THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. GREGORIO LUNA LUNA, Petitioner, pro se.	S.Ct. No. 90847-8 COA No. 30734-4-III PETITION FOR DISCRETIONARY REVIEW "Clerk's Action Required"

OPENING STATEMENT

Petitioner Gregorio Luna Luna, pro se with the help from an inmate that understands the english language, respectfully requests the Supreme Court of Washington accept review of the Court of Appeals Division Three September 9,2014 decision. See Appendix A

I. COURT OF APPEAL DECISION

Petitioner is seeking review of the the Court of Appeals unpublished opinion in State v. Luna Luna, No. 30734-4-III filed on September 9,2014. See Opinion in Appendix A.

The Court of appeals for division three affirmed petitioner's conviction for first degree murder.

Petitioner is raising claims that are significant constitutional questions and the court of appeals decision conflicts with other courts decisions.

II. GROUNDS FOR RELIEF

GROUND ONE

PETITIONER DOES NOT UNDERSTAND ENGLISH THEREFORE THE INFORMATION CHARGING HIM WITH INTENTIONAL PREMEDITATED MURDER IS FATALY DEFECTIVE BECAUSE IT OMITS THE NECESSARY COMMON LAW ELEMENTS OF PREMEDITATION.

Language is the priciple means of communication in a legal proceeding, therefore petitioner's ability to understand the common law elements of premeditation in his language is critical to proceedings fairness. Thonvanh v. State, 494 N.W. 2d 697,681-82 (Iowa 1993). Furthermore adequate translation requires continuous word for word translation of everything relating to the trial a defendant conversing in english would be privy to hear. U.S. v. Joshi, 896 F.2d 1303,1309 (11th Cir.1990).

The Amended Information in Count I charged:

That the said Gregorio Luna Luna in the County of Franklin, state of washington, on or about the 24 of May 2010, in violation of RCW 9A.32.030(1), with a premeditated intent to cause the death of another person did stab Griselda Ocampo-Meza, thereby causing the death of Griselda Ocampo-Meza... See CP at 91-92.

The information charging petitioner with premeditated murder is fatally defective because it omits a necessary element of the crime, an allegation that the murder of Griselda Ocampo-Meza involved more than a moment in a point of time in which a design to kill was deliberately formed by Mr. Luna Luna, however this language did appear in the trial court's instructions as elements of the crime. See Jury Instructions 10,11 and 19. (RP 02/27/12 at 44,47-48).

The court of appeals would not rule on the merits of petitioner's claim and incorrectly concluded appellant argued in his SAG that the charging document needed to define the word "premeditation," and that Mr. Luna Luna presented no relevant authority in support of his argument. See 9/9/14 ruling at 3 n.2

In State v. McCarty, McCarty did not argue the charging document needed to define the word "conspiracy" McCarty argued the information omitted the necessary elements of conspiracy, and this Court held the information was constitutionally insufficient because it did not allege the elements of conspiracy. McCarty, 140 Wn.2d 420, 425-26 (2000).

In McCarty the charging information in Count III stated the "word conspire", but failed to allege the elements of conspiracy, that a third person was involved outside the agreement to deliver drugs. McCarty, 140 Wn.2d at 424

Similar to the error in McCarty, petitioner's charging information in Count I stated the "word premeditated" but failed to allege the elements of premeditation, that the murder involved more than a moment in a point of time in which a design to kill was deliberately formed. See SAG at 1, 4-5.

The reversible error in McCarty is similar to the error petitioner argues here, in both cases the charging information omitted the necessary commonlaw elements of their crimes (conspiracy McCarty) and (premeditation Luna Luna).

Mr McCarty is/was an attorney with a law degree, so how could the state Supreme Court hold McCarty was prejudiced by the omitted elements of conspiracy, and the court of appeals would not consider petitioner's argument that he was prejudiced by a similar error as McCarty. McCarty, 140 Wn.2d at 420-21

Petitioner is confused by the logic of the court of appeals 9/9/14 conclusion, apparently in the state of washington you have to be an attorney like Mr. McCarty to be prejudiced by the omitted elements of the crime (conspiracy). It appears prejudice does not apply when the omitted elements of the crime is premeditation, and you are a Mexican national like Mr. Luna Luna who does not have a law degree and does not understand english.

The error claimed by petitioner is actually more prejudicial than the error in McCarty, because of the language barrier, petitioner does not under stand the english language so how can he be informed of the elements of premeditation, when the information is in english and only alleges the "word premeditated" but omits the necessary elements of premeditation.

The 6th amendment requires that in all criminal prosecutions the accused shall ... be informed of the nature and cause of the accusation.... Wash. Const. art.1, §22 (amend.10) further states that in criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation against him.... Therefore an accused has a protected right under our state and federal charters, to be informed of the criminal charge against him so he will be able to prepare and mount a defense at trial. Every material element of the charge, along will all essential supporting facts, must be put forth with clarity. McCarty, 140 Wn.2d at 424-25; citing State v. Kjorsvik, 117 Wn.2d 93,97 (1991).

Four decades ago, the Supreme Court held "the right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the state's accusations." Chambers v. Mississippi, 410 U.S. 284,294 (1973). This right stems from the sixth amendment's compulsory process and confrontation clauses, and guarantees a criminal defendant is provided with "a meaningful opportunity to present a complete defense." Crane v. Kentucky, 476 U.S. 683,690 (1986). In practicle terms, this means that a criminal defendant must "possess sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" otherwise, the proceeding would be merely "an invective against an insensible object." U.S. ex.rel. Negron v. New York, 434 F.2d 386, 389 (2d Cir.1970);(holding that a defendant who spoke no english, and "sat in total incomprehension as the trial proceeded" was not sufficiently "present" to satisfy the dictates of the sixth amendment. Negron, 434 F.2d at 390).

The information is defective and Luna Luna's conviction obtained on the charge of first degree murder must be reversed and the charge dismissed without prejudice. Petitioner need not show prejudice because "liberal interpretation" does not uphold the validity of the charging information. Hagner v. U.S., 285 U.S. 427,432 (1931).

GROUND TWO

DUTY TO CONVICT LANGUAGE OF INSTRUCTION

Petitioner's appellate attorney raised this claim in brief of appellate, and petitioner will be mailing statements of additional authorities to this court to support this argument. See Brief of Appellant. at 17-35

The Court of Appeals incorrectly ruled that the failure to challenge the instruction precludes consideration of this issue on appeal. See 9/9/14 ruling at 3 n.2

Petitioner requests this court afford liberal construction to this petition keeping in accordance with Haines v. Kerner, 404 U.S. 519,520-21 (1972);(Pro se pleadings were held to less stringent standard than formal papers drafted by lawyers).

III. CONCLUSION

Petitioner respectfully requests this Court accept review of this petition and reverse his conviction for first degree murder for the reasons stated in this petition.

Petitioner also requests this Court appoint counsel and grant an evidentiary/reference hearing to resolve the material disputed facts of this case.

Dated this 30th day of September 2014.

Gregorio Luna Luna, pro se
1830 Eagle Crest Way
Clallam Bay, WA 98326-9723

APPENDIX A

September 9, 2014 Unpblished Opinion

FILED

SEPT 9, 2014

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 30734-4-III
Respondent,	)	
	)	
v.	)	
	)	UNPUBLISHED OPINION
GREGORIO LUNA LUNA,	)	
	)	
Appellant.	)	

KORSMO, J. — Gregorio Luna Luna challenges his conviction for first degree aggravated murder in the stabbing death of his ex-wife, primarily challenging the trial court's decision requiring him to provide a deoxyribonucleic acid (DNA) swab. We affirm.

FACTS

At arraignment on the original charge of first degree murder, the State sought a DNA swab in accordance with CrR 4.7(b)(2)(vi).[1] Defense counsel objected to the request, and the prosecutor supplemented the affidavit of probable cause with the testimony of Detective Scott Warren.

[1] The rule provides in part that the court may require the defendant to "permit the taking of samples of or from the defendant's blood, hair, or other materials of the defendant's body."

Detective Warren testified that police had recovered blood samples belonging to the suspect from two locations. The affidavit of probable cause established that Mr. Luna Luna had been involved in altercations with first the victim and then, as he tried to flee, a man at the scene. The altercations resulted in injuries that bled. The only question asked by defense counsel was whether the blood samples had been tested to see if they contained "usable DNA." They had not been tested.

The court granted the motion and a swab was eventually collected. Mr. Luna Luna's DNA matched the DNA obtained from the two locations, including DNA found on the handle of the knife used to kill the victim. The charge ultimately was amended to a single count of first degree murder with aggravating circumstances and an included offense of second degree murder.

After lengthy delay, the matter was tried to a jury. The jury found Mr. Luna Luna guilty of aggravated first degree murder. The trial court subsequently imposed the mandatory sentence of life imprisonment. Mr. Luna Luna then timely filed a notice of appeal to this court.

ANALYSIS

The sole issue[2] we will address in this opinion is the contention that the trial court erred in authorizing the DNA swab. The issue as argued to the trial court was whether or not the blood samples recovered at the scene contained DNA. On appeal, Mr. Luna Luna also argues that the State failed to show that the samples were blood. Both claims are without merit.

Cheek swabs are searches and therefore implicate attendant state and federal constitutional protections. *State v. Garcia-Salgado*, 170 Wn.2d 176, 184, 240 P.3d 153 (2010). Consequently, warrantless cheek swabs are per se unreasonable under both constitutions. *Id.*

Criminal Rule 4.7(b)(2)(vi) creates a limited exception to this warrant requirement by permitting the State to take bodily material where the following requirements are met:

> A CrR 4.7(b)(2)(vi) order must be entered by a neutral and detached magistrate; must describe the place to be searched and items to be seized; and must be supported by probable cause based on oath or affirmation; and

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[2] Counsel presents a second issue concerning the "duty to convict" language of the defense-proposed elements instruction. Subsequent to the filing of appellant's brief, this court rejected this argument, concluding that the failure to challenge the instruction precludes consideration of the issue on appeal. *State v. Wilson*, 176 Wn. App. 147, 307 P.3d 823 (2013). We thus will not further address that claim. Mr. Luna Luna also filed a Statement of Additional Grounds that raises an argument that the charging document needed to define the word "premeditation." He presents no relevant authority in support of that argument and we will not consider it.

> there must be a *clear indication* that the desired evidence will be found, the method of intrusion must be reasonable, and the intrusion must be performed in a reasonable manner.

Garcia-Salgado, 170 Wn.2d at 186 (emphasis added). This court reviews legal determinations of whether qualifying information as a whole amounts to probable cause de novo. *State v. Gregory*, 158 Wn.2d 759, 822, 147 P.3d 1201 (2006).

Here the State was granted permission to obtain a DNA sample from Mr. Luna Luna's cheek under the authority of CrR 4.7(b)(2)(vi). Mr. Luna Luna concedes that all required conditions are met except that there was no clear indication that the desired evidence would be found. He bases this contention on the fact that the State did no presumptive testing on any substances found at the scene in order to ensure a DNA match could be made. He relies on factual distinctions between the case at bar and *Gregory* to support his argument. *Gregory*, 158 Wn.2d at 777.

In *Gregory*, the court upheld a CrR 4.7 search that intruded into the body. The State requested the order to obtain the defendant's DNA so that it could be compared to DNA discovered in a rape kit examination of the victim. *Id.* at 820.

Mr. Luna Luna assigns significance to the fact that in *Gregory* the State had an existing DNA profile from the victim prior to its application for a CrR 4.7 order. Accordingly, he argues that the court in *Gregory* determined that such evidence is necessary to fulfill the "clear indication" requirement.

Gregory does not support that argument. There the court merely found that the evidence available to the trial court was sufficient to fulfill the "clear indication" requirement; the court did not articulate a minimum standard for CrR 4.7 applications. *Id.* at 825. Thus, no authority requires presumptive testing of evidence to ensure that a DNA profile exists[3] prior to issuing a CrR 4.7(2)(b)(vi) order.

Notwithstanding the lack of presumptive testing, the trial court did have evidence to support a clear indication that a DNA match could be made. The motion was supported by a qualified officer who testified that the police had obtained samples of what appeared to be blood from the crime scene and that witnesses saw Mr. Luna Luna bleeding from an injury in the same location. Thus, the court reasonably believed that a DNA swab would yield evidence linking Mr. Luna Luna to the crime.

Accordingly, the trial court did not err in directing the defendant to provide the DNA swab. The conviction is affirmed.

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[3] To the extent that Mr. Luna Luna argues that there also needed to be a showing that the samples were blood, we reject the argument. The officer reported that Mr. Luna Luna was bleeding at the scene and there is no evidence that human blood exists that does not contain DNA. Whether or not a sample is of sufficient quality to yield DNA results is a separate question apart from the issue of whether probable cause exists to believe that Mr. Luna Luna was the source of the blood samples.

No. 30734-4-III
State v. Luna Luna

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Fearing, J.

Lawrence-Berrey, J.

DECLARATION OF SERVICE BY MAIL
GR 3.1(c)

I, GREGORIO LUNA LUNA, declare that, on this 1st day of OCTOBER, 2014 I deposited the forgoing documents:

PETITION FOR DISCRETIONARY REVIEW (one original and one copy to Court of Appeals), and one copy to state Supreme Court and one copy to prosecutor and one copy to appellate counsel.

COA No. 30734-4-III

or a copy thereof, in the internal legal mail system of

Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326-9723

And made arrangements for postage, addressed to: (name & address of court or other party.)

Washington State Supreme Court, Temple of Justice, PO BOX 40929, Olympia, WA 98504-0929

Court of Appeals Division 3, 500 Cedar St., Spokane, WA 99201-1905

David Gasch Attorney at law, PO Box 30339, Spokane, WA 99223-3005

Benton Co. Prosecuting Attorney, 7122 W. Okanogan Place Kennewick, WA 99336

I declare under penalty of perjury under the laws of the United States, pursuant to Title 28 U.S.C. § 1746, that the foregoing is true and correct.

Dated at Clallam Bay Washington (City & State) on October 1,2014 (Date)

G. L. L.
Signature
Gregorio Luna Luna

Type / Print Name