by Det. PUNZALAN, and we have a direct misrepresentation about a CI and we also have a potential motive by an Employer witness that is completely FALSE.

* The affiant is lying and that is an absolute PERVERSION OF THE JUSTICE SYSTEM.

The search warrant application was predicated on several tainted statements by Ms. Miranda, initially, the police did not use certified interpreters when interviewing this material witness, her statements are relayed through several officers. These statements were false. Mot. to Supress Evidence at 19.

The litany of exaggerated information, Ms. Miranda's outright denials of incriminating statements to police and the misinformation provided in the search warrant affidavit was either done purposely or with reckless regard for the truth. Systematic exaggeration and putting forward information that a witness never stated is not the sort of innocent mistaken facts the courts overlook. It shows a deliberate attempt to mislead the court to finding probable cause, therefore reversal is required and this court should grant a new trial and supress all the evidence seized as a result of the search warrant.

GROUND # THREE

THE FIREARM EVIDENCE, AND CELL PHONE EVIDENCE WAS MISLEADING AND PREJUDICIAL AND SHOULD HAVE BEEN SUPPRESSED.

1. TOOL MARK EVIDENCE.

JOHN SCHOEMAN who claimed to be a tool mark expert, is not ATFC certified. 2RP. 1645.

Mr. Schoeman examination of the gun and shell casings on evidence is not valid, He's not a Scientist. Mr. Schoeman just came to a conclusion based on his visual comparison of the gun and shell casings, He didn't do any kind of measurements. 2RP. 1658-1659

Mr. Schoeman just gave his personal opinion on the gun and shell casings, but can't prove it scientifically, it was an assumption on his part and Mr. Schoeman "AGREED" to that. 2RP. 1798-1803

Mr. schoeman also "AGREED" that there were a lot of dissimilarities between the shell casings. 2RP. 1663-1666

Mr. schoeman also said that he's not familiar with the manufacturing tool finishing process and their effects on the tool surface. 2RP. 1645, 1653, 1655-1656

Mr. schoeman didn't use any kind of Micro-measuring tool or specialized measuring tools in this case.
Mr. schoeman credentials are in question. 2RP. 1647-1648

Mr. schoeman didn't follow all the "PROTOCOLS" by the (NAS) report. and his testimony to the JURY was very dangerously misleading. 2RP. 1680-1684.

During a defense interview, Mr. Shoeman claimed that his craft is science. He stated that he did not use a data base, and he was not sure if the articles he relied on and referred to were accepted in the scientific community. Mr. Shoeman admits he did not measure the length or depth of the striations on the shell casings. He claims that his laboratory conducts proficiency testing but does not posses an error rate. The review of his work is by his supervisor, not an independent agency. Mr. Shoeman states he has reviewed the National Academy of Science Report. This report scrutinizes the flaws of non-scientific evidence such as tool mark evidence. In addition, he admits when he compares two items he does not try to match a certain number of marks or points before he reaches a conclusion. 2RP 1745-49. 2RP. 119-121, 123

Mr. Shoeman admits he cannot quantify his work, yet he insists it is science even though the NAS strongly refutes this. His work basically involves looking at comparisons under a microscope and drawing conclusions based on his training and experience. He told the defense that the firearm in question is very common and that the cartridges are very common. 2RP 1745-49.

2. The chain of custody

The state asserted that one of the strongest pieces of evidence is the firearm obtained from appellant's house pursuant to a search warrant. The firearm is a 9.mm. According to the state's expert, this is a very common firearm. Initial DNA testing from a very small amount of blood extracted from the inside the barrel revealed that the blood belonged to victim Christian Rangel.

Subsequently, Detective Chris Johnson requested that Washington state DNA technician Marion Clark conduct further testing on the gun. In an email to Ms. Clark, Detective Johnson stated that he was hoping and appeared confident that appellant's DNA would appear on the trigger and handle of firearm. This was not the case. The DNA extracted from the trigger was not that of appellant or any other suspect, but belonged to the victim Christian Rangel.

Furthermore, Ms. Clark, said that the gun in this case was possibly mishandled by a police officer and the firearm analyst. 2RP 1412-1413. The state failed to show that the chain of custody was not broken. 2RP 1492. Furthermore, Detective Jordan doesn't know who transported the firearm or who sealed up the firearm. 2RP 821-825. At least 4 people handled the firearm. 2RP 961-62,1412-13,1420,1422-23.

The authentication of evidence is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. ER 901. If the evidence is an object connected with the commission of a crime, the proponent must also establish the chain of custody, Gallego, 276 F.2d 914,917 (9th Cir.1960).

Also, one of the evidence custodians informed the Defense of some of the mishaps that had happened in her department. The evidence Custodian also said that evidence has been Mishandled in other cases.
The DNA expert said that mishandling of the gun could cause the DNA to spread.
The DNA expert also said that the DNA of that gun was CONTAMINATED. 2RP. 91-94

Because of the nature of DNA evidence, the chain of custody becomes particularly important in this context. The particular nature of this burden has been observed from the very beginning of the use of DNA evidence in Washington state. In State v. Russell, 125 Wn.2d 24,54 (1994), the Washington Supreme Court found that methodologies and principles of PCR DNA analysis satisfied the Fry standard for the admissibility of scientific evidence; however in Russell the court noted the special care that a trial court must exercise in applying the rules of evidence to proposed DNA evidence, noting "we caution that [the court's decision on admissibility under Frye] by no means assures the automatic admission of PCR DQ alpha test results. Serious flaws in a given test may render PCR evidence unreliable and thus inadmissible pursuant to ER 702. In seeking to admit PCR evidence, counsel must be prepared to establish adherence to proper laboratory procedures and protocols." The Russell court further observed that "adherence to proper laboratory procedure is essential in assessing the reliability of PCR test results and thus their admissibility." Id. at 53.

The state cannot show that the DNA on the firearm in this case was in substantially the same condition when it was used in the crime. The state witnesses in this case behaved with gross negligence when they mishandled vital evidence: The firearm and shell casings. It cannot show that it strictly adhered to proper processing and preservation procedures required for the handling of DNA evidence. Therefore, it cannot establish a reliable chain of custody and the firearm must be supressed.

3. Cell Phone Evidence

The state presented detailed cell phone evidence. Sheriff Mike Mellis examined phone records and cellular data towers and testified regarding the general movements of phones associated with appellant, co-defndant Alfredo Velez Fambe, and other suspect Clemente Benitez on the day the three men went missing. 2RP 1563-621. Mellis indicated he saw "a general pattern of movement that was similar between all three phones at any given time." 2RP 1618.

Mellis acknowledge that the cellular data he relied upon did not pinpoint the location of any cell phone and that he had no knowledge of who possessed the particular phones on the dates in question. 2RP 1571-72, 1629-30. Mellis also recognized that phone companies were constantly tweeking their coverage areas. 2RP 1633. Thus, while the maps he showed the jury correctly illustrated the orientation of a particular cell tower sector, they did not give the tower's range; instead, the range information was based on mellis's guesswork. 2RP 1630-31,1634.

2RP 137-139

There's no evidence appellant was arrested with a cell phone. 2RP 1294-96, 1610-11. And if appellant was arrested with a phone on 12/23/10, why were calls being made up until March 2011. The prosecutor lied to the jury. 2RP 1610-12, Furthermore, appellant was not the subscriber of the phone in evidence. 2RP 1536-37,1550, and Ms. Miranda lied about her phones because she was offered a bribe by the government with an offer of S-Visa by imigration in exchange for her testimony. She also sold one of her phones to other people. 2RP 1200. Appellant just had his work phone and prepaid phone, or pay phone, that was not conected to the crime. 2RP 839,906, 1198,1612-13.

2RP 80-83

GROUND # FOUR

INNEFECTIVE ASSISTANCE OF COUNSEL.

- My attorney's didn't motion the coort for a "warrant" on a material witness (JOHNNY BRYANT), after they knew BRYANT wasn't going to came to trial.
My attorney's just subpoena BRYANT.
(BRYANT didn't honor his subpoena). 2RP. 679-680.

JOHNNY BRYANT gave a statement to a police officer: (officer SIVANKEO), saying that he saw the 3-victims alive at 9:00 pm. on 12-12-2010 the day this 3-victims dissapeared clearly contradicting the state's timeline of events. the trial court didn't let officer SIVANKEO to testify. 2RP. 1708-1712

JOHNNY BRYANT was on the defense witness list and under SUBPOENA. BRYANT was a Material Witness with a potential and relevant testimony. 2RP. 1731-1732

Detective PUNZALAN spoke with JOHNNY BRYANT before he wrote the affidavit for a search warrant and intentionally did not included this information on his affidavit. 1RP. 49-54, 79
The report that has contradictory information to the state's case is not put in it.
This report was from officer SIVANKEO who spoke with JOHNNY BRYANT on 12-13-2010. 2RP. 784.

GROUND # FIVE
(GOVERNMENT MISCONDUCT)

I was prejudiced by witness GUADALUPE MIRANDA when she lied against me. The government offered to Ms. Miranda a "S-VISA" in exchange for testimony. Ms. Miranda was Bias and her testimony was influenced by a promise of benefits of a "S-VISA".

In Ms. Miranda prior interviews she contradicts herself. She is scare to deportation by Immigration.

Everything was planned by the state, when the government offered to Ms. Miranda a "S-VISA" in exchange for her testimony at trial. Ms. Miranda changed her testimony at trial after she got the "S-VISA". C.P. 173
2RP. 80-83

Ms. Miranda got impeached at trial with her prior interviews and recorded statements. Ms. Miranda is a Biased and compromised witness. 2RP. 1814-1816

a false testimony from Ms. Miranda was BOUGHT...

GROUND # 6
GOVERNMENT MISCONDUCT (OTHER SUSPECTS).

Motions limine were DENIED with prejudice because the trial JUDGE doesn't allowed evidence of the lifestyle of the victims that hurt the states case. CP. 173
2RP. 77, 744-745

The victims own family made incriminating statements to the state of the lifestyle of their victims, where we can clearly see a motive to commit a crime from OTHER SUSPECTS, but the JUDGE doesn't let this evidence to be admitted at trial and made the victims look like such a good persons in the eyes of the JURY, but the evidence says the contrary.
We have the MOTHER, SISTER and WIFE OF victim "ORTIZ" incriminating him.
CP. 173
2RP. 85-89, 745

We also have the girlfriend of victim "RANGEL" saying incriminating statements about her boyfriend RANGEL. She said that her boyfriend RANGEL was a gang member, and that He has a tatoo on his knee that stay for his gang.

(OTHER SUSPECTS).

Rangel's girlfriend also said that she has a gun (.32 cal.). and that her boyfriend RANGEL has his own gun but she doesn't know what kind of gun.

(THE MURDER WEAPON IN THIS CASE HAS RANGEL'S DNA - ON THE TRIGGER).

The Trial JUDGE prevented all this evidence to be heard by the JURY. 2RP. 682, 725-727.

* OMISSION OF EXCULPATORY EVIDENCE BY CO-DEFENDANT.

My Co-defendant pleaded GUILTY to Murder. 2RP. 1329

I didn't got a pair Trial when the trial JUDGE do not allowed the Exculpatory Evidence by my Co-defendant ALFREDO FOMBONA.

ALFREDO told to witness Ms. Miranda that Alberto Avila never used the gun in this case, and that she doesn't have to worry because is not true what the state is saying about Alberto Avila because Alberto didn't have anything to do with the gun in evidence.

2RP. 1181-1183

GROUND # SEVEN

GOVERNMENT MISCONDUCT (ZIP TIES).

-Prosecutor is lying because witness Guadalupe Miranda doesn't gave those statements to the Police on 12-17-2010.

Ms. Miranda was motivated to lie "AFTER" she got an offer of the "S-VISA" in exchange for testimony. 2RP. 660, 80-83

Prosecutor is lying to the JURY by telling them that Alberto Avila bought those ZIP TIES. The state never prove this. 2RP. 669

Investigators produced a receipt to show it to the JURY, and the state is trying to create Evidence and want to make the JURY think that Alberto Avila bought those ZIP TIES and that they found a receipt. This is speculation. 2RP. 1273, 1792

There's no video of LOWES STORE that shows Alberto Avila buying those ZIP TIES. 2RP. 677, 1106, 1211

ZIP TIES...

Prosecutor lied to the jury by telling them that the ZIP TIES in evidence are the same type and brand from LOWES STORE than the ones from GARDNER BENDER. 2RP. 1468

But, witness "Anthony Gilbert" testified at trial that his company GARDNER BENDER sell ZIP TIES to a number of Retail Stores.

Mr. GILBERT wasn't able to tell the jury that the ZIP TIES in evidence are the same kind and type than the ones sold by his company GARDNER BENDER 2RP. 1465-1468, 1791

The state did not conclusively link those ZIP TIES to Alberto Avila.
There's NO DNA, Fingerprints or a VIDEO from Lowes store of who purchased those ZIP TIES. 2RP. 1790-1791

GROUND # EIGHT

GOVERNMENT MISCONDUCT

(SIXTH AMENDMENT RIGHT VIOLATED).

I was represented by a private attorney "SEAN WICKENS" and He never receive the declaration of the detective that supported the Search Warrant.

On 2-15-2011 the state very well planned a "custodial statement in the absence of Counsel".

The state didn't inform SEAN WICKENS that my charge was already dismissed. My charge was GUN possesion only, based on a search warrant in the pierce county superior court. 2RP. 57-60, 63

After the state dismissed my case I was transfered to Federal Court with the exact same charge I had on superior court.

Nobody inform my attorney that my charge had been dismissed, INSTEAD the state planned a custodial statement in the absence of my attorney. The state used this statement later against ME. 2RP. 69.

This action was very well planned by the Pierce County Prosecutor, Federal Agents and the Pierce County Detectives. 2RP. 157-158, 176

This is a case worth mentioning:

UNITED STATES V. Martinez, 972 F2d. 1100 (1992) 9th Circuit

GROUND NINE

* MEDIA VIOLATION OF COURT ORDER

On 7-08-2015 shortly after the opening statements THE MEDIA (SEATTLE PI) wrote an article online violating a court order by showing a photograph of: Alberto Avila being handcuffed. 1RP 107
2RP. 688-689

This court order says - NO IMAGES ARE TO BE PUBLISHED OF THE HIGH SECURITY GARB AND PHOTOGRAPHY IS TO BE FROM THE SHOULDERS UP. C.P. 21-22

I did not get a fair trial when the MEDIA published false information online and contaminating the JURY's mind by saying that there was a motive for this crime. The media also wrote that my attorney's gave them that information. This action by the MEDIA was highly prejudicial.
2RP. 684-686

All jurors were asked if they read the MEDIA article, but none of them answered YES or NOT. (WHY THE JUROR'S DIDN'T ANSWER NOT ?). Ofcourse the JUROR'S read this article during trial. 2RP. 690

In this case the JURY didn't have a unanimous feeling. We have 2-JUROR'S believing that I was NOT GUILTY and 2-JUROR'S undecided. 1RP. 106

So, the MEDIA article poisoned the JUROR'S mind. I was deprived of a fair trial.

GROUND 10

(GOVERNMENT MISCONDUCT)

Detective JOHNSON lied to the JURY by telling them that it was found my co-defendant's phone number (206) 793-1969 on the contact list of the phone that the state is attributing to ME. But the prosecutor never showed to the JURY the actual contact list of that phone where we can clearly see a contact named: "ALFREDO" with a different number.

On Detective JOHNSON prior interviews, HE stated that when HE called the name ALFREDO it wasn't the same ALFREDO as my co-defendant.

This is a big lie, and the prosecutor, the detectives and also my attorney's knows this is false. 2RP. 1297

*VIOLATION OF MOTION LIMINE

We have a Motion Limine for not to let witnesses watch the Trial, but the trial JUDGE allowed some witnesses to remain in the court room during trial. CP. 173 2RP. 748

PROSECUTOR MISCONDUCT

*The gun in evidence it's not mine - Prosecutor made witness Ms. Miranda to lie about the gun in this case.

Ms. Miranda was motivated with the offer of a S-VISA from immigration in exchange of FALSE TESTIMONY. 2RP. 80-83

At trial, the prosecutor never showed the gun to Ms. Miranda for identification, not even a picture of the gun. Why? - because the state was scare of the identification of the gun by Ms. Miranda.

2RP. 1794

* Also - the State forced the JURY to find ME Guilty of at least an Accomplice, by giving them the JURY INSTRUCTION # 8, because even they are not confident of who did the killing.

2RP. 1806, 1817-1818

* Also - Prosecutor lied to the Trial JUDGE on many occassions telling Him that Witness Ms. Miranda "DO NOT WANT CONTACT WITH ME", it was a big lie to keep Ms. Miranda against ME during trial.

Ms. Miranda NEVER ASK for a "NO CONTACT ORDER" with ME. Ms. Miranda has been visiting ME subsequent to Trial.

1RP. 115-116

GROUND ELEVEN

INNEFECTIVE ASSISTANCE OF COUNSEL

My attorney's were innefective because on my 3.5 hearing we were expecting Detective JORDAN who's the states main witness, but JORDAN never came to the hearing. My attorney's never ask for a new hearing, instead they proceed with the 3.5 hearing without Detective JORDAN being present. 2RP. 53, 70

Also, on My 3.6 hearing we were expecting Detective CONLON, but the state never called Him. Detective CONLON statement's contradicts Detective PUNZALAN statements who's the affiant of the Search Warrant.
My attorney's proceed with the hearing instead of motion for a new hearing. 1RP. 16, 73

My attorney's were innefective because they didn't showed to the JURY the actual contact list of the phone that the state is attributing to me.
My attorneys didn't object when Detective JOHNSON was lying to the JURY by telling them that he found a contact named "ALFREDO" on that phone with the #(206)793-1969.
If we open the actual contact list of that phone we can clearly see that it's a different phone number under the name of ALFREDO. 2RP. 1297

INNEFECTIVE ASSISTANCE OF COUNSEL

My Attorney's were innefective when they never told the jury that the government offer a S-VISA from immigration to witness Ms. Miranda in exchange for false testimony.
A motion LIMINE was granted by the court but my attorney's covered this information from the jury. CP. 173
2RP. 80-83

Also, my Attorneys were innefective because they didn't show to the jury evidence of Ms. Miranda's infidelity to ME.
Ms. Miranda confessed to the police that she was scare of ME because she was having an AFFAIR with ALEX MONCADA, but my attorneys hide this information from the eyes of the jury. We have the police report with Ms. Mirandas confession.

Ms. Miranda's infidelity is one reason for her to lie, and she has a very big motivation when the government gave her a S-VISA in exchange for false testimony.
2RP. 1193

GROUND # TWELVE

GOVERNMENT MISCONDUCT (CERTIFIED INTERPRETERS).

Detective PUNZALAN never used a certified interpreter when He spoke with witness Guadalupe Miranda and do not recorded his conversations with Ms. Miranda (she doesn't speak in English). 1RP. 45

Ms. Miranda didn't get help with translation and her statements contradicts each other. 2RP. 677-678

Detective JOHNSON also spoke with Ms. Miranda without a certified interpreter. 2RP. 1315

ME— Alberto Avila didn't understand everything on the interview of 12-17-2010 with detective Bunton. My English is limited.

Officer HECTOR helped a little with translation but she's not a certified interpreter. 2RP. 5, 11-15.

~~Even~~ detective Bunton said that officer HECTOR wasn't able to translate everything because her Spanish is not good. 2RP. 22-24

Detective CATLETT is not a certified court interpreter. I did not understood everything on the interview of: Alberto Avila 2-15-2011 where detective CATLETT translate. 2RP. 37.

Detective CATLETT said that he didn't translate all of the 2-15-2011 interview. 2RP. 33

GROUND # 13

INNEFECTIVE ASSISTANCE OF COUNSEL

I was denied a continuance with prejudice.

I didn't get all my discovery before trial and the court DENIED our motion for continuance. The defense didn't have enought time to get ready for trial. During trial, my attorneys were still giving me transcripts of witnesses who favor our defense, for example: KEVIN WESTBERG who was on the state's witness list. 2RP. 131-133

The prosecutor and the trial JUDGE do not want to continuance the trial date. because they were just thinking on their vacations, and the JUDGE wanted to finish my trial before his daughter wedding, but the defense was not ready for trial.
2RP. 160-161

The STATE comes up short in this case, because FAIL to connect the evidence and did not prove beyond a reasonable doubt that ME_Alberto Avila is guilty of Murder in the first deggre or that I planned or killed anyone.

In this case there's not a MOTIVE and you don't premeditated to kill somebody without a reason, righ ?.

Also, there's not a confesion or an eyewitness that came to court and testified and said that Alberto Avila was involved in this crime.

The state, also, can't prove any kind of forensic evidence showing that Alberto Avila handled the phone in evidence.

I AM INNOCENT...

The state is just Guessing and Speculating.

This is a circumstantial case, that lacked direct evidence, there was no eyewitness, there was no confession and most importantly, there were several other suspects. Mr. Avila-Cardenas did not commit these crimes.1RP 105

There was no motive, fingerprints or DNA that link me.

Furthermore, he cooperated with the authorities. Unlike, at least one other suspect, appellant did not flee. He walked in on his own volition and spoke to authorities on two different occasions, he did not flee because he was not involved in any planing or any violence in this case. 10/9/15 RP 105-06.

Constitutional test for sufficiency of the evidence is whether after viewing the evidence in the 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 (1979). Because appellant is actually innocent he respectfully requests this court reverse his convictions and remand for a new trial.

GROUND [redacted] 14

APPELLANT'S CONVICTIONS FOR FIRST DEGREE MURDER MUST BE REVERSED BECAUSE THE AMENDED INFORMATION FAILED TO CHARGE THE ELEMENTS OF PREMEDITATION WHERE APPELLANT COULD UNDERSTAND

Here, the trial court appointed interpreters for appellant because he does not understand the english language fluently. A criminal defendant is denied due process when he is unable to understand the proceedings due to a language difficulty. U.S. v. Johnson, 248 F.3d 659,663 (7th Cir.2001).

Here the Amended Information in Count I,II, and III charged in part:

That the defendant ALBERTO AVILA-CARDENAS and JOSE ALFREDO VELEZ-FOMBONA, and each of them, in King County, Washington, on or about December 12,2010, with a premeditated intent to cause the death of another person, did cause the death of (Count I Jesus Bejar Avila); (Count II Yazmeni Quezada-Ortiz); (Count III Cristian Alberto Rangel)... See Information in Exhibit A

Appellant's Judgment and Sentence (J&S) is invalid on it's face, because the charging information for first degree murder in Counts I,II, and III omitted the necessary elements of premeditation, that involves more than a moment in a point in time in which a design to kill the victims were deliberately formed.

Appellant cannot read or understand english fluently enough to be informed of the elements of premeditation, when the charging information state's the word premeditated, then omits the elements of premeditation. Appellant was further prejudiced for not being provided with a translation written in Spanish of the charging information and the elements of First Degree Murder. See Exhibit A.

The constitutional right of a person to be informed of the nature and cause of the accusation against him or her requires that every material element of the offense be charged with definteness and ceratinty in order to appraise the accused of the nature of the charge. Sixth Amendment U.S. Const. State v. Kjorsvik, 117 Wn.2d 93,97 (1991).

The test for the sufficiency of charging documents challenged for the first time on appeal is as follows:

(1) Do the necessary facts appear in any form, or by fair construction can they be found in the charging document, and if so, (2) can a defendant show that he was nonetheless actually prejudiced by the inartful language which cause the lack of notice. Kjorsvik, 117 Wn.2d at 109 (adopting the federal standard announced in Hagner v. U.S., 285 U.S. 427,433 (1931)).

Charging documents that fail to set forth the essential elements of a crime are constitutionally defective and require dismissal, regardless of whether the defendant has shown prejudice. State v. Hopper, 118 Wn.2d 151,155 (1992). It is not fatal to an information that exact words of the statute are not used, the information must however, "state the acts constituting the offense in ordinary and concise language...." State v. Reyse, 66 Wn.2d 552,557 (1965).

Some jurisdictions have entirely abandoned the term such as "premeditation" in statutes defining homicides, instead substituting other terms and phrases clearly indicating the highest level of culpability is reserved for defendants who kill their victims in accordance with a prior plan. State v. Solomon, 66 Ohio St.2d 214, 20 Ohio ops 3d 213,421 NE 2d 139 (1981).

Here the charging information failed to allege the murders of Jesus Bejar Avila, Yazmani Quezada-Ortiz, and Christian Alberto Rangel, involved more then a moment in a point of time in which a design to kill was deliberately formed by appellant to constitute the crimes of intentional premeditated murder, however this language did appear in the jury instructions as elements of the crimes. See Jury Instruction #12.

When the state failed to allege in the charging information the elements of premeditation, it denied appellant his Sixth Amendment right to be informed of all essential elements of first degree murder.

III. CONCLUSION

For the reasons stated in this SAG and in appellant's Opening Brief, the errors were not only a violation of state law, they denied him his Fourth, Fifth, Sixth and Fourteenth Amendment rights against unreasonable search and seizure, effective counsel, due process, fair trial, and equal protection of the law, and he asks this court to reverse his convictions and remand for a new and fair trial, and grant a evidentiary hearing to resolve any material disputed facts of this case. Duncan v. Henry, 513 U.S. 364-66 (1995).

Dated this 28 Day of November 2016.

ALBERTO AVILA

Alberto Avila Cardenas
Appellant, pro se
1830 Eagle Crest Way
Clallam Bay, WA 98326-9723

EXHIBIT A

AMENDED INFORMATION

State v. Alberto Avila-Cardenas No. 11-C-05713-1-KNT

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON, Plaintiff, v. ALBERTO AVILA-CARDENAS, and JOSE ALFREDO VELEZ-FOMBONA and each of them, Defendants.	)	No. 11-C-05713-1 KNT ✓ 11-C-05735-2 KNT AMENDED INFORMATION

COUNT I

I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse ALBERTO AVILA-CARDENAS and JOSE ALFREDO VELEZ-FOMBONA, and each of them, of the crime of **Murder in the First Degree**, committed as follows:

That the defendants ALBERTO AVILA-CARDENAS and JOSE ALFREDO VELEZ-FOMBONA, and each of them, in King County, Washington, on or about December 12, 2010, with premeditated intent to cause the death of another person, did cause the death of Jesus Bejar Avila, a human being, who died on or about December 12, 2010;

Contrary to RCW 9A.32.030(1)(a), and against the peace and dignity of the State of Washington.

And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendants ALBERTO AVILA-CARDENAS and JOSE ALFREDO VELEZ-FOMBONA, and each of them, at said time of being armed with a 9mm semi-automatic handgun, a firearm as defined in RCW 9.41.010, under the authority of RCW 9.94A.533(3).

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COUNT II

And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse ALBERTO AVILA-CARDENAS and JOSE ALFREDO VELEZ-FOMBONA, and each of them, of the crime of **Murder in the First Degree**, a crime of the same or similar character and based on a series of acts connected together with another crime charged herein, which crimes were part of a common scheme or plan, and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

That the defendants ALBERTO AVILA-CARDENAS and JOSE ALFREDO VELEZ-FOMBONA, and each of them, in King County, Washington, on or about December 12, 2010, with premeditated intent to cause the death of another person, did cause the death of Yazmani Quezada-Ortiz, a human being, who died on or about December 12, 2010;

Contrary to RCW 9A.32.030(1)(a), and against the peace and dignity of the State of Washington.

And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendants ALBERTO AVILA-CARDENAS and JOSE ALFREDO VELEZ-FOMBONA, and each of them, at said time of being armed with a 9mm semi-automatic handgun, a firearm as defined in RCW 9.41.010, under the authority of RCW 9.94A.533(3).

COUNT III

And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse ALBERTO AVILA-CARDENAS and JOSE ALFREDO VELEZ-FOMBONA, and each of them, of the crime of **Murder in the First Degree**, a crime of the same or similar character and based on a series of acts connected together with another crime charged herein, which crimes were part of a common scheme or plan, and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

That the defendants ALBERTO AVILA-CARDENAS and JOSE ALFREDO VELEZ-FOMBONA, and each of them, in King County, Washington, on or about December 12, 2010, with premeditated intent to cause the death of another person, did cause the death of Cristian Alberto Rangel, a human being, who died on or about December 12, 2010;

Contrary to RCW 9A.32.030(1)(a), and against the peace and dignity of the State of Washington.

And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendants ALBERTO AVILA-CARDENAS and JOSE ALFREDO VELEZ-FOMBONA, and each of them, at said time of

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being armed with a 9mm semi-automatic handgun, a firearm as defined in RCW 9.41.010, under the authority of RCW 9.94A.533(3).

DANIEL T. SATTERBERG
Prosecuting Attorney

By: _____
Scott M. O'Toole, WSBA #13024
Senior Deputy Prosecuting Attorney

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