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THE SUPREME COURT OF

OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT PETITION OF

FABIAN ARREDONDO

ANSWER TO PETITION FOR REVIEW BY YAKIMA COUNTY

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A. INTRODUCTION

Petitioner was found guilty by a jury on October 21, 2011 and was sentenced on October 27, 2011 for Count 1 - Second Degree Murder RCW 9A.32.050(1)(a); Count 2 – First Degree Assault RCW 9A.36.011(1)(a); Count 3 – First Degree Assault RCW 9A.36.011(1)(a) and, Count 4 First Degree Assault RCW 9A.36.011(1)(a). The judgment and sentence further set out in section 2.2;

> Counts 1, 2, 3 and 4 do not encompass the same criminal conduct and do not count as one crime in determining offender score, pursuant to RCW 9.94A.589.
> The crimes in Counts 1, 2, 3, and 4 are felonies in the commission of which a motor vehicle was used. The clerk of the Court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.
> The defendant committed the crimes in Counts 1, 2, 3, and 4 while armed with a firearm, as defined by RCW 9.94A.510, RCW 9.94A.825 and RCW 9.41.010.
> ...
> The defendant is a criminal street gang member or associate as defined by RCW 9.94A.030.
> The defendant committed the crime in Counts 1, 2, 3 and 4 with intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for criminal street gang as defined RCW 9.94A.030, its reputation, influence, or membership. RCW 9.94A.535(3)(aa).

This arose under Yakima County cause number 09-1-02316-1.

The judgment and sentence next set forth the basis for the court imposing an exceptional sentence;

> 2.6 Exceptional Sentence: The Court finds substantial and compelling reasons exist which justify an exceptional sentence. Pursuant to RCW 9.94A.535(3)(aa), the Court finds that an exceptional sentence of 60 months which is 60 months above the Enhanced Range of 194-294 months on Count 1; 60 months which is 60 months above the Enhanced Range of 153-183 months on Count 2; SO months which is 60 months above the Enhanced Range of 153-183 months on Count 3; and 60 months which is 60 months above the Enhanced Range of 153-183 months on Count 4 shall be imposed based on the following aggravating circumstance(s):
>
> > The defendant committed the crime in Counts 1, 2, 3 and 4 with intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for criminal street gang as defined RCW 9.94A.030, its reputation, influence, or membership. RCW 9.94A.535(3)(aa).
> >
> > Aggravating circumstances were found by the jury by special verdict.

Arredondo filed a direct appeal. The Court of Appeals affirmed the convictions on appeal in an unpublished opinion. All three judges concurred in upholding the conviction and denied all claims raised except the issue raised regarding legal financial obligations, the majority moved to remand the case for a rehearing regarding the imposition of those LFO's.

Both parties petitioned the Court of Appeals requesting that the case be published that request on October 13, 2015.

B. ISSUE PRESENTED BY PETITION

Arredondo petitions this court requesting review of the decision of the Court of Appeals denying the substantive issues from his direct appeal.

Petitioner alleges;

1. Did the trial court violate Mr. Arredondo's constitutional right to a public trial by allowing the trial to continue past 4 p.m. during a portion of the jury selection, where the courthouse door was locked at 4 p.m. and a sign on the door indicated the courthouse closed at 4 p.m., thereby effectively excluding the public from portions of the trial?
2. Did the trial court abuse its discretion in allowing evidence of other acts contrary to ER 404(b)?
3. Was Mr. Arredondo's Sixth Amendment right of confrontation violated when the trial court barred any inquiry into the mental state of the State's witness, Maurice Simon, during cross-examination?
4. Was Mr. Arredondo's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove the special verdict enhancement that he committed the crime with intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang, its reputation, influence, or membership?

ANSWER TO ISSUES PRESENTED BY PETITION

1. This request for review of the Court of Appeals decision does not meet the requirements of RAP 13.4. The Court of Appeals decision is not in conflict with any other case from this court or Court of Appeals; the issues raised are not a significant question of law involving the Constitution of the United States or the State of Washington nor is this issue one of substantial public interest.
2. The Court of Appeals correctly applied the law regarding public access to the courts.
3. The Court of Appeals correctly ruled that the trial court did not abuse its discretion when it allowed admission of evidence pursuant to ER 404(b)
4. Arredondo's Sixth Amendment rights were not violated when the trial court refused to all inquiry into the mental health of one witness.
5. The "street gang" enhancement was fully proven, the jury's decision should not be disturbed.

C. STATEMENT OF THE CASE

The Court of Appeals set forth the facts in its decision, the State will also rely on that statement and shall address specific areas of the facts in the argument s section below.

D. ARGUMENT

Acceptance of review of the Court of Appeals opinion is governed by RAP 13.4(b). This rule sets forth the manner and mechanism for review of the denial of a direct appeal. In this case Arredondo's case does not meet any of the criterion set forth in RAP 13.4(b)

1. Standards of Review.

RAP 13.4(b) Considerations Governing Acceptance of Review;

This case does not **1**) Conflict with any decision by this court; **2**) This ruling does not conflict with any ruling by any other division of the Court of Appeals or for that matter any court; **3**) The ruling does not raise a significant question under either the State or Federal Constitution; the ruling merely reiterates the standard that has been applied for years **4**) The issues raise in this petition for review do not involve a issue of substantial public interest that this court should determine.

The issues raised are clearly settled law.

E. ISSUE PRESENTED BY PETITION

A. ISSUES PRESENTED.

Appellant makes numerous assignments of error. These can be summarized as follows;

1. The court violated Appellant's constitutional public trial right.
2. The trial court abused its discretion when it allowed the introduction of evidence under ER 404(b).
3. Appellant's Sixth Amendment rights were violated when the court denied his motion to question a State's witness about alleged mental health issues.
4. The State presented insufficient evidence the acts committed by Appellant were to benefit a criminal street gang.

B. ANSWERS TO ISSUES PRESENTED.

1. There was no violation of the right to a public trial.
2. The trial court did not abuse its discretion when it allowed the admission of ER 404(b) testimony.
3. The court did not err when it denied Appellant's motion to question a State's witness regarding alleged mental health issues.
4. There was sufficient evidence to support the gang aggravator.

F. ARGUMENT

RESPONSE TO FIRST GROUND – CLOSED COURTROOM.

Petitioners claims that this case can be distinguished from State v. Andy, 182 Wn.2d 294,301,340 P.3d 840 (2014), it cannot. While literally all cases can be distinguished because no two cases have identical facts or rulings from the court or juries, the fact remains that in the law these difference are taken into account when courts of review issue their opinions. This court in Andy addressed a nearly identical fact pattern.

Both cases were remanded for a reference hearing after which the initial sitting court issued a ruling regarding the question of whether the courtrooms were closed during trial. The only real difference in evidence presented in this case is that Arredondo would have this court consider is whether a mechanism in a door was turned in a direction that it was not in the Andy case. He would have this court determine that the courtroom was closed because one witness indicated that the policy at that time was that the door was locked to the building. This is a distinction without a distinction.

The record before the Court of Appeals after the reference hearing was that the courtroom itself was not closed at any of the times that the trail proceedings went past 4:00PM. The State can say it no better than the Court of Appeals:

> However, if the trial court does not actually close the courtroom during jury selection, the court need not engage in a *Bone-Club* analysis. *See* State v. Brightman, *155* Wn.2d 506,515-16, 122 P.3d 150 (2005). On remand, the court heard testimony from court officials and security officers. Based on this testimony, the court entered findings that all members of the public were able to access the courtroom at all times during the trial and that no member of the public was deterred by the sign posting the courthouse hours. Specifically, the court found that on October 10 and 11,
>
> > the public entrance of the Yakima County Courthouse was not closed or locked at 4:00 p.m. because a courtroom was still in session in which case security officers kept the public entrance open until all courts were no longer in session for that day. Yakima County's

> policy was that the public entrance remained open as long as any courtroom was in session. The courts and security officers followed this policy.
>
> CP at 114. Mr. Arredondo challenges the sufficiency of the evidence to support these findings.
>
> This court reviews findings from a reference hearing for substantial evidence. In re Pers. Restraint of Gentry, 137 Wn.2d 378,410,972 P.2d 1250 (1999). As long as some reasonable interpretation of the evidence supports the trial court's findings, this court will not reweigh any conflicting evidence. *Id.* at 411. And credibility determinations are for the trier of fact. *Id.* at 410-11.
>
> The facts revealed at the reference hearing in this case are nearly identical to those in the recently-decided *Andy* case, where the Washington Supreme Court upheld the remand court's finding that no closure occurred. 182 Wn.2d at 301-02. Both cases were tried at the Yakima County Courthouse, and the signs posted on the courthouse door during both trials used the same language. However, there are two differences between this case and *Andy.* For one, the court in *Andy* concluded, "[T]he evidence shows that at all times during Andy's trial proceedings, the door to the courthouse was *unlocked*. ..." *Id.* at 297.(Emphasis in original.)

As the Court of Appeals stated "the parties presented conflicting evidence as to whether the outside courthouse doors were locked." There was only one officer who testified that that that time of Petitioners trial the policy was to lock the door and the testimony of that officer was "[i]f a member of the public wanted in the building to watch the trial, he or she would need to knock or pull on the door to get the security officer's attention. The officer would then ask the person why he or she was there, and if the person indicated it was for court, the officer would allow that person to enter the building." Thereby allowing any person who wanted

access to be allowed in. Based on this record it is clear that the trial court at the reference hearing was correct when it determined the public was not excluded from the courtroom and the Court of Appeals correctly held;

> Despite these two differences, we believe that the outcome here should be the same as Andy. First, even if the courthouse doors were locked, officers were present to admit members of the public trying to enter. The courtroom itself was not locked. Second, while the courthouse signs may have been worded poorly, this court does not reweigh conflicting evidence where the evidence can reasonably be interpreted to support the trial court's finding that the signs did not deter members of the public. Thus, substantial evidence supports the court's findings from the reference hearing.

This court in Andy, 301-2, stated;

> Criminal defendants have the right to a public trial. Const. art. I, § 22. Defendants can raise claims of public trial rights violations for the first time on appeal. State v. Wise, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012). We review such claims de novo. State v. Easterling, 157 Wn.2d 167, 173-74, 137 P.3d 825 (2006). In general, findings of fact by the superior court are verities on appeal if supported by substantial evidence. *See* State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997).
>
> We recently reiterated that the defendant has the burden of providing a record that shows that a courtroom closure occurred. *See* State v. Koss, 181 Wn.2d 493, 503, 334 P.3d 1042 (2014); State v. Slert, 181 Wn.2d 598, 608, 334 P.3d 1088 (2014); State v. Njonge, 181 Wn.2d 546, 556, 334 P.3d 1068 (2014), *cert. denied*, No. 14-6940 (U.S. Dec. 15, 2014).
>
> ...
>
> We hold that the evidence in this case demonstrates that the sign was not a deterrent to public access, and thus there is no basis for a finding that the courtroom was closed to the public.

There is no conflict between Petitioner's case and this court's ruling in Andy a nearly identical case previously decided by this court.

RESPONSE TO SECOND GROUND – ER 404(b)

While clearly Petitioner does not agree with the ruling in the Court of Appeals that alone is not sufficient for this court to accept review. None of the subsections of RAP 13.4(b) have been met by Petitioner.

This case does not 1) Conflict with any decision by this court; 2) conflict with any ruling by any other division of the Court of Appeals; 3) The ruling does not raise a significant question under either the State or Federal Constitution, the standards applied by the Court of Appeals has been the standard for years; and finally 4) the issues raised do not involve an issue of substantial public interest that this court should determine.

The Court of Appeals addressed the trial court ruling stating as follows;

> Well, it's as-I think under [ER] 404(b) it has probative value. I think the probative value in identifying that is Mr. Arredondo's animosity towards people who are of the Sureño persuasion, if you would, and it goes to show identity, and motive as well.
>
> So, under the circumstances, I believe that the probative value outweighs the prejudicial effect. I'll allow testimony regarding the earlier incident. RP (Oct. 10, 2011, Suppl.) at 26-27.
>
> During the trial, the court gave a limiting instruction to the jury before testimony related to the February 2009 shooting, stating:

> [T]he testimony regarding that particular incident can be considered by you in only one way. Okay? You can only consider it in regard to the issue of whether-the issues of *identity* and *motive* and *intent* of the Defendant. Okay?
> So you cannot consider it as to whether Mr. Arredondo may or may not be a bad person or may or may not have acted in a similar fashion on February 9th of 2009 to what he's alleged to have done on December the 5th of 2009. RP at 466 (emphasis added).

The Court of Appeals based its ruling on "State v. Stein, 140 Wn.App. 43, 65, 165 P.3d 16 (2007). This court reviews a trial court's admission of ER 404(b) evidence for an abuse of discretion. State v. Freeburg, 105 Wn.App. 492, 497, 20 P.3d 984 (2001)... Because this weighing determination is the province of the trial court, not the appellate court, we are reluctant to determine otherwise. We find no abuse of discretion in the admission of the ER 404(b) evidence related to the February 9, 2009 drive-by shooting. See State v. Herzog, 73 Wn.App. 34, 50, 867 P.2d 648 (1994)."

Stein, Freeburg and Herzog are the epitome of well settled case law, all three cases are from the other two divisions of the Court of Appeals and therefore the opinion issued in this case does not conflict with any other case by any other division of the Court of Appeals; further, Stein was not accepted for review by this court, therefore it does not conflict with any ruling of this court; this issue while of great concern to Mr.

Arredondo is not a significant issue regarding either constitution and finally, the issue is not one of great concern to the general public.

Arredondo has not met any of the conditions necessary for this court to accept review of this issue.

RESPONSE TO GROUND THREE – INQUIRY INTO WITNESSES MENTAL HEALTH.

As with the first issue Arredondo presents to the court for review this issue does not fall within and subsection of RAP 13.4, Petitioner fails to indicate how the Court of Appeals opinion falls within any portion of this rule. Therefore review should not be accepted.

Petitioner was allowed to examine this witness outside the presence of the jury. This inquiry gave the trial court sufficient information upon which to makes its decision regarding exclusion of this very testimony. The Court of Appeals cited to the reasoning in "State v. Peterson, 2 Wn.App. 464, 466, 469 P.2d 980 (1970). Generally, the trial court has discretion to admit evidence of a witness's mental condition for impeachment purposes. State v. Froehlich, 96 Wn.2d 301, 306, 635 P.2d 127 (1981)."

The Court of Appeals then distinguished the present case from Froehlich, it did not ruling in a conflicting manner. The Court ruled;

> The facts in this case are distinguishable from both *Perez* and *Froehlich.* Unlike the witnesses in both of those

> cases, Mr. Simon did not display any readily apparent mental deficiencies while on the witness stand. The court permitted questioning of Mr. Simon regarding his mental condition outside the presence of the jury. During that examination, counsel for appellant referenced three mental health evaluations that revealed Mr. Simon has problems with depression, concentration, comprehension, anxiety, distrust of other people, hypervigilance, PTSD, and substance abuse of both alcohol and methamphetamine. However, Mr. Simon testified that while his substance abuse might affect his short-term memory, none of these issues affect his long-term memory. Mr. Arredondo did not produce any evidence to the contrary.
>
> . . .
>
> . . .allowing Mr. Simon to testify as to these problems that have no effect on his long-term memory would not have aided the jury in its credibility determination of Mr. Simon's ability to "observe, recollect and communicate truthfully." *Froehlich,* 96 Wn.2d at 307. We conclude that the trial court did not abuse its discretion when it barred defense cross-examination of Mr. Simon's mental state.

<u>RESPONSE TO GROUND FOUR – STREET GANG AGGRAVATOR.</u>

Here once again Petitioner has not fulfilled his obligation to set forth facts that would support his claim that the opinion violates one of the edicts of RAP 13.4. Without that evidence this court need not review the ruling of the Court of Appeals.

The challenged aggravator, commonly called the street gang aggravator is set out in the opinion, "RCW 9.94A.535(3)(aa), requires the State to prove beyond a reasonable doubt that Mr. Arredondo's involvement in the drive-by shooting was based on his desire "to directly

or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership." (Slip at 23)

This is a question presented to the jury and therefore "[t]his court will review "a jury's verdict on an aggravating factor for substantial evidence just as [it does] when evaluating the sufficiency of the evidence supporting the elements of a crime." State v. DeLeon, 185 Wn.App. 171, 212, 341 P.3d 315 (2014)." (Slip at 23) There are not many cases that have addressed this aggravator and none of them conflict with the ruling of the Court of Appeals. One of the cases that has reviewed this statute was State v. Moreno, 173 Wn.App. 479, 495-97, 294 P.3d 812 (2013), review denied, 177 Wn.2d 1021 (2015). The facts herein are similar to Moreno, this court's denial of review of the decision in Moreno would clearly indicate that the Court of Appeals decision in this case does not support review under the first two subsection of RAP 13.4. The facts in the present case mirror the facts in Moreno and support the jury's finding. The evidence introduced was set out by the Court of Appeals;

> Here, Mr. Arredondo admitted that he is a member of the Nortenos and that he had become a member after growing up in the gang lifestyle. Additionally, testimony revealed that Mr. Arredondo was at a house party with other Nortenos the night of the shooting. Some of the Nortenos at the party were carrying guns. The victim and his friends, some of who were members of the rival

> Sureño gang, arrived at the party. Shortly thereafter, an altercation occurred between members of the rival gangs. Most people left the party after the fight, including the victim and his friends, and the drive-by shooting followed. Detective Brownell, assigned as the street crimes detective for the Toppenish Police Department, testified regarding the rivalry between the Nortenos and Surenos, as well as what parts of the city are controlled by which gang. He also testified generally regarding the gang lifestyle wherein members "earn a certain level of prestige and respect amongst the gang members and even rival gang members" based on the number of crimes they have committed and how much they have hustled. RP at 684. Thus, this evidence, which is comparable to the evidence in both *Moreno* and *DeLeon,* establishes the required nexus between the drive-by shooting and Mr. Arredondo's motivations to benefit his gang.

"[T]he evidence shows a sufficient nexus between the crime and gang membership to prove the gang aggravator." Id. (Slip at 24)

G. CONCLUSION

This court should not accept review of the Court of Appeals decision.

Respectfully submitted this th day of November, 2015.

s/ David B. Trefry
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DECLARATION OF SERVICE

I, David B. Trefry, state that on November , 2015, I emailed, by agreement of the parties, a copy of the State's Answer to Mr. David Gasch at gaschlaw@msn.com

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

DATED this th day of November, 2015 at Spokane, Washington,

s/ David B. Trefry
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Please find attached the States Answer to Mr. Arredondo's Petition for Review.

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