

70506-7

70506-7

NO. 70506-7-1

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

STATE OF WASHINGTON,

Respondent,

v.

FRANCISCO MENDOZA-GOMEZ,

Appellant.

REC'D
MAR 31 2014
King County Prosecutor
Appellate Unit

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 MAR 31 PM 3:58

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

The Honorable Bill Bowman, Judge

BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>Procedural Facts</u>	2
2. <u>Substantive Facts</u>	3
C. <u>ARGUMENT</u>	14
DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO DEMAND A MISTRIAL ONCE JURORS WERE INFORMED THE CASE DID NOT INVOLVE THE DEATH PENALTY.	14
D. <u>CONCLUSION</u>	20

TABLE AUTHORITIES

Page

WASHINGTON CASES

State v. Benn
120 Wn.2d 631, 845 P.2d 289
cert. denied, 510 U.S. 944 (1993) 16

State v. Bowman
57 Wn.2d 266, 356 P.2d 999 (1960) 3, 14

State v. Gilchrist
91 Wn.2d 603, 590 P.2d 809 (1979) 18

State v. Hicks
163 Wn.2d 477, 181 P.3d 831 (2008) 17

State v. Mason
127 Wn. App. 554, 126 P.3d 34 (2005) 15

State v. Mason
160 Wn.2d 910, 162 P.3d 396 (2007) 15, 17

State v. Murphy
86 Wn. App. 667, 937 P.2d 1173 (1997)
review denied, 134 Wn.2d 1002, 953 P.2d 95 (1998) 14

State v. Rafay
168 Wn. App. 734, 285 P.3d 83 (2012)
review denied, 176 Wn.2d 1023, 299 P.3d 1171
cert. denied, 134 S. Ct. 170, 187 L. Ed. 2d 117 (2013) 16, 18

State v. Thomas
109 Wn.2d 222, 743 P.2d 816 (1987) 18

State v. Townsend
142 Wn.2d 838, 15 P.3d 145 (2001) 14, 17

FEDERAL CASES

Strickland v. Washington

466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)..... 16, 18

RULES, STATUTES AND OTHER AUTHORITIES

U.S. Const. Amend. VI 1, 16

Wash. Const. Art. I, § 22 1, 16

A. ASSIGNMENT OF ERROR

Appellant was denied his constitutional right to effective representation under the Sixth Amendment and art. 1, § 22 of the Washington Constitution when his attorney failed to object or move for a mistrial after jurors were informed his case did not involve the death penalty.

Issue Pertaining to Assignment of Error

In a non-capital case, it is error to inform jurors the death penalty is not at issue. It makes jurors less careful during deliberations and more likely to convict. At appellant's trial, his attorney failed to object and jurors were told the death penalty was not an option. Where defense counsel failed to object or move for a mistrial after disclosure, did appellant receive ineffective assistance of counsel?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged Francisco Mendoza-Gomez,¹ Agalega Pua,² Amalia Cervantes,³ and Eric Tharp with multiple offenses in connection with the September 30, 2011, abduction of Juan Moreno-Zuazo.⁴ CP 1-10. Pua's and Cervantes' cases were severed from those of Mendoza-Gomez and Tharp, who were tried together. 2RP⁵ 11. That trial ended in a mistrial when prosecutors, while examining Tharp, improperly impeached him using evidence they had failed to disclose. 18RP

¹ Mendoza-Gomez is known by the nickname "Chaparro." 31RP 34.

² Pua is known by the nickname "Milo." 32RP 70-71.

³ Cervantes also is known as "Amalia Castillo," her maiden name, and the nickname "Maty." 37RP 12.

⁴ Although the victim in this case identifies himself as Juan Moreno-Zuazo, he prefers to be called Moreno. 31RP 28-29. In fact, however, Moreno and Moreno-Zuazo are fictitious names. His real name is Isais Lozano. 31RP 28-29; 32RP 7-8.

⁵ This brief refers to the verbatim report of proceedings as follows: 1RP - 6/15/12; 2RP - 6/19/12; 3RP - 6/25/12; 4RP - 6/26/12; 5RP - 6/27/12; 6RP - 7/2/12; 7RP - 7/3/12; 8RP - 7/5/12; 9RP - 7/9/12; 10RP - 7/11/12; 11RP - 7/12/12; 12RP - 7/16/12; 13RP - 7/24/12; 14RP - 7/25/12; 15RP - 7/26/12; 16RP - 7/27/12; 17RP - 8/7/12; 18RP - 8/8/12; 19RP - 9/7/12; 20RP - 12/21/12, 2/21/13, and 3/5/13; 21RP - 3/28/13; 22RP - 4/1/13; 23RP - 4/2/13; 24RP - 4/3/13; 25RP - 4/4/13; 26RP - 4/8/13; 27RP - 4/9/13; 28RP - 4/10/13 (77 pages); 29RP - 4/10/13 (39 pages); 30RP - 4/11/13; 31RP - 4/15/13; 32RP - 4/16/13; 33RP - 4/17/13; 34RP - 4/18/13; 35RP - 4/22/13; 36RP - 4/23/13; 37RP - 4/24/13; 38RP - 4/24/13 (jury instructions); 39RP - 4/25/13; 40RP - 4/26/13; 41RP - 5/31/13.

83-108.

By the time of Mendoza-Gomez's retrial, Pua and Tharp had pled guilty. 20RP 6. Cervantes had also gone to trial and been convicted of several offenses. Jurors hung in Cervantes' case, however, on Conspiracy to Commit Murder in the First Degree. 20RP 9. Mendoza-Gomez and Cervantes were then joined for their retrials. 20RP 70-71. Both Mendoza-Gomez and Cervantes were tried for Conspiracy to Commit Murder in the First Degree. Mendoza-Gomez also was tried for Kidnapping in the First Degree and Assault in the Second Degree. The conspiracy and kidnapping charges included a firearm sentencing enhancement; the assault included a deadly weapon sentencing enhancement. CP 421-423.

Jurors convicted Mendoza-Gomez and Cervantes as charged. CP 457-462. The Honorable Bill Bowman sentenced Mendoza-Gomez, including enhancements, to 386 months. CP 527. Mendoza-Gomez timely filed his Notice of Appeal. CP 538-550.

2. Substantive Facts

Just after 5:00 p.m. on September 30, 2011, Hossam Gayed was working as a cashier at a Shell gas station in Federal Way when he saw Juan Moreno come crashing through the front doors. Moreno jumped over the counter and sought refuge behind it. 29RP

18-21. Two men, one of whom appeared Samoan and was armed with a black handgun, pursued Moreno into the store, where they punched and kicked him before exiting and fleeing in a black Acura SUV driven by a woman. 29RP 22-25; 30RP 64-65, 122.

Based on surveillance footage from the gas station, eyewitness accounts, and additional investigation, police identified the two attackers as Agalega Pua and Eric Tharp, and identified the driver of the SUV as Amalia Cervantes. 30RP 61-67, 85-89, 99-105, 118-124; 34RP 27-44, 51-68.

Tharp and Cervantes were located and arrested together on October 12. 34RP 67-68. Pua was arrested the following day and, based on information he provided, police suspected Mendoza-Gomez also was involved. 34RP 74-75, 119-120. Mendoza-Gomez was arrested at his place of employment, without incident, on January 3, 2012. 34RP 91-93, 129.

What happened leading up to the incident at the Shell station was a matter of great dispute. The stories varied widely depending on when they were told and by whom.

Juan Moreno initially told an investigating police officer and, later, a detective that the three people in the Acura SUV had picked him up while he stood on Pacific Highway South waiting for a friend.

He was forced at gunpoint to enter the vehicle and robbed of his wallet and cell phone before he was able to make his escape at the Shell station. 31RP 116-117; 32RP 13-18, 29-41. Moreno expressly denied Mendoza-Gomez's involvement. 34RP 124. It was not until July 2012 – ten months after the incident – that Moreno changed his story to the one he presented at trial. 32RP 18-19; 34RP 46-48, 50.

Moreno's revised story was that he knew Mendoza-Gomez from a local bar where the two men played cards and pool. 31RP 35-37. In September 2011, Mendoza-Gomez invited Moreno to his home. During that visit, Moreno met Cheila, who was Mendoza-Gomez's sister-in-law (married to Mendoza-Gomez's brother). 31RP 38-40; 34RP 93; 37RP 19-20. Moreno was attracted to Cheila and wanted to see her again. 31RP 41.

Approximately one week later, on September 30, Moreno stopped by the home again to "talk with [Cheila] and have a friendship." 31RP 42. While Moreno was visiting with Cheila, Mendoza-Gomez and Amalia Cervantes arrived. 31RP 46. According to Moreno, Mendoza-Gomez appeared angry and Cervantes said to Moreno, "you are in trouble." 31RP 48-50. Two Samoan men arrived shortly thereafter – one of whom was Agalega Pua – and spoke to Mendoza-Gomez. 31RP 52-53; 34RP 61-62.

Pua, who was armed with a silver pistol, and the second Samoan man forced Moreno into a car driven by a Hispanic man Moreno did not know. 31RP 54-63.

According to Moreno, he was taken to an apartment at a different location, where he was in the company of several Samoan men, including Pua. 31RP 64, 69-71. Moreno sat on a couch for 20 to 30 minutes before Mendoza-Gomez and Cervantes arrived. 31RP 72. Mendoza-Gomez pulled out a black .45 pistol, which he handed to Pua, who put on blue latex gloves. 31RP 76-81. Mendoza-Gomez then retrieved an aluminum bat, told Moreno he had "screwed up," and swung the bat toward Moreno's feet. 31RP 81-85. Moreno attempted to defend himself, resulting in the bat hitting his hand and breaking a finger. 31RP 84-88.

According to Moreno, he was then forced into the black Acura SUV. 89-90. Cervantes was driving and Pua sat in the back seat with Moreno, holding the .45. 31RP 91-95. Moreno asked Cervantes to let him go, and she responded that she had been told to kill him and was going to do so. 31RP 96. They drove to another apartment, where they picked up Eric Tharp, who sat in the front passenger seat. 31RP 98-103. The SUV was having transmission problems, so Cervantes drove to a nearby Wal-Mart, where Tharp

purchased transmission fluid. 30RP 38-43; 31RP 101-105. Cervantes kept the doors locked while Tharp was gone. 31RP 103. Tharp returned and attempted to put fluid in the transmission but could not do so without a funnel. 31RP 105-106.

Tharp got back in the SUV, and Cervantes drove to the nearby Shell station. 31RP 106. Tharp obtained a funnel and poured the fluid into the transmission. 31RP 106-107. As before, Cervantes locked the SUV's doors when Tharp left the vehicle. 31RP 107. When Tharp got back in, however, Cervantes forgot to lock the doors. As she started to pull away, Moreno opened the rear door and ran into the gas station. 31RP 108-109. He jumped over the counter, but Pua and Tharp followed him, beating him while he lay on the floor. 31RP 109-110.

Moreno claimed he initially lied – saying he was abducted on Pacific Highway South – because he did not want his girlfriend to find out he had visited another woman. 31RP 114-116. By the time of trial, Moreno had been convicted in California on a drug charge, was under an immigration hold, and faced possible deportation. 31RP 29. Although he had not been promised anything in exchange for his testimony, he had asked for assistance with his immigration issues and prosecutors told him they would try and help. 31RP 29; 32RP

20-21, 66-67.

Mendoza-Gomez did not testify at trial, but participated in a lengthy interview with police officers following his arrest.⁶ 34RP 92-93; exhibit 134. Mendoza-Gomez explained that Moreno had been having an affair with his brother's wife. He admitted paying \$300.00 to have Moreno – who had threatened to harm Mendoza-Gomez – taken away and beaten up. 34RP 93-95; exhibit 134 at 13, 15-38, 42-57, 77-83, 91-98, 101-102, 106. He denied a plan to kill Moreno. 34RP 133-134; exhibit 134, at 49-50. And he denied providing a firearm to anyone. Exhibit 134, at 45-46.

Cervantes testified at trial and also refuted the notion of a plan to kill Moreno. 37RP 61. According to Cervantes, Mendoza-Gomez had long known that his sister-in-law was having an affair. 37RP 20. On September 30, 2011, she received a phone call from Mendoza-Gomez, who sounded scared and said someone wanted to beat him up. He asked her to come over. 37RP 21-24. Cervantes, along with Pua and another friend, headed directly to the apartment. 37RP 21, 24-25. When they arrived, Mendoza-Gomez and Moreno were arguing. Moreno denied any wrongdoing

⁶ The prosecution read a redacted transcript of this interview at trial. See 35RP 110; 36RP 6.

with Cheila and refused to leave the premises. Cervantes eventually left with Mendoza-Gomez to run errands. 37RP 25-29.

According to Cervantes, about a half hour later, she and Mendoza-Gomez ended up at the Traveler's Choice Motel, where Cervantes had a room, and were surprised to see Moreno there. 37RP 31-32, 36. No one had any guns out and no one was preventing Moreno from leaving. 37RP 32. Mendoza-Gomez and Moreno began to argue again. 37RP 32-33. Mendoza-Gomez grabbed a small aluminum bat that was already in the room and struck Moreno. 37RP 34-36. Mendoza-Gomez immediately stopped the attack, however, when Cervantes told him to. 37RP 36.

Cervantes testified that she wanted Moreno to leave and offered to give him a ride. This was her idea and Mendoza-Gomez was not telling her what to do. 37RP 36-37. She and Pua then left with Moreno in the Acura SUV, which belonged to Mendoza-Gomez. 37RP 37. The plan was to drop Moreno in Tacoma, where his cousin lived. 37RP 41-43.

Just about the time the car's transmission started to act up, Cervantes received a call from Tharp, who lived in the vicinity and told her to stop by. 37RP 43-44. They picked up Tharp, who diagnosed the problem. From there, they stopped at Wal-Mart and

then the Shell station. 37RP 45, 52-53. According to Cervantes, the SUV's doors were never locked. 37RP 47, 54.

As they started to leave the Shell, Moreno unexpectedly ran from the SUV and Pua chased him. Because Cervantes could not leave without Pua, she told Tharp to go get Pua and he did. Both men eventually ran back out and got back in the SUV. Cervantes did not know what had happened. 37RP 55-60. Just as she had told police when questioned, she denied there was a plan to assault Moreno, much less kill him, and she never received any payment for what happened to Moreno. 36RP 35; 37RP 61-63.

When police located and arrested Cervantes and Tharp, they were traveling in a Jeep. 34RP 69; 37RP 64. Inside that vehicle, police found the two firearms (the silver handgun and the black .45) associated with Moreno's abduction. 32RP 61-62, 88, 112; 34RP 69-70, 153-157. Cervantes denied any knowledge of these firearms or other firearms found in the vehicle, except a handgun she had obtained after September 30, which she was carrying in her purse. 37RP 64-65, 99-107.

Cervantes is dating, and has a child with, Pua's older brother, Aigaleli Pua, who was incarcerated when the crimes were committed in this case. 32RP 73-74; 34RP 51-54; 37RP 13. In an attempt to

impeach Cervantes, prosecutors read a transcript of a taped jail telephone call between the two the day after the crimes. 34RP 58. Aigaleli Pua asks Cervantes “why the boys on the run,” to which she responds, “me, your brother Milo and my homeboy Eric made – we pulled, we – we – we did a – we did some – a job yesterday.” 34RP 56-57. Cervantes denied she had been referring to the incident at Shell. 37RP 67.

By trial, Pua had traded a guilty plea to reduced charges (the State dropped the Conspiracy to Commit Murder charge) for testimony against Mendoza-Gomez and Cervantes. 33RP 14, 23. And he was no longer claiming, as he told detectives when first arrested, that he had merely been asked to beat up Moreno. 34RP 75-78, 110-111, 120-121.

Instead, Pua’s testimony was similar to a statement he later gave police. See 34RP 78; 36RP 37-42. According to Pua, on September 30, Cervantes called him and said a car was coming by to pick him up. 32RP 77-78. He was then driven to the apartment where Moreno had been found with Cheila. 32RP 78-80. Once there, Cervantes handed him the silver gun and told him to watch Moreno, which he did. 32RP 85-89. At Cervantes’ direction, Pua then took Moreno at gunpoint to the car in which he had arrived.

32RP 90-92. According to Pua, Cervantes said that Mendoza-Gomez wanted Moreno killed. 32RP 90.

Moreno was driven to the Traveler's Choice Motel and taken inside one of the rooms. 32RP 93-94. Cervantes and Mendoza-Gomez arrived shortly thereafter, along with Mendoza-Gomez's brother. 32RP 103. Pua watched as Mendoza-Gomez struck Moreno with the bat, injuring Moreno's fingers. 32RP 105-107. According to Pua, Cervantes told him to take Moreno to the Acura. She also gave Pua the black .45, which Mendoza-Gomez had given to her, and told Pua that Mendoza-Gomez said to use one bullet. 32RP 110-113; 33RP 13-14. Pua then put on the blue gloves to avoid leaving prints in the SUV. 32RP 113-114.

For the events that followed, Pua's testimony largely mirrored that of Moreno. Cervantes told Moreno he was going to be killed. 32RP 118-119. The group picked up Tharp, stopped at Wal-Mart for transmission fluid, and ended up at the Shell station, where Pua and Tharp beat Moreno after he fled the SUV. 32RP 119-129. According to Pua, he and Tharp each were paid \$300.00 plus some drugs for their participation. 32RP 131-132.

Danyale Pasley also testified for the prosecution. 35RP 35. Her testimony did not match what she initially had told police. 35RP

54. Pasley testified that she knew all four defendants. 35RP 36-39. She had previously owned the black Acura SUV, but had traded it to Mendoza-Gomez in September 2011. 35RP 39-40. According to Pasley, on September 30, Cervantes called her, said the Acura had been stolen, and indicated that Pasley should call the police and report the vehicle stolen from her own driveway. 35RP 43-44. Cervantes called back, however, within a few minutes and told Pasley to never mind because the matter had been taken care of. 35RP 45.

According to Pasley, Cervantes then asked her to come down to a hotel so that everything could be explained to her. 35RP 45-46. Pasley went to the hotel and spoke with Cervantes. 35RP 46. She also claimed that Mendoza-Gomez was there, in an adjoining room, although she only saw him from behind and did not speak with him. 35RP 46-47, 60, 64-65. Cervantes told her about a "hit" on a man having an affair with Mendoza-Gomez's sister-in-law. Cervantes said she had driven the vehicle, along with Pua and Tharp, and intended to take the man to some woods, where he would be "finished off." 35RP 50-51. Pasley also testified that, some time later, Mendoza-Gomez apologized to her for getting her involved and said Mexico was "mad at him" for putting a hit out on someone

without permission. 35RP 47, 63-64.

C. ARGUMENT

DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO DEMAND A MISTRIAL ONCE JURORS WERE INFORMED THE CASE DID NOT INVOLVE THE DEATH PENALTY.

The law is well established in Washington. “The question of the sentence to be imposed by the court is never a proper issue for the jury’s deliberation, except in capital cases.” State v. Bowman, 57 Wn.2d 266, 271, 356 P.2d 999 (1960). Consequently, in a non-capital case, it is error to tell jurors the death penalty is not involved. State v. Townsend, 142 Wn.2d 838, 846-47, 15 P.3d 145 (2001); State v. Murphy, 86 Wn. App. 667, 668, 671, 937 P.2d 1173 (1997), review denied, 134 Wn.2d 1002, 953 P.2d 95 (1998).

This is a “strict prohibition” that “ensures impartial juries and prevents unfair influence on a jury’s deliberations.” Townsend, 142 Wn.2d at 846. Specifically, “if jurors know that the death penalty is not involved, they may be less attentive during trial, less deliberative in their assessment of the evidence, and less inclined to hold out if they know that execution is not a possibility.” Townsend, 142 Wn.2d at 847.

This prohibition applies even when a juror asks if the penalty might apply. In State v. Mason, 160 Wn.2d 910, 162 P.3d 396 (2007), cert. denied, 553 U.S. 1035, 128 S. Ct. 2430, 171 L. Ed. 2d 235 (2008), the Supreme Court rejected the notion that when a juror expressly asks about the death penalty, it is appropriate to instruct jurors it does not apply. The trial judge had reasoned this would benefit the defense because those concerned about the penalty would naturally be pro-defense and remove themselves from consideration if they were not assured of the penalty's absence. State v. Mason, 127 Wn. App. 554, 573, 126 P.3d 34 (2005). Citing Townsend, the Supreme Court found this unpersuasive and faulted the trial court for revealing this information. Mason, 160 Wn.2d at 929-930.

Despite this clear prohibition, Mendoza-Gomez's jury was informed the case did not involve the death penalty. Following a reading of the charges and hardship excusals, and in the presence of the entire prospective panel, one of the jurors indicated he would be uncomfortable sitting on the case if it involved the death penalty. 26RP 110. In response, counsel for Cervantes stated, "we are not dealing with a death penalty case," to which the juror responded

that he would have no problem serving.⁷ 26RP 111. Counsel for Mendoza-Gomez took no action to prevent, or in response to, this revelation. This was ineffective.

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993). Review is de novo. State v. Rafay, 168 Wn. App. 734, 775, 285 P.3d 83 (2012), review denied, 176 Wn.2d 1023, 299 P.3d 1171, cert. denied, 134 S. Ct. 170, 187 L. Ed. 2d 117 (2013).

Both requirements are met here.

No reasonable attorney would have allowed jurors to learn that the death penalty did not apply. In Townsend, defense

⁷ Shortly thereafter, however, this juror was excused for cause based on an expressed inability to be fair in any case involving an allegation of murder, even conspiracy to commit murder. 26RP 113-116.

counsel failed to object when the court informed jurors of this fact. Addressing that failure, the Supreme Court recognized that, considering the longstanding prohibition against revealing that information, the failure to object fell below prevailing professional norms. Townsend, 142 Wn.2d at 847. The Court also rejected any argument that revealing this information was part of a legitimate strategy:

There was no possible advantage to be gained by defense counsel's failures to object to the comments regarding the death penalty. On the contrary, such instructions, if anything, would only increase the likelihood of a juror convicting the petitioner.

Townsend, 142 Wn.2d at 847.

In State v. Hicks, 163 Wn.2d 477, 181 P.3d 831, cert. denied, 555 U.S. 919, 129 S. Ct. 278, 172 L. Ed. 2d 205 (2008), the Supreme Court again found deficient performance where defense counsel permitted the court and prosecutor to inform jurors the death penalty did not apply and then referenced the penalty's absence themselves. Hicks, 163 Wn.2d at 482-483. Citing Townsend and Mason, the Hicks Court repeated the applicable rule: "in response to any mention of capital punishment, the trial judge should state generally that the jury is not to consider sentencing." Hicks, 163 Wn.2d at 478 (emphasis added).

Similarly, in Mendoza-Gomez's case, his attorney performed deficiently by failing to object to the disclosure. There was no legitimate strategy to informing jurors of this fact. Compare Rafay, 168 Wn. App. at 779-782 (defense legitimately agreed jurors should be told penalty did not apply where subject of penalty a critical aspect of defense trial strategy and clear this was a deliberate, considered, and strategic choice). Moreover, following disclosure, counsel should have immediately moved for a mistrial, which would have been granted. See State v. Gilchrist, 91 Wn.2d 603, 612, 590 P.2d 809 (1979) (mistrial necessary where nothing short of a new trial would ensure defendant is tried fairly).

Mendoza-Gomez suffered prejudice. There is a reasonable probability that the mistake affected the jury's verdict on Conspiracy to Commit Murder in the First Degree. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (quoting Strickland, 466 U.S. at 693-94).

In the absence of informing jurors this was not a death penalty case, Mendoza-Gomez had a legitimate chance of acquittal, or at least a hung jury, on the Conspiracy to Commit Murder charge. The evidence on this charge was far from overwhelming.

Cervantes' first trial resulted in a deadlocked jury on this very charge. 20RP 9. Mendoza-Gomez explained to police that the only plan was to assault Moreno, not kill him. 34RP 93-95, 133-134; exhibit 134 at 22-23, 37-38, 42-57, 77-83, 91-98, 106. So did Pua, initially. 34RP 75-78, 110-111, 120-121. And Cervantes also consistently denied a plan to kill. 37RP 61-63.

Jurors were provided the option of convicting on the lesser charge of Conspiracy to Commit Assault in the Second Degree. CP 485-486, 488-491. This is what defense counsel encouraged jurors to do. 39RP 60-61, 64, 77-80. But once jurors were informed they need not give this case the care and thoughtful reflection appropriate to the most serious cases, the chance of conviction on the greater offense increased and the chance of conviction on the lesser offense, or even outright acquittal, diminished.

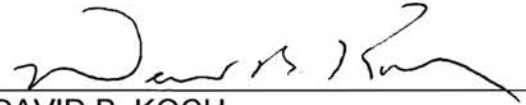
D. CONCLUSION

This Court should reverse Mendoza-Gomez's conviction for Conspiracy to Commit Murder in the First Degree and remand for a new and fair trial on that charge.

DATED this 31st day of March, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

DAVID B. KOCH
WSBA No. 23789
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 70506-7-1
)	
FRANCISCO MENDOZ-GOMEZ,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF MARCH 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] FRANCISCO MENDOZ-GOMEZ
DOC NO. 367237
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF MARCH 2014.

x *Patrick Mayovsky*