

940312

**Case # 328414**

**Statement of Additional Grounds  
for Review**

**State of Washington  
v.  
Marco Antonio Gallegos**



**FILED**

NOV 23 2015

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By SO

WASHINGTON COURT OF APPEALS  
DIVISION III

MARCOS GALLEGOS  
Appellate

STATEMENT OF ADDITIONAL GROUNDS

VS.

THE STATE OF WASHINGTON  
Respondant.

APPEAL FROM THE SUPERIOR COURT OF WYKING COUNTY

No. 32841-1-4-111

MARCOS GALLEGOS DOC# 345959  
WASHINGTON STATE PENITENTIARY  
1313 N. 13th Avenue  
Walla Walla, Washington  
99362

IN AND FOR THE STATE OF WASHINGTON  
FOR THE COURT OF APPEALS  
DIVISION III

MARRCO GALLEGOS,  
Appellate,

v.

STATE OF WASHINGTON  
Respondant.

No. 32841-4-1-111  
STATEMENT OF GROUNDS  
FOR REVIEW

I, MARRCO GALLEGOS, Appellate, pro-se, Residing at the Washington State Penitentiary 1313 N. 13th Avenue, Walla Walla Washington and hereby asks this Court of the following relief;

RELIEF

1. That This Court order a evidentiary hearing to expand the record for his Ineffective Assistance of Counsel Issues to determine the amount of prejudice counsel's ineffectiveness had on Marrco Gallegos's trial.
2. Order a new trial In the Interest of Justice standard.
3. Any other relief this court deems just and proper.

GROUNDS

ISSUES FOR CONSIDERATION

- I. DEFENSE COUNSEL WAS INEFFECTIVE BY NOT INFORMING DEFENDANT GALLEGOS HIS RIGHTS WHEN HE SIGNED AWAY HIS RIGHTS TO PROVE THE UNLAWFUL POSSESSION OF A FIREARM THUS, CONCEDED HIS GUILT ON THE HOMICIDES IN LUE OF THE ACCOMPLICE INSTRUCTIONS THAT MISSTATE THE ELEMENT OF THE CRIMES GALLEGOS WAS CONVICTED OF.
- II. THE COURT'S INSTRUCTIONS VIOLATED MR. GALLEGOS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY ALLOWING CONVICTIONS WITHOUT PROOF OF EACH ESSENTIAL ELEMENT OF PREMEDITATED MURDER AND FELONY MURDER.
- III A EVIDENTIARY HEARING IS NEEDED TO FIND OUT HOW MUCH PREJUDICE UNDER THE Nader HARMLESS ERROR STANDARD EFFECTED MR. GALLEGOS'S TRIAL.
- IV. EVIDENCE OF AFFILIATION, WHICH IS SPECIAL SUBJECT OF EVIDENCE OF PRIOR BAD ACTS, CANNOT BE ADMITTED IN MR. GALLEGOS TRIAL BECAUSE THE INTRODUCTION OF GANG RELATED EVIDENCE IS VIOLATIVE OF ER 403.
- V. IT WAS IMPROPER TO PROSECUTE MR. GALLEGOS HOMICIDE TRIAL AS GANG EVIDENCE OF WHICH THE "GANG-RELATED" EVIDENCE ADMISSION WAS PREJUDICIAL ERROR, BECAUSE IT WAS NOT ADMITTED FOR A RELEVANT PURPOSE AND NOT ACCOMPANIED BY A LIMITING INSTRUCTION.

Mr. Gallegos cites to the record withing the arguements below and are part of the record.

Mr. Gallegos is asking for a evidentiary hearing and cites the Rules and authority that allows this Court to grant the remand for a hearing. The reason why he asks this Court for it now and not in a collateral proceeding is in part his attorney on appeal raised the Ineffective Assistance of Counsel and once an issue is raised it is only with Good Cause can it be raised again.

DEFENSE COUNSEL WAS INEFFECTIVE BY NOT INFORMING DEFENDANT GALLEGOS HIS RIGHTS WHEN HE SIGNED AWAY HIS RIGHTS TO PROVE THE UNLAWFUL POSSESSION OF A FIREARM THUS, CONCEDED HIS GUILT ON THE HOMICIDES IN LUE OF THE ACCOMPLICE INSTRUCTIONS THAT MISSTATE THE ELEMENT OF THE CRIMES GALLEGOS WAS CONVICTED OF.

a. WAIVER

Mr. Gallegos has not waived his right to challenge a waiver of a Constitutional right because it must be knowing, intelligent and voluntary. City of Bellevue v Acrey, 102 Wn.2d 207, 691 P.2d 957 (1984); State v. Harris, 123 Wn.App. 906, 921, 99 P.3d 903 (2004).

Absent and adequate record to the contrary, a reviewing court must indulge every reasonable presumption against the validity of an alleged waiver of a constitutional right.

In Johnson v Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.ed.2d 1461 (1938); And under state law also, State v. Wicke, 91 Wn.2d 638, 645, 591 P.2d 452 (1979). The court does not "presume acquiesce in the loss of constitutional rights." Zerbst 304 U.S. at 548. In order to be effective, the 'waiver of a fundamental constitutional right must be 'an intentional relinquishment of abandonment of a known right or privilege." State v. Thomas, 128 Wn.2d 553, 558, 910 P.2d 475 (1996)(citing Zerbst, 304 U.S. at 458). "Presuming waiver from a silent record is impermissible." BNoykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

In the States closing arguments he raised the issue of the stipulation. (RP Pg. 1944 & Pg. 1953) [Stipulated to Unlawful possession of a Firearm & Instruction of ownership or possession or control of a firearm.."].

Mr. Gallegos position was he was not there and not an as

accomplice. Mr. Gallegos trusted in his defense counsel and never thought that the stipulation he signed acted as a confession or in the least it conceded to the homicides in lue of the language of the Accomplice liability instruction. "A crime". Looking at the "to Convict" instructions and the Accomplice Liability in light of the Stupulation and closing argument by the state Counsel abandon his client.

Prejudice in this case was the defense counsel relieved the prosecutor of his burded of proof of each essential elements of the felony and aggravated homicides.

A hearing is warranted on direct review so that counsel can explaine how this "Stipulation" was a trial tactic"?

THE COURT'S INSTRUCTIONS VIOLATED MR GALLEGOS'S  
FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY ALLOWING  
CONVICTIONS WITHOUT PROOF OF EACH ESSENTIAL ELEMENT  
OF PREMEDITATED MURDER & FELONY MURDER.

Due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; In re Winship, 397 U.S. 358, 364, 909 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Jury instructions tghat relieve the state of its burden to prove every element of an offense violata due process. State v. Thomas 150 Wn.2d 821, 844, 83 P.3d 970 (2004).

Such instructions also create a manifest error affecting a constitutional right, and thus can be raised for the first

on appeal. RAP 2.5(a); State v Chino, 117 Wn.App. 531, 538, 72 P.3d 1133 (2004). Accordingly, a court's instructions to the jury "must more than adequately convey the law. They must make the relevant legal standard "manifestly apparent to the average juror.'" State v. Wakins, 136 Wn.App 240, 240-41, 148 p.3d 1112 (2006)(quoting State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996)).

Jury instructions that mistake an element are not harmless unless it can be shown beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. State v. Woods, 138 Wn.App. 191, 202, 156 P.3d 309(2007).

To convict Mr. Gallegos, the state argued on (RP 1986-87) "Lets go back to the accomplice liability instruction. Either as a principal or an accomplice it doesn't matter whot first they're all, every shot kills you dead..." And looking back at the "Stipulation" to the Possession of a firearm it is affirmed that the gun was used in "a crime" and how this stipulation that was supposed to be the defense strategy attaches to all the crimes Mr. Gallegos was charged with. The prejudice is obvious when the state argued what was necessary to prove that the defendant committed the different ways of committing homicide. (RP 1943, 1944 & 1945). It was mentioned on RP page 1944 Lines 4 through 14), There is no substantial change in



in the nature of criminal application of stipulation's abjective because it encompassed liability for all the crimes charged. All the jury needed to do was read the accomplice liability instruction.

The State argued at RP 1946:

"Accomplaiice liability this is an important idea. The Judge read this instruction..."

The prosecutor used this instruction and the "Stipulation" to modify the "to-convict" instruction so that this instruction attaches liability in the way the prosecutor instructs the jury to do so with the IPAC method. (RP 1947 Line 22-25).

In State v. Roberts, 142 Wn.2d 417 (2000) and State v. Cronin, 142 Wn.2d 558 (2000), found reversible error where jury instructions premised accomplice liability on erounious accomplice liability instructions. These cases has been modified yet these instructions permitted attribution of liability for elements that was stipulated to on strict liability basis, and are inproper even as applied here.

A EVIDENTIARY HEARING IS NEEDED TO FIND OUT HOW MUCH PREJUDICE UNDER THE NADER HARMLESS ERROR STANDARD EFFECTED MR. GALLEGOS'S TRIAL.

Appellate asks this court for a evidentiary hearing so the record can be expanded.

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995).

A expanded record is almost always needed to support the issue

of ineffective assistance of counsel. Mr. Gallegos will be procedurally barred from bringing this issue of Ineffective Assistance of Counsel in future collateral proceedings without good cause. There is enough in this record for this Court to proceed further.

This Court can "perform all acts necessary or appropriate to the fair and orderly review of a case". RAP 7.3. The Rules of Appellate Procedure will be liberally interpreted to promote justice and facilitate the decision of cases on their merits.

RAP 1.2(a). According to these rules Mr. Gallegos is requesting that the case be ordered back to trial and In re Rice, 118 Wn.2d 876, 828 P.2d 1086 (1992)

EVIDENCE OF AFFILIATION, WHICH IS A SPECIAL SUBJECT OF EVIDENCE OF PRIOR BAD ACTS, CANNOT BE ADMITTED IN MR. GALLEGOS TRIAL BECAUSE THE INTRODUCTION OF GANG-RELATED EVIDENCE IS VOLATIVE OF ER 403.

Evidence of gang membership is not admissible under the federal constitution. And under that standard Gallegos raises the authority in the Holding of: U.S. v McKay, 431 F.3d 1085, 126 S.Ct. 2345 (2010); Dawson v Delaware, 431 F.3d 1085, 126 S.Ct. 1093 (1992), Federal Rule ER 404 mirrors the State's 404.

In McKay, Id., The Court held "while evidence of gang membership is admissible if relevant to a dispute issue, gang affiliation evidence is not admissible where it is meant merely to prejudice the defendant to prove his guilt by association with unsavory characters.

Appellate is also raising this under the Washington Law and Rules. ER 404(b), read in conjunction with ER 403, which "requires exclusion of evidence even if relevant, if its probative value is substantially outweighed by the danger of unfair prejudice." State v. Mee, 166 Wn.App. 144, 159, 275 P.3d 1192 (2012)(Citing; State v Foxhoven, 461 W.2d 168, 175, 163 P.3d 786 (2007)).

ER 404 is not designed to deprive the state of relevant evidence necessary to establish an essential element of its case. But rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal type person who would be likely to commit the crime charged. See

Mee at 159. Id.

Accordingly to admit gang affiliation evidence there must be a nexus between the crime and gang membership. State v. Scott, 151 Wn.App. 520, 526, 213 P.3d 71 (2009). The analysis by which courts limit evidence of other crimes, wrongs, or acts to proper purposes is well settled: Before admitting the evidence the trial court must find by a preponderance of the evidence that the misconduct occurred; Identify the purpose for which the evidence is sought to be introduced; Determine whether the evidence is relevant to prove an element of the crime charged; Weigh the probative value against the prejudicial effect. State v Yarbrough, 151 Wn.App. 66, 81, 82, 84, 87, 210 P.3d1029 (2009).

State v. Mee, 163 Wa. App. 144, 275 P.3d 1192 (2012) is distinguishable to my facts as applied to this issue. Mee [G]eneralized evidence regarding the behavior of gangs and gang members absent (1) Evidence showing adherence by ~~the~~ defendant or the defendants alleged gang to those behaviors; (2) A finding that ~~The~~ evidence relating to gangs is relevant to prove the elements of the charged crime serves no purpose but to allow the state to "suggest that the defendant is guilty because he or she is a criminal type person who would ~~be~~ likely to commit the crime charged". Mee Id.

Like Mee the facts show it is speculative at best. The state told the court that the motive of the crime is not done because it is gang related. (RP 181). Mr. Gallegos was not charged with gang aggravators or elements. But testimony that

**FILED**

NOV 23 2015

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By SD

WASHINGTON COURT OF APPEALS  
DIVISION III

---

---

MARCOS GALLEGOS  
Appellate

STATEMENT OF ADDITIONAL GROUNDS

VS:

THE STATE OF WASHINGTON  
Respondant.

---

---

APPEAL FROM THE SUPERIOR COURT OF ~~WAKIMA~~ WAKIMA COUNTY

No. 32841-1-4-111

---

MARCOS GALLEGOS DOC# 345959  
WASHINGTON STATE PENITENTIARY  
1313 N. 13th Avenue  
Walla Walla, Washington  
99362

IN AND FOR THE STATE OF WASHINGTON  
FOR THE COURT OF APPEALS  
DIVISION III

MARRCO GALLEGOS,  
Appellate,

V.

STATE OF WASHINGTON  
Respondant.

No. 32841-4-1-111  
STATEMENT OF GROUNDS  
FOR REVIEW

I, MARRCO GALLEGOS, Appellate, pro-se, Residing at the Washington State Penitentiary 1313 N. 13th Avenue, Walla Walla Washington and hereby asks this Court of the following relief;  
**RELIEF**

1. That This Court order a evidentiary hearing to expand the record for his Ineffective Assistance of Counsel Issues to determine the amount of prejudice counsel's ineffectiveness had on Marrco Gallegos's trial.
2. Order a new trial In the Interest of Justice standard.
3. Any other relief this court deems just and proper.

## GROUNDS

### ISSUES FOR CONSIDERATION

- I. DEFENSE COUNSEL WAS INEFFECTIVE BY NOT INFORMING DEFENDANT GALLEGOS HIS RIGHTS WHEN HE SIGNED AWAY HIS RIGHTS TO PROVE THE UNLAWFUL POSSESSION OF A FIREARM THUS, CONCEDED HIS GUILT ON THE HOMICIDES IN LUE OF THE ACCOMPLICE INSTRUCTIONS THAT MISSTATE THE ELEMENT OF THE CRIMES GALLEGOS WAS CONVICTED OF.
- II. THE COURT'S INSTRUCTIONS VIOLATED MR. GALLEGOS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY ALLOWING CONVICTIONS WITHOUT PROOF OF EACH ESSENTIAL ELEMENT OF PREMEDITATED MURDER AND FELONY MURDER.
- III A EVIDENTIARY HEARING IS NEEDED TO FIND OUT HOW MUCH PREJUDICE UNDER THE Nader HARMLESS ERROR STANDARD EFFECTED MR. GALLEGOS'S TRIAL.
- IV. EVIDENCE OF AFFILIATION, WHICH IS SPECIAL SUBJECT OF EVIDENCE OF PRIOR BAD ACTS, CANNOT BE ADMITTED IN MR. GALLEGOS TRIAL BECAUSE THE INTRODUCTION OF GANG RELATED EVIDENCE IS VIOLATIVE OF ER 403.
- V. IT WAS IMPROPER TO PROSECUTE MR. GALLEGOS HOMICIDE TRIAL AS GANG EVIDENCE OF WHICH THE "GANG-RELATED" EVIDENCE ADMISSION WAS PREJUDICIAL ERROR, BECAUSE IT WAS NOT ADMITTED FOR A RELEVANT PURPOSE AND NOT ACCOMPANIED BY A LIMITING INSTRUCTION.

Mr. Gallegos cites to the record withing the arguements below and are part of the record.

Mr. Gallegos is asking for a evidentiary hearing and cites the Rules and authority that allows this Court to grant the remand for a hearing. The reason why he asks this Court for it now and not in a collateral proceeding is in part his attorney on appeal raised the Ineffective Assistance of Counsel and once an issue is raised it is only with Good Cause can it be raised again.

DEFENSE COUNSEL WAS INEFFECTIVE BY NOT INFORMING DEFENDANT GALLEGOS HIS RIGHTS WHEN HE SIGNED AWAY HIS RIGHTS TO PROVE THE UNLAWFUL POSSESSION OF A FIREARM THUS, CONCEDED HIS GUILT ON THE HOMICIDES IN LUE OF THE ACCOMPLICE INSTRUCTIONS THAT MISSTATE THE ELEMENT OF THE CRIMES GALLEGOS WAS CONVICTED OF.

a. WAIVER

Mr. Gallegos has not waived his right to challenge a waiver of a Constitutional right because it must be knowing, intelligent and voluntary. City of Bellevue v Acrey, 102 Wn.2d 207, 691 P.2d 957 (1984); State v. Harris, 123 Wn.App. 906, 921, 99 P.3d 903 (2004).

Absent and adequate record to the contrary, a reviewing court must indulge every reasonable presumption against the validity of an alleged waiver of a constitutional right.

In Johnson v Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.ed.2d 1461 (1938); And under state law also, State v. Wicke, 91 Wn.2d 638, 645, 591 P.2d 452 (1979). The court does not "presume acquiesce in the loss of constitutional rights." Zerbst 304 U.S. at 548. In order to be effective, the 'waiver of a fundamental constitutional right must be 'an intentional relinquishment of abandonment of a known right or provilege.'" State v. Thomas, 128 Wn.2d 553, 558, 910 P.2d 475 (1996)(citing Zerbst, 304 U.S. at 458). "Presuming waiver from a silent record is impermissible." BNoykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

In the States closing arguments he raised the issue of the stipulation. (RP Pg. 1944 & Pg. 1953) [Stipulated to Unlawful possession of a Firearm & Instruction of ownership or possession or control of a firearm.."].

Mr. Gallegos postition was he was not there and not an as



accomplice. Mr. Gallegos trusted in his defense counsel and never thought that the stipulation he signed acted as a confession or in the least it conceded to the homicides in lue of the language of the Accomplice liability instruction. "A crime". Looking at the "to Convict" instructions and the Accomplice Liability in light of the Stupulation and closing argument by the state Counsel abandon his client.

Prejudice in this case was the defense counsel relieved the prosecutor of his burded of proof of each essential elements of the felony and aggravated homicides.

A hearing is warranted on direct review so that counsel can explaine how this "Stipulation" was a trial tactic"?

THE COURT'S INSTRUCTIONS VIOLATED MR GALLEGOS'S  
FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY ALLOWING  
CONVICTIONS WITHOUT PROOF OF EACH ESSENTIAL ELEMENT  
OF PREMEDITATED MURDER & FELONY MURDER.

Due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; In re Winship, 397 U.S. 358, 364, 909 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Jury instructions tghat relieve the state of its burden to prove every element of an offense violate due process. State v. Thomas 150 Wn.2d 821, 844, 83 P.3d 970 (2004).

Such instructions also create a manifest error affecting a constitutional right, and thus can be raised for the first

on appeal. RAP 2.5(a); State v Chino, 117 Wn.App. 531, 538, 72 P.3d 1133 (2004). Accordingly, a court's instructions to the jury "must more than adequately convey the law. They must make the relevant legal standard "manifestly apparent to the average juror." State v. Wakins, 136 Wn.App 240, 240-41, 148 p.3d 1112 (2006)(quoting State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996)).

Jury instructions that misstate an element are not harmless unless it can be shown beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. State v. Woods, 138 Wn.App. 191, 202, 156 P.3d 309(2007).

To convict Mr. Gallegos, the state argued on (RP 1986-87) "Lets go back to the accomplice liability instruction. Either as a principal or an accomplice it doesn't matter whot first they're all, every shot kills you dead..." And looking back at the "Stipulation" to the Possession of a Firearm it is affirmed that the gun was used in "a crime" and how this stipulation that was supposed to be the defense strategy attaches to all the crimes Mr. Gallegos was charged with. The prejudice is obvious when the state argued what was necessary to prove that the defendant committed the different ways of committing homicide. (RP 1943, 1944 & 1945). It was mentioned on RP page 1944 Lines 4 through 14), There is no substantial change in

in the nature of criminal application of stipulation's abjective because it encompassed liability for all the crimes charged. All the jury needed to do was read the accomplice liability instruction.

The State argued at RP 1946:

"Accomplance liability this is an important idea. The Judge read this instruction..."

The prosecutor used this instruction and the "Stipulation" to modify the "to-convict" instruction so that this instruction attaches liability in the way the prosecutor instructs the jury to do so with the IRAC method. (RP 1947 Line 22-25).

In State v. Roberts, 142 Wn.2d 417 (2000) and State v. Cronin, 142 Wn.2d 568 (2000), found reversible error where jury instructions premised accomplice liability on erounious accomplice liability instructions. These cases has been modified yet these instructions permitted attribution of liability for elements that was stipulated to on strict liability basis, and are inproper even as applied here.

A EVIDENTIARY HEARING IS NEEDED TO FIND OUT HOW MUCH PREJUDICE UNDER THE NADER HARMLESS ERROR STANDARD EFFECTED MR. GALLEGOS'S TRIAL.

Appellate asks this court for a evidentiary hearing so the record can be expanded.

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995).

A expanded record is almost always needed to support the issue

of ineffective assistance of counsel. Mr. Gallegos will be procedurally barred from bringing this issue of Ineffective Assistance of Counsel in future collateral proceedings without good cause. There is enough in this record for this Court to proceed further.

This Court can "perform all acts necessary or appropriate to the fair and orderly review of a case". RAP 7.3. The Rules of Appellate Procedure will be liberally interpreted to promote justice and facilitate the decision of cases on their merits.

RAP 1.2(a). According to these rules Mr. Gallegos is requesting that the case be ordered back to trial and In re Rice, 118 Wn.2d 876, 828 P.2d 1086 (1992)

EVIDENCE OF AFFILIATION, WHICH IS A SPECIAL SUBJECT OF EVIDENCE OF PRIOR BAD ACTS, CANNOT BE ADMITTED IN MR. GALLEGOS TRIAL BECAUSE THE INTRODUCTION OF GANG-RELATED EVIDENCE IS VOLATIVE OF ER 403.

Evidence of gang membership is not admissible under the federal constitution. And under that standard Gallegos raises the authority in the Holding of: U.S. v McKay, 431 F.3d 1085, 126 S.Ct. 2345 (2010); Dawson v Delaware, 431 F.3d 1085, 126 S.Ct. 1093 (1992), Federal Rule ER 404 mirrors the State's 404.

In McKay, Id., The Court held "while evidence of gang membership is admissible if relevant to a dispute issue, gang affiliation evidence is not admissible where it is meant merely to prejudice the defendant to prove his guilt by association with unsavory characters.

Appellate is also raising this under the Washington Law and Rules. ER 404(b), read in conjunction with ER 403. which "requires exclusion of evidence even if relevant, if its probative value is substantially outweighed by the danger of unfair prejudice." State v. Mee, 166 Wn.App. 144, 159, 275 P.3d 1192 (2012)(Citing; State v Foxhoven, 161 W.2d 168, 175, 163 P.3d 786 (2007):

ER 404 is not designed to deprive the state of relevant evidence necessary to establish an essential element of its case. But rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal type person who would be likely to commit the crime charged. See

Mee at 159. Id.

Accordingly to admit gang affiliation evidence there must be a nexus between the crime and gang membership. State v. Scott, 151 Wn.App. 520, 526, 213 P.3d 71 (2009). The analysis by which courts limit evidence of other crimes, wrongs, or acts to proper purposes is well settled : Before admitting the evidence the trial court must find by a preponderance of the evidence that the misconduct occurred; Identify the purpose for which the evidence is sought to be introduced; Determine whether the evidence is relevant to prove an element of the crime charged; Weigh the probative value against the prejudicial effect. State v Yarbrough, 151 Wn.App. 66, 81, 82, 84, 87, 210 P.3d1029 (2009).

State v. Mee, 163 Wa. App. 144, 275 P.3d 1192 (2012) is distinguishable to my facts as applied to this issue. Mee [G]eneralized evidence regarding the behavior of gangs and gang members absent (1) Evidence showing adherence by ~~the~~ defendant or the defendants alleged gang to those behaviors; (2) A finding that the evidence relating to gangs is relevant to prove the elements of the charged crime serves no purpose but to allow the state to "suggest that the defendant is guilty because he or she is a criminal type person who would be likely to commit the crime charged". Mee Id.

Like Mee the facts show it is speculative at best. The state told the court that the motive of the crime is not done because it is gang related. (RP 181). Mr. Gallegos was not charged with gang aggravators or elements. But testimony that

the jury heard was with a gang expert David Cortez (RP 1240-1257). The testimony of David Campos doesn't testify or admit to being a gang member, yet the "gang evidence" from the expert and prosecutor paints him as a gang member. (RP 1769-1796). Campos testimony states he is a very good friend of Mike EBY and Mike EBY had solicited him to rob his other friend.

The testimony of Nicole Vargas was "Mike talked highly of him. Mike liked him a lot." (RP 565-70). As the state presented in closing that Campos was a Sureno gang member and Mike EBY solicited him to rob a rival gang member associated with the Nortenos (RP 1933-199).

The state introduced argument in state's closing that the state's witness [Pineda and defendant, Mr. Gallegos], are from the same gang and back each other up. This evidence is improper and was an abuse of the discretion of the court to allow it in because this type of evidence had nothing with the defendant being at the crime scene or had anything to do with this unfortunate incident.

The state's evidence of "gang" culture was extremely prejudicial because it invited the jury to make "forbidden inference" underlying 404(b). That Mee's gang membership showed his propensity to commit the charged crime. Mee Supra.

Counsel failed Gallegos for not limiting the use of this type of evidence. The court approved a limiting instruction and counsel for the defense allowed the state to argue also in closing unrestrained. This was violative of Strickland v. Washington, 466 U.S. 668, 687 (1984), Trial counsel performed deficient. A hearing is required. See, State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

IT WAS IMPROPER TO PROSECUTE MR. GALLEGOS HOMICIDE TRIAL AS GANG EVIDENCE OF WHICH THE "GANG" EVIDENCE ADMISSION WAS PREJUDICIAL ERROR, BECAUSE IT WAS NOT ADMITTED FOR A RELEVANT PURPOSE AND NOT ACCOMPANIED BY A LIMITING INSTRUCTION.

When evidence is admitted for a limited purpose and the party against whom it is admitted requests a limiting instruction, the court is obliged to give it. State v. Freeburg, 105 Wn.App. 492, 501, 20 P.3d 984 (2001).

ER 106; "when evidence which is admissible as to one party or one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

The Court ruled that "it is not a gang case but had elements involved. It's about methamphetamine and, some disadvantaged youth we will call them. [RP 1782]. Defense counsel asked for a limiting instruction. [RP 106-07].

Defense counsel stipulated to "gang Evidence", [RP 98], Defense counsel concedes gang evidence. [RP 319].

In State v. Humphries, 181 Wn.2d 708, 336 P.3d 1121 (2014), The court's analysis was: "A Propriety of a Stipulation Over The Defendant's Objection. -- Humphries argues that the decision to enter a stipulation at trial is exclusively within the defendants discretion. Accordingly, Humphries argues that before a stipulation can be entered, a court must engage in a colloquy



with the defendant to ensure that the defendant is entering the stipulation knowingly and voluntarily. The state argues that whether to enter a stipulation is a strategic decision to be made by counsel and that the defendant's express objection is irrelevant. This is an issue of first impression in Washington. We hold that although the decision to stipulate an element of the crime does not generally require a colloquy on the record with the defendant, such a decision may not be made over the defendant's known and express objection.

Here is the thing with Mr. Gallegos's trial, Mr. Gallegos has tattoos all over his face and a mongol haircut. The jury's determination of guilt or innocence rested on its opinion of the co-defendant's credibility. It is impossible to say that the jury would have necessarily found the witness testimony credible if it had not been improperly bolstered by "gang evidence". This was not an element of the case. Yet counsel stated he "might" use the gang evidence. He might as well be working for the prosecutor because if it looks like a fish (tattoos on face), smells like a fish (Co-defendant's testimony), then it must be a fish. This analogy fits the prejudice evidenced by the jury's verdict.

The critical question is whether defense counsel can stipulate to a status of inadmissible evidence over defendant's objection. This question turns on the allocation of decision-

making authority between client and counsel. Thus, this is a United States Constitutional issue the defendant wishes to raise now. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

When trial counsel stipulated to "gang" evidence and failed to request an instruction (rather see to it the instruction was included in the courts instruction), when the court granted the limiting instruction, he failed to provide effective assistance of counsel. Effective assistance of counsel is guaranteed by both U.S. Const. amend. VI and Wash. Const. art. I, § 22 (amend. X). Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). To show ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the outcome of his trial. State v Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Counsel's error results in prejudice when there is a reasonable probability that the outcome of trial would have differed absent the errors. Thomas, 109 Wn.2d at 226. However, a defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Strickland 466 U.S. at 693.

Mr. Gallegos was prosecuted over the way he looks. (RP 108). And when the prosecutor brought in closing all the argument of gang prejudice. As well as the testimony that Mr. Gallego s was "Scary". Anyone with tatoo's all over his

face both look the part of a scary person. [RP 133-142].

Defendant's counsel stated to the court that he had a trial tactic for stipulate to let the gang evidence in. Yet the defense never used this evidence. The presumption of counsel's performed adequately is overcome by there was no conceivable legitimate tactic explaining counsel's performance.

The gang evidence was not a legitimate theory. The court said this. [RP 1782].(Supra). The record does not show that defense counsel used "gang evidence" as he stated to the court, so why did counsel stipulate away MR. Gallegos's evidentiary challenges to this prejudicial material? This shifted the burden of proof and relieved the state of coming forth with the evidence. Mr. Gallegos has these tattoo's on his face and without these prejudicial closing arguments referring to the gang testimony heavy it bolstered the co-defendant's testimony because with the tattoo's on Mr. Gallegos's face, Gallegos had no way to rebut this with testimony. Every time the gang stuff was raised the jurors looked over at the defendant and "yep" he was guilty of that.

A EVIDENTIARY HEARING IS WARRANTED ON DIRECT REVIEW  
IN THE INTEREST OF JUSTICE BECAUSE OF THIS EXTRAORDINARY  
CIRCUMSTANCES REQUIRING A RECORD ON DIRECT APPEAL.

SAG PAGE 14

It is appropriate for this court to order a hearing on this issue of counsels effectiveness. RAP 7.3. (Supra.). A hearing should be facilitated based on the merits. RAP 1.2(a).

The defense counsel was not effective and his prejudice affected the outcome of the trial.

ABA Standards for Criminal Justice, Standard 4-1.2(b):

A basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation.

Trial counsel's representation of Mr. Gallegos was anything but quality representation. It was anything but effective.

The record reflects that defense counsel basically conducted ~~no investigation prior to trial. Or to have investigator perform~~ his duties; locate necessary witness's defendant asked to seek for his alibi, or to consult with him, and otherwise prepare the case for trial.

The Commentary to ABA Standard 4-1.2 provides, in part;

Advocacy is not for the timid, the meek, or the retiring. Our system of justice is inherently contentious, albeit bounded by the rules of professional ethics and decorum, and it demands that the lawyer be inclined toward vigorous advocacy. Nor can a lawyer be half-hearted in the application of his or her energies to a case. Once a case has been undertaken, a lawyer is obliged not to omit any essential

lawful ethical step in the defense....

Trial counsel's representation of Mr. Gallegos cannot be considered other than deficient. He allowed the murder weapon to be stipulated to and the gang evidence. He never investigated Mr. Gallego's alibi defense or put the state's case to a meaningful testing.

ABA Standards 4-3.1(a) provides, in part:

Defense counsel should seek to establish a relationship of trust and confidence with the accused and should discuss the objectives of the representation.... Defense counsel should explain the necessity of full disclosure of all facts known to the client for an effective defense, and defense counsel should explain the extent to which counsel's obligation of confidentiality makes privileged the accused's disclosures.

There is no evidence that trial counsel complied with Standard 4-3.1(a).

Counsel is not expected to perform flawlessly or with the highest degree of skill. But in light of my showing in the record and authorities if his lack of preparation is so prejudicial it requires a hearing.

ABA Criminal Justice Standard 4-4.1(a) states:

Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues

leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

Mr. Galleogs defense counsel's failure to investigate the witness Galegos provided to him or to press for the statements that was made by co-defendant's and withheld by the prosecutor deprived him of any opportunity to rebut the "gang" evidence and explain his version.

Appellate pro-se asks this court for a remand to trial court for a hearing based on ineffective assistance of counsel in light of the record.

Further, in State v Humpries, 181 Wn.2d 708 (2014), The majority with minimal analysis, it concludes that a trial court cannot accept counsel's decision to stipulate to an element of a charged crime when it knows the defendant disagrees. The defendant must be kept in the loop. Florida v. Nixon, 543 U.S. 175, 187, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004).

A hearing is warranted.

**CONCLUSION**

Based on the record and the absence of the record additional briefing may be warranted by appeal counsel or Appellate.

Based on the authorities above and argument Appellate asks this court for the relief below.

**RELIEF REQUESTED**

1. Appellate asks for a Hearing in the Interest of Justice;
2. That, this Court remand for a New Trial;
3. Any other relief that this court deems proper In the Interest of justice.

RESPECTFULLY SUBMITTED:

November 16, 2015.

  
MARCO GALLEGOS

