SUPREME COURT NO. 101260-8
NO. 81463-0-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
LENDSAY LESHLY MEZA,
Appellant.

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

PETITION FOR REVIEW

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II. ISSUES PRESENTED FOR REVIEW

1. Does the Court of Appeals opinion directly conflict with this Court's decision in *In re Personal Restraint of Glasmann*, 175 Wn.2d 696, 286 P.3d 673 (2012), in focusing on whether competent evidence sustained the convictions to determine whether Ms. Meza suffered prejudice from the prosecutor's misconduct rather than focusing on instances of misconduct and their impact on the jury's verdict?

2. The Court of Appeals created a novel "good faith" standard to justify precluding a key witness for the defense from testifying, even though his

conviction was unqualifiedly final. This presents a constitutional question and a question of public importance. RAP 13.4(b)(3), (4). Should the Court provide guidance on the correct meaning of Fifth-Amendment privilege against self-incrimination?

III. STATEMENT OF THE CASE

In 2016, Ms. Meza was 18 years old when she met Anthony Hernandez-Cano online. RP 2252, 2256. Mr. Hernandez-Cano moved from Georgia to Seattle to live with Ms. Meza and her family at Vantage Apartments. RP 2247, 2250, 2254-56.

On the night of June 27, 2018, Mr. Hernandez-Cano and Ms. Meza attended a quinceañera—A coming of age, 15th birthday celebration. RP 2224, 2268-69.

Ms. Meza smoked marijuana before the party, and then drank alcohol and took Xanax at the party. RP 2224, 2272-74,76; CP 118-19.

After the quinceañera, Mr. Hernandez-Cano, Ms. Meza, and two other men drove away in Ms. Meza's red Saturn. RP 2279. They met up with Hassani Hassani and Mohamed Adan. RP 2280.

Mr. Hernandez-Cano, Mr. Hassani, and his girlfriend Anika St. Mary all lived at Vantage Apartments—they were friends. RP 1499-1500. Mr. Adan stayed at Vantage Apartments on-and-off. RP 1501.

Mr. Hassani had caught Mr. Adan and Ms. St. Mary kissing. RP 1587. Mr. Hassani was looking to settle this "beef" with Mr. Adan. *See* RP 2295. Mr. Hassani had a similar "beef" with Mr. Ezekiel Kelly concerning Ms. St. Mary, his girlfriend. RP 1419.

After the quinceañera, the party in the red Saturn stopped for Mr. Adan and Mr. Hassani and then drove to a parking lot. RP 2280-88. Everyone else

got out but Ms. Meza and another person remained passed out inside the car. RP 2282-88. It seemed like 30 minutes passed, everyone returned, and Ms. Meza drove them to Vantage Apartments. RP 2289-91. When Ms. Meza entered the garage, Mr. Adan was there, and he seemed beaten up. RP 2294. Ms. Meza thought the men were settling "a beef." RP 2295. Ms. Meza got in her car to sleep off the drugs and alcohol in the front passenger seat. RP 2298.

Around noon the next day, someone discovered Mr. Adan's body on the side of the road. RP 971-72, 976-79, 984-85.

Ezekiel Kelly was friends with Mr. Adan. RP 1382. He lived with his mother, LaTonage Kelly, in an apartment on Admiralty Way in Everett. RP 1382.

Ms. Meza testified that on July 2, Mr. Hernandez-Cano, Mr. Hassani, and Ms. St. Mary asked her for a ride to the gas station. RP 2347.

At the gas station, Mr. Hernandez-Cano and Mr. Hassani got out of the car and returned with Mr. Kelly. RP 2348. Mr. Hernandez-Cano told Ms. Meza to drive to South County Park. RP 2354-55. In the backseat, Mr. Hernandez-Cano and Mr. Hassani were screaming at Mr. Kelly. RP 2350. Ms. Meza did not like it and she swerved a couple of times to attract the attention of police, but to no avail. RP 2354.

At South County Park, Mr. Hernandez-Cano told Ms. Meza to get out with them. RP 2354. She thought they were just going to beat up Mr. Kelly to settle their "beef" and then leave him. RP 2355; 2295. At the park, Mr. Hernandez-Cano prevailed on Ms. Meza, and she

hit Mr. Kelly on his leg with a baseball bat. RP 2356. But not hard enough to hurt him. RP 2356.

The three men got back in the car. RP 2358. Ms. Meza had difficulty seeing Mr. Kelly—it was dark, and his complexion was dark. RP 2358. Ms. Meza drove towards the apartment complex, thinking they were going back home. RP 2361. Sounds of punching continued. RP 2359. Mr. Hernandez-Cano and Mr. Hassani told her to stop near an abandoned house. RP 2361-62. Mr. Hernandez-Cano and Mr. Hassani dragged Mr. Kelly out of the car. RP 2361. Ms. Meza drove to a nearby Albertson's with Ms. St. Mary. RP 2363.

When the women returned, Mr. Hassani and Mr. Hernandez-Cano got back in the car. RP 2406. When they got to Vantage apartments, Ms. Meza realized the backseat was covered with Mr. Kelly's blood. RP 2406.

Ms. Meza sent Mr. Hernandez-Cano and Mr. Hassani a video yelling at them about the blood in the backseat of her vehicle. Ex. 225, RP 1960.

On July 3, a neighbor found Mr. Kelly's body in a large pool of blood under a carport of a small, abandoned building. RP 1196, 1206. Mr. Kelly appeared to have died from gunshots and stab wounds. RP 1487.

Police traced the red Saturn to Ms. Meza. RP 1115-16. Mr. Kelly's mother told police that on Saturday, June 30, Mr. Adan, and Mr. Kelly left together. RP 1112. Mr. Adan and Mr. Hernandez-Cano had also come looking for Mr. Kelly at home. RP 1112.

On July 5, the police arrested Mr. Hernandez-Cano at Vantage Apartments for violating his no-contact order with Ms. Meza. RP 1327. Ms. Meza agreed to speak with the police about the no-contact

order. RP 1328. Her interview quickly turned to questions about Mr. Adan and Mr. Kelly's death. Ex. 324-26, 334; RP 1616-34, 1654-56. Ms. Meza lied to protect her boyfriend, Mr. Hernandez-Cano. RP 2377-78, 2381. Police did not arrest Ms. Meza but seized her cellphone as evidence. Ex. 334, p. 197.

When police interviewed Mr. Hernandez-Cano the next morning, he confessed to the murders and insisted on a field trip to the scenes of the crimes to explain what happened. Ex. 542, 543, 578, 579; RP 1934-1935, 2015. Mr. Hernandez-Cano led the police to the .22 caliber gun, which he had dismantled and dumped in two drains near Vantage Apartments. RP 2/26/20 RP 20, 24-25.

Three days later, police interviewed Ms. Meza again and arrested her. Ex. 327, 328, 334; RP 1329; 2073-75.

Mr. Hernandez-Cano pleaded guilty to two counts of aggravated first-degree murder and received a life sentence. CP 181-201. Mr. Hassani pleaded guilty to first-degree murder and first degree kidnapping, and received a 35-year sentence. CP 70.

As for Ms. Meza, regarding Mr. Adan, the prosecution charged her with felony murder predicated on first-degree kidnapping. CP 217. Regarding Mr. Kelly, it charged her with premeditated intentional murder and felony murder predicated on first-degree kidnapping. CP 217-18. The prosecution charged Ms. Meza with these three offenses under a theory of accomplice liability.

The court precluded Ms. Meza from calling Mr. Hernandez-Cano as a witness, even though he pleaded guilty, was serving a life-sentence, and his convictions

were final and the time for appeal had come and gone. RP 890-91.

The jury found Ms. Meza guilty as charged. RP 2560-61. Ms. Meza received a 50-year sentence. CP 14.

IV. ARGUMENTS WHY THE COURT SHOULD ACCEPT REVIEW

1. The Court of Appeals' opinion conflicts with *Glasmann*.

a. Because it glossed over reversible misconduct.

Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). To prevail on a claim of prosecutorial misconduct, the defendant must show both improper conduct and resulting prejudice. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011).

To show prejudice the defendant must show that there was a substantial likelihood that the misconduct affected the jury verdict. *Id*.

> Thus, deciding whether reversal is required is not a matter of whether there is sufficient evidence to justify upholding the verdicts. Rather, the question is whether there is a substantial likelihood that the instances of misconduct affected the jury's verdict. We do not decide whether reversal is required by deciding whether, in our view, the evidence is sufficient.

Glasmann, 175 Wn.2d at 711(internal citations omitted).

Here, during opening remarks, the jury heard from the prosecutor's own mouth that a few days after the killings, Ms. Meza created Snapchat videos of herself playing with the actual gun used to kill Mr. Adan and Mr. Kelly. RP 962-963. The words "crazy [as fuck] BITCH" left the prosecutor's mouth in reference to how Ms. Meza self-described. See RP 962-963. The

jury saw the video of Meza holding the gun against her cheek, then sticking her tongue out, pointing the gun at the camera, and pantomiming blowing smoke from the muzzle. See App. at 12.

But, the prosecutor did not correct the record that the three Snapchat videos and caption were made about a month *before* the homicides. The prosecutor did not walk back his false comments that Ms. Meza possessed the actual murder weapon days after the killings.

The prosecutor intentionally sought to create the impression in the minds of the jury that Ms. Meza was a callous, sinister "crazy [as fuck] BITCH!!."—Because only a few days after the killings of Mr. Adan and Mr. Kelly, she played with the murder weapon against her cheek, stuck her tongue out, pointed it at the camera, and pantomimed blowing smoke from the muzzle. See

App. at 12. The prosecutor impermissibly suggested Ms. Meza was the kind of person who would likely participate in kidnapping and killing Mr. Adan and Mr. Kelly. Yet the Court of Appeals saw no misconduct.

b. Because it fixated only on the "Crazy asf BITCH!!!" caption in isolation.

The Court of Appeals fixated on the caption "Crazy asf BITCH!!!" in isolation. App. at 12-13. The Court of Appeals was distracted by whether Ms. Meza could prove the prosecution acted in "bad faith" and the prosecutor's repeatedly assurances he acted on the "good faith" belief the evidence would be admitted. App. at 11-12.

As a result, the opinion did not focus on the cumulative impact of the prosecutor's misconduct on the jury verdict. It did not focus on the impact of the prosecutor telling the jury DNA, ballistic, and other

evidence proved mere days after the killings of Mr. Adan and Mr. Kelly, Ms. Meza recorded herself on Snapchat playing with the murder weapon. It did not focus on the impact on the jury of the prosecutor enunciating the words "Crazy as fuck BITCH" in reference to a young Latina woman on trial in the context of also casting Ms. Meza's boyfriend a Sureños gang member and in the context that no one walked back the prosecutor's false statements about the murder weapon. Prosecutorial misconduct is an issue of substantial public interest under RAP 13.4(b)(3).

c. Because it ignored the prosecutor's misconduct in falsely telling the jury Ms. Meza played with the murder weapon days after her boyfriend, a Sureños gang member killed two people with it.

In *Glasmann*, during closing argument, the prosecutor showed altered versions of the defendant's booking photograph and other photographs intended to influence the jury's assessment of his guilt by adding

captions, one of which included the words "GUILTY, GUILTY, GUILTY." 175 Wn.2d at 678. In reversing the defendant's conviction for prosecutorial misconduct, this Court found that there was a substantial likelihood the misconduct affected the jury's verdict. *Glasmann*, 175 Wn.2d at 714.

Just like *Glasmann*, Ms. Meza's case involved a false caption and an improper argument. Ms. Meza did not possess with the murder weapon any time after the killings as the prosecutor told the jury. But the prosecutor's opening argument left the jury and the press with a lasting impression of Ms. Meza wantonly playing with the murder weapon after Mr. Hernandez-Cano killed Mr. Adan and Mr. Kelly with it and she self-described as "Crazy as fuck BITCH!!!"[1] In fact, Mr.

[1] The Court can take judicial notice under ER201(b) of the February 18, 2020 newspaper

Hernandez-Cano dismantled and threw the murder weapon in two drains near Vantage Apartments. RP 2/26/20 RP 20, 24-25.

In a trial accusing Ms. Meza, a Latina young woman, of actively assisting Mr. Hernandez-Cano and Mr. Hassani to kill Mr. Adan and Mr. Kelly, the prosecutor's improper argumentation and use of the inflammatory caption loaded the deck against Ms. Meza, after Mr. Hernandez-Cano and Mr. Hassani both accepted pleas. CP 181-201; CP 70.

Ms. Meza maintained her innocence and went to trial. At trial, the court precluded Ms. Meza from calling Mr. Hernandez-Cano as her key witness, even though he pleaded guilty, and his convictions was unqualifiedly final. RP 890-91. The prosecution told the

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https://www.heraldnet.com/news/girlfriend-on-trial-in-2-torture-murders-in-snohomish-county/

jury Mr. Hernandez-Cano, the principal who killed two people, was a member of the Sureños gang. RP 954.

The prosecution moved pretrial to admit into evidence three Snapchat videos and a captioned still photograph retrieved from Ms. Meza's cellphone. The defense objected to this evidence urging the trial court to at least require the prosecution to lay a proper foundation that the videos and caption were made on July 4 before showing the jury such prejudicial evidence. RP 383-85.

The prosecution assured the trial court that the next day Detective Headrick would prove from the metadata of Ms. Meza's cellphone that the videos and the captions were created on July 4, 2018, at about 11:03 p.m. RP 687-89. The court ruled the three videos and the captioned still picture were admissible provided the prosecution laid foundation for its

admissibility at trial. RP 689. The trial court cautioned, "it could be at [the prosecution's] peril" if it was unable to lay the proper foundation at trial, but otherwise allowed the use of the three videos and the captioned photograph during opening remarks. RP 1689-91.

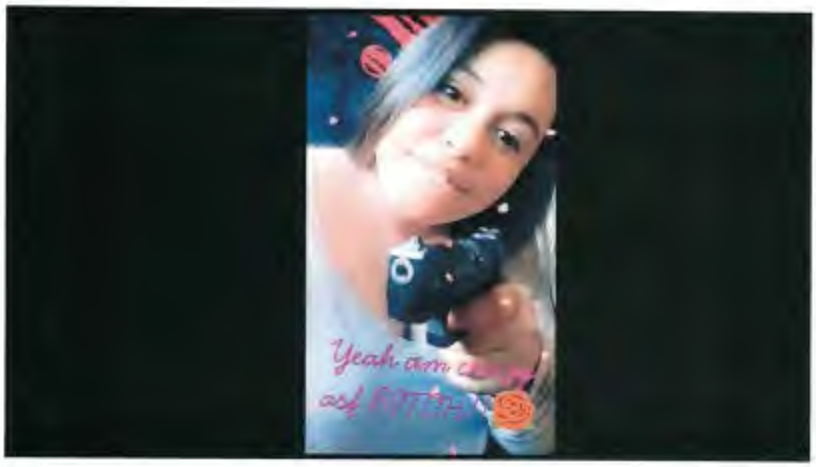
The prosecution then saw fit to tell the jury Ms. Meza self-described as a "crazy [as fuck] BITCH!!" who after her boyfriend, a Sureños gang member, used the gun to kill Mr. Adan and Mr. Kelly, pantomimed smoke coming from the muzzle of the same .22 caliber murder weapon. Ex. 230-33; RP 378.

The prosecution opened by telling the jury:

> But on the defendant's phone, in addition to the images of Mr. Adan in the backseat along with Mr. Hernandez, there were three Snapchat videos of about seven or eight seconds in length each, all of a theme. <u>But what was interesting about them is that the video was taken on July 4th of 2018, and we</u>

> know this because the metadata, the date stamp, is embedded in video.
>
> So two days after the murder of Ezekiel Kelly, three days after the murder of Mohamed Adan, the defendant has what appears to be that .22 Ruger, pointing it at the camera, with the heading underneath it, "Yeah am crazy asf" -- as fuck – "bitch." This was created two days after the murder of Kelly and three after the murder of Adan.

RP 962-963 (emphases added). The prosecutor told the jury this was consistent with DNA and ballistic evidence found at the scenes of the killings. RP 960, 963. The prosecution showed the jury this image of Ms. Meza:



Ex. 320, p. 16.

After opening statements, the defense questioned Detective Headrick who conducted the search warrant of Ms. Meza's cellphone. According to Detective Headrick, the metadata showed the videos, and the caption were created June 10—Not on July 4. CP 140; RP 962-963.

Ms. Meza moved for a mistrial. CP 147-157; RP 1645-47. The prosecutor acknowledged, "Detective Headrick cannot tell us what occurred on [July 4], whether the lettering was added on that date from other information that we have. It is apparent at this point that the original video of the defendant with a gun was not filmed on that date." RP 1647. Defense counsel argued the only remedy for the unfair and incurable prejudice was a new trial. RP 1666-72, 1674-77.

The court rejected the defense's calls for a new trial and ruled three Snapchat videos were admissible. RP 1690. However, because the prosecution could not prove the still picture was captioned on July 4, the court ruled any probative value of the caption was substantially outweighed by the danger of unfair prejudice. RP 1690; ER 403. The still photograph of Ms. Meza pointing the .22 caliber firearm was admitted without the caption. RP 1690. The trial court denied defense's calls for mistrial on the grounds that the prosecution's opening statement was not evidence. RP 1689-91. The trial court found no misconduct and offered no curative instructions.

The Court of Appeals agreed with the trial court in finding no misconduct and went further to rule Ms. Meza did not establish prejudice:

> The videos and pictures the State referenced were admitted, just not the

> caption on the video. The video still showed Meza handling the murder weapon and jokingly pointing it at the camera. It is unlikely that the State's remarks regarding the caption prejudiced Meza; therefore, the trial court did not abuse its discretion in denying the motion for a mistrial.

App. at 12-13.

The Court of Appeals' analysis improperly focused on the properly admitted evidence. *Glasmann*, 175 Wn. 2d at 711 (The focus must be on the misconduct and its impact, not on the evidence that was properly admitted.)

This court on a number of occasions cautioned that reviewing claims of prosecutorial misconduct is not a matter of determining whether there is sufficient evidence to convict the defendant. *Glasmann*, 175 Wn. 2d at 710. Because the issue is whether the prosecutor's comments deliberately appealed to the

jury's passion and prejudice and encouraged the jury to base the verdict on the improper argument " 'rather than properly admitted evidence.' " *Glasmann,* 175 Wn.2d at 711-12.

d. Because it focused on the quantum of properly admitted evidence and not instances of misconduct and its impact on the jury.

The Court of Appeals focused on the properly admitted evidence (App 12-13) and did not consider the cumulative effect of each instance of prosecutor's misconduct. The misconduct included telling the jury Ms. Meza made videos of herself playing with the murder weapon after Mr. Hernandez-Cano used it to murder two people. Showing the jury those Snapchat videos and then reading the inflammatory caption "crazy [as fuck] BITCH" to refer to a Latina woman on trial for a double homicide. The prosecutor told the jury

this after telling the jury Ms. Meza's boyfriend, the killer, was in the *Sureños* gang.

The Supreme Court in *Loughbom* warned Washington courts to focus less on whether the prosecutor's misconduct was flagrant or ill-intentioned and more on whether the comments or contested evidence in the broader "context of the total argument" resulted in "incurable prejudice." *State v. Loughbom*, 196 Wn.2d 64, 74, 470 P.3d 499 (2020).

The Court of Appeals also gave short shrift to prejudice. See App. at 13 (The Court of Appeals only concluded the prosecutor's use of the captioned photograph was not misconduct and failed to consider other misconduct and prejudice such as the prosecutor falsely telling the jury Ms. Meza recorded herself playing with the actual gun used to kill Mr. Adan and Mr. Kelly mere days after their killings.).

The Court of Appeals failed to consider the broader context, such as the frequency of improper comments [or the captioned photograph], the intended purpose, the subject, and the type of case to determine whether incurable prejudice occurred. *See Loughbom*, 196 Wn. 2d at 75. It failed to consider whether the prosecutor's comments deliberately appealed to the jury's passion and prejudice and encouraged the jury to base the verdict on the improper argument " 'rather than properly admitted evidence.' " *Glasmann*, 175 Wn.2d at 711-12.

This Court should accept review to address this reversible misconduct. RAP 13.4(b)(1), (4).

2. The Court of Appeals manufactured a "good faith" standard for deciding whether the Fifth-Amendment privilege attaches. This constitutional question is also of substantial public importance.

Ms. Meza sought to call Mr. Hernandez-Cano to testify in her case-in-chief. CP 164-77. Mr. Hernandez-Cano asserted a privilege against self-incrimination because his personal restraint petition (PRP) was pending with the Court of Appeals. RP 885-90. The court and the prosecution agreed with Ms. Meza that Mr. Hernandez-Cano's chance of obtaining relief in his collateral attack was remote. RP 846. Nevertheless, the court ruled it would have required Mr. Hernandez-Cano to testify but his assertion of the privilege was valid because he was attacking his guilty plea in a PRP. RP 890-91. Unsurprisingly, the Court of Appeals later dismissed Mr. Hernandez-Cano's PRP as frivolous.

a. This Court need not countenance an unworkable "good faith" standard that has no basis in any state and federal case law.

Generally, "once a person is convicted of a crime, he no longer has the privilege against self-incrimination as he can no longer be incriminated by his testimony about said crime." *Reina v. United States*, 364 U.S. 507, 513, 81 S. Ct. 260, 5 L. Ed. 2d 249 (1960). "When a person has been convicted of a crime and there is no longer any possibility of appeal, the Fifth Amendment privilege no longer exists because there is no potential jeopardy for testifying." *State v. Ruiz*, 176 Wn. App. 623, 636, 309 P.3d 700 (2013) (internal citation omitted); 1 McCormick on Evidence § 121 at 527 (Kenneth S. Broun ed., 6th ed. 2006).

And if the person is pursuing a collateral attack, there must be a specific showing the challenge to the conviction is likely to succeed. *Ruiz*, 176 Wn. App. at

636 (*citing* 1 Mccormick On Evidence § 121, at 527 (Kenneth S. Broun ed., 6th ed. 2006) ("absent some specific showing that collateral attack is likely to succeed, most courts treat finality of conviction as unqualifiedly removing the risk of discrimination.").

Here, the Court of Appeals has adopted an unworkable novel "good-faith" standard for determining whether the Fifth-Amendment privilege against self-incrimination attached: "We hold instead that where a collateral attack, such as a PRP, has been timely filed, and the petition objectively gives rise to a good faith argument for post-conviction relief, that the privilege against self-incrimination extends." App. at 8.

No party argued the Court of Appeals to adopt this novel "good faith" standard. More importantly, it is unworkable and has no support in Washington precedent, any other state law, or federal case law.

b. Factually, Mr. Hernandez-Cano could not self-incriminate by answering a few narrowly tailored questions.

Mr. Hernandez-Cano has never maintained his innocence but has always readily admitted: "I committed my crime." Affidavit In Support of Motion To Withdraw Guilty Plea, App. 32-34. He readily admits he was at the scene and committed both homicides.

In that affidavit, he declares "[m]y attorney never advised me I was pleading to a life sentence. That's why I am filing ineffective assistance of counsel" and "Diminished capacity. I was under the influence of **drugs and alcohol** when I committed my crime. . . .I was temporarily insane do (sic) to the **drugs** that's why I am using Diminished capacity as my defence." App. 32-34(emphasis added.)

Clearly, Mr. Hernandez-Cano readily accepts responsibility for the killings but blames his counsel for not advising him he was pleading guilty to a life sentence and not arguing Mr. Hernandez-Cano's drug and alcohol intoxication was "new evidence" of "diminished capacity." App. 32-34. Mr. Hernandez-Cano could not incriminate himself by answering a few narrowly tailored questions.

c. The entire opinion unravels without the magical premise that Mr. Hernandez-Cano would not have pleaded guilty to a life sentence had he known the death penalty was unconstitutional.

The Court of Appeals claims: "[b]ased on the argument of counsel, Cano pleaded guilty to aggravated murder and received a life sentence, thus avoided a possible death sentence." App. at 9.

Mr. Hernandez-Cano has never argued or asserted that had he known the death penalty was not

a possibility, he would not have pleaded guilty to a life sentence. App. at 9.

First, Mr. Hernandez-Cano's "petition" did not say he pleaded guilty to aggravated murder to avoid a possible death sentence.

Attorney Mahoney who did not represent Mr. Hernandez-Cano in his post-conviction proceeding first crafted this hypothetical argument. Ms. Mahoney met Mr. Hernandez-Cano a few moments before his evidentiary hearing. Ms. Mahoney represented Mr. Hernandez-Cano in the hearing on his insistence to plead the Fifth. *See* RP at 369.

In fact, Ms. Mahoney disavowed "and I don't represent him [Mr. Hernandez-Cano] on appeal, so I can't say that he will actually argue this." RP at 846. In the three-page motion to withdraw his guilty plea, Mr.

Hernandez-Cano does not assert he is pleading guilty to a life sentence to avoid the death sentence.

Second, if we take Mr. Hernandez-Cano at his word, he is adamant: "My attorney never advised me I was pleading to a life sentence." *See* App. 32-34.

This inconvenient fact belies the Court of Appeals' factual assertion: "Based on the argument of counsel, Cano pleaded guilty to aggravated murder and received a life sentence, thus avoided a possible death sentence." App. at 9. The Court of Appeals' published opinion is incorrect. Mr. Hernandez-Cano never had to decide either a life sentence or a death sentence.

Notably, our supreme court's ban on the death penalty in *State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018) came on October 11, 2018. Mr. Hernandez-Cano was sentenced on October 23, 2018. He knew about that "change in circumstance" before his conviction

became final and did nothing. See App. at 9. Mr. Hernandez-Cano could have raised this claim at or before his sentencing hearing if he truly believed the possibility of a death sentence induced him to plead guilty to a life sentence.

The Court should accept review if only to take a closer look at the magical premise that stands in the way of Meza's constitutional right to present a complete defense. RAP 13.4(b)(3).

> *d. Alternatively, even under the novel "good faith" standard, a motion to withdraw a guilty plea unsupported by any argument or legal authority is not "objectively" a "good faith" argument for post-conviction relief.*

The novel rule in the published opinion says that where a person brings a timely collateral challenge, such as a PRP, and that petition "objectively" gives rise to a "good faith" argument for post-conviction relief, the

privilege against self-incrimination extends post-conviction. *See* App. at 9.

Objectively, Mr. Hernandez-Cano's "petition" had no prayer of being allowed to withdraw his guilty plea.

Generally, petitioners have only one year from the date their judgment and sentence become final to bring a PRP. RCW 10.73.090. Mr. Hernandez-Cano's judgment was entered June 23, 2018. Mr. Hernandez-Cano's conviction became final on June 23, 2019. He never filed a personal restraint petition (PRP).

On February 13, 2019, Mr. Hernandez-Cano filed a motion to withdraw his guilty plea under Crim. Rule 7.8. See attached Motion and Affidavit (App. 32-34). One year later, February 14, 2020, the trial court transferred his CrR 7.8 motion to the Court of Appeals as a PRP. App. 33-45.

The opinion ignores the fact that no one, including the lower court, understood the basis why Mr. Hernandez-Cano was asking to withdraw his guilty plea in his CrR 7.8 motion. He made no argument and provided no authority in support of his motion. App. 32-34. The trial court said it could not even make sense of his motion: "I'm reading his motion and his declaration, and honestly, I -- I can't tell you what -- I mean, I can't tell you exactly what he's claiming." RP 371. The prosecution acknowledged the "petition" lacked "any merit." RP 847-48. The trial court agreed Mr. Hernandez-Cano had not made a substantial showing of his entitlement to relief. See RP 366-67.

A bare-bone-hand-written CrR 7.8 motion and affidavit without any argument or legal authority in support does not "objectively" gives rise to a "good

faith" argument for post-conviction relief. App. at 9. Mr. Hernandez-Cano's "petition" did not even pass muster under the novel "good-faith" standard.

e. This Court should review to curb blanket foreclosures of testimony in favor of a question-by-question analysis of all Fifth-Amendment privilege claims.

Ruiz teaches that instances Fifth-Amendment privilege must be asserted on a question-by-question basis. 176 Wn. App. at 636 *citing State v. Levy*, 156 Wn.2d 709, 732, 132 P.3d 1076 (2006). A claim of privilege may be raised only against specific questions, and not as a blanket foreclosure of testimony. *State v. Lougin*, 50 Wn. App. 376, 381, 749 P.2d 173, 176 (1988) *citing Eastham v. Arndt*, 28 Wn. App. 524, 532, 624 P.2d 1159 (1981).

Furthermore, unless the question would obviously and clearly incriminate the witness, a claim

of privilege against answering it must be supported by facts which, aided by "use of 'reasonable judicial imagination'", show the risk of self-incrimination. *Lougin*, 50 Wn. App. at 381 citing *Arndt,* 28 Wn.App. at 532.

The Court of Appeals lost focus of the pivotal question of whether Mr. Hernandez-Cano could incriminate himself by answering a few narrowly tailored questions: about the party on June 30; the use of alcohol and drugs at the party; Meza's use of alcohol and drugs at the party; his opinion of Meza's intoxication; Ms Meza's driving the car on the day in question; and photos on Meza's phone. See App. at 6.

The Court of Appeals' opinion conflicts with *Ruiz*, by not analyzing question-by-question the narrowly-tailor questions the defense sought to put to Mr. Hernandez-Cano. The blanket foreclosure of Mr.

Hernandez-Cano's testimony violated Meza's Sixth Amendment right to present a complete defense. *See Ruiz*, 176 Wn. App. at 636.

The correct meaning of Fifth-Amendment privilege is a constitutional question, of substantial public importance warranting review under RAP 13.4(b)(3) and (4).

V. CONCLUSION

The Court should grant review under RAP 13.4(b).

This brief complies with RAP 18.7 and is approximately 4,991 words after excluding words exempted by the rule.

DATED this 6th day of September 2022.

Respectfully submitted,

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APPENDICES

FILED
6/27/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. LENDSAY LESHLY MEZA, Appellant.	))))))))))	No. 81463-0-I DIVISION ONE PUBLISHED OPINION

MANN, J. — Lendsay Meza was convicted by jury of two counts of first degree murder with firearm enhancements. Meza appeals raising several arguments including that: (1) the trial court erred in applying the privilege against self-incrimination to a witness whose conviction was final; (2) the prosecutor committed misconduct by presenting inadmissible evidence during opening statements; (3) the failure to provide jurors fair compensation deprived her of a constitutionally fair jury trial; (4) the evidence was insufficient to prove she committed felony murder predicated on first degree kidnapping; (5) the prosecution failed to prove beyond a reasonable doubt that one of the victims, Ezekiel Kelly, died as a result of Meza's acts as required in the jury

instructions; (6) the trial court erred in ruling it lacked discretion to grant Meza an exceptional sentence; (7) count 3 must be vacated rather than dismissed; and (8) the trial court erred in applying discretionary supervision fees. We remand for the trial court to strike supervision fees. We vacate the order sealing exhibits and otherwise affirm.

FACTS

Meza and Anthony Hernandez Cano met online in 2016 when Meza was 18 years old. Shortly after, Cano moved from Georgia to Seattle to live with Meza. The pair lived in the Vantage Apartments with Meza's family. Meza and Cano frequently used cocaine, methamphetamine, and prescription medication. Cano and Meza had an abusive relationship which included a no-contact order between them.

A. Mohamed Adan's Death

On June 30, 2018, Cano and Meza attended a quinceañera. Meza drank alcohol, smoked cannabis, and consumed Xanax. After the party, Meza drove Cano, Chris Diaz, and Edwin Valdespino in her car, a red Saturn, back to her apartment. While driving, she stopped when Cano and Diaz saw Hassani Hassani and Mohamed Adan and asked her to stop the car. Hassani was Cano's friend and lived at the Vantage Apartments. Earlier that night, Hassani and Adan had an argument because Hassani caught Adan kissing his girlfriend, Anika St. Mary. Hassani and Adan got into Meza's car and Meza drove the group to the parking lot at the apartment complex where Meza lived. At the parking lot, everyone got out of the car except Diaz and Meza, who recall being in and out of consciousness. After about 30 minutes, everyone got back in the car and Meza drove the group to the parking garage at the apartment complex upon Cano's request. The group went into an apartment garage and Meza

saw that Adan had been badly beaten. Thinking the men were "settling a beef," Meza went back to her car and fell asleep. The men then bound and further beat Adan in the garage. Meza testified that she was asleep for the rest of the events, only waking up in Marysville on the way back home where she then went to sleep again.

On July 1, 2018, a neighbor found Adan's body at Blue Stilly Park near Arlington. He was shot seven times. Two bullets penetrated his foot and the other five penetrated his chest and abdomen. There were cigarette like burns on his face, a laceration on his head inflicted by a linear object, such as a baseball bat, and swelling and bruising to his face.

Surveillance cameras showed Meza's red Saturn entering a road leading to Blue Stilly Park at 5:19 a.m. and leaving the park at 5:33 a.m. It returned at 5:38 a.m., and left again at 5:42 a.m. A deleted photograph shows Cano holding a gun outside the car and another photograph shows Cano in the same park with Adan. Police later searched the garage at the Vantage Apartments and found blood stains with DNA that matched Adan. Meza recited many different versions of that night's events, including one where she stated being at home in bed the entire night. Meza eventually admitted she believed the group killed Adan.

Cano similarly gave a lengthy recorded statement of the events. Cano stated he tied up Adan and drove him to Arlington with Meza asleep in the front seat. Cano told Adan to get out of the car and shot him twice in the leg or foot. They then left Adan there, drove away, and came back after approximately 10 minutes. Cano shot Adan in the chest and then the group left a last time.

B. Ezekiel Kelly's Death

Ezekiel Kelly lived with his mother in Everett. Hassani told his friend Vadim Patsula that he was interested in finding Kelly and beating him up because of something to do with his girlfriend, St. Mary. On July 2, 2018, Patsula called Hassani and told him he saw Kelly near a Shell gas station. Meza, claiming to not know why, drove Cano, Hassani, and St. Mary to the gas station. At the gas station, Cano and Hassani got out of the car and returned with Kelly. Cano then told Meza to drive to South County Park. Surveillance footage from the Shell shows Kelly and a red Saturn arriving in the parking lot.

Meza testified that she drove through the back roads and ended up in Edmond but tried swerving the car to get the attention of police along the way. At South County Park, Cano, Hassani, and Meza got out of the car with Kelly. Meza claimed Kelly discussed raping her, so she got mad and hit him twice on the legs with a baseball bat. The group returned to the car and Hassani and Cano started punching Kelly again. Meza then drove the group to an abandoned house where Hassani and Cano forced Kelly out of the car. Cano then told Meza to leave. As she drove away, she claimed to hear a gunshot.

On July 3, 2018, a neighbor found Kelly's body in the carport of an abandoned building. He was stabbed multiple times and shot five times, three times in the head, one to his hand, and one to his knee. Four stab wounds penetrated his right lung and liver. He had also been stabbed in the head with a screwdriver like object. An injury on his head resembled that of a linear object such as a baseball bat.

C. Conviction and Sentencing

Meza was convicted of three counts of first degree murder. Count 1 was for the felony murder of Adan predicated on first degree kidnapping. Count 2 was for the premeditated murder of Kelly. Each count contained a firearm enhancement. The jury also found Meza guilty of count 3, the felony murder of Kelly. The trial court dismissed the conviction on count 3 finding it merged with count 2. Meza was sentenced to 50 years' confinement.

Meza appeals.

ANALYSIS

A. Privilege Against Self-incrimination

After Meza sought testimony from Cano, Cano refused asserting his Fifth Amendment privilege against self-incrimination. Meza argues that the trial court erred in affirming Cano's right not to testify because Cano pleaded guilty and did not timely appeal his judgment and sentence. Based on the record before us, we disagree.

Criminal defendants have the constitutional right to present a complete defense and to call witnesses to testify. U.S. CONST. amends. VI, XIV; CONST. art. I. § 22; State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). Washington recognizes an obligation of a witness to testify. State v. Parker, 79 Wn.2d 326, 331, 485 P.2d 60 (1971). A witness called to testify may, however, claim the Fifth Amendment privilege against self-incrimination. U.S. CONST. amends. V, XIV; CONST. art. I, § 9. The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." This privilege includes the right of a witness not to give

incriminating answers in any proceeding. Kastigar v. United States, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972).

"'[T]he power to decide whether the hazards of self-incrimination are genuine and not merely illusory, speculative, contrived or false, must rest with the trial court before whom the witness is called to give evidence.'" State v. Hobble, 126 Wn.2d 283, 291, 892 P.2d 85 (1995) (quoting Parker, 79 Wn.2d at 332). "The determination whether the privilege applies lies within the sound discretion of the trial court under all the circumstances then present." Hobble, 126 Wn.2d at 291. Whether a privilege is available, however, is a question of law that we review de novo. See In re Pers. Restraint of Cross, 180 Wn.2d 664, 681 n.7, 327 P.3d 660 (2014) (clarifying that in reviewing Fifth Amendment issues, appellate courts defer to unchallenged findings of fact but review legal conclusions de novo), abrogated by State v. Gregory, 192 Wn.2d 1, 427 P.3d 621 (2018).

Meza sought to call Cano to testify as a witness. Cano previously pleaded guilty to two counts of aggravated first degree murder in the homicides of Adan and Kelly. Cano received a life sentence. He did not appeal the judgment and sentence. However, Cano filed a timely personal restraint petition (PRP) seeking to vacate or withdraw his guilty plea. In determining whether Cano should retain the privilege, defense counsel questioned Cano outside the presence of the jury. The topics of inquiry included the party on June 30, the use of alcohol and drugs at the party, Meza's use of alcohol and drugs at the party, Cano's opinion of Meza's intoxication, driving of the car on the days in question, and the photos on Meza's phone. Cano asserted his Fifth Amendment right not to testify for each question.

The trial court reviewed Cano's motion to withdraw his guilty plea and heard argument from counsel, including Cano's counsel. Cano's counsel pointed out that Cano pleaded guilty to aggravated murder and life in prison thereby preventing the State from seeking the death penalty. But in the interim, our Supreme Court had ruled the death penalty unconstitutional, raising the question whether Cano would have pleaded differently. Gregory, 192 Wn.2d at 1. The prosecutor reluctantly agreed that the subsequent abolishment of the death penalty was of concern.

The trial court upheld Cano's privilege against self-incrimination because he was attacking his guilty plea with a PRP:

> I'll find that, because there's a current personal restraint petition pending where the defendant is seeking to, as part of the relief, vacate or withdraw the guilty plea that he entered in this case, I'll find that he is in jeopardy in relation to the response to these questions. I will allow him to assert the privilege. I'll find that he is unavailable as a witness related to these issues.

The court also explained that if Cano did not have a pending PRP, Cano would not have retained the privilege:

> It's because I find, that, at this point, because he has that pending action to withdraw his plea that he has potential jeopardy to him associated to that. But if he had not brought that action, I would have not have allowed him to assert the privilege.

We must first decide whether a privilege was available to Cano. As a general rule, "once a person is convicted of a crime, he no longer has the privilege against self-incrimination as he can no longer be incriminated by his testimony about said crime." Reina v. United States, 364 U.S. 507, 513, 81 S. Ct. 260, 5 L. Ed. 2d 249 (1960); State v. Ruiz, 176 Wn. App. 623, 636, 309 P.3d 700 (2013). The law is less clear on the effect of a postconviction collateral attack such as a PRP.

Relying in part on Ruiz, Meza urges a bright line rule that the privilege no longer exists after the deadline for an appeal of the original judgment and sentence. In Ruiz, Division Three of this court stated: "When a person has been convicted of a crime and there is no longer any possibility of appeal, the Fifth Amendment privilege no longer exists because there is no potential jeopardy for testifying." Ruiz, 176 Wn. App. at 636. Because Cano did not appeal his original judgment and sentence, Meza contends that Cano's privilege against self-incrimination no longer exists. We disagree with Meza's overly narrow reading of Ruiz.

Indeed, the next sentence in the opinion, citing McCormick on Evidence, recognizes "absent some specific showing that collateral attack is likely to succeed, most courts treat finality of conviction as unqualifiedly removing the risk of discrimination." Ruiz, 176 Wn. App. at 636 (citing 1 MCCORMICK ON EVIDENCE § 121, at 527 (Kenneth S. Broun ed., 6th ed. 2006)).

Moreover, the McCormick article cited in Ruiz bases its concern, in part, on the idea that allowing a collateral attack to extend the privilege would greatly expand the privilege:

> Collateral attack is generally available at any time, so regarding the risk of retrial after a successful attack of this sort as preserving protection would dramatically expand the protection of the privilege. The best solution is to treat the possibility of successful collateral attack and retrial as raising the question of whether the facts present a "real and appreciable" danger of incrimination. In the absence of some specific showing that collateral attack is likely to be successful, a conviction should be regarded as removing the risk of incrimination and consequently the protection of the privilege. Most courts, however, treat the finality of a conviction as unqualifiedly removing the risk of incrimination.

1 MCCORMICK ON EVIDENCE § 121, at 799 (Robert P. Mosteller ed., 8th ed. 2020).

This concern, however, is at least partially eliminated in Washington by the legislature's decision limiting most collateral attacks to one year. RCW 10.73.090(1). We hold instead that where a collateral attack, such as a PRP, has been timely filed, and the petition objectively gives rise to a good faith argument for postconviction relief, that the privilege against self-incrimination extends.

Based on the record before us, at the time he invoked his Fifth Amendment right against self-incrimination, Cano had a timely PRP pending before this court. Based on the argument of counsel, Cano pleaded guilty to aggravated murder and received a life sentence, thus avoided a possible death sentence. Postconviction, however, our Supreme Court held the death penalty unconstitutional. Gregory, 192 Wn.2d at 1. This change in circumstances raised at least a question of whether Cano would have pleaded differently if the death penalty had not been a possibility. Cano's timely petition for review objectively gave rise to a good faith claim for relief and his privilege existed.

Because the trial court found that Cano's testimony at Meza's trial put him at jeopardy of self-incrimination in the event Cano's PRP was successful, and he was allowed to withdraw his guilty plea, the trial court did not abuse its discretion.

B. Prosecutorial Misconduct

Meza next argues that the prosecutor committed misconduct by presenting evidence during opening statements that was unfairly prejudicial. We disagree.

A trial court may grant a new trial "when it affirmatively appears that a substantial right of the defendant was materially affected . . . [by m]isconduct of the prosecution." CrR 7.5(a)(2). We review for abuse of discretion the trial court's order denying a new

trial based on prosecutorial misconduct. State v. Dawkins, 71 Wn. App. 902, 906, 863 P.2d 124 (1993).

To prevail on a claim of prosecutorial misconduct, the defendant must prove "'that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.'" State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003)). To establish prejudice, the defendant must prove that "'there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict.'" State v. Thorgerson, 172 Wn.2d 438, 443-44, 258 P.3d 43 (2011) (quoting Magers, 164 Wn.2d at 191). When determining whether prosecutorial misconduct requires reversal, the court must review the statements in the context of the entire case. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

The "prosecutor's opening statement may outline the anticipated evidence that counsel has a good faith belief will be produced at trial. The defendant bears the burden of showing the prosecutor acted without good faith." State v. Farnsworth, 185 Wn.2d 768, 785-86, 374 P.3d 1152 (2016). The trial court maintains wide discretion in deciding the good faith of the prosecutor. State v. Campbell, 103 Wn.2d 1, 16, 691 P.2d 929 (1984).

Pretrial, the trial court considered videos and photos obtained from Meza's cell phone. One of the photos was a screenshot showing Meza holding what appeared to be a .22 Ruger pointed at the camera with a caption "Yeah am crazy asf BITCH." The State claimed the videos and photos were created only days after the homicides. The defense disagreed, arguing that the timing was inaccurate. The trial court ruled that the

State would need to lay the foundation for admissibility during trial, but it would allow the photographs and videos during opening statements. Meza objected. The State argued it had a good faith belief it had the foundation necessary to admit the evidence. The court allowed the State to use the evidence but claimed "it could be at their peril" if they were unable to establish the necessary foundation later.

In its introductory instructions, the trial court instructed the jury that lawyers' statements are not evidence or law—the only evidence is the testimony and exhibits. During its opening statement, the State showed the videos to the jury and explained:

> But on the defendant's phone, in addition to the images of Mr. Adan in the backseat along with [Cano], there were three Snapchat videos of about seven or eight seconds in length each, all of a theme. But what was interesting about them is that the video was taken on July 4th of 2018, and we know this because the metadata, the date stamp, is embedded in video.
>
> So two days after the murder of Ezekiel Kelly, three days after the murder of Mohamed Adan, the defendant has what appears to be that .22 Ruger, pointing it at the camera, with the heading underneath it, "Yeah am crazy asf"—as fuck—"bitch." This was created two days after the murder of Kelly and three after the murder of Adan.

After opening statements, defense counsel interviewed Detective James Headrick about the videos. Detective Headrick concluded that the videos were created on June 10th, not July 4th, and could not determine when the caption was created. Meza moved for a mistrial. The court determined a mistrial was unwarranted because opening statements are not considered as evidence. However, the court found the probative value of the caption was substantially outweighed by the danger of unfair prejudice. Therefore, the parties could seek admission of a still photo from the video, but not the caption.

The videos and photos from Meza's phone were admitted at trial, without the added caption. The videos showed Meza holding a gun against her cheek. She sticks her tongue out, points the gun at the camera, and then pantomimes blowing smoke from the muzzle.

We disagree with Meza's contention that the prosecutor's comments during opening statements were misconduct. First, the State's use of the video and caption in opening remarks was not improper. In opening statements, a prosecutor may present anticipated evidence in good faith. Farnsworth, 185 Wn.2d at 785-86. There is no claim that the State acted in bad faith by discussing the photos and captions in the opening remarks. The court specifically determined the prosecutor had a good faith belief that the photograph would be admitted. And it was in part. Defense counsel also acknowledged that his "remarks about the picture [were] not meant to say that the State has acted in any nefarious way." A good faith presentation of anticipated evidence does not become improper because it was later not introduced.

Meza cites In re Personal Restraint of Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012), and State v. Pete, 152 Wn.2d 546, 98 P.3d 803 (2004), to support the assertion that it is misconduct to present extrinsic evidence to the jury. These cases are distinguishable as they discuss closing statements and jury deliberations. In closing arguments, it is improper for a prosecutor to refer to matters outside the record developed at trial. Glasmann, 175 Wn.2d at 704-05. At the time of closing arguments and jury deliberations, all the evidence have been introduced. But during opening statements, no evidence had been introduced; therefore the rules surrounding closing arguments and jury deliberations do not apply.

Second, Meza cannot demonstrate prejudice. The prosecutor's statement referenced a picture and caption at the beginning of the trial. The trial court instructed the jury before the opening statements and before deliberation that the parties opening remarks are not considered evidence. The videos and pictures the State referenced were admitted, just not the caption on the video. The video still showed Meza handling the murder weapon and jokingly pointing it at the camera. It is unlikely that the State's remarks regarding the caption prejudiced Meza; therefore, the trial court did not abuse its discretion in denying the motion for a mistrial.

C. Constitutional Rights of Jurors

Meza argues that the jury expense compensation set by Washington statute violated her constitutional rights. We disagree.

Before jury selection, Meza objected to excusing any juror from service based on economic hardship. Meza argued that economic hardship disproportionately removes traditionally marginalized members of the community. Meza also asked the court to order the State to provide reasonable compensation to any juror who would otherwise be excused for economic hardship. The trial court agreed that jurors are not adequately compensated, but denied Meza's request, stating, "I can't do it," and "[w]e don't have sufficient funds to do it." Meza argues that during jury selection, the court excused eight jurors for economic hardship. That statement is incorrect. Jurors 7, 51, and 65 were excused for true economic hardship. The other five jurors mentioned were excused for a variety of reasons such as anxiety, potential for a poor work performance, job interviews, and lack of childcare.

1. Impartial Jury[1]

Meza argues first that excluding individual jurors for economic hardship violated her right to an impartial jury trial with jurors that represent a fair cross-section of the community.

Criminal defendants have a constitutional right to a jury trial. U.S. CONST. amends. VI, XIV; CONST. art I, §§ 21, 22. This includes the right to have a jury drawn from a fair cross-section of the community. Taylor v. Louisiana, 419 U.S. 522, 527, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975).

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979).

Excluding jurors based on low economic or social status violates this right, as does any other systematic exclusion of distinctive groups in the community. Thiel v. S. Pac. Co., 328 U.S. 217, 223-24, 66 S. Ct. 984, 90 L. Ed. 1181 (1946); Duren, 439 U.S. at 363-64. But the fair cross-section applies to the selection of the venire, not to the dismissal of individual jurors at the jury panel stage. Holland v. Illinois, 493 U.S. 474, 480, 110 S. Ct. 803, 107 L. Ed. 2d 905 (1990). At the jury panel stage, "jury selection must be done in a fair way that does not exclude qualified jurors on inappropriate grounds." State v. Pierce, 195 Wn.2d 230, 231-32, 455 P.3d 647 (2020).

[1] In Meza's reply brief, she explains that the State mischaracterized her claim as a violation of her federal constitutional right to have a jury that represents a fair cross-section of the community. However, considering subsection 3(a) of Meza's opening brief is titled "Defendants have a constitutional right to an impartial jury trial with jurors drawn form a fair cross section of the community," we address the claim.

Meza's argument fails. First, RCW 2.36.080(3) states that no one is excused from the venire based on economic status. Furthermore, granting an exemption based on hardship is not an exclusion. Rocha v. King County, 195 Wn.2d 412, 428-29, 460 P.3d 624, 632 (2020).

Second, jurors excused for financial hardship do not create a "distinctive group." The heart of a fair-cross-section claim is the systematic exclusion of a "distinctive group" in the community, such as people of color, women, or Mexican-Americans, for reasons completely unrelated to the ability of members of the group to serve as jurors in a particular case. Lockhart v. McCree, 476 U.S. 162, 175, 90 L. Ed. 2d 137 (1986). The Arizona Supreme court held that persons excused because of hardship are not a "cognizable group," and other courts agree. State v. Atwood, 171 Ariz. 576, 622, 832 P.2d 593 (1992); People v. Tafoya, 42 Cal. 4th 147, 169, 164 P.3d 590, 64 Cal. Rptr. 3d 163, 187 (2007); Atwood v. Schriro, 489 F. Supp. 2d 982, 1046 (D. Ariz. 2007); Coleman v. McCormick, 874 F.2d 1280, 1284 (9th Cir. 1989); People v. Reese, 670 P.2d 11, 14 (Colo. App. 1983). Because the dismissed jurors are not a distinctive group, Meza fails the first step of the Duren test.

In Thiel, the Supreme Court held that the practice of excluding from jury lists all persons who worked for a daily wage violated jury selection statutes. 328 U.S. at 222-23. However, the court stated, "a federal judge would be justified in excusing a daily wage earner for whom jury service would entail an undue financial hardship. But that fact cannot support the complete exclusion of all daily wage earners." Thiel, 328 U.S. at 224. Washington follows Thiel. Prospective jurors cannot be systematically excluded on account of economic status, but individual jurors may be excused on a specific

showing of undue hardship. RCW 2.36.080(3); RCW 2.36.100(1). This system, therefore, does not deprive criminal defendants of their right to a jury trial.

2. Equal Protection Clause

Meza argues next that the $10 dollar per day juror compensation rate violates equal protection because jury service is a fundamental right, and the low compensation restrains this right.

Washington statute instructs counties to set juror compensation at $10 to $25 per day. RCW 2.36.150. "Equal protection under the law is required by both the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution. Equal protection requires that all persons similarly situated should be treated alike." Am. Legion Post #149 v. Wash. State Dep't of Health, 164 Wn.2d 570, 608-09, 192 P.3d 306 (2008). Under the equal protection clause, strict scrutiny applies to laws burdening fundamental rights or liberties, otherwise, rational basis review applies. Am. Legion, 164 Wn.2d at 608-09. A law passes rational basis review if it bears a rational relation to some legitimate end. Am. Legion, 164 Wn.2d at 608-09.

Meza argues that the ability to serve on a jury is a fundamental right. However, in State v. Marsh, 106 Wn. App. 801, 808-09, 24 P.3d 1127 (2001), this court held that "eligibility for jury service is not a fundamental right protected by the constitution." It went on to apply rational basis review to an equal protection claim surrounding jury service. Marsh, 106 Wn. App. at 809. Here, the Washington jury statutes do not discriminate on the basis of wealth. They prevent excluding anyone from jury service because of economic or social status. RCW 2.36.080(3). Every juror receives the

same compensation. Simply, statues that treat all persons equally do not invoke an equal protection claim.

3. Privileges and Immunities Clause

Meza argues that the juror compensation of $10 per day results in the systematic excusal of jurors based on lack of financial resources, therefore violating the state constitutional prohibition against special privileges and immunities.

The Washington Constitution prohibits special privileges and immunities: "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." That provision was "intended to prevent favoritism and special treatment for a few to the disadvantage of others." Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc., 196 Wn.2d 506, 518, 475 P.3d 164 (2020); CONST. art. I, § 12. Article I, section 12 "is more protective than the federal equal protection clause and in certain situations, requires an independent analysis." Martinez-Cuevas, 196 Wn.2d at 518. An analysis is warranted "where a law implicates a privilege or immunity." Martinez-Cuevas, 196 Wn.2d at 518. If it does, we ask whether there is a reasonable ground for granting that privilege or immunity. Martinez-Cuevas, 196 Wn.2d at 519. This analysis is only triggered by benefits that implicate a fundamental right of state citizenship. Martinez-Cuevas, 196 Wn.2d at 519. If these two requirements are satisfied, "the court will scrutinize the legislative distinction to determine whether it in fact serves the legislature's stated goal." Martinez-Cuevas, 196 Wn.2d at 523.

Meza's argument fails. First, eligibility for jury service is not a fundamental right. Marsh, 106 Wn. App. at 808. Second, while low compensation may make it difficult for

some to serve on the jury, these statutes do not create any favoritism or special treatment. All jurors are entitled to serve and are selected for venire regardless of economic or social status. RCW 2.36.080(3). And all jurors receive the same payment for service. RCW 2.36.150. Thus, we conclude the juror compensation statute does not implicate the privileges and immunities clause.

D. Sufficiency of Evidence

Meza argues that the State failed to prove that Adan was killed in the course of or in furtherance of kidnapping. Because this was an essential element to count 1, the conviction must be reversed. We disagree.

Due process requires the State to prove all elements of the offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 368, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. CONST. amend. XIV; CONST. art. I, § 3. Under an insufficiency of the evidence claim, the court determines whether, "after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); see also Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

Meza was convicted of the first degree felony murder of Adan, predicated on the felony of first degree kidnapping. To prove the offense, the State carried the burden of showing that "the defendant or an accomplice caused the death of Mohamed Adan in the course of or in furtherance of [Kidnapping in the First Degree] or in immediate flight from such crime." RCW 9A.32.030(1)(c). The State only needed to prove the "defendant caused a victim's death either in the course of or in furtherance of the

commission of another felony." State v. Bass, 18 Wn. App. 2d 790, 789, 491 P.3d 988 (2021).

Kidnapping is a continuing course of conduct crime. Bass, 18 Wn. App. 2d at 792. The crime of kidnapping continues until the person abducted reaches safety. Bass, 18 Wn. App. 2d at 792. Thus, a killing that occurs before the victim reaches safety is "in the course of" the kidnapping. The Washington Supreme Court determined a homicide is "in furtherance of" a crime "if the homicide [was] within the 'res gestae' of the felony, i.e., if there was a close proximity in terms of time and distance between the felony and the homicide." Bass, 18 Wn. App. 2d at 790 (quoting State v. Leech, 114 Wn.2d 700, 706, 790 P.2d 160 (1990)).

At 5:19 a.m., a camera at a fire station shows the red Saturn traveling on a dead-end road towards Blue Stilly Park, where Adan was shot and killed. A photograph shows Adan outside of the car with Cano and the park's "Discover Pass Required" sign in the background. Cano beat Adan with a baseball bat, shot Adan twice in the leg, and then left him there. Video from the fire station shows the red Saturn leaving the park at 5:33 a.m. At 5:38 a.m., video from the fire station shows the red Saturn returning to the park. A picture shows Cano standing with a gun pointed to the ground, in the same area where Adan's body was found. Cano told police he went back and shot Adan multiple times. Video from the fire station shows the red Saturn leaving the area at 5:43 a.m. for a final time. Meza argues that, because the group left Adan at the park for a period of time before returning and killing him, the kidnapping ended before Adan was killed. Conversely, the State argues that a reasonable jury could conclude that the

killing of Adan occurred both "in the course of" and "in furtherance of" the kidnapping. We agree with the State.

First, Adan did not reach a place of safety. Adan was left in a park after being beaten and shot twice in the foot. Adan's abductors left him there for less than 10 minutes before returning to the same place Adan was left and killed him. Any rational trier of fact could determine being left in a park for just 10 minutes after being shot in the foot is not a place of safety. Thus, because a reasonable juror could decide Adan never reached a place of safety before he was killed, his death occurred in the course of the kidnapping.

Further, a reasonable juror could conclude that Adan was still abducted when he was killed. A person is abducted when he is restrained by being held in secret or in a place not likely to be found. RCW 9A.40.010(1). To restrain means "to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his or her liberty." RCW 9A.40.010(6). A person can be abducted in a public setting if it is unlikely that he will be found by persons concerned with his welfare. State v. Stubsjoen, 48 Wn. App. 139, 145, 738 P.2d 306 (1987). Cano drove Adan to a park in the early hours of the morning. A juror could reasonably infer that no one with any intentions to help Adan would likely find him at that time. Especially not in the 10 minutes he was alone. Thus, a reasonable juror could conclude that Adan was killed in the course of kidnapping.

In addition, the jury could conclude that the killing of Adan occurred "in furtherance" of the kidnapping. A killing is "in furtherance of" a crime if there is a close proximity in time and distance. Bass, 18 Wn. App. 2d at 790. Even if the kidnapping

ended when Cano left Adan at the park, because Adan was killed at the same location he was left when kidnapped, and the killing occurred within 10 minutes of the kidnapping, a reasonable jury could conclude the time and location were sufficiently close in time and proximity to render the killing "in furtherance of" the kidnapping.

Meza cites State v. Diebold, 152 Wash. 68, 277 P. 394 (1929), to argue that liability for felony murder ends the moment that the felony is completed. In Diebold, the defendant stole a car, drove around, and stopped for a meal. After eating, he decided to return the car and accidentally struck and killed a pedestrian. There, under the Criminal Code, the court held that the defendant was no longer engaged in committing or withdrawing from the scene of a felony. Diebold, 152 Wash. at 73-74. This case does not establish a rigid requirement. In State v. Ryan, 192 Wash. 160, 73 P.2d 735 (1937), a defendant committed a burglary and then shot an officer around 40 miles away when the police tried to stop him. The court directly rejected the idea that the holding in Diebold created a "definite rule." "Each case must depend upon its own facts and circumstances, and, as a rule, presents a question for the jury." Ryan, 192 Wash. at 166. Thus, under the relevant statute, a reasonable juror could conclude that the killing was so close in time and proximity to the kidnapping that the killing occurred in furtherance of the kidnapping.

Any reasonable juror could conclude that the killing of Adan in count 1 occurred "in the course of "kidnapping because the kidnapping was ongoing, or that the killing occurred "in furtherance of" a kidnapping because the killing occurred close in time and proximity to the kidnapping. We conclude the evidence in count 1 was sufficient.

E. Jury Instructions

Meza argues that the evidence did not prove that she committed first degree premeditated murder as charged in count 2. We disagree.

The State has the burden of proving all of the elements set out in the to-convict instruction. State v. Dreewes, 192 Wn.2d 812, 432 P.3d 795 (2019). "While the to-convict instruction, 'serves as a yardstick by which the jury measures the evidence to determine guilt,' we do not read the instruction in isolation." State v. Tyler, 191 Wn.2d 205, 216, 422 P.3d 436 (2018) (quoting State v. France, 180 Wn.2d 809, 815, 329 P.3d 864 (2014)).

The to-convict instruction set out the following elements:

> (1) That on or about the 2nd day of July, 2018, the defendant or an accomplice acted with intent to cause the death of Ezekiel Kelly;
> (2) That the intent to cause the death was premeditated;
> (3) That Ezekiel Kelly died as a result of the defendant's acts; and
> (4) That any of these acts occurred in the State of Washington.

Meza argues that element 3 requires the State to prove that Meza's personal actions resulted in the victim's death, not as an accomplice.

Criminal liability is the same whether one acts as a principal or as an accomplice. RCW 9A.08.020(1), (2)(c). Accomplice liability is not an element or alternative means of a crime. State v. Teal, 152 Wn.2d 333, 338, 96 P.3d 974 (2004). Although the State need not charge the defendant as an accomplice in order to pursue liability on that basis, the court must properly instruct the jury on accomplice liability. State v. Davenport, 100 Wn.2d 757, 764-65, 675 P.2d 1213 (1984). The court can instruct on accomplice liability either by giving a general accomplice liability instruction, or by

modifying the "to-convict" instructions to include the language "the defendant or an accomplice." Teal, 152 Wn.2d at 336 n.3.

Meza's argument fails for two reasons. First, the jury received a standard instruction defining accomplice liability:

> A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A defendant can be convicted based on the acts committed by another person when the jury receives a separate instruction on accomplice liability. Teal, 152 Wn.2d at 339. Regardless of the language of the to-convict instruction, the jury can find that the acts were committed by another person, and the defendant was an accomplice to those acts. Dreewes, 192 Wn.2d at 826.

Second, Meza's reading of the to-convict instruction creates a conflict with the other jury instructions. Again, in the charge for first degree murder in count 2, element 3 stated, "the defendant's acts" rather than "the defendant or an accomplice" as element 1 stated. Meza argues that this means, per element 3, the State must prove that Meza's personal acts resulted in Kelly's death. However, this would create a conflict with instruction 22 on accomplice liability, which makes the defendant guilty of a crime committed by an accomplice. Additionally, instruction 18 describing first degree murder states, "he or she causes the death of such person." There is no reference to an accomplice presumptively due to general instruction 22. Thus, Meza's reading that the absence of accomplice language requires acts to be personally carried out by the defendant only, would create conflict between the jury instructions. Jury instructions are

read as a whole to alleviate misunderstanding, and when done so, there is no conflict or missing elements within the jury instructions. Tyler, 191 Wn.2d at 216-17.

We conclude that the jury was given general instructions of accomplice liability; therefore the State's evidence was sufficient to prove the elements of the to-convict instruction.[2]

F. Sentencing

RCW 9.94A.540(1)(a) establishes the mandatory minimum sentence for first degree murder at 20 years confinement. The standard range on both of Meza's convictions was 240 months to 320 months. RCW 9.94A.510, .515. Serious violent offenses run consecutive. RCW 9.94A.589(b). The State asked the court to impose a 240 month sentence for each conviction to run consecutively. In addition, each conviction included a firearm enhancement of five years to run consecutively. RCW 9.94A.533(3)(a).

1. Exceptional Sentence

Meza argues that the trial court erred in finding it lacked the authority to run the two sentences concurrently through an exceptional sentence. The State concedes the issue but argues the error was harmless because the court explained why it would not grant an exceptional sentence regardless. We agree the trial court erred, but that the error does not require remand because the error was harmless.

The court has authority to impose concurrent sentences for serious violent offenses through an exceptional sentence. State v. Graham, 181 Wn.2d 878, 887, 337

[2] The State argues that even if the State did not provide sufficient evidence to prove the to-convict elements of count 2, it could reinstate count 3 for the first degree felony murder of Kelly. We disagree. It is impermissible to conditionally dismiss a count based on double jeopardy and reinstate the count in the event of a successful appeal. State v. Turner, 169 Wn.2d 448, 465, 238 P.2d 461 (2010).

P.3d 319 (2014). The trial court abuses its discretion when "it refuses categorically to impose an exceptional sentence below the standard range under any circumstances." State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (quoting State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)). Failure to consider an exceptional sentence is reversible error. Grayson, 154 Wn.2d at 342. However, sentencing errors generally do not require remand if the reviewing court would have imposed the same sentence based on proper factors. State v. Jackson, 150 Wn.2d 251, 276, 76 P.3d 217 (2003) (reviewing court overturned one or more aggravating factors but was satisfied the trial court would have imposed the same exceptional sentence).

Here, the trial court stated it did not have the authority to run the two sentences concurrently through an exceptional sentence. However, the court stated, "I would not grant the request for an exceptional sentence below the standard range in this particular case based on the facts and circumstances." The court dedicated five pages to explain why an exceptional sentence was unwarranted in this case. Thus, even though the court erroneously found it could not consider an exceptional sentence, the record is clear that the trial court considered the special facts and circumstances of this case and would have rejected the request regardless of error.

2. Youth as a Mitigating Factor

Meza argues that the trial court failed to meaningfully consider her request for an exceptional sentence because consecutive sentences are excessive, and her youth was a mitigating factor. We disagree.

Article I, section 14 of the Washington Constitution prohibits cruel and unusual punishment, including additional protections for the sentencing of young people. CONST. art. I, § 14; In re Pers. Restraint of Monschke, 197 Wn.2d 305, 311 n.6, 482 P.3d 276 (2021). It is constitutionally impermissible to impose life sentences without parole on persons who committed crimes under the age of 18. Miller v. Alabama, 567 U.S. 460, 472, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). Also, when a person is younger than 18, "[t]rial courts must consider mitigating qualities of youth at sentencing" and have complete discretion to impose a sentence below what would otherwise be a mandatory range or sentencing enhancement. State v. Houston-Sconiers, 188 Wn.2d 1, 21, 391 P.3d 409 (2017). The Washington Supreme Court recently extended the Miller principles to young adults who were 19-and 20-years-old at the time of their offenses. Monschke, 197 Wn.2d at 311. Additionally, a minimum sentence of 46 years constitutes a de facto life sentence. State v. Haag, 198 Wn.2d 309, 327, 495 P.3d 241 (2021).

Meza was sentenced to 50 years' confinement without the possibility of parole. Under Haag, this is a de facto life sentence. Meza argues that the Monschke youthfulness principles should be extended to her, as she recently turned 21 at the time of the murders. Conversely, the State argues that the Monschke court only extended the mitigation of youthfulness to 19-and 20-year-old offenders, and that youthfulness should not extend to 21-year-olds. However, the State misunderstands Monschke. While that court applied youthfulness as a mitigating factor to a 20-year-old, it also emphasized youthfulness should not be a bright line rule. Monschke, 197 Wn.2d at 317, 319. Our Supreme Court held:

> Sentencing courts must have discretion to take the mitigating qualities of youth—those qualities emphasized in Miller and Houston-Sconiers—into account for defendants younger and older than 18. Not every 19- and 20-year-old will exhibit these mitigating characteristics, just as not every 17-year-old will. We leave it up to sentencing courts to determine which individual defendants merit leniency for these characteristics.

Monschke, 197 Wn.2d at 326. Therefore, while Monschke did not specifically extend mitigation for youthfulness to 21-year-olds, the opinion is clear that there is no bright line rule, and that it is up to the discretion of the sentencing judge to apply youthfulness principles on a case by case basis.

In this case, the sentencing court explained over five pages as to why an exceptional sentence under the standard range was unwarranted based on the facts and circumstances. In response to defense counsel's inquiry, the court also considered the defendant's age as a mitigating factor:

> I have considered it. And I'll say, in relation to this group of people that were involved in this incident, she was the most mature one. She's the one that had a job, she obviously had means of financial support. She did not come across to the Court as somebody being immature. Apparently, at least to this Court, it appeared she had the ability to care for herself. She had a vehicle, she drove. The claim in the statements, I think, part of the trial were somehow she might have some cognitive issues. I think at least that might have been raised. At least from this Court's perspective that did not come across during her testimony in this case. So I did take that into consideration, but I'm not going to give an exceptional sentence down based on her age.

The trial court considered various hallmark features of youthfulness including Meza's environment, financial situation, peer pressures, and extent she was involved in the crime. The grant of an exceptional sentence is in the discretion of the trial judge. State v. Graham, 181 Wn.2d 878, 884 337 P.3d 319 (2014). The trial judge analyzed the facts and circumstances of this case, and specifically addressed youthfulness. We

conclude the trial court did not abuse its discretion in denying Meza's request for an exceptional sentence.

G. Double Jeopardy

Meza argues that the trial court improperly dismissed, rather than vacated, count 3 for sentencing purposes. We disagree.

The jury found Meza guilty of first degree murder of the same person in counts 2 and 3. At sentencing, the court acknowledged that the two counts merged and dismissed count 3. For the first time on appeal, Meza argues that count 3 should have been vacated rather than dismissed.

For a constitutional issue to be raised for the first time on appeal, it must involve "manifest error." RAP 2.5(a)(3). Thus, the error must have "practical and identifiable consequences." State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). The error here is of constitutional magnitude. Both the federal and state constitutions protect persons from being twice put in jeopardy for the same offense. U.S. CONST. amend. V; CONST. art. I, § 9. However, Meza failed to articulate how the proposed error is manifest. There is no distinguishable consequence for a count being dismissed rather than vacated. Thus, we need not reach the issue on appeal.

Regardless, there is no support for the notion that a conviction must be vacated rather than dismissed per double jeopardy concerns. Notably, the Washington Supreme Court has used the terms vacating and dismissing a conviction interchangeably. See, e.g., State v. Muhammad, 194 Wn.2d 577, 616, 451 P.3d 1060 (2019).

H. Supervision Fees

Meza argues that remand is necessary after the court improperly imposed nonmandatory supervision fees after agreeing to waive all nonmandatory fees due to her indigency. The State argues that, because the judgment and sentence nonetheless requires Meza to pay supervision fees, this court should not follow the court's oral judgment, but maintain that of the written judgment. We agree with Meza and remand to strike supervision fees.

Meza is indigent. The prosecution asked the court to waive all nonmandatory fees and the court granted the request. However, the judgment and sentence orders Meza to "pay supervision fees as determined by [Department of Corrections]."

The relevant statute states, "unless waived by the court . . . the court shall order an offender to . . . [p]ay supervision fees as determined by the department." RCW 9.94A.703(2)(d). We have previously reversed supervision fees where it appears they were inadvertently imposed based on the trial court's oral ruling. State v. Dillion, 12 Wn. App. 2d 133, 152, 456 P.2d 1199 (2020). We recognize that Division Two of this court has determined that the trial court's oral opinion cannot be used to overturn its written judgment. State v. Starr, 16 Wn. App. 2d 106, 109-10, 479 P.3d 1209 (2021).[3] To remain consistent with Dillion, because it appears that it was the trial court's intention to waive all discretionary costs, we remand to strike the requirement that Meza pay supervision fees. 12 Wn. App. 2d at 152.

[3] The Supreme Court recently granted review in State v. Bowman, 198 Wn.2d 609, 498 P.3d 478 (2021).

I. Motion to Seal

The State argues that because the trial court granted an order sealing various exhibits of the victim's bodies, the Court of Appeals should seal the exhibits as well. Meza argues that the trial court exceeded its authority in sealing the exhibits because the appellate court already accepted the case for review. We agree that the trial court exceeded its authority.

During Meza's trial, the State introduced photos depicting the bodies of the decedents without limitation. Two weeks after the trial, on December 6, 2021, the trial court granted the State's motion to seal exhibits 13 through 15, 30, 32 through 54, 70, 71, 86, 87, 90, and 94 through 143. The trial court determined sealing the exhibits was necessary to protect the deceased privacy rights and because there was no substantial public interest in viewing the exhibits.

Under GR 15(g), records that were sealed in the trial court should be sealed from public access in the appellate court, subject to further order of that court. Under RAP 7.2(a), "After review is accepted by the appellate court, the trial court has authority to act in a case only to the extent provided in this rule, unless the appellate court limits or expands that authority as provided in rule 8.3." RAP 7.2(e) provides that "[t]he trial court has authority to hear and determine (1) postjudgment motions authorized by the civil rules, the criminal rules, or statutes, and (2) actions to change or modify a decision that is subject to modification by the court that initially made the decision."

In its motion, the State argued that under GR 15(g) the appellate court should seal the exhibits following the trial court's sealing of the exhibits. However, the trial court exceeded its authority. Rule 7.2 only allows the trial court to enter postjudgment

motions authorized by "civil rules, the criminal rules, or statutes" but these rules do not authorize a postjudgment motion to seal. Additionally, the trial court's order is not a modification or change to a previous decision. Therefore, because the trial court did not have the authority, the order violates RAP 7.2 and should be vacated. See In re Det. of G.D., 11 Wn. App. 2d 67, 72, 450 P.3d 668 (2019). The State's motion relied on GR 15(g), which does not apply in the absence of a valid order. Thus, we deny the State's motion to seal and vacate the trial court order sealing the exhibits.

We remand for the trial court to strike supervision fees. We vacate the order sealing exhibits and otherwise affirm.

Mann, J.

WE CONCUR:

Smith, A.C.J.

Dwyer, J.

⑦

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SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

18-1-02290-31
AFS 18
Affidavit in Support
4882379

SUPERIOR COURT OF WASHINGTON
COUNTY OF Snohomish

STATE OF WASHINGTON)
Plaintiff)
)
V.)
)
Anthony Hernandez Cano)
Defendant)

NO. 18-1-02290-31.

AFFIDAVIT IN SUPPORT OF
MOTION OF WITHDRAWAL
OF GUILTY PLEA
CrR 7.8, CrR 4.2

I. IDENTITY

Anthony Hernandez Cano, Pro Se, affirms under the penalty of perjury:

1) That I am acting Pro Se and make this affidavit in support of my motion to withdrawal my Guilty Plea entered into the record on 27 day of August, 2018, in Snohomish County Superior Court in front of the honorable Judge Linda C. Krese.

2) The defendant plead guilty on 27 day of August, 2018, to the charges of :

Aggravated Murder 1

3) The defendant now claims that a manifest injustice occurred, STATE v. TAYLOR, 83 Wn.2d. 594, 521 P.2d 699. The specific claims the defendant makes at this time are:

1) Ineffective assistance of Counsel.
2) Newly discovered Evidence.

4) At the time of acceptance of the plea agreement, the defendant was questioned by the court as to whether or not he understood the effect of the guilty plea and whether or not he had the

(3)

consultation of counsel. The defendant now submits to the court that he did not fully understand the consequences of the plea because of: My attorney never advised me I was pleaing to a life, Sentence. Thats why Im filing ineffective. Assistances of Cousel.

5) The defendant (did not/did admit to committing the acts as charged. He now makes the following statement in support of this argument: Diminshed Capacity. I was under The influence of drugs and alcohol when I commited my Crime.

6) The events detailed by the defendant cannot be used because of: I clearly didn't have the right mind set do my drug use. Thats why I'm using. Diminshed Capacity as my defence.

7) The statement of the defendant cannot be used to support the charges of

Aggravated Murder 1 - Aggravated Murder 1

because of: Im entitled to a new Sentencing hearing under State v. O'del. I was clearly under the age of 25 when this Crime happen. I was temporarely insane do to the drugs thats why Iam using. Diminshed Capacity as my defense.

8) The defendant, Anthony Hernandez Cano should be permitted to withdraw is plea of guilty since there existed only ambiguous expression of qualified guilt coupled with a statement of facts.

9) His colloquy with the court shows that the defendant was in fact declaring his innocence despite his formalistic recitations of guilt. Under these circumstances, he should be allowed to withdrawal plea and interpose a plea of not guilty.

10)

DATE: 02/03/2019

Signature

Anthony Hernandez Cano #411869
Printed Name/ DOC #
ADDRESS: Washington State Penitentiary 1313 N. 13th Ave Walla, Walla. WA. 99362.

18-1-02290-31
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Motion
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SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

SUPERIOR COURT OF WASHINGTON
COUNTY OF Snohomish

STATE OF WASHINGTON)
Plaintiff)
v.)
Anthony Hernandez Cano)
Defendant)

NO. 18-1-02290-31
MOTION OF WITHDRAWAL OF GUILTY PLEA
(CrR 7.8, 4.2)

I IDENTITY

Anthony Hernandez Cano, Pro Se, moves the court to grant the relief sought in part 3.

II GROUNDS

The authority for the court to grant this motion is contained within Criminal Rule 7.8 of the Washington Court Rules and supported by the attached Affidavit in Support of Motion of Withdraw Guilty Plea.

III RELIEF SOUGHT

The defendant, Anthony Hernandez Cano, pro se, asks the court to grant the defendant to withdraw his plea of guilty entered on 27, day of August, 2018, in Snohomish County Superior Court, Snohomish, Washington, and enter a plea of not guilty.

Dated: 02/03/2019

Signature

Presented by:
Anthony Hernandez Cano #411869
Printed Name/DOC#
ADDRESS: Washington State Penitentiary
1313 N 13th Ave
Walla Walla, WA 99362

MOTION OF WITHDRAWAL OF GUILTY PLEA

SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON, Plaintiff, v. HERNANDEZ-CANO, ANTHONY, Defendant.	No. 18-1-02290-31 STATE'S MOTION TO TRANSFER MOTION FOR RELIEF FROM JUDGMENT

I. MOTION

The State of Washington moves for an order transferring the defendant's Motion for Relief from Judgment to the Court of Appeals, for consideration as a personal restraint petition. This motion is based on CrR 7.8(c)(2) and the following memorandum.

II. FACTS

The defendant, Anthony Hernanez-Cano, was charged with two counts of aggravated first degree murder on August 24, 2018. The murders were alleged to have been committed on the July 1-3, 2018, six months after the defendant turned 18. Ex. 1. The charges stemmed from the murders of Mohamed Hassen Adan and Ezikial Kelly as retribution for what the defendant believed to be offensive actions against him. The defendant completely confessed to the murders. Ex. 2. On August 27, 2018 the

defendant pled guilty to the charges. Ex. 3. On October 23, 2018 the court sentenced the defendant to life without the possibility of parole on each count. Ex. 4

On February 13, 2019 the defendant filed a motion and affidavit in support of his motion to withdraw his guilty plea. He refiled the motion on May 22, 2019. The defendant sought appointment of counsel to represent him in the motion. The court denied the motion to appoint counsel.

III. ISSUE

Should this case be transferred to the Court of Appeals for consideration as a personal restraint petition?

IV. ARGUMENT

Motions to vacate judgment can be either resolved by this court on the merits or transferred to the Court of Appeals. The standards governing this choice are set out in CrR 7.8(c)(2):

> The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.

The court should engage in a "meaningful analysis" of these requirements. In re Ruiz-Sanabria, 184 Wn.2d 632, 362 P.3d 758 (2015). If the requirements for transfer are satisfied, the court may not decide the motion – even if the motion is clearly unfounded. State v. Smith, 144 Wn. App. 860, 184 P.3d 666 (2008).

Under this rule, this court should resolve three issues: (1) Is the motion barred by RCW 10.73.090? (2) Has the defendant made a substantial showing that he or she is entitled to relief? (3) Will resolution of the motion require a factual hearing?

A. THE DEFENDANT'S MOTION IS NOT TIME BARRED.

RCW 10.73.090(1) sets a time limit on motions to vacate judgments and other forms of "collateral attack." Such a motion must be filed within one year after the judgment becomes final. Since the judgment in the present case was not appealed, it became final on October 23, 2018, the day it was filed. RCW 10.73.090(3)(a). The present motion was filed on February 13, 2019. It was filed within the time limit.

B. THE DEFENDANT HAS NOT MADE A SUBSTANTIAL SHOWING OF ENTITLEMENT TO RELIEF.

When a defendant collaterally attacks his conviction he bears the burden to prove that he was actually and substantially prejudiced by a claimed constitutional error. In re Matter of Meippen, 193 Wn.2d 310, 315, 440 P.3d 978 (2019). He must show that the outcome would more likely than not have been different had the alleged errors not occurred. Id. at 315-16. As to claimed errors that are not of constitutional magnitude the defendant must demonstrate that the error constitutes a fundamental defect that inherently results in a complete miscarriage of justice. In re Davis, 152 Wn.2d 647, 672, 101 P.3d 1 (2004).

To meet his threshold burden to prove a prima facie case of prejudice the defendant must present competent evidence to support his claims. In re Matter of Moncada, 197 WN. App. 601,605, 391 P.3d 493 (2017). Bald assertions and conclusory allegations are insufficient to sustain his burden of proof. In re Yates, 177 Wn.2d 1, 18, 296 P.3d 872 (2013). If the defendant's allegations are based on matters outside the record he must present affidavits of those with knowledge of the relevant facts or other

corroborative evidence. In re Rice, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). The evidence must show that the defendant's factual allegations are based on more than speculation, conjecture, or inadmissible hearsay. Id.

1. The defendant has not shown actual prejudice from his ineffective assistance of counsel claim.

The defendant first argues that he received ineffective assistance of counsel on the basis that his attorney did not advise him that he was pleading to a life sentence. The defendant has a constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

To prove ineffective assistance of counsel the defendant must show that his counsel performed deficiently and that the defendant was thereby prejudiced from that deficient performance. State v. McFarland, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). A defendant who demonstrates that he received ineffective assistance of counsel demonstrates actual prejudice required to be entitled to relief. In re Crace, 174 Wn.2d 835, 846-847, 280 P.3d 1102 (2012).

To establish prejudice in the context of a guilty plea the defendant must demonstrate that but for counsel's errors he would not have pleaded guilty but would have insisted on going to trial. In re Riley, 122 Wn.2d 722, 780-781, 863 P.3d 557 (1993). A bare allegation that the defendant would not have pleaded guilty if he had known all of the consequences of the plea is not sufficient to establish the required prejudice. Id. at 782.

Here the petitioner fails to show prejudice for two reasons. First he makes no more than the bare allegation that his attorney did not tell him about the consequences of the plea, i.e. that he would face a life sentence. The defendant pled guilty before the Supreme Court invalidated the death penalty in State v. Gregory, 192 Wn.2d 1, 472 P.3d 621 (2018). Before that time the defendant faced the possibility that the State would file a notice of special sentencing proceeding under RCW 10.95.040(1). The affidavit of probable cause recites a series of vicious, premeditated acts which could have justified seeking the death penalty. The defendant had confessed his participation in those murders. Thus the State had a strong case against him. His strongest bargaining position was to seek a plea deal where he would avoid facing the death penalty. Under these circumstances he has not shown that even if counsel did not verbally tell him that the alternative was life without parole, it is not likely the defendant would have pled not guilty and gone to trial.

Second, the Statement of Defendant on Plea of Guilty states on pages 2, 3, and 10 that the mandatory minimum sentence is life without parole. The defendant signed the statement agreeing that he had fully discussed the information in the statement of defendant on plea of guilty with his attorney, and that he had no further questions. The plea agreement to the statement of defendant on plea of guilty also stated in paragraph 7 that the sentence recommendation would be life without the possibility of parole on each count, to run consecutive to each other. Thus the defendant was informed in writing that he faced a life without parole sentence. Even if his attorney did not mention that fact to him, he had that information before he pled guilty.

2. The Defendant has not shown that he has newly discovered evidence

To be entitled to a new trial based on newly discovered evidence the defendant bears the burden to show that the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) not merely cumulative or impeaching. State v. Gassman, 160 Wn. App. 600, 609, 248 P.3d 155 (2011). The absence of any one of these factors is grounds to deny a new trial. State v. Williams, 96 Wn.2d 215, 223, 634 P.2d 868 (1981).

Here the defendant fails to demonstrate that he did not the facts supporting an intoxication defense at the time he committed the murders, or that he could not have discovered those facts in the exercise of due diligence before he pled guilty. Certainly the defendant was in the best position to know what he had been ingesting before the murders, and what affect that may have had on him. Potential evidence supporting an intoxication defense does not constitute newly discovered evidence.

The defendant also states that he is "using diminished capacity as my defense." Diminished capacity is similar but different than an intoxication defense. A diminished capacity defense "allows the jury to consider evidence of a 'mental illness or disorder' in determining whether the defendant had the capacity to form the intent to commit the crime." State v. Thomas, 123 Wn. App. 771, 781, 98 P.3d 1258 (2004). The defendant does not claim to have any evidence supporting a diminished capacity defense. For

that reason a claim of newly discovered evidence as to a diminished capacity defense fails as well.

3. The defendant has not shown that the court had authority to sentence him below the mandatory sentence.

The defendant also claims he is entitled to a new sentencing hearing because he was younger than 25 when he committed the crime. Pursuant to State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015) he claims he is entitled to a new sentence hearing.

In O'Dell the Court considered the trial court's authority to impose an exceptional sentence under RCW 9.94A.535(1)(e) in light of the offender's age. The Court relied in part on a series of Eighth Amendment cases relating to juveniles to consider whether a trial court may rely on whether youth diminished a young adult's culpability in committing the crime. Id. at 695. Age is not a per se mitigating factor. Id. However, a court must consider the attributes of youth before determining whether the defendant's personal attributes justified an exceptional sentence below the standard range on the basis that his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired. Id. at 697.

Because O'Dell relied on statutory grounds, the defendant raises an issue that is not of constitutional dimension. He must therefore demonstrate that the sentencing hearing was a fundamental defect that inherently resulted in a complete miscarriage of justice.

The trial court has discretion to sentence the defendant below the mandatory minimum term when sentencing a juvenile offender. State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017). To date no case has extended the Eighth Amendment protections for juveniles which were the basis for the decision in that case to adults. Because the defendant was over the age of 18 at the time he committed the murders he was an adult. While the court recognized that the qualities of youth may still be present for those who are older than 18 that is "the point where society draws the line for many purposes between childhood and adulthood." Roper v. Simmons, 543 U.S. 551, 574, 125 S.Ct. 1183, 161 L.Ed. 1 (2005). That is the line at which eligibility for the death penalty exists. Id. It is also the line where eligibility for life without parole exists.

Thus the defendant is not entitled to re-sentencing to consider whether his youthfulness mitigated his culpability for these crimes. He has also not demonstrated that he would be entitled to re-sentencing because he proffers nothing about himself other than his age. That is clearly insufficient under O'Dell.

C. THE DEFENDANT IS NOT ENTITLED TO A FACTUAL HEARING.

A defendant is entitled to a hearing if he makes a prima facie showing that he was actually prejudiced, but the merits of his contentions cannot be determined solely on the record. Rice, 118 Wn.2d at 885. The defendant has failed to make a prima facie showing that he was actually prejudiced from any of the claimed errors. He is therefore not entitled to a hearing.

V. CONCLUSION

This motion is not time barred. The defendant has not made a substantial showing of entitlement to relief. There is also no need for a factual hearing. Under CrR 7.8(c)(2), the motion should be transferred to the Court of Appeals for consideration as a personal restraint petition.

Respectfully submitted on 13th day of February, 2020.

ADAM CORNELL
Snohomish County Prosecuting Attorney

By: Kathleen Webber
KATHLEEN WEBBER, WSBA #: 16040
Deputy Prosecuting Attorney

SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON, Plaintiff, v. HERNANDEZ-CANO, ANTHONY, Defendant.	No. 18-1-02290-31 ORDER TRANSFERRING MOTION FOR RELIEF FROM JUDGMENT (CLERK'S ACTION REQUIRED)

This matter came before the court pursuant to CrR 7.8(c)(2), for initial consideration of the defendant's Motion for Relief from Judgment. The court has considered the documents listed below. Being fully advised, the court hereby concludes and orders as follows:

I. CONCLUSIONS OF LAW

1. The defendant's motion is not time barred by RCW 10.73.090.

2. The defendant has not made a substantial showing that the defendant is entitled to relief.

3. Resolution of the defendant's motion will not require a factual hearing.

II. ORDER

1. Pursuant to CrR 7.8(c)(2), the defendant's Motion for Relief from Judgment is transferred to the Court of Appeals for consideration as a personal restraint petition.

2. The clerk of this court shall transmit copies of the following to the Court of Appeals:

a. This order;
b. The Defendant's Motion of Withdrawal of Guilty Plea (CrR 7.8, 4.2)(filed February 7, 2019).

c. The Defendant's Affidavit in Support of Motion of Withdrawal of Guilty Plea (CrR 7.8, 4.2)(filed February 7, 2019).

d. The Defendant's Motion of Withdrawal of Guilty Plea (CrR 7.8, 4.2)(filed February 14, 2019).

e. The Defendant's Affidavit in Support of Motion of Withdrawal of Guilty Plea (CrR 7.8, 4.2)(filed February 14, 2019).

f. The Defendant's Motion of Withdrawal of Guilty Plea (CrR 7.8, 4.2)(filed February 21, 2019).

g. The Defendant's Affidavit in Support of Motion of Withdrawal of Guilty Plea (CrR 7.8, 4.2)(filed February 21, 2019).

h. The Defendant's Motion of Withdrawal of Guilty Plea (CrR 7.8, 4.2)(filed May 22, 2019).

i. The Defendant's Affidavit in Support of Motion of Withdrawal of Guilty Plea (CrR 7.8, 4.2)(filed May 22, 2019).

j. The State's Motion to Transfer Motion For Relief From Judgment (filed February 14, 2020).

k. The Defendant's Response to State's Motion to Transfer Motion For Relief From Judgment (if a reply is filed prior to entry of this order).

Entered this 27th day of February, 2020.

JUDGE LINDA C. KRESE

Presented by:

KATHLEEN WEBBER, WSBA #16040
Deputy Prosecuting Attorney

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 81463-0-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Matthew Pittman
[matthew.pittman@co.snohomish.wa.us]
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[Diane.Kremenich@co.snohomish.wa.us]

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: September 6, 2022

WASHINGTON APPELLATE PROJECT

September 06, 2022 - 4:36 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	81463-0
Appellate Court Case Title:	State of Washington, Respondent v. Lendsay Leshly Meza, Appellant
Superior Court Case Number:	18-1-02486-7

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