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COURT OF APPEALS

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STATE OF WASHINGTON

BY Chm

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

NO. 32778-3-II

EDDIE AMADOR OTERO,

Appellant,

v.

THE STATE OF WASHINGTON,

Respondent.

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APPELLANT'S REPLY BRIEF

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Clark County Superior Court  
Honorable Robert L. Harris

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ORIGINAL

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## A. TABLE OF AUTHORITIES

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## APPELLANT'S REPLY BRIEF

COMES NOW Defendant/Appellant Eddie A. Otero, by and through his attorney on appeal Albert Armstrong, and submits the following Reply to the Brief of the Respondent State of Washington.

The Defendant/Appellant will likewise reply to the issues raised by the State in the same order, using the same heading numbers.

For reasons of clarity and in keeping with the provisions of RAP 10.4 (e), the Defendant/Appellant will be referred to as the "Defendant" and the Respondent will be referred to as the "State."

### **II. THE STATE'S ASSERTION THAT THE TRIAL RECORD CONTAINS ADEQUATE PROOF OF THE ELEMENTS (OF ATTEMPTED MURDER IN THE FIRST DEGREE) OF PREMEDITATION AND OF INTENT.**

Defendant challenges two factual assertions by the State: (1) the State's interpretation, at page 3 of the Respondent's Brief, of the testimony set forth at RP 499-502 that the assault victim that was shot bore a "passing resemblance" to one of the rival gang members who had attacked the members of the defendant's gang; and (2) the State's indication, also on page 3, that the evidence shows the shooters were "tracking" the victims as they ran inside the apartment during the commission of the crime. The testimony that the State cites only shows that assault victim

Juan Barboza was of the same height, roughly, of another individual resident in the same apartment complex who was said to have, at least at one time, been a member of the rival Sorino gang. There was no indication anywhere in the record that this individual, one "Manny," had anything to do with the prior assault on the younger Nortinos by Sorinos.

As for the "tracking" of the victims by the shooters as they ran into the apartment, the defendant once again notes (as he did in his opening brief) that the State's own expert testified there is no way in which the sequence of the firing can be directly shown (RP 663-664). The evidence does show wildly ranging shots in the direction of another apartment unit, not the precise firing portrayed by the State (PR 646).

With regard to the issue of premeditation, if the State is asserting that the presence of weapons is one factor that is to be considered, it is no doubt correct. However, it is not sufficient to merely show weapons were present or even in play. The bringing of a weapon to the scene must also be coupled with consideration of other factors. Premeditation can be proved by circumstantial evidence. See State v. Gentry, 125 Wn.2d 570, 888 P.2d 1105, cert denied 516 U.S. 843, 116 S.Ct. 131, 133 L.Ed.2d 79 (1995). Presumably, the circumstances surrounding any shooting can reasonably point to a resolve merely to scare or injure a given victim. The State's burden is greater with respect to the issue of premeditation in the instant case than in the cases cited in the State's brief in support of its

position; in this case, no one was in fact killed. In every one of the State's cases cited in support of its stance on this issue, the appellants had been convicted of murder, not attempted murder. The inference of premeditation is immeasurably stronger in cases wherein a death has actually taken place, a circumstance not present here.

As for the element of intent to kill, the State acknowledges in its brief that "intent exists where a known or expected result is also the defendant's purpose." Even interpreting all evidence in the State's favor on the issue of intent, such evidence as was presented at trial showed nothing more than the defendants intent to retaliate for the (non-deadly) assault on the younger Nortinos and that indeed no one was killed.

### **III. ISSUE OF GANG AFFILIATION**

The defendant wishes to underscore the trial judge's admonition when he ruled that gang affiliation would be admitted. Since this is cited at page 26 in the defendant's opening brief, there is no need to restate it in its entirety here. It is just necessary to recount that the judge was concerned the evidence offered could well be unfairly prejudicial if his guidelines were not followed. The trial judge indicated in his memorandum decision of November 24, 2004 that "the use [at trial] of gang activities will not be far ranging and [will be] limited in scope to show general gang membership and response to attack on a fellow member and the common reaction thereto." (The defense had indicated to the trial

court that an anticipated nexus between the defendants and the earlier attack had at least partially dissolved. Steven Sanchez had indicated to defense counsel that (in contrast to what the investigating officers contended he had told them) he did not tell the officers that the defendants had learned of the earlier attack prior to the shooting.) Additionally, a few days after the issuance of the Judge's memorandum decision, another tie-in with the earlier attack (the anticipated testimony of Tim Sanchez) vanished when Tim Sanchez failed to appear and a material witness warrant was issued for his arrest. CP 133-135.

Further, not only was the evidence of gang retaliation weaker than it had been earlier in the case, but the State sought to introduce evidence of gang affiliation that was not essential to the State's theory of the case: gang retaliation. As pointed out in the opening brief, the State, through a "gang expert," enlightened the jury about gang signs and symbols, colors (which, according to the expert, originated in San Quentin) and other facts concerning gang life. Four gang-related pictures of the defendants were introduced. A reference to the Mexican Mafia had to be stricken from the record. Even if (but not conceding) the State was justified in mentioning gang membership to prove retaliation and therefore motive or state of mind, this piling on of additional evidence was indeed excessive and could have only served to unfairly prejudice the jury.

#### **IV. ISSUE OF ADMITTING EXHIBIT 21**

Exhibit 21 was the typed “statement” of Steven Sanchez which summarized, according to the investigating officers, Mr. Sanchez’ statement to the police following his arrest. The statement itself was typed by Detective Henderson of the Vancouver Police Department. At trial, Mr. Sanchez disputed parts of the typed statement. He testified that the defendants really hadn’t known about the prior assault on the younger Nortinos and that Mr. Barasa hadn’t fired a handgun at the victims from the Suburban.

The State is correct in pointing out that the defense used the typed statement in cross-examining Steven Sanchez. This should not be used as a rationale for sending that typed statement to the jury. The defense team had the right and the duty to extensively employ the statement in their cross-examination of Mr. Sanchez. Sending it to the jury would only have the effect of unfairly emphasizing its contents to the jury. In other words, the State argues that since the defense used the document in cross, the statement could be sent to the jury in hopes of undoing any doubt that may have arisen among the jury members as to the accuracy of the version of events depicted in the statement. No one portion of the testimony should be officially emphasized over the others. Admitting this document could only have that effect.

## **V. ISSUE OF FIREARM/DEADLY WEAPON ENHANCEMENT**

The State notes that neither defendant took exception to the jury instructions. Since the special verdict forms specified “deadly weapon” and not “firearm,” it was the State’s responsibility to take exception to these “deadly weapon” forms if that is not the enhancement it wished imposed.

It simply was not the prerogative of the Court to substitute its factual assessment of what the term “deadly weapon” means in the context of this case. The holding of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 253, 159 L.Ed.2d 403 (2004) clearly forbids a trial court from usurping the jury’s function.

## **VI. CUMULATIVE ERROR**

Defendant Otero maintains that he was denied a fair trial due to cumulative errors set forth in Assignment of Error number 19.

## **VIII. ISSUES RELATING TO SEARCH WARRANT AND 3.6 HEARING**

The State maintains that information supplied by all three informants (Jose Valle Ramirez, Martin Chavez and Tim Sanchez) met the Aguilar-Spinelli tests: basis-of-knowledge and veracity.

Relative to the veracity prong, at least two of these informants (Martin Chavez and Tim Sanchez) by their own or others’ admissions, were probably acting as accessories-after-the-fact in facilitating the

transportation and hiding (according to the affidavit) of weapons used in a crime. In fact, Mr. Chavez and Mr. Sanchez could never be interviewed by the defense team as they went into hiding. Material witness warrants were issued for the arrest of each but they were never located. Their respective involvement precludes easy acceptance of these two as “citizen-informants” and their respective motives for giving their “information” were overlooked in the admissibility rulings below. With the Martin Chavez-Tim Sanchez information excluded from the affidavit due to lack of veracity, this affidavit fails for lack of probable cause. And, as pointed out in the opening brief, even Jose Valle Ramirez, the third informant, was involved, even by the State’s account, as he was a gang member.

The problems with the basis-of-knowledge prong relative to the information supplied by Martin Chavez and Tim Sanchez are highlighted at pages 43-44 of the opening brief. On a related note, the State maintains, at page 33 of Respondent’s brief, that the defendants and Steven Sanchez “were seen fleeing from the immediate area of the shooting...” In fact, the informant (Martin Chavez, at page 10 of the affidavit) is quoted as saying he saw “[the defendant Otero’s] suburban driving west on a street.”

Relative to the issue of staleness, it is true that most case law on this issue relates to drug activity. However, the information that was obtained from the informants indicated that no guns were hidden or were planned to be hidden at the Otero residence. There were indications that

the individual identified as Otero planned to dispose of some shell casings. The ease with which sought-after items can be moved (that is, is the sought-after item still likely to be where it was initially reported to be by the informant) is a factor considered relative to the issue of staleness of information. See State v. Dobyms, 55 Wn. App. 609, 779 P.2d 746 (1989). Spent shell casings would certainly be readily disposable.

#### **IX. ISSUE OF DEFENDANT OTERO'S POST-ARREST STATEMENTS**

The State indicates in its Respondent's brief that "it is difficult for the State to understand just what the issue is that is being raised here." This is most likely because in an effort to economize the text due to length-of-brief restrictions, Assignment of Error number 13 merely incorporated the issues and factual statements set forth in the assignments of error dealing with the insufficiency of the information contained in the affidavit for search warrant. This possibly rendered the gist of Assignment of Error number 13 less than crystal clear. To restate the issue, Assignment of Error number 13 alleges that the arresting officers lacked probable cause to arrest Mr. Otero, and, post-arrest Mirandizing notwithstanding, his statements to the police were illegally obtained, warranting suppression.

#### **X. ISSUE OF PROSECUTORIAL MISCONDUCT**

The State is no doubt sincere in its assertion that the prosecutor's

question and witnesses statement (concerning the two Hispanic men in a grey Suburban speaking Spanish to the witness' young daughters) was not substantive or even relevant evidence. However, the defendant maintains that this irregularity during the proceedings could not have but tainted the trial. Such relative subtleties as the distinction between substantive and non-substantive evidence and relevant and irrelevant evidence can be lost on jury members. This evidence, acknowledged as irrelevant by the State in its Respondent's brief, needn't have been elicited all, or could have been elicited in a more general fashion.

#### VIII. CONCLUSION

The Court of Appeals should grant the relief requested by the Defendant as set forth in the Assignments of Error section of the Defendant's opening brief.

Dated this 23<sup>rd</sup> day of May, 2006.



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Albert Armstrong WSBA # 8077  
Attorney for Defendant/Appellant

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BY Chm

**STATE OF WASHINGTON COURT OF APPEALS  
DIVISION II**

STATE OF WASHINGTON	)	
	)	
Respondent,	)	No. 32778-3-II
	)	
vs.	)	CERTIFICATE OF
	)	MAILING--
EDDIE AMADOR OTERO,	)	APPELLANT'S
	)	REPLY BRIEF
Appellant.	)	
_____	)	

**CERTIFICATE OF MAILING:**

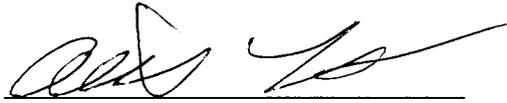
I, Albert Armstrong, declare that on the 23<sup>RD</sup> day of May, 2006, I deposited in the regular U.S. Mail, postage prepaid, a copy of the Appellant's Reply Brief filed in the above-numbered cause, addressed the following:

1. Defendant Eddie Amador Otero, DOC # 993816  
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Signed at Lynnwood, Washington on this 23<sup>rd</sup> day of May, 2006  
under penalty of perjury under the laws of the State of Washington:

A handwritten signature in black ink, appearing to read 'Albert Armstrong', written over a horizontal line.

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